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Chapter III

The idea of equality in modern legal philosophy

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1. Introductory remarks

According to the contemporary Canadian political philosopher, Will Kymlicka,

So the abstract idea of equality can be interpreted in various ways, without necessarily favouring equality in any particular area, be it income, wealth, opportunities, or liberties. It is a matter of debate between these theories which specific kind of equality is required by the more abstract idea of treating people as equals. Not every political theory ever invented is egalitarian in this broad sense. But if a theory claimed that some people were not entitled to equal consideration from the government, if it claimed that certain kinds of people just do not matter as others, then most people in the modern world would reject that theory immediately. Dworkin's suggestion is that the idea that each person matters equally important is at the heart of all plausible political theories.¹

At the same time, it is emphasised in the literature that the contemporary debate about the nature of equality has developed two basic thematic strands:

In modern society, the ideal of equality led a double life. In one of its forms it was very popular, though controversial; while in the second, it proved to be attractive to some and repellent for others. These aspects of equality are the *equality of democratic citizenship* and *equality of conditions*.²

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¹ Will Kymlicka, *Contemporary Political Philosophy. An Introduction*, Second Edition, Oxford University Press, Oxford–New York 2002, p. 4.

² Richard J. Arneson, *Równość*, in: Robert E. Goodin, Philip Pettit (eds.), *Przewodnik po współczesnej filozofii politycznej [A Companion to Contemporary Political Philosophy]*, Warszawa 1998, p. 628 [italics in the original — J.Z.].

If the idea of equality is actually considered to constitute, on the one hand, perhaps the most fundamental and, on the other hand, possibly the most controversial issue of contemporary moral philosophy, politics and law,³ the reference to Ronald Dworkin seems very characteristic. The so-called Dworkin's integral philosophy combines in itself all these elements: firstly, it is not only the philosophy of law, but also the philosophy of morality and politics; secondly, it touches both upon the problem of the equality of democratic citizenship as expressed in contemporary constitutions (political and legal equality) as well as the problem of the equality of conditions determined by the principles of distributive justice (social equality);⁴ thirdly, on the one hand, it is still of interest for the global science⁵ and, on the other hand, the author himself constantly takes part in a debate on the essence of the idea of equality.⁶

There naturally arises the question about the logical and chronological relation between the two aforesaid trends in the contemporary debate over the idea of equality. It seems, *prima facie*, that the debate over the equality as an element of distributive justice is of a primary character. The starting point here is in fact based on the universal formulas already proposed by Plato⁷ and Aristotle.⁸ Political and legal equality, in turn, is rather a product of modernity and it is these days discussed primarily in the context of the relevant constitutional and international legal regulations and on the basis of the jurisprudence of constitutional courts and international tribunals. In the following discussion, therefore, the text focuses, on the one hand, on equality in the sense of distributive justice in contemporary political philosophy and philosophy of law, and on the other hand, on Ronald Dworkin's selected concepts. The assumption of the primary character of social equality and the secondary nature of the political and legal equality is, however, as already mentioned, only a *prima facie* conclusion. When taking a closer look,

³ Nicholas Smith, *Why Do We Speak of Equality*, "Otago Law Review" 2005, Vol. 11, No. 1, p. 53: "Equality is a core value in moral, political and legal philosophy".

⁴ The existence of these two types of equality has been emphasised, thus referring to a broad extent to Dworkin's concept, by Wojciech Sadurski, *Equality and Legitimacy*, Oxford 2008, *passim*.

⁵ In the most recent publications, see Alexander Brown, *Ronald Dworkin's Theory of Equality. Domestic and Global Perspectives*, Basingstoke–New York 2009.

⁶ Ronald Dworkin, *Justice for Hedgehogs*, Cambridge 2011 — analysed in the Polish literature by Jerzy Zajadło, *Prawnik transcendentny (artykuł recenzyjny) [Transcendental lawyer (review article)]*, "PiP" 2011, No 6, p. 98–107.

⁷ Plato, *Laws*, VI 757: "Equal should be treated equally, unequal should not be treated equally" (cited after Plato, *The State, Laws* (Book 7), Kęty 1999, Book VI, p. 447 ff.).

⁸ Aristotle, *Politics*, III 9 (1280a): "For instance, it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal" (quoted after Aristotle, *Politics*, Warszawa 2008, p. 87; cf. also Aristotle, *Etyka nikomachejska [Nicomachean Ethics]*, Warszawa 1981, p. 168 ff.).

it turns out that in contemporary debates these two perspectives of equality are closely intertwined. As a result, the discussion about the juridical aspect of the idea of political and legal equality undertaken on the basis of constitutionalism stimulates to a certain extent the disputes around the idea of social justice carried out on the basis of the political philosophy. Therefore, for the sake of a certain transparency of argumentation, I present the basic elements of the principle of equality adopted in modern constitutionalism. The relevant provision of the Polish Constitution will serve as the example here.

2. The principle of equality in the Constitution of the Republic of Poland

In the Polish Constitution of 1997 the principle of equality in the broad sense has been defined in article 32, on the one hand, as equality in the strict sense and in this sense it stands for the right to equal treatment by public authorities at the level of law application (equality before the law) and law making (equality in the law) (article 32 paragraph 1), and on the other hand, as the prohibition of discrimination for any reason in political, social or economic life (article 32 paragraph 2). In the literature of the constitutional law the prohibition of discrimination is sometimes identified with the equality in the law, but for the purposes of this study there has been adopted a classification which, on the one hand, emphasises the positive (equality) and the negative (discrimination) aspect of the problem, while on the other hand, indicates the possibility of violations both on the level of law application as well as law making. Originally, the principle of equality, and especially equality before the law, was related primarily to the problem of law application. On the basis of the general theory of constitutional rights, however, Robert Alexy showed in a very convincing manner that the so-called general right to equality should also apply to the process of law making.⁹ It seems that a broad understanding of the principle of equality as a certain concept is also referred to in the Preamble of the Constitution: “All citizens of the Republic of Poland [are] equal in rights and obligations towards the common good — Poland”.

Equality is also referred to in the article 33 concerning the equality of women, but from a normative point of view, it is a kind of constitutional *superfluum* because its disposition is, in fact, contained in the general principle expressed in article 32. The act of introducing a separate provision concerning the equality of women to the Basic Law was, however, justified from the perspective of facts as well as the educational role of the constitution. It should be also noted that the widely understood issue of equality can be encountered in other places of

⁹ Robert Alexy, *Teoria praw podstawowych [Theory of Constitutional Rights]*, Polish translation by Bożena Kwiatkowska and Jerzy Zajadło, Warszawa 2010, p. 297 ff.

the Constitution of 1997 (article 6, article 11, article 60, article 64 paragraph 2, article 68 paragraph 2, article 70 paragraph 4, article 96 paragraph 2, article 127 paragraph 1 and article 169 paragraph 2), but it is not always connected with the said principle of equality in the strict sense and with the prohibition of discrimination. The principle of equality applies not only to all citizens, but also to people who are not Polish citizens (foreigners, stateless people). What is more, in practice it applies not only to individuals but also to legal persons and other organizational units without legal personality.¹⁰

