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SYMBOLIC VIOLENCE IN TECHNOCRATIC LAW AND ATTEMPTS AT ITS OVERCOMING: POLITICISATION THROUGH HUMANIZATION?¹

ABSTRAKT

PRZEMOC SYMBOLICZNA W PRAWIE TECHNOKRATYCZNYM I PRÓBY JEJ ZWALCZANIA: POLITYZACJA PRZEZ HUMANIZACJĘ?

Prawo technokratyczne dokonuje aktów przemocy symbolicznej na osobie ludzkiej poprzez narzucanie jej redukcjonistycznej wizji egzystencji, ograniczonej do aspektu *homo oeconomicus passivus*. Dokonywana przemoc symboliczna ma jednak także na celu osiągnięcie zasadniczego celu technokracji, jakim jest odpolitycznienie procesów podejmowania decyzji. Prawo jest postrzegane w perspektywie instrumentalności racjonalnej, a jurydyzacja nie ma na celu osiągnięcia sprawiedliwości, lecz przeciwnie, służy odizolowaniu technokratycznego procesu podejmowania decyzji od sfery polityczności. Celem niniejszego artykułu jest pochylenie się nad zagadnieniem, czy humanizacja prawa technokratycznego w procesie jego sądowej wykładni może prowadzić do jego ponownego upolitycznienia (repolityzacji). Na podstawie trzech studiów przypadku poświęconych szeroko znanym wyrokom Europejskiego Trybunału Sprawiedliwości (sprawy: Leitner, Omega i Aziz) artykuł dochodzi do wniosku, że istotnie, humanizacja może służyć osiągnięciu celu repolityzacji. Jednakże, wskazując na wyrok Alemo-Herron, artykuł stwierdza w ostatecznych konkluzjach, że polityzacja jest tylko pierwszym krokiem, zaś kolejnym musi być pytanie o rzeczywisty podmiot interesów chronionych przez prawo.

SŁOWA KLUCZOWE: polityczność, legitymizacja, Trybunał Sprawiedliwości UE, prawo technokratyczne, przemoc symboliczna

¹ This article presents exclusively the personal views of its Author.

ABSTRACT

Technocratic law inflicts symbolic violence on human subjects by imposing upon them a reductionist vision of their existence, limited to the aspect of *homo oeconomicus passivus*. At the same time, this symbolic violence serves to achieve the main technocratic goal of the depoliticisation of decision-making. Law is perceived through the optic of instrumental rationality, while juridification has nothing to do with justice, but merely serves to insulate technocratic decision-making from the political sphere. This paper enquires whether, in the process of its judicial interpretation, the humanization of technocratic law can lead to its repoliticisation. On the basis of case studies of three well-known judgments of the European Court of Justice (Leitner, Omega and Aziz), the article makes the assertion that indeed, humanization can be instrumental to repoliticisation. However, by referring to the judgment in *Alemo-Herron*, the author draws the final conclusion that politicisation is only the first step, and a further one is to ask specifically about the subject of interests protected by the law.

KEYWORDS: political nature, legitimacy, Court of Justice of the European Union, technocratic law, symbolic violence

1. Introduction

The concept of ‘symbolic violence’ refers to a situation in which the dominant discourse does not allow an individual or a group to articulate its own interests adequately, due to the fact that the language of that discourse forecloses it. In this paper, I will claim that technocratic law, by reducing the human subject to an instrumentally treated *homo oeconomicus passivus* is a discourse which exerts symbolic violence against the human subject precisely by offering a reductionist vision of humanity and by excluding all other aspects of human existence whilst focusing only on passive economic activity (consumption). As Andrzej Szahaj points out, technocracy is the opposite of the political and it actually ‘kills politics’.² On this assumption, the paper will inquire whether introducing the human dimension into judicial decisions interpreting technocratic law (the humanization of technocratic law) can be treated as a strategy of its repoliticisation. For this purpose, the paper will focus on three decisions of the Court of Justice

2 A. Szahaj, ‘O nędzy polityki polskiej i technokratyzmie jako reakcji nań’ [On the Poverty of Polish Politics and Technocracy as a Reaction to It], *Etyka* 33 (2000): 118–125, p. 123.

of the European Union in which, despite the reductionist perspective of technocratic legal rules subject to interpretation, the Court nonetheless recognized the truly human dimension of the subject, looking outside the purely economic sphere. These decisions are *Leitner*, *Omega* and *Aziz*. *Leitner* and *Aziz* are concerned with consumer law, whilst *Omega* with the free movement of goods. In each case the Court recognised a certain non-economic value: pleasure and avoidance of suffering (*Leitner*); human dignity (*Omega*); the family home (*Aziz*). The paper will try to answer the question whether humanization of technocratic law – as effected through the recognition of non-economic values in human existence – can serve as a vehicle of its repoliticisation. For this purpose, the paper will inquire whether the decisions in the three cases can be deemed as *political* in the precise sense of containing a decision concerning the contested spheres of interest of litigants which did not follow in a compelling way from an unequivocal interpretation of the applicable legal rules. In other words, a judicial decision is ‘political’ in this sense whenever the court, in a situation of interpretive ambiguity, enjoys a sphere of discretion and uses that discretion to decide *as if* it were the legislator.

As regards methodology, the paper should be conceived as an intervention in the field of philosophy of law, at the interstices of political theory and political philosophy. It has, therefore, a theoretical and speculative character, rather than an empirical one. The three case studies which will be discussed do not purport to give a representative overview of the relevant case-law, but rather aim at providing points for discussion and reflection on the conditions of possibility for overcoming the on-going symbolic violence perpetrated against human subjects by technocratic law. On the other hand, the examples taken from existing discourse will serve to illustrate the paper’s claims. Reasoning based on these examples will be inductive.

2. Technocratic law, symbolic violence and the political

2.1. Technocratic law

Technocracy is understood as a way of approaching the socio-economic reality which treats all problems as ‘technical’ ones, those which can be ‘solved’ by resorting to ‘expert knowledge’, prescribed formulas, procedures, etc. As Magdalena Ziętek points out: ‘Technocratic decisions are

justified especially by referring the criterion of the efficiency of a solution with regard to its aims and optimization criteria. [...] Technocracy is usually defined as the government of experts, who have at their disposal specialized scientific and technical knowledge and who manage the state on the basis of purely professional criteria.³

Technocracy effectively conceals the political dimension of society, i.e. the dimension of a structural, irresolvable conflict which underlies the very foundation of it. Social and economic issues which would otherwise be politically contestable become the object of uncontested technocratic assumptions allegedly following from a body of commonly accepted knowledge.⁴ Technocracy is closely linked to, but not identical, to bureaucracy. Commenting on the relationship between technocracy and bureaucracy, Magdalena Ziętek notes that: ‘Technocracy as a form of formal organization *is one of the forms of bureaucracy* oriented towards the efficient performance of determined tasks of the contemporary state by resorting to specialized scientific and technical knowledge.’⁵ Bureaucracy, therefore, *is a necessary ontological presupposition of technocracy*, in that an ‘institutional technocratic design, premised on the separation of “knowledge” and “politics”, depoliticizes⁶ the setting of goals in a technocratic polity, allowing to ‘frame salient political issues as merely technical ones’.⁷ In fact, technocratic law – just like technocracy itself – is ‘post-political’,⁸ and

3 M. Ziętek, ‘Europejskie prawo konsumenckie jako wyraz technokratycznej koncepcji prawa umów’ [in:] *Kierunki rozwoju europejskiego prawa prywatnego* [Directions of Development of European Private Law] (Warszawa: CH Beck, 2012) p. 276.

4 M. Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’, *European Law Journal* 21.5 (2015): 572–598, p. 574.

5 M. Ziętek, ‘Europejskie prawo konsumenckie’..., *op. cit.*, p. 276.

6 M. Bartl, ‘Internal Market Rationality’..., *op. cit.*, p. 576.

7 *Ibidem*.

