

NEUTRALIZATION OF VALUES IN LAW

Edited by
Krzysztof Pałeczki

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Contents

Foreword / 7

Part I

The General Perspective / 9

Krzysztof Pałeczki

An Axiological Explanation of Social Activity / 11

Krzysztof Pałeczki

Neutralization of Values in Law—Main Concepts / 22

Maurycy Zajęcki

Socio-anthropological Assumptions of the Neutralization of Values in Law and the Determination of Law by Values: the Basic Model and its Limitations / 59

Mateusz Stępień

Neutralization of Values in Law in the Face of Political Value Dynamics. A Case of Using Law as Placebo / 78

Sylwia Wojtczak

The Broadening of Legal Notions as a Tool in the Neutralization of Values in Law / 116

Part II

The Perspective of the Formation of Law / 135

Mateusz Pękala

Lawmaking Principles and the Neutralization of Values in Law / 137

Michał Dudek

**Instrumentalization of the Law and Neutralization of Values in Law.
Some Reflections after Reading the Draft Amendments of the Special
Part of Polish Penal Code of the Sixth Term of Office of the Polish
Sejm (2007–2011) / 189**

Janina Czapska

**Public Security. Values in the Discussion of the Bill on the Means
of Force and Firearms / 238**

Michalina Szafrńska

**Penal Populism as a Manifestation of the Neutralization of Values
in Penal Law / 266**

Part III

The Perspective of Legal Application / 301

Hanna Dębska

**Legal Doxa as a Form of Neutralization of Values in the Law.
The Case of Constitutional Tribunal Judgments / 303**

Jerzy Zajadło

The Problem of Slavery and Legal Axiology / 352

Summary / **369**

Bibliography / **375**

About the Authors / **409**

Foreword

This volume is the result of research on the issues of the axiological conditions of lawmaking and the application of law. It was performed as part of the project “Neutralization of Values in Law” (from 2010 to 2013, reg. no. N N 110 239439). The research team consisting of Janina Czapska, Hanna Dębska, Michał Dudek, Mateusz Pękała, Mateusz Stępień, Michalina Szafrńska, Maurycy Zajęcki, Jerzy Zajadło and Sylwia Wojtczak, directed by Professor Krzysztof Pałeczki, reflected extensively on the function of values in the legal regulation of social order. The main aim of the project was to establish the grounds, classify various forms and evaluate the consequences of the phenomenon of weakening interdependences between the axiological grounds of the decisions to make and apply law, and their regulatory contents.

This volume presents NoViL (Neutralization of Values in Law) from various perspectives and in various forms. The common basis for all of the texts is the theoretical framework introduced in the first two chapters by K. Pałeczki. However, this does not prevent the authors from presenting their own standpoints on this complex issue. For example, some authors focus their research on the internal features of law, whereas others refer mostly to external factors. Therefore, the individual parts of this volume, although methodologically different, constitute a comprehensive, multifaceted picture of NoViL. We believe that such diversity is a good thing, because it contributes to further theoretical considerations upon the issues of values dynamics in law implementation, and encourages further empirical verification of this matter. In the philosophical context, the conclusions drawn from the issues of NoViL can serve as a new context for reflection upon good law. They can also inspire an approach which is different from the epistemological one which is predominantly used in jurisprudence nowadays. And the practical applicability of the presented texts results

from the recommendations for legal policy given by the authors. They can provide, for example, an increased efficiency of law and new actions aimed at a reduction of the negative effects of NoViL.

The realization of the particular aims of the research project was possible thanks to a multidimensional and interdisciplinary approach. This volume refers to the following issues: a) the use of socio-psychological concept of “appulsion” and “repulsion” in order to explain the functioning of values at normative actions (Krzysztof Pałecki, Maurycy Zajęcki), b) the placebo effect connected with value dynamics (Mateusz Stępień), c) a new approach to ambiguity and the vagueness of legal terms (Sylwia Wojtczak), d) the expression of axiological grounds in legal texts (Mateusz Pękala), e) the formulation of values as goals in the process of criminal law-making (Michał Dudek), f) political and legal aspects of the discussion about using coercive means (Janina Czapska), g) penal populism mechanisms (Michalina Szafrńska), h) methods of argumentation used by the Polish Constitutional Tribunal (Hanna Dębska) and i) axiology dynamics in the history of law (Jerzy Zajadło).

