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Justification of Legal Change: In Search for a Model of Neutrality*

Uzasadnienie zmiany prawa. W poszukiwaniu modelu neutralności

ABSTRACT

This paper examines neutrality, understood as a necessary requirement for law's legitimacy. In the conventional, liberal formulation of it, the law must neither favor nor depend on any particular conception of the good. Taking into consideration the critique that the principle of neutrality has received, from within liberalism as well as from rival perspectives, the authors search for an alternative. The proposed solution is the Model of Neutrality as Non-Arbitrariness (the MNN), according to which the making and application of law must seek equilibrium within different justifying reasons that are backing the particular law in question. As such, neutrality under the MNN is conceived as a virtue of legislators and judges which allows them to weigh competing justifications in a manner that appears as best in a particular case.

Keywords: neutrality; justification of legal change; liberalism; legislators; judges

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INTRODUCTION

In a democratic state, law is binding on all members of society alike, regardless of their political, ethical, religious, or cultural affiliations. Given this universal binding force (within a jurisdiction), alongside the unquestionable fact of pluralism that marks most societies today, one has every reason to demand that democratic law be somehow neutral. In other words, there is a legitimate expectation that law helps to reconcile citizens' different commitments and backgrounds, rather than introducing domination of prevailing groups of shared commitments or common backgrounds. A liberal response to this demand is the principle of neutrality, according to which political power should not be used to impose disputable conceptions of the good. One of the most influential formulations of this principle comes from R. Dworkin, according to which "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life".[1] Consequently, the law should neither depend on nor favor any particular conception of the good. In its most common formulation, the principle of neutrality does not require the law to be completely value-neutral, which would be obviously self-defeating (isn't neutrality a value?).[2] The requirement is rather that law, being grounded in democratic values such as equality or individual autonomy, should not enforce views about what is worth pursuing in individual life, so that people are "free to pursue their own ends within a general framework of rules that is neutral towards these ends".[3]

In our view, the liberal principle of neutrality, when scrutinized without bias, is far from being immune to critique. Although initially criticized mostly from standpoints rival to liberalism,[4] it has gradually become contested even among liberals themselves.[5] In the context of neutrality of law, as opposed to neutrality of the state (it is the former that is our main concern), one problem seems particularly troublesome. Namely, most laws actually biding in real liberal states do not meet the neutrality criterion.[6] Of course, there is nothing wrong in delegitimizing the law on philosophical grounds. But there must be a point at which a highly abstract

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[1] R. Dworkin, *A Matter of Principle*, Cambridge–London 1986, p. 191.

[2] As A. Patten writes, "A decision to be neutral in some conflict or contest is sometimes based on nonneutral reasons", and thus liberal neutrality might be based on a quite rich set of values such as equal respect, or equal moral agency (A. Patten, *Equal Recognition: The Moral Foundations of Minority Groups*, Princeton–Oxford 2014, p. 108). A similar recent defense of liberal neutrality is offered by W. Ciszewski (*Zasada neutralności światopoglądowej państwa*, Kraków 2019).

[3] W. Sadurski, *Moral Pluralism and Legal Neutrality*, Dordrecht 1990, p. 90.

[4] M. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy*, Cambridge 1996.

[5] M. Kramer, *Liberalism with Excellence*, Oxford 2017.

[6] This is admitted, e.g., by G. Gaus, *Liberal Neutrality: A Compelling and Radical Principle*, [in:] *Perfectionism and Neutrality*, eds. S. Wall, G. Klosko, Lanhan 2003, p. 157.

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principle loses its relevance to the real world, and that seems to be the case here. If regulating almost anything by means of law presupposes some choices about what human goods should be pursued,[7] and perhaps even the rule of law itself is a form of such good,[8] then either most laws must be repealed, or their neutrality is, after all, unimportant. This becomes particularly obvious when we examine law in its "genetic" aspect, in which every new law changes one that came before it.[9] Since law's permanent feature is change, and the justification thereof always somehow points at the good which it is to bring, then "legal neutrality", in a liberal form at least, seems almost ridiculous.