8 Cfr. C. Douzinas, ‘A Short History of the British Critical Legal Conference or, the Responsibility of the Critic’, *Law and Critique* 25.2 (2014): 187–198, p. 196, who notes that: ‘Specialization and professionalization coincided with the emergence of postpolitics and the attack on democracy as a form of life. [...] The supposed complexity of modern government and the heights of scientific sophistication mean that proper objective advice given to policy-makers helps solve problems. [...] Economic and scientific expertise is not open to debate and voting. Indeed all democratic participation and mobilization is expensive, counter-productive and gives the impression that there may be more than one solution to problems that have objectively right answers.’

it ‘forecloses the emergence of political controversy’.⁹ There is a close link between technocratic law as a *form* and neoliberal ideology as the *content*.¹⁰ Nonetheless, the technocratic form can accept also other ideological contents, such as various forms of socialism or state capitalism.

Technocratic law is the product of technocracy, even if it is formally adopted by parliaments or laid down in the form of presidential decrees. What is essential for technocratic law, is the way in which it is conceived and – most importantly – the way in which it *conceptualizes the world*. The technocratic approach to the world is a mechanistic one, based on social engineering (in any sphere, from the economy to criminal law). The approach of technocratic law – in line with the technocratic approach in general – is that of identifying ‘problems’ and then ‘solving’ them with the use of legal norms.¹¹ The problems can be varied, and technocrats are not necessarily the agenda setters,¹² but the technocratic *method of regulation* leaves a distinct imprint on technocratic law: goals are presented as noncontroversial, and solutions are presented as based on scientific knowledge, which leads to what Marija Bartl refers to the ‘reification of political action (governance *qua* knowledge)’.¹³ In fact, technocratic law is not just an accidental admixture of technocracy and the juridical; technocracy actually requires the ‘juridification of certain

9 M. Bartl, ‘Internal Market Rationality’..., *op. cit.*, p. 595.

10 Cfr. *Ibidem*, p. 577.

11 Cfr. *Ibidem*, p. 574, who describes this in terms of ‘production of knowledge’, noting that the ‘demand for the interpretation of the internal market prompted a production of knowledge (reports, impact assessments, policy documents, expert opinions, consultations, euro-barometers, etc.) which helped identify the “problems” in the internal market (for instance, what is a “barrier” to trade or what constitutes a “transaction cost”) and suggests possible “solutions” (“harmonization”, “learning”, “empowerment” and so on).’

12 Cfr. *Ibidem*, p. 577, who points to the ‘political endorsements [...] a macro-political level’ which underly technocratic policy and law-making.

13 *Ibidem*, p. 575. The choice of the conceptual metaphor expressed through the term ‘reification’ (etymologically pointing to the target domain of *res*, i.e. a thing, corporeal or, by extension, also non-corporeal) seems unfortunate, as it does not convey any negative evaluation of the phenomenon. One could imagine terms such as ‘fixation’, ‘ossification’ or ‘fossilization’, which – through the underlying metaphorical mappings – would underline the fact that policy choice, in technocracy, are no longer subject to political debate, but are there ‘fixed’, ‘ossified’ or ‘fossilized’. On conceptual metaphors see: G. Lakoff, M. Johnson, *Metaphors we live by* (Chicago University Press 2000).

substantive political choices¹⁴ in order to make them incontestable (i.e. removed from political debate) and subject to technocratic enforcement techniques.¹⁵ However, technocracy is paradoxical in its relationship with the juridical: despite a tendency towards hyperjuridification, technocratic law at the same time destroys traditional legal forms (codes) and promotes decodification.¹⁶ What is more, law as such is no longer a value in itself (as it had been in our civilisation since Roman times¹⁷), but is merely treated instrumentally as *means* to an end, usually a political or economic one.¹⁸ Hence, we can speak of a reductionist vision of the juridical in the imaginary of technocratic law (the juridical merely as instrument in the hands of technocrats, no longer as autonomous value).

A prime example of technocratic law is the *corpus* of European private law adopted on the basis of Article 114 TFEU¹⁹ and its predecessors, which is conceived as aimed at removing ‘obstacles’ to the free movement of goods, services, persons and capital within the internal market. All ‘measures’ adopted on this basis are supposed to be means towards this aim.²⁰ They do not intend to bring about justice (even social justice), to fulfil the political aspirations of this or that social group, but have a purely technocratic aim. The life-cycle of the ‘measures’ – aimed at assessing their

¹⁴ *Ibidem*, p. 575.

¹⁵ Cfr. *Ibidem*, p. 577.

¹⁶ On which see e.g. W. Dajczak, F. Longchamps de Brier, ‘Prawo rzymskie w czasach dekodyfikacji’ [Roman Law in Times of Decodification], *Forum Prawnicze* 10.2 (2012), p. 9.

¹⁷ B. Sitek, ‘Prawo jako wartość. Rozważania o autonomii i ponadczasowości prawa w świetle zjawiska ponowoczesności’ [Law as Value: Discussions on the Autonomy and Intemporality of Law in the Light of the Postmodern Phenomenon] [in:] *Człowiek – Prawo – Państwo. Księga jubileuszowa prof. Stanisława Leszka Stadniczenko* [Man – Law – State: Studies in Honour of Professor Stanisław Leszek Stadniczenko], ed. J. Jeżewski, A. Pawlak (Warszawa: WSiFiZ, 2017), p. 898–899.

¹⁸ B. Sitek, ‘Od antropocentryzmu prawniczego do ekonomizacji prawa’ [From Juristic Anthropocentrism to the Economisation of Law] [in:] G. Dammacco, B. Sitek, O. Cabaj (ed.), *Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej* (Olsztyn-Bari: Uniwersytet Warmińsko-Mazurski – Università degli Studi di Bari, 2008), p. 66–78; B. Sitek, ‘Prawo jako wartość’..., *op. cit.*, p. 899.

¹⁹ For an analysis of Article 114 TFEU as a competence norm see R. Mańko, ‘Kompetencje Unii Europejskiej w dziedzinie prawa prywatnego w ujęciu systemowym’, *Kwartalnik Prawa Prywatnego* XXV.1 (2016): 37–80.

²⁰ M. Bartl, ‘The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit’, *European Law Journal* 21.1 (2015): 23–43, p. 29–30.

effectiveness – is a clear example of the technocratic approach which gives rise to them. In this logic, consumer protection, as will be shown later on, is merely a corollary of building the internal market. As Marija Bartl notes: ‘Posing the construction of the single/internal market as the key task of private law has transformed radically its key tenets: the concept of justice underpinning private law, the concept of the person or subject of law, the (re)distributive pattern of private law, and the normative basis on which private law stands.’²¹ And, as Magdalena Ziętek points out: ‘The technocratic character of European consumer directives follows from the way in which those instruments are created. The European directives are created by European officials, they do not originate from legal practice and are not elaborated in any other way by the community of jurists. Although the process of norm-creation involves the participation of representatives of academia and practice, it is the European officials who are responsible for their final shape. These enactments are part of determined political programmes of the EU; the process of creating directives is inextricably linked with the process of attained of EU political goals.’²²

In fact, the technocratic character of consumer directives seems to be deepening, as Marija Bartl suggests by comparing the Unfair Terms Directive’s underlying ideology (protection of weaker parties) with the ideological premises behind the Consumer Rights Directive, ‘concerned with procedural rights and empowering consumers to contribute to the internal market’.²³

2.2. Symbolic violence

2.2.1. The concept of symbolic violence

As Lidia Rodak points out, ‘different types of violence have been identified: psychological, symbolic, structural, epistemic, hermeneutical, as well as aesthetic violence.’²⁴ Undoubtedly, the notion of ‘symbolic violence’

²¹ M. Bartl, ‘Internal Market Rationality’..., *op. cit.*, p. 599.

²² M. Ziętek, ‘Europejskie prawo konsumenckie’..., *op. cit.*, p. 282.

²³ M. Bartl, ‘Internal Market Rationality’..., *op. cit.*, p. 580.