The research team which analysed NoViL can be viewed as “asking for axiology” in their reflections upon modern legal systems. The processes of value neutralization have not been a separate object of interest in legal science thus far and this volume is the first multifaceted publication on this issue. The members of the research team have endeavoured to fill a cognitive gap, albeit at least partially. The sociological and simultaneously with it legal approach applied in the research seems to be the most promising for many explanatory and pragmatic reasons. The formulation of direct practical guidelines was not the main purpose of the researchers. However, they based their research on the conviction that the appropriate recognition of the phenomenon provides such possibilities.

Krzysztof Pałecki

Part I

The General Perspective

An Axiological Explanation of Social Activity

The few subsequent observations on cognitive beliefs could perhaps constitute an introduction to a more developed theory; however, for the purpose of the study which they precede, they only serve as a most general set of assumptions, a unique epistemological *credo* that all the authors agree upon to a greater or lesser extent, and which forms a *sui generis* legitimization of a number of research ideas gathered in the project titled “Neutralization of Values in Law”.

The leitmotif of our discussion will be the comment made by Anthony Elliott: “...there is no value-free way of engaging with social theory.”¹ This clearly applies, provided that the “theory” is understood as an ordered set of general statements explicating certain phenomena in (social) reality, and “valuing” in formulating the theory hinges on using specific values as necessary premises in the process of explication. Subsequently, the subject of these deliberations will be a “valuing” method of explication (explanation) of that portion of social reality that will be specified as “social activity”.

To put it in simplest terms, the subject can be understood as common, repeatedly performed activities in a certain populous community (society), that can be characterized by the idiosyncratic similarity of the method by which they are performed. One may undoubtedly employ Anthony Giddens’ concept of structuration in order to describe the “repeatability of human social practices entangled in unique reflexivity.”² However, a more subtle use of the term “social activity”, as it will be understood (explained) hereinafter, necessitates referring to certain

¹ A. Elliot, *Współczesna Teoria Społeczna. Wprowadzenie* [Contemporary Social Theory. An Introduction], Polish translation by P. Tomanek, Warszawa 2011, p. 11.

² A. Giddens, *Stanowienie społeczeństwa. Zarys teorii strukturalizacji* [The Constitution of Society], Polish translation by P. Amsterdamski, Poznań 2003, p. 39.

anthropological properties. Michał Heller's well-known axiom denotes these properties both accurately and synthetically: "The man possesses his consciousness and is conscious of his consciousness."³ Accepting it, we simultaneously determine—for our own purposes—"consciousness" as a syndromic set of psychological determinants of the methods of person when perceiving nature, objects of culture, other people and himself or herself. Subsequently, "a set of psychological determinants" defining this act of perceiving will be narrowed down to experiences of a two-fold type: cognitive and valuing. The former are subject to "being preserved" in the form of knowledge with the latter as relatively constant (repetitive) perceptual appulsive or repulsive reactions.⁴ Therefore, let us omit extra-reflexive emotional states but not self-knowledge about one's own emotional states. It is easy to notice that both constituent "parts" (which we have differentiated in the above manner) of consciousness, in one moment appear in the form of appulsion-repulsion processes of acquiring knowledge, or perception creating appulsion-repulsion, but at another they are "a state of mind", i.e. a collection of information and a memory trace of appulsive and repulsive experiencing. The dynamics of transformation from processes to states and from states to processes is a characteristic feature of consciousness, particularly important for explicating (explaining) "social activity" which consists of actions controlled by consciousness, starting from states determining decisions, and ending in processes completing those decisions. Let us note that this "controlling" (determining), in other words this causative process, cannot for many reasons have a typical, natural character of a fictive relationship in which unequivocally determined causes induce unequivocally determined effects. In the world of society, the intricacies of processes leading from (knowledge and values) consciousness states, which are always incompletely defined, to initiating their diverse activities, which are also not completely predictable, necessitate the use of some "weak", but directed (and also modelled, as we shall attempt to prove in the further discussion) version of influence; moreover, it is not unidirectional but, more often than not, multi-directional influence,

³ M. Heller, *Świat wartości [World of Values]* (in:) M. Heller, *Wszczęświat jest tylko drogą. Kosmiczne Rekolekcje [The Universe is just the Road. Space Retreat]*, Kraków 2012, p. 75.