In this paper, however, we will not push this critique further – in fact, the principle of liberal neutrality will neither be defended nor refuted. Instead, our focus will be on a basic intuition underlying liberal neutrality, namely, one saying that it is immoral to apply means of coercion against other people without sufficient justification.[10] Considered in itself, this intuition is not rigidly tethered to any particular political philosophy, and may be interpreted in different ways, within different and rival political and legal theories. For purposes of our inquiry, we may call it "intuitive prohibition of arbitrariness", which is widely shared. For example, while M.N.S. Sellers strongly rejects liberal skepticism with regards to finding the truth about the good, and thereby develops a kind of perfectionist republicanism, he nevertheless acknowledges that people may "find themselves in disagreement about what the common good entails" and thus need a procedure or technique "for impartially evaluating one's own views about the common good".[11] Another example: despite all his criticism toward liberal neutrality, and despite his natural law arguments for human perfection or fulfillment as a legitimate political end, J. Finnis tries to sustain what appears as some form of the harm principle, saying that human authenticity requires "that one has adopted one's commitments in accordance with one's own conception of duty".[12] This being historically convergent

[7] As B.Z. Tamanaha compellingly outsets, "It is characteristic of non-instrumental views that the content of law is, in some sense, given; that law is immanent; that the process of law-making is not a matter of creation but one of discovery; that law is not the product of human will; that law has a kind of autonomy and internal integrity; that law is, in some sense, objectively determined" (B. Tamanaha, *Law as a Means to and End: Threat to the Rule of Law*, Cambridge 2006, p. 11). All of these claims are more less strongly rejected by the modern liberal view on law – and if law is instrumental, then it must presuppose the notion of the aim, and aims are tantamount to goods that are pursued.

[8] This is argued by T. Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, "Washington University Jurisprudence Review" 2011, vol. 4(1).

[9] Reference to author's work – anonymized.

[10] Here we paraphrase G. Gaus, *op. cit.*, p. 139.

[11] M.N.S. Sellers, *Republican Legal Theory*, Handmills–New York 2010, p.32.

[12] J. Finnis, *Duties to Oneself in Kant*, [in:] idem, *Human Rights and Common Good*, Oxford 2011, p. 67. It may debatable if and in what sense J. Finnis acknowledges the harm principle, but at least some scholars read him in this way. See C. Tollefsen, *Pure Perfectionism and the Limits of*

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with liberal neutrality, one might say that J. Finnis shares the intuitive prohibition of arbitrariness despite rejecting its subsequent development in the form of liberal neutrality. One might argue, then, that prohibition of arbitrariness serves as a genuine common ground for theories otherwise rival to each other. For instance, numerous critical theories, such as these coming from the feminist movement, do implicitly acknowledge the intuitive prohibition of arbitrariness when accusing liberalism, conservative natural law theory, and others, of not being sensitive enough to identify and tackle factual coercion that is inherent in gender relations.[13] Hence, while the principle of liberal neutrality might be legitimately questioned, the underlying, intuitive prohibition of arbitrariness can hardly be imagined refutable.

Taking the above into consideration, this paper aims at finding a suitable interpretation of the intuitive prohibition of arbitrariness, as applied to making and applying laws. In this sense, we are in search for a model of neutrality, but one that is not exclusively liberal and could be shared by a considerable set of rival political theories. As a response to these requirements, we propose the Model of Neutrality as Non-arbitrariness (hereinafter: the MNN). The explication of the MNN proceeds as follows. First (Section I), we identify two different possible approaches to law's neutrality – procedural and content-related.[14] Although the two approaches may go hand in hand and generally do not exclude each other, we set the procedural aspect aside, and seek for a content-related model of neutrality. Having in mind the highly doubtful plausibility of liberal neutrality in its "standard" formulation, we present our conception as an alternative thereto. Instead of finding a rigid set of democratic values which constitute the (allegedly) neutral basis for further justification, we adopt the Open Justification Model (hereinafter: the OJM), in which law is perceived as grounded in different (public and non-public) justifications. Since the OJM emerges from our recognition of the communitarian critique of liberal neutrality, Section II offers a reconstruction of the communitarian approach (chiefly represented by A. MacIntyre) to justification of legal change. According to this reconstruction, the content of law is always "decoded" from the pre-existing social practices and patterns of rationality, and the sustainability of new laws depends chiefly on the prudence of the legislator. Finally, Section III

Paternalism, [in:] *Reason, Morality, and Law: The Philosophy of John Finnis*, eds. J. Keown, R.P. George, Oxford 2013, p. 206.

