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RAFAŁ MAŃKO¹

The Political as an Analytical Category in the Critical Study of Case Law (Theoretical Model and Case Study)²

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Abstract

The aim of the present paper is to operationalise the concept of the political in order to make it available as an analytical category for the critical study of judicial decisions (case law). The concept of the political is understood here, following, in particular, Chantal Mouffe's agonistic theory, whereby it is a dimension of a social antagonism. Such an antagonism can be played out not only in the process of legislation (creation of abstract and general legal norms), but also in the process of adjudication (the so-called 'application of law', which, however, always has a creative element to it). As an analytical category, the political can be operationalised in order to subject judicial decisions to a critique which goes beyond the question of the 'correct' interpretation and 'application' of law in a given case, but puts in the spotlight real social, political and economic conflicts that are at stake. The analytical framework is exemplified by judicial decisions of the European Court of Justice.

Keywords: the political, analytical category, legal critique, case law, European Court of Justice.

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RAFAŁ MAŃKO

Polityczność jako kategoria analityczna w badaniach nad orzecznictwem (model teoretyczny i studium przypadku)

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Streszczenie

Celem niniejszego artykułu jest dokonanie operacjonalizacji pojęcia polityczności w celu uczynienia z niej kategorii analitycznej służącej do prowadzenia krytycznych badań nad orzecznictwem sądowym. Pojęcie polityczności rozumiane jest tu na sposób „agonistyczny”, zaproponowany przez Chantal Mouffe, tj. jako wymiar społecznego antagonizmu. Tego rodzaju antagonizmy mogą być przedmiotem sporów na etapie prac legislacyjnych (tj. tworzenia abstrakcyjnych i generalnych norm prawnych), ale także w procesie orzekania (tj. tzw. „stosowania” prawa, który to proces zawsze zawiera w sobie określony element twórczy). Jako kategoria analityczna polityczność może zostać zoperacjonalizowana w celu poddania orzeczeń sądowych krytyce, która wychodzi poza ramy „prawidłowej” wykładni i „zastosowania” prawa w danej sprawie, kładąc w zamian nacisk na rzeczywiste konflikty o charakterze społecznym, politycznym i ekonomicznym. Zaproponowane ramy analityczne zostały zilustrowane w oparciu o wybrane orzeczenia Europejskiego Trybunału Sprawiedliwości.

Słowa kluczowe: polityczność, kategoria analityczna, krytyka prawa, orzecznictwo, Europejski Trybunał Sprawiedliwości.

Introduction

For some time now, the concept of the political has gained citizen rights in legal scholarship.³ This is thanks to critical legal theory which, since the beginning of its existence, has emphasised the conflicts and antagonisms present in society,⁴ pointing out that law, whilst granting rights to some, and imposing duties on others, divides benefits and privilege, but also applies violence.⁵ The use of the concept of the political in critical legal research does not, however, imply going down the path of legal nihilism. To say that society is divided into certain groups which are in an antagonistic or agonistic relationship with each other and pointing out that those conflicts are, to a certain extent, regulated by law, does not imply in any way the negation of law's social role. However, it is one thing to say that law regulates social conflicts in a certain way, and another to affirm *in blanco* the way in which law regulates such conflicts. Traditionally, jurisprudence would draw a strict dividing line between creating law, on one hand, and its application, on the other hand, suggesting that the latter is merely secondary and determined. Critical legal theory disagrees with such an assumption underlining – together with legal realism – that judicial interpretation and application of the law have a creative character. Obviously, what is at stake is not an exaggerated *ad absurdum* indeterminacy thesis, according to which judges could allegedly decide cases in an entirely arbitrary way, but rather the highlighting of the existence of judicial discretion which sometimes has a broader, and sometimes a more narrow scope.⁶ Judicial discretion cannot, however, be eliminated entirely.⁷ Such an assumption would be utopian *inter alia* owing to the

³ See e.g. M. Paździora, M. Stambulski, *Co może dać nauce prawa polityczność? Przyczynek do dalszych badań*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 1; A. Sulikowski, M. Wojtanowski, *The Polish Constitutional Court crisis: some remarks on the political, liberalism and culture*, [in:] B. Pokol (ed.), *The Gradual Emergence of the Juristocratic State*, Budapest 2019; M. Zirk-Sadowski, *Metodologie teorii prawa a problem polityczności prawoznawstwa. Aspekt behawioralny i intensjonalny*, „Przegląd Prawa i Administracji” 2017, 110.

⁴ R. Mańko, J. Łakomy, *In search for the ontological presuppositions of critical jurisprudence*, "Critique of Law" 2018, 10(2), pp. 475–477.