⁴ See K. Pałeczki, *Prawoznawstwo. Zarys wykładu. Prawo w porządku społecznym [Jurisprudence. An Outline of Lecture. Law in Social Order]*, Warszawa 2003, pp. 18, 79; *Neutralization of Values in Law—Main Concepts*, in this volume.

and nearly always reversible influence. Hence, the term “explaining” was used in the title (and will be used further on here), in the sense of less unequivocal, less certain (with a larger margin of exceptions) “explication”; since the latter term—usually understood in the sense of Ajdukiewicz’s school of logic—is nothing other than an analogy of syllogistic “argumentation” in which the certainty (veracity, axiomatcity) of premises is a necessary condition for some indisputable (true, correct) conclusion.⁵ Yet, our *explanans* (explanatory phenomena) we propose here, i.e., consciousness (and its subsequent “products”—obligational models of behaviour, “norms”) are never in a definable state, and its explanatory capacity depends on the degree of accuracy of the indices employed, which are ever unreliable and interferential. Hence, the conclusion is, at the most, more probable than random, but frequently it eludes quantification.⁶ When the conclusion of explanatory reasoning still only remains a more substantiated hypothesis—it does not attain the status of a statement—the suggested description for the explanatory procedure is “explication”. In social sciences (humanities) such a procedure is the rule.

Then, there instantly arises the issue of the collective, supra-individual character of consciousness, being an essential “causative element” of social activity. Excluding unverifiable empirical holistic concepts at the beginning, we assume the occurrence of similar content of consciousness (knowledge and values) in many (all, a majority of, a significant number of) people living in the same social environment and in the same (essentially similar or nothing less than approximate) cultural circumstances, as certainty. We cannot also discard the argument constituted by the research done in modern antropomorphical evolutionism, according to which all people’s specific common somatic features developed in the process of evolution also mould their psychological similarity and therefore the similarity of the substance of consciousness.⁷ Not only would the latter, therefore, be the exclusive

⁵ Cf. K. Ajdukiewicz, *Logika pragmatyczna [Pragmatic Logic]*, Warszawa 1965, p. 395ff.

⁶ Cf. S. Ossowski, *O osobliwościach nauk społecznych [On Peculiarities of Social Sciences]* (in:) S. Ossowski, *Dzieła. Tom IV. O nauce [Works. Volume IV. On Science]*, Warszawa 1967, p. 261ff; polemically E. Nagel, *Struktura nauki [Structure of Science]*, Polish translation by J. Giedymin, B. Rassalski, H. Eilstein, Warszawa 1970, p. 394ff.

⁷ See e.g. R.D. Alexander, *Ewolucja ludzkiej psyche [Evolution of the Human Psyche]*, Polish translation by J. Szacki (in:) A. Jasińska-Kania, L.M. Nijakowski, J. Szacki,

outcome of the similarity of the socialisation and acculturation processes, but also—to a significant degree—the result of a common direction of organic evolution. Without delving into the details of this exceptionally complex matter, it will be enough to say that the common similarity of the content of consciousness (of knowledge and values) in a given community can be regarded as its collective consciousness, keeping in mind that it is never either a completely homogenous assemblage, or some kind of “new”, supra-individual phenomenon, different from its constituents. The consequence of accepting the existence of “aggregated” collective (in other words, social) consciousness that was implied in the above approach must lead to accepting the occurrence of processes that are epiphenomenal to this consciousness; i.e., patterns of commonly performed activities that correspond to this substance of collective consciousness and in the same way to the order of the same activities constituting social activity. From this point, it is a proverbial stone’s throw to normative order; i.e., the order of obligational models formulated in normative statements. Yet, the explanation of the creation of the latter order requires some consideration of a few different, relevant issues.

Let us start from the transformation process of a part of consciousness—namely values into value-goals; it is worth adding the process is persistently overlooked by psychologists and sociologists analysing the determinants of individual and/or collective human behaviour (social activity). However difficult it is to agree with some of Michał Heller’s assertions, at least one of them particularly aptly fits our convictions: “Value is what one aims at, and one only aims at what has some value.”⁸ It is worth noting that, for us, value (anti-value) means the appulsive (repulsive, respectively) perception of any object by a specific subject, individual and/or collective, which means that we are of an opinion that it is defined as axiological perceptionism.⁹ The mechanism itself that generates appulsion or repulsion is left to detailed psychological research (as well as neurological research and the like). Our prudent hypothesis in this matter is as follows: insofar as appulsion (repulsion) may have its basic source—yet, by no means it is the only source—in somatic processes that were developed through

M. Ziółkowski (eds.), *Współczesne teorie socjologiczne. Tom I [Contemporary Sociological Theories. Volume I]*, Warszawa 2006, p. 211ff.

