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# On Law, Ideology, and Violence: A Reply to Maciej Pichlak[2]

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## Abstract

The present paper is a reaction to Maciej Pichlak's article *Law in the Snares of the Political: Addressing Rafał Mańko's Critical Philosophy of Adjudication* which was published in this journal ("The Critique of Law" 2020, 12(3), pp. 109–125). The present response addresses selected issues raised in Pichlak's critique, focusing on three aspects: law and the political, the importance of justice in the critical project, and finally the question of adjudication and ideology. On a more general note, the polemic reveals the importance of philosophical, political and ideological commitments and presuppositions of legal theorists and poses the question of the limits of the autonomy of jurisprudential debates *vis-à-vis* such commitments.

**Keywords:** critical legal theory, critical jurisprudence, law and ideology, law and the political, law and violence, adjudication, legal interpretation.

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**RAFAŁ MAŃKO**

# O prawie, ideologii i przemocy: odpowiedź Maciejowi Pichlakowi[3]

## Streszczenie

Niniejsza praca stanowi reakcję na artykuł Macieja Pichlaka pt. *Law in the Snares of the Political: Addressing Rafał Mańko's Critical Philosophy of Adjudication*, który ukazał się w tym czasopiśmie („Krytyka Prawa", 2020, 12(3), s. 109–125). W odpowiedzi zajęto się wybranymi kwestiami, które poruszył Pichlak w swojej krytyce, kładąc nacisk na trzy aspekty: relację prawa i polityczności, znaczenie sprawiedliwości w projekcie krytycznym i wreszcie na kwestię orzekania i ideologii. Mówiąc bardziej ogólnie, polemika ujawnia wagę filozoficznych, politycznych i ideologicznych orientacji i wynikających z nich presupozycji teoretyków prawa, co każe postawić pytanie o zakres autonomii sporów względem takich orientacji.

**Słowa kluczowe:** krytyczna teoria prawa, prawoznawstwo krytyczne, prawo i ideologia, prawo polityczność, prawo i przemoc, orzekanie, wykładnia prawa.

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In a recent issue of "The Critique of Law", M. Pichlak published a critical account of the critical theory of adjudication,[4] as presented in my monograph on that topic.[5] Whereas it is well known that M. Pichlak himself is not a critical legal theorist,[6] and therefore his critique of that theory is *ex definitione* an external one, I still consider it worthwhile to clarify certain aspects of the critical theory of adjudication to ensure that the debate does not lead to a distortion of that theory among theorists who do not subscribe to it.

## Concept of the Political

Pichlak is correct in pointing out that the notion of the political is 'of fundamental importance' to the critical theory of adjudication and it constitutes indeed 'the keystone that sustains the whole structure.'[7] However, he takes issue with the choice, in my monograph on critical theory of adjudication, of relying on the agonistic version of the concept of the political, as expounded by C. Mouffe.[8] Obviously, there are other, alternative visions of the political, but the specific choice of Mouffe is quite apt for any critical legal theory which, as is well known, has been broadly inspired by poststructuralism.[9] Therefore, using poststructuralist philosophy – including Chantal Mouffe, but not, for instance, Arendt, Habermas, Rawls or Raz – is an obvious move within critical legal theory. As Adam Sulikowski rightly points out: 'Poststructuralist reflexions draw attention to the political which is concealed where

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4 M. Pichlak, *Law in the Snares of the Political. Addressing Rafał Mańko's Critical Philosophy of Adjudication*, "Critique of Law" 2020, 12(3), pp. 109–125.

5 Cf. R. Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, Łódź 2018.

6 Judging from his publications, M. Pichlak can be described as a representative of reflexive legal theory, inspired by sociologists of law such as Giddens, Beck, Luhmann, Teubner and Selznick. See e.g.: M. Pichlak, *Refleksyjność prawa. Od teorii społecznej do strategii regulacji i z powrotem*, Łódź 2019, pp. 13, 17; idem, *Ideał legalności w koncepcji prawa Philipa Selznicka*, "*Przegląd Prawa i Administracji* 2020, 120(1); idem, *Constitutionalism as a Reflection on Political Identity*, [in:] A. Sulikowski et al. (eds.), *Legal Scholarship and the Political: In Search of a New Paradigm*, Warszawa 2020.

