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Chapter IV

Positive law and the idea of freedom

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1. Introduction

The content of this study is provided by the analysis of the phenomenon of positive law as a precondition for implementing one of the fundamental values of our culture, namely the idea of freedom. This analysis will be undertaken according to the assumptions of the method of the phenomenological analysis as a methodological tool for describing the basic concepts of the selected areas of reality. The purpose of this method is to cognitively reach the fundamental ontological categories and to describe this result by means of possibly unambiguous terms, so that — as the phenomenologists assume — firstly, there was fully revealed to us the object of cognition and, secondly, to avoid the errors of categorical transition, namely in order not to relate the cognitive results of a given ontological category to another category.

The fact that in the history of jurisprudential thought there is being constantly analysed the issue of a full understanding of the phenomenon of positive law, is the outcome of a certain need resulting, on the one hand, from continuous efforts to develop unambiguous answers to currently posed questions and, on the other hand, from the fact that the object of cognition escapes our understanding. This dialectical movement which has been given to us for at least twenty-five centuries, not only in relation to the concept of positive law, but also to a number of basic categories analysed in the context of the social sciences and humanities, and which since the Enlightenment has appeared with the ideal of the so-called scientific knowledge and the program of 'disenchantment of the world',[1] affects

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the whole area of jurisprudence and the question of its scientification and a precise definition of its fundamental concepts.

The reason for our continuous search for an adequate definition of a real (essence) of positive law is a certain methodological error which is gradually discovered in the history of jurisprudential thought, yet which, in my opinion, is not entirely realised by those who deal with the issues of the positive law. The question is to separate and thus to realize the object of cognition, namely positive law. This error is revealed in an improper separation of the concept of law and the concept of positive law, the concept of legal norm and the concept of the norm of positive law and translating the analyses of ethical issues into positive law issues, and thus in inconsistently assigning the cognitive results in some areas of research to other areas.

It is naturally not only the deficit of a consistent methodological attitude, but — as shown by the history of jurisprudential thought, or by the history of the idea of natural law and the political and legal doctrines — a certain fleeting (of course not in the aesthetic sense) or elusive object of study, namely positive law. This object somehow escapes in its analysis, either in the direction of the concept of law in general, or in the direction of the concept of normativity of law, or the concept of the norm of law itself, or in the direction of the issues concerning values, morality and, finally, in the direction of the general issues of theoretical and normative ethics.

The same is postulated by Jacques Derrida in *Force of Law*, namely that it is necessary to realize the diversity of the concept of positive law from other concepts which are brought closer to it or sometimes even identified with it, like the concepts of justice, rule or law.[2]

Despite the fact that the indelible dichotomy between law of nature (and the divine law) and positive law has been perceived from the very beginning of the ancient thought, a reflection was always directed towards the former and it was mainly from this perspective that arguments were formed about the latter. This always results in conceptual analyses of law in heteronomic nature of the concept of positive law with respect to the autonomous concept of natural law and divine law as well as in the subordination of the former in respect to the latter, as typically evidenced by the Stoic doctrine.

The centuries-long struggle with the attempt to determine the nature of the law in general and the nature of positive law in a way that would satisfy (or not) not only the creators of a given concept, but also other philosophers of law, has led in case of most philosophers of law of the twentieth century to the rejection of the possibility of creating the ontology of law and the ontology of positive law.

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[1] Max Horkheimer, Theodor W. Adorno, *Dialektik der Aufklärung*, S. Fischer, Frankfurt am Main 1988 (Polish edition: Max Horkheimer, Theodor W. Adorno, *Dialektyka oświecenia* [*Dialectic of Enlightment*], trans. by M. Łukasiewicz, Wydawnictwo IFiS PAN, Warszawa 1994), p. 19.

[2] Jacques Derrida, *Force of Law*, in: idem, *Acts of Religion*, Routledge, New York–London, 2002, p. 232–235.

Clearly, however, the advent of the phenomenological movement in the philosophical thinking of the early twentieth century has provided us with such methodological tools and solutions developed by means of them that already today allow to deal with the numerous problems of broadly understood ontology of law. Developing the method of eidetic analysis in phenomenology; making a clear separation between the issues of formal and material ontology; identifying the ways of being and the so-called moments of being; defining what we mean by the concept of being and the concept of idea; determining the mutual relations between the area of metaphysics and ontology — all these are the methodological tools that allow not only to precisely determine the subject of the analysis, but at the same time they also allow to avoid the entire series of the error of categorical transition in the study of what is generally referred to as the phenomenon of law, and in particular the phenomenon of positive law.

At this point I skip the problem of describing the method of phenomenological analysis and the conceptual apparatus characteristic of this phenomenological movement, since the matter of this issue would not only far exceed the framework of an article in its traditional meaning, but it would also suffice for the publication of a comprehensive monograph[3]. What I intend to do at this point due to the subject of this article, is to emphasise that what is defined in the phenomenology as the idea of a given object, is often linguistically presented by the word 'concept', hence the literature often talks about the concept of a given object; just as the philosophy of law, for instance, talks about the concept of law, typically meaning that what phenomenology calls the idea (of law).[4] Therefore, when speaking of the concept of law, it will be in the phenomenology of law and in the phenomenology of positive law, in accordance with the premises of the method of phenomenological analysis, that we will search for the content of the idea of law and the idea of positive law as necessary and feasible relations between the ideal qualities (pure beings). The latter of these concepts, namely the concept of an ideal quality in phenomenology, is characterized as follows: An ideal quality is something that can be referred to as the basic data in the ontology, i.e. something that can no longer be reduced to more basic properties, and thus to be described by means of other predicates. This is something original that can be — to use the language of phenomenology — 'seen' or 'captured' and linguistically defined only in some explanatory context. Such qualities include, for example, 'plane', 'goodness', 'identicality', or 'squareness'. The relationships between the ideal qualities in the context of a given idea are

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[3] All of these issues could be found in the works of Husserl, the phenomenologists of Munich and Göttingen group and in the subsequent generations of philosophers who identify themselves with the phenomenological movement. As for the Polish literature, these issues are described extensively in numerous works of Roman Ingarden and his students.