⁵ R. Cover, *Violence and the Word*, "Yale Law Journal" 1985/1986, 95; R. Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, Łódź 2018, pp. 171–173.

⁶ D. Kennedy, *Freedom and Constraint*, [in:] idem, *Legal Reasoning: Collected Essays*, Aurora, CO 2008.

⁷ Idem, *A Left/Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation*, [in:] idem, *Legal Reasoning...* Cf. L. Leszczyński, *Types of Application of Law and the Decision-Making Model*,

nature of legal language and of adjudication.⁸ Therefore, instead of concealing judicial discretion, critical jurisprudence puts forward the proposal to make it one of the key objects of legal theory research.⁹

The concept of the political, mentioned above, seems to be a particularly useful tool for research on the way how judges use the discretionary power vested in them. This concept, introduced to the scholarly debate by Carl Schmitt,¹⁰ was later heavily modified by Chantal Mouffe.¹¹ In this paper, it shall be understood as denoting the **dimension of conflict** which underlies any society or community which cannot be eliminated. The political in this sense should be discerned from politics and from policies.¹²

The present paper will be structured as follows. First, I will present the concept of the political as an analytical category, applying Chantal Mouffe's theory to the legal domain. Then I will propose an outline operationalisation of the concept, using the ECJ as an example. Following that, I will put forward a fully-fledged case study focusing on the *Alemo-Herron* judgment given by the ECJ in a labour law case.¹³ This will illustrate the dimension of the political which falls within the remit of the Court's discretionary power and will also set a blueprint for an analysis of the Court's case law in line with critical legal methodology.

In methodological terms, the present paper is an intervention in the field of applied legal theory. In the first step, the paper develops a theoretical tool (the concept of the political in jurisprudence); in the second step, it operationalises the tool; and in the third step, the tool is applied to analyse empirical material (a judgment of the ECJ). The main claim of the paper is that the method of analysis put forward in it – which can be dubbed the 'agonistic analysis of case law' – can provide new critical insights into the study of judicial discretion. The method's main added value is the analysis of **alternative interpretations** of the applicable legal materials and their ordering according to the interests of the antagonistic groups or collectivities. A systematic analysis of **all** such alternatives, conceivable under a given legal cul-

"Studia Iuridica Lubliniensia" 2015, 24(2), pp. 23–25.

⁸ Cf. T. Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej*, Kraków 1986.

⁹ Cf. D. Kennedy, *A Critique of Adjudication (fin de siècle)*, Cambridge, MA 1997.

¹⁰ C. Schmitt, *The Concept of the Political*, Chicago 2007.

¹¹ C. Mouffe, *On the Political*, Routledge 2005.

¹² A. Sulikowski, R. Mańko, J. Łakomy, *Polityczność prawa i ogólnej refleksji nad prawem: wprowadzenie*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2018, 3. The concept of "policies" is used by Tomasz Koncewicz to construct the notion of a "political judgment" – see: T.T. Koncewicz, *Trybunał Sprawiedliwości Unii Europejskiej. Od „sądowego aktywizmu” do „europejskiej filozofii sądenia”?*, [in:] L. Leszczyński (ed.), *Wykładnia prawa Unii Europejskiej*, Warszawa 2019, p. 445.

¹³ Judgment of 18.7.2013, C-426/11.

ture, could enrich the practice of the critical analysis of case law and, specifically, the art of writing case notes, one of the most important avenues of dialogue between legal scholars and judges.

The agonistic concept of the political as an analytical category

As I have already pointed out above, it was Carl Schmitt who introduced the concept of the political into the discourse of legal philosophy. In his version, the political was a particularly intensive form of collective enmity which determined the borders of the community.¹⁴ The Schmittian concept of the political is, therefore, exclusionary – by determining the identity of the members of the community (friends) it simultaneously eliminates the enemies from it.¹⁵ This approach can be referred to as **antagonistic**, and can be opposed to Chantal Mouffe's **agonistic** approach.¹⁶ For Mouffe, the political is a dimension of conflict which is capable of being tamed and played out within the community. Mouffe's political does not determine the friend-enemy relationship, as was the case with Schmitt, but the relationship between adversaries or opponents. The stake of the political is no longer the physical elimination of the enemy, but winning the struggle against the adversary and the imposition of one's own hegemony. This approach to the political is, therefore, **inclusive** because it does not exclude the enemy from the community, but includes the adversary within that community, bestowing an intra-community character upon the conflict. The main forum in which agonisms should be played out is, according to Mouffe, parliamentarism, based on free, but also actually representative elections.¹⁷ Individual political parties, according to Mouffe's model, should represent specific groups of economic or cultural interests. The destruction of the bond of representation, observed under the conditions of post-politics and technocracy, inevitably prevents a parliament from being a forum where the political can be played out. Technocracy as a technique of governance¹⁸ leads to the transfer of powers to experts, including legal experts. Social life becomes juridified, and decisions regarding social conflicts are made not only in parliaments, but also in court-

¹⁴ C. Schmitt, op. cit., p. 25–27.

