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Law in the Snares of the Political. Addressing Rafał Mańko's Critical Philosophy of Adjudication

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Abstract

The paper aims at reconstruction and critical discussion with the main tenets of political theory of adjudication, as presented by Rafał Mańko in his book, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja* [Towards a Critical Philosophy of Adjudication. The Political, Ethics, Legitimacy]. In the paper, I demonstrate: that the interpretation of the concept crucial for the entire theory – which is the concept of political – has been chosen by Mańko in an ideological and *a priori* manner; that the choice above effectively prevents the realisation of the main objective of the book, which is to legitimise adjudication; that the adoption of the ethics of adjudication advocated in the book is – in the light of the basic assumptions of that very publication – both improbable and hardly acceptable. Finally, I claim that Mańko's theory, due to its totality, can distinguish neither between legitimate law and violence, nor between justified and unjustified adjudication. As a result, it loses its critical force. All these problems are not peculiar to Mańko's theory, but they are general weaknesses of various versions of critical jurisprudence.

Keywords: critical theory of law, critical legal studies, theory of adjudication, the political nature of adjudication, the legitimacy of adjudication, adjudication ethics.

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Prawo w sidłach polityczności. Polemika z Rafała Mańki krytyczną koncepcją orzekania

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Streszczenie

Tekst ma na celu rekonstrukcję i krytyczną polemikę z głównymi założeniami politycznej teorii orzekania, przedstawionej w pracy Rafała Mańki *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*. Wykazuję kolejno, że: interpretacja kluczowego dla całej pracy pojęcia, jakim jest pojęcie polityczności, zostaje wybrana przez Mańkę w sposób ideologiczny i aprioryczny; wybór ten uniemożliwia realizację głównego celu książki, czyli legitymizację orzekania; realizacja proponowanej przez autora etyki orzekania jest (w świetle jego własnych założeń) zarówno mało prawdopodobna, jak i niezbyt pożądana. Wreszcie, z racji na totalny charakter krytyki, teoria ta nie jest zdolna odróżnić legitymowanego prawa od przemocy, a orzeczenia uzasadnionego od nieuzasadnionego. W konsekwencji, traci ona swoje krytyczne ostrze. Jak wskazuję, nie są to przypadłości wyjątkowe dla omawianej koncepcji, ale bardziej powszechne słabości różnych wariantów krytycznej teorii prawa.

Słowa kluczowe: krytyczna teoria prawa, krytyczne studia nad prawem, *critical legal studies*, teoria orzekania, polityczność prawa, polityczność orzekania, legitymizacja orzekania, etyka orzekania.

Anyone who was brought up on a steady diet of readings from the field of legal theory will appreciate the seductive power of Rafał Mańko's book, *W stronę krytycznej filozofii orzekania* (Towards a Critical Philosophy of Adjudication).² This work embodies the rare combination: originality of thought, clarity of exposition and scholarly erudition. Mańko presents and navigates his way through theoretical constructions with extraordinary proficiency. Suffice it to say that he has succeeded in convincingly combining the achievements of the analytically oriented legal theory with the proposals of Anglo-Saxon critical jurisprudence, to create an unlikely assemblage. To paraphrase the words of Wisława Szymborska, the mastery of this combination lies in the fact that the seams are invisible.³ The aim of this text is to address and critique the views expressed in Mańko's book. It should be emphasised at the outset that the praises offered above are by no means a mere courtesy; they are entirely sincere and fully justified. Any disagreement with the theses presented, even if fundamental, does not preclude appreciation of the style in which the presentation is made. Indeed, there are works whose quality is measured by the weight of the charges that it is worth levelling against them.

By embarking on this polemic, I am joining a long-standing debate on the critical theory of law. This entails the fact that my remarks will substantially repeat many of the criticisms that have already been made. In my defence, I would argue, firstly, that this is nothing out of the ordinary in the humanities or social sciences; and secondly, that since critical jurisprudence keeps repeating its theses, the criticism of those theses also needs to be sustained. Let me add that Mańko's project – despite the fact that it clearly instantiates general views shared in the critical legal scholarship – stands out from many other works in this field due to its positive character. It aims to present a constructive model of jurisprudential practice, which can be described as the theory of political adjudication. This is an ambitious goal; nevertheless, it strengthens and energises possible criticism and doubts.

Mańko's work focuses on three main issues: the political nature of adjudication, the ethics of adjudication, and the legitimacy of adjudication. Hence, this article is structured as follows. The first section analyses the author's conception of the poli-

² R. Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, Łódź 2018.