⁸ M. Heller, *Świat wartości...* [*World of values...*], op. cit., p. 22.

⁹ Zob. K. Pałęcki, *Neutralization...*, op. cit., in this volume.

processes of evolution, values that become objectives (value-goals) have their basic source—but not the only one—in cognitive processes determined by both individual experiences and cumulated “collective knowledge”, i.e., in the socialisation and acculturation processes. They determine and rationalizing evaluative states of consciousness, which, in simple terms, can be demonstrated as procedures for given subjects to find and select—individually and collectively—“suitable” (according to their state of knowledge) ways of creating, securing and increasing (intensifying) objects that generate such states (value-implementing). The rationalizing of evaluative perceptions need not be oriented in any case exclusively towards the efficiency of planned implementing activities (actions), i.e., determined by the state of knowledge. It seems that it is at least equally subject to both the evaluative perceptions of these very activities, and almost certainly the preferential scale retained by rationalizing subjects, in accordance with the estimating rule which states that “not only what we want to achieve is important, but how it is achieved is equally important”. This “how” becomes “articulated”—the more often it becomes, the more the accomplishing activities are perceived as appulsive—in a certain pattern of behaviour, which itself becomes an object of evaluative perceptions developing an obligational pattern (“norm”).

Assuming these hypotheses are accurate, it becomes apparent that not all values that are experienced go through the processes of rationalization, whereas value-goals are always generated by the rationalization processes of the former. Hence, a simplified model of value-goals can be constructed as a unique fusion of appulsive perception (or repulsive, alternatively) and its teleological rationalization based on knowledge. Prognostic inference by means of this model, i.e., predicting what actual behaviour of a person in whom such processes take place will be, is always subject to considerable uncertainty (at least because of multitude of possible factors interfering directly with the decision-making process concerning whether to engage in or disengage from an activity). On the other hand, the reductive inference, when the course of the given conduct and the content of normative pattern according to which it should progress is known, creates conditions for obtaining a much higher probability of re-creating its causes, and thus, a more accurate explanation of such conduct (and an answer to the question “why”). Nevertheless, does such an explanation, which in fact is tantamount to comparing a given activity to its normative

requirements, extend past the scope of cognitive needs? Processes that cause a given norm (a normative statement) to become the reason for its designated conduct are quite well-known and researched (for example in psychology, social psychology, and sociology of law).¹⁰ However, what is known about the causes of process that are prior (more “original”, “deeper”) to the norms themselves (normative statements)? How does this characteristic of the pattern that is perceived as “a must” (obligatory, binding, etc) appear; the pattern that justifies its completion, or, in this respect, being ineffective?

Deliberation on this query assures us that the process of explanation, when its subject is collective (social), ordered activity, requires another reflection; this time it concerns the creation of these obligatory patterns that were only marked above (the creation of “norms” as regards normative approach in the sociological-legal approach, as we propose¹¹). In other words, it is still necessary to recreate another sequence of dependencies. This time it progresses both from defined value-goals that have been realized by specified subjects, and preferential scales that order these values, to “initiating” their activities, first of all including normative acts, especially those that have a collective character, and within them, the institutional normative activities¹² as they take place in the legal normative system, whose “products” are normative statements (obligational patterns of conduct: “norms”).

The whole process of creating the social normative world (the world of values and norms) should be presented as a closed sequence of mutual conditioning, leading from values transforming into value-goals, then through articulation of normative statements (“norms”) seen as desirable strategies of realizing value-goals, and further, a sequence of activities (executive activities) meeting (restrictive) requirements included in these norms; which again, in some simplification, aim at realizing states of things perceived as values; these values, which earlier became transformed into value-goals. It also remains outside the debate—as was mentioned above—that these same “strategies”—normative statements (“norms”) can be seen as “autonomous” values, even if the processes of their implementation do not occur.

¹⁰ Cf. e.g. G.J. McCall, J.L. Simmons, *Social Psychology. A Sociological Approach*, London 1982, pp. 53ff, 197ff.

¹¹ See K. Pałeczki, *Neutralization...*, in this volume.

¹² Cf. *ibidem*, p. 14.

