

# ТЕОРІЯ ТА МЕТОДОЛОГІЯ ПУБЛІЧНОГО ПРАВА



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## *The outline of the subject of biojurisprudence (part 2)\**

### **The Epistemology of Biojurisprudence**

Epistemology or gnoseology, as the names derived from Greek, have their equivalent in the term: theory of cognition. The subject of theory of cognition, it would even be better to speak of the theory of getting to know as after all it is still an open and unfinished process, are above all the methods and limits of cognition. The epistemology of biojurisprudence, using various cognitive methods, seeks to know life within the boundaries of the need to regulate it by legal norms, in their relations with religious and moral norms. The specific nature of getting to know life in its diverse aspects consists in determining this process of cognition precisely with life, therefore,

this is always, at least to some extent, the cognition of oneself. Certainly, the cognitive process cannot omit such fundamental issues as the concepts of truth, causality, fact and fiction, etc<sup>1</sup>.

Biojurisprudence is based on the cognitive assumption that life is the pre-value and prenorm of everything that exists, especially of the law. It is the pre-value because it has an intrinsic value, primary and fundamental to all other values as their source. It is the prenorm because it shapes itself – regulating itself and organizing itself, at the same time showing the determinants and limits of all other regulation. This prenorm is most clearly observable in the thought of natural law, which derives appropriate sets of norms from the process of cognition

\* *Продовження.* Початок статті див.: «Публічне право». – 2013. – № 3.

<sup>1</sup> The problems of biojurisprudence were presented in the form of research projects by inter alia the Faculties of Law and Administration of the Jagiellonian University in Krakow and Białystok University. Professor Oktawian Nawrot of the Faculty of Law and Administration conducts graduate seminars in *Biojurisprudence and philosophy of law*.

of the nature of human life, the society, the world, and images of deities. All other trends in legal thought therefore focus their attention on secondary problems, not directly associated with life as the prevalue and the prenorm, which is recognized and emphasized by biojurisprudence. However, while the thought of natural law is characterized by a clearly philosophical, often speculative nature, biojurisprudence bases its cognitive process and its results mainly on scientific discoveries.

The scientific discoveries of comparative law point to contextualism as a necessary condition of the epistemology of biojurisprudence. The cognitive importance of biojurisprudence depends on the contexts in which life is considered. These contexts are intrinsic to all the issues of biojurisprudence because they not only define the kind of life but also show its environment and cultural determinants. The relation between a biojurisprudential issue and the context determines the cognition of its essence of content and function. Cultural diversity in almost all biojurisprudential problems enable us to speak of comparative biojurisprudence, both domestic and international, even global. The ideas of cultural uniformity still belong to non-realistic thought. Therefore, local determinants mainly determine the choice of the problems to be considered, ways of solving them, and the adoption of specific decisions to be implemented in practice, with the intention to overcome or deepen inequities among people in their endeavors to strengthen their life, as long and best as possible. Here, biojurisprudence takes into account the contexts of sensitivities of local cultures to the elimination of hunger, poverty, pathologies, wars, diseases, suffering, unnatural death rate, depending on the character of the authorities – communist, participatory, or authoritarian.

Just as there are different ways of cognitively practicing bioethics, so too this applies to biojurisprudence, inspired by the rise and development of the former. These ways are anthropocentric and cosmocentric, theoretical and empirical, descriptive and evaluative, narrative and normative. They have specific limits determined by the limits of the prevalue and prenorm of life, and their own cognitive capacities. Their common ultimate limit is finiteness or finitude in the sense of the death of human, animal, and plant life, the imperfection of human cognition, imperfection of judgment or religious and ethical evaluation, or finally, in the sense of imperfection in regulating the lives of individuals, societies, and the world<sup>2</sup>. Discussions on finitude and limits are necessary for the methodological description and deepening of the subject of biojurisprudence. Advances in biological and medical sciences, once inconceivable for traditional jurisprudence, shift the limits of possibilities of interference in life processes beyond the boundaries of religious faith and of moral admissibility. Not only have definitions of death multiplied, but also the formerly clear-cut boundaries between life and death have become blurred. Axiological and normative systems are lagging behind the extraordinary achievements in biotechnology and biomedicine.

Finitude as a cognitive theory is neglected in practical sciences, including traditional jurisprudence and the law based upon it. Recognized and appreciated by biojurisprudence, finitude allows us to better characterize the ontological limitation of life on a certain level of earthliness. The concept of finitude may cause annoyance among all those who find it painful realize that their own life must necessarily end. In religious faith, finitude is contrasted with the theological idea of eternal life, but it is not

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<sup>2</sup> In English-language literature on the subject this is the conception of finitude. See C. Rehmann-Sutter, M. Duwell and D. Mieth (Eds.), *Bioethics in Cultural Contexts. Reflections on Methods and Finitude*, Springer 2006, p. 1 et seq.

earthly and not certain. Ignoring the finitude of life as a constitutive feature of human existence means the lack of existential authenticity as Martin Heidegger aptly put it. Death is an indispensable element, an ontological weakness, inevitable necessity, frequently tragic, but it does not depend on human choice. The concept of finitude enriches the secular cognitive tools of biojurisprudence, without having to rely exclusively on religious or metaphysical premises. It shows clearly that both the prevalue and prenorm of life also have their final limits.