³ This is how Szymborska – the Polish poet and the Nobel-prize-winner in literature – summarised the work of Jeremi Przybora (another Polish poet and songwriter). See: W. Szymborska, *Nowe lektury nadobowiązkowe*, Kraków 2002, p. 141.

tical to show that it has been adopted in an ideological and *a priori* manner. In the subsequent sections, I indicate that the adopted conception of the political makes the legitimisation of adjudication impossible (sections 2 and 3); and that implementing the ethics of adjudication proposed by Mańko is (in the light of his own assumptions) both unlikely and undesirable (4). The paper concludes with some final remarks (5).

The Political and Ideology

The notion of the political⁴ is undoubtedly of fundamental importance to the entire Mańko's book: the keystone that sustains the whole structure. The assumption concerning the political nature of the social world, including the primacy of the political over other dimensions of that world, should be considered as one of the most crucial issues in critical jurisprudence as a whole.⁵ Two theoretical decisions are key to understanding this concept. The first one is quite uncontroversial: it distinguishes *the political* from *politics* (the latter understood as a certain institutional 'power play'), and also from *policies* (practices which pursue social objectives).⁶ Unlike the two other concepts, *the political* denotes one of the fundamental dimensions of social ontology (as well as human existence): the ontological and existential space in which the individual participants of social life meet.

What is much more questionable, is the second of Mańko's decisions, namely a concrete interpretation of the political. Here Mańko draws on the writings of Carl Schmitt⁷ and Chantal Mouffe⁸ to treat the political as a sphere of ineradicable and irresolvable antagonism. This 'agonistic' concept of the political is complemented by another assumption, with definitely Marxist provenance,⁹ according to which

⁴ A notion of the political similar to the one proposed by Mańko has been presented in Polish legal scholarship earlier – as Mańko acknowledged – by Michał Paździora and Michał Stambulski. See: M. Paździora, M. Stambulski, *Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 1, pp. 55–66.

⁵ In his text co-authored with Jakub Łakomy, Mańko explicitly acknowledges this assumption as '[t]he seemingly first and fundamental assumption on the social ontology shared by all currents of critical legal science' – R. Mańko, J. Łakomy, *In Search for the Ontological Presuppositions of Critical Jurisprudence*, "Krytyka Prawa" 2018, 10(2) p. 475. See also R. Mańko, *Nauki prawne wobec problemu polityczności. Zagadnienia wybrane z perspektywy jurysprudencji krytycznej*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2018, 3, pp. 38–50.

⁶ R. Mańko, *W stronę krytycznej...*, pp. 149–150.

⁷ C. Schmitt, *Pojęcie polityczności*, [in:] idem, *Teologia polityczna i inne pisma*, Warszawa 2012, pp. 253–255.

⁸ C. Mouffe, *Polityczność*, Warszawa 2008.

⁹ Though the author himself derives this thesis from the writings of Chantal Mouffe, see R. Mańko, *W stronę krytycznej...*, p. 147.

the basic social entity is not an individual, but a group (class). As a consequence, the political is viewed as the primary dimension of social life and human existence, in which the opposing interests of particular classes or social groups collide with each other, in a way that precludes their resolution.

The ineradicable and irresolvable nature of social antagonism leads to a state of domination, in which certain groups or classes gain a permanent structural advantage over others. Ideology is a means of such domination, for it legitimises the existing status quo. In an interesting study of the evolution of the notion of ideology, running from the thoughts of Karl Marx, to Louis Althusser and Slavoj Žižek, to Duncan Kennedy, Mańko shows the role of ideology in sustaining relations of domination, as well as its persistently questionable character. After all, there are no 'better' or 'worse' ideologies, just as there are no more or less legitimate social interests – there are only those which have currently gained the upper hand.

Obviously, the author has the right to choose such a Schmittian-Marxist conception of the political for his own purposes. What I have reservations about is the fact that Mańko neither justifies his choice nor even acknowledges the existence of alternative conceptions. Yet each fairly complete theory from the field of political philosophy contains some assumptions about social ontology and thus also its own vision of the sphere of the political. These visions are different for e.g. liberalism, republicanism or organicist positions (such as nationalism or some of the natural law approaches), etc. Therefore, the political can indeed be described in the language of antagonism, but it can also be regarded as a space for the meeting of rational and equal agents or through the lens of common fate or common good. The choice that Mańko makes from these alternatives seems to be *a priori* and justified only ideologically. It is, in fact, a purely conceptual exercise which pretends (even if unconsciously) to something more: to metaphysics of the political.

