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JUSTICE AS THE CHIEF VALUE OF LAW

Research Assumptions

I have adopted, primarily for cognitive reasons, the following assumptions: 1. the chief position and importance of justice as the value of law, 2. the connection of truth and justice, 3. axiological nihilism in the Marxist theory of state and law, 4. the right representation of justice by natural law thought, 5. the depreciation of justice by the thought of legal positivism, 6. the indispensable need for a category of justice in the processes of making and applying the law, 7. the clash between the justice-oriented understanding of law making and law application and the understanding of it in terms of legality, 8. the search for a compromise between the justice-oriented and the legality-based understanding of law.

These assumptions reflect, in the light of justice as the chief value of law, various ways of presenting the law: in terms of description, evaluation, interpretation, and postulates. These have distinct references to the transformation of the political structure now underway in post-socialist countries, especially in Poland.

Justice and Law

There has never been any doubt about the most intimate connection of law and justice. The etymology of the Latin term *ius* (law) is related to the Latin word for justice, *iustitia*. To a certain extent, defined by the scope of legal regulation, justice is implemented with the aid of law. Not every law, however, is capable of implementing justice. Only the law that is an agreement with moral values, with good, can achieve it. Abuse of confidence for combining law and justice by some lawmakers that create laws contrary to morality and thereby unjust made it necessary to distinguish between legality

legality and justice. It is an abuse to recognize legality as a symbol of formal justice contrasted with material justice as consistent with the canons of good. Formal justice also expresses protection of certain material values[1].

Justice as the chief value of law serves as a criterion for assessing other values: institutions of the political system, social systems, individual and group actions. Those other values serve as the basis of classification and systematization of various conceptions of justice. In view of the connection of those conceptions with the law, the most important role is probably played by their division into legalistic and non-legalistic conceptions of justice. The legalistic conceptions give the content of justice the value of legally binding force. The non-legalistic conceptions do not see in law an indispensable condition for implementation of justice; they expect this from moral, religious or social norms. Both the legalistic and non-legalistic conceptions of searched for the deepest meaning of justice, in ideas of equality, love, obligation, freedom, general security, or equivalent exchange. This was demonstrated in detail by numerous conceptions of justice formulated in particular historical epochs[2].

Before modern times the main exponent of justice was natural law thought. In modern times the triumph of natural law, whose contents pervaded the so-called grand codifications, paradoxically superseded from law the idea of justice in favor of the idea of legality. Since statute law coordinated with natural law is already just, the argument went, it is sufficient to observe it, to rule by the law, and justice will be attained. This reasoning was one of the fundamental principles of legal positivist thought.

The latest tendencies in legal thinking have witnessed the shaking of confidence in the positivist assumption that the statute law is always a just law. A decisive influence on the shattering of this confidence was exerted by the tragic experience with brown (fascist) totalitarianism and with its red (stalinist) brand. The philosophy of legal positivism has to make concessions to natural law philosophy while the understanding of law in terms of legality has likewise to concede to its justice-oriented interpretation. This was done in a highly spectacular way by an eminent German lawyer Gustaw Radbruch, first a consistent proponent of legal positivism and a legality-oriented sense of law, and later, after the experience of World War II, an ardent supporter of natural law and a justice-oriented interpretation of the law. Seeing the evil effects of legality based on the application of statute law that is contrary to justice expressed by rational natural law, he found it impossible to support

[1] This is what Lon L. Fuller asserted in his conception of the procedural natural law and his numerous followers developing the conceptions of procedural justice. On the views of this thinker cf. R. Tokarczyk: *Prawa wierne naturze. Krytyka doktryny Lona Luvois Fullera* (Laws True to Nature. Criticism of the Doctrine of Lon Luvois Fuller), Lublin 1980; R. Summers: *Lon Fuller*, London 1984.

[2] On different conceptions and classifications of justice cf. R. A. Tokarczyk: *Filozofia prawa. W perspektywie prawa natury* (Philosophy of Law. In the Perspective of Natural Law), Białystok 1996, especially Chapter Twelve: Idea sprawiedliwości (The Idea of Justice), 160–187; Cf. also Z. Ziembiński: O pojmowaniu sprawiedliwości (On Understanding Justice), Lublin 1992.

the positivist thesis that „law is law" (Gesetz ist Gesetz); which is why he introduced the concept of statutory lawlessness (gesetzliches Unrecht). This notion means that the statute law – a statute contradicting justice, is not law. Choosing the side of natural law he stressed that the goal of law is justice. Justice, however, means not being guided by considerations of particular person, and treating everyone in an equal way[3].

The experience with the law of the totalitarian systems has demonstrated that the identification of law with the lawmaker's will, as legal positivists would have it, is not only irrational but also very dangerous in practice. The legislator's voluntarism, enhanced by the judge's voluntarism, can lead to the violation of even the most obvious values protected by natural law and conceptions of justice. As Lon L. Fuller warned, the law cannot itself be an instrument of injustice[4].

Justice and Truth

In every field of human activity there are fundamental values that serve at the same time as reliable criteria of its evaluation. Such values and at the same time evaluation. Such values and at the same time evaluation criteria are, for example, truth – in science, profitability – in economics, beauty – in art, faith – in religion, efficiency – in politics. In the field of law, this value and at the same time an evaluation criterion of the truth of law, has always been justice. The belief, established over the millennia of the history of law and jurisprudence, in the fundamental importance of justice for the law was temporarily weakened by legal positivism, which saw this value in legality. However, while justice as the chief value of law reflecting its deepest sense leads to knowing the truth about law, legality as a value related above all to politics (governing by means of law) leads, to a greater extent, to knowing the sense of politics rather than the law. Hence the advocates of justice as the crucial value and the criterion of evaluation of law use, while coming to know the truth about law, a distinctly legal category, whereas the advocates of legality try to do so, more or less sincerely, by means of a political science category.

The importance of justice for knowing the truth about law has been emphasized by those thinkers who did not treat law instrumentally, but merely as a means of the activity of the state authority. Recently, the connection of justice with truth was expressed in a particularly eloquent manner by John Rawls. „Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be re-

[3] Cf. J. Zajadło: *Gustaw Radbruch i antynomie współczesnej filozofii prawa* (Gustaw Radbruch and the Antinomies of Contemporary Philosophy of Law), in: „Colloquia Communia", no. 6, 1988 – no. 1, 1989, 63–75.

[4] L. L. Fuller: *Anatomy of Law* (Polish translation), Lublin 1993, 61.

jected or revised if it is untrue; likewise laws and social institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust... The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising... One may think of a public conception of justice as constituting the fundamental charter of a well-ordered human association"[5].

There is a well-known view that striving for justice stimulates action far more intensely than striving for truth. If so, some doubt may be raised whether a just action but contrary to truth is possible. The settling of this doubt depends on where we see the essence of justice: whether in rationality, emotionality or in combinations of rationality with emotionality. From the standpoint of rationalist conceptions of justice, respect for truth is an indispensable condition of justice. According to the emotionalist conceptions of justice truth can give way to other considerations, for example mercy. The conceptions of justice that consist in combining rationality with emotionality are usually those that admit of fairness as an emotional correction of justice, too strict with its rational coldness. The conception of emotional justice may, as Chaim Perelman put it, „lead to mockery of the administration of justice if the latter derides truth in the name of dubious and vague considerations"[6]. It must be observed that while the advocates of the justice-oriented interpretation of the law associate it consistently with truth, proponents of interpreting the law in terms of legality are more inclined to sell the law to some ideology in the service of the state authority.