[4] In phenomenology, in turn, the meaning of the expression 'concept' is utterly different. Roman Ingarden, *Z teorii języka i filozoficznych podstaw logiki* [*From the Theory of Language and the Philosophical Foundations of Logic*], PWN, Warszawa 1972, p. 375.

what is referred to as the essence of a given subject. These relationships are not easy to intellectually grasp, since they include the areas of existence (or, to be exact, the mode of existence), matter (or more specifically, the essence of quality) and form (or specifically, the attributes of the entity). "Every object (anything at all) — as Ingarden writes — can be considered from three different points of view, or in other words, in three different respects: 1) as to its existence and mode of existence, 2) as to its form, 3) as to its material properties".[5] Accordingly, in the process of a proper cognition of the object there can be differentiated three horizons of the ontological problems: 1) existential and ontological questions, 2) formal and ontological questions, and 3) material and ontological questions. The first horizon requires from us the answer to the question about the mode of existence proper to a given object; the second requires the answer to the question about which form can be attributed to the object, and the third requires the answer of which variables and constants are present in the idea of a given object, namely the questions about the relationships between the qualities present in the content of the idea of that object. Thus, the essence of the object cannot be regarded as a set of certain properties which statistically appear most frequently in the characteristics of a given object, but it is rather a very complex image that we would often like to reduce to a formula of a (real) definition, which in the case of many objects is simply impossible. Even in relation to the seemingly 'transparent' objects in mathematics, such as a square, determining that it is 'a rectangular equilateral parallelogram' — can be, on the one hand, regarded as ultimate insight into the nature of a square, but on the other hand, it is far from its understanding. Thus, someone who wants to reflect on the idea of a square cannot confine himself merely to repeat this formula, but he needs to — metaphorically speaking — cause such intellectual acts that end with self-realization and with 'seeing' the idea and those three qualities that form its core (or essence). This is an endless cognitive dialectic, because in order to know something, one needs to understand it, yet in order to understand, one needs to continually learn it. Thus, the essence of the object is revealed along with researching these three abovementioned areas, namely the material properties, the form and the mode of existence.

2. The concept of law

I shall begin by presenting the area of research horizon which constitutes the starting point of any phenomenological analyses. I will therefore present (though due to the scope of the article, only synthetically) the issues relating to the substance of the law in general, in order to subsequently ask about the nature of

[5] Roman Ingarden, *Spór o istnienie świata*, t. I: *Ontologia egzystencjalna* [*The Dispute over the Existence of the World*, Vol. I: *Existential Ontology*], PWN, Warszawa 1987, p. 68.

positive law. Thus, the analysis of the phenomenon of law deals with the ambiguity of this concept, which on the one hand, seems obvious, but on the other hand, as I view it, requires a continuous emphasis due to the abovementioned phenomenon — frequently encountered in the literature — of reducing the analyses concerning the meaning of the concept of positive law to the concept of law in general, or to the analyses of other phenomena, such as the concept of normativity, or the concept of the rule of action.

The analysis of the concept of law as law must be therefore — according to the assumptions of the phenomenological analysis — initially determined by intuitively grasping its constitutive nature. The individual nature that constitutes the object (constitutive nature) is regarded in the understanding of the phenomenological analysis as a particular moment which determines that a given object is itself. Constitutive nature is expressed in the phrase 'this is X', where the word 'is' is present in the identifying function that constitutes a given individual object. Due to the process of initially drawing our attention to a particular object, we can begin eidetic analyses, thus rising gradually to higher and higher levels of abstraction in the direction of the analysis of the nature of the object.[6] Recognizing the existence of the nature that constitutes the object has two meanings, crucial from the perspective of the ontological analysis. It protects us, firstly, against reductionism and, secondly, against the error of a categorical transition, and in the process of researching the essence of the law, the nature that constitutes the object does not allow us to be directed at such concepts as 'the legal norm', 'the social phenomenon', 'the rule of conduct (behaviour)' or 'value', and thus to reduce the concept of law to the abovementioned concepts. Naturally, if we state that the debtor shall render performance and then we provide a number of opinions, like 'This is a norm', 'This is a rule of behaviour', 'This is value', 'This is a social phenomenon', 'This is law', all these judgments are indeed true, yet from the point of view of the ontology of law, the condition of them being true is complied with only when ensuring that the last argument is true. In other words, if we are interested in the law, the first four judgements are not independent in respect of the last. However, if we are interested in the norm, rule, social phenomenon, or value, then these judgments are neutral from the point of view of the ontology of law. Therefore, the concept of the nature that constitutes the object allows us to preserve the horizon of interest only as a part of the concept of law, rather than in other normative areas, thus protecting us from seeking its nature in other categorial areas, for example ethical ones, i.e. the issues of justice or utility.

In other words, the analysis of the phenomenon of positive law will deal with a certain range of social phenomena, some of which may be referred to as the law, but at the same time many of them cannot be qualified as such phenomenon, at least in the sense of the concept of law searched for here. If we say that one should

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[6] Idem, *Z teorii*..., p. 344–351.

use cutlery when eating; one should help the elderly; one should not interrupt others; one should admit one's mistakes; one should judge people fairly, these are not situations that are commonly understood as belonging to the idea of positive law, though they express certain rules or norms that could be referred to as law.[7] Even if we do this, it is not perceived as the act of defining law that is meant when we say that the debtor must render performance or that the competent court to adjudicate divorce lawsuits is the regional court, or that agreements shall be abided by. Therefore, we need to exclude a vast range of social phenomena for which a common concept of the rule of action or normativity allows to call them law, yet it is not the concept of positive law that would aptly characterise this phenomenon. Thus, any attempts to declare the research on the being, the idea, the nature, or the concept of law, oriented at the analyses of the concept of the rule, normativity, justice, mental experience, social behaviour or norm, are doomed to failure. It is already at the outset that they undertake a reduction or categorial transition, not even intuitively reaching the correct object, or in other words, they do not aim at the constitutive nature of law as law or the constitutive nature of positive law. Nobody naturally doubts that the concept of the legal norm, the legal rule, normativity of law or justice are related to the concept of law as law, but they are not the latter. Nobody doubts either that law is considered as social phenomenon and as the element of mental experience, for example of the obliged party, yet law has an utterly different ontological status than its norm, not to mention justice or mental experience.

