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The Transformation of Erinyes into Eumenides: Justice as Generosity

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The problem addressed in this paper is of the crucial difference between justice and revenge. Following the vivid images of revenge and justice present in literature, I argue that revenge is rooted in a reactive, backward-looking spirit which is destructive for both individuals and the community. Justice, on the other hand, is rooted in an active, forward-looking spirit which is constructive and aimed at restoring order. I analyze the different functions of punishment which are based on payback and are thus focused on the balance of power and status which is more typical for revenge than justice. Punishment should be based on a normative balance rooted in norms and values, and which is aimed at promoting accountability. Anger transformed by justice should be focused on wrongdoing (the act), rather than the wrongdoer (person). Justice in its highest degree, when complemented by mercy, becomes 'justice as generosity' which is able to restore trust in social relations, fostering solidarity and reconciliation in society.

Key words: justice, revenge, generosity, Nussbaum, Erinyes, anger

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Introduction

Martha Nussbaum provides an insightful analysis of *The Oresteia* by Aeschylus in which she emphasizes the transformative character of justice.[1] The legal transformation of the *polis* is illustrated by the great parabole in which the ancient goddesses of revenge—the *Erinyes*—are transformed into the *Eumenides* (The Kindly Ones). I will follow Nussbaum's idea and make the tragedy of Orestes the point of departure for my considerations on justice which will be further complemented by other vivid illustrations from the literature.

In the present paper I attempt to elucidate the differences between justice and revenge by discussing both notions and specifying the role of anger to be traced within them. I claim that justice enables us to transform anger and overcome revenge because of its active and creative character. The fullness of justice requires its correction by equity and complementation by mercy—this kind of complete justice is what I mean by "justice as generosity". I coined

1 Martha Craven Nussbaum, *Anger and Forgiveness. Resentment, Generosity, Justice* (Oxford, 2016).

this term having been inspired by Martha Nussbaum, who emphasizes generosity as one of the most important and productive virtues on which justice should be based.[2] Yet, in contrast to Nussbaum, I do not assume that welfarist conception of punishment is the best alternative to retribution, and I am more sympathetic with Nicolas Wolterstorff's idea of reprobative punishment.[3] Besides I claim that emotions including anger may play an important role in the inner transformation of a person and thus are also to some extent useful in the legal realm.

According to Max Scheler, tragedy is not a conflict of good and evil. It rather presents the clash of two worlds, two entire systems of values which results in their annihilation. The same power which enables the value to be achieved becomes its destroyer.

1. *The tragedy of Orestes*

The Oresteia is a trilogy which begins with the tragedy of Agamemnon—the king of Mycenae who won the Trojan war, yet he had to sacrifice his own daughter Iphigenia in return for that success. Queen Clytemnestra was unable to forgive her husband for the murder of their daughter, and exacts revenge for Iphigenia by killing Agamemnon. In the second part of the trilogy, the son of Agamemnon and Clytemnestra—Orestes—receives an order from Apollo to seek vengeance for the murder of his father. He returns to the city and kills his own mother Clytemnestra but, in the third part of the trilogy, Orestes is hunted by the Erinyes (in the Latin version, the Furies) for committing matricide. The Erinyes are charged with hounding anybody who breaks an oath or sheds blood and the tormented Orestes turns to Athena for help. She arranges for him to be brought to trial, arranging a jury of twelve Athenians to judge him. Apollo represent Orestes, while the Erinyes speak on behalf of Clytemnestra. The result is a hung jury and thus Athena intervenes in favor of Orestes, convincing the Erinyes to stop hunting him. She persuades them that their bloodthirsty revenge, one which is full of anger, is not good for the *polis* and asks them to accept the rules of justice, inviting them to settle in the city. After they accept the invitation, she renames them the Eumenides, stressing their transformation and new role within the legal order.

According to Max Scheler, tragedy is not a conflict of good and evil.[4] It rather presents the clash of two worlds, two entire systems of values which results in their annihilation. The same power which enables the value to be achieved becomes its destroyer. "The great art of the tragedian is to set each value of the conflicting elements in its fullest light, to develop completely the intrinsic rights of each party", as Scheler emphasizes.[5] From that clash of the worlds of values, a new order is born.

It is characteristic of tragedy that the tragic hero is not guilty since he does not fully choose to act. Roberto Calasso writes that a tragic hero does not choose his actions but rather the actions precede him and "come

2 Ibid., p. 13.

3 See Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton, 2008); Nicholas Wolterstorff, *Justice in Love* (Grand Rapids, Michigan, 2011).

4 Max Scheler, "On the Tragic," trans. B. Stambler, *CrossCurrents*, no. 4 (1954), 178–191.

5 Ibid., p. 181.

to meet him, like a towering wave".[6] The tragedy of the hero is that he "'becomes guilty' while doing a guiltless thing", tragic guilt is "unguilty guilt" which comes to him.[7] Thus, the tragic hero "does not sin (…) every law, all natural order indeed the moral worlds, may be destroyed by his actions, yet by these very actions a higher, magical circle of effects is drawn which found a new world on the ruins of the old one that has been overthrown"[8] as Nietzsche says.

Orestes did not kill his mother because he wanted to, he *had to* kill her because this was the ancient moral law which he obeyed. He hesitated to kill his mother yet he did it to fulfil the god's order and therefore he became his mother's slayer tormented by the Erinyes. The tragedy of Agamemnon, Clytemnestra and Orestes who fall into the trap of a family slayer is that they violated the sacred law by fulfilling their duties based on law on which their community was based—the law of vengeance. The tragedy written by Aeschylus reveals the destructive force of the rule of revenge which torments the heroes, destroys the family and brings chaos to the *polis*. In the clash of these values, from the duty to seek revenge on the one hand, and the duty to respect blood relations and life on the other, a new world of legal order is built.

2. *Justice and order*

In the oldest philosophical texts of our culture, justice (Greek: *diké*) is identified with a process of restoring balance in the universe, with a kind of a rhythm of the Universe as we learn from Anaximander.[9] The pre-Socratic notion of *diké*, which appears together with its opposite *adikia*, is an effect of a never-ending struggle between opposing forces, from which one is aimed at difference and chaos, while the other strives for unity and order. Order, once achieved, is not permanent yet justice aims at its renewal, just as nature is engaged in a constant cycle of rebirth. The *status quo ante* cannot be restored, injustice cannot be counterbalanced, it can only be *reconstructed*. Justice is not a reactive force—it is not repaying like with like—it is rather a creative one which provides a new element. Justice as a ceaseless renewal of order is thus the Apollonian objection to the Dionysian chaos.

The pre-Socratic notion of *diké*, which appears together with its opposite *adikia*, is an effect of a never-ending struggle between opposing forces, from which one is aimed at difference and chaos, while the other strives for unity and order. Order, once achieved, is not permanent yet justice aims at its renewal, just as nature is engaged in a constant cycle of rebirth.

6 Roberto Calasso, *The Marriage of Cadmus and Harmony*, trans. T. Parks, ebook, (New York, 1994), 709.

7 Scheler, "On the Tragic", 190.

8 Friedrich Nietzsche, *On the Genealogy of Morality*, ed. K. Ansell-Pearson, trans. C. Diethe, (Cambridge 2007), 47.

9 Jan Patrick Oppermann, "Anaximander's Rhythm and the Question of Justice," *Law and Critique*, no. 14 (2003), 45–69.

Nussbaum claims that this magic thinking about justice as a kind of cosmic balance is still present in our legal systems, especially the penal system where we require a repayment from the wrongdoer for his or her wrongful act which caused harm. Nussbaum interprets repayment in a narrow way—as suffering inflicted on a wrongdoer, either to compensate for the suffering of the victim or to restore the diminished status of a victim by means of humiliating or downgrading the wrongdoer. She calls the former strategy "the road of payback", and the latter one—"the road of status".[10] The manner of payback is, in her opinion, connected to the magic thinking of justice which restores balance by repaying suffering with suffering. This strategy is irrational, since suffering cannot by compensated for with suffering, the wrong which was done cannot be undone by the fact that the wrongdoer suffers. The way of status is more efficacious, as Nussbaum notes, since the humiliated victim may indeed feel better by humiliating the wrongdoer, since the strategy offers the reversal of positions between the parties involved. Yet the latter strategy is normatively controversial because of its morally repulsive character.

I agree that both strategies described by Nussbaum are equally wrong. Yet in my opinion, they are wrong because *both* are based on an illusion. One may feel better by repaying like with like, yet in fact inflicting suffering on the wrongdoer will neither make one's own suffering disappear, nor will it restore the status of the victim. If we understand status in terms of dominance and power, then it may seem that the humiliated victim restores her undermined status by humiliation of the wrongdoer. Yet, if we define status in moral terms, connecting self-respect to moral integrity as the virtue ethics of Plato and Aristotle would suggest, then repaying humiliation with humiliation would not upgrade one's own status. Quite the contrary, it equates the status of the victim with that of the perpetrator, something which is morally degrading for both. This is precisely what makes this strategy both morally repulsive and normatively wrong. In my opinion, the aforementioned strategies, despite being introduced in an insightful way by Nussbaum, do not describe justice but rather revenge, something which is often confused with justice.

10 Nussbaum, *Anger*, 5.

First, if we reject the idea of justice based on reciprocity, punishment does not have to be understood as repayment aimed at inflicting suffering on a wrongdoer as it was described by Nussbaum. The role of punishment should rather be aimed at providing practical knowledge, in contrast to the merely theoretical, which involves emotions and therefore becomes embodied. By punishment, one may understand bearing the consequences of one's own actions which is an essential condition for accountability.

Second, I think that understanding justice as a kind of balance is a deeply rooted insight which does not require "magic thinking", yet it definitely requires the kind of metaphorical thinking which is present at most of our abstract notions and plays a significant normative role. I will attempt to elucidate this claim by specifying the differences between the notion of justice and revenge, and by illustrating these differences with the kind of vivid images that can only be provided by literature.

3. *Justice and revenge*

Oliver Wendell Holmes points out that "early forms of legal procedures were grounded in vengeance".[11] Old laws, from the code of Hammurabi to pre-modern European legal systems, involved the idea of repayment called *ius tallionis*—according to which one must repay like with like (evil for evil, good for good). Let me briefly analyze this idea in order to draw a distinction between justice and revenge.

3.1. *Payback: balance and status*

The beginnings of our legal systems and states are soaked in blood and connected with great suffering as Nietzsche famously notes.[12] The German philosopher presents a genealogy of penal systems, emphasizing their brutality as well as the public and humiliating character of the punishment they entail. In the work of Michel Foucault, we can find a further description

11 In Kenji Yoshino, *A Thousand Times More Fair. What Shakespeare's Plays Teach Us About Justice*, ebook, (New York, 2011), 20.

12 Nietzsche, *On the Genealogy*, 39. Cf. M. Soniewicka, *After God: The Normative Power of the Will from the Nietzschean Perspective* (Frankfurt am Main, 2017), 112–140.

of the evolution of the Western penal system, which until recently (to the French Revolution and in many respects until the 20th century) focused on public punishment.[13] The creation of tortures such as breaking on the wheel, impaling on a spike or burning at the stake not only led to the infliction of pain but also, and above all, had a ceremonial character intending to shame the perpetrator and cleanse the society of the wrong that had been done and affected the whole community.[14] Thus, it indeed had the magic character which Nussbaum mentions.

The oldest and most naïve canon of justice as retribution, *ius talionis*, stemmed from the strongly rooted idea that one can repay like with like. The idea of compensating for suffering is made on the false assumptions concerning the interchangeability of suffering and its conversion. The exchangeability of suffering was tightly connected with status of persons involved. The rule 'an eye for an eye, a tooth for a tooth' does not claim that every eye or tooth is equal, but only the eyes and teeth of the same class of people.[15] For instance, the eye of a free person was equal not to the eye of a slave, but rather to his life. Thus, the status enjoyed by the parties involved in the crime, both the victim and the perpetrator, was crucial for the measurement of the requisite punishment. According to Nietzsche, the idea of compensation and exchange of suffering was rooted in contractual relations. Law and morality influenced by trade relations were based on an assumption that everything has its price and everything may be paid for, including both good and bad actions.

The idea of payback, which is central to the execution of punishment, was mainly aimed at restoring the balance of power, as Nietzsche accurately points out:

> *Balance* is therefore a very important concept for the oldest theories of law and morality; balance is the basis for justice. If in more barbarous ages justice says, 'an eye for an eye, a tooth for a tooth,' it presupposes the attained balance and wants to *maintain* it by means of this recompense: so that if someone transgresses against another, the other person no longer takes revenge in a blindly embittered way. Instead, by virtue of the *jus talionis* the balance in power relations that has been disturbed is *reestablished*: for having one eye or one arm *more* than another is in such primitive conditions like having a bit more power, a heavier weight than him.[16]

Re-establishing the disturbed power relations by means of payback is interwoven with the issue of status, thus both ways—of payback and status—overlap. The idea of restoring diminished status by downranking that of the perpetrator provides an explanation for the cruelty of the punishment, as well as its public and humiliating character. Pre-modern punishments were more reminiscent of a religious ritual sacrifice, as Nietzsche writes, than of a rational system of justice.[17] The suffering, the ostentatious and often furious dimension of the punishment had a political character—it was about confirming and renewing power; the response of the rulers to the violence of the guilty party was even greater violence and had the goal of showing their strength. In the case of public punishment, the ruling party such as the king, executed the punishment in order to reverse the positions and make the wrongdoer suffer. By violating the king's law, the perpetrator undermined the status of the king. Thus, the king was compelled to punish the perpetrator for his disobedience in public to regain his power status. The power to punish is nothing more than the power to punish disobedience, as Nietzsche notes. The stronger the power becomes, the less ostentatious its displays of power become.

With time, punishment as a spectacle disappears and repression becomes hidden within the shadow of justice, obscured by abstract and impersonal administrative procedures. Together with the growth in the strength of society, justice began to serve to protect the

13 Michel Foucault, *Discipline and Punish. The Birth of the Prison*, trans. A. Sheridan (New York, 1991).

14 Foucault, *Discipline*, 34 ff.

15 Henri Bergson, *The Two Sources of Morality and Religion and Morality*, trans. R. A. Audra and C. Brereton, (Notre Dame, 1977).

16 Friedrich Nietzsche, *Human All Too Human II and Unpublished Fragments from the Period of Human, All Too Human (Spring 1878–Fall 1879)*, trans. G. Handwerk, *The Complete Works of Friedrich Nietzsche*, vol. 4 (Stanford, 2013), 164–165.

17 Nietzsche, *On the Genealogy*, 52–54.

criminal from those he had harmed and their revenge. It is not only the limiting of physical punishment which shows the strength of a modern state but it is also reflected in a shift in attitude towards criminals, who begin to be seen as sick, degenerate, in need of both treatment and help rather than punishment. The gradual weakening of the system of punishment is often termed the "civilizing of society". This may be a sign of the strength of a community that no longer feels threatened by the actions of individuals and thus may show them mercy. Violence on the part of the state is a sign of its weakness, since rule by fear stems most often from powerlessness, hatred and a sense of threat.

Building on the genealogy of penal systems as described by Nietzsche and Foucault, one is compelled to admit that premodern penal systems seem to be grounded on vengeance and maintaining a balance of power. This kind of justice, which Nietzsche calls "cold justice", can be easily identified with revenge: "And when they say: 'I am just [*gerecht*],' then it sounds always like: 'I am just avenged [*gerächt*]!'".[18] However, this is not the only alternative available.

Plato and Aristotle follow the intuitions of the the Pre-Socratics by identifying justice as a kind of balance or harmony.[19] Yet they firmly reject the idea of justice as a balance of power. They consider justice as a special virtue related to both political order (*polis*) and spiritual order (*psyche*), a kind of a balance of virtues, a meta-virtue which is able to balance the other virtues. Moreover, Plato and Aristotle distinguish justice from vengeance. Aristotle argues that the idea that "a person should suffer what he did" so "the right justice would be done",[20] is wrong and it expresses rather vengeance than justice. Aristotle, just like Plato, identifies justice with giving to each person their due, as famously repeated by the Roman jurist Ulpian in the formula: *suum cuique*. Compensation in terms of justice is aimed not at determining an equivalent punishment but rather one which is *relevant* to the crime committed. The "relevant" measure of punishment, just like the relevant measure of the distribution of goods, is defined in social practices and institutions. Since there is no relevance between the suffering of different persons, inflicting suffering on a wrongdoer should never be the aim of justice. Suffering may only be an inevitable side-effect of the execution of a punishment in the realm of justice.

Order based on the norms and values is nothing permanent, more a kind of fragile balance which may be easily disturbed. Yet restoring balance does not mean repaying like with like. If we respond to suffering and humiliation with suffering and humiliation, we will not restore the balance and order which are aimed at mitigating suffering and providing meaning to our relations. It will only multiply the suffering and humiliation in the world, which will be even more unbalanced then before. By balance, I mean here order which is acting according to certain norms and promoting significant positive values. In order to restore the social order based on violated norms, we should not respond with evil to evil. We have to introduce special measures which will bring about good for the individuals involved, as well as the society as a whole. The aim of justice is to reestablish order, restore social trust and provide reconciliation, healing the "diseased social relations",[21] and helping to "bind up the nation's wounds".[22]

Justice, in contrast to revenge, focuses on the community as a whole, rather than on the particular interests or harm of individuals. Revenge was originally an obligation of the harmed and their family, allowing them to let off steam and gain some measure of satisfaction in the suffering of the other. In time, an endless cycle of violence, ultimately destructive for society, is thus transformed into the idea of redress determined by the community; its goal is to end the argument and restore order. A confirmation of this can be found in Max Weber, who shows that the trial is the oldest form of legal action, based on a contract—an agreement to redress.[23] Trial proceedings usually

18 Friedrich Nietzsche, *Thus Spoke Zarathustra. A Book for All and None*, eds. A. del Caro and R. B. Pippin, trans. A. del Caro (Cambridge 2006), 73.

19 Aristotle, *Nicomachean Ethics*, trans. and ed. R. Crisp (Cambridge, 2000), 1133b, 91.

20 Ibid., 1132b, 89.

21 Nussbaum, *Anger*, 178.

22 Abraham Lincoln, in ibid., 239.

23 Max Weber, *Economy and Society. An Outline of the Interpretive Sociology*, ed. and trans. G. Roth and C. Wittich (Berkeley, 1978), 761.

take place in public (they are social gatherings), with the judgement given in public but the execution of the law in private.[24]

Interpreted in the spirit of trade, a community brings benefits to all of its members, stemming from cooperation and a guarantee of security—and is based on obliging its members to respect norms in order to enjoy the benefits of its existence. In this respect, members of a community are its debtors and society is their creditor:

> [T]he community has the same basic relationship to its members as the creditor to the debtor. You live in a community, you enjoy the benefits of a community (…), you live a sheltered, protected life in peace and trust, without any worry of suffering certain kinds of harm and hostility to which the man *outside*, the 'man without peace', is exposed (…) The lawbreaker is a debtor who not only fails to repay the benefits and advances granted to him, but also actually assaults the creditor: so, from now on, as is fair, he is not only deprived of all these valued benefits,—he is now also reminded *how important these benefits are*[25].

In this understanding, a criminal is seen as one who breaks this covenant and draws an undue advantage. The task of justice is thus to take back these ill-gotten gains. It originally did this by the most radical means to exclude him from society (exile and shame). The more contemporary approach to equalising mainly leads to depriving the person who breaks the contract of goods which are held valuable by the society, the most highly prized being freedom. As a result, the idea of imprisonment became widespread in Western societies from the end of the 18th century.[26] This idea is reflected in contemporary theories of retributive justice, such as those presented by John Rawls and Herbert L.A. Hart.[27] These theories of retribution do not assume that the idea of punishment is to be understood as the deliberate infliction of suffering upon the wrongdoer who deserves to suffer.

It is worth emphasising here the distinction between justice as reciprocity and subject-centered justice introduced by Allen Buchanan.[28] According to justice as reciprocity, basic rights and duties result from the cooperation and are based on mutual advantage. This approach to justice, limits the rights to social resources to those who at least potentially could contribute to the cooperative surplus. Yet, Rawlsian idea of justice as fairness is distinct from this approach and represents subject-centered justice, according to Buchanan. Subject-centered justice assumes the preeminent moral value of persons and grounds rights and duties in the moral status which is independent from the ability to harm or contribute. Rawlsian egalitarian theory of justice assumes the fundamental moral equality of persons.[29]

A different example of subject-centered justice is Wolterstorff's idea of rights-based justice in which rights are grounded in human worth (dignity).[30] Wolterstorff strongly rejects the code of reciprocity and claims for re-considering the idea of punishment.[31] By rejecting the idea of reciprocity as central to justice, we stop explaining justice in terms of trade and get free from the idea of punishment as retribution. Instead, Wolterstorff argues for the idea of reprobative punishment which is aimed at "expressing public denunciation of wrong"[32] which could be supported by my further considerations.

3.2. The normative role of anger

Justice should neither include vengeance, nor be grounded in it. Yet there is indeed something that both justice and revenge have in common and thus could often be confused. Both the desire for revenge and

24 Ibid., 649; M. Foucault, *Discipline*, 118.

25 Nietzsche, *On the Genealogy*, 46–47.

26 Foucault, *Discipline*, 231–256.

27 H. L. A. Hart, *Punishment and Responsibility* (Oxford, 2008), 1–27; 210–237.

28 Allen Buchanan, "Justice as Reciprocity versus Subject-Centered Justice", "*Philosophy & Public Affairs*" vol. 19, no. 3 (1990), 227–252.

29 John Rawls, *A Theory of Justice* (Cambridge, 1971).

30 Wolterstorff, *Justice: Rights*; Wolterstorff, *Justice in Love.*

31 Wolterstorff, *Justice in Love*, 193–205.

32 David Mcllroy, "Justice in Love. By Nicholas Wolterstorff", "*Oxford Journal of Law and Religion*" no. 03/20 (2012), 305–308.

a feeling of injustice are often fed by the same anger which results from an experience of being wronged or harmed. Yet justice has the power to transform anger which was depicted in the tragedy of Orestes. By introducing the legal institutions to the *polis* to end the endless cycle of vengeance, justice overcomes revenge. Justice does not simply replace revenge by eliminating anger, it rather transforms anger into a drive to restore social trust and order. As Nussbaum points out:

> Aeschylus suggests that political justice does not just put a cage around anger, it fundamentally transforms it, from something hardly human, obsessive, bloodthirsty, to something human, accepting of reasons, calm, deliberate, and measured. Moreover, justice focuses not on a past that can never be altered but on the creation of future welfare and prosperity.[33]

Nussbaum claims that the normative aspect of anger is controversial in both the private and public sphere. According to her, the anger which results from a serious wrong always includes the will to inflict suffering on the wrongdoer; anger is conceptually connected with a wish for violent revenge. Anger is focused on an act (wrongdoing), but its target is a person (a wrongdoer). She considers three aspects in which anger could be useful—as a signal that somebody was wronged; as the motivation to challenge the wrongdoing and defend yourself; and as a deterrent to prevent others from wrongdoing. Yet Nussbaum comes to the conclusion that in none of these aspects does anger play an essential role and thus it is not a necessary emotion in the context of justice due to its irrational and destructive character. She rejects the idea of any kind of 'noble anger' and argues for the so called 'transition anger' which in fact transforms anger into non-anger. Transition anger is not aimed at making the wrongdoer suffer, it is neither focused on the victim, nor on the perpetrator. It is focused on the wrongdoing itself and its target is the state of harm which has to be changed. This is when we say: "How outrageous! Something must be done about this."[34]

I agree with Nussbaum that justice should be based on 'transition anger' and ought to focus on the act of wrongdoing which has to be challenged. Yet I think that this is still a kind of anger, and a very useful one. The most crucial from the normative perspective is to transfer anger from a wrongdoer to the wrongdoing which should be the main target of the anger. If we agree that emotions are our embodied knowledge and help us understand and evaluate people's actions,[35] then feeling angry when a serious wrong has been done is not only a natural reaction, it is also necessary to fully understand the situation. If we are able to distinguish between the wrongdoer and his or her act, and to target the act with our anger instead of the person, then anger will not be connected with the wish to make anybody suffer and therefore not result in violent revenge.

Judith Shklar notes that injustice is "the special kind of anger we feel when we are denied promised benefits and when do not get what we believe to be our due. It is the betrayal that we experience when others disappoint expectations that they have created in us."[36] These expectations are concerned with the intended functioning of social relations and structures (like the expectation that people will keep their promises etc.)[37]. The feeling of injustice helps us challenge the frustration of being out of control of one's own life and motivates us to demand a change. Martin Luther King emphasizes that:

> [A]nger may play a valuable part in motivating some people to get involved. Nonetheless, even when there is real anger, it must soon lead to a focus on the future, with hope and with faith in the possibility of justice (K 52). Meanwhile, anger toward opponents is to be 'purified' through a set of disciplined practices, and ultimately transformed into a mental attitude that carefully separates the deed from the doer, criticizing and repudiating the bad deed, but not imputing unalterable evil to people[38].

33 Nussbaum, *Anger*, 3.

34 Ibid., 35.

35 See Martha Craven Nussbaum, *Upheavals of Thought. The Intelligence of Emotions* (Cambridge, 2001).

36 Judith N. Shklar, *The Faces of Injustice* (New Haven and London, 1990), 83.

37 Ibid., 89–90.

38 In Nussbaum, *Anger*, 222

Pondering the difference between revenge and justice, one may claim after Aristotle that revenge is excessive anger, wrongly manifested and for which we are to be blamed.[39] The feeling of injustice, on the other hand, is rooted in the mean state of anger—"in virtue of which we get angry with the right people, at the right things, in the right way".[40] The difference between the anger in which a demand for revenge and a demand for justice are rooted is not only a matter of its strength and expression, but also of its direction and nature. Aristotle emphasizes that "it is not easy to determine how, with whom, at what, and how long one should be angry, and the limits of acting rightly and missing the mark. (…) [S]uch things depend on the particular circumstances, and judgment lies in perception".[41] Yet the even-tempered person should not be directed by their feelings alone, but by reason.

The difference between the anger in which a demand for revenge and a demand for justice are rooted is not only a matter of its strength and expression, but also of its direction and nature.

Such a person is more inclined, as Aristotle writes, "not to revenge so much as to forgiveness".[42] Aristotle claims that people who remain angry too long, become obsessed with revenge since it "relives their anger, by substituting pleasure for pain".[43] Often, a person who takes revenge enjoys inflicting pain on the opponent. Suffering becomes something done for its own sake. This kind of excessive anger destroys those people and those closest to them.

Anger obeys reason to some extent, as Aristotle claims. Yet because of its heated nature it may rush into taking revenge before fully hearing the command and thus fails to do what it is asked to.[44] In other words, anger which drives the demand for justice is a form of emotion directed by reason which separates the deed from the doer and targets the deeds. Anger which drives the desire for vengeance is an emotion which directs reason and identifies the deed with the doer, and therefore targets the person.

Nussbaum identifies the conditions which help in achieving transition anger: impartiality (A. Smith), taking the perspective of the wrongdoer (Aristotle)—cultivating empathy, acknowledgment of wrongdoing and its seriousness, as well as a forward-looking effort of reconciliation.[45] It is worth emphasizing that transition anger is not passive, but active—it enables violence to be overcome through mental change, training in solidarity and generosity.

It is a mental state that good parents experience when their child has done something wrong. They do not want to make the child suffer, but rather seek to prevent him from doing wrong in the future. It does not mean that the good parents should never be angry. Of course, they are and should be angry if the child did something seriously wrong. Yet they should direct their anger not towards the child they love, but rather to the act of wrongdoing which is harmful for others, as well as for the child. This kind of anger does not exclude punishment. Yet the punishment is not focused on inflicting pain or suffering. The child should be able to understand what it did wrong and learn why. Punishment, such as for instance sending

39 Aristotle, *Nicomachean*, 1126b, 74.

40 Ibid.

41 Ibid., 1126a–1126b, 73–74.

42 Ibid., 1126a, p. 73

43 Ibid., 1126b, p. 74.

44 Ibid., 1149a–1149b, 129.

45 Nussbaum, *Anger*, 52–53, 238.

the child to its room to rethink what it did, or taking away some pleasures for some time (e.g. computer games) may produce some suffering for the child. This emotionally unpleasant aspect may help the child to learn that harming others is wrong, for instance. It is not about merely disciplining the child but rather embodying knowledge by means of emotional associations which help us to react in the right way in the future. This should include an explanation given by the parent so the child is fully conscious of the wrong and is able to understand it.

Imagine a teenager who has a car accident in which a person is severely injured or killed. In panic, the teenager drives away from the place of the accident and comes back home in tears to tell his or her parents about it. In such a situation, we would expect that good parents would convince the teenager to go to the police and claim responsibility for the accident, with the resulting punishment that this entails. The parents certainly do not want their child to suffer, yet they know that it is good, not only for the society, but also for their child if he or she bears the consequences of their action and pays for the harm they have done. If the idea of payback embodied in punishment was only about inflicting suffering and downranking, then loving parents would protect the child from the punishment. Yet, this is not what we expect from them. What we expect from the good parents is the recognition of the wrong which was done by their child. Recognition of the wrong is a pre-requisite for both moral improvement and forgiveness, and therefore love should not be understood as benevolence detached from justice as Wolterstorff argues.[46] Building on Wolterstorff's idea of rights-based justice, one may claim that this reasoning justifies neither deterrent nor retributive but reprobative justice—i.e. punishment aimed at condemnation of wrongdoing which is usually accompanied by negative feelings such as anger.[47]

Therefore, I claim that anger which results in the demand for punishment may be useful and normatively justified if it is aimed at providing accountability—the knowledge that one has to suffer the bad consequences of one's own wrongdoing. It is not about suffering for the sake of suffering or for the sake of compensation of the suffering of the others. It is rather about the full awareness of the wrongdoing. Being fully aware of harming somebody means to suffer even more than the person harmed since empathy (being able to feel what the harmed person feel) is accompanied with suffering which stems from the knowledge that it was I who harmed the person (a sense of guilt and regret). Taking full responsibility for one's own actions, which includes the punishment that may accompany it, may even help in overcoming this kind of suffering based on guilt.