The mature epistemology of biojurisprudence should constitute open reflection on the content, values, and norms of various cultures on our globe, on all levels of knowledge and methodology. Apart from multi-dimensional contextualism, it should be characterized by many cognitive perspectives or pluriperspectivity<sup>3</sup>. If this epistemology is to be useful in practice, it must discover the good and the righteous in human life. As a special «factory of practical rationality», pragmatic wisdom, and useful prudence, it assumes the need to be involved both in eliminating manifestations of evil damaging to life and the attainment of good or even better life. When it rejects certain biotechnological and biomedical achievements, it adopts a utilitarian attitude, also called consequentialist, comparatively estimating that fears outweigh hopes, or a deontological attitude, justifying fears with religious or metaphysical reasons. When it accepts these achievements, it praises the freedom of scholarly research, expresses trust in scientists and science, it separates research from the applications of its results, it restricts applications rather

than research, it closely combines the development of humanity with the advances and development of science. Unlike the thought of natural law, biojurisprudence is not based on imaginary concepts of nature and natural laws that do not exist even in liberal states<sup>4</sup>. The focus of its cognitive pluriperspectivity includes the ideas of autonomy, tolerance, and responsibility.

The process of cognition of the essence, origin, and purposes of life has been going on from the very beginnings of the thinking man. Life is the circle of cognitive interests of almost every serious thinker<sup>5</sup>. In the history of philosophical thought, two main currents, related by sense, in the philosophy of life developed: vitalism and naturalism, also called biologism. The knowledge of justifications of life in these currents provides the basis for creating normative systems: ethics, bioethics, and biojurisprudence.

Vitalism derives its name from the Latin expression *vis vitalis* – life force. Initiated by Paracelsus, it was developed further by eighteenth- and nineteenth-century physiologists. It arose from the belief that between animate organic nature and inanimate inorganic nature there is a fundamental difference in quality. It consists in the impossibility to derive the inanimate from life. In any manifestation of life there is its characteristic life principle differently named by various thinkers – entelechy, the dominant, cell soul, life instinct, or life force. Some thinkers gave it spiritual properties, others – material ones, at the same time without identifying it with either the spiritual or the material. Being expressed in the affirmation and cult of the completeness and expansion of all manifestations

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<sup>3</sup> For the term, see *ibid.*, p. 5 et seq.

<sup>4</sup> On the relations between the thought of natural law and biojurisprudence see R. Tokarczyk, *Refleksje o życiu jako fenomenie kulturowym* [in:] *Księga Jubileuszowa poświęcona Profesorowi Zdzisławowi Cackowskiemu*, (eds.) J. Dębowski, M. Hetmański, Wydawnictwo UMCS, Lublin 2000, p. 311 et seq.

<sup>5</sup> Also getting to know the assumptions of biojurisprudence, even by serious thinkers, requires some effort, which they seem to wish to avoid T. Twardowski, A. Michalska, *Kontrowersje – Klonowanie*, «Medycyna Wieku Rozwojowego» 2001, V, Supplement I to no. 1.

of life, this ontological vitalism is translated into the language of epistemological vitalism, axiological vitalism, methodological vitalism, and normative vitalism. What is regarded as the opposite of each of the vitalisms is mechanicism. These vitalisms have been countered since the twentieth century by neopositivism, which reduces philosophy to the logical analysis of language on the basis of experience<sup>6</sup>.

Naturalism is the term derived from Latin *naturalis* – natural, innate, inherent. This term, interchangeably used with the term biologism, regards behaviors as good, fair, and just, when they defend life, promote life, and seek to maintain the long and life of the human species. Unlike vitalism, in naturalism, the emphasis on the principal value of life is at the same time aimed at the normative protection of maintaining it. Herbert Spencer, as one of the main exponents of naturalism, regarded the selfish maintenance of one's own human life as the main criteria for goodness, fairness, and justice. He justified this equation by the contents taken from biologism, evolutionism, hedonism, relativism, and utilitarianism, at the same time rejecting absolutism and ascetism. In Friedrich Nietzsche's thought the attitude of full, exuberant life – Dionysian – was contrasted with the Apollonian attitude – that of morbid deviations of ascetic idealists. Naturalism included in the circle of its representatives the aforementioned J. M. Guy, and parts of the views of earlier thinkers: Epicureanism, Stoics, Cynics, Cyreneans, Hobbes, Helvetius, Rousseau and others. Both vitalism and naturalism, however, interpret human life too one-sidedly; they see only the biological life of man without sufficiently appreciating his/her spiritual and social life.