A good illustration of the adopted conception of the political as a conceptual solution with metaphysical pretensions is furnished by the author's deliberations on the role of ideology in adjudication.¹⁰ Mańko first notes that it would be possible to establish such a role through, for instance, empirical or phenomenological research, yet he declares to follow a different path. Namely, he undertakes to 'answer the question about the role of ideology in adjudication from *prima principia*,¹¹ that is, from assumptions about the very concept (the 'essence') of ideology. Thus, one is dealing with a conclusion about reality derived from assumed concepts. In this case, the concept of ideology leads to the conclusion that 'ideology in adjudication is a fact, and a judge who claims to be "non-ideological" is acting in bad faith; is actually in

¹⁰ Ibidem, pp. 130–142.

¹¹ Ibidem, p. 133.

denial, in the psychoanalytical sense.¹² Regardless of whether one agrees with this claim or not, its apriorism is striking. The argumentation employed is strongly reminiscent of Anselm's proof of the existence of God, in which the existence of the Perfect Being is proved by the very concept of such a being. And these aprioric assumptions of the analysed theory strongly affect the way that the law is conceived of.

The Conception of Law

To answer the question about the conception of law adopted by Mańko, a distinction must first be made between the concepts of the juridical system and the legal one. In this pair of notions, the juridical is a much broader category, understood – similarly to the concept of the political – as 'one of the spheres (...) of social life.'¹³ What distinguishes this sphere from others is the particular way that the juridical sphere determines the form of conflict, that is, as a dispute between equal parties that is resolved by an impartial arbitrator.¹⁴ Several noteworthy consequences ensue from this. First, the juridical (and the law behind it) is conceived of in a purely formal way, as a specific form of conflict. Second, the key function of law becomes that of resolving conflicts;¹⁵ thus it is not surprising that the author's attention is focused on adjudication as the area of legal practice in which this function is most clearly exercised.¹⁶ Third, as a sphere of social life, the juridical is subordinate to the political: since the political is the space in which conflicts initially manifest themselves, the juridical is only a particular form of their articulation. Although law retains its specificity, it is secondary to the political.¹⁷ Fourth, the law, being secondary to the political, is at the same time subordinated to ideology: the concrete shape of the legal form is determined by the 'hegemonic' ideology. At the same time, however, the law, in its historical development, refines its own internal ideology; as a result, it does not become simply a part of politics, or a completely compliant tool in the hands of those

¹² Ibidem, p. 136.

¹³ Ibidem, p. 152.

¹⁴ See ibidem; idem, *Legal Form, Ideology and the Political*, [in:] A. Sulikowski, R. Mańko, J. Łakomy (eds.), *Legal Scholarship and the Political*, Munich 2020 (in press).

¹⁵ One may wonder if the author, in an unjustified way, misses other functions assigned to law (see, for instance, I. Bogucka, *Funkcje prawa. Analiza pojęcia*, Kraków 2000; J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford–New York 1979, p. 163 ff.). However, this doubt is rather an aside.

¹⁶ On the concept of adjudication, see R. Mańko, *W stronę krytycznej...*, pp. 92–94.

¹⁷ Ibidem, p. 156. See also idem, *Legal Form...*

in power.¹⁸ It is rather a 'plastic medium within which lawyers – who are thus at the same time limited and empowered – operate' [emphasis in the original].¹⁹

To sum it up: the primary function of law, in terms of its belonging to the sphere of the juridical, is to resolve conflicts through adjudication. However, the upshot of Mańko's deliberations on the notion of the political is that such conflicts are irresolvable by definition. After all, there are no more or less legitimate interests, and to prioritise one set of them against the others is always an act of violence. This leads to the conclusion that the task of law is to resolve irresolvable conflicts. Is there any way out of the overt paradox (i.e. solving the irresolvable) into which law falls here? This question leads directly to one of the most important issues in Mańko's work, namely that of the legitimacy of law and adjudication.

The Legitimacy of Adjudication

The answer to the above-mentioned question might be a short one: there is no way out of the paradox into which Mańko drives law. The assumptions which he adopts in his conception of the political and law entail that it is impossible for the latter to gain legitimacy. Hence, the discussed conception falls into internal contradiction: it is not possible for its assumptions to be adopted and for its goal to be achieved. This is for a simple reason, already signalled on several occasions: the impossibility of formulating criteria which would allow one to distinguish between more and less legitimate interests.