[13] K.A. Yuracko, *Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism*, "UCLA Women's Law Journal" 1995, vol. 6(1), p. 48.

[14] This distinction assumes that we are dealing with non-consequential neutrality – it is not the consequences of policies or laws that matter, but their basic conditions, intentions, or justification. We consider the content-related neutrality as focused on law's justification. In contrast our approach, a defense of the consequentialist view on neutrality may be found in S. Clarke, *Consequential Neutrality Revivified*, [in:] *Political Neutrality: A Re-Evaluation*, eds. R. Merrill, D. Weinstock, Houndmills–New York 2014.

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explicates the MNN, which is considered a genuinely common ground in between liberalism and communitarianism, bridged through the open justification. Legal neutrality as non-arbitrariness is finally presented as an equilibrium between different possible justifications coming either from public reason (the liberal element) or background culture (the communitarian element). As such, neutrality under the MNN is conceived chiefly as a virtue of legislators and judges which allows them to weigh competing justifications for laws in a manner that appears as the best in a particular case.

NEUTRALITY: PROCEDURAL VS. CONTENT-RELATED

As the introductory remarks have hopefully made explicit, some formula of non-arbitrariness ought to be found for law, in order to sustain its basic legitimacy. By the same token, the idea of neutrality of law should not be abandoned, despite criticism: rather, it should be reformulated into a possibly widely acceptable version. Insofar as genuine respect for law shared by majority of citizens is to be maintained, this appears as a practical necessity. But how can or should it be done?

According to J. Waldron, "There are two different ways we can think about law and lawmaking. To put it crudely: we can think of law as partisan, as nothing more than the expression in legislative terms of the particular ideology or policies of a political party; or we can think of law as neutral, as something that stands above party politics, at least in the sense that once passed it ought to command the obedience and respect of everyone".[15] Setting Waldron's own conception of neutrality aside we should reflect in more general terms what "law being situated above particularistic politics" may mean. Certainly, it may mean liberal neutrality, but this option has been set aside at the outset. What are the other options? In a constitutional regime, law may be perceived as transcending day-to-day politics and thus deserving some degree of universal respect by virtue of fulfilling proper procedures, first and foremost the constitutional principles and rules. Procedural requirements of legislation, of adjudication, and perhaps of public discourse about those two, can be perceived as a source of law's neutrality. To give examples: if everyone has a possibility to influence the process of legislation, directly or indirectly; or if proper systems of controlling administrative decisions and court judgements by higher courts are in place, one may say that arbitrariness or partisanship of the legal processes is diminished. The law is then neutral with regards to personal convictions, emotions, or ideological and cultural bias of those who make or apply it. Neutrality may be conceived gradable.[16] This reading may be called "procedural

[15] J. Waldron, *The Law: Theory and Practice in British Politics*, London–New York 1990, p. 91.
[16] This is compellingly argued by W. Ciszewski (*op. cit.*, pp. 273–280).

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neutrality", which is commonly considered intelligible and desirable. Alternatively, or perhaps on top of that, Waldron's passage may be read as requiring something additional – some form of content-related neutrality. In other words, it is not only the procedural correctness that may endow the law with a status of neutrality and thus the universal claim to respect, but also the substance of its justification. Under this reading, a set of substantive reasons – not necessarily actually provided, but at least one that "could be provided for it under certain idealized conditions"[17] – should allow everyone to believe that law has a sound substantive basis that they may accept as not narrowly ideological.

This paper examines the latter possibility (the procedural neutrality being taken for granted). As we have seen, however, finding a convincing model of substantive or content-related neutrality is much more demanding than doing this within a merely procedural approach. In fact, liberal neutrality is one such attempt, at least at the level of constitutional law. For example, J. Rawls' liberal principle of legitimacy says that "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse".[18] And although he considered the very term "neutrality" unfortunate, he claimed that his theory, while not procedurally neutral, offers prospects for an overlapping consensus, and thus a public, universally acceptable basis for justification.[19] In other words, J. Rawls argued for some form of content-related neutrality, which may be understood as universal acceptability of a political conception which works "from fundamental intuitive ideas implicit in the public political culture and abstracting from comprehensive religious, philosophical, and moral doctrines".[20] This vision, however, is very close or practically identical to the liberal neutrality which has been considered highly problematic.

