

IN SEARCH FOR COMMON SENSE  
IN CYBERSPACE

*by*

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*The primary aim of this paper is to introduce some thoughts and insights about the application of the law of balancing in cyberspace, the concept of identity (liberalism versus communitarianism), the code of legal culture structure and the “lex-net” and “ius-net” programs.*

**KEYWORDS**

*Law of balancing, cyberspace, liberalism, communitarianism, legal culture*

**APPLICATION OF THE  
LAW OF BALANCING IN CYBERSPACE\* [1]**

The conception of the Structure of Balancing is based on the assumption that principles are simply “optimization requirements”. Principles only require “that something be realized to the greatest extend possible, given the legal and factual possibilities”.<sup>1</sup> Therefore principles will never establish exactly what should be done or what must not be.<sup>2</sup> Every principle should be carried out to “the greatest extend possible”. In order to do it, it is necessary to contrast it with opposing principles. The Structure of Balancing consists of three elements. The first one is the Rule of Balancing. The second is the Weight Formula. The third is called the Burden of Argumentation.

The Rule of Balancing has nothing to do with a complete hierarchy of values or “an absolute” relation between principles. It is rather based on the assumption that “the greater the degree of non-satisfaction of, or detriment

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<sup>1</sup> Alexy R., 2004, *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

<sup>2</sup> Pulido, Carlos B., 2006, *The Rationality of Balancing*, ARSP, (92).

to, one principle, the greater must be the importance of satisfying the other".<sup>3</sup> According to the Rule of Balancing the establishment of the "importance", "abstract weight" and "reliability" of the principles is required.

What is "importance"? In this way a commensurability can be established (a triadic scale: "light=1", "moderate=2", 'serious=4').<sup>4</sup> And it is relevant to establishing "whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first". What is "abstract weight"? This means finding out the "greater abstract weight". What is "greater" in one principle comparing to another one derives not only from the different legal hierarchies of the legal sources but also from the social values (a triadic scale: "light=1", "moderate=2", 'serious=4"). What is "reliability"? It is the reliability of empirical assumptions. It answers the question what the measure means for the non-realization of the first principle and the realization of the second in the particular case (a triadic scale: "reliable"=1, "plausible"= 1/2, "not evidently false"= 1/4).

In order to have a balancing outcome for certain case, "importance", "abstract weight" and finally "reliability" ought to be assessed. The tool for this is called the "weight formula". The structure of this formula is as follows:

$$\frac{Ip1 \times AWp1 \times Rp1}{Ip2 \times AWp2 \times Rp2} \quad ? \quad \frac{Ip2 \times AWp2 \times Rp2}{Ip1 \times AWp1 \times Rp1}$$

*Ip1/2 is Importance for principle 1 or 2*  
*AWp1/2 is Abstract Weight for principle 1 or 2*  
*Rp1/2 is Reliability for principle 1 or 2*

The third element of Alexy's Structure of Balancing is the Burden of Argumentation. It refers to the situation when the weight of the principles is identical.

$$\frac{Ip1 \times AWp1 \times Rp1}{Ip2 \times AWp2 \times Rp2} = \frac{Ip2 \times AWp2 \times Rp2}{Ip1 \times AWp1 \times Rp1}$$

<sup>3</sup> Alexy R., 2004, *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

<sup>4</sup> Pulido, Carlos B., 2006, 'The Rationality of Balancing', *ARSP*, vol. 92, pp.5-12.

In this situation it seems that there might be no right answer. However, at the end of the day it more depends what kind of the concept of identity the judge is likely to undertake: an individual identity or a communal one.