It is assumed in modern constitutionalism that the principle of equality should be the foundation and an inherent feature of civil society, while on the other hand, it should be viewed as a democratic rule of law. Just as human dignity is sometimes considered ‘principle of principles’ in the axiological sense, the equality (German *Gleichheit*) can be, in turn, treated in the same categories from social, political and juridical perspective. On the basis of the Constitutional Court jurisprudence this principle is sometimes referred to as the ‘very first of the principles’.¹¹ This does not mean that the principle of equality is deprived of the axiological dimension—on the contrary, according to some authors only a joint approach to equality, dignity and liberty allows to understand the constitutional system of values.¹² The principle of equality, conceived in this way, is nowadays widely used in all areas of human life and it permeates from the level of the constitution through the entire legal system to its different branches — civil, financial, economic, commercial, criminal, labor, procedural, family, etc. In the historical sense, equality was naturally a dynamic category and its content and significance have evolved with the progress of civilization and political, economic as well as social development. Hence, it is difficult to compare the relevant solutions of the Polish fundamental laws — from the Constitution of May 3rd of 1791, the Constitution of March 1921, the Constitution of April 1935 and the Constitution of July 1952. No doubt, however, that the principle in question has never played such a considerable political role as in the current Constitution of 1997. The contemporary significance of the principle of equality cannot be in fact

¹⁰ Bogusław Banaszak, *Prawo konstytucyjne* [Constitutional Law], Warszawa 2008, p. 481; Marek Chmaj, *Równość wobec prawa* [Equality before Law], in: Marek Chmaj (ed.), *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej* [Freedoms and Human Rights in the Polish Constitution], Zakamycze, Kraków 2006, p. 62.

¹¹ Jerzy Oniszczyk, *Równość — najpierwsza z zasad i orzecznictwo Trybunału Konstytucyjnego* [Equality — the Very First Principle and the Jurisprudence of the Constitutional Court], Warszawa 2004.

¹² Anna Łabno, *Zasada równości i zakaz dyskryminacji* [Principle of Equality and Prohibition of Discrimination], in: Leszek Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce* [Individual Freedoms and Rights and their Guarantees in Practice], Warszawa 2006, p. 35–51; cf. also Marzena Kordela, *Zarys typologii uzasadnień aksjologicznych w orzecznictwie Trybunału Konstytucyjnego* [The Outline of the Typology of Axiological Justifications in the Jurisprudence of the Constitutional Court], Bydgoszcz–Poznań 2001, *passim*.

detached from the environment in which it operates, and especially from the idea of civil society, democratic rule of law and the international protection of human rights.

In the hierarchy of the Polish Constitution the principle of equality is factored out in Chapter II in the context of a detailed catalogue of human liberties, rights and obligations in the form of a general principle, next to, among others, the principle of dignity (article 30) and freedom (article 31).¹³ It should be emphasised that the European law has similarly placed equality in the Charter of Fundamental Rights of the European Union. Equality is presented there as one of the general principles, in addition to dignity, liberty and solidarity.

In the history of politico-legal thought the idea of equality was most typically confronted with the idea of freedom; to simplify, it could be said that while freedom represented, especially in the nineteenth century, the basis of liberal doctrines, the equality was at the centre of the socialist movement. It should be noted, however, that the ground-breaking importance was attributed to the political thought of the French Enlightenment, particularly the ideas of Charles Montesquieu (*The Spirit of Laws*) and Jean-Jacques Rousseau (*The Social Contract*). From historical point of view, nevertheless, the problem has a much longer tradition and more complex dimension; the attitude to the principle of equality among people, from antiquity until today, has always been the basis for creating different visions of social and political order, and depending on whether it was a positive or a negative attitude, there emerged different concepts based on egalitarianism or, on the contrary, on elitism. It should be noted, however, that under the conditions of mass society and from the point of view of modern science such a picture should be regarded as a far-reaching simplification. There still arise disputes about whether the values of liberty and equality are compatible,¹⁴ but the stereotype that identifies them exclusively with right-wing or left-wing political mainstream respectively is rather the thing of the past.

These modern trends in ethics, political philosophy and legal philosophy are also reflected in the contemporary constitutionalism. Currently there are attempts to formulate the text of the Constitution, including the constitutional catalogues of human and civil rights and liberties, in such way as to ensure a complementary realization of different values.¹⁵ The theory of human rights differentiates the so-called three generations of human rights, attributed to certain ideals, namely liberties and personal rights as well as liberties and political rights arising out of the idea of liberty (the first generation of human rights); economic, social and

¹³ Leszek Garlicki, *Prawo konstytucyjne. Zarys wykładu [Constitutional Law. Outline of a Lecture]*, Warszawa 2007, p. 87–93.

¹⁴ From the most recent literature, cf. Jan Narveson, James P. Sterba, *Are Liberty and Equality Compatible?*, Cambridge 2010.

¹⁵ Zygmunt Ziemiński, *Wartości konstytucyjne — zarys problematyki [The Constitutional Values — Outline]*, Warszawa 1993.

cultural rights and liberties arising from the idea of equality (the second generation of human rights); solidarity rights arising out of the idea of solidarity (the third generation of human rights). Despite the fact that the division into three generations of human rights was established primarily in the international law doctrine, it can be also *mutatis mutandis* applicable to the theory of the constitutional law. It should be nonetheless emphasised that equality on the basis of the constitution has a much broader scope and it is not merely an ideological foundation of economic, social and cultural rights and liberties, since as a principle of law it pervades the entire catalogue of human and civil rights and liberties. There can indeed arise some conflicts between the ideas of liberty, equality and solidarity,¹⁶ yet these are the Constitution and the generally accepted standards of international human rights protection that should constitute the normative basis where the problems are solved through the socio-political discourse in the context of the so-called deliberative democracy.

It should be recognised, however, that while such principle of human dignity is considered as a widely accepted standard in the constitutions of modern democratic states, the principle of equality is a commonly adopted standard. The vast majority of the constitutions of modern democratic states contains solutions similar to the above-quoted article 32 of the Constitution of 1997. It means that, on the one hand, the principle of equality is treated as a general principle factored out in the context of human and civil rights and liberties and, on the other hand, the principle of equality gains a double meaning: equality before the law and equality in the law as well as prohibition of discrimination. The literal wording of article 32 of the Constitution of 1997 implies not two, but rather three principles (equality before the law, the right to equal treatment and prohibition of discrimination), but it seems that the first two essentially constitute normative unity and they create the principle of equality in the strict sense. It is not certain what else could be equality before the law if not the right to equal treatment on the part of public authorities at the law application level (equality before the law) and law making level (equality in the law). In turn, a different approach is presented when treating the prohibition of discrimination as the prohibition of an arbitrary interference with the principle of equality in the strict sense.

When analyzing the Polish Constitution of 1997, equality before the law (namely, *isonomia* already encountered in the ancient thought)¹⁷ and, respectively, equality in the law, stand for, to paraphrase Ronald Dworkin's rhetoric, an attempt of a compromise between *treating everyone equally and treating everyone as*

¹⁶ Thomas Hoppe, *Menschenrechte im Spannungsfeld von Freiheit, Gleichheit und Solidarität*, Stuttgart 2002.