This paper examines another possibility for a content-related model of neutrality. Although our proposal is Rawlsian-inspired, it also departs from J. Rawls in a fundamental way (one might say that this is a "subversive" reinterpretation of his thought). As we have seen, J. Rawls sought "a neutral ground", and the public acceptability (that is, an acceptability that is universal within a jurisdiction) was a necessary condition for neutrality. The solution we propose is based on the OJM, considered as an alternative to the traditional liberal principle of public justification. According to the OJM (which was originally conceived as a model of justifying legal change): "Legal change is justified when each citizen has a sufficient, con-

[17] J. Kis, *State Neutrality*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajo, Oxford 2012, p. 319.

[18] J. Rawls, *Political Liberalism*, New York 1996, p. 137.

[19] *Ibidem*, p. 191.

[20] *Ibidem*, p. 192.

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tent-related reason to obey it, seeing it as not merely arbitrary but justifiable to a minimally sufficient extent".[21]

The reason for introducing the OJM into law is the following: when examined from a dynamic or genetic point of view, law appears to be marked by change, not as an accidental, but as its permanent and recurrent feature. As we already mentioned, legal changes are being justified by appeal to different aims or goods that are fundamentally grounded not only in public reasons, but also in divergent comprehensive (political and non-political) conceptions. And although one could argue that it simply entails that law may never be neutral in the content-related sense, the OJM suggests otherwise. Namely, the law can be neutral (or non-arbitrary) insofar as the divergent reasons for it are properly weighted, or remain in equilibrium. When this is the case, one may have a good reason to accept or obey laws he does not fully endorse. "Just as courtesy or respect makes us accept invitations to gatherings we have neither interest nor delight in attending, open justification allows and requires us to accept laws which fail to meet our own well-considered criteria for just or optimal law".[22]

The OJM, as well the approach to neutrality that in our view stems from it, is developed as a result of interaction between liberalism and its communitarian critique. According to communitarianism, political community, and the common good (understood substantially), constitute the primary source of law's justification. The law is perceived as rooted in long-lasting traditions of a concrete society, its practices and normative claims that may be decoded from these practices and traditions. In the communitarian approach (understood as a general model, opposed to the liberal account) a legal change is justified only if it follows some change in the latter spheres. The OJM offers a synthetic approach, namely, one assuming that the community practices and public justifiability which stands for the liberal element, are equally important determinants of democratic law, and should remain in equilibrium. A change in the law under the OJM is understood as a result of an interplay between those two spheres, each having an independent justificatory power. In order to make it more explicit, we must now offer a reconstruction of the communitarian approach legal change.

[21] M. Rupniewski, *Public Reason, Background Culture, and the Justification of Legal Change*, [in:] *The Philosophy of Legal Change*, eds. M. Chmieliński, M. Rupniewski, London–New York 2020, p. 36.

[22] *Ibidem*.

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LAW AS CONFIRMATION: THE COMMUNITARIAN RESPONSE TO LIBERAL NEUTRALITY

A natural rejoinder to the contractualist model of public justification (and liberal neutrality inherent to it) comes from communitarianism, understood as a rehabilitation of the political whole, as something more than a simple sum of individual parts comprising it. The general communitarian model we have in mind does not consist simply in endorsing the priority of the common good over individual rights, as social holism could be understood (which is why communitarians themselves find the label "communitarianism" misleading[23]). Rather, communitarians challenge the contract-liberal vision of autonomy of a moral or economic agent (isolated from other agents). What is even more important from the point of view of this paper, communitarians reject the idea that public institutions can be justified in a way which is detached from substantial conception of the good life, or cultural patterns of rationality. Consequently, they tend to challenge the notion of "abstract-rational will" and "rational-universal procedure" underlying liberal neutrality. As communitarians argue, institutions should be determined by a substantial common good which is somehow set by the historical and cultural traditions; and these traditions are the ultimate source of rationality itself.