Mańko seems to see the solution to this problem in the idea of justice that judges should aim at when making their decisions. To show why this solution turns out to be ineffective, one has to examine the concept of justice deployed by the author. In his book, Mańko refers to two concepts of justice, both highly regarded throughout critical jurisprudence. The first comes from Emanuel Levinas,²⁰ the second from Jacques Derrida.²¹ Alas, neither of these concepts is suitable for solving the issue of the legitimacy of adjudication in the field of the political (though each for slightly different reasons).

¹⁸ Cf. *ibidem*. This is an interesting contribution to the discussion on legal autonomy.

¹⁹ *Idem*, *W stronę krytycznej...*, p. 66.

²⁰ *Ibidem*, pp. 189–191. See also C. Douzinas, A. Gearey, *Critical Jurisprudence. The Political Philosophy of Justice*, Oxford 2005, p. 162 ff.

²¹ R. Mańko, *W stronę krytycznej...*, pp. 85–92. See also A. Sulikowski, *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności*, Wrocław 2008.

Mańko refers to Levinas' concept of justice via the classic authors of British critical jurisprudence – Costas Douzinas and Adam Gearey. Justice is perceived as a result of the encounter with the Other and the claims to which this encounter gives rise. This is a valuable and classic proposal,²² but it seems irreconcilable with Mańko's views. For Levinas, the phenomenon of the encounter has a strictly individual character – which is something also emphasised by Douzinas and Gearey – and for this reason, it is both pre-political and extra-political. Here, ethics takes primacy over the political, and thus can be contrasted and juxtaposed with the latter. However, such a situation is not acceptable in Mańko's system, where the political takes precedence over the ethical. According to Mańko, what should be of interest to the judge is not the individual claim of the 'other', but the collective interest of the group to which this 'other' (usually a party to the proceedings) belongs. Therefore, Levinas' concept of justice is irreconcilable with Mańko's views.

The second concept of justice cited in Mańko's book, namely that of Jacques Derrida, cannot be used to legitimise adjudication, either. This is due to the fact that for Derrida, justice takes on a radically aporetic character. It is equated with deconstruction and as such it serves to delegitimise rather than legitimise adjudication – it casts doubt on the latter, questions it, throws it off balance. The task that Mańko assigns to justice, that is, the task of legitimising adjudication, demands a more constructive concept of justice, which (while still recognising its subordination to the political) would also formulate some positive requirements.

But what are the requirements of the justice that is subordinated the political? One simply doesn't know. The problem is that this category appears in Mańko's project as a *deus ex machina*: he makes a leap from the political to justice without explaining or justifying this transition. As a result, the very status of justice and the way in which it is linked to the political remain unclear. The same goes for the content of this concept, and thus the criteria that justice should employ. The only indication that the author gives one is a reference to the 'emancipatory purpose' which justice is supposed to pursue, and which the judge is supposed to follow. However, this suggestion gives rise to at least two problems.

First, since it is not clear how to decide whose emancipation is at stake here, or which one of them should be supported, any choice in this respect can be considered arbitrary and random. The provided enumeration of the people whose aspirations a judge should support (employees, pensioners, patients, consumers – all these

²² On this issue, see, for instance, T. Gadacz, *Historia filozofii XX wieku. Nurty*, Vol. 2, Kraków 2009, pp. 575–599; J. Tischner, *Filozofia dramatu*, Kraków 2006; and in the field of legal science, see: P. Kaczmarek, *Tożsamość prawnika jako wykonawcy roli zawodowej*, Warszawa 2014, pp. 154–159.

‘working people of towns and villages’)²³ reveals this risk of randomness, which would accompany any drafting of such a list.

The second doubt is related to the first, but it is of a more fundamental nature. It is difficult to avoid the suspicion that this lack of criteria for emancipation/justice is not due to chance or omission, but is rather an essential feature of the scrutinised theory. As has already been noted, the author’s conception of the political in no way allows for the recognition that in the conflict of interests, some of them may be more legitimate than others. Thus the whole idea of emancipation turns out to be suspended in a vacuum. Why, focusing on the first of the above examples, should the judge give preference to the interests of the employee rather than the employer? Should this happen in every case? Mańko seems to take such a decision for granted, but – leaving aside other doubts connected with it²⁴ – there is no element in his own theory that would justify such a choice.