It is noteworthy that in the theories of social sciences, or in generalized explanations of collective activity and the products of this activity, a complete and closed chain of mutual conditions is virtually non-existent. For example, in the behavioural approach (or broadly speaking, behaviouristic) some types of behaviour are often explained by others physiologically determined by “stimuli” or “rewards and penalties”, ascribed to the behavioral responses to the explained behavior or benefit derived from (economic) tangible property. In theories of “exchange” there is also such a similarity.¹³ In the functionalist approaches, which are still the most common, the *explanans* are variously understood “functions”, which can be narrowed down to social activities or patterns, rules, “norms” directed in a manner of purposefulness.¹⁴ The explanations of different types of social activity and their implications by citing the requirements articulated in the relevant normative statements are, it seems, an especially frequent and “typical” procedure in the social sciences, succinctly put. This is certainly the case in the sciences dealing with “normativity” (normative social systems). In the legal sciences of “Kelsen’s school” (namely: all positivist theories of law) according to the the assumption of insurmountable separation of *sein* from *sollen*, the origins and validity of “norms” are explained by extracting them from other norms (“*the basic norm*”, “the superior norms”, procedural rules). In different varieties of psychologism, the procedures of explanation touch upon specific mental states of the individual psyche or the collective psyche in holistic approaches. In the political sciences, “norms”, provided that their origins are the subject of the theory, are most commonly understood as the epiphenomenal creation of authority (for instance, the institution

¹³ Cf. G.C. Homans, *Podstawowe procesy społeczne* [Basic Social Processes], Polish translation by J. Olbrycht (in:) A. Jasińska-Kania, L.M. Nijakowski, J. Szacki, M. Ziółkowski (eds.), *Współczesne teorie socjologiczne. Tom I* [Contemporary Sociological Theories. Volume I], Warszawa 2006, p. 73ff; P.M. Blau (Wymiana społeczna [Social Exchange], Polish translation by D. Niklas (in:) A. Jasińska-Kania, L.M. Nijakowski, J. Szacki, M. Ziółkowski (eds.), *Współczesne teorie socjologiczne. Tom I* [Contemporary Sociological Theories. Volume I], Warszawa 2006, p. 82; *Wartości pośredniczące w wymianie w strukturach złożonych* [Intermediary Values in the Exchange in Complex Structures], Polish translation by W. Derczyński, A. Zawadzka (in:) A. Jasińska-Kania, L.M. Nijakowski, J. Szacki, M. Ziółkowski (eds.), *Współczesne teorie socjologiczne. Tom I* [Contemporary Sociological Theories. Volume I], Warszawa 2006, pp. 93, 105ff).

¹⁴ Cf. R.K. Merton, *Teoria socjologiczna i struktura społeczna* [Social Theory and Social Structure], Polish translation by E. Morawska, J. Wertenstein-Żuławski, Warszawa 1982, p. 94ff.

of political power).¹⁵ In cultural anthropology, social activity is also explained by the described “norms” (rules, patterns, regularities, etc.) obligatory in the specific community, and these, in turn, are explained by natural and/or “environmental” conditions of existence.¹⁶ In different varieties of modern constructivism, essential explanatory significance is attributed to variously stated “structuration elements”, i.e., everything that is subject to the process of regulation, and thus subordinate to normative requirements. For instance, Anthony Giddens explains the formation of common patterns of activities (actions) by the process of generalizing repeated practices (the “pattern” itself in his opinion is “a procedure that can be generalized”).¹⁷ This does not say a word about the norm-generative functions of a value. The aforementioned McCall refers—with approbation—to Nicholas Rescher, who, in his *Introduction to Value Theory*,¹⁸ states that “values ought to be treated as banners under which someone fights for his or her rights”,¹⁹ whereas he regards norms as products of “common language.”²⁰ In the different varieties of evolutionary sociology, the role of *explanans* is implemented by (natural and cultural) properties, enabling the survival of the species, etc. Similar to economics, “necessities” are partly substituted in place of values (or treated as synonymous with them). In addition, let us note that in the legal sciences, explaining by means of a so-called economic analysis of law makes the material “costs” of legal regulations serve as an essential explanatory and justifying element of these regulations.²¹

All these examples of the basic rules of explaining, presented, by necessity, in a very simplified manner, and which could be enumerated many times over, seem to prove that there is extraordinarily excluded—yet highly important—“link” in the chain of conditions described above for collective activity; namely, determining the impact of values and

¹⁵ Cf. e.g. J.J. Wiatr, *Socjologia stosunków politycznych* [*Sociology of Political Relations*], Warszawa 1980, p. 193ff.