Once liberal neutrality is rejected, what remains as a possible model of law's justifiability, according to communitarianism? The general answer is the following: law is justifiable (always within a concrete legal community) when it follows the pre-existing social practices and the conception of the good that a prudent legislator is allegedly able to "decode" from these practices.[24] Such interpretation may be found in A. MacIntyre's views on human rationality. According to him, the idea of Cartesian, *a priori* rational mind should be rejected. Rather, human mind is always "informed as a result of its engagement with objects",[25] that is, always interacts with concrete-empirical reality. Practical rationality is no different, and thus moral standards also must be embedded in real practices that have been going on in a concrete society. Those standards, A. MacIntyre seems to claim, have emerged within particular traditions, with their genuine modes and patterns of inquiry, argumentation, and moral apprehension. There is no possibility to "reason out" of this context, and therefore every evaluation of a claim, for example, has to be done "with an eye to the specific history and character"[26] of a tradition that underlies this

[23] M. Sandel, *Public Philosophy: Essays on Morality in Politics*, Cambridge 2005, pp. 252–260.

[24] M. Chmieliński, *Legal "Determinism" or/and Legal "Creationism"? Conservative-Communitarian versus Contractarian Approaches to Legal Change*, [in:] *The Philosophy of Legal Change…*, p. 88.

[25] A. MacIntyre, *Whose Justice? Which Rationality?*, Indiana 1988, p. 356.

[26] *Ibidem*, p. 398.

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particular claim. It applies to public reasoning also, so there is no rationality and rational standards of public discourse outside of a concrete tradition.

Taking the above for granted, the communitarian model of justifiability of legal change would be centered on the notion of "codification". Saying this, we assume that A. MacIntyre's approach to rationality of law cannot be essentially different from the vision of public rationality as such. First of all, one should say that the domain of law is a sub-domain of *phronēsis*, that is, practical wisdom gained in a process of learning from within a particular, concrete community.[27] Despite *phronēsis* being a virtue of individual persons, the communitarian factor constitutes here the main point of reference and the source of normativity. This is what the context-dependent nature of rationality inevitably entails. As a consequence, justification of legal norms must turn out relativized to a particular culture or cultures forming a legal community in question. To speak in M. Sandel's terms – given the fact that we are "thickly constituted" and "morally encumbered" people (rather than transcendental selves, or citizens having a separate identity as political persons), we will always reason within our deep moral beliefs and cultural patterns (which famously argued by M. Sandel[28]). As a result of this, when actors in the public domain are deliberating about the laws, exercising their reason, they cannot escape being dependent on what is already there in the tradition and culture.

Granted, the "codification" of law, in the sense adopted in this paper, consists in translating the pre-existing informal patterns of action such as custom, traditions of rational inquiry, or religious rules governing the community into a framework of formal normative acts. Such codification is accompanied by the conviction that these norms had existed beforehand, and the human legislator only confirms their validity for the community by introducing them in a formal way as the law of that community. Of course, this does not mean that this is a completely static model. Civic debates should be held, and can possibly bring deep changes in the legal system. But the debate itself must, by its very nature, follow the historical-cultural patterns of rationality, which allows the *ratio legis* of the subsequent new law be already embedded in the consciousness of the community members. Accordingly, legal norms which follow shallow, current needs, or respond to rapidly changing social situations, are considered unsatisfactory. Therefore, a well-justified change should be evolutionary, and new laws, or changes in streams of judicial decisions, should be "decoded" from the changing social practices.

[27] *Ibidem*, p. 119.

[28] M. Sandel, *Liberalism and the Limits of Justice*, Cambridge 1983.

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FINDING A GENUINELY COMMON GROUND: NEUTRALITY AS NON-ARBITRARINESS

The MNN, as we want to propose it, takes the communitarian arguments about the nature of law's justification into account. To avoid misunderstanding: it is a form of recognition of the communitarian standpoint, or of taking it seriously, but is not tantamount to adhering to it. Quite to the contrary – we believe that the communitarian doubt on the possibility of an independent judgement about one's own culture, leads to serious practical and theoretical problems. On the one hand, communitarians do not simply say that law should be perceived as an outcome of partisan clashes of different cultural patterns, or as a simple institutionalization of the dominating cultural pattern. Rather, they share the intuitive prohibition of arbitrariness – for instance, M. Sandel believes that his vision of morally engaged debate enhances mutual respect better than liberal neutrality.[29] On the other hand, it seems very unclear how prohibition of arbitrariness would be grounded and articulated if such arbitrariness was deeply embedded in the practices of a community concerned. It is likewise unclear how the clashes between competing cultures within a pluralist society could be resolved.