Legal positivists negate both the connections of law with truth and the existence of permanent truths in law. Hobbes maintained that it is not truth but authority that makes law (*non veritas, sed auctoritas facit legem*)[7]. For even if the law expressed truth, he explained, there would have to be the state power – the political authority – for the binding force and application of the law. Therefore truth alone contained in the law will suffice since we cannot bring it into effect by means of the law without using some political authority. Legal positivists, while treating law as a singular instrument of power helpful in implementing its current goals, fail to see permanent truths in the law, unlike the trends in static, immutable natural law. Here is an extreme expression of the axiological relativism of legal positivism by one of its supporters: „... just as there is no ultimate truth concerning the essence of phenomena in nature, so too there is none with regard to man and society.

[5] J. Rawls: *A Theory of Justice*, Cambridge, Mass., 1971, 3 et seq.

[6] Ch. Perelman: *Legal Logic. A New Rhetoric* (quoted after Polish translation), Warszawa 1984, 93.

[7] For more cf. R. Tokarczyk: *Hobbes*, Warszawa 1987.

Scientific knowledge will not furnish the answers to the questions of how to live or how to behave in all life situations."[8] Although the latest natural law doctrines with a variable content relinquish axiological absolutism recurrent in the earlier static doctrines of natural law, thereby approximating legal positivism, they still retain certain canons of immutable values that should be protected by law.

Association of law with truth, justice and fairness belongs to the canons of the culture of common law. Ronald Dworkin, an eminent English law philosopher, attempted to adopt these canons to the culture of the statute law as well. In his universality-aspiring conception of constructional interpretation he conceives of the essence of law as an interpretive fact that combines descriptive elements with normative (prescriptive) ones, in either case permeated with values, especially with respect for justice and fairness[9].

Dworkin's conception of law as an interpretive fact links it with justice and fairness while opposing its association with legality. In the light of that, law is not merely an instrument of governing, as emphasized by legal positivists espousing the legality-oriented interpretation of the law. The function of law is not exhausted in controlling the society by those exercising the state authority. Law as an interpretive fact assumes the standing of an autonomous value, independent of frequently immoral manipulation by the rulers. The sense of law, adjusted to the long-standing and continuing meaning of its interpretation, becomes a manifestation of legal culture as an integral part of the whole of culture. Depositaries of law are then both those governing and the governed, the rulers and the citizens, the whole of political community that they form. Thus, there are very clear connections of the foregoing conception with the common law culture where the law lives its own life, largely independent of the state's current activity as the sphere of struggle for short-term influence and political gains of various social groups. Dworkin's conception could be useful in harmonizing the elements of justice with the elements of legality basing on the conception of the democratic law state[10].

Legal Nihilism

Even against the general background of the relation between law and justice and truth, legal nihilism was manifest in socialist countries, imposed on societies by the official Marxist ideology and reinforced by the theory of state and law which aspired to the name of science. „Formed in the so-

[8] J. Kowalski: Zmierzch ideologii prawa natury (Decline of the Ideology of Natural Law), „Acta Universitatis Wratislaviensis", No. 1772, Prawo CCXLIV, Wrocław 1995, 82. In view of the repeated revival of natural law J. Kowalski's outlook is isolated.

[9] Cf. R. Dworkin: *Law's Empire*, Cambridge, Mass. 1986.

[10] On the common law culture compared with other law cultures cf. R. Tokarczyk: *Wprowadzenie do komparatystyki prawniczej* (Introduction to Comparative Law), Lublin 1966, 62–99.

cialist countries in the early 1950's, the model theory of state and law, as a peculiar conglomerate of dogmatic positivism and a simplified version of Marxism, has never been condemned or entirely verified. The scale of devastation effected at that time was vast: what was not leveled out by vulgar Marxism was destroyed by the positivist attacks on philosophy in general."[11] Without intending to uncritically condemn the theory of state and law as it was a specific *signum temporis*, I shall seek, nevertheless, to point out some damage that the theory caused by shedding the living content of philosophy of law onto the scrap heap of allegedly antiquated historical conceptions[12].

Shielded by Marxism supported by the ideological policy, the theory of state and law managed, by eliminating philosophy of law, to purge the official line of thinking from the inconvenient conceptions of natural law and their integral pat: the ideas of justice and fairness. In the light of Marxism those conceptions were considered inconvenient for politicians since they advocated the primacy of law over politics, demanded that law be adjusted to morality, pointed at justice as the principal autonomous value of law and at the same time the most important criterion of its assessment. The theory of state and law, while declaring its subservience to the goals of Marxist ideology, strove to implement them by the right use of the favorable philosophy of legal positivism. The leading Polish exponents of this philosophy asserted that „Marxist theory of state and law promotes the principle of legality and obedience to the socialist law (...), adopting the exclusive binding force of positive law"[13]. Even on the basis of this quotation we can identify legalism, legality and voluntarism as the main ideas of the Marxist theory of state and law.

All the main ideas of the Marxist theory of state and law stemmed from legal nihilism which was one of the fundamental assumptions of Marxist ideology. Marxism, as we know, explains the essence of law as a normative reflection of class conflicts in state societies that will exist as necessary evil only as long as these conflicts continue. The demise of classes would be followed by the demise of class conflicts and of the law itself as created for conflict solving or at least mitigating, supported by the power of state authority. In stateless communist society, free from class conflicts, the law enforced by the power of state authority would be replaced by moral norms. This is how Marxism, regarding the law as temporary and necessary evil, promulgated legal nihilism: contempt for the law and lawyers both treated

[11] That is exactly what was written by the editors of the above quoted journal „Colloquia Communia", p. 3.

[12] See a convincing argument by L. Falandysz: *Powrót filozofii prawa* (The Return of Philosophy of Law), in: *Filozofia prawa a tworzenie i stosowanie prawa* (Philosophy of Law and the Making and Application of the Law), Katowice 1992, 13 et seq.

[13] S. Zawadzki: *Słownik niemarksistowskich koncepcji teoretycznych* (Dictionary of Non-Marxist Theoretical Conceptions), in: W. Lang, J. Wróblewski, S. Zawadzki: *Teoria państwa i prawa* (Theory of State and Law), Warszawa 1980, 490.

as instruments form implementing the principal goal of politics and politicians. That goal, the communist society, was to justify all wicked, immoral, unjust and wrong actions undertaken in order to achieve it. The legal nihilism of Marxist ideology was approved, developed and consolidated by the Marxist theory of state and law, which operated on the principle that the end justifies the means[14].