¹⁷ Małgorzata Masternak-Kubiak, *Prawo do równego traktowania [Right to Equal Treatment]*, in: Bogusław Banaszak, Artur Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP [Civil Rights and Liberties in the Polish Constitution]*, Warszawa 2002, p. 119.

equals.¹⁸ In other words — it is not a general prohibition of differentiating the legal situation of individuals, but it is rather a prohibition of such differentiation on the basis of arbitrary criteria without factual inequalities that lead to discrimination or undue preference. In this sense, the principle of equality is combined with the idea of justice. It is obvious that the law can and even should differentiate individuals and social groups due to their specific characteristics (e.g. age, health, family or material situation). The issue is that “units that are equal in some particular respect determined by the law, must be treated equally, and the like in a similar manner”.¹⁹ In this sense, “the principle of equality is not absolute” and “it allows for the differentiation of the legal position of similar units” but “it must be nevertheless justified — only if such justification is missing, this differentiation assumes the form of discrimination (preference) and becomes contrary to article 32 paragraph 2 of the Constitution”.²⁰

Thus it is clear that both aspects of the principle at issue, namely equality before the law and equality in the law (article 32 paragraph 1) and the prohibition of discrimination (article 32 paragraph 2) are closely related. It should be stressed that this second aspect of the principle of equality (i.e. the prohibition of discrimination) has been defined in the Constitution of 1997 in a very broad sense, not to say that “it has been presented as widely as possible”.²¹ This is distinguished by article 32 paragraph 2 both from other similar solutions adopted in the constitutions of modern democratic states as well as from the regulations found in the acts of international law (e.g. article 14 of the European Convention on Human Rights and article 2 paragraph 1 of the Covenant on Civil and Political Rights). What is being most often pointed out are the criteria based on which discrimination should not occur, like gender, race, colour, language, religion, political views, property birth, etc. Meanwhile, article 32 paragraph 2 does not indicate these criteria and rather uses the general prohibition of discrimination “in political, social or economic life for any reason whatsoever”. From the point of view of the doctrine of the constitutional law, “Polish regulation, though it is unusual, is very practical and functional”.²²

A broadly understood principle of equality is of utmost importance from the perspective of the activities of the Constitutional Court — the references to this principle can be encountered in a number of rulings both after the entry into force of the Constitution of 1997, as well as on the basis of the July Constitution of 1952. When analysing the three principles factored out in the constitutional catalogue

¹⁸ See below on the equality conception in Dworkin’s integral philosophy.

¹⁹ Marek Chmaj, *op. cit.*, p. 65.

²⁰ Leszek Garlicki, *op. cit.*, p. 92 ff.

²¹ Marek Chmaj, *op. cit.*.

²² *Ibidem*, cf., however, Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms as of 4 November 2000.

of human and civil rights and liberties, namely dignity, liberty and equality, the latter is by far the most common. Generally speaking, it can be said that the case law has interpreted this principle in three main contexts: “the obligation of treating equally all equals and treating the like in like manner; the admissibility of legitimate diversities; relating equality to the principle of justice”.²³

3. The problem of equality in contemporary philosophy of law and political philosophy

We can therefore state that in the modern constitutionalism (in the constitutional law and in the science of the constitutional law) the principle of equality in terms of political and legal equality is a widely accepted and rather uncontested paradigm. Even if this interpretation encounters major difficulties and controversies in judicial practice and in the doctrine, it applies rather to details than to the fundamental principles. For the sake of accuracy it must be emphasised that there are opinions that question both the rationality and the substantive content as well as practical juridical significance of different kinds of constitutional formulas of the principle of equality, but they are rather rare. In 1982, there has been published an extensive article in “Harvard Law Review” by Peter Westen that had a very characteristic title: *The Empty Idea of Equality*.²⁴ Although his proposal has more opponents than supporters, yet it cannot be ignored in the legal discussions on the nature and functions of the principle of equality. The framework of this study is too modest to allow for a detailed analysis of Westen’s basic thesis about non-substantive character of equality. Let us only indicate that this viewpoint touches upon the recognition that both in the legal as well as in juridical language, the equality is merely a rhetorical ornament that can be confidently given up without any damage to the idea of justice. The following examples are given in this respect: there is the sentence *Equal Justice under Law* on the United States Supreme Court building. What does it actually mean? Why not simply: *Justice Under Law*? The same is true of the fourteenth amendment to the American Constitution and the so-called *Equal Protection Clause*; why isn’t it simply called *Protection*?²⁵

A slightly different approach can be observed in the philosophy of law and political philosophy — it is difficult to talk here about a clear, universal and

²³ *Ibidem*, p. 75.

²⁴ Peter Westen, *The Empty Idea of Equality*, “Harvard Law Review” 1982, Vol. 95, No. 3, p. 537–596; the author presented his thoughts later in a more extensive monograph *Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse*, Princeton 1990.

²⁵ William O’Brien Jr., *Equality in Law and Philosophy*, “Inquiry — An Interdisciplinary Journal of Philosophy” 2010, Vol. 53, No. 3, p. 260.

generally accepted paradigm, especially when it comes to the idea of equality in the sense of social equality. What is more, the vast majority of contemporary authors accepts very differently conceived idea of equality, yet there is also a very large group of scholars contesting all forms of egalitarianism.²⁶ Although the issue has been already extensively described in complex literature, it still remains valid also in practical terms. For example, US President Barack Obama's proposals to reform health care and social insurance encountered a response from a libertarian philosopher, Tibor R. Machan, in the form of a book with a very characteristic title: *Equality, So Badly Misunderstood*.²⁷ In Poland the discussion about the problem of state intervention in the financial market in the defence of individual borrowers who took out credits in Swiss francs was nothing else than just analysing the problem in terms of the so-called *luck egalitarianism*²⁸ and the consequences of life choices related therewith.

It should be noted that for the purposes of this study, although the concepts of 'philosophy of law and political philosophy' are used here, the proper understanding should be that of the political philosophy. Modern scholars dealing with the idea of equality, both approvingly and critically, very often are not legal philosophers (lawyers) in the strict sense, but rather philosophers in general sense, namely ethicists, political scientists, sociologists, sometimes even economists, to indicate only such names as Richard J. Arneson, Isaiah Berlin, Gerald A. Cohen, Stefan Gosepath, Jürgen Habermas, Friedrich A. Hayek, Will Kymlicka, Thomas Nagel, Jan Narveson, Kai Nielsen, Robert Nozick, Derek Parfit, Thomas W. Pogge, John Rawls, Thomas Scanlon, Samuel Scheffler, Amartya Sen, Peter Singer, James P. Sterba, Larry Temkin, Ernst Tugendhat, Michael Walzer, and Bernard Williams. This substantive differentiation of authors that deal with the idea of equality in the meaning of social equality is hardly surprising, since defining the principles of rational distributive justice (and hence the idea of equality) requires not only knowledge of philosophy, but also economics, political science, social psychology or sociology. The problem of equality in the sense of social equality is in fact much more complex and controversial, and much more difficult to solve than the phenomenon of equality in terms of political and legal equality.

Legal philosophy devotes much less attention to the issues of equality compared to other fields. If the issue of equality appears in monographs, textbooks and anthologies of texts in this field, it rather concerns the problem of the relations between law and morality,²⁹ or the philosophical foundations

²⁶ There is a wide presentation of a variety of viewpoints, *ibidem*, p. 257–284.

²⁷ New York 2010.

²⁸ More broadly on this aspect of the problem of equality, see Carl Knight, *Luck Egalitarianism. Equality, Responsibility and Justice*, Edinburgh 2009.

²⁹ E.g. David Dyzenhaus, Sophia Reibetanz Moreau, Arthur Ripstein (eds.), *Law and Morality: Readings in Legal Philosophy*, 3rd ed., Toronto 2007, in particular Chapter V: *Equality*, p. 445–532.

of constitutionalism and the principle of politico-legal equality as an essential element of this philosophy.³⁰ On the other hand, however, it is difficult to make a clear distinction between the philosophy of law and political philosophy. There can be in fact encountered scholars who combine both these disciplines, such as Joseph Raz, Jeremy Waldron or, last but not least, already mentioned Ronald Dworkin. Yet, what is characteristic, for these authors the main interest in equality is in direct proportion to the assumed interrelations between the philosophy of law and political philosophy.