7 M. Pichlak, *Law in the Snares…*, p. 112.

8 Ibidem, p. 113.

9 G. Minda, *Postmodern Legal Movements: Law and Jurisprudence and Century's End*, New York–London 1995, p. 125; A. Sulikowski, *The Crisis of Traditional Legal Theory: A Diagnosis and View into the Future*, [in:] A. Bator, Z. Pulka (eds.), *Legal Theory and Philosophy of Law: Towards Contemporary Challenges*, Warszawa 2013, pp. 236–241; A. Sulikowski, *Poststrukturalistyczne oddziaływania na prawoznawstwo. Wybrane wątki*, [in:] J. Czapska, M. Dudek, M. Stępień (eds.), *Wielowymiarowość prawa*, Toruń 2014, pp. 334–344.

the modernist narratives officially do not notice its presence, that is in acts of applying the law, of its interpretation, in the allegedly non-controversial and objectively true concepts, in the habits of legal dogmatics.'[10] In this context, relying on Mouffe's postructuralist concept of the political is an obvious choice. Furthermore, there is a number of good reasons why specifically her theory – from among other postructuralists – is very useful for critical legal theory[11] for reasons which I have explained elsewhere.[12] Obviously, however, I agree that accounts based on other critical thinkers, such as Michel Foucault, Gilles Deleuze, Judith Butler, Giorgio Agamben and many others, would also be beneficial for the development of the critical theory of adjudication.

More importantly, Pichlak claims that the treatment of the question of the political in my account of the critical theory of adjudication is 'a purely conceptual exercise which pretends (even if unconsciously) to something more: to metaphysics of the political.'[13] By this he means my discussion of the role of ideology in adjudication and, more specifically, the fact that I do not propose an empirical or a phenomenological[14] approach to ideology in adjudication, but rather a purely conceptual one. Pichlak is critical of my approach, pointing out that 'one is dealing with a conclusion about reality derived from assumed concepts' and that my 'apriorism is striking.'[15] I would argue that it is actually impossible to engage in any kind of research, be it theoretical or empirical, without making a number of *a priori* assumptions, and perhaps empirical researchers – in order to meaningfully produce and analyse empirical data – are actually forced to make more such assumptions and are less justified to do so than those (as myself) engaging in pure theory where everything can be questioned.

Obviously, to follow Pichlak's proposal, one would have to develop a scientific theory only bottom-up, i.e. in an inductive way, proceeding from the observation of empirical facts towards their generalisation in the form of a theory. Therefore, to point out to the role of ideology in adjudication, one would have to analyse a certain body of case-law and to conclude only on this basis that ideology played a role in decision-making. However, how would one arrive at the concept of ideology in the first place? Do judges explicitly say, 'Now I am going to take an ideologi-

