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On Law – From the Perspective of Philosophy and in Reference to the Constitutional Concept – Herbert L.A. Hart's Defense of Utilitarianism

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Słowa kluczowe: H.L.A. Hart, pozytywizm prawniczy, utylitaryzm, uprawnienia naturalne

Abstract

The article aims at reconstructing the defense of utilitarianism, a philosophical doctrine being the basis for legal positivism (which is the foundation of the constitutional concept of sources of law), undertaken by H.L.A. Hart. Hart took up this defense in the face of a significant increase in the interest of legal theorists in concepts related to natural law. Discussing the views of his master, J. Bentham, Hart also expresses his own deep doubts about the ideology of natural law, the adoption of which leads to the rejection of legal positivism deeply rooted in utilitarianism. Presented more than four decades ago, Hart's remarks remain relevant today; modern thinkers still search an appropriate, other than referring to natural law, philosophical justification for a specific code of fundamental human rights.

Streszczenia

O prawie – w perspektywie filozofii i w nawiązaniu do konstytucyjnej koncepcji – Herberta L.A. Harta obrona utylitaryzmu

Celem artykułu jest rekonstrukcja podjętej przez H.L.A. Harta obrony utylitaryzmu, doktryny filozoficznej będącej gruntem dla pozytywizmu prawniczego, który jest fundamen-

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tem konstytucyjnej koncepcji źródeł prawa. Obrony tej podjął się Hart w obliczu znaczącego wzrostu zainteresowania teoretyków prawa koncepcjami nawiązującymi do prawa natury. Omawiając poglądy swego mistrza, J. Benthama, Hart wyraża też własne, głębokie wątpliwości dotyczące ideologii praw naturalnych, której przyjęcie prowadzi do odrzucenia głęboko ugruntowanego w utylitaryzmie pozytywizmu prawniczego. Uwagi Harta sprzed ponad czterech dekad nie tracą dziś na aktualności, współcześni myśliciele wciąż szukają odpowiedniego, innego niż nawiązujące do prawa natury, filozoficznego uzasadnienia dla swoistego kodeksu podstawowych ludzkich praw.

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As it is known, the constitutional concept of law, based on the Article 87 of the Polish Constitution of 2 April 1997, should be understood as norms of a general and abstract nature, i.e. directed to an unspecified number of addressees and regulating repetitive patterns of behavior. The source of law in the constitutional sense is an act established or recognized by the state as containing norms of conduct binding to their addressees. The system of sources of law in the Republic of Poland is civil legal system; the statutory acts (law-making facts) are the Constitution (Article 235), statutes (Article 118 et seq.), regulations having the force of statute (Article 234), regulations (Article 92), enactments of local law (Article 94), internal resolutions and orders (Article 93). In addition, pursuant to the Constitution the sources of law, i.e. law-making facts, include: international agreements (Articles 89–91), laws established by an international organization of which Poland is a member [Article 91 (3)], as well as collective labour agreements [Article 59 (2)]. The Polish doctrine is based on the view that the Constitution of the Republic of Poland adopts, in principle, the positivist concept of law[2] and that there are no grounds in the Constitution for recognizing norms of conduct derived from sources other than acts of state power a binding law[3]. It was to be a deliberate step – the founders of the Constitution

[2] A. Bałaban, Źródła prawa *w polskiej Konstytucji z 2 kwietnia 1997 r.,* "Przegląd Sejmowy" 1997, No. 5, p. 34; R. Mojak, *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.,* "Studia Iuridica Lublinensia" 2009, No. 12, p. 31.

[3] K. Działocha, *Konstytucyjna koncepcja prawa i jego źródeł w orzecznictwie Trybunału Konstytucyjnego,* [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego,* ed. M. Zubik, Warsaw 2006, pp. 306, 309.

intentionally abandoned the idea to grant binding power to norms not established by the state, i.e. derived from natural law, along with the sources of constituted law. It seems that this concept of law does not conflict with including the provision of Article 30 referring to the "inherent" human dignity, which is a "source of human rights and freedoms" in the Constitution. According to the Polish doctrine, this provision means that "the axiology of natural law is somehow invited to co-define the system of values arising from the constitution"[4] and the concept of law in the Constitution is axiologically oriented in this context[5]. Despite the fact that some provisions of the Constitution refer to non-legal rules (Articles 1 and 2), it does not give grounds to consider that the status of applicable law has been granted to the norms of natural law[6]. One of the philosophers of law dealing with the issue of the relationship between positive law and fundamental human rights is Herbert L.A. Hart. The article presents his opinion on the subject. Hart argues that enforcement for basic human rights should not be sought in the concepts of the natural law, but in the doctrine of utilitarianism – in his opinion the best invented so far. The English writer does not propose a ready-made, innovative theory of human rights, but he encourages to seek for it precisely on the basis of utilitarianism.