¹⁵ Cf. C. Mouffe, op. cit., p. 14.

¹⁶ Eadem, *Agonistics: Thinking the World Politically*, London 2013.

¹⁷ Ibidem, chapters 1 and 4.

¹⁸ Cf. J.N.P. Feitsma, *The behavioural state: critical observations on technocracy and psychocracy*, "Policy Sciences" 2018, 51, p. 389.

rooms. This is because technocratisation and juridification lead not so much to depoliticisation, but rather to a change in the place where the political emerges and is played out.¹⁹ The courtroom becomes one of such places, often preventing democratic debate and replacing it with the government of judges – ‘wise men’.²⁰ Decisions made by judges become increasingly ‘political judicial decisions’,²¹ and not only acts of applying the law created by parliament.

I leave aside the question of evaluating the phenomena of technocracy²² and juridification of social life.²³ They are a certain fact which critical legal research must accept as an existing state of affairs that requires the development of an adequate research toolbox. One should also add, however, that even without the phenomenon of technocracy, a certain degree of juridification of social life exists in any state where a separate judicial power exists, whose members enjoy a certain degree of power over citizens and their organisations. Therefore, the question of the political character of adjudication is not only a phenomenon typical for contemporary states and organisations of a technocratic character, which are characterised by a high degree of the juridification of social, economic and political life. This problem occurs whenever lawyers wield certain power in society.

The concept of the political, as proposed here, is concerned with the dimension of conflict which is collective, and not merely individual. That conflict can be of a variegated nature: economic, cultural, linguistic or pertaining to the sphere of one’s worldview. What turns a conflict into an antagonism (thereby placing it within the sphere of the political) is its collective character, i.e. the possibility to identify at least two opposing **collectivities** which will have an interest in a different settling of that conflict.²⁴ I am using the notion of ‘interest’ in a broad sense, including

¹⁹ This follows from the assumption, adopted in this paper, according to which the political is a dimension of social being, and not a certain fragment of the public sphere in which a debate on conflicts, important for the community, takes place.

²⁰ Cf. A. Czarnota, *Populist constitutionalism or new constitutionalism?*, “Critique of Law” 2019, 11(1), pp. 45–46.

²¹ R. Mańko, *Orzekanie w polu polityczności*, „Filozofia Publiczna i Edukacja Demokratyczna” 2018, 7(1), p. 73.

²² See e.g. A. Czarnota, op. cit., p. 45; N. Munin, *Debating Over European Union’s Future: Repoliticisation and Back to Direct Democracy?*, “Humanities and Social Sciences: Latvia” 2019, 27(1), pp. 49–50. Cf. idem, *Democracy and Financial Crisis Between the Five Presidents Report and the Brexit: In Search for a New Way?*, “International and Comparative Law Journal” 2016, 16(2); R. Mańko, *Symbolic Violence in Technocratic Law and Attempts at Its Overcoming: Politicisation Through Humanisation?*, “Studia Erasmiana Wratislaviensia” 2017, 11.

²³ See e.g. J. Sawicka, *Does a Democratic Rule of Law Create Opportunity for Civic Engagement?* “Critique of Law” 2019, 11(1), pp. 152–153.

²⁴ Cf. A. Czarnota, op. cit., p. 51.

both a purely subjective interest, following from one's political, economic or ethical/moral or religious views. Therefore, the interest does not need to be an objectified one, and certainly it does not require to be a material (patrimonial) one. It may as well happen that the actual interest of a given collectivity is not legally relevant, as poignantly shown by D. Kukovec.²⁵ Likewise, the concept of a 'collectivity' should not be automatically identified with the notion of a 'social group' as defined in sociology and social psychology.²⁶ Certain collectivities, such as workers (employees), are identical with social classes; others, such as professional, ethnic or religious groups, correspond to determined social groups, but yet others, such as consumers, are a collectivity identified mainly on the basis of a common interest, though they do not necessarily need to correspond to any social group, social stratum or economic class.

Also the notion of a 'conflict' (as taking place in the courtroom) should not be identified with strictly collective litigation (e.g. a class action or a constitutional complaint, filed by an organisation representing the rights of a given social group, minority, etc.). Even strictly individual litigation (e.g. between an employer and employee, a trader and a consumer, an activist representing a certain vision of moral order and a service provider, refusing to provide a service²⁷) may be, and frequently is, in a politico-juridical dimension, a collective conflict because the parties to the litigation, even if they are acting in their own name on their own behalf in legal terms, **in political terms, they are acting as representatives** of opposing collectivities (economic classes, an ethnic or moral minority or majority, etc.). What is more, this collective character can gain a strictly juridical character once the case law of common courts becomes established, or in the case of decisions which are *de iure* or *de facto* precedent, because the outcome of litigation before a supreme or constitutional or supranational court will *eo ipso* have an impact on the practice of adjudication in other, similar cases which can be seen as subsequent battles in the entrenched war between conflicting social collectivities.