10 A. Sulikowski, *Postrukturalistyczne…*, p. 334.

11 Cf. M. Paździora, M. Stambulski, *Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 1.

12 R. Mańko, *Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication*, "Law and Critique" 2022, 33, pp. 177–179.

13 M. Pichlak, *Law in the Snares…*, p. 113.

14 In the specific sense used by D. Kennedy, *Legal Reasoning: Collected Essays*, Aurora, Co 2008, pp. 12–85.

15 M. Pichlak, *Law in the Snares…*, pp. 113–114.

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cal decision' or 'There are five legally possible interpretations, but I will adopt the one that fits my ideological preferences'? Of course not. Especially in Civil Law countries, judges and lawyers 'put a lot of effort into proving in their argumentation that they are relying only on the [legal] text even if that is not the case.'[16] One has to be realistic and remember that the context of discovery is something different from the context of justification. I argue, following Duncan Kennedy, that ideology plays a crucial role in the context of discovery.[17] At the same time, I am fully aware that, especially in European legal culture, ideology is absent from the context of justification.[18] Only traces of ideology can be found in judicial decisions, where they occur just like Freudian slips of the tongue: they are merely symptoms, returns of the repressed. However, judges do not speak openly of ideology. Does this mean that if judges are silent about ideology, then we, legal scholars, should also pretend that ideology plays no role in adjudication? Can we overlook the fact, just because judges deny it, that law 'is first and foremost an ideological practice, a way of understanding the world,'[19] and that 'law is central to ideology'?[20] Many authors do so: they 'either completely ignore the presence of ideology in judging or they admit it, but pay little attention to it.'[21] The reason, perhaps, is the negative connotations that the word 'ideology' has for many lawyers, especially those belonging to the positivistic tradition, where the separation of law and morality, on one hand, and law and politics, on the other, is seen as the cornerstone of law's claims to legitimacy and a foundation of the rule of law. For positivists, saying that the law is ideological is an insult. The concept of ideology is used in the same way in the general discourse, where calling a judge or her decision 'ideological' serves to undermine their legitimacy.[22] This approach is foreign to the critical legal tradition, which fully embraces what the positivists are trying to downplay, and precisely asks openly about the relationship between law and the political, on one hand, and law and ideology, on the other hand. For us, critical jurists, ideology is not an insult but a fact of legal life. In this vein, scholars have identified, for instance,

[16] J. Leszczyński, *Pozytywizacja prawa w dyskursie dogmatycznym*, Kraków 2010, p. 188.

[17] D. Kennedy, *A Critique of Adjudication (fin de siècle)*, Cambridge, Ma 1997, passim.

[18] T. Ćapeta, *Ideology and Legal Reasoning at the European Court of Justice*, [in:] T. Perišin, S. Rodin (eds.), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of Court in the European Union*, Oxford 2018, p. 90.

[19] C. Douzinas, *A Short History of the British Critical Legal Conference or, the Responsibility of the Critic*, "Law and Critique" 2014, 25, p. 188.

[20] C. Douzinas, A. Gearey, *Critical Jurisprudence: Towards a Political Philosophy of Justice*, Oxford 2015, p. 221.

[21] T. Ćapeta, op. cit., p. 90.

[22] This can explain the fact why a new concept – the imaginary – is making such a career among socio-legal scholars nowadays. See most recently M. Bartl, *Socio-Economic Imaginaries and European Private Law*, [in:] P. Kjaer (ed.), *The Transformation of the Law of Political Economy in Europe*, Cambridge 2020, pp. 228–253; J. Přibáň, *Constitutional Imaginaries*, London–New York 2022.

that some judgments follow neoliberal ideology,[23] whilst others are characterised by conservative ideology,[24] or that certain legal rules are inspired and instrumentalised by nationalist ideology.[25] In order to undertake a systematic analysis on the role of ideology in adjudication one needs to compare the *legally possible* interpretations of a given norm, evaluate them ideologically, and then see which interpretation was chosen by the court. The language used by the court can also be revealing in this respect, and therefore the toolbox of critical discourse analysis can be immensely helpful in analysing the ideological dimension of case-law.[26] I think that the key to appreciating the role of ideology in judicial decision-making lies precisely is the acknowledgment of the fact that judges enjoy much more discretion than they are ready to admit. Only once we realise this – on the basis of an *internal* critique of traditional theories of interpretation – the space to analyse the role of ideology in adjudication is opened up.[27]

## Law and Violence

Pichlak is critical of my statements concerning law and violence. Instead, however, of disproving the claim I make, he resorts to *argumentum ex auctoritate* citing philosopher Leszek Kołakowski. It is striking to me that Pichlak decided to refer to this author despite the fact that, firstly, he never contributed in any way to jurisprudence, and secondly, his philosophical approach has nothing to do with critical theory. Pichlak refers to Kołakowski's dictum that identifying law with violence is 'childish'.[28] Despite deploying best endeavours to give a charitable reading of Pichlak's review, I cannot escape the impression that the argument he uses suffers from the strawman fallacy: I never wrote that law is *only* and *exclusively* violence. I am not, therefore, *identifying* law with violence. Rather, my position is more sophisticated and – relying on Robert Cover – I claim that law *entails* violence.[29] However, I have

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23 See e.g. S. Giubboni, *On the Vanishing Functional Autonomy of European Labour Law*, [in:] P. Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law*, Cambridge 2020, p. 281.