In either case: of classical juspositivism and the Marxist model theory of state and law, formal correctness alone sufficed for irrefutability of the law that cleared the ground for legalism in the service of politics. In reality such law produced „tragically ominous effects" since it was legalism of the „blind bayonets"[15]. Law was degraded to the role of a tool in the state's hands. The state in turn was interpreted in term of dictatorship of the ruling classes, of unlimited power „hampered by absolutely no laws or regulations whatsoever"[16]. Dictatorial power could and did make a law of even the most inhumane norms insofar as they served its goals. That which was called the law was in fact often flagrant lawlessness. Not only did the Marxist theory of state and law accept dictatorial laws but also searched for their justification in which the promise of communist paradise invariably occupied the most important position.

The leading idea of legalism, developed by the Marxist theory of state and law and elevated to the standing of a political structure principle in socialist countries, became legality. The idea or principle of legality gives extreme precedence to politics over law, disregarding morality. For Marxists law became „politics elevated to the rank of a statute" while socialism a manifestation of „a certain historical tendency in the development of law that can be defined as a process of demoralization of the law"[17]. Clad in the robes of legalism, politics freed from the fetters of morality eagerly reached for the instrument of legality. The instrument of legality was granted by the Marxist theory of state and law the rank of the supreme value „freed from the inconvenient company of old concepts" – natural law, justice, fairness – that were present in the whole history of philosophy of law. Legality – governing by means of law, became an exceptionally flexible and efficient instrument of power in the socialist countries. As essentially a political science category, legality in fact deprived the Marxist theory of state and law of the character of precisely the theory of law, thus becoming primarily a theory of state.

Voluntarism present in legal positivist thought was taken over and consolidated in the Marxist theory of state and law. It consisted in exempting

[14] For more cf. K. Wrzesiński: *Pozytywizm prawny w Polsce Ludowej: przesłanki teoretyczne a konsekwencje praktyczne* (Legal Positivism in People's Poland: Theoretical Premises versus Practical Consequences), in: *Filozofia prawa a tworzenie i stosowanie prawa* (Philosophy of Law and the Making and Application of the Law), op. cit., 213 et seq.

[15] Z. Ziembiński: *O pojmowaniu pozytywizmu oraz prawa natury* (On Understanding Positivism and Natural Law), Poznań 1993, 91 et seq.

law from under the supervision of any system of values, and in subordinating it to the will of the politicians usurping the competence of legislators themselves, their will being complemented by the will of the subjects/entities applying the law but deprived of decision-making independence. Providing reasons for the functions of the socialist state by the Marxist theory of state and law turned into propagandistic state worship (statualism), which had very little in common with honest cognition. The threats posed by that brand of voluntarism were even more dangerous because they originated from the socialist state's ambitions striving for swift and thoroughgoing restructuring of the whole social order on the basis of wishful thinking, without a possibility of predicting all actual effects of that process. Among the instruments of socialist voluntarism, law invariably occupied a key position since the Marxist theory of state and law inclined towards so-called administrative law idealism that was deluded by the faith that simply making law for a definite objective was almost equivalent with attaining the objective itself. In socialist thinking and practice this faith was clothed in the attire of programs of „peaceful revolutions", „speeding up of development", „great leaps", which most often ended in great collapses[18].

As the socialist states were liberalized the position of the Marxist theory of state and law was weakening, the necessity for recovering philosophy of law being more and more emphasized[19]. Considerations on the formal aspect of legalism and legality came to be accompanied with considerations on their material side which virtually meant the introduction of elements of the justice-oriented interpretation of the law. After the political system of socialist countries collapsed in Poland after 1989 the existing political liberalism admitted the coexistence of natural law with legal positivism and of the Marxist theory of state and law, expurgated of some embarrassing contents, with the timeless philosophy of law. The conception of the democratic law state has won the greatest recognition in pluralistic societies. It creates favorable conditions for endeavors to harmonize the value of justice with the value of legality. Only on such ground could Montesquieu's worthwhile idea be implemented: „Not everything that is the law is of itself just, but that which is just should become the law"[20].

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[16] V. I. Lenin: *Works* (quoted after Polish translation), vol. 10, Warszawa 1955, 239.

[17] This was asserted for example by W. Lang: *Prawo i moralność* (Law and Morality), Warszawa 1989.

[18] Z. Ziembiński: op. cit., 91 et seq. See also his: *Wstęp do axiologii dla prawników* (Introduction to Axiology for Lawyers), Warszawa 1990.

[19] Cf. the special volume of „Studia Filozoficzne" (Studies in Philosophy), no. 2–3, 1985, titled W kręgu filozofii prawa (In the Sphere of Philosophy of Law).

[20] Charles-Louis de Secondant de Montesquieu: *Pensées* (Quote after the Polish translation), Warszawa 1985, 56.

Justice and Natural Law

The present-day philosophy of law no longer identifies the whole of natural law with justice. According to Johannes Messner's fairly representative opinion, natural law covers the whole of universe while justice only part of it. While earlier static conceptions of natural law corresponded to static conceptions of justice, the present dynamic conceptions of natural law with a variable content are followed by the variable content of justice[21].

Despite those divergent opinions about the association of natural law with justice there is agreement among the supporters of natural law that it always contains a specific conception of justice with which the statute law should be coordinated if it aspires to the name of just law. If the statute law discards protection of values, above all justice, it does not rightly comprehend its objectives. As Chaim Perelman aptly put it, „The task of law is to support those values among which justice is very much in the foreground"[22].

The reading of justice by human reason – rationalism – is regarded as an axiom of natural law thought. When defining the concept of rationality its supporters derive it from knowledge to which they attribute the properties of certainty, reliability and infallibility resembling mathematical knowledge. The authors of the classic conceptions of natural law saw the possibility of finding absolutely rational knowledge whereas in the most recent times this view has already been abandoned. For it turns out that there are many problems that are difficult or even impossible to solve unequivocally by means of the criterion of rationality which can, for example, conflict with the criterion of good. For that reason, in more recent conceptions of natural law, rationalism makes concessions to emotionality.

Intuitive reading of justice is described by already numerous theories of intuitive law which is regarded as a synonym of both natural law and justice. Intuitive law can involve a sense of justice adopted as the basis of defining the content of law. In the German-Austrian school of free law this feeling was named *Rechtsgefühl*. In its Dutch version it is called *Rechtsbewustsein*, in English *feeling of justice*, in Italian *sentimento giuridico*, in French intuition *réactive. A fully developed theory of intuitive law as presented by Leon Petrażycki, a Polish thinker, who emphasized the distinctly prominent position of justice. The American law philosopher Edmund Cahn recognized – on the contrary – the sense of injustice as the vital force that determines the content of legal decisions. A common characteristic of all intuitive law theories that belong to the wide current of psychologism in legal thought is the emphasis on the sense of justice or injustice as the leading factor in making and applying the law*[23].

[21] J. Messner: *Das Naturrecht*, 1966.

[22] Ch. Perelman: op. cit., 108.

[23] The sense of justice has been discussed in numerous studies; e. g. W. Friedman: *Legal Theory*, London 1953, 29, 85, 186, 199.