Hart, one of the greatest English theorists of law, is a writer who appreciates the importance of philosophical thinking in theoretical and legal inquiries. He admits, this is not a commonly adopted attitude, more often law theorists leave their discipline outside the scope of philosophy. Even then, however, states Hart, should recognize the considerable influence exerted by the philosophical thought of Jeremy Bentham, the founder of utilitarianism, on the current shape of the general theory of law, especially in its British version.

Bentham is widely regarded as the creator of utilitarianism, but he was not the actual author of the principle of utility. The philosopher himself said that this principle had appeared to him while reading the treatise entitled *Essay*

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[4] Own translation based on L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu,* Warsaw 2011, p. 38.

[5] K. Działocha, *O prawie i jego źródłach z perspektywy pięciolecia obowiązywania Konstytucji Rzeczypospolitej Polskiej,* [in:] *Pięć lat Konstytucji Rzeczypospolitej Polskiej. Materiały z konferencji na Zamku Królewskim w Warszawie,* ed. H. Jerzmański, Warsaw 2002, pp. 47–48.

[6] M. Wiącek, [in:] *Konstytucja RP. Tom II. Komentarz do art. 87–243,* eds. M. Safjan, L. Bosek, Warsaw 2016, pp. 36–40.

on Government by Joseph Priestley, who assumed that happiness of the majority of citizens is a criterion that should be applied in assessment of all state matters. Earlier, it had also appeared in writings of Hobbes, Hutcheson, Beccaria, Hume and Helvetius who influenced Bentham most strongly. Bentham contributed to its explicit pronouncement, as well as its general application both in relation to morality and law[7]; the principle of utility was the foundation of his philosophical system.

Hart notes that, for a long period, the term "utilitarianism" functioned as a synonym for progressive socio-legal thought, and British advocates of natural law trends and of the existence of natural human rights, were until recently in a definite retreat. As the author of the monograph on the evolution of this theory stated, all reforms during the nineteenth century were forced to speak the language of utilitarianism[8], the principles of utilitarianism infiltrated British administrative and governmental institutions and were settled there permanently.

Recognizing utilitarianism as fundamental to the development of law and political theories of the last three centuries, in 1976 Hart noted that perhaps a certain era is about to end; that utilitarianism, hitherto considered as "a manifestation of European Enlightenment", is increasingly accused of justifying the wrong done to individuals in the name of increasing the general well-being of societies[9]. According to Hart, the reluctance for utilitarianism goes hand to hand with increasingly frequent references to theories proclaiming important conceptual connections between law and morality which law is to justify. Although Bentham's views were criticized in England and America as early as in the 19th century, they were not conclusively discredited at that time. The criticism of Bentham's utilitarianism was aimed at improving it, clarifying what was obscure in it, and not rejecting this doctrine *en bloc*.

As Hart notes, currently the tone of critical remarks regarding utilitarianism has changed significantly and qualitatively. Today it is increasingly recognized as an excuse for evil inflicted on individuals in the name of maxi-

[7] F. Copleston, *A History of Philosophy*, "New York" 1994, vol. VIII, p. 4.

[8] H.L.A. Hart, *Utilitarianism and Natural Rights*, [in:] *Essays in Jurisprudence and Philosophy*, Oxford 2001, p. 183.