24 See e.g. T. Ćapeta, op. cit., pp. 99–101.

25 See e.g. D. Šulmane, *Ideology, Nationalism and Law: Legal Tools for an Ideological Machinery in Latvia*, "Wroclaw Review of Law, Administration & Economics" 2016, 5(1).

26 See e.g. H. Dębska, T. Warczok, *The Social Construction of Feminity in the Discourse of the Polish Constitutional Court*, [in:] R. Mańko et al. (eds.), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*, Oxford 2016, pp. 106–130.

27 See e.g. R. Mańko, *Ideology and Legal Interpretation: Some Theoretical Considerations*, [in:] K. Torgans et al. (eds.), *Constitutional Values in Contemporary Legal Space*, Vol. I, Riga 2016, pp. 117–126.

28 M. Pichlak, *Law in the Snares…*, p. 118, quoting L. Kołakowski.

29 The entire body of law with very few exceptions is always, in the last instance, backed by a violent sanction.

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a deeper problem, namely with Pichlak bluntly refusing to acknowledge that law perpetrates violence. I cannot understand how can we deny that law's violence rests in 'turning the other to an instance of interpretation'?[30] How can we deny that law's violence also rests in 'the physical violence that follows every verdict and judgment'?[31] In fact, Pichlak provided no arguments to disprove the claim of Robert Cover that: 'Legal interpretation takes place in a field of pain and death. (…) When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.'[32]

Pichlak claims that in my theory conflicts are irresolvable in the sense that any solution will inflict violence on one of the parties.[33] This statement correctly captures my position that judges are asked to weigh up conflicting interests – that is the essence of adjudication – and by giving priority to some over others they are *ex definitione* operating in the field of the political and inflicting violence. However, does this mean that such conflicts are 'irresolvable'? The operation of the law as a technique of solving conflicts presupposes the need for a judge and his decision. If conflicts were resolvable 'automatically', there be no need for adjudication nor for legal interpretation. Therefore, what Pichlak describes as a 'paradox' is nothing else than the simple nature of law, ever since it appeared as distinct social discourse in ancient Rome where it was a form of civilising the class conflict between the patricians and the plebeians.[34] Thus, the law's very genesis lies in the linking of the microlevel of conflict (two litigants against each other) with the macrolevel of conflict (class conflict) aiming at channelling the latter through a formalised litigation that creates a civilised framework for the former. Law is violent, but it is a structured and predictable violence. As Foucault describes this discourse: 'The law is not born of nature (…): the law is born of real battles, victories, massacres, and conquests (…); the law was born in burning towns and ravaged fields. (…) Law is not pacification, for beneath the law, war continues to rage in all the mechanisms of power, even the most regular. War is the motor behind institutions and order.'[35] Thus, there is no paradox in the organic link between law as a technique of solving individual disputes, and the larger collective conflicts that these disputes emerge from, opposing 'two groups, two categories of individuals, or two armies'.[36] The

30 C. Douzinas, A. Gearey, *Critical Jurisprudence…*, p. 172.

31 Ibidem.

32 R. Cover, *Violence and the Law*, [in:] M. Minow, M. Ryan, A. Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover*, Ann Arbor 2004, p. 203.

