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Encountering Difference: The 'Other' Philosophies of Human Rights

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INTRODUCTORY WORDS

This section of Issue 113 of *Acta Universitatis Lodziensis. Folia Iuridica* focuses on legal-philosophical approaches to Human Rights that are innovative or rather unusual. However, looking back at the massive abuses of Human Rights registered "just" in 2025, thinking about Human Rights' Law as a working or living system is a challenging endeavour. This is not the place to list all events – whether international, such as Israel's war on Gaza and Lebanon, national, such as Milei's systematic attack on Human Rights by using direct violence against unarmed retired persons and many others in Argentina, or global, such as the ongoing killings of Human Rights' defenders and the systematic destruction of natural ecosystems that inevitably entail Human Rights' violations. Nor is this the place to list all weak and inconsistent calls for Human Rights, even by outspoken and action-oriented governments in Europe, which further deepen a sense of illegitimacy around Human Rights and a perception of futility of the international system as a whole. Surely, this journal is not the place to list all the issues that make our work with Human Rights Legal Philosophy often a paradoxical (if not cynical) endeavour.

But it is a place to ask: "What then?"

What do we do when the usual philosophical and legal tools we have to engage with offences against humanity or, better, to foster human liveliness, are not sufficient?

This section of *Folia Iuridica* is the result of a journey that started back in 2022 at the IVR in Bucharest, when I met Michał Rupniewski and Olga Rosenkranzová for the first time. Back then, one of the main concerns leading scholarly discussions was the escalation of the situation in Ukraine following the Russian invasion in February, and the start of the current phase of the war. Three years later, not only is this war ongoing, but we also face a drastic recession in humanitarian aid funding by some of the biggest world economies as well as a major deployment of military forces, for example those of the United States in the Caribbean. It is no coincidence that this issue of the Acta developed within this frame of radical weakening of the international system. In a way, this circumstance returns me to the original sense of searching that moved me to call for the Special Workshop "Encountering Difference: The 'Other' Philosophies

of Human Rights" at the IVR 2022, seeking for new perspectives in Human Rights' philosophy that could resignify and revitalize Human Rights or at least reconnect theory to lived experiences within a context marked by the diminishing legitimacy of Human Rights and Law altogether.

While not all articles presented here focus explicitly on those issues of international political relevance pointed out above, all of them embody a commitment to the question "What then?" They question "how can we make sense of Human Rights in a fractured world with uncertain legal and political structures, and pluralized (individual) identities?" Thus, the question about the bearer of rights, of personhood, "*for whom* are these Human Rights?" pervades this issue. On another line the papers included also ask: "What for? What is the aim pursued by Human Rights and to what extent do contemporary approaches allow us to address it?"

The questions are obviously too big and, therefore, this issue offers only some paths of reflection that can (and need to) be further explored. In fact, because of the positive resonance, the workshop was continued at the IVR 2024 and connected to a methodological workshop on arts-based research. The proposal followed the idea that we need not only to enter into dialogue with a variety of perspectives on Human Rights and legal philosophy, but also that this process of renewal requires us to inquire and reshape the methodologies that form our thinking. While the original plan was to introduce methodological experiments in this printed outcome of the workshop, we had to leave this aspect to a future opportunity. This is also true for a variety of perspectives that are unfortunately not represented in this issue, like approaches emerging from indigenous perspectives (often mistakenly relegated to legal anthropology) and those focusing on environmental issues. As with any good research, pointing out these shortcomings does not diminish the value of the work presented, but signals open doors for further engagement.

This issue presents a variety of perspectives ranging from revisiting historical sources to addressing digital identities, always aiming to nurture contemporary debates in Human Rights Legal Philosophy. Unsurprisingly, a recurrent element is the dialogue with other disciplines like sociology and psychology, as well as other branches of philosophy. The first article, written by me, elaborates on the link between Human Rights philosophy and contemporary theories of Peace and Conflict Studies, considering how plurality and relationality can reshape our understanding of human dignity. With this aim it addresses Pico della Mirandola's historical work, in a similar manner as Olga Rosenkranzová does in the subsequent paper. She critically inquires trans- and posthumanist approaches, linking them with key concepts of Renaissance philosophy. Piotr Szymaniec further engages with transhumanism through Slavoj Žižek's thought examining issues around individual freedom and dignity.

The question of the legal subject endowed with Human Rights is further explored by Elena Papangelodemou, who invites us to consider fractured, unstable and unconscious dimensions of subjectivity, drawing particularly on insights from Jacques Lacan's psychoanalysis. The legal subject in Human Rights law is also at issue in Zsófia Folkova's work in dialogue with Bruno Latour's theory and the notion of fluid personhood rooted in animist perspectives presented by Guido Sprenger. The section concludes with the collaborative work of Ondrej Hamuľák, Lusine Vardanyan and Hovsep Kocharyan, who call for a reconsideration of legal concepts of bodily integrity, informational self-determination and digital sovereignty, advocating for a more comprehensive protection of individuals in the digital sphere.

From this short overview, it becomes clear that the editorial team had to make a particular effort to make possible an issue encompassing such a variety of approaches. I would like to thank Michał Rupniewski, who invited me to co-edit this issue and was both encouraging and patient throughout the process. Special thanks are due to my colleague Olga Rosenkranzová, who co-edited the issue with me, from the initial concept through content development and practical coordination. From the editorial team, I would like to thank especially Agata Dąbrowska, who, as Scientific Secretary, played a crucial coordinating role across institutions and platforms, solving all sorts of problems on the way.

I also especially thank Assoc. Prof. Özlem Derin Saglam, who contributed significantly to this issue through a thorough process of cross-reading during the preparation and writing phase. In a different role, many colleagues supported this issue anonymously, namely as academic reviewers. Saying it was "not easy" to find suitable and willing reviewers is a mere euphemism. All the more, I am grateful to all those who made space in their agendas to take this responsibility with integrity purely for the sake of ensuring the quality of academic research. In the same spirit, I thank all institutions supporting this issue, exemplified by the University of Łódź, which opened its doors to me and to unconventional research paths. Finally, this issue would not exist without the contributions of the authors. My sincere thanks to each one of you for exploring new paths in the philosophy of Human Rights. May this publication provide a platform for opening further dialogue in the Legal Philosophy through our research.

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RE-MEMBERING PLURALITY AND RELATIONALITY IN HUMAN RIGHTS' DIGNITY A PEACE STUDIES APPROACH TO PICO DELLA MIRANDOLA'S *DE HOMINIS DIGNITATE*

Abstract. The concept of 'dignity' at the base of Human Rights has been criticized, paradoxically, for a humiliating treatment of the 'Other' that disregards, for example, the embeddedness of individuals within communities. In response, I argue for considering dignity as a plural and relational concept, introducing contemporary peace and conflict research into legal philosophy.

Besides the established approaches linked usually to values like 'justice', 'security' and 'freedom', this article addresses a 'concordial' perspective that needs to be recovered and put in relation to prevailing discourses on 'dignity'. This 'concordial' dignity, as I show, is oriented by different guiding principles like community, non-duality, processuality, systemic embeddedness, dynamic balance, harmony and fertility.

While these principles have been often connected to so-called indigenous or 'Eastern' philosophies, these are central (and neglected) elements also at the core of 'Western' philosophy. Exemplarily, I inquire a key historical source for the concept of dignity in contemporary human rights philosophy: Pico della Mirandola's *Oratio on the Dignity of Man.*

Keywords: dignity, community, peace, Renaissance

PLURALISTYCZNE I RELACYJNE UJĘCIE GODNOŚCI W PRAWACH CZŁOWIEKA. PERSPEKTYWA STUDIÓW NAD POKOJEM W ODNIESIENIU DO *DE HOMINIS DIGNITATE* PICA DELLA MIRANDOLI

Streszczenie. Pojęcie godności leżącej u podstawy praw człowieka było krytykowane – paradoksalnie – za poniżające traktowanie „Innego", czy też jako pomijające zakorzenienie jednostki we wspólnocie. W odpowiedzi na tę krytykę niniejszy artykuł proponuje postrzeganie godności jako pojęcia pluralistycznego i relacyjnego, wprowadzając współczesne badania nad pokojem i konfliktem do filozofii prawa.

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Obok ujęć o ugruntowanej pozycji, zwykle powiązanych z wartościami takimi jak sprawiedliwość, bezpieczeństwo i wolność, artykuł podejmuje perspektywę „konkordialną", którą należy odzyskać i powiązać z dominującymi dyskursami dotyczącymi „godności". Pokazuje, że ta „konkordialna" godność orientuje się według odmiennych zasad przewodnich, takich jak wspólnota, niedualność, procesualność, systemowe zakorzenienie, dynamiczna równowaga, harmonia oraz twórczość.

Choć zasady te bywają często łączone z tzw. „rdzennymi" lub „wschodnimi" filozofiami, stanowią one również centralne, choć zaniedbane, elementy tradycji filozofii zachodniej. Jako przykład, artykuł analizuje kluczowe historyczne źródło współczesnego rozumienia godności w filozofii praw człowieka, traktat *O godności człowieka* Pica della Mirandoli.

Słowa kluczowe: godność, wspólnota, pokój, Renesans

1. INTRODUCTION

Having started its formal career in positive legal documents in 1948 with the UN Declaration on Human Rights as a response to World War II, the concept of dignity builds today a cornerstone of legal structures and argumentation. The UNDHR acknowledges human dignity as the foundation of freedom, justice and peace already in its Preamble and Art. 1.[1] However, the increasing violence and injustice experienced since its enactment at a global level have put in question the meaning and validity of this grounding concept.

In fact, despite its centrality to the legal argumentative architecture, the concept of dignity has been criticized from the very moment of its legal insertion in 1948. It is the understanding of a (generalized) rational individual which has been put in question by, amongst others, postmodern philosophers, pointing out that this view does not acknowledge difference, relationality and situatedness of the experience of being human in its complexity. Exemplary critiques arose from the fields of anthropology and feminist thought along with socio-political demands of recognition, more specifically of recognition of dignified 'Others' to the modern subject (Engle 2001; Carosio 2007). Paradoxically, the representatives trying to develop a tool to protect the dignity of all humanity in the context after World War II, were criticized exactly with the argument that they were by the same token treating the 'Other' with indignity.

Considering these legitimate concerns, I argue that we are dealing with a historically and philosophically mutilated understanding of the term, and consequently with a mutilated academic dialogue about it. Importantly, as with any discourse, this limiting approach pervades not only the explicit aspects of contemporary discussion, but also the interpretation of the sources that are used to (philosophically and politically) legitimise contemporary concepts, making some discussions on dignity possible or not; some research methods valuable and others not. I explore here exemplarily a paradigmatic source for Western

[1] This principle was restated at the Vienna Conference (1993). The first legal document with an explicit mention of 'dignity' is the Irish constitution of 1937 (Masferrer 2017).

understandings of 'dignity' as a humanistic triumph: Pico della Mirandola's *Oratio on the Dignity of Man* (1486).

While it is not enough either to acknowledge the limitations of this conceptualization, I propose here to explore how a revised view on dignity can offer us a more relational, integrative and useful perspective. While there is a vast literature on the issue of dignity in legal philosophy, due to the space limitations of this article, I focus here on those aspects of dignity that are less explored and are linked specifically with diversity and relationality.[2] As a reference point to explore theses facets of dignity, I will resort to the contemporary revision of another, more researched keyword of Human Rights: peace.

2. DIGNITY: FOUNDATION OF PEACES?

The critique posed to dignity regarding the undignified treatment of the 'Other' does not stand alone in the frame of the postmodern revision of Human Rights. Amongst many other concepts and categories, also the very concept of law has been inquired. As a result, diverse approaches have advanced pluralizing understandings of law. Be it in line with legal anthropological and sociological research under the title of 'Legal Pluralism' (Swenson 2018), or, from the side of philosophy and cultural studies, as a result of the deconstruction of 'Law' (Derrida 1992), the field of law has experienced a groundbreaking convulsion. Categories related to the field like 'justice', 'security' and 'freedom' have been equally destabilized, opening the terrain of Human Rights for new exploration paths. To use an image, a rather 'dignified' picture of Lady Justice presiding the reign of Law has burst into a million of pieces of a mosaic we are still trying to figure out.

Like 'dignity', also the concept of 'peace', another cornerstone of Human Rights, has 'suffered' a loss in legitimacy, becoming as much void of meaning as dreadfully necessary. As a consequence, new proposals emerged in the last several decades. Based on Muñoz' concept of *imperfect peace* and Galtung's differentiations of positive and negative peace[3] (Muñoz 2001; Galtung 1969), a key line of Peace and Conflict Research has explored socio-linguistic, cultural and historical variations of understandings of peace, leading to the Theory of Many Peaces (Dietrich 2008). The findings allowed to differentiate 'families'

[2] For an account on contemporary approaches see Rupniewski (2023).

[3] With this differentiation, Galtung emphasized the importance of envisaging peace, beyond the avoidance of war, as a positive concept that includes human well-being in different facets. Later he differentiated types of violence (direct, structural, cultural) that can be linked to diverse understandings of peace.

of peace-approaches gravitating around certain key-principles that I summarize below.[4] I propose to use this advanced differentiation amongst different approaches to peace to explore the diversity existing within 'dignity'.

It will not surprise that one approach to peace is tied to justice. In this line, peace depends on the realization of certain values ('moral' peaces). It is just to protect pre-defined values, and when this happens, peace is established. However, as much as we advocate for the importance of justice in the world, it is important to recognize that, hand-in-hand with this understanding goes the assumption that war can still be legitimized if it responds to the pursue of justice. To put it bluntly, there are some wars that do count as peace; they are conceived as necessary for peace. In this line, we find the concepts of 'just war' as much as the brutal Conquest of the Americas in the name of the betterment of Humanity. Sadly, reiterations of this type of argument have been found in contemporary approaches to 'Development'.[5]

A different, even if related, approach to peace, is based on the primacy of the pair 'security-freedom'. It responds to questions like: Which institutions and structures can secure peace? Which mechanisms do we need to engineer? To what extent can an individual's freedom be constrained in order to secure another's person freedom, and thus social peace? Following an appeal to reason, concrete subjects subordinate their individual freedom to structures, e.g. the modern state, which will manage their freedom-security for their own benefit. Modern state law is a paradigmatic example of this promise. The notion of states as actors, carried by rational citizens, aiming for security, dedicated to (and dependent of) technical progress and free commerce, is at the base of the prevalent notion of international relations and (classical) international law.[6] The Westphalian Peace (1648) carries this paradigm exemplarily and the United Nations Charter inherited the same logic.

The emergence of the Human Rights discourse in the 20th century is, for example, directly linked to the concept of the Four Freedoms, elaborated by Franklin D. Roosevelt in the "Four Freedoms State of the Union address" (1941).[7] They became part of the personal mission undertaken by Eleanor Roosevelt in

[4] Dietrich's exploration is profound and vast and links to various other scholars like Adam Curle and John Paul Lederach. I refer here only to some key aspects that frame the current paper. For a better understanding, I have chosen to address the principles connected to the 'peace families' rather than the names Dietrich uses for his categories: 'energetic', 'moral', 'modern', 'postmodern', and an integrative 'family of transrational peaces'.

[5] Just to name a few paradigmatically critical voices, see: Sachs (2010); Esteva (1995); Kothari et al. (2019).

[6] For a more detailed account, see: Dietrich (1998, 200 ff., 206 f., 212ff.).

[7] They encompass: Freedom of Speech, Freedom of Worship, Freedom from Want, and Freedom from Fear (Hennessey, Knutson 1999, 95).

1948, who decisively influenced the UNDHR, resulting in their inclusion into its preamble.[8] In turn, they nurtured the development discourse that would launch 'modern development' (and with it modern law) as an export commodity (Dietrich 2011, 312 ff.; Esteva 2006)

In line with postmodern critique, a third approach to peace, underlines the relevance of recognizing the validity of diverse subjective truths.[9] Therefore, speaking of 'peace' depends upon the particular perceptions and experiences of the individuals involved. Peace becomes a matter of negotiation between individual perceptions embedded in a power struggle. It depends upon a continuous, always unfinished and imperfect act of communication. This pluralized vision is at the base of the postmodern critique to 'dignity' named above.

While these three approaches to peace resonate easily with currents of legal philosophy and struggles of Human Rights, a fourth 'peace family' remains rather unrepresented in Western legal discourse. This fourth approach emphasizes the principle of harmony as a dynamic balance between opposites. These harmonic understandings of peace conceive the individual human being always embedded within a variety of systems. Here, the notion of 'community', rightly addressed in the IVR Congress 2022 as a necessary aspect of contemporary reflection, gains a central role. The constant change of focus and the relationality between the particular and the whole is part of this holistic approach. In Western discussion we find this type of argument today more easily in the frame of ecological struggles. In 21st century, a peace conceived as separated from the wellbeing of the planet has become impossible.

After this *tour de force* through the Many Peaces Philosophy and remembering the UNHDR's call setting dignity as "the foundation of freedom, justice and peace in the world" (Preamble), there is an obvious question that begs asking: If we acknowledge that there are many approaches to and experiences of peace that are inherent to Human Rights discourse, then which kind of dignity can ever serve as their foundation? I argue, only one that succeeds putting them in relation and is itself not stiffly 'fixed'.[10] As a precondition, 'dignity' needs to find its links to the different peaces at stake, allowing for the recognition of its own diversity.

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[8] "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy the freedom of speech and belief and freedom from fear and want has been proclaimed the highest aspiration of the common people."

[9] Truth is the principle that Dietrich connects to the so-called 'postmodern peaces'. Despite Dietrich's wording, for a first approach it might be easier to understand this perspective as connected to 'diversity' as the 'lack of One Truth', envisaging a world of co-existing and colliding (subjective) truths.

[10] This consequence echoes Dietrich's call for a relational, integrative approach, which he envisages as 'trans-rational peaces'. To work towards this dynamic balance amongst the many approaches to peace is the goal of Elicitive Conflict Transformation (see paradigmatically Lederach 2003).

3. DIGNITIES

Revising contemporary argumentation on Human Rights[11], it is quite easy to find a widespread approach to dignity connecting its meaning to values, particularly to a sense of 'justice'. One main line, for example, connects dignity to religious monotheistic, mostly Christian, traditions. Dignity derives from the act of divine creation, which bestowed specific traits on humans. Therefore, human worthiness is a result of divine justice (Müller 2020). As a consequence, it is '*dignus*' of man to behave in a certain way, live in a certain way, work in a certain way etc. Going back to the example of the Conquest of America, the legitimation of the enslaving and brutal treatment of the inhabitants of the 'New World' depended on this question.

This type of argument pervades also surreptitiously contemporary debates. Particularly explicit is this in the field of international development, which holds the goal of dignifying the lives of others at its core. The legal field is a main territory of this project, resulting in a multitude of legal transplants from the so-called 'developed' to the so-called 'underdeveloped' World in the name of human dignity and increasing social justice (Gardner 1980). In Western Europe, also cultural clashes find expression in a dignity-debate linked to right/wrong questions: Is it '*dignus*' for a woman (in Europe) to use a burka? Is the dignity of a teacher hampered if she is not allowed to take a hijab, but she would be allowed to take a necklace with a cross? Is the dignity of a schoolkid mistreated when he is obliged to take consistently a mask at school? What about a compulsory vaccination? Is it 'okay' for, and thus worthy of, a human being to manage his own death with medical support?[12]

At the same time, the prevailing concept of dignity clearly has a frame connected to the notion of an autonomous rational individual, that reasonably creates and joins structures for the sake of its survival. Looking at the development of 'dignity' in European legal philosophy, the context of Enlightenment and later neo-Kantian philosophy marked this approach (Kristeller 1964; Garin 1965; Copenhaver 2019). From this stance, the notion of 'dignity' is embedded in specific structures of a modern state, which has the duty to ensure that the dignity of its citizens will be upheld. What surpasses the limit of dignity, is to be inquired following rational universal principles: If human freedom, and thus human free-will, is not secured by certain structures and procedures, then we cannot speak of a 'real dignity'.

In this frame, dignity is ensured by certain mechanisms within the legal structure, like the procedural guarantees. The 'right to a fair trial' is based on the

[11] Amongst the vast literature, see for an overview Andorno (2014) and Moka-Mubelo (2017).

[12] See for example the ECHR Cases: S.A.S. v. France (2014) ECHR 695; Dahlab v Switzerland (2001) ECHR 15; Case of Gross v. Switzerland (2013) ECHR 429.

understanding that a specific procedure secures the '*dignus*' treatment of every human (Dupré 2021). This echoes, at a social level, the idea that the right procedure of election (the freedom of choice) secures living in democracy (as a *dignified* form of social life for free individuals), or the right legislative procedure secures laws that are in line with human dignity. At an international level, we need to acknowledge that the mechanisms of Human Rights or the structure of the Security Council are meant to engineer a thriving peaceful world, dignifying human life.

However, several movements have addressed that these dignity-and-peace 'clockworks' do not seem to be working. The existence of power structures beyond the modern state, upon which democratic institutions are nevertheless dependant, are at odds with a sense of dignity across the world. Within the judicial system, the failure to 'secure' the human dignity of the parties in legal procedure, for example by providing solutions within an adequate timeframe, has been a driving factor in the increase of alternative mechanisms like mediation, negotiation and arbitration (Sourdin 2014). When it comes to Human Rights in line with labour and social law, the movement of *Los Indignados* in 2011 as much as Occupy Wallstreet and similar movements in Italy and France have shown that the struggle for dignity is not limited to the imaginary boundaries of national 'underdevelopment'.[13]

Similarly, to think of the human being as an autonomous individual endowed with 'free will' sounds rather like a bad joke in the face of the collapse of whole ecosystems. It has become tragically obvious that the ongoing biological debacle goes along with the shattering of ancient cultural (eco)systems, particularly those that emphasize the embeddedness of the individual within communities and the human within a bigger stream of vital creation. (see for example, Johnston et al. 2012). The desperate calls for ecosystemic balance of Biological Diversity and Cultural Diversity (UN CBD 1992; UN UDCD 2001) put the finger in the wound: (human) dignity does not exist in a vacuum. No dignity without diversity. Problematically, this is the same diversity that runs risk of draining dignity from any meaningfulness for multi-cultural societies. The quandary is the same as it was pointed out in relation to 'dignity' (*Menschenwürde*) as the mother-basic-right in the German Constitution: "the beautiful and the dangerous about [the idea of dignity in Art. 1 GG] is: Everyone can conceive something by this, but it is different for everyone" (Janisch 2019, my translation[14]).

My elaborations above show that we are constantly dealing, even if usually only in an implicit manner, with a variety of approaches to dignity both in the

[13] Interestingly, one of the main sources of inspiration for *Los Indignados* was the book of German-French diplomat, ambassador, writer, concentration camp survivor and French Resistance member Stéphane Hessel. Noteworthy, Hessel had been observer of the editing of the Universal Declaration of Human Rights. His biography and book *Indignez-vous*! (2011) are paradigmatic for the detour of dignity in the 20th and 21st centuries.

[14] Translations are mine unless detailed in the bibliography.

social life that law and human rights aim to address as much as in the legal-political debate. Justice, security and lately also diversity are recognized as pillars of legal institutions and their founding philosophies. So, it is rather unsurprising that we do find justice-, security- and diversity-based approaches to peace and dignity intertwined in legal mental and pragmatic structures. But what about harmony ('energetic' peaces) and their proposal of recreating a dynamic balance amongst humans in community? We will explore this other approach using a key source for the concept of dignity in Western modern philosophy: Pico della Mirandola's *Oratio on the Dignity of Man*.

4. DIGNITY: A CONCORDIAL CALL

The proposal to bring in community and relationality (back) into a peaceful vision of our societies is not new. Already in the 1950s Erich Neumann, put forward the concept of *concordia* as a "lively peace" (*lebendiger Frieden*) characterized by its intimate connection to life: never stable or fixed but in constant movement (Neumann 2005 [1958/9]). The word's very etymology reveals a significant constellation of meanings. While we find its root also in 'concordat' as a legal term since the 15th century,[15] the Latin word *concordia* means literally "hearts together" (Harper n.d.).[16] *Concordia* referred still in the 14th century to an agreement between persons, meaning also a "state of mutual friendship, amiability" while the verb 'to concord' equated "to reconcile, bring into harmony" (Idem). Neumann's proposal comes so to a similar field of reference as Dietrich would do 50 years later speaking of 'energetic peaces' (Dietrich 2008).

It is therefore not just a mere coincidence that it is the Princeps Concordia, as Pico della Mirandola was nicknamed,[17] who exemplifies the link of dignity with a harmonic perspective on peace and Human Rights. His *Oratio*, later (1504) titled *On the Dignity of Man*, "has been celebrated as the great Renaissance proclamation of a modern ideal of human dignity and freedom" (Copenhaver 2002, 56) and is the work of Renaissance philosophy best known in our time.[18] This text is a clear example of Pico's commitment to bring to concord different

[15] Browne (2018, 180), regarding conventions between the Holy See and a sovereign state. Nowadays it depicts also a legal agreement between indebted companies and their creditors.

[16] *Concordis* is also translated as "of the same mind" (Harper n.d.). Interestingly, this identification of heart and mind is also present in the Chinese character 心 (xīn) (Hall et al. 1998).

[17] While this nickname makes both reference to Giovanni's nobility title as Pico della Mirandola et Concordia and particularly to his vision of 'pacifying' the central dispute of his time between Aristotelians and Platonists, his endeavour was explicitly broader. Pico himself used *concordia* also as a conceptual tool to dettach from the notion of final truth reserved to the Holy Scriptures (saving his own skin in front of the Inquisition), reestablishing so the relationship between *opinio* and *fides* (Edelheit 2008).

[18] On Pico's life and oeuvre, see, for an overview: Copenhaver (2020).

philosophical traditions, showing a multicultural ancestry of 'Western thought'.[19] This is just the most visible aspect of the actual context of this text, namely Pico's call for a philosophical and ecumenic encounter where his *900 Theses* or *Conclusiones* would be discussed.

The gathering that this *Oratio* aimed to introduce was, however, suspended by Innocent VIII. Giovanni's attempt ended in the inspection of his *900 Theses* by a papal commission and Pico's confinement to gaol in Castel Sant'Angelo (Bori in Borghesi 2012, 15 citing Wirszubski). In June 1487 the Pope "summoned the tribunal of the Inquisition, and on 31 July Giovanni signed an act of submission that granted permission for the copies of the *Conclusiones* to be burned at the stake" (Idem). This was the response to a 'concordial' call by an environment in agony: 15th century Europe was dismantled by wars amongst collapsing and emerging institutions[20] that were struggling to demarcate (and secure) 'their' territory and 'their' people as well as to legitimize 'their' power.[21] This is true as much for the emerging modern states with a new socio-economic ground as for religious institutions that resorted to ever drastic methods – like the Inquisition – to avoid their downfall.

This historical context shows a particular link amongst the appearance of a notion of dignity that served as base for our contemporary understanding of the term, the emergence of the modern state and its law, and the quest for peace beyond winning wars and signing peace treaties. The brittle political, religious and socio-economic environment made necessary to revise the meaning of being human and a dignified life – not very different from our current situation.[22] Pico might thus offer refreshing insights for the challenges of our time.

[19] On Pico's syncretism in a broader perspective, see: Farmer (1998).

[20] For an overview, see Fletcher (1999) and Hale (1986).

[21] The mechanisms to 'build' and enforce these conforming elements of what we today define as 'state' were just developing in 15th century. Take for example Castilian-Aragonese Spain, seen as the first 'modern' state, which in 1492 was just building its unity against the common enemy of the Ottoman Empire. In parallel to territorial wars within 'Spanish' territory, the unity of the subjects into 'one people' was pursued by the standardization of 'Spanish' (Castilian) by Nebrija's *Grammar of the Castilian Language* (1492) and the corresponding development of educational institutions. This struggle continued in the Conquest of America (Mignolo 1992).

[22] The experience of dismantlement in Pico's time might have been similar to our contemporary experience of a 'BANI' – world: Brittle, Anxious, Non-linear, Incomprehensible (Cascio 2020).

4.1. A fertile dignity

It is noteworthy that, in Pico's *Oratio*, man's dignity is not connected to a specific vision of what man[23] 'is'. In contrast, his dignifying quality is exactly that his being has no pre-fixed form, it is '*indiscretae'*, undetermined (18).[24] In other words, what makes human beings worthy of wonder is their ability to become, to change. Without a pre-set model, the human embodies full potential as much as a never-ending process of becoming. She is infused with "every sort of seed and all sprouts of every kind of life" (27).

This very fertile image of what is it to be, or rather to continuously become a *dignous* man is directly related to Neumann's approach to *concordia* and Dietrich's understanding of energetic peaces. *Concordia* means for Neumann[25] a peace intimately linked to creative processes, a constant reactivation of the fertility of the whole system (Neumann 2005 [1958/9], {16} ff., 7 ff.). This is possible through the continuous dynamic of unifying and differentiating opposites.

As examples from non-Western traditions, Neumann refers, similar as Dietrich (2008, 29 ff., 68 ff.), to the I Ging, an ancestral Chinese text that grounds on the dynamic between the Yin- and Yang principles symbolized in the Taijitu. Equally, he elaborates on the mandala as a perennial and trans-cultural symbol for the creativity contained within an enclosed (*umfriedeten*) circle, within a fertile void. This idea of the unfolding of human community as connected intimately with fertility and cyclic transformation finds expression also in the archetype of the Great Mother (Neumann 1963 [1955]), who in her womb holds space for the whole Creation.

While Pico refers explicitly in large portions of his text (as in the rest of his oeuvre) to Biblical sources and its characters, he introduces as well other players to orient man's journey. One example is Pico's call to allow our souls to be flooded with a particular and sacred ambition, a Junonian one ("Invadat animum sacra quaedam et Iunonia ambitio (…)," 47). The author puts this Junonian ambition as a guiding example for man to be "not satisfied with what is mediocre" and instead to aspire "*ad summa*" (46). Juno is an expression of the Great Mother, the Roman Queen of Heaven and Mother of the Gods. She is the "nearly monotheistic deity of women" (Walker 1988, 209) in ancient Rome, a composite deity with a pervasive presence. Juno Curiitis, for example, was the primeval mother of all the clans.

[23] While the contemporary inquiry on dignity includes all humanity beyond their gendered identities, I use the term 'man' when referring specifically to the historical source written in 15th century, which was addressed to men rather than to women. Otherwise, I use interchangeably female and male pronouns to address 'humans'.

[24] The numbers in brackets refer to the number of Pico's proposition according to the edition of Borghesi (2012).

[25] He refers explicitly to Bertalanffy's research on systems (1949).

Later on, her role and some of her titles as Star of the Sea,[26] visible in her star-shaped emblem, was inherited by the Virgin Mary.

As it is often the case for female deities, Juno's being and influence changed according to different phases. Consequently, in some phases "she was both a chaste virgin and – in other phases – a deity of sexual lust, as Juno Caprotina, whose fertility rites were held to fructify the fig trees (Rose 1959, 217)." Here lies the key for Pico's reference and his call upon man: Juno renewed her virginity each year and man is equally called upon to renew himself constantly. In doing so Giovanni puts the endeavour of the philosopher, and the *dignus* man that he envisages in the frame of the archetypical Great Mother or Great Goddess.

4.2. "Neither, nor" or "Yes, and"

The union of the Great Goddess with her counterpart through an act of communion, *hieros gamos* or Holy Wedding, depicts a union of opposites in the same way as the ancient yin-yang symbol portrays. It is this encompassing *communion* the one that allows for a lively *community* to unfold, one that integrates diversity and unicity in continuous recreation. Consequently, the philosophies that connect to this concordial perspective are based upon a logic of 'neither/nor' and 'yes/and'. The divine is neither one aspect nor the other alone, rather it is one *and* the other at the same time.

It makes sense that man, holding a "changing and metamorphous nature" (33) is "neither of heaven nor of earth, neither mortal nor immortal" (20, 2). It is nothing definite and it can become everything. This approach echoes other philosophical traditions. Take for example the worshipping of Hindu deity Shiva in the Six verses of Nirvana: "I am neither the mind, nor the intellect, nor the ego, nor the mind-stuff;/ I am neither the body, nor the changes of the body;/ I am neither the senses of hearing, taste, smell, or sight,/ Nor am I the ether, the earth, the fire, the air;/ I am Existence Absolute, Knowledge Absolute, Bliss Absolute –/ I am Shiva, I am Shiva (*Shivoham, Shivoham*)."[27]

Since man entails the potential to become everything, della Mirandola's understanding of the human condition moves from 'neither, nor' to 'yes, and', to end, in a radical sense of wholeness as the base for human condition and dignity. Using biblical references, he chooses, of the three angelical beings (seraphs, cherubs and thrones) the figure of the cherubs as the model for man to become *dignus*. While seraphs are in the heights of love and thrones are dedicated to the duties of active life, the cherub "uses his light both to prepare us for the seraphic fire *and* likewise to illuminate for us the judgement of the thrones" (65; my italics). Becoming like a cherub, man will be able to be "raised from him to the heights of love *and* descend from him, well taught and prepared, to the duties of the active

[26] Also, as Queen of Heaven, Lily, Rose, and Blessed Virgin.

[27] For a complete version of the text in English see Sankaracharya (2004).

life" (66, idem). The cherub represents thus an integrative and dynamic force that allows to love *and* to judge, to be "for the creator alone" *and* to "take care of inferior things" of the active life, to access experience with "charity" *and* "with proper consideration of their worth" (55, 57). By emulating them man gets access to "supreme height" (like seraphs) *and* "great power" (like thrones) (62).

Thus, following this example, man will shine with cherubic light when he meditates "on the Creator in His creation *and* on creation in the Creator" (my italics), engaged in this dialectic movement with the tranquillity of contemplation (56). In expressions like this, the relationality, movement and integration of opposite dualities is explicit: creator and creation, subject and object are interwoven. It is this connection the one that fosters life, a dignified life for man. Man is called to go through and beyond every duality and gather "himself into the centre of his own unity, thus becoming a single spirit with God (…)" (30). On the contrary, if he would actualize only one aspect of his being, he would not become a *dignus* man, but a slave to a part of himself (37, 38).

This integrative quality links man to the divine because Pico's 'God' is himself related to the whole life potential at the same time. 'He' is emphatically the creator of the supercelestial, the heavenly globes *and* the "excremental and filthy parts of the lower world", as much as the creator of the intelligences, the eternal souls *and* "the multitude of forms of animal life" that inhabit them respectively (11). On the one side, 'He' is set within a wider sense of spirituality and sacredness, and on the other 'He' is brought to the sphere of the vernacular (10).

The union of opposites, but even more so the dynamic emergent between them as much as the unfinishedness of the process, present in Pico's elaborations resonates with philosophies often deemed foreign to 'Western' modern Human Rights philosophy and advocacy. The *Oratio* shows, however, an approach to man's dignity that is bond to its boundarilessness: to remain true to it in a constant process of renewal, like Juno renews her virginity over and over again.

4.3. The Many into One, the One into Many

A further reference that della Mirandola uses to speak to the shapeshifting character of a *dignus* man is Proteus. This prophetic old man of the sea (*halios gerôn*) is characterized by his ability to change shape. Particularly interesting for us is that he, like Melikertes,[28] is assumed to be the "Greek equivalent of the Phoenician sea-god Melkart" (Atsma n.d.). During the *egersis*, the annual resurrection ritual of Melkart, the god 'died' and was awakened or resuscitated, eventually through a sacred marriage (*hieros gamos*) with the goddess Astarte (Bonnet 1988; 2005).

[28] According to Kerenyi, Melikertes was a milk-brother of Dyonisos and son of Ino, "a primeval dionysic woman, a Mother of God" (Kerenyi 1976, 246), later named Leucothea (White Goddess).

The divine couple and their sacred marriage is, in fact, addressed in different parts of the *Oratio*. Connecting Biblical and Egyptian mythology, Giovanni asserts that once we, inspired by the cherubic spirit, have reached the point of accompanying the angelical beings on Jacob's ladder towards God, "then shall we descend, dashing the one into many with Titanic force like Osiris, and ascend, drawing together with Phoebean might the many into one, like Osiris's limbs" (82). This is an intertextual reference to the complex myth of Isis and Osiris, the Holy Couple performing recurrently the ancestral Holy Wedding.

In the corresponding cult, Isis devoured Osiris each year and gave him life again. He was torn to pieces and reassembled. In doing so, Isis formed him a new penis of clay and breathed life into him. Thus, Osiris arose and they held the Holy Wedding, whereupon life could go on (Walker 1993, 464 ff, 819 ff.). The famous story of Seth's murder to his brother, that Pico points at here, has thus a blueprint, and, most importantly, an unnamed protagonist: Isis.[29] She is another expression of the Great Mother, giver and destroyer of all life and mother of all heroes/kings/gods (Dietrich 2008, 57 ff.). Isis is the Goddess from whom all becoming arose, daughter of Nout, who equally embodies the archetype of the Great Mother, in form of the sky.[30]

Osiris' death and rebirth as a result of Isis' loving power has a particular connotation for our inquiry on human and dignity. Historian and philosopher Mircea Eliade noted that this mythical process refers to the transformation of identity (Eliade 1961). This is the symbolic death of the one who is initiated into sacred mysteries (as the Eleusinian mysteries Pico refers to), so that a 'new man' can be born. Pico's notion of man as a being full of potential, with no boundaries for self-realization, that becomes *dignus* of being man through this constant care for his own process of becoming, is totally in line with the cycle of death and rebirth portrayed in the myth of the *hieros gamos* of Isis and Osiris as one vitalizing process.

[29] There is a strong tendency to see Isis as "a secondary figure to her husband Osiris" (Rosicrucian Egyptian Museum), despite the evidence for the twin-quality between Isis and her lover-brother Osiris. According to Walker (1988, 198), Egyptian sources used Athene as a title of Isis meaning "I have come from myself." Here the self-referential emphasis already presented above resonates again. Asserting her key role in Egyptian mythology, see the Egyptian scriptures: "In the beginning there was Isis, the Oldest of the Old. She was the Goddess from whom all becoming arose" (cit. in Walker 1993, 464).

[30] In Egyptian mythology, the Great Mother first appears as Tefnet, daughter of Creator Atum – the All. Together with her brother and bridegroom Shu, she conceived Nout and Geb. This siblings' pair, in turn, were parents of Osiris, Seth, Isis and Nephthys, all protagonists of the widespread Creation myth.

5. BECOMING ONE: DIGNITY AND COMMUNITY

But Pico goes beyond a reference to a specific myth. The metaphor of the *hieros gamos* and the union of life and death in one vitalizing process (93 ff., 108) return several times, e.g. when it comes to find the "most holy peace" for "grave internal wars" (87 ff.), *the* central conflict of his time particularly in regard to the 'Christian family' just before the Reformation. To achieve human dignity means to rejoice in this "*individua copula*", in this "harmonious friendship, in which all souls, in one mind (a mind that is above all minds) are not only in agreement but, indeed, in a certain ineffable way, inwardly become one" (93 f.).

This idea of communion is at the core of the goal-path of being-becoming a dignified 'man'. Thus, the unfixed unity with or within a whole, with and within a community, be it a 'small' community or the community of the whole Creation, is at the core of Pico's text. Becoming "a guest at the table of the gods while still alive on earth" (108), nurturing oneself from this fountain-like fullness,[31] is intimately connected to Pico's vision of man's dignity. This loving bond with the life-giving force, embodied e.g. in Sophia, is what makes becoming a *philo-sopher* so central for human dignity. Peace, friendship, happiness, all these are achievable for the *dignus* man once he "curbe[s] the drive of the emotions" (71) and "disperse[s] the darkness of reason", so that neither "our emotions run amok" nor "our reason imprudently run off course."[32] Dignity entails thus enhancing a consciousness that integrates and goes beyond emotion *and* reason.

Being conscious of the unlimited potential relying within each man and mankind as a whole, Pico calls us to care for this wonder (46 ff.). Interestingly, the importance of care as a specific quality of relations and as a category for philosophy and ethics has been highlighted also from a feminist perspective on dignity. Following Gilligan, Held, for example, advances an ethics of care (Gilligan 1982; Held 1993; 2006) putting concrete relationships to the foreground of the debate on dignity. Interestingly, also the methodologies of (elicitive) conflict transformation, informed by the Many Peaces Philosophy put relationality at the core of its approach.

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[31] The metaphor of "fountain-like fullness" nourishing and inebriating celestial beings and the *dignus* man (98, 108) directly recalls the image of the Great Mother, for example in the shape of Artemis or Diana, goddesses depicted with many breasts and mythological sources of the Milky Way. The nourishment metaphors are consistent throughout the text particularly when Giovanni comes to speak about the Socratic frenzies (109 ff.). Interestingly, Diana's image was sculpted often "in two materials, alabaster and bronze, one white and the other black, denoting the luminous and dark qualities of the Goddess" (Penna 1993, 122). Also, here the union of opposites finds a new expression.

[32] Noteworthy is here particularly, that reason *can* run off course, reason is dark: a very different under-standing from the "light of reason" that guiding modern man. Equally, Pico speaks of "the tumults of reason agitated and tossed about between the contradictions of speech and the captiousness of syllogisms" (90).

6. CONCLUDING NOTES

Pico's text was later interpreted much restrictively, particularly under the influence of his nephew's (Gianfrancesco Pico della Mirandola) editorial work. These observations on Pico's *Oratio*, however, show the existing diversity of understandings of dignity at the base of contemporary Human Rights politics and law. Looking at dignity as a prism of approaches with different sources, aims, languages and problematics, makes visible the strong tension existing within this concept. As jurists and philosophers, we are called to avoid rhetoric simplification in detriment of using dignity's full potential to enhance human life. It is our task to put these different threads in relation with each other making of this tension a creative interplay.

In this line and integrating Neumann's and Dietrich's proposals regarding 'peace', the mandate to protect dignity is strongly related to the duty to enhance the constant recreation of a dynamic balance. In this vein, we can speak of the need to integrate harmony-based approaches, understanding harmony as the possibility to put conflicting elements in dialogue, and not as a (in Dietrich's terms) modern understanding of peace would suggest, attempting to suppress dissent. If we do so, it is not sufficient to read Human Rights merely as provisions securing human dignity as an object. From the perspective of fostering enlivened communities, dignity is intimately bound to concrete relations in constant change. A change that, while it cannot be controlled, requires care.

But what could this mean for law? A law that materializes these Human Rights aims to foster a holistic unfolding of the human potential of the individual *in relation* to the whole, recreating life in intra-personal as much as in communal, social and global layers. As exploratory research, this paper cannot aim to provide definitive answers but can conclude best by signalling lines for further research on the potential implications of such an integrative approach to dignity.

Some aspects to explore further are linked to the extent in which this approach could contribute to transitional justice processes and, in another scale, to retributive justice models. In terms of contemporary legal philosophy, Mette Lebech offers interesting conceptual tools that dialogue with the notion of dignity as experience, linking dignity to the lived experience of value (Lebech 2011). The aspect of intersubjective mutual recognition addressed by Buchwalter (2021) addresses also relational aspects linked to dignity. A relational approach to dignity includes 'naturally' its relation to Nature, addressed today in the debate around 'Nature Rights' and 'biodignity' (Pele et al. 2022).

Furthermore, to foster an enlivening dignity, this law needs to be conceived and performed as an organic and enlivening (law) system. Such a law necessarily entails actors (law agents) that are themselves connected to their own full human potential. Equally, it requires infrastructures that provide spaces to engage with conflict inquiring as much into aspects of security, justice or truth – as they do so

far in judicial settings –, as into issues related to (dis-)harmony. In this vein, we can envisage judicial work engaging differently and holistically with conflict[33] while the preparation of (human rights) lawyers could entail training in the line of conflict transformation. When human rights and law ground on the notion that dignity requires to recreate and celebrate cyclically a reencounter with our human potential, the whole legal architecture based on that ground is dedicated to care for this wonder and to foster the force bringing it to life.

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[33] Sami Storch's work on Systemic Law is inspirational in this regard (Paiva Sales 2024).

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DIGNITY AND FREEDOM IN HUMANISM, TRANSHUMANISM AND POSTHUMANISM – PHILOSOPHICAL AND ETHICAL FOUNDATIONS FOR LEGAL REGULATION

Abstract. The paper critically examines the philosophical foundations of neurorights, morphological freedom based on the concept of body ownership and boundless freedom for self-determination, including cyborgs. The origins of modern transhumanism (Huxley, Bostrom, More) can be found in Renaissance humanism with an explicit reference to the concept of dignity and freedom in Giovanni Pico della Mirandola. By analyzing Pico's work *De dignitate hominis* we find a misinterpretation. Posthumanism warns against the loss of human dignity and points to its widespread instrumentalization, which could be a subsequent risk of bodily improvements (Ferrando, Braidotti). Even the Renaissance addressed the question of man's position in relation to nature and animals, the so-called *scala naturae*. The concept of *divine nature* is a manifestation of Pantheism in Neoplatonism and is not materialist (Böhme, Comenius, Ficino).

Can ego-centrality be a reason for the limitation of *morphological freedom*, i.e. for the limits of the right to bodily integrity? So far, transhumanist enhancements take place within the framework of the right to bodily integrity and freedom to deal with one's body, i.e. the autonomous space of the individual, closely related to the right to direct one's life towards *personal happiness*. If human rights and their basis are more moral in nature, this can accept the use of proportionality to measure rights, principles, values and interests in law also taking into account environmental protection and the rights of marginalized entities, including *non-human rights* (Balzer, Rippe, Schaber).

Keywords: dignity, morphological freedom, cyborg, Transhumanism, Posthumanism, divine nature, non-human rights

GODNOŚĆ I WOLNOŚĆ W HUMANIZMIE, TRANSHUMANIZMIE I POSTHUMANIZMIE – FILOZOFICZNE I ETYCZNE PODSTAWY REGULACJI PRAWNEJ

Streszczenie. Artykuł poddaje krytycznej analizie filozoficzne podstawy neuropraw, wolności morfologicznej opartej na koncepcji własności ciała oraz nieograniczonej wolności samostanowienia, obejmującej również byty cyborgiczne. Genezy współczesnego transhumanizmu (Huxley, Bo-

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strom, More) można poszukiwać w humanizmie renesansowym, szczególnie w koncepcji godności i wolności Giovanniego Pico della Mirandoli. Analiza *De dignitate hominis* tego autora ujawnia jednak błędną interpretacją. Posthumanizm ostrzega przed utratą ludzkiej godności oraz wskazuje na jej szeroko rozpowszechnioną instrumentalizację, co może stanowić kolejne ryzyko związane z ulepszaniem ciała (Ferrando, Braidotti). Już w renesansie podejmowano pytania o miejsce człowieka w porządku natury i wobec zwierząt, w ramach tzw. *scala naturae*. Koncepcja boskiej natury stanowi przejaw panteizmu w neoplatonizmie i nie ma charakteru materialistycznego (Böhme, Comenius, Ficino).

Czy ego-centryczność materii może być podstawą ograniczenia wolności morfologicznej, a więc wyznaczenia granic prawa do integralności cielesnej? Jak dotąd, transhumanistyczne modyfikacje mieszczą się w ramach prawa do integralności cielesnej oraz wolności w dysponowaniu własnym ciałem, tj. autonomicznej sfery jednostki ściśle powiązanej z prawem do ukierunkowywania własnego życia na osobiste szczęście. Jeżeli prawa człowieka i ich fundament mają w większym stopniu charakter moralny, wówczas dopuszczalne staje się stosowanie zasady proporcjonalności do wyważania praw, zasad, wartości i interesów w prawie, z uwzględnieniem także ochrony środowiska i praw podmiotów marginalizowanych, w tym podmiotów nie-ludzkich (Balzer, Rippe, Schaber).

Słowa kluczowe: godność, wolność morfologiczna, cyborg, transhumanizm, posthumanizm, boska natura, prawa nie-ludzkich podmiotów

1. INTRODUCTION

The title refers to dignity in humanism, transhumanism and posthumanism, and I would like to touch upon legal and philosophical dignity as well. You can see, however, that the topic is very broad, so let's just focus now on the very topical issue of cyborgs, on which I would like to demonstrate the development of dignity.

The main question I pursue in the concept of freedom and dignity in Renaissance humanism, transhumanism in modernity, and posthumanism in postmodernity is whether the concept of freedom leads to or indirectly contributes to human self-centeredness and egocentrism. If so, this leads to the materialization of freedom in the care of the soul and in the concept of self-mastery only on a self-centered personal or psychological level as a result of disenchantment with lost spirituality. Here, I discuss the question of the limits of autonomy in the search for human happiness and individual self-realization. I also examine whether there is an instrumentalization of man or humanity, i.e., a violation of human dignity in humanism, transhumanism, and posthumanism. I focus only on the problem of cyborgs, people enhanced by biotechnology, and I present here moral and legal solutions to the conflicting legal values of freedom, dignity, and equality. An anthropological perspective cannot be avoided. I do not address the normative problem of incorporating morality into law, but I do start from the moral basis of human rights (Tasioulas 2015, 50).

The paper critically examines the philosophical foundations of neurorights, morphological freedom based on the concept of body ownership and boundless freedom for self-determination, including cyborgs. The origins of modern transhumanism (Huxley 1957; Bostrom 2005; More 2003) can be found in Renaissance humanism with an explicit reference to the concept of dignity and freedom in Giovanni Pico della Mirandola. By analyzing Pico's work *De dignitate hominis* we find a misinterpretation. If transhumanism works with the idea that man is free enough to be what he wants to be, then according to Pico we cannot understand this as freedom without limits. On the contrary, in the context of Pico's philosophy, it is about freedom of choice (Copenhaver 2022, 244) and his concept of dignity and freedom, man has as a spiritual biblical Adam, a state of ensoulment, to which we arrive by a spiritual path connected to moral purification. And therefore, Pico's concept of freedom and dignity cannot be interpreted only materialistically and egocentrically, as transhumanism does.

