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Utopia Without the Law – Why Is It Impossible?

Dlaczego nie jest możliwa utopia bez prawa?

ABSTRACT

The academic character of the article is connected with the attempt to answer the question asked in the title: Utopia without the law – is it possible? The theoretical arguments provided by the author lead to an affirmative answer to this question and allow for formulating the following thesis: there is no utopia without the law. The law is not only present in utopias, both positive and negative ones (anti-utopias and dystopias) but also, to a great extent, determines their existence and functioning. As a result, it links utopian thinking to reality. Any answer to this question is possible and justifiable in the academic discourse. According to the author of this article not only the law is present in the utopia but the law in the utopia must exist. The essence of the law in utopias is justice, but there is not justice in utopias without wisdom. The Bible, Roman law and philosophical and legal reflection were the sources of an approach to law for the creators of utopia. Referring to the views of such thinkers as: Plato, Immanuel Kant, Rudolf von Ihering, Gustav Radbruch, Karl R. Popper, Bronisław Baczko, the author states that the law is an integral part of both worlds: the utopian world and real world. So, there is not utopia without the law as an idea of jusctice, implemented into the social life of the people who are intelligent beings.

Keywords: utopia; the law; utopian thinking; reality; academic discourse; the Roman law; justice

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Etiam latrones suis legibus parent /
Even robbers have their own laws.
(Cicero)

INTRODUCTION

The title question is very simple. Yet, the answer to this question does not have to be equally simple. Quite to the contrary, especially in the academic discourse, any answer to this question is possible and justifiable but always requires a proper substantiation. While preparing my answer I decided to focus on three issues related to the axiology of law and, in particular, legal absolutism and nihilism. The first one regards the instrumentalisation of the law in utopias and the close and inextricable links between law and politics. The second issue refers to the notion of lawlessness, which always stems from the instrumental use of law and, eventually, from injustice. The third one is an answer to a question regarding philosophy and law, i.e.: What should the law be and what can we read about that in utopias? If we answer "no" to the question asked in the title, we must realize that in utopias, the law as such is understood very broadly. Thus, there is no utopia without any law at all, i.e. the law understood, first of all, as principles, rules and norms that apply to people who are social and intelligent beings. The definition of utopia provided by Witold Parniewski puts an emphasis on the fact that it is

> a world based on rules but those rules are, however, totally different from the ones that exist in the real world. It is a reality that is alternative to what is real, imperfect and empirically verifiable. Utopia is also an expression of an act of thinking that comes from a longing for perfection, structure, order, happy places and happy times.[1]

The author believes that utopia comes in different forms and shapes:

> […] it can be contained in social treaties, moral systems, theories of upbringing, projects (constitution, state, law) aimed at improving the forms of social interactions, transforming humanity; in scientific and philosophical works, in ideas, religions, myths, legends and fairy tales, in literature and in art.[2]

In such a context, we can develop the negative answer further by saying that there is no utopia without the law understood as a certain catalogue of clearly defined orders and prohibitions or civil rights and obligations. The law in utopias can also be described as a catalogue of natural, universal, eternal and inalienable rights of each individual human being, which are identified today as human rights. Finally, there is no utopia without the law understood as a carrier of higher val-

[1] W. Parniewski, *Szkice z dziejów myśli utopijnej (Od Platona do Zinowjewa)*, Łódź 2000, p. 11.
[2] *Ibidem*.

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ues, either republican, democratic, liberal, egalitarian, socialist or communist but, most of all, the values that are referred to as ideals, i.e. justice, fairness, goodness, beauty, truth, peace, etc.

What is more, since their creation, social utopias have clearly contributed to establishing new branches of law or developing and reforming the existent ones. Most of all, we can see in them a harmonious co-existence of the law that applies to community (public) interest and the law that applies to individual (private) interest. However, the focus is on the regulations connected with criminal law and civil law, which leads to specializations within those disciplines which we now have in the contemporary law, such as penitentiary law, police law, marital law, property law, inheritance law, labour law and a number of social laws. The important thing here is that the law in utopias becomes a collection of innovative ideas used by the real legal system, e.g. they can be referred to in the legislative process as *de lege ferenda* suggestions. It is because the law in utopias is a carrier of new legal institutions and solutions that could be implemented in the real life and used in practice. In such a way, the law in utopias constitutes an important element that gives an actual meaning to the ideological message of a utopia itself. Thus, there is no way that a utopia can be realized without the law, which should be recognized as a *sine qua non* to realizing a utopia. A perfect law becomes a *sine qua non* for the existence, creation or organization of a perfect world. Law is not only an element which brings those two worlds (utopia and reality) together like a bridge but, most of all, law transcends those two worlds and exists in both of them, influences and shapes them.

Within this framework, what appears to be one of the main messages of social utopias is that we can live in a better world and we should try to improve it. Therefore, just like the law, also the world can be, in fact, shaped in any given way. However, the problem is that it is much easier to change the world by changing the law than change, or rather create the so-called "new human being". Utopias usually give simple recipes assuming that the first step to make this world a better place is to introduce a new legal order or change the current one. It means that we have more faith in the possibilities offered by the law than we have faith in people. While it is very easy to change the law, it is more difficult to improve the world and the most difficult task is to make people better. Most utopians had no doubt while creating their imaginary worlds that it is the law that has the biggest power of making an impact on people, who are intelligent beings willing to organize their relations based on the best possible rules. What is interesting is that, in practice, such an approach, which is an instrumental use of law, has led to the same approach to the world and, in consequence, an instrumental use of people.