Justice and Legal Positivism

According to quite numerous conceptions of legal positivism, whose assumptions also pervade most jurisprudentia, sociological, psychological, economic and political science conceptions, the statute law is the only real source of law. Basing on cognitive realism, the person aspiring to the scientific status of legal positivism confines his/her interests to what exist, while rejecting as unscientific the considerations on what should be as belonging to the realm of values. This reliance on statute law only, aspiration after scientific character and removal of values from law are the main reasons why legal positivism does not openly take up the problem of justice[24].

Positivistic reliance on statute law follows from the conviction that the supreme reason for its binding force consists in preventing anarchy through aiming at law and order, security, and certainty as the elementary conditions of preserving human life and the functioning of society. Statute law entirely dependent here on the lawmaker's will need not be subjected to some abstract values among which legal positivists rate justice. The proper goal of statute law is to secure the state authority's operation by the rule of law and the legality of the citizens' conduct. Statute law consists of objectively binding norms whereas justice all too often leans towards subjective norms. Therefore, even if positivists apply the term justice, which is highly untypical, they identify it with legalism and legality – obedience to statute law, but according to the paroemia they obey the law they made themselves (*patere quam ipse fecisti legem*).

Positivist axiological neutrality would consist in eliminating values and evaluation from law and jurisprudence, and in accepting only a description of law that conforms with scientific rules. Fear of evaluation of the law stems from a tendency to preserve its irrefutability for the sake of more ideological than scientific purposes. Historically, justice as a value has repeatedly been used to challenge the existing legal and constitutional order. In their attempts to avoid such a challenge the positivists give precedence to the „interest of the state" over justice. For that reason „The ideology of legal positivism can be accompanied with statolatry or poleolatry: glorification of the state that treats the „interest of the state" as an autonomous value, superior to rather than only instrumental towards the interests of society"[25]. At bottom therefore, as unintentionally admitted by the latest mutations of legal positivism, it is not axiologically neutral since enthymematically is accepts certain evaluative assumptions.

[24] „The Marxist theory of state... even if it admits of some evaluation in jurisprudence, these are relativized assessments", S. Ziembiński: *Słownik...* (Dictionary...), op. cit., 490.

[25] Z. Ziembiński: ibid., 94.

Justice and Lawmaking

The two main tendencies in philosophy of law, natural law and legal positivism, are matched by two corresponding models of lawmaking[26]. The basis of natural law provides conceptual foundations for creating a model of the just lawmaker while the basis of legal positivism for creating a model of the rational lawmaker. Both models present postulates concerning the conditions of the lawmaking operation, the features and goals of the law being made. The model of the just lawmaker calls for such conditions for lawmaking, existing generally in liberal and democratic states, that would make it possible to coordinate this law with the material and procedural content of justice. The classic model of the rational lawmaker confined itself to the requirement of retaining only the formal conditions of the legality of lawmaking, making more concessions with time for admitting the material content in it. The just lawmaker is attributed to have the features of morality-conforming operation, similarly, they are ascribed to the results of his lawmaking: the just law. To the rational lawmaker, however, are ascribed the features of political efficiency whereas the law he makes is itself not subject to moral evaluation. Before he makes a law, any lawmaker, whether acting on behalf of justice or rationality, must have some idea of its goals in terms of a set of values that represent a more or less idealized social order he would like to achieve through the legal order. For the former it has to be above all a just order, for the latter a legal order.

The knowledge, evaluations and preferences of the just lawmaker are centered around the essence and formulas of justice. When presenting the model essence of justice as a manifestation of the just lawmaker's knowledge, we must remember that it is combined with a definite understanding of equality. Recognizing equality as the essence of justice we should stress that there are nevertheless unjust equalities and just inequalities. From the standpoint of justice we can speak of just equality, just inequality, unjust equality and unjust inequality. We must also distinguish between the strong and weak versions of justice. The strong version is based on a dual division into what is just and what is unjust. To put it in another way: what is not just is unjust. The weak version, however, divides the scope of justice into three departments: justice, neutrality and injustice. On the basis of the weak version not everything that is not just is unjust, since between justice and injustice, there is an area of neutrality that is not subject to justice-oriented assessment[27].

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[26] On the modeling of processes of making and applying the law cf. inter alia R. A. Tokarczyk: *Uwagi ogólne o niektórych modelach systemów prawnych* (General Remarks on Some Models of Law Systems), „Państwo i Prawo" 1986, no. 11.

[27] Cf. R. A. Tokarczyk: *Filozofia prawa...* (Philosophy of law...), op.cit., 171 et seq.

The just lawmaker, intending to achieve a just social order by means of just lawmaking, uses formulas of justice suited to the social matter regulated by law. The collection of these formulas is usually headed by the blank formula of „to each his own" (*suum cuique*) which needs to be concretized on the basis of more specific criteria: equality, needs, birth, work, effort, merits, position, mercy. All these can be corrected by the category of fairness which mitigates excessive strictness or tightens undue liberalism of the formulas of justice.

The whole body of relations between justice and lawmaking is made up, apart from material justice, also of procedural justice. Recognized as the opposite of arbitrariness, procedural justice defines the competence of the lawmaking subjects/entities, the procedure of making and promulgating laws, and the postulates that should be satisfied by a just legal system. It determines the length of time of lawmaking by fixing the deadline for promulgation of laws between the extremes of excessive haste and unjustified delay. By trying to satisfy the last condition, procedural justice follows the English saying that justice delayed is justice denied[28].

Rationality and Lawmaking

In the model of the rational lawmaker, which is representative of legal positivism, the main role is played by the category of rationality. As one of the advocates of positivism put it, rationality „consists in justifying a decision with good reasons unlike an unreasonable decision, which is badly justified, and an irrational one, which does not give any such reasons"[29]. „Good reasons" in the positivist interpretation concern in fact technical criteria of law such as efficiency, clarity, flexibility, cohesion, generality, typical legal structure, reliability, permanence of the binding force, non-retroaction, which is why they have little in common with good in the moral sense. Positivists often add more criteria that are non-technical or material, for example, economy, adequacy for social needs, social acceptance, whereby admitting that „it is not easy to eliminate morality from the realm of law"[30].

The characteristics of the rational lawmaker are expressed in the postulates directed at his knowledge, estimates and preferences. The rational lawmaker's knowledge should be systemic, coherent, logical, and conforming to the rules of language. The rational lawmaker's assessments should be a complete system of evaluation that takes into account primarily the conditions of political efficacy. For the rational lawmaker „gives political pro-

[28] Numerous studies have been devoted to procedural justice. Cf. J. Czaja and J. Stelmach: *W stronę proceduralnej teorii sprawiedliwości* (Towards Procedural Theory of Justice), Logos i Ethos 1993.

[29] J. Wróblewski: *Sądowe stosowanie prawa* (Judicial Application of the Law), Warszawa 1988, 385.

[30] See e. g. W. Lang: *Aksjologia prawa* (Axiology of Law), in: *Filozofia prawa a tworzenie i stosowanie prawa* (Philosophy of Law and the Making and Application of the Law), op. cit., 123 et seq.

grams the form of legal language"[31]. Preferences of the rational lawmaker should be asymmetric (if he prefers one state of affairs to another, he cannot prefer other to the first), transitive (if he prefers one state of affairs to the second, and the second to the third, it cannot be that he does not prefer the first to the third). In his preferences, political states of affairs take precedence over the others, especially the moral ones.