¹⁶ Cf. e.g. R. Benedict, *Różnorodność kultur* [*Variety of Cultures*], Polish translation (in): E. Nowicka, M. Głowacka-Grajper (eds.), *Świat człowieka – świat kultury. Antologia tekstów klasycznej antropologii* [*World of Human—World of Culture. Anthology of Classic Texts of Anthropology*], Warszawa 2009, p. 357ff.

¹⁷ A. Giddens, *Stanowienie społeczeństwa...*, p. 50ff.

¹⁸ N. Rescher, *Introduction to Value Theory*, New York 1969.

¹⁹ G.J. McCall, J.L. Simmons, *Social Psychology...*, p. 53.

²⁰ *Ibidem*, p. 197.

²¹ See J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa* [*Ten Lectures on the Economics of Law*], Warszawa 2007, p. 17ff.

value-goals on norm-generative activities (on the processes of creating norms). The interesting thing in this context is that in social sciences literature, authors too often invoke values and “norms”, so to speak “in one breath”, as *explanans* in their explanations. However, equally frequently it is only the declarable *explanans*. By way of example, let us cite Alfred L. Kroeber in *The Nature of Culture*. First we find an assurance that values—among the other things he enumerates, such as norms (*author's note*) are an “essential component of culture.” Then, we encounter the following statement: “*Values have long been neglected in the study of culture, probably due to their emotional side*”, which he considers to be a serious methodological flaw.²² Consequently, Karl Popper, for instance, admits that values may be, or when reflecting on ethical norms, they should be, “subject to rational discussion”, leading to their understanding.²³ And that is where the “epistemological mission” ends in the process of explication (explanation) he assigns to values. In many empirical studies, in the best case, the typical procedure explaining a given part of collective activity “ends”—as it was already noted previously—at aligning the course of certain activities and/or their consequences to the normative requirements contained in the content of the “norm”. Values, on the other hand, appear then as some kind of unique “ornament”, usually as an element of hardly specified “motivational processes”. In legal sciences, perhaps the best examples are provided by the research on identifying the dimension and prevention of different types of crime. However, many years ago, Jerzy Wróblewski proposed an introduction to the so-called planes of law research, admittedly a separate “axiological plane,” but the justification of the postulate—at that time, truly innovative and, what is more, “revisionist”—took him only a few lines of the book, and amounted to distinguishing “primary” and “secondary” valuing (legislation “norms”; *author's note*). He concluded they are “necessary for interpreting and comparing the content of various statements (...), estimations, and norms.”²⁴

²² See A.L. Kroeber, *Istota kultury* [*The Nature of Culture*], Polish translation by P. Sztompka, Warszawa 2002, pp. 7, 10ff.

²³ K.R. Popper, *Autobiografia intelektualna* [*Unended Quest: An Intellectual Autobiography*], Polish translation by A. Chmielewski, Kraków 1997, p. 270ff.

²⁴ J. Wróblewski, *Badania aksjologiczne w prawoznawstwie* [*Axiological Research in Jurisprudence*] (in:) W. Zawadzki, *Teoria państwa i prawa* [*Theory of Law and State*], first edition, Warszawa 1979, pp. 31, 38.

In more recent literature, a characteristic example is Wojciech Załuski's *Evolutionary Philosophy of Law*. While otherwise very inspiring, he concludes his reflections on the problem that we are interested in with a "teleological-axiological question": can the theory of evolution be useful for determining the purposes of the law, the fundamental values which the law should implement? The author answers this question in the affirmative with a so-called "strong" and "weak" variant of determining these objectives (values) through definite versions of "human nature."²⁵ Again, nothing is said about determining norms through values. At the same time, the axiological explanation of the processes that create norm-generative actions, perhaps the most human forms of activity in general, and undoubtedly determining the special distinction of the human species, often defies any methodological proposals.

It would be appropriate to "complete" this observation with another, more general one; namely, that any collective (social) activity is accompanied—by necessity—by the process of modelling induced by the required interaction, transformed into the processes of normativity formation, which contains the ideal shape of what is to be achieved by this activity. Thus, a collective activity is syndromic with specific axiological processes (of the transformation of values into value-goals and the formation of the content of normative statements by the latter). Most concisely, it can be said that collective (social) activity is an epiphenomenon of specific axiology. In other words, we say this activity—when it takes the form of social action—is nothing more than the standardized realization of values formed in the collective consciousness (defined as above). Let us note that this "normalization" (the creation of obligational patterns) is made on an ongoing basis, and accompanies each implementation stage of the value (value-goals) that can be distinguished and never ends once-and-for-all with articulated, "ready", normative prescriptions. Hence, we can also venture the hypothesis that the sets of values that make up preferential social scales are—as to their content ("composition")—more durable than the accepted strategies for their implementation (the social norms), however much their "internal" hierarchical order, and therefore probably the order of their implementation, does not appear to be equally resistant to change.