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INSTRUMENTALISATION OF LAW IN UTOPIAS

There is no doubt that law and state are interrelated. A matter that is still disputed, however, is the significance and consequences of their mutual impact. On one hand, "law is an active instrument of political activities". On the other hand, "law also impacts the state because it strengthens the values vital for community life, which influence the state policy".[3] Therefore, like Lech Morawski said, everything that is non-instrumental is related with various values, including, most of all, "the expression of justice, a social condemnation of morally reprehensible acts".[4] In this context, "it may mean that everything that is not instrumental remains the field of the axiology of law – the evaluations that have not been instrumentally relativised".[5] Marek Safjan points to a particularly strong axiological connotation of the principles that determine the rules applied in the state of law, where the violation of the values behind those rules is (or should be) considered as the violation of those rules.[6] In his opinion, "at some point, in a country where there is a rule of law, it is no longer possible to separate the formal domain from the axiological domain".[7]

It was for a reason that Bronisław Baczko (1924–2016), while describing a perfect Renaissance utopian, wrote that it is "a political dreamer creating delusive visions of ideal legislation".[8] This "delusiveness" comes from "a longing for a society that is logical, cohesive and transparent, but also from the belief that social life can be transformed and rationalized".[9] To transform and rationalize life, which is difficult, and, in the strict utopian sense, practically impossible, we can transform the law in any way we want but that does not mean we can rationalize it.

Hence, if we claim that there is always a certain type of law in every utopia, it is most certainly treated as a tool. However, as I have pointed out in the introduction, the instrumental approach to law in utopias must be considered necessary but, at the same time, dangerous or even damaging. It is not only about the two extreme approaches to the instrumental use of law, i.e. legal nihilism and absolutism, but also the third type of such use – the relativisation of law. Each of those instrumental

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[3] E. Zieliński, *Nauka o państwie i polityce*, Warszawa 2006, p. 69.

[4] L. Morawski, *Instrumentalizacja prawa (zarys problemu)*, „Państwo i Prawo" 1996, no. 6, p. 23.

[5] S. Kaźmierczyk, *Założenia metodologiczne rozważań o relacjach między prawem w znaczeniu instrumentalnym a prawem w znaczeniu pozainstrumentalnym*, [in:] *Z zagadnień teorii i filozofii prawa. Instrumentalizacja prawa*, ed. A. Kozak, Wrocław 2000, p. 18.

[6] M. Safjan, *Państwo a wartości etyczne. Prawo i polityka*, [in:] *Prawo a polityka. Materiały z konferencji Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, która odbyła się 24 lutego 2006 roku*, ed. M. Zubik, Warszawa 2007, p. 25.

[7] *Ibidem*.

[8] B. Baczko, *Światła utopii*, transl. W. Dłuski, Warszawa 2016, p. 47.

[9] Idem, *Wyobrażenia społeczne. Szkice o nadziei i pamięci zbiorowej*, transl. M. Kowalska, Warszawa 1994, pp. 155–156.

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ways of using the law makes it more distant from its most important ideal – justice. It often happens that in the pursuit of values other than justice, the law, although still seems to have its binding power, loses its essence and axiological sense. In the end, the law without justice – according to Gustav Radbruch (1878–1949) – is no longer the law, especially the kind of law that it should be in the philosophical and legal understanding.[10]

The question asked in the title can also be answered with a "yes" and such an answer, assuming the possibility of a social utopia without the law, is also justifiable in the academic discourse, just like any other theoretical concept. In practice, however, one cannot find any point in a utopia without the law, especially if the utopia applies to the life of people understood as beings that are intelligent and social at the same time, which is the usual utopian approach. Utopianism also has its roots in philosophical idealism, which means that they both have the same object and method as they base on ideas understood as mental constructs.[11] But do utopias always make sense or should they? As Charles Rihs said: "utopian philosophers did not develop their systems only *a priori*". He believed that, quite to the contrary, their concepts of man, human nature, justice, reason, political and social equality are not closed theoretical constructions but are always related to what is practical and based on reality.[12] Historical examples show that there is no other way to realize utopia or even try to realize it than by means of law. What is more, this way is the simplest and most effective method. The communist ideology is the best example here. While its doctrine advocated legal nihilism, the end of the state, freedom and equality in a classless society, the political practice of the proletarian revolution showed a growing disparity between reality and the ideals declared by Marks and Engels in their writings and then by the Bolsheviks winning the October Revolution.[13] They believed that communism was not a utopia because it was supposed to be realized and yet, since it has not been realized, it remained to be a utopia.[14] Thus, the communist practice of making and applying the law was utopian from the start. Law was treated as a tool used mainly in the ideological and political fight for power. Historically, it evolved from the declared legal nihilism to a more and more visible legal absolutism.[15]

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[10] See M. Szyszkowska, *Europejska filozofia prawa*, Warszawa 1993, pp. 2–3, 83–94.

[11] Cf. Ł. Stefaniak, *Utopizm. Źródła myślowe i konsekwencje cywilizacyjne*, Lublin 2011, p. 11, 140.

[12] Cf. Ch. Rihs, *Les philosophes utopistes: le mythe de la cite communautaire en France au XVIIIe siècle*, Paris 1970, p. 241.

[13] See A. Bosiacki, *Utopia, władza, prawo. Doktryna i koncepcje prawne „bolszewickiej" Rosji 1917–1921*, Warszawa 1999.

[14] Cf. K. Kuźmicz, *Istota utopii komunizujących*, [in:] *Oblicza utopii, obłudy i zakłamania*, ed. W. Łysiak, vol. 1, Poznań 2013, pp. 45–61.

[15] Cf. idem, *Filozoficzne przesłanki instrumentalizacji prawa w utopii komunistycznej*, „Miscellanea Historico-Iuridica" 2015, vol. 14(1), p. 311 ff., 322.