33 M. Pichlak, *Law in the Snares…*, p. 115.

34 Cf. A. Schiavone, *The Invention of Law in the West*, Cambridge–London 2012, p. 102.

35 M. Foucault, *Society Must Be Defended. Lectures at the Collège de France, 1975–1976,* Penguin Books 2020, p. 50.

36 Ibidem, p. 51.

reason why law has been so successful is not that it managed to annihilate conflict or sublimate it, but because it gave the oppressed a new and effective weapon. Indeed, as Dmitry Poldnikov and Yuri Vogelsohn point out, the rule of law was successful only in those societies, where law gave an efficient tool to the oppressed – the *plebei* in Rome (rise of Roman law), the manorial peasants in England (rise of the Common Law) or townsmen of medieval Europe (rise of the *Ius Commune*).[37]

## Questions of Justice

Discussing my treatment of the concept of justice, Pichlak notes that I refer to Levinas (via Douzinas) and to Derrida,[38] noting that 'neither of these concepts is suitable for solving the issue of the legitimacy of adjudication in the field of the political'.[39] Concerning Levinasian justice, Pichlak's critique rests on the premise that the individual dimension of encounter (relation: judge – litigants) cannot be reconciled with the larger project of doing social justice through law (relation: judge – social groups to which the litigants belong). However, he does no explain why these two types of relations cannot be reconciled. I do not see a reason to treat them as disjunctive. What is more, Pichlak, on several occasions in the review, points out that I do not provide a guiding principle for deciding between antagonisms.[40] However, the Levinasian dimension of justice as reaction to the encounter of the Other provides precisely the answer. In contrast to legal form, which is based on programmatic abstraction and detachment from the conditions of social being, my project of justice-through-adjudication calls upon the judge to perceive the civil litigant or accused in a criminal trial as the Levinasian Other. In other words, to look *beyond legal form* and see the human being in the courtroom, not just the 'plaintiff', 'defendant', 'applicant', 'accused' etc., thereby reducing the symbolic violence inflicted by law. Concerning Derrida's concept of justice, Pichlak is correct in saying that it cannot be a foundation for the legitimacy of adjudication because it rests on deconstruction.[41] I agree that the Derridean concept of justice-as-deconstruction rather undermines that strengthens the legitimacy of adjudication. It

37 D. Poldnikov, Û. Fogel'son, *Social'naâ istoriâ prava kak faktor verhovenstva prava*, "Sravnitel'noe Konstitucionnoe Obozrenie" 2021, 2(141), pp. 5–11.

38 M. Pichlak, *Law in the Snares…*, p. 115. See: C. Douzinas, *Adikia: On Communism and Rights*, [in:] C. Douzinas, S. Žižek (eds.), *The Idea of Communism*, London 2010; idem, *Philosophy and Resistance in the Crisis*, Cambridge 2013; J. Derrida, *Force de loi. Le «Fondement mystique de l'autorité»*, Paris 1994.

39 M. Pichlak, *Law in the Snares…*, p. 115.

40 Ibidem, pp. 115–116.

41 Ibidem, p. 116. *Emphasis added.*

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reveals its aporetic character, and is a *caveat* for judges too sure of their power. As Adam Sulikowski puts it: 'Justice in Derrida (…) is always fluid and can never be fully realised. It cannot be crystallised or petrified in a determined conception. It is the constant task of opening oneself to the other. (…) Law (…) consists of more or less direct and conscious attempts at introducing by force (power) certain visions of justice.'[42]

My references to Derrida's concept of justice are not haphazard or inadvertent. To the contrary. But it must be borne in mind that Levinasian and Derridean concepts of justice are applicable on the *micro-scale* – the encounter with the other and his face. These concepts are not applicable to the *macro-scale* which Pichlak seems to address. One should not, therefore confuse 'macro-justice' (descending from Aristotle, down to Marx, Nozick, or Rawls and their 'formulae' of justice) and 'micro-justice' (descending from Levinas and Derrida). Macro- and micro-justice entail macro- and micro-legitimacy of the juridical, and they are based on the macro-political (such as class conflicts) and the micro-political (individual instantiations of that conflict). This distinction is crucial if one wants to understand my critical theory of adjudication and the two levels should not be conflated.