²⁵ W. Załuski, *Ewolucyjna filozofia prawa [Evolutionary Philosophy of Law]*, Warszawa 2009, p. 109ff; see also English edition: W. Załuski, *Evolutionary Theory and Legal Philosophy*, Cheltenham 2009.

The acceptance of such beliefs consequently leads to a requirement to focus on empirical research and theoretical considerations (explanations) on the axiological origins of social norms and preferential social scales, including and ordering the values constituting their “base”, not only in terms of generating the content regulating normative statements, and assigning meaning and importance to them, but at least equally determining the course of actions taken to implement these norms and their consequences.

In the end, we do not make a secret of the fact that the extent to which we are primarily interested in the “use” of such a methodological *credo* is defined within the framework of the influence of legal normative statements (“norms”). The unique nature of their formation and implementation into the social order directs our attention towards research on the deliberate and arbitrary (authoritative) “picking out” by legislators (both those who make the law and those who use different types of law acts) of value-goals that they would like to implement, and the formulation of standardized methods (“strategies”) for carrying them out (“norms”). The whole process often does not appear transparent enough, thus depriving recipients of “norms” of the possibility of attributing specific meaning to those norms, or even worse, depriving them of the possibility of accepting (associate) value-goals implemented in this manner, which leads to an entire sequence of negative consequences from this state of affairs (for example, a sense of the lack of legitimacy of “imposed” legal regulations, induced anomie, and others). Therefore, disclosing the factual value-goals to be carried out that are “selected” by legislators seems an important and interesting challenge for the legal sciences, especially for sociologists and law psychologists. The results of their research profit from its pragmatic quality and the possibilities of formulating a variety of recommendations that may help avoid the harmful effects the functioning of the legal system, as they are reliable “material” (*explanans*). This material allows for a more accurate explanation of this aspect of social activity that shapes the normative world, including that part of the social world which is programmed into legal “norms”.

Neutralization of Values in Law—Main Concepts

Law is a “mechanism”, not a text. A legal text creates an ideal world of illusion, which the realities of later practice hollow out.

Ewa Łętowska¹

1. Introduction

Formulated thus, the title imposes certain **obligations to specify the subject under review**. One may understand it in different ways by way of preliminary associations, e.g., as avoiding values in the process of legitimizing law, “ignoring” some values when interpreting the content of legal acts, not considering values as a criterion when assessing the effectiveness of law or for assessing its rationality, “reducing” the influence values have in motivating the decision processes regarding the operation of relevant law, not invoking values when articulating or justifying legal decisions or operations pretending to such a justification, and without doubt in still other ways. As I shall attempt to demonstrate below, all these semantic associations are appropriate; one can generalize from them, because they simply reflect different species (variants) of the same phenomenon, which is referred to as the neutralization of values in law (axiological neutralization), and hereinafter referred to by the acronym “NoViL” (in Polish: “nap”). The study of these phenomena and the accompanying theoretical reflections should offer some practical benefit, providing for its reliable

¹ E. Łętowska, *Wprowadzenie do Konferencji: “Jan Baszkiewicz – człowiek uniwersytetu”* [Introduction to the conference—Jan Baszkiewicz, University man, Warszawa, 7 November 2011.

identification and allowing one to avoid the adverse social effects from various defects related to the operation of mechanisms binding law to its axiological determinants.² The conceptualization of a study such as is announced in the title requires an explanation of the understanding of **“values” adopted**, as well as basic clarification of what is **meant by the concept of “law”**. Proposals on how to understand the concepts of “values” and “law” permit us to map out a general framework for deliberation, which is then narrowed to focus on the particular relations between them; this, in turn, should make it easier to describe and attempt to clarify the development of these same processes in the activities various actors, both individual and collective, though especially institutional entities (legal institutions).