[9] H.L.A. Hart, *1776–1976: Law in the Perspective of Philosophy*, [in:] *Essays in…*, p. 148.

mizing average well-being of the entire society[10]. The criticism of this theory made by contemporary American political philosophers – mainly John Rawls in *Theory of Justice* and Robert Nozick in *Anarchy, State, and Utopia*, primarily concerns the utilitarians ignoring the importance of the fact that the division of society into individuals is fundamental, which is a sufficient reason for recognising specific individual interests of individuals as inviolable[11]. Rawls's concept is dominated by the rule of duty of the authorities to respect the separateness of individuals, and Nozick's one – by the obligation of the authorities to treat them with equal respect[12]. In turn, the criticism by Ronald Dworkin, Hart's successor in the position of professor in jurisprudence in Oxford, alongside similar allegations – depreciation by utilitarianism of individual matters for the general interest, which at least in Dworkin's view, could not be a proper philosophical ground for the idea of human rights – it also has a new feature based on reinterpreted conceptual connections between law and morality, which the law is supposed to justify (Dworkin's concept stands so strongly against utilitarianism that the term "right" is given the adjective "anti-utilitarian"[13]).

Looking for common features of various arguments against utilitarianism, Hart distinguishes four main points: firstly, classical utilitarianism does not add significance to individual entities, focusing on the total sum of happiness – individual people do not matter as themselves, but as "channels" or "carriers" of the value that is added up. The second objection concerns the definition of utilitarianism as an individualistic or egalitarian doctrine, as it recognizes people as equal ("everyone should count as one and nobody as more than one", happiness of a given individual counts the same, regardless of their religion or skin colour) – in fact, according to critics, it treats people as having no moral value, after all, what counts is not the people but the pleasures experienced by them. Therefore, it is possible and rational to sacrifice happiness of individuals, as long as this ultimately contributes to greater happiness of more people. The third argument reconstructed by Hart relates to the primary objective of utilitarians –

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[10] This opinion is also popular in the 21st century. O. Górecki, *Utylitaryzm – doktrynalna analiza ewolucji nurtu*, "Annales. Etyka w życiu gospodarczym" 2011, vol. 14, No. 1, p. 115.

[11] H.L.A. Hart, *1776–1976: Law in…*, p. 148.

[12] *Idem, Between Utility and Rights*, [in:] *Essays in…*, p. 199.

[13] Ibidem, p. 208.

the maximum sum of happiness; critics of Bentham's thought note that it is not someone's experience, no one is a recipient, a carrier of the abstract sum of human happiness. The last argument, related to the third one, points to the false analogy between the actions of a wise, rational individual and the authorities' actions based on requirements of the utility principle – just as an individual is able to sacrifice their temporary satisfaction for greater but future satisfaction, a rational government treats the pleasure of the individual as substitutable with greater, sometimes even future happiness of other people. Utilitarians treat society as an organic whole, which individuals are parts of[14].

The defense of utilitarianism and genetically associated to it legal positivism against its over-zealous critics remains in the focus of several Hart's works[15]. Analyzing Bentham's writings, he shows that his ideas have not faded completely, that he agrees with him on many points, and finally that new theories proposed by today's opponents of Bentham's doctrine are at least debatable, if not controversial. However, Hart is convinced that basic rights and freedoms can also find their justification in utilitarianism, even in the version proposed by J. S. Mill. Hart expresses strong belief that utilitarianism and liberalism are reconcilable orders and they are not in fundamental contradiction[16].

Hart's attempt to defend Bentham's views starts with recalling his response to various versions of the declaration of human rights. When in 1776 the American Congress passed the Declaration of Independence, and when Bentham's book *A fragment on government* containing the first formulation of the principle of utility was published, satirical and anonymous *An Answer to the Declaration of the American Congress* also was published, to which J. Bentham had contributed significantly[17]. The shaft of satire in this text was aimed against the theory of natural equality of people and their inalienable subjective rights and the philosophical preamble of the Declaration[18]. Ben-

[14] Ibidem, pp. 200–201.

[15] H. Steiner, *Are There Still Any Natural Rights,* [in:] *The Legacy of H.L.A. Hart. Legal, Political, and Moral Philosophy,* eds. M.H. Kramer, C. Grant, B. Colburn, A. Hatzistavrou, Oxford 2013, p. 239.

[16] H.L.A. Hart, *Utilitarianism and…,* p. 195.

[17] H.L.A. Hart, *The United States of America,* [in:] *Essays on Bentham. Studies in Jurisprudence and Political Theory,* Oxford 2011, pp. 54–55.