Let me now pass to the links between justice and the political which, in Pichlak's review, have been somewhat misunderstood. Firstly, he bemoans the fact that there is a transition from the political (antagonism) to justice without a sufficient justification. Secondly, he is critical that the 'status of justice' in my project is not clarified. Thirdly, that the link between justice and the political 'remain[s] unclear.' Finally, that the 'content' of the concept of justice, as well as the 'criteria that justice should employ' remain enigmatic.[43] Within critical jurisprudence the political is conceived of as the agonistic dimension of social being, it is the conflictual aspect of society. The dialectics of law and justice are the juridical expression of class struggle pursued in legal form. Perceived in a properly dialectical way, justice can only be approached in a dynamic manner, without any fixed 'content' or 'criteria', as required by Pichlak. The only timeless aspect of justice is the one which Professor Douzinas points to: it is the opposite of *adikia*, of injustice.[44] However, any positive formula of justice would be its annihilation.

I cannot, therefore, agree with Pichlak's accusation that my approach entails what he describes as the 'semantic evisceration of justice.'[45] His critique rests on a false alternative: either there is justice fixed through an abstract formula, as that

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42 A. Sulikowski, Współczesny *paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności*, Wrocław 2008, p. 165.

43 M. Pichlak, *Law in the Snares…*, p. 116.

44 C. Douzinas, *Adikia…*, p. 90.

45 M. Pichlak, *Lawin the Snares…*, p. 118.

of Aristotle, Ulpianus,[46] Marx[47] or Rawls,[48] or there is no justice at all. This is a false alternative, and I cannot agree with Pichlak's argument – based on Kołakowski – that refusing to adopt an abstract definition of justice leads down to 'authoritarianism' or even 'despotism'.[49]

Pichlak rightly notes that in approaching dialectically the notion of justice, I put an emphasis on the emancipatory goal.[50] With regard to that, he contends, however, that 'it is not clear how to decide *whose emancipation* is at stake here, or which one of them should be supported, any choice in this respect can be considered arbitrary and random. The provided enumeration of the people whose aspirations a judge should support (employees, pensioners, patients, consumers – all these "working people of towns and villages" reveals this risk of randomness, which would accompany any drafting of such a list.'[51] I cannot agree that the examples are random. To the contrary, I focus on those who suffer from various forms of violence, especially economic and symbolic violence. This is because the critical jurisprudential project is the corollary of the progressive political project, aimed at eliminating various forms of economic and symbolic domination.

## Adjudication and Ideology

Alexandre Kojève, the well-known French Hegelian, linked the concept of law to that of justice in a subtle, dialectical manner, and my theoretical project owes a lot to Kojève's insights. In is paper, Pichlak cited my sentence (which is a paraphrase of Kojève[52]) where I state that 'the desire that underlies the identity of the individual as a judge is the desire to do justice',[53] labelling it as an instance of 'escaping into existential metaphysics' and sharing his 'certain helplessness in trying to understand the exact meaning of this sentence.'[54] Kojève's idea – expressed in the sentence quoted by Pichlak – is that the ideal judge's sole motive ought to be to realise the ideal of justice in society.[55] This desire is what defines the judge *qua* judge, it defines

[46] D. 1, 1, 10: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*.

[47] 'From each according to his ability, to each according to his needs', K. Marx, *Critique of the Gotha Programme*, [in:] K. Marx, F. Engels, *Works*, Vol. 24, London 2010, p. 87.

[48] J. Rawls, *Justice as Fairness: A Restatement*, Cambridge, MA 2001, pp. 42–44.

[49] M. Pichlak, *Law in the Snares…*, p. 118.

[50] Ibidem, p. 116.

[51] Ibidem, pp. 116–117.

[52] A. Kojève, *Outline of a Philosophy of Right*, Plymouth 2000, p. 173 ff.

[53] R. Mańko, *W stronę…*, p. 174.

[54] M. Pichlak, *Law in the Snares…*, p. 120, n. 40.

[55] A. Kojève, op. cit., p. 233.