Even the Renaissance addressed the question of man's position in relation to nature and animals, the so-called *scala naturae*. Is it not possible to find in the Neoplatonic natural philosophy of the Renaissance and early modern times the ideological sources of *divine nature*, i.e. naturalism leading to *moral respect* not only for man, but also for nature? But this respect as *dignity is not egocentric* and powerful, but mastering oneself according to the instructions of the sphere of spirit, *Logos* (Pico in Borghesi 2016; Pico in Copenhaver 2019; Pico 2005; Comenius 2017; 2022; Böhme 1974). The concept of *divine nature* is a manifestation of Pantheism in Neoplatonism and is not materialist (Böhme 1974; Comenius 2017; 2022). Therefore, *duties* were imposed on man, especially to himself; only later do we encounter freedoms and rights (Cicero 1970).

Posthumanism warns against the loss of human dignity and points to its widespread instrumentalization, which could be a subsequent risk of bodily improvements (Ferrando 2013; Braidotti 2022).

The image of a person as a subject in law is dynamic. Can ego-centrality in matter be a reason for the limitation of *morphological freedom*, i.e. for the limits of the right to bodily integrity? So far, transhumanist enhancements take place within the framework of the right to bodily integrity and freedom to deal with one's body, i.e. the autonomous space of the individual, closely related to the right to direct one's life towards *personal happiness*. We find ethical theories accepting ego-centrality, but also *vice versa*. The right to focus one's life on personal happiness as a right to self-determination is part of the protection of human dignity according to the theory of recognition as a *heteronomous concept* (Tiedeman 2012). Can these physical enhancements only be achieved with the consent of the person undergoing the enhancement? Is this consent part of the concept of so-called *neurorights*, and can *neurorights* be characterized as postmodern fundamental human rights in the digital age?

I believe that a *transhumanist* approach to the body, for example, accepting all biotechnological enhancements, exemplified now by Elon Musk's telepathy chips and Neuralink, requires setting limits that only enhancements for health and preservation of life are acceptable, not just better employment or violence and warfare. Finally, *human cloning* was prohibited because of the risk of the *objectification* (*instrumentalization*) of human beings, which is precisely an essential characteristic of the protection of human dignity in law, based on the so-called *Dürig's object formula* (Dürig 1956).

A suitable methodological solution in legal argumentation may be the *proportionality* test, which seeks to balance legal principles and values against each other without completely overriding one of them (Alexy 2015; 2018; Barak 2015) despite the critics of proportionality, there is not necessarily an inflation of inherent natural human rights (Huscroft 2014; Webber 2014). The *legal order*, like nature in our vision and postmodern and posthumanist (Braidotti 2022) understanding, is no longer hierarchical (Teubner 1989; Ondřejek 2020), and it is impossible to theoretically rule out the collision of more than two conflicting values in a pluralistic world. If human rights and their basis are more moral in nature, this can accept the use of proportionality to measure rights, principles, values and interests in law, also taking into account environmental protection and the rights of marginalized entities, including *non-human rights* (Singer 1984; Heeger 2014; Balzer, Rippe, Schaber 1999).

2. DIGNITY AND FREEDOM IN TRANSHUMANISM, THE PROBLEM OF MATERIALISTIC SELF-WILL AND EGOCENTRISM

We are currently dealing with cyborgs. Let us first say who they are. They are not robots, artificial intelligence, but they are human beings, that is, subjects of the law. They are people who have taken advantage of biotechnological enhancements in their bodies. We meet people who have a new sensory organ for color perception, to be better artists. Or technology replaces nerve connections and works in prosthetics. The term *cyborg* was coined by musician and neuroscientist Manfred Clynes (1925–2020) in collaboration with Nathan S. Kline (1916–1983), a psychoanalyst, psychiatrist, and director of the Rockland State Research Center. Research regarding the effects of music and sounds on the human psyche led to the interconnection of art and science to deliberately evoke certain positive emotions (from sad to glad) in the audience, so the question was how to technologically modify music and sounds in the context of human perception (Clynes, Kline 1960, 27).[1] Humans are thus improving and constantly evolving dynamically as

[1] For more see: Clynes, Kline (1960) "Altering man's bodily functions to meet the requirements of extrater- restrial environments would be more logical than providing an earthly environment

a result of science, to improve their physical and mental functions. There is no death or sadness, no vulnerability, no suffering or pain, only positivity. There is only constant change towards perfection.

And more recently in January 2024, Elon Musk's company, *Neuralink* is conducting trial research into implanting a Telepathy chip. The chip allowed Noland Arbaugh to play a game of chess on the computer using only his mind. Simply put, technology, electronic connections are replacing neural connections; also, the chip can respond to the brain's thinking centres, i.e. it responds to a given thought and allows even a physically paralysed person to write an email, and use a PC and a mobile phone. Elon Musk plans to improve people with sensory disabilities and would like to work on memory enhancements. The research is being presented as the *holy grail in Pandora's box*.[2]

Less well known were recent situations related to the COVID period in Sweden, where payment cards, or rather small chips implanted into the body, specifically into the wrist area, were implemented in order to minimize contact. Implanting the chip directly into the wrist sped up payment for transportation in cities and ensured contactless payment (eliminating cash and also making it easier to use payment cards). All of this with the consent of the persons concerned. Similarly, during the COVID period, some American employers introduced wrist chips with the consent of their employees. EU regulation in this area is currently lacking. Issues of bodily integrity and voluntary technological interventions have not been legally addressed (Martínez-Ramil, Bolaños-Frasquet, Solarte-Vasquez 2022, 144–145, 150–151).

Now the improvements are mainly implemented for sick patients, and the treatment would eventually be part of the health insurance reimbursement. But we can see that there is a cyborg who just let another sense, an antenna for color discrimination, be completed. This is an enhancement here that does not pursue the purpose of healing but is implemented in the context of the artist's work. And now we come to the question: what purpose can be considered legitimate? As for health and preservation of life, let's say it's a justifiable reason that will help sick people. However, what about other reasons going beyond the necessary, i.e., enhancement for one's profession (improving performance, creativity), or for beauty (which is what the current cosmetic industry does with all the plastic surgery and procedures) that are not aimed at preserving health and life?

The bodily enhancements of the human being are based on *morphological freedom*, the concept of possessing the body. We humans are the owners of our bodies; we can do what we want with them. Our freedom is unlimited and as

for him in space (…) Artifact-organism systems which would extend man's unconscious, self-regulatory controls are one possibility," p. 27 see: "Cyborg deliberately incorporates exogenous components extending the self-regulatory control function of the organism in order to adapt it to new environments."

[2] https://neuralink.com/

gods in perfection we experience no wrong, no evil, no sickness and suffering, no stupidity and humiliation of vulnerability. The concept of physical enhancement fully corresponds to the modern philosophy *of transhumanism*.

Transhumanism developed in modern times in the 1970s. The father of the idea of transhumanism was Julian Huxley (1887–1975).[3] As Bostrom writes about transhumanism, Huxley based his conception of *freedom and dignity* on that of the Renaissance humanist, Giovanni Pico dela Mirandola. Huxley himself does not quote Pico directly (see later notes), but rather his successors in transhumanist ideas, such as Nick Bostrom. Huxley emphasizes the dynamic nature of human development, and Pico's motif is in the background here "man does not have a predetermined form, but that he changes and is responsible for his own form" (Bostrom 2011, 1–2).[4] Bostrom further quotes from Kant and adopts the notion of autonomy as independence from external influences and dependencies; and further refers to Nietsche's *Über-mensch* as independence from religion (Bostrom 2011, 4). Bostrom reflects conservative views that criticize transhumanism due to the possible decline of values such as dignity according to Hans Jonas and adds to his thesis an analysis of the risks of technology (Bostrom 2011, 21).

There are many versions of transhumanism, but essentially it is based on the dignity conditioned by freedom according to Pico. Transhumanism is based on an emphasis on rationality, which during the Renaissance led to an

[3] "The human race, in fact, is surrounded by a large area of unrealized possibilities, a challenge to the spirit of exploration" (Huxley 1957, 15). "(…) therefore that we must explore and make fully available the techniques of spiritual development; above toll, that there are two complementary parts of our cosmic duty – one to ourselves, to be fulfilled in the realization and enjoyment of our capacities, the other to others, to be fulfilled in service to the community and in promoting the welfare of the generations to come and the advancement of our species as a whole.

The human species can, if it wishes, transcend itself – not just sporadically, an individual here yi one way, an individual there in another way, but in its entirety, as humanity. We need a name for this new belief. Perhaps transhumanism will serve: man remaining man, but transcending himself, by realizing new possibilities of and for his human nature" (Huxley 1957, 17).

"What rituals and techniques of 'salvation', of self-development and self-transcendence will be worked out, what new incentives and new modes of education, what methods for purgation and for achieving freedom from the burdens of guilt and fear without inflicting harmon on oneself or on others, what new formulations of knowledge and consequent belief? What modes will the future find of distilling its ideas of its destiny into compelling expression, in drama or architecture, painting or story, or perhaps in wholly new forms of art?" (Huxley 1957, 126).

[4] Bostrom's quotation omits the term Adam and differs rather from Pico's quotation (compare Pico's later quotation): "Renaissance humanism also created the ideal of the well-rounded person, one who is highly developed scientifically, morally, culturally, and spiritually" (Bostrom 2011, 1–2). A landmark of the period is Giovanni Pico della Mirandola's *Oration on the Dignity of Man* (1486), which proclaims that man does not have a ready-made form and is responsible for shaping himself: "We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine."

awareness of individuality and the concept of free will (Copenhaver 2022, 244). However, this was not unlimited autonomy. In history, it was the first time that the concept of freedom was formulated in opposition to fatalism and predestination. Furthermore, it was not a materialistic concept, as I will show below in the text, nor was it egocentrism, which is the fundamental pillar of transhumanism and today's concept of morphological freedom of unlimited bodily perfection.

I suppose that transhumanist freedom, understood in this way, ultimately turns humans into instruments, objects that lose their dignity as subjects, their value as human beings, and ultimately live in the wake of their passion for perfection, driven by their own egos. The concept of ownership of the body turns against humans and leaves no room for the care of the soul, which should turn to the spirit. It is a typical Faustian work, freedom without limits. The fact is that since the Renaissance, there has been a materialization and, as part of the disenchantment (Copenhaver 2015, 424–427), also a loss of divinity and ultimately a loss of God and an ever-increasing captivity of the body.

But if we read Huxley's 1957 essay more closely, he too presents his transhumanist vision as a belief in human progress, and he also discusses spiritual methods of raising consciousness to a higher level of meditation, literally self-transcendence. Huxley sets himself against the authority of religion, fatalism and the hedonism to which individualism leads us (Huxley 1957, 58, 124), but he is himself quite concerned with the religious aspect and does not explicitly quote Pico, unlike Spinoza or Pascal.

The myth of immortality was related to the body, and the soul fell, exactly the opposite of what Pico points out (Pico 2005; Pico in Borghesi 2016; Pico in Copenhaver 2019). The soul has the freedom to choose to rise to the divine spirit and return to the state of Adam before his consciousness fell out of paradise (Pico 2005; Pico in Borghesi 2016; Pico in Copenhaver 2019; Heptaplus 2022, 206). What is missing here is suffering, and thus the purification of the soul through human suffering and self-awareness of smallness would not be a desire for the great divinity that also lies within man like a seed, in which his greatness truly lies, that he has the seed of divinity within him, like a spark (later – Paracelsus and Jakob Boehme). To be a sculptor in the Renaissance means to carve into stone, the stone of one's own ego, and thus consciously work on the purification of the soul to death. This is well illustrated by the Renaissance concept of *docta ignorantia* (Cusanus 2001 and Comenius 2022), a concept based on limits and self-responsibility, on duties to oneself and other people. It is a philosophical, ethical, and teleological concept at the same time. As Jaroslav Malík argues, transhumanism ultimately leads to a lack of freedom, to totalitarianism (Malík 2022, 144). Through his analysis of superintelligence, Malík concludes that: "However, these two methods of control are distinct from each other. We can only control instruments, we can only control persons normatively. The status of a given object or being derives from its characteristics" (Malík 2021, 107).

So how is transhumanism itself defined? Max More defines it,

> Transhumanism shares many parts with humanism, including respect for reason and science, the necessity of progress, and the valuing of human (or transhuman) existence in this life. (...) Transhumanism distinguishes itself from humanism by recognizing and anticipating the radical changes in the nature and possibilities of our lives arising from the various sciences and technologies (...). (More 2003)[5]

More's principles of transhumanism are: perpetual progress, Self-Transformation, Practical Optimism, Intelligent Technology, Open Society – information and democracy, Self-Direction, Rational Thinking (More 2003).

The principle of "*Self-Direction* – means valuing independent thinking, individual freedom, personal responsibility, self-direction, self-respect, and a parallel respect for others" (More 2003). We can see that for More, this principle involves limits on individual freedom with inherent responsibility; his understanding does not involve unlimited freedom. In the second point, *Self-Transformation*, he also mentions the necessity of respecting other people and their *dignity* (More 2003). Furthermore, he defines an open society as a combination of *freedom and responsibility*, stating that freedom alone would be similar to adolescence. Regarding Self-Direction, he states that it involves *self-knowledge*, *self-control*, *self-discipline*, *personal responsibility* in *self-experimentation, spontaneity, self-protection*, and *self-control* as opposed to the good of the whole and paternalism. Freedom of choice and *self-determination* go hand in hand with risk-taking and responsibility for one's decisions and judgments, excluding external authorities. External power destroys self-responsibility built on individual rationality and reflection.

I quote further:

> Since self-direction applies to everyone, this principle requires that we respect the self-direction of others. This means trade not domination, rational discussion not coercion or manipulation, and cooperation rather than conflict wherever feasible. Self-direction means being clear about our values and our purposes. Having clear purpose in life not only brings both practical and emotional rewards but also protects against manipulation and control by others. Freedom from others brings fulfillment and personal progress only when combined with self-direction. (More 2003)

Social relationships with others are rooted in self-confidence. Further quoting from More: "Self-direction means approaching others as potential sources of value, friendship, cooperation, and pleasure." Benevolence implies the application of common morals and goals, policies. More concludes his *transhumanist manifesto* with the thesis:

> Self-direction means being in charge of our lives. This requires choosing actions intelligently. This in turn requires independent thinking. (…) Self-direction calls on us to rise above the surrender of independent judgement that we see – especially in religion, politics, morals, and relationships. Directing our lives asks us to determine for ourselves our values,

[5] https://web.archive.org/web/20131015142449/http://extropy.org/principles.htm

> purposes, and actions. New technologies offer more choices not only over what we do but also over who we are physically, intellectually, and psychologically. By taking charge of ourselves we can use these new means to advance ourselves according to our personal values. (More 2003)

The above means that transhumanism has many faces and, according to Max More, does not represent the idea of autonomy as completely boundless, without limits and responsibility towards oneself and others. On the contrary, it explains that unlimited and irresponsible autonomy would be like the behavior of an adolescent. However, in the case of Elon Musk, who supports transhumanism, it is not entirely clear that this is such a cultivated concept. The problem is that science and technology are his business and that he does not see the effort to avoid discriminatory behavior and egocentric arbitrariness and self-centeredness as worthwhile (Boehme 1974; Comenius 2022). States should jointly regulate this issue legally. Ethical discussions are not enough.

Transhumanism is justified by utilitarian ethics and well-being. It means that humans are supposed to continually evolve towards a better version of themselves, the best version of themselves, thanks to rationality, science and technology, among other things. The goal is self-development and that the well-being of the self is the well-being of society. Transhumanism is justified by utilitarian ethics and well-being. It means that humans are supposed to continually evolve towards a better version of themselves, the best version of themselves, thanks to rationality, science and technology, among other things. The goal is self-development and the well-being of the self is the well-being of society. However, are there any limits to personal choice? Whether Max More formulates them in intelligent decision-making, self-responsibility, and respect for others in theory, the problem is always practical action and the ethics of applied biotechnology research. So, can we expect a steadily improving future?[6]

Nick Bostrom defines *morphological freedom* as the *civil right* of a human being to either maintain or modify his or her own body on his or her own terms, through the informed, consensual use or rejection of available therapeutic or basic medical technology (Bostrom 2005). The use of biological and technological advances in science to enhance the body and consciousness.

We can accept prosthetic replacements and perhaps even telepathy chips for paralyzed people, where we deal with illness and disability everywhere. Within the framework of autonomy and disposal of the body, we can accept abortion and reproductive medicine, which can serve other purposes (family happiness, having or not having children at certain stages of life). Furthermore, sex change can be justified in the context of anti-discrimination rights and gender identity. If Max More requires intelligence and self-responsibility for autonomy, then cosmetic and aesthetic modifications to the body related to other diseases (e.g., cancer) can also be accepted. What I find problematic is the purely aesthetic perspective based

[6] World Transhumanist Organization (WTA); H+ Magazine, see more: transhumanism.org

on social trends. If we make such decisions based on fashion trends, I believe we are not autonomous, but rather compare ourselves to our surroundings and, under pressure from our surroundings and society, accept certain standards that are not close to us; this has been a phenomenon of fashion for centuries. As adults, intelligent and reflective individuals, we should be able to completely free ourselves from societal pressures and consciously create space for others.

The goal of transhumanism is also to make changes in consciousness, cognitive abilities, memory, perception, senses, and emotions (Malík 2021). The telepathy chip is one such intervention in the brain. At some point in our body enhancement, the question of preserving human identity may arise (Malík 2022). We may then ask, "How long am I still me?" This leads us to consider what our essence is. It is a bit like asking, "What is a river?" Is a river its bed or its water? Is my essence my ego, or my consciousness, which is broader and presupposes a non-egocentric basis, let's say the soul? The ego is undoubtedly finite. What about the soul? Further information on this in the chapter on Renaissance humanism, according to which the soul was the link between spirit and body, and therefore Neoplatonism works with the triad of the physical, the metaphysical, and, let's say, the hyperphysical – in Pico's case, the *celestial court* (Pico 2016; 2019).

The central idea of legal and certain philosophical concepts of human dignity (e.g., in Kant 2016; 2017) is precisely the prohibition of instrumentalization (Dürig 1956; Maunz, Dürig 2009; Rosenkranzová 2019; 2022; 2024). If we treat other people as mere objects, the object of exchange, this is a violation of human dignity in law. However, it also applies philosophically and ethically. A significant sign of objectification and instrumentalization is humiliation, and this can happen whether we are vulnerable or have perfect bodies. Aren't even perfect bodies a weak band-aid on the wound of our own lower and insufficient self-worth, our self-doubt, and low self-confidence? Isn't physical perfection and following fashion just proof of our lack of autonomy, intelligence, and identity? For example, Kant's concept of the dignity of a rational person presupposes a great deal of perfection of the soul and self-restraint, even asceticism and self-denial (Kant 2016; Rosenkranzová 2019; 2021; 2022; Sensen 2011).

So, we are all technologically enhanced cyborgs, a combination of organism and mechanism, but where is the care for the soul?

3. DIGNITY AND FREEDOM IN RENAISSANCE HUMANISM AND THE MISINTERPRETATION OF PICO

But what is Renaissance humanism about?

It helps to consider the differences between the Renaissance and the Middle Ages. The Middle Ages are characterized by man's dependence on spiritual authority; man is passive. Supranaturalism is professed, that is, the world here

is seen only as a temporary tear valley, and theocentrism, God is the center of all things. The Renaissance, on the other hand, responds to these manifestations by making man active; man has free will as a choice, he has autonomous reason to make decisions, and he is noble, dignified, and responsible. Naturalism is professed – this life is true, and spiritual values are already realized in this world, nature is analogically divine. The concept of man is cosmological; he is seen as part of nature and the universe, astrology is advanced, and the influence of the stars on man is explained. The question of who man is becomes so fundamental that man becomes like a small universe, a *microcosm* at the center of the world, analogous to the earth, which is gradually overcome by heliocentrism. On the theological level of Neoplatonism, man is identified with the earth and the sun with Christ. It symbolizes that spiritual transformation must be realized in the body and in the material world. If spiritual questions disappear in the Renaissance literary art of some authors, then only matter, beauty, and self-improvement remain. The circle of philosophers around Marsilio Ficino, together with Giovanni Pico della Mirandola, at the Medici's Platonic Academy in Florence, did not abandon the theological concept, and their main objectives were the search for ancient wisdom that would verify Christianity. Transhumanism and posthumanism remain mostly only in matter, in egocentrism, and do not seek any higher good or spirituality leading to a transformation of consciousness.

And so, we know, thatthe Renaissance Humanism was inspired by Cicero's concept of dignity as the nobility.

For example, the predecessor of Giovanni Pico della Mirandola (1463–1494), Giannozzo Manetti (1396–1459), wrote a work entitled: *On Human Worth and Excellence* (1452/3) (Copenhaver 2018; Steenbakkers 2014, 88–89). From Giovanni Pico della Mirandola came the work *Oratio de dignitate hominis* in 1486, which was only so designated by the publisher, not by Pico (Pico in Copenhaver 2019; Manetti in Copenhaver 2018, 7).

As evidenced by my earlier research (Rosenkranzová 2017; 2019; 2022)[7] and especially Brian Copenhaver's (2015; 2019; Manetti in Copenhaver 2018, 7), Pico did not create any concept of dignity (Kristeller 1955; 1972; 1981; Nejeschleba 2005; Steenbakkers 2014; Herůfek 2017; 2022; Borghesi, Papio, Riva 2016; Black 2006). In my view, he speaks of a spiritual path, and both dignity and freedom refer to the original heavenly Adam, to whose state we fallen, materialistic humans

[7] Rosenkranzová (2022): "(…) According to Copenhaver, the term dignitas is used here only twice. However, it is always in a different context from the point of view of human dignity (In *Oratio the Seraphs, the Cherubs, and the Thrones* are the model of dignity and glory (Pico 2016)). Reportedly, there was a marginal remark dignitas hominis in the first edition (Nejeschleba 2005). Pico's work Heptaplus discusses the dignity of man in connection with the days of creation and the creation of man, who alone is analogous to God the Creator. There are even similar passages as in Oratio (Black 2006). The term dignity is used as prominence in the form of the seed of divinity over other creatures."

are to return by returning our souls to the spiritual and taking a moral life stance as well. This freedom to do whatever we want is meant, in the context of Pico's work, time, and Neoplatonism, as a call to live according to the spirit.

According to Pico, we can say, that each being has its nature (prototype, archetype, *extra imago dei*),[8] except man, who has no fixed form and no definite nature. Man is created as a free creature who chooses his nature based on his free will (*freedom of choice*). Man decides for himself whether his life should have the character of a plant, an animal or an angel (low life, instinctive or sublime, soulful), or God. This means that man has these germs within him as a principle and it is up to him what he develops within himself and what path he takes. The germ is a principle, latent and does not at all mean the full development of the principle, but at the same time, as far as the germ of God in man is concerned, it also means finality, as the goal of all our human direction and effort. If one chooses to cultivate the germ of God in the soul, it is only a possibility.[9] Man is partly mortal and partly immortal (Plato). One participates in divinity to the extent that one approaches God.

According to Pico, human freedom goes beyond ordinary perception and is highlighted (it is freedom of choice at the level of hyperphysics – Mind; Adam). Being is the result of activity, since, if we are not spiritually transformed into the state of Adam before the fall, then it is as if we are not. To be a sculptor is a symbol of the ego's shattering and the hard work of self-rejuvenation in the ensuing union.

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[8] Pico (in Borghesi 2016, 117: 18–20): "He therefore took man, this creature of indeterminate image, set him in the middle of the world, and said to him: "We have gave you, Adam, no fixed seat or form of your own, no talent peculiar to you alone. This we have done so that whatever seat, whatever form, whatever talent you may judge desirable, these same may you have and posses according to your desire and judgment. (…) But you, constrained by no limits, may determine your nature for yourself, according to your own free will, in whose hands we have placed you. We have set you at the centre of the world so that from there you may more easily gaze upon whatever it contains. We made you neither of heaven nor of the earth, neither mortal nor immortal, so that you may, as the free extraordinary shaper of yourself, fashion yourself in whatever form you prefer. It will be in your power to degenerate into the lowel forms of life, which are brutish. Alternatively, you shall have the power, in accordance with the judgement of your soul, to be reborn into the higher orders, those that are divine."

Pico (in Borghesi 2016, 113: 15): "(…) Pico's man has not been created in the image of God but is opus indiscretae imaginis."

[9] *Oratio de dignitate hominis*, Pico states: "The Father infused in man, at his birth, every sort of seed and all sprouts of every kind of life. These seeds will grow and bear fruit in each man who sows them. If he cultivates his vegetative seeds, he will become a plant. If he cultivates his sensitive seeds, he will become a brute animal. If he cultivates his rational seeds, he will become a heavenly being. If he cultivates his intellectual seeds, he will be an angel and son of God. And if he – being dissatisfied with the lot assigned to any other creature – gather himself into the centre of his own unity, thus becoming a single spirit with God in the solitary darkness of the Father, he, who had been placed above all things, will become superior to all things. Who will not wonder at this chameleon of ours? Or rather, who will admire any other being more?" (Borghesi 2016, 121: 27–30).

Human dignity is not predetermined and conditioned by being. Dignity does not happen automatically but must be achieved as a state of being. The automatically bute concept of man dynamic (we are what we want and desire). Man can become God. A person is a knowing (active) subject, and the world is a known object. The germ of divinity is the beginning and goal of man (Neoplatonic).

Dignity and freedom for Pico is the state of the original heavenly Adam – a spiritual entity, the spiritual element in the human being. Dignity is not materialistic and not self-centered, selfish. Dignity is not only metaphysical, but *hyperphysical* – supranaturalism for Pico; we have body, soul and spirit. The principle (seed) of dignity is in) each man, but to get it, we should take a spiritual path to rebirth Adam. Dignity is not innate, is not equal for everyone as in modern legal documents and interpretation. And this is why we constantly misrepresent Pico's notion of dignity and freedom in modern and postmodern interpretations (Copenhaver 2015; 2019).

When Pico speaks of mastery of oneself, it is the result of accepting the spirit, or rather the union of the soul with the spirit, which requires inner spiritual purification, high morality, and above all the disappearance of egocentricity, replaced by logo-centricity, which is an inner spiritual transformation after which we can speak of mastery as a path of initiation. It is not a materialistic, egocentric project of self-will. Nor is it about dominion over nature as supremacy. This must have been misunderstood soon after Pico's death. The image of man at the top of the pyramid (*scala naturae*) was rather unfortunate.[10] It is not about domination, but rather about developing the concept of man as a *microcosm*, so that we understand what man is composed of (Allen 2014; Black 2006).[11] In addition to the seed of divinity, he carries minerals in his bones, has the vitality of plants and the passions and aggression of animals, and the rationality and will, which are reflections of man. On the contrary, a person who completes the journey of consciousness transformation to logocentrism connects with the original beginning and experiences inner peace, joy, and respect for all creation, that is, the dignity of oneself as a human being and the dignity of all creation, nature, animals, creatures, and the cosmos. It is precisely *dignity*, or nobility, that is also a symbol in Pico's poetic expression of divinity, as the seed of divinity in man and the signature of God's speech in nature (Pico in Borghesi 2016; Pico in Copenhaver 2019). Thus, man retroactively recognizes his life's task and dignity. However, this is a consequence of uniting with the spirit and not self-will. It is precisely the will that follows the intentions of the spirit. And in Pico's interpretation, it is such a universal concept, as he sought to search across religions and philosophies in view of his syncretism.

[10] Carlus Bovillus (Charles de Bovelles), 1509 – *scala naturae* different from Pico in Oratio and Heptaplus.

[11] Pico – Heptaplus (Allen 2014; Black 2006).

4. DIVINE NATURE IN NEOPLATONISM AS THE BASIS OF DIGNITY AND LEGAL PROTECTION OF NATURE TODAY

Nature is creation; in nature we read the signatures of God and, according to Jacob Boehme and Jan Amos Comenius, we can know God through nature (Comenius 2017, 2022; Schifferová 2009). According to the classical Rosicrucians of the 17th century, in addition to the Bible (as a book of scripture), nature, the *book of nature* (*Famma Fraternitatis* and the book of the world, *libri naturae*; Gilly 1998), is also given to man for knowledge (Bouman, van Heertum 2014; Quispel 2000). The entire creation, including humans, minerals, plants, animals, the planet as part of the universe, and the universe itself, originates from an unknowable beginning, the spirit, the Logos. Before the Word, which was biblically in the beginning, however, according to some Neoplatonists, such as Jacob Boehme (Boehme 1974), there was *Ungrund*, or according to other Rosicrucians, *prima materia*, i.e. nothing. Some speak of *higher (solitary) darkness* (as seen in Pico in Borghesi 2016, 121),[12] others of the original mother and father (*prima mater* + *frater*, i.e. water and fire).

The individual stages of Creation are reflected in a hierarchical conception of the world. However, this does not imply focus or dominance. In Neoplatonism, alongside the hierarchical conception, we also encounter an image of the world as a wheel or circle. This can be seen, for example, in the works of Jacob Böhme (1974) and Comenius (2017). It is typical for both authors that the original cause of Creation is actually also the finality, the purpose to which the human spirit should return. Returning to the original cause is actually Plato's *anamnesis*, the process of remembering the Light, the Sun, and it is the Neoplatonic concept of Christian re-creation. It is uniquely man who has the important task, given his mind and higher intellectual abilities, to turn his soul into spirit and attract the divine, spiritual higher energy of the spirit into matter, thereby bringing about renewal according to the original idea and renewal, the rebirth of the spirit in individual human beings, even physically in the body (by reviving individual spiritual centers, primarily the heart and head). Then, with this renewed, transformed energy, man increases the planetary spiritual vibration and that of the universe, and also has a spiritual, energetic effect on animals, plants, and stones. Man has to even redeem the gods themselves in this way (Pico in Borghesi 2016; 2019; Allen 2014; Black 2006).

Neoplatonism is based on Plato and Platonism, Pythagoras and the Pythagoreans, Christianity, and in Pico's work, syncretism incorporates elements of Arabic mysticism, Jewish Kabbalah, and Hermeticism in an effort to discover ancient wisdom (*prisca theologica*), according to the traditional method of

[12] Pico in Borghesi (2016, 121) – Oratio: 30, 27 – God in darkness. See Rosenkranzová (2019b) – the poetic text inspired by Pico *Reflection of the day – a higher darkness*: reflections-of-the-day-about-a-higher-darkness/

searching for roots (*ad fontes*). The influence of Pythagoras is also evident in Pico's *Heptaplo*. (Pico in Borghesi 2016; Allen 2014; Black 2006).[13] A concise expression of the teachings of Pythagoras and the Pythagoreans can be found in these words of Porphyry, a disciple of Plotinus, which were later also taken up by Giovanni Pico della Mirandola:

> What he said to his disciples no man can tell for certain, since they preserved such an exceptional silence. However, the following facts in particular became universally known: first that he held the soul to be immortal, next that it migrates into other kinds of animal, further that past events repeat themselves in a cyclic process and nothing is new in an absolute sense, and finally that one must regard all living things as kindred. These are the beliefs which Pythagoras is said to have been the first to introduce into Greece. (Guthrie 1995, 186: Porphyry (V.P. 19, DK. 14.8a))

It follows from the above that particularity contributes in part to *universality*. This implies the interconnectedness of all parts of the whole. In Neoplatonism, this interconnectedness is admired as *Platonic love*, a force that connects everything. For Neoplatonists and Pythagoreans, however, it is not just a matter of material laws in physics, but at the same time it has always been a theological concept, namely the concept of *divine nature*. In Pythagoras, we can find the idea of reincarnation (specifically, the *transmigration of souls*), since all matter and energy only transform; nothing completely disappears. This ultimately led to a high *respect* and recognition of all life, since everything stems from one common substance and origin, which he expressed in his mathematics and further in a certain set of rules for spiritual life, including, among other things, not eating meat. For Pythagoras and his school, *vegetarianism* is an expression of *brotherhood, friendship and substantial kinship with animals and plants*, which are very close to humans. Moreover, Pythagoras carefully observed purity, namely mental purity, so as not to be influenced, for example, by the emotions of animals (aggression, passion, loss of courage). Eating animals would mean cannibalism (Guthrie 1995, 195).

I believe that these are the germs of *virtue ethics* as we see it in *Stoicism* in Cicero (*De officies*), and as it is finally developed and surpassed by Immanuel Kant (*Methafhysik der Sitten*) with his own conception of deontological ethics, but both without vegetarianism. (Rosenkranzová 2019; 2021; 2022; Kant 2016; Cicero 1970).

Going back to Pythagoras, the exact reason for the prohibition of killing and eating animals is that: "(…) they share with us the right to a soul."[14] "Aristoxenus said of Pythagoras and his followers: 'Every distinction they lay down as to what

[13] Borghesi, Riva, Papio, Marchignoli, Melloni, Buzzeti (2016, 76): Pythagorean inspirated Pico by idea of transmigration of man, concept of man as mikrokosmos and seeds and stages of creation **(**transmigration of souls makes us friendly to the plants ets. – Empedocles doctrine).

[14] Guthrie (1995, 190), (D.L. VIII, 12. – quotes from Plutarch and his after-dinner Questions).

should be starting-point; their hole life is ordered with a view the divine. This is their and it is the governing principle of their philosophy'" (Guthrie 1995, 199). Guthrie explains that by purifying the soul, the members of the Pythagorean Brotherhood were drawing closer to the divine, which was a priority for them. It is only from this effort to approach the divine that the concept of "kinship of all life, which was a necessary presupposition to the doctrine of transmigration. This kinship had a very wide extension, embracing more than what we should be inclined to accept as animate nature (…)" (Guthrie 1995, 200). Next, Guthrie introduces Empedocles, for whom: "everything had a share of consciousness (fr. 110.10) and even the universe as a whole was a share of eyes of the Pythagoreans a living and breathing creature" (Guthrie 1995, 200).[15]

Guthrie further states that: "The Pythagorean Ectophanus described the world as a form of divine power called Mind or Soul which was cause of physical motion" (Guthrie 1995, 200).[16] The Pythagorean doctrine according to Democritus was characterized as follows:

> Natural kinship between man and the universe, microcosm and macrocosm, must be close. The universe was one, eternal and divine. Men were many and divided, and they were mortal. But the essential part of man, his soul, was not mortal, and it owed its immortality to the circumstance, that it was neither more nor less than a small fragment of the divine and universal soul, cut off and imprisoned in a perishable body. (Guthrie 1995, 200)[17]

Pythagorean *transmigration of souls* takes place within unity with the eternal thanks to sympathetic force. Through the cultivation of the individual soul, union with the universal soul is achieved, thereby liberating the soul from the cycle of rebirth. This requires a deep inner desire for salvation (it was a mystery initiation cult) and, at the same time, not abandoning the rationality that leads to understanding (*philosophia*) (Guthrie 1995, 203–205). This is clearly summarized in Guthri's sentence: "The philosopher who contempates the kosmos becomes kosmos in his own soul" (Guthrie 1995, 211).

It is precisely this commonality, anchored in the whole, that leads us to overcome ourselves and surrender our egocentricity, as Comenius and Jacob Böehme say, to rid ourselves of our self-centeredness, our self-will. If we are harmonized with the whole, with the universe, we see that it is easier to relinquish our own domination, lordship, that is, cruelty, aggression, disrespect, indignity, destruction and absorption, excessive consumption. However, I see that the perspective of the whole must be earned from the bottom up by each person, gradually, according to the maturity of their soul. No one should appropriate the perspective as a whole, such as an international organization, as this will lead to ideological violence. In the spirit of Comenius, everything is education

[15] Ar. Phys. 213b22, De Philos. Pythagore (DK, 58B30; 277).

[16] DK, 51. I, pp. 324.

[17] P. 200 – E. Frank – Anon. Londinensis, DK, 44A27.

of the soul, and his motto, written in emblem was: "*Omnia sponte fluant. Absit violentia rebus*" – we can say "let everything flow freely, free of all violence" (Comenius 2017; 2022; Wouter 2016; Schifferová 2009). For Jan Patočka, inspired by Comenius, partiality is a risk of losing one's humanity and becoming a mere thing. He appealed for us to make a "spiritual conversion – a turn towards universality" (Schifferová 2009; Patočka 1997).

In addition to the *Pansophia* (*General Consultation on the Correction of Human Affairs*), Comenius describes the idea of the world and the place of man and God in his book *Centrum securitatis*, where he states: "Every ray has a double center. (…) Similarly, every human being has a double center" (Comenius 2017, 29). The whole world is radiation. Matter is energy. Everything is permeated by vibrating rays. As Comenius says, each ray has a dual center, then it means that the nature of the universe, the man and the macrocosm is dual. There are two essences side by side, two qualities, two orders, two matrices. Comenius expands this idea: "(…) The general one or common one, from which it runs out and to which it returns. The other one is its own one (…) The common one, which is God, the creator and maintainer of everything, and the other one, its own one, which is its God given nature" (Comenius 2017, 29; 2022). There are two parallel worlds emerging from two centers. First one is carried by the ray of eternity, the other one comprises variability and transience.

However, it should be added that Comenius otherwise emphasizes the Neoplatonic triad of matter, light, and spirit (physics, metaphysics, and hyperphysics). In *Centrum securitatis*, however, he focuses on the importance of the whole. Comenius' metaphysics is non-Aristotelian (Wouter 2016).

I believe that if we start from Neoplatonism and its conception of *divine nature* and man, then through caring for the soul, we arrive at an inner mystical experience of the soul connected with the spirit (motifs of the alchemical wedding in the microcosm of man, *sponsus et sponsa*) and then, after a spiritual transformation of consciousness, one becomes aware of oneself as part of a larger whole, the macrocosm and the divine creative *Logos*, in which man participates internally (Pektas 2018). This leads to a spiritual and internal renewal of consciousness, as was the original Adam from the energy of the beginning. There is an internal unification and self-annihilation in the beginning. The forgetfulness of the soul caused by its vibrational fall is restored. As a result, a connection arises in human consciousness, the rose of the heart, the spark of the spirit, where there is a point of communication with the Spirit, the divine energy. To achieve this, we must be refined by purification of the soul and care for the soul. The condition is the dissolution of egocentricity, not morally, through exercise, but through the method of abandoning the ego and letting in the spirit. A person cannot force themselves into this, but it is the inner eros of the soul longing for connection with the Spirit, with the Logos. Then a person is guided by the spirit and soul, or rather the spiritual soul, renewed, married, and egocentricity is gone, as it

is gradually replaced by logos-centricity, which the soul longs for and towards which it is directed. Inner unification naturally brings with it a deep and natural respect for oneself and other people, as well as respect for animals and nature, the universe, and all of creation, as all of this is created by the higher, more intelligent forces of the creative Logos.

This is precisely where *Pico's dignity* as a human being lies, in the fact that he can transform himself spiritually, or rather transform his consciousness, like a chameleon (Pico in Borrghesi 2016, 123; Pico in Copenhaver 2019), and participate in all shades and colors, in all expressions of being. This means having an indefinite form within oneself and at the same time all the seeds of potential. It is up to human choice what sprouts. It is freedom of choice, unforced choice, to learn, as in the school of life, to care for the soul and enable its inner spiritual unification, like the original Adam, and to revive its higher spiritual abilities, including higher consciousness, as opposed to earthly cunning and goodness. In the *Logos*, on the one hand, there is equality, freedom, and dignity, but on the other hand, there is also a certain vibrational hierarchy of spheres. Pico's concept of dignity is a theological and philosophical concept of Neoplatonism, which is strongly influenced by his syncretic inspirations from Kabbalah, Arabic mysticism, and, in addition to Christianity, also from Neoplatonic paganism, which exists in the background of Plato and the Pythagoreans. We do not become God, but in our souls we experience participation in the Logos, in creation, through higher consciousness and in the depths of our hearts. We participate in the world soul.

5. DIGNITY AND FREEDOM IN POSTHUMANISM, DESTRUCTION OF HIERARCHIES?

Just as transhumanism expresses modernity, posthumanism is characteristic of postmodernity; it is the deconstruction of the human condition through critical theory. Posthumanism is diverse and pluralistic, bringing critiques of humanism as anthropocentric, that is, humans are not at the top of the evolutionary pyramid or experience equality with animals and nature. Humans do not have inherent rights to destroy nature or place themselves above it. Also, human knowledge is reduced to a position of less control, previously considered to be the defining aspect of the world. Human rights exist on a spectrum of animal rights and posthuman rights.

Francesca Ferrando claims that:

> Posthumanism is often defined as a posthumanism and a post-anthropocentrism: it is "post" to the concept of the human and to the historical occurrence of humanism, both based, as we have previously seen, on hierarchical social constructs and humancentric assumptions. Speciesism has turned into an integral aspect of the posthuman critical approach. The posthuman overcoming of human primacy, though, is not to be replaced with other types of primacies (such as the one of the machines). Posthumanism can be seen as a post-exclusivism: an empirical

> philosophy of mediation which offers a reconciliation of existence in its broadest signiications. Posthumanism does not employ any frontal dualism or antithesis, demystifying any ontological polarization through the postmodern practice of deconstruction. (Ferrando 2013, 4)

Rosi Braidotti writes: "A posthuman approach avoid the recreation of a pan-humanity that would dialectically absorb these others into a new superintelligence project" (Braidotti 2022, 67). Then let us add Rosi Braidotti's critical reflections on the Renaissance concept of man in the words of Fraser Gray:

> Rosi Braidotti claims that the paradoxes generated by humanism occur because beneath its pretensions to universality, a certain image of the subject is always presupposed by those declaring the universal self-evidence of human equality. And throughout history, the predominant image of the subject of equality has been humanist Man, the model for which is Leonardo DaVinci's Vitruvian Man: "a male of the species" who is also "white, European, handsome and able-bodied." Braidotti thus suggests that "the human of humanism" or humanist subject of equality often operates as a normative principle, "a systematised standard of recognizability – of Sameness – by which all others can be assessed, regulated and allotted to a designated social location." To perpetuate its own supremacy, the humanist subject must ensure that these "others" (modes of being not recognised as fully human) are not only barred from participation in the community of humanist subjects, but hierarchised on a sliding scale of inequality. Braidotti argues that this form of subjugation operates via a "dialectics of otherness," the "anthropocentric, gendered and racialised" process by which others are "cast out of normality." That is, as a historically dominant mode of being, the human of humanism reduces all others to a non-identity, to their "not-being" a humanist subject. This not only results in the exclusion of all those different from the norm but also results in the creation of a new system of domination, as the hypocrisies of the American independence movement demonstrate." (Grey 2025)

Rosi Braidotti approaches posthumanism through the lens of feminism and focuses on the value of equality and the emancipatory efforts of *others*, which must be differentiated. Based on *Critical Legal Studies* and *feminism*, which are anti-theoretical, Braidotti considers personal experience of embodiment, matter containing vitality, intelligence, and self-organization to be significant. Matter cannot be reduced to a social construct, and therefore social relations and, we might add, rights are deconstructed. For Braidotti, *new materialism* is bodily empiricism, the philosophy of lived experience, and materialism is the basis of *posthuman feminism* (Braidotti 2022, 108).

Braidotti's *new materialism* brings a *non-anthropocentric* concept of cooperation between *species*, speaking *beyond dualism* about the parallelism of entities, and therefore it is not just about the *experience of the human body,* but about the experience with technologies and natural species. Braidotti rejects the duality of nature and culture (established by Aristotle) and prefers a holistic approach, inspired by Spinoza and his idea of a single source of nature, a single matter, with inherent equality. By *not distinguishing between subject and object* in social relations, we contribute to the formation of relationships without superior subjects, where all entities (humans, animals, technology, and nature) coexist (Braidotti 2022, 113).

Braidotti describes the sheep Dolly as an emblem of *denatured* and modified biology, which is a kind of vitality, life, a renaturalization of the artificial, a *denaturation* of *queer inhumanism*. Preciado says that we live in punk hypermodernity (Braidotti 2022, 159). According to Braidotti, the strategy of posthumanism is *self-design* – body perfection, fitness, diets, cosmetics, plastic surgery, sex changes, and genetic engineering. The combination of nature and the artificial (biotechnology) is demonstrated by the widespread use of reproductive medicine (Braidotti 2022, 167).

I suppose that posthumanism misunderstood the concept of the so-called Platonic Academy of Marsilio Ficino, including his pupil Giovanni Pico della Mirandola and others in Renaissance Florence, the concept of man was *cosmological* and very Neoplatonic in oriented, adopting elements of Pythagoreanism, Hermeticism, and, especially in Pico's case, inspired by Kabbalah and Arabic wisdom. The nobility, uniqueness, and dignity of man lay in his potential ability to transform his consciousness into a higher spiritual consciousness that participates in the *Logos*, in Creation, like the original heavenly Adam before the Fall. This was a theological concept that became heresy and was perhaps adopted by some Western esoteric movements (such as Rosicrucianism, Freemasonry, and Martinism; Rosenkranzová 2022; Quispell 2000; Bouman, van Heertum 2014; Glenys 2008).

During mystical inner union with the Logos, there is no superiority, but rather a deep respect and recognition of the equality of all creation (Eckhart, Boehme 1974; Comenius 2017; 2022), which was the concept of *divine nature*, the signature of God's Word in matter. The prerequisite for achieving unity with the beginning, with the *Logos*, is self-purification and humility, no arbitrariness or pride and dominion, only dominion over one's internal states, passions, inclinations, strong emotions, instincts (Pico 2016; 2019; Ficino, Comenius 2017; 2022).

Therefore, I believe that the *scala naturae* was a misunderstanding of Florentine Renaissance humanism. Whether Rossi Braidotti follows Spinoza with the idea that everything created has one origin, one source, one matter, Spinoza also follows Renaissance Neoplatonism and is even partly part of it, similar to Comenius. For more, see the previous chapter, including Pythagoreanism. However, unlike the posthuman Braidotti, Spinoza thought in the context of his spirituality. I see it as both posthumanism and Neoplatonism developing a certain version of equality, respect, friendship, brotherhood and dignity. The fact that liberalism emphasized only Pico's freedom in misinterpretation, since it was only about freedom of choice (Copenhaver 2022, 244), is of course problematic.

I agree with the idea of equality and dignity of creatures, which must be respected. The question is whether it is possible to redefine legal subjectivity, as this would better express the equality of all posthuman entities. Humans, animals, creatures, nature, the cosmos, robots, and other machines would all be on the same level. On the other hand, would humans lose their responsibility? What we can

certainly do now is to legally recognize at least protection under anti-discrimination law and, if necessary, deduce protection for other entities by analogy.

The effort to eliminate duality is possible either through unification or triad. According to the Pythagoreans, odd numbers are stable. This is possible in philosophy, theology, and on the psychological level of the individual, as well as in social relations. Since the dynamics of law are always quite conservative, but over time always react conservatively to social changes. Proportionality can be used to measure conflicting subjective rights in pluralism, and it is not impossible that multiple values would be taken into account in the measurement, which is what happens in hard cases. Źofia Folková discusses the elimination or weakening of the subject-object duality of legal relationships in more detail in this issue of the journal. I believe that the solution may rather come from recognizing the dignity of all entities except humans and compensating for the unequal status of non-subjects by analogy, as in classical relationships, or emphasizing the protection of creatures as objects.

6. MORPHOLOGICAL FREEDOM AND NEURORIGHTS AS A FUNDAMENTAL RIGHT AND PROPORTIONALITY IN LAW

We can legally conceive of morphological freedom as a Fundamental Right or Freedom under Article 2 or 8 of the European Convention on Human Rights.

In medical practice, it is consensual self-determination or reversion as a refusal of medical service. According to Nick Bostrom, morphological freedom is the *civil right* of a human being to either maintain or modify his or her own body on his or her own terms, through the informed, consensual use or rejection of available therapeutic or basic medical technology (Bostrom 2005). Use of biological and technological advances in science to enhance the body and consciousness, as set out in Chapter II. The goal of the TH+ movement is the widest possible range of morphologies and lifestyles.

A characteristic feature here is precisely the autonomy and consent of the individual.

The term *neurorights* (*global neurolaw*) has been in existence since 2016 (Shen 2016, 1075). Neurorights are even considered fundamental rights. I have no problem with this, because they are always possible variants of current fundamental rights, since the legal definition of fundamental rights has always been extended through *evolutionary interpretation*, or vague legal concepts have simply been clarified. Elisa Moreu Carbonell (2021, 155) asks the question whether to regulate neurorights legally or not?[18] I agree with regulation, but the question is in what

[18] "Neuro-rights are ethical, legal and social principles of freedom 31 The Cyborg Foundation, https://www.cyborgfoundation.com, cofounded by N. Harbisson, the first cyborg recognised as such, fights for recognition of a range of rights for cyborgs, such as equal rights with natural

form and at what level, whether within the EU or at Member State level, and how outside the EU. These are questions that I have not yet resolved.

Ienca and Adorno (2017, 23–24) proposes to address the protection of neurorights through Article 3 ECHR, as part of bodily integrity, specifically *mental integrity*.[19]

The provision of medical services is partly a private right and partly a public right, as medical procedures are usually covered by health insurance. However, elective medical procedures (on request) beyond the scope of standard medical practice – i.e. cosmetic surgery – go beyond what is necessary, which could be ethically questionable. Legally, this is a matter of the right to the protection of physical integrity (Article 2 of the European Convention on Human Rights, hereinafter referred to as the ECHR). Physical integrity is part of the right to life, including prevention and social aspects. If we also consider abortion to be an expression of transhumanist autonomy, we must take into account Article 2 of the ECHR.

Applying Article 2 of the ECHR has a certain advantage, as it is the most important right in terms of proportionality and balancing of rights, similar to how interference in human dignity is given priority in national states as an absolute right (Wagnerová 2012; Barak 2015; Rosenkranzová 2019; 2024). The European Court of Human Rights (hereinafter referred to as the ECtHR) is not usually restrained when it comes to the right to life and is willing to address it, as opposed to the rights under Article 8 of the ECHR, given the theory of the *margin of appreciation*, which is more closely linked to the positive obligations of Member States, i.e. when some action is expected from the state towards the protection of rights (Kmec, Kosař 2012, 88–89). Remaining within Article 2 of the ECHR, in the context of morphological freedom, this is more of a so-called negative obligation, meaning that the member state must create space and conditions for the exercise of freedoms, and any positive obligations are rather secondary.