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If law is used in an instrumental way, oriented on security or some clearly defined goals, especially short-term political ones, it can never be regarded as fair. Franciszek Ryszka (1924–1998) warned against such situations when authoritarianism or totalitarianism is born in the majesty of law although not in the majesty of justice. Taking the example of Nazi Germany, we can repeat after Ryszka that as far as lawmaking is concerned, everything "starts from the consolidation of the mechanism and from political and legal centralization. At the same time, social life is being subordinated to the state. There is no doubt: it is the state, the fascist state that dominates all aspects of life and subordinates everything to state control".[16] Referring to the opinions presented by F. Grimm – a professor of law and a declared Nazi, Ryszka emphasized also that the great misfortune of the then German judicature was that it had become political because all the evil that came from that started when politics was mixed with the administration of justice.[17] Such a combination usually works in favour of the power holders but it has little to do with justice. According to Jerzy Oniszczuk, in Radbruch's times, the practice of fascism questioned the utopian belief that only reasonable legal regulations constitute the law and that it was not possible to make irrational and unfair laws that hit man's freedom.[18]

On the example of totalitarian – communist and Nazi – ideologies, we can see from a historical perspective the effects of such instrumental use of law and what it leads to. It is typical not only for non-democratic governments, i.e. totalitarian systems, all kinds of dictatorships and tyrannies, but it is also connected with the revolutionary approach to law. Different utopias take an active part in practically each "revolutionary celebration"[19] and leave their marks not only on the newly established law but also on the lives of ordinary people, more often making it hell rather than heaven. According to Harold Berman, revolution is the change of the binding law and it is a change that is systemic in its nature, i.e. major, sudden and permanent.[20] The old legal system is always replaced by a new one with an assumption that it is also a better (a more appropriate) one for the given times, place and people. Even Plato (427–347 B.C.), when asked: "What kind of country do we need if we want to introduce our laws easily?", said: "Give us a country ruled by

[16] F. Ryszka, *Państwo stanu wyjątkowego. Rzecz o systemie państwa i prawa Trzeciej Rzeszy*, Wrocław–Warszawa–Kraków–Gdańsk 1974, p. 343.

[17] Cf. *ibidem*, pp. 352–353.

[18] Cf. J. Oniszczuk, *Prawo do oporu i Radbrucha wizja nieposłuszeństwa obywateli. Opór jako odtworzenie nowoczesnej polis*, [in:] *Nieprzeciętność. Dylematy wolności*, eds. M. Szyszkowska, A. Rossmanith, Warszawa 2013, p. 20. See also *Dobre prawo, złe prawo – w kręgu myśli Gustawa Radbrucha*, eds. P. Mochnaczewski, A. Kociołek-Pęksa, Warszawa 2009.

[19] B. Baczko, *Światła…*, p. 266 ff.

[20] Cf. H. Berman, *Prawo a rewolucja. Kształtowanie się zachodniej tradycji prawnej*, transl. S. Amsterdamski, Warszawa 1995, p. 33.

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a tyrant! He just needs to be young, clever, brave and generous"![21] It must, then, be a person who will always treat the law as a tool for the state policy and he himself will be above the law in this country. Quite rightly, utopias, as "prophecies",[22] should be treated as strictly related to totalitarianisms[23] and can be blamed for them but, certainly, they do not take the whole blame. It would be inadequate and unfair to assume that. We should stop and think: Would the world without utopia be a better place? Although we will never know which way the history would have gone without it, we can most certainly say that the contemporary world without utopia would be civilizationally and culturally poorer.

TYPES OF LAWLESSNESS IN THE CONTEXT OF INSTRUMENTALISATION OF LAW

The instrumental use of law often leads to lawlessness, especially if it is accompanied by examples of injustice. We can differentiate three main types of lawlessness. The first of them is nihilistic lawlessness – the true lawlessness, connected with the etymology of the word. Obviously, lawlessness is the absence of law but, in its hardcore version, it is also the lack of any rules, principles or norms that have a character of legal regulations. The Polish dictionary defines "lawlessness" as "a state not regulated by any laws: anarchy, chaos" and "an illegal act; an abuse" while the adjective "lawless" is defined as "contrary to the law, forbidden by the law, illegal".[24] Certainly, lawlessness in this sense of the word cannot be associated with Plato's nihilism. His ideal state, which is an archetype of utopia, is a state where, despite the lack of laws, there is justice, governance and order. While interpreting the views of this philosopher expressed first in the *Republic* and then in the *Laws*, we can talk about the lack of different laws but not about the lack of values. In Platonic idealism, the ultimate value is attributed to ideas, which are objective realities: perfect, timeless, unchangeable and hierarchized. At the top, we have goodness, beauty, truth and justice – the most important idea both for the law and for the state. The latter is defined as a harmony of civil virtues: wisdom, courage and moderation. It is an indication of the idea of goodness in the life of the state and its citizens.[25] According to Plato "no state or individual can be happy

[21] A. Krawczuk, *Pan i jego filozof. Rzecz o Platonie*, Poznań 1984, p. 180.

[22] Cf. K.R. Popper, *Społeczeństwo otwarte i jego wrogowie*, vol. 2: *Wysoka fala proroctw: Hegel, Marks i następstwa*, transl. H. Krahelska, Warszawa 1993.

[23] Cf. B. Baczko, *Wyobrażenia społeczne…*, pp. 135–157.

[24] *Słownik języka polskiego*, vol. 1: *A–K*, ed. M. Szymczak, Warszawa 1978, p. 148.

[25] M. Szyszkowska, *Zarys filozofii prawa*, Białystok 1994, p. 70.