According to the method of the phenomenological analysis, we need to reduce our knowledge to the original phenomena and to the original moment at which we start perceiving law and whose nature is being intuitively searched by us. This primary moment is the relationship with another entity. In a single self of the entity understood either as a transcendental I or as an empirical entity with mental experience this concept will not be found. We can only find there such laws which, on the one hand, can be counted among the natural sciences, and on the other hand, can be possibly counted among those laws which *a priori* constitute categorial forms of thinking. The concept of law which constitutes a specific phenomenon of the interrelations between entities always presupposes — we might say, in its very nature — not only the existence of the second entity, but something more, namely, some indifferent attitude towards the latter. It is the attitude that requests something from the other entity, or requires a certain behaviour towards it. This is a primary phenomenon which we call law. In jurisprudence it assumes the form of a linguistic expression: 'a claim' (or 'right') and 'obligation'. The concept

[7] It is at the same time obvious that there are some phenomena that can be referred to as laws, yet which differ far from the concept of law that we look for. I am referring here to the laws in the sense used by deductive or empirical sciences, but also linguistic laws (rules), or the laws of the effective operation.

of ‘a right’ is, however, understood and used more widely in jurisprudence than the concept of the claim, for example, when we talk about the right to property, rights in rem or the individual right. Each of these concepts, however, is always secondary to the concept of a claim (‘the right to …’) and is involved in a number of assumptions, including the assumption of the existence of positive law, whose content grants to a certain entity some right, for example the right to property, or is involved in the existence of some metaphysical source where this claim is drawn from, for example the right to life.

The primary phenomenon, however, is always the claim and obligation, namely the possibility of requiring something from someone, or the need for a certain behaviour towards someone. Such a primary phenomenon of intersubjective relationship is characteristic of the areas that are commonly referred to as human social activity. However, there are multiple areas of the existence of mutual claims and obligations. They contain those that are traditionally called morality, statutory (positive) law, customs, religion. However, when sticking to the assumptions of the phenomenological analysis method (eidetic reduction), we naturally assume that we do not have any knowledge about these areas yet. It is not only easy to assume such attitude but also to remain in it. The point is that the entire ‘bulk’ of knowledge should not be mindlessly transferred to the analysis of the phenomenon of law, but always used through the prism of — so to say — a giant filter of positive criticism and lack of involvement in the existing conceptual apparatus. It is very important to carefully separate the two specific phenomena and not to fall — as it often happened in the history of the philosophy of law — in the ambiguities and complex concepts. In any case, the attempt to capture the constitutive nature of law shows the multiplicity of areas which this name could be attributed to, as it is the case with the name ‘moral law’, ‘statutory law’ or ‘customary law’.

The idea of law defined in the above manner (i.e. law as law) can now be subject to the ontological analysis, according to the abovementioned areas of substantive — ontological formal — ontological and existential — ontological research. However, due to the modest frames of this article, I will leave aside the detailed analyses that should be carried out in these three areas, thus referring the readers to the literature where the latter task was undertaken.[8] In order to most

[8] See Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, in: idem, *Sämtliche Werke*, Textkritische Ausgaben in 2 Bänden, heraus. Karl Schumann, Barry Smith, Philosophia Verlag, München–Hamden–Wien, 1989; Tomasz Bekrycht, *Aprioryczność prawa. Ontologia prawa w fenomenologii Adolfa Reinacha* [*A priori Nature of Law. The Ontology of Law in Adolf Reinach’s Phenomenology*], Wolters Kluwer, Warszawa 2009; idem, *O związku koniecznym między prawem a moralnością* [*On Necessary Relations between Law and Morality*], in: *Abiit, non obiat. Księga Poświęcona Pamięci Księdza Profesora Antoniego Kościa SVD* [*Abiit, non obiat. The Book Devoted to the Memory of Professor Antoni Kość SVD*], (collective edition), Wydawnictwo KUL, Lublin 2013.

adequately turn to the analysis of the phenomenon of positive law, I shall now make a few summarising remarks.

The idea of law as law assumes two inseparable moments, namely the claim and the obligation. These two moments which are the primary phenomenon of law are the starting point for the analysis of qualitative property of its ideas. Both obligation and claim require carriers. It is a certain relationship of necessity, because the claim is always the claim of someone vis-à-vis someone else, while the obligation is always seen as the possibility of requiring that the carrier of the claim fulfils it. One of the most difficult problems perceived by the phenomenological analysis is a material determination of the carriers of claims and obligations. This involves a question of what qualities must a carrier or carriers of this interrelation have to be the subjects of law by their very nature. However, when remaining only with the analysis of qualitative property of the idea of law as law, it can be then assumed that the claim and the obligation are characterised by the content which always refers to the future behaviour of the carrier of the obligation, regardless of the type of this behaviour and irrespective of whether the content of the obligation concerns the very behaviour or its outcome.[9] In addition, behaviour may relate to the carrier of the claim itself and to the third party. In other words, the addressee of the content of the obligation does not need to be the addressee of the obligation. The content of the obligation can assume the existence of a certain condition and term and there may be a multiplicity of the carriers of claims and obligations. All of these relations of necessity and probability which form the part of the idea of law, constitute its qualitative property, being both the changeable and stable contents of its ideas.

In turn, there arises the question of the form of law, namely the need to verify the idea of law in the formal-ontological dimension. On the ground of ontology there exists a close relationship between the form and the material property of the entity.

> Any form of anything — as Roman Ingarden writes — is in its very nature a form of some materially defined object. Without this material 'filling', without any qualitative determination […] it would be only a certain artificially created abstractum that could not exist for itself. Conversely, qualitative determination cannot exist without the form.[10]

The abovementioned analysis of qualitative property of the idea of law entails a strictly relative (correlative) nature of law as law. The correlate of right is the obligation and necessity-based existence of carriers: 'A is obliged vis-à-vis

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[9] Such act of relating the content of law to the future behaviour has its implications that are crucial for the logical analysis of norms, or more precisely for the question of whether norms have the logical value. It is a derivative of the question about the logical value of 'the statements about the future'.