Taking these theoretical problems as well as practical circumstances of pluralism into consideration, it seems prudent to try to achieve a normative model of legal change that could somehow integrate or reconcile both perspectives, i.e. that of the social contract, and that of communitarianism. As a response to this, we believe that the liberal categories should be rearranged or re-interpreted in order to accommodate to the communitarian insistence on the constitutive importance of the community practices that influence the public discourse. Only once this is done, a widely plausible model of neutrality may be developed. In fact, possibility of this arises within liberalism itself, particularly, in Rawlsian political liberalism. As already mentioned, however, this requires a modification or supplementation made in political liberalism. The criterion of public justifiability should be reinterpreted, and this is what is done by the OJM. Let us now explain how this "subversive" interpretation of Rawlsian political liberalism works.

As commonly known, J. Rawls believed that developing a political conception of justice one should avoid claims to the whole truth (the philosophical truth, so to say), in order to assure that all reasonable citizens will be given due respect, and will hopefully accept the political principles, regardless of differences in their comprehensive views. In order to reconcile the universal validity of the principles of (public) justice with particularism of the comprehensive doctrines, J. Rawls proposed to split up the culture of a democratic society into two spheres – public political culture and the background culture. The former is the culture guided

[29] Idem, *Justice: What's the Right Thing to Do?*, London 2010, p. 268.

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by democratic ideas and principles. The latter is the culture of a pluralistic civil society.[30] Now, according to J. Rawls, each human individual can be perceived as having a twofold identity. On the one hand, as a citizen, one holds a commitment to political principles, for example those present in the constitution. On the other, as a moral person, one endorses a comprehensive doctrine of some kind – religious or secular. A pluralistic society consists of many different communities at one level (groups connected by common worldview or aims), and one political-national community at the other level, guided by public reason.[31] The latter is "the reason of equal citizens, who, as a collective body, exercise final political and coercive power over one another in enacting laws and amending their constitution".[32] Of course, the two spheres are not completely separate – the public institutions do form the worldviews that citizens have, and the citizens do form the institutions according to the worldviews they have.[33]

The OJM adheres to this vision of society. The crucial difference with the original J. Rawls is that according to him the comprehensive worldviews may influence public institutions only insofar as they are consistent with the public reason (comprising basic liberties, democratic procedures, constitution, and the like). The OJM challenges this, at least as far as legal activity is concerned. It is assumed that the background culture which is "the culture of daily life, of its many associations: churches and universities, learned and scientific societies, clubs and teams, to mention a few"[34] is a legitimate source of normativity. After all, not all the law comes from public reason, also in J. Rawls's original view, and members of civil society may legitimately claim that their comprehensive views be somehow pursued by legal means. As J. Rawls writes, "Many if not the most political questions"[35] do not concern the fundamental matters of public reason – issues such as funding art, or protecting certain areas of the country as national parks, or rules of building law, do not directly involve public justifiability.

[30] J. Rawls, *Political…*, p. 443.

[31] Interestingly enough, there is a communitarian aspect to it, somehow tacitly admitted by J. Rawls himself. As he writes, the institutions rest upon "public political culture itself, including its main institutions and the historical traditions of their interpretation, as the shared fund of implicitly recognized basic ideas and principles" (*ibidem*, p. 393). In this respect, J. Rawls breaks up with (or at least considerably transforms) the Enlightenment tradition of the social contract as a transcendental idea, and relies on a political and legal culture of a democratic (pluralist) community. And it is not only a democratic community taken in the abstract. Sometimes he explicitly refers to his own country, e.g. when writing: "We look to ourselves and to our future, and reflect upon our disputes since, let's say, the Declaration of Independence. How far the conclusions we reach are of interest in a wider context is a separate question" (idem, *Collected Papers*, Cambridge–London 1999, p. 306).

[32] Idem, *Political…*, p. 214.

[33] *Ibidem*, pp. 168–173.

[34] *Ibidem*, p. 14

[35] *Ibidem*, p. 214.