The frames of this study are too modest to discuss all the aspects of the debate undertaken in contemporary political philosophy on the principle of equality, there is, however, no doubt that egalitarianism still remains a central problem in this field of knowledge, next to such concepts as liberalism, communitarianism, democracy, identity or justice.³¹ Let us only try to reconstruct the basic elements of the paradigm of this discussion. As befits philosophy in general and political philosophy in particular, this paradigm can be reduced to a few fundamental questions that are attempted to be answered, but it should be emphasised that the answers are very diverse.³² The central question is naturally the question *What is equality?* However, it is to such an extent general that it needs to be clarified and, consequently, there arise subsequent questions: firstly, *Equality of what?* — welfare, resources, opportunities, capabilities, skills?; secondly, *Equality of (between) whom?* — what are the criteria of the similarities and differences between people that should be taken into account in the process of their equal or unequal treatment?; thirdly, *Equality when?* — as a starting point or rather as an adjustment of already encountered inequality (i.e., *ex ante* or *ex post factum*)³³?; moreover, *Equality why?* — is equality entitled to any immanent moral value, and if so, what is the relationship of this value to other values, like liberty, dignity, justice, solidarity, etc.?

When considering the academics who combine legal philosophy with political philosophy and attach the utmost importance to the issue of egalitarianism, a special place is given undoubtedly to Ronald Dworkin. As far as such legal philosophers

³⁰ E.g. Maimon Schwarzschild, *Constitutional Law and Equality*, in: Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Malden–Oxford 2010, p. 160–176; cf. also David M. Adams, *Philosophical Problems in the Law*, Belmont 2005, in particular Chapter 3: *Constitutional Law: Equal Protection of the Laws*, p. 276–383.

³¹ Cf. recently Thomas Christiano, John Christman (eds.), *Contemporary Debates in Political Philosophy*, Malden–Oxford 2009; in Polish literature — Adam Swift, *Wprowadzenie do filozofii politycznej [Introduction to Political Philosophy]*, Kraków 2010.

³² A clear picture of this paradigm is presented by Stefan Gosepath, *Equality*, in: *Stanford Encyclopaedia of Philosophy* (<http://plato.stanford.edu>).

³³ It is, in turn, stressed in ethics that the correction of inequalities for the sake of equality may be either of a retrospective or perspective dimension — Bernard R. Boxill, *Równość, dyskryminacja i polityka preferencji [Equality, Discrimination and Policy of Preferences]*, in: Peter Singer (ed.), *Przewodnik po etyce [Guide to Ethics]*, Warszawa 1998, p. 381–390.

as Joseph Raz³⁴ or Jeremy Waldron³⁵ touch upon equality rather incidentally, in case of Dworkin we deal with the development of a comprehensive and coherent conception, sometimes referred to as the theory of liberal egalitarianism. In any case, Dworkin is probably the only legal philosopher who tries to answer all the specific abovementioned questions of the paradigm of equality in terms of social equality: What? Whose? When? Why?

4. Equality as part of axiological holism — *Justice for Hedgehogs*

Dworkin's theory of liberal egalitarianism is relatively well-known in Poland — either by direct works³⁶ or by Polish translations of English-language publications in the area of political philosophy.³⁷ This concerns in particular his construction of a hypothetical auction resulting *ex ante* in the equality of resources, but adjusted *ex post* by insurance scheme that provides fair approach to egalitarianism. In the subsequent part of this article I will therefore leave aside a detailed analysis of the views of the American legal philosopher in this regard, referring the interested reader to the cited literature, yet, on the other hand, it is worth at least briefly recalling some facts in this respect. First of all, different kinds of egalitarian formulas have already appeared in Dworkin's first major work, i.e. *Taking Rights Seriously* in 1977.³⁸ They are considered interesting for a lawyer in this respect that due to their brevity, they to some extent resemble the abovementioned elements of the paradigm of equality in the sense of politico-legal equality (especially *equality before the law* and *equality in the law*).³⁹ Dworkin suggests in fact that, first of all, the essence of equality should be reduced to *the right to equal concern and respect*⁴⁰ and, secondly, to distinguish *equal treatment* of all from treating all *as equals*.⁴¹ We are dealing here in fact with the answer, general as it may seem, to the question of *What is equality?* Dworkin's views on the idea of

³⁴ Cf. e.g. Joseph Raz, *The Morality of Freedom*, Oxford 1986.

³⁵ Cf. e.g. Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, New York 2002.

³⁶ Cf. e.g. Janusz Karp, *Sprawiedliwość społeczna. Szkice ze współczesnej teorii konstytucjonalizmu i praktyki polskiego prawa ustrojowego* [*Social Justice. Sketches of Modern Theory of Constitutionalism and Practice of the Polish Institutional Law*], Kraków 2004, p. 94–104.

³⁷ Cf. e.g. Richard J. Arneson, *op. cit.*, *passim*; Will Kymlicka, *op. cit.*, p. 103–117; Stuart White, *Równość* [*Equality*], Warszawa 2008, p. 107–132.

³⁸ Polish edition – Ronald Dworkin, *Biorąc prawa poważnie*, Warszawa 1998.

³⁹ It should be emphasised that the importance of these formulas is still attracting attention in the legal literature — among the recent studies, cf. e.g. William Lucy, *Equality under and before the Law*, “University of Toronto Law Journal” 2011, Vol. 61, p. 411–465.

⁴⁰ Ronald Dworkin, *Biorąc prawa poważnie*, p. 328.

⁴¹ *Ibidem*, p. 407.

equality were later developed in four articles published in the 80's of XX century. What is characteristic, nevertheless, these studies are numbered as related parts and bear the joint title *What is Equality?* The author criticizes and rejects, above all, the idea of equality of welfare,⁴² then he votes in favor of equality of resources,⁴³ confronts the equality with liberty,⁴⁴ and finally explains the essence of political equality.⁴⁵ Dworkin's most fundamental work devoted to liberal egalitarianism is primarily the book *Sovereign Virtue* of 2000. In this work, the author develops his thoughts contained in the previous above-cited books and articles, yet he also goes a step further — he in fact recognizes the equality in the formula of *the right to equal concern and respect* as the fundamental virtue legitimizing the liberal-democratic sovereign.⁴⁶ The above questions about the essence of equality are answered by Dworkin in the following way: *Equality of what?* — resources rather than welfare; *Equality of whom?* — individuals treated not equally but rather as equals; *Equality when?* — both *ex ante* (hypothetical auction) and *ex post* (insurance system, egalitarianism of a particular case); *Equality why?* — as liberal-democratic order (the virtue of sovereign), complementary and not competitive vis-à-vis liberty.

My intention is to focus on Dworkin's recent book, *Justice for Hedgehogs* (hereinafter abbreviated as *JfH*),⁴⁷ since, on the one hand, it reflects the current state of the author's views and, on the other hand, it places the idea of equality in a wider context of ethics, political philosophy and legal philosophy. Dworkin mentioned his work on this publication already when he gave an interview, characteristically enough entitled *The Transcendent Lawyer*,⁴⁸ in autumn 2005. The author said then that “The book would be a good opportunity to recapitulate what he wrote on various issues: equality, law, morality, human values and meaning of human life. All of this would require showing interdependencies between these

⁴² Idem, *What is Equality? Part 1: Equality of Welfare*, “Philosophy and Public Affairs” 1981, Vol. 10, p. 185–246.