What is overwhelming? The temptation to be-shared. What is more than overwhelming? The temptation NOT to be-shared. However, it seems that in the cyberspace environment the temptation to share is growing in importance. We consider cyberspace as a phenomena, a new home of Mind. This is why we have to think about architecting cyberspace with a commons.<sup>5</sup> At the same time we ought to re-imagine the language of private property that has been accepted as best *scenario* in the past years.<sup>6</sup>

*Eldred* case is about access to knowledge principle on one hand and on the other refers to the protection of intellectual property (namely copyright) in cyberspace. Facts of the case were as following: Eldred was the one who developed the non-profit, free, digital library for the books that already belong to the public domain in cyberspace according to copyright law (this could be called a “non-profit publishing cyberspace house”). Hence he was the one depended upon the public domain as an online book publisher of works in the public domain. However, in 1998 US Congress extended (that was the eleventh time during the past 40 years!) the time of copyright protection again (twenty-year extension). As a result no works created after 1923 were allowed to join Eldred’s collection up till the year 2019 according to *Sony Bono Copyright Term Extension Act – CTEA*. Therefore, Eldred’s free, cyberspace library was limited in works and the access to knowledge was blocked and the knowledge was not to be commonly used through cyberspace by its users. The *CTEA* made it impossible for Eldred to publish new material. Eldred and his advocates were of the opinion that *CTEA* was against the *Progress Clause* stated in US Constitution. According to this *Clause*: “Congress is obliged to promote the development of science (...) through the assurance of the copyright for the definite period of time.” Finally, Eldred was unsuccessful in rescinding the twenty-year extension to copyright. In fact the winner was the strong lobby of those who are not able to balance intellectual property rights but present the view of both strong

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<sup>5</sup> Lessig L., 2006, *Code.Version 2.0*, Basic Books, New York.

<sup>6</sup> Halbert D.J., 2005, *Resisting Intellectual Property*, Routledge, Taylor&Francis Group, London and New York.

and long protection of works even in the cyberspace era. However, one is not able to turn back time but it is tempting to analyze this case using Alexy's conception of the Structure of Balancing.

The development of the knowledge society depends on the access to knowledge principle in cyberspace. However this principle is refused in the name of copyright protection provided for certain works. This implies a conflict between the right to access to knowledge in cyberspace and copyright. Is it constitutionally sound to mandate the access to knowledge principle contrary to copyright? Is it constitutionally sound to mandate the collective right of access to knowledge contrary to the individual right to copyright? A Court could consider that the degree of detriment of copyright protection (principle P1) is serious as is the "importance" of access to knowledge (principle P2). Further the Court could consider that the "abstract weight" of copyright protection is moderate and that the principle of access to knowledge is high. And finally the Court could state that the "reliability" is reliable in both principles. Then in *Eldred* case the application of the law of balancing leads to the following conclusion:

$$\frac{4 \times 2 \times 1}{4 \times 4 \times 1} ? \frac{4 \times 4 \times 1}{4 \times 2 \times 1}$$

$$\frac{8}{16} ? \frac{16}{8}$$

$$\frac{1}{2} < 2$$

According to the law of balancing protecting access to knowledge principle in *Eldred* case could be considered as an example of solidarity. While discovering "importance" for both principles as well as "reliability" the "triadic elements" stayed equal. However, there was a difference with the "abstract weight" application. Access to knowledge principle in cyberspace was given "serious" while the principle of copyright protection in cyberspace got "moderate". The reason for this derives from the knowledge soci-

ety values since even from the theory of law or political philosophy perspective it is not possible to “weight” the principle without the vision of the society one might create.<sup>7</sup> Therefore, the conception of the knowledge society values such as *Knowledge, Reflectiveness, Dialogue* might be found adequate for the access to knowledge principle (the knowledge society is therefore holistic, applicable, interactive and discourse-minded).