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if their life is not ruled by reason and justice".[26] Therefore, "the lawgiver ought to have three things in view: first, that the city for which he legislates should be free; and secondly, be at unity with herself; and thirdly, should have understanding".[27] Similarly, political activity is "nothing other than carrying out the principles of justice in practice".[28] However, in his opinion, wrong are those who think "that it is possible to give permanent foundations to a state just by laying down the laws".[29] As a result, in view of Plato's objective idealism, the essence of everything, including the laws, is determined by absolute, timeless and unchangeable ideas. Looking at Plato's political and legal concepts, we can see very clearly legal nihilism, especially in the context of statutory law, but, at the same time, there is also the absolutism of values, which appears to be dominant. Eventually, power exercised by men, even the best ones, turns out to be less certain than the power of good laws. The ultimate principle that ensures justice appears to be "subordination to the law, which exercises its supreme power not only over citizens but also kings if they commit any unlawful acts".[30]

The second form of lawlessness is blatant lawlessness, which can also be referred to as relativist lawlessness. It is a state where the binding law and legal order is violated consciously and deliberately, thus – blatantly. According to the definition proposed by Ulpian (around 170–228 A.D.) "lawlessness takes its name from the situation when something happens against the law; we say that everything that is against the law is lawless".[31] On one hand, lawlessness is also connected with the lack of respect for the law. Hence, even if the law is binding, it is not respected. On the other hand, lawlessness may be identified with self-will. There is always somebody who does not like the binding legal regulations, thinks they make no sense, are disadvantageous and even useless. It should be emphasized here that, just like Rudolf von Ihering (1818–1892) said, there is a constant and ruthless struggle between law and lawlessness.[32] This battle is fought between those who abide by the law and those who violate it. The struggle for law becomes an obligation we have towards ourselves and the whole society[33] because "everybody is a natural defender of law acting in public interest".[34] In this struggle, law is identified with

[26] Platon, *Państwo: z dodaniem siedmiu ksiąg Praw*, transl. W Witwicki, vol. 1, Warszawa 1958, p. 42.

[27] Idem, *Laws*, www.gutenberg.org/files/1750/1750-h/1750-h.htm#link2H_4_0012 [access: 29.12.2020].

[28] *Ibidem*.

[29] *Ibidem*.

[30] Idem, *Państwo*..., p. 73.

[31] Ulpianus, D. 47.10.1, quoted after *Łacińska terminologia prawnicza*, ed. J. Zajadło, Warszawa 2009, p. 34.

[32] Cf. R. von Ihering, *Walka o prawo*, transl. B. Kutyłowski, Petersburg 1894, p. 52.

[33] *Ibidem*, p. 26, 50.

[34] *Ibidem*, p. 55.

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justice and lawlessness with its absence. The positivistic sense of this concept is that the binding law, always and everywhere, determines, defines and delivers justice. Here, the law treated in an instrumental way appears to be a proper tool or even the only and the best weapon to fight against any lawlessness. Ihering summed it up in the best way by saying that "the highest and the bravest element of art and literature is the man's fight for ideals, the struggle for law and truth".[35] That is the struggle that fits perfectly with the beliefs of utopians, the majority of whom were men of letters, mostly rationalists and idealists, rather philosophers and jurists than practicing lawyers.

The third form of lawlessness is the so-called "statutory lawlessness", which, the above-mentioned Radbruch contrasted with "supra-statutory law".[36] This kind of lawlessness means that the binding legal regulations are blatantly unfair and, as such, cannot, in fact, be considered as law. This concept applies also to the imperfections of positive law as compared to the ideal of justice. Due to the formal nature of law – its making and then application – it is, in fact, its form that determines what the law is rather than its content. Therefore, we cannot talk about any law if its application results in any injustice or damage, or, if such law leads, or what is even worse, forces people to do wrong.

WHAT SHOULD LAW BE? LAW IN UTOPIAS

In utopias, we can not only find the answer to this question but also find out what it means that the law is perfect, wise and right. This is the law in its axiological sense: fair, wise and simple, both in terms of content and form. The creators of utopias did not hide the fact that they based their ideas on three ancient sources of the European culture: the Bible, Roman law and Greek philosophy. Quite the opposite, they emphasized those sources and referred to them in practically all law-related contexts.

First of all, in utopias we have clear and quite frequent references to the biblical understanding of law contained therein, which is the manifestation of God's justice. Only a handful of men on Earth remained faithful to God's justice: prophets, including Noah, Abraham, Moses, the wisest of Israeli kings – Salomon or, the capstone of its power – Jesus Christ – the saviour and messiah for Christians, but also the future judge of mankind on Judgment Day. It comes as no surprise since the vast majority of utopists were Christians and many among them, especially in the modern era, were clergymen.

[35] *Ibidem*, p. 85.

[36] G. Radbruch, *Filozofia prawa*, transl. E. Nowak, Warszawa 2009, pp. 244–254.

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The law is revealed in the Old Testament, but justice, righteousness, fairness and every good path can only be understood by those to whose hearts wisdom have entered and to whose souls knowledge is pleasant.[37] The Book of Proverbs praises the just and the righteous. We can read there that happy is he who keeps the Law for he is a wise son; the Lord will not allow the righteous soul to famish; in the house of the righteous there is much treasure; righteousness leads to life; the upright will dwell in the land; righteousness exalts a nation; the desire of the righteous will be granted; the righteousness of the upright will deliver them; the thoughts of the righteous are right; the righteous man walks in his integrity; the righteous will never be removed; the righteous is delivered from trouble; the righteous than others happier; and to the righteous, good shall be repaid.[38] It is also worth remembering that when the righteous are in authority, the people rejoice,[39] and by justice a king gives a country stability[40].