Another possibility for legally protecting morphological freedom, *neurorights*, and other manifestations of transhumanism is Article 8 of the ECHR, which guarantees the right to respect for private and family life, which encompasses

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persons or the right to design themselves as a species. related to the ownership of people's brains and thoughts, in other words, rights protecting the human brain and thoughts. As mentioned above, the law is based on the premise that we humans have the capacity to choose freely (autonomy of will or free will). But what will happen when humans are exposed to others knowing our emotions and introducing thoughts in our heads? That is why attention must be paid to neuro-rights" (Carbonell 2021, 155).

[19] "(…) mental integrity is protected by the EU Charter of Fundamental Rights (Article 3), this right is conceptualized as a right to protecting mental health and is complementary to the right to physical integrity. We suggest that in response to emerging neurotechnology possibilities, the right to mental integrity should not exclusively guarantee protection from mental illness or traumatic injury but also from unauthorized intrusions into a person's mental wellbeing performed through the use of neurotechnology, especially if such intrusions result in physical or mental harm to the neurotechnology user" (Ienca, Adorno 2017, 23–24).

various forms of autonomy, such as reproductive medicine, gender identity and identity in general, the right to self-determination and self-realization (including the distinction between the so-called *fora interna* and *fora externa*), worldview, and the right to pursue one's happiness, including the protection of privacy and human dignity (not to be instrumentalized or humiliated). In addition, there may be situations where the situations listed above are governed by anti-discrimination law, such as discrimination against LGBTI people. Human dignity is a subjective right in Article 8 ECHR, but it also functions independently as a legal value for interpretation or as a legal principle (Barak 2015; Rosenkranzová 2019; 2024). Usually, various conflicts of principles and rights cannot be ruled out, which is where so-called judicial proportionality tests are applied in individual court cases (Alexy 2015; 2018; Barak 2015). Proportionality tests are a suitable legal tool for resolving conflicts in a pluralistic world. I believe that they are also an expression of postmodern posthumanism.

A suitable methodological solution in legal argumentation may be the *proportionality* test, which seeks to balance legal principles and values against each other without completely overriding one of them (Alexy 2015; 2018; Barak 2015) despite the critics of proportionality, there is not necessarily an inflation of inherent natural human rights (Huscroft, Webber 2014).

The *legal order*, like nature in our vision and postmodern and posthumanist (Braidotti 2022) understanding, is no longer hierarchical (Teubner 1989; Ondřejek 2020, 75), and it is impossible to theoretically rule out the collision of more than two conflicting values in a pluralistic world. If human rights and their basis are moral (Tasioulas 2015, 50), then we can accept the use of proportionality to measure rights, principles, values and interests in law also taking into account environmental protection and the rights of marginalized entities, including *non-human rights* (Balzer, Rippe, Schaber 1998). The existence of non-human rights in the broadest sense is also confirmed by studies of neurorights (Shen 2016, 1075).[20]

7. CONCLUSIONS

I came to the following conclusions:

1) Transhumanism misinterprets Pico's concept of dignity, focusing on the spiritual quality of a caring soul that experiences freedom, but that freedom is not limitless. In Renaissance humanism, it is only freedom of choice. It is by no means a materialistic and self-centered conception. Dignity must be arrived at by purification of the soul, care of the soul, and spiritual restoration to the state of the divine Adam.

[20] And in 2012, a group of scientists (including many neuroscientists) signed the Cambridge Declaration on Consciousness, which declared that "the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness" (Shen 2016).

2) The misunderstanding had negative implications for the concept of *scala naturae*, where man was placed at the top of the food pyramid chain and as an arbitrary master, in the sense of power and superiority over nature. If man and mankind acted according to the spirit and soul unselfishly, then they would understand this, according to Pico, as a moral challenge to master their passions, instincts and carnality and become the master of themselves. This is the spiritual concept of Neoplatonism. By analogy, nature is divine and man as a conscious being and master who has come to know himself has respect for all life. Posthumanism eventually comes to similar conclusions but manifests itself only in a naturalistic and materialistic way, since God has long been dead.
3) *Morphological freedom* as a manifestation of transhumanism is another form of materialism if we deal with the body and can partly a concern the soul expressing its autonomous space. According to law, it is part of the right to bodily integrity, dignity and privacy, including the right to personal happiness and self-identity or worldview.
4) It will be ethically legitimate to accept bodily enhancements of people made possible by implanted technologies (chips), i.e., cyborg enhancements, if the purpose of the operation is life and health (limb immobility and paralysis, loss of senses, or even mental and neurodegenerative diseases). Such a goal could be financed by health insurance. However, if other goals were involved, mere enhancement to improve professional skills (artist) or even violence (individual or collective), then this cannot be accepted. The artist's enhancement is purely egocentric. And this would bring health care into the realm of privately provided services, which are not usually strictly regulated.
5) Transhumanism leads to the perfection of the body, thus reducing us humans to objects, instruments, and items of care materialized in the body. It is a manifestation of materialization and de-spiritualization, a trivialization of *care for the soul* (Patočka 1997), an ancient concept directing the soul toward the spirit, toward the Logos. This leads to the flattening of human consciousness and its captivity in matter; in Western culture, there is no spiritual transformation of consciousness and the organs of internal secretion. The *aesthetics* of perfection in transhumanism overlooks the ugly and vulnerable. This is *discriminatory* and, at the same time, can lead to a violation of dignity and humiliation, according to Avishai Margalit (1998) in his concept of dignity as relational respect for other people, where the characteristic is *being seen*, and therefore any overlooking is exclusion and discrimination. Fabio Macioce (2026) elaborates on this idea in his research.[21]

[21] Fabio Macioce presented a paper entitled: "Groups and humiliation: the case of aesthetic humiliation" at a workshop the 27.06.2025 in Onati International Institute for the Sociology of Law.

6) Discrimination is remedied by posthumanism, which emphasizes plurality and allows us to see even the ugly. Equality is a central value of posthumanism. Through its efforts to raise awareness and perception of all entities as visible. Posthumanism is respectful and thus protects human dignity, the *dignity of creatures*, and the dignity of all entities. Unlike Neoplatonism, posthumanism does not carry a theological concept and is materialistic, so equality and dignity are only physical and psychological. It does not liberate us from dualism with another dimension, as Renaissance Neoplatonism did. However, freedom is in last place, which is understandable because posthumanism reacts critically to previous liberalism. Freedom is manifested more in the right to self-determination, self-identity, including gender identity. It is precisely posthuman deconstruction that is helpful to the dignity of all entities and the protection of the environment and animals, even though posthumanism is anti-naturalistic with a positive relationship to technology, whose progress is just as irreversible.
7) I think that dignity (love), freedom and equality (community) should always balance together. A *triad of values* is more stable than a duality creating opposites. One cannot exist without the others. This is illustrated by the reflection: "Posthumanism seeks to problematize these binaries or overcome them. Spirituality assumes transpersonal experiences and forms of being in which distinct ontological boundaries may be blurred or erased, leading to nondual experiences" (Ferrando, Banerji 2023, 2).

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HUMAN RIGHTS, DESIRE, AND THE LACANIAN SUBJECT: BETWEEN SELF AND OTHER

Abstract. This paper seeks to re-examine the subject of law through the lens of Lacanian psychoanalysis, arguing for a more nuanced and critically engaged understanding of subjectivity. In Jacques Lacan's psychoanalytic theory, the *Other* refers to both specific individuals and, more significantly, the Symbolic Order of language, law, and culture that shapes our subjectivity and desire. By situating the subject (the *Self*) in relation to the Other – of which Law and Human Rights can be seen as paradigmatic expressions – an attempt is made to explore this dynamic relationship within legal theory. The aim is to expose the legal subject not as a transparent bearer of rights, but as a complex, desiring subject entangled in unconscious structures.

Building on this reframing, the paper argues for moving beyond an imaginary, universalising conception of morality – one often embedded in Human Rights discourse – and toward an ethics of desire. According to the Lacan's psychoanalysis, *morality* is not ethical; rather, it is a defence mechanism, a way for the subject to compensate for having renounced its desire. Ethics, on the other hand, requires confronting the finitude and non-totality of both the Self and the *Other*. To act ethically, the subject must dethrone the *Other* – recognising that the Other, as such, as an essence, does not exist.

If we understand Human Rights as a form of the *Other*, offering a supposed universal moral order, then we must ask: "Shall the ethical subject require the 'dethronement' of Human Rights?" And if so, "should Human Rights discourse be re- or de-constructed through the lens of desire and psychoanalytic ethics?"

Keywords: human rights, desire and the Lacanian subject

PRAWA CZŁOWIEKA, PRAGNIENIE I PODMIOT LACANOWSKI: POMIĘDZY „JA" A „INNYM"

Streszczenie. Niniejszy artykuł podejmuje próbę nowego namysłu nad podmiotem prawa w świetle psychoanalizy lacanowskiej, argumentując na rzecz bardziej zniuansowanego i krytycznie zaangażowanego ujęcia podmiotowości. W teorii psychoanalitycznej Jacques'a Lacana, pojęcie „In-

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nego" odnosi się zarówno do konkretnych osób, jak i, co istotniejsze, do symbolicznego porządku języka, prawa i kultury, który konstytuuje naszą podmiotowość i pragnienie. Umiejscawiając podmiot („Ja") w relacji do „Innego", którego paradygmatycznymi ekspresjami mogą być Prawo oraz prawa człowieka – artykuł podejmuje próbę zbadania tej dynamicznej relacji w obrębie teorii prawa. Celem jest ukazanie podmiotu prawa nie jako przejrzystego nosiciela praw, lecz jako byt złożony, jako pragnący podmiot uwikłany w struktury nieświadome.

Na tej podstawie tekst postuluje odejście od wyobrażeniowej, uniwersalizującej koncepcji moralności często wpisanej w dyskurs praw człowieka – na rzecz etyki pragnienia. Z perspektywy psychoanalitycznej moralność nie jest etyczna w sensie lacanowskim; stanowi raczej mechanizm obronny, sposób kompensowania przez podmiot wyrzeczenia się własnego pragnienia. Etyka natomiast wymaga konfrontacji ze skończonością i niecałościowością zarówno podmiotu, jak i Innego. Aby działać etycznie, podmiot musi „zdetronizować" Innego – uznając, że Inny jako taki, jako esencja, nie istnieje.

Jeśli zatem rozumiemy prawa człowieka jako formę Innego, oferującą domniemany uniwersalny porządek moralny, musimy postawić pytanie: „Czy podmiot etyczny wymaga 'zdetronizowania' praw człowieka?" A jeśli tak, to jawi się kolejne pytanie: „Czy dyskurs praw człowieka powinien zostać prze- lub zdekonstruowany przez pryzmat pragnienia i psychoanalitycznej etyki?"

Słowa kluczowe: prawa człowieka, pragnienie, podmiot lacanowski

> "…the law-observer's assembly decided to kill silence once and for all and erect on that very point the statue of her eyes' calmness for the young woman was holding her recovered sight inside her hands like a miraculous snake."[1]
>
> "Όλα είναι δρόμος"[2]

Francesco del Cossa, *Saint Lucy*, c. 1473/1474

[1] An extract from *Completion of Freighter Steamboat* by Andreas Embeirikos (Greece 1901–1975).

[2] The title of a Greek movie by Pantelis Voulgaris, translated into "It's a Long Road," 1998.

PART I

Father, when I was a child, and I would ask you: "Where are you?" You would reply: "(Everything) It's a long road, son" wrote Alexis to his father before committing suicide in the opening scene of Voulgaris' movie *It's a Long Road*. The father goes back to revisit the place where his son died a year later. This storyline showcases the constant flux of human experience and existence through space and time, in our attempt to understand our Self. This paper is, first and foremost, dedicated to this never-ending quest of grasping our own humanity and selfhood. The focus and obsession with this specific viewpoint are what this paper seeks to contribute to the ongoing discussion around the subject matter at hand.

Contemporary legal thought has struggled to coherently address the question of the subject of law – that is, to meaningfully interrogate who it is that produces, interprets, and consumes law. Legal theory has largely operated under the assumption of a stable, autonomous, rational, and unified legal subject – one whose subjectivity is granted and regulated by a sovereign legal order. This presupposed subject is bestowed with access to a presupposed universal morality, a supreme Good, and is positioned as inherently competent and self-transparent.

Such an assumption fails to account for the fractured, fluctuating, and unconscious dimensions of subjectivity. The insights of psychoanalysis, particularly the work of Jacques Lacan, have been notably absent from mainstream legal discourse, despite being discussed in depth among critical legal thinkers and philosophers, such as Slavoj Žižek, Costas Douzinas and Maria Aristodemou. Lacan's notion of the subject – as a divided, desiring becoming constituted through language and the unconscious – has yet to be meaningfully integrated into legal theory. The subject, in this view, is neither sovereign nor self-contained, but is fundamentally shaped by the *Other* – the symbolic and social field into which it is inserted, and through which it is constituted.

The genesis of the problem *of the subject of law* lies in the widely accepted assumption that the law's subject is unproblematic (Caudill 1997, 66) – a rational, self-contained individual whose subjectivity is *conferred* upon them by the legal system of the state (Vesting 2024, 170). From legal formalists and rule-of-law theorists to critical legal scholars and legal pragmatists, this notion of the subject remains largely intact. As Schlag (1991) observes, virtually all theoretical orientations rely on a conventional, liberal[3] conception of subjectivity: "In his most educated moments, the liberal subject understands that he is socially and rhetorically constructed, but nonetheless retains his autonomy to decide just how constructed or autonomous he really is" (Schlag 1991, 1625–1626).

[3] Liberal in the sense of focusing on the individual and its autonomy.

This presupposition – that the legal subject is a knowing, autonomous actor situated within a sovereign and self-contained legal system – has led to a largely uncritical stance toward the subject itself. Even in critical legal theory, reflection often halts at the threshold of "the space occupied by a presupposed competent individual subject" (Schlag 1991, 1739–1740). While legal systems, rules, and doctrines have undergone extensive scrutiny, the legal subject and its intricate relationship with the Law have largely escaped sustained critical attention. As a result, a conspicuous gap exists: a lack of a comprehensive account of the subject of law, its entanglement with the Symbolic Order, human rights, and what Lacan terms the *Other* – the unconscious, that both enables and constrains subjectivity. This absence arguably contributes to a partial or misconceived understanding of the law itself.

This paper examines the subject and its intimate relationship with the *Other*. The aim is to foreground the complexity and instability of the subject in legal thought, in the hope that doing so will enrich our broader understanding of law, law's nature and structure, and to ultimately raise the question of human rights.

To this end, the paper turns to the foreign field of psychoanalysis – and specifically to Lacanian theory – to reveal that the nature of the law and its subject is in constant flux; far from a concrete construct, it is a perpetual path – "Όλα είναι δρόμος." Traditional legal theory focuses on logic, rules, and reason. Psychoanalysis introduces ambivalence, fantasy, repression, and enjoyment (jouissance), exposing and exploring what might be hidden behind legal reasoning and obedience. Thus, psychoanalysis allows us to explore how law is not just an external system of rules, but something deeply entangled with self-formation, unconscious desire, authority, and guilt. Lacan is chosen not merely for his insights into subjectivity, but for his radical assertion that the subject is born of language, desire, law, and the symbolic structure of society – including human rights. For Lacan, the **Symbolic Order** (language, rules, norms, Law) structures subjectivity. This perspective allows us to see law not just as a system of rules, but as a language that structures identity, desire, and power relations. In this view, the subject of law is the subject itself.

PART II

The Lacanian subject

Jacques Lacan (1901–1981) writes and theorises in the light of Sigmund Freud's great discovery of the unconscious or – in Floridi's terms – the third revolution in the realm of self-understanding (Floridi 2014, 89–90). By introducing the unconscious, Freud fashioned a new image of what it means to be human (Sarup 1992, 1). In the aftermath of this discovery, Lacan presents a radically new theory of subjectivity.

The Lacanian subject is a fascinating creature which bears many definitions, explanations, and relations. It is neither the "individual" nor the conscious subject of Anglo-American philosophy, nor the abstract, transcendental subject of the German idealism: Descartes' ego cognitas, Kant's 'I think' and Hegel's spirit. The Lacanian subject is not a fundamental or underlying entity but rather a subjugated or disintegrating instance, "an unstable epiphenomenon of the unconscious and its impulses" (Zima 2015, 3). In Lacan's words, "The subject is never more than supposed', meaning the subject is no more than an assumption on our part; it does not exist, it emerges."

"Lacan's subject is – but is not only – a network of relations among – at least – the speaking subject, the subject of identificatory (mis)recognitions, other people, and the Other – the latter term a notoriously ambiguous reference to the 'place' of unconscious discourse, the outside-within-us, culture, and (in dozens of senses) that to which the subject is in a dialectic relationship" (Caudill 1997, 8). Lacan does not only speak of a split, de-centered subject; his analysis goes far beyond this, Lacan appearing to shatter the subject and then attempts to keep up with each shard (Caudill 1997, 8).

The Self, far from being an inherent quality, is a meta-stale formation, something we acquire and realise through transindividual individuations, whereby the embodiment of Other(s), our capacity "to affect and be affected" (Spinoza), is synonymous with this very Self. The Self is an event in culture, not our natural or inevitable state (Mansfield 2000, 178); it is historically and evolutionarily conditioned (Vesting 2024, 35). Subjectivity will only emerge in a dialectical movement of selfhood and otherness, in which the Self is kept "from occupying the place of the foundation" (Vesting 2024, 35).

Lacan's subject is decentered, fragmented, and relational. It is not an autonomous, rational Self but an emergent effect of unconscious processes, symbolic structures, and encounters with the Other. The Self is not natural but cultural, historically conditioned, and always constituted through its relation to what lies outside of it.

The 3 orders

Lacan sets out a triadic interaction between the Imaginary, the Symbolic, and the Real orders. These three orders are interrelated spheres of thought and experience that collectively represent the human world. As Bowie explains, "if [the three orders] are aligned, interconnected and disjoined with appropriate subtlety they will tell the whole story of mind in action" (Bowie 1991, 111).

1) The Imaginary

"Le moi (…) est uno fonction imaginaire" states Lacan referring to the first instance of self-identification. The Imaginary or the 'mirror stage' is commonly

experienced at an age when the child has not fully mastered its own body, but it first manages to perceive itself as a unified and independent being. The child recognises itself in the mirror, in the eyes of the Other (in first instance this being the mother). The Other validates the existence of the child, certifies the existence of the Moi/the ego. This is the moment when human individuality is born and at this time, there only exists a dyadic world of the mother (the mirror) and the child.

Lacan describes the mirror stage as "a drama (…) which, for the subject caught in the snares of spatial identification, fashions the series of fantasies that runs from an image of a fragmented body to what we may call the orthopedic vision of its totality (…)" (Lacan 2006, 4). For Lacan, the Imaginary carries a negative connotation as it is a narcissistic identification of *Moi* with the Other, "the child identifies in an imaginary way with the object of his mother's desire." In this order there is a maintained distance between the subject and the image. It is this alienated relationship of the Self to its own image that Lacan refers to as the domain of the Imaginary (Sarup 1992, 66).

This Imaginary is irrefutably crucial in the development of subjectivity, as it offers the subject an image of wholeness, unity and totality to replace the fragmentation and dissociation that has dominated beforehand. Through the Imaginary's wholeness, an 'ideal-ego' is merely being born, the *Moi*. But this first image is a misrecognition [*méconnaissance*], Lacan explains, as its apparent smoothness and totality is nothing but a myth, a mirage. It is nothing else but an image of the Self (Sussman 1990, 144). This image of the *Moi, the ideal-ego,* follows each individual being throughout their existence. The Imaginary is both a stage in human genesis, and a permanent state of the human psyche (Sarup 1992, 66).

2) The Symbolic

The Symbolic Order is the world of language, "the big Other, the complex network of rules and meanings which makes us see what we see the way we see it (and what we don't see the way we don't see it)" (Žižek 2014, 118), including the language of the unconscious (the discourse of the Other). The moment one acquires speech, they are inserted into a pre-existing Symbolic Order and submit their desire to the systemic pressures of that order (Sarup 1992, 105), to the Name-of-the-Father, in Lacanian terms, i.e. to the laws and restrictions that control both ones desire and the rules of communication: "It is in the *name of the father* that we must recognize the support of the symbolic function which, from the dawn of history, has identified his person with the figure of the law" (Lacan 2006, 67). Through recognition of the Name-of-the-Father, you are able to enter into a community of others.

"Dieu merci," Lacan elucidates, "the subject lives in the symbolic world, that is in the world of the others who speak" (Lacan 1993, 267). The subject is the subject of speech and the subject of language (Sarup 1992, 53), a product of the Symbolic in an instance of discourse. When entering into the Symbolic Order, the child is crossing the frontier from the dyadic world into recognition of

the Name-of-the-Father and his Law; in other words, out of a body-based maternal relationship into one created by social exchange, culture and taboos (Sarup 1992, 48).

The Imaginary and the Symbolic are not successive stages, but intertwined ones. The Symbolic encroaches upon the Imaginary, organises it, and gives it direction (Sarup 1992, 105).

3) The Real

The Real is the impossible to symbolise, that which resists symbolisation absolutely (Fink 1996, 25). The Real "expects nothing, especially not from the subject, as it expects nothing from speech, but it is there, identical to its own existence, a noise in which one can hear everything, ready to submerge with its splinters what the reality principle has built under the name of external world." (Lacan, *Ecrits*). In Kantian terms: it is the 'thing in itself'.

As Žižek explains, for Lacan, the three dimensions of the Imaginary, the Real, and the Symbolic are intertwined, like the famous Escher drawing "Waterfall," which shows a perpetually descending circuit of water (Žižek 2014, 85). The Imaginary and the Symbolic work in tension with the Real. The Real serves to reconfirm to human subjects that their Imaginary and Symbolic constructions exist in a world that exceeds them, that is beyond them and is unconceivable, unbanishable and infallible.

The Other

The Other, or the Big Other, of Lacan designates radical alterity, an otherness that transcends the illusory otherness of the imaginary because it cannot be assimilated through identification. The Other is inscribed in the Symbolic Order; it is exterior and determinative to the emergence of human subjectivity.

Initially the place of the Other is occupied by the mother for the child, and then when entering the Symbolic Order the father as the first representative of law and the place from which we obtain language – the outside from which we are named. Subsequently, the Other changes forms, but it is essentially the place of order and rules, the unconscious gods that we internalise. God might be dead, as per the famous proclamation of Nietsche's Zarathustra, but the place supposedly vacated by God's death has been occupied by other gods: Law, State, Family, Community, Human Rights (Aristodemou 2014, 9). As Aristodemou explains, we may have killed God but we have kept the most important thing: God's place (Aristodemou 2014, 37). Where once humanity placed God as the ultimate source and holder of truth, the universal moral compass, the father of all, now that "God is dead," instead of humanity denouncing the need for God altogether, it has just replaced God with other gods.

Nietzsche's proclamation of the "death of God" is a diagnosis of Western culture: the old metaphysical and religious foundations of meaning no longer

hold. The "death of God" is the collapse of transcendent sources of meaning and authority. Aristodemou argues that law, especially Western legal thought, often operates as if such a transcendent guarantor still exists – whether in the form of *Natural Law*, *Reason*, *Human Rights*, or *Justice with a capital J.* These serve as "shadows of God," in Nietzschean terms, that mask the contingent, constructed, and human-made nature of law. For Aristodemou, Nietzsche's announcement forces law to confront its own groundlessness: law has no divine or metaphysical guarantee. Its legitimacy, like morality, cannot be anchored outside the messy play of human desire, discourse, and power.

If God is dead, then the subject can no longer rely on transcendent meaning but must face the unruly, unconscious ground of desire. Lacan formulates this as the subject's dependence on the Other – language, desire, and law that both constitute and destabilize it.

Nietzsche's "madman" who announces God's death echoes Lacan's insistence that there is no final guarantee, no metalanguage, no last authority. Aristodemou seizes on this parallel to argue that law and its subject must live with absence, contradiction, and undecidability rather than covering them over with transcendental fictions.

According to Lacan, *God* became unconscious (Lacan 1979, 59). The Other lies beyond conscious control, hence "the unconscious is the discourse of the Other" (Lacan 2006, 16).

It is with this unconscious Other that we are in a continuous dialectic relationship, through which our subjectivity emerges. The subject of Lacan is, in other words, over-determined by the non-conscious language of the Other.

Law as the Other

The subject of Law does not merely relate to the Law but how it is formed, that is, how the subject is constructed by the Law as the Other. The Law is determining subjectivity as we internalize it and submit to it in order to become (the subject). The subject of the law is in an open and continuous discussion with the Law as Other, through which it achieves its existence. Law provides images and a language by which we understand our society and family's structures, our relation to property, our sense of being wronged or harmed, our inflicting of wrong or harm, our (human) rights, (non-) enforcement of promises. Our beliefs, desires and fantasies regarding these and many other instances are not just mediated by law, they are formulated in accordance to it and its terms. The relationship between law and its subject is not an instance of social influence on an independent subject, nor that of a social institution within the control of collective subjects; it is the exterior within, the subject is the social, and the law is effective because it is internalized (Caudill 1997, 140). Žižek frames the Other

not only as a psychoanalytic category but also as the locus of ideological authority that structures subjects' desires and perceptions of law (Žižek 2014, 74–76).

As the French legal historian, Pierre Legendre argues, the law does more than regulate society – it symbolically stages the figure of the Father as a totemic principle. Institutions such as God, the Pope, the King, or the State give consistency to this image, representing the *Other* and spreading the effects of legal interdiction. Social order depends on a "Reference" (in Legendre's terminology) – a void or absence – that must be legally transmitted through genealogy, emblems, and juridical discourse. This symbolic, non-juridical dimension of law constructs the founding images that guide subjects, and its authority is sustained through the paternal function (Douzinas 2000, 311).

The importance of this acknowledgment is beyond understanding the subject of law, it extends to comprehending Law itself. "The social function of law is not to be found in its direct effect on socio-economic activity, but rather in its effect on people's minds" (Gabel 1980, 10). This in turn highlights the tentative, changeable and rather fragile character of Law: the Law as the Other, can also be killed just like any other god.

Lack and Desire

The moment we surpass the dyadic world of mother-child, we separate from the object (initially mother's womb, later mother's breast) that which offered a hypothetical unity, and we are enabled to emerge as subjects, at that moment a fundamental absence, a void is created. This rift leads to the advent of what Lacan refers to as the object *a*, the remainder produced when the hypothetical unity breaks down, "a certain something" in Socrates' terms, or the "agalma" in Plato's Symposium, a precious, shiny, gleaming something (Fink 1996, 59), the surplus, the excess we assume we once had and suppose we need again to "complete us" (Aristodemou 2014, 18).

What has been lost, however, is something we never had in the first place – a condition that makes the pain of losing it all that more desperate (Aristodemou 2014, 17). This lack instigates and permeates our cultural products, as well as our social, legal, and political practices (Aristodemou 2014, 7); it is a prerequisite of all human creations. This nothing, just like the potter's empty vase, explains Lacan, "creates the void and thereby introduces the possibility of filling it. Emptiness and fullness are introduced into a world that by itself knows not of them" (Lacan 1992, 120–121).

The subject – lacking in being – is left with the hope of filling the gap, it is left with *desire*. Desire originates from the mOther's desire, the child would wish to be the sole object of the mother's affections and her desire, to be recognised by her. Thus, desire being essentially "desire of the Other's desire." The child would also attempt to grasp the mOther's desire, it is the mother's very desirousness that

the child finds desirable. Thus, the Other's desire begins to function as the cause of the child's desire (Fink 1996, 59). This exposes the Other's desire as object *a, as o*bject a is essentially the cause of desire, that which sets desire in motion.

Desire is a core idea in Lacan's work; it is an indestructible force, a component of drive, the longing for objects and others, and "it exists at every point in the psychic structure" (Caudill 1997, 58). Lacan follows Spinoza in arguing that "desire is the essence of [wo]man" (Lacan 1977, 275), always referring to unconscious desire.

As the subject assumes responsibility of the Other's desire and as this desire is not its own, it is essentially and eternally unfulfilled. Desire (unconscious desire) is forever displaced and disguised as something else (as the Purloined Letter); it leaves traces of itself behind but always eludes us (Caudill 1997, 58). Thus, desire incites the subject to a never-ending search, but it also defends it by ensuring that the search does not end (Aristodemou 2014, 32).

Desire and law

"Desire is a defense, a defense against going beyond a limit in jouissance" (Lacan 2006, 699). A limit is necessary both to create desire but also to prevent its full realisation, which would mean the end of subjectivity, if not the death of the subject. Law's prohibitions play a paramount role in creating and maintaining this space of desire (Aristodemou 2014, 32).

"Desire is the reverse of the Law," states Lacan (2006, 787). Law imposes limits on desire and simultaneously creates desire by introducing prohibition. Desire is essentially the desire to transgress to unlimited and unbearable enjoyment, but for there to be the possibility of transgression, it is first necessary to be prohibited (Lacan 1992, 83).

Lacan proceeds to explain that "It is not the Law that bars the subject's access to jouissance- it simply makes a barred subject out of an almost natural barrier… The true function of a Father is fundamentally to unite (and not to oppose) a desire to the Law" (Lacan 2006, 696–698). Lacan seeks to establish a (positive) bond between law and desire. Law's function – he claims – is not to prevent access to desire but to act as a limit, not to freedom, but to limitless and thus unbearable enjoyment (Aristodemou 2014, 56). In prohibiting his son's escapades, the father simultaneously tolerates and even solicits them. The Father, as the agent of prohibition/law, sustains desire/pleasures: there is no direct access to enjoyment/jouissance since it arises only in the interstices and blind spots of the Father's supervisory gaze (Žižek 2014, 88). We (unconsciously) adopt limits, the Law, to avoid confronting the impossibility of desire, and yet to maintain desire as a drive of our very existence.

The relationship between desire and law is paradoxical. While law imposes restrictions, it also creates the conditions for desire to emerge. Prohibition does not extinguish desire; it sustains it by marking certain objects as forbidden and

thus desirable. Lacan's notion of jouissance – a form of excessive enjoyment that transcends pleasure – illustrates this dynamic. Law regulates jouissance, not by eliminating it but by structuring its expression, thereby reinforcing the subject's engagement with desire. Law is not an external force imposing order but an internal structure that shapes and is shaped by unconscious desires.

The subject's relationship with law is mediated through fantasy. Law provides a framework within which fantasies are played out, offering a structure that both constrains and enables the expression of unconscious desires. This relationship is not one of simple opposition but of co-constitution. Law and desire are intertwined, each shaping and being shaped by the other. The subject of psychoanalysis is introduced to the "indissoluble link between desire and law and the subject's simultaneous encounter of law and desire. This negotiation marks the beginning, for the subject, of all forms of moral, legal, religious and social authority, and her precarious navigation between the demands of the pleasure and reality principles" (Aristodemou 2014, 57).

PART 3

The subject of the law, as we have now understood it to be a complex subject of the unconscious reflecting its existence in the Other, is in dire need of abandoning the universal morality that it has been chained with. A morality so estranged and unfamiliar to the subject of law, which is ultimately unable to exert (successfully) normative power on the subject. This chapter calls and explores the ethics of desire as an alternative.

The 'unethical' morality

Psychoanalysis distinguishes morality from ethics. Morality entails a notion of the Good, as a sovereign and supremacy. Morality or the Good encompasses or refers to a system of moral rules that have developed over the course of time and aim at indicating which behavior is acceptable and which is not, what is right and wrong, what is bad and good. In many, if not most, societies, morality has its roots […], and derives from, […] religion. Like law, morality is something each subject is being introduced into in the Symbolic Order […], it pre-exists […] pre-exists the subject's subjectivity, and it is proposed to be of universal nature.

As Lacan claims in his *Seminar on Ethics*, the appropriate starting point for ethical reflection is ethics, not morality, which relates to the subject's desire, rather than the widespread understanding of ethics and morality as universal, exterior, and often divine or God-given. Any ethical theorising should not begin with an attempt to define the good, or the sovereign or the supreme good, but from the subject's desire. Lacan does not speak of the good as an appropriate ethical barrier

to our unethical desires – his emphasis is quite the contrary, insofar as human desire is far better than any "social" good. For Lacan, the good acts as a barrier to desire in four ways:

To begin with, the idea of "the good" – whether it is framed in terms of natural order, pleasure, happiness, or wealth – creates an obstacle for theory. This is because it directs ethical reflection away from the more fundamental task: giving an account of desire. Lacan does not, however, accept just any account of desire. He critiques both the view that desire is inherently bad and must be contained by law, and the opposing view that desire should be freed in the pursuit of pleasure. The first approach fails to recognize that desire and law are bound together – that law not only prohibits but also makes transgression possible, and that desire itself precedes and exceeds morality. The second approach, emphasizing liberation, fails historically: the more theory and critique of society develops, the more obligations are placed on the supposedly "liberated" subject. Freud's notion of the pleasure principle had at least shown that satisfaction can be deceptive, functioning like a hallucination, and that it requires the reality principle to limit and guide it.

A second way in which "the good" hinders desire arises in the analytic situation. Against those who claim that psychoanalysis is a moralizing practice, Lacan insists that the analyst does not dispense virtue. Instead, the analyst opens pathways through which the subject might discover their own desire. While ethical judgment is inevitably present, the aim is not to help the subject fill their absence with illusions of happiness, whether borrowed from others, from their "own good," or from society's good. What psychoanalysis offers – if "cure" is the right term – is the confrontation with the disarray into which desire throws us, a confrontation with the very structure of the human condition.

If such an outlook seems pessimistic, Lacan acknowledges the critique, especially from leftist intellectuals. Borrowing images from Elizabethan drama, he describes right-wing intellectuals as "scoundrels" who appeal to the harsh realities of the human condition, though in groups they fall into collective foolishness. Leftist intellectuals, by contrast, are "innocent fools" in their optimism, yet when gathered together they deceive each other into thinking that progress comes without significant cost.

A third sense in which the good functions as a barrier to desire is closely linked to the first two: in both theoretical and analytic contexts, "the good" misleads thought. As Jacques-Alain Miller notes, this is why Lacan's seminar on ethics illuminates so many of his key concepts: "the good" is not a stable foundation but a signifying construct, something shaped by the Symbolic Order rather than giving it shape. Just as psychic functions are revealed only through symbolic processes, so too is desire revealed – though never fully – through the subject's relation to language. Moral law, then, is not foundational but an after-effect, a trace or oversimplification of desire.

Finally, Lacan describes the good as a barrier in a structural sense: it marks the law of the desiring subject. He writes that "the sphere of the good erects a strong wall across the path of our desire," and suggests that ethics lies not behind that wall as a model of the good, but beyond it.

Morality, far from being ethical, is our compensation for giving up on our desire, on our capacity for freedom, on what is properly ethical (Aristodemou 2014, 119). "Morality is the darkest and most daring of conspiracies" (Aristodemou 2014, 119). An ethical subject, as opposed to a moral one, is one who acts in conformity with her desire. And only such a person may come to terms with her own singular relationship to Law (Aristodemou 2014, 118–119). The discovery of the unconscious brought into light the possibility of the good of desire as an ethical compass.

Human Rights in question

Further to a Lacanian subject of the unconscious and a dismantled morality, the question we now bear is where do Human Rights stand as the Other? What is their significance after the unconscious is taken seriously (Aristodemou) and when the 'bad' is good (Schlag)? Are Human Rights to be dethroned? Shall they fall from the polished pedestal upon which – at least the Western world – claims to have placed them?

It is here argued that yes, human rights shall be dethroned, as this is the only way in which human rights are to truly become the fundamental, innate rights of humans. And based on this, the law can develop to protect what cannot be undone, as it is to be a vital and intrinsic part of the subject of law itself.

Žižek's analysis in "Against Human Rights" of humanitarian purity shows, in a profound way, how human rights have failed to be actual rights for humans, as they have effectively been reduced to an instrument used by the West to intervene in "third world" countries and the rich and privileged to wash their consciences. "The discourse of universal human rights thus presents a fantasy scenario in which society and the individual are perceived as whole, as non-split. In this fantasy, society is understood as something that can be rationally organised, as a community that can become non-conflictual if only it respects 'human rights'" (Salecl 1994, 127). This paper advocates for the prompt and definitive unravelling of this fantasy, by replacing a universal morality with an ethics of desire.

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THE PROBLEM OF TRANSHUMANISM IN THE CONTEXT OF INDIVIDUAL FREEDOM AND DIGNITY: A LESSON FROM SLAVOJ ŽIŽEK

Abstract. In his book *Hegel in a Wired Brain*, Slavoj Žižek uses the approach of G.W.F. Hegel because he considers that this approach can be used to describe the reality of people immersed in technology, but above all to analyze the situation of connecting people and computers into one network. Simultaneously, the interpretations of Hegel's concepts presented by Žižek must be considered plausible. For instance, the Slovenian philosopher correctly understood Hegel's concept of abolition: *Aufhebung*. Žižek asks a fundamental question, namely how the phenomenon of the "wired brain" can affect the human experience and the status of human beings as free individuals. Žižek also considers the socio-political implications of connecting brains, which is written about by transhumanists such as Ray Kurzweil and Elon Musk. He ponders how this new situation may affect power relations and forms of freedom. Žižek uses Hegel's critique of J.G. Fichte's concept of the "police state" to undermine Kurzweil's and Musk's positions. The problem analyzed in the article is whether Žižek's Hegelian analyses contribute something fresh to the understanding of freedom and human dignity on the ground of contemporary philosophy of law. The author emphasizes that Žižek's analyses human exceptionality are particularly interesting from the point of view of the philosophy of law.

Keywords: Slavoj Žižek, transhumanism, G.W.F. Hegel, human dignity, freedom, philosophy of law

PROBLEM TRANSHUMANIZMU W KONTEKŚCIE WOLNOŚCI I GODNOŚCI JEDNOSTKI: LEKCJA Z ROZWAŻAŃ SLAVOJA ŽIŽKA

Streszczenie. W swojej książce *Hegel i mózg połączony* (*Hegel in a Wired Brain*, wydanie polskie 2021) Slavoj Žižek posługuje się podejściem G.W.F. Hegla, ponieważ uważa, że można je wykorzystać również do opisu rzeczywistości ludzi zanurzonych w technologii, a przede wszystkim do analizy sytuacji połączenia ludzi i komputerów w jedną sieć. Jednocześnie interpretacje koncepcji Hegla przedstawione przez Žižka należy uznać za przekonujące. Przykładowo – słoweński filozof trafnie zrozumiał Heglowskie pojęcie „znoszenia" – *Aufhebung*. Žižek stawia fundamentalne

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pytanie, a mianowicie, jak zjawisko „połączonego mózgu" może wpływać na ludzkie doświadczenie i status człowieka jako jednostki wolnej. Žižek rozważa również społeczno-polityczne implikacje łączenia mózgów, o czym piszą transhumaniści, tacy jak Ray Kurzweil i Elon Musk. Zastanawia się, jak ta nowa sytuacja może wpłynąć na relacje władzy i formy wolności. Žižek wykorzystuje heglowską krytykę koncepcji „państwa policyjnego" J.G. Fichtego, aby podważyć stanowiska Kurzweila i Muska. Problem analizowany w artykule dotyczy tego, czy heglowskie analizy Žižka wnoszą coś nowego do rozumienia wolności i godności człowieka na gruncie współczesnej filozofii prawa. Autor podkreśla, że analizy Žižka dotyczące ludzkiej wyjątkowości są szczególnie interesujące z punktu widzenia filozofii prawa.

Słowa kluczowe: Slavoj Žižek, transhumanizm, G.W.F. Hegel, godność człowieka, wolność, filozofia prawa

1. INTRODUCTION

Slovenian philosopher Slavoj Žižek (born 1949) is a provocative thinker, and as a result, he is not taken seriously by many. He is often considered a celebrity intellectual who became fashionable because he appealed to leftist elites, and that he has little to offer beyond brilliant paradoxes and philosophical analyses of popular films. In the literature, you can find sociological analyses showing how, thanks to the media revolution, an intellectual from a small Central European country became a global phenomenon.[1] In my opinion, however, the Slovenian philosopher deserves to be taken seriously. Certainly, Žižek often references films and popular culture texts, but he does not stop there. He is an expert not only in Marx's thought and psychoanalytic concepts but also in German classical philosophy, and has repeatedly presented original interpretations of the ideas of Immanuel Kant, Johann Gottlieb Fichte, and especially Georg Wilhelm Friedrich Hegel. In 2020, to commemorate the 250th anniversary of Hegel's birth, Žižek published the book *Hegel in a Wired Brain*, in which, among other things, he looks through the prism of the author of *The Phenomenology of Spirit*'s concepts at the ideas of transhumanists such as Ray Kurzweil and Elon Musk (Žižek 2020). Žižek focuses on transhumanist ideas that assume overcoming humanity's limitations through connection with machines that would not only be controlled by the human brain (a brain-computer interface) but would also form a single network with humans, allowing for the sharing of experiences.[2] In his 2020 book, Žižek poses a fundamental question: how the phenomenon of the "wired brain" can affect the human experience and the status of human beings as free individuals. In this article, I adopt the perspective of legal philosophy, and the main question I ask here concerns whether Žižek's considerations – especially those made in the context of his assessment of transhumanism – enrich the philosophico-legal

[1] Cf. Bar-El (2025, chapters 3–4).

[2] The notion of transhumanism can be understood in different ways. On the history of the very concept, cf. Sulikowski (2013, 119–139).

approach to individual freedom and dignity. This question, however, requires two caveats. First, Žižek does not devote much attention to law and the institutional sphere in general. This is understandable, given that his starting point is Marx's critique of the institutions of capitalist society and liberal democracy, which is considered by him as the political equivalent of late capitalism. Second, Žižek also follows Marxist thought by not using the term "human dignity,"[3] although he devotes considerable attention to what constitutes the uniqueness of the human individual and her experience. I therefore believe that these considerations by Žižek indirectly concern human dignity, although this term is not used. To assess the potential benefits of transferring some of Žižek's concepts of freedom and individual uniqueness to the field of legal philosophy, it is necessary to briefly present the dominant philosophico-legal positions on freedom and human dignity. The aim of the article is a rather restrained and moderate one, namely to point out the components of Žižek's analyses of transhumanism that are interesting from the point of view of contemporary discussions on human dignity in the field of law and which can be inspiring even if one does not share many of Žižek's philosophical views.

2. INDIVIDUAL FREEDOM AND HUMAN DIGNITY IN PHILOSOPHY OF LAW

It is impossible to provide here a comprehensive overview of even the most important concepts of individual freedom within the philosophy of law. In its most typical understanding, individual freedom consists in the existence of a legally protected sphere of individual autonomy and decision-making. This sphere encompasses several rights and freedoms (Girgis, George 2020). Discussions on freedom in the philosophy of law may/often refer to Isaiah Berlin's division into negative liberty ("freedom from"), encompassing the sphere free from state interference, and positive liberty ("freedom to"), meaning the area in which an individual can demand specific actions on his or her behalf from state authorities (Berlin 2002). The "Capabilities Approach," developed by Martha Nussbaum based on the economic concepts of Nobel Prize winner Amartya Sen, adds another dimension to the concept of freedom: it puts emphasis not so much on legal guarantees of individual freedom of choice, but on the actual ability to take action and choose a life path that individuals value and desire. This approach also emphasizes the material resources necessary to truly exercise freedom of choice and is based on the quality of life (Nussbaum 2011, 17–45).

[3] In Marxist concepts, human dignity was and is understood primarily, if not primarily, as self-respect. The hostility of Marxists toward the universal concept of dignity stems primarily from the fact that Marxism views humans not so much as individuals but as products of society (Green 2007, 152).

Nussbaum, unlike Sen, links the concepts of freedom and human dignity: "… the Capabilities Approach, in my version, focuses on the protection of areas of freedom so central that their removal makes a life not worthy of human dignity" (Nussbaum 2011, 31).[4]

Contemporary legal literature and the case law of Western legal cultures distinguish two fundamental and competing approaches to human dignity. The first is the so-called absolute approach to dignity, undoubtedly grounded in Article 1(1) of the German Basic Law of 1949 (Mahlmann 2012, 379–380). This provision states that human dignity is inviolable (*unantastbar*). The 1997 Polish Constitution adopts the approach to dignity expressed in both the German Basic Law and the case law of the Federal Constitutional Court in Karlsruhe. Article 30 of the Polish Constitution states that dignity is not only inviolable but also "inherent" and "inalienable," and constitutes the source of individual constitutional rights and freedoms. The absolute approach to dignity has also permeated, to varying degrees, the case law of other Central European countries, including the Czech Republic, the Slovak Republic, and the Republic of Hungary. Essentially, this approach assumes that dignity understood as a constitutional principle is not subject to balancing against other constitutional principles, and dignity as a constitutional right cannot be limited in accordance with the principle of proportionality.[5] The relative approach to dignity, in turn, means that dignity understood both as a legal principle and as a subjective right (the right to dignity) does not occupy a special, distinguished place in the legal system. An advocate of this approach is the Israeli judge and law professor, Aharon Barak (born 1936), who believes that dignity is not an axiomatic and universal concept, and that the concept of dignity evolves historically. Barak maintains that dignity is a "relational" category in the sense that it concerns an individual's relationships with other people within society. Therefore, it is impossible to speak of individual dignity outside of society (Barak 2015, 6–8). Furthermore, in his opinion, a relative understanding of human dignity prevails in most legal systems.

Two philosophical concepts of dignity have gained particular popularity in legal literature and have also permeated the jurisprudence of many countries. The first is a concept that is a particular reading of Giovanni Pico della Mirandola's

[4] Nussbaum presents a long list of capabilities she considers central (Nussbaum 2011, 33–35). This list includes: life, "bodily health," "bodily integrity," "senses, imagination, and thoughts," "practical reason" (being able to define a concept of goodness), "affiliation" (being able to form relationships with other people and not be discriminated against), "other species" (being able to form relationships with components of nature, especially animals), "play," and "control over one's environment" (this category also includes political freedoms). This list raises the question of whether these elements were chosen arbitrarily (they are consistent with liberal-leftist ideology, but supporters of other ideologies would likely choose a different set of central values), and the extent to which considering many of them central might be controversial. However, a broader discussion of Nussbaum's concept is not possible here.

[5] On proportionality, cf. Barak (2012).

famous oration *De hominis dignitate* (1486). According to Pico, unlike other beings, man – or at least the first man, Adam, before original sin – is not bound by his nature. It is up to him whether he descends to the rank of animals or even becomes something like the devil or attains divinity. This is precisely the essence of human dignity (Pico della Mirandola 2012). As Olga Rosenkranzová aptly states, the typical interpretation of the Renaissance philosopher's ideas presented in legal literature is anachronistic, misleading, and even deceptive, as it completely ignores their Neoplatonic context and Hermetic elements (Rosenkranzová 2019, 44–67). The second concept is based on Immanuel Kant's considerations in *Groundwork for the Metaphysics of Morals* (1785). Kant argued that there are things that have dignity and things that have value. The dignity of a human being is expressed in her moral autonomy, i.e., freedom of will. At the same time, in the famous second formula of the categorical imperative, Kant states that every human being should treat the humanity in others as an end in itself and never merely as a means to an end (Kant 2002, 52–54). German constitutional scholar Günter Dürig (1920–1996) transferred Kant's considerations, which pertain to the sphere of morality, to the realm of constitutional law and legal philosophy. Commenting on Article 1(1) of the German Basic Law, Dürig presented the "object formula" (*Objektformel*). According to this formula, state authority in a democratic state cannot treat an individual solely as an object of its actions. Human dignity is expressed in the fact that the individual must therefore be treated as a subject of state authority's actions (Dürig 1956). Objectifying a human being is, therefore, contrary to the principle of human dignity. This understanding of dignity was utilized by the German Federal Constitutional Court, and this interpretation was also adopted in the case law of the Polish Constitutional Tribunal.[6] It is also worth mentioning Ronald Dworkin's more recent concept of dignity, which argues that the principle of dignity encompasses two principles, i.e. self-respect

[6] It is worth pointing out that the Polish Constitutional Tribunal, in its judgment of September 30, 2008 (file no. K 44/07), concerning the possibility of shooting down a plane taken over by terrorists, adopted the argumentation based on *Objektformel* developed by the German Federal Constitutional Court in the judgment of February 15, 2006, file no. 1 BvR 357/05 (Urteil des Ersten Senats vom 15. Februar 2006). Other references to the same formula can be found, among others, in the following case-law of the Polish Constitutional Tribunal: judgment of October 15, 2002, file no. SK 6/02 (point 6.2); judgment of July 9, 2009, file no. SK 48/05 (point 2.2). Similar argumentation was present in the case law of other Visegrad Group countries. Of the approximately 40 judgments in which the Constitutional Court of the Czech Republic referred to human dignity, in four the court directly used the Dürig formula (judgments: of March 6, 2012, file no. I. ÚS 1586/09; of August 18, 2009, file no. I. ÚS 557/09; of September 26, 2013, file no. III. ÚS 3333/11; of June 14, 2016, file no. Pl. ÚS 7/15). Cf. (Rosenkranzová 2019, 140–146; Benák, Vyhnánek, Zahumenský 2018, 197–210). The Constitutional Court of the Slovak Republic used the same formula particularly in its judgment of November 9, 2016 (I. ÚS 689/2014). The use of German constitutional jurisprudence on dignity by the Hungarian Constitutional Court before the constitutional amendment in 2011 has been described in great detail in the literature (Dupré 2003, 65–155). Cf. Szymaniec (2025, 97–113).

and authenticity. The former implies that each person should take his/her own life and the lives of others seriously. The latter implies that each person should express himself/herself in relationships with others and choose a life path that he or she deems appropriate in given circumstances (Dworkin 2011, 203–213). This concept, however, is controversial, firstly because it is difficult to apply in case law. Secondly, it is based on a specific vision of the relationship between society and the individual and an extremely individualistic vision of a human being as the subject of rights. For this reason, it is difficult to expect it to gain widespread acceptance.