The possibility of rational use of Knowledge is at the moment the most important for the society.<sup>8</sup> Economic growth of the knowledge society is based on digital technologies which cause important technological changes. Technological changes are not a mechanical procedure. High level products and fast innovations are not possible without stimulation. Intellectual property rights became an idyllic tool used by the market to encourage innovators and to reward them for their creative and innovative activities. Thus, we protect more and more of intellectual property in order to stimulate economic growth (and it is often stated that such claims rest on myth and paradox rather than proof, and should be viewed skeptically). Hence one can assume that there is neither a place for “sharing” nor for a new realization of intellectual property rights in the cyberspace environment.<sup>9</sup> However, it is not the only truth because, at the moment, one can observe the process of legal friction within the framework of intellectual property rights: social interest (users) on one side and individuals on the other side. For the first time in the history, Cyberspace introduced knowledge itself as a construction of reality – construction which transgresses all the borders with ease.<sup>10</sup>

Modern sociologists perceive the society as a kind of a non-static and abstract reality. Therefore, *Reflectiveness* is called the main feature of the present society being the kind of the social/community awareness. The primary aim of the *Reflectiveness* feature is to reverse the unfavorable trends (e.g. in law) in the society which are very often taken contrary to economic *ratio*.<sup>11</sup> Saying that the society is a reflective one means that a society is able

<sup>7</sup> Zdybel J., 2005, *Między wolnością a powinnością. Filozofia polityczna Isaiaha Berlina i Alasdaira MacIntyre’a*, Wydawnictwo Uniwersytetu M. Curie-Skłodowskiej, Lublin.

<sup>8</sup> Jabłoński A., 2006, *Budowanie społeczeństwa wiedzy. Zarys teorii społecznej* Karla R. Poppera, Wydawnictwo Katolickiego Uniwersytetu Lubelskiego, Lublin.

<sup>9</sup> Nawrot A.M., 2006, *The Meaning of Intellectual Property Rights in the knowledge society – EU perspective*, Mercado Kierkegaard S. (eds.) *Legal, privacy and security issues in information technology, Volume 2.*, COMPLEX, Institutt for rettsinformatikk, Oslo.

<sup>10</sup> Bauman Z., 1996, *Socjologia*, Wydawnictwo Zysk i S-ka, Poznań.

<sup>11</sup> Giddens A., 2003, *Stanowienie społeczeństwa*, Wydawnictwo Zysk i S-ka, Poznań.

to activate self-corrective mechanisms and reverse everything that is not a value for the community.<sup>12</sup> Therefore, social movements like Open Source, Open Content might be perceived as the examples of the *Reflectiveness* mechanisms particular for cyberspace environment. They create an Intellectual Commons in Cyberspace.<sup>13</sup> The movements' affection, however, would not be so significant and so recognizable if not the cyberspace environment. This would mean that cyberspace and the digital technologies development are the basic platform for social movements to develop social values for cybersociety. These values show that changes in technology will require more than subtle changes in the meaning of intellectual property law; and there is no one right way to solve any problem but it is crucial to realize (through social values) that some rules are simply inappropriate for cyberspace.

*Dialogue* in order to be effective is to be *ethically unindifferent* and *constitutional*. *Ethically unindifferent* means simply: authentic, honest, justified.<sup>14</sup> *Constitutional* is the term created in this context by H.G. Gadamer who is of the opinion that any breach of the *Dialogue* is to be restored with the use of the communities own forms of restoration and based on the communities best knowledge of this particular breach.<sup>15</sup> This would also apply to any dialog in cyberspace, particularly while trying to articulate alternatives to the continued expansion of intellectual property rights.<sup>16</sup>

The application of the law of balancing for the *Eldred* case introduces mechanisms that are sensitive to the public interest. They give an opportunity to clarify and assert the value of the public domain. This could be a "theoretical core" proposition for the judges, particularly for the cases that need balancing common interests with private property interests in the knowledge society in which cyberspace plays vibrant role.<sup>17</sup> The argument of this paper is that the articulation of the law of balancing for cyberspace could become not only the proposition of the "theoretical core" but also could

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<sup>12</sup> Kołakowski L., 1990, *Cywilizacja na ławie oskarżonych*, Res Publica, Warszawa.

<sup>13</sup> Hess Ch., Ostrom E., 2006, Introduction: An Overview of the Knowledge Commons, Hess Ch., Ostrom E. (eds.) *Understanding Knowledge as a Commons. From theory to Practise*, The MIT Press.