4. Revenge in an unjust world: equality, freedom and truth

Justice guarantees harmony and reinforces order, being based on knowledgeable reasoning and therefore produces objective and impartial judgments. Revenge, on the other hand, is its opposite—directed by emotions, excessive, subjective, partial, and destructive for both the individuals involved and the community.

The problem of the destructive character of vengeance is present in a vast body of literature, such as Shakespeare's *Titus Andronicus*. This cruelest, bloodiest and most harrowing of Shakespeare's tragedies "carries a serious message about the necessity of the rule of law"; "Titus is a cautionary tale for how the rule of law must quash cycles of vengeance that would otherwise destroy society", as Kenji Yoshino writes.[48] Because of the extreme violence it contains, the play has been overlooked and reviled since the Victorian period and rarely played, despite being one of the most popular of Shakespeare's plays during his own lifetime.

Vengeance is a means of the "barbarous", while justice belong to the "civilized" world. Yet "the line between the 'civilized' Romans and the 'barbarous' Goths is immediately blurred"[49] when both the Roman general Titus Andronicus and the queen of the Goths Tamora turn into the bloody cycle of revenge. Vengeance transformed Titus into a monster and alienated him from the audience. Richard Posner writes about this effect of alienation which is usually present in literature in which revenge is described:

46 Wolterstorff, *Justice in Love*, 53, 166.

47 Ibid., 166–205.

48 Yoshino, *A Thousand*, 19–20.

49 Ibid., 30.

> We the audience start off with great sympathy for the revenger and wish him or her complete success, only to find that as the play (or story) proceeds we cool on revenge. The vivid picture of the revenger's wrong with which we began fades and is replaced by an equally vivid picture of the horrors of the revenge itself. [50]

Therefore, "Titus must die on our behalf. Only when he does so can the vengeful part of us that has identified with him perish".[51]

Reinforcement of justice and the rule of law may break the cycle of vengeance and mitigate its consequences. As Nussbaum accurately points out: "When the basic legal structure of society is sound, people can turn to the law for redress; the Eumenides recommend this course. But sometimes the legal structure is itself unjust and corrupt".[52] In such situations, in an unjust world, the desire for revenge immediately occurs—the Erinyes return to the city. Yet the Erinyes are unable to restore order and instead bring about chaos, destruction and escalation of suffering.

In order to emphasize the destructive character of revenge and its close relations to justice, I will discuss revenge stemming from three kinds of injustice—social, political, and post-totalitarian, illustrating them with vivid images from great literary works.

4.1. Challenging social injustice: the struggle for equality

The short novel by Heinrich von Kleist entitled *Michael Kohlhaas* (1810) "is neither simply a tale of revenge that would restore a pre-given economy, nor merely one of a failed call for revolution" as Jeffrey Champlin points out.[53]

Kohlhaas was a horse trader who lived a happy life in a village in the 16th century. He had been regarded as a model citizen until one of the local lords, Wenzel von Tronka, treated him unjustly. The lord requested unfair payment for crossing his land and took Kohlhaas' horses as a deposit, treating them badly in the process. Kohlhaas sought justice in court for the maltreatment of his horses. Yet his lawsuit was dismissed, and Kohlhaas's wife died due to her mistreatment at the hands of the prince's guards when she tried to claim her husband's rights. He was so disappointed by the corrupted courts that he did not want to live in a country where his rights were not protected. When the court failed, he wrote a decree himself "by virtue of authority inborn in him" and commanded the lord to bring his pair of stolen horses back to him within

Justice guarantees harmony and reinforces order, being based on knowledgeable reasoning and therefore produces objective and impartial judgments. Revenge, on the other hand, is its opposite – directed by emotions, excessive, subjective, partial, and destructive for both the individuals involved and the community.

50 Ibid., 54.

51 Ibid.

52 Nussbaum, *Anger*, 211.

53 Jeffrey Champlin, *The Making of a Terrorist: On Classic German Rogues* (Northwestern University Press 2015), 97.

three days.[54] When the lord did not fulfill the command, Kohlhaas raised an army, burned the castle of the lord, killed his people and went after the lord, burning cities on his way. He drafted the so-called "Kohlhaas Mandate" in which he declared his "just conflict" with von Tronka and "he called upon 'every good Christian'" to join him and fight for his cause.[55] "In yet another mandate that followed soon thereafter, he called himself 'a man free of worldly and imperial ties, beholden only to the Lord God.'"[56] The only court of law that counted for him was "his innate sense of justice", his "heart of hearts".[57] Kohlhaas saw himself as a representative of all those treated unjustly by their lords. He was "one of the most upright and at the same time terrible men of his time" as the author describes him.[58]

He stopped fighting after receiving a public letter from Martin Luther, who condemned his war and wrote:

> Kohlhaas, you who pretend to have been sent by Him on high to wield the sword of justice, by what right do you, in your audacity and the madness of blind fury, dare disseminate the very injustice you claim to oppose, but which you yourself embody from head to toe? (…) How can you maintain that you were denied your right, you, who, after your first frivolous attempts to seek redress came to naught, just dropped everything and, egged on in your seething breast, gave yourself over heart and soul to the base urge for revenge? (…) You're a rebel and no warrior of God! Your earthly destination is the rack and the gallows and eternal damnation in the great beyond for your godless misdeeds.[59]

Kohlhaas claimed that he was denied the protection of the law and therefore he had been cast out of his country into the wild, where one uses violence to fight for what they are due.[60] Even in front of such an authority as Luther, he did not accept that his war was unjust and was unable to forgive the Junker who offended him. Thus, he did not obtain the blessing of absolution from Luther, yet he was promised a just ruling from the Elector. He entered into an amnesty agreement and finally justice was done. The court considered his lawsuit regarding the maltreatment of his horses again and ruled in his favor, yet the same court found Kohlhaas guilty of starting the war and all the attacks, including those performed by his people and he was sentenced to death.

The tragedy of Kohlhass was that "his sense of justice turned him into a thief and a murderer", and "the world would have had to bless his memory had he not gone too far in one virtue".[61] Thus, the lesson we can learn from this story is that violence, even when raised in a just cause, is not able to restore justice and the legal order. It can only destroy life and everything one cares about. The story shows that injustice and corruption forced a good citizen to take justice into his own hands, replacing justice with revenge and transforming the victim of injustice into a violator of justice. The violence he inflicted undermined his moral integrity and brought about his fall.

4.2. Challenging political injustice: the struggle for freedom (the problem of justifying terrorism and treason)

The most famous and vivid illustration of revenge in Polish literature comes from a poem written by the Romantic poet Adam Mickiewicz entitled *Konrad Wallenrod: An historical poem* (1828). The poem tells the story of a mysterious Lithuanian who grew up among the Germans, joining the Teutonic Order and becoming its Grand-Master: all to take vengeance. He led the German knights into battle with the Lithuanians and, as a result of his deliberate negligence, he led them to a huge defeat.

The poem by Mickiewicz was written during a period of history in which Poles were unsuccessfully struggling to regain their independence. The story of an

54 Heinrich von Kleist, "Michael Kohlhaas", in *Selected Prose of Heinrich von Kleist*, trans. P. Wortsman, ebook, New York 2010, 194; Champlin, *The Making*, 102.

55 Von Kleist, *Michael*, 200.

56 Ibid., 200–201.

57 Ibid., 171.

58 Ibid., 163.

59 Ibid., 209–210,

60 Ibid., 213–214.

61 Ibid., 164.

oppressed Lithuanian country is thus a metaphor for an oppressed Poland and its fight with the tyranny of the invaders. The poem poses the question of whether taking revenge on an enemy can be considered as something praiseworthy and whether the dishonorable means used in the revenge do not also question the idea of the revenge itself.

The same problem of conspiracy and justifying unethical means to free the country were addressed in another play by Mickiewicz entitled *Forefather's Eve* (part III) (1832). The main protagonist, also named Konrad, is being held in a Russian prison and has been unfairly accused of conspiracy against the tsar. He meets other political prisoners there, mainly students, and they decide to take their revenge on the Russian occupiers, thinking of assassinating the tsar. Konrad sings a song which they repeat numerous times: "Then vengeance, vengeance on the foe, God upon our side or no!".[62] A priest calls this "a pagan song" and the corporal calls it "the Satan singing" which shows that the idea of vengeance is at odds with the Christian religion and violates the moral law. Konrad compares himself to God and demands the rule of souls from God. He challenges God and considers himself as a martyr who suffers for his people and the independence of his country ("My name is million, for I love as millions, Their pain and suffering I feel").[63] Konrad faints and the spirits begin to fight for his soul. In the next scene, the priest performs the Catholic ritual of exorcism on Konrad and the spirits who drove him mad go away.

Another great Polish Romantic poet—Juliusz Słowacki—wrote the play entitled *Kordian* (1833) in which he addressed the same issue, yet he was critical on the idea of sacrifice and conspiracy as presented by Mickiewicz. He was explicitly against the idea of using such dishonorable means like assassination in order to regain independence.

Kordian shows up among the conspirators and calls for vengeance on the Russian authorities:

> As the very day of our vengeance shall be!
> A day that shall ring down the centuries!
> When freedom dawns joyfully in the skies,
> Heaven will shake with our people's glad cries.[64]

Yet he is opposed by the chairman, the old man and the priest. The Chairman refers him to his conscience and ask him to stop seeking revenge which is forbidden by God:

> The golden images you offer hide
> Satanic thought—your conscience won't abide
> To delve within and see it for what it is.
> Your ardour swings you out over the abyss!
> Look, boy—you kill the Tsar. His family
> Is next, for that's the next step, naturally.
> But then God's heavy hand fells you, and us,
> For God is just![65]

The Priest requests Kordian to forgive the world and refrain from revenge. Although Kordian's idea of the assassination of the tsar is lost by ballot, he decides to kill the tsar himself. When he is on his way to perform the deed, he experiences inner conflict in his soul—the struggle between his fear and imagination which ultimately prevents him from killing the tsar.

The message from these works, written by the greatest Polish Romantic poets, is that revenge is a destructive way which is against the moral law and therefore corrupts the soul, destroying not only the target of the vengeance but, first and foremost, the avenger himself. Anger which drives revenge is blind, kills reasoning and disrupts the imagination. Vengeance may be inspired by the desire to regain control over oneself, one's own life and one's own country, yet it results in the opposite—taking control over others at the cost of one's own self, which is corrupted by excessive anger and is out of control. Moreover, vengeance is backward-looking and therefore unable to build the future independent state and provide order, it merely destroys social relations and undermines trust.

62 Adam Mickiewicz, "Forefather's Eve," ed. G. Rapall Noyes, trans. D. Prall Radin, *The Slavonic Review*, no. 3 (1925), 499–523, 522.

63 Adam Mickiewicz, "Part III, Sc. II–V, Forefather's Eve," ed. G. Rapall Noyes, trans. D. Prall Radin, *The Slavonic Review*, no. 4 (1925), pp. 42–46, p. 49.

64 Juliusz Słowacki, "Kordian", in *Four Plays, Mary Stuart, Kordian, Balladyna, Horsztyński*, trans. Ch. S. Kraszewski, ebook (Glagoslav Publications, 2018).

65 Ibid.

4.3. Challenging post-totalitarian injustice: the struggle for the truth

The issue of restoring justice and trust in communities destroyed by bloody cycles of vengeance which have resulted in mass-killings, genocide, and discrimination is one of the most intricate problems in the field of justice. In countries like South Africa and Rwanda, special courts and tribunals were established to achieve reconciliation (e.g. the Truth and Reconciliation Commission in South Africa). One of the most perplexing problems of societies in which tremendous wrongs and harm have been done is that the victims are forced to live alongside the perpetrators of the cause of their pain, particularly when no justice was done. The core problem of such societies is that the victims have been denied one of the most fundamental human needs—that of the truth.

This problem is vividly illustrated by the drama entitled *Death and the Maiden* written by Ariel Dorfman (1991) and adapted by Roman Polański for the screen (1994). The author presents a story inspired by the terror inflicted by General Pinochet's dictatorship in Chile. During this period, many people were killed, held in prison and tortured. The victims of the dictatorship never found justice and lived alongside their tormentors, side by side. The play depicts a woman who was one of the victims of the cruel dictatorship, held in prison, tortured and raped over a long period. We encounter her many years after, when she lives a seemingly normal life, until one night she recognizes in the neighbor brought home by her husband, the doctor who tortured her and raped her. She believes he is the one who brutally abused her, yet he denies it. She puts him on quasi-trial in her house and tries to make him talk about and admit what he had done to her. Over the course of one long night, she works hard on his confession, but unsuccessfully. We are faced with the problem of how a person may react to an unspeakable harm done to them if the perpetrator is later left at their mercy. We can see how tempting it is for them to take revenge: in the play, she even contemplates the idea of raping the doctor, either with the use of a stick, or asking her husband to do it on her behalf. Yet she realizes that there is no way in which this form of repayment could ever mitigate her suffering. What was done to her cannot be undone, and whatever she does in revenge would not bring her back what she has lost. Inflicting violence on the perpetrator does not compensate for the violence inflicted on her, but only serves to multiply the violence.

The play addresses the problem of how to break the cycle of recrimination and retaliation without violence. The only way to do so is to seek justice, and justice does not require us to inflict pain on the perpetrator, but requires the determination of guilt or innocence via a criminal procedure. The main protagonist who was the victim could not seek justice in the court and when she tried to seek it on her own, she quickly realized that how easily this path could transform her from a victim into perpetrator:

> We inhabit a time of fear and mistrust: nothing could be more urgent than asking ourselves how we should react when we have been overwhelmed by a monstrous offence; nothing could be more imperative than the need to understand how easy it is to go from victim to accuser, from accuser to invader, from violator to victim.[66]

The problem so vividly described in the play was present in many post-war and post-totalitarian countries. Svetlana Alexievich addresses this problem in the post-soviet countries, in which the victims of the communist regime have to live side by side with their tormentors.[67] "Our entire tragedy lies in the fact that our victims and executioners are the same people", as we can read in the book[68]. The permanent state of terror which lasted for several generations has transformed the society and blurred the line between the victims and violators:

> Imagine a victim and an executioner from Auschwitz sitting side by side in the same office, getting their wages out of the same window down in accounting. With identical war decorations. And now, with the same pensions.[69]

66 Ariel Dorfman, "A vicious circle," *The Guardian* (17 Jan 2008), https://www.theguardian.com/world/2008/jan/17/chile.theatre (last access: 05.25.2021).

67 Svetlana Alexievich, *Secondhand Time. The Last of the Soviets*, trans. B. Shayevich, ebook (New York, 2016), 78.

68 Ibid., 602.

69 Ibid. 624.

Victims do not necessarily want to make their perpetrators suffer, in most cases they only want to be heard and to hear that those who have harmed them are guilty of what they have done. And when it is denied to them, society is unable to be fully restored. The recognition of human dignity and restoring trust to social and legal institutions as well as trust in social relations, is one of the main aims of justice. The government owes the truth to the victims of dictatorships and totalitarian regimes which is necessary for showing them respect and restoring their status of full participants of the political-legal community.

One of the main characteristics of a totalitarian regime is its denial and corruption of truth, something which was vividly described by such writers as Czesław Miłosz (*The Captive Mind*), Vaclav Havel (*The Power of the Powerless*) or George Orwell (*1984*)—to name but a few. The elementary need of human beings is "an attempt to live within the truth"[70] which requires acknowledging moral autonomy and individual responsibility. "Trials are the normal means of establishing a public truth. In a nation with a legal system that commands public trust, they are, as Aeschylus saw, a preferable means," as Nussbaum writes.[71] Yet, if the totalitarian regime collapses and people are denied such trials which would "acknowledge the wrongs of the past, restoring public trust in government and creating a shared public sense of right and wrong", then justice and reconciliation are highly questioned. Without an attempt to recognize truth and acknowledge responsibility for past wrongs and harm, the post-totalitarian society remains deeply rooted in totalitarian ideology and no restoration of a just society is possible.

As Martha Nussbaum accurately points out:

> The focus should be on establishing accountability for wrongdoing, as a crucial ingredient of building public trust, on expressing shared values, and then on moving beyond the whole drama of anger and forgiveness to forge attitudes that actually support trust and reconciliation. What values promise such support? Generosity, justice, and truth.[72]

Without an attempt to recognize truth and acknowledge responsibility for past wrongs and harm, the post-totalitarian society remains deeply rooted in totalitarian ideology and no restoration of a just society is possible.

Concluding remarks: justice as generosity

Justice reduced to its reactive spirit becomes revenge, which in turn undermines just social institutions. Justice enhanced by love (*agape*) may overcome revenge and reach its fullness, becoming justice as generosity.[73] Generosity enables the reintegration of a community which has disintegrated because of the violation of its norms.

Generosity is best displayed by good parents who, although angry at a child who did something wrong, want to help the child to improve. Good parents should

70 Vaclav Havel, *The Power of the Powerless*, trans. P. Wilson, accessed May 5, 2021, https://hac.bard.edu/amor-mundi/the-power-of-the-powerless-vaclav-havel-2011-12-23.

71 Nussbaum, *Anger*, 238.

72 Ibid., 13.

73 See Wolterstorff, *Justice in Love*. Cf. Timothy P. Jackson, *The Priority of Love* (Princeton 2008); Timothy P. Jackson, *Political Agape: Christian Love and Liberal Democracy* (Grand Rapids, Michigan: 2015).

send the child a clear message of the unacceptability of the bad act. Yet they should do this in the spirit of love and generosity which encourages the child to the transformation by separating the wrongful deed from the self of the child. Such a separation helps the child "to think of him- or herself as capable of good in the future".[74] Using this analogy in the political context, Nussbaum argues for building justice on generosity:

> Equally important, the Political Realm is not simply a realm of impartial justice. If a nation is to survive and motivate people to care about the common good, the public realm will need some of the generosity and the non-inquisitorial spirit that I think of as proper to the personal realm, where keeping score of all one's wrongs may be carried too far and poison the common endeavor. That, really, is the core of Aeschylus' insight: that instead of exporting to the city the vindictiveness and bloodthirstiness of the family at its worst, the city should draw on the bonds of trust and the emotions of loving generosity that characterize the family at its best.[75]

Nussbaum provides three powerful exemplars of the spirit of generosity, Mahatma Gandhi, Nelson Mandela and Martin Luther King. Their remarkable attitude helped societies which had been divided by long lasting harm and wrongs to overcome the past and reintegrate in the common effort of building the future. The non-violence practiced by them and their social and political movements was a strategy which had an instrumental negative meaning. Yet its positive correlate—'loving generosity'—was crucial in the political transformation and had "both strategic and intrinsic political significance".[76] "It is only through the inner transformation involved in replacing resentment by love and generosity that nonviolence can ever become creative", as Nussbaum summarizes.[77]

Generosity has creative power and enables the conflicting parties to move forward towards mutual respect. Nussbaum translates generosity into liberal terms of a welfarist state which is aimed at their citizens' welfare, including the welfare of wrong doers. In this conception, anger is transformed into non-anger, retribution is replaced with resocialization, and the role of punishment is diminished. The generosity may be also interpreted differently, as rooted in the Christian virtue of love (*agape*) which is expressed by *misericordia* (mercy). Mercy is a moral virtue that, like justice, dependents on human will and is regulated by reason.[78] Yet, mercy comes from the heart, while justice comes from reason.[79] In contrast to justice, which gives each person her due, mercy gives more good and less evil than one deserves. Justice is capable of restoring social order, while mercy is capable of much more—of restoring our relations with other people, as well as with ourselves:

> True mercy is, so to speak, the most profound source of justice. If justice is in itself suitable for 'arbitration' between people concerning the reciprocal distribution of objective goods in an equitable manner, love and only love (including that kindly love that we call 'mercy') is capable of restoring man to Himself.[80]

Neither love, nor mercy replace justice, they rather complement each other. Both love and mercy can be considered as powerful sources of justice which ground justice in respect to inner worth of human beings and enable to overcome vengeance and restore inner and political order.

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74 Nussbaum, *Anger*, 200.

75 Ibid., 9.

76 Ibid., 220.

77 Ibid., 218.

78 St. Thomas Acquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province, Benziger Bros. edition 1981, digital version, accessed May 5, 2021, part II-II, question 30, article 3, http://www.ccel.org/ccel/aquinas/summa.html

79 Ibid., question 30, article 1 and 9.

80 John Paul II, *Dives In Misericordia, On the Mercy of God*, Encyclical Letter, 1980, accessed May 5, 2021, http://www.thedivinemercy.org/message/johnpaul/encyclical.php.

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Religious Freedom and Legal Education

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For what was obvious yesterday is not necessarily obvious today, i.e., to the present generation of young citizens. In the past, freedom of religion for all has always been an important element of constitutional guarantees, but one wonders whether religious freedom would be defended by the present younger generation. In particular, would the young of Europe defend it? The answer, unfortunately, is most probably in the negative. But maybe the United States is different—is indeed our Euro-Atlantic world divided on the issue of religion and its role in modern societies? Legal history teaches that freedom of religion always comes at a price. The crucial point is who has to pay the price. Freedom cannot defend itself. It needs its own witnesses, martyrs and, above all, guardians and protectors. Recently, that is during the last two terms, the Supreme Court of the United States has sent out a series of instructive and influential signals that protection of religion should be strengthened. The relevant cases are American Legion *v.* American Humanist Association *(2019),* Espinoza *v.* Montana Department of Revenue *(2020),* Little Sisters of the Poor Saints Peter and Paul Home *v.* Pennsylvania *(2020),* Our Lady of Guadalupe *v.* Morrissey-Berru *(2020) and* Fulton *v.* City of Philadelphia *(2021).*

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Whether one personally appreciates it or not, religion brings redeeming values to personal and social life. Therefore, protecting religious freedom as broadly as is practicable is, in fact, despite sundry contemporary protests, protecting humanity. This is not a matter merely of the expression of ideas, as in freedom of speech. Protecting freedom of religion is protecting our personal internal life. It is a matter of personal integrity and the coherence between what we choose and do, on the one hand, and what we ultimately believe and trust in, on the other. What we do and choose is necessarily a manifestation of our internal life, our intentions and decisions, our expectations and aspirations. That is why during political debates we find religion protected as an essential concern. Contradictorily, one cannot truly be even a humanist without protecting religion. But the question we find ourselves having to ask is: is this present generation willing or not to hold onto and protect essential human values?

For what was obvious yesterday is not necessarily obvious today, that is to the present generation of young citizens. In the past, freedom of religion for all has always been an important element of constitutional guarantees, but one wonders whether religious freedom would be defended by the present younger generation. In particular, would the young of *Europe* defend it? The answer, unfortunately, is most probably in the negative. But maybe the United States is different—is indeed our Euro-Atlantic world divided on the issue of religion and its role in modern societies?

But legal history also teaches us that freedom of religion always comes at a price. The crucial point is who has to pay the price.[2] Freedom cannot defend itself. It needs its own witnesses, martyrs and, above all, guardians and protectors. Recently, that is during the last two terms, the Supreme Court of the United States has sent out a series of instructive and influential signals that protection of religion should be strengthened.

This protection comes under the aegis of the celebrated First Amendment to the US Constitution, which belongs to the *topica*—the topics of modern legal cul-

Would religious freedom be defended by the present younger generation?

Legal history, in giving the opportunity to take advantage of the experience of past generations and their systems, can prove itself to be quite practical when applied in the field of legal studies, i.e., for legal research or analyses. Legal history teaches that constitutional orders have been formed for centuries and it seems likely that all were established with the intent of enduring forever; nevertheless, we know that in practice they are always in a continuous process of refinement and development and will change during the life of any particular society or state. Inevitably, then, some systems and epochs will be richer than others in their understanding of ways to put in normative order what is needed for a society in those situations that require regulation. Justice Hugo Black, writing in the United States in 1951, was clearly aware of living in a less than optimal time with regard to particular freedoms but was able to put this in a broader, historical perspective: "There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[1]

ture. The Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Nevertheless, despite the highlighted position of the protection of religion in the First Amendment, our actual experience in teaching law[3] proves that if two separate university courses are offered today on subjects related to freedoms secured by this Amendment, it is certain that more students will be attracted to freedom of speech than to freedom of religion. This order, we note, is opposite to that declared by the Constitution, and should be the other way round: religion first, then speech, as the First Amendment puts freedom

1 *Dennis* v. *United States*, 341 U.S. 494, 581 (1951) (Black, J., *dissenting*).

2 Franciszek Longchamps de Bérier, "Cena wolności słowa," in *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, ed. Piotr Kardas and Tomasz Sroka and Włodzimierz Wróbel (Warszawa: Wolters Kluwer Polska, 2012) vol. 1, 259–74.

3 Franciszek Longchamps de Bérier, "Roman Law and Legal Knowledge—Law Faculties versus Law Schools," in *Roman Law and Legal Knowledge. Studies in Memory of H. Kupiszewski*, ed. T. Giaro (Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji UW, 2011), 15.

of religion in the *first* place—and, as we will see, for various reasons.

1. We note that in civil law countries, the interest of students should *prima facie* be equal for both courses, inasmuch as they both create the opportunity to acquire skills in common law analyses and in the practice of American courts. In the US, these courses are not broad in their scope, as they cover only one chapter of American constitutional law. There are, however, several possible explanations for the fact that classes in religious freedom tend to be only half as numerous as those in freedom of speech. The first explanation could be that our students think they know a lot and have much to say about freedom of speech. On the other hand, they probably do not find religion an important subject or even, in perhaps the majority of cases, a part of personal and social life that is worth protecting. This is not surprising as the general European tendency seems to be to reduce freedom of religion to freedom of expression[4] as if religion had no redeeming value in itself for individuals or communities—that is, as if religion were not anything more than a particular kind of verbalization of ideas. But religion is not just a matter of expressing certain concepts.

We can get a useful perspective on the Gordian knot of these two freedoms from the results of legal analyses, which allow us to trace important crossroads where both these freedoms meet. And in these intersections it is freedom of religion that seems to have priority over freedom of speech—basically because it also saves religious values that exist in the political sphere.[5] As regards the United States, one could in addition argue, formally speaking, that in the order given in the First Amendment religion is protected before speech and expression are. One might ask: but why take this particular *comparative* example into consideration and refer to American legal experience when discussing the urgent need for awareness in religious freedom *over here in Europe*?[6] First, the conclusions of recent comparative report-studies explicate the underlying rationale for and validity of such comparisons.[7] Second,

If one is apprised of the key issues of free speech, one cannot but be aware that it is impossible in practice to reduce freedom of religion to freedom of speech.

4 Cf. Piotr Szymaniec, *Koncepcje wolności religijnej: rozwój historyczny i współczesny stan debaty w zachodniej myśli polityczno-prawnej* (Wrocław: Oficyna Wydawnicza Atut—Wrocławskie Wydawnictwo Oświatowe, 2017).

5 Andrzej Bryk, "Covenant, the Fear of Failure and Revivals as the Contemporary Sources of American Identity," in *Amerykomania. Księga jubileuszowa ofiarowana profesorowi Andrzejowi Mani*, ed. Włodzimierz Bernacki and Adam Walaszek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2012), vol. 2, 60–63, 75–78.

6 Grzegorz Blicharz, "Conclusion: A Historical and Comparative Perspective," in *The Battle for Religious Freedom. Jurisprudence and Axiology*, ed. Grzegorz Blicharz and Maria Alejandra Vanney and Piotr Roszak (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2020) 421: "The jurisprudence of the courts is highly influenced by the legal tradition of the country meaning that issues of religious freedom are dependent on local circumstances and the history of each society."

7 *Freedom of Religion. A Comparative Law Perspective*, ed. Grzegorz Blicharz (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), *Freedom of Conscience. A Comparative Law Perspective*, ed. Grzegorz Blicharz (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019).

the fact that in the United States religious freedom is declared as the very first freedom does not mean it is protected well enough even there. The number of cases concerning the First Amendment that come before the Supreme Court of the United States each term is surprisingly high. Each term (i.e., from early October till early July) the Supreme Court of the United States decides upon only a small number of cases, about 70 to 90, and yet every term there is a least one (sometimes two or three) decided on the basis of, or even directly concerning, the religious clauses of the First Amendment. And it is surprising how many cases have arisen even after *Cantwell* v. *Connecticut*[8] was decided in 1940, as it might be assumed that everything had already been settled and said about religious freedom in First Amendment jurisprudence 80 years ago … What might give reason for concern is the fact that recent cases in which the Court has granted *writ of certiorari* are not about mere details or trifles.

Both the factors we noted—that our students think they already know a lot about freedom of speech, and that they probably do not find religion an important subject—might lead to a negative answer to the question as to whether religious freedom could effectively be defended by this generation. If we do not need religion in Europe anymore, then we will probably feel it does not need to be protected. And so it is that we leave constitutional protection clauses as little more than mere ornaments on legal documents, for European practice and governance, and court decisions, too—of both national and international courts—show that they no less than *despise* religion and the need for religious freedom, and, indeed, those citizens who are religious. One recent example is given by works on the process of implementation of the EU directive on whistleblowers. With regard to exceptions, the directive itself accepts only "legal and medical professional privilege"[9], but not religious privilege. This lack poses a threat for instance to the seal of confession—which is fundamental to a Catholic and to his or her whole inner and outer life. This could lead to the paradoxical situation where the seal of confession is respected in criminal and other procedures, but not in whistleblowing legislation. The Legal Affairs Commission of the Commission of the Bishops' Conferences of the European Union (COMECE) noticed that during a meeting with an EU official, he testified that, during negotiations, there had indeed been requests to expand the scope of clauses on confidentiality within the Directive, but that they had been rejected on the grounds that the protection of public interest was considered prevalent. This official confirmed that two Member States had requested the inclusion of a provision quite specifically on confessional secret, but "the point had not been considered as relevant." However, problems caused by recent regulations in Australia[10] suggest that the issue is by no means irrelevant.