The closest to ideas of the protection of life is the ethics of reverence for all life advanced by Albert Schweitzer. In his view, only such ethics is complete, profound, sensitive, mature and serious. He explains that the ethics of reverence for life, which requires kindness to all living beings, corresponds to the natural sensitivity of any thinking man. By practising ethical behavior towards all creatures we are a spiritual relationship with the Universe Through reverence for life we become religious in a natural, profound, vivid way. The fundamental fact of which we are aware at any moment of existence, is this: 'I am life that wants to live, in the midst of life that wants to live'. 'Goodness is the saving or helping of life, the enabling of whatever life I can to attain its highest development Evil is what annihilates, hampers, or hinders life' [or 'good consists in maintaining, promoting, and enhancing life, and that destroying, injuring, and limiting life are evil'] The fundamental ethical principle is therefore reverence for life. Everything that we render to a living being as good is ultimately the assistance we provide to maintain and enhance its existence. Most importantly, reverence for life commands us to do the same as the ethical principle of love. The difference being that reverence for life contains the justification for the imperative of love and demands compassion for any creature<sup>7</sup>.

Biojusgenesis, along with biojustherapy and biojusthanatology, is one of the three elements, which co-create the subject matter of biojurisprudence. For that reason, for biojusgenesis in particular, and for biojurisprudence in general, certain epistemological significance is attached to the philosophical, scientific and religious problems pertaining to the origin of life<sup>8</sup>. For these

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<sup>6</sup> See *Słownik etyczny*, (ed.) Stanisław Jedynek. It concisely discusses the views of the main representatives of vitalism, especially J. M. Guyan.

<sup>7</sup> A. Schweitzer, Speech delivered in 1952 in Academie des Sciences Morales et Politiques in Paris [in:] I. Lazari-Pawłowska, *Schweitzer*, translated by K. Krzemień, Warszawa 1976, p. 226 et seq.

<sup>8</sup> An introduction to these vast problems, widely discussed for a long time, was prepared inter alia by D. Soczyńska, *Nauka i filozofia o pochodzeniu życia* [in:] *Wykłady z filozofii dla młodzieży*, (ed.) K. Łastowski, P. Zeidler, Poznań 2001, p. 19 et seq.

issues, expressed with the question about how the world and man originated, there are two competing answers: secular evolutionism and religious creationism. According to evolutionism, the theory developed by Charles Darwin, the path that the life of individual species of living beings traveled after the Earth came into being has a nature of long-term evolution. Religions, however, see the driving force of all life in a single act of creation performed by differently understood gods. While evolutionism is based on materialist foundations, creationism has no real, sense-based, perceptible object of research because it appeals to religious faith. The fact that creationism ignores the fundamental principle of scientific methodology – possession of a real object of research – does not deprive it, however, of importance to biojurisprudence. This importance stems from the serious impact of religion on the shaping of normative axiology.

The coexistence of many religions and many moralities creates cognitive difficulties in axiological and normative choices for liberal, democratic and pluralist societies. The problem is to choose the authority empowered to define what is good and what is evil from a moral standpoint, and what is just and unjust from a legal standpoint. The role of biojurisprudence, in its closest relationship to bioethics, in publicly recognizing, considering and making axiological and normative choices, consists in providing information indispensable for making biolaw established in the bioethical beliefs of societies. In shaping these beliefs, one should indicate one or more general principles, from which particular norms could be derived. The choice of one principle is supported by the principlist approach, and of more than one principle – by the four principles approach. Both approaches seek this principle or principles in the contexts of the whole

subject of biojurisprudence connected with the subject of biolaw.

Although biojurisprudence is based on one ontological, axiological and normative principle – precedence of life as the prevalue and prenorm, yet it is still seeking one epistemological principle. The quest for such a principle in bioethics has so far been unsuccessful in pluralist societies. Even the search for a procedural principle of social consensus on the material foundation of the principles of value and regulation of life does not go beyond the level of dispute. There are also doubts as to whether the task of these academic disciplines – bioethics and biojurisprudence – consists in seeking to attain a social consensus. We should distinguish here between a desirable cognitive consensus and a consensus, almost always raising some doubts, about the practical application of it. Despite instances of social consensus, people in the present-day world still do not fully know what they are obligated to do to one another in practice. Bioethics and biojurisprudence formulate in this area only minimal although most important bases for such practical obligations.

The four principles approach avoids seeking one most general principle, trying to distinguish the medium-range principles that govern bioethics and are useful for biojurisprudence. They are: 1) respect for man's autonomy; 2) nonmaleficence; 3) beneficence; 4) justice<sup>9</sup>. Although the second and third principles essentially express the same, only in the negative or positive form, they can all be useful, however, for the contextual analyses in bioethics and biojurisprudence. Without imposing some hierarchy of their cognitive importance, they can be equally helpful in developing more particular norms of solving bioethical and biojurisprudential conflicts. The authors of the four principles approach also introduced the concepts of cohe-

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<sup>9</sup> See T. Beauchamp, J. Childers, *Principles of Biomedical Ethics*, New York 1979, 5th edition 2001.

rentism and specification belonging to the epistemology of bioethics and biojurisprudence Coherentism or 'reflexive equilibrium', as John Rawls termed it, is the process of two-way adjustment of general principles to particular norms, and particular norms to general principles. Specification, on the other hand, applies to general principles so that more particular norms could be deduced from them.