²⁴ L. Rodak, ‘Structural Violence and Its Gender Dimension in Polish Law’ [in:] *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*, ed. R. Mańko, A. Sulikowski, C. Cercel (Oxford: Counterpress, 2016), p. 133. To these we can certainly add *linguistic violence*, cf. M. Škop, ‘The Importance of Being

is a particularly paradoxical one: it contains within itself a deliberate contradiction: violence (which is normally physical) is contradicted by the adjective 'symbolic', which indicates not the order of the Real but precisely the Symbolic order, the realm of ideology and culture. Pierre Bourdieu and Jean-Claude Passeron defined 'symbolic violence' in the following terms:

Every power to exert *symbolic violence*, i.e. every power which manages to impose meanings and to impose them as legitimate by concealing the power relations which are the basis of its force, adds its own specifically symbolic force to those power relations.²⁵

Bourdieu added that symbolic violence is

a gentle violence, imperceptible, and invisible even to its victims exerted for the most part through the purely symbolic channels of communication and cognition (more precisely, misrecognition), recognition, or even feeling.²⁶

Commenting on Bourdieu, Nicolaescu points out that

Symbolic violence is, fundamentally, the *imposition of categories of thought and perception* on the prevailing social agents. This is the incorporation of unconscious structures that tend to perpetuate the action structures of dominators.²⁷

Or, to quote Hanna Dębska, we can define symbolic violence as

[...] the imposition of forms and cognitive patterns by the dominators [with the result that] the dominated consider their choices to be unequivocal. They are under the impression that they have access to a universal

a Linguist: Critical Legal Thought in Central Europe' [in:] *Law and Critique...*, *op. cit.*, p. 32ff.

25 P. Bourdieu, J.C. Passeron, *Reproduction in Education. Society and Culture* (London: SAGE, 1990), p. 4.

26 P. Bourdieu, *Masculine Domination* (Stanford: Stanford University Press, 2001), p. 1.

27 C. Nicolaescu, 'Bourdieu – habitus, symbolic violence, the gift: "you give me / i give you" principle', *Euromentor Journal* 1.3 (2010): 1–10, p. 6.

perspective, while in fact they promote the particular interests of the dominating agents, only expressed in a universal manner.²⁸

In other words, symbolic violence is about ‘imposing mental schemata on actors of social life’.²⁹ As regards the relation between symbolic and physical violence, Nicolaescu considers that:

Symbolic violence is in some ways more powerful than physical violence, since it is incorporated even in modes of action and knowledge structures of individuals, and imposes the legitimacy spectrum of social order.³⁰

Thus, the concept of symbolic violence is strictly connected to the Hegelian notion of recognition (*Anerkennung*). Individuals strive for *Anerkennung*, and an act of symbolic violence denies them this. In the words of Nicolaescu, ‘Symbolic violence is an *act of non-recognition* which is outside the control of consciousness and will, in the practical schemes of habitus.’³¹ Ivana Radačić adds that symbolic violence is about the

imperceptible shaping of specific visions of the world. Symbolic violence is actualized through *imposed categories of perception and valuation*. Its functioning is hard for individuals to detect, because it is effectively a universalization of a determined particularism whose arbitrariness is misrecognized due to specific social processes.³²

In the sphere of the juridical, the notion of symbolic violence is most deeply connected to the possibility of representing (in the literal and metaphorical sense) the interests of human subjects (belonging to a specific group, holding a specific world-view, etc.) within the legal discourse. The concept of symbolic violence is being increasingly used in critical legal studies. For instance, it is stated that the ‘lack of a centre-periphery concept in European

28 H. Dębska, ‘Legal Doxa as a Form of Neutralization of Values in the Law. The Case of Constitutional Tribunal Judgments’ [in:] K. Patecki (ed.), *Neutralization of Values in Law* (Warszawa: Wolters Kluwer, 2013), p. 310.

29 H. Dębska, T. Warczok, ‘The Social Construction of Femininity in the Discourse of the Polish Constitutional Court’ [in:] *Law and Critique...*, *op. cit.*, p. 118.

30 C. Nicolaescu, ‘Bourdieu’..., *op. cit.*, p. 6.

31 *Ibidem*, p. 7.

32 I. Radačić, ‘Feminist Legal Education in Croatia: A Question of Fundamentalism or a Fundamental Question?’ [in:] *Law and Critique...*, *op. cit.*, p. 109 [emphasis added].

legal discourse is a form of symbolic violence towards Central Europe, aimed at ideologically stifling our legal communities and preventing them from articulating our—specifically Central European—point of view on contentious issues of EU law such as those, inter alia, of public economic law'.³³ Also agenda setting by Western crits can be perceived as a form symbolic violence *vis-à-vis* Eastern European crits.³⁴ Other authors trace symbolic violence in the case-law of the Constitutional Court.³⁵ It seems that the critical legal tool of tracing examples of 'symbolic violence' can be adequate for the critique of technocratic law, too, which will be done in the further part of this article.

2.3. The political and adjudication

A final notion which needs to be clarified is concept of 'political', from which also the notions of 'depoliticisation' (removal from the sphere of the political) and 'repoliticisation' (reintroduction into the sphere of the political) are derived from. The notion of 'the political' was introduced into legal theory by Carl Schmitt.³⁶ Schmitt opposed 'the political' from 'politics' as a field of social activity, defining the political through the friend/enemy distinction. The political is therefore a formal notion, identified by the intensity of binary code (friend/enemy).³⁷ Its underlying substance, in contrast, can be of variegated nature.³⁸ Examples of spheres which can give rise to conflicts of a political nature are the economic, social, ethnic or religious fields.³⁹ In contemporary political philosophy, the notion of the political is being theorised

33 R. Mańko, C. Cerceł, A. Sulikowski, 'Law and Critique in Central Europe: Laying the Cornerstone' [in:] *Law and Critique...*, *op. cit.*, p. 4, interpreting the research of Slovenian critical legal scholar Damjan Kukovec (D. Kukovec, 'Law and the Periphery,' *European Law Journal* 21.3 (2015): 406–428).

34 C. Douzinas, 'On a Recent Change of Tone in Politics and Law' [in:] *Law and Critique...*, *op. cit.*, p. xv.

35 H. Dębska, T. Warczok, 'The Social Construction'..., *op. cit.*

36 M. Paździora, M. Stambulski, 'Co może dać nauce prawa polityczność? Przyczynek do dalszych badań' [What Can the Concept of the Political Give to Legal Science? Notes Towards Further Investigations], *Archiwum Filozofii Prawa i Filozofii Społecznej* 8 (2013), p. 56.

37 C. Schmitt, *The Concept of the Political* (Chicago–London: University of Chicago Press, 1996), p. 25–26.

38 *Ibidem*, p. 27–28, 37–39.

39 *Ibidem*, p. 26: 'The distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.'

upon by Chantal Mouffe, who proposes to replace Schmitt's antagonistic model (friend vs. enemy) with an 'agonistic' model (adversary vs. adversary).⁴⁰ The difference between antagonism and agonistics is that an enemy is to be destroyed, even physically, whilst an adversary is to be overcome, but not destroyed. Therefore, whilst a friend and enemy share nothing in common, in particular they are divided by their different ways of life, the adversaries, although struggling against each other for hegemony, still share a certain set of common principles and do not question each other's legitimacy.⁴¹

From the point of view of the political community, the friend and enemy belong to different communities which wage war against each other (on behest of their respective sovereigns, who make the friend/enemy distinction by way of a decision), whilst adversaries belong to the same community and resort, *inter alia*, to parliamentary struggles.⁴² Mouffe's agonistics is therefore an attempt at saving the idea of a liberal parliamentary democracy despite the acknowledgment of the existence of the antagonism splitting society, for instance an economic, ethnic or religious antagonism.

Connecting Schmitt's notion of the political and law,⁴³ it should be first underlined that the law operates with a different binary code: instead of 'friend/enemy' it is the code of 'legal/illegal'.⁴⁴ The political is 'a public and collective phenomenon, not to be confused with purely interpersonal animosities and conflict between private individuals',⁴⁵ as Michael G. Salter points out. Hence, probably not all court cases, in which legal interpretation is performed, are inherently political. Nonetheless, if litigants are perceived not as isolated private individuals, and their conflicts are perceived not as purely interpersonal animosities (which may be the case in some lawsuits), then such cases can be deemed political, be they economic (e.g. trader vs. consumer, employer vs. employee), religious/ethical (pro-life vs. pro-choice, pro-secular vs. pro-confessional) or any other in their underlying nature.