2. What might prompt pessimism is a controversy which recently reached the US Supreme Court concerning a cross located only six miles from the very building which houses this court.[11] Federal courts were expected to order the relocation or demolition of this cross or at least the removal of its arms. It is known as the Bladensburg Cross—a Latin cross, about twelve-meters tall, erected 85 years ago at the center of a busy intersection in the suburbs of the nation's Capital. The cross was erected as a tribute to 49 soldiers from the area who gave their lives in the First World War. The erection of such a cross was not surprising since the Latin cross had become a central symbol of the war. The image of row after row of plain white crosses marking the overseas graves of soldiers was emblazoned on the minds of Americans at home. The situation of the twelve-meter cross was challenged in 2014 by those who claimed to be offended by the sight of the memorial on public land and the expenditure of public funds to maintain it. They themselves were apparently not ready to pay the price of freedom for others. They maintained that this situation, long-established and accepted by the community concerned,

8 *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

9 Art. 3 § 3 (b) Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (CELEX 32019L1937).

10 Cf. Brian Lucas, "The seal of the confessional and a conflict of duty," *Church, Communication and Culture* 6 (2021) no. 1, 99–118.

11 *American Legion* v. *American Humanist Association*, 139 S.Ct. 2067 (2019).

violates the Establishment Clause of the First Amendment; the Court of Appeals for the Fourth Circuit agreed with them that the memorial is unconstitutional and remanded for a determination of the proper remedy. The Supreme Court, however, was of the opposite opinion, by a vote of 7:2; therefore, as far as the highest court in the land was concerned, the matter seemed reasonably clear-cut.

For nearly a century, this cross has expressed the community's grief at the loss of the young men who perished, the community's thanks for their sacrifice, and its own dedication to the ideals for which they fought. It has become a prominent community landmark, as since 1925 it has been the site of patriotic events honoring veterans on, for example, Veterans Day, Memorial Day, and Independence Day. Its removal or radical alteration today would be seen by many not as a neutral act—a respect for all religions—but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions."[12] And there was no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Supreme Court observed: "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim."[13] In terms of European jurisprudence we would say there is the right to the cross on public property. This is the right of citizens who are believers or nonbelievers: the right to the cross's presence on public land or in prominent public buildings.

In Poland, there had been a similar issue during the 2011 controversy concerning the presence of the cross in the chamber of the Polish parliament. The speaker for the Parliament entrusted four experts with presenting written analyses on the issue. The experts were chosen—one would say—on the scheme 2:2—two who could potentially be in favor of keeping the cross in the chamber room, two who *prima facie* would likely argue for its removal. The surprise was that not one of them really argued for the removal.[14]

Both these Polish experts and the US Supreme Court were convinced that there seems to be no logical connection between the presence of the cross in public places and the government's impartiality in religious matters. The cross does not threaten religious impartiality as its function is an essentially *social* one: it calls for a readiness to sacrifice for the sake of the good of other people. The cross cannot, therefore, be understood as erected *against* anybody: the right to the cross becomes an expression of sincere concern for the common good and of true humanism by the readiness for sacrifice for the sake of others. The people's expectation that they have a right to the cross is respected, in particular when the cross had already been present on public land for a significant period of time. But such historical arguments are not the only arguments and not even necessary in the sense that the lack of them would make a display of the cross unconstitutional or the cross would thereby become a sign of intolerance or religious indoctrination. By the very nature of the cross, that could never be.

The case of the Latin cross suggests that retaining established, religiously-expressive monuments, symbols, and practices, is quite different from erecting or adopting new ones. The Court concluded: "The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else: that […] the monument is a symbolic resting place for ancestors who never returned home[; that…f]or others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in [the First Amendment…of] the Constitution."[15] No doubt the cross originated as a Christian symbol.

12 *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (Breyer, J., *concurring in judgment*). Cf. Weronika Kudła, *Wrogość wobec religii. Ostrzeżenia ze strony Sądu Najwyższego USA* (Kraków: Księgarnia Akademicka, 2018), 36–37, 300–308.

13 *American Legion*, 2074.

14 Weronika Kudła and Franciszek Longchamps de Bérier, "Prawo do krzyża w przestrzeni publicznej. Odpowiedź stowarzyszeniu humanistów," *Forum Prawnicze* 4 (2019), 19–37.

15 *American Legion*, 2090.

And it always retains its religious meaning, although it can have a variety of other, lay meanings as well. Challenging the cross only for its intrinsic religious meaning or the original purpose of the monument as infused with religion could only be considered an act of hostility towards religion—not the desire to *permit* all religions but rather the desire to *destroy* all religions.

First, tolerating the meaning of this cross does not actually *harm* anybody—it might only *allegedly* hurt. There is no coercion involved in the presence of the cross, yet there might very well be no basis at all for a legal challenge to this public cross.[16] After all, how is it possible to adjudge, for the challenge to be valid, which particular persons would need to feel offended by the sight of the memorial? Must it include everyone? And how do we define the features of these ostensibly 'offended subjects'? And to what degree do they need to be offended, and how empirically measure the offence felt? And what about exceptions—is not the offence felt at its removal to be also taken into account? Certain lower courts did indeed invent a form of 'offended-observer standing' for Establishment Clause cases in response to *Lemon* v. *Kurtzman*[17]—and so, once again, we might argue that we have here yet another call for overturning *Lemon*. Probably the most trenchant expression of this plea is that of Justice Antonin Scalia. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: our decision in *Lee* v. *Weisman* conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.' Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."[18] Justice Scalia's prose is not just eloquent but entirely to the point—pointing out just how difficult and never-ending free-religion jurisprudence is. And finally we note that the US Supreme Court in the *Town of Greece* case reasoned that the historical practice of having, since the First Congress, chaplains in Congress showed "that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[19]

With regard to religion, it is not assertiveness that is needed but rather religious-freedom awareness.

Second, it is those above all who champion the religious freedom of their co-citizens who are most likely to avoid hostility towards religious groups. Moreover, there is no reason to limit religious speech and display to that which is nonsectarian. In fact, the nonsectarian is often considered, by sincere adherents of a religion, to retain little or nothing of the truly religious—it is no longer religious in any sense. In Poland, such hostility to religion as that shown towards the cross in the suburbs of

16 *American Legion*, 2096 (Thomas, J., *concurring*).

17 *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

18 *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 398–399 (1993) (Scalia, J., *concurring in judgment*).

19 *Town of Greece, N.Y.* v. *Galloway*, 572 U. S. 565, 576 (2014).

Washington, D.C. would be considered to be against the common good—*bonum commune*, that is Article 1 of the 1997 Constitution of Poland. This is particularly evident when we consider that quite different in nature was the act of establishing the cross in public space in the first place from subsequently taking down a well-established and generally respected cross or—worse—demolishing the cross by cutting its arms or removing it completely from any public space. Such demolition would be but an act of vandalism, even if legal in some jurisdictions. But, thankfully, both crosses remain where they were originally set: one on the crossroads six miles from the Supreme Court of the United States, and the other in the chamber of the Polish Parliament.

Freedom always comes at a price. Someone has to pay for it.

3. During the US Supreme Court's 2019 term, there were three cases which concerned religious freedom quite specifically. They are quite instructive for understanding the general tendency in jurisprudence to take into consideration and respect the freedom of religion.

In *Espinoza* v. *Montana Department of Revenue*[20] the highest court had to revisit an issue which has been vigorously discussed since the late sixties of the twentieth century: the constitutionality of spending public funds on helping (parents and their) children who attend parochial schools. The occasion was given by the actions of the Montana legislature. It had established a program granting tax credits to those who donate to certain organizations which in turn award scholarships for private school tuition. The point was that the regulation as worded was about financing *private* schools but not *parochial* (i.e. religious) schools, as, in connection with this program, the Montana Department of Revenue had promulgated "Rule 1" prohibiting families from using the scholarships for education at, *specifically*, religious schools. When three mothers sought to use the scholarships at a religious school, the Montana Supreme Court found the program unconstitutional *simpliciter* and without addressing further the objectionable stipulation. The mothers challenged their decision, maintaining that it was specifically the Rule discriminated on the basis of their religious views and the religious nature of the particular school they had chosen. The question was presented in this way: "whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision" of the Montana Constitution. The point was, therefore, not to bury the issue by accepting that the program is simply unconstitutional but address quite explicitly the issue concerned. And the US Supreme Court disagreed with the Montana highest court, reversing its decision by a close 5:4 vote.

During the seventies and eighties, the financing of parochial schools was not allowed by the US Supreme Court, but in the mid-90s the Court changed its line of precedence for various practical reasons, including the extremely high costs of complying with previous Court decisions. The Court became more realistic in finding a fine line discriminating between impermissible establishment and permissible accommodation. Finding this line did not mean paying no price for accommodating others' freedom. This time the Court buried major doubts concerning constitutionality and legitimacy of financing educational institutions that are under sectarian control. For that reason, it went as far as to cite the founding case for American constitutional jurisprudence: *Marbury* v. *Madison* that the "*supreme law of the land* condemns discrimination against religious schools and the families whose children attend them."[21]

A shorter but not less polarizing discussion was closed this same term by another decision in a case

20 *Espinoza* v. *Montana Department of Revenue*, 140 S.Ct. 2246 (2020).

21 *Marbury* v. *Madison*, 1 Cranch 137, 180 (1803).

that was quite clearly about the free exercise of religion. In *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*[22], the US Supreme Court held that an administrative health agency is entitled to promulgate religious and moral exemptions. Pennsylvania had objections to the Departments of Health and Human Services, Labor, and the Treasury accommodating in such a way a religious employer which is only a religious *order* and not a church, sect or denomination. The issue was created by the Affordable Care Act of 2010, i.e. by the so-called 'Obamacare' that requires those employers who are covered to provide women with "preventive care and screenings" without "any cost-sharing requirements." Health plans provide coverage for all Food and Drug Administration approved contraceptive methods, including early-abortion drugs. In two previous cases, the Supreme Court had decided to respect the conscientious objections of a family firm, with expectations that church exemptions would be broadened.[23] And this time, the Court decision was decided by a 7:2 vote and confirmed the constitutionality of the actions taken by the administrative agency. It legitimately granted exceptions that accommodate and respect religious objectors who have had to fight for the ability to continue in their worthy charitable work without violating their sincerely-held religious beliefs.

Our Lady of Guadalupe v. *Morrissey-Berru*—a case concerning the so-called 'ministerial exception'—was decided by the very same vote and on the very same day, July 8, 2020.[24] This same issue had appeared before the Supreme Court nine years earlier in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*[25] when the court confirmed the freedom of religious entities to hire and fire those whom they consider their ministers, that is to say, persons involved in accomplishing the denominational mission. There was absolutely no doubt that religious institutions are to decide for themselves, free from state interference, not only matters of faith and doctrine but those of church government as well. This right is protected by the First Amendment and for courts it meant that they are barred from entertaining an employment-discrimination claim brought by a teacher of a religious school. The *Our Lady of Guadalupe* case strongly confirmed the ministerial exception, saying that the First Amendment's Religion Clauses foreclose the adjudication on employment-discrimination claims in religious schools. "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[26]

The case was based on proceedings brought by two teachers in the Archdiocese of Los Angeles. Their employments had been terminated, allegedly because one had achieved old age and the other had breast cancer. Neither teacher wanted to pay the price for the ministerial exception granted to their employers, so after their employment was terminated they proceeded to sue their schools. Both were employed under nearly identical agreements that set out the schools' mission to develop and promote a Catholic school faith community; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases. Both teachers taught religion in the classroom, worshipped with their students and prayed with them, and had their performance measured on religious bases. The point of this case was not the *adoption* of the privilege as in the *Hosanna-Tabor* case, but rather the elaboration of its correct understanding. Is there any test as to who is a minister? If one works in a religious school but is of a different faith, could one still be considered a minister? How much teaching, how much preaching needs to be exercised to be considered a minister? In the *Our Lady of Guadalupe* case a "function-only" test was argued for by those who

22 *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 140 S.Ct. 2367 (2020).

23 *Burwell* v. *Hobby Lobby Stores, Inc.* 573 U. S. 682, 696–697 (2014), *Zubik* v. *Burwell*, 578 U. S. 403 (2016). Franciszek Longchamps de Bérier, "Law and Collective Identity: Religious Freedom in the Public Sphere," *Krakowskie Studia z Historii Państwa i Prawa* 1 (2017), 176–77.

24 *Our Lady of Guadalupe* v. *Morrissey-Berru*, 140 S.Ct. 2049 (2020).

25 *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012).

26 *Our Lady of Guadalupe*, 2069.

expected an overturning of the *Hosanna-Tabor* case. In the same vein, the US Court of Appeals for the Ninth Circuit that covers California by its jurisdiction wanted to limit the scope of the understanding of who can be considered a minister simply in order to avoid chaos. There were various indications that could be taken from *Hosanna-Tabor* to limit the ministerial exception. First, the church itself gave the teacher the title of minister, with a role distinct from that of most of its members. Second, her position "reflected a significant degree of religious training followed by a formal process of commissioning." Third, she "held herself out as a minister of the Church" and claimed certain tax benefits. Fourth, her "job duties reflected a role in conveying the Church's message and carrying out its mission." The Supreme Court decided that the circumstances which the Supreme Court had found relevant in *Hosanna-Tabor* had mistakenly been treated by the Ninth Circuit as a mere checklist of items to be assessed and weighed against each other. But that is insufficient because when it comes down to details we have to enter into churches' internal affairs. No wonder, then, that the Supreme Court stated what in hindsight seems obvious: "Deciding such questions would risk judicial entanglement in religious issues." It is not only much better keeping away, it is in fact the only honest attitude that could be taken by a government with any serious constitutional respect for and declaration of religious freedom.

4. The 2020 term started with only two cases in which there was any religious element, but for both religion was only in the background.[27] In November, however, an important case arose when the US Supreme Court agreed on an executive order establishing occupancy limits in the time of pandemic in order to curb rising infections. A Roman Catholic diocese and two Orthodox Jewish synagogues sued to block enforcement of the executive order as it negatively impacted them when introducing *no* capacity restrictions on certain businesses considered 'essential'. The businesses were in fact only secular. The court granting the injunction against the executive order stated that if the restrictions that were being challenged were in fact enforced they would cause irreparable harm; on the other hand, blocking them would *not* infringe the public interest. The Supreme Court took the occasion, therefore, to reaffirm that freedom of religion is not to be disregarded even in times of crisis. Government officials cannot treat religious activities worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available.[28]

We need to think in terms of educating so as to be of help to those who pay the price of religious freedom.

A major contribution to the affirmation of individual religious freedom came with a case decided unanimously in mid-June 2021. In *Fulton* v. *City of Philadelphia*[29], a public entity stopped referring children to a foster-care agency which would not certify same-sex couples as foster parents due to the agency's religious beliefs about marriage. Yet no same-sex couple had ever sought certification from the agency. If one did, the agency "would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples." For over fifty years (up until 2018) the agency had successfully contracted with the City to provide foster-care services while holding to its beliefs. It was plain to the

27 *Tanzin* v. *Tanvir*, 141 S.Ct. 486 (2020) and *Uzuegbunam* v. *Preczewski*, 141 S.Ct. 792 (2021).

28 *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S.Ct. 63 (2020).

29 *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868 (2021). See https://www.catholicnewsagency.com/news/249688/city-of-philadelphia-to-pay-2-dollars-million-to-catholic-foster-care-agency-in-settlement., accessed November 26, 2021.

US Supreme Court, in the first place, that the City's actions had burdened the agency's "religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." The task of the Court was to decide whether the burden the City had placed on the agency was constitutionally permissible. And it found that the City had indeed burdened the agency's religious exercise "through policies that do not meet the requirement of being neutral and generally applicable." The Court recalled two important cases[30] as precedent that Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. The City had transgressed this standard of neutrality, but, even more serious, its regulation was not generally applicable. The regulation did in fact provide a mechanism for individualized exemptions, but the agency had not been offered one. The City invoked, unsuccessfully, its compelling interest in enforcing its non-discrimination policies but offered no compelling reason why it had a particular interest in denying an exception to the Catholic agency while making them available to others. They had, therefore, prohibited religious conduct while at the same time permitting secular conduct. It was clearly a partisan decision and against the Constitution.

nation, a nation which is understood politically as the result of a political covenant. This covenant is realistic when it takes into consideration the fact that the citizens it consists of are also subjects of various religious covenants.[31]

What proposals do we put forward, then, with regard to legal education? The need for religious freedom might be obvious to the US Supreme Court and to older generations, but there is an urgent need to explain convincingly to younger generations the redeeming value of this freedom—and not only the position it happens to have in our countries' constitutions. It is not enough to teach freedom of religion in general courses on human rights or constitutional law as a perfunctory add-on to other freedoms. There is a constant need for specific courses dedicated to religious freedom itself, preferably with this freedom explicitly named in the titles of the courses. It is good and helpful to teach free speech as well, but separately—also in order to present the conflicts and common problems that arise between these two freedoms and the endeavors to protect both. If one is apprised of the key issues of free speech, one cannot but be aware that it is impossible *in practice* to reduce freedom of religion to freedom of speech, unless the intention is in fact to neglect or diminish freedom of

We should take up the challenge of educating our young about religious freedom.

5. The number of cases concerning religious freedom that continue to come up before the Supreme Court of the United States proves that religious freedom and keeping healthy relations between government and religion are essential for the good of American society. This is unsurprising, as religion brings what is redeeming to the common life even of this most modern, diverse or—as we love to say—'pluralistic' religion—which would be an enormous reduction in individual freedom and of a vital aspect of that freedom. It would, of course, be possible to attempt to regulate religion in the same way as speech, i.e. using a top-down approach, but true freedom of religion could not be enjoyed under such regulation, because religious freedom requires respect for ordinary everyday practices. And that is why freedom of religion requires rather a bottom-up analysis.

30 *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 531–532 (1993) and *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1731–1732 (2018).

31 Franciszek Longchamps de Bérier, "Church-State Relations: Separation without the Wall," *Studia Iuridica* 30 (1995), 91.

Legal education about religious freedom could clearly present argumentation in favor of the freedom of religion, but this should not be a mere presentation of certain splendid victories that have occurred in courts. It is important that it is seen that religious freedom is and, indeed, *should be* respected. It might perhaps be a better approach to analyze attacks against this freedom and against religion itself that unfortunately *succeeded*. Studying such defeats for religion could be useful for training our young to be prepared for the situations they might encounter. Note that, with regard to religion, it is not assertiveness that is needed but rather religious-freedom *awareness*.

When addressing a broad audience, Jesus Christ would often talk in parables. Parables are excellent literary style. They are quite safe for the speaker and respectful to the listeners, for parables come to each listener at his or her own level of intelligence and awareness. If those who hear are sufficiently acute they will understand more than the literal, explicit meaning and may even add something from their own experience. If the hearers are very sharp-witted or sagacious, the speaker might be required to explain the parable in plain, explicit terms. Foreign court cases—like those decided by the US Supreme Court or others known from comparative report-studies—are the parables that allow us to see as in a fable our own local issues and guide us as to the measures to be taken.

In our workshops and other educational practices, we should ourselves remember, as well as reminding others, that freedom always comes at a price. Someone has to pay for it. This observation of a simple fact needs to be combined with the following simple and evident but nevertheless powerful message: "freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[32] Constitutionally-guaranteed protection has to be ensured to everyone, not just to those who can afford it. We need to think, therefore, in terms of educating so as to be of help to those who pay the price of religious freedom.

The decisions of courts often seem obvious in hindsight and we might wonder how anyone could have thought of challenging a certain monument or ministerial exception or failed to take into consideration the educational needs of mothers or the conscientious objections of foster agencies or of nuns who did not want to sponsor early-abortion drugs. Nevertheless, these things did happen and we need to be constantly prepared for challenges to religious freedom. We should take up the challenge of educating our young about religious freedom, and that includes being ready to confront challenges to that freedom. We should have good and inclusive and tolerant answers ready to hand so we can protect and defend the freedom of religion opportunely and staunchly. So help us God.

32 *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943).

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Human Person and Fictitious Capacity: Law in Leonardo Polo's Thought

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Leonardo Polo enriches legal philosophy with the concept of 'person', one whose act of being means co-being, co-existence, and which allows the person to grasp his or her act of being through encounter with others—being 'ademas'. This concept might suggest anthropological reflection on individual rights, which are usually conceived as the autonomous sphere of a person as one who can act according to his or her own act of will, and in this way by the exercise of rights can be self-determined. The idea of the person as being-ever-more ('ademas') opens us to the idea of the correlation of our entitlements and of our capacity towards others—which means that we may understand both our entitlements and our capacity only when we encounter others—in dialogue or at the court—by recognizing the constraints upon us of others' entitlements and capacities.

Key words: Leonardo Polo, person, transcendentals, anthropology, Roman law, sources of law, legal interpretation, legal methodology

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1. Introduction

The relation between human person and law turned out to be at the core of Polo's legal reflection. Thus, the function of law as well as the meaning of legal relations for Polo's idea of the openness of the human person—*being-always-more—being-ever-more* (*además*)—will be at the center of our paper. We will try to point to these aspects of Polo's reflection on law, aspects which confirm, nevertheless, the importance of Roman legal thought for his ideas and offer a possible extension of Polo studies towards this field of legal research, which in my case has been inspired by the paper of Daniel H. Castañeda y G.[1]

2. Leonardo Polo and Legal Philosophy

Leonardo Polo is known as the most recent philosopher to have thought in terms of systematic philosophy and who offered a coherent and holistic view on metaphysics, epistemology, ethics and anthropology. It is not surprising that he took on the topic of

1 Daniel, Horacio Castañeda y Granados, "Requirements for the Study of Time and Action in Polo's Notion of Law and Jurisprudence," *Journal of Polian Studies*, no. 1 (2014), 121–162.

law and the legal order as well. Just like other authors of philosophical systems, especially Plato, Aristotle, Aquinas, Hegel and Kant to whom Polo refers constantly, he offered his views on how he understands law in terms of 1) its metaphysical status—mode of existence, essence and relational characteristics; 2) the topic of the just law, whether it exists and what the basis for the justification or legitimacy of the norms of positive law is; and finally 3) legal epistemology, ie. the theory of legal knowledge—"the origin, foundation and nature of the different legal knowledges and the procedures through which the different types of legal knowledge can be accessed".[2]

> **The distinction between public and private is much less clear than the division between individual and state.**

One should not forget that from the very beginning law played an important role in his scientific life. In 1949 he graduated from the Faculty of Law at Universidad Central in Madrid[3] and started practising law, but shortly after he returned to the academic life, receiving a scholarship at the Spanish Juridical Institute in Rome for his doctoral thesis on the existential character of natural law (*¿Qué es el Derecho Natural?*). An important role in this project was played by the professor of Roman law Alvaro D'Ors, who was then also the head of the Higher Council for Scientific Research. However, while studying the issue of the existential character of law Polo discovered the more fundamental question of being and the act of being, and it was in 1950 when he first encountered the issue of mental limit, which led him afterwards to steer his PhD research towards philosophy and the topic of the *real distinction* between being and the act of being. From this moment on his core idea and method became the *abandonment of the mental limit*, which influenced all his philosophical thought.

Although the topic of law was no longer at the center of his work, he did not entirely abandon it. Interestingly enough, it was not Roman law that influenced his remarks regarding legal issues but rather the ideas of Plato and Aristotle, and foremost those of Hegel. Polo's references to Hegel's *Grundlinien der Philosophie des Rechts* are numerous, especially concerning the meaning of I (*el yo*), person (*persona*) and man (*hombre*).[4] In fact the topic of law is particularly interesting for Polo, both in relation to his metaphysical statements on the access to being and with regards to his later developed transcendental anthropology. It is quite significant that the major portion of his analysis of legal matters deals with man-made law[5]: *derecho objetivo* and *derecho subjetivo*.[6] In fact in his early years his work was not inspired by any theory of natural law of his own, even though he taught the course on natural law during his first years at Navarra University, and later during his lectures referred to natural law and human rights, mainly interpreting them from the point of view of Platonic, Aristotelian and Thomistic philosophy.[7]

2 Salvador Rus, "La filosofia juridica de Leonardo Polo," *Anuario Filosófico*, no. 25 (1992), 225–226.

3 Juan, Antonio García-González, "Introducción," in *El acceso al ser. Obras Completas de Leonardo Polo*, Leonardo Polo (Pamplona, 2016), 9–10.

4 Leonardo Polo, *El yo. Presentación, estudio introductorio y notas de Juan Fernando Sellés* (Pamplona, 2004), 53, 58, 60.

5 Juan, Carlos Riofrio Martinez-Villalba, "Derecho, realidad y ficción. Posibilidades y límites," *Revista Telemática de Filosofía del Derecho*, no. 17 (2014), 118.

6 Leonardo Polo, *Politica, derecho, socieded, cultura y arte*, eds. G. Castillo, M.I. Zorroza, II.3 (unpublished).

7 Polo, *Politica, derecho*, II.3.

He accepted the importance of the legacy of Roman legal thought, but it seems that he was much more inspired by Greek philosophy related to the role of law in shaping the state and politics, and the idea of the origin of law. But this does not mean that he was focused only on public law. In fact, he questioned the very idea of a clear distinction between public and private property, suggesting that a more proper understanding of this distinction may be crucial for challenges faced by modern societies.[8] He considered the distinction between public and private much less clear than the division between individual and state.[9] For example he would refer quite readily to private law matters, whether concerning the relation between the human person and the law, as in the case of possession and property, or with regards to the correlation between law, economics and politics when analysing especially commercial law and the role of companies.

A peculiar sign from the time of his PhD research of Polo's interest in the legal philosophy and legal history of the 19th century is his review, published in 1951, of the Spanish edition of the book authored by Roscoe Pound, *Las grandes tendencias del pensamiento jurídico* (Barcelona 1950).[10] Reading his short review paper, one can easily detect how much he was at that time already interested in the philosophical aspect of the legal order.[11] It is not by chance that Polo in a two-pages long review quotes *in extenso* only two fragments of the reviewed book. He did so when pointing out the failure of Anglo-Saxon legal scholarship, that it perceived the law as a tool of social engineering, an approach which reduces the central idea of the continental legal tradition—the affirmation of the individual whose action is imputable as being included in the limits of his act of will—to the idea of a legal order which consists, basically, in reconciling, harmonizing or finding a compromise between interests that collide or overlap.[12] This interplay between act of will, interests and rights influenced Polo's later reflection on the topic of law and its function.

3. *Person and Law*

What Polo's anthropology offers us is the concept of a human person as *being-always-more—being-ever-more*. Bearing in mind different levels of reflection over the human person used by other philosophers—I-person-man—we can refer to the person as an act of being. For Polo, this triune distinction is neither hierarchical nor synonymous. According to Polo, we should instead refer more directly to levels of person-human essence-body. In Polo's perspective, the concept of person and I (*yo*) evolved. He decided to express I and person in the '90s differently when reshaping his analysis prepared in Rome in 1972. He referred to I as to the sphere of human essence—ápice *de la esencia* (apex of the essence)—man's most profound psychological dimension.[13] In contrast, he considered person the deepest, transcendent dimension of the human being. Polo argues that the act of being a person does not vanish in the act of being of the Cosmos. Hegel proposed that the I is no longer a person: it is the act of being of the Cosmos which reappears in all the things of the world: the well-known world spirit. Absolutely contrary to Hegel, Polo recognizes that the cosmic act of being does not preclude other acts of beings—the acts of being of a person. However, regarding the cosmic act of being, it is composed of a variety of substances, but there is one act of being (metaphysical act) and one essence.

Polo does always differentiate between person and man, so the difference in compass needs to be considered. Polo says that the person cannot be approached in general terms, while the man can. Person is always an act of being that is unrepeatable, while a man (*hombre*) refers to human nature—body and soul: intellect and will. And this brings us to the center of Polo's anthropology—the human person's act of being. "Man is not

8 Leonardo Polo, *Las organizaciones primarias y las empresas* (Pamplona, 2007), 170.

9 "Una sociedad poco juridificada inhibe la actividad humana. Entrevista a Leonardo Polo," with O.V. Zegarra, *Ius et Veritas*, no. 1–2 (1991), 24.

10 Leonardo Polo, "POUND, ROSCOE: Las grandes tendencias del pensamiento jurídico (Book Review)," 18 *Arbor* 63 (1951), 465–466.

11 Juan, Antonio García González, Rafael Reyna Fortes, "Presentación," in *Escritos menores (1951–1990). Obras Completas de Leonardo Polo*, Leonardo Polo (Pamplona, 2017), 12.