Later, in the New Testament, Jesus Christ, in his teachings, often mentioned his Kingdom and that is what he said about its law:

> Love, not severity radiates from God: sunbeams, not flashes of lightning… when the Kingdom of God is established, that is the Kingdom of love, the children of God and subjects of the King will be given one only commandment which will comprise everything: "Love your God with your whole self and your neighbour like yourself". […] How simple the last Law will be! As God is, Who is perfect in His simplicity. Listen: love God with your whole self, love your neighbour like yourself. Mediate: are the burdensome six hundred and thirteen precepts and all the prayers and blessings not already included in those two sentences, divested of useless cavils, which are not religion but slavery towards God? If you love God, you will certainly honour Him every hour of the day. If you love your neighbour, you will not do anything that will grieve him. You will not lie, steal, kill or injure, you will not commit adultery.[41]

Lech Dubel emphasized that this love to mankind declared by Jesus Christ is not dependent on any human traits such as gender, nationality or profession. According to him, Christ's formula of love, which goes beyond the Old Testament, is not limited to a feeling but foregrounds an active attitude to other people. Thus: "By loving God, we love other people".[42] In view of what Thomas More (1478–1535) later said in his utopia – the first one, after all – about the law (what it should be),

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[37] *Book of Proverbs*, 2:9–10, www.biblegateway.com/passage/?search=Proverbs%202%3A9-10&version=NIV [access: 29.12.2020].

[38] *Ibidem*.

[39] *Book of Proverbs*, 29:2, www.biblegateway.com/passage/?search=Proverbs%202%3A9-10&version=NIV [access: 29.12.2020].

[40] *Book of Proverbs*, 29:4, www.biblegateway.com/passage/?search=Proverbs%2029%3A4&version=NIV [access: 29.12.2020].

[41] M. Valtorta, *The Poem of the Man-God*, https://archive.org/details/Volume1OfThePoemOfTheManGod [access: 29.12.2020].

[42] L. Dubel, J. Malarczyk, *Historia doktryn polityczno-prawnych*, Lublin 2001, p. 65.

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we can conclude that: firstly, life without law is not possible, especially in a community. Secondly, life, especially social life, should be organized based on law. And thirdly, the power of law comes from justice, which is strictly related to its wisdom and simplicity. The inhabitants of Utopia

> have but few laws, and such is their constitution that they need not many. They very much condemn other nations whose laws, together with the commentaries on them, swell up to so many volumes; for they think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk, and so dark as not to be read and understood by every one of the subjects. […] They argue thus: all laws are promulgated for this end, that every man may know his duty.[43]

For most utopists, the second important source of law is Roman law. Latin legal maxims appeared to be particularly useful here. Although they were not quoted directly, the message they carry shows how seriously law was treated in utopias. First of all, I am referring here to the principles of Roman public law (*ius publicum*) connected with power, lawmaking or law enforcement and, secondly, the principles related to different institutions which take their origins in the Roman private law (*ius privatum*).[44] If Romans believed that even robbers have their own laws (*etiam latrones suis legibus parent*), then, obviously, so do all those who want (willingly and consciously) to abide by the law. The point made in this quotation, which is attributed to Cicero, is developed in another of his "golden thoughts" addressed to all those who want to live in accordance with the law, i.e. "we are slaves of the law in order to be free" (*leges non esse servor oportet, ut liberii simus*).[45] Indeed, life without law is impossible and hard to imagine but do we have to regulate literally everything with law? It is against common sense and, even more so, against wisdom, and usually leads to legally sanctioned absurdities. The making or application of law in itself cannot become the sense of life or, even less so, the rationale for power. By interfering into people's private lives or, what is more, trying to control them and regulate by means of statutes, personal freedoms of the individual are gradually limited and finally taken away – and it happens in accordance with the law. When the law becomes a value in itself, it stops being the carrier and manifestation of other values, which it should implement and guarantee.

Most Latin maxims indicate that law is a value in itself, which borders on absolutism. Such an approach to law is confirmed by such commonly known today principles as: *dura lex sed lex*, *in dubio pro reo*, *lex retro non agit*, *nulla poena sine*

[43] T. More, *Utopia*, www.fulltextarchive.com/pdfs/Utopia.pdf [access: 29.12.2020].

[44] Ulpianus: *Publicum ius est quod ad statum rei publicae Romanae spectat, ius privatum est quod ad singulorum utilitatem spectat* (quoted after *Wstęp do nauk prawnych*, ed. A. Jamróz, Białystok 1998, p. 84).

[45] *Latin maxims*, https://best-quotations.com [access: 29.12.2020].

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lege, *pacta sunt servanda*.[46] Besides, the law does not concern itself with trifles (*de minimis non curat lex*) and the law does not arise from injustice (*ex iniuria non oritur ius*).[47] There are too many laws that do not introduce order but contribute to chaos, making our life even more difficult and complicated than it really is instead of making it easier and simpler. Even Tacit (approx. 55–120 A.D.), an ancient Roman historian, warned that: "the more numerous the laws, the more corrupt the government" (*corruptissima res publica plurimae leges*).[48] In utopias, it is postulated, just like the Romans wanted, that laws should be concise (*legem brevem esse oportet*) and easy to understand for everybody (*leges ab omnibus intellegi debent*).[49]

What is more, the Romans, just like Plato, came to the same conclusion regarding the relationship between law and power holders. According to them, the authority of the rule of law is always more powerful and mighty than the authority of men (*imperia legum potentiora quam hominum*),[50] and those who hold power cannot stand above the law. They claimed that it is much better if there is any law, even if it has its shortcomings, than when there is no law at all (*melior aliqua quam nulla lex*).[51] Although realistic and pragmatic, the Romans idealized the law and emphasized its great importance for the society. They believed that laws are the foundations of an efficiently functioning state (*in legibus fundamentum rei publicae*) and understood that stern masters do not reign long (*iniqua numquam regna perpetuo manent*).[52] Therefore, in order to exist all peoples must be ruled by laws and customs (*omnes populi legibus aut moribus regentur*),[53] and the state is nothing else but an association of citizens based on law (*quid est enim nisi iuris societas civium*).[54]