⁴³ Idem, *What is Equality? Part 2: Equality of Resources*, “Philosophy and Public Affairs” 1981, Vol. 10, p. 283–345.

⁴⁴ Idem, *What is Equality? Part 3: The Place of Liberty*, “Iowa Law Review” 1987, Vol. 73, p. 1–54.

⁴⁵ Idem, *What is Equality? Part 4: Political Equality*, “University of San Francisco Law Review” 1987, Vol. 22, p. 1–30.

⁴⁶ Idem, *Sovereign Virtue. The Theory and Practice of Equality*, Cambridge–London 2000.

⁴⁷ Cf. above, footnote 6.

⁴⁸ Adam Liptak, *The Transcendent Lawyer*, “New York University — The Law School Magazine”, Autumn 2005, Vol. XV, p. 13–23; it must be emphasized that in English the word ‘transcendent’ stands both for ‘transcendent’ and ‘highest’ (in the sense of authority), but also ‘indefinite’ (*Wielki słownik angielsko-polski [The Great English-Polish Dictionary]*, Warszawa 2002, p. 1247) — taking into account the content of the entire interview, it seems that the transcendent lawyer in this case stands for “a lawyer of the highest authority”, being transcendent in the sense that he exceeds the established limits and ways of thinking.

values. In his previous work he had tried to treat the matters more broadly than, so to speak, practised by a majority of legal philosophers; hence there arose the need to combine them all together". From this point of view, *JfH* indeed deserves special attention of the Polish reader, since it is a kind of summary of different topics of Dworkin's philosophy, relatively fairly well known in our country.⁴⁹ The book is special and unique to such extent that even before its official release (sic!) it was subject to a special scientific conference with the participation of prominent economists, ethicists, philosophers, political scientists and lawyers.⁵⁰ This allowed Dworkin to make changes to the original manuscript, which took into account at least some of the comments of his adversaries,⁵¹ but also in the very first sentence of the introduction to *JfH* (p. IX) the author writes: "This book is not about what other people think: it is conceived as a completely autonomous argument" [own translation]. In the foreword to the said conference the author acknowledges that he appreciates the specificity of the situation when the book is being discussed in such a group even before its publication. It must be admitted that these comments prove that the American lawyer has a big sense of humor. In this context Dworkin even recalls an anecdote from the life of his master, a distinguished Judge Learned Hand. The latter repeatedly told how he imagined the heaven after death and one of the elements of this vision was a banquet with the participation of prominent philosophers, including Socrates, Descartes, Franklin, and the speaker of the evening was Voltaire. After a few preliminary words, the crowd of philosophers shouted: "Shut up Voltaire and sit down. WE WANT HAND". Dworkin refers to this story and in this context he writes that he had his own vision of heaven, since there gathered such outstanding people "to discuss yet unfinished book thus giving him the chance to take advantage of what they say. Yet, the best part is that he by no means intended to die". Dworkin concludes his introduction by paraphrasing Hand: "And now I'm going to shut up and listen".⁵²

⁴⁹ Cf. Polish editions of Dworkin's works: *Biorąc prawa poważnie* [*Taking Rights Seriously*] and *Imperium prawa* [*Law's Empire*], transl. by J. Winczorek, Wolters Kluwer, Warszawa 2006.

⁵⁰ The conference was held on 25–26 September, 2009 at the University of Boston, and its results were published in the "Boston University Law Review", April 2010, Vol. 90, No. 2, p. 465–1087 (*Symposium: Justice for Hedgehogs. A Conference on Ronald Dworkin's Forthcoming Book* (with the participation of, inter alia, Kwame Anthony Appiah, James E. Fleming, Samuel Freemann, F.M. Kamm, David Lyons, Stephen Macedo, Martha Minow, Amartya Sen, T.M. Scanlon, Lawrence B. Solum, Jeremy Waldron and the response of Ronald Dworkin)).

⁵¹ Ronald Dworkin, *Response*, "Boston University Law Review" 2009, Vol. 90, No. 2, p. 1059: "I will try to indicate, in the published version, where I have changed the earlier draft significantly in response to criticism here, and I apologize in advance if I have neglected to mark some changes in that way". In *JfH* this attitude was reflected primarily in the footnotes (p. 425–487), where the author refers to some of the papers presented at the said conference.

⁵² Idem, *Keynote Address. Justice for Hedgehogs*, "Boston University Law Review" 2009, Vol. 90, No. 2, p. 469, 477.

The title of the work requires some explanations (*Justice for Hedgehogs*),⁵³ because it determines both the book's content and the applied methods. Dworkin was here inspired by a well-known essay by Isaiah Berlin first published in 1953. In this essay the author presented his own interpretation of the following sentence uttered by Archilochus, a Greek poet of the seventh century BC: "The fox knows many things, but the hedgehog knows one big thing". The colloquial meaning of this aphorism indicates mostly that in the face of many sneaky tricks of the fox, the hedgehog has indeed only one method of defence, yet a very effective one, he curls up. Berlin attempted to give it a little deeper meaning. According to him,

Scholars had variously interpreted these vague words which probably mean only that the fox, for all his cunning, must surrender to one weapon of the hedgehog. When understood figuratively, these words may, however, reveal the meaning that emphasizes one of the deepest differences which divide writers and thinkers, and perhaps people in general. There is indeed a huge gap between those who boil everything down to a single central vision, to one less or more coherent or articulated system within which they understand, think and feel, namely to a single, universal principle whereby everything what they are and what they say matters; while, on the other hand, those who seek multiple targets, often unrelated, or even contradictory, if at all somehow interconnected, unrelated to any aesthetic or moral principle due to some psychological or physiological reasons. Life led by the latter, their deeds, the ideas professed by them, can be referred as centrifugal rather than centripetal, since their thought disperses or dissolves, errs on many levels, grasping the essence of the most diverse experiences and things as something in themselves, without trying to consciously or unconsciously place them within (or leave them outside) any unchanging, all-embracing, sometimes self-contradictory and incomplete, sometimes fantastic, uniform internal perspective. The first type of intellectual and artistic personality belongs to the hedgehogs, the second to the foxes.⁵⁴

Berlin himself later claimed that this metaphor was viewed by him only as a certain intellectual game and he never assumed that this interpretation will become even a methodological paradigm in the literature.⁵⁵

Dworkin definitely assumes the attitude of the hedgehog and hence this is not only the origin of the title of the reviewed work, but the general methodological characteristics of all his philosophico-legal system, called, after all, 'integral legal philosophy'.⁵⁶ Indeed, Dworkin, as pointed out by Berlin when characterizing scholars-hedgehogs, has 'one and central vision' of law, within the general philosophical reflection, subordinate to 'one and universal principle'. In case of

⁵³ It seems that Polish translation *Justice according to Hedgehogs* is more appropriate taking into account the content of Dworkin's book and the semantics of the Polish language.

⁵⁴ The Polish edition: Isaiah Berlin, *Jeż i lis. Esej o pojmowaniu historii u Tolstoja* [*The Hedgehog and the Fox. An Essay on Tolstoy's View of History*], Warszawa 1993, p. 27 ff. (also in Isaiah Berlin, *Rosyjscy myśliciele* [*Russian Thinkers*], Warszawa 2003, p. 21 ff.).

⁵⁵ Ramin Jahanbegloo, *Conversations with Isaiah Berlin*, London 2000, p. 188 (Polish edition: *Rozmowy z Isaiah Berlinem*, Warszawa 2002).