12 Polo, *POUND, ROSCOE*, 466.

13 Leonardo Polo, "La persona humana como ser cognoscente," *Studia Poliana*, no. 8 (2006), 53.

restricted to being, but rather to co-being. Co-being designates person, that is, being as intimate and outward openness: therefore co-being refers to being-with".[14]

Aristotle's greatest contribution to metaphysics lies in the plurality of the ways to speak of the *ens*—being. Thomas Aquinas masters the concept of *esse*—the act of being—as different from essence (*essentia*). Leonardo Polo—following Aristotle and Thomas Aquinas—offers an idea that there are distinct acts of being (*esse*): persistence (cosmos), co-existence (human person), and Original Identity (God). Human act of being (*esse*) is different from the act of being (*esse*) of the physical universe, ie. cosmos (extramental reality), and also human essence (*essentia*) is different from the essence (*essentia*) of the physical universe (extramental reality). In such case the study of human essence and human act of being would be categorically different from the study of essence and act of being of extramental reality. According to him they are creatures in a different manner: the human creature is personal but the cosmic creature is not. Leonardo Polo challenges the idea that the study of man is a secondary philosophy, the study of a particular given being as a part of reality—*ens* (the concept of being in general). According to Polo the concept of being in general which is the object of classical metaphysics takes its character from extramental reality—"extramental being is first discovered as the grounding, or foundation, of the physical universe". Thus, conclusions of metaphysics (study of the cosmos) cannot be extrapolated in a strict sense to anthropology (study of man), nor can the results of anthropology be strictly applied to metaphysics. Therefore, anthropology must undertake its study in a different way than metaphysics: it must have a different method, and different transcendentals.[15] Consequently, therefore one can argue that Polo's claim on different methodological stance of anthropology confirms that the study of laws of the physical universe, would be categorically different from the study of human laws. And indeed, such conclusion is obvious and understandable.

Polo argues that referring to the human person through the concept of one (*unum*) which merges everything in *ens* (taken from extramental reality), as an object of metaphysics, is the mental limit that is contrary to our initial and basic experience with regards to the act of being—that everyone is distinct—that there is a plurality of beings and acts of beings. Therefore he offers a parallel set of transcendentals of the human person: personal co-existence, personal freedom, personal intellection, and personal love. Co-existence, freedom, intellection, and love are transcendentals that are convertible with the human act of being, because this act is personal, but not with the act of being of the cosmos, which is not personal.[16] Personal co-existence challenges the concept of one, pointing out that human person never can be one, i.e. alone, otherwise it would be a tragedy. In fact human person means—each one—that everyone is a *novum*. Personal freedom removes the idea of human person as a *res* which is driven by necessities, or at best a sponta-

Leonardo Polo—following Aristotle and Thomas Aquinas—offers an idea that there are distinct acts of being (*esse*): persistence (cosmos), co-existence (human person), and Original Identity (God).

14 Leonardo Polo, "Antropología trascendental," vol. 1, *La persona humana* (Pamplona, 1999), 32.

15 Salvador, Piá Tarazona, "The Transcendental Distinction Between Anthropology and Metaphysics", 2 *American Catholic Philosophical Quarterly* 77 (2003), 270.

16 Tarazona, *The Transcendental Distinction*, 269.

neous material movement. Contrary to it Polo argues that human act of being is centered around free acts. That is why, being free differs from the persistence of extramental reality. In Polo's concept then human co-existence is more similar to God's mode of existence—Original Identity. And thus, human is more dependent on God, than extramental reality is. That is why, if God is not personal and free human person will be an absurd—it will still be something—*aliquid*, but it will not be someone—*aliquis*. There will be no transcendental truth (*verum*) if there will be no transcendental intellect corresponding to reality, and thus intellection is the personal side of truth. Finally, not every act of being knows, but also not every act of being loves, so in order to claim that goodness (*bonum*) is transcendental we need a transcendental personal act of being that loves, ie. that is directed towards the good.[17] This is how Polo shapes his concept of human act of being as convertible to personal co-existence, freedom, intellection, and love.

into freedom and personal love, which are necessary in order to grasp our own act of being somehow as if additionally while in the exercise of our freedom and love. "To give is transcendentally free insofar as it refers to acceptance, and to accept is transcendentally free insofar as it refers to giving".[18]

How in the context of Polo's anthropology may we place his reflection on law? In a very similar way, Polo considers the law to allow transcendence—namely, the transcendence of the human person's natural capacity. In explaining the essence of this process, Polo uses the example of the owner. The entitlement that the owner possesses allows him "to protect him/her against aggressions and then, to make it possible for a man to carry out actions" that are not possible by his/her own nature. This image of the owner is unchanged across the works of Polo. It returns when describing the civil law model which does not match the image of the entrepreneur. The owner is understood by Polo as one who shall *guardar el territorio*, *custodiar la propiedad y recibir los frutos*—guard his territory, protect his property and receive fruits. In terms of *titularidad* and *capacidad,* the owner is able to protect his property and his territory, not by physical force but merely by expression of his entitlement—by putting up a sign "No trespassing". By doing this, he utilizes a force which does not belong to him personally. In fact, his entitlement will be observed only if this use is effective: that the trespasser will decide to go away or will be sent away by the court. In that sense we can say that the (act of being of) law (entitlement–capacity) has the character of something furthermore/additional *being-always-more—being-ever-more* (*además*): it empowers the human person with fictitious capacity and is established in relation to others. That is why we may better understand Roman jurists saying: *senten-*

Law transcends the typical powers of human person, providing with a fictitious capacity.

In Polo's reflection on anthropology he claims that the human act of being is necessarily oriented towards others—we can discover our own being only thanks to others, and through that arrive closer to the Original Identity. If, by contrast to this route, we attempt to discover our own act of being by thinking about it, we will try to make it an object of thought, and this very attempt misplaces the true character of the act of being. This, according to Polo, is the mental limit we have to abandon. Therefore, we can grasp our own act of being only as we enter into relation with the other person. "Man cannot give his own act of being, as this is not at his disposal", but "he does have the potential to give his works". Here we encounter the ideas of giving and gratuity, as a way to face our own act of being. In Polo's anthropology, this is convertible

17 Tarazona, *The Transcendental Distinction*, 279–283.

18 Polo, *Antropología*, 220.

tia ius facit inter partes. In fact, decisions of the court become the expression of our entitlements and capacities—*ius*. We may conclude that Polo's idea that the law encounters the human person at the moment of giving him or her entitlement (*titular*) can be understood to mean that at that moment the person becomes enabled to accept entitlement, to give it to others and to exercise new capacities towards others. The act of being of a particular *titular* can be grasped only when it is capacitated, i.e. enforced.

in the legal scholarship on the degree of free will of human person, the understanding of cognitive actions, ie. knowledge and finally of personal love, ie. moral acts of human person.

4. Titularidad *and* Capacidad

There are several issues raised by Polo in his celebrated interview which deserve to be analysed more deeply.[20] First of all, Polo referred to the concept of the historical development of law—"no hay duda que el

Law is a special normativity based on two notions: that of *titularidad*—entitlement, and that of *capacidad*—capacity.

It is very true that any legal order takes into account the fact of coexistence of human person with others, the freedom of human person, its acts of knowledge and love, across different institutions both of private and criminal law. Nevertheless, Polo admits that law transcends the typical powers of human person, providing with a fictitious capacity. It is hard to deny, then, that Polo accepts that human person is driven by certain extramental necessities, like natural limits of our body and physical power. The natural—physical power of man is replaced or reinforced by artificial—intellectual power of legal system. It is confirmed by Polo's idea that *homo sapiens* escaped from the process of mere adaption to environment, typical for other animals, and it started to adapt environment to the need of man—thus he differentiated between hominization (as a somatic process of becoming *homo sapiens*) and humanization which leads to psychological and cultural aspect of man.[19] The intersection of body and soul fuels the longstanding discussions

Derecho experimenta variaciones históricas pero quizá su función sea la misma a lo largo de la Historia" (There is no doubt that the law undergoes historical variations, but perhaps its function has been the same throughout history). In explaining this phenomenon Polo accepts the variety and multitude of legal orders, but asserts that all legal orders nevertheless have something in common, namely the function of law. He refers to two key concepts which express this function: *titularidad* (entitlement) and *capacidad* (capacity/faculty)—"El Derecho es una especial normatividad que descansa sobre dos nociones: La titularidad, y la de capacitación o potestad" (Law is a special normativity based on two notions: that of *titularidad*—entitlement—, and that of *capacidad*—capacity/faculty—or power). Polo's analysis should be read in the context of his philosophy, a fact that was wisely observed by D.H. Castañeda y G., and notions which Polo uses should not be given the meanings commonly used within legal doctrine.

In fact, the notions both of *titularidad* and of *capacidad* will seem very familiar to anyone interested in legal doctrine. However, we do know that even in

19 Leonardo Polo, "On the Origin of Man: Hominization and Humanization", transl. R. Esclanda, A.I. Vargas, *Journal of Polian Studies*, no. 3 (2016), 9–23.

20 *Una sociedad poco juridificada*, 22–24.

Roman law we cannot relate them directly to *titulus* and *capacitas*. In Roman law both terms have their own very precise meanings: the former is the cause of acquiring ownership title, and the latter is the capacity to acquire estate through testamentary succession. In the very same way we should be careful to assign technical legal meanings to Polo's two fundaments of legal order.

One should bear in mind that the understanding of legal order is, in Polo's philosophy, closely related to the concept of the human person, and especially to his transcendental anthropology. That is why his considerations of law are somewhat brief and rather additional to the main theme of analyzing the distinction between act of being and essence across all fields of human experience. In modern legal science *titularidad—entitlement* may be associated with the concept of rights and interests, and with the theory of subjective rights; and *capacidad—potestad* with legal capacity. Again it would be an anachronism to apply such meanings to Polo's notions, although one would have no problem in describing the history of law as a process of assigning rights and distributing legal capacity influenced by social and economical changes. Even though it is difficult to develop a deeper understanding of Polo's legal reflection due the lack of more extensive elaboration of his own, we will stick to the published works as well as some unpublished manuscripts of his lectures which will help us understand better how he approached legal issues.

Polo considers the distribution of entitlements (*titularidades*) among people and the provision of capacity (*capacidad*) as the main functions of any legal order. Regardless of the historical development of law, and regardless of differences between modern legal orders, there is one thing which all legal orders have in common: the function of law which always boils down, according to Polo, to these two spheres: *titularidad* and *capacidad*. Legal orders may differ in the degree to which they fulfil this function and that is why the development of law occurs across time and space. According to Polo: "No hay derecho sin titular y no hay derecho si éste no faculta. En la medida que el Derecho se refiere al titular tiene un entronque en la persona humana" (There is no right without a holder and there is no right if it does not provide with capacity. To the extent that the right refers to the holder, it has a connection with the human person). Law depends on entitlement and capacity, and the relation between law and human person is established in the moment of distributing entitlement. By distributing entitlements and providing people with capacity (not in terms of what legal scholarship calls legal capacity), law enables the human person to transcend its biological limits. That is why law belongs to the sphere of culture. It provides the human person with new capacities which are not available to animals. As Polo puts it, law empowers the human person in that it gives power greater than any individual can have.

The example and ideal to which Polo constantly refers is the title of ownership and its protection. There is no need for the owner to protect his property by force or by erecting physical limits like fences. It is enough that he puts a sign "No trespassing" to effectively protect his own land. By this sign the owner becomes protected by much greater power than he can wield on his own, namely by the power of law which is enforced by the authority of the state. Polo considers the ownership title a pattern, the most fundamental element of *titularidad*. For him, law means a great elevation of the human person above the condition of an animal, which is able to mark its territory but not govern it as an owner. Legal order, by eliminating governance by violence (the law of the club), enables human beings to create a civilization. On the one hand, law gives titles (entitlements) which help to organize and coordinate the relations between people. On the other hand, title holders receive a capacity—an empowerment—to protect their titles by the power of the state. It is legal sanction that makes an entitled person more powerful than a trespasser. From this point of view, a society which is governed by law and in which persons are aware of their rights enables man to flourish and develop.

The interplay between title and empowerment (*capacitación—potestad*) which drives the legal order is for Polo unnatural. It gives to man something which he does not possess in the realm of nature, something which is not material, and that is why it enriches the human being. According to Polo, law exceeds the natural capacity of the person and in fact "it pretends (in the most noble sense of the word) the legal capacity",

meaning that legal capacity is a fictious (unnatural) faculty—a concept which *extends* the natural capacity of the person. As Polo puts it, this task can be completed in different ways, and that is why across history there have been various legal orders which differed in the degree to which they assigned titles and capacity. Some of them are now judged as unjust. Nevertheless, even ancient slavery or medieval feudal dependency was based on this same idea of an interplay between title and capacity.

Jurisdiction, and especially territorial jurisdiction, is another aspect which influences the legal order, for it is jurisdiction that petrifies the distribution of title and capacity. Polo shows that extending jurisdiction over the territory led to the abandonment of feudal dependency. Moreover, it opened up the market which consequently extended the capacity of people and the range of their entitlements. Here we can observe how rich Polo's reflection is, combining legal, philosophical and economical developments. According to Polo, through law we are plugged into the bigger system, we become better than before, and we are embedded in the culture. Polo accepts that there are different legal orders in the world, and that law changes over time; however, every legal order can be judged and analysed through a prism which is universal and constant—the function of law—title and capacity which perfects the human person by giving it new possibilities (*capacitación*).

Looking at this short description of Polo's reflection on law, it is readily observed that here he focusses on matters of private law. One might remark that he is referring to the discussion on the theory of subjective right which evolved in the legal philosophy of modern times. In fact in the 19th century the model example or ideal pattern of subjective right was considered to be the ownership title. Very similarly, ownership title (*propriedad*) plays a key role in describing the meaning of *titularidad* and the normative system which is constituted of legal entitlements (*titularidades*). Does it mean that Polo rejected the idea of the human rights which are vested in every man from the very fact of being a person, and instead referred only to man-made law? Does it mean that Polo did not take into account the 19th century criticism of the theory of subjective right based on the pattern of ownership title that led to invoking the so-called social function of law, and replacing subjective rights with interests? Absolutely not. Polo was fully aware of the idea of the theory of coordinated interests rather than absolute rights that we have seen in the above-cited fragment of his review article of Roscoe Pound book. What is more, he was aware that in modern times the central role of ownership title has been diminished by the concept of the so-called social function of property, which involves the ownership title losing its hegemony.[21]

Polo explains the division into objective right (*derecho objectivo*) and subjective right (*derecho subjectivo*) as the difference between the system of norms and the system of legal entitlements. One cannot understand the norm unless one conceives it as a system of *titularidades*. Such legal entitlement enables the individual to perform actions that exceed the natural capacity of the subject. That is why the validity of the norm is oriented towards the effectiveness of realizing possibilities (*capacitades*) provided by *titularidad*. That is why putting up a sign saying "No trespassing" effectively protects the object of ownership. A mere item of information enables the potential trespasser to decode the abstract sanction. Therefore, efficacy can be achieved simply from the level of concepts influencing the actions of the person.

Even legal proceedings themselves can be seen as a continuation of an interplay of concepts of this sort, as indeed was argued by D.H. Castañeda y G. Sometimes such normative sanction may be effectuated by the authority of the state, but only as a last resort. Here we touch on the idea of the effectiveness of legal norms. It is absolutely intriguing that in Roman law there were established numerous *leges imperfectae*—statutes without normative sanctions—which may be compared to the modern phenomenon of 'soft law'. Nevertheless, these statutes were adhered to by citizens. From Polo's point of view, we can argue that Roman society was a right-based society, driven by law, in which the citizens were well aware of their rights. There were many other means of social constraint which encouraged following rules like *leges imperfectae*, such as that of social esteem (dignity) and the system of moral behavior (often controlled by censors), showing that, even without legal sanction

21 Polo, *Politica, derecho*, II.4.

and the possibility of having recourse to more extensive powers, society can develop institutions that are closely bound to man and can influence his behavior towards fulfilling legal norms.

Polo did acknowledge that human rights—rights of the individual—are inalienable and their violation should be sanctioned, although he was also aware that certain individual freedoms were invoked as natural rights principally because they were politically attractive for liberals and social democrats.[22] Moreover, his concept of the human person and his transcendental anthropology has already been used to justify and clarify the concept of human rights.[23] His analysis of *titularidades* and *capacitad*, and his concept of law as a useful fiction of man's higher powers did not reduce legal order to positive law, created by men only, whether legislators, courts or legal scholarship. Thus, he did not eliminate the concept of rights (entitlements) vested in man from the very fact of being human.

Commercial regulation borrows the model of the civil law owner and this does not fit the reality of the entrepreneur.

5. Polycentric Sources of Law: Customary Law, Statutory Law and the Role of Legislator

For Polo, both customary law (*Derecho consuetudinario*) and statutory law (*Derecho codificado*) belong to the same mode of existence of legal norm—both are the examples of *Derecho positivo*. From the point of view of the origins of norms, there is no difference between them—both have the same author for both kinds of law are man-made. Usually statutory law comes later and serves to codify what practice has already developed. Obviously, for Polo customary law does not belong to the written law but still plays the same role as written law. He highlights the fact that the status of law is that it is in force and recognized. What Polo urges us to reflect upon is that sometimes the state may not be able to provide such legal order—due to its own weakness or that of the judicial branch, or to the lack of regulation. In such cases, there are other social institutions which can produce law which is both effective and recognized. That is why there are differences between customary law and statutory law in terms of the origin of law: the former comes from custom and is unwritten, the latter is written and is binding due to the authority of the body by which it is formally promulgated.

According to Polo, the state is not the sole author of law. That is why he rejected the Kelsenian hierarchy of legal sources. What is quite interesting is that Polo refers to the role of entreprenuer and commercial law as an argument in favor of his idea of polycentric sources of law. He argues that merchants out of the need to distribute risk and security created practical solutions which later were codified as commercial law. Moreover, he shows that modern regulation of commercial law is one of the examples of the weakness of the state and of statutory law. According to Polo, at the center of commercial law stands the entrepreneur and not the model man, the *bonus pater familias* which is characteristic for civil law and stems from the tradition of Roman law. Polo states that modern commercial law is the prolongation of civil law mixed with labor law and regulatory rules created by the state. In his opinion this mode of regulation does not occupy the field of the social phenomenon of commerce and entrepreneurship and that is why there is all the time the place for commercial practice to flourish and to

22 Leonardo Polo, *Politica, derecho…* III.C.4.1.

23 Blanca Castilla de Cortazar, "Antropología trascendental y fundamentación de la dignidad humana," *Miscelánea Poliana* 49, 2015, 2–17.

create its own rules. According to Polo, the model of the owner who "must guard the territory, protect the property and receive the fruits" is mistaken as regards commercial law and should be replaced by the figure of the entrepreneur.

Interestingly, he is not in this respect considering natural law but rather gaps in the legal system which are filled in by the actual practice of people themselves. He offers an example of a commercial law which, according to him, is not entirely filled in by the legislator, a fact which placed it somewhere between civil law and labor law: commercial regulation, Polo asserts, borrows the model of the civil law owner and this does not fit the reality of the entrepreneur. In his lectures, still unpublished, Polo suggests that the model of ownership title lost its hegemony due to the idea of the "social function of property" which is visible in the changing social structure and especially in "the figure of the entrepreneur (*empresario*)". That is why, Polo claims, it is natural that there are many sources of legal norms and they are not limited to state authority only.

Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine. In ea quidem ex non scripto ius venit quod usus comprobavit. Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare, cum legis vigorem habeat quidquid de consilio et consensu magnatum et rei publicæ communi sponsione, auctoritate regis sive principis præcedente, iuste fuerit definitum et approbatum. Sunt etiam in Anglia consuetudines plures et diversæ secundum diversitatem locorum. Habent enim Anglici plura ex consuetudine quæ non habent ex lege, sicut in diversis comitatibus, civitatibus, burgis et villis, ubi semper inquirendum erit quæ sit illius loci consuetudo et qualiter utantur consuetudine qui consuetudines allegant.

If law is excessively formalized, then legal minds are not formed. Where there is no more interpretation, the application of the law is annulled.

Polo's recognition that the legislator is not the only source of legal norms is quite in line with the long European legal tradition. We can at this point usefully refer to one of the fathers of English common law, Henry de Bracton, who begins his monumental work *De Legibus et Consuetudinibus Angliae* ("On the Laws and Customs of England") with a comparison of England and other countries (this part is assumed to be contrasted specifically to the countries of continental Europe).

Bracton: *De legibus et consuetudinibus Angliae libri quinque.*
Quæ sunt regi necessaria, 9–19:

This points to the difference in the *method* of lawmaking: on the one hand, the law can come from statutes (statutory law) and from *jus scriptum;* on the other hand, the law can be unwritten and can come from custom (what usage has approved). Thus, two ways of lawmaking are indicated: promulgating law and recognition of usage. Interestingly, the term *lex* is applied not only to laws that are written down, but also to norms that are valid because they have been agreed upon by the relevant state authorities. Thus, it is possible to speak of unwritten statutory law, which is something different from mere custom. For Bracton custom means a custom which is essentially *local*, which is different for particular counties, towns, villages etc.; it is specific in every place and always needs to be learnt and its use ascertained. There is therefore a difference between what results from custom and what results from law. We take this as an indication that legal norms do not have to come from written legal

acts but can also come from social practice. Moreover, the law is not only limited to statutes but also includes *jus scriptum*, which should be understood as written legal knowledge, legal doctrine and scholarship (which at that time flourished in continental Europe following the rediscovery of Justinian's Digest).

6. Legal Interpretation—Law as an Art, not a Science

Polo places himself among those who consider law an art, not a science. The element of practice is for him a fundamental factor of law. He does not consider law to be among the subjects which are essentially constituted by generalized conceptions and claims that formalization of law leads to abrogation of its interpretation and thus of the application which is its core mode of operation. Polo acknowledges that law has "a certain scientific character, but it is not fundamentally a science". He claims that the scientific aspect of law was highlighted in 19th century legal scholarship, especially in German legal doctrine. In this context we can note in particular the Pandectistic legal doctrine, which highly conceptualized legal thought. According to Polo such formalization "may help but it is not the center" of law. He states that if law is "excessively formalized, then legal minds are not formed." Why did he take such an approach to law?

Legal scholarship had to meet the challenge of defining itself and locating itself against the other sciences. This challenge was taken up primarily in the 19th century at the time there arose the dispute between naturalism and anti-naturalism—naturalism at both ontological and methodological levels. However, when we return to Roman legal thought, it is possible to encounter the very same attitude to law as an art (*ius est ars boni et aequi*). In Roman times, however, art was considered one of the forms of science, a science that is constantly applied—*ars*, not *scientia* or *techne*.

Arthur Kaufmann (a representative of legal hermeneutics) stated bluntly: "the world of law comes directly from language", and it exists „only because man exists".[24] How would the Roman jurist Ulpian have reacted to this? Legal hermeneutics is a further step towards an analytical interpretation of the law, since it already uses methods of science that deal with text and language in general, i.e. with the sciences dealing with literature and language itself but also with Bible texts. The question arises as to whether the law can be reduced to language—this is the danger that exists in closing the law off to nothing but a legal text. This is something that in Polo's legal thought would amount to limiting the authors of law to none but the legislator. According to Ulpian, in order to know what the law is, in order to actually deal with the law, one has to know where the word 'law' comes from. Such a sensitivity to language, to what certain concepts mean, is indeed characteristic of Ulpian—*unde nomen iuris descendat* (D. 1,1,1pr. Ulpianus, *Institutes*, book 1). Nevertheless, it would be difficult to say that Ulpian simply reduced the law to language only. The word law—*ius*, according to Celsus and Ulpian, comes from justice—*iustitia*, which is an analysis that goes somewhat beyond just juggling with legal concepts, i.e. merely focusing on the text or legal language, because it refers to *justice*, which in the Digest is considered to be a "permanent will to give what is due to another". A permanent will, a permanent capacity, and therefore a certain virtue, which is visible in this axiological context and which appears naturally in Roman jurisprudence.

When we look at the experience of ancient Roman lawyers, at the experience of *ius commune*—to what happened in law before the scientific or methodological revolution of the 19th century—and when we also look at the experience of American law, which developed a somewhat beyond the overwhelming statutory law and beyond the codification process that was developed in the 18th and 19th century on the European continent, then we observe that the common element of all those who study law—the common activity of any legal order—is interpretation. Thus, the starting point of any theory of law will have to take account of the question of interpretation, and above of all the literal interpretation of norms, written or unwritten, and of certain concepts which are not necessarily legislated but which have been built up by legal doctrine.

Polo also has his own views on this topic of legal interpretation. For him, the interpretation of law cannot be limited to literal interpretation. Such limita-

24 Arthur Kaufmann, "The Ontological Structure of Law," *Natural Law Forum*, 95 (1963), 90.

tion would negatively influence the application of law. Polo highlights the difference between taking into account the intention of the law and that of the legislator. Although both are important, Polo states that it is the intention of the law that should take precedence. That is why he accepts a wide use of analogy and stresses the important role of courts in avoiding legal gaps. The process of understanding—decoding—which happens between the norm and the situation to which it has to be applied convinces Polo to reject the limitation of legal analysis to literal interpretation only. This would leave no room for dialogue, for understanding the norm, and, as Polo explains, where "there is no more interpretation, the application of the law is annulled".

Conclusion

What makes Polo's reflection attractive for legal scholarship is his freedom in thinking about law outside the mental limits of legal doctrine. What I have found particularly interesting is the interplay between the concept of person and the ideas of *titularidad* and *capacidad*. From the standpoint of legal philosophy, most fruitful are Polo's reflections about legal ontology and epistemology: what is the function of law, how does it work, and how we get to know it. In addition, the topic of the mode of existence of law and the idea of just law and natural law deserve more thorough examination. Reading Polo's ideas with a background in Roman law, one can discover many similarities between the two, even though Polo usually maintained that his direct inspiration came from Greek philosophy and the Greeks' understanding of law. Roman legal concepts—of private property, of the owner (*bonus pater familias*)—were, however, invoked in order to describe the current mode of operation of civil law. What is noticeable is that Polo exemplifies the idea of *titularidad* and *capacidad* with exactly the same example of owner and ownership title as the pattern for the meaning of entitlement. Quite surprisingly, Polo acknowledges that the concept of ownership title and property is in crisis nowadays, and in fact is challenged by the rise of commercial law and the role of entrepreneur, which for Polo is part of the idea of the social function of law which Polo may have inherited from the ideas of R. Pound. Needless to say, Polo's reflections on law confirm many intuitions based on Roman law, specifically: 1) treating law as an art which is in constant application and is based on interpretation, which in Roman law was not limited to literal interpretation; 2) thinking outside the box in terms of the author of law: it is not limited to the legislator, and Roman law fuels us with the experience of a plurality of legal sources ranging from customs (*mos maiorum*), through flexible exercise and adjudication of rights which may even challenge *ius civile* by *ius honorarium*, to Roman jurists (*iurisprudentia*) who by interpretation filled the gaps or even interpret with the intention of law (*ratio legis*) and not of the legislator. Finally, Polo enriches legal philosophy with the concept of the person whose act of being means co–being, co–existence, and implies the need to recognize myself through my encounter with others. This concept may well give rise to anthropological reflection on individual rights, which are usually conceived as the autonomous sphere of the person who can act within his/her own act of will, and in this way can be self-determined by the exercise of his rights. The idea of the person as *being-always-more—being-ever-more* opens us to the idea of the correlation of our entitlements and capacity with those of others—which implies that we may understand our entitlements and capacity only when we encounter others, be it in dialogue or at the court—recognizing the constraints that are upon us.

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Constitutional Utopianism: a Case Study of the Constitution of the Islamic Republic of Iran

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This paper will examine constitutional utopianism in the specific case of the Constitution of the Islamic Republic of Iran. Given that utopianism in constitution-making is inevitable, some constitutionalists place an emphasis on pragmatic utopianism as the acceptable approach towards constitutional utopia. Also, it is stated that the consistency of constitutional values and principles, mostly derived from constitutionalism, is a necessary element for a possible constitutional utopia. Based on this theoretical framework, the Constitution of the Islamic Republic of Iran is examined as a case study. It is demonstrated that, instead of one constitutional utopia, we can find three inconsistent utopias intertwined in a single constitutional text: a constitutional utopia based on Western Constitutionalism, an Islamic utopia and a leftist utopia. Through examples taken from the preamble and articles of the Constitution, the inconsistency of these utopian worlds is demonstrated. Finally it is concluded that Iranian Constitution of 1979, and its amendments in 1989, may be categorized as failed constitutional utopianism.

Key words: Utopianism, Constitutionalism, Consistency, Values and principles, Constitutional utopia

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1. Introduction

Human beings have sought a better life since ancient times. Despite all differences, Plato's *Republic*, St Augustine's *The City of God*, More's *Utopia* and Al-Farabi's *Al-Madina al-Fadila* (The Virtuous City) and the like, are the best examples of this innate and perennial tendency. This desire towards a better society has inspired many thinkers, philosophers, poets, artists and scientists to appeal to the imagination for creating their preferred and perfect world in their minds. Dissatisfaction with present conditions of life and hope for making life better in the future have led to various kinds of utopianism insofar as changing human nature and the entire world were demanded, at times, by some utopians. For example Hafez Shirazi, a major 14th century Persian poet, in one of his well-known poems wished for such a world:

My heart is full of pain, alas, a remedy!
My heart is dying of loneliness; for God's sake send me a companion!
Whose eyes get rest of this fast-moving world?
O, cup-bearer, give me a glass of wine, so that I may rest a moment!
I said to a wise one, look at these conditions! He laughed and said
A difficult day, a strange affair, a perplexing world!

In the world of dust, no human being comes to hand
It is necessary to build another world and to make Adam anew

This is an example of a desire to change humanity and the world at the macro level, regardless of human limitations. But for the purpose of this paper, we are not considering this type of utopianism which is prevalent in certain genres of literature or art. To put it in another way, those types of utopianism which do not go beyond mere speculation about and the depiction of a better life and society, regardless of natural human limitations, are factored out in constitutional theories. Solum describes those ideal constitutional theories that 'rely on false assumptions about human nature or institutional capacities in order to argue for constitutional arrangement that exist only in nomologically inaccessible worlds' as bad utopianism.[1] Therefore, we are talking here about utopia as a good place.

This type of utopianism is 'human centered, not relying on chance or on intervention of external, divine forces in order to impose order on society'.[2] So, the heaven or paradise which is promised by the most religions to their believers and followers is not addressed here either.