On the other hand, the Romans understood that to know the laws is not to observe their mere words, but their force and power (*scire leges non hoc est verba earum tenere, sed vi mac potestatem*).[55] Being aware of the threats related to the complexity of law and strict adherence thereto, they even considered the latter to be supreme injustice (*summum ius summa iniuria*).[56] What is more, they came to the

[46] "Tough law but still a law" (D. 40.9.12.1); "When in doubt, [for] the accused" (D. 50.17.125); "The law is not retroactive" (ad C. 1.14.7); "Agreements must be kept" (ad D. 2.14.7.7). Quoted after W. Wołodkiewicz, *Czy prawo rzymskie przestało istnieć?*, Kraków 2003, pp. 176–178.

[47] *Latin maxims…*

[48] Tacitus, *Ab excessu divi Augusti*, *Annales* III, 27, quoted after *Sentencje łacińskie*, comp. M. Dubiński, Warszawa 2005, p. 335.

[49] C. 1.14.9, quoted after: *Łacińska terminologia…*, p. 41.

[50] *Latin maxims…*

[51] *Ibidem*.

[52] *Ibidem*.

[53] *Ibidem*.

[54] Cicero, *De re publica* 1.49, quoted after W. Wołodkiewicz, *op. cit.*, p. 177.

[55] D. 1.2.17, quoted after W. Wołodkiewicz, *op. cit.*, p. 173.

[56] Cicero, *De officiis* 1.33, quoted after W. Wołodkiewicz, *op. cit.*, p. 176.

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conclusion that the law should be comprehensible to all (*leges ab omnibus intellegi debent*)[57] because where the right is uncertain there is no right (*ubi ius incertum, ibi ius nullum*).[58] The law presented in utopias is usually based on Roman principles and the meaning they carry: wisdom, universality and, most of all, respect for law in general and for the values that the law represents and safeguards. In utopias, not only freedom is protected by law (*libertas in legibus*)[59] but also all other values because without law they would be utopian and in utopia, they are not. Thanks to those values, the law becomes more meaningful and thanks to the law, values can be put into practice. To sum up the above deliberations, it may be said that the Latin maxim which best fits both the world of utopia and the real one is: wherever there is society, there is, or at least, there should be law (*ubi societas, ibi ius*).[60]

Also the legacy of Greek philosophy is clearly visible in utopia, just like that of the Bible and the Roman law. What was particularly useful for utopists were the Greek philosophical concepts concerning the state and the law. The first of them is connected with a branch of philosophy known as political philosophy, whose purpose is to find the best polity for the state, including legal solutions and reflections on the possibilities of holding the power. The second is connected with the perennial reflection on the essence of law, its functioning and axiology.[61] In Greek mythology, the three daughters of Zeus and Themis were goddesses: Eirene – the goddess of peace, Dike – the goddess of socially enforced justice, and Eunomos, who was identified with the rule of law. The Greeks understood that they had to make sure the law is good. The Romans believed that the law is their king (*lex est rex*) and in the modern era, all of that has been confirmed and developed into the doctrine of the state based on justice and integrity, or, in other words – the rule of law (*Rechtsstaat*). At present, the idea of "implementing the principles of social justice" is practiced by the Republic of Poland, which, in accordance with the binding constitution, is "a democratic state ruled by law",[62] which, "to put it simply, can be defined as the obligation of public authorities to act with respect for the rule of law".[63]

In this context, a great example of modern political philosophy and the philosophy of law is a pro-republican concept presented by Immanuel Kant (1724–1804), who described the proper relations between politics and law by saying that "all politics must bend the knee to the principle of right, and may, in that way, hope

[57] *Codex Iustinianus* 1.14.9, quoted after W. Wołodkiewicz, *op. cit.*, p. 173.

[58] *Latin maxims…*

[59] *Ibidem*.

[60] *Ibidem*.

[61] Cf. G. Radbruch, *Filozofia…*, pp. 13–21.

[62] Article 2 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: 10.02.2021].

[63] M. Derlatka, *Wprowadzenie*, [in:] *Konstytucja Rzeczypospolitej Polskiej*, Warszawa 2012, p. 9.

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to reach, although slowly perhaps, a level whence it may shine upon men for all time".[64] Therefore, "politics which is in accordance with law is just and useful; the opposite makes it false and ugly".[65] However, woe to him who does politics and does not hold the binding law as sacred.[66] At the same time, it is still a fact, and an issue of concern that "politics undergoes juridification, i.e. it is more and more often subjected to legal rules and values" but also the fact that there are no "social norms, other than formally imposed legal regulations, that would structure political life".[67]

Thomas More, the author of the first modern utopia and an educated jurist, an advisor and a chancellor of Henry VIII, King of England, was certainly inspired by the Bible, the Roman law and philosophical and legal reflections regarding the values that are important for the law.[68] The next utopists followed in his footsteps and usually chose the easiest way, i.e. discarded a certain type of law, its branch or certain legal institutions claiming them to be unnecessary. Hence, in utopias we may not find certain branches of law that we are familiar with such as, for instance, constitutional law – when there is no constitution (in its formal sense) or we do not have a number of legal acts (constitution in its material sense) of major significance; marital and family law – when there are no marriages or families; criminal law – when there is no crime; tax law – when taxes are not collected, etc. In this way, we can create a conceptual model of a society which has no legal regulations or instruments for the given aspect of life. On the other hand, however, utopias can come up with new regulations that are deemed necessary and cater for the needs related to different life situations. Very often, in utopias we have new legal solutions, which forerun new branches of law such as the branches of contemporary law: labour law, ecclesiastical law, penitentiary law. The absence of certain branches of law in a utopia is usually manifested by the absence of a code that would regulate it. This is why, first of all, a utopia may not have the kind of law that is fundamental in our world, i.e. statutory, man-made law (positive law) in the form of different normative acts such as constitutions, acts, edicts, decrees, ordinances, regulations, orders, etc., which are not adopted in a utopia. The existence of the law of nature

[64] I. Kant, *Perpetual Peace, a philosophical essay*, https://archive.org/stream/perpetualpeaceph00kantuoft [access: 29.12.2020].

