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CONSTITUTIVE JUSTICE AND HUMAN RIGHTS

ABSTRACT
In order to show the validity of here proposed conception of social ontology and its advantages over descriptive theories of social reality, which in the analysis of the socio-ontological status of human rights find only legally understood normativity as present in social reality, we will first (1) lay out Searle's interpretation of human rights. In the second step, we will (2) introduce the methodical approach and basic concepts of our socio-ontological position, and explain the structure of the relationship between justice, law, morality, social institutions and collective intentionality. At the end (3) we will show how our theory of social ontology is better than Searle's legal positivism in examining the ontological status of human rights. At the end, (3) we show in what ways such a theory of social ontology more intuitively and with wider arguments explains the ontological status of institution of human rights than Searle's legal positivism.

KEYWORDS
constitutive justice, collective intentionality, human rights, social ontology, John Searle

1 Searle's Theory of Social Reality

Searle's social ontology project is characterized by three elements: collective intentionality, status functions and constitutive rules. In the social field, Searle analyzes human agency in two directions: as (a) cognitive ability that attaches functions and status determinations to other objects and members of the same group; and as (b) social acts through which people collectively accept these ontological statuses as ontologically real and consider them facts in the outside world. Ontological social dimension is, thus, essentially determined by collective intentionality that produces social facts. Such type of intentionality is further characterized by the ability of people to share their own intentions within a group, which in turn is constituted as a group only through such collective intentionality and collective acceptance of the status and functions which are jointly attributed to other members and social institutions. In this

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way, according to Searle, institutional facts as ontological objects are created in social domain, to which we attribute a status functions in a particular context, that they inherently do not contain. Searle describes this process with the famous formula 'X counts as Y in C'. For example, in the context of a traffic accident, a man wearing police uniform, through which he acquires current position and status of certain power, has a certain social deontological authority and power over other participants in a traffic accident. But, when his working hours expire and he removes the uniform, that same man loses in the context of traffic accident his status determination and deontological power. The latter is crucial for the constitution of new institutional facts. This is because the existing constitutional rules attribute to other human beings or social objects "deontic powers" through which the interpersonal relations within a group are regulated. In this way, Searle introduces a *normative* element into his social ontological theory (duties, obligations, rights, etc.). Nevertheless, he hasn't developed in a deeper manner the normative side of his theory, limiting it thus to institutional normativity arising from legal positivism, which is evident in his understanding of human rights in the book *Making the Social World* (2010).[1]

If the attribution of the new status to social objects by means of collective intentionality becomes a daily routine in the context of a particular group, then this attribution acquires *normativity*, which can create new constitutive rule. According to Searle, this is the situation with human rights as social constructions: "[o]n my account all rights are status functions and thus human creations. We do not discover human rights in nature as we discover human chromosomes. But if human rights are created by human beings, then what rationally compelling justification can we give for the creation of universal human rights?" (Searle 2010: 139–140) Human rights therefore are not ontologically objective, but they are ontologically subjective and institutional, i.e. created by human conventions and thus intentionally relative. But from Searle's claims – as Corlett noticed – does not necessarily follow that human rights cannot be *both* institutional and moral (non-institutional), for "a person might possess that same non-institutional (moral) right to potable water even if there existed global (socially constructed) laws denying such a right" (Corlett 2016: 16). The very institutional understanding of human rights, as Searle argues, cannot reject counter arguments that a certain society can (and could, as we learn from the recent past) socially construct the category of human rights on a nationalistic basis, i.e. by exclusion of some other groups and by genocidal *plan* (i.e. by a social act that involves the collective intentionality) against some other group. Searle does not pay much attention to such arguments that are based on the necessity of the moral foundation of human rights and remains firmly on the ground of legal positivism.