<sup>14</sup> Zirk-Sadowski M., 2000, *Wprowadzenie do filozofii prawa*, Zakamycze, Kraków.

<sup>15</sup> Gadamer H.G., 2003, *Język i rozumienie*, Aletheia, Warszawa.

<sup>16</sup> Halbert D.J., 2005, *Resisting Intellectual Property*, Routledge, Taylor&Francis Group, London and New York.

<sup>17</sup> Halbert D.J., 2005, *Resisting Intellectual Property*, Routledge, Taylor&Francis Group, London and New York.

contribute to the creation of advocacy of how to weight property and access: "To Be or NOT To Be Shared."

## **THE CONCEPT OF IDENTITY: LIBERALISM VERSUS COMMUNITARIANISM\* [2]**

### THE CONCEPT OF IDENTITY

- |                           |                        |
|---------------------------|------------------------|
| 1. An individual identity | 2. A communal identity |
| WHO AM I?                 | WHO ARE WE?            |

The individual rights are emphasized by liberalism. Classical liberalism, focused on individual liberty, is often associated with John Stuart Mill and his "harm principle" (that government interference with individual liberty is only justified by prevention of harm to others). Advocates of such position, e.g. John Rawls, Ronald Dworkin, Thomas Nagel and T.M Scanlon, belong to *team L*, which treats the individual human rights (dignity, freedom, ownership) as the principle with exceptions in form of various "public clauses".

The collective rights are joined with communitarianism that emphasizes the importance of community and the social good. Michael Sandel, Alasdair Macintyre and Michael Walzer (team C.) continue the tradition invented by Hobbes and Locke. They manifest an idea of solidarity and notion of security: political, ecological, social, and economic. Solidarity is behind various autonomous principles which are vis-à-vis the protection of individual rights.

Discussion on justice usually center on one or more of subcategories of justice. It does not reflect a balance between the individual rights and the collective rights. Therefore, modern version of the Alexy's Structure of Balancing-is welcome. Such a structure is based on a generic- case economic model or a dialogue might help to solve the conflict between two rival principles, e.g. *the individual right to intellectual property and the collective right of access to knowledge*.

Modern theory of justice respects the view that human nature is *homo economicus* (egoistic approach, Hobbestian tradition) and uses the theory of

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utility maximization (altruistic approach, Kantian tradition). Vast majority of philosophers present very realistic perspective that correspond to self-regarding preferences. The fact that human reason has a moral dimension is well known, however, those (e.g. John Rawls, Brian Barry and arguably John Harsanyi - a promoter of the utilitarian philosophy) who are in favour of altruistic approach and work on the conditions of strategic rationality are still looking for the Saint Graal.

The conditions of strategic rationality underline the concept of Nash equilibrium called straight forward maximization (reflecting the behavior of players who directly maximize their expected utility) or the concept called constrained maximization (reflecting the behavior of players who are less selfish). Von Neumann and Morgenstern pointed out that a rational outcome of bargain must meet two requirements: the individual rationality and the collective rationality, i.e. Pareto-optimal.<sup>18</sup>

### **CODE OF LEGAL CULTURE AS A FRAMEWORK FOR DEEPER ANALYSIS\* [3]**

Philosophers are inclined to study a history of ideas. That provides a unity to the field. In the history of thought Confucius conception is of particular interest here first, because his triad (*ren*- humanitarianism; *li*- effectiveness; *yi*- justice) enjoys a growing number of adherens in Eastern and Western cultures. The idea of effectiveness corresponds to the legality and the rationality.

There is a close connection between the philosophic concept of idea and the legal concept of norm, which is one of the most fundamental in all jurisprudence. "Norm", as the basic concept of law, is divided into three aspects: institutional, substantive and procedural.