⁵⁶ Marek Zirk-Sadowski, *Wprowadzenie do filozofii prawa* [*Introduction to Legal Philosophy*], Kraków 2000, p. 197 ff.

the book at issue this approach still relies on a consistent treatment of the law as a moral idea and the recognition of the indissolubility and homogeneity of values embodied in it, the content and interrelationships of which are determined by interpretation.⁵⁷ As a result, ‘values’ and ‘interpretation’ are two central concepts in the centre of Dworkin’s thinking when assuming the attitude of the hedgehog. One more feature of this method of understanding the world should be emphasised — according to Dworkin, in the process of interpretation we do not need, as claimed by Archimedes’ ‘fulcrum to move the earth’. On the contrary, the interpretation should be undertaken without preconceived assumptions within the meaning of Archimedes’ fulcrum, because otherwise we only hinder the achievement of a consensus by reaching the truth and in this sense, as highlighted in the literature,⁵⁸ Dworkin’s system is anti-Archimedean.

It is difficult to overestimate Dworkin’s role in the contemporary legal philosophy. According to the official statistics, he is one of the most quoted authors in the American legal science, just like his basic works,⁵⁹ It therefore comes as no surprise that in the literature there are relatively many papers on both Dworkin’s entire output,⁶⁰ as well as his individual works.⁶¹ What is more, this year will probably bring further discussions and analyses since December 11 marks the eightieth anniversary of the American scholar’s birth. One can disagree with Dworkin or not, but it is hard not to appreciate the extent and quality of his work and the great commitment in the discussion over current problems concerning morality and political-legal issues. In this respect, Dworkin is truly a unique philosopher of law,

⁵⁷ It should be emphasized that the idea of the unity of values in terms of metaphors referring to the attitude of the hedgehog does not appear in the reviewed book as *Deus ex machina*, but it was previously developed by Dworkin — cf. e.g. Ronald Dworkin, *Do Values Conflict? A Hedgehog’s Approach*, “Arizona Law Review” 2001, Vol. 43, No. 2, p. 259. Such a methodology provided the basis for Dworkin’s vision of the relations between equality and liberty as can be seen especially in the work *Sovereign Virtue*.

⁵⁸ Arthur Ripstein, *Introduction: Anti-Archimedeanis*, in: idem (ed.), *Ronald Dworkin*, New York 2007, p. 5 ff.

⁵⁹ In 2000, Dworkin held the second place on this list, just after Richard Posner and just before Oliver Wendell Holmes — Fred R. Shapiro, *The Most-Cited Legal Authors*, “The Journal of Legal Studies” 2000, Vol. 29, No. S1, p. 424; when it comes to the most frequently cited works, Dworkin’s three books are at the forefront (*Law’s Empire* — 2nd place, *Taking Rights Seriously* — 9th place, *A Matter of Principle* — 11th place: Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, “The Journal of Legal Studies” 2000, Vol. 29, No. S1, p. 401).

⁶⁰ Cf. e.g. Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London 1984; Alan Hunt (ed.), *Reading Dworkin Critically*, New York 1992; Stephen Guest, *Ronald Dworkin*, 2nd ed., Edinburgh 1997; J. Burley (ed.), *Dworkin and His Critics. With Replies by Dworkin*, Malden–Oxford–Carlton 2005; Arthur Ripstein, *op. cit.*

⁶¹ Cf. e.g. Scott Hershovitz (ed.), *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin*, Oxford–New York 2006; and a special edition of the journal “Ethics” 2002, Vol. 113, No. 1, p. 5–143, *Symposium on Ronald Dworkin’s Sovereignty Virtue*.

he presents quite a different type of a legal philosopher, a philosopher who feistily moves through the existing state of science, disputing the current political and social problems, affecting directly the minds of lawyers and public opinion in general, rooted directly in the practice of law.⁶²

This influence applies not only to American jurisprudence, but also to other countries, it suffices to point out, for example, the extensive reception of these concepts in the case law of the German Federal Constitutional Court.⁶³ Throughout his life, Dworkin engaged not only in criticism of legal positivism,⁶⁴ but also in the dispute about the essence of the principle of equality⁶⁵ and the basic moral dilemmas associated with abortion and euthanasia,⁶⁶ central to the political philosophy. Initially, Dworkin's core legal philosophy in his polemic with Hart consisted mainly in the issue of the borders and the essence of the law, but later it was primarily the problem of its application and interpretation in practice,⁶⁷ including the practical problems of moral interpretation of the American constitution.⁶⁸ Dworkin has a unique polemical talent and a soul of not only a scholar but also of a committed journalist who keenly reacts to the surrounding reality — the latter is surely the source of his many essays published for many years in the “New York Review of Books”, “The Times Literary Supplement” and “The Guardian”. This also resulted in the release of major works that were published in response to the negative phenomena in American democracy⁶⁹ and the functioning of the Supreme Court⁷⁰ during the presidency of George W. Bush. If *JfH* is in fact, according to the author, a kind of summary of the different strands of the current scientific output, it must be admitted that Dworkin has indeed much to recapitulate. It is emphasised in the literature that Dworkin's multithreading interests — from the criticism of legal positivism, through the role of interpretation in law application process, political philosophy of egalitarian liberalism, moral dilemmas related to the essence of

⁶² Tomasz Kozłowski, *Autorytet versus przemoc. Ronald Dworkin w obronie imperium prawa [Authority versus Violence. Ronald Dworkin in Defence of the Empire of Law]*, “Studia Iuridica” 1996, Vol. XXXI, p. 47.

⁶³ Jeffrey B. Hall, *Taking ‘Rechts’ Seriously: Ronald Dworkin and Federal Constitutional Court of Germany*, “German Law Journal” 2008, Vol. 9, No. 6, p. 771–797.

⁶⁴ As already seen in *Taking Rights Seriously*, later in *Law's Empire*, and recently, partly also in *Justice in Robes*, Cambridge 2006.

⁶⁵ Ronald Dworkin, *Sovereign Virtue*.

⁶⁶ Idem, *Life's Dominion. An Argument about Abortion, Euthanasia and Individual Freedom*, New York 1993.

⁶⁷ Idem, *A Matter of Principle*, Cambridge–London 1985.

⁶⁸ Idem, *Freedom's Law. The Moral Reading of the American Constitution*, Cambridge 1996.

⁶⁹ Idem, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton–Oxford 2006.