For the purposes of biojurisprudence, I propose the epistemological principle of obviousness or self-evidence as the basis of the cognitive certainty of truth at the same time. Self-evidence is sometimes accepted as a criterion of truth while certainty is distinguished from belief, conjecture, opinion, and plausibility. When defining self-evidence the conditions of immediacy and visualization (visual intuition) of cognition co-occur as the sources of obtaining knowledge, in our case – the knowledge of life. Out of many cognitive activities claiming to be immediate, only to getting to know one's inner life, whether spiritual or psychical, called introspection, raises no objections to its immediacy. Visual intuition does characterize sense-based cognition of life; it is more difficult, however, to speak of visualization in getting to know even one's own inner life, the less so the manifestations of purely intellectual life. Science accepts, however, that if we attribute to cognitive evaluations and their relations their self-evidence stemming from immediacy and/or from visualization, we thereby confirm their truth or falsity. The concept of self-evidence, close to the concept of intuition, applies first of all to simple, uncomplicated cognitive contents, here concerning life.

With the cognition of life, just as with cognition of other phenomena, there are as many cases of self-evidence as manifestations of immediacy and visualization of life being known. There is thus

sense-based, spiritual, emotional, rational self-evidence and its other types. Theorists explain these types of self-evidence in the group of cases of empirical or assertorical self-evidence, and in the group of cases of aprioristic or apodictic self-evidence. In either group, the ascertainment of self-evidence excludes doubt, for example as in Descartes' famous proposition: *Cogito ergo sum*. Contemporary epistemology finds a proposition self-evident which is enough to understand to be convinced about its truth or falsity. In biojurisprudence self-evidence is applied more broadly in ontology and epistemology while its axiology and methodology will probably never attain such a broad range of consensus in pluralist societies. When examining the relationship between self-evidence and truth, it is easy to observe that they are determined by the levels of sensitivity, abilities, intelligence, education and socialization. Self-evidence has then the character of subjective self-evidence – intellectual or emotional, in contrast to objective self-evidence – independent of whether it is perceived or not perceived by a cognitive subject. In broader studies on truth, unconditional or absolute certainty (*certitudo absoluta*) both empirical (assertorical) and aprioric (apodictic) is distinguished from conditional certainty (*certitudo conditionale*) also both empirical and aprioric<sup>10</sup>.

### **The Axiology of Biojurisprudence**

The axiology of biojurisprudence is a constituent element of the subject of biojurisprudence, which produces probably the most important disputes, difficult to resolve unambiguously, concerning the value of law. Seeking to eliminate these disputes, for example on the basis of the principle of self-evidence understood by anyone, biojurisprudence sees the primary, highest and fundamental value in life, especially in human life.

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<sup>10</sup> For more, see inter alia S. Judycki, *Szkic o oczywistości i pewności*, available on the Internet.

Life, as the primary value or prevalue, creates the first natural norm, the prenorm for all the other values of law: justice, rightness, order and others expressed in legal norms. Life, as the highest value is a value in itself, which conditions the origination, existence and realization of all other values. Finally, life is a fundamental value because the whole world of humans, animals and nature arises from it. For these indisputable reasons, life deserves normative protection on the part of all normative systems, especially law, religion, and morality.

The boundaries of the axiology of biojurisprudence run between the affirmative extreme of the cult of life and the destructive extreme of the cult of death. The cult of life was extolled by many trends of thought, especially Epicureanism or hedonism. The cult of death, however, is found in justifications for sacrificing one's life for gods, nation, family, and for desperate rejection of its low quality. The cult of life makes one treat life as a special gift, right, and duty while the cult of death appeals to higher values than the life of an individual. Therefore, 'man lives not only by the power of his body, not only by the energy of his life, but above all by the way he/she is dedicated to values'<sup>11</sup>. Values, *nolens volens*, permeate the whole of human life, hence it is impossible to evade axiological issues. They also imbue the whole of legal thought and all law, which is recognized and emphasized by the axiology of biojurisprudence.

Although man's life is a value in itself, it is subject to evaluation by different conceptions of its quality. One of the most mature conceptions is one of the indicators of quality of life developed by the British weekly «The Economist». These are the indicators, which make the axiology of biojurisprudence

realistically measurable: material well-being indicated by the GDP per person in US dollars; health with life expectancy; political stability and security ratings; family life with divorce rate per 1000 population; community life assessed with the rate of church-attendance or trade-union membership; climate and geography distinguishing between warmer and colder climates; job security measured with unemployment rate in percent; political freedom with political and civil liberties on a scale of 1 (completely free) to 7 (unfree); and gender equality measured with the ratio of average male and female earnings<sup>12</sup>. The axiology of biojurisprudence recognizes quality of life as a highly significant feature of life's value belonging to the domain of regulation, not only by law.

The axiology of biojurisprudence rests on the credo of the axiology of bioethics consisting of the following duties: the condition for survival of mankind and nature conditioning this survival in the crisis-ridden world is the necessity of broad international cooperation with a global reach; each man should be concerned not only with enhancing the quality of his/her life but with the survival of just as good life of future generations; it is necessary to accept the arguments and emotions of each man in manifesting his/her uniqueness, without, however, endangering the good of the community; inevitability of suffering in nature imposes on man the duty to alleviate and eliminate it; acceptance of the awareness of the necessity of death should not clash with respect for life, for brotherhood of men, and with responsibility to future generations, animals, and nature<sup>13</sup>. These are the duties of global ethics conducive to the aspirations of biojurisprudence to attain a global reach.