3. FOUNDATIONS OF ŽIŽEK'S VIEWS ON LAW

Slavoj Žižek's thought is based on three foundations. The first is – obviously – Marxism. The source of social antagonisms for Žižek continues to be the economic system of late capitalism. At the same time, he has been criticizing the approach of contemporary leftist critics of capitalism for years, who do not dare to criticize the current system in its entirety. Žižek compares the approach of these critics to the image of a democratic political system emerging from Hollywood political fiction films. In such films, some secret organization that corrupts the system is often responsible for the evil of the system. The thinker describes such an approach as paranoiac (Žižek 2002a, 170–171). Similarly, according to Žižek, contemporary critics of capitalism are afraid to admit that it is the system that is flawed, not its specific pathologies. Žižek also claims that although modern liberal democracy declares freedom of expression and opinion as an indisputable human right, on the other hand it introduces a kind of unwritten censorship or "ideological oppression," which the thinker calls the German term *Denkverbot*, referring to the unwritten prohibitions used in the Federal Republic of Germany in the post-war period. *Denkverbot* consists in the fact that any substantively radical criticism of capitalism is met with the response that such views lead in practice to totalitarianism and the creation of the Gulag. Žižek firmly emphasizes that: "the actual freedom of thought means the freedom to question the predominant liberal-democratic 'post-ideological' consensus – or it means nothing" (Žižek 2002a, 168). According to him, the possibility of questioning the economic system must be combined with the possibility of criticizing the political order based on parliamentary democracy with which this system is closely linked (Sydor 2012, 104–105). This approach implies Žižek's suspicion toward the law of modern democratic states. However, as Paweł Sydor writes, in the light of Žižek's thought, the only just legal system is one that provides broad possibilities for freedom of opinion, including the possibility of questioning the existing order, as well as guaranteeing the rights of hired workers and the rights of all social minorities (Sydor 2012, 105).

The second source of Žižekian concepts is the psychoanalytic theory of Jacques Lacan (1900–1981). This theory indicates three dimensions of an individual's functioning: the imaginary, the symbolic and the real (Žižek 2007). On the first of these levels, an individual creates their identity. Symbolic space is the one in which an individual functions, interacting with other people. A large number of phenomena of a symbolic nature make up this dimension, and these include those that are fundamental for society such as language and law. An individual is a kind of prisoner of conventions created in this very dimension, for example those related to naming specific things or social phenomena (Sydor 2012, 95). Using Lacanian categories, Žižek recognizes that an individual, by creating the imaginary or the symbolic, simultaneously maintains his/her reality. The symbolic is part of the construction of the individual's reality. Such a reality, however, is itself a fantasy-construction. As Žižek himself puts it, "'Reality' is a fantasy-construction which enables us to mask the Real of our desire" (Žižek 2008, 45). Ideology is not a dreamlike structure being beyond reality, but "a fantasy-construction which serves as a support for our 'reality' itself." The function of ideology is to support our social relations, but at the same time, to mask the rift that is the kernel of reality. Žižek calls this the "insupportable, real, impossible kernel" and, referring to Chatal Mouffe and Ernesto Laclau, writes that it is "a traumatic social division that cannot be symbolized" (Žižek 2008, 45). The symbolic sphere is always simultaneously ideological. Žižek refers to the French Marxist Louis Althusser (1918–1990), who coined the concept "ideological interpellation," where the term "interpellation" denotes a forceful appeal, coupled with a specific demand addressed to individuals. According to Althusser (1971, 170), "ideology 'acts' or 'functions' in such a way that it 'recruits' subjects among the individuals (it recruits them all), or 'transforms' the individuals into subjects." Ideology binds individuals to specific social structures (Sulikowski 2013, 98).[7] Žižek uses the term "quilting" to describe the function of ideology described by Althusser, meaning the element connecting the subject with a "master signifier." The "master signifiers" are specific ideologies, such as liberalism or communism. These ideologies determine how concepts such as "freedom," "state," "peace," or "justice," which are called "floating signifiers" by Žižek, will be understood, and therefore also what role will be assigned to subjects (Žižek 2008, 111–116; Mańko 2014, 46–47; 2015, 26–34).[8] For Žižek, influenced by Lacanian psychoanalysis, interpellation is always incomplete, always marked by a "lack" (absence), meaning that element of the individual (also called the Real) that has not been symbolized, and therefore has not been susceptible to the processes that transform the individual into a subject (Mańko 2014, 47).

[7] Cf. Gillot (2014).

[8] On the notion of ideology with the reference to Žižek, cf. Sabján (2022, 128–129).

From Žižek's assumptions about the symbolic sphere it follows that law serves as a tool for social interaction, but it can also be oppressive in the sense that it petrifies certain conventions or socially imposed labels that can be oppressive for an individual (e.g. a specific model of life can be defined as a crime just because it goes beyond what the majority accepts). Experiencing the law's enforcement could be, therefore, traumatic for certain individuals. Furthermore, Žižek's perspective can be useful in pointing out the role of ideology in transforming individuals into subjects of law. This perspective can be helpful in uncovering the ideological background of legal institutions, concepts, and notions that shape the individual as a legal subject. For example, the civil codes of the classical liberal period were based on the notion of the individual as an autonomous individual striving to achieve their economic goals.[9] These provisions, in a sense, forced individuals into the role of such individuals. Moreover, the legal text points out, after all, model (exemplary) features of such legal entities as, for example, "consumer" or "employee," and indication of these features undoubtedly has an ideological aspect. In this way, positive law participates in creating a certain vision of human subjectivity (Mańko 2014, 52–53).

Žižek openly wrote about the law in his 2015 essay. He noted a significant paradox of the law. The law is considered an impartial and rational system, but it contains an "obscene supplement," which consists in the fact that the law is unable to fully encompass and control social reality, and furthermore, it contains elements of fantasy and what is unconscious (Žižek 2015, 220–247). Žižek views the law as a complex social system, which is why the approach represented by legal realism is closest to his own. At the same time, the Slovenian philosopher uses a conceptual framework developed in psychoanalysis to conceptualize the phenomenon of law, while also displaying a strong distrust towards positive law. The inherently incomplete nature of law in general, and public law in particular, means that its rules must be supplemented by "a clandestine 'unwritten' code aimed at those who, although they violate no public rules, maintain a kind of inner distance and do not truly identify with the 'spirit of community'" (Žižek 2005, 55). Drawing on Mikhail Bakhtin and his concept of carnivalization, Žižek recognizes that the presence of this internal, clandestine code makes periodic moments of transgression and suspension of public law inherent to the social order and essentially serve its stabilization (Žižek 2005, 55). However, they also carry a certain, but essentially unavoidable, danger. One of the threats is that the moment of "carnivalesque" suspension of "egalitarian" public law is the authoritarian-patriarchal regime (Žižek 2005, 56).

In his book *For They Know Not What They Do*, Žižek argued that the establishment of law is preceded by the "real of violence," namely usurpation. The violence underlying law must be concealed, however, because the law can

[9] In the legal thought of that period, a good example of such perceptions of the individual are the considerations of Rudolf von Jhering in his famous pamphlet *Der Kamf ums Recht* (Jhering 1879).

operate thanks to the concealment of this violence. Only because this violence is concealed, legal subjects recognize the authority of law as eternal and true. Žižek argues that the violence upon which law is based was invalidated in classical political philosophy (Žižek 2002b, 204). This is certainly an accurate statement in relation to social contract theory, although this violence is certainly less concealed in Hobbes' theory than in Rousseau's idea of social contract. However, David Hume, in his famous critique of the social contract as a historical fact, explicitly noted that most known governments originated from usurpation or conquest (Hume 1994, 186–201). For Žižek, the violence with which law is connected is related to the fact that the symbolic (and law belongs to this sphere) is marked by "a lack," because it cannot fully express the real. The act of changing the law is also marked by brutality. From the perspective of the old law, changing it is a kind of crime, but the crime is nullified when the new legal order is established. Commenting on Žižek's thought, Jodi Dean called the specific identity of law and crime emphasized by the philosopher a paradoxical source of law (Dean 2004, 1–24). Žižek's thought is not so much connected to Marxist concepts of law, which emphasize the class nature of law, but also to the gradual extinction of law under socialism, when the radical social conflict that characterized previous systems is overcome.[10] As noted in the literature, Žižek draws more on Lacanian psychoanalysis, in which the establishment of human subjectivity and their entry into the symbolic are linked to imaginative brutality (Michalik 2017, 147).

According to Žižek, law is also linked to violence in the sense that violence is associated with inevitable moments of transgression and suspension of public law. In his view, it is not the law itself that binds a community most closely, but the transgression against it. One example he cites is the activities of Ku Klux Klan members in the southern United States in the 1920s, who, despite murdering defenseless African Americans, remained respected members of the community.

> The deepest identification that holds a community together is not so much an identification with the Law that regulates its 'normal' everyday rhythms, but rather identification with the specific form of transgression of the Law, of its suspension (in psychoanalytic terms, with the specific form of enjoyment). (Žižek 2005, 55)

Žižek is undoubtedly one of the most influential political thinkers, and many of the themes of his incredibly rich work can have an impact on legal thought. Currently, the representatives of critical legal studies are most inspired by his thought. They use Žižekian concepts and individual categories Žižek has employed

[10] The gradual withering away of law – so-called legal nihilism – was particularly emphasized by legal concepts developed in the first period after the October Revolution (Bosiacki 2012, 197–330). Evgeny Pashukanis (1891–1937) was undoubtedly one of the most significant legal theorists of that period, and his critique of legal form is still commented on today (Head 2008, 169–192; Cercel 2025, 169–184). Against this background, it must be stated that Žižek does not so much criticize legal form as seek to expose the element of brutality and a certain "obscenity" underlying law itself.

(sometimes in isolation from their original context) to critique mainstream legal scholarship (Mańko 2015).[11]

The third basis of Žižek's thought is Hegelianism, to which much space will be devoted later in this article. For years, Žižek has been reading Hegel in a way that emphasizes what is most radical in the German philosopher's thought and what differs from both earlier and later philosophical traditions. He effectively avoids the clichés that portray Hegel as an apologist for the institution of state or even an advocate of proto-authoritarianism. Although Žižek frequently cites the writings of the young Hegel, he does not refer to the distinction proposed by the Hungarian Marxist György Lukács (1885–1971), who distinguished the revolutionary work of the "young" Hegel from the conservative stance of the mature Hegel (Lukács 1977).[12] For Žižek, all of Hegel's work, including his late lectures delivered at the University of Berlin, is revolutionary, but in the sense that it introduces new content into philosophical discourse. Žižek does not deal with the different traditions of interpreting Hegel's philosophy, including the differences in the readings of this philosopher's work by the Left Hegelians and the Right Hegelians. He disregards, however, Alexandre Kojève's influential interpretation (later partially adopted by Francis Fukuyama), according to which Hegel was a philosopher announcing the "end of history" (Parker 2004, 18–32; Stambulski 2015, 49–51).[13] The Slovenian thinker interprets Hegel's famous phrase, "[t]he owl of Minerva spreads its wings only with the falling of the dusk" (Hegel 1967, 13), in such a manner that a philosopher can only analyze his/her own epoch,[14] and the future is completely open and indeterminate. All reflection about the future is based on conjectures. Paweł Sydor aptly observes that: "Žižek recognizes Hegel's method as adequate for the holistic analysis of the condition

[11] A good example of such a strategy is Comsin Cercel's use of the concept of "fetishist disavowal" which is used by Žižek for example to explain the phenomenon of belief (Žižek 2001, 89). According to Cercel, the position of contemporary mainstream lawyers can be defined by this Žižekian notion, and their attitude can be characterized by the following words: "I know very well that the law is not grounded in its own self-reference, that the legal field is not easy to delineate, yet as a matter of legal practice I act as if it is" (Cercel 2019, 17). However, the analysis of the use of Žižek's thought in contemporary legal thought goes beyond the modest scope of this article.

[12] Lukács distinguished four phases in the work of the "young" Hegel, from his youthful republicanism to his break with the philosophy of W.F.J. Schelling and the writing of *The Phenomenology of Spirit* (1807), which concludes Hegel's "early" work.

[13] On Kojève's view on the "end of history," cf. Nichols (2007, 81–96).

[14] Žižek ephasizes: "Hegel was (…) probably the first to articulate the delay which is constitutive of the act of interpretation: the interpretation always sets in too late, with some delay, when the event which is to be interpreted repeats itself; the event cannot already be lawlike in its first advent. This same delay is also formulated in the Preface to Hegel's *Philosophy of the Law*, in the famous passage about the owl of Minerva (that is, the philosophical comprehension of a certain epoch), which takes flight only in the evening after this epoch has already come to its end" (Žižek 2008, 65). This interpretation emphasizes that the future is open and only philosophical comprehension of reality is limited. Cf. Avineri (1972, 129); Žižek (2002b, 130).

of a contemporary man and society …" (Sydor 2012, 96). Certainly influenced by Lacan's thought, Žižek recognizes that Hegel's holistic vision of reality contains at its core a radical negativity. The fact that Hegel's system is closed, and thus it is a kind of totality, does not mean that it is full; on the contrary, it contains at its core an emptiness (Žižek 2002b, 66–72; Schroeder 1998, 12). The emphasis on the element of negativity is where Žižek's interpretation differs most from previous ones. Moreover, the Slovenian philosopher is not interested in the details of Hegel's philosophy of law, understood as an analysis of the legal institutions of the modern state.[15]

4. ŽIŽEK ON TRANSHUMANISM AND THE EXCEPTIONALITY AND FREEDOM OF AN INDIVIDUAL

In *Hegel in a Wired Brain*, Žižek asks one fundamental question: "how will the phenomenon of a wired brain affect not only our self-experience of free human individuals, but also our very status of free human individuals?" (Žižek 2020, 12). In 2005 Ray Kurzweil, perhaps the greatest "prophet" of transhumanism, predicted the arrival of the "Singularity," a future period in which rapid technological advancements would transform humanity and in which human intelligence and artificial intelligence would merge. According to Kurzweil:

> The Singularity will allow us to transcend (…) limitations of our biological bodies and brains. We will gain power over our fates. Our mortality will be in our own hands. We will be able to live as long as we want (…) We will fully understand human thinking and will vastly extend and expand its reach. By the end of this century, the nonbiological portion of our intelligence will be trillions of trillions of times more powerful than unaided human intelligence. (Kurzweil 2005, 9)

Žižek points out that Kurzweil connects the Singularity primarily with the development of artificial intelligence, but the Slovenian philosopher is more interested in a slightly different understanding of the Singularity, namely, it would mean a situation in which, as a result of connecting human brains to one network via machines (computers), it will be possible not only to issue commands to machines using thoughts, but also to directly share experiences and thoughts with other people (Žižek 2020, 13–15). Furthermore, Žižek sees Musk's interpretation of the Singularity as "the Gnostic New Age reading," according to which the Singularity becomes not only a new stage of post-humanity, but a "key cosmic event" (Žižek 2020, 61). Criticizing Kurzweil and Elon Musk, Žižek argues that their transhumanist visions are naive and primitive, relying on a commonsense notion of the ego (as a psychoanalyst, Žižek must reject such a conception of the subject) and vulgar naturalism. Consequently, they understand the essence of being an individual in a narrow and misleading way (Žižek 2020, 16).

[15] On that aspect of Hegel's thought, cf. in particular Avineri (1972, 176–193).

As to the first issue, Žižek analyzes concerns whether the Singularity will mean the emergence of a new police state and whether the Singularity will be capable of preserving human freedom. In this context, Žižek utilizes the Hegelian concept of *Aufhebung*, which he interprets correctly. In Hegelian dialectic of concepts, expressed in the *Science of Logic* (1812–1813, 1816), *Aufhebung* signifies the overcoming of the previous stage of a concept and the transition to a higher level of development, at which its previous form, assigned to a given time and place, is rejected, while at the same time, what is truly rational in it is maintained. Thus, *Aufhebung* signifies both overcoming (cancellation) and preservation.[16] It does not, therefore, mean the "dissolution" of the previous form into the next. As Hegel argues in the *Principles of the Philosophy of Right* (1820), individuals form families, and within the family, individuality is overcome, but this also means its preservation in a certain way at a higher level. Similarly, families are part of civil society (*bürgerliche Gesellschaft*), in which the direct social bond based on feeling (love), typical of the family, is abolished, since civil society is based on the system of needs rather than on natural feeling, but in a certain way such a bond is also preserved (Hegel 1967, 105–134). The "dissolution" of the individual into a shared neural network would be the opposite of *Aufhebung*; in such a state, individuality could no longer be preserved. Žižek recognizes that the emergence of the Singularity will create a new kind of freedom, namely freedom from being connected to a common network. However, the question arises as to who would be entitled to such freedom and under what conditions. Another question Žižek asks is whether there is "a dimension of being human which in principle eludes Singularity" (Žižek 2020, 19–20).

Žižek draws on the work of another popular author today, the book *Homo Deus: A Brief History of Tomorrow* (2015) by Israeli intellectual Yuval Noah Harari. According to Harari, the development of devices and technologies using artificial intelligence to precisely understand human preferences and habits will negate free will. Subsequently, the development of biotechnological interventions in the human body will cause a radical division of society into those who will be perfected and the rest, who will be condemned to extinction. This division, in turn, will mean the end of liberalism and liberal democracy. Žižek points out that what distinguishes Harari from popular scientistic authors who question free will, such as Steven Pinker or Richard Dawkins, is that Harari openly negates liberal

[16] On the notion of *Aufhebung*, cf. (Sparby 2015, 193–194; Kuderowicz 1970, 40; Szymaniec 2019, 230). As Michel Rosenfeld aptly writes, a proper understanding of the *Aufehung* allows for a proper interpretation of Hegel's conception of the modern state. Thanks to the *Aufhebung*, Hegel is able to reject unbridled individualism while simultaneously avoiding the fall into collectivism. Therefore, for example, freedom of contract can be preserved as an important element of Hegel's understanding of state and law: "Accordingly, it is reasonable to insist that in the modern, freedom of contract within certain well-defined limits should be adopted as one of the community norms contributing to the definition of the ethical substance of the state" (Rosenfeld 1991, 235–236).

democracy, something that Pinker or Dawkins do not do (Žižek 2020, 25). Žižek calls Harari's vision a "digital police state" and claims that this vision is a kind of Fichtean revenge on Hegel.

In 1800, Johann Gottlieb Fichte (1762–1814), who would hold the philosophical chair at the University of Berlin before Hegel himself did, presented in the second part of *Foundations of Natural Right* (1797) a vision of a state in which everything is rationally organized and every citizen's action is regulated by the law and supervised by administrative and police authorities (Fichte 2000, 249–263). Then Fichte proposed a proto-socialist utopia titled *The Closed Commercial State* (*Der geschlossene Handelsstaat*), in which wealth differences would be very limited and the economy would be strictly regulated by the state. In his early writings, Hegel firmly rejected Fichte's vision, arguing that it would lead to the creation of a "machine state," in which every citizen would be responsible for controlling others (Hegel 1977, 146–149; 1999, 15–26). It would thus be a state of universal surveillance.

According to Žižek, the vision of the *digital police state* is even more dangerous than Fichte's, because in Fichte's state, individuals were supposed to be subject to external coercion, whereas digital control would not be experienced as external coercion, and the appearance of free choice would be maintained. Žižek believes that the most dangerous form of enslavement arises when enslavement is experienced as a manifestation of freedom (Žižek 2020, 29–32). Writing about the brain-computer interface (BCI), Žižek notes that its proponents demonstrate how much it can benefit humanity. One example is the improvement in the condition and quality of life of people with disabilities. However, Žižek emphasizes that "mind-controlled machines imply also machine-control of mind itself" (Žižek 2020, 46). The possibility of connecting humans to a neural network raises the issue of power and regulation: "what regulatory mechanism will decide which experiences I will share with others, and who will control this mechanism?" (Žižek 2020, 74). Žižek, at the end of his analysis, states that what is particularly "under threat from the wired brain is our ordinary self-experience as free human individuals with direct access to our inner life" (Žižek 2020, 181).

Referring to Hegel's *Phenomenology of Spirit* (1807), Žižek points out that we always express our thoughts in words, even if we don't say them out loud. However, words never fully express the intentions of the speaker. Most often, they express "too much" or "too little" in relation to what the individual intended to express. Therefore, communication is always doomed to some kind of failure. Žižek notes, therefore, that the question of whether neuralink will adequately capture the meaning of human thoughts is misplaced. Rather, the question should be whether neuralink will be able to capture the redundancy or incompleteness of human thoughts expressed in words (Žižek 2020, 44–45).

Here we come to the most important issue raised by Žižek, i.e. the experience of human exceptionality. In addressing this issue, Žižek once again draws on Hegel's philosophy: "For Hegel, all spiritual life, all actual existence of Spirit, remains

rooted in our finite bodily existence, in our material historical reality; There is no independent realm of Spirit; Spirit exists in human culture; language is its medium" (Žižek 2020, 59). This may be an overly materialistic interpretation of Hegel's philosophy, but it highlights an important element of Hegel's thought: Spirit, and therefore also human being as such, can achieve self-knowledge only through the experience of negation, and therefore also through erring. Žižek notes that while Hegel believed that true reconciliation of thought and reality is possible only in the sphere of philosophy, advocates of the Singularity assume that this reconciliation, and thus the achievement of a higher level of human development, will be achieved when people will become part of the Singularity. That also inevitably means renouncing individuality. In this context, Žižek asks whether – contrary to the assumptions of transhumanists – joining the neural network will not mean achieving divinity, but rather a shallowing or flattening of human existence (Žižek 2020, 63, 67). According to the Slovenian philosopher, the neural link perspective challenges those experiences that constitute our condition as human beings, namely finitude, sexuality, and "embeddedness-in-the-symbolic" (Žižek 2020, 78).

Žižek considers the Hegelian position regarding the positive meaning of finitude and an obstacle for humanity to be completely accurate and still valid:

> [F]or Hegel, we, humans, reach immortality and infinity not (…) by way of somehow getting rid of the obstacle of our finite bodily existence and moving to another dimension of some higher reality, but by way of reconciling ourselves with (what appeared as) the obstacle and accepting that this 'obstacle' plays the positive role of sustaining the space of what it appears as the obstacle to. (Žižek 2020, 89)

Žižek's reading of Hegel's thought is accurate.[17] Referring to Hegel's thought interpreted in this way, Žižek draws his own reflection:

> […] [S]ince our – humanity's – 'highest' achievements are rooted in our very limitations (failure, mortality, and the concomitant sexuality), i.e., in what we cannot but experience as the obstacle to our 'higher' spiritual existence, the idea that this 'higher' level can survive without the obstacle, without what prevents its full actualization, is an illusion…" (Žižek 2020, 136)

Hegel emphasizes that "Error or other-being, when superseded, is still a necessary dynamic element of truth: for truth can only be where it makes itself its own result" (Hegel 1975, 274). Žižek interprets this idea to mean that humans can only attain truth through error and even through ignorance. Error, therefore, is a necessary element in the development of humans and humanity as a whole (Žižek 2020, 90, 139). Achieving perfection excludes the possibility of making mistakes, and thus of further development. Only in the context of errors and imperfections humans are able to formulate a concept of what is perfect (Žižek 2020, 136). According to Žižek, the ability to make mistakes is an element of

[17] In that context it is worth noting that according to the most general definition presented by Hegel, freedom means "being at home with oneself in the other" (*Bei-sich-selbst-sein-im-Anderen*) (Hofmann 2019, 10).

the exceptional human experience and therefore part of the human condition. Transhumanists, striving to create a perfect human being, or at least a more perfect one, transcending her own limitations, thereby deprive humans of a significant part of their uniqueness. Žižek adds also that possibly "the immersion in Singularity will deprive us of our status of singular individuals acting alone (in the sense of autonomy)" (Žižek 2020, 139). The Slovenian philosopher, therefore, believes that neuralink negates the moral autonomy of the subject understood in the Kantian way, and thus also the moral responsibility of an individual.

Using Hegelian arguments, Žižek emphasizes that only through imperfection do we gain the idea of perfection. In Žižek's view, transhumanists, by striving to transform humans into creatures that, through technology, will transcend their own limitations, deprive the essence of humanity of a crucial element of its exceptionality: limitation and imperfection. In my opinion, emphasizing that human exceptionality also lies in human beings' imperfection, limitation, and the possibility of making mistakes, is a significant and new element in the discussion on human dignity. Previous discussions on human dignity have emphasized three elements: the autonomy of individual choice, the inadmissibility of objectification by both other people and state authorities, and the set of conditions that must be met to call a human existence dignified. Žižek, drawing on Hegel, points to another, most often overlooked, element of human dignity: the imperfection inherent in both individual humans and the human species as a whole. Depriving a person of this element would simultaneously prevent any individual development. The perspective presented by Žižek is not, however, opposed to prevailing interpretations of human dignity, drawing on the concepts of Pico della Mirandola or Kant, but it can certainly be compatible with them, and at the same time introduces a new dimension to the discussion on human dignity.

Žižek does not suggest how to regulate the use of technologies intended to enhance humans. Moreover, such a recommendation would contradict the philosopher's general skepticism toward positive law, as well as the general tone of his reflections on law, which emphasize that law is incapable of fully encompassing and controlling social reality, and that, furthermore, concealed violence lies behind it. However, if there is a lesson to be drawn from Žižekian reflections, it is that if law wishes to affirmatively address human dignity, it must acknowledge the imperfection inherent in the human species.

5. CONCLUDING REMARKS

Slavoj Žižek views the law as a complex system that pretends to be impartial and rational, but has an "obscene supplement," since social reality eludes the law The Slovenian philosopher uncovers the hidden "obscenity" and ambiguity of law itself. This article was concerned, however, less with Žižek's general view

on law, but primarily with the issue whether his analyses of transhumanism offer new insights into the understanding of freedom and human dignity within the context of contemporary philosophy of law. Žižek's standpoint concerning individual freedom in the "wired brain" world is a fairly typical technological dystopia. They add little new to the discussion on human liberty. However, they demonstrate that freedom is not limited to individuals' formal decision-making or equally formal consent to specific conditions. However, the reminder that enslavement can also occur while maintaining the formal possibility of free decision-making is a certain value of the Slovenian philosopher's viewpoint. In my opinion, Žižek's reflection on human exceptionality is much more interesting. His position, expressed in polemic with transhumanists, is somewhat reminiscent of the widespread, "existentialist" interpretation of Giovanni Pico della Mirandola's concept of dignity. Žižek demonstrates that the unique nature of human subjectivity is expressed in its dynamic nature. The interpretation inspired by Pico presents the individual in similarly dynamic way, while the "classical" conception of human dignity, inspired by Kant's ethical thought, presents the individual in a decidedly more static manner. There is, however, an important difference between the Pico-inspired view and the Žižekian standpoint. While the former emphasizes the individual's ability to choose his/her condition, Žižek, drawing on Hegel, puts emphasis on something else, namely the importance of making mistakes and imperfections in the subjective development of a human being. From this perspective, one of the manifestations of human dignity is not only the capacity to make mistakes (this element is already present in Pico della Mirandola's concept, or at least in its most widespread interpretation, which emphasizes the autonomy of human choice, including the wrong choice), but also imperfection, which is inherent in the essence of the human species. It is also an important element from the perspective of contemporary legal philosophy. Žižek's "Hegelian" considerations are consistent with those concepts that link the dignity of the individual with his or her autonomy.

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NEGOTIATING PERSONHOOD BEYOND THE HUMAN: A RELATIONAL LEGAL THOUGHT EXPERIMENT

Abstract. This article explores the ontological foundations of legal personhood in light of contemporary philosophical challenges to the human–nonhuman divide. Drawing on Bruno Latour's theory of quasi-objects and Guido Sprenger's animist notion of fluid personhood, it examines how shifting metaphysical assumptions may reshape legal personhood. The article argues that legal theory should move beyond fixed, anthropocentric categories and engage in a deeper negotiation of who – or what – counts in law.

Keywords: legal personhood, flat ontologies, fluid personhood, Bruno Latour, posthumanism, anthropocentrism

NEGOCJOWANIE PODMIOTOWOŚCI PRAWNEJ, POZA TYM CO LUDZKIE: RELACYJNY EKSPERYMENT MYŚLOWY W TEORII PRAWA

Streszczenie. Artykuł bada ontologiczne podstawy podmiotowości prawnej w świetle współczesnych filozoficznych wyzwań wobec podziału na to, co ludzkie i nieludzkie. Odwołując się do teorii quasi-obiektów Bruna Latoura oraz animistycznej koncepcji płynnej podmiotowości Guido Sprengera artykuł analizuje, w jaki sposób zmieniające się założenia metafizyczne mogą przekształcać rozumienie osoby prawnej i jej podmiotowości. Artykuł dowodzi, że teoria prawa powinna wyjść poza sztywne, antropocentryczne kategorie i podjąć głębsze negocjacje dotyczące tego, kto – lub co – jest uwzględniane w prawie jako podmiot.

Słowa kluczowe: podmiotowość prawna, osobowość prawna, ontologie płaskie, płynna podmiotowość, Bruno Latour, posthumanizm, antropocentryzm

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1. INTRODUCTION

One of the central ontological axioms of Western legal thought has, for centuries, been the separation of persons and things. Since these two categories – alongside normative relations such as rights and obligations – constitute the most fundamental building blocks of law, it is hardly surprising that both legal theorists and practitioners have devoted considerable attention to defining and redefining them, interpreting their respective roles[1] (and, naturally, any theoretical articulation of one concept has shaped and influenced the definitions of the system's other two foundational elements: person, thing, and relations).

This article does not aim to provide a comprehensive overview of the relevant theories. Its starting point is the premise that the legal ontological dichotomy – the separation between person and thing – while specific to law and often explicitly fictional (Fischer-Lescano 2020) – reflects the broader dichotomous structures of philosophical and social (extra-legal) thought over the past centuries: the divide between subject and object, society and nature, individual and community. It takes as a basic proposition that the core of this distinction, its very rationale, lies in the (non-) allocation of rights and obligations to certain entities – legal persons are the sole possible bearers of rights and/or duties. The article is grounded in the conviction that the normative question of "who can be a legal person" cannot be answered without extra-legal considerations. Its central inquiry is thus the following: how has the relationship between human and nonhuman (between humanity and its "environment") changed over the past half-century, how does this affect law (primarily the concept of legal personhood), and what new ontological and epistemological possibilities emerge for the legal system when it comes to the question of "who should be taken into account"[2] – i.e., who should be granted rights and/or obligations?

This article argues that the current dichotomous conception of legal personhood has become increasingly untenable. Developments in philosophy, science, and technology have raised fundamental questions about what it means to be human and how humans are entangled with the world around them. These transformations cannot be ignored by law; indeed, both legal theory and legal practice are already responding – explicitly or implicitly – to the shifting ontological terrain.

The following discussion adopts a partly normative stance: it advances the thesis that we must move beyond what Kurki has described as the "orthodox view" of legal personhood (Kurki 2019) and begin to articulate new legal ontologies.

[1] Kurki e.g. identifies five distinct schools of thought concerning the theory of legal personhood (Kurki 2019, 55–56).

[2] Pietrzykowski argues that it is precisely this right – the right to be taken into account – that distinguishes legal subjects from non-subjects (although in his theory, these subjects are not necessarily legal persons; see Pietrzykowski 2017).

The second part of the article explores one such possibility. Rather than merely "extending" legal personhood to new entities within the confines of existing dichotomous logic and its philosophical foundations, it attempts to reconceptualize personhood altogether – shifting from a fixed-entity model to one that understands personhood as a form of relational positioning. While the second part is primarily a philosophical thought experiment, drawing heavily on the ontological work of Bruno Latour (2004) and Guido Sprenger (2021), it is also deeply inspired by broader strands of relational theory. Its aim is not to propose a ready-made normative framework, but to explore one possible way in which law might accommodate an ontology in which the traditional boundaries between subject and object no longer hold.

In the approach adopted by this article, legal personhood is not merely a technical or analytical concept, but also a moral judgment and a mechanism of selection. Crossing the threshold of legal personhood is only possible for those who *matter* – and recent decades have increasingly demonstrated that our traditional answers to the questions "who (or what) exists?" and "who (or what) matters?" (namely, the human being or human communities) may have become obsolete.

2. LEGAL PERSONHOOD AND THE CLASSICAL ONTOLOGICAL FRAMEWORK

Over the centuries, certain foundational ontological tenets have become deeply embedded in the fabric of law, transformed into "normative truths" upon which the stability of the entire legal system continues to depend.

2.1. Person and thing

The default figure of legal personhood became the human being (Fischer-Lescano 2020), and the image of the paradigmatic legal person – endowed with rights and obligations – was defined by Western modernity: a rational, autonomous adult individual of sound mind, possessed of free will and the capacity to exercise control over their own life (Hunt 2017). This paradigm found its fullest expression in human rights doctrine. During the French Revolution, only white, propertied men fulfilled these criteria. However, the "inner logic of human rights" gradually came to include an ever-wider range of persons, ultimately extending to the entire human species (Hunt 2017). This expanding logical spiral also gradually transformed the very logic of human rights: the primacy of *free will* as an organizing principle was supplanted by the notion of *dignity*.[3]

The image of the legal person as a healthy, autonomous adult individual remains deeply embedded in the normative structure of law – well beyond the

[3] This shift also reflects the growing influence of interest theory over will theory in the field of human rights.

domain of human rights, and legal relations continue to be shaped by this underlying assumption. The classical construction of the legal person as the subject of rights and duties is thus based on two key assumptions: first, that legal personhood is dichotomous – an entity either is or is not a legal person, with no intermediate possibilities; and second, that full legal personhood belongs to every human being (as the result of the ever expanding spiral of human dignity and human rights), and to certain human collectives (Kurki 2019, 6–10).

Within the framework of this dichotomous conception, a *thing* is defined negatively, as anything that is not a legal person.[4] From its metaphysical (extra-legal) foundations, the object is not characterized by free will or contingency (as the subject), but by determinism and causal necessity (Harman 2006). Matter, object, nature, thing – these constitute the other side of the dichotomy. In the words of Anna Grear: "The subject (also, in a historically central sense, the fully human) is thus defined by its ontologically independent and ultimately self-referential rationalism, while 'everything else' (including the human body) becomes inert 'matter' to be viewed, examined, probed, and ultimately controlled and exploited: mere 'dead' res extensa" (Grear 2017, 133–134).

This category encompasses not only the inanimate environment but also living nature, without substantial differentiation or categorization.[5] The essence of this bipolar ontology lies in the separation of the human from its environment. Persons, things, relations – this triad forms the core of the "orthodox view"[6] of Western legal ontology.

2.2. Taking the nonhuman into account

It soon became apparent that the anthropocentric worldview is not a unified or closed system: "the human" does not constitute a sufficiently homogeneous category to sustain one pole of a dualist ontology. Even the expanding spiral of human rights destabilized the ontological foundation of the legal subject as the "bounded heterosexual male body" (Grear 2017, 133). The designated categories fell into contradiction: on the one hand, legal personhood was attributed to entities that did not meet the criteria of the "paradigmatic person" and were thus not capable of participating in all legal relations (in particular, those requiring the exercise of legally relevant free will – such as children or persons with mental disabilities); on the other hand, rights were denied to entities that, based on the very criteria legitimizing legal personhood, arguably ought to have possessed

[4] Some theories consider only those entities to be objects that can be owned; see Kurki (2019, 12).

[5] The further examination and classification of objects may fall within the scope of scientific inquiry, but not that of legal theory.

[6] "The Orthodox View" is a term used by Kurki to refer to the classical dichotomous conception of legal personhood (Kurki 2019).

them.[7] The hierarchical logic placing the human at the top – by virtue of mental capacity – began to falter.

The abstraction of legal personhood, therefore, entered into an irreconcilable conflict with its own internal logic and ontological foundations. In recent decades, entities have emerged in legal and philosophical discourse that the original anthropocentric model neither anticipated nor could accommodate within its framework of legal personhood: nature, ecosystems, rivers – but also machines, artificial intelligences, and biotechnological hybrids, the outcomes of technoscientific innovation.

Legal theory and practice have responded to these tensions and to broader socio-philosophical transformations with a range of conceptual experiments aimed at reconciling subject and object – or at least blurring the boundaries between them. Some scholars have proposed models of graduated personhood, rejecting the dichotomous structure. Kurki, for instance, distinguishes eight different incidents of legal personhood and claims that legal personhood is a cluster concept ranging from fully passive to fully active legal personhood (Kurki 2019, 91–124); Pietrzykowski proposes the category of the "non-personal subject of law" for vertebrate animals, who have at least one right: the right to be taken into account (Pietrzykowski 2017). Even Western legal systems increasingly differentiate between sentient animals (i.e. capable of experiencing pain) and other "objects," granting the former a higher level of protection.[8]

Law is increasingly taking nonhuman animals into account, affording enhanced protection, but it is also placing greater emphasis on environmental preservation. In certain cases, *nature* is beginning to break out of its ontological isolation, and Western legal systems are making tentative efforts to perceive ecosystems as organic wholes – singular entities deserving of protection and *rights* – not merely as aggregates of individuals.[9] For example, the Whanganui River in New Zealand has been recognised as a legal person: according to the Te Awa Tupua Act, the river is understood as an indivisible living whole rather than a mere collection of water, banks, and resources, and it has "all the rights, powers, duties, and liabilities of a legal person." Similarly, the 2008 Ecuadorian Constitution enshrines the rights of Pachamama (Mother Earth), granting ecosystems the right

[7] See e.g. Kurki's analysis on the tension between what he calls the extensional and the intentional beliefs concerning legal personhood (Kurki 2019, 15).

[8] See e.g. the art. 494 of the Czech Civil Code (zákon č. 89/2012 Sb., občanský zákoník): "A living animal has a special meaning and value already by virtue of being a sentient living creature. A living animal is not a thing, and the provisions on things shall apply to it only to the extent that they do not contradict its nature."

[9] See the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, 20 March 2017.

to exist, regenerate, and flourish, and allowing humans to appear in court not as owners of natural resources but as representatives asserting nature's own rights.[10]

What these experiments share is a willingness to consider nonhuman entities *for their own sake*. Yet their underlying logic remains within the orbit of the anthropocentric worldview. Kurki and Pietrzykowski, for example, conclude that as to nonhumans, legal personhood can be extended only to vertebrates. As Kurki puts it, "Sentient beings include at least born, non-anencephalic humans, human foetuses during the final trimester; and most vertebrates" (Kurki 2019, 64). For Kurki, this definition becomes the authoritative point of reference for examining the criteria of legal personhood. The definitions of these authors and their justifications remain fundamentally anthropocentric, merely extending the ideals of humanism – rationality, subjective sensation (such as the experience of pain), and individualism – to other entities.

In the case of ecosystems and the rights of nature, efforts to alter their ontological status draw inspiration from a range of sources. These include Western science-based ecological movements and their ideological frameworks, as well as the cosmologies of certain Indigenous cultures. However, the logic that underpins these approaches – and the legal structures built upon them – remains unchanged. Thus, although these frameworks seek to recognize nature *in its own right*, they often generate categories that are incompatible with Western legal understandings and, in the end, do little to challenge the fundamentally dualist architecture of our legal culture.[11] Attempts to reinterpret – or dissolve – the division between subject and object often remain trapped within the framework of the old paradigm. While they extend the right to be taken into account to nonhuman beings, the criteria by which this is done continue to draw on a human-centred, dualist worldview. Even environmental protection is frequently mediated through human rights and articulated in the language of human entitlement (e.g. Kersten 2017).

Yet this dualist abstraction is ill-suited to serve as the organizing principle of a world in which the voice of "nonhumans" is becoming increasingly important. As Latour warns, the concept of the object, of Nature was constructed precisely so that it could not be united with the human. The object is "that which resists subjectification" (Latour 2004, 103). These are the concepts of an era whose

[10] Constitution of the Republic of Ecuador (Constitución de la República del Ecuador) 2008, arts 71–74.

[11] As Reeves and Peters caution in relation to the legal personhood of the Whanganui River: "As a legal person, however, the River does not become 'equal' to other legal persons; it is positioned on a spectrum of personality below 'whole' persons who, as Grear notes, are ultimately characterised as white male property owners (or beyond them, disembodied corporate persons). The result is not so much an overcoming of the hierarchy of the anthropos, but rather situating the River within it, allowing for the continued exploitation of the 'rest' of nature. […] In short, environmental personhood responds to anthropocentrism with anthropocentrism" (Reeves, Peters 2022, 497).

foundational assumption was the radical separation and incommensurability of subject and object.

For this reason, it is not enough to simply add nature to society without first establishing new ontological foundations. The basic contradiction – the very rationale behind the existence of these categories – cannot be resolved by aggregation alone. In both philosophy and law, a different trajectory emerges: one that experiments with the possibility of a paradigm shift.

3. NEW ONTOLOGICAL FOUNDATIONS

The blurring and fraying of the boundaries of "the human" and "the subject" had, in fact, already begun with the expansion of human rights – through the gradual inclusion of women, slaves, children, Indigenous peoples, the disabled, and others (Braidotti 2019). In parallel, the rising visibility and valorization of the object – the growing consideration of nonhuman entities – has further amplified this development in recent decades.

In place of the classical concepts of human, subject, and rational autonomous individualism, attention is shifting toward the relations between humans and nonhumans, toward mutual attachments, embeddedness, context, perspectivism, interdependence (both human and nonhuman), and the Other – nature, the object, matter – as it resists full conceptual capture.[12]

This ontological paradigm shift is finding its way into legal theory as well, with a growing number of scholars rethinking the core concepts of law in light of these transformations. Alongside attempts to stretch or expand the classical humanist and anthropocentric worldview (as discussed above), legal thought is increasingly responding to the emergence of a new metaphysical turn.

This transformation is most clearly visible in the emergence and development of relational theories. Beginning with the ecocentric interventions of the 1960s and 1970s – exemplified by Christopher Stone's famous challenge to the anthropocentric limits of legal standing (Stone 1972) – a range of alternative approaches has gradually taken shape, each foregrounding different aspects of law's relationship to its subjects. Feminist legal theories (e.g. Nedelsky), Indigenous jurisprudences (e.g. Arstein-Kerslake et al. 2021), and various strands of new materialism (e.g. Davies 2017) all participate in this shift.[13] What unites these otherwise heterogeneous

[12] For a concise overview of different posthuman approaches and philosophies, see e.g. Braidotti's and Hlavajova's Posthuman Glossary (Braidotti, Hlavajova 2018).

[13] Michał Dudek, however, warns that legal theories drawing on flat ontologies often approach the new metaphysics – and the broader ontological and epistemological insights of philosophy and the social sciences – in an instrumental manner. These theories tend not to engage with such frameworks systematically or reflectively; rather, their methods are often eclectic, selectively appropriating elements from various philosophical traditions to suit their purposes. In *On Flat*

perspectives is a common move away from atomistic, autonomous individuals conceived as fixed categories, and toward the relations that bind entities together: relations between humans, between humans and nonhumans, and between what have traditionally been construed as subjects and objects. Some of these theories continue to understand legal personhood as an individual status, but one that can only be fully realized within webs of social and material relations – and that is not necessarily confined to human beings. Other approaches adopt a more radical position and treat relations themselves as the primary formative force of legal personhood. In this view, we become – or fail to become – legal persons through our relations. It is in this sense that Latour's account of collectives and networks can be read as a relational ontology of personhood, and that Guido Sprenger's reflections on animism and fluid personhood draw attention to practices in which personhood is constantly negotiated through shifting connections rather than anchored in stable human essences.

The next section of this article will explore legal personhood through the lens of these emerging metaphysical perspectives, focusing on the possibilities for reinterpreting the subject–object divide in philosophy. Particular emphasis will be placed on the concept of fluid, situational personhood, drawing primarily on Latour's framework and on the animist configurations described by Guido Sprenger (Sprenger 2021).[14]

3.1. The concept of fluid personhood

Bruno Latour is an unavoidable reference when it comes to the critique of anthropocentrism, the reassessment of the role of objects, and the emergence of a new metaphysics. He laid out his ontological assumptions in *Politics of Nature*, and was among the first to attempt the construction of a new metaphysical framework – one that continues to resonate, in various forms, throughout object-oriented currents of thought. While Latour's theory is open to critique on several fronts (Fischer-Lescano 2020), the paradigm shift he proposes in ontology – and its potential implications for law – are far-reaching.

Ontologies and Law, Dudek partially addresses this gap by systematically examining the theories of selected philosophers (Gabriel Tarde, Bruno Latour, Manuel DeLanda, Karen Barad, and Graham Harman) from a legal perspective, and by assessing whether these frameworks can meaningfully contribute to a reconceptualization of law (Dudek 2024).

[14] Latour is relevant to legal theory in numerous respects, and his work has attracted significant attention within the field. It is not my aim here to present the full scope of his oeuvre. For broader discussions of Latour's relevance to law, see, for example, Dudek's chapter on Latour (Dudek 2021); for his theory of representation, see Brown's analysis (Brown 2017).

In what follows, I focus only on Latour's most fundamental claims concerning the reconceptualization of personhood – primarily as articulated in *Politics of Nature* (Latour 2004), and as interpreted by Harman (2006).

As Graham Harman has pointed out, Latour is neither a materialist, nor a relativist, nor a social constructivist; nor can he be neatly situated within either the analytic or continental traditions of philosophy (Harman 2006). Instead, he dismantles the strict dichotomies of subject and object, nature and (human) society – what he calls the "Old Constitution." In this old regime, "the Upper House" is composed of Nature, and "the Lower House" of Society. Nature, as a concept, does not refer to a portion of reality, but rather functions as a political device – its entire conceptual function is to exclude, to separate, to render certain entities external (Latour 2004, 83).

The organizing principle of Nature is causality and immutability (and thus depoliticization), whereas that of Society is contingency and arbitrariness (and thus political relevance). For this reason, the unification of Nature and Society is impossible – the two worlds cannot be reconciled. As Latour puts it, "subjects and objects can never associate" (Latour 2004, 105).

Latour sets his "New Constitution" in direct opposition to the rigid, dichotomous worldview of the Old. At the heart of this New Constitution lies the collective – a formation composed of hybrid constellations of human and nonhuman entities, or what Latour, following Michel Serres, calls quasi-objects (Harman 2006, 150). These entities are neither pure nor final, nor are they clearly bounded. Rather, they are in constant transformation, depending on the nature of their interactions and attachments.

For Latour, *esse est actio* – to be is to act: "[s]ubjects are actually objects, and […] all objects (both human and nonhuman) are actors or actants" (Harman 2006, 150). The criterion of existence (and of being taken into account) is not any internal essence, fixed property, or ontological category, but agency: "Latour rejects all claims of vacuous material objects lying around in isolation from their relations. A thing attains reality only through these relations" (Harman 2006, 150).

Actants, entities, things, propositions – these are synonymous terms in Latour's vocabulary. These actants interact, entangle, form collectives, and seek admission into the common world, which may either accept or reject them. And the basis of this world is negotiation: "reality is relation, and relation is negotiation" (Harman 2006, 156). Objects, in this view, are not passive, neutral matter to be manipulated, but active participants – who, as Harman notes, resist human appropriation in a very real sense (Harman 2006, 155). The existence (and configuration) of the collective is thus a constant matter of negotiation.

From the standpoint of legal personhood, two core features of Latour's thought are especially significant:

1. He abolishes the classical notions of subject and object, Nature and Society as defined by the Old Constitution, replacing them with quasi-objects – hybrids of humans and nonhumans with shifting, "frayed" (*chevelu*) boundaries; and

2. He attributes agency to nonhuman actants as well: they are not inert material or mere representations constructed through human perception, but autonomous entities in the ongoing formation, persistence, and dissolution of hybrids. These actants limit human action and compel negotiation in the continuous shaping of the collective.

If we define the entities to be considered along these lines, we move beyond a conception of the subject organized around the human. This allows us to define who – and why – matters within a new ontological framework. This Latourian gesture strongly resonates with a question posed by anthropologist Guido Sprenger in his essay *Can Animism Save the World?* (Sprenger 2021). Sprenger describes animist societies in which the notion of personhood is not tied to stable entities (as it is in Western philosophy), but is instead fluid: depending on the situation, an entity may be regarded either as a person or as a thing, and its status depends on its perceived complexity.

Sprenger ties the attribution of personhood to complexity. As he writes: "From the point of view of living humans, certain conditions are required for the recognition of personhood, namely an attentiveness that possibly identifies events as – often unpredictable – communication, and not just as – relatively predictable – effect." Complexity implies communication, and the essence of communication is "the necessary relation between expectation, disappointment and opacity" (Sprenger 2021, 82).

An entity is thus treated as a person when it communicates, when it negotiates, when we recognize a form of internal complexity within it. What Latour (and, according to Sprenger, certain animist cultures) offers is the decoupling of communicative capacity from inherently human traits, rendering entities – using Sprenger's term – fluid.

The question, therefore, is no longer *who* may be a (legal) person, but *when*, and *under what circumstances* someone or something becomes a person – when an entity must be taken into account. And this may vary across time, space, and relational context.

Such a reframing – abandoning the individualist model of fixed ontological status – could transform our legal conception of personhood and perhaps enable a fundamental rethinking of the rights of nature. If we begin to see nonhumans as communicative, complex entities entering into our common world through diverse configurations, this not only opens the possibility of conceiving their rights outside of anthropocentric terms – beyond the assumption that only those who resemble us (e.g., "vertebrates," "sentient beings") are worthy of rights.