1 In his 1995 book *The Construction of Social Reality* Searle commented on the problem of human rights just in passing and on one page only: "Perhaps the most amazing form of status-function is in the creation of *human* rights." (Searle 1995: 93)

Searle's neglect and non-insistence on the study of complexity of normative structures of human community life must be wondered at, since according to him norm is an integral part of intentionality, so that "all intentionality has a normative structure" (Searle 2001: 182). But this type of normativity in his social ontology is limited to simple ability of the mind to provide for itself rights and obligations, i.e. to recognize the existing constructed rights and obligations within the given context and joint life in a society. Consequently, only deontic powers, inherently contained by status functions, provide an individual orientation in the world and reasons for his/her action. If Searle's theory contains at all any *moral* dimension of social institutions, then it is understood only as *socially constructed and collectively recognized*. That is why Smith and Zaibert can rightfully criticize Searle that in his theory of institutional reality there is no room for moral normativity, i.e. that Searle's understanding of normativity arises only from the constitutive rules that regulate subjective acts of individuals by providing them with desire-independent reasons for action.[2]

The second issue that remains unresolved by Searle is the issue of *legitimacy* of social institutions, as institutional facts are perceived only in a self-referential way (Searle 1995: 32–4, 52–3). The fact that the process of legitimation of institutions is at the end based on the belief, stops his project of social ontology precisely at the moment at which the original philosophical questions arise. It is necessary to entertain this issue in more details, since it represents a crucial problem for Searle. It seems that the most important role of status functions is explaining legitimacy and authority of *other* human beings and existing institutions. For example, we recognize that Tramp is the person who has the function and public authority in the USA to order a nuclear attack by the fact that he is the president of this country. The latest claim is explained by the fact that he won the presidential elections and under the existing constitution he is the legal president of USA. But how can we legitimize the existing constitution? There now arises the above-mentioned self-referentiality: The constitution is justified because *we accept and believe* that it is justified. But is it really so? Are all existing institutions based on legalistic beliefs in their justification? Do people not turn to other sources of legitimation of existing normative orders: faith in revelation, conviction in the correctness of different ideologies, moral justification, etc.?

1.1 Searle on Human Rights

This problem becomes very clear when we start to analyze the ontological status of human rights. The 'Declaration of Human Rights' (1948) starts by claiming 'All persons possess natural and equal human rights'. But is it not so that collective declarative beliefs, with their guaranteeing mind-world adequacy, constitute social institutions? In that case the 'Declaration of Human Rights' should guarantee the adequacy of the mind-world fit and translate a catalog of

2 Cf. Zaibert & Smith 2007: 159 ff., who call this type of normativity 'soft normativity'.

human rights into positivity of the institutional network. But we all know that is not so. No human right can be resolved through the declarations, or through countless amendments and appendix to the original declaration.

So, how does Searle perceive human rights? I shall here only take into account the last chapter of the *Making the World Social* which analyzes human rights as status functions (Searle 2010: 174-199). Status 'human', who is the holder of the rights and obligations, represents a status function, but which directly refers to *pre*-institutional fact 'of being human', i.e. what we believe that is the essence of this 'being human'. Searle, therefore, must agree that "the justification for human rights cannot be ethically neutral" (Searle 2010: 130). According to this, certain status functions must be *ethically justified*, they cannot be merely legitimized as a conventional institutional fact and something that is widely accepted in the context of a given society. Nevertheless, regardless of the ethical beliefs that underline human rights, for Searle they still remain a mere convention, and only with respect to a particular society. Hindriks has rightly observed that there is a gap between Searle's thesis that human rights require the collective recognition of its existence and his claim that they continue to exist even when they are not recognized (Hindriks 2011).