The words *critique* and *criterion* have a common etymology, namely the Greek term κρίνω (*krínō*), which means ‘to distinguish, separate, resolve’. This is an indication that meaningful criticism needs a set of criteria which it could follow. In the absence of such criteria, criticism falls into the temptations of intellectual comfort and dogmatism, and can become an exercise in futility. These are the problems of contemporary ‘critical’ theories which Leszek Kołakowski diagnosed: ‘We live in a world in which all our inherited forms and distinctions have come under violent attack; they are attacked in the name of homogeneity, which is held up as an ideal with the aid of vague equations purporting to show that all difference means hierarchy, and all hierarchy oppression – the exact opposite and symmetrical corollary of the old conservative equations, which reduced oppression to hierarchy and hierarchy to difference.’²⁵ No critical learning emerges from such totalising equations, just as from their conservative predecessors. They may be suitable for slogans in political struggles, but not as a tool for understanding the world.

Kołakowski went on to describe the implications of such a view for, among other things, the law: ‘Since the law is nothing more than an instrument of class oppression, there is no real difference, except in technique, between the rule of law and

²³ Ibidem, p. 219.

²⁴ A homogeneous vision of the employer-employee relationship seems to lurk behind the author’s view; one which does not take into account the considerable complexity of employment relations in the modern economy. We can observe that while Derrida’s concept of justice requires judges to question the solutions imposed on them and to read the law ‘twice’, critically, inquiring about the prejudices hidden in it, Mańko himself tries to impose certain solutions, what results in losing the ground under his feet.

²⁵ L. Kołakowski, *The Revenge of the Sacred in Secular Culture*, [in:] idem, *Modernity on Endless Trial*, Chicago 1990, p. 70.

brute force.²⁶ In this light, it is hardly surprising that such identification is found in Mańko's views, as he acknowledges directly that 'every judgment is an act of violence,²⁷ and 'a court judgment always exerts violence on one person, in the name of providing legal protection to another. This is the basic property of jurisprudence.²⁸ If this is the case, can one really call it justice when 'those who are dominated and experience violence'²⁹ are defended by using these very measures of domination and violence? What kind of defence against violence is the one which is violent itself?

Sensible talks about justice and effective criticism require criteria, even if the latter are inconclusive and disputable. Nor does their adoption mean that they need to be used in a dogmatic or formalistic way, without looking at the situational context.³⁰ However, the renunciation of all criteria – this semantic evisceration of justice – leads one down a blind alley. One are then doomed to conceptual enforcement of uniformity which abolishes all important distinctions. As Kołakowski noted, it is then no longer possible to distinguish between an order that effectively implements the standards of the rule of law, 'with the strong mediating function of the juridical system,' and an authoritarian system or 'the most perverse despotism'.³¹ Paradoxically, it is the despot who benefits most when he ceases to differ in any way from democratically elected rulers who are subjected to the requirements of the rule of law. Nonetheless, as Artur Kozak soberly noted: 'A law tailored to our needs [i.e. embodying the rule of law – MP] is not the worst of the options offered to us by the modern world.'³²

Kołakowski described this equation of law with violence as 'childish identification'.³³ Lacking his sharp perspicacity, I would be inclined to put it more gently: a theory that allows such identification loses its ability to make any meaningful

²⁶ Ibidem, p. 71.

²⁷ R. Mańko, *W stronę krytycznej...*, p. 269.

²⁸ Ibidem, p. 171. See also R.M. Cover, *Violence and the Word*, "Yale Law Journal" 1985/1986, 95, pp. 1601–1629; D. Kukovec, *Hierarchies as Law*, "Columbia Journal of European Law" 2014, 21, pp. 131–193, whose views the author refers to.

²⁹ R. Mańko, *W stronę krytycznej...*, p. 172.

³⁰ Aristotle already made these two points, and since then, they have been reaffirmed by numerous figures, e.g. in J. Rawls, *A Theory of Justice*, revised edition, Cambridge, MA 1999, especially pp. 42–45.

³¹ L. Kołakowski, *Rozważania o przemocy*, [in:] idem, *Pochwała niekonsekwencji. Pisma rozproszone sprzed roku 1968*, Z. Mentzel (ed.), 2nd edition, Vol. 3, London 2002, p. 137.

³² A. Kozak, *Postponowoczesna koncepcja prawa*, [in:] M. Błachut (ed.), *Z zagadnień teorii i filozofii prawa. Ponowoczesność*, Wrocław 2007, p. 77.

³³ L. Kołakowski, *Rozważania...*, p. 137.

distinctions – and thus ceases to fulfil its critical task. Instead, it falls into rather sterile dogmatism.³⁴

The Ethics of Adjudication

According to Mańko, justice has two key functions: in the external dimension, it is supposed to legitimise the law, while in the internal legal dimension, it is allegedly the key to the ethics of adjudication. Unfortunately, the proposed ethics raises as many doubts as the legitimacy project discussed above. First of all, it seems – once again – irreconcilable with the adopted conception of the political nature of law.