These entities – rivers, ecosystems, intricate, living assemblages from which vertebrates or humans cannot be cleanly separated – may at the very least be granted the *right to be taken into account* (as Pietrzykowski suggests in relation to vertebrates). Moreover, this dynamic, fluid notion of personhood may help us better conceptualize the ongoing but as-of-yet insufficiently theorized legal

transformations surrounding the rights of nature. It allows the nonhuman world to speak no longer in the language of human rights, but to assert its interests in its own terms – through its entangled relations with humans.

4. CHALLENGES

Such a paradigmatic shift raises a host of pressing questions. Chief among them is the classical problem of representation: who speaks on behalf of nonhumans? Who translates what they "say" into human language? What are the appropriate mechanisms for bringing the common world into being? Latour offers a Hobbesian response to this question, assigning a role to scientists, politicians, moralists, and economists in the process of composing the common world (Brown 2017). In legal practice, experiments with granting rights to parts of nature have given rise to a variety of institutional arrangements. Some entities are represented by appointed guardians or trustees (as in the case of the Whanganui River's guardians, Te Pou Tupua); in other jurisdictions, any person is authorized to seek protection on behalf of ecosystems (as under Ecuador's constitutional rights of nature and the figure of Pachamama). From the perspective of fluid personhood, however, none of these solutions can be regarded as definitive. Fluid personhood presupposes continuous and open-ended negotiation: as relations shift, so too do the entities that emerge from them and the rights that attach to those entities. But how might the legal system institutionalize such a fluid ontology, and what would such a change mean for the principle of legal certainty? Pietrzykowski emphasizes that even the right to be taken into account must be evaluated through the proportionality test when in conflict with other interests. Could the principle of proportionality help us determine in which contexts, and under what circumstances, specific entities should be granted legal personhood?

Another concern is the range of risks and consequences that may accompany the abandonment of fixed ontological categories in favor of a more dynamic, fluid (and unpredictable) conception of the world. Could this redefinition of personhood potentially destabilize the legal status and rights of some human beings? If complexity, unpredictability, and communicative capacity are to serve as criteria for personhood, would this mark a radical departure from previous attempts to expand legal personhood based on interest theory? Might such a shift backfire – leading not to the personalization of nonhumans, but to the depersonalization of certain humans?[15] After all, several centuries of human-rights thought rest on the assumption that human beings, by virtue of their humanity, are special: they possess inherent dignity, and certain statuses and protections attach

[15] Sprenger raises very similar concerns in the concluding section of his analysis (Sprenger 2021, 81–85).

to them as a matter of right. A new paradigm or metaphysics that unsettles this assumption may push the discourse toward a landscape in which some humans find themselves stumbling along the margins of legal personhood, and in which the most vulnerable – those whose capacity to negotiate and to be heard among proliferating entities is weakest – risk once again being eclipsed by other interests.

Some theorists advocate a more modest, pragmatic approach: legal personhood should be understood as a legal instrument rather than as the direct reflection of metaphysical categories (e.g. Pasha et al. 2024), thereby allowing for the protection of nature without disrupting the established human-rights order. Yet this view, too, gives rise to tensions and inconsistencies that cannot be fully resolved within the old paradigm, and which point to a deeper conflict between posthumanist ontologies and the humanist foundations of modern human-rights discourse.

These questions remain largely unanswered. Yet if the goal is to transform law in such a way that it can include nonhuman entities in their own right – not solely on the basis of their relationship to, usefulness for, or exploitability by humans – then the old categories and the fundamentally humanist, anthropocentric ontologies will no longer suffice. Law is beginning to respond to these challenges, but I agree with Michał Dudek in asserting that what is needed is deep, systematic work: the integration of philosophy, other social sciences, and legal scholarship to reflect on and analyze the possible implications of these ontological changes for the legal system (Dudek 2024, 33–38).

5. CONCLUSION – TOWARDS A NEW JURIDICAL METAPHYSICS

This article has sought to offer one possible interpretation of the interaction between a shifting metaphysical-ontological landscape and the law – specifically, the concept of legal personhood – through the lens of Bruno Latour's theory and the notion of fluid personhood as rooted in the animist perspectives presented by Guido Sprenger. Such a paradigm shift – or rather, a thought experiment – inevitably raises a host of unresolved questions. Yet, given the growing number of attempts in both legal theory and legal practice to expand the category of legal subject, the urgent question arises: on what philosophical and ontological foundations do these attempts rest, and in which direction might they evolve?

As Latour reminds us: "Far from 'overcoming' the dichotomies between human and nature, subject and object, systems of production and environment, in order to find quick remedies to the crisis, it was necessary instead to slow the movement down, take one's time, suspend it – and then go beneath these dichotomies to dig, like the old mole" (Latour 2004, 5).

This article has been an effort to partake in such a slowing down, by focusing on one specific segment of the legal field and asking what it might mean for law if we take these ontological developments seriously.

Future legal thought must, therefore, grapple with the pluralization of personhood, the flattening of ontologies, and the expansion of the common world. Achieving this, however, requires sustained interdisciplinary cooperation and mutual understanding across philosophical, legal, and social scientific domains.

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FROM CELLS TO CODES: THE LEGAL TRANSFORMATION OF DIGITAL IDENTITY, INTEGRITY, AND SELF-DETERMINATION IN THE DIGITAL AGE

Abstract. This article examines the evolving relationship between the human body and digital data, particularly in light of technological advancements that blur the distinction between physical and digital identities. The research explores the implications of this transformation for legal frameworks, questioning whether current data protection laws sufficiently safeguard personal integrity and identity in the digital age. This study emphasises the limitations of existing regulations, which primarily focus on personal data rather than the broader concept of individual identity. A central argument is that the right to informational self-determination discussed in the scientific literature and recognized in German legal practice should play a critical role in ensuring autonomy and personal identity protection. The discussion also highlights the necessity of developing more effective legal mechanisms to safeguard digital identities against technological vulnerabilities, unauthorised profiling, and market-driven commodification of personal data. This study ultimately calls for a reconsideration of legal concepts such as bodily integrity, informational self-determination, and digital sovereignty, advocating for a more comprehensive legal approach to the protection of individuals in the digital sphere. This document argues that the existing legal framework inadequately protects new forms of identity in the digital environment, especially with regard to information self-determination and digital embodiment. By exploring the changing boundaries of the human body in technological and digital contexts, this article aims to promote clearer recognition of digital identity rights within legal systems.

Keywords: digital identity, bodily integrity, biometric data, data protection, digital sovereignty, legal frameworks

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OD KOMÓREK DO KODÓW: PRAWNA TRANSFORMACJA TOŻSAMOŚCI CYFROWEJ, INTEGRALNOŚCI I SAMOSTANOWIENIA W ERZE CYFROWEJ

Streszczenie. Artykuł analizuje ewoluującą relację między ludzkim ciałem a danymi cyfrowymi, szczególnie w kontekście postępu technologicznego, który zaciera granicę między tożsamością fizyczną a cyfrową. Badanie bada konsekwencje tej transformacji dla istniejących ram prawnych, stawiając pytanie, czy obowiązujące przepisy dotyczące ochrony danych osobowych w wystarczającym stopniu chronią integralność i tożsamość jednostki w erze cyfrowej. Autorzy podkreślają ograniczenia obecnych regulacji, które koncentrują się głównie na danych osobowych, pomijając szersze pojęcie tożsamości jednostki. Główną tezą jest to, że prawo do samostanowienia informacyjnego, omawiane w literaturze naukowej i uznane w niemieckiej praktyce prawnej, powinno odgrywać kluczową rolę w zapewnieniu autonomii i ochrony tożsamości osobistej. W artykule podkreślono również potrzebę opracowania skuteczniejszych mechanizmów prawnych chroniących tożsamości cyfrowe przed podatnościami technologicznymi, nieautoryzowanym profilowaniem i rynkową komodyfikacją danych osobowych. Ostatecznie badanie wzywa do ponownego przemyślenia takich pojęć prawnych jak integralność cielesna, samostanowienie informacyjne i suwerenność cyfrowa, postulując bardziej kompleksowe podejście prawne do ochrony jednostki w przestrzeni cyfrowej. Artykuł dowodzi, że obecne ramy prawne nie zapewniają wystarczającej ochrony nowym formom tożsamości w środowisku cyfrowym, szczególnie w odniesieniu do prawa do informacji i cyfrowego ucieleśnienia. Poprzez analizę zmieniających się granic ludzkiego ciała w kontekstach technologicznych i cyfrowych, celem artykułu jest promowanie wyraźniejszego uznania praw do tożsamości cyfrowej w systemach prawnych.

Słowa kluczowe: tożsamość cyfrowa, integralność cielesna, dane biometryczne, ochrona danych, suwerenność cyfrowa, ramy prawne

1. INTRODUCTION

In the digital age, technological developments are changing our understanding of the human body, integrity, and identity (Atoyan et al. 2023, 93). Recent technological advances have opened a new era for our physical nature: they have transformed it into a technological platform. Our physical life, including our body, environment, work and services, is increasingly intertwined with digital technologies and the Internet, creating a harmonious combination of the physical and virtual worlds, thereby posing new challenges to society (Warwick 2015, 79). For example, many people now work from home using video calls and online tools. Shopping has also changed: online shopping allows people to purchase goods from the comfort of their homes. These examples show how digital technologies are becoming a natural part of our lives. Not only do digital technologies have positive consequences, especially in stimulating the transformation of medical research and industry as well as other aspects of social life, but their use also leads to violations of fundamental human rights. Nowadays digital technologies expose privacy and cybersecurity to unprecedented vulnerabilities. In this context, the EU, one of whose main policies and activities is the protection of fundamental human rights for EU citizens and the

promotion of human rights worldwide, is faced with the need to develop adequate legal responses to the possible negative consequences of these technologies.

At the same time, there is also the question of the effectiveness of the current EU legal framework for the protection of personal data and personal integrity to fully safeguard (ensure?) the persons from new challenges, as digital technologies generate huge amounts of biometric and behavioral data, as well as create new issues for data management (Andraško et al. 2021, 623). A special feature of digital technologies is the processing of what can be called "live" bits and bytes – that is, digital data that is constantly generated, transmitted, or updated in real time, such as streaming videos (including from video calls or surveillance cameras), real-time sensor data (including health data obtained from medical applications), or real-time messages (for example, voice messages), which can be recognized as components of a person's personality and which, in turn, raise the question of finding the most effective legal mechanism to protect a person from imperfect and vulnerable software. For example, software that processes this data, such as video streaming platforms, medical applications, or communication tools, may contain bugs, security flaws, or outdated encryption, making them vulnerable to hacking, data leakage, or manipulation (Darwich, Bayoumi 2025).

As digital technologies are increasingly introduced into our daily lives, concepts such as body autonomy, integrity, and identity are being redefined. The growing use of prosthetics, implants, biometric data, and virtual representations is changing not only how we interact with the world, but also how we perceive ourselves. Of course, this study does not provide a comprehensive and specific analysis of all the aforementioned human and technology integrations. However, we recognize that these achievements collectively indicate a broader shift in the understanding of human identity and embodiment in modern society. These changes raise crucial questions about the legal protection of a person's physical (bodily) integrity and identity, especially in the context of new technologies that blur the boundaries between the physical and digital worlds (Bublitz 2022, 3). The concept of "body as data" represents a new challenge for legal systems traditionally focused on protecting physical bodies from harm (Bygrave 2010, 1–25). As our bodies generate data through biometric sensors, wearable devices, and digital interfaces, the concept of personal (bodily) integrity needs to be redefined to take into account the growing role of data in shaping our personal identity. This shift has serious implications for human privacy, autonomy, integrity, and control over the physical and digital self. The purpose of this research is to explore the evolving relationship between the human body and digital data, examining how this intersection influences legal interpretations and protection of bodily integrity and identity in the digital era. In this regard, the key questions of these research are the following:

1) What challenges arise from the convergence of physical and digital identities in terms of existing legal protections?
2) How might existing or new legal frameworks respond to these challenges?

The study uses a doctrinal method supported by a comparative and analytical review of European and international sources. It examines the main EU laws (the Charter of Fundamental Rights (CFR) and the GDPR), the case law of the European Court of Human Rights, as well as the scientific doctrine of digital identity, integrity and information self-determination. This approach was chosen because the topic concerns the normative development of legal concepts rather than empirical measurement. The purpose of the analysis is to identify conceptual gaps and propose a coherent interpretative framework for integrating digital integrity into existing human rights protection structures.

We argue that the protection of human personal integrity in EU legislation should be designed in such a way as to cover not only the physical body, but also its digital manifestations. In our opinion, the right to information self-determination and the emerging concept of digital integrity together can provide the necessary regulatory framework to ensure personal autonomy and dignity in the digital age.

2. LITERATURE REVIEW

In the legal literature there are a number of research contributions that are devoted to the analysis of existing risks and challenges of human data protection from the perspective of human bodily integrity (Quesne 2022, 37–45; Matwyshyn 2019, 167). In particular, some scholars analyse the existing legal challenges to personal data protection in the EU law from the perspective of the concept of informational self-determination (Thouvenin 2021, 246). Other scholars pay particular attention to the privacy and cybersecurity vulnerabilities and conflicts across regulatory regimes in the context of AI governance and data optimisation (Pauwels, Denton 2018, 230; Hoffiani 2021, 14).

At the same time, there are also some research contributions dedicated to the issues of boundary stability between human and digital bodies, as well as the convergences between human and digital bodies through posthumanist theoretical perspectives in law (Käll 2017, 162). From the point of view of a potential change in the accepted ontology of the body (body as data) and the entry into force of the GDPR (Bygrave 2010, 1–25), the question of how widely the terms "information" and "data" are interpreted within the framework of regulation is becoming more relevant (Purtova, 2018). In this context, as a solution, very few researchers suggest to recognise a new fundamental right – the right to digital integrity, which will help to create fundamental guarantees for data protection in the context of the Internet of Bodies (IoB) (Roussel 2020; Rochel 2020; Mahon 2020; Kuhn 2020).[1] Of course, we also agree that the right to digital integrity of a person, that

[1] These contributions are from the proceedings of the conference "The Right to Digital Integrity: Real Innovation or Mere Evolution of the Law?" (in French: Un colloque sur le thème "Le droit à l'intégrité numérique: réelle innovation ou simple évolution du droit?"), Faculty of

is an emerging concept referring to the ability of individuals to maintain control over their digital presence, identity, and interactions in the digital environment, including protection both with and against digital technologies (for example, protection against malicious tracking, surveillance, and identity theft) (Rochel, 2021; Roussel, 2023), has a strong potential in strengthening the protection of a person and their data in the digital world, which was confirmed by our previous research (Vardanyan et al. 2022, 172). In particular, as it was mentioned in the conclusions of the research:

> (…) it is necessary to find an alternative foundation for the legal regulation and protection of personal data. We consider that the right to digital integrity can be a new foundation for digital rights, the recognition of which, similar to the right to physical and mental (psychological) integrity, can protect the person from becoming a commodity and reduce the number of cases of violation of human dignity in the digital sphere." (Vardanyan et al. 2022, 179)

The main difference between the right to digital integrity and the right to data protection is that it is aimed not only at protecting data, but also at protecting the person behind that data, that is, their dignity, autonomy, and the inviolability of their physical and mental integrity in the digital world. Accordingly, the concept of digital integrity is becoming increasingly recognized and is gradually being consolidated in the constitutions of various Swiss cantons, while discussions continue on the inclusion of this fundamental right in the Swiss Federal Constitution (Fratini 2024; Roussel 2023; Kolbe 2023; Barbie 2023).

This study critically examines the evolving relationship between the right to personal data protection and the concept of personal integrity in the context of rapid digitalization. Although many existing sources consider these rights separately, we emphasize that digital technologies are increasingly blurring the line between them, creating new legal and ethical problems (Solove 2008; Samuelson 2000). Our contribution is to identify specific gaps in the current legal framework and propose a comprehensive approach that considers data protection not only as a matter of privacy, but also as an important component of personal integrity. This will facilitate a more thorough understanding of the existing legal situation in this area of EU law (*de lege lata*), as well as propose appropriate legal mechanisms capable of protecting a person and his/her data in the context of emerging digital technologies (such as artificial intelligence (AI), big data, the Internet of Things (IoT), biometric systems, and blockchain, etc.) (*de lege ferenda*). We believe that the right to digital integrity can play a fundamental role in addressing this issue, as it can meet the growing need to protect the autonomy, dignity, and personal data of individuals in a digital environment (Rochel 2021). The fact is that, unlike the commercialization of personal data, which is often driven by commercial and marketing interests, the right to digital privacy

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Law, University of Neuchâtel, 21 February 2020, https://publications-droit.ch/files/colloques/programme/2020-02-21-integrite-numerique-a4.pdf (accessed: February 2025).

prioritizes human dignity and individuality, much like the principles underlying bioethics (Dickens 2020; Papalois, Papalois, 2020; Saed 2011; Rothhaar 2010). Just as bioethics insists on respecting the physical integrity and autonomy of individuals beyond scientific or economic benefits, digital integrity requires that people be treated as holistic beings, not just as data sources or marketing tools, ensuring that their digital selves are protected from exploitation, manipulation, and reduced commercial value (Vardanyan et al. 2022).

New technologies such as artificial intelligence (AI), the Internet of Things (IoT), big data, and biometric systems are blurring the boundaries between the physical and digital selves (Adib Bin Rashid, Ashfakul Karim Kausik, MD 2024). Since these systems collect, analyze, and process personal data, often without full transparency or individual control, traditional data protection rights (such as consent or data minimization) are no longer sufficient. The right to digital integrity goes beyond data protection: it recognizes that a person's digital presence is an extension of their identity and physical integrity in the digital world (Guillaume, Mahon 2021). This implies the right to control how your data is used, how your digital self is formed, and how to be protected from manipulation, surveillance, and digital exploitation. Thus, we believe that the inclusion of the principle of digital integrity in the future legal framework (*de lege ferenda*) can provide a more human-centered approach to technology management that is consistent with EU traditions in the field of fundamental rights, in particular the EU Charter of Fundamental Rights (Articles 1, 7, and 8).

It should be noted that the legal analysis of risks and challenges arising from the development of digital technologies, such as, for example, algorithm bias, large-scale data profiling, and automated decision-making, is crucial not only from a philosophical and theoretical point of view, but also from a regulatory and practical point of view. These technologies exacerbate issues related to fairness, transparency and accountability, which are difficult to properly address in current EU data protection legislation (Reis et al. 2024, 74). For example, algorithm bias can lead to discriminatory results that bypass traditional legal protection mechanisms, while automated solutions often lack transparency to provide meaningful user consent or challenge it. Despite the increased attention of scientists, the existing legal literature does not sufficiently cover these specific gaps in legislation, especially with regard to the relationship between data protection and personal integrity (Ben-Shahar, Porat 2021). Therefore, we argue that there is an urgent need for focused legal research to develop more subtle and effective mechanisms that could keep pace with technological progress and protect fundamental rights in practice.

At the same time, the problem of ensuring a high level of personal data protection, as well as effective control over bodily data and choice has recently gained renewed relevance in the context of the EU's efforts for digital sovereignty. This concept refers to the European Union's ability to operate independently in the digital sphere, that is, to develop and control its own digital infrastructure,

technologies, data and services in accordance with European values, interests and laws, without excessive dependence on foreign (especially non-EU) technologies or platforms. According to the definition of the President of the European Commission, digital sovereignty is the main goal of the EU Digital Decade (Ryan et al. 2024, 4). The protection of fundamental rights and European values is one of the three key features of this concept, used both as a justification for the pursuit of digital sovereignty and as one of its goals in the context of the EU (Roberts et. al. 2021, 4). The digital sovereignty of the person, which refers to the person's capacity and right to exercise full control over their personal digital data, identity, and online interactions, ensuring autonomy, privacy, and protection from undue interference or exploitation in the digital environment, is one of the three "levels" of the concept of digital sovereignty (Fratini, Hine, Novelli 2024). Thus, the success of the Digital Decade project also depends on ensuring a high level of personal data protection and personal sovereignty (Gábriš, Hamuľák 2021, 112). In our opinion, this represents a fundamental "layer" within the broader concept of digital sovereignty, emphasizing the empowerment of individuals to manage their digital presence in accordance with their rights and values.

The development of digital technologies leads to the formation of "a network of human bodies, whose integrity and functionality rely (...) on the Internet and related technologies, such as artificial intelligence" (Matwyshyn 2019, 77). This development also requires understanding the mechanisms for protecting both data and personal integrity, since the Internet almost always collects and processes special categories of data that do not "lose" connection with the physicality of the person. For example, after a photo or video is taken, they can be copied, published, and saved anywhere without the physical presence of a person. The image exists separately from the human body and can be used for other purposes without its control. In addition, wearable medical devices (such as fitness trackers, smart watches, or continuous glucose meters) continuously collect data on heart rate, sleep patterns, or blood sugar levels (Mansour, Darweesh et al. 2024). This data is processed using cloud platforms and artificial intelligence (AI) algorithms that not only monitor health conditions, but can also be shared with insurers, employers, or other platforms. Similarly, neural implants and brain-computer interfaces (BCIs) used for medical or experimental purposes collect neural activity data that can potentially reveal emotional or cognitive states (Shumao, Yang et al. 2024). Even artificial intelligence systems for emotion recognition, which are now used in education, hiring, and law enforcement, interpret facial microexpressions to determine mental state, blurring the line between physical presence and data extraction. All these examples show that such data does not "lose" its connection with a person after digitization. Rather, they empower the body in the digital space by raising fundamental questions about bodily integrity, autonomy, and ownership of the data obtained about a person's physical or mental state. Although images are personal data because they identify individuals, they are generally not classified

as special categories of data according to the GDPR (Article 9). Special categories of data, such as biometric information, medical records, genetic data, or data revealing racial or ethnic origin, are considered more confidential because they can directly affect a person's fundamental rights and freedoms (Quinn, Malgieri 2022). These types of data (for example, the same health data) are increasingly being collected using digital devices such as wearable medical technologies, neural implants, and biometric systems that track and record deeply personal aspects of the body and mind. The processing of such data requires a higher level of legal protection due to its close relationship with the physical integrity and autonomy of the individual (article 9), which raises complex issues of consent, control and possession that go beyond traditional data privacy considerations.

Despite the fact that the GDPR has two goals, the CJEU has already expressed a position that prioritises interpretating the GDPR provisions in light of protecting the rights of the person over the free flow of data (Vardanyan, Kocharyan 2022, 96). However, a detailed examination of this legal document still indicates some uncertainties that may unlawfully expand the scope of the GDPR and make it possible to recognise it as, according to N. Purtova "the law of everything" (Purtova 2018, 18), including the area that traditionally refers to the right of personal integrity, such as physical and psychological (mental) autonomy, which have historically been considered outside the scope of data protection (Ligthart 2025). This adds to the problematic issue of the relationship between the right to personal integrity and the right to personal data protection.

In this context, it is especially necessary to emphasise the uncertainty of such concepts as "data" and "information," which only increases the problem of "data" and "body" correlation (Lu, Zhou, Li 2024). In addition to these questions/ concerns, it is necessary to consider the ownership of devices imported into the human body as well the use of artificial intelligence (AI), which increases the volume, variety and speed of obtaining information about every aspect of human life and highlights privacy as a global public policy issue remain unresolved. Although biointegrated devices (such as neural implants or subcutaneous chips) have not yet become widespread, their development is accelerating (Abyzova, Dogadina et al. 2023). As they begin to blur the line between man and machine, they raise fundamental questions about the autonomy of the body and the ownership of data that require active legal and ethical consideration. In this regard, the purpose of this article is to examine the legal consequences of this blurring of the boundaries between the body and data, analyzing whether the current EU data protection system sufficiently guarantees personal integrity in a digital context and whether the emerging concept of digital integrity can provide a more adequate legal response.

3. THE DEVELOPMENT OF THE CONCEPT OF THE BODY AND ITS RELATION TO THE LEGAL PROTECTION OF PERSONAL INTEGRITY

If a person's physical existence is protected by the fundamental rights to prevent any violation of their integrity, then the emergence of the category of "digital person" should lead to the emergence and recognition of rights that should also protect their integrity in the digital world. Indeed, as R. Clarke, D.J. Solove and L. Floridi note, the development of information technology has led to the emergence of a "digital person" (Clarke 1994, 77–92; Solove 2004, 296; Floridi 2009, 153–158). With the help of these technologies, a personal identity is "assembled" from his/her "digital parts." Moreover, the formula "one person – one identity" no longer reflects reality, as personal identity becomes dispersed, multiple, ubiquitous, decentralised and eternal. Therefore, we must agree with the opinion of those researchers who point out that if people live in a digital format, it should be borne in mind that their integrity extends to this dimension (Roussel 2020). We believe that the existence of a digital person and digital life presupposes the expansion of the legal coordinates of the individual and highlights the need to develop more comprehensive mechanisms for protecting the individual in the digital world.

It is known that the human body has almost always been an unavoidable guideline of legal norms, and mainly based on the naturalistic concept of the body, this suggests a clear distinction between the body and the thing (Shilling 2012, 59). For example, one can see that many fundamental rights, such as the right to life, physical integrity, personal autonomy, freedom from torture, and the right to privacy, are directly or indirectly based on the protection of the body or derive from it (Fertsman 2022). This central role of the body highlights its unique legal and ethical status, distinguishing it from other objects or things. In other words, according to the naturalistic concept, the human body is considered not as a simple thing, but as a unique entity requiring special legal consideration. However, the naturalistic concept of the body as a whole, distinct from the environment, is deconstructed – mainly in modern postmodern philosophy and critical legal studies. For example, postmodern scholars challenge this traditional view to emphasize how the body is intertwined with social, cultural, and technological contexts (Russo 2019). This deconstruction aims to question the rigid dualism of mind, body, and environment and better explain the changing, interconnected, and dynamic nature of incarnation. The goal is to provide a deeper understanding of identity, autonomy, and integrity, especially given that advances in digital and biointegrated technologies are blurring the boundaries between human and machine, as well as raising new ethical and legal issues that a naturalistic concept cannot fully solve.

Bert-Jaap Koops argues that the traditional differences between physical and non-physical methods of impact on human body (for example, physical bullying

or cyberbullying), between human bodies and things, and between the external and internal parts of the human body, must be rethought (Koops 2014, 6). In particular, traditionally the distinction between the outer and inner parts of the human body was based on visibility and accessibility. For example, external parts (such as skin, limbs, or facial features) are visible and interact directly with the environment, while internal parts (such as organs or tissues) are hidden inside the body and are usually protected by its external structure. This separation has influenced legal and ethical frameworks, such as the distinction between surface contact and invasive medical procedures. However, technological developments such as biointegrated devices, neural implants, and advanced surveillance are blurring this line, making it increasingly difficult to clearly distinguish between what is considered "external" and "internal." These blurred boundaries challenge existing legal categories and require a rethink of the concept of physical integrity in the digital age. They all stem from the assumption that the human "body" is physically separated from the environment and represents a convenient concept of marking boundaries, allowing distinguishing levels of intervention (for example, skin touching (physical contact in public or by government officials), body scanning at airports (millimeter-wave scanners), facial recognition cameras in public places, biometric data collection (for example, fingerprint scanning, vaccination or injections, etc.).

Due to the deconstruction of naturalistic theory, some scholars are calling for a rethink of the moral and legal boundaries of human personality in legal terms (Rich et al. 2012, 1–6). The issue of body protection is closely linked to discussions around the scope of the right to personal integrity and one of the most sensitive rights to the choice of body concept (Viens 2013; Bublitz 2022; von Arnauld, von der Decken, Susi 2020). Therefore, it is not surprising that along with the problematisation of the naturalistic concept, some scholars even advise abandoning the right to personal integrity (Viens 2020, 363–377). In our opinion, this approach is not necessarily related to the sensitivity of the right itself, but also to concerns about its conceptual vagueness, overlap with other rights, and its limited usefulness in solving complex problems of modern biomedicine and digital technologies. In this scientific contribution, we will briefly consider this right in the context of the relationship between its scope and the boundaries of the physical body, in order to identify the potential for possible application to the protection of digital body data.

From the very beginning of the analysis, the ambiguity of this relationship is revealed, as the right to personal (bodily) integrity protects the embodied personality, rather than the body viewed solely as a physical object. To be clear, legal scholars support this interpretation, recognizing bodily integrity as a means of protecting the individual, and not just its shell (Bublitz 2014; Mantelero 2020). In particular, if we turn to the legal experience of Germany, we will see the following: the German Federal Court (*Bundesgerichtshof*) ruled that sperm extracted

from the body and frozen for fertilization can be considered as a part of the human body, because it is protected as not a material substance, but the existence and formation of a personthat materialises in the human body (Bundesgerichtsh of 09.11.1993 – VI ZR 62/93, BGHZ 124, 52; Neue Juristische Wochenschrift 1994, 127). At the same time, in the legal practice of the United States, beatings do not require actual touching of the human body and contact with clothing or objects closely related to the human body is sufficient.

> The 'essence of the plaintiff grievance consists in the offence to the dignity in the (…) invasion of the inviolability of the person and not in any physical harm done to his body, so it is not necessary that plaintiffs actual body be disturbed (…) contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person. (Judgment of the Supreme Court of Texas, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 1967)

In our opinion, the above-mentioned judicial practice illustrates the most important principle: physical integrity is not limited to protecting the body as a simple physical object, but extends to protecting the personality and dignity that the body expresses and embodies. These interpretations show that the law protects the body to the extent that it represents a person, including individuality, autonomy, and personal dignity. This broader legal understanding of bodily integrity recognizes that the body functions as a vessel or expression of personality, not just as a biological entity. This conceptual shift is directly relevant to the topic of this article, which examines how the traditional legal framework regarding physical integrity is being threatened by digital technologies that increasingly expand data and present the body in new forms. In particular, in the digital age, biometric data, wearable sensors, neural implants, and virtual avatars act as modern additions to the body and personality. If legal remedies already recognize that physical integrity is linked to personality, then it follows that these remedies should logically extend to digital representations and data flows that embody or reveal aspects of personality. Thus, this expanded understanding of bodily integrity supports the main statement of the article: legal systems must evolve in such a way as to eliminate blurred boundaries between physical bodies and digital personalities, ensuring the protection of not only the physical body, but also its digital manifestations. We argue that this shift is necessary in an era when the physical and digital are becoming increasingly inseparable. If legal systems already recognize that the body is more than just matter, then it is logical and necessary to extend measures to protect physical integrity to the digital sphere, where personality is increasingly represented and expressed through data. Based on this, it logically follows that the protection provided to the body should also cover its digital manifestations – biometric data, avatars, neural implants – which increasingly express and shape personality and identity.

In addition, in the modern digital environment, such forms of close communication and representation are realized through biometric identifiers, avatars, neural interfaces, and continuous data flows – all of which reflect, express, and increasingly shape a person's identity. These digital functions are not neutral nor external tools; they are deeply ingrained in how people present themselves, make decisions, communicate, and how they are perceived by others. For example, biometric data such as facial recognition or fingerprint scanning is not only unique to a particular person, but can also be used to track, classify, or manipulate that person in various contexts. Virtual avatars in games, workspaces, or on social platforms often act as intermediaries for human presence and activity. As these digital forms become increasingly integrated into our lives, their disruption or misuse can have serious consequences for autonomy, dignity, and identity, comparable to physical impairments.

Moreover, when considering violations of Article 3 of the European Convention on Human Rights (hereinafter – "Convention" or "ECHR"), the case law of the ECtHR also establishes the possibility of such violations of the bodily integrity even without direct contact with the human body. This allows for the possibility that the right to personal (bodily) integrity may not fully correspond to the volume of a biological (physical) body (for example, see the judgment of the European Court of Human Rights of 22 September 2020, *Vasilyev and Others v. Russia* (application no. 38891/08)); the judgment of the European Court of Human Rights of 10 January 2012, *Harutyunyan v. Russia* (application No. 48977/09) and the Judgment of the European Court of Human Rights of 10 October 2001, *Price v. The United Kingdom* (Application No. 33394/96). In other words, the judicial practice of the ECtHR interprets the scope of the right to personal integrity in such a way that it does not coincide with the naturalistic concept of the body, thereby indicating the possibility of protecting not only the bodily components of a person. This, in turn, becomes the basis for the emergence of new concepts (such as, for example, the concept of the body as the embodied human subjectivity or the concept of extended subjectivity) and difficulties in understanding human physicality and its boundaries (such as, for example, defining the exact boundaries between physical and digital selves), as well as their legal protection, which will be discussed in more detail below.

4. THE CONCEPT OF THE BODY AS THE EMBODIED HUMAN SUBJECTIVITY

One of the concepts of the human body in the literature is the concept of embodied subjectivity (Halák 2016, 26–40). According to these phenomenological ideas, human bodies are not just material objects, but living bodies, places of subjective experience and a peculiar way of existence in the world (Herring, Wall 2017, 566–588). For clarity, within the framework of Cartesian dualism, René

Descartes, as is known, separated the mind (*res cogitans*) and the body (*res extensa*) – the body was considered as an extended mechanical object separate from the conscious mind. From this point of view, the body was often reduced to something instrumental rather than essential to the personality (Wee, Pelczar 2008). As opposed to that, the integrity of an individual is understood as the natural order of their life, formed from everything they have experienced, and which can be described in the form of a human life story. This approach allows us to perceive an individual without detaching them from their life reality, taking into account their personal experience, self-understanding, and self-identification, as well as the totality of their actions, will, principles, views, and life positions. In other words, the concept of personal (bodily) integrity connects a person's subjective experiences with their existence.

Considering the problems of defining human physicality, modern interdisciplinary studies identify at least three important subjective elements: "body image," "body schema," and "body model" (Balogh 2014, 7; Roel Lesur et al. 2018, 94–105). In general, the problem of defining "human physicality" lies in the complexity of the body as a biological and empirical phenomenon (Ibragimova, 2021). The subjective elements – body image, body diagram, and body model – show that physicality is not only flesh and bones, but also how these flesh and bones are perceived, used, and understood by oneself and others (Sattin, Parma et al. 2023). People have a conscious idea of their body, as well as beliefs, feelings, and attitudes about it. Moreover, bodily sensations are spatially structured and experienced as localised in the human body (Skrzypulec 2023, 142). This sphere is called the somatosensory system, and it forms the phenomenological boundary of the human body (De Vignemont 2007, 428). Moreover, this boundary can be expanded to also cover external objects. The variety of body images with different degrees of plasticity is connected with a diverse human experience (De Vignemont, Farne 2010, 203–211). We think that the difference in experience leads to different assessments as to whether one or the other given is a part of their body. This, in turn, leads to a perhaps surprising realisation: the postmodern views that suggest that the boundaries of the body are not fixed are indeed true.

One might reasonably ask, what should the law do about this? The law should go beyond rigid, purely physical definitions of the body and include an understanding that the boundaries of the body can extend to tools, technologies, or digital extensions (the "body model" includes external objects as part of a person's bodily experience). This means that legal protection may be required not only for the physical body, but also for related digital or prosthetic devices. For example, if someone perceives an external object (for example, a prosthetic limb, a virtual avatar, or biometric data) as a part of their body, the law must protect its autonomy and the rights associated with these additions – for example, to control the collection, storage or use of biometric or emotional data.

Despite the fact that the GDPR represents a significant step in regulating the protection of personal data, it remains fundamentally limited in solving complex problems related to the digitization of personal integrity. The emphasis on data regulation, transparency, and consent often reduces personal information to simple "content" that needs to be managed, rather than taking into account the embodied and subjective nature of the human person.

Moreover, GDPR mechanisms tend to focus on compliance with legal requirements and risk management, which many companies use more as a marketing tool than as a real basis for protecting the autonomy and dignity of individuals. In practice, GDPR can facilitate the commercialization of biometric data under the guise of privacy protection, allowing market-oriented actors to exploit "digital integrity" without fully considering its profound implications for physical autonomy and psychological experience. Consequently, although the GDPR provides important protections, it does not take into account the fluid, technologically driven boundaries between the body and the individual, which requires new legal approaches that more adequately recognize and protect the expanded, embodied nature of identity in the digital age. In other words, the law should expand its understanding of physical integrity to include the subjective, dynamic, and technologically enhanced nature of the body, creating protections that support autonomy, dignity, and privacy in both the physical and digital realms.

Indeed, the human body currently has many boundaries, such as, for example:

- *physical (biological)* (meaning the biological structures of the body – skin, limbs, and internal organs – which traditionally defines where a person "begins" and "ends"),
- *mental* (encompassing the psychological and emotional aspects of bodily experience, such as internal perception of pain, anxiety, or body image disorders such as dysphoria that affect how a person relates to their own body – Picasso's ear),
- *social* (shaped by cultural, gender, and racial norms that dictate how to handle the body, discipline it, or make it visible in society – for example, through a dress code, surveillance, or social expectations regarding appearance),
- *technological* (they appear when external devices are perceived as extensions of the body, such as prosthetic limbs, pacemakers, wearable health monitoring devices that blur the line between a person and a machine),
- *digital* (they are formed, for example, using, biometric profiles, facial recognition recordings, digital avatars, or emotion tracking algorithms that abstract and recreate physical identity in digital systems, often without full awareness or control of the subject).

They all reflect different aspects of our body's perception, representation, and regulation. Taken together, these intersecting and changing boundaries show

that the body is no longer a fixed, purely biological unit, but a dynamic and multifaceted construct shaped by life experience, technology, and social context.

Based on this idea, Jonathan Herring and Jesse Wall justify the right to personal integrity as the basis of subjectivity or as a point of integration between subjectivity and objectivity (Herring, Wall 2017, 566–588). What a person goes through in their body and daily life really matters to their overall life experience. Therefore, the boundary between what is captured by bodily integrity and what is not is determined not by objective and physiological facts, but by whether the bodily component is a point of integration of subjectivity and objectivity of a person (Herring, Wall 2017, 566–588). In practice, the definition of this point of integration includes both subjective understanding (personal stories, life experiences) and objective recognition (legal, medical or social framework). For example, with gender dysphoria, the biological body may come into conflict with its inner sense of self. In this case, bodily integrity is not only the physical body, but also how it supports or undermines a person's subjectivity. With the advent of prosthetics or wearable technology, the boundaries of the body are expanding. In our opinion, a device is not "just a tool": it becomes part of how a person lives, moves, and communicates with others. It also combines subjective usage and objective form.

Stephen Hawking's life is a prime example of how the integrity of the body goes far beyond the physical or biological form. Hawking was diagnosed with ALS, and he gradually lost almost complete control of his muscles, but his personality, activity, and intellectual presence were preserved and even enhanced by technical means. His communication, mobility, and interaction with the outside world depended on devices such as a speech-generating computer and a wheelchair, which became integral parts of his body. These technologies were not just external tools; they were part of how he perceived the world (subjectivity) and how the world perceived and interacted with him (objectivity). Hawking's case shows that the boundaries of the body are not fixed on the skin, but can be expanded, revised and integrated through life experience and external mediation. Thus, from the point of view of Herring and Wall, his bodily integrity was not limited to his biological state, but included technological systems that supported his autonomy and identity. To deny the role of these technologies in defining his personality would be to ignore the point of contact between his subjective experience and the objective reality of his existence.

At the same time, the applicable concept of subjectivity remains uncertain, but the conclusion remains clear: the right to personal (bodily) integrity protects human subjectivity. But the following question arises: what are the limits of such subjectivity? The fact is that the existing concepts of personal (bodily) integrity do not take into account all new technological possibilities that are beginning to become an integral part of the human body. At the same time, the applicable concept of subjectivity remains uncertain, but one conclusion is clear:

the right to personal (bodily) integrity has historically served as a guarantee of human subjectivity. However, this traditional concept may be too restrictive at the moment. As new technologies are increasingly integrated with the human body – through biometrics, wearable devices, neural interfaces, and other forms of digital embodiment – the boundaries of subjectivity are expanding beyond the purely physical. An important question arises: what are the limits of such subjectivity today? The existing legal concepts of physical integrity have not yet fully taken into account these technological extensions of personality, which underlines the need to revise or expand the scope of the concept of personal integrity in accordance with modern realities.

At the same time, the same Article 3 of the Charter on Fundamental Rights (CFR) does not fully correspond to the realities of the digital world, which, in turn, poses new challenges to EU law (Vardanyan et al. 2024). Although Article 3 of the Charter protects the right to personal integrity, especially in medical and biological contexts, it still focuses on the physical body and does not explicitly address the forms of intrusion, manipulation or harm that occur in the digital environment. As digital technologies increasingly mediate and expand human identity through biometric data, digital profiles, and artificial intelligence-generated representations, the scope of personal integrity must expand to include the digital dimension of personality. The current legal framework lacks adequate tools to address issues such as digital identity theft, document forgery, unauthorized biometric surveillance, and emotional or psychological harm caused by digital means, phenomena that challenge traditional notions of physical and mental integrity.

Under these conditions, modern technological changes require an expanded understanding of the concept of "physicality." However, it should be noted that the term "physicality" is not a clearly defined legal concept in EU law or judicial practice. It is more often used in philosophical, sociological, or bioethical discourse to denote the embodied, material dimension of human existence. In the legal context, especially in EU legislation on fundamental rights (for example, the Charter of Fundamental Rights), the focus is most often on "physical integrity." This is due to the fact that the introduction of digital technologies is already calling into question traditional approaches to bodily integrity, and the transition from a biological body to an expanded (technologically improved) body opens up new ethical and legal issues that require legal reflection and adaptation. For example, brain-computer interfaces (such as Elon Musk's Neuralink) blur the line between thinking and digital communication, raising questions about the sanctity of mental life and consent (Lavazza, Balconi et. al. 2025; Burwell, Sample et. al. 2017). Wearable medical devices (such as insulin pumps or heart monitors connected to the Internet) constantly collect and transmit biometric data, making the body partially dependent on external, potentially vulnerable digital systems. Prosthetic limbs integrated with artificial intelligence or controlled by neural

signals challenge generally accepted definitions of what constitutes a "body" for legal protection purposes. Even microchip implants used for identification or access control are increasingly combining the physical and digital selves, raising concerns about surveillance, autonomy, and the body's freedom of action (Maras, Miranda 2023). These changes suggest that the legal framework should be adapted to ensure the physical integrity of not only the biological body, but also its digital and technological extensions.

5. EXTENDED HUMAN SUBJECTIVITY: THE HIERARCHY OF OFFLINE/ONLINE REALITIES

In a broad sense, personal (bodily) integrity can be seen as the right to self-determination beyond our own physical boundaries. As an argument, one could argue that bullying someone online is just as harmful as bullying offline, since threats to physical security become the basis for the illegal use of personal data. For example, if we look at the example of pornography without consent or "revenge porn," the victims' experiences coincide with those of actual sexual violence (Hearn, Hall 2022; Patella-Ray 2018, 786–791). That is, victims' own descriptions of harm tend to focus on issues of physical violence and loss of self-determination. In this context, we would like to mention the case of *Söderman v. Sweden*, in which the ECtHR ruled that intrusive photography constitutes a violation of personal integrity. In other cases concerning photographs, the Court stated that the image of a person is one of the main attributes of their personality, since it reveals the distinctive characteristics of a person and distinguishes them from their kind (Judgment of the European Court of Human Rights of November 12, 2013, *Söderman v. Sweden,* no. 5786/08).[2]

At the same time, the introduction of information technologies combined with biometric systems to identify individuals whose personal integrity is "digitised" (i.e., transformed into a digital form, where parts of a person's physical, emotional, or psychological self are represented, stored, processed, and often used by digital systems), deprives people of the opportunity to selectively represent themselves and makes it difficult to protect their human rights, especially in a situation where "digitised integrity" becomes the object of market-oriented powers. To be clear, "digitized integrity" is a state in which a person's physical, mental, and identity-related characteristics are captured, represented, and digitally processed using technologies such as biometric systems, health trackers, artificial

[2] More information on the case law concerning the right to the protection of one's image can be found here: Right to the protection of one's image, Press Unit, November 2023, https://www.echr.coe.int/documents/d/echr/FS_Own_image_ENG#:~:text=%E2%80%9C%5BA%5D%20person%E2%80%99s%20image%20constitutes%20one%20of%20the%20chief,one%20of%20the%20essential%20components%20of%20personal%20development (accessed: February, 2025).

intelligence for emotion recognition, or brain-computer interfaces. This means that key aspects of personal integrity traditionally associated with the physical self are now becoming apparent, indirect, and potentially manipulated in the digital environment, creating new challenges for autonomy, dignity, and legal protection.

Instead of perceiving the images of a person as "content," we tend to view them more as "digital prosthetics," i.e. extensions of ourselves, our will, and our activities. We should understand that they ("digital prostheses") not only represent us, but also personify us. That is why A.R. Stone notes that our close relationship with new technologies that mediate our interactions forces us to rethink the boundaries of where our selves begin and end (Stone 1994, 14). Stone even describes this inclusion of objects in personality as "split subjects." For clarity, the term "split subjects" refers to the fragmentation of the self that occurs when individuals are mediated, expanded, or represented through technology. In this context, the "subject" (that is, the personality) is no longer a single, integral entity, but rather is divided into various representations and technological extensions what we call "digital prostheses." Similarly, the *Cyborg Manifesto* states that the "bodies are maps of power and identity," whose blurred boundaries represent "a kind of disassembled and reassembled, postmodern collective and personal self" (Haraway 1991, 163). Does this make us rethink where our personality begins and ends? Someone might ask, what does this mean for the law and the protection of human rights? The answer is that traditionally the law protects an "individual" – a physical being with bodily integrity, identity, and rights. But when personal integrity becomes fragmented digitally, this protection becomes insufficient. In this framework, the law should begin to consider digital images (for example, biometric profiles, emotional states, digital doubles, avatars) not just as "data," but as a legal extension of personality.

As S. Casini points out: "Our bodies are scanned, probed, imaged, sampled, and transformed into data by clinicians and technologists" (Casini 2021, 312). We believe that the problem lies deep down – in the ontological shift in the concept of the body, which is the result of the development of various technologies that conceptually challenge the difference between body, data and information. This in turn blurs the clear line between biology and technology. As Michio Kaku correctly points out, even after people die, their body can be revived from their genome, and their consciousness can be restored from their connectome. For clarity, a connectome is a complete map of all the neural connections in the brain, something like a detailed diagram of how neurons connect to each other. It is the structural basis of the brain's functioning and, possibly, the encoding of thoughts, memories, and personality. The connectome concept is well known in neuroscience. There are even major research projects, such as the Human Connectome project, aimed at mapping these connections in detail. However, this part is highly speculative and is currently science fiction. Although some theorists (for example, Michio Kaku, Ray Kurzweil, and others from transhumanist

circles) suggest that one day it may be possible to reconstruct the mind using a connectome, this is far beyond modern possibilities, but it cannot be ruled out. The possibility that we can still continue to live as information pushes us to the conclusion that we are nothing but information (Kaku 2024).

At the same time, various human enhancement (HE) projects serve as another reason for revising the ontology of the human body (Lawrence 2013, 254–278). The modern understanding of the human body is moving away from the idea of its staticicity and immutability, which characterised it earlier. For example, this is confirmed by modern research in the field of posthumanism and feminist theory. In particular, some scholars (Shildrick 2002; Braidotti 2013) note that modern approaches increasingly challenge earlier biomedical or philosophical models, which typically viewed the human body as fixed, biologically determined, or unchangeable. These new views reflect a shift towards understanding the body as mobile, changeable, and closely related to technology. Instead, the human body is already seen as an object that can be modified and improved using various technologies and devices.

In particular, new technologies make it possible to overcome the physical or mental limitations of the human body, temporarily or permanently expanding its abilities and characteristics. The accumulation of human biological samples in biobanks and the growing adoption of biometric technologies are also "informatising" the human body by converting its characteristics into processed digital data. In turn, the need for identification/verification of individuals is the reason for the expansion of the introduction of biometric technologies, which have a clear overall effect: the transformation of certain aspects of physical existence into electronic data and information amenable to digital processing. All the developments we have mentioned undoubtedly challenge the conceptual separation between the human body, on the one hand, and information about it, on the other. In this regard, Irma van der Ploeg convincingly suggests that this should be seen as something deeper than creating another example of collecting "personal information," as it is most often done (Van Der Ploeg 2005, 57–74). Rather, the human body is involved in the process of co-evolution with technology, in particular with information technology. In these conditions, a new conceptualisation of bodily existence and a new ontology of the body appears: the body as information (Van Der Ploeg 2005, 57–74).

In the digital age, people face various forms of online violations or "digital intrusions," such as unauthorized data collection, surveillance, or manipulation that challenge traditional notions of personal boundaries. These digital intrusions can affect not only privacy, but also a person's sense of physical integrity, as they blur the boundaries between the physical and the digital self. While respect for personal (bodily) integrity is well established in the offline world, similar protections are often lacking in the digital environment. Because the physical and sensory limitations that protect us offline are difficult to replicate online,

the emotional and psychological impact of digital intrusions is often overlooked. Therefore, it is important to develop a new balanced approach that guarantees personal integrity in both the physical and digital spheres.

Nevertheless, one of the potential ways to understand the impact of digital interference still remains the prism of personal (bodily) integrity. And while respect for personal (bodily) integrity may have become the norm in our physical (offline) world, the digital sphere has not followed this course at all. Because our physical boundaries and sensory processes are so difficult to transfer to the digital realm, the connection between everyday online intrusions and our emotional well-being is often ignored, which requires a new balanced approach highlighting significant gaps in existing legal remedies. This study argues that current laws should evolve in such a way as to recognize and eliminate this intangible but real harm, while ensuring adequate protection of personal integrity, including emotional and psychological aspects, in the digital age.