It seems that the only solution to this problem lies in an introduction of a different, *non-institutional* justification of human rights. Indeed, Searle goes this way when he takes into consideration the category of *human nature*. But even then, he stops at *biological* understanding of human beings and does not take into account normative ethical beliefs of individuals about their nature as ingredient of a social ontology. In a few pages only (Searle 2010: 190-192) Searle seems to be hesitating which way to go and, apparently falls into ambiguity, if not in a contradiction in his view on human rights. What is it all about? Since human rights - and the constitution as the highest social institution - fall into the self-referentiality, because the status functions of human rights "do not derive from some other institution" (Searle 2010: 192), *justification* of human rights that are "assigned to beings solely in virtue of being human will have to depend on our conception of what a human being is" (Searle 2010: 192). Searle then immediately adds that such assessment of human nature includes only "certain biological characteristics of human beings" (Searle 2010: 192). However, only two pages earlier, he emphasizes that "*the justification for human rights cannot be ethically neutral. It involves more than just a biological conception of what sorts of beings we are; it also involves a conception of what is valuable, actually or potentially, about our very existence*" (Searle 2010: 190). Such justification Searle limits to a "certain set of values" (Searle 2010: 198), with no consideration at all for the counter argument that human rights are fundamentally moral, not merely institutional rights.

We believe that Searle's claim that *certain* status functions are not ethically neutral must be deepened and must include a much stronger concept of normativity in the sphere of social reality than the one he only allows. However, such a project requires a different social ontology, which does not limit the complexity of social life to institutionally reduced normativity. In the

next chapter we shall present a basic draft of such social ontology and show that it can better explain the problem of human rights by drawing attention to *pre*-institutional constitution of groups, collective intentionality and institutional network of social world. In order to show this, we shall introduce a broader understanding of social ontology, which will not only include a descriptive analysis of what *is* in the social sphere, but will necessarily involve a wider range of human agency, which cannot be reduced to descriptive terms.

2 Towards Normative Account of Social Ontology

Unlike Searle, here presented theory of social reality is primarily characterized by the *dual* position. Namely, social ontology must also include moral normativity of human agency in order to be able to thoroughly encompass the whole complexity of the social sphere. In other words, in addition to social institutions (and rights as a fundamental institution of human intersubjectivity) social ontology is necessarily addressed to the issue of the relation of normativity to collective intentionality, which is neglected in current discussions. Having said that, the research should also respond to the requirements of the test of moral normativity within the domain of institutional reality (we will call this type of normativity – *strong normativity*), not just legal normativity (the only type of normativity that Searle allows, and which we will call - *weak normativity or soft positivism,* since this type of normativity can avoid examination of the problem of 'objectivity' of legal norms in its understanding of the rights as status functions, i.e. as institutional facts).

Apart from the objectivity of the institutional order within the very possibility of community life, human being *per se* has the power of judgment and justification of both, his own actions and justness of social life. Social reality is therefore taking place simultaneously on two levels: *objective-institutional level* and *normative-deliberative level.* Searle admits that only the first level is constitutive of social reality, and that collective intentionality - although it is familiar with the notions of obligation, rights, duties, etc. – is in no way related to the 'fact' of normative *justification* of existing institutions. But, it is indeed one of the basic social *facts*, for how could we otherwise put into question the *justification* of the existence of groups (corporations, societies, states,...) with whose members we share the same collective intentionality? We believe that in addition to the institutional order, the fact of its *constant and everyday* justification represents a *constitutive* part of community life. How can we live in a world of social facts without noticing when someone else (some other member, some other group) violate the 'rules of the game' and endangers the entire existence of communal life? Or when the same social institutions corrode and survive only on the reification of collective intentionality of the majority of members of a group?[3] In order to be able to respond to these questions, it is necessary to add to descriptive institutional life normativity that adorns

3 Cf. Thompson 2017.

subjectivity as such, i.e. the ability to reason and rationalize, which is inherent to such animals that are human beings.

This issue is certainly not new in contemporary social ontology. The problem lies in the fact that not enough attention is paid to it, and current social and ontological theories stop halfway when trying to explain how the normative side of human agency belongs to social ontology. Unlike natural life, social ontology includes also the normativity inherent to human beings. In order to more specifically set forth our position, we will start first with the objective-institutional level of social life, which does not challenge Searle's basic program.