40 See most recently C. Mouffe, *Agonistics: Thinking the World Politically* (London–New York, Verso: 2013), p. 1ff.

41 Cfr. M. Paździora, M. Stambulski, 'Co może'..., *op. cit.*, p. 58.

42 C. Mouffe, *Agonistics...*, *op. cit.*, p. 75.

43 Cfr. M. Stambulski, 'Polityczność jako etyka polityczna prawa' [The Political as Law's Political Ethics] [in:] *Aksjologiczny wymiar prawa* [Law's Axiological Dimension], ed. M. Dudek, M. Stępień (Kraków: Nomos, 2015).

44 M. Paździora, M. Stambulski, 'Co może'..., *op. cit.*, p. 57.

45 M.G. Salter, *Law as Politics, Ideology and Strategic Myth* (London–New York, Routledge, 2012), p. 30.

As it was underlined already above, the technocratic approach is opposite to the political one, meaning that technocracy involves depoliticisation, whereas removing a certain sphere from the technocratic realm effects its repoliticisation. Technocracy, as a government of experts which instrumentalizes the law as a means to technocratic ends, depoliticises its spheres of regulation, alleging that there is no conflict (social, economic) in them. Repoliticisation is the act of reclaiming the sphere of conflict and contestation. One of the avenues of repoliticisation which will be explored in this paper is through the judicial interpretation of technocratic law. In the course of interpreting technocratic norms (which conceal conflicts), a judge can break through the ideological mask of technocracy and uncover the actual political dimension hidden behind it.

A judicial decision can be described as 'political' in the sense used in this paper if it fulfils three criteria.⁴⁶ Firstly, there is a broad sphere of judicial discretion involved, i.e. the judge is not merely performing a simple act of noncontroversial legal reasoning (such as the syllogism), but enjoys a broader scope of discretion (makes an actual decision, not just draws an inevitable conclusion).⁴⁷ This will depend on the legal materials he is interpreting. Secondly, the judge's decision must be concerned with an actual social conflict, for instance an economic one, or an ideological one, or an ethnic one. Thirdly, the decision must have an impact upon this conflict, at least as represented by the parties to the adjudication who act as stand-ins for broader social groups in a deep conflict.⁴⁸

3. Symbolic violence in technocratic law

Technocratic law perpetrates various forms of symbolic violence.⁴⁹ First of all, it perpetrates violence against the *sacerdotes* of the traditional legal

⁴⁶ Cfr. R. Mańko, 'Ideology and Legal Interpretation: Some Theoretical Considerations' [in:] *Constitutional Values in Contemporary Legal Space*, ed. Kalvis Torgāns et al. (Riga: University of Latvia Press 2016), vol. I, pp. 117–126.

⁴⁷ The degree of discretion depends on the methods of legal reasoning used which normally should be a consequence of the relative openness or closure of the legal texts. See R. Mańko, 'Ideology and Legal Interpretation'..., *op. cit.*, p. 121–124.

⁴⁸ *Ibidem*, p. 124.

⁴⁹ I would like to thank my friend Jakub Łakomy for drawing my attention to the variegated nature of symbolic violence perpetrated by technocratic law.

knowledge, the *iuris prudentia*. It tells them that their knowledge – the deposit of a centuries-long tradition, dating back to Roman law – is unnecessary today, because allegedly today's law needs to solve modern problems, which were unknown in the past. This violence is clearly visible in the destructive nature of technocratic legal acts, almost deliberately directed against the sublime aesthetics of the old Civil Codes.

Secondly, it perpetrates violence against the political actors, telling them that the aims and means are within the sphere of expert knowledge, and cannot be decided upon by mere political will. Of course, this kind of symbolic violence has been perpetrated by the *sacerdotes of iuris prudentia* for many centuries,⁵⁰ but the violence perpetrated by technocrats is of a new and much more dangerous quality.

Thirdly, technocratic law perpetrates symbolic violence against the human subject, by refusing him recognition (interpellation) in the entirety of his human *Dasein*,⁵¹ but instead interpellating him merely as a means to an end. This not only violates Kant's second moral imperative – making consumers an addition to the market is precisely transforming them into *means* towards an economic end – but also deprives them of the highest human aspiration identified by Hegel, namely recognition. In the specific context of technocratic private law, which I wish to focus on, the human subject is interpellated *qua* consumer, i.e. *homo oeconomicus passivus*. His worth and dignity are reduced to economically quantifiable figures. The only value that a human being represents in the picture painted by technocratic law is to contribute to the 'smooth functioning' of the market, by being a 'confident' consumer, 'actively seeking' goods and services. The whole spiritual, ethical or any other dimension of human existence is factored out.

50 Cfr. H. Dębska, 'Legal Doxa'..., *op. cit.*, p. 312–317.

51 I am using this Heideggerian concept in the sense identified by John Haugeland, who pointed out that *Dasein* is not a being, but an entity (J. Haugeland, 'Reading Brandom Reading Heidegger', *European Journal of Philosophy* 13.3: 421–428, p. 422) adding that: '*Dasein* is neither people nor their being, but rather a way of life shared by the members of some community. It is ways of life, in this sense, that have the basic structure of being-in-the-world. [...] *Dasein*, and more particularly the understanding of being that it embodies, is owned by some individual person—in the sense of taking responsibility for its tenability' (ibid., p. 423). This emphasis on the community as essential for the human existence coincides neatly with Carl Schmitt's emphasis on the *concrete order* and the links he made between the concrete order of a given community as law – the 'shelter' of that community (Mariano Croce, Andrea Salvatore *The Legal Theory of Carl Schmitt* [Routledge 2013], ch. 3).

Together with it disappears the political dimension of law. As I remarked earlier, technocratic law is *par excellence* post-political, and the disavowal of any *non-economic* aspects of human existence – the dehumanization of the subject – go hand in hand with the disavowal of any *political* aspects of law. The underlying conflicts between the ‘haves’ and ‘have nots’, i.e. the owners of capital and the rest of society, are neatly wiped out in an ideological picture painted by the technocratic law-makers. As Hesselink notes: ‘The civil law has traditionally addressed human beings as ‘persons’. In such an approach matters of contract law are regarded quite naturally as matters of justice in the fullest possible sense. However, European contract law does not address us as persons who should be treated with justice nor as citizens who have fundamental rights, but, most of the time, as consumers. Moreover, [...] in the European Union consumer protection is often regarded as a policy which is *instrumental* to the construction of the internal market. The combination of *reducing persons to citizens, citizens to consumers*, regarding the latter as instrumental to market building and moving towards horizontal and full harmonization brings us very far away from contract law as a matter of justice.’⁵² Thereby, in the words of Marija Bartl, human subjects in technocratic private law ‘become vehicles for achieving a greater objective – market integration’.⁵³ What is more, technocratic discourse not only *interpellates* individuals *qua* consumers, but also attempts at constructing human subjectivity instrumental towards achieving goals set by the technocrats.⁵⁴

4. Repoliticisation through judicial humanization?

4.1. A feasible strategy?

Having found that technocratic law is post-political, but at the same time post-human (or anti-human), may point the way to strategies of resistance. The claim I wish to subject to a discussion in this section is whether rehumanization of technocratic law could be instrumental to its

52 M.W. Hesselink, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’, *European Review of Private Law* 15.3 (2007): 323–348, p. 347. Emphasis added.

53 M. Bartl, ‘Internal Market Rationality’..., *op. cit.*, p. 581.

54 *Ibidem*, p. 582.

repoliticisation. In order to test that claim, I will refer to three judgments of the European Court of Justice (ECJ) in which the ideological veil of purely economic human existence was pierced, revealing the Real of authentic human existence. The specific question I wish to address is whether this piercing of the ideological veil of technocratic law could in any way contribute to unmasking the political dimension of law, concealed behind the screen of apolitical technocracy and post-political politics.