The ontology of biojurisprudence seeks answers to the question what life

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<sup>11</sup> A. Siemianowski, *Człowiek a świat wartości*, Gniezno 1993.

<sup>12</sup> These indicators are available in Wikipedia on the Internet.

<sup>13</sup> Credo was first published by V. R. Potter, *Bioethics. Bridge to the Future*, New Jersey 1971, p. 196.

is, while the axiology of biojurisprudence asks other questions: whether life has a value, and if so, whose life; what value it has in its particular stages: birth, youth, adulthood, old age, and dying; or finally, whether the value of man's life depends on how his/her actions and behavior are evaluated. Both ontology and axiology find it difficult to answer these questions. There are just as great difficulties in trying to derive axiological beliefs about life's value from the ontological definitions of life. These difficulties are compounded by the conception, called the naturalistic fallacy, maintaining that from the description of a being do not follow the values of this being, here life, especially human life<sup>14</sup>. One of the Polish proponents of this conception wrote: 'Life is a necessary condition for the existence and survival of other values. It does not mean at all, however, that something that is a necessary condition for the existence of other values thereby acquires a special value'<sup>15</sup>. Proponents of avoidance of the naturalistic fallacy distinguish between a logical descriptive order of thinking about life and the axiological order that gives life a value. According to them, logical descriptions of life show objective existence without at the same time determining its objective value; human life has only a subjective value determined by different cultural factors<sup>16</sup>.

The axiology of biojurisprudence rejects the conception of naturalistic fallacy in reference to the well-founded possibility of deriving the value of man's life from the description of his/her life. Out of all values, the value of human life

is the only intrinsic value, primal and thereby exceptional, being the source, pre-norm, and sense and the goal of all other values in the broadest sense. As the prevalent and pre-norm of this kind, life cannot be treated like other values, which are secondary to life and most often serve as its means. Therefore, only human life is an autonomous value while all other values are instrumental ones in relation to it. Separation of the ontological order from the axiological one in the case of human life leads straight to the paradoxical conclusion that man's spiritual life, especially intellectual, has no relationships with the physical life. It tries to reduce the dimensions of life to two separate worlds – biological and spiritual, contrary to the principle of self-evidence which shows the closest, inextricable, lasting and necessary relationships between them, ensuring the integrity of the human person. The axiology of biojurisprudence is well-established in most cultures in the world.

We shall now stop at a very general survey of views, which recognize a unique value in human life. The view which grants the highest value to man's life, merely because he/she belongs to the *homo sapiens* species, is criticized by the opponents of specicism, who see similar arguments for granting value also to the life of other species<sup>17</sup>. Human life has an exceptional value in the religious views that recognize it as a gift from God, who created the man in his image and likeness, investing his/her soul with the property of immortality, and retaining the exclusive right to decide about the end of his/her life<sup>18</sup>. Human

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<sup>14</sup> J. Searle, *Jak wywieść «powinien» z «jest»*, «Etyka» 1978, t. 16.

<sup>15</sup> Z. Szawarski, *Wartość życia* [in:] *W kręgu życia i śmierci*, (ed.) Z. Szawarski, Warszawa 1987, sp 56.

<sup>16</sup> For more, see inter alia. R. Tokarczyk, *Współczesne kultury prawne*, 7<sup>th</sup> ed., Warszawa 2008.

<sup>17</sup> On specicism and its analogies to racism, nationalism, and feminism, see e. g. P. Singer, *Etyka praktyczna* [Polish translation of Practical Ethics] Warszawa 2003, p. 65 et seq.

<sup>18</sup> Contrary to superficial interpretations, these religions, particularly Christianity, do not however contain the faith in the value of life of any man. On the basis of evaluation of behaviors, they recognize the value of life of religious, moral and righteous people, admitting deprivation of unworthy lives of sinners, heretics, enemies in a just war, in self-defence. This was expressed especially by Thomas Aquinas, *Summa theologiae* ..., 2–2, qu. 64, a. 2.



life has a special value in light of the views that attribute to man inalienable, inherent dignity expressed with his/her mind and free will. It is an autonomous value expressed in the general, necessary, universal and formal law of the categorical imperative formulated by Immanuel Kant. The categorical imperative has three formulas of: Universal Law 'Always act according to that maxim whose universality as a law you can at the same time will', the End in Itself 'Act with reverence to every rational being (whether yourself or another) so that it is an end in itself in your maxim... never as a mere means'; and Autonomy 'So act as if your maxims should serve at the same time as the universal law (of all rational beings'<sup>19</sup>.