Among these different versions of utopias, we are considering possible alternatives for the present life which might be created by human reason and not just an abstract, fictional, dreamlike and impossible world which is not even partially achievable. As Loughlin mentioned, the role of the utopia 'is to highlight contingency of the existing order by offering a vision of what might be. But a utopia is not a mere dream'.[3] In this sense, although the main function of utopia is to provide criteria for evaluating and criticizing the status quo, but this is not the only function. This understanding of utopia guides people to reorganize and recreate the order of their life and society. In this regard, one can think about utopianism as a program for social change and political reform. Vieira called this kind of utopia a 'pragmatic utopia'[4], while Sargent called it a 'concrete utopia'.[5] Sargent explained his idea as follows:

> *Bloch says that 'we never tire of wanting things to improve' and that 'the pull towards what is lacking never ends', but such wanting lacks direction, it must become a drive or a need. It must move from what Bloch calls 'abstract utopia' to 'concert utopia' between utopias disconnected from and connected with human reality.*

In sum, according to what is said, utopianism in a broad sense, is a label for those types of thoughts that intend to bring about a better society while utopia is an imaginary society based on specific types of ideals which not only can be used for criticizing real and present life but which also causes certain actions that encourage sudden, or gradual, changes towards a better life. According to this understanding of utopianism, ideal constitutional theory is inevitably utopian but it would not be careless of creating a possible better life for the citizens. Therefore, we are considering concrete or pragmatic utopianism as appropriate type of utopianism in constitutional thinking.

2. *Constitutional utopianism*

Constitutions are ubiquitous phenomena in our world and most countries around the world, with

1 Lawrence B Solum, "Constitutional Possibilities," *Illinois Public Law and Legal Theory. Research Paper*, no. 06–15, 2007, 20.

2 Fabio Vieira, "The Concept of Utopia," in *The Cambridge Companion to Utopian Literature*, ed. Gregory Claeys (Cambridge: Cambridge University Press, 2010), 7.

3 Martin Loughlin, "The Constitutional Imagination," *The Modern Law Review*, vol. 78, issue 1 (2015), 13.

4 Vieira, "The Concept of Utopia", 22.

5 Lyman Tower Sargent, *Utopianism: A Very Short Introduction* (New York: Oxford University Press, 2010), 97–98.

different political regimes, have either a written or unwritten constitution. As Parpworth puts it 'a constitution can be defined as being a body of rules which regulates the system of government within the state'.[6] In most constitutional law textbooks similar definitions are repeated in one way or another. But the story of the constitution is more complex than this. It might be said constitutional rules can be categorized into two broad norms: first, those norms that establish governmental organizations and bodies and, second, those that recognize fundamental rights and guarantee them. These two types of rules are based on certain values and principles that interact with each other in a particular way for the achievement of an ideal society. As Sartori puts it:

> *all over the Western area, people requested or cherished the constitution because this term meant to them a fundamental law, or fundamental set of principles and correlative institutional arrangement which would be restrict arbitrary power and ensure a limited government.*[7]

However, constitutional ideals are not only negative in that limiting and controlling power of the state, as Sartori puts it, but they are positive too. It means that the state has duty to advance the well-being of its members and to provide positive conditions for people that enable them to pursue their private ends. In fact, constitutional ideals whether positive or negative may be realized if these fundamental values and principles interact consistently.

So, what are these constitutional ideals? What are the characteristics of the imaginary constitutional society? A comparison of the constitutions of different countries shows that they are permeated by ideas, ideals and ideologies. Regarding ideals Frankenberg explains:

A comparison of the constitutions of different countries shows that they are permeated by ideas, ideals and ideologies.

> *ideals capture the programmatic, utopian or at any rate speculative vision believed to be enshrined in a constitutional document. They signify collective goals to be pursued like maximum individual freedom or high standard of equality, a government of laws and not men or a people's democracy...*[8]

As Viera expresses this, 'utopia belongs to the realm of the ideal'[9] and this idealistic aspect of constitutions might be called constitutional utopianism. Apparently, utopianism in this sense is inevitable in constitution laws because most of them, to some degree or other, promise a better society within which freedom, equality, prosperity, the rule of law, respect for human rights, accountability and the responsibility of holders of power are guaranteed. Herman in his article on Constitutional Utopianism, an exercise in law and literature, wrote that a constitution contains the preferred ideals of a given society along with a government organized in such a way as to reach to these chosen

6 Neil Parpworth, *Constitutional and Administrative Law* (Oxford: Oxford University Press, 2012), 3.

7 Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *The American Political Science Review*, vol.56, no. 4, (1962), 855.

8 Gunter Frankenberg, "Comparing Constitutions: Ideas, Ideals and Ideology—Toward a Layered Narrative," *International Journal of Constitutional Law*, vol.4, iss. 3, (2006), 440–441.

9 Vieira, "*The Concept of Utopia*," 19.

ideals.[10] He believes that 'this is what More was offering in Utopia too: the construction of a society—albeit an imaginary society—built on a choice of ideals.' It seems this is exactly what designers of constitutions do: They select ideals and provide the appropriate institutions for attaining these ideals. However, it does not mean that the founders and designers of constitutional laws necessarily chose reasonable, consistent and achievable ideals.

Distinguishing theoretical from obtainable ideals, Barber stresses those constitutional ideals that are actually achievable:

> *they are ideals that have been shaped by the limitations of human nature and society. It is at least possible that a state could successfully realize all of the [constitutional] principles, and that an ideal constitution could be created.*[11]

When Barber states that constitutional ideals are achievable this implies that they *should be* achievable. Hence, it is apparently possible to design a constitution full of impossible or even rival ideals. In other words, in one way or another, a given constitution may contain an abstract vision of utopia instead of a concrete or pragmatic utopia.

Therefore, it is better to ask: What are these consistent and possible constitutional ideals? What does consistency mean in constitutional context? It seems that constitutional ideals comprise constitutional values and principles and, together, they make up an imaginary society, namely a constitutional utopia. Then, for understanding a constitutional utopia we need at first to understand the nature and characteristics of the constitutional values and principles which were gradually formed during the age of Enlightenment under the rubric of constitutionalism.

Apparently, utopianism in this sense is inevitable in constitution laws because most of them, to some degree or other, promise a better society within which freedom, equality, prosperity, the rule of law, respect for human rights, accountability and the responsibility of holders of power are guaranteed.

3. Constitutional Utopia and Constitutionalism

As has been mentioned, constitutions are familiar phenomena in our world and every country has either a written or an unwritten constitution. However, one cannot claim that these countries are necessarily constitutional. As Sartori puts it, every state has constitution but only some states are constitutional.[12] This means that we should distinguish between constitutions as they are and constitutions as they ought to be. In order to understand this difference, one needs to be able to identify the fundamental values, principles and institutional structures which have been created during the process of constitutionalism. For better

10 Susan N. Herman, "Constitutional utopianism," *Utopia500* (December 2016), 93–94.

11 Nick W. Barber, *The Principle of Constitutionalism* (Oxford: Oxford University Press, 2018), 231.

12 Sartori, "Constitutionalism", 856.

understanding of these values and principles some points are noteworthy:

First, like utopianism, constitutionalism in the modern sense is also an offspring of the Enlightenment that was introduced into Western Europe. Consequently, the main features of the Enlightenment movement of the 18th century which was secular, scientific and rational, were also reflected in constitutional values and principles. As Adler has pointed out:

> *Enlightenment or 'modernist' thinking places the individual at the center of the political process and regards reason as the key to human happiness. One task of the Enlightenment was to justify state power by reason. As an impersonal and neutral form of organization, the state, in its ideal form, treat all person equally and release the individual from dependence upon customary, religious and traditional ties.*[13]

> *ideal, yet women did not obtain the right to vote till 1920 in United States and till 1944 in France.*[14]

Even today in the twenty-first century, some constitutional ideals still remain unachievable in democratic countries, let alone in those that are not democratic. Dahl rightly mentioned that, though the expansion of democratic ideas since the eighteenth century, 'the gap between the goal of political equality and its actual achievement is huge[15]' even in democratic countries.

Second, although the constitutional movement developed in Western Europe and North America, it was not limited to those regions and, now, most countries in the world have different kinds of constitutions through which these universal values and principles are recognized in addition to their national values, identity and history. In fact, constitutions are not purely a national or domestic matter and they no

It is very important to know that there would be consistent interactions between the values and principles enshrined in constitutionalism.

These, then, are a set of ideals which gradually developed during the age of the Enlightenment and, obviously, at the beginning they appeared utopian and the realization of these ideals took a long time. Even now they remain impossible to achieve in some parts of the world. Therefore, when we think about the constitutional utopia, we should consider its relativity. As Rosenfeld noted, although some of these ideals were mentioned in United States and French constitutions, for long time they were not realized:

> *to take but one example, equality between men and women is clearly prescribed by the Enlightenment*

longer simply represent national identities and distinct events of their own nations. As expressed by Backer constitutions do not merely represent the individual will of a political society but, under the influence of natural constitutionalism, there are universal values and principles that are common features of the constitutions around the world. Similarly, Venter noted that:

> *the history of modern constitutionalism has reached a global fullness of development, from which emanates a distinct set of commonalities, principles, standards*

13 Jonathan M Adler, *General Principles of Constitutional and Administrative Law* (Hampshire: Palgrave Macmillan, Hampshire, 2002), 17.

14 Michel Rosenfeld, "Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religion Revival?" *Cardozo Law Review*, (2009), 23334.

15 Robert A Dahl, *On the Political Equality* (Yale University, 2006), 1.

and values that have gained currency in constitutional dialogue all over the world.[16]

Some writers refer to the global convergence of constitutions in terms of these values and principles[17]. Backer mentioned that constitutional values provide the criteria for judging constitutions as legitimate or illegitimate and serve as the foundation of constitutionalism.[18]

Third, it is very important to know that there would be consistent interactions between the values and principles enshrined in constitutionalism. It seems that, within the context of constitutionalism, the ultimate purpose of government is the well-being of people and those values and principles are intended to advance this ultimate purpose. As will be discussed below, there would be consistency between constitutional values and principles and also among the constitutional principles. In fact, consistent interactions of values and principles among other things can guarantee the desired outcomes of constitutional laws. As Barber states: '[t]he interconnectedness of the principles entails that no single principle can be fully realized without the demand of the others also having been satisfied: the principles come as a package'.[19] This implies that not every constitutional order will be conducive to the desirable outcomes of constitutionalism such as democracy, observing human rights, social and economic rights, labor rights, religious liberty, secularism, combatting corruption and the like. Therefore, consistency matters.

3.1. Values of Constitutionalism

It was mentioned that Constitutionalism as one of the main important products of the Enlightenment and, in turn, is based on those philosophical doctrines (*jus naturale*, contractarianism and liberalism) that mostly had deep roots in this age. Also the Enlightenment was a human-centered movement and modern constitutionalism, which was created during this period, consequently deems human dignity to be a fundamental value. Worthy of note is that these values bring about at least three functions: 'they regulate by directing human action at a desired target, they enable legitimation and justification of actions in their relief function and they simplify decision making.[20]

Scholars like Murphy[21] introduce human dignity as fundamental value of constitutionalism. He believes that both democracy and constitutionalism are based on human dignity while Nishihara[22] according to the venter's hierarchical systems of values considers human dignity to be a primary value of constitutionalism and equality and freedom as supporting values. He deems democracy and rule of law as the structural values.[23] Backer considers protections of the individual as a substantive value of constitutionalism.[24]

Loughlin stated that 'utopianism seeks realization today mainly through the claims of cosmopolitanism and universal human rights[25]' Through studying constitutional values in a few constitutions around world, Venter concluded that human dignity, human rights, popular sovereignty, democracy, justice and equality frequently appeared in constitutions as common values[26]. Therefore, it might be said that these are values that modern constitutions should be based upon from a normative point of view.

16 Francois Venter, "Utilizing Constitutional Values in Constitutional Comparison," *Potchefstroom Electronic Law Journal*. no. 4 (1), 2001, 1.

17 Jiunn Ron Yeh and Wen Chen Chang, "The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions," *Penn State International Law Review*, vol. 27:1, (2011), 197.

18 Larry Catá Backer, "From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems," *Indiana Journal of Global Legal Studies*, vol. 16, iss. 1, Article 5 (2009), 676.

19 Barber, *Principle*, 219.

20 Christian A. Bauer and Harald Bolsinger, "The Value of Constitutional Values: With Examples of The Bavarian and Indian Constitution," *Tattva—Journal of Philosophy*. no. 6. (February 2014), 66–67.

21 W. F Murphy, "Constitutions, Constitutionalism And Democracy," in *Constitutionalism and Democracy: Transitions in the Contemporary World*, eds. D. Greenberg et al. (Oxford: Oxford University Press, 1993), 3.

22 Hiroshi Nishihara, "The Significance of Constitutional Values," *Potchefstroom Electronic Law Journal*, no. 4. (2001), 5.

23 Nishihara, "Significance of Constitutional," 2.

24 Backer, "From Constitution to Constitutionalism," 693.

25 Loughlin, "The Constitutional Imagination," 24.

26 Francois Venter, "Utilizing Constitutional Values in Constitutional Comparison," *Potchefstroom Electronic Law Journal*, no. 4 (1), (2001), 33–44.

3.2. Principles of Constitutionalism

Constitutionalists rarely define the principles of constitutionalism as a separate concept distinguished from values. They usually use it interchangeably such terms as 'values', 'characteristics', 'dimensions', 'elements' and the like.

As a partial and idealized model for the state, constitutional principles relate directly to the institutional structure of the state. For example, as a constitutional principle the separation of powers requires an independent judiciary. This structural principle ultimately provides autonomy for individuals and is, ostensibly, an important dimension of human dignity. The rule of law and judicial review also provide for the equality and liberty of citizens. According to McIlwain's normative conception of constitutionalism, Sturm[27] identifies five basic principles of constitutionalism, as follows: First, governing according to law or the rule of law and, second, democracy or popular consent; in other words, the fundamental law according to which people are governed should be based on the consent of the citizens. Third is the separation of the public and private spheres of life, which indicates that the realms of governmental authority or public power should be distinguished from the rights and liberties of citizens. Four, the rights and liberties of citizens should be protected by independent courts. And, five, government bears a responsibility towards its citizens and the people has the right to exercise control over the holders of power. According to these principles, the following represent the fundamental claims of constitutions: first, to guarantee the rights of men; second, to divide political power between different branches of government; third, to improve the social conditions of people; and, finally, to guarantee equality and right of all people to participate in political life. As Buratti mentioned, constitutions should provide these promises *consistently*.[28] Weale believes that the fusion of rule of law, protection of fundamental rights and securing property rights are all principles of constitutional government, and that making public policy according to majority rule as a fourth principle turns it into a constitutional democracy. He notes that:

> [t]*he fusion of these doctrines in ideals and institutions on constitutional democracy would not be problematic if the theoretical assumptions and practical implications of the two sets of principles were consistent with one another.*[29]

Barber notes that, in addition to the interplay between constitutional values and principles, the principles themselves are coherent; this means that 'our understanding of any one of the principles, conditions, and is conditioned by our understanding of the others'.[30] Taking constitutional principles as a package, the function of the constitution is not simply to introduce an ideal society through the prescription of any principles regardless of their capacity for co-existence. So, it is irrational to prescribe values and principles that are irreconcilable. Moreover, it is unreasonable to celebrate values or principles in a constitution which are apparently in conflict with those values and principles that form core elements of constitutional thinking. For example, avoiding concentration of powers is an undeniable principle of constitutionalism and, clearly, is not compatible with absolutism. Waldron notes that:

> *the idea* [constitutionalism] *is that the concentration of power leads to its abuse and this is why the power-dispersing, the power-slowing, and the power-checking elements of constitutional structure are thought to be important.*[31]

To take another example, in the context of constitutionalism: As some writers have mentioned protection of the values of personal freedom and autonomy is paramount. Allied to this, the idea that everyone deserves

27 Douglas Sturm, "Constitutionalism: A Critical Appreciation and an Extension of The Political Theory of C.H MaIlwain," *Minnesota Law Review*, no. 54, (1969), 228–239.

28 A Burrati, *Western Constitutionalism, History, Institutions, Comparative Law* (Springer Nature Switzerland AG & G.Giappichelli, 2019), 3.

29 Albert Weale, "Constitutional Design," in *Encyclopedia of Democratic Thought*, eds. Paul Barry Clarke, and Joe Foweraker, (London: Routledge, 2001), 116.

30 Barber, Principle, 116.

31 Jeremy Waldron, "The Rule of Law," *Stanford Encyclopedia,* 2016.

equal respect as an autonomous and thus free person is the most genuine form of morality which should be protected by the constitution and its concomitant rules and legislation.[32]

These are constitutional ideals and reasonable founders of any given constitution would not prescribe inequality either explicitly or implicitly by giving special privileges to a particular group of people because of their gender, ethnic, faith, color, social class, and so on. In other words, the equality of citizens based on human dignity is a universal constitutional principle and every constitution should explicitly acknowledge that.

4. Utopianism in the Constitution of the Islamic Republic of Iran

Utopianism has deep roots in Iranian political philosophy. Al-Farabi (872–950 CE) who is regarded as the founder of political philosophy in the Islamic world designed his ideal society (the 'Virtuous City') mostly inspired by Plato. Like Plato, the core element of this utopian city of Al-Farabi was justice; however, he added certain additional elements of Islamic political thought such as leadership or 'Imamate', and the concepts of goodness and perfection.[33]

The contemporary political system in Iran as it is articulated in the Constitution of the Islamic Republic is not far from Al-Farabi's ideal society since it aims to establish a virtuous society through which people can reach absolute goodness and happiness. However, from Al-Farabi's point of view he did not just consider happiness for the current life, but also for the afterlife as well. In his Virtuous City, people are under the leadership of an absolute spiritual leader and, under his direction, the aforementioned happiness can become realized[34]. This concept of the ideal state was clearly formulated in the Constitution of Islamic Revolution of 1979 and its amendment of 1989. An Islamic utopia or an Islamic community within which Islamic rules are rigorously implemented by political institutions under leadership of a spiritual man (not a woman) comprises the core element of the Iranian Constitution.

Nevertheless, Islamic political thought is not the only source of inspiration of Iran's current political system. Modern Western political thinking has been combined with traditional beliefs regarding the desirable society since over a century ago when Iranians became aware of developments in the Western world. During the second half of the nineteenth century, a new middle class emerged in Iran who became familiar with new Western ideas through traveling to and education in Western countries. They introduced new ideas to Iranian society, such as the inalienable rights of people (instead of the divine rights of kings to govern), liberalism, secularism, nationalism and socialism. 'They venerated no the shadows of God on earth but the triumvirate of Equality, Liberty and fraternity[35].' These new ideas found their way into the first Iranian Constitution of 1906 and its Supplementary Constitution as a result of the Constitutional Movement. At the same time, under the influence of high-ranking clergy who represented the traditional tendency, Article 2 of the Supplementary Constitution of 1907 stipulated that a Supreme Committee of at least five *Mojtahids* (high-ranking clergy) must examine the enactments of the Parliament to ensure their consistency with Sharia laws. This Committee would remain in place until the appearance of the Hidden Imam or Imam Mahdi. Although this part of constitution of 1906 was never implemented due to subsequent political pressures, this duality of approach extended to Iran's Islamic Revolution of 1979. In fact, '[t]he traditional gospel of Shi'ism had been incorporated into a modern structure of government derived from Montesquieu'. After the Islamic Revolution of 1979, this duality rose again while religious and Western secular constitutional values and principles were simultaneously recognized in the Constitution. As a consequence, the political system of the Islamic Republic of Iran is neither purely Islamic nor is it a com-

32 Maurice Adams, Ernst Ballin and Anne Meuwese, "The Ideal And The Real in The Realm of Constitutionalism And The Rule of Law: An Introduction," in *Constitutionalism and The Rule of Law, Bridging Idealism and Realism*, eds. Maurice Adams, Anne Meuwese, and Ernst Hirsch Ballini (Cambride: Cambridge University Press 2017), 12.

33 Zahra Golnaz Manteghi Fasaei, *Taking a Look at The Concept of Utopia in the Political Philosophy of Plato and Farabi*, (2019), 7.

34 Hojatollah Asil, *Armanshahr Dar Andishe-e Irani* (Tehran: Nashr-e-Nay, Tehran, 2014), 212–213.

35 Ervan Abrahamian, *Iran. Between Two Revolutions* (Princeton: Princeton University Press, 1982), 50.

pletely modern because the political power behind the Islamic Revolution of 1979 comprised of many opposition groups from different strands, including liberals or constitutionalists, leftists, nationalists, secularists and Islamist groups who followed their own imaginary and ideal state and society. However, two of these groups—the Islamist and leftist groups—provided the main power of the revolutionary engine and, naturally, played more important role in establishing the new constitutional order. Due to the political dominance of these two prominent groups during the drafting and enactment of the post-revolutionary constitution, the complexity of the constitutional text should be understood in the light of those values and principles that are partly recognized in the Constitution.

The Islamists, led by Ayatollah Khomeini, emphasized an Islamic state. During the preparation of first draft of the Revolutionary Constitution he expressed that, from his point of view, the constitution of an Islamic Republic means Islamic law[36]. As Gheissari and Nasr have pointed out:

> *rather than a modern theory of state or even an ideology,* [Ayatollah] *Khomeini's approach amounted to a Shia version of Plato's Republic in which the Guardian Jurist would be the Philosopher king.*[37]

On the other hand, leftist groups, especially Marxist ones, supported the principles of egalitarianism, social justice and denouncing imperialism, capitalism and so on. Despite their irreconcilable differences, in the course of combating with the former regime the viewpoints of the Islamist and leftist groups gradually became closer. The best way to describe their partially common ideas regarding their ideal society is as follows: as a classless monotheistic society. Dabashi clearly explains the meaning of this well-known slogan of Revolutionaries in the following terms:

> *in this utopia there is but one religion in which all hatred and inequalities are eliminated, all knowledge is harmonious, nature is unified, classes are eliminated, the economy is monotheized, leadership is synchronized, leader and society are cross-identified, and perfect universal peace is attained.*[38]

4.1. Three rival utopias in the constitutional text

To some extent, the pre-revolutionary movements' struggle over their ideal society is reflected in the Constitution of the Islamic Republic of Iran. Due to the inherent incompatibility of their values, the final draft of the Revolutionary Constitution contained some rival principles that have remained in perpetual tension for more than 40 years. Instead of one consistent utopian society, it seems that three contesting and inconsistent utopias are recognized in one single constitutional text: Firstly, a liberal democratic utopia that is evidently set out in Chapter Three under the title Rights of the Nation. In addition, major elected institutions such as the Parliament in Chapter Six, the Presidency in Chapter Nine and Councils in Article 7 represent liberal and democratic elements of the Iranian Constitution. Second, we find a leftist utopia that mostly reflects the egalitarian attitudes of the important section of revolutionaries. Due to their influence, the government's full responsibilities towards citizens are prescribed chiefly in Article 3, social security for all Iranians are set out in Article 27, free education and training up to end of high school and free higher education for all up to the level of self-sufficiency are provided for in Article 30, and a state-oriented economy is prescribed in Articles 43 and 44 of Chapter Four (entitled Economy and Financial Affairs). The content of these articles indicates that the concept of the ideal society mostly under the influence of Islamic leftist groups was also acknowledged. Finally, and above all, an Islamic utopia that forms the heart of Iran's Islamic Constitution and the most important articles of that which are dedicated to articulating the values, principles and institutions of an ideal Islamic society. The Islamic utopia is mostly mirrored in its preamble and in key words and statements, such as: to establish an 'ideal and modal society'; the 'righteous' responsibil-

36 Ruhollah Khomeini, "Islamic Republic of Iran Constitution Means Islamic Law," *Keyhan Newspaper*, no. 10738 (1979), 3.

37 Ali Gheissari and Vali Nasr, *Democracy in Iran: History and Quest for Liberty* (2006), 87.

38 Hamid Dabashi, *Theology of Discontent* (London: Routledge 2017), 387.

ity for governing and administering the country; the formation of 'single world community' in accordance with the Quran; a governmental responsibility and aim 'to foster the growth of man' towards the divine order and God; the realization of a government of the 'oppressed upon the earth' according to the promise of Quran; 'extending the sovereignty of God's law [Sharia] throughout the world' as an aim of an ideological army; 'building an ideal Islamic society that can be a model for all people of the world' and other similar statements.

It is of profound importance to know that these are not simply empty slogans but are important articles within the Constitution which are aimed to be realized. For instance, according to Article 57, the main powers of government (Parliament, the executive branch and the judiciary) function under the supervision of the institution of the Leadership. Based on Article 110, the Supreme Leader has widespread duties and authorities such that he can control parliamentary and presidential elections (Article 99) and all enactments of Parliament through Guardian Council (Articles 93 and 94). It should be noted that the twelve members of Guardian Council are appointed directly or indirectly by the Supreme Leader. The Judiciary is also under full control of the Supreme Leader whose Head is appointed by him. It was believed that for realization of an ideal Islamic society all laws and regulations must be based on Islamic criteria. Therefore, the Guardian Council has the responsibility to control the compatibility of all laws and regulations with Islamic criteria. Other important and influential institutions, such as the Expediency Council (Article 112), Assembly of Experts for Leadership (Article 107 and 111), Armed Forces (paragraph 4 of article 110), Radio and Television (Article 175), and the Supreme Council for National Security (Article 176) are under the full control of the Supreme Leader. Despite the relative prevalence of unelected institutions as opposed to elected institutions, there has been a perpetual tension between two contested discourses since the creation of the Constitution of the Islamic Republic of Iran: On the one hand, an Islamic discourse in pursuit of the ideal Islamic society and, on the other, a constitutional discourse that seeks to create a constitutional utopia according the values and principles of constitutionalism. In order to gain a better understanding of their incompatibilities, some examples are examined in more detail below.

4.1.1. Descending thesis versus ascending thesis

The preamble of the Islamic Constitution of 1979 is clearly idealistic, emphasizing as it does the Islamic nature of revolution under the leadership of Ayatollah Khomeini and describing the features of the Islamic State. The nature of the Islamic State, depending on the viewpoints of different branches of Islam, is different. The Islamic State which is set out in the Iranian Constitution is based on the ideal state under the direction of Islamic jurists and is derived from Shia Islam. It is noteworthy that, in the context of the Revolutionary Constitution, Shia Islam should be interpreted according to Ayatollah Khomeini's understanding of it. According to his point of view, political power derives from God and this power, in turn, was transferred to the Prophet Mohammad and his successors (the Twelve Shia Imams and the Shia jurists or the Ulama). The most important characteristic of this doctrine is its appropriation of certain political authority for the figure of Shia jurist (*Faqih*) who, in turn, represents God's will. In Article 56 of the Constitution it is noted that '[a]bsolute sovereignty of universe and Man belongs to God…'

Obviously, this content of the Iranian Constitution also reflects a descending political theory of government which was prevailed in the mediaeval period. According to this theory:

> *original power was located in a supreme being which, because of the prevailing Christian ideas, came to be seen as divinity itself. St Augustine in the fifth century had said that God distributed the laws to mankind through the medium of kings. And in the thirteen century St, Thomas Aquinas expressed the same idea when he said that power descend from God.*[39] (Ullman 2010, p. 107)

Notwithstanding this, Article 6 of the Constitution articulates that the country's affairs in the Islamic

39 Walter Ullman, "Ascending and Descending Theses of Government," in *The Political Theory Reader*, ed. P Schumaker (Wiley-Blackwell, West Sussex 2010), 107.

Republic of Iran must be managed on the basis of public opinion as expressed through elections, including the elections to the presidency, of the representatives of the Islamic Parliament and the Councils, or through referenda.

Obviously, Article 6 is based on an ascending political theory of government or democratic government. The main feature of the ascending thesis is that 'original power is located in the people or in the community itself[40]'. Although Katouzian, one of the most important and prominent writers of the first draft of the Revolutionary Constitution claimed that national sovereignty and sovereignty of God is combined in its best form in Article 56[41], more than forty years of the Islamic Republic hardly supports this claim. The (religious) descending scheme of government and the ascending (democratic) component of government enshrined in the Iranian Constitution 'have not been adapted to one another in harmonies way, but appear in one and the same text as elements that contradict and exclude one another[42]'. Milani believes that Ayatollah Khomeini's idea of Islamic government within which rule of the Jurist is the main source of legitimacy is irreconcilable with the modern idea of popular sovereignty[43]. Leadership by a spiritual jurist is one of the main elements of the Shia utopia while popular sovereignty is one of important principles of the constitutional utopia. Moreover, the descending thesis normally leads to absolutism whereas the ascending thesis recognizes the constitutive character of the popular will. Therefore, it is impossible to imagine that people are master of their own destiny and, at same time, they bind to the rules that directly or in directly originate from God's will. If we presume that such a constitutional system in reality is completely impossible, then we can categorize it as abstract utopianism. As has been mentioned, the function of a constitution is to introduce a framework of an ideal and possible political society, not an exemplary society which is reasonably impossible to be achieved.