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The OJM takes this thought even more seriously. It assumes that "different communities forming the society's background culture have their own normative and cultural traditions and they are entitled to introduce them into laws".[36] In cases in which the regulated subject matter is not directly connected to constitutional essentials, and remains within their boundaries, the situation is clear: comprehensive views are fully legitimate sources of justification of a legal change. From the perspective of adherents to a particular comprehensive doctrine, it is simply a pursuit of what they consider the (common) good. For other citizens (opponents), while such legislation may fail to realize the good, it is nevertheless of some value. First, it pursues something of importance for the supporters, and the virtue of citizenship requires the opponents to take that into account. Second – and more importantly – the new law should be perceived as justified in a non-arbitrary manner. Even after serious debates, or perhaps all the more thereafter, the legislation may appear defective to its opponents. But at the same time they have every reason, and perhaps even a duty, to acknowledge a genuine engagement of the supporters. If the latter is really the case then even a defective legislation is something more than just an arbitrary collective want or an uncoordinated, unreasonable "efflorescence" of law.

In case of constitutional essentials, the picture is different. The OJM affirms that these constitutional matters are governed by public (and non-comprehensive) reasons, which enjoy certain priority over the comprehensive views present in the background culture. However, the role of background culture is a little more subtle than simply giving way to public reasons. As the OJM assumes, the general ideals comprising a public reason of a given community are subject to constantly evolving interpretation. As K. Greenawalt notices, "people with certain inclinations are highly likely to develop different views over time about specific subjects as a culture and perception of values develop".[37] As both this passage and the common-sense observation of legal activities suggest, this is not a process that takes place in a vacuum, or within public reason alone. Rather, it is the lively "organism" of different formal and informal forums and institutions that result in these changes of perception. Therefore, background culture and public reason cannot be perceived differently but in a constant interplay.

Taking the above into consideration, our approach to neutrality – the MNN – can be presented as seeking a synthesis of the contractarian and the communitarian thinking, making a way for the genuine common ground between the two. The justification of legal change may draw from the two different sorts of sources, namely, from public reason (the political-liberal element), as well as from background culture (the communitarian element). The particulars depend on circumstances. For instance, when deciding on heritage monument protection, the justification

[36] M. Rupniewski, *op. cit.*, p. 40.

[37] K. Greenawalt, *The Realms of Legal Interpretation*, Oxford 2018, p. 58.

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should draw from background culture mostly, and when deliberating on the issues of equality, the justification should be guided by constitutional ideals in the first place. Most cases would probably draw on both spheres, since in the real life public reasons are always presented at some wider background. In these cases, what the MNN requires is the proper weighing of competing reasons. The law may claim neutrality only insofar as the content of its justification reflects the acceptance – acceptance by the persons concerned, the parties to judicial or legislative process – of the justifying reasons. Therefore, a set of reasons that is given as justification of a particular law in the process of legislation or law's application, must somehow reconcile the competing claims. Granted, non-arbitrariness appears first and foremost as a virtue of legislators and judges. It is their job to weigh reasons, and if they do it well, one may say that they have done it neutrally. As a consequence, one should say that neutrality as non-arbitrariness is, or should be, an important element of the ethos of judges and legislators in a democratic state.

Although this paper has developed a theory, and there is no space for a detailed case study, it seems expedient to briefly illustrate the MNN with an example. An instructive one seems to be national legislations, introduced in most European countries (for instance, France, Germany, Poland) which concern special protection of rural land, including strict limitations imposed on farmland trade. This was approved, and to some extent triggered, by the European Union. In one of the recent resolutions of the European Parliament, we read that "whereas land is an increasingly scarce resource, which is non-renewable, and is the basis of the human right to healthy and sufficient food, and of many ecosystem services vital to survival, and should therefore not be treated as an ordinary item of merchandise",[38] and therefore the member states should enhance their protective measures. The member states have done this, accordingly to their exclusive competence in this area of law.

From the perspective adopted in this paper, such protective legal solutions are strictly connected to the communitarian and (classical) republican assumption of protecting the common good, manifesting itself in specific structure of national agriculture. As such, it certainly does not meet the requirements of liberal neutrality – the legislation seems to presuppose not only economic/ecologic efficiency, but also the substantive value connected to the specific "life style" of family farming.[39] To the contrary, according to the MNN, the question of possible neutrality of such

[38] European Parliament Resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers (2016/2141(INI)), P8_TA(2017)0197.

[39] The said resolution says that the EU as a whole affirms a "multifunctional agricultural model, in which family farms are an important feature" (*ibidem*, letter A). This is very well observed in national law. For instance, according to the Polish Constitution, "the basis of the agricultural system of the State shall be the family farm" (Article 23 first sentence of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, no. 78, item 483, as amended; English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.02.2019]).