2.1 Objective-Institutional Level of Social Reality

Social reality is, like the objects of the natural world, already given to human beings. Humans first learn to use the objects of social reality, to recognize the status functions that are attached to them, to use them to orient themselves in a given world through desire-independent reasons for their actions. The fundamental structure of the relationship mind-world – which we find in human perception and practices – is a core concept in social ontology, which Husserl called 'intentionality', and by using this category influenced the further development of social philosophy in the 21st century.

We will analyze the form of intentionality characteristic of objective-institutional level only with regard to the law as a fundamental social institution. Pervading nature of the law in the social world was analyzed in 1870 by Jhering in his book *Die Jurisprudenz des täglichen Lebens*.[4] With a series of examples from everyday life Jhering shows in a masterful way how the individual always find themself and their actions already within a given legal institutional network. Legal intentionality – in terms of connecting with other people and objects of the social world – is given on the level of human practice in a non-explicit way and prior to any reflection. For example, when we buy a ticket on the train and give it to the conductor to validate it and thus legitimize our journey, we already find ourselves in a legal institutional network. Our action is already regulated by the existing rules, which we share with other members of a community or a group. Acting in an objective-institutional level is, therefore, impossible without taking the *first-person plural perspective,* i.e. 'we-mode' intentionality. At the objective-institutional level we-mode intentionality functions as a habit, as a human 'second nature'. Agents do not have in their minds explicit intentional purposes of their practice (later we will show that the theoretical reflection necessarily belongs to we-mode intentionality on normative-deliberate level of social reality). Within the institutional network an individual without prior theoretical reflection takes the perspective of the

4 Rudolph von Jhering, *Die Jurisprudenz des täglichen Lebens. Eine Sammlung an Vorfälle des gewöhnlichen Lebens anknüpfender Rechtsfragen*, 11. Auflage, Verlag von Gustav Fischer, Jena 1897. The book has been translated into English 1904 (*Law in Daily Life. A Collection of Legal Questions Connected with the Ordinary Events of Everyday Life*, Clarendon Press, Oxford)

group agent, i.e. first-person plural perspective. For example, when we check in our ticket at the airport in order to book a seat on an airline flight, our action is in accordance with other actors within the same context as the joint action is already at work here. With our intention to travel from Belgrade to Vienna, our acts need to be in compliance with the existing institutional rules, i.e. they are executed in the sphere of mutual obligations: we are obliged to follow the line leading from the check-point, through passport control, to the gate that is assigned to our flight, while at the same time expecting from others (customs officers, stewards) to synchronize their acts with a common intention that we share. Thus, in the we-mode intentionality our actions are determined by the expected goal of the shared intention (travel) and expected acts of others, who are obliged to work with us in order to achieve the shared purpose.

All actions that carry out the institutional network are guided by the perspective of the group agent and the first-person plural. That is why we call the action of an individual in everyday life, the *institutional act*, because it is impossible for an individual to successfully orient his action in the outside world without expectation and trust[5] that others will act in accordance with the existing rules, but also without his own intention which takes group agency mode. But that would not be possible unless law as a fundamental institution of objective-institutional level of social reality is previously *given*. The problem of understanding this lies in the complexity of the way in which law is manifested as an objective fact: events, borders, lines, mutual obligations, joint expectations etc. We think that the old word 'order' (despite the problematic tradition of its use that it carries as a burden) still best describes the way in which human beings are imbued with legal institutions. This is because this term also shows the fundamental *limitation* which faces an individual at the objective-institutional level. In fact, there is no order that does not inherently contain a binary position inclusion/exclusion related to membership in a group. We shall not dwell on this issue, which we consider one of the fundamental problems of the philosophy of law, it is enough to point out that this issue indicates that it *potentially* contains the capacity of genocidal act - as the most radical form of the binary position, because the affirmation of one's own group in this radically negative social act is happening through the destruction of others or other groups.[6]

Normativity contained in the objective-institutional level is an expanded version of legal normativity. Modern analytical social ontology, insisting on ontological descriptivity, recognizes only that type of normativity. In contrast to the current trend in social ontology, we consider that a moral normativity must be taken into consideration if one uses such concepts as belief, conviction, trust, etc. In the next chapter we will present a draft of normative-deliberate level of social reality.