In his ethics of adjudication, Mańko postulates and presupposes, on the one hand, that the judges strive to implement justice (going ‘against the grain’ of the law)³⁵ and, on the other hand, that they interpret and apply the law ‘in the light of the ideology whose hegemony the judges would like to secure.’³⁶ It is not entirely clear what the relationship between the two postulates is – after all, according to Mańko, ideology invariably provides a rationalisation of a certain pattern of domination and violence, so it is not easy to reconcile it with the idea of justice – but let us put this problem aside. Mańko seems to ultimately believe that there are some ‘good’ ideological projects: these which protect the representatives of weaker and disadvantaged classes.³⁷ In such an approach, the ideology can be a way of providing justice, and justice can be interpreted through the prism of ideology.

My fundamental doubt here is not even whether this is conceptually coherent, but whether such a project is feasible in practice. In other words: where does Mańko draw the hope that the judges would be willing to support precisely this right and noble ideological project, rather than one that will lead to the deepening and strengthening of inequality and exploitation, from? After all, if the judges responded to Mańko’s appeals, they would be acting against their own class interests. It is no secret that the judges of the highest courts in particular – and it is to them that Mańko

³⁴ See e.g. P. Jabłoński, *O przydatności rad Odo Marquarda we współczesnym namyśle nad prawem*, [in:] M. Blachut (ed.), op. cit., pp. 55–66; O. Marquard, *Kompetencja w kompensowaniu niekompetencji? O kompetencji i niekompetencji filozofii*, [in:] idem, *Rozstanie z filozofią pierwszych zasad. Studia filozoficzne*, Warszawa 1994, pp. 32–34; P. Selznick, *Threshold Definitions, Normative Theory, and Sociology of Law*, paper delivered at the Annual Meeting of the ISA Research Committee on Sociology of Law, Tokyo 1995, p. 3.

³⁵ See, inter alia, R. Mańko, *W stronę krytycznej...*, pp. 173, 213.

³⁶ Ibidem, p. 218.

³⁷ For instance, the author formulates a postulate for judges to ‘depart from the line of case law based on neo-liberal readings in favour of pro-worker and pro-consumer readings that put the interest of the working man before the claims of capital,’ ibidem.

primarily (though not exclusively) directs his ethical postulates – can be considered members of the upper class or at least the upper middle class. Let us consider only one, but important indicator of class affiliation, namely earnings. In Poland, the Supreme Court Act currently in force guarantees judges of that court a minimum level of earnings in excess of four times the average salary,³⁸ which places this group among the two percent of the best-paid citizens.³⁹ If we apply Mańko's ethical postulates to the practice of adjudication, it is rather likely that activist judges will actively support the political interests of the social group to which they themselves belong – and not these who are worse-off and disprivileged.

The assumption that judges will be willing and able to leave their own interests at the door of the courtroom in order to pursue alien (and sometimes even contradictory) class interests is somewhat difficult to accept.⁴⁰ It becomes even less likely in the realms of the social ontology close to Mańko's heart, with a vision of the political as being rife with dominance and antagonism. Thus, Mańko's critical philosophy can be accused of falling into a peculiar version of the scholastic fallacy,⁴¹ believing in some special predispositions of the judges who would have the ability to cast off their – archetypally human – nature as political animals and rise above their temporal, class interests.

Obviously, it can be argued that this charge refers to conditions which are essentially contingent and can easily be changed. In this regard, the author also proposes far-reaching institutional reforms aimed at democratising the justice system.⁴² The question of the possibility and legitimacy of such changes must remain open here. Let us just note, first of all, that for the time being, one has to live in a certain institutional order, wherein one expects a certain level of justice from the law; and secondly, that, as experience with other branches of government

³⁸ Art. 48, ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (the Act of 8 December 2017 on the Supreme Court) (Dz.U. 2019, poz. 825).

³⁹ Cf. Główny Urząd Statystyczny, *Struktura wynagrodzeń według zawodów w 2018 roku*, 21.11.2019, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-zatrudnieni-wynagrodzenia-koszty-pracy/struktura-wynagrodzen-wedlug-zawodow-w-pazdzierniku-2018-roku,5,6.html> (access: 10.12.2019); P. Rojek-Socha, *Prezes Izby Dyscyplinarnej na szczycie płac w SN*, 31.07.2018, <https://www.prawo.pl/prawnicy-sady/prezes-izby-dyscyplinarnej-bedzie-zarabiac-wiecej-niz-i-prezes,290353.html> (access: 10.12.2019).