6. THE RELATIONSHIP BETWEEN PHYSICALITY AND HUMAN DATA: ARE WE OUR DATA?

In her article for *Deep Dives*, Sara Wong says that our primary language for conceptualising data is privacy, which treats our personal information as separate from us, as a piece of property that can be measured, discussed, sold, and reused (Wong 2020). But in fact, she argues, data does not belong to us in the same way as our physical objects (for example, a house or a car): data is us. The researcher emphasises: "It is like a quantum particle that can exist in two places at the same time, as both a representation of who you are and also a commodity that can be sold" (Wong 2020). Moreover, S. Wong also emphasises that in our age, individuality is mediated by digital technologies (Wong 2020). One can say that because of this, the digital footprints of our bodies are no longer just content: they are an extension of our free will. Any intrusion into this integrity (and therefore into our sense of wholeness) can be devastating, regardless of whether it happens to our physical bodies or our "data bodies."

In this regard, we argue that the protection of identity in the digital world is more important than the protection of personal data *per se*. We believe that although personal data protection laws (including the GDPR) are primarily aimed at controlling the collection, storage, and use of individual data, they often overlook the broader and deeper implications of how this data shapes, constructs, and sometimes distorts a person's digital identity. Identity includes not only individual data, but also the narrative, personality, and integrity of the person behind that data (Hnit, Almanna 2025). Thus, in our opinion, protecting the individual means protecting individuals from manipulation, distortion of information, and intrusions that affect their autonomy, dignity, and social

existence in the digital environment. This shift from data protection to personal data protection requires the creation of a legal framework that takes into account the dynamic, interconnected and embodied nature of personal data, ensuring that people retain control over how their digital selves are formed, perceived and used.

The development of modern digital technologies enables creating a person's identity from their "digital parts" based on evolving marketing practices, regardless of their actions or consent. In the conditions of opaque data processing, the unlimited possibility of data controllers in obtaining such data using the "consent myth" means consent to profiling, on the one hand, and consent to fragmentation of the digital self, on the other (Vardanyan et al. 2022). It should be noted that the idea that people consciously consent to the collection and use of their personal data, especially in a digital environment, is increasingly being criticized as a myth. Theoretically, consent is the cornerstone of the GDPR, designed to ensure individual autonomy and control (Article 6). However, in practice, this is often not a genuine expression of conscious will. First, most consent mechanisms are built into strict legal privacy rules that are difficult or impossible for ordinary users to understand. Research consistently shows that users do not read these rules (for example, privacy policies, cookie policies, terms and conditions available on the website, etc.), and even when they do, it is difficult for them to understand the consequences of adopting complex and opaque data processing methods (Solove 2013; Nissenbaum 2010). Secondly, consent is usually presented in a binary "take it or not take it" format, for example, in the form of banners with cookies or terms of service, which do not provide a real choice. In many cases, users must consent to extensive data processing in order to access basic services, which makes consent compulsory rather than voluntary. This is especially problematic when there is an asymmetry of power between data subjects and large platforms (Padden, Öjehag-Pettersson 2021). Third, data processing systems are opaque and constantly evolving, especially with the use of artificial intelligence and algorithmic profiling. Users often have no real idea of how their data will be used, combined, or what conclusions will be drawn from it, making it impossible to provide meaningful, informed consent (Bergemann 2018; Gefenas, Lekstutiene et al. 2022). This includes data used for profiling, behavioral targeting, or emotional surveillance – processes that remain invisible to the user. Finally, even when consent is technically obtained, it often serves as a legal shield for data controllers rather than a mechanism to protect users. This instrumental use of consent supports what may be called as the "consent myth" – the illusion that users have control, while in fact they are subjected to widespread surveillance and manipulation under the guise of choice (Vardanyan et al. 2022; Zuboff 2019).

At the same time, the same digital technologies have given people the opportunity to project their identity in the digital space, for example, through the right to be forgotten (de Andrade 2012, 65–97). This right allows a person to develop self-images containing elements of their personality, as well as enter

into specific interactions with other people in the framework of another aspect of human existence in the digital world. As one can see, personal data became the "building blocks" of a person's digital life, as well as integral elements of their digital identity (Lupton 2018, 339–354). We believe that ensuring the legal protection of only personal data without proper protection of the person themselves, is an incorrect approach. And we argue that proper protection involves moving from a narrow approach to a more holistic legal recognition of digital identity. This means not only protecting individual pieces of personal data, but also protecting the ways in which these pieces of data create and express a person's identity in the digital space. This requires a legal framework that takes into account the autonomy, dignity, and continuity of the digital self, including the rights to correct, curate, or erase part of one's digital footprint – not only to protect privacy, but also to support self-development and identity in relationships. Moreover, proper protection should also address the asymmetry of power between individuals and digital platforms (data controllers), ensuring that individuals retain meaningful control over how they are represented, profiled, or marketed in the digital environment. Ultimately, it is the person behind the data, not just the data itself, that should be at the center of legal and ethical attention.

Moreover, we argue that even if the digital identity exists beyond the biological (physical) body of the human being, it is not external to the human being itself. Today, human existence, along with physical attributes, includes digital representations of these attributes. This reflects one of the contemporary anthropological understandings associated with the human body, which has traditionally been perceived as a "container" of human identity and integrity. However, in the context of the digital world, personal data itself has become such a "container."

At the same time, the dematerialisation of the subject is not complete (Kim 2001, 87–111). In other words, a person does not completely move into another space-time dimension, but rather an extension or overlap where aspects of our identity and experience coexist with and are inseparable from our embodied physical selves. For example, Instagram and Facebook accounts often remain active even after the person's death. People can still see his/her photos, messages, posts, and memories. But this does not mean that this person has completely moved into a new digital world: online presence is just a copy or reminder of them, not of a real, living person. In this regard, the "digital" self can reflect the physical self with certain distortions, edits, and/or filters, while portable and even wearable technologies combine with or expand our physical bodies to generate continuous data related to our physical presence in the world (Kasket 2019). However, the biological body does not disappear, but feelings, consciousness, actions and will pass into the digital world. In particular, free will and subjectivity, which were previously closely related to the physical body, are now no longer limited to the body, but rather exist in the interaction of multiple media, including technological devices and mass media. Some scholars even talk about divided subjects ("dividuals")

to describe the situation (Linkenback, Muslow 2020, 323–344). This approach reflects the evolution of ideas about subjectivity and free will in the digital age, where a person's interaction with the outside world takes place not only through their physical body, but also through digital media.

As we can see, subjectivity is becoming more expanded, separating from the traditional boundaries of the body and penetrating into new digital spaces. A person begins to experience their own existence not only through their body, but also through their "digital prostheses." Thus, the subject goes beyond the concept of a "single" subject (individual), which is generally accepted in the theory of law. In practice, this means that the traditional legal understanding of a person as an individual is no longer fully applied. Today, human identity extends to various digital platforms, devices, and online interactions – what we might call "digital extensions" of personality. Because of this, the law faces new challenges in determining who is responsible for actions taken online, how to protect personal rights when personal data is fragmented, and how to ensure personal integrity in both the physical and digital worlds. Legal systems need to adapt to this reality by developing new frameworks that take into account the complex, interconnected nature of modern subjectivity, rather than relying solely on the idea of a fixed individual subject. This shift could affect everything from data protection and privacy laws to issues of responsibility in the digital world. For example, when someone posts content on social media through a shared or hacked account, it becomes difficult to determine legal responsibility – who exactly is the "person" behind this action? Similarly, a person's personal data can be scattered across multiple platforms, making it difficult to comprehensively protect their privacy and personal data. Another example is the use of avatars or digital characters in a virtual environment or online games, where the line between a real person and their digital representation is blurred, raising questions about the rights and protection of these "digital personalities" (Zimmerman, Wehler, Kaspar 2023).

Moreover, human experiences, regardless of whether they occur in digital (online) or offline space, feel like they are in a single reality, so we consider artificial dividing lines between offline and online worlds to be untenable from the point of view of common human experience. In the latter case, the division between "online" and "offline" does not fully convey our life experience: the modern world manifests itself in both analog (offline) and digital formats, and neither of them has the exclusive status of reality (Rey, Boesel 2014, 173–188). Of course, within this framework, one could ask: why do we need special rights to digital identity at all, instead of simply redefining identity? Although today the human experience does organically combine online and offline aspects into a single reality, the specific problems and risks associated with the digital environment require separate consideration. Digital identity rights exist because the ways in which personal information, its presentation, and interaction occur online are fundamentally different from offline contexts, such as the ease of

data replication, manipulation, and permanent storage beyond the user's control. Thus, rather than abandoning the concept of identity or completely combining it with autonomous identity, digital identity rights aim to address these unique challenges by providing individual protection that takes into account how identity is created, expressed, and potentially violated in the digital space. In other words, it is important to rethink identity, as well as create a legal framework that meets the new conditions and vulnerabilities that arise in the digital sphere.

Such a total interweaving of online and offline does not only mean that we cannot escape one "world" by moving to another. This also means that in our unique world, there is simply no way to avoid the influence of both one's physical body (for example, by transferring oneself to cyberspace) and digitally mediated interactions (for example, by disconnecting from the network). Within the framework of a single world, the subject (person) acts and moves towards understanding his/her being. Therefore, the formation of a person, his/her being, his/her development is impossible only offline. Otherwise, a part of a person's personality is amputated, and freedom of will is limited. This points to the concept of expanded subjectivity, which emphasises the continuity of the subject's experience, even when the person (subject) expands their freedom of action and embodiment on multiple media. All the experiences of the subject (person), regardless of how they are mediated, are always inextricably linked.

However, the idea that the experiences mediated by digital technology is also a part of "real life" still causes resistance. In particular, digital systems are perceived as dangerous because "the agency/body coupling so diligently fostered by every facet of our society is in danger of becoming irrelevant" (Stone 1994, 14). In this context, we argue that there needs to be a rethinking of subjectivity – one that recognizes the existence of a person in both physical and digital dimensions in order to be able to ensure equal treatment of all aspects of the subject (personality). The modern subject today lives in a double structure of experience, where physical and digital realities are interconnected like two sides of the same coin. According to Vardanyan et al. (2022, 170), these aspects cannot be separated, and therefore it is impossible to legally protect one of them while ignoring the other. This duality requires a legal and ethical framework in which both aspects are given equal importance. By not recognizing the digital presence of a subject as an integral part of their embodied self, legal systems risk undermining the integrity and autonomy of the individual. This is where the right to digital identity and personal integrity becomes important. This ensures that the digital self is not seen as secondary or disposable, but as an integral part of a person's life experience, equally deserving of protection (Vardanyan et al. 2022, 170). The new (digital) dimension is increasing pressure on the law, as the massive exchange of personal information that has occurred with the widespread adoption of the digital platforms, services and infrastructures, has made individuals more vulnerable.

7. CONCLUSION

The research shows that blurring the boundaries between personal (bodily) integrity and the digital self requires a review of the legal protection of the individual. Modern technologies, including biometrics, wearable devices, and digital profiles, are merging the physical body with data, creating a new ontology of "body as data" (Bygrave 2010, 1–25). The traditional right to personal (bodily) integrity is focused on protecting the physical body, but it does not take into account the threats that arise in the digital environment. Digital intrusions, digital identity theft, and data manipulation threaten individual autonomy in the same way that physical attacks do. This requires rethinking existing legal categories, including the protection of digital identity in the sphere of personal rights, and developing new legal regulation mechanisms that take into account digital physicality (for example, via digital identity wallets). To be clear, digital identity wallets can serve as secure digital tools that will allow individuals to store, manage, and share personal data and credentials (such as identity cards, driver's licenses, or medical records) in a controlled manner while maintaining privacy and control over one's integrity. In our opinion, this technical mechanism could help protect the digital self, that is, aspects of identity and integrity that currently exist as data (for example, biometric profiles, medical records from wearable devices, etc.).

The increasing convergence of digital and physical identities necessitates a reassessment of legal protections concerning bodily integrity, identity, and autonomy. Traditional legal frameworks struggle to address the emerging challenges posed by the transformation of human bodies into sources of biometric and behavioral data. While the GDPR provides a foundational level of personal data protection, its broad interpretation and limitations highlight the need for further refinement. Legal uncertainties surrounding the concepts of "data" and "information," as well as questions of ownership over embedded technologies and AI-driven identity profiling, further complicate regulatory responses.

The notion of the "body as data" underscores the need to protect digital identities not merely as personal data but as integral components of personhood. In light of this, the right to informational self-determination should be recognised and strengthened to ensure that individuals retain agency over their digital representations (Thouvenin 2021). Additionally, the increasing integration of digital technologies into daily life calls for expanded legal definitions of subjectivity and integrity, ensuring that digital extensions of the self are adequately protected (Custers 2022).

The research suggests that failing to recognise the interconnected nature of online and offline realities risks undermining fundamental rights and personal autonomy. The evolution of digital identities and the emergence of a "digital person" (*homo digitalis*) demand the development of more comprehensive

legal frameworks that safeguard the individual from identity fragmentation, unauthorised exploitation, and market-driven digital profiling. As technological advancements continue to challenge traditional legal notions, the law must evolve to address these new realities, ensuring a balance between innovation and fundamental human rights protection.

In response to these challenges, new rights and redefinitions should include recognition of the right to digital privacy, which will protect people from unauthorized manipulation and harm to their digital selves, similar to physical integrity. At the same time, the right to informational self-determination should be recognized and expanded in order to give people real control over their biometric and behavioral data, including profiles and conclusions based on artificial intelligence. In addition, the legal recognition of digital identity – "*homo digitalis*" – is essential to prevent identity fragmentation and to recognize the inseparability of physical and digital experiences. These changes require the creation of a unified legal framework that would combine the means of protecting both physical and digital identification data, eliminating non-physical damage such as reputational damage and emotional distress caused by digital intrusions. Ultimately, these new legal constructs will be vital to preserving personal autonomy, dignity, and integrity in an era when digital and physical selves coexist and constantly interact.

To sum up, the answers to our research questions posed in the introduction are as follows:

1) The convergence of physical and digital identification data reveals gaps in the existing EU legal protection, as the current regulations (GDPR, Article 3 of the CFR) are still based on the physical concept of integrity.
2) These problems can only be solved by recognizing the right to informational self-determination and the right to digital integrity as complementary aspects of human autonomy and dignity in the digital world. Together, they can provide a solid foundation for personal protection in both physical and digital reality.

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WRITING IN THE SAND: MERCY AND CHARITY ABOVE THE LAW?

Abstract. In this text the author elaborates the nature of the concepts of mercy and charity in western legal jurisdictions based on Judeo-Christian tradition and culture, arguing that both concepts, although different, have crucial roles in shaping justice and adjusting the repressive power states and governments possess. It is shown that contemporary law could not be fully fulfilled without the application of charity and mercy which guarantee the existence of law designed to serve humankind. Subsections of this article examine examples from Biblical Law to more recent legal systems and give the perspective in which the place of charity and mercy stays within the regulatory framework of contemporary legal scholarship.

Keywords: mercy, charity, biblical law, civil law, common law, justice

PISZĄC PALCEM PO PIASKU: MIŁOSIERDZIE I MIŁOŚĆ BLIŹNIEGO PONAD PRAWEM?

Streszczenie. W niniejszym tekście autor analizuje pojęcia miłosierdzia i miłości bliźniego w zachodnich systemach prawnych, opartych na tradycji i kulturze judeochrześcijańskiej argumentując, że oba te pojęcia, choć odmienne, odgrywają kluczową rolę w kształtowaniu sprawiedliwości oraz w regulowaniu represyjnej władzy, którą dysponują państwa i rządy. W artykule wykazuje się, że współczesne prawo nie mogłoby zostać w pełni urzeczywistnione bez zastosowania miłosierdzia i miłości bliźniego, które gwarantują istnienie prawa kształtowanego tak, by służyć człowiekowi. Poszczególne części artykułu omawiają przykłady od prawa biblijnego po nowsze systemy prawne, ukazując perspektywę, w której miłosierdzie i miłość bliźniego zajmują swoje miejsce w ramach regulacyjnych współczesnej nauki prawa.

Słowa kluczowe: miłosierdzie, miłość bliźniego, prawo biblijne, prawo cywilne, common law, sprawiedliwość

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1. INTRODUCTION

In a very well-known parable in the Gospel, Jesus meets His Jewish critics who ask him what they should do with the adulterous woman. In ancient Jewish Law, punishment for adultery was stoning to death. One might ask himself why Jewish scholars and Pharisees ask Jesus about the content of Jewish Law, which they all know well. Like many times recorded throughout the Gospels, this is a trap. If Jesus replies, yes they should stone her, as it is the Law and he is not merciful, but if he says to leave her, he is not following the Law. Instead, Jesus replies, "who among you is without sin should throw his stone first" (John 8:1–11, RSVCE).[1] We all know that nobody threw the stone and they all started to leave, starting from elders. This famous quote from the Bible is often cited and used as a message that one should not judge, but rather to reflect on themselves and ask the Lord to be merciful and charitable towards them. This was subsequently followed by other passages in the Gospel: one is quite precise in which Jesus asks us not to judge others, and that the measure of judgement through we judge, will be the measure for ourselves (Matt. 7:1–6, RSVCE). The major question, although quite provocative is: "who has the final word?" Is it justice, or is it mercy, or both? If the law in its juridical form has the final say, then should that law contain mercy and charity in order to exist in accordance with Divine or Natural Law, or, on the other hand should law be elementary, that is, (just) formal in its rigid, positivistic sense? Should law have to be embedded in mercy and charity in order to have that fundamental quality of serving mankind? Gustav Radbruch wrote that the law which does not contain a minimal quantity of humanity ceases being a law (Radbruch 1946, 105–108), and even before him St. Augustine with his famous "*lex iniusta non est lex*," which arose from his "*nam lex mihi esse non videtur, quae justa non fuerit*" argumented in *De libero arbitrio voluntatis* (Augustine 1955, 5.11.33). This notion is present through today in contemporary legal theory through natural theorists like Fuller and Finnis, but also H.L.A. Hart who regardless of his positivist stance accepted that, although non-moral laws are valid, and despite the fact that he was critical towards the discretion when applying moral concepts, some moral considerations (e.g. forgiveness, mercy) should be considered in order to reach just solutions in specific circumstances. This approach, of course, made him an inclusive positivist (Hart 1997; Starr 1984, 673–689).

The result of this endeavor is that the mercy and charity embedded within humanity qualifies the law, that is, allows the law to become well-rounded and complete, thus becoming a true/perfected Law.

[1] All biblical quotations in this paper are taken from the Bible Gateway website, Revised Standard Version, Catholic Edition (RSVCE).

2. MERCY AND CHARITY

Etymologically, both mercy and charity have their roots in medieval Latin words. Mercy originates from *merced, merces* and, interestingly, is connected with paying the price, which was further evolved into the word merchandise. This root of the word might be of greater importance than one might think. If the law is, as Ulpianus states, *suum quique tribuere* then the equality of actions is the very center of understanding what the law really is: in Civil Law giving and receiving the same amount of value (goods or money or work) and in the Criminal Law adequate punishment for the severity of a particular crime, which in Judeo-Christian concept derives from the principle of *lex talionis*.[2] Mercy therefore presumes that something has been given and that the life has to be again put into a balance. Mercy includes benevolence or kindness or forgiveness and the main question is "who gives mercy and who is the subject or equalizer of returning the deeds into harmony?" Mercy by all means has more than one meaning: according to the Meriam-Webster Dictionary, mercy can be compassion or forbearance, blessing or act of divine favor, or compassionate treatment for those in need or distress (Merriam-Webster 2024a). It seems that for the act of mercy we have to be aware that there is one special relationship, in which one (person) is "in power," and another "in need." That would be a little bit different in relation to charity where there is also a similar relationship, but the person who is giving charity is not in the position to act based on power, but rather due to pure compassion, although those two overlaps. An even more important feature of the relationship is the fact that mercy is given in situations when person with his or her actions did not deserved kindness but his or her subsequent actions require it to be given. This is well explained by the Oxford Dictionary.[3] In a particular sense, mercy requires repentance and this fills the gap which was done by the wrongdoing. In a specific sense mercy is often misplaced with charity although both exist with the same framework of love.[4] The etymological roots of the word

[2] Although lex talionis is widely accepted as the moral concept of retaliation in which an eye is given for an eye and a tooth is given for a tooth, scholarship in the majority focuses too much on the concept of punishment and retaliation and less on the notion of an equal amount of action. And that is wrong. Jewish Law (Hallacha) describes what is based more on equality and less on the punishment and the nature of it. An eye and/or tooth has a value and what is requested is that the punishment reflects more on the value of wrongdoing than the pain itself. See more in: Savić (2018, 65–85).

[3] "Clemency and compassion shown to a person who is in a position of powerlessness or subjection, or to a person with no right or claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected, esp. in giving legal judgment or passing sentence." See Oxford English Dictionary (2024).

[4] For instance, in art see Caravaggio's famous painting Seven works of Mercy (Sette opere di Misericordia), which is more connected with Charity and in Italian it would be better and more accurate if this painting is called Sette opere di Carità. This famous painting shows Christian

mercy show that for mercy one must provide some sort of trade, or provide some sort of spiritual "market value" – and what would be the market value in this case? This value could be shown or unshown, but the existing remorse or the emotional willingness to repent for the wrongdoing by the perpetrator can allow the punishment proscribed by law to be substituted or filled in or swapped in return for mercy. In this relationship one side is weak(er) and another strong(er) and in power.

Charity on the other hand is a different kind of relationship. Charity is more connected with requesting on one side and receiving on the another, and mercy requires two-way "action"; although it might seem that mercy isn't fulfilling actions on both sides – it is. While with charity we notice giving on one side and receiving on the other, in mercy we are aware of the two giving: one is by one who has power to forgive and on the another one who wants and require forgiveness. But it is true that in a particular way we could say that in both situations one side is more active and another is more passive. The Merriam-Webster Dictionary defines charity as generosity and helping those in need or suffering, then as the institution that cares about needy and poor, and then as public provisions funding those in need (Merriam-Webster 2024). Also, this is connected with a gift that is given for the public benevolent purposes or if the charitable institution was made or supported by such a gift; and also, lenient judgement of others.

3. MERCY AND CHARITY OVER JUSTICE

It is a question where mercy and charity could be found in contemporary western law. The examples are numerous if we follow the formula that both mercy and charity are some sorts of contracts, where mercy is a two-sided contract where both sides are required to perform duties and charity obligation only exists on one side. It has already been said that mercy is more connected with forgiveness and charity with generosity, but the question about these two concepts is: which is more connected to law? The answer is both. The more appropriate question would rather be: do mercy and charity constitute concepts which are part of the law itself or are those separated from it? In legal jurisprudence and statutory law, we can see both are present.

Three possible scenarios are evident: first is that those concepts are quasi-legal and they modify the law by making it, the second possibility is that mercy and charity are part of the core of law in its normative sense, and the third is that they are outside the law and that they are only used as a correction and perfection

charitable works for the people who are the most needy. In some languages, especially Slavic, charity and mercy is usually used by one homonym, e.g. in Croatian, milosrđe.

of the law itself by implementing them through juridical proceedings on a case-to-case basis.

At this point it is worth mentioning Aristotle's view on equity, which is often observed through the lenses of observing the positive and normative law as a system of rules that have to be corrected by subjective elements, which law as an objective system cannot encompass and therefore have to be considered when making just decisions to avoid unfairness and prevent from undeserved (but proscribed) harm. Both charity and mercy could fit the same pattern of using them (as well as equity) to balance and influence the final legal result regardless if they are considered part or legal system or not (Beever 2024, 33–50).

Mercy is obviously present in the legal concept of pardon or acts of clemency, and parole, and is in the judicature of both civil and common courts, although it is more prevalent in latter. "Pardon, in law, release from guilt or remission of punishment. In criminal law the power of pardon is generally exercised by the chief executive officer of the state. Pardons may also be granted by a legislative body, often through an act of indemnity, anticipatory or retrospective, for things done in the public interest that are illegal" (Bauer 2024). A pardon is explicit act of mercy but is almost always prescribed by law. In Commonwealth countries such as Australia and Canada, a pardon is based on the Royal prerogative of Mercy, which was initially in the monarch's hands.[5] Obviously the recommendation on which a pardon is granted contains some amount of discretion (Colgate Love 2001, 125–133) which again is determined by law, usually Constitution or Statute. In European republican systems the pardon prerogative usually lies in the hands of the president and is usually done according to the recommendation of the Ministry of Justice or another Governmental Agency. The United States Constitution gives pardon rights to the president who, as it may seem, holds a fair amount of discretionary power to exercise that right,[6] and at the same time the president may, by using pardon, show that there is a necessity of changing the law (usually softening of the legal norm). A typical example of this is when president J.F. Kennedy pardoned offenders under the Narcotics Control Act in 1956 as a beacon for the Congress to change the Law (Wex Definitions Team 2024).

[5] Blackburn in *Monarchy and the personal prerogatives* explains that the "personal prerogative" of the monarch is a set of powers that must be exercised according to law, and must follow the advice of the Prime Minister, or in accordance with Parliament and the courts.

[6] A pardon is the use of executive power that exempts the individual to whom it was given from punishment. The president's pardon power is based on Article II of the Constitution which says, "(…) he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Unlike a commutation, which shortens or eliminates an individual's punishment, a pardon absolves the individual of guilt. For example, President Trump commuted Roger Stone's prison sentence so that Mr. Stone did not serve the punishment for his guilty conduct," see Wex Definitions Team (2024).

Mercy is present in the judicature of the Courts, namely in the Criminal Law when the judge in civil legal jurisdictions again, has discretionary power, but, and in accordance with precise criteria, to soften the punishment of the defender. It is important to stress that merciful softening always comes after the decision that the defendant is guilty. For instance, the age of the defendant together with the fact that he/she has shown real regret or even did everything in his or her power to repair or compensate his or her wrongdoing is a solid ground to reduce/lower a harsh(er) sentence to a milder one. In common law jurisdictions the judge may have even more discretionary power.

The famous case of Catherine Jane Stubbs (aka Ma Shanti Bhadra), a member of the international religious cult the Rajneesh movement (Rajneesh or Sannyasins) who was charged on attempted murder and murder conspiracy,[7] after pleading guilty for the first charge, was sentenced to jail and served a year in federal prison after which she was released and left for Germany. Later on, she was indicted for the conspiracy to commit murder, but was unavailable since Germany refused to extradite her. She came to United States voluntarily and pleaded guilty. The judge had the right to impose any sentence up to life imprisonment, but instead he decided to allow her to leave on probation (United States Department of Justice 2005). In this case as well in all others where there is a combination of statutory rules and discretionary power, on one hand, we have asking for forgiveness, and, on the another, a merciful hand of those who hold that same power.

Charity could also be found in legal contexts when those in power release some of the burden of those who are subordinated to them, and by doing so they consider political circumstances often connected with elections or other public pressure. One might rightly ask if this is done because of personal or political interest, and argue that there is a lack of charity involved. But charity is also giving something to the one who is able and capable of receiving it. And yes, those who give could also have their interests involved, e.g., a sense of joy and expectation of earthly or heavenly rewards. Anyhow, charity is present in all cases when those in power give something they are not obliged to do, e.g., the state releases some burden of its citizens. For instance, that could be a tax decrease or giving the money or assets to people who suffered from a wildfire, flood or earthquake. These are clear forms of charity.

The main issue here is to address the question of the nature of charity and mercy with regard to the law and the legal system. As earlier, it seems that there are three possible ways of looking at this matter.

One approach is that mercy and charity are both extralegal entities which are here to make changes to law itself. In this proposition, mercy and charity are bodies outside the law which are used to repair the flaws of the law, by remaking the law itself, in order to establish the legal system as *ars boni et aequi*. In another

[7] See the full list of defendants, charges and sentences: The Oregonian (n.d.).

proposition, charity and mercy are part of the law *ab initio* and therefore just forms of different legal expressions and existing normative reality. In this concept, legal expressions were initially extracted form societal norms and later dunked into the normative structure and therefore those societal norms became legal norms.[8] A social norm becomes a legal norm when it becomes accepted by the legal system. In a particular sense every legal norm is a derivation of a specific social norm. Mercy and charity in a specific way belong to those norms that are part of the ethical and even spiritual fiber of the way at looking at things; they are connected with the notions of how things could and should be done.

The third situation exists when mercy and charity are concepts outside the law and law recognizes the, as such, but admits to implementing their logic into the system through procedural implementation in particular cases without being defined by legal norm *ab initio* – as the system wants to be more humane (not just, but humane). Here, the difference from the first proposition is that mercy and charity in both situations are extralegal concepts, but for the purpose of procedure in the third solution they become part of legal reasoning, while in the first option mercy and charity are concepts which are looked upon in order to make laws as such.

Of course, all this is derived from moral concepts and values of a humanistic society which are embedded in western culture and the western legal system – both in civil and in common law legal jurisdictions, and those values are connected with Judeo-Christian legal culture(s) (Welker 2014, 225–235). In all those propositions the concepts of mercy and charity are a specific upgrade of the Law.

Although the result of all three concepts leads to somewhat similar solutions, accepting any one of those three options could lead us to different practical implications. We have to distinguish to understand if charity and mercy is something law should be consisted of, or if mercy and charity are purely merely ethical interventions into the law but not part of it. It should be repeated in all three views that normative regulation will be required, either statutory or juridical (procedural). But for legal scholars it might be interesting to see if we take mercy and charity as integral part of Law or it is just borrowed (for). It seems that the concept of borrowing is more appropriate for common law jurisdictions and the statutory concept is more applicable to civil law systems although the common law is very much penetrated with statutory interventions as well.

If we take that Mercy and Charity are outside the law, then we have to admit that the only logical concept in which something that is outside the core of Law can intervene is that this is above the Law. It is really not important if those concepts are regarded as some sort of soft law or interventions from outside of the legal system and its body. Also, it is not important that the result of that penetration

[8] In Legal Theory, legal norms are social norms and distinctive to all others due to the major characteristic, which is connection with the pubic authority in the form of its bringing and introducing into the legal system and secondly for the reason of coercion and enforcement.

is the "legalization" of those concepts. What is important is that there are social and ethical norms that prevail in western legal societies and systems, because they are founded and rooted in Judeo-Christian legal culture. Those roots are primarily religious and spiritual sources, but they have not been only that; they are already mentioned by the notion of humanity set up by Gustav Radbruch and the annulment of law if humanity in its minimal value does not exist.[9] Requests for both mercy and charity, at the same time, are connected with tribal or family bonds that can be extended to a society as a whole.[10]

4. MERCY AND CHARITY AS BIBLICAL CONCEPTS

The most important Christian prayer "Our Father," contains huge demands of those who pray to God, but at the same time there is an even larger request for those who pray. "Forgive us our debts, as we have forgiven to out debtors" (Matt. 6:12–13, RSVCE). In this very well-known passage of the Gospel we have both mercy and charity but in a particular way. The mercy we ask from God is dependent on our perpetual actions e.g., In Luke (11:2–4, RSVCE) request is connected with perpetual and ongoing action while in Matthew (6:9–13, RSVCE) our forgiveness belong to past tense through formula: "we have forgiven – please, You forgive us," for in the standard relationship of mercy, just as in a two-sided relationship or a two-sided contract, there should be request for mercy through our words or actions. It is interesting that here the word "debt" is used, which corelates to the original meaning of the word "mercy." By praying and receiving, the mercy debt is annulled and the societal peace is again reclaimed. The request, in any case, has to be more or less explicit and connected to the wrongdoings the were done. In prayer "Our Father" the request is deeper and wider in scope but even more concrete: we ask forgiveness as we were ready to offer forgiveness to others. In other words, those who pray ask for mercy according to the mercy which they have offered to others. It is a different form from when measuring what amount of wrongdoing exists and there is only one act of regret, which results in the annulment of one specific wrongdoing. When praying "Our Father," those who pray are in perpetual movement of offering forgiveness as an ultimate form of mercy for actions of the wrongdoings that are daily present in their lives. This is a formula: we forgive, we ask you to forgive. This form is accepted in the Canon of the Catholic Church (Luke instead of Mathew). It is another form of perpetual mercy like in a paternal or maternal – child relationship, while other forms of mercy are more juridical and connected for particular crimes or wrongdoing.

[9] For more on Mercy, also Radbruch and criminal justice see other insights into analysis of mercy in Criminal Law in: Snarski (2024, 1–5).

[10] Compare to Ibid.

Charity is present in receiving daily bread, "give us our daily bread" (Matt. 6:11, RSVCE) as the faithful are aware of the presence of God in their lives and for that offer gratitude and thanksgiving.

There are numerous examples of Mercy and Charity both in the Old and New Testaments. The strongest example of mercy is probably when King David becomes merciful to Shimei who was cursing him, although by the power of Law he had the right to execute him (death penalty) (2 Sam 16:5–13, RSVCE). It is interesting that King David is merciful even though Shimei is not asking for mercy; the relationship that is important here is the relation of King David with God who was merciful to him, who is also a sinner. He transfers the mercy he received from God to Shimei although he did not ask for forgiveness and mercy, but the mercy was asked for later (2 Sam 19:16–23, RSVCE). What can be learned from those chapters of the Bible is that King David anticipates Shimei's future behavior; he as a wise ruler who understands the nature of people and he is very well aware of his position, which is given by God, and that David himself has full power: in this Biblical story it is not even important that Shimei's begging does not come from the heart, but the ruler is satisfied with the formal expression of guilt. Parallels can be made here with contemporary legal systems when judges may take into account various personal identities and qualities of the defendant and impose less strict sentences. This is very well present in both, civil and common law legal systems. Also, it shows that mercy requires power to be exercised (God or King, or Government).[11]

Probably the most important story in the New Testament that describes both mercy and charity is the story of prodigal son – a very well-known text in which Jesus describes the love of the father to a son who has returned (Luke 15:11–32, RSVCE). That love actually consists of both mercy and charity. Of course, the image of the father is a personification of God's existence as the supreme Being of love and compassion. In this Biblical text the prodigal son asks for his father's forgiveness, and his only expectation is that his father accepts him as one of his workers. This is typical two-sided relationship, where both "parties" are active. The Father shows himself as a merciful father who gives more than the son could ever want and expect, prepares a feast for him, ask his workers to bring a ring for his finger and new robes – all signs of nobility and status. His father reinstates him as a member of his family. His mercy also contains charity; he gives his assets because his love is unconditional and always existed, even when there is still no action on the other side. This is the Biblical image of God – his father when he saw him start running towards him to give him charity. At that point no action is required or seen from his son. This image shows that he was looking for his son,

[11] I am most grateful fot incidental insights and guidance which I have received by listening the lecture of Fr. Dario Tokić, OCarm, who was talking about forgivness in the parish of St. Jerome in Zagreb, on November 16, 2024.

he was waiting for him, and at the pure sight of him, he was ready to hug him, feed him and put clothes on his body. This is the pure image of charity. After his son's words of regret, the perfection of mercy was fulfilled. In this story mercy absorbs charity and vice versa and it is clear that it contains both; his mercy is visible through his charity and his charity is visible through his mercy. From the legal point of view his father's actions were unnecessary, since justice towards his son was served, he had already received half of his inheritance, therefore the action of his father was both merciful and charitable, but also far beyond the justice and legal norms of Inheritance Law and the Laws of the land. This is also story of reintegration into society, which is also communicated through application of mercy and charity.

In that respect, pope Francis stresses the importance of mercy:

> "Mercy towards a human life in a state of need is the true face of love" Pope Francis said, explaining that it is by loving the other that one becomes a true disciple of Jesus and that the face of the Father is revealed. "Be merciful, just as your Father is merciful" he quoted from Luke the evangelist, highlighting the fact that God's Commandment to love one's neighbor for Christians is a single and coherent rule of life. (Bordoni 2019)

And by doing so, we enter into the field of love, and love cannot be proscribed by law.

Regarding Magisterial Documents of the Catholic Church, it should be noted that, probably the most comprehensive and detailed elaboration of charity is contained in Pope Benedict XVI's Encyclical *Caritas in Veritate* in which one can a see direct connection with the a) truth (seeking the truth) and b) justice (Benedict XVI 2009).

Pope Benedict XVI first addresses the question of charity and truth as understanding through the abundance of its values, which enables men and women to go beyond their personal opinions and judgements by asking them to seek what is important in its substance; it seems that this also requires moving from the solely formal aspect of pure and sometimes rigid justice, which is imbedded in national legal reality and its history.

> Because it is filled with truth, charity can be understood in the abundance of its values, it can be shared and communicated. Truth, in fact, is lógos which creates diá-logos, and hence communication and communion. Truth, by enabling men and women to let go of their subjective opinions and impressions, allows them to move beyond cultural and historical limitations and to come together in the assessment of the value and substance of things. (Benedict XVI 2009, § 4)

Also, at the same time, it requires understanding that charity is interconnected with love and, in the Christian perspective cannot be detached from it, and at the same time it cannot be detached from the truth in order to avoid relativism. In other words, charity is interconnected with both justice and truth, which means that in reaching for justice, charity does not jeopardize it – it fulfills it. Justice, in

Christian view, is planted in God which is Love, as well as is charity. It also does not underestimate notions of justice which are products of the laws of society.

> Truth opens and unites our minds in the lógos of love: this is the Christian proclamation and testimony of charity. In the present social and cultural context, where there is a widespread tendency to relativize truth, practicing charity in truth helps people to understand that adhering to the values of Christianity is not merely useful but essential for building a good society and for true integral human development. A Christianity of charity without truth would be more or less interchangeable with a pool of good sentiments, helpful for social cohesion, but of little relevance. In other words, there would no longer be any real place for God in the world. Without truth, charity is confined to a narrow field devoid of relations. It is excluded from the plans and processes of promoting human development of universal range, in dialogue between knowledge and praxis. (Benedict XVI 2009, § 4)

It is interesting to analyze Pope Benedict XVI's further explanation about charity as the grace which we have received. If we observe charity and its implication within the legal system through the lenses of Christianity we would easily encounter what is obvious: charity is what we all receive even if undeserved; charity arises from God's unconditional love for every man and woman and for His understanding of our particular omissions and circumstances. The greatest sign of this is Jesus' words on the Cross: "Father, forgive them; for they know not what they do" (Luke 23:34, RSVCE). In this sense charity and mercy go out of the pure concept of what would be right in the perspective of law through a notion of justice that is derived from love and then the truth itself.

> Charity is love received and given. It is "grace" (cháris). Its source is the wellspring of the Father's love for the Son, in the Holy Spirit. Love comes down to us from the Son. It is creative love, through which we have our being; it is redemptive love, through which we are recreated. Love is revealed and made present by Christ (cf. Jn 13:1) and "poured into our hearts through the Holy Spirit" (Rom 5:5). As the objects of God's love, men and women become subjects of charity, they are called to make themselves instruments of grace, so as to pour forth God's charity and to weave networks of charity. (Pope Benedict XVI 2009, § 5)

Justice can't reach its fulfillment without charity because then it does not produce the truth necessary to have social conscience and responsibility; charity is necessary to have society where social actions don't only adhere to the logic of power.[12]

The core of the Encyclical is explaining the interconnections between justice and charity where the Pope accepts that every society has its own system of justice, but adds that charity goes beyond justice and never lacks justice. As the Pope describes it, justice and charity are two separate entities, but interconnected in a such way that one (justice) cannot be complete without the other (charity).

[12] See Benedict XVI (2009, § 5): "Without truth, without trust and love for what is true, there is no social conscience and responsibility, and social action ends up serving private interests and the logic of power, resulting in social fragmentation, especially in a globalized society at difficult times like the present."

> Not only is justice not extraneous to charity, not only is it not an alternative or parallel path to charity: justice is inseparable from charity, and intrinsic to it. Justice is the primary way of charity or, in Paul VI's words, "the minimum measure" of it, an integral part of the love "in deed and in truth" (1 Jn 3:18), to which Saint John exhorts us. On the one hand, charity demands justice: recognition and respect for the legitimate rights of individuals and peoples. (Pope Benedict XVI 2009, § 6)

Only Justice with charity makes justice rounded up in perfection, two entities, but coexistent and integral. It seems that it is clear that "the right" justice contains charity and that pure rigid legal reasoning where law that is the sum of rights and duties can't satisfy the moral demands of societies in need. It is not possible without charity and mercy,[13] and the quest for common good (Pope Benedict XVI 2009, § 7).

Also, in a Thomistic approach, justice is more than juridical justice, which is accepted by positivists worldwide as a sum rights and obligations (duties); on contrary it is a "net" of laws and virtues like charity, mercy, love, compassion, forgiveness that made it rounded and sound; Biblical justice is far more than the simple dichotomy between rights and duties (Philpott 2020, 1148). Justice as a Biblical concept is based on proper and right relationships.[14] Even more, justice from a Biblical perspective describes the character and desires of God (Philpott 2020, 1152),[15] and if so, Jesus' examples of living are crucial to understanding that the Law itself should not be a formal and rigid system deprived from both charity and mercy.

5. WRITING IN THE SAND: BIBLICAL REFLECTIONS ON MERCY (AND CHARITY)

"In the dust writes and in the sand plants who tries to proud and shrew man give an advice" (Marulić 2021).

Famous Croatian writer Marko Marulić, author of the epic masterpiece "Judita" wrote those words of significant importance, with profound meaning that giving advice to a proud and shrew man is useless, because his heart is not able to receive it; by doing so his words turn into dust and do not yield fruit. In the very well-known story from the Gospel, when the adulterous woman is brought before Jesus and when Jesus was asked what should be done with her, He writes in the sand.

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[13] See Pope Benedict XVI (2009, § 6): "The earthly city is promoted not merely by relationships of rights and duties, but to an even greater and more fundamental extent by relationships of gratuitousness, mercy and communion. Charity always manifests God's love in human relationships as well, it gives theological and salvific value to all commitment for justice in the world."

[14] See Philpott (2020, 1148–1149). For similar and more detailed notions on relationships and God's desire for people to follow the Law which God loves see Philpott (2022, 172).

[15] Compare to Psalm 11:1.

> Jesus returned to the Mount of Olives, but early the next morning he was back again at the Temple. A crowd soon gathered, and he sat down and taught them. As he was speaking, the teachers of religious law and the Pharisees brought a woman who had been caught in the act of adultery. They put her in front of the crowd. "Teacher," they said to Jesus, "this woman was caught in the act of adultery. The law of Moses says to stone her. What do you say?" **They were trying to trap him into saying something they could use against him, but Jesus stooped down and wrote in the dust with his finger.** They kept demanding an answer, so he stood up again and said, "All right, but let the one who has never sinned throw the first stone!" Then he stooped down again and wrote in the dust. When the accusers heard this, they slipped away one by one, beginning with the oldest, until only Jesus was left in the middle of the crowd with the woman. Then Jesus stood up again and said to the woman, "Where are your accusers? Didn't even one of them condemn you?" "No, Lord," she said. And Jesus said, "Neither do I. Go and sin no more." (John 8:1–11, RSVCE)

Exegesis of this text is usually quite clear: the Pharisees are asking a question that does not have a right answer; this is trap question. If Jesus replies that she has to be stoned, he is not merciful, and if He insists that she has to be released, He would be against the Law.[16] Instead, Jesus answers in order to provoke their hearts and the result is that she received forgiveness both from the crowd and from Jesus himself. It is quite rare that writers write about the posture of Jesus and his writing in the sand. Croatian writer Marulić writes about hearts of mean and proud men who are full of "justice" but in reality, do not care about anybody else but themselves. He writes that is useless to educate people who do not want to receive knowledge and wisdom, except if that wisdom comes from themselves. And Jesus is doing exactly this. Why? Who is writing in the sand? Who is trying to build the house in the sand? as another parable of Jesus contemplates.[17] Sand and dust are used in the Bible because they disappear, on which nothing firm can be built or exist. So, who is writing in the sand, or builds in the sand? Obviously only a crazy or unwise man. But then, why is Jesus writing in the sand during the encounter with the Pharisees? He writes in the moment when they ask him a legal question – this is actually a question about the necessity of respecting the Law. This is an obvious example of invoking mercy into the Law. He wants to say Law exists, but without your hearts Law does not have a value, like your question or Law itself. Jesus points to each one of them and asks them to show mercy. He did not ask them to break the Law, he asks them to be merciful, to go deep into their hearts. This is exactly what Jesus talks about on other occasions regarding the nature of the law when he says "do not think that I have come to abolish the Law

[16] Jewish Law (Hallacha).

[17] "Everyone then who hears these words of mine and does them will be like a wise man who built his house on the rock. And the rain fell, and the floods came, and the winds blew and beat on that house, but it did not fall, because it had been founded on the rock. And everyone who hears these words of mine and does not do them will be like a foolish man who built his house on the sand. And the rain fell, and the floods came, and the winds blew and beat against that house, and it fell, and great was the fall of it." See John (7:24–27, RVSCE).

or the Prophets; I have come not to abolish but to fulfil" (Matt. 5:17, RSVCE). So explicitly mercy, and then subsequently charity exist for the fulfillment of the law, and without them it cannot be perfected. What is the message from this story? It is the narrative that if law lacks mercy and charity it remains inhumane and that that kind of law is in fact against God and nature because that kind of law would be lifeless. In that respect, law would miss the desirable or necessary amount of humanity and this is the same message that both Jesus and Radbruch, as well as so many others share, each one of them through their own contexts.

6. CONCLUSION

Mercy and Charity, two constructs derived from both religious and humanistic social contexts, exist in contemporary western legal systems, both in civil and common law legal traditions. Despite the fact that manifestations of both may differ from one system or another and that the presence of those could be defined by different roots, the fact is that they exist and influence legal systems: namely rules of the legal process, sentencing and punishment, but also various branches of law like taxation, labor or inheritance. Although all norms of legal systems are in fact directly or indirectly derived from societal norms, their nature is somehow different than all others. Their specialty lies in the fact that they are able to penetrate each branch of the law: they are specific but they are universal. Why is that so? The nature of law should be serving to mankind, law as a concept cannot exit with human activities, interaction and life, and law is necessity for mankind. Nothing more than charity and mercy does not serve the principal and universal human need for understanding, forgiveness and love, even in the strict and often narrow normative orders of contemporary laws. Mercy and Charity, both, are close to being supra-legal or meta legal concepts that are applied to law, equally in common law or statues for the reasons of reparation, understanding, forgiveness, and putting things back into the order and balancing. Without them in law, human society does not exist and with them law becomes what people require from the law itself. Charity and Mercy as relationships between the parties are both above the law and part of the law at the same time, or better to say they are part of the law that makes it more human and more divine.

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DISTRIBUTIVE JUSTICE AND CHARITY IN TORT LAW ADJUDICATION[1]

Abstract. A common claim in tort scholarship has been to argue that, generally, there is no place for distributive justice or charity considerations in tort law. This article discusses this claim. It is first shown that the thesis according to which there is no place for distributive justice considerations in tort law is doubtful. It is then argued that tort adjudication is a form of distributive justice, utilizing the framework of tort adjudication as a means of distributing justice between the parties. And finally, the example of the reduction of damages rule (art. 10:401 PETL) will be analyzed as an illustration of the thesis about tort adjudication.

Keywords: distributive justice, charity, tort law, adjudication, reduction of damages

SPRAWIEDLIWOŚĆ DYSTRYBUTYWNA I MIŁOSIERDZIE A ODPOWIEDZIALNOŚĆ DELIKTOWA

Streszczenie. W odniesieniu do orzekania o odpowiedzialności deliktowej powszechnie przyjmuje się tezę, że w prawie deliktów co do zasady nie ma miejsca na rozważania dotyczące sprawiedliwości dystrybutywnej ani miłosierdzia. Niniejsze twierdzenie, jest w tym artykule krytycznie rozważone. Po pierwsze, argumentuję, że teza, zgodnie z którą w prawie deliktów nie ma miejsca na rozważania dotyczące sprawiedliwości dystrybutywnej, jest wątpliwa. Następnie rozważam tezę, że orzekanie w sprawach deliktowych stanowi formę sprawiedliwości dystrybutywnej, wykorzystując ramy postępowania w sprawach deliktowych, jako środek rozdzielania sprawiedliwości między stronami. Wreszcie analizuję przykład zasady redukcji odszkodowania (art. 10:401 PETL), ilustrujący tezę dotyczącą orzekania w sprawach deliktowych.

Słowa kluczowe: sprawiedliwość dystrybutywna, miłosierdzie, odpowiedzialność deliktowa, orzekanie, redukcja odszkodowania

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1. INTRODUCTION: NO PLACE FOR CHARITY IN TORT LAW

The Chilean Supreme Court recently held that "the judge does not have to practice charity with the responsible party, not even at the expense of a very wealthy victim. 'Rich and poor alike have the right to equal reparation, which includes all harm'" (Supreme Court, Rol No. 31.064, of March 21, 2016). Certainly, a common claim in tort scholarship has been to argue that, generally, there is no place for distributive justice nor charity considerations in tort law. I wish to discuss this claim. Assuming that the duty of charity can be traced back to the demands of distributive justice, I will show that there are good reasons to reconsider this framework for tort law at least. For the present purposes, I understand charity as an act performed solely for the benefit of another, without any prior duty to repay or a special relationship with the beneficiary (Lichtenberg 2009, 17).

This article will first analyze the general thesis that distributive justice has no role to play in tort law. It will be shown that this thesis is unconvincing, or at least doubtful. The following section will argue in favor of assigning relevance to distributive justice considerations within the process of adjudication in tort law, using the framework of adjudication as a form of distributive justice between the parties. And finally, the fourth section will briefly analyze the contours of the reduction of damages rule that many jurisdictions have established, including the Principles of European Tort Law (PETL), as a case study of the claim about tort adjudication. The rule is clearly based on distributive justice considerations, allowing courts (in exceptional cases) to practice charity with a defendant who is liable in tort. Some concluding remarks are included at the end.

2. NO PLACE FOR DISTRIBUTIVE JUSTICE IN TORT LAW?

Orthodox tort scholarship typically asserts that tort law focuses on corrective justice rather than distributive justice. The definitional feature of this thesis is epitomised by Weinrib's claim, according to which both forms of justice "are categorically different and mutually irreducible" (Weinrib 2012, 74). He holds that if corrective justice depends on the initial entitlements determined by distributive justice, then "corrective justice would become a species of distributive justice" (Weinrib 2012, 79). According to Weinrib, it follows that the relationship of private law must be understood in terms of corrective justice rather than distributive justice: "Admixing distributive considerations into the corrective framework of private law precludes the relationship from attaining the coherence of either corrective or distributive justice" (Weinrib 2012, 74).