²⁵ D. Kukovec, *Hierarchies as Law*, "Columbia Journal of European Law" 2014, 21(1).

²⁶ The concept of a 'collectivity' used in this paper, analysed in the light of the concept of a 'social group' in sociology, may sometimes denote a group with which its members identify, e.g. in case of minorities of self-conscious consumers, workers or employers, or, in other cases, with which members do not identify, but are still part of because they were assigned to it by the researcher. In some cases, the collectivities which are in conflict may be identified with 'pressure groups' in the sense used in sociology. Cf. P. Hansen, M. Rapley, *Groups*, [in:] B.C. Turner (ed.), *The Cambridge Encyclopedia of Sociology*, Cambridge 2006, p. 256.

²⁷ See e.g. W. Ciszewski, *Czy wolność uprawnia do dyskryminowania? Rozważania teoretycznoprawne na kanwie sprawy drukarza z Łodzi*, "Forum Prawnicze" 2017, 5(43); A. Śledzińska-Simon, *O cukierniku i o drukarzu, czyli o dwóch tradycjach praw człowieka*, [in:] R. Balicki, M. Jabłoński (eds.), *Dookoła Wojtek... Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław 2018.

The concept of the political, in this sense, can be perceived either as an analytical or normative category.²⁸ As an **analytical** category, the political becomes a tool which the researcher can use to describe a given state of affairs and subject to it to a critique, e.g. the case law. As a **normative** category, the political becomes a postulate, i.e. a state of affairs that a critical legal researcher considers to be desirable and worth of bringing about. In the following pages, I will show how the concept of the political can be used as an analytical category with regard to the critical study of case law, leaving the question of its use as a normative category to another paper.

General operationalisation of the concept of the political

As an analytical category, the concept of the political can be used as a criterion determining the directions of research on case law in general, as well as on individual judicial decisions. For this to be possible, the concept needs, however, to be operationalised, i.e. modified or expanded in a way which will allow for applying it to empirical research – *in casu* for research on the case law of a given court. As far as the first type of research is concerned, i.e. general research on a given court's case law, using the political as an analytical category will entail creating a specific analytical framework, serving to analyse the case of a given court or tribunal or category of courts (e.g. criminal or civil courts of a given country, administrative courts, etc.). In this case, operationalisation will consist in determining, on the basis of a general overview of the case law of a given court and the scope of its jurisdiction, what kind of collective conflicts (antagonisms) are subject to the power of a given court, without, however, answering the question whether that power is discretionary.

In reference to the example of the ECJ, one can identify a number of areas in which that Court decides on collective conflicts.²⁹ In line with its scope of jurisdiction, one points *inter alia* to the following ones: (1) conflicts between businesses and consumers (interpretation of the relatively numerous consumer law directives, especially the Unfair Terms Directive);³⁰ (2) conflicts between employers and employees (interpretation of the relative few directives on labour law, but also of treaty rules relevant from the point of view of employer-employee relationships);³¹ (3) conflicts

²⁸ This dichotomy is well established within social sciences (see e.g. D. Pietrzyk-Reeves, *Idea społeczeństwa obywatelskiego: Współczesna debata i jej źródła*, Toruń 2012, p. 9), and it can also be useful in jurisprudence.

²⁹ R. Mańko, *Dimensions of the political in adjudication: a case study*, "Acta Universitatis Lodzianensis. Folia Iuridica" 2020, 93, pp. 8–13.

³⁰ E.g. judgment of 3 October 2019, C-260/18.

³¹ E.g. judgment of 18 July 2013, C-426/11.

between ethnic majorities and minorities, e.g. with regard to the transcription of family names;³² (4) conflicts between groups holding a specific worldview or moral convictions, e.g. with regard to the internal market freedoms and their limitations,³³ the free movement of citizens³⁴ or equal treatment,³⁵ (5) gender conflicts, e.g. women's struggle for equal rights in the work³⁶ (this conflict coincides with the conflict between employers and employees, but has an additional dimension to it); (6) conflicts between the judiciary, on the one hand,³⁷ and the executive and legislative, on the other hand (on the basis of rules of the Charter and Treaties concerning the right of access to justice);³⁸ (7) conflicts between environmentalists and persons (or public authorities) who do not see the need of protecting the environment or who even proactively destroy it (e.g. with regard to rules concerning the Natura 2000 areas).³⁹