⁷⁰ Idem, *The Supreme Court Phalanx: The Court's New Right-Wing Bloc*, New York 2008; a reprint of the text on this problem was also published in Poland, “Gazeta Wyborcza” of 31 October 2008 — *America needs to be humble*.

human life, to the problem of American politico-legal system — result partly from his personality and character, and partly from his biography. In this last aspect, there should be primarily noted the impact that other eminent lawyers and philosophers, like Herbert L.A. Hart, Judge Learned Hand, and last but not least, John Rawls had on Dworkin's conceptions.⁷¹ Each of them was a source of invaluable inspiration for Dworkin, yet, on the other hand, Dworkin argued with all of them — to the greatest extent with Hart, to a slightly lesser extent with Hand and the least with Rawls. The polemic with Hart resulted primarily in the criticism of legal positivism and the search for the so-called third way. Hand contributed to the understanding of law application process and the interpretation of law and constituted to some extent the prototype of a paradigmatic judge — Hercules. Finally, Rawls' theory of justice provided an inspiration, though not uncritical one, for Dworkin's liberalism and egalitarianism. When a few years ago there was issued an anthology of texts which were the canons of American legal thought of the last century, Dworkin's now classic article about the so-called hard cases had a very characteristic title: *liberalism: interpretation and role of the judge*.⁷² It is hard to disagree — an integral legal philosophy indeed relies on placing special emphasis on the judge who practises certain moral and political values in the process of interpretation. In this sense, the judge, especially the constitutional judge, is not only 'legal philosopher' but also a 'political philosopher'.⁷³

In *JfH* we revisit all these topics, and not only these. This confirms the abovementioned thesis that Dworkin is indeed primarily a philosopher of law, but not only that, he is also a moral philosopher and a political philosopher. The work consists in fact essentially of several parts, determined by these three primary areas of the author's interest and the issues that he touches upon (or, more correctly, recapitulates), namely independence [of the moral sphere — J.Z.] (p. 21–96), interpretation (p. 97–188), ethics (p. 189–252), morality (p. 253–324) and politics (p. 325–415). The entire content is joined in the first chapter, which forms a kind of a road map for the entire book (p. 1–19) and in the epilogue, which recognizes the indivisibility of human dignity (p. 417–423). It would seem that in *JfH* there are relatively few philosophico-legal issues and that the book at hand is devoted primarily to the theory of morality, but these are only appearances. In fact, in Dworkin, the inherent connection between morality and the law is the hallmark of his entire output, from *Taking Rights Seriously*, through *A Matter of Principle*,

⁷¹ Arthur Ripstein, *Introduction...*, p. 2–5.

⁷² David Kennedy, William W. Fischer III (eds.), *The Canon of American Legal Thought*, Princeton 2006, p. 549 ff. (originally, Ronald Dworkin, *Hard Cases*, "Harvard Law Review" 1975, Vol. 88, No. 6, p. 1057–1108).

⁷³ Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, "Oxford Journal of Legal Studies" 2004, Vol. 24, No. 1, p. 1–37 (also in *Justice in Robes*, p. 140–186); more on this topic, recently David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review*, Princeton 2010.

Law's Empire, Freedom's Law and *Justice in Robes*, to *JfH*.⁷⁴ In the literature, such legal philosophy (e.g. Radbruch formula, Dworkin's integral legal philosophy) is defined in this context as 'ethical-legal essentialism' — as opposed to 'nihilism' (e.g. Scandinavian Legal Realism, the theory of autopoiesis), 'reductionism' (e.g. Kelsen pure theory of law) and 'normativism' (e.g. Hart's moderate positivism, Radbruch's relativistic idealism).⁷⁵ It should be noted, however, that even if we accept Dworkin's legal philosophy as a kind of legal moralism, it has nothing in common with paternalism and with such form of the interrelations between law and morality as would be suggested by Patrick Devlin in his famous dispute with Herbert L.A. Hart. Regardless of any differences between Hart and Dworkin in terms of the substance of the law, both of them had fundamentally criticized Devlin's legal moralism (paternalism) from the position of liberal tolerance. Dworkin does not in fact question the impact of public morality on the law, but at the same time he asks the question of what is understood by public morality and which of its content should be legally relevant.⁷⁶

In *JfH*, however, we deal with something more than just ethical cognitivism — Dworkin not only argues that values may be the subject of objective cognition, but he even claims that, in the process of interpretation, we can form opinions on the sentences concerning morality in terms of truth and falsehood.⁷⁷ Moreover, it does not only concern ethics, but also meta-ethics. In other words, the sentences describing our moral and ethical beliefs can also be true or false. It can be expected that such standpoint will be a subject of radical criticism on the part of philosophers, as was already evident in some of the papers delivered during the abovementioned conference in Boston. However, the differentiation between ethics and morality, as adopted in *JfH* requires some explanation. According to Dworkin, ethics refers to that part of human dignity which is associated with our

⁷⁴ It must be emphasized that Dworkin is not isolated in this respect, because the idea of combining legal philosophy and moral philosophy is very prevalent in American jurisprudence — more on this see Matthew D. Adler, *On (Moral) Philosophy and American Legal Scholarship*, in: Francis J. Mootz III (ed.), *On Philosophy in American Law*, New York 2009, p. 114–121.

⁷⁵ Dietmar von der Pfordten, *Rechtsethik*, Munich 2001, p. 112–203 — ethical and legal essentialism stands here for a close relationship between law and ethics; ethical and legal nihilism emphasizes the absence of any such relation; ethical and legal reductionism confirms the existence of such a relation, but regards it as undesirable and therefore unreal; finally, ethical and legal reductionism recognizes the existence of such a relationship as possible from normative and factual point of view, yet irrelevant from the perspective of the concept and ontology of law (*ibidem*, p. 113).

⁷⁶ Cf. recently Robert Kane, *Ethics and Quest of Wisdom*, Cambridge 2010, p. 251; cf. also Ronald Dworkin, *Biorąc prawa poważnie [Taking Rights Seriously]*, Chapter X: *Wolność i moralizm [Liberty and Moralism]*, p. 429–460.

⁷⁷ Dworkin developed this thought more broadly for the first time in an extensive work Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, "Philosophy and Public Affairs" 1996, Vol. 25, No. 2, p. 87–139.

choices in respect of good and dignified life; while morality can be viewed as a set of norms that determine our attitude to other people.

In this context there arises the following question: do we need to be acquainted with Dworkin's previous works to properly understand *JfH*? The answer is not straightforward. One can in fact read *JfH* as a completely autonomous work of a specific moral theory applied to politico-legal problems. Yet, one can also read this book differently — as a kind of original explanation of why the earlier works presented specific views on the nature of law, equality, liberty, democracy, dignity, etc. Therefore, before proceeding to a detailed reading of *JfH*, one should carefully read the first chapter, which indeed constitutes, in accordance with its title (*Baedeker*), a kind of a road map⁷⁸ of the entire work. Dworkin makes here one basic assumption and several more specific assumptions (although he does so in a reverse order as compared to the actual layout of the book), which he then develops in the nineteen chapters.

This basic assumption, befitting the person assuming the attitude of the hedgehog, reads as follows: “This book defends the great and traditional philosophical thesis: the unity of values”. “Value is one grand thing” which, according to Dworkin, is seen by a legal philosopher who assumes the attitude of the hedgehog from Archilochus aphorism (*JfH*, p. 1). The author has in mind here not values in general, but he focuses primarily on ethical and moral values. This does not mean, however, that Dworkin does not recognize the pluralism of values, on the contrary — it only means that “ethical and moral values are mutually interrelated” (*JfH*, p. 1). Thus, Dworkin undermines not moral pluralism, but rather moral skepticism and relativism (*JfH*, p. 23–68).

In turn, the specific assumptions, as already mentioned, are presented in a reverse order as compared to the layout of the book. The author begins therefore with the idea of justice which includes values of equality, liberty, democracy and law. When it comes to equality, Dworkin repeats all these elements that he previously developed in *Sovereign Virtue*. He thus revisits his well-known twofold thesis of egalitarianism (‘equal concern’ and ‘equal respect’ towards the individual on the part of the state) and the idea of distributive justice being based on ‘equality of resources’ and on the rejection of ‘equality of welfare’. The author follows here Rawls’ ideas, yet with one significant difference, he does not join the idea of equality with the conception of the social contract, but he infers it directly from a specific ethical theory which allows people to make their own choices in life.⁷⁹ Dworkin recognizes that there may arise conflict between equality, conceived in the above sense, and liberty, but unlike Hayek, and especially in contrast to the leading representatives of contemporary libertarianism, he does

⁷⁸ The author himself describes it in this manner: “a road map of the entire argument” (*JfH*, p. IX).