[10] Roman Ingarden, *Spór…*, Vol. I, p. 69.

B' and 'B has a claim against A'. This indicates that law assumes the form of a relation, and carriers as "the subjects forming the elements of the relation not only materially determine the 'core' of the relation, but they are also a purely ontological foundation of the existence of the core of the relation, and thus of the relation itself".[11] The form of the relation is characterised by the fact that it includes at least two objects, namely the carriers of the relation who — together with this specific relation attributable to them — form one whole of a higher order.

From the perspective of the analysis of the phenomenon of law there arises a very interesting issue, namely which factor determines that someone (something) becomes the element of this relationship and, secondly, at which point such relation is indeed formed and thus when is law actually created.

At this point, due to the scope of this article, I am urged to settle only for general comments, which constitute the cognitive result of the analysis of many other issues. In general, it can be said that a necessary condition for the existence of legal relation is the existence of a certain communication bond, which indicates that the carriers of the relationship of law can only be those entities that can communicate, namely understand the meaning of the words uttered by them, or more generally, they must have and use the same meanings, regardless of their carriers. In turn, the second question, one of the most difficult yet most important for capturing the phenomenon of law, is the question of what is the source of its origin, i.e. how is it that the situation of communication involves law, namely a bond based on claims and obligations.

This is nevertheless the question not only about the source of the formation of law, but about the very possibility of the existence of the situation of communication. In this sense, it is a transcendental question about the conditions of the possibility of communication, whose detailed analyses are left aside in this article in order to provide the readers with the references to one side of the phenomenological research related to the concept of social acts and acts of speech as well as the analyses undertaken in the transcendental philosophy as to the issue of constituting intersubjectivity.[12]

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[11] Idem, *Spór o istnienie świata*, t. II: *Ontologia formalna*, cz. 1" *Forma i istota* [*The Dispute over the Existence of the World*, Vol. II: *Formal Ontology*, Part I: *The Form and the Being*], PWN, Warszawa 1987. p. 299.

[12] See, inter alia, Karl-Otto Apel, *Transformation der Philosophie*, Band 2: *Das Apriori der Kommunikationsgemeinschaft*, Suhrkamp, Frankfurt am Main 1973; John L. Austin, *How to Do Things with Words*, Harvard University Press, Oxford 1975; Armin Burkhard, *Soziale Akte, Sprechakte und Textillokutionen*, Max Niemeyer, Tübingen 1986; Johann Gottlieb Fichte, *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre*, Felix Meiner, Hamburg 1960; Jürgen Habermas, *Theory of Communications Action*, Vol. 1: *Reason and the Rationalization of Society*, trans. by Thomas McCarthy, Beacon Press, Boston 1987; idem, *Theory of Communications Action*, Vol. 2: *Lifeworld and System: A Critique of Functionalist Reason*, trans. by Thomas McCarthy, Beacon Press, Boston 1987; Georg W.F. Hegel, *Phänomenologie des*

When generalizing the cognitive results of the abovementioned areas it should be assumed that, in accordance with the contemporary tradition of transcendental philosophy and phenomenology, the relation of law arises, *a priori*, as a result of an act of communication by fulfilling the act of the promise.

At this point I intend to refer briefly to the existential-ontological analyses, i.e. to the mode of the existence of law. What is important for these analyses is the statement that the mode of the existence of the relation (and thus, law) cannot be reduced to the mode of the existence of its carriers. It will be like this only in the situations in which we deal with the relations between ideal objects. However, in case of the carriers attributed with other mode of existence than the ideal one, the case gets more complicated. It can be doubted already in the context of the relations between the carriers attributed with a real mode of existence (people) that, for example, the relation of law between two entities (people) exists in the same way as these entities, namely in the real terms. 'Having a claim' and 'having an obligation' exist in fact differently than X who is entitled to a claim and Y who is obliged. The existence of law, or the occurrence of the said relation between X and Y does not involve any changes in those entities themselves, but rather in some other sphere of existence from which these entities are somehow ontically separated, as really existing individuals. The case can be even more complicated if we recognised the existence of the relation of law between the entities who are attributed with different ways of being; it would be so, for example, in regard to determining the mode of the existence of law, in the relation between God and man. Here, the mode of the existence of each entity—carrier of the relation of law is different, unless we deem, as a part of some doctrine, that both God and man are entitled to the same mode of existence. Roman Ingarden, having undertaken a meticulous formal, existential and ontological analyses of the idea of 'relation', assumes that it is very difficult to determine its type of the mode of existence. The mode of the existence of the relation somehow escapes cognitive analyses, hence we encounter such problems in a centuries-long analysis undertaken as a part of the philosophy of law, as to the existence of law as such and as to the possibilities of its cognition as a specific category of being. On the one hand, one could raise a defence against the statement that this is not an intentional creation, because after certain speech acts have been undertaken, the relation of law is created *a priori* and exists independently of the acts of the consciousness of the carriers, while, on the other hand, neither law nor carries treated as real objects can be perceived sensually. It could be ultimately assumed — following Ingarden's insights as to how the relation exists—that law is attributed with so-called weaker mode of existence, as a real existence, when the carriers of the relation of law are real objects (just as in the currently existing world these are people), and there could

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Geistes, in: idem, *Gesammelte Werke*, Bd. 9, Hamburg 1980; Jaakko Hintikka, *Cogito, ergo sum: Inference or Performance?*, "Philosophical Review" 1962, Vol. 71, No. 1.

be basically left unresolved the question of the determination of the existence of law for the entities — carriers who would be, in turn, attributed with various modes of existence; hence there arises such a cognitive problem in the area of legal analyses which we relate to the idea of God and divine law.