The model of the positivist rational lawmaker has been criticized not only by the natural law supporters but also by non-orthodox positivists. Above all it was emphasized that the criterion of rationality applies to all kinds of human activities, which is why it does not permit to distinguish any special features of the lawmaker's activity. Separation of rationality from morality can serve even the most wicked, immoral and unjust purposes. It gives lawmaking the features of political rather than juristic activity. It is only by taking into account the material content directly expressed by material justice and somewhat timidly by positivist material legality that the *differentia specifica* of the rational lawmaker's activity can be determined. „The frequently emphasized tendency to make open, flexible law with room for general clauses and with a special role attributed to interpretation, can arouse fears concerning instability of the law or, in the extreme case, even a threat to the principle of the rule of law. It is procedural law that will be a specific safeguard, a counterbalance to this threat"[32].

The two model of the lawmaker, just and rational, have definite reference to the real lawmaker. The just, real lawmaker speaks on behalf of just law whereas the rational, real lawmaker speaks above all on behalf of politics. The attributes of the former include rationality in correcting the severity of the law that makes irrational-emotional concessions to fairness. The attributes of the latter, contrary to the theoretical positivist assumptions, incorporate the contents of justice covered by the labels assembled under the banner of material legality, and admitted through widely applied general clauses. The design of lawmaking, whether just or rational, cannot fail to take into account the elements of economic calculation, the comparison of anticipated costs with anticipated profits. This must be accompanied by the question of the so-called rational choices in the context of the goals which the law being made is to serve. Thus, the differences between the just, real lawmaker and the rational, real lawmaker are generally much smaller than it follows from their ideal models.

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[31] H. J. M. Boukema: *Good Law. Towards Rational Lawmaking Process*, Bern 1982, 52.

[32] M. Borucka-Arctowa: *Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawa* (Procedural Justice versus Decisions of the Constitutional Tribunal and Its Role in the Period of Transition of the Law System), in: *Konstytucja i gwarancje jej przestrzegania* (Constitution and Guaranties of Its Observance), *In Memory of Professor Janina Zakrzewska*, Warszawa 1996, 27.

Justice and the Application of the Law

The problems of applying the law, especially its most mature form – judicial application of the law – are best reflected by the so-called administration of justice. Judicial application of the law means administering justice by the judges, in accord with the law in force, and for that reason it means observing the law at the same time. On the one hand we should accept Dworkin's well-known opinion that philosophy of law is an indispensable introduction to every judicial judgment, yet on the other hand it would be difficult to deny Holmes' popular conviction that law is what the courts actually do. It is in the courtroom, as Fuller summed it up, that the view on what law is combines with practice „It is here that the Word becomes the Deed". It is in the courtroom that the natural law understanding of law clashes with its positivist interpretation, the desire for justice with the desire for legality, the guiding principle of the two tendencies being rationality, objectivity, lawfulness, uniformity, efficacy, swiftness, reliability, accuracy, and advisability although their hierarchies are decidedly different. Before the birth of legal positivism there was absolute dominance of the justice-oriented approach to the judicial application of the law. Legal positivism, during the period of its dominance, tended towards the legality-oriented understanding of the judicial application of the law. Finally, since about the mid-20th century the consequence of weakening the differences between natural law thought and legal positivism has been a tendency to coordinate the justice-oriented judicial application of the law with the legality-oriented judicial application of the law. „It is sad, that there should be no common understanding of what we define as «interpretation and application of the law»" commented Fuller[33].

The justice-oriented paradigm of judicial application of the law can be expressed by the following questions: who? what? how? to what end? with what effects?

While answering the question about who applies the law the supporters of natural law point to a notional Just Judge. A similar view is dominant in the common law countries. For example, the Americans see the personification of justice in the judges of the federal Supreme Court and, accordingly, name them Justices. Among the qualities attributed to the Just Judge, the most prominent is the command of the art of good judging as the elementary condition of administering justice. „A complex undertaking called the law requires practicing judging and this judging must be practiced by the people and for the people. It cannot be programmed on computer"[34].

A search for the answer to the question of what just judges apply leads the natural law followers to a conclusion that this is statute law or (and)

[33] L. L. Fuller: *Anatomy of Law*, op. cit., 60.

[34] Ibid., 63.

common law coordinated with justice and fairness. As they see the essence of law in justice, they admit of the judge's interpretation going beyond the limits of the statute law, if the latter does not, in their belief, conform with the content of natural law. As Fuller put is with some exaggeration, „the right of the courts to interpret legal acts gives them as a result an unlimited power of transforming them"[35]. However, this power is in fact defined by, on the one hand, the discretionary power of the judge originating from his independence, while on the other hand it is restricted by being bound by the content of statute law, which cannot go beyond the admissible boundaries of the judge's activism.

The question of how the law should be applied is answered by the natural law supporters on the basis of different formulas of justice, which, however, are always an instance of the application of equality principle in the meaning of equal treatment of equal subjects/entities in equal situations. Justice as the practical administration of justice has its formal and material aspects. Material justice defines the content criteria of just legal decisions (judicial decisions) while formal justice provides formal, procedural conditions of using the law. It is debatable whether „Invoking the natural law conception can in some aspect constitute greater margins of decisions for the agencies applying the law..."[36]. For appealing to natural law can actually narrow the choice of decision to even one single decision that conforms with the nature of the facts. Nor does natural law weaken the rigor of the statute law but it replaces formal-legalistic rigor with the axiological rigor of justice. For that reason the inclusion of the natural law conception of justice-oriented application of the law in the so-called ideology of freedom of judicial decision calls forth doubts.

The question about the goals of law application goes beyond achieving justice itself as an autonomous value. For more highly regarded than justice itself are the values that are, as it were, achieved through it: harmony of human relations, the strengthening of law and order, striving to achieve the common good. Injustice, on the other hand, arouses anger, produces social tension, leads to conflicts, instability of law and order, and public disorder. The goal of applying the law is the „practical task of discovering the ways of eliminating or alleviating injustice that arises from the sporadic and arbitrary application of the law"[37]. Social objectives are the right goal of applying the law, which is why the role of the judge cannot be confined to rational reasoning, convincing argumentation and rhetoric: it must subordinate them to the goals of justice.

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[35] Ibid., 63; The model of the judge's personality was discussed inter alia by J. M. van Dunne: *The personality of the judge. Some jurisprudential remarks*. Serie Rechtsvinding, Arnhem, The Netherlands 1984.

[36] Z. Ziembiński: op.cit., 93.

[37] L. L. Fuller: op.cit., s. 21.

Finally the question about the effects of just application of the law finds a natural law answer in the social consequences of a just judicial decision. The present-day natural law thought leans towards the view that according to justice-oriented axiology there is only a narrow range of just decisions concerning a definite state of facts; it even encourages a search for one such decision. Natural law thinking supports this view even in reference to general clauses, illusory in their allegedly wide freedom of decision. For even in the area of general clauses, be they justice-oriented or legality-oriented (the latter frequently yielding to politics), there is, independent of the judge's intention, actually one just or legality-based judicial decision rather than their almost unlimited range. Therefore, if the proponents of introducing general clauses into law combine them with the so-called margins of decision and at the same time admit of filling them with the justice-oriented, natural law content, they thereby become virtual allies of the ideology of the bound, rather than declared, free judicial decision.