Let us examine the argument in more detail. The core of Weinrib's thesis is that, following Aristotle, corrective justice involves a different type of operation than distributive justice, for it "looks only to the distinctive character of the injury,

and treats the parties as equal" (Aristotle 2009, V.4, 1132a4-5). Other scholars share this view, arguing that this is a necessary feature of corrective justice. For instance, Waluchow argues that the distinctive function of corrective justice is to rectify the imbalance produced by the defendant's action "who has seized an advantage (…) at the plaintiff's expense" (Waluchow 1987, 156). Accordingly, he claims that the rectifying operation of corrective justice excludes all distributive considerations, such as the relative merit of the parties or the greater need for the good acquired. Similarly, Wright argues that what provides a substantive content to the principle of corrective justice is the fact that it excludes considerations of virtue, merit or any other distributive comparative criterion to rectify the injustice (Wright 1992, 701).

Indeed, Aristotle's depiction of corrective justice fits with the standard practice of courts dealing with tort cases, which usually do not consider, for example, the wealth of injurers and defendants. At least, courts do not explicitly consider these aspects in their judgments. I will address this issue later. But there is a more general question to answer here: Should courts always look to the distinctive character of the injury only? Weinrib seems to come close to defending such a position when he argues that corrective justice secures that private law is a "purely juridical and completely non-political" activity (Weinrib 2012, 214). For, according to him, corrective justice does not need to make a political choice of an extrinsic goal to operate. Under this framework, distributive justice appears to be associated with legislative bodies, whereas corrective justice is linked exclusively to the adjudication of private disputes. But the truth is that in many cases, courts *do* take into account the virtues and vices of the parties involved in a private dispute. Take family law. I assume it would not be difficult to justify considering the personal character of a father when deciding whether he should have custody of his son or not. Weinrib could respond either that family law is not private law or that this practice is wrong. Both responses seem unsatisfactory to me. Why should we treat the case of family law differently? Not taking into account the character of the parties in family law for the sake of coherence does not look promising.[2] How can we justify, then, the practice of courts in the case of tort law, and Aristotle's formulation of corrective justice?

Let us unpack Aristotle's notion of "the distinctive character of the injury." The character of the injury appears to be in contrast to the character of the parties. In this sense, corrective justice seems to mandate that courts should not take into account the character of the parties at all. There is some truth here for tort law. Defendants will generally not be allowed to argue that they are virtuous persons. For instance, "I have always been a cautious driver" will not constitute

[2] Keren-Paz makes a similar point: "it is hard to understand why the rulings of courts in public law litigation which is based (in part) on considerations of equality is deemed legitimate, while similar rulings in the context of private law litigation are not" (Keren-Paz 2007, 25).

a successful defence in a tort suit. The reparative aim of corrective justice justifies this: its objective is not to distribute gains and losses according to the merit of the parties or some other criteria; rather, it seeks to repair the losses suffered by the victim as a consequence of a wrongful interaction. Hence, Aristotle's formulation of corrective justice adequately captures an important truth about the practice of tort law, namely, that tort adjudication, in contrast with, for instance, criminal law, is not about judging character; it is about repairing wrongful losses.

However, this characterisation of tort law needs to be hedged in at least three senses. First, as civil recourse theorists have vigorously argued, it is important to publicly hold wrongdoers responsible or accountable for the wrongs they commit (Goldberg, Zipursky 2020, 137–146). Following this idea, it might well be argued that tort law is, in essence, a judgment of character after all: holding a defendant liable for a wrong does not necessarily indicate whether she is a good or bad person, but rather that she committed a wrong and is accountable for it. Indeed, this fact does not make tort law indistinguishable from criminal law, but it cannot be denied that it makes them more similar, as Duff has recently pointed out (Duff 2014, 229).[3] Weinrib's response might be that this feature of tort law is a positive side effect. Accordingly, tort aims to undo the injustice caused by the wrong and nothing else. If, in the process of undoing the injustice, wrongdoers are held responsible and accountable, that fact should not lead us to abandon the way in which courts deal with tort cases, looking only to the distinctive aspect of the injuries. That might well be the case for an explanatory theory of tort law. But in a justificatory inquiry, the response is less attractive. Why should we disregard justifying the existence of tort systems based on the importance of holding wrongdoers officially responsible for the wrong they have committed?

Secondly, tort law usually considers the defendant's behaviour in order to allow a victim to bring an action against her. In some cases, it is irrelevant whether the defendant committed the wrong negligently or intentionally, such as in the case of most proprietary torts. It is irrelevant whether the defendant did not know that she was trespassing on the claimant's land; what is relevant in these cases is only that the defendant infringed a claimant's proprietary right. However, in other cases, the defendant's behaviour is taken into account. The tort of negligence is a paradigmatic example of this. If courts should only look to the distinctive character of the parties, then why should courts determine whether the defendant was negligent or not? Weinrib holds that the standard of negligence is compatible with corrective justice, since the "conception of reasonable care gives expression to the idea of agency that underlies" it (Weinrib 2012, 151). Hence, under this

[3] Arguing that "civil recourse is much more like the criminal process than its proponents seem to allow: in both cases, someone who is alleged to have committed a wrong is called to account for it in a court of law; in both cases, if he is held liable for that wrong, he is liable, also, to suffer the imposition of a legal consequence (a civil remedy, a criminal punishment) that is essentially punitive in its meaning."

framework, determining whether the defendant was negligent or not can be part of looking to the "distinctive character of the injury." For, the injury, in this case, would be defined in terms of imposing "a risk that no reasonable person would impose upon others" (Weinrib 2012, 147). Weinrib may be right on this. It is possible that negligence is indeed compatible with corrective justice.

Weinrib's argument, however, cannot explain why some torts distinguish between negligence and malicious or reckless wrongdoing to determine whether a defendant is liable. Intentional torts such as battery, assault, and false imprisonment are good examples of torts in which mere negligence is not enough; in these torts, a claimant will need to show that the defendant acted with the intention of unlawfully touching, assaulting or confining the victim against her will.[4] Another example is the tort of the intentional infliction of emotional distress in the United States, which imposes liability on subjects who "by extreme and outrageous conduct *intentionally or recklessly* causes severe emotional distress to another."[5] Finally, another example is the role that intention plays in cases of nuisance, for in some cases it has been argued that malice is relevant to determine whether the defendant's activity is wrongful or not.[6]

And thirdly, in many cases, courts do take the defendant's conduct into account to determine the adequate remedy. Exemplary and aggravated damages are the most obvious examples, as the reprehensibility of the defendant's conduct will be a crucial factor in determining whether a court will grant an exemplary or aggravated award.[7] Disgorgement damages are another example, which courts have awarded in many cases of intentional wrongs, such as in the torts of trespass, conversion, and inducing breach of contract.[8] The examples are problematic for Aristotle's mandate of looking only to the "distinctive character of the injury," since in these cases, courts will have to consider whether the defendant's conduct was intentional or merely negligent, awarding this type of remedy only in the former case.

In my view, the key to solving the problem is to interpret Aristotle's mandate of looking only to the "distinctive character of the injury" in a different sense. *Pace* Weinrib and Wright, what distinguishes corrective justice from distributive

[4] Even though in some of these cases the conduct might still be actionable by the tort of negligence.

[5] American Institute of Law, Restatement (Second) of Torts, § 46(1).

[6] *Christie v Davey* [1893] 1 Ch 316 (arguing that "what was done by the Defendant was done only for the purpose of annoyance and in my opinion, it was not a legitimate use of the Defendant's house to use it for the purpose of vexing and annoying his neighbours" [326-7 (North J)]). See also *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.

[7] "[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff." *Rookes v Barnard* [1964] AC 1129 (HL), 1221 (Lord Devlin).

[8] The cases are summarised in Edelman (2002, 136–145).

justice is not excluding considerations based on merit, virtue, or wealth, but rather the aim of repairing the injury. Under this framework, looking to the "distinctive aspect of the injury" means that courts indeed will usually disregard distributive considerations. However, it does not exclude the possibility of considering these factors in order to perform the task of repairing the injury. I will explore this argument in the following sections.

3. DISTRIBUTIVE JUSTICE IN TORT ADJUDICATION

Following the famous expression coined by Perry (1996), it is possible to appreciate a shift or "distributive turn" in tort theories. It could be said that this turn has two main aspects. The first relates to the assessment of tort systems' performance in light of distributive justice criteria. Under these parameters, the question posed is whether tort systems meet the demands of distributive justice. Keren-Paz (2007) argues that they don't, claiming that these systems have regressive effects on wealth distribution. This diagnosis is relevant not only because it confirms the well-known fact that tort law is indifferent to or maintains the substantive inequalities in which the parties find themselves, but also because it reveals that these systems exacerbate or increase these inequalities. Others, such as Cane (2001), have emphasized that tort systems have distributive consequences that must be justified if the practice is to be considered a desirable institution. To this end, he proposes a division of labor between corrective and distributive justice. While the latter is concerned with determining the rules that regulate the requirements and limits of tort liability, the former is concerned with applying these rules in individual cases. Thus, distributive justice could explain the regulation of tort liability, whereas corrective justice could explain the adjudication in particular cases.

Some authors have developed a different account of distributive justice in tort law from the perspective of adjudication. In this sense, Finnis has argued that the act of adjudication itself has a distributive nature, for according to him, "the submission of an issue to the judge itself creates a kind of *common* subject matter, (…) which must be allocated between the parties" (Finnis 2011, 179). In the same vein, Cane holds that "a court presented with a tort dispute (for instance) cannot avoid or evade the distributive decision involved in choosing or making a rule of liability to resolve the dispute" (Cane 2001, 420).

Gardner has developed the notion of localized distributive justice, which he refers to as "distributive justice between the parties" (Gardner 2014, 346–350). Perry once called this feature as a form of "localized distributive justice," dealing with the problem of distributing the burden of an injury among a group of persons (Perry 1992, 461). For Perry, however, this localized nature of distributive justice was unjustified: there are no reasons to limit the potential bearers of the loss

to victims and injurers only (Perry 1992, 461). By contrast, Gardner holds that the localized nature of this type of distributive justice is justified based on corrective justice: the reasons that support restricting the potential bearers of the burden of the injury to victims and injurers alone are "reasons to do (and to support the doing of) corrective justice" (Gardner 2014, 348). Applying this idea more concretely, Gardner argues that certain tort doctrines – such as mitigation and remoteness of damages, as well as contributory negligence – aim to distribute the losses between plaintiffs and defendants. According to him, therefore, they lack a "corrective-justice rationale" (Gardner 2014, 349). In a similar way, Sheinman claims that corrective justice can only adequately explain tort doctrines such as proximate cause, contributory negligence, and mitigation of damages if it is conceived as a form of distributive justice. For these "doctrines are sensitive to the relative contribution of the parties to the production of the wrongful interaction or its consequences" (Sheinman 2014, 376). More recently, Jaffey argues that it is possible to articulate a notion of distributive justice within a "standpoint limitation," suggesting that distributive justice considerations can play a role in adjudicating private law conflicts, as long as the decision achieves "a just resolution of the dispute between the parties" (Jaffey, 2023, 85).

In my view, tort adjudication is – at least in some sense – a distributive task. Take Lord Denning's opinion in the English classical case *Miller v Jackson* [1977] 1 QB 966 (Court of Appeal). The claimants were the owners of a property located next to a cricket ground. They sued the cricket club for negligence and nuisance, claiming damages and an injunction to restrain the club from playing cricket without taking adequate steps to prevent balls being struck out of the ground onto the claimant's house or garden. In this case, the Court of Appeal had to make a choice: either to grant the injunction to the claimant, restraining the practice of cricket in that ground (which had been practiced there for about 70 years), or to refuse the injunction, allowing the practice of cricket and its interference with the enjoyment of the neighbouring properties when cricket is being played. On the face of it, it seems to me that a judge cannot rely on property law to solve this problem. At first sight, the solution seems to point in favour of the claimant, since the defendant's activity is interfering with the claimant's enjoyment of their land. However, for Lord Denning, the law should also consider the beneficial effects on the general public for each of the possible solutions. This means balancing "the interest of the public at large" with the "interest of a private individual":

> The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone… As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. ([1977] 1 QB 981-982)

Lord Denning's approach is controversial, and I do not wish to defend it here. However, his approach shows that courts also share this view of tort law as a distributive mechanism. By contrast, corrective justice scholars usually criticise *Miller*. For instance, Beever argues that the decision is unjust because it confiscated the claimant's property rights "on the basis of interests possessed by the public (…) that have no proper legal status whatsoever" (Beever 2013, 148). From an exclusively doctrinal point of view, Beever's claim has weakened after the English Supreme Court's more recent decision in *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822, in which the Court firmly established that the public interest must be taken into account to decide whether to grant an injunction in cases of nuisance.[9] But Beever claims that the decision in *Miller* was not only doctrinally wrong, but also *unjust*. Why? The reason seems to be that courts should not be allowed to make this type of decision. Again, the argument is that the role of judges should be restricted to implementing corrective justice with its correlative or bilateral structure, whereas distributive decisions should be confined to legislative bodies, in which public interest concerns can be properly taken into account. But as was seen above, it is questionable to argue that this is a requirement of corrective justice, and it is also very doubtful that such division of labour between courts and legislative bodies is feasible.

But my view does not need to rely on *Miller* to show that tort adjudication involves, in some sense, a distributive task. *Donoghue v Stevenson* [1932] AC 562 (HL) is, for instance, an uncontroversial example. The famous case had an apparent distributive effect: the losses associated with defective products were transferred from consumers to manufacturers. Accordingly, the decision redistributed the burden of these losses from consumers to manufacturers. As Stapleton points out, "*Donoghue*'s case shows us the redistributional potential of changes in the law" (Stapleton 1995, 837). Cardozo J's decision in *MacPherson v Buick Motor Co*, 111 NE 1050 (NY 1916) is another example. *MacPherson* overruled the old "privity" rule, according to which victims injured by defective products or negligently provided services could not make a tort claim if they were not the immediate purchaser of the product or service.[10] Abolishing the privity rule leads to the same result as was in *Donoghue*: losses were redistributed from one class of individuals (consumers) to another (manufacturers or service providers).

[9] "As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor (…) The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood." [2014] UKSC 13, [2014] AC 822, [124] (Lord Neuberger).

[10] The rule was originally established in *Winterbottom v Wright* 152 Eng Rep 402 (Ex 1842).

Interestingly, some legislatures have made an explicit reference to distributive concerns in the tort adjudication process. I shall signal two of these references here. Both references are consistent with the approaches that stress the role of distributive justice in tort adjudication, but without altering the bilateral structure of private law. The first rule to mention is § 829 of the German Civil Code, establishing that:

§ 829 Liability in damages for reasons of equity

> A person who, for reasons cited in §§ 827 and 828, is not responsible for damage he caused in the instances specified in §§ 823 to 826 must nonetheless make compensation for the damage, unless damage compensation can be obtained from a third party with a duty of supervision, to the extent that in the circumstances, including without limitation the circumstances of the parties involved, equity requires indemnification and he is not deprived of the resources needed for reasonable maintenance and to discharge his statutory maintenance duties (Dannemann, Schulze 2020, 1627).

The rule allows courts to impose liability based on reasons of equity in cases where victims will not be compensated through tort law, for the defendant lacks the capacity to be held liable. It is a mechanism to correct any possible unfair situations that may arise for victims. In my view, the rule cannot be explained in terms of corrective justice but is consistent with the bilateral structure of private law. Only considerations of distributive justice could justify the court's intervention in these cases, because the assessment of damages will clearly not be based on the "distinctive character of the injury," but rather on the circumstances of the case, taking especially into account the economic situation of the parties: "The equity judgment must take into account all relevant circumstances, in particular the economic situation of both parties. Compensation can only be awarded if there is a great economic imbalance in favour of the actor" (Dannemann, Schulze 2020, 1629). In the same vein, it has been argued that this rule poses "a question of distributive justice arising within the framework of principles of corrective justice" (Jansen 2021, 107). Thus, the rule can be interpreted as an instance of distributive justice with the "standpoint limitation" (Jaffey 2023, 84–86).

A second clear reference to distributive justice and charity is the reduction of damages rule in many jurisdictions but including the harmonization projects of tort law in Europe. This clause can be seen as a reverse rule of § 829, allowing courts to reduce the amount of the award of damages based on some equitable considerations like the German rule. Notably, however, the German Civil Code does not endorse this rule.

4. A CASE STUDY: THE REDUCTION OF DAMAGES RULE

Article 10:401 of the Principles of European Tort Law (PETL) provides:

Art. 10:401. Reduction of damages

> In an exceptional case, if in light of the financial situation of the parties, full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Article 1:101), the scope of the protection of the interest (Article 2:102) and the magnitude of the damage have to be taken into account in particular (European Group on Tort Law 2005, 10).

The rule was much discussed within the Working Group, since the most influential jurisdictions in Europe – namely England, France, and Germany – do not have such a rule. However, the rule ultimately remained in the text, largely due to the influence of Scandinavian jurisdictions, as well as other systems that include the rule within their Civil Codes (e.g., Portugal, Switzerland, and the Netherlands). Surprisingly, the rule has begun to be seen in other legal systems far from Europe, such as Brazil or Argentina. It must be noted, however, that the rule remains controversial among different jurisdictions (von Bar 2009, 971). Interestingly, both harmonization projects in Europe (PETL and von Bar's Principles) on this matter have adopted it, especially considering that the typically influential European legal systems, such as England, France, and Germany, do not adopt it.

The systems that do adopt the rule formulate it in various ways. Some mention it as a mechanism that allows for a 'reduction of the defendant's liability' (for example, PETL, von Bar's Principles, and the Swiss Federal Code of Obligations). Others allow for a reduction or limitation of the duty to compensate (for instance, Poland and Finland) or of the amount of compensation (as in the case of the Netherlands). In the area where there appears to be a wide variety is in determining the factors that influence the possibility of reducing compensation. First, the codes explicitly state that this is a rule of an exceptional nature and is not intended to be applied in most cases. This is expressly highlighted in the PETL, which states at the outset of the rule that the mechanism operates in "exceptional cases." Other ways to express it include the requirement that the compensation must be "disproportionate" or "excessively burdensome" for the defendant. The Swiss Federal Code of Obligations is particularly emphatic on this point, stipulating that the defendant must be in a "state of emergency when paying compensation."

The key issue is to determine which exceptional circumstances make the rule applicable. A widespread criterion in various formulations relates to the defendant's economic capacity. Therefore, for the reduction to be justified, it would be necessary for the compensation to be disproportionate or excessive considering the defendant's economic situation. However, most codes also invite us to consider the victim's economic situation. In this aspect, the Polish

Civil Code provision is very interesting, referring to the "principles of social coexistence." While the economic situation is not the only criterion for the rule to apply, it is the primary element that must be present for the reduction to be justified. Therefore, in my opinion, the economic situation of the parties should be proven during litigation. Otherwise, it would be mere intuitions or speculations by the court regarding the economic situation of the parties. At the very least, the defendant should have presented some evidence in court to demonstrate the disproportionality or excessively burdensome nature of potential compensation on their personal assets.

Another requirement for the rule to apply is that the defendant did not act with intent or maliciously. Some jurisdictions explicitly mention this condition, while others refer to it indirectly by stating that the seriousness of the defendant's conduct must be considered or by referring to "other criteria," among which could be regarded as the wrongfulness of the defendant's conduct. The Swiss Federal Code of Obligations goes even further by also excluding cases of gross negligence. The general principles of tort law justify the restriction regarding intent or malicious behavior. It represents a benefit that a defendant acting with negligence could obtain, but which is forfeited as soon as intent is established.

On its face, the rule is based on charity or distributive justice, since the reason to reduce the sum of damages is based on the "financial situation of the parties." Interestingly, however, the rule is not always articulated in Civil Codes based on the financial situation of the parties. For instance, art. 6:202 of the PEL/von Bar Principles endorses a similar rule, but it does not mention the financial situation of the parties. This is also the case in Article 944 of the Brazilian Civil Code.[11] It is also worth noting that most jurisdictions that do have the rule are not particularly unequal. At least according to the Gini index (or coefficient), which measures inequality, the trend appears to indicate that legal systems with these types of rules do not necessarily correspond to particularly unequal countries. Taking the example of Poland (27.0), Finland (26.6), Sweden (29.5), Switzerland (31.1), and Portugal (33.7), these are countries with relatively low levels of inequality that also have the rule in place. Among countries with relatively high levels of inequality, Brazil stands out (52.0).[12] However, apart from Brazil, it does not appear to be a determining factor that a country must have high levels of inequality to integrate the rule.

The PETL indicate that the rule serves a dual function: first, to "clarify an obscure and often unidentified judicial practice" (European Group on Tort Law 2005, 180). It is interesting to formulate the rule as an explicit statement of covert judicial practices. In civil law jurisdictions, it is common for courts

[11] Even though scholars do mention these distributive considerations in their commentaries to the rule. See e.g. Braga Netto and Rosenvald (2024, 482).

[12] Source: https://datosmacro.expansion.com/demografia/indice-gini (accessed: 6.07.2024).

to introduce retributive considerations in non-pecuniary damages cases (Pereira Fredes 2015). Elsewhere, I have argued that courts often consider the defendant's economic capacity when determining damages to be paid, both to increase or decrease compensation (Pino Emhart 2018). The expression of such a rule could therefore compel courts, in some cases, to explicitly state their reasons for reducing compensation that may be deemed excessively burdensome for the defendant. The existence of the rule allows for this practice to be carried out in a regulated manner, rather than capriciously or arbitrarily, with courts required to justify their decisions based on the rule's parameters.

The PETL add that in some systems, the rule may aim to "the official recognition of an infringement rather than full compensation, which may be an oppressive burden to the defendant in some cases" (European Group on Tort Law 2005, 180–181). These are situations where the judgment allows the victim to criminally prosecute the defendant, as in some jurisdictions, a civil action for damages will secure that the defendant is criminally prosecuted. Von Bar's project, on the other hand, offers as a justification that the rule could serve as a mechanism to control civil liability in light of "considerations of justice and equity." This point emphasizes a different aspect and is equally interesting as a rationale for the rule. It is particularly highlighted in Brazilian law, where the rule could be applied to moderate the disproportion that may arise between the seriousness or culpability of the conduct and the amount of compensation that the defendant is obligated to pay (Netto, Rosenvald 2024, 477–478). Unlike in criminal law, there is little sensitivity regarding the seriousness of the defendant's conduct, which can be morally criticized in the realm of tort liability. Von Bar's project also argues that the rule could fulfill a function analogous to foreseeability in contract law.

It has been argued that the existence of this rule introduces an element of uncertainty and unpredictability into tort law. Additionally, it has been claimed that the principle of equality is arguably infringed, as the rule would potentially provide different treatment to victims who suffer the same type of harm. In my opinion, this criticism is exaggerated. The judicial criterion indeed introduces some degree of uncertainty in determining compensation amounts. However, it is primarily a mechanism of an exceptional nature, as highlighted in the norms that establish it, which either explicitly state that it applies in exceptional cases or uses special criteria such as "excessive disproportion," "emergency situation," or "clearly unacceptable outcomes." Moreover, tort liability already encompasses sufficiently uncertain elements such as causation, fault, or foreseeability of harm, not to mention the inherent uncertainty in compensating non-pecuniary damages.

In my view, the rule does not violate the principle of equality, if judges apply the rule reasonably and consistently. Any case meeting the established circumstances would be treated in the same manner. It could be argued that a victim might receive differential treatment simply because the defendant is in a financially disadvantaged position. However, this also occurs in cases of compensation for

loss of earnings, where some victims receive more or less, depending on the income level they would have had had the wrongful act not occurred. Moreover, if the defendant is indeed in a financially unfavorable situation, the chances for the victim to obtain real compensation during the execution of the judgment will be slim.

Additionally, critics have pointed out that the defendant's potential insolvency should not be a concern of tort law but rather an issue belonging solely to bankruptcy law. This debate resembles discussions about the role that distributive justice can (and should) play in tort liability. Are these concerns that tort law should address, or do they fall within the purview of other legal disciplines such as tax law, administrative law, social security law, or constitutional law? And of course, it is the same argument that is usually run against assigning a role to distributive justice in tort law.

Another possible criticism of the rule is whether alternative normative criteria within tort law, which may be less controversial, could be used to provide an equitable solution to such cases. For instance, causation or the criterion of the significance or severity of the damage could be considered. These concepts also provide some degree of flexibility to trial judges, allowing them to potentially use these tools to resolve cases involving defendants under these economic hardships. However, it is not entirely satisfactory to invoke these doctrines for factual scenarios different from those they are intended to regulate. An explicit rule addressing disproportionality towards the defendant from this perspective appears more transparent in determining the amount of compensation, thereby avoiding argumentative manipulation of tools meant for regulating other types of scenarios.

In sum, despite the abundant criticisms, especially those suggesting that other doctrines within tort law could address the issue more effectively, the rule serves to explicitly clarify and encourage a more transparent application of a criterion that may already be applied covertly by courts. It remains to be seen whether the rule is necessary for a tort system and which of these normative justifications should prevail. However, it seems that its establishment would not entail an intolerable violation of the general principles that typically govern systems of tort law, especially considering that it is a rule of a highly exceptional nature. For the same reasons, the rule is consistent with Jaffey's "standpoint limitation" for distributive justice considerations in private law. The rule enables a more precise delineation of when and how a reduction in compensation might be justified, thereby avoiding arbitrary decisions and ensuring more consistent judicial outcomes. Nonetheless, further debate and analysis are needed to fully justify its existence and determine whether it effectively balances fairness and legal certainty in tort law contexts. However, it certainly challenges the general claim that judges in tort law should not engage in charity.

5. CONCLUDING REMARKS

I hope to have shown that the orthodox thesis, according to which there is no role for distributive justice or charity in tort law, is at least doubtful. There is an array of scholarship and doctrines posing critiques to this traditional view of tort law. More concretely, this claim has been discussed using the reduction of damages rule, which allows the judge, in some cases, to exercise discretion in partially discharging the defendant from their duty to pay damages. It is not an uncontroversial rule in European tort law, but it has also been observed in other non-European jurisdictions, such as Argentina and Brazil. There is much to discuss about this prerogative of courts. However, it is my contention that the orthodox view regarding the connection of tort law with distributive justice has hindered a proper discussion of mechanisms like these. It is expected, therefore, that once this orthodox view is abandoned, more debates will follow regarding these issues.

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THE TAXATION OF DIGITAL NOMADS UNDER ROMANIAN LAW: WHAT IS THE CATCH?

Abstract. Promoted as an attractive country for digital nomads (ranked on the 3rd place in the Digital Nomad Index[1]), Romania adopted the Law no. 69 of 29 March 2023, which brought changes to the tax regime for digital nomads.

According to the new provisions, the so-called "digital nomads" are exempt from income tax and compulsory social contributions (health and pension contributions) for a limited timeframe. This article examines, exclusively from the income tax perspective, the features of digital nomads to which the tax provisions apply and the conditions under which the income tax exemption applies.

Keywords: digital nomads, Romanian tax law, double tax treaties, taxation

OPODATKOWANIE CYFROWYCH NOMADÓW W PRAWIE RUMUŃSKIM – GDZIE WYSTĘPUJĄ WĄTPLIWOŚCI?

Streszczenie. Promowana jako kraj atrakcyjny dla cyfrowych nomadów (3 miejsce w Indeksie Digital Nomad), Rumunia przyjęła ustawę nr 69 z 29 marca 2023 r., która wprowadziła zmiany w reżimie podatkowym dla cyfrowych nomadów.

Zgodnie z nowymi przepisami tzw. „cyfrowi nomadowie" przez ograniczony czas są zwolnieni z podatku dochodowego i obowiązkowych składek na ubezpieczenia społeczne (składki zdrowotne i emerytalne). W artykule zbadano, wyłącznie z punktu widzenia podatku dochodowego, cechy cyfrowych nomadów, do których mają zastosowanie przepisy podatkowe oraz warunki, na jakich obowiązuje zwolnienie z podatku dochodowego.

Słowa kluczowe: cyfrowi nomadzi, rumuńskie prawo podatkowe, umowy o unikaniu podwójnego opodatkowania, opodatkowanie

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[1] The Digital Nomad Visa Index is a comprehensive ranking system evaluating and ranking countries based on their suitability for digital nomads. This index considers various factors critical for remote workers who travel and live in different countries. For more details, see: https://visaguide.world/digital-nomad-visa/digital-nomad-index/.

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1. WHO ARE DIGITAL NOMADS?

The concept of digital nomads is not new. In 1997, *T. Makimoto* and *D. Manners* (Beretta 2022, 6) in a book titled *Digital Nomad* predicted that the development of technology would enable people to work remotely.

Twenty years later, the digital nomad is defined as "an emerging sub-population of nomadic workers with a distinct motivation for travel, world adventure and independent remote work. The motivation most often associated with digital nomad's mobile lifestyle is travel adventurism and escape from the office atmosphere" (Kostic 2019, 205).

Contrary to the case of digital workers (typical remote workers), a short degree of permanence is specific to digital nomads. A digital nomad is always a remote worker, but a remote worker is not always a digital nomad, as the latter lacks interest in staying longer in the same jurisdiction. In other words, the digital nomad is a category of mobile professionals who perform their work remotely from anywhere in the world, taking advantage of digital technologies (Gadzo 2022) and of the fair and open Digital Environment (Mănescu 2024, 289–304).

2. THE EXPERIENCE OF OTHER COUNTRIES

After the COVID-19 pandemic, many states have introduced provisions tailored to attract digital nomads.

For example, Estonia[2] implemented in 2020 the Digital Nomad Visa that allows digital nomads to live and work in Estonia for up to one year. This visa is open for individuals who can work online and independently of location, and depends on several conditions to be met: (i) the ability to work remotely using telecommunications technology; (ii) the ability to present an active employment contract with a company registered outside Estonia, or to conduct business through their own company registered abroad; or (iii) the ability to work as a freelancer for clients outside Estonia. In addition, the individual's income must meet the minimum threshold (4,500 EUR gross of tax) during the six months preceding the application.

Another country with a similar solution is Croatia, which introduced the so-called "digital nomad visa,"[3] which is, in fact, a residence permit, in accordance with which the digital nomad is defined as a third-country national who is employed or works via communication technology for a company or their own company that is not registered in Croatia or do not work or provide services to employers

[2] See: https://www.e-resident.gov.ee/nomadvisa/ (accessed: 15.09.2024).

[3] How to apply for the digital nomad residence permit in Croatia – Guide for 2024: https://www.expatincroatia.com/digital-nomad-visa-croatia/#law (accessed: 15.08.2024).

in Croatia (Gadzo 2022). Furthermore, under domestic tax law, digital nomads are not taxed on the income obtained based on employment or self-employment activity for an employer located outside Croatia.

In January 2023,[4] Spain introduced the digital nomads visa as part of the Startup Act to attract and recover international and national talents that will allow individuals to reside and work in Spain for five years. This type of visa is available only for non-EU/EEA citizens, for both employees and self-employed with many clients worldwide and who receive income from different sources from online activities outside Spain. The tax regime provides for a decrease of income tax to 15% from the standard tax rate of 24%.

In 2021, Greece introduced a Visa for Digital Nomads, who are defined as third-country nationals, self-employed or employed, who work remotely using Information and Communication Technologies (ICTs) with employers or clients outside Greece to whom a visa is granted for a period of up to twelve months. Moreover, Greece also allowed European and non-EU workers to transfer their tax residence to its territory and granted them a 50% off on income tax of a Greek source for up to seven years (Pignateri 2023, 383–401). Of course, the trade and cooperation agreement between the European Union, the European Atomic Energy Community, and the United Kingdom of Great Britain and Northern Ireland – concluded at the end of 2020 – has also helped in regulating digital trade (Mănescu 2021, 963–974) in general, as well as the way in which the digital nomads perform their activities.

Other countries – such as Brazil, Capo Verde, Cayman Islands, Costa Rica, Georgia, Hungary, Iceland, Malta, Mauritius, Mexico, Monserrat, Panama, Saint Lucia, or Seychelles – have designed programmes for digital nomads (Beretta 2022, 2–25), and the list is open.

3. DIGITAL NOMADS UNDER ROMANIAN LAW

In accordance with Law no. 22/2022,[5] under Romanian law, a digital nomad is defined as a foreigner (i) who is employed under a labour agreement concluded with a company registered outside Romania and who provides services using a information and communication technology, or (ii) who owns a company registered outside Romania through which the individual provides services using an information and communication technology, and conducts the activity remotely by using this technology.

[4] See: https://schengenvisainfo.eu/digital-nomad-visa/spain/ (accessed: 15.08.2024).

[5] Law no. 22/2022 on the amendment of Government Emergency Ordinance no. 194/2002 on the foreigners' regime in Romania, published in Official Gazette no. 45/14 of February 2022.

The explanatory memorandum to Law no. 22/2022[6] states that the term "digital nomad" has emerged to define the category of employees who work remotely for an employer registered in one country but who wish to live and travel between countries while teleworking. Over time, the concept of digital nomads has evolved to include people who have registered a company but are able and willing to carry out economic activity remotely, living or travelling in a country other than the one in which they have registered their company.

This new concept under Romanian law is justified by the large number of digital nomads around the world,[7] so Romania aims to attract many people with this status to spend financial resources here. There is no estimated financial impact for Romania – with the only economic reference being made to Argentina – that planned to introduce this concept in 2021.

Under Romanian law, the concept of a digital nomad has the following features:

- it is a foreign individual defined[8] as a person who does not have Romanian nationality, the nationality of another Member State of the European Union or of the European Economic Area, or the nationality of the Swiss Confederation. Thus, the tax regime of digital nomads shall apply only to third-country nationals,[9] similar to the tax regime from Croatia and Spain;
- the individual is employed under an employment contract by a company registered outside Romania and performs work using an information and communication technology;
- the individual owns a company outside Romania and renders services using an information and communication technology.

The first remark related to the personal scope of the "digital nomad" concept is that self-employed individuals are excluded, although this is a category quite common in practice, as is shown by the practice of other counties that have extended the legal regime of the digital nomad concept to cover also self-employed individuals.

The exclusion of self-employed individuals is even more unjustified, because, as Pignatari (2023, 389) points out,

> The concept of "employee" and "independent service provider" are becoming increasingly indistinguishable so that the dichotomy has lost its importance due to the emergence of new business models and new modalities of work within digital economy world. The very concept

[6] See: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=19549 (accessed: 16.08.2024).

[7] It is shown that in 2018, the number of digital nomads was estimated to be around 4.8 million, while 17 million aspired to hold this status in the future.

[8] By Art. 2 letter a) of G.E.O. no. 194/2002 on foreigners' regime in Romania, republished in Official Gazette no. 421/05 of June 2008.

[9] Which means that this regime does not apply to EU/EEA/Swiss nationals working remotely while they stay in Romania.

of work is moving away from the need for a physical presence either on the employers premises or in the employers own jurisdiction. In this context, the question is whether it is appropriate to give different tax treatments to these two categories that, day after day, come closer, and their differences become less distinct.

Then, with reference to individuals who own a company outside Romania to which the services are provided, there is no detail on the type of activities carried out. The notion of a "company" is not defined, and ownership most likely covers the holding of corporate rights giving rise to dividends. However, the rendering of services could be carried out as a shareholder or could also cover the provision of dependent personal services (from an employment relationship) with one's own company, in which case it is the presence of a digital nomad who performs activity under an employment contract.

4. THE TAX PROVISIONS

To reflect the common law provisions on the concept of digital nomads, the Romanian Tax Code was amended by Law no. 69/29 of March 2023 to lay down a more appealing tax treatment. I will further analyse the tax treatment both in terms of domestic law provisions and with reference to the application of double tax treaties.

4.1. Domestic tax provisions

The newly introduced provision (art. 228 (2) d) of Romanian Tax Code) stipulates that the following is non-taxable:[10]

- income from salaries or assimilated obtained by an individual with the status of a digital nomad,[11] from the activity he/she performs under an employment contract with a company registered outside Romania and who provides services using a information and communication technology *or* who owns a company registered outside Romania, where he/she provides services using an information and communication technology and may carry out the activity as an employee or the activity within the company remotely using an information and communication technology
- provided that the individual is present in Romania for a period or periods not exceeding in aggregate 183 days during any period of 12 consecutive months ending in the calendar year concerned.

[10] There are similar provisions stating that digital nomads are exempt from compulsory social contributions.

[11] Defined according to the provisions of G.E.O. no. 194/2002 on the foreigners' regime in Romania, published in Official Gazette no. 45/14 of February 2022.

These provisions are included in Title VI of the Romanian Tax Code on the taxation of non-residents and lay down an exception to the provisions according to which income obtained by non-resident individuals from a dependent activity carried out in Romania is taxable in Romania.

There are two categories of persons exempted from taxation, depending on the nature of the activity carried out by the digital nomad, analysed below.

4.2. Income from salaries or assimilated earned by the digital nomads employed by a company registered outside Romania

The income earned by digital nomads from salaries and assimilated income is subject to tax exemption. Although it is stipulated that income from salaries and assimilated income is earned for work performed under an employment contract, in accordance to Romanian domestic tax law, only the income from salaries is earned under an employment contract. Income assimilated to salaries may be derived in addition to an employment contract from other contractual relationships such as directors' fees derived under a management contract, which under the Romanian tax code have the same legal approach as salaries. There seems to be a contradiction between the nature of the income (from salaries) and the legal relationship that generates it (employment contract). It can be considered that the nature of the income takes precedence and that income obtained by directors can also be included in the category of exempted income, as it is assimilated in domestic tax law to salary income.

As has been shown, self-employed individuals are excluded from the notion of a digital nomad. However, if a person carries out a self-employed activity for the beneficiary, i.e. a company registered in another state, but which – according to the criteria of art. 7 para. (3) of the Tax Code – is of a dependent nature, it can be reclassified into dependent activity by the tax authority under the general anti-abuse rule of art. 11 para. (1) of the Romanian Tax Code. The outcome will be the exemption from tax of the independent activity reclassified into dependent activity under the digital nomads regime.

With reference to the employer, income from salaries and assimilated must be obtained from a company registered outside Romania. The digital nomad is a foreigner, a person with the nationality of a third country (non-EU or non-EEA). However, the employer only needs to be a company registered outside Romania, and it is possible to be registered in a EU or EEA country.

Then, the exemption from income tax is granted "if the individual is present in Romania for a period or periods not exceeding 183 days during any period of 12 consecutive months ending in the calendar year concerned." In other words, the exemption does not apply for a period of 183 days but is subject to the physical presence of the digital nomad under 183 days in any twelve-month period ending in the calendar year concerned. If the digital nomad has a presence of more than

183 days in the performance of his/her activity (for a non-resident employer), he/she will be taxed retroactively from the first day of activity in Romania. Therefore, by limiting tax exemption on the salary income "under the condition" and not "for" a period of 183 days, the original objective – attracting digital nomads – is practically reduced.

4.3. Income earned by the digital nomads who own a company registered outside Romania

This hypothesis also refers to income from salaries and assimilated that is earned by the digital nomad. This time, the digital nomad "owns a company registered outside Romania" and "can carry out the activity as an employee or activity within the company." Thus, there are two possible scenarios: the digital nomad is employed in his/her own company and earns income from salaries, or the digital nomad performs "activity" in his/her own company. There is no detail on the type of activity performed, but – since only salary and assimilated income is exempt under the legal provision – the only option available is to perform activity is as a director, which under the Romanian tax code is assimilated to salary income.

Again, there is the condition relating to physical presence in Romania for a period or periods not exceeding 183 days during any period of 12 consecutive months ending in the calendar year concerned. There is no limitation regarding the clients for whom the company is performing the activity, so they can even be clients from Romania, the only restriction being the performance of the activity for a company registered outside Romania.

4.4. Is there a tax benefit when a double tax treaty is applied?

As a rule, under Romanian domestic tax provisions, the income earned by non-residents from an activity carried out in Romania is taxable in Romania. If the conditions for the existence of the digital nomad are met, the same income is not taxable in Romania if the physical presence of the digital nomad is less than 183 days in any twelve-month period.

However, if a double taxation treaty applies, is there any tax benefit applicable to the digital nomad?

Romania has about 89 double tax treaties[12] in place which follow the OECD Model Convention regarding the allocation rules of taxation applicable to salaries. Thus, art. 15 para. (1) first sentence of the OECD MC provides the exclusive taxation right in the employee's residence state (income beneficiary) as follows:

[12] See: https://static.anaf.ro/static/10/Anaf/AsistentaContribuabili_r/Conventii/Conventii.htm (accessed: 15.07.2024).

"subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that state unless the employment is exercised in the other Contracting State." However, this rule applies only if the employee exercises his/her employment in his/her residence state or a third state (Reimer, Rust 2015, 1115).

For this analysis, of interest is the allocation of taxing rights provided by art. 15 para. (1), which states that "if the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other state." However, art. 15 para. (2) of the OECD MC provides for the exclusive taxing rights of the residence state, even if the activity is carried out in the source state, if the three conditions of art. 15 para. (2) are met cumulatively, namely:

a) the recipient is present in the other state for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned;
b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other state;
c) the remuneration is not borne by a permanent establishment which the employer has in the other state.

The second and third rules provided by art. 15 para. (2) of the OECD MC are directly linked to the physical presence of the employer in the state of activity, but in the case of digital nomads, the employer is by default a company registered in a country outside Romania. It is not excluded that the employer, although registered outside Romania, may have a permanent establishment in Romania which bears the remuneration, in which case the income derived by the digital nomad is taxable in Romania regardless of his/her period of physical presence.

However, most likely, the provision of art. 15 (2) a) will be applicable – the employee must be present in the other contracting state for a period or periods that do not exceed a total of 183 days in any twelve-month period commencing or ending in the relevant fiscal year. If the test of physical presence of less than 183 days is met, Romania does not have the competence to tax the salary income for the activity carried out in Romania either under domestic tax law or under a double tax treaty.

Therefore, in the case of digital nomads to whom the provisions of a double taxation treaty apply, within the physical presence limits set by the Tax Code (less than 183 days), Romania has no competence to tax the earned income anyway.

Lastly, if one investigates art. 16 on the Director's fees which might come into play for the activity carried out by the digital nomad in his/her own company, again the taxing right is not allocated to Romania but to the state where the managed company is located.

5. CONCLUSIONS

Romania has introduced the concept of a digital nomad and established a more favourable tax regime through the provisions of the Tax Code. However, the regime does not apply to the largest category of digital nomads, i.e. those who are self-employed. Then, if we are in the situation of digital nomads with the residence in a country with which Romania has concluded a double taxation treaty, there is no tax benefit: in any case, by applying the taxing rule provided by Article 15 or 16, the salary and assimilated income is not taxable in Romania. The only tax advantage is for residents of countries with which Romania does not have a double taxation treaty, in which case, for a period of physical presence of up to 183 days, the salary and assimilated income is not taxable in Romania under the provisions of the domestic tax provisions.

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INSTRUMENTALITY IN THINKING ABOUT LAW (A SKETCH OF THE PROBLEM)

Abstract. The paper highlights the significance of instrumentality in law by emphasizing its inherent nature and transformative potential. Instrumentality is portrayed as a fundamental aspect of law, suggesting that law naturally tends to become an instrument. This characteristic allows law to adapt and respond to various social and legal needs, making it a dynamic and evolving entity. The paper questions the possibility of maintaining non-instrumentality in law, implying that the instrumental nature of law is essential for its function and relevance in society.

Keywords: law, instrumentality, non-instrumentality, cognition of law, analytical studies, real legal problems

INSTRUMENTALNOŚĆ W MYŚLENIU O PRAWIE (ZARYS PROBLEMU)

Streszczenie. W artykule podkreślono znaczenie instrumentalności w prawie, zwracając uwagę na jej nieodłączny charakter i potencjał transformacyjny. Instrumentalność jest przedstawiana jako fundamentalny aspekt prawa, co sugeruje, że prawo w naturalny sposób ma tendencję do stawania się instrumentem. Ta cecha pozwala prawu dostosowywać się i reagować na różne potrzeby społeczne i prawne, co czyni je dynamicznym i ewoluującym podmiotem. W artykule podano w wątpliwość możliwość utrzymania nieinstrumentalności w prawie, sugerując, że instrumentalny charakter prawa jest niezbędny dla jego funkcji i znaczenia w społeczeństwie.

Słowa kluczowe: prawo, instrumentalność, nieinstrumentalność, poznanie prawa, studia analityczne, realne problemy prawne

1. I believe that the issue of the instrumentality of law can be considered as fundamental, especially if we could cognitively reconstruct the stopping point at the boundary, and within this stopping point, between instrumentality and non-instrumentality, if non-instrumentality is indeed consistently possible in law.

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This is not about descriptively presenting something as an instrument or simply naming it so in the introduction to legal studies. The doctrine recognizes many such cases, yet little can be drawn from this prospectively. To fundamentally free ourselves from them, let us instead try to perceive and create instrumentality secondarily in the dependencies of the examined reality or in the expressed views.

It seems that this instrumentality is seen as something dependent on law, which does not always mean that it is primarily legal. On the other hand, it is something wholly produced within law and for law without delving into primacy. Finally, it is something generated because of the verticality of law regarding its essence. And there is no end to this. For law, in its expressed characteristics, posseses the ability to be reduced to instrumentality. It requires numerous facilitations in this regard. Could this influence its understanding and functions? It is not the aim of the paper to reflect on how this instrumentality is used. We do not want to achieve only a significant impact on the scope of the functions of law in quantitative terms, which limits the problem that law itself in its study becomes significant and more organized. It is not about further divisions but about clarifying the essence of law in its need to be law. This need presupposes a different kind of philosophy than law, as it is presented through known definitions or other used terms.

We know that law has numerous complexities, partly because it is everywhere, also with vague boundaries of occurrence, especially in terms of subject matter, which plays a fundamental role in instrumentality or conventionality. It may also appear in various complex issues, often repeated, thus generally becoming simple. For the considerations in understanding law, it would be beneficial to establish trends between the complex and the simple or vice versa. Naturally, the multitude of entanglements corresponds to the multitude of interpretations with various qualifications and invented so-called tools. Meanwhile, it seems most important for this to determine whether it is easy, applying the principles of the classification of ease, or whether it opens inventiveness to law. This issue borders on the creation of an interpretative theory, which does not yet exist, and thus there is also no developed theory of law, or developed law at all. Today's interpretation is a kind of sealed law. We have many conceptual and terminological resources. Moreover, we are ready to announce every new term even in exaltation, sometimes forgetting its placement within legal thought. This often happens due to the failure to recognize the sphere of the emergence of more instrumental law than that created in appropriate procedures. It is uncertain how these multitudes relate to each other, moreover, how their generation proceeds against their backdrop, as we have few research solutions concerning them and few deepened relations, but a lot of repetition in discussing (describing) their very elements. On these occasions, the question might arise: what in legal-theoretical statements corrupts law in the course of its implementation, especially since we do not always deal with direct pursuit? It is precisely the elements and relations in the context of instrumentality that constitute the focus of this analysis.

2. It is not about the fact that laws are sometimes specially named, often becoming slogans rather than emphasizing their theoretical distinctiveness, which for this reason, because of said distinctiveness, gives more weight to the complexity of their emergence than to the fact that they simply exist. There seem to be many issues here, certain methodological injunctions that are more instrumentally directed to the aforementioned emergence as instrumental distinctiveness than related to naturalness.

We believe that the answer to these questions, if it were to be for the law, its entirety should be taken into account: firstly, the law in the plane of sublimation with thought about itself, because this is the case when we refer to it even immediately after legislative activity. It then meets with ennoblement, e.g. proper beginnings, passing through our thoughts born in the need for law, or that its significance is also extra-legal. Well, in times of need, it must be used instrumentally, but with sublimity. Secondly, after the permissible expression of the law in sublimation, which after all goes towards instrumentalization, is also the instrumentalization in of itself, we nevertheless obtain a new version of the law. After all, it is one thing to focus on instrumentality as a product, and another thing to focus on the processes (activities) of arriving at it from the beginning. This separation is fruitful, because the very reflection on origins is generally preceded by the need to conceptualize the existence of law, i.e. instrumental law and natural law. So there it is. It is born, after it has been issued, in versions of e.g. judicial law, or in the pursuit of justice, also in the aspirations of the Ombudsmen, demonstrations, etc. In the understanding of non-legal values, these are also the extra-legal values of rights as something different from superiority, but nevertheless basic (fundamental), especially on a social scale. Therefore, sublimation is not accidental here, but with its instruments enters between the two, creating, perhaps, a new version of the law with its greatness and its superiority. How they are generically legal remains unanswered.

3. As if it naturally coincides with interpretation, learning to understand the law is also important, however, it is more borrowed, less original. Understanding, though not free from sublimation, has only as much of it as needed for a complete interpretation. After all, interpretation is dictated by the need to reproduce in the legal text its meaning in cases, and not in theory. That is, as for the scope, it is one-sided and still does not open. What is more, we also have *the principle of clara non sunt interpretanda*, i.e. a situation that excludes the admissibility of interpretation. Indeed, the interpretation is instrumental, but via a clearly defined need. Meanwhile, sublimation with the ennoblement of law presupposes social aspirations through law, so it is something that is not free from instrumentality. Of course, granting the law instrumentality without sublimation will even become harmful to it and for this reason is unacceptable. Sublimation, in itself, is the effect of its proper instrumentality, simply even instrumentality *per se*, and

the lawyer is supposed to transfer it to the law, not taking anything away from it, but only developing, for the chosen and at the same time the admissible model of law, so that it becomes a pursuit of values (Zirk-Sadowski, Bekrycht 2017, 5; Pietrzykowski 2017, 46–68) of human need and of its other subjects. This is where the fundamentality of law is supposed to be and develop (Nowak 1966, 29). Therefore, the relationship between it and the ethics mentioned here, in clear reference to sublimation as something categorical in law, the empirical nature of law, etc., does not make instrumentality a pursuit of another definition, but a search for (in reconstruction) the assumptions of the study of law's depth in its problematic complexities.