4.2. *Leitner*: homo iuvans, homo patiens

4.2.1. Factual background of the dispute

The factual background of the *Leitner* case⁵⁵ is as follows: an all-inclusive family holiday of an Austrian (apparently upper middle-class family) goes sour because the daughter of Mr and Mrs Leitner, the 10-year-old Miss Simone Leitner, contracts salmonella after a week of stay, the said poisoning being attributable to the food offered at the TUI resort in the Turkish town of Side. The contract law regime applicable to the package holiday taken out with TUI is Austrian law which, in contrast to English, French or German law, does not provide for the possibility of compensation for non-patrimonial loss, as opposed to the patrimonial loss of the wasted holiday. The court of first instance awarded Miss Leitner damages for her suffering caused by the salmonella poisoning (the *Schmerzensgeld*, literally ‘pain money’), but refused to grant her damages for her lost enjoyment of holiday (*entgangene Urlaubsfreude*), pointing out that Austrian law does not provide for compensation of non-patrimonial loss in general, but only in an enumeratively limited number of cases (notably including suffering but not loss of enjoyment). The national court of second instance, apparently unhappy with the limitation posed by the rules of the ABGB (Austrian Civil Code) sought to “correct” it by referring the case to the supranational jurisdiction. This was enabled by the fact that the right to damages from a tour operator – but not their exact extent! – is regulated in the Package Travel Directive and the Austrian rules of private law on damages were caught within its scope *ratione materiae*. The Austrian court essentially asked the ECJ whether the concept

55 Case C-168/00.

of damage, used in that directive, requires Member States to grant compensation also with respect to non-patrimonial loss, and in particular – the loss of enjoyment of a holiday.

4.2.2. Legal framing of the issue by the ECJ

The ECJ happily accepted the Austrian court's request for a preliminary ruling, which gave it a rather unique occasion to interpret (broadly) the Package Travel Directive. The Court ruled that 'Article 5 of the Directive is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.' In its legal motives, it started off by reiterating the content of the relevant Article 5(2) of the Directive, noting that it 'requires the Member States to take the necessary steps to ensure that the holiday organiser compensates "the damage resulting for the consumer from the failure to perform or the improper performance of the contract"' (para. 19). Then it moved on to teleological reasoning, referring to the preamble which – according to the ECJ – makes it 'clear [...] that it is the purpose of the Directive to eliminate the disparities between the national laws and practices of the various Member States in the area of package holidays which are liable to give rise to *distortions of competition* between operators established in different Member States' (para 20). This, obviously, brings in the technocratic logic at its purest: the Directive is, in this optic, a means to a well-defined end – removal of 'distortions of competition' in the internal market. Then the Court goes on to a rather banal syllogism, stating that 'the existence in some Member States but not in others of an obligation to provide compensation for non-material damage [non-patrimonial loss – RM] would cause significant distortions of competition, given that [...] non-material damage [non-patrimonial loss – RM] is a frequent occurrence in that field' (para. 21).

It is only after these two rather technocratically framed arguments that the Court passes on to the 'human face' of the *homo oeconomicus passivus*, noting that 'the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the *loss of enjoyment* of the holiday is of particular importance to consumers.' (para. 22).

Following that, the Court operates a systemic argument (taken over from the AG's opinion) pointing out that although 'the first subparagraph of Article 5(2) merely refers in a general manner to the concept of damage, the fact that the fourth subparagraph of Article 5(2) provides that Member States may, in the matter of damage other than personal injury, allow compensation to be limited under the contract provided that such limitation is not unreasonable, means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.' (para. 23)⁵⁶.

4.2.3. Analysis

By granting to a tourist the right to compensation for lost enjoyment of his holiday, the Court *eo ipso* makes a number of assumptions about human nature.⁵⁷ Firstly, it admits that the human subject is not only guided by desire of profit and avoidance of loss (*homo oeconomicus*) but also searches for pleasure (*homo iuvans*)⁵⁸ and entertainment (*homo ludens*)⁵⁹. A food poisoning during a package holiday does not necessarily mean, first and foremost, an economic loss (unless the tourist indeed wishes to repeat the wasted holiday), but certainly prevents the tourist from enjoying the pleasure usually associated with a holiday.⁶⁰ Therefore, legal protection extends also to the sphere of *iucundum* (pleasure) as such

⁵⁶ Whereas this form of apparently systemic reasoning could be open to discussion, I will not dwell upon it in more detail, as the focus of this case-study is on politicisation through humanization, and not on legal reasoning in general.

⁵⁷ R. Mańko, 'Homo iuvans przed Trybunałem: Wyrok *Leitner* w perspektywie teorii i filozofii prawa' [*Homo Iuvans Before the Court of Justice: The Leitner Judgment in the Perspective of Legal Theory and Philosophy of Law*] [in:] P. Cybula, P. Świącicka (ed.), *Prawne aspekty podróży i turystyki – historia i współczesność* [Legal Aspects of Travel and Tourism: History and Modern Times] (forthcoming).

⁵⁸ Cfr. the much telling formulation '*mancato godimento*' used by AG Tizzano in para 10 of his opinion in the *Leitner* case.

⁵⁹ This aspect is most clearly visible in the famous English case of *Jarvis v Swan Tours* [1973] 1 All ER 71 where the defendant tour operator's liability was established, inter alia, on the basis of the fact that the plaintiff-tourist was the only participant of a house party (where he expected, naturally, to meet other people).

⁶⁰ Of course, this loss of pleasure can be the result of factors beyond the tour operator's control, and hence, outside the scope of his even possibly imaginable liability, such as conflicts between the tourist and his/her partner or friends with whom he decides to go on holiday.

which should, normally, be the result of the services provided by the tour operator. In effect, we can speak not only of liability for *lucrum cessans*, known since Roman law, but also of liability for *iucundum cessans* as a new sphere of civil liability.⁶¹ However, at the same time, by granting a *pecuniary* compensation for *iucundum cessans*, the Court seems to assume that money as such can be the source of human pleasure, or, at least, that pleasure can be purchased (*pretium iucunditatis*). One can wonder whether this way of perceiving human nature indeed drives us that far away from the technocratic notion of *homo oeconomicus*.

4.3. Omega: homo iniquus

4.3.1. Factual background of the dispute

The case of *Omega*⁶² was concerned with a German company (Omega Spielhallen) which was operated a so-called ‘laserdrome’ in the city of Bonn, where people could practice ‘laser sport’. This sport, was in fact, a form of game where people pretended to kill other people: they used laser machine guns and wore jackets with sensors. The equipment was supplied to Omega by a British company Pulsar under a franchising contract. The population of Bonn manifested against the laserdrome project, and the Bonn police issued an order prohibiting this the ‘play at killing’ people. Breach of the police order would lead to a fine imposed upon Omega of 10.000 DEM per illegal play-at-killing game. The legal basis for the Police order was the regional *Ordnungsbehördengesetz* (act on order organs) which allows police authorities to ‘take measures necessary to avert a risk to public order or safety in an individual case’. The order stressed that the play-at-killing game trivialised violence and was in breach of fundamental values prevalent in society. Omega appealed, eventually reaching the *Bundesverwaltungsgericht* (federal administrative court) with a *Revision* (appeal on a point of law). Here, Omega’s lawyers constructed the argument as a case of infringing its freedom to provide services under Article 49 of the EC Treaty, arguing that the equipment for the play-at-killing game came from a British supplier (Pulsar). The *Bundesverwaltungsgericht* submitted a request for a preliminary ruling to the ECJ, pointing out that the game operated by Omega violated

⁶¹ R. Mańko, ‘*Homo iuvens*’..., *op. cit.*

⁶² C-36/02.

human dignity, as protected by the German *Grundgesetz*. The German court, therefore, framed the dispute in terms of putting on the scales two opposing values: economic activity (freedom to provide services) on the one hand, and fundamental human rights (dignity) on the other hand, obviously favouring the second one.

4.3.2. The ECJ's judgment

In its judgment of 14 October 2004, the ECJ agreed with the *Bundesverwaltungsgericht* and ruled that 'Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that activity is an *affront to human dignity*.'⁶³

The Court accepted the legal framing of the issue as an opposition between economic rights and human dignity, or more broadly – 'human rights vs. economic rights'.⁶⁴ In the motives of the judgment it underlined that 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law' (para. 34). The ECJ added that 'the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services' (para. 35). Turning to the case at hand, the ECJ indicated that '[...] according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee [...]. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus "play at killing" people, the contested order did not go beyond what is necessary in order to attain the objective pursued [...].'⁶⁵

⁶³ *Omega*, operative part, emphasis added.