The list above is, obviously, only a set of examples and is not exhaustive. Even knowing the Court's scope of jurisdiction, it is still difficult to predict what concrete, real conflicts of a social, economic or political character may, under the existing legal rules, become the object of its discretionary power in the future. Yet, even on the basis of this list of examples of conflicts, it is possible to say that they are very divergent. Some of them can be said to coincide with traditionally conceived class conflicts (consumers vs traders, workers vs employees); others are an emanation of the emancipatory struggles of various groups, such as women or minorities; yet others are concerned with conflicts between branches of government (conflicts concerning the judiciary) or between certain groups and the authorities (conflicts concerning the environment).

The **general** operationalisation of the concept of the political with regard to a given court already has a significant cognitive value: it allows to ascertain what conflicts and of what character are subject to the decision-making powers of a given court, and therefore, it allows one to answer the question concerning the areas in which that court's case law can exert a social, economic or political impact. What is essential is that this scope is not given once and for all, but rather evolves both with the scope of the court's jurisdiction (which can be the object of a dynamic

³² E.g. judgment of 12 May 2011, C-391/09.

³³ E.g. judgment of 4 October 1991, C-159/90.

³⁴ E.g. judgment of 5 June 2018, C-673/16.

³⁵ E.g. judgment of 1 April 2008, C-267/06.

³⁶ E.g. judgment of 6 December 2007, C-300/06.

³⁷ Judges as a group have common collective interests (K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford 2001, p. 45).

³⁸ E.g. judgment of 19 November 2019, C-585/18, C-624/18, C-625/18.

³⁹ E.g. judgment of 17 April 2018, C-441/17.

interpretation), as well as with the scope of cases that actually reach the court. Therefore, the general operationalisation of the concept of the political as an analytical category can be operationalised in its **historical** dimension, thus allowing one to see the growth of the real significance of a given court or tribunal for social, political and economic life of a given polis. What is remarkable in the ECJ's case is a gradual passage from purely economic, often very technical cases, to cases of a greater political, ideological and social significance. But even in the early case law, especially in such cases as *Van Gend en Loos*,⁴⁰ *Costa v ENEL*⁴¹ or *Simmenthal*,⁴² when deciding cases of purely technical character (pertaining to economic conflicts), there appeared conflicts concerning the place of lower-instance courts with regard to higher-instance courts, and the Court of Justice gave its powerful support to the former, significantly strengthening their position in the national judicial hierarchy.⁴³

Obviously, not all disputes decided by the ECJ belong to the category of 'antagonisms' within the meaning used in this paper. In other words, not all decisions of the Court are made in the field of the political. The key question that needs to be answered in order to ascertain whether the case belongs to the sphere of the political (within the meaning used in this paper) regards the possibility of identifying a given **collectivity** for which the decision is of the essence because it impacts (at least potentially) that collectivity's interests.

Specific operationalisation of the concept of the political

The general operationalisation of the political is, however, only a preliminary phase leading to the **specific** operationalisation, consisting in the formulation of a certain protocol of reading a given court's case law. Such a protocol consists of a number of directives which should be followed by the researcher when subjecting a judicial decision to critical scrutiny.⁴⁴ I propose to identify the following **five** directives, as described below.

Firstly, it is necessary to determine what kind of **conflict (antagonism)** is at stake in the dispute. The identity of the parties to the litigation may be an indication thereof, but it is not a decisive one. It is necessary to view the dispute before a court

⁴⁰ Judgment of 5 February 1963, C-26/62.

⁴¹ Judgment of 15 July 1964, C-6/64.

⁴² Judgment of 9 March 1978, C-106/77.

⁴³ K. Alter, *op. cit.*, p. 45–60.

⁴⁴ Obviously, what is at stake here is not directives of legal interpretation as formulated by theories of legal interpretation.

in the entirety of its social, political and economic context. Furthermore, more than one antagonism could be identified in one and the same case, e.g. in the *Laval* case,⁴⁵ there was both the visible antagonism between the employer and trade unions (these were the parties to the proceedings), but also a hidden antagonism of a regional (spatial) nature.⁴⁶ This hidden antagonism can be revealed only on the basis of an analysis of the broader socio-economic or even geographical-political context.

Secondly, once the essence and content of all the antagonisms at stake have been identified, it becomes necessary to ascertain what **legal norms** may be appropriate to decide the case. The character of such norms will depend on the given court and the legal culture within which it acts; in any event, only norms, which are treated in a given legal culture as legally binding (binding authority), are at stake here.