The humanitarian but too general and absolute categorical imperative has negligible normative significance in practice. According to the view distinguishing persons from objects, the former have an absolute value while the latter only a relative value<sup>20</sup>. This view has the flaw of failing to acknowledge, on the one hand, the existence of animals with properties of personality (chimpanzees, dolphins), and on the other hand, the existence of people devoid of the features of person (embryos, newborn babies, comatose people). In utilitarianism, based on the comparative assessment of the value of pleasure and happiness and the value of suffering and unhappiness, only the relative rather than absolute value of human life is justified<sup>21</sup>. To justify the value of life, the desire alone for life is given, which somehow explains the right to life but it does not after all take into consideration the human

beings and animals without consciousness<sup>22</sup>. Even less widespread is the view that the value of quality of life is determined by its subject – man him/herself<sup>23</sup>. Finally, we must also mention the view justifying the value of man's life by the presence of psychical dispositions that other people value highly<sup>24</sup>.

The scopes of axiology of biojurisprudence also comprise the value of animal and plant life, discussed in detail in the currents of the thought of ecologism. The separate character of these currents is discerned depending on how they explain the relation of the value of human life to the value of animal life and of other constituents of nature. In Western cultures the value of human life is given precedence over the value of animal and plant life. From Aristotle, to Thomas Aquinas, to the present day, in these cultures the view prevails that plant life is subordinated to animal life, and animal and plant life – to human life. In Eastern cultures, especially in Hinduism and Buddhism, all manifestations of life have equal value. There are also cultures approved by ecologism, where harmonious coexistence of people with animals and plants is sought.

Western cultures are based on the anthropocentric attitude to the assessment of the value of animal and plant life, found in its religious and secular versions. The religious version invokes the Bible, showing the hierarchy of animate beings created by God and subordinated to man's rule for his practical ends. In this version man is permitted to kill animals, devoid of the immortal soul, but not to treat them cruelly. The more so he is permitted to use plants. The

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<sup>19</sup> I. Kant, *Uzasadnienie metafizyki moralności*, [Polish translation of *Grundlegung zur Metaphysik der Sitten*] Warszawa 1984, pp. 50, 51, 62.

<sup>20</sup> This is also the view most clearly presented by Kant, *ibid.*, s. 61 et seq.

<sup>21</sup> Especially so by J. Bentham, *Wprowadzenie do zasad moralności i prawodawstwa* [Polish translation of *Introduction to Principles of Morals and Legislation*] Warszawa 1958, p. 17 et seq.

<sup>22</sup> This view was developed in many of his works mainly by P. Singer, *inter alia* in *Animal Liberation*, London 1975, p. 33 et seq.

<sup>23</sup> See T. Regan, *The Case for Animal Rights*, Berkeley 1983.

<sup>24</sup> Z. Szawarski, *Wartość ...*, p. 70 et seq.

question remains open to what extent the biblical idea of man's domination over nature may have contributed to his/her destructively exploitative attitude to it. Some of the present-day interpreters of the thought of Thomas Aquinas – neo-Thomists – attempt to tone down the idea of man's absolute rule over nature. Like ecologist thinkers, they recognize the separate character of the wealth of animal life, which is a great value, not only a utility value<sup>25</sup>. In the secular version, anthropocentrism has developed since the ancient times. The highest value of man's life among all animate beings is justified by his/her rationality as the highest link in biological evolution, which allowed him/her to attain the level of social life.

Anthropocentrism is condemned by animal rights advocates, accusing it of species chauvinism, or specieism, which assesses the value of life of all species of animate beings from the standpoint of the apodictically accepted, highest value of the human species. Animal liberation movement thinkers demand rights for all animate beings capable of suffering. Striving for a new ecological order they regard the survival of animals and plants as a condition for the survival of man<sup>26</sup>. In the thought of contemporary utilitarianism, the subjectivity of animals is considered in comparison with man's moral and legal subjectivity. Differences between a fully healthy man and animals are clear-cut as regards the capacity to acquire rights, obligations and responsibilities. They disappear almost entirely when we deal with sick people, incapable of expressing their subjectivity. Then the rights of these people are represented by their attorneys, who could also be appointed to represent animal rights.

Another justification for granting rights to animals shows the existence of the interest, needs, aspirations, and feelings of animals just like people's. Therefore, animals should be at least entitled to the right to life, freedom, property, territory, and the right to humane rather than cruel treatment. Animal life, even if it had a lesser value than human life, should not be treated as an exclusively instrumental value<sup>27</sup>.

Anthropocentrism is rejected by the view that justifies the equality of people and animals as animate beings. The founder of this view sees this equality in the capability to suffering<sup>28</sup>. From equality so understood, he derives the conclusion about the value of animal life, which deserves normative protection: moral and legal. The view of equal axiological and normative treatment of human and animal suffering is, however, subject to an exception when there is a conflict of interest between people and animals, above all when it is necessary to choose between man's life and animal life. Then higher value should be accorded to human life. However, this exception does not eliminate doubts what to do when a conflict of interest relates to people at the mental level similar to animal level. Serious practical consequences follow from this radical view: ban on experiments on animals, vegetarianism, stopping breeding of animals, and a resolute condemnation of hunting when it is not a condition for man's survival.

As part of utilitarianism a different approach to the question of value of animal life is also possible. If we understand utility as an increase in the sum of happiness (pleasure) in the world, then we will consider it evil to kill a being capab-

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<sup>25</sup> Thus e. g. T. Ślipko, *Granice życia. Dylematy współczesnej bioetyki*, Warszawa 1988, p. 65 et seq.