4.1.2. Political elitism versus political equality

It has been noted above that equality, including political equality, is one the main values of constitutionalism. By political equality we refer to the equal consideration of all citizens' interests and preferences. Obviously, political equality requires political participation. According to Dahl political equality is based on two important assumptions: 'the first is the moral judgment that all human beings are of equal intrinsic worth … and that the good or interests of each person must be given equal consideration[44]'. Accordingly, people should have an equal opportunity in political contests whether for electing public officials or be elected as a power holder. This fundamental right is acknowledged in the Iranian Constitution, as in many constitutional democracies. Different dimensions of equality are recognized in the Iranian Constitution too. For instance, in the final part of paragraph 14 of Article 3, government is recommended to direct all its resources for 'securing the multi-faceted rights of all citizens, men and women, and providing just legal security for all, and equality of all before law.' Also, based on Article 19 of the Constitution 'all people of Iran, regardless of ethnic group or tribe, enjoy equal rights, color, race, language and the like do not bestowed any privilege.' Even though some types of equality for all citizens are recognized in the aforementioned articles, other articles and some parts of the preamble to the Constitution recognized special right of particular groups of citizens to govern. For example in the preamble to the Constitution under the title Method of Governance in Islam, it is stipulated that:

> *in creating the political infrastructures and institutions which make the foundation of society on the basis of an ideological outlook, the righteous assume the responsibility of governing and administering the country with the Qur'anic verse (verily, my righteous servants shall inherit the earth).*

40 Ulman, *Ascending.*

41 N Katouzaian, "Gozari Bar Tadvin-e Pish Nevis-e Ghanon Asasi," *Constitutional Law Quarterly*, no. 1 (2002), 122–123.

42 A Schirazi, *The Constitution of Iran: Politics and State in The Islamic Republic*, trans. John O'kane, I.B Tauris, London, 1997, 19.

43 Abbas Milani, "The three paradoxes of Islamic Revolution in Iran," in *The Middle East Institute. The Iranian Revolution at 30* (Washington DC, 2009), 26.

44 Dahl, *Political Equality*, 4.

The ambiguity of the term 'righteous' is clarified in the paragraphs that follow. For instance it is stated in the preamble (under the title of Guardianship of the Jurist) that, in keeping with the Islamic principle of governance and the perpetual necessity of leadership, the establishment of leadership by a qualified jurist (clergy) recognized by the people is necessary: '[T]his is in accordance with the Hadith: the direction of public affairs is in the hands of those who are learned concerning God and are trustworthy in matter pertaining to what he has made eligible and forbidden...' The same content is repeated in Article 5. In Article 109, three criteria are stipulated for the person who is to be elected by the Assembly of Experts for leadership as the Supreme Leader. The first is having the scholarship required for giving rulings (*Fatwa*) in various fields of Islamic law (*Faqih*). This means that it is only those persons who have a high degree in religious studies (high-ranking clergy) and no other citizens who are eligible to be nominated as the Leader. It should be noted that, according to Article 113, the Supreme Leader is the highest public official in Islamic Republic of Iran. Moreover, the Head of Judiciary whose functions and authority compared with those of his counterparts in other jurisdictions is extraordinary, should be nominated from among the high-ranking clergy too, based on Article 157, which provides that:

> *for the purpose of carrying out the responsibilities of the judiciary in all judicial, administrative and executive matters, the Leader shall appoint for five years a doctor in religious studies (high rank clergy) who is just, has knowledge of judicial matters, is prudent and has magisterial skills, as Head of the Judiciary who shall be the highest authority of the judiciary.*

The same qualification of being a member of the high-ranking clergy is also stipulated for the President of the Supreme Court and the Attorney General (Article 162). Moreover, six out of the twelve members of the Guardian Council must be appointed by the Supreme Leader from among the high-ranking clergy according to Article 91. It should be noted that, according to Article 96, determination of the compatibility of legislation passed by Parliament with Sharia law rests with only the majority of the aforesaid high-ranking clergy, while determination of its compatibility with the Constitution (not Sharia law) rests with the majority of all members (lawyers together with high-ranking clergy) of the Guardian Council.

Based on what has been reviewed above, despite an acceptance of political equality found in some articles of the Constitution, prominent political offices are reserved solely for high-ranking clergy. Therefore, the term *righteous* in the preamble is explicitly limited to a closed circle of such high-ranking clergy; this is obviously in conflict with political equality which is a fundamental value of constitutionalism.

4.1.3. The rule of man versus the rule of law

As it was mentioned above, some writers like Venter considers the rule of law as a structural value of the constitutionalism and others, like Waldron, refer to it as a prominent principle of liberal political morality. In a constitutional utopia according to Aristotle the rule of the best laws is preferred to rule of the best men[45]. Looking for good characteristics of law, Fuller identifies the following eight criteria as the internal morality of law that guarantee at least the formal aspect of the rule of law. Fuller illuminates the fact that a good law should be general, promulgated, clear, non-contradictory, not requiring the impossible and be consistent with the way they are implemented by officials[46]. As Waldron puts it:

> *the most important demand of the rule of law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, ad hoc or purely discretionary manner on the basis of their own preferences*[47].

Although the preamble to the Iranian Constitution is mostly dedicated to the depiction of an Islamic utopia, the rule of law as a constitutional principle is recognized in different articles of the Constitution.

45 Aristotle, *Politics* (Massachusetts: Harvard University Press, 1955), 255–256.

46 Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, New Haven, 1969), 33–91.

47 Waldron, *The Rule of Law*.

Various words for Sharia laws in Iranian Constitution	Preamble of the Constitution	Articles of the Constitution
Islamic principles	✓	
Islamic rules	✓	
Islamic standards	✓	26
Islamic program	✓	
Rules of Islamic codes	✓	
Islamic ordinances and regulations	✓	
Islamic criteria		110, 147, 151, 167, 171, 175 and 177
Islamic law		45
Islamic ordinances		91
Islamic regulations		107
Norms and principles of Islamic justice		14
Principles and commandments of official religion		85
Principles of Sharia		112
Criteria of Fiqh		163
Islamic sources and authentic fatwa		167

For example many of the articles contained in Chapter Three emphasise the importance of the rule of law, in particular Article 36 which states: '[a] sentence to punishment and its execution must only be by the decision of a competent court, and by virtue of law.' In addition, Article 22sets out the inviolability of the dignity, life, property, rights, residence, and occupation of the Iranian citizens and Article 25 proscribes the inspection and interception of letters, recording and disclosure of telephone conversations, disclosure of telegraphic and telex communications, censorship, or willful failure to transmit them, as well as eavesdropping, and all forms of covert investigation except those provided by law. Other relevant articles include Article 32 which prohibits unlawful arrest and Article 38 that forbids torture and related actions.

At the same time, under the Iranian Constitution the rule of law is undermined in so far as it turns to the 'rule of men'. In the preamble and in several of its articles, one can find in the Constitution different articulations of Sharia laws using various words that is shown in below table:

Regarding the use of the abovementioned terms, the following important points should be considered:

First, these are different terms with similar connotations: this means that Sharia laws and principles must be considered as a main source of the legal order. Second, According to Article 4:

> *civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations…*

This indicates that Sharia laws and principles are of a higher order than ordinary statutes and regulations that are normally issued by the democratic institutions of Parliament and Government. Third, only the six Islamic Jurists (not lawyers) out of twelve members of the Guardian Council who are appointed directly by Supreme Leader can judge in this matter. Therefore, the legal system inevitably depends on the interpretations of a limited number of Islamic jurists. It is believed that the Hidden Imam allocated the responsibility of Sharia solely to the religious authorities.[48] Essentially, both

48 Abrahamian, *Between Two Revolutions*, 15–16.

in theory and practice, individual rights are restricted by the clergy's understanding of permeable rights, communal unity, and the elite's interests[49]. Fourth, in comparison with ordinary laws and regulations that can easily be found in the statute book, Sharia laws are scattered throughout a myriad of religious books and are subject to differing interpretations. As a result, they are mostly disputed and there is no consensus regarding their content. Moreover, they are mostly set out in Arabic which makes them inaccessible for most people. As was mentioned even in the official text of the Iranian Constitution, Sharia law has more than ten similar terms about whose meaning writers and commentators have no agreement.[50] Examining different usages of Sharia laws and principles in the Iranian Constitution, some writers, interestingly, conclude that both prominent Islamic jurists and the founding fathers of the Islamic Revolution, and even members of Assembly of Experts for the Islamic Constitution, did not fully know the content and extent of the Sharia laws and principles.[51] Therefore, the rule of law in such a political system may be reduced to rule by a closed circle of sovereign clergy; people who are authorized to interpret them officially.

5. *Conclusion*

Utopian thinking as the capacity to create and recreate an imaginary desirable society and the search for a better life is an intrinsic characteristic of human beings. According to the values and principles of the constitutionalism as it was explained in this paper, constitutions normally promise a desirable life for the people of a given society. In such a society, human dignity is recognized as central value and liberty, equality and individual autonomy are protected as supporting values. Constitutional principles such as popular sovereignty, separation of powers, rule of law and judicial review and the like guarantee the realization of this constitutional utopia. Although there are some ten-

Content analysis of the preamble and articles of the Iranian Constitution indicates that the Islamic utopia, as a core element of the Constitution, is substantially in conflict with the constitutional utopia that has deep roots in Western Constitutionalism. It seems that the Iranian Constitution might be categorized as failed constitutional utopianism as the consequence of choosing irreconcilable and inconsistent constitutional ideals.

49 Mehran Tamadonfar, "Islam, Law and Political Control in Contemporary Iran,", *Journal for the Scientific Study of Religion*, vol. 40, iss. 2 (2001), 207.

50 Mahdi Kadivar, "Shara-e Shoraye Negahban Dar Barabre Ghanon-e Majles," *Baztabe Andishe*, no. 43 (2003).

51 Mohsen Esmaeli and Amini Hoissein, "The Semantics of Some of The Islamic Norms in The Constitution Based on The Concept of «Islamic Criteria»,". *Quarterly Journal of Public Law Knowledge* (2015), 3–5.

sions between these values and principles, for example between liberty and equality, popular sovereignty and judicial review and so on, more or less they constitute a relatively consistent whole. As a system of interrelated norms, it might be claimed that consistency of these norms within a given constitution, is a necessary (however not enough) condition of it realization. In such a situation we can categorize constitutional utopia as concrete or pragmatic utopia.

In the light of this understanding of constitutional utopia, the Constitution of the Islamic Republic of Iran is examined. It is shown that instead of one consistent utopia we can find three rival utopias that are interwoven with each other. Stressing on constitutional utopia and Islamic utopia, their inconsistency is demonstrated through three examples in section four. It might be said the Constitution of the Islamic Republic of Iran is a good example of attempts to recreate a utopian world through blending traditional beliefs and modern ideas. The founding fathers of the Constitution of the Islamic Republic of Iran completely ignored, or at least understated, the necessity for consistency among the values and principles of the desirable society which they depicted in the Islamic Constitution. Content analysis of the preamble and articles of the Iranian Constitution indicates that the Islamic utopia, as a core element of the Constitution, is substantially in conflict with the constitutional utopia that has deep roots in Western Constitutionalism. It seems that the Iranian Constitution might be categorized as failed constitutional utopianism as the consequence of choosing irreconcilable and inconsistent constitutional ideals.

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Marcin Kamiński

Rejection of Complaints: Lessons for National Competition Authorities on the Eve of the Implementation of ECN+ Directive

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Directive 2019/1 provides for a harmonisation of important procedural aspects related to the enforcement of competition law by National Competition Authorities. The power to set priorities, stipulated in art 4 of ECN+ Directive, is one of particular practical implications for both NCAs as well as undertakings concerned. This power allows NCAs to reject a complaint lodged by a complainant due to the lack of sufficient interests in pursuing an investigation. Such right is strongly intertwined with the procedural rights granted to complainants. While the current legal framework for setting priorities and safeguarding complainant's rights diverge significantly among Member States, a minimum legal standard should be guaranteed in order to ensure coherent model of applying EU competition law within European Competition Network. In order to protect and enhance the process of lodging complaints, such prioritisation has to be counterbalanced by rights granted to complainants and obligations imposed on the Institutions. In this regard, similar legal frameworks and established requirements should exist in national law as the obligations imposed on the Commission. In particular, NCAs and national legislators should learn lessons from the mistakes committed by the Commission which were verified by the European Courts. The importance of providing a proper statement of reasons and obligation not to omit relevant evidence shall be remember and properly implemented by NCAs. At the end of the day the goal is to cause that the rejection of complaint would not be a mere formality.

Key words: Complaint, complainant, EU interest, discretion, priorities, negative priorites, prioritisation, ECN+ Directive

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1. Introduction

Directive 2019/1 (hereinafter: ECN+ Directive)[1] provides for a harmonisation of important procedural aspects related to the

1 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective

enforcement of competition law by National Competition Authorities (hereinafter: NCAs). The power to set priorities, stipulated in Article 4 of ECN+ Directive, is one of particular practical implications for both NCAs as well as undertakings concerned. This power allows NCAs to *inter alia* reject a complaint lodged by a complainant due to the lack of sufficient interests in pursuing an investigation. Such right is strongly intertwined with the procedural rights granted to complainants. While the current legal framework for setting priorities and safeguarding complainant's rights diverge significantly among Member States, a minimum legal standard should be guaranteed in order to ensure coherent model of applying EU competition law within European Competition Network (hereinafter: ECN).[2] Taking into account that the European Commission (hereinafter: the Commission) has been rejecting complaints based on the notion of the lack of sufficient EU interests since at least 30 years and is obliged to guarantee relevant rights for complainants, its decision-making practice and the jurisprudence of the European Courts should serve as the model indicating minimum legal requirement applicable to each NCA. In order to properly depict this model it is of crucial importance to deprive it from some common misconceptions or restrictive interpretations and provide information based on legal acts and findings of the European Courts. The most important lesson for NCAs is that the rejection of complaints is not a mere formality. Despite being granted a discretion to set negative priorities, NCAs are obliged to meet certain legal requirements related mainly to rights granted to complainants. This lesson should be born in mind in the process of implementation and further application of the right to set priorities enshrined in ECN+ Directive.

2. *Prioritisation and ECN+ Directive*

The ability to set priorities constitutes one of the elements strengthening institutional independence[3]. Pursuant to the ability to establish its own priorities NCAs are granted an opportunity to pursue its own policy objectives. Two types of prioritisation are being distinguished[4]. The first type of prioritisation is a discretion to set positive priorities which allows NCAs to commence an *ex officio* investigations in the cases (related to particular sector or given practices) deliberately selected by NCAs. The increasing interests in pursuing investigations related to e-commerce and digital market both by the Commission[5] and by NCAs[6] might serve as an example of policy objective pursued by these Institutions. Moreover,

The ability to set priorities constitutes one of the elements strengthening institutional independence.

enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, 3–33.

2 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, 43–53.

3 Wouter P.J. Wills, *Competition authorities: Towards more independence and prioritisation?*, 39, accessed May 12, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000260.

4 Wouter P.J. Wills, *Discretion and Prioritisation in Public Antitrust Enforcement, in particular EU antitrust enforcement*, 7–10, accessed June 12, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759207.

5 See for example press release, *Antitrust: Commission opens investigation into Apple practices regarding Apple Pay*,accssed May 15, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075.

6 Wouter P.J. Wills, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt*,

positive priorities might also be stipulated in soft-law acts such as guidance on the enforcement priorities provided by the Commission.[7] The second and even more important type of prioritisation constitutes a right to set so called negative priorities. The ability to set negative priorities means that an Institution is entitled to reject a complaint for lack of priority interests[8]. It is strongly related to the management of the resources possessed by Institutions. The power to set negative priorities is of particular importance for the complaints due to the fact that it allows NCAs and vested with rights to set negative priorities[9]. The lack of competence to reject a complaint (*inter alia* by evoking lack of priority interests) explains why French NCA has been issuing the most decisions in the whole ECN.[10] These discrepancies in competences granted to NCAs have been indicated repeatedly before the adoption of ECN+ Directive. The need to vest NCAs with the ability to set priorities in the exercise of their task was emphasised in the recommendations issued in 2013 by the ECN[11]. Moreover, in the Commission's ten-year report on Regulation 1/2003[12] it was stressed out that

It is crucial to strike a proper balance between a discretionary right to reject a complaint for the lack of priority enforcement and safeguarding the rights of complainants.

the Commission to unload an administrative burden related to the process of investigating a complaint and without undue requirements reject a complaint evoking lack of priorities interests. The following sections of this article will dwell into the details related to this kind of prioritisation, in particular concerning the obligations of the Institutions and rights of complainants in the event of rejecting a complaint for lack of priority interests.

It shall be remember that before the adoption of ECN+ directive rights to set priorities diverged significantly among NCAs. Notably French NCA (fr. *Autorité de la concurrence*) and Spanish NCA (spa. *Comisión nacional de los mercados y la competencia*) were not not all NCAs have express powers to set their enforcement priorities, i.e. to choose which cases to investigate. One of the conclusions of this report concerned a necessity to ensure that all NCAs have a complete set of powers at their disposal including the right to set enforcement priorities.[13]

Against this background ECN+ Directive deals with the challenge related to differences in rights to set

accessed July 12, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424592.

7 Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, 7–20.

8 Wills, *Competition authorities*, 41.

9 Wouter P.J. Wills, *Independence of Competition Authorities: The Example of the EU and its Member States*, accessed June 13, 2020, http://ssrn.com/author=456087.

10 Wills, *Competition authorities*, 41.

11 *European Competition Network recommendation on the power to set priorities*, accessed July 13, 2020, https://ec.europa.eu/competition/ecn/recommendation_priority_09122013_en.pdf.

12 Communication from the Commission to the European Parliament and the Council—Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014)453 of 9 July 2014, accessed July 13, 2020, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52014DC0453.

13 Ibid., 34.

priorities among NCAs. According to the preamble to ECN+ Directive NCAs should be able to prioritise their proceedings for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)[14] to make effective use of their resources, and to allow them to focus on preventing and bringing anti-competitive behaviour that distorts competition in the internal market to an end. This goal is intended to be achieved by art. 4 (5) of ECN+ Directive. This provision provides NCAs with powers to set priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU. It therefore establishes a common right of NCAs to set positive priorities. What is more important it also provides a right to set negative priorities. According to this provision, to the extent that NCAs are obliged to consider formal complaints, NCAs shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority. This right is of utmost importance not only for NCAs but also and in particular for complainants. It is crucial to strike a proper balance between a discretionary right to reject a complaint for the lack of priority enforcement and safeguarding the rights of complainants. While the transposition of ECN+ Directive is still ongoing, it is worth indicating some relevant lessons for the rejection of complaints stemming from the experience of the Commission and the European Courts. The following analysis would be focused on the legal standards for the process of rejecting a complaint by the Commission for lack of enforcement priorities.

3. The legal framework in the European Union's competition law and the rights of complainants

A short presentation of the legal framework in the European Union's law related to rejection of complaints should be provided. The most relevant legal provisions from the perspective of a complaint are Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereinafter: Regulation 773/2004)[15] and Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter: Regulation 1/2003)[16]. Additional procedural guarantees for the proper implementation of the complainant's rights are stipulated in the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (hereinafter: Hearing Officer Decision).[17] There exist also soft-law acts which give some useful indications on the meaning of some relevant expressions and Institutions' attitude toward them. As far as the complainant is concerned, the Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (hereinafter: Notice)[18] is of significant importance. Of some, rather practical importance, also come Antitrust Manual of Procedures (hereinafter: Manual)[19] which contains a section on the rules governing the procedure of handling the complaints. Soft-law act although deprived from the binding force might even constitute a basis for considerations related to the compatibility of the final decision with EU law.[20]

14 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390.

15 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, April 27, 2004, 18–24.

16 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, January 4, 2003, 1–25.

17 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, October 20,2011, 29–37.

18 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, April 27, 2004, 65–77.

19 Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, accessed January 24, 2020, https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

20 Advocate General M. G. Pitruzzell's opinion presented on 7 may 2020 r. in case C-132/19P, ECLI:EU:C:2020:355.

Legal framework presented above provides for rights of complainants. First and foremost there exist a right for concerned parties to lodge a complaint. Should there be no right to file a complaint, the whole process of rejecting a complaint would not exist. In both Regulation 773/2004 and Regulation 1/2003[21] this right is explicitly stipulated. Pursuant to the relevant provision any natural or legal person is entitled to lodge a complaint as long as it shows a legitimate interest, except for Member States, which are always considered to possess legitimate interest.[22] Once a complaint has been lodged, the exact scope of rights of complainant depends on the actions of the Commission. Should the Commission decide to take up an investigation and issue a statement of objections, a complainant will be entitled to obtain the non-confidential version of this document[23] and comment on it. The Commission shall take into account and consider the views expressed by the complainants.[24] Moreover, the complainant is granted under Regulation 773/2004 also the right to request to be provided with an opportunity to express their views at the oral hearing. Nevertheless, these rights are granted only to a particular group of complaints which complaints triggered an official investigation. More relevant for the topic of this article is the other group of rights—rights of complainants related to the rejection of complaint.

In this regard, according to the jurisprudence of the Courts of the European Union[25], two extremely important rights shall be distinguished. Firstly, the complainant has the right to be informed of the reasons for which the Commission intends to reject its complaint. Secondly, it has the right to submit observations concerning the reasons for rejecting the complaint. These rights are enshrined in the relevant acts.[26] As emphasised by the General Court, rights conferred to the complainant include the rights laid down in article 7 of Regulation 773/2004, which provides that, where the Commission takes the view that on the basis of the information in its possession, there are insufficient grounds for acting on the complaint, it is to inform the complainant of its reasons and set a date by which the latter may make known its views in writing. The complainant has the right to make its views known before the final adoption of the decision. Accordingly similar rejection procedure stipulated in national law of all Members States would be more than welcomed.

Abovementioned right to be informed simultaneously imposes certain obligation on the Commission. Once the complaint is lodged, the Commission is obliged to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States.[27] Nevertheless, it does not mean that there is an obligation to comment on each argument expressed in a complaint.[28] Pursuant to art. 190 TFEU the Commission as one of the European Union's Institutions is obliged to provide a statement of reasons appropriate to the measure. As far as rejection decision is concerned the Commission is obliged to state all the relevant facts and points of law[29] which are of decisive importance in the context of decision assessment concerning the rejection of complaint. Such statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Institution which adopted the measure in such a way as to enable the complainant to ascertain the reasons for the rejection decision.[30]

21 Art. 5 of Regulation 773/2004 and art. 7 Regulation 1/2003.

22 Art. 7 (2) of Regulation 1/2003.

23 Art. 6 of Regulation 773/2004.

24 Notice, par. 72.

25 Judgment of the Court of First Instance of 18 September 1992, case T-24/90 *Automec Srl* v *Commission of the European Communities*, ECLI:EU:T:1992:97, par. 72.

26 Judgement of the General Court of 12 May 2010, case T-432/05 *EMC Development AB* v European Commission, ECLI:EU:T:2010:189, par. 56.

27 Automec judgement, par. 79.

28 Judgement of the General Court of 26 September 2018, case T-574/14 *European Association of Euro-Pharmaceutical Companies (EAEPC)* v *European Commission*, ECLI:EU:T:2018:605, par. 142–143.

29 Judgment of the Court of 2 April 1998, case T-367/95 *Commission of the European Communities* v *Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval)* and *Brink's France SARL*, ECLI:EU:C:1998:154, par. 63.

30 Judgment of the Court of First Instance of 16 December 1999, case T-198/98 *Micro Leader Business* v *Commission of the European Communities*, ECLI:EU:T:1999:341, par. 40.

The reasons stated by the Commission must be sufficiently precise and detailed to enable the General Court to review effectively the Commission's use of its discretion.[31] This obligation to provide appropriate statement of reasons shall be deemed as the most important element in the whole process of rejecting a complaint. The lessons concerning this matter are of utmost importance for all NCAs as well as national legislators designing a process of rejecting a complaint related to *inter alia* ability to set negative priorities.

For the record it is worth bearing in mind that the European Union's competition law system similarly to systems existing in some Member States[32] does not provide a right to obtain the decision concerning the existence or non-existence of the infringement pointed out in the complaint. Neither Regulation 773/2004 nor Regulation 1/2003 contains any provision imposing on the Commission any obligation to carry out an investigation. Moreover, the complainant is the only party obliged to provide evidence [33]. The Commission is not required to take into account facts which have not been brought to its notice by the complainant or which could have only been discovered by an investigation.[34]

4. *The lack of EU interest—negative prioritisation by the Commission*

Before explaining why the process of rejecting a complaint for lack of priority interest should not be regarded as a mere formality, the Commission's ability to set priorities shall be commented on. The Commission's ability to set negative priorities is reflected in its right to reject a complaint due to the lack of sufficient EU interest. It constitutes the most popular (and instigating the most controversies[35]) reason for rejecting a complaint. The notion was introduced in judgement of of the Court of First Instance in case T-24/90 (hereinafter: Automec judgement).[36] It is derived from the fact that the Commission is entrusted with public service tasks. The Commission is entitled to take all the measures necessary to perform the task, including setting priorities within the limits prescribed by the law.[37] According to article 3 TFEU establishing of the competition rules necessary for the functioning of the internal market is the exclusive competence of the European Union performed by the Commission. The Commission is entrusted with the task of performing competition policy and can set priorities within this domain. It stems from these considerations that the Commission is also entitled to apply different degrees of priority to the submitted cases. In other words, the Commission is entrusted with the task of ensuring the application of article 101 and article 102 TFEU and is responsible for defining and implementing EU competition policy and for that purpose has a discretion as to how it deals with complaints.[38] These criteria for assessing the existence of EU interest are not limited nor permanently established. The assessment depends on the circumstances of each individual case.[39] The Commission is entitled to give priority to a single criterion in assessing the EU interest established.[40] To emphasise the Commission's discretion it is worth remembering that even if the Commission is convinced

31 Judgment of the General Court of 21 January 2015, case T-355/13 *easyJet Airline Co. Ltd* v *European Commission*, ECLI:EU:T:2015:36, par. 70.

32 For example United Kingdom, W.P.J. Wils, *Discretion and Prioritisation in Public Antitrust Enforcement…*, 24.

33 Judgment of the Court of 19 September 2013, case C-56/12 *European Federation of Ink and Ink Cartridge Manufacturers (EFIM)* v *European Commission*, ECLI:EU:C:2013:575, par. 71.

34 Judgment of the General Court of 30 September 2016, case T-70/15 *Trajektna luka Split d.d.* v *European Commission*, ECLI:EU:T:2016:592, par. 63.

35 Alfonso Lamadrid, *Wrapping up the week / Case T-427/08, CEAHR v Commission*, accessed January 25, 2020, https://chillingcompetition.com/2010/12/17/wrapping-up-the-week-case-t-42708-ceahr-v-commission/.

36 Judgment of the Court of First Instance of 18 September 1992, case T-24/90 *Automec Srl* v *Commission of the European Communities*, ECLI:EU:T:1992:97, par. 72.

37 Ibid., par. 77.

38 Judgment of the Court of First Instance of 26 January 2005, case T-193/02 *Laurent Piau* v *Commission of the European Communities*, ECLI:EU:T:2005:22, par. 80.

39 Judgment of the General Court of 11 January 2017, case T-699/14 Topps Europe Ltd v European Commission, ECLI:EU:T:2017:2, par.65.

40 Judgment of the Court of 19 September 2013, case C-56/12 European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v European Commission, ECLI:EU:C:2013:575, par. 85.

of the existence of the infringement of EU competition law, it might nevertheless reject the complaint based on the lack of EU interest.[41] Those statements create the impression that the Commission vested with the possibility to use such a blurrily constructed concept, possesses a discretionary power to loosely reject any complaints as far as the procedure stipulated in Regulation 773/2004 was fulfilled. Although the scope of discretionary power of the Commission is indeed very significant, it is not unlimited.[42]

tion to define priorities.[44] The discretion granted to the Commission does not allow it to reject some complaints claiming that certain situations are just in principle excluded from its interest, as far as the situations come under the task of competition policy entrusted to it by TFEU.[45] Each case has to be assessed individually. The Commission has to consider and attentively examine all of the legal and factual particulars presented in each submitted complaint.[46] After examining the particular set of circumstances and legal consideration

The discretion to define priorities granted to the Commission does not allow it to reject some complaints claiming that certain situations are just in principle excluded from its interest, as far as the situations come under the task of competition policy entrusted to it by TFEU.

The principal limitation is an aforementioned obligation to provide a statement of reasons. The Commission is not entitled to refer to the EU interest in the abstract. As stated in Automec judgment, it must set out the legal and factual considerations which led it to conclude that there was insufficient EU interest to justify an investigation into the case.[43] The statement of reasons provided in the rejection decision has to be sufficiently precise and detailed as to enable effective judicial review of the Commission's use of its discre-

contained in the complaint, the Commission has to perform a balancing test consisting of three premises:

1. the significance of the alleged infringement as regards the functioning of the internal market,
2. the probability of its being able to establish the existence of the infringement, and
3. the extent of the investigative measures required.[47]

41 Judgment of the Court of First Instance of 3 July 2007, case T-458/04 *Au Lys de France SA* v *Commission of the European Communities*, ECLI:EU:T:2007:195, par. 70.

42 Judgment of the Court of 4 March 1999, case C-119/97, *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE* v *Commission of the European Communities and May Courier*, ECLI:EU:C:1999:116, par. 89.

43 Automec judgement, par. 85.

44 Judgment of the Court of 19 October 1995,case C-19/93 *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV* v *Commission of the European Communities*, ECLI:EU:C:1995:339, par. 27.

45 Judgment of the Court of 4 March 1999, case C-119/97, Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission of the European Communities and May Courier, ECLI:EU:C:1999:116, par. 92.

46 Automec judgement, par. 86.

47 Judgment of the General Court of 11 January 2017, case T-699/14 Topps Europe Ltd v European Commission, ECLI:EU:T:2017:2, par. 64.

This balancing test consists of weighing up the significance of the alleged infringement against the probability of establishing its existence and the scope of investigative measures necessary to prove it. For each of these parts of the balancing test the Commission shall provide a statement of reasons. For each conclusion the Commission shall provide sufficient reasons as to allow the judicial review of its findings. Bearing in mind that neither the General Court nor the European Court of Justice is entitled to substantiate the assessment of the existence of EU interest[48], the statement of reasons and due examination of the evidence provided is of crucial importance. In this regard, the judicial review of the rejection decision based on the lack of EU interest is focused on whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or a misuse of powers.[49] The jurisprudence provides significant practical lessons for the Commission and all NCAs exercising their rights to reject a complaint for the reasons of enforcement priorities.