⁶⁴ G. Chu, "Playing at Killing" Freedom of Movement: Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, *Legal Issues of Economic Integration* 33.1 (2006): 85–94, p. 85.

⁶⁵ *Omega*, para. 39.

In conclusion, it found that the police order against Omega ‘cannot be regarded as a measure unjustifiably undermining the freedom to provide services’.⁶⁶

4.3.3. Analysis

The brief reasoning of the ECJ shows that it accepted the German courts’ view whereby the protection of human dignity must prevail over purely economic interests. In that, it admitted a broader framing of human existence than merely the reality of *homo oeconomicus*. Nonetheless, it must be remarked that the Court’s treatment of the problem of dignity was very succinct. The decision of the Court in *Omega* can be described as ‘political’, due to the fact that it was concerned with the interpretation of an open norm – the general clause of ‘public policy’, found in Article 46 of the EC Treaty as one of the possible exemptions to the free movement of goods.⁶⁷ Indeed, the interpretation given by the Court is by no means uncontroversial,⁶⁸ which supports the assumption that its decision was a truly political one. As Garry Chu concluded, ‘*Omega* confirms the central place of human rights in the Community legal order, and shows that even a notion as nebulous as “human dignity” may be accorded priority over economic rights.’⁶⁹ Thomas Ackermann underlines that the

⁶⁶ *Omega*, para. 40.

⁶⁷ Cfr. M.K. Bulterman, H.R. Kranenborg, ‘What if rules on free movement and human rights collide? About laser games and human dignity: the Omega case’, *European Law Review* 31.1 (2006): 93–101.

⁶⁸ Cfr. e.g. G. Chu, “Playing at Killing”..., *op. cit.*, p. 93: ‘accepting such an amorphous concept as ‘human dignity’ to be a possible ground for pleading the ‘public policy’ exception under Art 46 EC could potentially erode free market access for services within the European Community.’ See also the view of Thomas Ackermann, who pointed out, in the context of *Omega*, that: ‘what some regard as a matter of human dignity would appear to others to be a question of morality or taste. Such a divergence of opinions is typical of discussions on topics ranging from the most serious (e.g. euthanasia) to the faintly ridiculous (e.g. reality shows like “Big Brother”)’ (T. Ackermann, ‘Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn’, *Common Market Law Review* 42.4 (2005): 1107–1120, p. 1107).

⁶⁹ G. Chu, “Playing at Killing”..., *op. cit.*, p. 94. Thomas Ackermann adds that ‘*Omega* was another test for the Court’s “stance on the ‘human v. economic’ rights interface” in which the Court came down in favour of human rights’ (T. Ackermann, ‘Case C-36/02’..., *op. cit.*, p. 1117).

interpretation of Article 46 of the EC Treaty regarding ‘public policy’ with reference to ‘human dignity’ is far from unequivocal.⁷⁰

4.4. *Aziz: homo domesticus*

4.4.1. Factual background

The facts of the *Aziz*⁷¹ case are, sadly, representative for many similar cases arising in Spain and elsewhere, where people have been deprived of their homes as a result of the economic crisis. The factual narrative behind *Aziz* starts in 2007 when Mr Aziz signed a loan agreement with the Catalunya Caixa bank for EUR 138,000, secured by a mortgage on a house he had owned. Mr Aziz was supposed to reimburse the loan over 33 years. The contract provided for an annual default interest of 18.75%, automatically applicable to sums not paid when due, without the need for any notice. Furthermore, it conferred on Catalunya Caixa the right to call in the totality of the loan if Mr Aziz was late in his payments and provided that the bank could unilaterally determine the amount of Mr Aziz’s debt for the purposes of enforcement proceedings. Definitely, quite an imbalanced ‘agreement’ between a powerful bank and a weak consumer.

In 2008 Mr Aziz stopped making his monthly payments. As a result, the Catalunya Caixa unilaterally declared that his debt amounts to EUR 139 764.76 and demanded immediate payment of that sum, corresponding to the unpaid monthly instalments, including contractual and default interest. When Mr Aziz failed to pay, the bank instituted enforcement proceedings against him seeking recovery over EUR 180.000 (including interests and costs). Mr Aziz failed to make an appearance in court, and in December 2009 the court ordered enforcement. Mr Aziz did not react.

In 2010 a judicial auction of Mr Aziz’s house was arranged, but no bid was made. Therefore, in accordance with the provisions of the Spanish Code of Civil Procedure, the court adjudicated the house to the bank at 50% of its value. The court decided that the house would be repossessed by the bank on 20 January 2011 with the result of evicting Mr Aziz from his family home.

Before the eviction took place, on 11 January 2011, Mr Aziz applied for a declaration seeking the annulment of the clause of the mortgage

⁷⁰ T. Ackermann, ‘Case C-36/02’..., *op. cit.*, p. 1116–1117.

⁷¹ Case C-415/11.

loan agreement which allowed the bank to determine Mr Aziz's debt in a unilateral fashion. Mr Aziz pleaded that it is unfair.

However, Spanish law made it very difficult for the debtor to plead the unfairness of the mortgage loan contract at the stage of mortgage enforcement proceedings. In particular, such objections could be made only at a later stage and without the effect of suspending the eviction from the house. The Spanish court considered that those rules of national law made it extremely difficult for a Spanish court to ensure effective protection of the consumer. Furthermore, the Spanish court considered that the loan mortgage contract could also contain more unfair terms, in particular the term providing for very high default interest rates.

Therefore, the national court submitted two questions to the ECJ, one procedural one, regarding the possibility of analysing the unfairness of terms at the stage of mortgage enforcement proceedings and a substantive one, regarding the fairness of certain clauses in Mr Aziz's contract. Regarding the substantive question, the national court wanted to know how to understand 'disproportion' in the rights and duties of the parties with regard to the terms of the contract containing the acceleration clauses (allowing the bank to demand repayment of the whole debt in case of consumer default, whilst that debt was to be spread over 33 years), very high default interest rates exceeding 18% and the right of the bank to unilaterally determine the consumer's debt for the purposes of enforcement proceedings.

4.4.2. Legal framing of the issue by the ECJ

In its reasoning, the ECJ first addressed the question of the unfairness of the Spanish civil procedure rules. It pointed out that consumers would, in practice, find it very difficult if at all possible to make use of their rights: '[...] taking into account the progress and the special features of the [Spanish] mortgage enforcement proceedings [...] there is a significant risk that the consumer [...] will not make that preliminary registration within the period prescribed for that purpose, either because of the *rapidity* of the enforcement proceedings in question or because *he is unaware of or does not appreciate the extent of his rights*'.⁷²

The Court clearly acknowledges the consumer's lack of legal knowledge and experience and uses psychological statements, referring to the

⁷² *Aziz*, para. 58 [emphasis added].

consumer's state of mind in a quite realistic perspective. A further passage shows how the ECJ acknowledges the specific situation of Mr Aziz, who – as a result of the bank's proceedings targeted at him – lost his family abode: '[...] the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.'⁷³

The ECJ did not treat the object which is encumbered by mortgage just as an abstract *res* of private law, but entered into the social context, underlining that it is the 'family home of the consumer' and that the enforcement proceedings, if uninterrupted by the court on account of the unfairness of certain terms in the contract, will lead to the 'definitive and irreversible loss of that dwelling'. The abstract *res* becomes a concrete *domus*,⁷⁴ and the *homo oeconomicus* is admitted in his quality of *homo domesticus*.

In conclusion, the ECJ found that the Spanish legislation violates the principle of effectiveness, and therefore is not caught by the principle of procedural autonomy of the Member States, but must be set aside in order to ensure the full effectiveness of the Directive.

Regarding the national court's second question seeking guidance on applying *in concreto* the prohibition of unfair terms to three controversial clauses in the mortgage loan contract between Mr Aziz and the Catalunya Caixa, the ECJ started from pointing out that the concepts of 'good faith' and 'significant imbalance' used in the Directive 'merely defin[e] in a general way the factors that render unfair a contractual term that has not been individually negotiated'.⁷⁵ The Court explained the content of those notions in the following terms: '...in order to ascertain whether a term causes a "significant imbalance" in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether

⁷³ *Aziz*, para. 61.