Yes, problematic in not what the law says or does but in how they are used, the significance of which depends not so much on the citation of the law itself, but rather perceiving the consequences of it, especially as developed through momentous issues. It seems that instrumentality, if it is to be different from naturalness, even if it is understood in any way, which is not simple and definitive, includes the depth of thinking about law, that is, the depth of law. Secondly, it seems to be important for law to distinguish between this naturality of the law and this depth of thinking about the law, which could mean establishing the existence of a boundary between them, focusing on the issue of instrumentality. This is because, we think, it can be said that it is common to say with regards to law that: something always borders on something else, and this borderline is sufficient when it is enforced, but by introducing that border in the first place it comes into question all the elements that it is bordered against.

From this distinction, indeed following in its footsteps, one can propose connections and differences among these that determine how both thinking about law as well as how law is formed are developed, and not that law is always made ready-to-use.

4. On the way to identifying instrumentality in the law and how it connects to the law, let us make a reservation that in the instruments found in the law or reproduced from laws, in addition to versions of the law elementary distinguished according to their binding force (higher or lower), we also have "greater laws" that are not only great because they are binding but also because of their historical value, and are therefore historically great. Their example, it seems that indisputably, is the Magna Carta. On this occasion, the question of whether it is formally binding becomes unnecessary (Jabłońska-Bonca 1995). Would it be better if it was in force? After all, the differences between these questions seem to be momentous. While the validity of law is a matter of the existence of evidence rather than essence, this issue is related to the fact that it a matter of instrumentality also in the sense of allowing certain questions in the discourse to be existentially important, while ignoring others, of course under the conditions of what assumptions are adopted.

Whether a great law can also be an exemplification of the great questions in the law still remains unanswered. Undoubtedly, they are suitable starting points for searching for great questions in the law as the basis for the development of legal theory. However, this cannot be done without a thorough examination of the question of whether law is a science. Perhaps a good starting point would be to abandon the attempt to propose a definition or to even consider it in a legal context as something extraordinary, that is, from outside the legal aspect, through research. This is certainly conducive to searching for the construction of the theory of law's beginnings because this construction does not yet exist, at least in the intellectual judgement of what is the law, because such a construction sinks into the social consciousness of great laws' greatness to the point where writing about the greatness of a constitution becomes superficial. Law, thanks to its mechanism, always updates itself both upwards and downwards, increasing in sophistication, becoming something more. And although this is simple and familiar in a lawyer's experience, at least two spheres of law can be distinguished: one with a tendency to actualize itself quantitatively, that is, by appropriating large numbers of sources and another where this appropriation of sources, though distinct, is directed toward instrumentality – for these spheres themselves, though arranged in an order of magnitude, do not always measure themselves strictly as higher or lower.

5. These spheres are acknowledged, in their proper context, as fitting within legal reasoning Law is law, and instruments are instruments. This statement is valid, yet it seems that because neither concept is sufficiently elaborated, they are perceived as both inseparable and distinct. It's just so. Nor can this be rejected, since in certain cases the use of adjectival forms is linguistically necessary. And taking this into account, we make it easier for ourselves to instrumentalize the internal point of view of the law. This point seems to be of greater importance here than in ordinary (natural) cases, because a certain relationship, at least in law, between the natural and instrumental system of successive consequences has not yet been developed. It seems that another issue of emergence arises here, which is much more strongly born in the direction of the instrumental. Its exploration would be of fundamental importance here for the problem we are interested in. Of course, these instrumentalities exist within the law and arise from it, yet they do so through our reflection and the principles, rules, and the like that accompany it. But we must not conflate them with the law itself, for then the law becomes all-encompassing, even in substance, and its differences are submerged within it. We hold that in reflecting on instrumentality, the differences mentioned above become apparent, and therefore it is necessary to make use of them. It is impossible to conceive of instrumentality in law otherwise than in terms of plurality. Thus, we must consider law both as a whole and in the plurality of its differences, assuming that it is then necessary to take into account the relations between those differences. After all, it is from these that one can reconstruct the problems

arising from the complexity of legal matters. It seems that this complexity requires distinct assumptions, methodologically different in character: when we consider law in terms of its entirety, that is its formative whole, and when we reflect on it in terms of differences. Then, bringing together the results of both, any statement about law as a whole may require certain assumptions, for example concerning the correspondence between them. Here it is not sufficient merely to say that there is an applied law and a prior law.

6. After all, these are descriptive approaches. And from a certain point of view, they are necessary, but if they stop there, because of this stopping, they become closed at once, as they do now. This does not mean they are wrong, but rather that they are sufficient only in acknowledging the admissibility of differences, which – without proper treatment of the relations between them – remain fundamentally non-developmental, that is, reduced merely to naming or identifying the difference.

And this is no longer a matter of description. Here arises the problem of assigning significance to differences, and with it the possibility of proposing correspondingly distinct assumptions. And differences must give a new word. They cannot but be used for something more than the mere belief that this and that are also being descriptively expressed. Indeed, even in such a simple way, the differences once expressed lend themselves to a new and rather simple use: namely, to think and speak about law in terms of differences. Methodologically, this opens the possibility of unfolding law into an unprecedented plurality, while preserving its established hierarchy. It suffices to note that there are constitutions of a more fundamental character and others that do not extend beyond the supremacy assigned to them. From this one may derive differences in their respective "powers," not to mention how such distinctions shape the social perception of law, especially in relation to courts or Constitutional Tribunals. Because instrumentality is a matter not only of the law itself and the variety of approaches to it, but also of the variety of contexts in which it can appear as a ready-made creation. That is, taking all this into account, and recognizing at the same time the impossibility of proposing any definite order among the instrumentalities, one may say that they can be grasped as a whole externally related to law. In this sense, law is characterized by instrumentality as its basic feature. Adhering to the notion of a law, as in the case of the "Great Law," it appears that as a higher law it has the peculiarity of being not only supreme but also explanatory. Constitutions, though they possess the highest legal force and the consequent authority of those who govern, likewise possess an explanatory power. One could dispute which of these powers is greater, depending on the criteria: whether in the final analysis we remain within its explanatory function or its hierarchical force. This may also depend on who makes the claim – whether society itself, in its various communities, or the authorities.

7. Thus, we enter the complexity of instrumentality, which is not only structural. By adhering to this and referring to the law, instrumentality can be distinguished, and this in turn can be led to a different nature of the law, if we assume that its nature is to be instrumental. This leads to the question: do we here possess the advantage of naturalness? And this is again fundamental for the inquiry into the meaning of non-instrumental law. Such a claim confers a certain dimension upon law, but first we must distinguish law in the narrative of its sources from law in the narrative of its instrumental plurality. Even a thorough orientation to the law may depend on the depth of this difference, especially after adopting appropriate research assumptions. However, research assumptions can be difficult in their complexity and variation, leading to levels of law close to instrumentality or, on the contrary, less varied and less complex, announcing the achievement of generally simple issues also freed from instrumentality. When we ask about the source, we are satisfied with the fact that the law exists, placing it in the appropriate range of the hierarchical structure. The related area of knowledge is generally simple, most often expressed in statements. This knowledge is simple, because it is both preliminary and sufficient as such. By contrast, when we enter into instrumental plurality, we can rarely avoid accounting for complexity – inspired first by this plurality and then often by the ambiguity of the instrument itself. Interpretation, however, should encompass the final diagnosis. Although it does not directly serve the narrative of the source, its enactment is intended to embody the final result. For this reason, it should not be taken as proof of complexity. Complexity is to be concerned with determining the meaning of a given provision that is unclear, or the state of instrumentality occurring in a certain context. Probably everything. Nevertheless, the context seems to be significant. It is a matter of assumptions: first, assumptions established at the outset as the starting point for the entire interpretation; and second, assumptions for determining the relationship between the envisaged instrument and its dependencies within the provision under consideration.

8. Of course, this does not exhaust interpretation, which after all has a huge literature and at least thematic diversity. On the other hand, when it comes to making an instrument out of law, its interpretation, although it still remains from the internal point of view (Kaczor 2007), goes upwards, because the meaning combined with the performance is important for it in general. This performance, in turn, is first connected with instrumentality, its determination, and being a forerunner in itself, it leads not so much to meaning, because it is fulfilled in the space from the rule, but to the ultimacy related to the final result of the legal norm that is supposed to satisfy it. Therefore, the transition between the regulation and this norm is complex. Because it is not the case, at least not always, that we go directly from the recipe to the finished product, which is supposed to be the norm. If law contains instruments – and it does, for example in the move from

provision to norm, which is itself instrumental – then we should try to distinguish law, as a creation of generally accepted interpretation, from the sphere of what is instrumentally significant yet separate. Of course, this can be combined into one norm, but in practice we make it two and possibly three or more, e.g. in the case of general clauses, unless we take the first one as the final result of interpretation. What follows from this? It seems that first law is stratified within the legal norm, and then within law as a whole, naturally beginning from that norm. The stratification itself is not only a technical procedure, but one that leads to a different appearance of obligation with the possibility of building separate categories out of it. This could connect the legal norm not only to the very basis of individual adjudication, but also to the ability to employ obligation in combination with the normativity of the law (Zirk-Sadowski 2001, 85). And although we understand them separately, we make little cognitive use of this understanding. After all, norms derived from a legal norm may point to the whole, but they prepare it as something complex – for instance, by distinguishing relationships between norms, not simply in terms of their existence (which is given), but in terms of the variety of states of obligation. Exactly – and these states are more important here than stressing the elements as necessary for constructing a legal norm. For construction does not create obligations; it is rather a matter of order, a necessary sign of their occurrence, always within certain limits. Thus, one can speak of a norm as rules within a rule (norms within a norm), especially when it contains instrumentalities marked by separate obligations. This gives rise to an orientation toward the complexity of law, a complexity that would go unnoticed if the norm were always regarded solely as the final result of interpretation.

9. Interpretation can also be considered, as has been mentioned many times, in order to determine its significance in solving a legal issue; let us add that in legal practice. From this it follows that the instrumental approach contained in interpretation is revealed in the language employed there. Here, we are often dealing with the use of observational terms or sentences that can be transformed into observational material, which is also indispensable for an observational decision. It's even simple to do so. After all, this is what every court does. Nevertheless, one thing is to disclose a given procedure of interpretation in a language easily translated into the structures of judicial conduct as required, and another is to relate this conduct to law – not in terms of compliance (for that is assumed), but in terms of instrumentality, as translated into the values of law. That is, the relationship between these values and this instrumentality, leading to contextual rather than observational sentences. While the latter are relatively easily exhausted, the former have the ability to reappear, of course always within the limits of the law-making effect. Naturally, this is presented differently in the court and in legal reflection. Thus, instrumentality does not have to close itself off from reflexivity. After all, reflexivity, with the right assumptions, can lead

thinking about law to the theory of law (Dehnel 2012). After all, a lot depends on how this conduct fits into the chosen assumptions, so that it is possible to derive further instrumentalizations from them – so not subsequent instrumentalizations nor necessarily instruments, unless they are indispensable in reconstructing the instrumentalization process. For the organization of instruments is one thing, and what we want to produce with them is another, especially by enlarging the areas of theoretical significance as something separate from the theory of law. Consequently, there are no obstacles when taking this into account, to distinguishing theoretical instrumentality but justifying it at the theoretical and the dogmatic-legals.

10. It seems that this remark is suitable for a separate exploration in a joint approach, because it is the case that some legal issues, although e.g. theoretical ones, cannot be revealed without interjections of their dogmatism. Besides, it is impossible to maintain that something is only theoretical or only dogmatic, unless we deprive it of contexts (Zeidler 1993). After all, both may derive from the intellect, and in a given case – though not in general – it will be one or the other. At least this can be said from the example of law, in which it follows the case of the individual more than the whole. Perhaps for this very reason, intuitions about instrumentality can be developed more towards something isolated, as a consequence of law, than into its structural units. It is precisely in this way that succession is taken as primary in itself, though it should instead be understood in relation to the instrument. Without going into details, there are fields of knowledge that develop thanks to the development (improvement) of instruments and their characteristics, properly explained, which does not seem to be the case with law, where a case with its consistently closed result is often elevated to the rank of an epistemic standard. Therefore, when writing about the instruments of law, we do not mention, and we certainly do not think, that it would be up to the level of, for example, the progress of legal knowledge. It develops due to intellectual inquisitiveness on the way of searching for consequences and only in it, instrumentality. It theoretically/conceptually becomes the area from which the lawyer derives the justification of his decisions. What is more, for the sake of the equipment of law, which is also transformed into various instruments. The legislator creates legal texts, and their instruments are mainly a matter of accepted legal thinking, which become a necessary superstructure of the law, and in the practical dimension also of the control of the law.

11. Thus, when instrumentalizing we use, to simplify, two visions. The first is aimed at this superstructure for the recollection of law in its various cognitive aspects. The second, most often expressed descriptively as instrumentality in implementation. This seems to be complex in application, because it was also necessary to interpret the law both *qua* law and then solely as a result of established

instruments, in order to bring the whole interpretation to instrumentalization. So, the order of application cannot be ignored due to the impact of the distinctiveness of the mechanism of its implementation. Nevertheless, I think that it is not possible to omit the latter in the end, so that they unite in the whole. They require separate research approaches (assumptions) with the indication of problems in large numbers. These approaches cannot be minimal, simple assumptions, because then the effects of instrumentality will also be such. And for this reason, the importance of the role of assumptions is assumed more than, for example, terms or even definitions. After all, the aim may be to preserve instrumentality from being exhausted. But let's leave it at that: assumptions appearing in their richness seem to give birth to instruments in of themselves, if only from the relationships between them, relationships that are especially fertile, reaching beyond mere description. Here, too, the beginnings of every theory for the chosen subject seem to occur.

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BALANCING OF FUNDAMENTAL RIGHTS BY THE EMPLOYER? EMPLOYER'S MARGIN OF MANOEUVRE TO ORDER MANDATORY VACCINATION AND TO TERMINATE OR SUSPEND THE LABOR CONTRACT OF NON-VACCINATED EMPLOYEES[1]

Abstract. During the (post-)COVID period, states rendered several restrictions of fundamental rights justified by the overarching interest in the protection of human life and public health. Among others, mandatory vaccination may be ordered by the employer, which imposes a clear limitation on employees' rights to free conscience, self-determination, free occupation, and the right to work. Moreover, in several countries, the decision was vested in the employer for termination or suspension. In a public health emergency, strong arguments support the implementation and extension of mandatory vaccination requirements as well as further extraordinary steps, such as unprecedented allocation of competences, may be reasonable. Some countries opted for mandatory vaccination in healthcare institutions as either a condition of employment or a precondition for entering the institutions. In these cases, however, mainly states had to balance the colliding fundamental rights in order to determine an exact conclusion. On the contrary, involving private stakeholders (employers) in determining the scope of the mandatory vaccination requirement may overstep the lawfully increased margin of manoeuvre of state authorities during a public health emergency. Several states allowed mandatory vaccination in the private workplace on very differentiated grounds. Based on the comparison of three models constituted by Canada, Hungary, and Poland, our research outcome provides a proposed system of criteria for states to determine

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under which circumstances and under which limitations private employers may be authorized with the power of balancing fundamental rights, especially regarding mandatory vaccination.

Keywords: vaccination, COVID-19 pandemic, termination or suspension of labor contract, fundamental rights, comparative analysis, right to bodily integrity, right to health

RÓWNOWAŻENIE PRAW PODSTAWOWYCH PRZEZ PRACODAWCĘ? MARGINES UZNANIA PRACODAWCY W ZAKRESIE ROZWIĄZANIA LUB ZAWIESZENIA UMOWY O PRACĘ Z NIEZASZCZEPIONYMI PRACOWNIKAMI

Streszczenie. W okresie (po)pandemicznym COVID-19 państwa wprowadziły szereg ograniczeń praw podstawowych, uzasadniając je nadrzędnym interesem ochrony życia ludzkiego i zdrowia publicznego. Między innymi, pracodawcy mogli wprowadzać obowiązek szczepień, co stanowiło wyraźne ograniczenie prawa pracownika do wolności sumienia, samostanowienia, swobodnego wyboru zawodu oraz prawa do pracy. Ponadto, w kilku krajach decyzję o rozwiązaniu lub zawieszeniu stosunku pracy powierzono pracodawcom.

W sytuacji zagrożenia zdrowia publicznego istnieją silne argumenty przemawiające za wprowadzeniem i rozszerzaniem obowiązku szczepień, a także za podejmowaniem dalszych nadzwyczajnych działań, takich jak bezprecedensowe przekazywanie kompetencji, które mogą być uzasadnione. Niektóre państwa zdecydowały się na wprowadzenie obowiązkowych szczepień w placówkach opieki zdrowotnej, traktując je jako warunek zatrudnienia lub wymóg wstępu do tych placówek. W takich przypadkach to głównie państwo dokonywało wyważenia kolidujących praw podstawowych i podejmowało ostateczne decyzje.

Z kolei angażowanie prywatnych podmiotów (pracodawców) w określanie zakresu obowiązku szczepień może wykraczać poza prawnie zwiększony margines swobody działania władz publicznych w sytuacjach nadzwyczajnych. W kilku państwach dopuszczono obowiązkowe szczepienia w sektorze prywatnym, opierając się na bardzo zróżnicowanych przesłankach. Na podstawie analizy trzech modeli: kanadyjskiego, węgierskiego i polskiego, nasze badania przedstawiają proponowany system kryteriów, który może pomóc państwom określić, w jakich okolicznościach i przy jakich ograniczeniach prywatni pracodawcy mogą zostać uprawnieni do równoważenia praw podstawowych, w szczególności poprzez wprowadzanie obowiązku szczepień.

Słowa kluczowe: szczepienia, pandemia COVID-19, rozwiązanie lub zawieszenie umowy o pracę, prawa podstawowe, analiza porównawcza, prawo do integralności cielesnej, prawo do zdrowia, stan nadzwyczajny, równoważenie

1. INTRODUCTION AND METHODOLOGY

During the public health emergency and the initial stages of the post-COVID period, states rendered several far-reaching restrictions of fundamental rights, which were justified by the overarching interest in the protection of human life and public health. Among others, mandatory vaccination may be ordered by the employer, which imposes a clear limitation on employees' rights to free conscience, self-determination, free occupation, and the right to work (Ius Laboris 2021). Moreover, in several countries, such as Hungary, the decision was

vested in the employer for termination or suspension, while in the public sector, similar measures have been implemented in other countries, which have entailed constitutional review processes (Reuters 2021).

Nonetheless, requiring the employees to be vaccinated was also present before COVID-19 (Mtimkulu-Eyde et al. 2022), and employers were also involved in the establishment of such policies (Erikson 2022). For instance, in Hungary, the employer has been obliged to prepare a risk assessment and may be required to mandate employees be vaccinated. However, the State provided strict prerequisites for the employers to balance which positions may be subject to which kind of vaccination as an *ultima ratio* solution.

In a public health emergency, strong arguments might be raised for the implementation and extension of mandatory vaccination requirements (King et al. 2022), and further extraordinary steps such as unprecedented allocation of competences may be reasonable (Varga 2022). Some countries opted for mandatory vaccination in healthcare institutions as either the condition for employment or a prerequisite for entering the institutions (e.g., Hungary, Australia, or France). In most cases, the restriction of the employees' fundamental rights was deemed to be necessary and proportionate given the public health circumstances of that period. In these cases, however, mainly states had to balance the colliding fundamental rights in order to determine an exact conclusion (i.e., need for mandatory vaccination).

On the contrary, involving private stakeholders (employers) in determining the scope of the mandatory vaccination requirement may overstep state authorities' lawfully increased margin of manoeuvre during a public health emergency, or at least strict conditions should be attached to such mechanisms. Several states have allowed private employers to impose mandatory vaccination for employees on very differentiated grounds; still, as detailed below, there are some groups of countries with certain similarities that help the comparative analysis.

The European Court of Human Rights (ECtHR) has addressed the limits of employer authority and the legal framework surrounding vaccination mandates. While no direct ruling exists on workplace vaccination requirements, relevant case law provides insight into how the Court balances employer power (see, for instance, Barbulescu v. Romania; Lopez Ribalda and Others v. Spain) and public health interests (see, for instance, Vavřička and Others v. Czech Republic; Solomakhin v. Ukraine). Moreover, in a case specifically related to workplace vaccination mandates, the ECtHR dismissed an application challenging a mandatory COVID-19 vaccination requirement for certain professions. The applicant, a firefighter, contested the suspension from his position due to non-compliance. The Court deemed the case inadmissible for procedural reasons; therefore, the legality of the mandate itself was not examined (Thevenon v. France).

Our analysis will reflect on an issue with a long history, which should have been almost completely reconsidered in light of the global pandemic (TexasLawHelp 2022). We first identify three main models of balancing

competences between the state, the employer, and the employee when mandatory vaccination is concerned.

The first category would be based on Canada, where no special rules of employment have been enacted during the public health emergency. The vaccination mandates ordered directly by employers were based on the extensive interpretation of existing laws, and such decisions were subject to judicial review. A similar model was apparent in the United States (Anderson 2022), where the Supreme Court struck down the mandate of the Biden administration for large businesses working with more than 100 employees to impose vaccination mandates on their workers (Biden v. Missouri), while upholding the validity of the mandatory vaccination of healthcare workers employed in institutions receiving federal funding (National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration).

The second group is represented by Poland, where the State obliged employees in certain sectors to be vaccinated; such a requirement could not be established by the employer. Nevertheless, the position of the employer has been strengthened vis-à-vis the employees in various manners since employers were authorized to access the medical records and vaccination information of employees even without said employees' consent. Such regulation was implemented, among others, in France and Italy.

Thirdly, the countries where state intervention went even further will be illustrated by Hungary, where employers were vested with the right to impose mandatory vaccinations on employees. Non-compliance with this demand resulted in the suspension of the employment contract. Brazil might also be found in this spectrum of the scale of state intervention.

This study would join the strand of literature assessing the margin of manoeuvre of employers to order mandatory vaccination as a prerequisite for employment; our analysis will contribute to the existing scholarship with two meaningful elements. Firstly, with the help of the aforementioned classification of existing models, we will provide a deeper understanding of already elaborated conceptualizations of the issue, especially owing to the integration of the comparative method into the already detailed approaches. Secondly, based on the careful assessment of relevant regulatory concepts, we identify three main subgroups of countries; and then, with the combination of these, we would put forward a system of criteria establishing a proper and differentiated distribution of competences between the state, the employers, and the employees in the field of vaccination (Elson 2021).

In our view, the best solution would be to differentiate among occupations by law on the grounds of objective public health situations, while a limited space for maneuver should be left for employers in this regard, also subject to clear and detailed standards for the assessment (Charalampos et al. 2022). We will accept the definition of Barak, who described the need to balance the marginal benefit to the public good and the marginal limit to human rights (Barak 2010).

2. LITERATURE REVIEW

Our contribution is part of an extensive effort in legal scholarship to reconsider the space of maneuver of the State to vest employers with the power to impose mandatory vaccination on their employees. As Rothstein and his co-authors analyzed, vaccination mandates date back to the 19th century, and even employers had the possibility to assess the necessity of introducing a mandatory vaccination requirement (Rothstein et al. 2021). Bardosh and his co-authors took a cursory glance at the short-term impact of the COVID-19 pandemic on the employers' role in restricting the personal autonomy of their employees on public health grounds (Bardosh et al. 2022).

However, Giubilini and his co-authors warned that the global pandemic should reconsider the sharing of competences regarding vaccination not only during the emergency period, but also in the long run, as attitudes towards balancing individual autonomy and public health considerations would change dramatically (Giubilini et al. 2023).

Linked to the public health emergency, a series of national reports have been published on job-related vaccination mandates. Jefferies dealt with the issue in a specific Australian context (Jefferies 2022), while Mapuranga and her co-authors researched the dialogue between employers and employees considering mandatory vaccination in Zimbabwe (Mapuranga et al. 2022). Ashwell and his co-authors convincingly demonstrated that the involvement of employers in ordering compulsory vaccinations and the sanctions envisaged for non-compliance considerably enhanced the willingness of employees to be vaccinated in New Zealand (Ashwell 2021).

By contrast, Graeber and his co-authors came to the opposite conclusion based on German statistics and experience (Graeber et al. 2021). As regards the supranational level, Hungler (2022) and Krasser (2021) examined whether the case law of the ECtHR would allow for enabling the employers by national regulations to impose a vaccination duty in the workplace. Furthermore, Kaminer provided an overview of the first reflections of national courts on employers' decisions regarding mandatory vaccination (Kaminer 2020).

Ferranna and her co-authors enumerated the potential benefits and disadvantages of employers participating in determining the scope of the mandatory vaccination requirement imposed on employees (Ferranna et al. 2021). Archard and his co-authors (Archard et al. 2021), as well as Reczulska and Tomaszewska (2022), also highlighted the potential role of employers in increasing the vaccination rate of children by influencing the attitudes of parents. Meanwhile, Politis and his co-authors focused on the attitudes of employees in sectors where mandatory vaccination was imposed directly by the State as a measure with general sectoral applicability (Politis et al. 2023).

Gur-Arie and her co-authors provided a deeper understanding of ethical concerns regarding prescribing COVID-19 vaccination mandates by the employer (Gur-Arie et al. 2021). In addition to this, Law and her co-authors evaluated the ethical aspects of imposing vaccination mandates on employees only in certain sectors (Law et al. 2022). Kamlesh and his co-authors went further in this direction and argued for a differentiation of employment sectors to determine the preconditions and scope of vaccination mandates in the labor environment (Kamlesh et al. 2021).

Based on these strands in the literature, Litor recognized the importance of comparative materials regarding the role of employers in the field of vaccination mandates; therefore, he compared the latest American and Israeli developments in this regard (Litor 2022). Turning toward the visions for the future, Manning recommended a complex mechanism for allocating vaccination mandates, where the State should have the primary responsibility to outline the scope of such a requirement, but limited flexibility would be left to account for the circumstances of each sector and workplace (Manning 2021). Our contribution would outline a slightly similar structure to that proposed by Manning; however, as a step forward, a classification of currently existing models will be proposed, and policy recommendations will also be formulated based on our comparative assessment.

3. RESEARCH

3.1. The first category: vaccination even without Government Decrees – a general approach in Canada

Many Canadian employers have introduced mandatory COVID-19 vaccination policies, considering the legal obligation to identify potential workplace hazards and take all reasonable precautions to protect the health and safety of employees based on occupational health and safety legislation (Lach 2023). In Canada, an employer cannot automatically impose a vaccine mandate for non-unionized employees (Human Rights Victoria 2021); moreover, a company's policy on vaccinations may be considered legal if the government that regulates the workplace (provincial or federal) mandates vaccinations for that workplace or sector of employment (Samfiru Tumarkin LLP n.d.).

Based on this background, several cases reached diverse courts and tribunals in recent years, which may provide us with guidance in assessing the validity of job-related mandatory vaccination policies in Canada (Flood et al. 2021). We detail two of these cases below: [Parmar v. Tribe Management Inc., 2022 BCSC 1675 (British Columbia); and Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers, Local 175 (Ontario)].

The Supreme Court of British Columbia was the first court in Canada to confirm that a non-unionized employee was dismissed unconstitutionally when the employee was placed on unpaid leave for failing to comply with the employer's mandatory COVID-19 vaccination policy.

The plaintiff ('Ms. Parmar') was employed by Tribe Management Inc. ('Tribe'), which implemented a Mandatory Vaccination Policy ('MVP') to protect the health and safety of Tribe's employees (Parmar v. Tribe Management Inc. 2022 BCSC 1675 (British Columbia) [53]). The Policy required all employees to be fully vaccinated; however, it provided for medical and religious exemptions and allowed extra time for those employees who were unable to meet the deadline for being vaccinated (Parmar v. Tribe Management Inc. [56]). The Policy also provided that any employee who (for personal reasons) chose to remain unvaccinated would be placed on an unpaid leave until the employee took the vaccines, similarly to the Hungarian legislation. Unvaccinated employees would not be dismissed or disciplined (Parmar v. Tribe Management Inc. [47]). Ms. Parmar did not meet the requirements of the MVP; therefore, Tribe put her on a three-month unpaid leave, after which she resigned from Tribe and filed a civil claim alleging constructive dismissal (Parmar v. Tribe Management Inc. [78]).

The Supreme Court of British Columbia held that the MVP appropriately balanced Tribe's primary and substantial interests of protecting the health and safety of its employees along with its continued viability as a commercial enterprise, and the MVP also contemplated exemptions on legitimate medical or religious grounds (Parmar v. Tribe Management Inc. [121]). The Supreme Court further explained:

> [Tribe] struck an appropriate balance between Tribe's business interests, the rights of its employees to a safe work environment, its clients' interests, and the interests of the residents in the properties it serviced. It also satisfied its responsibility as a corporate citizen. At the same time, it ensured that individuals like Ms. Parmar could maintain a principled stance against vaccination without losing their employment by, instead, being put on a leave of absence. (Parmar v. Tribe Management Inc. [137])

The Supreme Court also stressed that unpaid leave cannot be considered as termination of employment. It was clear that Tribe wanted the employment relationship to continue, as it had plans for Ms. Parmar's role in management. It was Ms. Parmar who resigned, taking the position that she had been constructively dismissed (Parmar v. Tribe Management Inc. [151]). The Supreme Court, in general, held that the MVP was reasonable under such pandemic circumstances:

> it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. (Parmar v. Tribe Management Inc. [154])

The Supreme Court highlighted that ordering mandatory vaccination with certain exceptions, as mentioned above, does not force an employee to be

vaccinated. What they do force is a choice between getting vaccinated and continuing to earn an income or remaining unvaccinated and losing income (Parmar v. Tribe Management Inc. [154]).

In another landmark Canadian judgment [Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers, Local 175 (Ontario)], Arbitrator Stephen Raymond upheld a private retirement home's mandatory vaccination policy as a reasonable workplace rule consistent with the collective bargaining agreement, the Occupational Health and Safety Act (OHSA), and the Retirement Homes Act, 2010 (RHA) ('Decision'). The retirement home's policy required all newly hired and existing employees to be fully vaccinated. The short judgement detailed the reasonableness and lawfulness of the retirement home's mandatory COVID-19 policy when the province of Ontario reduced and/or eliminated public health measures relating to COVID-19, especially those impacting retirement homes:

> Having carefully considered the evidence, arguments and authorities, it is my view that the Policy has been and remains a reasonable workplace rule, consistent with the Collective Agreement, the Occupational Health and Safety Act, Retirement Homes Act, 2010 and the related regulations and requirements, and the relevant authorities. More specifically, this is my view even in the context of the Ontario Government and other public health authorities recently reducing or eliminating various vaccination and other COVID-19 related requirements for staff, contractors and visitors in the context of retirement homes, long-term care homes and, more generally, other facilities and venues. (Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers [5])

This judgment, even if the background and the precise legal reasoning are not public, is important in the post-COVID era of ordering vaccination by the employer. The judgment suggests that it is likely that the elimination or loosening of COVID-19 restrictions will not create barriers to the implementation of vaccination policies by the employers and that all employers will act reasonably if they require their employees to get all recommended boosters even in the future (Extendicare Lynde Creek Retirement Residence and United Food and Commercial Workers [6]).

3.2. The second category: Poland

Shortly after having revealed the very first types of COVID-19 vaccinations, no special legal provisions were enacted to reconsider the legal relationship between the employer and its employees (Kowalczuk-Pakula 2021). Nevertheless, the Government acknowledged the special role of employers in fostering vaccination among their employees (COVID-19 vaccination 2021); however, mandatory vaccination, especially rendered by the employer, had not been widely discussed during this period. The Government introduced a workplace vaccination program (Wądołowska 2021) that intended to increase the availability of this

protection for employees even in their workplace, without having to be absent from work for a whole day if not for at least several hours. The option to grant an additional rest day for workers who have been vaccinated had been rumored (CA Contract Administration 2021), but such a rule had not been adopted. On the contrary, employers were obliged to conduct an occupational risk assessment until January 2021 in certain sectors such as agriculture, food production, and health-care units, and, based on this assessment, necessary protective measures were expected to avoid being fined by the National Labor Inspectorate (NOERR 2021).

The spread of additional virus variants during the second half of 2021, especially the rise of the Omicron variant, again invigorated the discourse on strengthening the role of the employer vis-à-vis its employees in terms of enforcing or at least supporting the increase of the vaccination rate. In Poland, the authorization of the employer to impose a vaccination mandate on its employees had not been seriously raised; however, other legal means had been introduced as adaptations to the extraordinary public health concerns. At first, in August 2021, a bill was proposed to allow employers to check the vaccination status of employees (Kolasa-Dorosz, Sopata 2021) even without the consent of the persons concerned (Poland: Employers will 2021).

The first reflections on these ideas were mostly critical; therefore, this plan was withdrawn from the agenda (Małobęcka-Szwast, Syska 2021). However, during the winter period, when the public health situation deteriorated again (Visegrad Post 2021), this bill was finally passed (CA Contract Administration 2022). This happened almost simultaneously with the adoption of the Hungarian law allowing employers to suspend labor contracts unless the employee was vaccinated by a specific deadline set by the law. The Polish amendment just authorized the employers to access the medical reports and vaccination information of employees, which might have meant an additional motivation for employees to be vaccinated (Kalecka 2022), but it was far from any form of vaccination mandate (Wołoszyn-Cichocka 2021).

Moreover, mandatory vaccination was suggested by the opposition, also with fines envisaged for non-compliance with this requirement (Notes from Poland 2021), but this was clearly rejected by the right-wing governmental parties as well as by the president of the republic (Wilczek 2021). Despite this attitude, the necessity of sectoral vaccination mandates was acknowledged (Poland to introduce 2021), and in December 2021, the State ruled on the mandatory vaccination as a requirement for medical workers, teachers, and members of armed forces to maintain their employment (AP News 2021).

This meant that the Government completed the balancing mechanism between competing rights and interests in the field of vaccination without involving employers and employees in the process (Borowska 2021). Those who did not meet the criteria of vaccination by the deadline set by the law were removed from their position due to non-compliance with a statutory requirement;

employers did not have any margin of discretion. Consequently, in Polish-like regulatory concepts, as well as in France and Italy, the State preserved its exclusive competence to impose mandatory vaccination on its citizens; no other actors, especially private employers, had this competence, as in Hungary. Moreover, the Polish amendments were not subject to judicial review, in contrast to Canada and Hungary.

3.3. The third category: Hungary

In Hungarian practice, it is not unique to require certain or all citizens be vaccinated. In a wider context, the legislator, as well as the Hungarian Constitutional Court (HCC), dealt with cases of age-based vaccination, i.e., protection of children (HCCD 39/2007). In the employment context, there were, however, no strict mandatory rules on this topic; therefore, judicial practice is mostly missing (Horváth 2022). The only guidance employers could seek to decide when and where to require vaccination was based on the Methodological Letter of the National Centre for Public Health issued year to year (Methodological Letter 2019).

The regulation obliged the employer to assess the biological risks to the health and safety of employees [NM Decree 18/1998 Section 9 (1): "Employers must assess the biological exposures at the workplace that pose a risk to the health and safety of employees in accordance with separate legislation. In order to reduce this risk, the employer must ensure, as a condition of employment, that employees employed in the positions at risk are vaccinated in accordance with the separate legislation. At the request of the employer, the district office shall issue an opinion on the results of the assessment of the positions at risk."], the exposure (hazard) at the workplace in accordance with the provisions of a separate decree (EüM Decree 61/1999).

Based on the Methodological Letter, "in order to reduce the risk of illness, the employer must ensure, as a condition of employment that the employee employed in a hazardous position is vaccinated" (Methodological Letter 2019). This includes, for example, vaccination against tick-borne encephalitis for foresters. Based on this soft-law document interpreted *in lieu* of the mentioned decrees, only general occupational health and safety sanctions may be imposed on the employer if the employee does not take the vaccine. This means that the legal consequences of not taking the COVID-19 vaccination by the employee, as detailed below, were not part of the Hungarian legal system in the pre-COVID era.

As many scholars argue, the unilateral ordering of mandatory vaccinations is perhaps the most controversial area of employer measures contended by employees (Varga 2022; Hungler 2022). The Hungarian State issued three different Government Decrees for a certain group of workers during the public health emergency: (1) compulsory vaccination of healthcare workers against COVID-19 (Government Decree of Healthcare GD 449/2021); (2) the protection of private

workplaces against COVID-19 (Government Decree of Private Employers GD 598/2021); and (3) the compulsory use of COVID-19 vaccination by employees of public institutions (Government Decree of Public Institutions GD 599/2021).

The private employers were provided the opportunity to decide whether they want to implement mandatory vaccination or not based on the Government Decree of Private Employers. This Government Decree mostly allows private companies, other than those referred to in the other two Government Decrees (e.g., municipalities), to require employees to be vaccinated against COVID-19 as a condition of employment if they consider it necessary for the health and safety of the employees and taking into account the specific nature of the workplace and the position. The employee is exempted from the obligation to receive vaccinations if it is supported by a medical opinion (GDPE Section 1-2).

If the employee has not taken the vaccination within the time limit specified in the employer's notice, the employer could order unpaid leave or, after one year, terminate his/her employment with immediate effect (Gera 2022). If the employee takes the vaccination after the unpaid leave has been ordered, the employer shall immediately terminate the unpaid leave [GDPE Section 2(11): "If the employee takes the vaccination after the unpaid leave has been ordered in accordance with paragraph 8, the employer shall immediately terminate the unpaid leave."]

Similarly to the other two Government Decrees (HCCD 3128/2022; HCCD 3537/2021; Csink 2022), the HCC examined the Government Decree of Private Employers. The four complainants referred to the interference with the following six fundamental rights in their petitions: right to physical and mental integrity, right to equal treatment, right to human dignity, prohibition of human experimentation without consent, right to physical and mental health, and right to work (HCCD 3088/2022 [6]-[14]). One complainant also pointed out that the Government Decree of Private Employers infringed upon the fundamental rights of the employee because it provided discretion for the employer to decide whether to order compulsory vaccination, even though it had neither the professional nor any other qualifications to determine whether vaccination is necessary (HCCD 3088/2022 [7]).

Unfortunately, the HCC did not examine the Government Decree of Private Employers on the merits but dismissed the claims because – based on its reasoning – neither ordering compulsory vaccination, nor ordering unpaid leave, nor the termination of the employment relationship follows directly and compellingly from the challenged Government Decree of Private Employers, as it merely creates the possibility of compulsory vaccination and the application of legal consequences (HCC 2022). As to the HCC, it follows from the dispositive nature of the contested rules that all these provisions do not take effect *ex lege*, but by a discretionary measure taken by the employer individually.

Consequently, against those decisions of the employer, the employee may bring a claim under the general rules of labor law if the employer has infringed the

rules governing decision-making (HCCD 3088/2022 [23]; Rules on such labor law claims are laid down in Section 285(3) of Act I of 2012 on the Hungarian Labor Code: "A claim may be brought against an employer's discretionary decision if the employer has breached the rules governing the making of that decision.").

As of the date of the publication of this contribution, we are not aware of any labor law court decisions that ruled on such complaints. However, two dissenting opinions and two concurring opinions were attached to the HCC ruling. From these opinions, we may be able to draw conclusions as to what decision could have been reached based on the merits of the case. One judge who deemed the case admissible mentioned the HCC's well-established case law with regard to compulsory vaccination in her dissenting opinion (HCCD 3088/2022 [43], [49]). Based on this, we may conclude that the HCC would have dismissed the claims even on the merits of the case. Another judge, however, highlighted the problem of the wide margin of manoeuvre of the employer:

> I do not see a clearly convincing reason whether the legal background (i.e., the Government Decree) provided for ordering compulsory vaccination by the employer is sufficient to allow the balancing of arguments for and against compulsory vaccination, and whether the obligation can be considered (taken) as a consequence of this balancing, and whether it is a reassuring normative answer against the doubts of the realistically possible (potential) obligations. (HCCD 3088/2022 [53])

It would have been interesting to see what the substantial decision of the HCC on this topic would have been. The examination of this question would have been a cornerstone of future interpretation of the employer's discretionary right to order vaccination (Society for Liberties 2021). In our opinion, only the State is authorized to restrict the fundamental rights of individuals or at least to determine the main aspects of the balancing test to be performed by the employers, as the State has the necessary information to reach a conclusion on this topic. The restrictive data processing options of the employers at the time of the Government Decree of Private Employers did not allow the employers to precisely determine which positions require vaccination with respect to which employees (NAIH).

As Herdon and Rab point out: "The employer does not have any data that would show the danger of jobs in such an epidemic situation, nor does it have any additional statistics that show the employees at risk. Likewise, the employer cannot assess the success of individual alternative therapies and is also not competent to judge the frequency and severity of complications caused by possible vaccinations" (Herdon, Rab 2021; Varga 2022). Consequently, we deem the too wide margin of manoeuvre of the employer as stipulated by the Government Decree of Private Employers rather problematic.

4. DISCUSSION

The abovementioned models demonstrate that we are very far from a consensus, even at the theoretical and practical level, on how to allocate decision-making competences between the state, the employers, and the employees when vaccination is concerned in classical employment relationships. In other words, it is dubious where we should allocate the task of balancing competing rights and interests among the three stakeholders. Using our classification as a starting point, we would describe our proposed regulatory framework, which might be worthy of consideration for all countries facing these paramount issues even in the future.

4.1. The scope of vaccination mandate imposed by the State

The first main element of our concept distinguishes certain sectors selected on objective public health grounds, where the state would have exclusive competence to render mandatory vaccination for all employees (Kozma, Pál 2021). The sectors that should belong to this category are where: employees would be more vulnerable vis-à-vis public health concerns; where the employees could easily infect other potentially vulnerable persons; where job-related ordinary activities would cause significant risk of contamination; and where the role of the service provided is essential for safeguarding certain fundamental rights. Further analysis should be required, and in the public sector, the role of the employer might be stronger, but in the private sphere in our understanding, healthcare workers, private teachers, food production workers, agriculture workers, shop assistants, and private security guards may fall within this group.

In this category, the State retains the option to prioritize the right to life, the right to health, and the protection of public health over competing rights such as the right to self-determination, the right to conscience, the right to occupation, and the right to work. Compelling reasons should justify such far-reaching state intervention; nevertheless, the envisaged social harm and the assumed severe limitations of paramount fundamental rights and constitutional values might provide a proper explanation for granting strong competences to order restrictive measures with general applicability, such as mandatory vaccination. In the balancing mechanism, the fundamental rights of the employers, the employees, as well as third parties (clients or other potential collaborators) should be taken into account. The uninterrupted operation of these businesses would secure the prevalence of numerous essential fundamental rights, which also justifies state interference.

One can easily recognize that this component of our framework is mostly borrowed from Poland, where stricter requirements are applicable for the employees of certain sectors, while state interventions for the promotion of vaccination are also stronger in certain occupations. In our view, the State should

not be deprived of the opportunity to impose a vaccination mandate on certain employees, especially in the case of an extraordinary context; however, such measures should be strongly justified, narrowly tailored, and based on objective public health justifications. In these sectors, the State should not necessarily implement a vaccination mandate for certain illnesses but should retain this right as an exclusive competence, where other stakeholders should not intervene.

The law should not provide the exact circumstances that may lead to the extension of the vaccination mandate but shall enumerate those sectors of employment outside the public sector where such a requirement might be implemented by state authorities. In case of non-compliance with such a requirement within a reasonable deadline prescribed by the law or the emergency decree, the employee shall be dismissed, and his/her employment contract should be suspended or terminated. Reasonable exemptions should be provided for those for whom vaccination is not recommended due to specific health concerns. If the State ordered mandatory vaccination, the costs of implementation should be covered by state authorities. The exemptions should safeguard the fundamental rights of the employees, while the cost allocation serves the right of employers to conduct their business.

4.2. Sectors where employers would have margin of decision based on objective criteria prescribed by law

In the second category of employment sectors, the employer would have a margin of movement to decide whether a vaccination mandate would be imposed on its employees. If an employer were to rely on a vaccination mandate in these sectors, employees who failed to comply with this requirement should be dismissed or at least suspended from their position. This flexibility should be provided for those employers whose activities would entail huge public health concerns; however, the threat is less intense than within the first group, or the public interest is less weighty in maintaining the uninterrupted functioning of these services (Tambone et al. 2022). To set some concrete examples, restaurants, bakeries, patisseries, pubs, sports clubs, fitness centers, theaters, cinemas, libraries, accommodations, maintenance services, and workplaces with fully remote activities may belong to this category, among several other potential fields of application (Sporrer 2023).

In these sectors, the State would not conduct the whole balancing mechanism through regulation; instead, the law would provide only some points for consideration, but the final decision would be left in the hands of the employer. Amongst others, the law may provide the severity of the public health concerns (Samuel, Shimada 2023); the local intensity of the pandemic; the activity of that particular business; the number of employees; the number of clients; the form of contact between the employees and the clients; the roominess of the space in the

workplace; the frequency of job-related international travels; the effectiveness of home office methods to fulfill the essential tasks in case of contamination.

Owing to this regulatory concept, the employer could consider: the local circumstances; the characteristics of the particular activity; the latest tendencies of public health concerns, and the uniqueness of that labor surrounding. Obviously, this assessment by the employer should be limited by the law, which should determine which factors the employer must consider when deciding. By this method, especially during extraordinary periods, a certain level of flexibility might be in compliance with the requirement to provide any limitation of fundamental rights by a law (Lach 2023). Reasonable exemptions based on medical recommendations should also be included in the employer's policies, while the costs of vaccination mandates rendered by the employer must be primarily borne by the employer. Nevertheless, the State might provide partial or full compensation for the employers if their intervention is deemed to be reasonable.

From a fundamental right perspective, the law establishes the grounds and the limits of the employer's competence, balancing competing rights and interests. However, the exact application depends on the employer, which may give additional flexibility on the one hand, but also excludes the consideration of broader social implications by the employer on the other. Most constitutions lay down the principle that fundamental rights may not be restricted unless provided for by law. Therefore, the constitutionality of such a regime would be almost doubtful: precise regulatory orientation would be needed on behalf of state authorities safeguarding the constitutional protection of fundamental rights; however, the margin of manoeuvre of the employers should not be emptied. The continuous operation of these businesses would still have a significant influence on exercising fundamental rights; however, this link is deemed to be less intense in comparison with the first category. Apart from this, reasonable exemptions and rules on allocating the costs would have also strong impact on the protection of fundamental rights.

4.3. Fields where vaccination mandate would be excluded

Obviously, the exact classification may vary from illness to illness; our current vision is focusing on epidemiological fears similar to the recent global pandemic. Nevertheless, if we go forward in the same direction as in the previous two subchapters, the third category would contain those sectors where a vaccination mandate would be forbidden; neither the State nor the employer could render such a requirement to maintain existing labor contracts. In these sectors, the impact of potential public health concerns is estimated as less serious in comparison with the first two groups, and also the public interest in continuing the operation of these workplaces would be less meaningful in the shadow of extraordinary health dangers.

Amongst others, this group might be comprised of amusement centers, casinos, and gambling centers. In these workplaces, no compelling reason might be raised to introduce a mandatory vaccination requirement; therefore, interference is not reasonable to restrict the autonomy of employees in this regard (Legalaid 2023). If these businesses were to be closed, this would not cause significant disruption in exercising citizens' fundamental rights; consequently, less weighty arguments might be raised for restricting employees' fundamental rights.

We are fully aware of the fact that the enumeration of each category is very far from providing a complete and exclusive list of employers falling into any of the respective groups. However, our purpose with this study was not to outline a detailed regulatory concept but to formulate policy recommendations that would merge the elements of the three identified models.

5. CONCLUSION

The curfew period caused by the COVID-19 pandemic is behind us; however, its long-term consequences and experiences will remain with our society, and several issues should be reconsidered in the first years of the post-COVID period. One of these crucial fields has been the decisions regarding vaccination mandates, which constituted a controversial matter even before the global pandemic. The involvement of employers in imposing such requirements was also experienced before the rise of the global pandemic; the public health emergency just highlighted and reinforced these ongoing debates with the introduction of several types of vaccinations (Rácz, Rácz 2022). The mandatory use of a protective mechanism, which was explored shortly after the appearance of the global pandemic, entailed huge concerns from the widest circles of society, which elevated the previous discussion of the constitutional standards of mandatory vaccination requirements (Allinger, Adam 2022).

The authorization of private employers to impose vaccination mandates on their employees generated considerable resound in light of the extraordinary context of the global pandemic (Workers' Rights under the COVID-19). The legal scholarship should play a weighty role in clarifying the constitutional implications of this matter. Our analysis contributed to this strand of the literature and complemented the already known assessment of the competing rights and interests with some new methods and arguments. In our view, insufficient attention has been paid to comparative analyses in this regard; a scale was missing to illustrate the potential frameworks to share the responsibility between the State, the employer, and the employee. The comparative endeavors led us to combine certain elements of the main identified models and to propose a complex alternative to elaborate a sophisticated classification of labor sectors from the perspective of rendering vaccination mandates.

The proposed policies should be adapted to the individual circumstances of each legal system, and concrete suggestions for classifications may also be premature at this stage. Moreover, the exact categorization should differ in light of the sources of public health concerns. Despite these reservations, the combination of the three main models, and on this ground, the proposed three layers of vaccination mandates might be worthy of consideration for policymakers around the world and may integrate the experience of the recent public health emergency into the post-COVID vaccination policies.

Although the fact that the vaccination programs reflected on the global pandemic constituted probably the most extensive endeavors to date to immunize the population against a public health concern, forthcoming threats should also require similar efforts from the whole society. Whenever this will be necessary, a more coherent sharing of vaccination competences between the State, the employers, and the employees would undoubtedly serve the best interest of the whole society; our contribution aimed to make some minor steps in this direction.

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