[65] Idem, *Wznowione pytanie czy rodzaj ludzki stale zmierza ku temu, co lepsze?*, transl. M. Żelazny, [in:] idem, *Spór fakultetów*, Toruń 2003, p. 188. See also B. Szlachta, *O pewnym temacie podejmowanym przez amerykańskich filozofów polityki*, [in:] *Amerykomania. Księga jubileuszowa ofiarowana Andrzejowi Mani*, ed. W. Bernacki, vol. 2, Kraków 2012, pp. 847–848.

[66] Cf. M. Szyszkowska, *Filozoficzne interpretacje prawa*, Warszawa 1999, p. 118.

[67] Cf. W. Staśkiewicz, *Prawo jako narzędzie polityki państwa okresu przemian (przeszłość wobec przyszłości)*, [in:] *Prawo a polityka*..., p. 75.

[68] Thomas More was beatified in 1886 by Pope Leo XIII and canonised in 1935 by Pope Pius XI. Pope John II declared More the patron saint of politicians and statesmen in *Motu proprio* encyclical of 31 October 2000. See D. Agasso, *Święci na każdy dzień. Czerwiec*, transl. K. Stopa, Kielce 2009, pp. 93–94.

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(natural law) is less often questioned by utopists, who are much more willing to rely upon it and treat it as a law which is universal, linked to human nature or has divine origins. But what we most often see in utopias are the local people, who respect the rules of customary law, based on the wisdom and justice of their ancestors and traditions. Hence, law, in this form or another, is usually present in social utopias although its role is not always emphasized. Even though, in theory, a utopia without a specific kind of law is possible, in practice, when there is no statutory law in a utopia, there are some norms derived from customary law, natural law, divine law, etc. In general, utopias acknowledge the co-existence of different kinds of law that come from such sources as God, Nature, customs, legislation or precedents.

Probably the most reasonable, so far, explanation of what law should not be was provided by Wilhelm Weitling (1808–1871), in his *Guarantees of Harmony and Freedom*. We can read in his utopia:

> There will be no crimes! Hence, there will be no punishments, judges, police, prisons, prison guards; there will be no patrolmen, court clerks, barristers; there will be no complaints, no prosecutors and no accused; there will be no criminal codes or court files, no executioner's axes, gallows or sticks; there will be no terror or fear; there will be no pretend virtues or vice; there will be no more murderers, bandits, thieves, slanderers or frauds! […] The same goes for producing all unnecessary papers such as: purchase or rental agreements, apprenticeship contracts, prenuptial agreements, leases, work contracts and other: rent and debt papers, last wills, calls for payment, court reports, mortgages, passports, circulars, tax lists; the whole caboodle will be all unnecessary.[69]

It is hard to imagine our life without all that but all we need is "to live honestly, to harm no one, and to give to each one his due"[70] – that is a really important, if not the most important, thing about the law – because this is what justice is.[71]

There is no doubt that what counts in the utopian approach to law is not the quantity – the number of regulations – but the quality of law, i.e. its basic content, which determines justice thanks to its wisdom and simplicity. It is clear that wisdom and justice are not only timeless values for the law itself but also universal values for people as intelligent and, at the same time, social creatures. Therefore, philosophical and legal reflections regarding, most of all, "legal axiology, which is the system of values underlying the whole legal system"[72] is an indispensable element of utopian thinking and the utopian world.

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[69] W. Weitling, *Gwarancje harmonii i wolności*, transl. E. Werfel, Warszawa 1968, p. 316, 318.

[70] Ulpianus, D. 1.1.10: *Iuris praecepta sunt haec: honeste vivere, alterum non ledere, suum cuique tribuere* (quoted after *Łacińska terminologia…*, pp. 35–36).

[71] See M. Jońca, *Praecepta iuris, czyli o tym, co jest w prawie naprawdę ważne*, „Edukacja Prawnicza" 2011, no. 3(123); P. Kołodko, *Sprawiedliwość jako naczelna idea prawa*, [in:] *Filozofia prawa w życiu i nauczaniu*, ed. M. Szyszkowska, Białystok 2004, pp. 134–142.

[72] A. Sylwestrzak, *Historia doktryn politycznych i prawnych*, Warszawa 2011, p. 18.

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CONCLUSION

Each law should be analysed with reference to Radbruch's concept of law triad: legal certainty, expediency and justice.[73] As underlined by Maria Szyszkowska, justice determines the form of law, to ensure legal certainty the law must be statutory while "expediency entails the determination of the contents of law".[74] Nevertheless, it is justice that is of the utmost value for the law itself, both in its axiological and ontic sense. Radbruch himself, in the fourth minute of his *Five Minutes of Legal Philosophy*, wrote:

> Of course, it is true that the public benefit, along with justice, is an objective of the law. And of course, laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course, it is true that, owing to human imperfection, the three values of the law – public benefit, legal certainty, and justice – are not always united harmoniously in laws.[75]

Just like in Corinthians 13 – The Hymn to Love, among the three listed divine virtues: faith, hope and love, love is the greatest one, if there was a hymn to justice, among the three values of law: certainty, expediency and justice – justice would be the most important one.[76]

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[73] See G. Radbruch, *Filozofia…*, pp. 79–84.