<sup>26</sup> L. Ferry, *Nowy ład ekologiczny. Drzewo, zwierzę, człowiek*, [Polish translation of *The New Ecological Order*] Warszawa 1995, p. 44 et seq.

<sup>27</sup> J. Feinberg, *Obowiązki człowieka i prawa zwierząt*, «Etyka» 1980, no. 18.

<sup>28</sup> Jest nim P. Singer, *O życiu i śmierci. Upadek etyki tradycyjnej* [Polish translation of *Rethinking Life and Death. The Collapse of Our Traditional Ethics*] Warszawa 1997.

le of experiencing sensations inasmuch as it causes a decrease in the sum of pleasures in the world. If we introduce additional differentiation between beings capable of experiencing sensations into: 1) beings that are conscious of themselves and desire to live (man and higher-order animals), 2) beings that only feel pleasure and pain but show no desire to live (lower-order animals), and we conclude that specimens of a given species are replaceable, then we are allowed to kill a being showing no desire to live if another specimen of the same species appears to replace it. What is most important here is that the sum total of pleasures in the world should not decrease. The principle of utility in connection with the principle of replaceability allows one to morally justify killing of lower-order animals (e. g. hens) ... it can lead to justifying e. g. infanticide.. No wonder that such an approach raises fears<sup>29</sup>.

The opposite of anthropocentrism is biocentrism which recognizes the value of everything that is alive – people, animals, and plants, and demands protection of them. The fundamentals of biocentrism are contained in the conception of reverence for life, developed by Albert Schweitzer and adopted by supporters of ecocentrism. He was illuminated by the idea of reverence for life while he was traveling along the African river of Ogawe, and saw a herd of hippopotamuses at sunset. By reverence for life he wanted to express the primal and universal notion of moral good. Reverence for life stems, we should repeat, from the awareness that 'I am life that wants to live, in the midst of life that wants to live'. This leads to the fundamental moral principle: 'Goodness is the

saving or helping of life, the enabling of whatever life I can to attain its highest development. Evil is what annihilates, hampers, or hinders life'<sup>30</sup>. Reverence for all life has an axiological and normative sense – religious, moral, legal, or even mystical. It follows from it that killing and hindering life is always evil, which should be minimized and eliminated contrary to antihumanitarian justifications.

A thinking trend that goes beyond the protection of animate nature only is deep ecology, which opposes shallow ecology<sup>31</sup>. While the latter, anthropocentric, aims to protect the life of nature for the sake of protection of human life, the former, biocentric, aims to protect the whole of nature – animate and inanimate, bearing in mind its intrinsic value. Deep ecology would like to overcome all manifestations of present crises by shaping a new ecological awareness, which rejects anthropocentrism, liberalism, and pragmatism. New ecological awareness recognizes the equality of all interrelated living beings, which demand protection not only of themselves but also of inanimate nature. 'In practice, such a program means, inter alia, limiting human population, restricting human expansion and the scale of man's interference in nature, maintaining consumption at the necessary level, preserving virgin areas on Earth, changes in the manner of agricultural and industrial production, changes in management and decision making – political and economic (instead of a centralized national community – alternative communities, i. e. bioregions) ... This program is supported by some ... while others are definitely against it... deep ecology may lead to fun-

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<sup>29</sup> D. Ślęczek-Czakon, *Problem wartości i jakości życia w sporach bioetycznych*, Katowice 2004, s. 51.

<sup>30</sup> A. Schweitzer, *Problem etyki w wyższym stadium rozwoju ludzkiego myślenia* [in:] J. Lazari-Pawłowska, *Schweitzer*, Warszawa 1976, s. 232.

<sup>31</sup> For more see especially B. Devall, G. Sessions, *Ekologia głęboka. Życie w przekonaniu, iż Natura coś znaczy* [Polish translation of Deep Ecology. Living as if Nature Mattered] Warszawa 1994.

damentalism, authoritarianism, or totalitarianism<sup>32</sup>.

Even this brief survey of justifications for the value of life shows that they are highly diversified. These justifications play a significant role in science while in popular thinking it is enough to recognize the value of life on the basis of self-evidence. The axiology of biojurisprudence respects every justification for the value of life, recognizing that the scope of this respect does not at all have to follow from its scientific character.

We should agree with the view that 'If we therefore attribute specific value to certain living organisms, this is not because they are living ones but because they are endowed with some specific properties – the more these are developed and capable of forming specific psychical dispositions, the more we are inclined to value them. However, life by itself, life devoid of any value-making features, is at best a necessary condition for life, which is worth living or life worthy of man<sup>33</sup>.

### **Токарчик Р. Окреслення предмета біоюриспруденції (частина 2)**

Епістемологія біоюриспруденції

Епістемологія або гносеологія – грецька назва терміна, еквівалентного теорії пізнання.