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his very juridical-judicial essence.[56] In practical terms, justice presupposes a certain ideology (as Kennedy would say) which fills this empty signifier with definite content *hic et nunc*. However, Pichlak would prefer judges to follow the 'ideology expressed in the *axiology of the legal system*' (assuming there would be one such ideology, which is rarely the case) or 'the ideological preferences of the current parliamentary majority.' This is deeply problematic for two reasons. Firstly, due to the historical layers of the legal system it is difficult to reconstruct a single ideology of that system. Secondly, because the ideological preferences of a given majority, temporarily in power, could be objectionable on ethical grounds (which Pichlak would surely agree with). Pushing judges towards the ideal of social justice, rather than urging them to adhere to the changing ideological whims of current or previous parliamentary majorities is the key ethical message of my book. Pichlak, furthermore, seems to overlook that the role of judges in creating the law is active, that they are not – as in the hyperpositivist conception[57] – merely passive subjects 'applying' 'the law' allegedly 'contained' in legislative acts. The creative role of the judiciary in law-making was acknowledged in French legal science already in the 19th century,[58] and I am afraid that the idea of supremacy of legislation over case-law and the legislature over that Pichlak seems to propose would risk taking us two centuries backwards.

## Conclusions

The title of Pichlak's review article contains a conceptual metaphor: it speaks of law being 'in the snares' of the political. According to the *Cambridge Dictionary*, a *snare* is 'a device for catching small animals and birds, usually with a rope or wire that tightens around the animal'.[59] So, in this metaphor, the law is weak (as a small animal or bird) and the political is something dangerous to the law which can catch it by a rope or wire which will tighten around the law, ultimately depriving it of its liberty and subjecting it to its grip. Pichlak's metaphor presupposes *a priori* that the law is (or at least can be) free from the political, that the political is external to it and, by extension, that the political is dangerous to the law and that law should be protected from the political. As a critical legal scholar, I could not disagree more, because in the way I see things, the very *substantive source* of the law as

56 Ibidem, pp. 173–174.

57 On hyperpositivism see e.g. R. Mańko, *Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome*, "Pólemos: Journal of Law, Literature and Culture" 2013, 7(2).

58 P. Jestaz, C. Jamin, *La doctrine*, Paris 2004, p. 95.

59 https://dictionary.cambridge.org/pl/dictionary/english/snare (access: 20.07.2021).

a social phenomenon is the political (social antagonism, conflict) and therefore, the political is ontologically inherent in the law. Therefore, instead of portraying the political as a dangerous snare the law should avoid, one should rather see it as law's very backbone around which it is built, its foundation and deeper self. Instead of ignoring the agonistic dimension of the law or – worse even – trying to protect law from it (which is not possible), legal theorists should come to terms with the social agonism. Therefore, we should not speak of law being ensnared by the political, but rather the political being framed by law. Ultimately, law provides a *form* for the political.[60]

## Bibliography


Bartl M., *Socio-Economic Imaginaries and European Private Law*, [in:] P. Kjaer (ed.), *The Transformation of the Law of Political Economy in Europe*, Cambridge 2020.

Ćapeta T., *Ideology and Legal Reasoning at the European Court of Justice*, [in:] T. Perišin, S. Rodin (eds.), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of Court in the European Union*, Oxford 2018.

Cover R., *Violence and the Law*, [in:] M. Minow, M. Ryan, A. Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover*, Ann Arbor 2004.

Dębska H., Warczok T., *The Social Construction of Feminity in the Discourse of the Polish Constitutional Court*, [in:] R. Mańko et al. (eds.), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*, Oxford 2016.

Derrida J., *Force de loi. Le «Fondement mystique de l'autorité»*, Paris 1994.

Douzinas C., *A Short History of the British Critical Legal Conference or, the Responsibility of the Critic*, "Law and Critique" 2014, 25.

Douzinas C., *Philosophy and Resistance in the Crisis*, Cambridge 2013.