The comparison of three main ideas (humanitarianism, effectiveness, and justice) with three basic characteristic of law (institutional, substantive and, procedural) leads to the "big frame" of legal culture:

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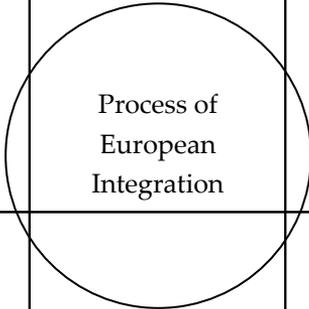
<sup>18</sup> Załuski W., 2006, *The Limits of Naturalism: A Game-Theoretic Critique of Justice as Mutual Advantage*, Kantor Wydawniczy Zakamycze, Kraków.

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Institutional law	The individuals 4	Rational legislator and efficient authority 9	Judge-Hercules 2
Substantive law	Liberté 3	Fraternite (solidarité) 5	Egalité 7
Procedural law	Procedural guaran- tees of the individuals 8	Democratic and effi- cient procedures 1	Procedural justice 6
	Humanitarianism	Effectiveness	Justice

Idea is not normative in principle. It therefore, appears as optimization requirement to be realized in the form of principles, rules and policies. It might be observed in all kinds of legal relations: international, community, and internal.

The comparison of three sources of law (principles, rules, and policies) with three categories of legal relations (international, community, and internal) justifies the creation of “small frame” of legal culture:

INTERNATIONAL RELATIONS			
RELATIONS COMMUNITY			
INTERNAL RELATIONS			
	PRINCIPLES	RULES	POLICIES

One of the important presuppositions of modern science has been the thesis that all principles phenomena can be described in the language of mathematics, which comply with the natural numbers: 0,1,2,3, etc.

Mathematical models use numbers from 1 to 9. If we consider numbers in the frames of legal codes (“big” and “small”) in a manner used in cosmology and Chinese medicine, than we receive the following graphs:

If we combine the nine fingers table in the following manner we will get the sum of 225 in each line – horizontal, vertical and slantwise. 225 is 15<sup>2</sup>. The sum of all numbers in the frames is 2025, which is 45<sup>2</sup>. 45 is the lo-szu number.

Jeśli połączymy tabele dziewięciu pałaców w następujący sposób, otrzymamy sumę 225 w każdej linii pionowej, poziomej i po przekątnej, czyli 15 do kwadratu. Suma wszystkich liczb wynosi 2025, czyli 45 do kwadratu. 45 zaś to liczba *lo-szu*.



4	9	2
3	5	7
8	1	6

$$4+9+2=15$$

$$3+5+7=15$$

$$8+1+6=15$$

$$2+5+8=15$$

$$4+5+6=15$$

4	9	2	4	9	2	4	9	2
3	5	7	3	5	7	3	5	7
8	1	6	8	1	6	8	1	6
4	9	2	4	9	2	4	8	2
3	5	7	3	5	7	3	5	7
8	1	6	8	1	6	8	1	6
4	8	2	4	8	2	4	8	2
3	5	7	3	5	7	3	6	7
8	1	6	8	1	6	8	1	6

Łatwo zaobserwować, iż każda z części tabeli dziewięciu pałaców ma wyjątkową cechę. Dlatego też *lo-szu* może posłużyć za symbol liczbowy, przedstawiający wszechświat jako wielki organizm ludzki czy też organizm ludzki jako mały wszechświat.



(graphics taken from Zhou Chuncai, *Księga Przemian*, Wydawnictwo Akademickie Dialog, Warszawa 2006)

The way from mathematical models to binary models has been constructed by Gottfried Leibniz. He laid the modern foundation of the movement from decimal to binary.<sup>19</sup> The bit and the binary system Leibniz invented by the end of 17<sup>th</sup> century. This became the basis of virtually all modern computers; where in a decimal system (base 10) the digits 0 – 9 are used to represent a number, in a binary system (base 2) only the digits 0 and 1 are used. So the numbers 1 – 10 are represented as follows in a binary system.

decimal	binary	incl. leading zeros
0	0	0000
1	1	0001
2	10	0010
3	11	0011
4	100	0100
5	101	0101
6	110	0110
7	111	0111
8	1000	1000
9	1001	1001
10	1010	1010