Legality and the Application of the Law

The emergence and development of the idea of legality is closely connected with the appearance and development of legal positivism. While expecting that their doctrine would secure reliability of the law, legal positivists supposed that this could be achieved by replacing the plurality of formulas of justice with one formula of legality. This supposition is reflected in defining legality as the actions of the state in accordance with the law: governing by means of law adjusted to the will of the governing. It must be observed that in socialist states the Marxist theory of state and law extended the scope of legality also upon the conduct of their citizens. Creating a pretense, through the declared principle of popular democracy, of the citizens' participation in governing the state ruled in fact by the communist party elites, this theory participated in a dishonest game that made it possible for those elites to charge all citizens with shared responsibility for their (the elites') immoral and unjust actions shielded with deceptive legality[38].

According to legal positivism the model of the subject-entity applying the law would be as much the Rational Judge as at the same time the Herculean Judge endowed with the power of authority delegated by the politicians. The limits of the judge's real power are defined on the one hand by the postulate of strict interpretation of the law (*ius strictum*) which is to guarantee the security of legal transactions, and on the other hand by the postulate of flexible interpretation of the law (*ius aequum*), admissible by the agency of general clauses. Legal positivism recognizes the ideology of the bound judicial decision which accepts lawfulness identified with formal legality as the condition of law, while the latter is in turn identified with

[38] Cf. J. Nowacki: *Rządy prawa. Dwa problemy* (The Rule of Law. Two Problems), Katowice 1995.

legalistic fairness and justice, „without seeing the element of evaluation expressed in the implicit acceptance of the law in force"[39]. This ideology caused great confusion in jurisprudence for many reasons. Above all, it comprises only Austin's command theory of law rather than the whole of legal positivist thought as this ideology would groundlessly have it. Moreover, it is clearly connected with natural law thought since, again contrary to the declarations of its proponents, it cannot avoid evaluating the statute law, which is revealed with glaring clarity with the application of general clauses. It is also an absolute misunderstanding to reduce justice, as positivists do, to formalist legalism and to derive the legalistic fairness and justice of law from its reliability.

In the practice of law application the status of the legal positivist judge is defined by two principles: that of the independence of the judge and that of binding the judge by a law. „Independence is an immanent attribute of the judicial authority. A dependent judge, subjected to the pressures of the authority that restricts his freedom of ruling in a particular case, is no longer a judge. He becomes a political functionary of a given regime, the more dangerous that his rulings acquire a pretense of legality that can legitimize the gravest crimes by giving them the full sanction of the law... During the period of overcoming the totalitarian system and forming the rule-of-law state, restoration and safeguarding of the independence of the judge is a fundamental issue[40]. In the practice of law application coordinated with positivism, the principle of judicial independence gives way to the principle of binding the judge by a law, which is gradable: from being fully bound to being partially bound.

The idea of the judge being fully bound presupposes the existence of case law, clear and unambiguous, requiring no interpretation but merely the subsumption of the facts of the case under the appropriate legal norm. The opposite of being fully bound relies exclusively on the judge's sense of law, advocated by the school of free law and obviously rejected by legal positivism. The binding of the judge by a law was in fact also questioned by the brown and red brands of totalitarianism that replaced it by political directives of the authority. According to positivism, the binding of the judge by a law in the sense that the judge cannot refuse to apply it is conducive to the preservation of the principle of reliability of law and equality of all before the law. The conceptions that seek a compromise between natural law and legal positivism, assert however that law can be derived neither purely deductively from the legal idea and norm (duty) nor can it be con-

[39] J. Wróblewski: op. cit., 356. An interesting monograph on the juspositivist conception of judicial law application was written by H. J. M. Boukema: *Judging*, Zvolle-Holland 1980.

[40] A. Zoll: *Związanie sędziego ustawą* (Binding the Judge with the Law), in: *Konstytucja i gwarancje jej przestrzegania* (Constitution and Guaranties of Its Observance), op. cit., 241.

structed purely inductively from actual facts (being). „Law arises from the norm and actual facts, from duty and being"[41].

Positivists point at the statute law as the object of interpretation and application by the judge. In the positivist view, interpretation of the law means literally drawing out that which the lawmaker has put in it. Moreover, without appealing as natural law conceptions do to the inner values of law, positivism has „almost nothing to say" in the process of law interpretation by referring the judge to extra-legal values: political, economic, social, ethical, religious etc. This applies primarily to the so-called margins of decision that are an immanent feature of any application of the law but are most manifest when the lawmaker makes general clauses. Depending on the degree of observing the principle of the judge's independence, this allows judges to turn to the justice-based interpretation of the law or they give in to the pressure of the centers of political power. General clauses, with the absence of political pressure to bear on the judges, permit therefore to combine the justice-oriented and the legality-based conception of law application.

In their explanation of how legality should be achieved with the existence of margins of decision, especially of general clauses, positivists are divided into two groups. On the one hand, there are extreme legalists, supporters of the case law which avoids margins of decision, who espouse the principle of formal legality because they avoid any evaluation of the law. Stripping legality of values they treat law instrumentally following the maxim „the end justifies the means". On the other hand, there are moderate legalists who admit of margins of decision which allow judges to evaluate the law in order to achieve material legality. Moderate legalism approximates the justice-oriented understanding of the sense of law. It differs from the latter by its stronger emphasis on the importance of legalism as a guarantee of the reliability of law, which, however, may prove illusory if there are general clauses. For basically „the essence of extra-legal evaluation evades qualification exclusively from the standpoint of legality and constitutes an element of definite but different conceptions of justice, fairness or practical and economic goals"[42].

Goals implemented by means of the legality-oriented application of the law are goals attributed to the statute law by the politics of law.

The effects of the legality-oriented application of the law can be placed between the extremes of formalist legalism (formal legality) and material legality (essentially close to material justice). The extremity of formalist legalism demands literal conformity of law application with the law applied for the sake of the maxim *Dura lex sed lex*. The extremity of material legality

[41] A. Kaufmann: *Problemgeschichte der Rechtsphilosophie*, in: A. Kaufmann, W. Hassemer (eds): *Einfuhrung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, Heidelberg 1985, 121 et seq.

[42] L. Leszczyński: *Klauzule generalne w stosowaniu prawa* (General Clauses in Law Application), Lublin 1986, 202. Developing the problems of general clauses by positivists is connected with the confirmation of the necessity of evaluation in the practice of lawmaking and law application.

would mean passing entirely into the realm of justice-oriented law application, full coordination of law application with morality and other extra-legal values. The category of justice can serve to assess the category of legality since, as the maxim of a Roman lawyer Paulus reads, „Not everything that is legally allowed is honest and fair" (*Non omne quod licet honestum est*)[43].