⁷⁹ M. Schwarzschild, *op. cit.*, p. 170.

not believe that this conflict cannot be overcome.⁸⁰ The author therefore proposes to distinguish freedom in abstract sense from liberty in particular sense. Freedom is not subject to any restrictions, hence limitations apply only to liberty. Only the latter can therefore be combined with equality — in such case the “apparent conflict between liberty and equality disappears” (*JfH*, p. 4). In this context there arises the problem of democracy and the conflict between positive liberty and negative liberty. According to Dworkin, the answer to this may be to distinguish between the different concepts of democracy: “majoritarian or statistical concept and partnership concept”, with a clear preference for the latter, because only this one guarantees the “participation of every citizen as an equal partner in a democratic community, which means more than having only one equal vote” (*JfH*, p. 5). Finally, Dworkin touches upon law as the ultimate element of the idea of justice thus revisiting his basic thesis about the close relationship between law and morality. In his opinion, morality has a branched tree structure: “the law is a branch of political morality, which is, in turn, a branch of a more general personal morality, and the latter is, finally, a branch of an even more general theory of the good life” (*JfH*, p. 5).

These assumptions about justice, equality, liberty, democracy and law have been further developed by the author in the last part of *JfH* — *Politics* (p. 325–415). This is, however, the final effect, presented in just less than one-fourth part of the book. All other fragments are as if a way to get to the final result. First and foremost, Dworkin explains his basic method — interpretation. As widely known, this is a key point in the integral philosophy of law — Dworkin himself stressed earlier that he perceives the essence of the law in the process of interpretation and he recognizes it as an interpretative fact.⁸¹ In *JfH* we deal with an even broader recognition of the problem — the author views the interpretation not only as a process of understanding the essence of the law, but as a general method of approaching moral problems, and perhaps it is even a certain type of philosophizing, *mos philosophicus*, the way to get to know and understand reality. One must indeed admit that such an understanding of this concept goes far beyond the traditional legal approach to interpretation as the synonym for clarification. Paul Ricoeur, when once analysing Dworkin’s legal philosophy asked in this context the question about the relationships between so-conceived interpretation and argumentation.⁸² In his opinion, Dworkin’s interpretation is

⁸⁰ The problem of the existence or non-existence of a necessary conflict between equality and liberty still arouses interest in the American political philosophy — in the recent literature cf. especially Jan Narveson, James P. Sterba, *Are Liberty and Equality Compatible?*, Cambridge 2010; regardless of this, Dworkin’s concept of equality has also become the subject of analyses — Alexander Brown, *Ronald Dworkin’s Theory of Equality*, New York 2009.

⁸¹ Cf. e.g. Ronald Dworkin, *A Matter of Principle*, Chapter II” *Law as Interpretation*, p. 119–177.

⁸² Paul Ricoeur, *Interpretation and/or Argumentation*, in: idem, *The Just*, Chicago 2000, p. 109–126.

not the same as the argumentation in Robert Alexy's or Manuel Atienza's theory of legal discourse, but it approaches the latter or, in any event, it at some point dialectically intersects it.⁸³ This becomes more clear and understandable when a pair of concepts 'interpreted/argued' is compared with the pair 'understand/explain'.⁸⁴ Either way, it is hard not to agree with the opinion expressed in modern science that Dworkin's interpretation is placed in that trend of thought which is referred to as "hermeneutic turn in law and philosophy".⁸⁵ In *JfH* such conceived interpretation was applied by Dworkin primarily to reconstruct the content of such values as justice, dignity, equality, liberty and democracy. What comes as a certain novelty in the work at issue is a precise determination of mutual and intrinsic relationships between these values within the basic assumption of work, namely 'the unity of value' seen through the eyes of a scholar who assumes the attitude of the hedgehog. It could seemingly be seen that we deal here with some axiological monism which is rather difficult to accept. In fact, however, at least in my opinion, it is rather an axiological holism, in which the idea of equality, as discussed here, remains in a symbiotic relationship with other values, like liberty, dignity, justice, democracy, etc.

It should be emphasized that the view which recognizes the unity of such values as dignity, equality and liberty is becoming increasingly popular in the science of law — such standpoint, even without referring to Dworkin, has been presented, among others, by Susanne Baer. According to the latter author, these values should be presented not as a hierarchical pyramid, but rather in the form of three vertices of a triangle defining the area of the rights of the individual. A characteristic feature of this approach is the recognition of the constitutional unity and necessity of all these values, without any preference for any of them.⁸⁶ It is also worth mentioning another graphic vision of the legal system that appeared recently in the literature in the context of the concept of global law. According to the author of this proposal, Rafael Domingo, the legal system has the structure of a pyramid, but it is not a flat figure within the meaning of the hierarchical model of Hans Kelsen, but rather a three-dimensional polyhedron. The basis of this model is provided by a broadly understood humanity, while its tip is a person that embodies the values of human dignity, personal liberty and

⁸³ In the Polish literature Marek Zirk-Sadowski, when describing Dworkin's conception, even uses interchangeably the concepts of 'interpretation' and 'argumentation' — *Wprowadzenie [Introduction]*, in: *Imperium prawa [Law's Empire]*, p. XIV ff.

⁸⁴ Paul Ricoeur, *op. cit.*, p. 110, 126.

⁸⁵ Francis J. Mootz III, *Interpretation*, in: Austin Sarat, Matthew Anderson, Cathrine O. Frank (eds.), *Law and the Humanities*, Cambridge–New York 2009, p. 357 (the author emphasises the fact that Dworkin in *Law's Empire* refers directly to Hans-Georg Gadamer — see *Imperium prawa [Law's Empire]*, p. 51 ff., footnote 2).

⁸⁶ Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, "University of Toronto Law Journal" 2009, Vol. 59, No. 4, p. 417–468.

equality among persons. The base and the top of the figure are joint by seven planes reflecting justice, rationality, coercion, universality, solidarity, subsidiarity and horizontality.⁸⁷

I have already indicated that *JfH* may be differently perceived by the readers, depending on whether they are fairly well acquainted with Dworkin's earlier works on legal philosophy, politics and morality, or had no previous contact with them. The first group would be represented both by ardent supporters of integral philosophy of law, as well as its radical opponents. It seems that reading *JfH* will only reinforce their positive opinions, while the skeptics will not presumably abandon their existing doubts, which may be even intensified. In turn, those who will have the first contact with Dworkin's views will be undoubtedly encouraged to read *Taking Rights Seriously*, *A Matter of Principle*, *Law's Empire*, *Freedom's Law*, *Sovereign Virtue* and, last but not least, *Justice in Robes*. Dworkin's book is in fact incredibly inspiring and provokes a heated discussion, both in its recapitulating layer, revisiting previously analysed issues as well as in the aspect of new ones. The author is aware of the controversy and the synthetic nature of some theses. Perhaps this prompted him to subject them to a critical evaluation even prior to the official publication of the work. Yet, a certain hallmark of our times of the Internet era may be the fact that Dworkin already in the introduction encourages his readers to a further discussion on a specially created web page (www.justiceforhedgehogs.net): "I cannot promise to answer all comments, but I will try to take into account the suggested additions and improvements" (*JfH*, p. X).

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⁸⁷ Rafael Domingo, *The New Global Law*, New York 2010, p. 121–194.

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