⁷⁴ Cfr. S. Iglesias Sánchez, 'Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v. Catalunya Caixa*', *Common Market Law Review* 51.3 (2014): 955–974, p. 960, 971–972.

⁷⁵ *Aziz*, para. 67.

and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.⁷⁶

What the ECJ essentially did, is a reception of the German notion of *Leitbild des dispositiven Gesetzrechts* (enshrined in § 307 II BGB) whereby the unfairness of a term should be assessed against the background of any default rules that would apply in the absence of contractual terms.⁷⁷

As regards the ECJ's interpretation of the notion of 'good faith' (*bona fides*), the Court made a textual reference to the preamble to the Directive: 'With regard to the question of the circumstances in which such an imbalance arises "contrary to the requirement of good faith" [...], the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.'⁷⁸

It is worth underlining that 'good faith' is a general clause, that is an open norm which serves to make the law more flexible. In the European legal tradition, to which the CJEU did not refer, good faith was understood as referring to the parties acting to one another *bona fide*, i.e. in good faith. Indeed, this meaning is enshrined in Recital 16 to the Directive when it states that the trader must 'deal fairly and equitably' and take the consumer's 'legitimate interests' into consideration. Commenting on the CJEU's notion of *bona fides* Sara Iglesias Sánchez pointed out that: 'as to compliance with the requirement of "good faith", the Court sets up a test that seems to differ from an objective conception of this notion. Although, admittedly the "good faith" of the seller is assessed regardless of the subjective will of the seller or provider, following the 16th recital of Directive 93/13, the judgment of the Court seems to imply a notion of the "rational consumer": the national court must assess whether the consumer would have agreed to the term in question in the framework of individual negotiations.'

⁷⁶ *Aziz*, para. 68.

⁷⁷ R. Mańko, 'The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on *Aziz v CatalunyaCaixa* (CJEU, 14 March 2013, Case C-415/11)', *Law and Forensic Science* 10 (2015): 7–26, p. 21.

⁷⁸ *Aziz*, para. 69.

Indeed, Iglesias Sánchez is correct in pointing out that the test put forward by the CJEU in *Aziz* is a normative novelty which cannot be deduced logically neither from the text of the Directive, nor even from its preamble. The present paper being limited to an analysis of the Court's reasoning, and not the substantive merit of its decision in *Aziz*, it will suffice here to observe that the introduction of the fragment of the judgment stating that 'the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations' is indeed a normative *novum*. As such, it is not directly supported by any specific arguments, neither intra-legal nor extra-legal. It should also be underlined that the formula itself requires the Court to analyse the hypothetical psychological will of the consumer ('would have agreed'), which, arguably, establishes a link between the strictly legal criteria and the actual economic circumstances (what would a *concrete consumer* agree to).

Passing towards an evaluation of the specific terms in the contract, the CJEU underlined that the annex to the Directive is only indicative: '70. In that regard, it should be recalled that the annex, to which Article 3(3) of the directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see *Invitel*, paragraph 25 and caselaw cited).' The only argument invoked in support of the legal view that the Annex is 'indicative and non-exhaustive' is an argument from case-law (*Invitel* case).

In the following paragraph the Court found that: '71. Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it (*Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42). It follows that, in that respect, *the consequences of the term under the law applicable* to the contract must also be taken into account, requiring consideration to be given to the national legal system (*Freiburger Kommunalbauten*, précité, paragraph 21, and the order in Case C-76/10 *Pohotovost* [2010] ECR I-11557, paragraph 59).'

The part of the Court's reasoning is mainly supported by intra-legal arguments. Let us recall that it is Article 4(1) of the Directive which explicitly mentions the criteria to be taken into account when assessing

an unfair term: '[...] the unfairness of a contractual term shall be assessed, taking into account the *nature of the goods or services* for which the contract was concluded and by referring, at the time of conclusion of the contract, to *all the circumstances* attending the conclusion of the contract and to *all the other terms* of the contract or of another contract on which it is dependent.'

A comparison of para. 71 sentence one of the *Aziz* judgment and the very wording of Article 4(1) of the Directive reveals that the references to case-law at the end of that sentence (pointing to *Pannon GSM*, paragraph 39, and *VB Pénzügyi Lízing*, paragraph 42) are patently superfluous – the norm restated by the Court is a word-by-word reproduction of the Directive's text. The fact that the Court nevertheless cites its case-law as additional authority shows how important argument from precedent is in the hierarchy of argumentative strategies employed by the CJEU.

In the second sentence of para. 72 of the *Aziz* judgment the Court adds that '[i]t follows that [...] the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system', citing two cases (*Freiburger Kommunalbauten* and *Pohotovost*) as authority. Although the duty of the national court to analyse the legal significance of the contentious terms under national law is not *explicite* mentioned in the Directive, it would be an absurd not to accept such a duty. Indeed, a term of contract understood as a set of signs, in order to have a meaning must be read in light with juridical rules of meaning, i.e. in the light of the applicable law. The need to refer to national law follows, therefore, not from the wording of the directive, but rather from the fundamental principles of language and meaning, whereby *omnia sunt interpretanda*.

Departing from its earlier prevailing practice of not giving national courts direct guidelines as to the fairness of individual terms, the CJEU in *Aziz* decided to give such guidance. However, this part of the judgment⁷⁹ do not contain any arguments, but simply applies the earlier considerations to the terms at hand. One can therefore speak here of a subsumption of the facts (the wording of the terms) under a legal norm (formulated in the preceding paragraphs). Therefore, these paragraphs will not be the subject of my analysis. Likewise, the final paragraph of the judgment which contains the conclusions⁴¹ (repeated later in the operative part) also does not contain any new legal argumentation and therefore is left outside the present exegesis.

⁷⁹ *Aziz*, paras. 72–75.

4.4.3. Analysis

The *Aziz* judgment of the ECJ is undoubtedly an example of a consumer-friendly approach, both with regard to form (rhetoric of *homo domesticus*, not only of *homo oeconomicus*) and as regards substance (a consumer-friendly extensive interpretation of *bona fides*, striking down Spanish procedural rules as unfair). Indeed, as Marija Bartl points out, this judgment is ‘often praised for [its] social and fundamental rights “minded” interpretation of EU law’ in a ‘mood of optimism’ about ECJ case-law.⁸⁰ Furthermore, the Court’s decision in *Aziz* can be described as political in the sense used in this paper for three reasons. Firstly, it is concerned with interpreting open norms of technocratic law (notably, fairness and good faith) meaning that the Court enjoyed considerable discretion. Secondly, the Court’s decision in fact decided on a more general economic (class) conflict, opposing (as friends/enemies) ordinary citizens (embodied *in casu* by the insolvable consumer, Mr Aziz) and the capital (embodied *in casu* by the bank of CatalunyaCaixa). The Court’s decision not being a merely mechanical application of the rules of the directive, but involving an actual interpretive decision having a far-reaching impact on a on-going social struggle in Spain can be correctly described as political.

5. Conclusions: Repoliticisation through humanization?

Undoubtedly, as was shown in section 3, technocratic law exerts symbolic violence towards the human subject by reducing him to the economic dimension of his existence. If he wants to articulate his interests in the technocratic legal discourse, he must follow the rules of that discourse. However, in this discourse his ‘rights’ are not connected to the notions of justice or authentic human rights (as opposed to ‘fundamental’ rights, granted to corporations⁸¹), but ultimately to the human being’s instrumental usefulness for market integration. Each of the three cases

⁸⁰ M. Bartl, C. Leone, ‘Minimum Harmonization After *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review’, *European Constitutional Law Review* 11 (2015): 140–154, p. 140.

⁸¹ A poignant example of a corporation using its fundamental rights to trump workers’ rights is the ECJ judgment of 18 July 2013 in Case C-426/11 *Alemo-Herron*, on which see: *Ibidem*, *passim*.

analysed in section 4 to an extent pierced the economic veil and uncovered a piece of humanity behind the *persona*⁸² of the *homo oeconomicus*. Thus, in *Leitner* the Court acknowledged human sentiments of pleasure and suffering, as felt by tourists; in *Omega* it acknowledged that playing at killing can be regarded as a deeply immoral form of entertainment; finally in *Aziz* it acknowledged that a home – even if treated by the law as an immovable thing, object of property and contractual rights – is, ultimately, the consumer’s family abode. What is common to all three cases, chosen for the analysis, is that they went beyond the merely economic dimension of human existence, as advanced by technocratic law. Enjoyment and suffering, dignity or having a safe family home have a value going beyond quantification. This acknowledgment is, as such, praiseworthy and indeed can be described as a move towards the humanization of technocratic law.