3. Positive law

The analysis of the general idea of law (namely the concept of law as law), as characterized above, encompasses in its scope a larger field of social phenomena than the one that we used to typically refer to as law, namely positive law. Therefore, in order to accurately capture the specificity of this important area of reality we need to very carefully follow the assumptions of the phenomenological analysis and not depart from the 'purity' of the appearing phenomenon which at this point can be merely regarded as a phenomenon of positive law.

The peak of the existence of positive law can be obtained here, following the guidelines of the methods of eidetic analysis, like in the analysis of law as law, only in the three areas of the ontological research, i.e. in substantive, formal, and existential-ontological research. In addition, in order to accurately capture the specificity of positive law, I will use the reference method, consisting in comparing these two phenomena, i.e. the phenomenon of law as law and positive law.

Firstly, in order to provide a correct characteristics of the phenomenon of positive law, one should properly identify and describe its constitutive nature, namely to point out the factor that makes it the object of analysis and that differentiates it from law as law. It turns out that it is not easy to indicate such a difference and cognitively grasp it, since positive law, like law as law, implies not only the existence of another entity, but also — as we have already indicated above — a peculiar indifferent attitude towards it, and this is the attitude of requiring something from another entity in the form of the necessity of its behaving in a certain way. Thus, positive law and law as law share a common form, namely relation.

Therefore, in order to capture the constitutive nature of positive law and not to confuse it with the phenomenon of law as law, it seems that one can point to a few differentiating moments that can be attributed to the phenomenon of positive law, and that are not specific to law as law. Firstly, what appears spontaneously in the phenomenon of positive law is a certain reference to the concept of power, coercion, sovereign and legislator. Secondly, the phenomenon of positive law indicates a specific way in which it appears in reality, namely it indicates other sources of its creation than the phenomenon of law as law. While in the analysis of the idea of law as law the latter source was simply one speech act (the act of promising, which *a priori* results in the existence in the area of claim and obligation), the phenomenon of positive law is seen as something more

complicated. In order to regulate, or set the world of the behaviour required from other entities, the mere performance of the act of regulation is not enough. Apart from the fact that there must be preserved all the conditions of the situation of communication, as mentioned above (there must be a sender, recipients, and there must be the identity of the meanings), which are associated with the indication of the communicative and material *a priori* as one of the ontological foundations of law, this condition appears as necessary, yet not sufficient for positive law. In other words, this situation requires a certain activity of the addressee of the act so that the reality proposed by the regulating entity (the sender of the act) could work in the field of potential actions, since an act of speech called an act of regulation (*Bestimmungsakt*) operates somehow in one direction and sets something, yet only for the recipient, as opposed to the act of speech, which — according to the possible source of the creation of the relation of law as law — operates equally in the area of the entity that fulfils the act as well as the entity to whom the act is addressed. However, to emphasise it once more, this one-sided operation of the act of regulation is not sufficient for its effectiveness. While the effective fulfilment of the act of promise (as a causal source of the phenomenon of law as law) has its basis in the *a priori* communicative action and there is no requirement of any action on the part of the recipient of the act, the effectiveness of the act of regulation requires something more. Thus, the fundamental source to justify the existence of positive law is not provided by the act of regulation (*Bestimmungsakt*) but rather by the specific act of being granted the possibility of regulation, thus constituting the sphere in which acts of regulation may play the role of projecting behaviours and, together with the act of regulation, create reality, defined by us as positive law-based reality. In this act there takes place a peculiar 'surrender' or 'giving away a part of one's freedom'.

Thus, the preliminary eidetic analyses of positive law demonstrate the difference of the positive law in relation to the concept of law as law, and this difference is primarily based on taking into account, on the one hand, the dual nature of social acts and, on the other hand, grasping the primordial role of the act of granting the possibility of regulation as the justification of positive law in the sense of causal justification. In other words, what differentiates the phenomenon of positive law from the phenomenon of law as law is the causal difference, namely the dual nature of the undertaken acts as the source of the existence of law. It can be also stated that the phenomenon of positive law is not exhausted in its being defined as an act of regulation, but it is necessary to characterise it also by indicating the act of granting the possibility of regulation. What is more, the latter provides basis for the former; it is the assumption of the former, without which the former could not exist. It is not possible to effectively undertake the act of regulation without a prior effective act of granting the possibility of regulation. There exists a close relationship of existence, namely interdependence of the relations between those acts arising from the essence of positive law. It therefore

seems that both significant correlation of these two acts, as well as the character of granting the possibility of regulation, fundamental to the phenomenon of positive law, have typically shunned the analyses of the concept of positive law and blurred the significant difference between the phenomenon of law as law and the phenomenon of positive law as well as the differences of such concepts as the sovereign and the legislator.

The concept of this act, as the justification of positive law, cannot be confused with any situation of a contract or agreement between the parties, the content of which would be a regulation. The situation of the contract will never result in a direct exposure of norms for specific recipients, but it will, at most, provide basis to a claim for complying with the norms. The point is that in such a situation there would disappear four constitutive moments that shape the phenomenon of positive law, i.e. the existence of the relation of power, coercion, legislature and sovereign. The entity that would be a party to the contract of regulation would have the same position in relation to the addressee of law, since it would be bound only by a claim and obligation. This position could be referred to as merely based on claim and obligation but not on authority or power. The entity bound by the contract would therefore not be able to be a legislator (it could not rule, or regulate). Omitting this phenomenon had, in my opinion, considerable effects on the justification of positive law, since it gave rise to a number of contract-oriented doctrines with a very strong intellectual influence on the jurisprudential issue of the justification of positive law. Moreover, there was observed a considerable duality of the concept of social contract, differentiating between the contract between the citizens themselves and the contract between the legislator and the citizens. This duality further obscured the issue of the nature and justification of positive law. No one noticed, at the same time, that the former contract is a classic civil law contract and falls under the concept of law as law, while the second contract — namely the contract between the people (nation, citizens) and the sovereign or the government — assumes an existing relationship of power and the existence of the legislator.