5. Three practical lessons stemming from the Commission's obligations and complainant's rights

5.1. The reasoning has to be sufficient and take into account relevant factors

In a milestone judgment[50] in the case T-427/08 (hereinafter: CEAHR judgement)[51] the practical importance of the reasoning provided by the Commission was emphasised.[52] The General Court scrutinised the definition of relevant market established by the Commission. The Courts of the European Union have only limited review of complex economic assessment provided by the Commission in order to define the relevant market.[53] Bearing this in mind, the General Court analysed whether the findings of the relevant market were based on materially correct facts and whether the Commission committed a manifest error of assessment. The General Court found that the Commission based its approach on the hypotheses which were contrary to the facts adduced.[54] According to the Court the Commission did not substantiate its findings with evidence.[55] Moreover, the Commission did not fulfil its obligation to examine carefully all of the evidence provided by the complainant.[56] The combination of these errors led to the conclusion that the Commission committed a manifest error of assessment in defining the relevant market.[57] The mere fact of committing an error in establishing the relevant market is not sufficient to annul the decision. The findings on the specific matter such as the relevant market has to affect the assessment of criteria on which the Commission based its conclusion that there is no sufficient EU interest. In CEAHR case the Commission based its assessment on the limited likelihood of the existence of infringements. The General Court concluded that the erroneous definition of the relevant market vitiated the conclusions concerning low probability that art. 101 or 102 TFUE were infringed.[58]

CEAHR judgement provides a very useful insight on the practical relevance of the Commission's obligations[59]. It stems from this judgement that the obligation to consider attentively all the matters of fact and law is not an illusory requirement. If the Commission omits the evidence which is contrary to its findings, it might commit a manifest error of assessment. In particular,

48 Ibid., par. 66.

49 Judgment of the General Court of 17 December 2014, case T-201/11 *Si.mobil telekomunikacijske storitve d.d.* v *European Commission*, ECLI:EU:T:2014:1096, par. 85.

50 Luis Ortiz Blanco, Konstantin Jörgens, "Important Developments in the Field of EU Competition Procedure," *Journal of European Competition Law and Practice*, vol. 2, iss. 6 (2011), 561.

51 Judgment of the General Court of 15 December 2010, case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR)* v *European Commission*, ECLI:EU:T:2010:517.

52 Ortiz Blanco, Jörgens, "Important Developments", 561.

53 Judgment of the Court of First Instance of 17 September 2007, case T-201/04 *Microsoft Corp.* v *Commission of the European Communities*, ECLI:EU:T:2007:289, par. 482.

54 CEAHR judgement, par. 89, 96 and 105.

55 Ibidem, par. 118.

56 Ibidem, par. 113.

57 Ibid., par. 120.

58 Ibid., par. 165.

59 Pepijin van Ginneken, "The CEAHR Judgement: Limited Discretion to Reject Complaints," *Journal of European Competition Law and Practice*, vol. 2 iss. 4 (2011), 348–350.

economic evidence provided by the complainant shall be taken into account. Although the Commission is not obliged to undertake any investigative measures and seek evidence of infringement on its own when argues against the arguments and evidence provided, it should present relevant counterevidence substantiating its findings. It is not sufficient to deny the facts and legal considerations rendered by the complainant. If the Commission pursues its different view, it has to substantiate it with evidence and relevant legal reasoning. Moreover, reasoning presented by the Commission has to be adequate and capable of properly substantiating the Commission's stance.

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5.2. The evidence cannot be simply overlooked

As stated above, the Commission is not required to take a stance on every fact or legal consideration brought to it by a complainant. It might happen that the Commission points out in rejection decision that the complainant did not present evidence on the existence of the alleged practice.[60] The conclusion that no evidence was furnished might be subject of the judicial review.[61] In this regard the difference between the conclusion that there is no evidence and the statement that the evidence is not sufficient should be drawn. The reasoning that there is no evidence cannot be based only on a mere statement. It is of particular importance when a complainant indeed provides some evidence even slightly hinting at the existence of infringement. The Commission cannot simply overlook and deem as having no relevance the evidence such as information concerning pricing policies.[62] In order to fulfil its obligation to examine attentively all the relevant facts, the Commission has to at least ascertain whether the information is substantiated and check whether the particular circumstances of the case point to a breach of EU competition law.[63] Even if the Commission is entitled to grant different probative value for the evidence adduced or express its view contrary to the arguments of the complainant, it is strictly obliged to take into account relevant evidence. According to the jurisprudence the obligation to attentively examine the facts and legal consideration is synonymous to an obligation to indeed examine the evidence provided and set the proper reasoning concerning them. It is forbidden to selectively take a stance on some facts and present conclusions without substantiation.

5.3. The significance of alleged infringement has to be indeed examined

The significance of alleged infringement is one of the criteria relevant for assessing the existence of EU interest. It seems to be highly difficult to challenge the conclusions concerning this criterion as it is rather opaque. However, the Commission's discretionary power to rely on this criterion is also not unlimited. The Commis-

60 Judgment of the Court of First Instance of 16 December 1999, case T-198/98 *Micro Leader Business* v *Commission of the European Communities*, ECLI:EU:T:1999:341, par. 30.

61 Ibidem, par. 32.

62 Ibid., par. 55.

63 Ibid., par. 57.

sion is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are.[64] While fulfilling this requirement following factor shall be taken into account: the duration and extent of the infringements complained of and their effects on that the competition situation in the European Union. It does not suffice to rely on the assessment the anticompetitive practice has ceased. It should be analysed whether the anticompetitive effects no longer continue. Moreover, the seriousness of the alleged infringement and the persistence of their consequences have to be examined[65]. In this regard, the importance of the recurring obligation to attentively examine all the relevant facts and consideration shall be raised once again. Once again it shall be emphasised that invoking a mere statement without providing proper analysis does not satisfy the Commission's requirements. Although the Commission is entitled to rely on the limited significance criterion, it is obliged to examine the abovementioned aspects of given practice. The assessment of these criteria and the facts taken into account shall be properly executed. In case of any of the criteria relevant for assessing the existence of sufficient EU interest, a manifest error of assessment or lack of substantiation might be raised by the complainant.

5.4. The interplay between the prioritisation on national and European level

According to art. 13 of Regulation 1/2003 the Commission may reject a complaint on the ground that NCA is dealing with the case. This provision is perceived by some authors[66] as granting a possibility to manage decentralized enforcement of competition law stemming from the ECN[67]. In respect to the topic of this article, the relevant question is whether a rejection of complaint by NCA for lack of priority interest amount to "dealing with the case" stipulated in aforementioned article. This question has been addressed in the jurisprudence. The General Court clarified that the meaning of the phrase "dealing with" or "dealt with" shall be interpreted broadly.[68] The outcome of the examination of NCA is of no relevance. As stipulated by the

However, the Commission's discretionary power to rely on the criterion of the significance of alleged infringement is not unlimited. The Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are.

64 Judgment of the Court of 4 March 1999, case C-119/97, *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE* v *Commission of the European Communities and May Courier*, ECLI:EU:C:1999:116, par. 94.

65 Ibid., par. 96.

66 David Viros, "Si.mobil Telekomunikacijske: the Rejection of Complaints as a Tool to Manage Decentralized Enforcement Within the ECN," *Journal of European Competition Law and Practice*, vol. 6 iss. 6 (2015), 415–417.

67 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, 43–53.

68 Judgment of the General Court of 21 January 2015, case T-355/13 *easyJet Airline Co. Ltd* v *European Commission*, ECLI:EU:T:2015:36, par. 26.

General Court the legislature has chosen not to limit the scope of article 13 of Regulation 1/2003 to cases of complaints which have already been the subject of a decision by another competition authority.[69] Even if NCA rejected a complaint on priority ground without performing any investigation, the Commission might invoke art. 13 of Regulation 1/2003. This finding is of particular importance in the light of ECN+ Directive's provisions providing for prioritisation rights for all NCAs. A complainant might not expect a second chance by lodging a complaint to the Commission if NCA decides to reject a complaint on priority grounds. In that respect it is even more important that NCAs draw conclusions from the presented lessons concerning the process of rejecting a complaint. For the record, the second criterion for applying art. 13 of Regulation 1/2003 should not be omitted. This provision applies only if the case brought to the Commission concerns the same agreements or practices which were subject to NCA's review. This condition is fulfilled if the complaint concerns the same alleged infringements on the same market within the same timeframe.[70]

6. Conclusions

ECN+ Directive vests NCAs with a power to set negative priority. This power provides for an opportunity to reject a complaint based on priority grounds. In order to protect and enhance the process of lodging complaints, such prioritisation has to be counterbalanced by rights granted to complainants and obligations imposed on the Institutions. In this regard, similar legal frameworks and established requirements should exist in national law as the obligations imposed on the Commission. In particular, NCAs and national legislators should learn lessons from the mistakes committed by the Commission which were verified by the European Courts. The importance of providing a proper statement of reasons and obligation not to omit relevant evidence shall be remember and properly implemented by NCAs. At the end of the day the goal is to cause that the rejection of complaint would not be a mere formality.

69 Ibid.

70 Judgment of the General Court of 17 December 2014, case T-201/11 Si.mobil telekomunikacijske storitve d.d. v European Commission, ECLI:EU:T:2014:1096, par. 73.

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Eugenic Abortion as Discrimination against Persons with Disabilities: Another Perspective on Current Constitutional Case in Poland

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On 22 October 2020, the Polish Constitutional Tribunal has declared provisions admitting eugenic abortion unconstitutional (case sign. K 1/20). Tribunal stated that the said provisions that sanction eugenic practices in relation to the unborn child deny respect and protection of human dignity (Art. 30) and the principle of legal protection of the life of every human being (Art. 38). Tribunal has not referred to another objection indicated in the MPs' motion that making the protection of unborn child's right to life dependent on its health status was tantamount to illegal direct discrimination (Art 32). Nevertheless, it seems noteworthy to underline that a negative assessment of a disease, handicap, or disability is not legally tantamount to a negative assessment of the affected human beings, their dignity and the value of their life. Human life valued so highly on normative grounds, regardless of the person's health condition, means that the life of a conceived child with malformations should be protected under penal law to the same extent as the life of a conceived and properly developing child. The admissibility of selective abortion based on the health status of the foetus must be recognized as unacceptable, just as abortion based on gender, race or social origin of the child.

Key words: protection of human life, eugenic abortion, malformed foetus, rights of persons with disabilities, anti-discrimination law, legal exclusion

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On 22 October 2020, the Polish Constitutional Tribunal has declared provisions admitting eugenic abortion unconstitutional (case sign. K 1/20). Tribunal stated that the said provisions sanction eugenic practices in relation to the unborn child deny respect and protection of human dignity (Art. 30) and the principle of legal protection of the life of every human being (Art. 38). Tribunal has not referred to another objection indicated in the MP's motion that making the protection of unborn child's right to life dependent on its health status was tantamount to illegal direct dis-

crimination. Nevertheless, it seems noteworthy to analyze the constitutional issue also from this perspective. The essential problems are: Can a human foetus be object to discriminatory action at all? Is a foetus with developmental defects really discriminated against pursuant to the relevant provisions on life protection under penal law compared to a properly developing foetus? Does the eugenic grounds foster discriminatory attitudes towards people with disabilities given the motivational function of the law?

Introduction

The Republic of Poland is among the few countries whose legal system penalizes abortion. Termination of pregnancy with the woman's consent in violation of the provisions of the law is a crime subject to punishment by imprisonment of up to three years, nevertheless a pregnant woman who has consented to abortion is not liable to a penalty.[1] Since 1993 specific legislation has provided for three types of circumstances in which termination of pregnancy in Poland has been legally admissible. Abortion could only have been performed by a physician if: 1) the pregnancy poses a threat to the life or health of the pregnant woman (so-called medical grounds), 2) prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible foetal defect or incurable illness that threatens the foetus's life (so-called eugenic grounds), 3) there are reasons to suspect that the pregnancy is a result of an unlawful act (so-called criminal grounds).[2] Every year, several hundred legal abortions have been performed in Poland, and almost all involved the probability of impairment or incurable disease of the foetus, with genetic defects, including Down's syndrome, prevailing.

On 22 June 2017, a group of parliamentarians of the 8th term of office from the lower chamber of the Polish parliament (the Sejm), associated with the ruling party (Law and Justice), filed a motion to the Polish Constitutional Tribunal to declare provisions admitting eugenic abortion unconstitutional (case sign. K 13/17). After the 2019 winning parliamentary elections, a group of deputies renewed the motion (case sign. K 1/20). They stated that the said provisions sanction eugenic practices in relation to the unborn child, thereby denying it respect and protection of human dignity and, moreover, make the protection of such a child's right to life dependent on its health status, which is tantamount to illegal direct discrimination. That abortion induced for eugenic reasons is a manifestation of discrimination against people with disabilities has been stressed by some individuals and organizations that advocate the broadening of the scope of protection of human rights. This objection has also been voiced, for example, in Great Britain, United States, Germany or Japan.[3]

The content of the MPs' complaint to the Constitutional Tribunal

The group of MPs submitted a motion to declare, inter alia, Article 4a(1)(2) of Family planning act 1993 i.e. a provision admitting abortion for eugenic reasons unconstitutional. In their motion, the MPs claim in the challenged provision is incompatible with the constitutional principle of human dignity[4] by allow-

1 Article 152 of Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz.U. nr 88, poz. 553 ze zm.) [Act of 6 June 1997 the Penal Code (Journal of Laws No. 88, item 553 as amended)].

2 Article 4a(1) of Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (Dz.U. nr 17, poz. 78 ze zm.) [Act of 7 January 1993 on the Family Planning, Human Embryo Protection and Conditions of Admissibility of Termination of Pregnancy (Journal of Laws No. 17, item 78 as amended)].

3 Robin Downie, "Disability and Healthcare: Some Philosophical Questions," in *Inspiring a medico-legal revolution: Essays in honour of Sheila McLean*, ed. Pamela M. Ferguson and Graeme T. Laurie (London, New York: Routledge 2016), 109–124; Massao Kato, *Women's Rights?: The Politics of Eugenic Abortion in Modern Japan*, Amsterdam: University Press, 2009; "Parliamentary Inquiry into abortion on the Grounds of Disability, 2013, accessed January 20, 2021 https://dontscreenusout.org/wp-content/uploads/2016/02/Abortion-and-Disability-Report-17-7-13.pdf; Marsha Saxton, "Disability Rights and Selective Abortion," in *The Disabilities Studies Reader*, ed. Lennard J. Davised (New York: Routledge 2013), 105–116; Rickie Solinger, ed., *Abortion Wars: A Half Century of Struggle 1950–2000*, University of California Press, 1998.

4 Article 30 of Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 ze zm.) [The Con-

ing eugenic practices in relation to the unborn child, thereby denying it respect and protection of human dignity. The authors of the motion indicate that if the constitutional standard set out in Article 30 is not met, they demand a judgement that the provision admitting eugenic abortion is against the principle of legal protection of the life of every human being (Article 38) by legalizing eugenic practices in the area of the right to life of a child not yet born and makes the protection of the right to such a child's life dependent on its health status, which is tantamount to illegal direct discrimination. The MPs emphasize that they raise their objection based on the violation of the prohibition of discrimination in respect of the right to life as an alternative if the objection related to the violation of the principle of human dignity does not hold because the principle of human dignity establishes the primary prohibition of differentiation of the very value of people's lives and their legal segregation.[5]

In connection with the challenged provisions, the Speaker of the Sejm of the Republic of Poland also presented his position in the proceedings before the Constitutional Tribunal. In his letter dated 1 March 2018, the Speaker approves the MPs' motion and requests that the challenged provisions be declared unconstitutional. It reads, among other things, that it is unacceptable to justify eugenic abortion either by caring for the psychological comfort of the woman or by concerns about the quality of the genetic information carried by the foetus. Accepting this kind of argument would amount to the statutory approval of negative eugenics leading to genetic control. This would create discrimination on the basis of genetic qualities, which is disallowed based on the general prohibition of discrimination contained in Article 32 of the Polish Constitution.[6] The Prosecutor General also expressed his position on the matter in a letter of 28 May 2018. He confirmed that the challenged provision was incompatible with the Polish Constitution and put forward his own arguments in favour of this thesis, without, however, directly referring to the objection related to discrimination.[7]

Human foetus as an object of discriminatory action

When reflecting on whether the human foetus can be an object to discriminatory action and, at the same time, aspiring to counteract discrimination in a real and comprehensive manner, a number of general reservations should be made. First, generally speaking, one of the disguised forms of discrimination of human beings may be delegitimation, including social exclusion by employed legal regulations.[8] At the extreme, it may manifest itself in depriving the members of a group of their subjectivity at the normative level (normative dehumanization).

Historically speaking, the most prominent examples of legal exclusion were predated by ideological dehumanization of members of a discriminated group based on the assumption that full humanity can be achieved in stages through a biological or social process. In consequence, denying a person's "human" or "fully human" status at an ideological level would lead to the

stitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended)].

5 K 13/17 – wniosek grupy posłów na Sejm RP [K 13/17 – motion of the group of MPs], https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%2013/17, accessed August 21, 2020.

6 K 13/17 – Stanowisko Sejmu [K 13/17 – Position of the Sejm]), https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%2013/17, accessed August 21, 2020.

7 K 13/17 – Stanowisko Prokuratora Generalnego [K 13/17 – Position of the Prosecutor General]), https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%2013/17, accessed August 21, 2020.

8 Daniel Bar-Tal, "Delegitimization: The Extreme Case of Stereotyping and Prejudice," in *Stereotyping and prejudice: Changing conceptions*, eds. Daniel Bar-Tal, Carl Friedrich Graumann, Arie W. Kruglanski, Wolfgang Stroebe (New York: Springer Science & Business Media 2013), 168–182; Daniel Bar-Tal, and Philip L. Hammack, "Conflict, Delegitimization, and Violence," in *The Oxford Handbook of Intergroup Conflict*, ed. Linda R. Tropp (Oxford University Press 2012), 29–52; Adriano Zamperini, Maria Luisa Menegatto, "Giving Voice to Silence: A Study of State Violence in Bolzaneto Prison during the Genoa G8 Summit," in *Conflict and Multimodal Communication: Social Research and Machine Intelligence*, eds. Francesca D'Errico, Isabella Poggi, Alessandro Vinciarelli, and Laura Vincze (Roma: Springer 2015), 185–206.

exclusion of subjectivity and reduced legal protection. In the past, this type of mechanism was employed, for example, to children, slaves, racial minorities, criminals, class enemies, and individuals with physical or mental disabilities.[9]

Formally, no discriminatory practices are in place since such legally excluded persons are not considered subjects of freedoms and rights. They are denied legal subjectivity, rights, or claims, meaning that they have no such rights granted by the system that can be limited. A possible legal protection may then have only its substantive scope and not the personal scope as its content and boundaries are arbitrarily set by the authorities or dependent on the will of other rightholders. It is also important to bear in mind that legal exclusion may, or may not, involve the intention of doing harm to or disadvantaging the members of a specific group. It also occurs when it deprives, or fails to grant, subjectivity or rights for the sake of "interest" of the excluded persons[10]. Hence, good intentions do not guarantee that no legal exclusion occurs. It is noted that in the event of full subjective exclusion it may even go unnoticed by those who remain subjects of law.[11]

Under Polish law, the principle of equality laid down in Article 32 of the Polish Constitution protects against discrimination and legal exclusion. This principle contains an imperative of equal application of the law to all who are subjects to legal norms and lays down the rule of equality before the law, i.e. making such laws that would neither discriminate nor privilege anybody under the law. Thus, public authorities are bound by this principle in their law-making activity. This is a fundamental principle, so it is general enough to cover all freedoms, rights, and duties. The principle of equality is underpinned by primary equality based on the fact that all people belong to the same species (genus) and possess the attributes of humanity[12]. The personal scope of the principle of equality is framed by the concepts of "all" and "nobody." The use of the term "all" should therefore be understood as "everybody," meaning "everybody has the right." In this way, the constitutional legislator permits the broadest possible determination of subjects covered by the principle of equality. Therefore, the personal scope of

Denying a person's "human" or "fully human" status at an ideological level would lead to the exclusion of subjectivity and reduced legal protection.

9 Lasana T. Harris, Susan T. Fiske, "Social Neuroscience evidence for Dehumanized Perception," *European Review of Social Psychology*, vol. 20(2009), 192–231; Nick Haslam, "Dehumanization: An Integrative Review," *Personality and Social Psychology Review*, vol. 10(2006), 252–264; Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser, Elaine Webster, *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, Springer 2010; Mari Mikkola, *The Wrong of Injustice: Dehumanization and Its Role in Feminist Philosophy*, Oxford University Press, 2016; Alessandra Roncarti, Juan A. Pérez, Marcella Ravenna, Esperanza Navarro-Pertus, "Mixing Against Nature: Ontologization of Prohibited Interethinic Relationships," *International Journal of Psychology*, vol. 44/(2009), 12–19; Cristian Tileaga, "Discourse, Dominance, and Power Relations: Inequality as a Social and International Object," *Ethnicities*, vol. 4/6(2006), 476–497.

10 Piotr Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [*Commentary to the Constitution of the Republic of Poland of 2 April 1997*], Warszawa: Liber, 2000, p. 51.

11 Margaret Davies, "Exclusion and the Identity of Law," *Macquarie Law Journal*, vol. 5(2005), 5–30.

12 Maria Bosak, "Zasada równości w Konstytucji RP i w prawie międzynarodowym" ["The Principle of Equality in the Constitution of the Republic of Poland and in International Law"] *Ius et Administratio*, no. 3(2005), 43–54.

the principle should pertain to every human being.[13] Nowadays, not only Polish citizens or natural persons but also legal persons and even entities without legal personality can rely on the principle of equality. This is the outcome of the implementation of the imperative of broad application of the principle of equality.[14]

The principle of equality is rested on primary equality, i.e. the fact that all people belong to the same species (genus), i.e. they possess the attributes of humanity (human DNA) and the same dignity. The starting point in determining the personal scope of the principle of equality is therefore the principle of protection of human dignity.[15] This principle laid down in Article 30 of the Polish Constitution is fundamental for the defence of the person against exclusion. A state governed by the rule of law respects the human being, in particular his or her dignity. The constitutional legislator attached constitutional significance to human dignity, thus making it a baseline for the system of values that resonate in the constitution and, at the same time, the cornerstone of the entire legal order (K 11/00). Dignity is regarded as an inherent and inalienable interest that is universal and is enjoyed by every person regardless of their attributes. Dignity is not a quality bestowed by the state and is ranked higher than the state. The constitution excludes the legal segregation of people into those who enjoy inherent rights and other "defective" or "flawed" persons who fall out of the legal protection. The constitutional protection of dignity determines the universality of constitutional rights. A person would be stripped of their dignity, for example, in a situation in which they would be objectified by action taken by the authorities, and their role would be reduced that of an exploited entity without legal subjectivity. The legislator is not empowered to decide on human subjectivity, hence the absolute prohibition of objectification (normative dehumanization).

The principle of equality is rested on primary equality, i.e. the fact that all people belong to the same species (genus), i.e. they possess the attributes of humanity (human DNA) and the same dignity.

Resting the constitutional guarantees of protection of human and civil rights, freedoms and duties upon the principle of the protection of the inherent human dignity determines the meaning of the concept of "person" in the constitution, and the interpretation of this concept implies the personal scope of human rights included in that basic law. The protection of human dignity requires that the referent of the constitutional concept of "person" be defined as broadly as possible, i.e. without exclusions, in full and completely. Interpretation of the concept of "person" by public authorities may not lead to the exclusion of any person from the category of subjects vested with human rights, regardless of any differentiating and secondary quality that may define them, including the phase of development, health status, race, origin, etc. Essentially, human dignity does not allow any exemptions,

13 Anna Łabno, "Zasada równości i zakaz dyskryminacji" ["The principle of equality and non-discrimination"] in *Wolności i prawa jednostki oraz ich gwarancje w praktyce* [*Freedoms and rights of an individual and their guarantees in practice*], ed. Leszek Wiśniewski (Warszawa: Wydawnictwo Sejmowe 2006), 35–51.

14 Jacek Falski, "Ewolucja wykładni zasady równości w orzecznictwie Trybunału Konstytucyjnego" ["Evolution of the Interpretation of the Principle of Equality in the Case Law of the Constitutional Tribunal"] *Państwo i Prawo*, no. 1(2000), 49–54.

15 Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* [*Polish Constitutional Law: The Outline of the Lecture*], Wolters Kluwer Polska, 2006.

which means that it is linked to the affiliation with the human species (the full scope of the category of "person" without any specifying attributes). By admitting the option of exclusions affecting the personal scope would strip the principle of protection of dignity of its meta-legal character; any interpretation to the same effect would be contradictory, and the principle would lose its axiological justification and normative value. That would lead to circumstances in which the legal subjectivity and the protection of human rights and freedoms would, contrary to the purpose of the principle, not result from humanity in its biological (genetic) sense but from "normative humanity, that is, an arbitrary decision of the authority as to who should be considered a person.

By allowing the slightest breach in the personal scope of Article 30 of the Polish Constitution, for example, by agreeing to exclude the human being in their prenatal stage of development, this kind of legal exclusion mechanism (dehumanization and delegitimation) could be readily applied to other categories by designing various criteria reflecting the most prominent current ideological trends. An excluding attribute could be infancy as a developmental phase, old age, disability (e.g. profound disability or retardation), dangerous mental illness, type of committed crime (e.g. of a terrorist nature), and even, although it is hard to imagine today, gender, religion, race, nationality, political views, etc.

The Polish Constitution says that human dignity is "inherent." The term is synonymous with such words and concepts as natural, innate, self, inbred, immanent, inseparable, inborn, internal, native, given by nature. Consequently, "inherent" refers human dignity to human identity defined by the species (genus) and does not indicate any temporal or spatial constraints narrowing dignity to a specific human developmental stage (postnatal period) or a place of development (outside the womb). The term "inherent dignity" used by the constitutional legislator has an inclusive function, i.e. that of protecting against delegitimation, and not an exclusive one and highlights the immanent relationship between dignity and the human being; it does not establish a physiological or obstetric exclusion criterion, either. The inherent human dignity does not emerge upon birth but is vested in the person before, during and after birth, but also in situations where there is no physiological delivery at all, for example, in the case of caesarean section, post-mortem delivery and, prospectively, also in cases of foetal development in an artificial uterus (incubator). The terms "person" and "inherent dignity" should therefore also refer to a human being in the prenatal stage of development as he or she has their own individual identity, as indicated by the DNA structure which is autonomous of that of the pregnant woman. Acknowledgement of the legal protection of the dignity of the human foetus provides grounds for including it in the personal scope of the principle of equality.

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Discrimination of foetus with malformations

In some cases, discrimination is justified and legally admissible. The differentiation of the legal position of individuals having a specific significant (relevant) quality does not violate the principle of equality if it is justified, proportionate and relies on the constitutional values. However, having a closer look at the protection of human life in the prenatal stage of development (a relevant quality) under penal law, then, given the eugenic grounds, what can alter its scope (and alter dramatically because upon the consent of the woman depriving the foetus of its protection until its full ability to live on its own) is highly probable foetal malformations leading to a severe and irreversible impairment or an incurable disease that poses a threat to the life of the foetus. Pursuant to the provision of Article 4a(1)(2) of Family Planning Act 1993, which fails to mention any threats to the physical or mental health of the pregnant woman, the basis for a major limitation of the penal-law protection of a conceived child's life (exclusion of protection guaranteed under Art. 152 of Penal Code 1997 is the probability of a bad health status of the foetus.

Meanwhile, care for human health, including in the prenatal stage of development, is a legal duty. The duty to take action for the protection of the health of the human foetus is voiced, inter alia, in Article 68(1) of the Polish Constitution and statutory law.[16] After a careful analysis, it appears that in the entire Polish legal system, apart from eugenic grounds for abortion, there is no legal basis for the reduction of the value of human life and its legal protection on account of poor health, disability, or terminal disease. Quite the contrary, there are standards that guarantee terminally ill, disabled or impaired persons respect for their dignity, equal treatment, and even special protection.[17] Standards of legal protection reside on the foundation of special care for the lives of seriously ill, impaired and disabled people and bolster the argument that even this kind of affliction like a severe disability or incurable disease cannot (per se) offer an excuse for the restriction of rights, in particular to the legal protection of life. The principle of protecting persons unable to determine their legal position independently is ranked among the basic principles of law. Any doubts as to the scope or level of protection of "structurally weak" individuals must be resolved in favour of that protection[18]. In this context, the provision of Article 4a(1)(2)

16 Art. 2 of Family Planning Act 1993; Art. 26 of Ustawa z 5 grudnia 1996 o zawodach lekarza i lekarza dentysty (Tekst jednolity Dz.U. 2011, nr 277, poz. 1634) [Act of 5 December 1996 on the Professions of Doctor and Dentist (Consolidated text: Journal of Laws of 2011, No. 277, item 1634)]; Art. 3(2)(1) in conjunction with Art. 2(1) of Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka (Dz.U. nr 6, poz. 69) [Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws of 2000, No. 6, item 69)].