Extremely literal, formalist application of the law in isolation from the realities of social life and moral norms can lead to severe contradictions between the postulates of legality and those of justice. Then, as Cicero put it, „Complete law means complete injustice" (*Summum ius summa iniuria*). In extreme cases, positivist legalism speaking on behalf of formalist legality obligates judges to implement „lawlessness by statute". Objecting to this, Gustav Radbruch appealed to the judges „First assess each case from the purely human point of view, and only then clothe your sentence in the attire of law"[44]. Thus interpretation and application of the law is connected with the necessity to permanently solve conflicts between the expectations of reliability of the law, which can be provided by the principle of legality, and the expectations of moral integrity, which is safeguarded by the principle of justice.

Justice and Legality

Comparison of the justice-based, natural law understanding of law with the legality-oriented, positivist conception of it leads to the conclusion about their similarities, differences and identities[45]. This depends primarily on the extent to which the model conceptions of natural law and legal positivism make concessions in favor of the rival ideas. The model conceptions of natural law in contact with those of legal positivism demonstrate contrasting differences between the justice-based and legality-based understanding of law. These contrastive differences are even more emphasized by the association of natural law with the political systems regarded as democratic and liberal, and legal positivism with non-democratic, totalitarian systems. On the other hand, the conceptions of the political system called the democratic law state create solid ground for finding also similarities and identities in the justice-oriented and legality-based understanding of the sense of law.

The modeling of history of the relation between justice and legality permits to distinguish three distinct periods.

Before the Great French Revolution of 1789 there was absolute prevalence of the idea of justice, albeit understood in the natural law sense or

[43] Those and other maxims were collected by M. Kuryłowicz: *Rzymskie sentencje prawnicze o człowieku, sprawiedliwości i prawie* (Roman Legal Maxims about Man, Justice and Law), „Palestra" 1988, no. 7, 71–83.

[44] Cf. G. Radbruch: *Pięć minut filozofii prawa* (Five Minutes of Philosophy of Law), „Colloquia Communia", op. cit., 61 et seq.

[45] Such a comparison was made by T. Stawecki, P. Winczorek: *Wstęp do prawoznawstwa* (Introduction to Jurisprudence), Warszawa 1995, 155 et seq.

quasi-positivist, since the idea of legality had not yet arisen. The second period lasted from the French Revolution until about the mid-20th century and was characterized by the domination of legality over justice expressed by the positivist doctrines of the law state, totalitarian fascism and totalitarian communism. Finally, the third period starting from the second half of the 20th century is characterized by the coordination of natural law thought with legal positivist thought and justice with legality.

In the present-day philosophy of law contrastive differences between natural law thought and legal positivist thought gradually evanesce as the two sets of doctrines make mutual concessions.

A natural law conception that is most open to the dialog with juspositivist conceptions is that of an English law philosopher, John Finnis. He achieved this by accepting the positivist assumption about the fallacy of deriving assessments and norms from descriptive sentences in the logical sense, the impossibility of logical transition from being to duty. He no longer adopted idealized natural models as the starting point of his conception, as did the supporters of natural law before, but he chose practical rationality in the meaning of common sense reflection on human conduct, which brought his view closer to the conception of legal positivism. Rather than seeking to make an exhaustive catalog of natural law values, he confined himself to indicating only basic values, like Hart's „minimum of natural law" or Rawls' value of justice, which some present-day positivists are already inclined to accept. Finnis also clearly confirmed the autonomy of statute law, which tends to be considered one of the principal theses of positivism[46].

The well-known polemic of Herbert L. Hart the eminent representative of contemporary legal positivism, with the eminent contemporary representative of natural law thought, Lon L. Fuller led the former to accepting „a minimum of natural law", but the latter did not accept even a minimum of legal positivism. The present-day positivists already recognize the significance of ethical values and legal ideals in the processes of making, interpreting and applying the law. At the same time they make use of the achievements of social sciences – anthropological, ethical, sociological, psychological, or ethnographic. They admit that the moral and social ideals of natural law „are less burdened with voluntarism against which positive law offends so often. That is why they can be an instrument of accurate criticism of various deviations of positive law"[47]. However, while natural law proponents evaluate law openly, legal positivists often do so in a veiled manner. In the processes of law application both parties take into account the rules of law interpretation expressed in the formulas of legal reasoning and subsequently in the theories of argumentation and reasons for legal decisions.

[46] J. Finnis: *Natural Law and Natural Rights*, Oxford 1992.

[47] J. Kowalski: op. cit., 83.

Defining justice and legality reveals numerous essential differences between them. The essence of justice, which is primary to law, consists in relying on such a law only that contains values and protects them. Justice is binding when the substance of law is determined by the content of justice. By giving law the status of an autonomous value, it objects to the instrumental treatment of law. The essence of legality, however, lies in relying on statute law and governing by means of it, without going into its value. Law thus becomes merely a means of operation in the hands of the governing authority – the state. Law secondary to values and its legality-oriented application lead straight to the instrumental treatment of law by the politicians.

Among different divisions of justice and legality the most important role is played by material justice and formal justice on the one hand, and by material legality and formal legality on the other.

Material justice deeply rooted in the centuries-old tradition of natural law is self-sufficient in the sense that it clearly defines the main values of law, shows their hierarchies and points to the moral means of their implementation. It applies original conceptions expressed through established notions and rich terminology. It has its own pantheon of gods of justice. Material legality has a far shorter history than material justice and only seemingly contains its own material content. For at bottom it is based on reference to other systems of values, not infrequently to natural law ones and in that sense it is not self-sufficient. This shows its poverty of conceptions, notions and terminology. Nor does it have its own gods, or at best they are self-styled gods – dictators. While formal justice is concerned with the preservation of values even in the forms of law application alone, formal legality, free from such concern, confines itself to idle legalism.

The range of subjects of justice is different from the range of subjects of legality. Justice covers with its scope all legal subjects/entities – natural persons, legal persons and the state. For all these entities are expected to behave in conformity with the formulas of justice, which recognizes the courts as a model subject of justice. Legality, however, defines the ranges of legality subjects instrumentally, depending on the short-term goals of the authority. It generally recognizes as the subject of legality only the institutions that apply the law on behalf of the state. Yet, when prompted by political interest, for example in socialist countries where the principle of popular democracy makes a pretense of participation of all citizens in governing the state, legality extends responsibility for the imperfections of this governing also upon them.

Justice can be gradated whereas legality essentially defies gradation. Justice can be violated or only infringed upon. Violated or infringed can be particular norms or whole sets of them. Not only in colloquial speech can the gradability of justice be manifested when it turns into injustice. We then speak about „great", „flagrant", „prejudicial", „slight", or „minor" injustice.

With legality gradation has not reached such a level. Legality is not violated or infringed by violating or infringing particular moral norms. If the state does not observe the law it has made, the rule of law is simply not maintained. The state then acts against legality.