[18] A. Bartnicki, K. Michałek, I. Rusinowa, *Encyklopedia historii Stanów Zjednoczonych Ameryki,* Warsaw 1992, pp. 67–68.

tham argued that the juxtaposition of the statement that there are inalienable human rights with the thesis that the government is to protect them and becomes empowered when it provides protection is absurd and internally contradictory[19]. All previous governments treated seemingly inalienable rights as transferable[20]. Bentham reacted even more violently to the French Declaration of Human Rights of 1791, which he called "bawling upon paper" and "nonsense upon stilts" in his unpublished work *Anarchical Fallacies*[21]. He argued that inalienable rights were contrary to both the very idea of government and reason. They are both nonsense and potentially dangerous anachronism.

The reason for the existence of government are not any prior entitlements that it has to defend, only the formation of government constitutes law and powers[22]. Natural rights are assigned only to inhabitants of Nowhere land or Utopia, only unfettered imagination speaks for them. As belonging to the world of fiction, they cannot function successfully in the real world. They do not fit in it, they cannot be modified, they are not flexible, they are not subject to calculations. They are by definition conflicting with each other[23], said Bentham, calling them "rights to anarchy". According to Bentham, the term "natural right" has an oxymoron character – it has an internal contradiction, as in "cold heat" or "resplended darkness"[24]. Natural entitlement and natural law belong to the sphere of non-existence, and their various lists or catalogues are nothing more than a list of wishes of their authors. They cannot be an objective measure of what may be required by law, but utilitarianism can be such a measure[25].

As Bentham's legal views arose directly from his utilitarianism and were its immediate consequences, the contemporary criticism of Bentham's utilitarianism also refers to the positivist approach to judge's decision making. Today, as Hart notes, the shaft of this criticism, mainly Ronald Dworkin's, is not pointed, as it once was, against formalism[26] in law, but against the positivist conviction that judicial decisions in hard cases are of a legislative nature. Since Bentham's

[19] H.L.A. Hart, *The United States…,* pp. 53–78.
[20] *Idem, 1776–1976: Law in…,* p. 151.
[21] *Idem, Utilitarianism and…,* p. 182.
[22] Ibidem.
[23] *Idem, 1776–1976: Law in…,* p. 150.
[24] *Idem, Utilitarianism and…,* p. 185.
[25] Ibidem, p. 186.
[26] *Idem, 1776–1976: Law in…,* p. 152.

time British positivists assume that, when it is unclear how to apply law, judges make decisions – one way or another, choosing one or other interpretation of it, the best one in their opinion. In "hard cases" they carefully look at opposite concepts, aware that strong arguments speak for each of them.

According to Dworkin, for each case one can find a solution best suited to it, the only one, the judge does not make law, he discovers it, just as one discovers the laws of mathematics since forever awaiting to be discovered. The foundations of every legal system – claims the antagonist of Hart and Bentham – are the general principles of fairness and justice with the ideals of human dignity and freedom inscribed in them, and they become the basis for the only right solution to hard cases, i.e. when individual, less or more specific legal provisions fail. The positivists are wrong in thinking that the judge engages in law-making activities in hard cases – their role is to provide the right decision-making rule in a given case, better than all others (although they can never be sure that they has accomplished the entrusted task well – such an achievement would be attainable only for a superhuman being, called by Dworkin "Hercules"). It is not that law can sometimes be accused of indeterminacy or lack of completeness – it is not law that is imperfect, but our human ability to recognize it. Even if there is no established law for a given case, it is always possible to indicate a prior right more deeply rooted in the system[27]. Dworkin illustrates his considerations with the example of two famous American judges from the period before the Civil War – Joseph Story and Lemuel Shaw, heavily involved in combating slavery. Almost "in an act of despair", against their moral convictions, they supported the Fugitive Slave Act passed by the American Congress and ordering slaves who got into the free states to return to their owners. Dworkin claims that they did this against themselves, convinced that it is their professional duty to comply with legal provisions which interpretation did not raise doubts – the Fugitive Slave Act and the Constitutional Convention resulting from an agreement between the free states and the ones supporting slavery. Dworkin accuses the judges who, contrary to their moral beliefs, acted according with the letter of applicable law, for contributing to a "failure in jurisprudence"[28].

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[27] Ibidem, p. 154.

[28] Ibidem, pp. 155–156.