Thirdly, having determined what legal norms are at stake, it is necessary to evaluate their **possible interpretations**. There can be no doubt that 'law (...) [is] a questioned social phenomenon' and that '[d]ifferent interpretations of law (...) exist in a society in which conflict is endemic.'⁴⁷ Adopting, in line with the assumptions of critical legal theory, the theses of **paninterpretationism**, I assume that no legal norm, formulated in legal provisions or (in the Common Law) in a precedent may be simply 'applied' to a given set of facts without its interpretation.⁴⁸ This is because we cannot experience any element of social reality 'directly', without interpretation, which always has, in essence, a creative character.⁴⁹ Assuming that interpretation is always necessary and often contested, I propose to order the possible results of the interpretation on an axis extended from the maximisation of the interests of group A to the maximisation of the interests of group B.⁵⁰ For instance, if the case at hand is concerned with the interpretation of consumer law, the possible ways of understanding a given rule could be placed on an axis extended from the most pro-consumer interpretation to the most pro-business interpretation, and in a labour case – from the most pro-worker interpretation to the most pro-employer interpretation.

⁴⁵ Judgment of 18 December 2007, C-341/05.

⁴⁶ D. Kukovec, op. cit.

⁴⁷ A. Czarnota, op. cit., p. 51.

⁴⁸ R. Mańko, J. Łakomy, op. cit., p. 480–482.

⁴⁹ J. Łakomy, *Hermeneutic Universalism: A Post-analytical Inquiry into the Political of Legal Interpretation*, [in:] A. Bator, Z. Pulka (eds), *A Post-analytical Approach to Philosophy and Theory of Law*, Berlin 2019, p. 51.

⁵⁰ My approach is inspired by the "individualism" – "altruism" axis proposed some time ago by D. Kennedy. See: D. Kennedy, *Form and Substance in Private Law Adjudication*, "Harvard Law Review" 1976, 89. A similar axis, with regard to possible solutions in the Code, was also proposed by M. Hesselink, *The Politics of a European Civil Code*, [in:] idem (ed.), *The Politics of a European Civil Code*, The Hague 2006, pp. 144–147 (who applied the terms "autonomy" and "solidarity").

Here I disagree with Chantal Mak who claims that it is possible to find a 'neutral' solution on such an axis,⁵¹ and likewise, I cannot agree with Paweł Skuczyński who claims that the plurality of possible interpretations does not pose a real dilemma for a judge.⁵² I assume that in certain situations – and these situations are not really exceptional – the judge genuinely faces a dilemma when he or she has to choose between various possible interpretations and has to make a decision which has a political character (in the sense of deciding on the social antagonism).⁵³

In the subsequent, fourth step, it is necessary to determine **which of the possible interpretive options was chosen by the court**, i.e. how can the court's decision be placed on the axis of interests of the two antagonistic groups.

A further analysis of the judgment – the fifth step of the analysis – can indicate that the interpretive options more favourable, for instance, to consumers or employees were actually backed by additional strictly juridical arguments, such as linguistic, systemic, functional or linked to constitutional values, etc. A key element of the proposed approach is that the judicial decision is analysed above all **as a political decision** on the contested interests of collectivities which are in conflict (e.g. traders and consumers, employees and employers) with the important assumption that there are possible legal arguments for other ways of interpreting the legal norms applicable in the case.

For such an analysis to make sense and to remain within the limits of the legal discourse, without exceeding their limits, a realistic approach to the analysis has to be maintained, especially with regard to the second and third step, i.e. the identification of the legal norms which, under a given legal culture, could be applied in the case and, as far as the third step is concerned, limiting oneself only to such interpretations which could be obtained by using the methods of interpretation accepted **in a given legal culture**.

Case study: the *Alemo-Herron judgment*

As a case study I have chosen the *Alemo-Herron* case which was concerned with an interpretation of Article 3 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of

⁵¹ See C. Mak, *Fundamental Rights in European Contract Law*, Alphen aan den Rijn 2008, pp. 212–213.

⁵² See P. Skuczyński, *Moral Dilemmas as a Matter of Contemporary Ethical Debates*, [in:] idem (ed.), *The Concept of Dilemma in Legal and Judicial Ethics*, Warsaw 2018, p. 32.