⁴⁰ Once again, the author seems to be escaping into existential metaphysics here, stating that 'the desire that underlies the identity of the individual as a judge is the desire to do justice' – *ibidem*, p. 174. I admit certain helplessness in trying to understand the exact meaning of this sentence.

⁴¹ Mańko finds this fallacy himself in other theories from the sphere of critical jurisprudence, see: *ibidem*, p. 217. For the scholastic fallacy, see: P. Bourdieu, *Medytacje pascaliańskie*, Warszawa 2006, ch. 1 and 2; H. Dębska, *Iluzje prawniczego rozumu. O społecznych warunkach praktyk (bez)refleksyjnych*, "Studia Prawno-Ekonomiczne" 2014, 42, pp. 18–20.

⁴² R. Mańko, *W stronę krytycznej...*, pp. 219–220, 243–247.

teaches us, democratisation is certainly not a panacea for the ills of partiality or the promotion of narrow, particular interests.

But let us assume for the time being that these difficulties can be avoided, and that the judges, rising above their own class conditioning, will therefore be able to pursue the emancipatory agenda suggested by critical theory. This agenda is encapsulated in Mańko's postulate to interpret the law 'in the light of the ideology whose hegemony the judges would like to secure,' in order to make the results of such an interpretation 'as consistent with the ideological project as possible.'⁴³ The question remains whether this is really the attitude that should be expected from them. To answer this, one should consider the sources of the above-mentioned postulate. Apparently, it is firmly rooted in a typically modern, expressivist vision of the subject and – closely related to this vision – the ethical ideal of authenticity.⁴⁴ According to this view, which emerged at the end of the 18th century (according to Charles Taylor, it was Jean-Jacques Rousseau and Johann Gottfried Herder who played the main role in its articulation), one should, throughout one's life, strive first and foremost to find oneself, one's unique identity, and to express oneself. Without the adoption of this vision, it is impossible to indicate why judges should – as Mańko claims – prioritise their personal ideological views over, for instance, the ideology expressed in the axiology of the legal system, or the ideological preferences of the current parliamentary majority.⁴⁵ Authenticity is a real and weighty moral ideal. Its adoption by Mańko should come as no surprise, given the existentialist inclinations of his theory – this ideal has always been close to the existentialist philosophy.⁴⁶ However, one may have doubts, first of all, as to whether this ideal, considering the available alternatives, should be crucial to how the role of a professional judge is understood. Is the authenticity and self-expression of one's own, deeply held ideological views really what should be expected from those who administer justice? Secondly, it is worth noting that the ideal of authenticity is susceptible to distorted interpretations – as all ideals. One of the most degenerate forms that this ideal takes is egotism or narcissism: a problem so widespread that it has even gained

⁴³ See *ibidem*, pp. 218–219.

⁴⁴ See C. Taylor, *Sources of the Self. The Making of the Modern Identity*, Cambridge, MA 1989, p. 368 ff.; *idem*, *The Ethics of Authenticity*, Cambridge, MA 1991, especially pp. 25–29.

⁴⁵ This, obviously, does not mean that a judge should give priority to any of these ideologies; the question of the relationship between them remains unresolved until someone decides to resolve it. As I indicate, Mańko's choice in this respect derived from his adoption of expressivism. Personally, in line with the perspective of reflexivity, I am inclined to believe in the need for and possibility of dialectically working through the differences between these different ideological projects.

⁴⁶ Louis Seidman distinguishes between existentialist and structuralist variants of critical theory – see L.M. Seidman, *Critical Constitutionalism Now*, "Fordham Law Review" 2006, 75, pp. 578–579.

a reputation as a culture-forming factor.⁴⁷ Therefore, it would be wise to exercise some caution and ask whether postulates like those put forward by Mańko do not lead to a model of a narcissist judge who considers his or her own point of view as the ultimate measure of justness. Kozak, among others, warned against such a scenario, writing that a lawyer who puts into practice the proposals of critical theories 'is, in fact, a capricious mass-man (...). For him, his firm "I (don't) want!" is both conclusive and causative.'⁴⁸

Conclusion

Mańko's theory of political adjudication is a set of interesting and provocative ideas, alas it gives rise to some quite fundamental doubts. Theoretical doubts because the basic concepts and theses adopted within its framework cannot be combined into a coherent whole. Practical doubts: concerning the real possibilities of putting the postulates of that theory into practice. Ethical doubts: whether the practice of the judiciary obeying its postulates is really the one we should desire. Finally, methodological doubts: firstly because of the apriorism of the theory, secondly because of its peculiar totalising tendencies, due to which it eventually loses its critical edge. At the same time, it should be noted that these problems are not unique to this theory; it is rather a perfect illustration of the problems in which many variants of the critical jurisprudence have become entangled. In this sense, the doubts raised here can be considered as the advantages rather than the drawbacks of the book under discussion. Its value resides, among other things, in the fact that it shows the key difficulties of critical legal studies in an exceptionally clear way.