Епістемологія біоюриспруденції, використовуючи методи пізнання, прагне усвідомити життя в межах необхідності його регулювання правовими нормами та зв'язок останніх із нормами релігії й моралі. Біоюриспруденція ґрунтується на пізнавальному засновку, за яким життя – це найвища цінність для всього, що існує, а особливо для права. Біоюриспруденція не обмежується філософським обґрунтуванням цінності життя, а вдається до когнітивного процесу, що сприяє багатьом науковим дослідженням.

Наукові відкриття порівняльного права характеризують контекстуалізм як необхідну умову епістемології біоюриспруденції. Когнітивна важливість біоюриспруденції залежить від контексту, в якому розглядається життя.

Культурне різноманіття в проблемах юриспруденції дозволяє нам говорити про порівняльну біоюриспруденцію як про внутрішню, так і про світову, навіть глобальну.

Біоюсгенезис разом із біоюстерапією та біоюстанатологією є одним із трьох елементів, що творять предметне поле біоюриспруденції. Саме тому для біоюсгенезису зокрема і для біоюстерапії в цілому особливе епістемологічне значення мають філософські, наукові й релігійні проблеми, пов'язані з витоками життя.

Роль біоюриспруденції в її найтіснішому стосунку до біоетики полягає в публічному розпізнанні, усвідомленні інформації та виробленні аксіологічних і нормативних варіантів розвитку, забезпечення яких є конче необхідним для розроблення біоправа, заснованого на біоетичних переконаннях спільнот.

Аксіологія біоюриспруденції

Аксіологія біоюриспруденції – значуща складова предмета біоюриспруденції, що продукує найбільш важливі дискусії, оскільки цінність права складно виокремити однозначно. У пошуках первинного й водночас найвищого фундаментального сенсу, що був би самоочевидним і зрозумілим для кожного, біоюриспруденція приходить до розуміння цінності життя, особливо життя людини.

Життя як витокова цінність, «першочінність», створює й первинні норми – «першонорму» для всіх інших цінностей права: справедливості, правдивості, порядку, інших цінностей, виражених у нормах права. Життя як найвища цінність є цінністю самою по собі, зумовлюючи таким чином виникнення, існування й реалізацію всіх інших цінностей. Нарешті, життя є фундаментальною цінністю, оскільки увесь світ

<sup>32</sup> D. Ślęczek-Czakon, *Problem ...*, s. 54 et seq.

<sup>33</sup> Z. Szawarski, *Wartość ...*, p. 76.

людей, тварин і самої природи постає із життя. Саме тому життя заслуговує на захист з боку всіх нормативних систем, а надто – з боку права, релігії та моралі. Життя людини є автономною цінністю, тоді як інші цінності – інструментальні щодо неї.

Межі аксіології біоюриспруденції перебувають між стверджуючими крайнощами культу життя й руйнівними крайнощами культу смерті.

Культ життя було звеличено багатьма інтелектуальними напрямками, особливо епікуреїзмом або гедонізмом. Культ смерті, своєю чергою, полягає в обґрунтуванні необхідності пожертвувати своїм життям в ім'я богів, нації, сім'ї, задля відчайдушного заперечення його мізерності. Культ життя проголошує навіть одне окреме життя особливим даром, правом та обов'язком, тоді як культ смерті апелює до цінностей вищих, ніж життя індивіда.

Цінності неодмінно пронизують усе людське життя, як наслідок – аксіологічні питання є неунікними. Вони також наповнюють ціле правової думки і всього права, саме це усвідомлюється й акцентується аксіологією біоюриспруденції.

Онтологія біоюриспруденції шукає відповідь на питання: що є життя? Тоді як аксіологія біоюриспруденції відповідає на інші питання: чи має життя цінність? Якщо так, то чиє життя має цінність? Якою є цінність життя на різних етапах – за народження, в юності, зрілості, в похилому віці, на порозі смерті? Чи залежить цінність життя людини від того, настільки значущими були її вчинки й поведінка? Як онтології, так і аксіології складно відповісти на ці питання.

Відокремлення онтологічного порядку від аксіологічного приводить до парадоксального висновку про те, що духовне, особливо інтелектуальне, життя людини не має стосунку до фізичного життя, штучно розділяючи ці виміри на два окремі світи, тоді як тільки їхня єдність і може створити людську особистість.

Аксіологію біоюриспруденції вкорінено в більшості культур світу.

**Ключові слова:** біоюриспруденція, епістемологія, гносеологія, аксіологія.

#### **Токарчик Р. Характеристика предмета биоюриспруденции (часть 2)**

Во второй части статьи автор раскрывает особенности таких составляющих предмета биоюриспруденции как эпистемология и аксиология биоюриспруденции. Автор подчеркивает, что биоюриспруденция основана на тезисе, что жизнь – это наивысшая ценность для всего сущего, в особенности для права.

**Ключевые слова:** биоюриспруденция, эпистемология, гносеология, аксиология.

#### **Tokarczyk R. The outline of the subject of biojurisprudence (part 2)**

In the second part of the article the author reveals features of such components of the subject of biojurisprudence as epistemology and aksiology of biojurisprudence. The author emphasizes that biojurisprudence is based on the premise that life – is the highest value for all that exists, especially for the law.

**Key words:** biojurisprudence, epistemology, gnoseology, aksiology.