Construction of the binary code of legal culture is based on the mathematical structure. Non- linguistic conception of norms is a very interesting option. It confirms that norms are not linguistic entities and normative discourse is part of our everyday experience.<sup>20</sup>

One of the important ontological presuppositions of the code of legal culture is the thesis of the existence of a formal field constituted by abstract relations and universal law. It might be called the legal world's matrix or the legal structure of the universe. In explaining the construction of the world expressed both in universality of the law and in its mathematical or

<sup>19</sup> <http://www.kerryr.net/pioneers/binary.htm>

<sup>20</sup> Woleński J., 2007, *Models of Legal Reasoning* [in:] *Law and Legal Cultures in the 21<sup>st</sup> Century – Diversity and Unity*, Oficyna Walters Kluwer Business, Warszawa.

binary formulas one finds useful philosophical ideas that were developed by Leibniz, Popper, and many contemporary philosophers for unity in human experience.

#### **FROM “LEX-NET” TO “IUS-NET”<sup>\*</sup> [4]**

Programme called “lex-net” corresponds closely to the positivist-analytical tradition. It usually covers legal texts, judgements and short comments. A work – programme for lawyers has been developed with particular reference to the semantic conception of a “norm-text”. The concept of normative significance and the concept of a reason for a norm are taken into consideration only in the light of hard cases.

There is a need to create a new programme which reflects the law of competing principles. Such programme (to be called “ius-net”) might help to resolve the conflict between principles by balancing norms (the model of pure principles or model of principles and norms) are based on logic, but not on algebra behind border of logic. Thesis that the axioms and theorems of arithmetic are legal norms is still criticized by positivists and incorporationists.<sup>21</sup> For vast majority of lawyers the idea of law as a set of discrete standards seems a scholastic fiction, in spite of the fact that arithmetical principles are already part of law on damages.<sup>22</sup> Russian law even has “Methodica” for assessment of damage to the environment *per se*.

How to determine the key-words presented above by matrix? A special attention must be given to the evaluation of number 5, which symbolizes an idea of solidarity: well-known ancient Roman concept of public utility and modern concept of collective interests . it appears from numerology that a wide variety of collective interests ranging from public health or security, protection of the environment, the combating of unemployment, including “copy-duties” (5) are more valuable than any individual right or the concept of liberty, including “copy-rights” (3) and less valuable than equality as substantial element of justice (7). We may, therefore, conclude that:

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<sup>21</sup> Kramer M. H., 2007, ‘Why the Axioms and Theorems of Arithmetic are not Legal Norms’, *Oxford Journal of Legal Studies*, vol. 27, no 3.

<sup>22</sup> Dworkin R., 2006, *Justice in Robes*, Cambridge, MA, Harvard University Press.

I. priority of collective interest over the individual right is a sign of renaissance of ancient procedural rule "*in dubio pro rem publicum*" being more valuable than well known procedural rule "*in dubio pro libertate*"

II. the primacy of efficiency (reflection of effectiveness) over distribution (reflection of justice) in analyzing law can be criticized even in a sphere of private sector that it seems to work in opposite way.

It is also important to describe a legal meaning of the sum of 15 in each line – horizontal, vertical and slantwise. A lot of arguments call for the test of proportionality that a nature of principles implies the test of proportionality and vice-versa. Proportionality with its three elements of suitability, necessity and the balancing requirement can even be deduced from principles.

Curiosity desire to know legal meaning of 45, which is the *lo-szu* number. It seems to be the spirit of the law. Such spirit is form of e.g. a spirit of the EC Treaty often enter judgment on the judge verdict and produces law-making precedent. The greater the use of numerical symbols (in fact economics) to examine the law and the recognition of the importance of law to an analysis of the economy (in fact market) have brought the two fields of law and economics closer together than they were at the end of the XX century. It is easy to foresee increasing use and sophistication of new methods in legal scholarship.

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