All the charges levelled here by no means entail that critical jurisprudence – and Mańko's work within it – is only suitable for rejection. In conclusion, therefore, it will be worthwhile to indicate the useful aspects of this theory. Here I will signal three points which, in my opinion, are particularly related to all that has been said above.

Firstly, critical theory is valuable when it remains *critical* – that is, when, following Derrida, it undermines, deconstructs and questions the existing truths and orders. It is precisely then that it does not allow one to become too familiar and comfortable with the institutions of law, which have always been organised im-

⁴⁷ C. Lash, *The Culture of Narcissism. American Life in an Age of Diminishing Expectations*, New York–London 1991.

⁴⁸ A. Kozak, *Postponowoczesna...*, p. 73.

perfectly. Thus, critical theory plays mainly a negative and purifying role in this approach.⁴⁹

Secondly, for a proper understanding of the place occupied by a critical perspective in the structure of legal practice and reflection, it is worth recalling Paul Ricoeur's proposed distinction between the 'hermeneutics of suspicion' and the 'hermeneutics of recollection'.⁵⁰ According to the declarations of the representatives of critical jurisprudence,⁵¹ it is supposed to carry out the former type of hermeneutics, consisting precisely in the aforementioned demystification. However, according to Ricoeur, alongside this, one also needs a second interpretative attitude, aimed at revealing the true meaning of the object subjected to interpretation. In case of law, this may entail an attempt to describe the ethical ideal on which the law is founded. Thus, the 'hermeneutics of the recollection' makes it possible to reveal the ethical and political sense of the law; the hermeneutics of suspicion, on the other hand, is necessary to indicate all those places where this sense is distorted or denied. Only such a combination of critical and affirmative views gives one the comprehensive and unbiased picture of the legal order.

Thirdly, a great merit of critical theory – as clearly exemplified by Mańko's book – is that it reminds one of the political dimension of law. The law is entangled in the political, and there should be no controversy surrounding this thesis. The only question is whether there are alternative ways of understanding this political nature of the law. As I have already suggested in section 1, such alternatives are available because every fairly complete doctrine in the field of political philosophy must address this problem in its own way.

One of the research trends developed in recent years in jurisprudence, which may provide an alternative to orthodox critical theory is that of reflexive constitutionalism.⁵² It has to be acknowledged that this is not a completely homogeneous

⁴⁹ In a similar vein, see A. Bator, *Post-analytical Theory and Philosophy of Law. New Problems, New Research Perspectives?* [in:] A. Bator, Z. Pulka (eds.), *A Post-analytical Approach to Philosophy and Theory of Law*, Berlin 2019, pp. 11–38.

⁵⁰ P. Ricoeur, *Konflikt hermeneutyk. Epistemologia interpretacji*, [in:] idem, *Egzystencja i hermeneutyka. Rozprawy o metodzie*, Warszawa 2003, pp. 132–156; P. Jabłoński, *Pytanie o prawo w kontekście konfliktu między hermeneutyką podejrzeń i hermeneutyką zaufania*, [in:] M. Pichlak (ed.), *Profesjonalna kultura prawnicza*, Warszawa 2012, pp. 93–107.

⁵¹ D. Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, "Law and Critique" 2014, 25(2), pp. 91–139; R. Mańko, *W stronę krytycznej...*, pp. 76–77.

⁵² See, for instance, K. Kaleta, *Sądownictwo konstytucyjne a refleksyjny konstytucjonalizm (przeszłość – teraźniejszość – przyszłość)*, [in:] T. Biernat (ed.), *Konstytucja Rzeczypospolitej Polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych, gospodarczych, technologicznych i społecznych*, Warszawa 2013, pp. 27–44; M. Pichlak, *Konstytucjonalizm jako refleksja*, "Filozofia Publiczna i Edukacja Demokratyczna" 2018, 7(1), pp. 5–24.

research programme (depending on the precise way in which reflexivity is understood), and within the scope of this paper, there is no room for presenting its basic assumptions and variants. Let us only note that it apparently makes use of the key advantages of critical jurisprudence, accepting some of its methods and findings, while avoiding its one-sidedness. It adopts a more comprehensive, critical-affirmative perception of both the political and law.

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