> The power — as Hannah Arendt writes — is never owned by the individual; it belongs to the group and it exists so long as the group holds together. When we say that someone is 'in power', in fact, a reference is made to the fact that a certain number of people authorized him to act on their behalf.[13]

It is ontologically materialised in the situation of communication, thus fulfilling the act of granting the possibility of regulation.

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[13] Hannah Arendt, *On Violence*, Houghton Mifflin Harcourt, Boston, MA 1970 (Polish edition: Hannah Arendt, *O przemocy. Nieposłuszeństwo obywatelskie* [*On Violence. Civic Disobedience*], trans. by A. Łagocka, W. Madej, Aletheia, Warszawa 1999, p. 56–57).

We must therefore distinguish and accurately describe the concept of the sovereign and the concept of the legislator as constitutive elements of the phenomenon of positive law. The sovereign is the entity (in the broadest sense of the word) that has the power, but in the sense of 'potency' or 'being powerful', in order to, on the one hand, define itself as a political unity and, on the other hand, as a decision-maker of the form and type of a certain political existence in which it fulfils the act of granting the possibility of regulation and thereby indicates the legislator.

In Carl Schmitt's view, it is 'system-granting power' which is uniform and indivisible, and 'it is not, next to different 'powers' (such as the legislative, the executive and the judiciary) yet another power co-ordinated with them, but it creates an extensive basis for all other 'powers' and 'divisions of powers'.[14] Only the entity (entities) which is the addressee of the act of regulation can be the sovereign, since it constitutes itself as a political unity, namely by fulfilling the act of granting the regulation, it agrees to being the addressee of law. No matter how we call this entity, whether the nation or the community or the people, this entity (as the sovereign) determines the effectiveness of regulation (as the addressee of law).

However, the analysis at the conceptual level needs to take into account — in accordance with the methodology of eidetic analysis — the actual idea of the sovereign. At the level of actuality we are unable to empirically identify this entity nor its norm-making activities. "[P]opular sovereignty is no longer embodied in a visibly identifiable gathering of autonomous citizens. It pulls back into the, as it were, 'subjectless' forms of communication circulating through forums and legislative bodies".[15]

> As Schmitt writes — as long as people have the will of the political existence, it is more important than any regulation or form. As an unorganised unit, it cannot be broken down. As long as it exists and wants to continue to exist, life force and energy of the people are inexhaustible and it is always able to find new forms of political existence. Its weakness lies in the fact that it has to resolve the fundamental issues relating to its political form and its organization, even though it is not formed or organized itself.[16]

In order for the sovereign to be able to take norm-making decisions and to actually shape the content of social relations there must appear some organizing principle, which is founded on an act of granting the possibility of regulation, that would define the institution of authority, but not the authority understood as 'potency' ('power') but as 'subjecting oneself' to the will of the legislator

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[14] Carl Schmitt, *Verfassungslehre*, Duncker & Humblot, Berlin 1993 (Polish edition: Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], trans. by M. Kurowska, R. Marszałek, Teologia Polityczna, Warszawa 2013, p. 144).

[15] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. by Wiliam Rehg, The MIT Press, Cambridge, MA 1996, p. 135–136.

[16] Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], p. 152–153.

and to the vision of the social relations shaped by the latter, in particular to the ought behaviours. Thus, there was revealed to us the second understanding of the concept of power, alongside the concept of 'the possibility of regulation' or the concept of 'the surrender' and 'dependency'.

At the same time, there arises the question whether a frequently encountered in the literature phenomenon of identifying the concept of the sovereign with the concept of the legislator is legitimate and whether the separation of these concepts is necessary or whether the phenomenological analyses do not accurately assess it. In other words, the question is whether the community can set laws itself. Obviously, this is not ruled out, but — in my opinion — we lose sight of the phenomenon of positive law. The norms set out by the community of law would not then be positive laws because there would be eliminated the relation characteristic of law in general and of the positive law, therefore we would lose the very form from a formal and ontological point of view — law would cease to be law. In addition, there would disappear such concepts as the concept of the sovereign, the power and the legislator. Yet, as I mentioned earlier, it is not excluded and can be — metaphorically speaking — conceptually saved using the structure of the social roles that we can assume in relations with other entities. However, this may cause a certain breakdown of the identity of the entity in cases of specific axiological dilemmas. For Kant, nevertheless, this dilemma is excluded, because in his conception of metaphysical elements of the theory of law he made the people (the nation) the sovereign, i.e., "The legislative authority can belong only to the united will of the people", [17] which — in his opinion — leads to quite embarrassing situation, giving rise to contradictory situations, that the sovereign is at the same time the subjected entity. To some extent, this is also perceived by Schmitt when he writes that there exist two opposing political organizational principles, namely that of the identity and that of the representation. In the first form, the sovereign would not only be the subject of political unity, namely the constitutional legislator, but the lawmaker. In this form, however, there would not emerge positive law. Its existence is, however, founded in the second form, namely the representation, because "the entire, absolute identity of real people with oneself as a political unity, is never and nowhere granted".[18] The same problem is noted by Jürgen Habermas when writing that there cannot be justified the situation where citizens vest laws in themselves, that is to create a situation in which the sovereign is also the legislator, namely the sender and the recipient of law. It is impossible because we lose sight of the phenomenon of positive law and we remain at the level of morality, that is, the concept of law as law, because

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[17] Immanuel Kant, *The Metaphysics of Morals*, trans. by Mary J. Gregor, in: Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant*, 12th printing, Cambridge University Press, Cambridge 2008, p. 457.

[18] Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], p. 335.

as moral legislators, we are not identical with the legal subjects on whom, as addressees, this right is *bestowed*. […] The idea of self-legislation by citizens, then, should not be reduced to the *moral* self-legislation of *individual* persons.[19]

This idea of self-legislation by citizens cannot exist without the idea of power (understood as 'surrendering'). "Political power is not externally juxtaposed to law but is rather *presupposedby* law and itself established in the form of law."[20]

The concept of representation can be thus identified with the act of granting the possibility of regulation and the entity that is the addressee of this act — with the concept of the legislator. At the same time, it entails the relation of power and, together with the fulfilment of the acts of regulation, it reveals the entire phenomenon of positive law — "the legislature is constituted as a branch *within* the state".[21]

Thus, such concepts as the concept of the sovereign, the representation, the legislator and the power as well as the concept of coercion associated with the latter (as discussed below) constitute, next to the form, that which is referred to in eidetic analyses as qualitative property of the object and what constitutes the scope of material and ontological research in the analysis of the idea of positive law.