Analytically, **the general relationship between law and values**, regardless of subsequent semantic distinctions, can be expressed as a continuum: ranging from a condition of complete independence of law from values to a condition of total dependence; i.e., from an ideal state of **“NoViL” (from law “liberated from values”)** to the **full, axiological determination of law (i.e., to law that is fully “determined by values”)**. **We will subsequently refer to this latter condition, in short, as “VDL”, from “value determination of law”. In other words, to an ideal condition of “VDL”.**

Anticipating later deliberations, we should here immediately disclose our conviction that this first condition (NoViL) never occurs in its “ideal” form; rather, it is a species of manipulation, creating the appearance that it supervenes, an appearance intended to facilitate the effective use of law in order to accomplish some of law’s axiologically defined goals (i.e., some form of VDL), at the cost of abandoning, neglecting, or even deliberately preventing other value-based goals from being implemented, indeed precisely those goals that were “neutralized” by the suitable manipulation. If we accept that law is never aimless, then we cannot reject the assumption that it always acts to put certain values (value-goals) into practice; only that, most commonly, for various practical and frequently extra-legal reasons (e.g., political, economic, ideological), this is not accomplished “directly”, by openly and transparently revealing the values that are in fact being fulfilled.

² Cf. W. Lang, *Aksjologia prawa [Axiology of Law]* (in:) B. Czech (ed.) *Filozofia prawa a tworzenie i stosowanie prawa [Philosophy of Law and Creation and Application of Law]*, Katowice 1992, p. 123ff.

Also, in yet another sense, the acronym “NoViL” obscures the various and numerous ways **law is instrumentalized**, which—let us here note immediately—when viewed in terms of the presumed social functions of law, would be difficult to assess positively in every instance.³

Likewise, “ideal VDL” (the total determination of law by a specified set of values) can only ever serve as an analytical device. As a rule, the process of implementing a desired state of affairs (value-goals) using legal instruments is far too complex and determined by too many different factors, including extra-legal intervening variables that are often quite hard to even recognize, for this state of affairs to be achieved by using such methods alone. In their most extreme form, however, NoViL and VDL do provide a framework for discussing how to conduct a rationalized **legal policy** that is hard to exaggerate; thus, the discourse surrounding dependencies linking law and a socially accepted (acceptable) set of values.⁴ Abandoning such a discussion can lead to the spread of the belief that making and executing law is entirely unpredictable, that it is nothing more than the “whim of a madman”, of political authorities who enjoy sufficient power, to disputing the teleological character of the law. Nevertheless a “simulated” discourse on axiology, i.e., one that assumes the law always implements self-evident and unquestioned values, will have a similar effect.

2. Understanding values

Let us begin defining the terminology announced above with the question of how we **understand values**. With respect to this question, I am first an ontological **realist**. So, for me, they are **phenomena (effects)**. They belong to the category of psychological phenomena (a specific kind of experience), and so are quite real, even in the somatic

³ Cf. e.g. A. Bator, *Instrumentalizacja jako aspekt prawa [Instrumentalization as an Aspect of Law]* (in:) L. Leszczyński (ed.), *Zmiany społeczne a zmiany w prawie. Aksjologia. Konstytucja. Integracja Europejska [Social Changes and Changes in Law. Axiology. Constitution. European Integration]*, Lublin 1999, p. 95ff; B.Z. Tamanaha, *Law as a Means to an End. Threat to the Rule of Law*, New York 2006, p. 101ff; T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa [Introduction to Jurisprudence]*, fifth edition, Warszawa 2009, pp. 123, 126ff.

⁴ K. Pałeczki, *Legal Policy. The Attempt of Reinterpretation and New Legislative Fields* (in:) T. Biernat, M. Zirk-Sadowski (eds.) *Politics of Law and Legal Policy. Between Modern and Post-modern Jurisprudence*, Warszawa 2008, p. 53ff.

The reflections in this volume clearly point to the significant practical influence of axiology on every aspect of legal activity (making, applying, executing, observing law, etc.). Legal science and public discussion about law frequently fail to recognize this influence and its scope. A lack of understanding or ignorance of this influence on the part of lawyers (officials), media representatives and, in consequence, the vast majority of other legal entities, can be regarded as one of the basic reasons of the expansion of NoViL [Neutralization of Values in Law] and its negative effects. Certainly, a lawyer (official) should be the kind of person who is well aware of the variety of axiological manipulations mentioned in this volume and who can also name them and respond to them.

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infolinia 801 04 45 45, fax 22 535 80 01
zamowienia.książki@wolterskluwer.pl
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