17 They are established, inter alia, in Art. 68 in conjunction with Art. 30 of the Polish Constitution and also Art. 10 of Konwencja o prawach osób niepełnosprawnych sporządzona w Nowym Jorku dnia 13 grudnia 2006 r. (Dz.U. z 2013 r., poz. 1169) [Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 (Journal of Laws of 2013, item 1169)]; Art. 2 and 23 of Konwencja o prawach dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r. (Dz.U. z 1991 r., nr 120, poz. 526) [The Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526)]; Art. 2 of Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego (Tekst jedn. Dz.U. z 2011 r., nr 231, poz. 1375) [Act of 19 August 1994 on the Protection of Mental Health (Consolidated text: Journal of Laws of 2011, No. 231, item 1375)]; Art. 20(2) of Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta (Tekst jedn. Dz.U. z 2013 r., poz. 159 ze zm.) [Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman (Consolidated text: Journal of Laws of 2013, item 159 as amended)]; Art. 9(1)(4) of Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej (Tekst jedn. Dz.U. z 2013 r., poz. 217) [Act of 15 April 2011 on Medicinal Activity (Consolidated text: Journal of Laws of 2013, item 217)]; Art. 15, 27, 33 of Ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (Tekst jedn. Dz.U. z 2008 r., nr 164, poz. 1027 ze zm.) [Act of 27 August 2004 on Healthcare Services Financed from Public Funds (Consolidated text: Journal of Laws of 2008, No. 164, item 1027 as amended)].

18 Leszek Bosek, "Konstytucyjne podstawy prawa biomedycznego w orzecznictwie TK" ["Constitutional Basis of

of Family Planning Act 1993, which offers autonomous eugenic grounds for the admissibility of termination of pregnancy with the consent of the woman, thus excluding the protection of the life of the conceived child provided for under Article 152 of Penal Code 1997has no axiological justification.

> **In the entire Polish legal system, apart from eugenic grounds for abortion, there is no legal basis for the reduction of the value of human life and its legal protection on account of poor health, disability, or terminal disease.**

When looking at the values in question from a different angle, i.e. the protection of the rights of the pregnant woman, who is the biological and legal guarantor of the life and development of her conceived child, when comparing the legal position of the pregnant woman and her conceived child, the principle of proportionality should be invoked and, at the outset, we should compare the woman's right to have her life and health protected and the same right vested in the impaired foetus. Based on such a comparison, it naturally follows that abortion would be justified if the continuation of pregnancy in the event of foetal malformations posed the risk of death or serious damage to the health of the pregnant woman. Attempts sometimes made in the doctrine to justify eugenic grounds by a threat to the health of the pregnant woman are misguided since if foetal defects in a specific case created this kind of hazard to the woman, termination of pregnancy would be admissible on medical grounds.[19] In such cases, eugenic grounds overlap with medical grounds, thus isolating the eugenic reasons for abortion to protect the life and health of the pregnant woman cannot be sustained logically.[20] An attempt to explain that the eugenic grounds are related to health but are just described differently in order not to have to assess the mother's psychological resistance in the event of foetal malformations, is not sufficient. It would be unacceptable to seriously undermine the protection of the value of human life in the prenatal stage of development by the sole need to avoid the demonstration of existence of the medical grounds. The specific eugenic grounds do not refer to the health of the pregnant woman and cannot be interpreted as a presumed threat to her mental health.

Another argument to justify the admissibility of termination of pregnancy due to potential foetal defects is the view that the possible moral requirement for a woman to give birth to a disabled child exceeds what is expected in the law, whose standards do not require people to be morally perfect but encourage less demanding ethical conduct. The birth of a seriously impaired or terminally ill child is considered a heroic attitude, and no law can demand that. The general norm, however, imposes the duty of protection of human life and health at the prenatal stage of development. Hence, we cannot ignore the fact that

Biomedical Law in the Jurisprudence of the Constitutional Tribunal"] *Zeszyty Prawnicze BAS*, vol. 22(2009), 29–30.

19 Art. 4a (1)(1) of Family Planning Act 1993.

20 Michał Królikowski, "Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerwania ciąży" ["The Problem of Interpreting the So-called the Eugenic Premise which is the Admissibility of the Termination of Pregnancy"] in *Współczesne wyzwania bioetyczne* [*Contemporary Bioethical Challenges*], eds. Leszek Bosek, and Michał Królikowski (Warszawa: C.H. Beck 2010), 175–183.

the birth of a disabled child does not impose an absolute obligation to look after it on the mother. There is an option of putting a disabled child up for adoption (including the possibility of leaving it in hospital), placement in a foster family or in a competent care institution. Mother's lowered standard of living can-

To regard the birth of an impaired child as an act of heroism rather than a natural consequence of pregnancy may lead to a dangerous view that killing disabled children before birth rather than allowing them to be born and offering them prenatal and postnatal care is a social standard.

not provide exclusive grounds for admissibility of abortion because it falls under the so-called social grounds already rejected in constitutional case-law (K 26/96, 1997). A collision of parallel values should be taken into account.[21]

Reinforcing discriminatory attitudes

The admissibility of abortion on eugenic grounds produces negative effects given the educational and motivational function of law and can lead to discriminatory attitudes towards people with disabilities also after their birth. To regard the birth of an impaired child as an act of heroism rather than a natural consequence of pregnancy may lead to a give rise to a dangerous view that killing disabled children before birth rather than allowing them to be born and offering them prenatal and postnatal care is a social standard. There are concerns that opinions that people with congenital disabilities should basically not live because the law offers the option of eugenic abortion may not be uncommon, and that parents, if they decided to accept and raise a seriously impaired or terminally ill child, should handle their situation alone because it was their heroic, yet free decision. If they decided so, it means that they were able to afford it emotionally and financially, and they did it only on their own account; by extension, they should not, for example, seek extra social benefits or expect the state or the local government to offer assistance to the child later on. Such opinions have been voiced in the Polish mass-media. One journalist argued that the budget cannot be stretched any further, and that experiencing unforeseen difficulties is not the same as living with the effects of a heroic decision. This type of stigmatization that violates the dignity of disabled children and their parents must not be amplified any further.

Also in states where abortion is widely available, there are opinions that eugenic practices, such as pre-birth selection, are regarded as discriminatory.[22] Bioethicists warn against a diminishing tolerance for

21 Legal acts regarding public financial support for mothers and children with disabilities i.a. Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej (tekst jedn. Dz.U. z 2013 r. poz. 135) [Act of 9 June 2011 on Family Support and Foster Care System (consolidated text: Journal of Laws of 2013, item 135)]; Ustawa z dnia 12 marca 2004 r. o pomocy społecznej (tekst jedn. Dz.U. z 2013 r. poz. 182) [Act of 12 March 2004 on Social Assistance (consolidated text: Journal of Laws of 2013, item 182)].

22 Oktawian Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy* [*Human Biogenesis in Bioethical Standards of the Council of Europe*], Warszawa: Oficyna, 2011.

the disabled and their social stigmatization[23]. Prenatal eugenics denies the right to equal treatment, and eugenics programmes subordinate the interests of the individual to social interests.[24] Elimination of disability and disease by abortion can render any form of disability or handicap socially unacceptable. It is stressed that it is not far from differentiating the value of life at the prenatal stage based on the physical or psychological qualities of the organism to the differentiation of the value of human existence in the postnatal phase and the denial or restriction of legal protection of the mentally or physically defective persons.[25] Moreover, the availability of eugenic abortion reinforces the concept that women are extremely harmed by their disabled child. As a consequence, this may give rise to a desire to establish the right to a perfect child: the admissibility of sex-selective abortion is not far from it.

It is argued that the real burden to be shouldered by the mothers of disabled children is not the actual child's disability as such (per se), but it is the lack or impeded access to the financial and organizational assistance by the state.[26] The legal solutions permitting eugenic abortion are said to be flawed by being based on a false and stigmatizing assumption that the life of a person with a disability must be unhappy, and at the heart of social policies they put the ethics of productivity, which solidifies the phenomenon of social exclusion of people with disabilities.[27]

23 Maja Grzymkowska, *Standardy bioetyczne w prawie europejskim* [*Bioethical Standards in European Law*], Lex, 2009.

24 Julita Jabłońska, „Prawo do integralności w Karcie Praw Podstawowych Unii Europejskiej" [„The Right to Integrity in the Charter of Fundamental Rights of the European Union"], in *Prawa człowieka wobec rozwoju biotechnologii* [*Human Rights in Relation to the Development of Biotechnology*], eds. Jelena Kondratiewa-Bryzik, and Katarzyna Sękowska-Kozłowska (Lex 2013), 4–5.

25 Grzegorz Kowalski, „Warunki dopuszczalności przerywania ciąży a prawna ochrona *życia* poczętego" ["Conditions for Permitting Termination of Pregnancy and Legal Protection of the Conceived Life"] in *Dziecko. Studium interdyscyplinarne* [*Child. An Interdisciplinary Study*], eds. Ewa Sowińska, Elżbieta Szczurko, Tadeusz Guz, and Paweł Marzec (Lublin: Wydawnictwo KUL 2008), 203–230.

26 Saxton, *Disability rights…*, p. 95.

27 Kato, *Women's rights…*, p. 68, 223.

Conclusion

On 22 October 2020, the Polish Constitutional Tribunal has declared provisions admitting eugenic abortion unconstitutional (case sign. K 1/20). Tribunal stated that the said provisions sanction eugenic practices in relation to the unborn child deny respect and protection of human dignity (Art. 30) and the principle of legal protection of the life of every human being (Art. 38). Tribunal has not referred to another objection indicated in the MP's motion that making the protection of unborn child's right to life dependent on its health status was tantamount to illegal direct discrimination (Art 32). Nevertheless, in the context of the judgement it is important to underline that a negative assessment of a disease, handicap, or disability is not legally tantamount to a negative assessment of the affected human being, their dignity and the value of their life. The axiological foundations of Polish constitutional law do not encourage reduction of the value and legal protection of human life based on a poor health status. In contrast, the sick have the right to have their health protected, and the disabled are guaranteed easier access to healthcare. Human life valued so highly on normative grounds, regardless of the person's health condition, means that the life of a conceived child with malformations should be protected under penal law to the same extent as the life of a conceived and properly developing child. The admissibility of selective abortion based on the health status of the foetus must be recognized as unacceptable, just as abortion based on gender, race or social origin of the foetus. Furthermore, selective abortion based on potential disability of the foetus supports a false assumption that life of a disabled person must be unhappy, and that one of the major problems of mothers, families and society is living with people with disabilities. This could result in the stigmatization of the disabled and the fossilization and deepening of discriminatory and exclusionary attitudes.

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Wim Decock. *Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius* (Brussels: Zones Sensibles, 2019), 248

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Leonard Lessius was one of the most accomplished philosophers of the Salamanca School whose great contribution to the study of law lies in the use of economic analysis to study legal institutes. The book, which is the subject to the present review, gives account of his scientific achievements. Among many other questions tackled by Lessius, the review discusses the evolution of the pacta sunt servanda principle, the morality and legality of interest, price mechanism, competition as well as the economic aspects of the salvation of one's soul. Attention is also paid to influence of Lessius on contemporary and later authors and timelessness of some of his theories.

Key words: School of Salamanca, ius commune, natural law, interest, banking, competition law

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In our times it is hard to overlook the popularity of law and economics which is a scientific method or rather an approach that uses economic analysis to study legal institutes. However, this is not a purely modern phenomenon. Ancient philosophers[1], lawyers[2] and subsequently scholastics scholars often proceeded in a similar way. Nevertheless, few of them have employed this approach to such an extent as Leonard Lessius whose work is the subject of the reviewed book authored by Professor Wim Decock, who was at the time of publication of the book Professor of Roman Law and Legal History at the Catholic University of Leuven, the very city where Lessius lived, lectured and where he also found his resting place. A short review of this book in English has already been published, but

1 E.g., The case of the merchant of Rhodes discussed by Diogenes of Babylon, Antipater of Tarsus and Cicero which mentioned *infra*.

2 E.g., D. 18.1.1., where Paulus discusses the nature of money and origin of the contract of sale.

the author of this review believes it deserves more thorough discussion.[3]

At the very beginning of the book, the author presents the world in which Lessius lived. It was a world turmoil and changes caused by Reformation and Counter-Reformation, rise of new philosophical and political doctrines as well as overseas discoveries which also had numerous economic implications. All of these posed new challenges for the human spirit, to which contemporary philosophers were trying to find an answer: Among them were the leading Spanish scholastics who formed the famed School of Salamanca.[4] Lessius was deeply influenced by the teachings of this school, not only because at the time the Netherlands was part of the Spanish Empire but also because he himself studied in Rome, where his teacher was no other than Francisco Suárez, one of the leading representatives of the said school. The first chapter also describes other aspects of Lessius life and his rich personality. The author rhetorically asks whether he was an economist, a saint or a lawyer. Based on his voluminous work and commendable conduct one may conclude that he was all that and even much more.

In his famous work *Die protestantische Ethik und der Geist des Kapitalismus*, Max Weber asserted that the Protestant and especially Calvinist ethics significantly contributed to the development of capitalism. It should be noted Weber himself later mitigated this view and acknowledged that certain Catholic authors, such as Bernardin of Siena, had a positive attitude toward capitalism. However, this does not satisfy Decock who points out that Weber's work is necessarily imperfect as it simply omits a significant number of sources. A vast body of scholastic literature contradicts the thesis of the hostility of Catholicism towards capitalism. Lessius's magnus opus *De iustitia et iure* alone contains enough material to dispel any doubts about it. In the following chapters of his book the author proves this view by meticulous step by step analysis.

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The third chapter, called *pactum serva*, deals with the origin and development of the doctrine of the general binding nature of contracts from the High Middle Ages to the present day while emphasizing Leonard Lessiuses role in this process to which he contributed. Special attention is paid to his argument regarding the binding nature of contracts. In the Middle Ages, their binding nature resulted from the fact that the witness of all covenants among Christians was God himself and his Church. However, in Flanders of Lessius's lifetime religious unity no longer existed. Among those who met and traded on the local markets were Catholics, Anglicans, Lutherans and Calvinists, so the Catholic Church could no longer serve as the guarantor of their contracts. Older scholastics were of the opinion that agreements with heretics were not binding, but Lessius disagreed with them. In his opinion, it is necessary to observe these contracts as well, because the principle *pacta sunt servanda* is contained in the natural law which could only be derogated by the positive law of God contained in the Bible and since the Scripture does not contain the opposite norm the agreements must indeed be kept.

The following part of the book is devoted mainly to issues of economic and moral character. Lessius was not a theorist living in an ivory tower, but a practical

3 Robert Fastiggi, "Wim Decock, Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius," *Journal of Jesuit Studies*, vol. 8, no. 1 (2020), 153–156.

4 For more information on the School of Salamanca cf. e.g.: Alejandro Antonio Chafuen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (Lanham, 2003).

man. He left the lecturing halls of Leuven and set out for Antwerp, which at the time was a bustling trading hub where complicated financial transactions such as discount of promissory notes, transfers of debt-instruments and forwards were already taking place. In case of them, there was a suspicion that they were nothing else than an interest-bearing loan (*mutuum*), which was contrary to the church doctrine of the time. Let us imagine the following situation. A debtor issued a promissory note in which he promised to pay his creditor 100 florins. Then someone bought the said note for 97 florins and it was subsequently repaid to him. Consequently, he made a profit of 3 florins. However, these 3 florins could be considered an interest and thus a violation of the church doctrine on usury. Lessius refused such a view. He realized that the money or any other goods which are present are of greater value than the goods that are absent because what is present is already at our disposal and is therefore secure. The future, however, as well as future goods is uncertain and therefore less valuable. He expressed this in the following words: *pecunia absens minus valet quam pecunia praesens*. This is nothing else than the application of the phenomenon of time preference known from contemporary economics![5] However, Lessius does not stop there and goes further in his reasoning leaving the field of economics and returning to that of law. He concludes that liquid assets such as cash are generally preferred to uncertain future money. Therefore, the present case is not an interest-bearing loan, but a sale (*emptio-venditio*), the subject of which is the purchase of a claim. This claim does not equal money and it could be valued less than its nominal value since it is uncertain. Such conduct does not violate the canonical ban on usury.

The issue of usury, or in today's terms interest, is closely related to that of the fair price. While presenting his opinion of the matter, Lessius uses the hypothetical example of the merchant of Rhodes, which was already discussed by the Hellenic Stoics as well as by Cicero who is our primary source on it.[6] According to this example, a merchant from Alexandria arrived on the island of Rhodes, where there is a hunger, with a shipment of grain. Unlike the locals, however, he knows that numerous other ships carrying provision are about to arrive shortly. He therefore solves the dilemma of whether to conceal the arrival of additional supplies and sell his grain for a high price, or whether to disclose their arrival to the inhabitants of the island and thus deprive himself of a hefty profit. The author does not immediately reveal Lessius's opinion on the matter and uses the case to draw a more general picture of argumentation employed by him in similar cases. The fundamental concept of his argumentation is a notion of a fair price, which he basically views the same way as Aquinas.[7] According to him, the fair price

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5 Cf. e.g., Shane Frederick, George Loewenstein and Ted O'Donoghue, "Time Discounting and Time Preference: A Critical Review," *Journal of Economic Literature*. vol. 40, no. 2 (2002), 351–401.

6 Cicero, *off.* 3,12: *Si exempli gratia vir bonus Alexandrea Rhodum magnum frumenti numerum advexerit in Rhodiorum inopia et fame summaque annonae caritate, si idem sciat complures mercatores Alexandrea solvisse navesque in cursu frumento onustas petentes Rhodum viderit, dicturusne sit id Rhodiis an silentio suum quam plurimo venditurus? Sapientem et bonum virum fingimus; de eius deliberatione et consultatione quaerimus, qui celaturus Rhodios non sit siid turpe iudicet, sed dubitet an turpe non sit.*

7 However, there are many deviations among these two authors when it comes to the application of said concept. Cf. Wim

is determined by the general valuation of the entities participating in the relevant market, i.e., all traders in a given city, who take into account the rarity of goods, their usefulness, risks associated with them, etc. This mode of price determination is called common estimation (*aestimatio communis*). However, the knowledge possessed by these subjects is imperfect, only God has perfect knowledge, and therefore, as another great scholar of the Salamanca school Juan de Lugo puts it, it is not possible for a person to determine the exact just price of a thing (*valor iustus mathematicus rei*). The author points out the proximity of this approach to the theory of prices for which Friedrich von Hayek received the Swedish National Bank's prize for the development of economics in 1974 in memory of Alfred Nobel better, but falsely known as the Nobel prize for economics.

Given the above said, however, the question arises as to how, in a world where a fixed fair price exists, can businessmen make a profit without sinning. According to Lessius the businessmen are professionals who can estimate what a fair price will be in the future and use this knowledge to their benefit. They use information, both publicly available and private, to estimate future developments. Publicly available information is available to everyone and therefore serves to determine a fair price. However, a private one is known only to certain persons, so one naturally asks whether it is at all justifiable to make use of it. Lessius, following the example of Thomas Aquinas and especially Luis de Molina, is of the opinion that the use of such information is permitted. Thus, the above-mentioned merchant does not sin when he conceals the arrival of other ships from the people of Rhodes and sells his cargo at the current price, which stems from a general estimation based on the shortage of goods. Likewise, according to Lessius, a businessman may even lie to other competitors about the information available to him. Moreover, he does not condemn insider trading either, by pointing out that it is not officially prohibited by regulations. One feels obliged to point out that our contemporary legal situation is somewhat different. However, the harshness of the conclusions made above is mitigated by the obligations put on the businessmen not to abuse the simplicity (*simplicitas*) of non-professionals. As the author points out, a contemporary lawyer cannot help himself but to see this norm as a means of consumer protection. In short, *nihil novi*.

Every business involves risk, so it is only natural that businessmen try to find ways to mitigate it. One of them is insurance. Already the ancient Romans knew aleatory contracts such as the *fenus nauticum* and it is of little surprise that they were also frequently discussed even by scholars of the Salamanca school such as Domingo de Soto, Luis de Molina, whose contributions the author also represents and, of course, Lessius. The contract of insurance was no longer considered by the late scholastics to be legally or morally problematic. That is why instead of presenting general considerations about insurance, Lessius addresses more specific issues. He bases his reasoning on then-contemporary legal literature devoted to this topic, which he supplemented with his own considerations revealing the same pattern of thinking as in the case of the merchant of Rhodes. He addresses, among others, the question of whether it is possible to conclude so-called late insurance, i.e., to insure against an event that has already occurred, but the parties do not know about it. Let us imagine that a shipowner in Antwerp wants to insure a ship sailing from Chios to Ancona, which has already sunk in the meantime. From the point of view of the *ius commune*, this would be an invalid contract, but it was valid under local law of Antwerp. Lessius considers such a contract to be valid if certain conditions are met. Above all, the parties, especially the insured, must be in good faith, that is they do not know about the shipwreck. There is a time limit after the expiration of which he could no longer claim to be in good faith. This time limit is objectively determinable and is calculated by measuring the distance between the place of the occurrence of the event insured against i.e., the shipwreck and the place of conclusion of the insurance contract which is then divided by the travel time of the information. According to the law of Antwerp the information traveled at a speed of one Roman mile per hour[8], while other legal systems or scholars used a different speed.

Decock, "Lessius and the Breakdown of the Scholastic Paradigm," *Journal of the History of Economic Thought*, vol. 31, no. 1 (2009), 59–65.

8 1 roman mile = 1,479 m.

Among other risks involved in business and trade, there is a risk involved in loans advanced to unreliable borrowers in today's terminology subprimes. These financial instruments are and already in Lessius time were commonly traded and naturally a question arose what their just price is. Lessius allowed the seller to sell them at a price determined by the market, even if its actors did not have all the relevant information and the price determined by them was thus based on incorrect assumptions. However, he considered it illicit to sell subprimes of an insolvent debtor without the seller informing the buyer about the fact. It may seem that the general rule applied in the case of the merchant of Rhodes no longer applies. However, according to Lessius, the information about the debtor's insolvency is in fact an information about the quality of goods themselves and in that case the seller is legally and morally obliged to inform the buyer about the deficiencies of the goods., i.e., loan subject to transfer, at the time of purchase. Therefore, he concluded, if someone sells such debt, that is if he transfers it and receives money for it, without informing the buyer of the debtor's insolvency, he commits a fraud.

The chapter on competition does not take the reader to early modern Flanders as he might expect, but to Western Germany in the 1950s and 1960s. It was during the so-called economic miracle (*Wirtschaftswunder*), when competition law developed as a consequence of Nazi dictatorship which preferred cartelization and control to a free market. However, what might seem a rather exotic excursion is not an end in itself. The author aims to demonstrate the intellectual connection between medieval scholastics and West German ordoliberals represented by such stately figures like Cardinal Joseph Höffner, late Archbishop of Cologne who did much to intellectually underline this connection. The works of his and other authors show that ordoliberalism is or at least originally was not just an economic school of thought, but a complex ideology looking at the economy from a moral, legal and philosophical point of view. Such a holistic view was also shared by scholastics, who like ordoliberals, were mostly socially conservative but economically liberal.

Let us again return to Lessius and his thoughts on competition. It is already the definition of a monopoly he gives that awakens an interest of a contemporary lawyer or economist. According to him, monopoly is every action aimed at fixing prices of tradable goods. Lessius further subdivides these actions into what we would now call agreements restricting competition and abuse of a dominant position. The author draws attention to the Articles 101 and 102 of the Treaty on the Functioning of the European Union which apply the same division. Unlike many other scholastics, Lessius does not base his condemnation of anti-competitive conduct on the Constitution of Emperor Zeno contained in the Code of Justinian[9] or on other regulations of Roman law, nor does he even quote norms of canon law devoted to competition, but rather on more general moral and legal considerations. He addresses, among others, a case concerning conduct of a businessman who has bought grain and does not sell it until the price rises. Following the example of his colleague and friend Luis de Molina, he at first defends such conduct. After all, whoever does so will make a profit on the basis of his foresight and proficiency in business and there is nothing condemnable about it. In the end, however, Lessius acknowledges that if it serves the general public (*utilitas publica*), public institutions may prohibit such conduct, and the prohibition must be complied with. Likewise, a sovereign may authorize or establish a monopoly. Lessius agrees with de Molina, who states that in the end it is generally beneficial that certain public monopolies exist, because the sovereign uses them to raise funds that he would otherwise have to obtain through other means, mostly taxation. Both scholastics also hold the same view in the case of monopoly book publishers. Based on royal privileges, only the publisher who printed the first edition of a book was allowed to continue producing its copies, after

9 C. 4.59.2 pr.: *Iubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad uictum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicito aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus coniuraret aut pacisceretur, ut species diversorum corporum negotiationis non minoris, quam inter se statuerint, venumdentur.*

all the term "copyright" is derived from this privilege. This argument was then developed by Juan de Lugo, another scholar of the Salamanca school, who proposed that similar 10-year privilege should be extended to inventors who could thus benefit from the fruits of their skill (*fructus industriae*). It is hard not to see this as a foreshadow of patents and similar intellectual property rights.

The topic of interest has already been mentioned above, but the book returns to it again in Chapter Eight, this time in connection with banking. At the turn of the 16th and 17th centuries, the money-lending market in Flanders was dominated by Jewish and Lombard bankers who charged high interest rates. The local authorities decided to combat this practice and set up so-called *Monte di Pietà* in Brussels. It was a charitable bank based on Italian example which engaged in pawnbroking. More specifically it advanced loans to the poor at affordable interest rates against collateral. At first sight, the requirement to pay interest may appear to constitute a breach of the canonical ban on usury. After all, this is why many critics opposed the institution at the time, including Cornelius Jansen, the spiritual father of Jansenism. However, Lessius was an ardent supporter and valiant defender of this institution. While doing so, he relied on the works of the Italian Franciscans, because in Italy similar institutions were established a hundred years earlier than in Flanders.

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In particular, the question arose as to how the interest paid by clients to the bank and by the bank to the investors could be justified. In this case Lessius primarily invokes the argument of equity. After all, no one is obliged to provide anything to others without receiving something in return. On the contrary, he who obtains a certain advantage must also bear the costs and, conversely, he who bears the costs is also entitled to the benefits. This principle is already included among the *regulae iuris* contained in *Liber Sextus* issued in 1298 by Pope Boniface VIII. and was often considered the ultimate expression of the principle of equity. Lessius, however, develops his argumentation even further. Not only does he not consider the above-mentioned tripartite agreement to be a violation of the canonical ban on usury, but on the contrary, he considers it to be in the public interest, as the investments made possible by the funds provided lead to prosperity and thus benefit society as a whole.

Whatever topic Lessius addresses he always has one ultimate goal in mind and that is the salvation of the soul. This is also the topic of chapter ten of the book. Protestant theologians strongly opposed the view which was generally accepted in the Middle Ages that the deeds of man are necessary for his salvation. According to them only faith sufficed to achieve this objective. Lessius again firmly defended the Catholic doctrine which is discussed in the most extensive chapter of the entire book aptly called the economics of salvation (*l'économie du salut*). This chapter focuses not only on views of Lessius, but also on the works of other representatives of the School of Salamanca, such as Francisco Suárez and Pedro de Oñate. In their opinion, man enters into a contract with God, according to which he will be saved if he does good deeds. The second of them goes so far as to qualify this contract as *locatio-conductio operarum*, where one undertakes to do good deeds, for which he receives a reward in the form of salvation. One cannot help to see the parallel with the novel *Embezzled Heaven* by Franz Werfel, the main heroine of which also believes she can conclude a contract with God. She promises to finance the studies of her nephew so

he may become a priest and she believes to get indisputable right to salvation in return.

Lessius rejects such a strict contractual qualification. He acknowledges that God is the most righteous and there would not be a problem with performance of the contract on his part. However, this cannot be said about a human who is never able to act in such a way as to fulfill the hypothetical contract properly and to earn salvation. Thus, Lessius considers the biblical references to the covenant between God and people to be metaphorical and not literal.

soul, the body is foreign. This was not the case of Lessius. He does not understand the body as the opposite of the soul, just as he does not understand the effort to acquire worldly wealth to go against the desire for salvation. After all, all these things can be achieved at the same time and it is even easier if one strives to achieve them together. Whoever acts properly in one area of human life is more likely to do so in others. Here, as anywhere else, Lessius manifests his meritocratic approach. However, such an approach necessitates personal and market freedom, both of

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Furthermore, Lessius opposes the Protestant doctrine of predestination, which he considers defeatist. On the contrary, he sees the beauty of Catholic teaching in the ability of man to influence his destiny and to estimate, albeit vaguely, his chance for salvation based on his own deeds. This estimate, as well as individual human acts, can be viewed through market logic. It must be emphasized, however, that Lessius never overlooks the primary role of God's grace, to which man responds of his free will by his acts and deeds. These deeds are a manifestation of man's acceptance of God's grace. This concept is an expression of Catholic orthodoxy. In the author's opinion, it is possible that Lessius did not lean towards a more contractualist conception of the process of salvation, as this could lead to an accusation of Semi-Pelagianism[10], which he had already faced at a younger age, and it was certainly not an experience he wanted to repeat.

The fact that Lessius was a truly versatile scholar is also shown by his work *Hygiasticon* dedicated to a healthy lifestyle. It might seem that to one who is primarily concerned with the questions of the human which Lessius vigorously defends. After all, such views resonate with the spirit of capitalism far better than Calvin's teaching of predestination. It is a pity that Max Weber himself cannot be confronted with this work of Professor Decock. However, the same effect will be achieved if at least readers of Weber's work become acquainted with it. Perhaps then they will look at him and his theories a little more critically and if they will learn something from the wisdom of the Oracle of the Netherlands as Lessius is sometimes called, all the better.

The book clearly summarizes voluminous work of Leonard Lessius while primarily focusing on his writings devoted to the legal and moral dimension of economic issues. Furthermore, it does not focus only on him, but presents his work in the context of the opinions of other scholars of the second scholasticism, his opponents and even followers. The storytelling style, in which the author clearly explains complex legal and economic problems, as well as the extensive footnote apparatus, which is not located within the text, but at the end of the book, contributes to the fluency of the text. The book is written in French, which further underlines the reading experience. Therefore, one can only recommend it to all

10 Pelagianism is a teaching stating that a person can achieve his own salvation by his own means without divine grace.

connoisseurs of law, economics, philosophy, history and their mutual contexts as well as to those who simply enjoy French language.

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