Costas Douzinas, reflecting upon the condition of the critical lawyer, pointing out to the tension between being a lawyer on the one hand, and being a critic, on the other hand.⁸³ Douzinas speaks, in this context, of ‘a kind of identity crisis, a mild schizophrenia’, which is due to the fact that by resorting to legal methods and procedures to fight for social justice (*qua* lawyers), critics are simultaneously conscious that ‘every victory for the oppressed and exploited *offers legitimacy* to a system that upholds its weak and weakened principles only exceptionally.’⁸⁴ I think that this is applicable *mutatis mutandis* to the strategy of politicisation of technocratic law through its humanization. Adding the human face to technocratic law undoubtedly emphasises the extra-economic aspects of human existence. But does it lead to a truly *internal critique* of technocratic law and its means-towards-ends economic reductionism? Does it really address the human being in the whole richness of his *Dasein*? Ultimately, we must not forget that, as Marija Bartl and Candida Leone rightly observed, ‘the ECJ is a supranational institution of a still predominantly economic entity, strongly invested into opening markets’, which, in turn, ‘may influence the Court’s ideology’.⁸⁵

In metaphorical⁸⁶ terms, technocracy is ‘cold’, whilst politics is ‘hot’ – technocracy strives to be free of emotions, based solely on allegedly

⁸² In the etymological Greek sense of ‘mask’.

⁸³ C. Douzinas, ‘On a certain’..., *op. cit.*, p. xvi.

⁸⁴ *Ibidem*, p. xvi.

⁸⁵ M. Bartl, C. Leone, ‘Minimum Harmonization’..., *op. cit.*, p. 154.

⁸⁶ S.L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago–London, University of Chicago Press, 2001), ch. 3.

scientific calculation, on *instrumental rationality*. Politics is on the opposite pole – it is *per se* emotional,⁸⁷ it can be irrational, it is about setting goals and favouring interests not for any instrumental purpose, but on the basis of pure decisionism. Law, in general, is on the side of the ‘cold’ rationality,⁸⁸ but technocratic law takes these features to the extreme by combining the rationality of law with the rationality of technocracy.

It can be said that humanization of technocratic law in the process of its interpretation – as exemplified by the three case studies analysed above – allows emotions into the otherwise ‘cold’, instrumentally rational fabric of technocratic law. Thinking of the Court’s account of *Leitner*, we feel either compassion (with the suffering, food-poisoned child) or anger (which her parents must have felt, wasting their holiday); thinking of *Omega*, we may feel disgust (at the game of ‘playing-at-killing’, so inappropriate in the light of the country’s recent history, and therefore prohibited by the German courts); finally, reading the Court’s presentation of the *Aziz* case, we immediately feel compassion with Mr Aziz, losing his home to the bank, standing for the Capital in general). The moments of humanization, if we may refer to them like that, can be said to be cracks in the fabric of technocratic law’s Symbolic order, cracks through which we can gaze into the abyss of the Real.⁸⁹

All three cases – as most cases before the ECJ, as a matter of fact – did not have simple, syllogistic solutions.⁹⁰ To the contrary, each of them required the interpretation of legal rules characterised by a greater or lesser degree of vagueness: the notion of ‘damage’ (*Leitner*), that of ‘public policy’ (*Omega*) and that of ‘good faith’ (*Aziz*). All three decisions, were therefore ‘political’ in the sense indicated in the introduction to this paper. This evaluation is corroborated by the fact that all three judgments, as pretty

⁸⁷ M. Nussbaum, *Political Emotions* (Cambridge MA: Belknap, 2013), p. 2–3.

⁸⁸ See e.g. S.L. Winter, *A Clearing...*, *op. cit.*, ch. 11.

⁸⁹ I am using the notions of ‘Symbolic’ and ‘Real’ in the Lacanian sense. For a discussion see R. Mańko, ‘Reality is for Those Who Cannot Sustain the Dream’: Fantasies of Selfhood in Legal Texts’, *Wrocław Review of Law, Administration and Economics* 5.1 (2015): 24–47, p. 27–29, 33–34 (with further references).

⁹⁰ The Court has a formal way of differentiating cases into a spectrum ranging from ‘hard’ to ‘easy’. The ‘hardest’ cases are decided by the full Court, whilst the ‘easy’ ones – replicating earlier decisions – are decided in the form of an order (as opposed to a judgment).

inobvious ones, were widely commented in the literature in the form of case notes and articles.⁹¹ Whilst the true motives behind the judicial decision will always remain concealed to the scholar, it can nonetheless be assumed, on the basis of the available motives of the decisions in question, that the moment of humanization had an impact upon the interpretive outcome. And, importantly, the outcome of all three cases was on the side of the human subject – the Court’s decision gave priority to the individual over the business. In this sense, therefore, a moderately positive answer can be given to the question indicated in the subtitle of this paper – humanization indeed can be a vehicle of repoliticisation.

On the other hand, politicisation as such does not *per se* predetermine the concrete outcomes. The case of *Alemo-Herron*⁹² is indeed instructive in this case and can serve to chill down the enthusiasm which could be brought about by reading together *Leitner*, *Omega* and *Aziz*. *Alemo-Herron* was a case in which the ECJ used a fundamental right enshrined in the Charter (right to pursue a business activity) to curtail the rights of employees under domestic contract law within the sphere of a minimum harmonization (pro-employee) directive, where the national rules otherwise applicable would have been more favourable to employees than the minimum required by the directive. Undoubtedly, the *Alemo-Herron* ruling is one which goes *contra legem*, as persuasively shown by Marija Bartl and Candida Leone in their critical case note.⁹³ The Court’s decision was, therefore strictly political in the sense used in this paper, as the

91 It can be assumed that cases which do not attract case-notes by specialists in the field are rather ‘easy’ ones, based on syllogistic or other more or less compelling reasoning, whilst the really ‘hard’ cases, involving a truly political *Entscheidung* by the court, attract more academic attention.

92 ECJ judgment of 18 July 2013, Case C-426/11. See critical case note by M. Bartl, C. Leone, ‘Minimum harmonization’..., *op. cit.*, *passim*.

93 M. Bartl, C. Leone, ‘Minimum harmonization’..., *op. cit.*, p. 145, where they note that ECJ found ‘little support for the new reading of the purpose of [Directive 2001/23] in the text itself’. What is more, they indicate that ‘[a]t the level of textual interpretation of the Directive the questions [of the national court] called for a simple response’ in light of the directive’s explicit minimum harmonization character (*ibid.*, p. 144). In sum, ‘the teleological interpretation of the Directive has been “taken care of” by the reinterpretation of the *telos* of the Directive, which ceased to be the protection of workers (as the text of the Directive would suggest), and turned out to be that of pursuing a “fair balance” between interests of employers and the employees as understood by the Court’ (*ibidem*, p. 152–153).

ECJ replaced the balancing made by the legislature by its own axiological preferences,⁹⁴ *in casu* within the realm of (neo)liberal orthodoxy.⁹⁵ However, instead of humanization, the Court showed understanding rather of the interests of Capital.

Ultimately, therefore, whilst a first step of critique of technocratic law must entail its repoliticisation, the second step is to ask *what repoliticisation* is needed, i.e. whose interests must the law articulate, serve and protect. However, the very fact that this question *can be asked* is possible only thanks to repoliticisation (in technocratic law, these questions are simply repressed). And in yet a further step, once the aims and interests underlying the law become once again contested, the juridical form can be conceptually separated from its political content, and – therefore – its autonomous value (*qua* form) can be once again revealed and appreciated.

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⁹⁴ M. Bartl, C. Leone, 'Minimum harmonization'..., *op. cit.*, p. 145–146.

⁹⁵ *Ibidem*, p. 151.

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