The fact that we usually detach the concept of positive law from the concept of power is an error, which has its foundation in the empirical analyses. This was pointed out by Habermas when writing that law is often perceived and it functions as the instrument of power, but he emphasises, at the same time, that it is a distortion arising from the fact that in such cases we in fact deal with the phenomenon of illegitimate power. Power and law are mutually constituted. Modern complexity of social relations has thus obscured the phenomenon of positive law, which can be — according to Habermas — correctly reconstructed on the examples of abstractly recognized primitive communities, where you can perceive the phenomenon of converting the power understood as authority into the power understood as a legitimized institution. According to Habermas, there can be seen two processes that occur at the same time, i.e. the power is authorized by some significant value, usually sacred law, and law is at the same time sanctioned by this authority. We must therefore distinguish the function fulfilled mutually by power and law from the function of law and the function of power as their intrinsic functions.[22]

In summary, when a given community fulfils the act of granting the possibility of regulation, in being there appears positive law, as very aptly described by Kant in the analysis of the basic problems of the philosophy of law: We give or disclaim our freedom in order to recover it again, but in different quality.[23] It could be said that it is the freedom to decide about the unity of the community, namely about

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[19] Jürgen Habermas, *Between Facts and Norms*…, p. 121.

[20] *Ibidem*, p. 134.

[21] *Ibidem*, p. 150.

[22] *Ibidem*, p. 137–143.

[23] Immanuel Kant, *The Metaphysics of Morals*, p. 450–451.

the political unity that demands from a man to make a choice between naturalistic and anti-naturalistic normativity. The first freedom is regarded as arbitrary will, namely unlawful wild freedom. The second, on the other hand, is referred to as legal freedom. This change is, nevertheless, undertaken at the cost of the loss of a part of the arbitrary will in favour of security, i.e. we cannot exceed the limits of the freedom of others, thus gaining security of action in the area of our own freedom. Leaving aside the motivational nature of the justification of law, connected with ensuring the safe operations in the sphere defined by law, the most important factor is that there conceptually arises the assumption of coercion, both in terms of limiting the actions in accordance with one's own will, namely arbitrary will, and in the sense of the entitlement to apply coercion as a remedy for the occurrence of violence on the part of the arbitrary will of another entity.[24]

However, the relation of power, namely positive law, as already mentioned above, can be in fact abolished, and the support for positive law (power) — as Hannah Arendt writes — "can be always challenged and its reliability cannot be compared with indeed 'unquestionable obedience', which is forced by the act of violence […]. This is the power of the people who lend power to the state institutions; it just constitutes a continuation of that consent which created laws in the first place".[25] Thus, the concept of coercion, resulting from the act of the 'surrender' (of power), as being yet another decisive factor in the context of the constitutive nature of positive law, cannot be confused with the concept of violence. Any political form of exerting power needs to have the support of the recipients of law. If it loses the latter, there ends power and there begins violence, namely a purely physical effect on the other party (often as an instrumentally better arsenal of tools, increasingly better developed in technical progress).[26] Power is constituted "between people, when they act together, and it disappears when they diffuse".[27] Power expresses what is common between those who act and those who speak. Power stems from the opportunity of joint action that exists in the entities, namely from the potency provided by speech and common life. This is not something empirical, but rather intentional and intellectual, therefore

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[24] *Ibidem*, p. 388–390.

[25] Hannah Arendt, *O przemocy…* [*On Violence…*], p. 52–53.

[26] Therefore, it cannot be said that the revolution is directed against power or law as such, but rather against a specific authority or against the content of law. Similarly, the institution of civil disobedience is only possible when we deal with a group and not with the individual person. Without the support of the group, the violation of the norms of positive law is viewed negatively as unlawful or illegal, not only in terms of the assessment of a broadly understood justice system, but primarily as a social judgement. Thus, the public nature of the violations of law by a single entity within the framework of civil disobedience is a kind of emanation of the group.

[27] Eadem, *The Human Condition*, The University of Chicago Press, Chicago–London 1998 (Polish edition: Hannah Arendt, *Kondycja ludzka*, trans. By A. Łagodzka, Aletheia, Warszawa 2000, p. 219).

power can be divided abstractly, without depleting it,[28] as opposed to violence, which is a purely physical domination of man over man.

The law of reciprocal coercion is referred to by Kant as "the *construction* of that concept".[29] To support his position, he uses analogy to mathematics, because, just like the properties of pure mathematics cannot be derived directly from the very concept of mathematics, but only from the construction of the concept, the concept of law can be discovered only by its construction; in other words, the act of presenting the concept of law cannot flow from the very concept itself, but from a "fully reciprocal and equal coercion", strictly subordinated to the common principle and compatible with the latter only.[30]

Kant identifies the concept of law with the authority to coerce. The thesis of this identity is derived from contradictions. He justifies it as follows: if a given entity uses its freedom in such a way that it cannot be reconciled with the freedom of another entity, in accordance with the universal laws, then its action is 'contrary to law'. The opposition to the illegal action — according to Kant — can be treated as providing support to this action and is compatible with the latter, and so

> if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.[31]

In turn, Habermas describes this bundle of two elements, namely coercion and freedom, existing within the phenomenon of positive law, in such a way that positive law derives its justification from the 'alliance' of two elements, i.e. the normative decision of the legislator and the expectations of the sovereign, namely the recipients of this normativity. At the same time, there exists a certain ideal tension which

> reappears in the law. Specifically, it appears in the relation between the coercive force of law, which secures average rule acceptance, and the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable.[32]

Habermas perceives the legitimization of contemporary legal systems in the idea of self-determination of the legal community, which arrives at this agreement by means of a discourse. In contrast, the functional justification is derived by positive law from the necessity of reconciling that which is private and that which is public. This element differentiates positive law from morality, or more broadly, from the

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[28] *Ibidem*, p. 221.