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law remains open. The legislative process, as well as subsequent application of law, consists to a large extent in weighing two important legal and political values: the liberal the right to private property and of contract on the one hand, and on the other the "communitarian", intrinsic value of maintaining the structure and specificity of national agricultural resources. In general, one can say that in these solutions, which limit the individual right to free sale of such areas, this is the latter that prevails. However, legislator or judge supporting such a protection remains non-arbitrary as long as the communitarian justification is reasonably, publically acceptable in the concrete liberal-democratic society, and does not completely destroy the right to private property (without which the very foundation the liberal-democratic society would be threatened). In the majority of European countries, it partially limits only the right of free sale of agricultural property, while other rights connected to it are left untouched. Therefore, it tends to some kind of equilibrium between constitutional individual rights protection and the protection of the substantial, communitarian common good and goals. Particular assessments of the level of neutrality, or its complete lack, must be left to practical judgement, and to the ethos of judges and legislators. The theory is only able to give guidelines to the latter.

The above-presented vision of the MNN, which consists in a dynamic interplay between public reason and background culture, seems not only pretty adequate to the social reality in modern democracies (as the agriculture example aimed to show), but also appears as the best justification of change in the light of the intuitive prohibition of arbitrariness. If the relevant elements of background culture are taken into consideration in the process of change, then the content of new law is likely to achieve social acceptance as a neutrally justified solution. The MNN, it seems, pays due respect to the factors such connected to public reason, as well as to the cultural commitments and determinants highly valued by communitarians.

CONCLUSIONS

In this paper, we attempted to propose a model of neutral justification of law. The point of departure was a recognition of the intuitive prohibition of arbitrariness. Taking into consideration the fact that the persistent feature of contemporary legal orders is change, and that change is always in one way or another connected to the ideological and political agenda, the virtue of neutrality appeared both easily questionable and necessary. As we aimed to demonstrate, the MNN, understood as a synthesis of contractarianism and communitarianism, provides a compelling reconciliation of political-ideological element in law with its neutrality, understood as non-arbitrariness. It may also provide a genuinely common ground not only between liberal neutrality and communitarian thinking. Speaking more broadly, it hopefully articulates the intuitive prohibition of arbitrariness in a form plausible

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for many rival political theories. If public reason and background culture remain in a reasonable equilibrium in the process of legal change, the result of this change may be expected to achieve social acceptance as the properly – and, in a sense, neutrally – justified law of the community.

Conceived in this way, non-arbitrariness appears first and for most as a virtue of legal actors – a judge or legislator remains neutral in the sense of striving to avoid simply taking their personal stance on an issue. Instead, she is trying to grasp different justifications of law that appear in the (legislative or judicial) process, and then, as impartially as possible, weigh the values these justifications evoke. This model of neutrality seems to have a potential of enhancing legitimation of law by going beyond mere formalism on the one hand, and avoiding rigidness of substantive principles such as liberal neutrality on the other. On the other hand, it is pretty demanding of judges and legislators, which makes it another call for "Herculeses" in the legal profession.

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Legal acts

European Parliament Resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers (2016/2141(INI)), P8_TA(2017)0197.

ABSTRAKT

W niniejszym artykule analizie poddano zagadnienie neutralności rozumianej jako konieczny wymóg legitymacji prawa. Najbardziej rozpowszechniona liberalna formuła neutralności wymaga, by prawo nie faworyzowało ani nie było ufundowane na żadnej partykularnej koncepcji dobra. Biorąc pod uwagę formułowaną z różnych stron (zarówno w ramach liberalizmu, jak i poza tym nurtem) krytykę liberalnej neutralności, autorzy poszukują alternatywy. Proponowane rozwiązanie to model „neutralności jako nie-arbitralności", zgodnie z którym tworzenie i stosowanie prawa musi poszukiwać równowagi w zbiorze racji uzasadniających stosujących się do tego prawa. Tak pojmowana neutralność stanowi przede wszystkim cnotę ustawodawców i sędziów, która pozwala im na wyważenie skonfliktowanych uzasadnień w sposób, który jawi się jako najlepszy w danym przypadku.

Słowa kluczowe: neutralność; uzasadnienie zmiany prawa; liberalizm; ustawodawcy; sędziowie