This is how Hart reconstructs the reasoning of his and Bentham's adversary: If these judges had known and professed a new better Dworkin's theory of law, they should have recognized that the idea of individual freedom, contrary to slavery, underlies the American Constitution, also including a conception of procedural justice (they should have used principles of law). However, the view that the State of Massachusetts was dependent in controlling the detention of people on its territory is contrary to the spirit of federalism cross-cutting the American Constitution[29]. These principles are far more fundamental than the slavery regulations that arose in response to the urgent need to establish, which are inherently detailed and transient. Therefore, Judges Story and Shaw should have decided on the basis of these fundamental principles. This decision, grounded in positive law, is hidden in it and the role of the judges was to find it, and at the same time to reject what they considered to be the obligation to apply law[30].

However, Hart notes that Dworkin with "latitude" authorizes both himself and the courts to indicate the line between what is treated as established law, being a source of justifying rules, and transient law, which the principles needed to issue decisions in "hard cases" derive from. Hart's second important objection concerns Dworkin's conviction that the judge would always be able to separate a coherent set of rules enabling him to solve a hard case under the applicable law (Dworkin calls it "gravitational pull"). Hart notes that there may be a situation in which one can distinguish rules or their sets that will be mutually opposite – in his opinion, this was the case in the situation in question, where the rules allowing for the settlement against slaves fit the law then in force as well as the ones indicated by Dworkin[31].

The next instalment in the defense of utilitarianism, undertaken by Hart, is an analysis of the version of this doctrine in the view of J.S. Mill, a follower of Bentham's thought. The corrections made in the master's doctrine done by Mill were due to his definition of democracy. While for Bentham democracy was a guarantee that the vision of minority's government over the majority would not be realised, Mill wanted it to ensure that minority rights were also respected; he feared a tyranny of the majority as much as Bentham feared

[29] Ibidem; V. Ostrom, *The Meaning of American Federalism*, Ics Pr 1991.

[30] H.L.A. Hart, *1776–1976: Law in…*, p. 155.

[31] Ibidem, pp. 156–157.

a tyranny of the minority[32]. He was afraid that the ruling majority would try to impose its vision of reality on the individual[33]. Creating the right political culture, real democracy respects the right to freedom and, to Mill, it is a means providing *everyone* with the opportunity to develop the ability to reasoning, self-fulfillment and self-determination. State institutions must respect the indisputable fact that individual members of society are unique individuals, in very different ways setting and achieving their life goals.

One of Mill's objectives was to show that justice, assuming respect for certain individual rights, does not conflict with utility (as it is commonly believed), but that it is its component, its special kind. His unique definition of "having a moral right", referring to the concept of utility, was helpful in this: "To have a right to have something which society ought to defend me in the possession of… If the objector goes on to ask why it ought [to do so], I can give him no other reason than general utility"[34]. Certain moral rights protecting the individual against damage caused by others and against unlawful limitation of their freedom to strive for self-defined happiness come from *general utility*[35]. The basic rights, derived from Mill's *general utility*, form "a particular kind or branch of general utility" clearly distinguished from others. These rights must take precedence over other forms of utility, regardless of the amount of hedonistically understood pleasure, convenience or daily benefits that the latter generate. It is important that since they create negative limitations for others, their maximization, as a particular form of utility, can only consist in applying them to *everyone* without exception[36]. It is important that they are basic and extremely important for human happiness, and, therefore, occupy a higher place on the scale of social utility binding more firmly than others[37]. Mill repeatedly stressed the links between certain powers and utility and renounced the benefit that his argument for certain moral rights could derive from freeing it from a close relationship with the idea

[32] *Idem, Utilitarianism and…,* pp. 192–193.

[33] J. S. Mill, *On Liberty,* https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf (18.11.2019).

[34] H.L.A. Hart, *Utilitarianism and…,* p. 188.

[35] Ibidem.

[36] Ibidem, pp. 190–192.

[37] J. S. Mill, *On Liberty,* https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf (18.11.2019).

of utility[38]. Hart himself appreciates the importance of Mill's thoughts, although at the same time he admits that his concept is not free from certain difficulties and at some points it is not entirely convincing[39].

More than 40 years ago, Hart's essays still seemed very relevant; the discussions about inherent human powers have still been vivid. One of the voices in this discussion was the opinion of Leszek Kołakowski, historian of ideas who shared some of Bentham's and Hart's doubts. Kołakowski in a statement from 2003 entitled *Why do we need human rights*[40] wondered how legitimate it is to build various catalogues and collections of human rights, such as the UN Declaration of 1948. The wishes contained in them alone did not raise philosopher's objections, he agreed with the thesis that the world in which they would be implemented would be a better place, but he was concerned about the way they are established as "human rights".