[29] Immanuel Kant, *The Metaphysics of Morals*, p. 389.

[30] *Ibidem*.

[31] *Ibidem*.

[32] Jürgen Habermas, *Between Facts and Norms*…, p. 39.

concept of law as law, where the said self-determination is uniform, i.e. whenever there is symmetry of rights and obligations. This symmetry cannot appear in the concept of positive law due to the need of separating the roles of the legislator and the recipient. If we agree that there exist some laws, apart from the idea of self-determination and recognizing it in the form of positive law, law ceases to be positive and thus legitimized by its recipients, and as a result, it begins to control them, which can have a risk in the ideology and violence — "an impersonal domination of laws is as fundamental as Leviathan's violence whom the laws must shackle".[33]

The most important thing is that the content of the concept of positive law must be sought in the said duality of the idea of freedom, which is the attribute of the political community and the power constituted of the latter, as potential limitation, or coercion.

4. Conclusion

By analysing the phenomenon of positive law, the latter appears, on the one hand, as something natural, necessary and immanent for the social reality and, on the other hand, together with the idea of power and coercion, it is seen as a specific problem and something unwanted, understood more as necessary evil than as good used for the benefit of the individual and society. Yet, as strongly emphasised here, the claim contained in the latter perspective, appears only because one would often like to talk about positive law and justify its existence in such areas of social relations in which it does not occur. In other words, where there is violence, there is no law, and violence — as very accurately analysed by Hannah Arendt — cannot be equated with coercion.

> Paradoxical achievement of law — Habermas writes — consists therefore in the fact that the potential conflicts of unleashed subjective freedom are tamed by law by means of norms which, as long as they can exert force, they are considered legitimate on the shaky ground of unleashed communicative freedoms.[34]

If we realize this interrelation, our attitude to law, to the act of shaping its content, its legitimization and respect to it, will return to their original idea of a joint, active participation in the social life and will realize the danger of dogmatic assertions about the rule of law and its institutional domination, since this idea recently departed from its original meaning. The phenomenon of positive law reveals the idea of the synthesis of that which cannot be reconciled, namely the idea

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[33] This quotation there is only in the 4th German edition and in the Polish edition (Polish ed. p. 583).

[34] *Ibidem* (Polish ed. p. 589).

of freedom with the idea of necessity. The emergence of positive law is — to use Habermas' metaphor[35] — a wedge of the exalted idea driven into social complexity, namely of the idea of self-restraint of liberty in the name of itself. This conclusion clearly indicates that the legal system is not constituted, and cannot be constituted by perfectly arranged rules that would be independent in their normativity of its actual social interactions, and thus the look at law cannot be taken only from the perspective of the objectives of its system, because it impoverishes its real (social) dimension, from which it derives its legitimacy and which it should ultimately serve.

Bibliography

Arendt, Hannah, *On Violence*, Houghton Mifflin Harcourt 1970 (Polish edition: Hannah Arendt, *O przemocy. Nieposłuszeństwo obywatelskie* [*On Violence. Civic Disobedience*], trans. by A. Łagocka, W. Madej, Aletheia, Warszawa 1999).

Arendt, Hannah, *The Human Condition*, The University of Chicago Press, Chicago–London 1998 (Polish edition: Hannah Arendt, *Kondycja ludzka*, trans. by A. Łagodzka, Aletheia, Warszawa 2000).

Bekrycht, Tomasz, *Aprioryczność prawa. Ontologia prawa w fenomenologii Adolfa Reinacha* [*A priori Nature of Law. The Ontology of Law in Adolf Reinach's Phenomenology*], Wolters Kluwer, Warszawa 2009.

Bekrycht, Tomasz, *O związku koniecznym między prawem a moralnością* [*On Necessary Relations between Law and Morality*], in: *Abiit, non obiat. Księga Poświęcona Pamięci Księdza Profesora Antoniego Kościa SVD* [*Abiit, non obiat. The Book Devoted to the Memory of Professor Antoni Kość SVD*], (collective edition), Wydawnictwo KUL, Lublin 2013.

Derrida, Jacques, *Force of Law*, in: Jacques Derrida, *Acts of Religion*, Routledge, New York–London, 2002.

Habermas, Jürgen, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. by Wiliam Rehg, The MIT Press, Cambridge, MA 1996.

Horkheimer, Max, Adorno, Theodor W., *Dialektik der Aufklärung*, S. Fischer, Frankfurt am Main 1988 (Polish edition: Max Horkheimer, Theodor W. Adorno, *Dialektyka oświecenia* [*Dialectic of Enlightment*], trans. by M. Łukasiewicz, Wydawnictwo IFiS PAN, Warszawa 1994).

Ingarden, Roman, *Spór o istnienie świata*, t. I: *Ontologia egzystencjalna* [*The Dispute over the Existence of the World*, Vol. I: *Existential Ontology*], PWN, Warszawa 1987.

Ingarden, Roman, *Spór o istnienie świata*, t. II: *Ontologia formalna*, cz. 1: *Forma i istota* [*The Dispute over the Existence of the World*, Vol. II: *Formal Ontology*, Part 1: *The Form and the Being*], PWN, Warszawa 1987.

Kant, Immanuel, *The Metaphysics of Morals*, trans. by Mary J. Gregor, in: Mary J. Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant*, 12th printing, Cambridge University Press, Cambridge 2008.

Reinach, Adolf, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, in: Adolf Reinach, *Sämtliche Werke,* Textkritische Ausgaben in 2 Bänden, heraus. Karl Schumann, Barry Smith, Philosophia Verlag, München–Hamden–Wien 1989.

Schmitt, Carl, *Verfassungslehre*, Duncker & Humblot, Berlin 1993 (Polish edition: Carl Schmitt, *Nauka o konstytucji* [*Studies on Constitution*], trans. by M. Kurowska, R. Marszałek, Teologia Polityczna, Warszawa 2013).

[35] *Ibidem* (Polish ed. p. 588).