⁵³ R. Mańko, *Orzekanie...*, p. 75–84.

undertakings or businesses (hereinafter: ‘the directive’). The facts of the case were as follows: one of the departments of the Lewisham London Borough Council was privatised, and its employees became employed by a private employer – initially CCC, later Parkwood. Their employment contracts contained a clause referring to a collective work agreement for local government services employees. After the enterprise had already been taken over by Parkwood, a new collective agreement was concluded; the new employer was not represented during the negotiations. Nonetheless, the collective agreement was **incorporated** into the content of the employment contracts,⁵⁴ which followed explicitly from the English law applicable to the privatisation of enterprises whose employers, even after privatisation, could rely on the benefits of collective agreements that would have been applicable to them had they remained in the public sector. In spite of that, Parkwood declared to the employees that it shall not abide by the new collective agreement as it is not a public sector employer. In view of that, the employees commenced legal proceedings which reached the Supreme Court of the United Kingdom. That Court referred a preliminary question to the ECJ, wishing to find out whether the English law, which allows employees to rely on the benefits of a public sector collective agreement despite the privatisation of the enterprise in question, is in conformity with the Directive.

Turning to an analysis of this judgment in accordance with the proposed method, it is now necessary, in the first step, to make the assertion that the antagonism that at stake is one between employees and employers. This assumption is crucial for the further analysis as it shows that in the third step of the analysis, it will be necessary to order the possible interpretive options from those most favourable to employees to those least favourable to them, but most favourable to employers.

As part of the second step of the critical analysis of the decision at stake, it is necessary to determine what legal norms could have been potentially applied in this case. When analysing the ECJ case law, one should remember that it only interprets Union law, whereas rules of national law which are taken into consideration are trader, from the perspective of EU law, as part of the facts of the case. A certain indication of the possible legal rules and other sources of legal norms are those which the Court mentioned itself, though it is not certain at all that it did invoke all possible provisions and precedents which potentially could be applicable. Indeed, that is the case in the analysed judgment where the Court did invoke Articles 3 and 8 of

⁵⁴ This is suggested by M. Bartl, C. Leone, *Minimum Harmonization After Alemo-Herron: The Janus Face of EU Fundamental Rights Review*, “European Constitutional Law Review” 2015, 11, p. 142.

the Directive, judgments in *Wehrhof*⁵⁵ and *Sky Österreich*⁵⁶ as well as Article 18 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as 'CFR') concerning the freedom to conduct an economic activity; nonetheless, the Court omitted paragraph 7 of the preamble to the Directive, as well as Article 28 CFR (concerning collective agreements). As far as the *Sky Österreich* judgment is concerned, the Court did rely on its paragraph 42, but did not take its paragraph 47 into account, which could have had a substantial impact on the outcome of the case.⁵⁷

Therefore, as part of the second stage of the analysis, it is necessary to take into account such binding authorities as Articles 3, 8 and paragraph 7 of the Directive's preamble, the *Wehrhof* case (paragraph 37), *Sky Österreich* case (paragraphs 42 and 47), as well as Articles 16 and 28 CFR. Due to the limited volume of the present paper, I cannot provide here the entire wording of the aforementioned provisions and paragraphs of cases and I must confine myself to a succinct discussion. Article 3(1) of the Directive provides that following the transfer of the enterprise, the transferee remains bound by any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Article 8 provides that the Member States may apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees than what is required by the Directive (minimum harmonisation clause in favour of employers). Paragraph 3 in the preamble clearly indicates that the Directive's purpose is to protect workers; it does not mention an additional purpose of protecting businesses. Article 16 CFR states that: 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.' In *Sky Österreich*, paragraph 42, the Court admitted that one of the elements of the freedom to conduct a business is the freedom of contract, but in paragraph 46 – not mentioned by the Court in *Alemo-Herron* – it observed that Article 16 CFR 'differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter' and therefore 'the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.'

On account of the preliminary reference, submitted by the English court, the Court of Justice was to rule whether Union law precludes national law from adopting

⁵⁵ Judgment of 9 March 2006, C-499/04.

⁵⁶ Judgment of 22 January 2013, C-283/11.

⁵⁷ As suggested by M. Bartl, C. Leone, *op. cit.*, p. 150.

a **dynamic** approach to the binding force of collective agreements following the transfer of an enterprise, i.e. that not only already existing, but also future agreements (concluded after the transfer) may be incorporated into an employment contract. In principle, a number of possible interpretive options can be envisaged and then ordered from those which are most favourable to employees to those which are least favourable to them. The possible options could include:

- 1) The directive requires a dynamic approach if the employees would have benefited from the new collective agreement had the transfer not taken place, especially in case of privatisations (this would be a teleological reading of Article 3(3) which does mention 'another collective agreement' without specifying whether the transferee should be represented in the negotiations leading to its conclusion);
- 2) The directive does not require a dynamic approach, but in line with the minimum harmonisation clause, the Member States may introduce it as is the case under the English law, provided that it is more favourable to the employees; Article 16 CFR is irrelevant, as it merely declares a principle and cannot be used as a limit to workers' rights under the Directive;
- 3) The directive does not require a dynamic approach, but in line with the minimum harmonisation clause, the Member States may introduce it as is the case under the English law, provided that it is more favourable to the employees and serves to protect the employees' legitimate expectations, especially if the employees would have benefited from the collective agreement had the transfer not taken place;
- 4) The directive does not require a dynamic approach, but in line with the minimum harmonisation clause, the Member States may introduce it as is the case under the English law; the national court should, however, verify whether under the circumstances of the case at hand, the equilibrium between the right of workers to collective bargaining (Article 28 CFR) and the entrepreneur's freedom of economic activity (Article 16 CFR) has been maintained; should the court find that a flagrant violation of that equilibrium occurred, it may decide that the transferee is entitled to avoid the legal effects of the new collective agreement if such an agreement was concluded in negotiations in which the transferee was not represented, and the transferee has no other legal remedy to avoid it; however, it is for the national court to determine, under the circumstances of the case, whether the balance between the employee's right to collective bargaining (Article 28 CFR) and the transferee's right to economic freedom has been preserved; should that not be the case, the court may determine that the new collective agreement,

which was negotiated without the transferee being represented, shall not be binding;

- 5) The directive prevents the Member States from introducing a dynamic approach, as this would violate Article 28 CFR.

When it comes to the fourth stage of the analysis, it has to be indicated that the Court of Justice chose the option which is least favourable to employees (option 5), whereas the legal norms at stake allowed for a different interpretation (options 1–4). As part of the fifth stage (critique of the decision), it would be possible to analyse arguments in favour of interpretations more favourable to the employees and compare the interpretive options both with regard to the force of legal arguments and from the point of view of their consequences for the protection of interests of employees and employers. In conclusion, it can be said that the Court's decision in *Alemo-Herron* was not in any way **warranted by the legal materials** neither by the norms of written law (directive, CFR) nor by earlier case law. The outcome, which was negative for the working class, was achieved with the scope of the Court's discretion. This finding allows to open a new dimension of critique of this and similar decisions.

Conclusions

Courts have no direct access to legal norms, which always require interpretation (*omnia sunt interpretanda*⁵⁸), and in the process of interpretation, judges undoubtedly co-create the legal norms which they apply.⁵⁹ Interpretive decision-making, in turn, requires making a choice between more than one possible interpretation. When analysing case law, both scholars doing doctrinal research in law and legal theorists usually focus on the formal aspects of the evaluation of the judicial decision made by the court, appraising it above all in the light of the directives of interpretation accepted in a given legal culture, as well as analysing its coherence with existing case law on similar matters. Doctrinal researchers also focus on the requirements of legal practice or other aspects which are not strictly juridical. The method of subjecting case law to critique, put forward in the present paper, has the aim of focusing

⁵⁸ M. Zieliński, *Wykładnia prawa: Zasady, reguły, wskazówki*, 7th ed., Warszawa 2017, p. 57. The principle was first formulated *expressis verbis* by Professor Maciej Zieliński in a conference paper of 2004 (published as: idem, *Podstawowe zasady współczesnej wykładni prawa*, [in:] P. Winczorek (ed.), *Teoria i praktyka wykładni prawa*, Warszawa 2005).

⁵⁹ J. Łakomy, *Polityczność (teorii) wykładni prawa. Perspektywa neopragmatyzmu Stanleya Fisha*, „Archiwum Filozofii Prawa i Filozofii Społecznej” 2018, 3, p. 31.

on one extra-judicial aspect as the key one: the **question of the political**, i.e. how a court, having a choice between two or more possible interpretations influences an existing social antagonism, e.g. the one between employees and employers or the one between consumers and traders. For this purpose, the proposed model entails an operationalisation of the concept of the political as an analytical category. This allows one to identify what social antagonism a given judicial decision has an impact on, as well as to point to other possible interpretations and to order them according to the furthering of the interest of one or the other side of the antagonism. As regards the case study, I have focused on the ECJ decision in the *Alemo-Herron* case, where the Court interpreted a directive intended to protect employees in case of a takeover of their enterprise in a manner which was very much detrimental to the employees' interests. My analysis of this case shows that the interpretive option chosen by the Court was not the only possible one, but that it was chosen from at least five plausible options. What is more, it seems that some of the other options could be supported by much stronger, strictly juridical arguments. This example illustrates how the method of analysing case law that I propose opens up new possibilities for a critique of judicial decisions not only in a purely formal perspective, but first of all, in the dimension of the political, a dimension which is inherent in legal interpretation.⁶⁰

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⁶⁰ Idem, *The Space of the Political in Legal Interpretation (Some Remarks on the Dworkin–Fish Debate)*, [in:] P. Bieś-Srokosz, R. Mańko, J. Srokosz (eds.), *Law, Space and the Political: An East-West Perspective*, Częstochowa 2019, p. 136.

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