Kołakowski began the analysis of the status of these rights, as Hart once did, by examining the way people usually use the phrase "I have the right". For example, it may mean that an individual is a party to a certain contract that allows them to do something – the basis of their right then becomes the general rule governing interpersonal relationships, stating that the contracts must be kept. The phrase "I have the right" often refers to a situation when a person refers not to the previously concluded contract, but to a certain unwritten custom. It seems that human rights enshrined in the 1948 Declaration should be understood in a different way – after all, they are to be universal, abstract and non-exceptional rights and apply to every human being. However, unlike the American Declaration of Independence, the 20th century document does not indicate God as the creator and guarantor of these rights. If the catalogue of human rights is not a list of sentences with a metaphysical dimension, then perhaps it is a normative text on how, according to the authors, the human world should look like – for example, it would be better if people received adequate remuneration for work and if no torture was exercized. In this approach, the Declaration of Human Rights appears

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38 J. Rawls, *Wykłady z historii filozofii polityki,* Warsaw 2010, pp. 291–295.

39 H.L.A. Hart, *Natural Rights: Bentham and John Stuart Mill,* [in:] *Essays on Bentham. Studies in Jurisprudence…*, pp. 103–104.

40 L. Kołakowski, *Po co nam prawa człowieka,* "Gazeta Wyborcza" No. 250, 25/10/2003 "Gazeta Świąteczna", p. 11.

as a subjectively compiled list of postulates of its creators and is certainly not a catalogue of true sentences or eternal truths. Yet another interpretation of "human rights" is understanding them as laws by which subjects defend themselves against the omnipotence of those in power, laws which distant ancestors were the Magna Charta, the Habeas Corpus Act, the Nantes edict or the *nemin captivabimus*. The "human rights" understood in this way stem directly from the restrictions that state power accepts, and the restrictions enshrined in positive law.

Like earlier Bentham, who perceived the sources of Jacobin terror in the idea of human rights, Kołakowski emphasized that it can be an excuse for persecution and intimidation. Kołakowski noticed another important and dangerous side of human rights phraseology – he made it responsible for disseminating the "atmosphere of infinite claims" which are guised in the language of these rights in civil Western countries. The philosopher considered the freedom to disseminate various lies and slander in the media, derived from the freedom of speech and print, often for political reasons – slanderers who refer to "human rights" usually remain unpunished – a particularly dangerous situation that can lead to human rights fanaticism.

Kołakowski called the list of human rights a utopian "constitution of all states worldwide". Recognizing the legitimacy of philosophical reflections on the theoretical basis of such rights as religious freedom, a secular state, freedom of speech or a ban on slavery, Kołakowski stated in the spirit of Bentham and Hart that they should have the nature of legal restrictions, they should be written in the text of applicable law, directly, precise and unambiguous language, different from the vague, often ambiguous language of human rights.

Looking at new, potentially revolutionary theories formed at the interface of jurisprudence and philosophy, theories intended to replace outdated utilitarianism and legal positivism associated with it, Hart concludes that the future of both disciplines has not yet been determined. And, although the optics of individual rights is becoming increasingly popular in Anglo-Saxon culture, especially when it comes to social policy, there is no convincing, coherent concept of human rights and their relations to other values implemented by the legal system. According to Hart, it has not yet been proven that a new definition of law, alternative to the positivist one, including in its framework a complex of principles that should be used in hard cases, will bring a clear,

more adequate description of the judges' work. Hart is convinced that the opposite will happen – the new theory will be even more confusing, giving legal philosophers a job for the next two hundred years[41]. It suggests that it is better – for the sake of both disciplines, law and philosophy – to stick to Bentham's concept, with some necessary corrections. In view of the enormity of anti-humanitarian activities, he notices the urgent need to establish a certain "code of authority" that would protect fundamental rights of citizens against actions of the state, Hart calls such a code the most pressing political problem of our time[42]. In his opinion, "a satisfactory foundation for a theory of rights will be found as long as the search is conducted in the shadow of utilitarianism"[43].

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41 H.L.A. Hart, *1776–1976: Law in…,* p. 158.

42 *Idem, Utilitarianism and…,* p. 196.

43 *Idem, Between Utility and…,* p. 222.

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