Justice and law have their own ideologies, especially the ideologies of law application by the court. The ideology representative of justice is that of the discretionary powers. Discretionary not in the sense of wide margins of decision that natural law should allegedly create as the source of justice. Discretionary in the meaning of the judge's independence of the orders of state authority in the processes of law application contained, among others, in statute law. Independence allows the judges to give the sense of justice to the norms of statute law, which is why the clear-cut boundary between lawmaking and law application can be blurred at this point. This ideology can be said to be rationalistic, non-legalistic, non-formalistic, objectivistic, and moralistic. Judicial application of the law, according to this ideology, takes place *ratione imperii.*

Legality is represented, however, by the ideology of the bound judicial decision. Bound in the sense of restricting the judge's independence by the order of the state authority contained in the statute law or in the general clause subject to manipulation. This ideology demands that a clear-cut boundary he maintained between lawmaking and law application. The ideology of the bound judicial decision is attributed with the features of rationality, legalism, reliability, formalism, subjectivism, voluntarism and axiological nihilism. In general, judicial law application is defined here as *imperio rationis.*

In conclusion we can say that justice is entirely a value of law whereas legality has the features of primarily political value. Therefore, overcoming axiological nihilism promoted by the Marxist theory of state and law, for example by means of the idea of formal legality, should start with the rehabilitation of justice as the principal value of law. That is why, as an old Oldenburg judge once put it, „Justice must drink what politics have brewed".

Seeking Compromise

Common ground for bringing together the natural law position and the positivist position, to find compromise in their timeless dispute, is provided by the conception of the political institution of the democratic law state. This conception refers, we might say, equally to natural law thought and legal positivist thought. It seeks to take into combined and balanced account the importance of the postulates of justice and those of legality in the conditions of the democratic state[48].

[48] It was recently presented by, inter alia, L. Morawski: *Spór o pojęcie państwa prawnego* (A Dispute over the Concept of the Law State), „Państwo i Prawo" 1994, no. 2.

This political system conception of the law state, currently recognized as a compromise, arose, however, out of legal positivism which emphasized the necessity of subordinating on equal terms all subjects/entities – the citizens and the state – to the statute law in force. This conception had its sources of thought in rationalism of the Enlightenment which postulated that the rationally made law become the object of universal respect. Under the impact of life it evolved, assuming successive versions of the state of statutes, the state of judges, the democratic law state, social law state, liberal law state, and the neoliberal law state. Without going into needless details of individual versions of the conception, we could confine ourselves to a general statement that by invariably adopting the idea of the democratic state as the basis, this conception entrusted the state's fate to, in turn, the law itself, judges interpreting it, democratic principles, social policies, the assumptions of liberalism and neoliberalism.

Today the conception of the democratic law state has become a political system principle introduced into the constitutions of many countries. In the Constitution of the Polish Republic it has gained the standing of a fundamental constitutional principle expressed in Art. 1: „The Republic of Poland is a democratic law state which implements the principles of social justice". The high standing of this principle is manifested with all its might during the period of transformation of the political system, the transition from the socialist to the capitalist legal order. For this principle permits to mitigate contradictions between prosocialist sentiments and procapitalist reality. The formula of „social justice" expresses prosocialist sentiments whereas the formula of the democratic law state is conducive to the consolidation of the procapitalist values of law, such as reliability of law, security of legal turnover, and the citizens' confidence in the state and its law[49].

The compromise character of the principle of the democratic law state is demonstrated by the reflections on the interaction of its three constituent elements: democracy, legality and social justice.

Democracy – power of the people – is, as is known, implemented only in very few direct democracies by all the people or rather citizens. As a rule, in the present-day political system this is indirect democracy, which represents the majority of rather than all citizens of a given state. This representation of the majority is authorized to make laws and to implement them in accord with the principle of legality. While even indirect democracy generally does not conflict with legality, it often clashes with the principle of justice. Now, if justice is to be an expression of the truth of law, a majority vote does not have to be in conformity with such

[49] Cf. T. Dybowski: *Zasada sprawiedliwości społecznej jako problem konstytucyjny w orzecznictwie polskiego Trybunału Konstytucyjnego* (The Principle of Social Justice as a Constitutional Problem in the Decisions of the Polish Constitutional Tribunal), in: *Sądownictwo konstytucyjne* (Constitutional Courts), „Studia i Materiały" no. 1, Warszawa 1996.

truth. For that which is true and just at the same time is not the effect of a majority vote but of accurate recognition of reality. It is on such a conviction that independence of the judge is based, obeying only the truth recognized during the court proceedings. Thus actions that are in accord with truth and are simultaneously just do not have to, although they can, rely on a majority vote.

Legality as governing on the basis of the law contents itself with the law made by observing the democratic rule of majority: for, apart from direct democracy impossible to apply universally, no better institutions of political system have been found for large human communities. In discussing the relation between legality and justice, it is extremely important to distinguish between formal legality, which abstracts from values, and material legality, which takes into account the respect for values. Formal legality without any values expressed by justice may lead to the making and application of the unjust law divested of morality. That was already observed by St. Augustine, who asserted, „If we reject justice, what are kingdoms if not great gangs of robbers"[50]. „Gangs of robbers" can hide behind „robber laws" passed by a democratic majority. Justice is a value that allows to distinguish a moral law from a „robber law", legality based on values from legality divested of values.

Justice in its relations with democracy and legality can arouse particularly many doubts. Above all, democracy admits of pluralism of convictions, which is why „... the plurality of conceptions defending that which is right and just, the absence of consensus on a definite hierarchy of values, can lead to different solutions"[51]. This plurality of possible solutions is heightened by the principle of the democratic law state, which appeals to an extraordinarily vast and nebulous idea of social justice, an object of endless interpretations and controversies. Somewhat more concrete substance can be found in social justice if we bring its sense closer to the modern conceptions of natural law expressed by the fundamental human rights. For these rights are not established by any authority, nor can it abolish them even through a democratic majority, since they are vested in man by virtue of his belonging to the human race. If the state tries to abolish them, regardless of its democratic or undemocratic system, it turns into a hotbed of lawlessness and injustice.

Discussion is going on whether to give precedence to legality or justice under the circumstances of the democratic law state. Only recognition of their complementary character appears to agree with the assumptions of this form of political system. For where legality divests itself of values indis-

[50] For more see A. Sylwestrzak: *Augustiańska filozofia sprawiedliwości* (St. Augustine's Philosophy of Justice), in: *W kręgu problematyki władzy, państwa i prawa* (Around the Problems of Power, State and Law), *A Jubilee Book on the 70th Birthday of Professor Henryk Groszyk*, Lublin 1996 et seq.

[51] M. Borucka-Arctowa: op. cit., 27.

pensable for the functioning of democracy, there manifests itself the corrective action of justice. Where however justice goes too far beyond the limits of what is legal, the importance of legality will be manifested. In the discussion on the complementariness of justice and legality a significant role could be played by the appropriate education of lawyers[52].

[52] See, inter alia, R. Tokarczyk: *Edukacja prawników polskich w międzynarodowej perspektywie porównawczej* (Education of Polish Lawyers in the International Comparative Perspective), in: *45 lat Wydziału Prawa i Administracji Uniwersytetu Marii Curie-Skłodowskiej* (45th Anniversary of the Faculty of Law and Administration, Maria Curie-Skłodowska University), Lublin 1995, 181–193; see also S. L. Stadniczenko: *Zarys pedagogiki prawa* (An Outline od Pedagogy of Law), Opole 1995.