Douzinas C., *Adikia: On Communism and Rights*, [in:] C. Douzinas, S. Žižek (eds.), *The Idea of Communism*, London 2010.

Douzinas C., Gearey A., *Critical Jurisprudence: Towards a Political Philosophy of Justice*, Oxford 2015.

Foucault M., *Society Must Be Defended. Lectures at the Collège de France, 1975–1976*, Penguin Books 2020.

Giubboni S., *On the Vanishing Functional Autonomy of European Labour Law*, [in:] P. Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law*, Cambridge 2020.

Jestaz P., Jamin C., *La doctrine*, Paris 2004.

Kennedy D., *Legal Reasoning: Collected Essays*, Aurora, Co 2008.

Kennedy D., *A Critique of Adjudication (fin de siècle)*, Cambridge, Ma 1997.


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[60] Cf. R. Mańko, *Legal Form, Ideology and the Political*, [in:] A. Sulikowski, R. Mańko, J. Łakomy (eds.), *Legal Scholarship and the Political: In Search of a New Paradigm*, Warszawa 2020.

 DOI: 10.7206/kp.2080-1084.585

Kojève A., *Outline of a Philosophy of Right*, Plymouth 2000.
Leszczyński J., *Pozytywizacja prawa w dyskursie dogmatycznym*, Kraków 2010.
Mańko R., *Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication*, "Law and Critique" 2022, 33, pp. 175–194.
Mańko R., *W stronę krytycznej filozofii orzekania*, Łódź 2019.
Mańko R., *Ideology and Legal Interpretation: Some Theoretical Considerations*, [in:] K. Torgans et al. (eds.), *Constitutional Values in Contemporary Legal Space*, Vol. I, Riga 2016.
Mańko R., *Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome*, "Pólemos: Journal of Law, Literature and Culture" 2013, 7(2).
Marx K., *Critique of the Gotha Programme*, [in:] K. Marx, F. Engels, *Works*, Vol. 24, London 2010.
Minda G., *Postmodern Legal Movements: Law and Jurisprudence and Century's End*, New York–London 1995.
Paździora M., Stambulski M., *Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 1.
Pichlak M., *Constitutionalism as a Reflection on Political Identity*, [in:] A. Sulikowski et al. (eds), *Legal Scholarship and the Political: In Search of a New Paradigm*, Warszawa 2020.
Pichlak M., *Ideał legalności w koncepcji prawa Philipa Selznicka*, "Przegląd Prawa i Administracji" 2020, 120(1).
Pichlak M., *Law in the Snares of the Political. Addressing Rafał Mańko's Critical Philosophy of Adjudication*, "Critique of Law" 2020, 12(3), pp. 109–125.
Pichlak M., *Refleksyjność prawa: Od teorii społecznej do strategii regulacji i z powrotem*, Łódź 2019.
Poldnikov D., Fogel'son U., *Social'naâ istoriâ prava kak faktor verhovenstva prava*, "Sravnitel'noe Konstitucionnoe Obozrenie" 2021, 2(141).
Přibáň J., *Constitutional Imaginaries*, London–New York 2022.
Rawls J., *Justice as Fairness: A Restatement*, Cambridge, Ma 2001.
Schiavone A., *The Invention of Law in the West*, Cambridge–London 2012.
Sulikowski A., *Poststrukturalistyczne oddziaływania na prawoznawstwo. Wybrane wątki*, [in:] J. Czapska, M. Dudek, M. Stępień (eds.), *Wielowymiarowość prawa*, Toruń 2014.
Sulikowski A., *The Crisis of Traditional Legal Theory: A Diagnosis and View into the Future*, [in:] A. Bator, Z. Pulka (eds.), *Legal Theory and Philosophy of Law: Towards Contemporary Challenges*, Warszawa 2013.
Sulikowski A., *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności*, Wrocław 2008
Šulmane D., *Ideology, Nationalism and Law: Legal Tools for an Ideological Machinery in Latvia*, "Wroclaw Review of Law, Administration & Economics" 2016, 5(1).