[74] M. Szyszkowska, *Teoria i filozofia prawa*, Warszawa 2008, p. 188.

[75] G. Radbruch, *Five Minutes of Philosophy*, http://wystap.pl/wp-content/files/Radbruch_Extreme_Injustice.pdf [access: 29.12.2020].

[76] A potential Hymn to Justice could go like that: "If there were no hungry or thirsty, / Poor or humiliated, / But there was no justice, it would be nothing. / If all men were made happy, / They enjoyed unrestrained freedom, but had no justice, / They would have nothing, / Because deep down they would still feel enslaved. / If law made them equal, / They would demand privileges and aim at inequality. / If the law declared that people were brothers and sisters, / They would swear they were strangers to one another. / Even if there was to be eternal peace, governance and order, / But for the price of justice, / It would be worse than war. / It would just be a cover-up for unimaginable chaos. / Because justice is like love, / It is an eternal blessing: / Divine for believers, the majesty of the state for those who crave for it. / Justice is the foundation for law-abiding rulers, / Who know that absolute adherence to regulations can turn into great lawlessness. / Justice is also patient. / It is not guided by personal likes and dislikes, / Which can turn it around. / It never looks for revenge because it knows no anger. / Justice is the art of doing what is good and right, / Always based on wisdom. / Justice needs courage and moderation. / It is an eternal, unchangeable and perfect principle of all laws. / It is about giving everybody what is due to them. / It contemns all vice and crime. / It cares only about the truth, recks little of father's or mother's tears. / It is a sister of peace and the rule of law. / Justice always wins in the end, / Even if it is only in the conscience of that who pleads guilty. / It believes in good will, / Vests its hopes in people's hearts, / Loves penitence and repentance, / Especially for wrong thoughts, words and acts. / Without it, we will vanish into thin air. / It's only thanks to justice that we can survive. / Trying to achieve it – we really become better. / So now certainty, expediency and justice abide. / These three values of the law that bring justice the most".

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Utopias assume that law secures and guarantees justice and, in consequence, the happiness of the people who live in them. The famous Radbruch Formula: *Lex iniustissima non est lex*[77] should then be considered to be the most important of principles of all laws and, most of all, the positive law, which should be binding in the real world just like the laws that are binding in utopias. "The law (legal act) unjust in its content loses its legal features [and] […] the law which does not attempt to do justice will be rejected as untrue (lawless)".[78] Hence, justice is there or not there and there is no such thing as "totalitarian justice",[79] which always remains to be injustice. Although we should not always identify the binding law with justice, whether or not a given law is a true law will always be determined on the basis of justice.

The law in utopias is necessary. First of all, it is vital for their very existence as the worlds which are not really there. Secondly, the law in utopias is necessary to transform the real world as it is the best and the most efficient tool, plan and method that can be used for this purpose. A utopia without the law is usually a kind of a negative utopia or rather an anti-utopia or dystopia. There is no doubt that the latter is associated with lawlessness, especially statutory lawlessness, which brings to mind the injustice of each totalitarian system. On the other hand, the purpose of classical utopias, i.e. positive utopias, is to create a community that is absolutely perfect on all levels: social, political, economic, moral, etc., and that cannot exist without equally perfect, i.e. based on the idea of justice, law, which creates, organizes and protects such a community.

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[77] A less radical and, at the same time, original version of this formula is: *Lex iniusta non est lex*, which most probably comes from Augustine of Hippo / Saint Augustine (354–430). Quoted after *Łacińska terminologia…*, p. 42.

[78] J. Oniszczuk, *op. cit.*, p. 16.

[79] Cf. K.R. Popper, *Społeczeństwo otwarte i jego wrogowie*, vol. 1: *Urok Platona*, transl. H. Krahelska, Warszawa 1993, pp. 108–142.

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ABSTRAKT

Charakter naukowo-dydaktyczny artykułu wiąże się z próbą odpowiedzi na postawione w tytule pytanie o to, czy możliwa jest utopia bez prawa. Argumenty teoretyczne podane przez autora prowadzą do udzielenia odpowiedzi twierdzącej, a zarazem tezy, iż nie ma w gruncie rzeczy utopii bez prawa. Prawo nie tylko jest obecne w utopiach, zarówno pozytywnych, jak i negatywnych (antyutopiach i dystopiach), lecz także w znaczącym stopniu decyduje o ich istnieniu i funkcjonowaniu. W rezultacie wiąże to myślenie utopijne z rzeczywistością. Każda odpowiedź na powyższe pytanie jest więc możliwa i w dyskursie naukowym zasadna. Jednakże autor uzasadnia, że w przypadku zdecydowanej większości utopii społecznych jakieś prawo zazwyczaj obowiązuje, a nawet musi w nich być. Istotą prawa w utopiach jest bowiem sprawiedliwość, a tej nie ma bez mądrości. Taki właśnie stosunek do prawa przejawia się w Biblii. Takie przesłanie niosą również zasady prawa rzymskiego oraz wynika ono z filozoficzno-prawnej refleksji. Przywołując poglądy m.in. Platona, Immanuela Kanta, Rudolfa von Iheringa, Gustava Radbrucha, Karla R. Poppera i Bronisława Baczko, autor wskazuje na prawo

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jako ważny element świata utopii, który je współtworzy, podobnie jak ma wpływ na rzeczywistość. Nie ma zatem utopii bez prawa jako idei sprawiedliwości wcielanej w życie społeczne ludzi będących istotami rozumnymi.

Słowa kluczowe: utopia; prawo; myślenie utopijne; rzeczywistość; dyskurs naukowy; prawo rzymskie; sprawiedliwość

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