5 Schmid argues that 'interpersonal trust', as a special kind of joint attitudes, combines cognitive and normative elements of shared intentional activity (cf. Schmid 2013).
6 On negative social acts, including the genocidal acts, cf. Bojanić 2015.

2.2 Normative-Deliberate Level of Social Reality

There is widespread consensus in current social ontologies that it is not possible to think normativity without human building of institutions. As a human act, normative order on the objective-institutional level of social reality foremost enables the personality of subjects, and the related notions of property rights, civil liberties, etc. At the very dawn of the industrial age Hegel correctly understood that the institutions do not limit, but *enable* human actions (cf. for example Zabel 2014). Only through involvement in various institutions an individual becomes a person subject to *universal* norms. However, in addition to legal norms, intersubjectivity of human life is also subject to the jurisdiction of moral norms, which also require the universality of their validity.

We mentioned earlier that the legal normativity of objective-institutional level of social reality and we-mode intentionality that is taken by group members in their shared agency is enacted eminently in the field of human *practice*. We-mode intentionality, however, inherently contains the moment of *judgment* of existing institutions and the necessity of their *justification*. This is why we want to introduce a distinction between *understanding and acceptance* of existing institutional facts and their *judgment and justification*. (Through this difference, we will later try to overcome the gap observed by Hindriks in Searle's theory – between the thesis that human rights require the collective recognition for their existence and the thesis that they continue to exist even when they are not recognized.) Transfer from the practical moment of collective intentionality onto the theoretical reflection as its ingredient necessarily entails the *transformation of agency*. An individual, as a member of a group or a society, guides his actions in certain situations also with regard to the moral norms that constitute (or should constitute) an integral part of existing institutions. As long as the community life takes place in the mode of habitus, and institutions successfully and without interruption offer desire-independent reasons for action, moral norms remain in the mode of individual intentionality, i.e. 'I-intentionality' (to use a distinction introduced by Tuomela). Only with the corroding and reification of institutions or with major social changes that alter the structure of the group, moral norms get included in the set of collective intentionality. In this case, the intentional structure of the mind-world relation is not immediate (as in objective-institutional level), but is mediated by principles of justice and moral norms.[7]

At this moment – in which the group itself is transformed during the transformation of individual members and their agency – moral standards, in particular the principles of justice, have a *constitutive* significance for the social reality. For, if constitutive rules cause institutional facts, in what way do the constitutive rules arise and what constitute their background? Why is this

7 It is understandable that perverted notion of justice can also be an intentional object. Let us remember that the nazi jurists and philosophers worked together on the project *Erneuerung des Rechts*, which remains the biggest philosophical project in Europe. Cf. Rastko Jovanov's book *Hegel and National Socialism* (2017, forthcoming).

primal sphere of constituency of social institutions neglected in modern theories of social ontology at the expense of the regulatory nature of legal norms? The answer probably lies, on the one hand, in overstressing the role of game theory in the social reality, and on the other hand, in the difficulty which is inherent to the term of original constitution. In his response to the problem of *first constitution* Searle stands at the point of self-referentiality, and thus remains on the ground of positive law, on the ground of regulation, rather than constitution. However, according to Kelsen's classical definition, the establishment of the law, i.e. the establishment of *new* order never happens by means of positive law. (Kelsen 1967: 154-155) A true law-maker is a law-breaker.[8] With the introduction of the principle of *constitutive justice* as the object of the collective intentionality in the formation of a group or, as we will soon show, with the introduction of new legal institutions, social ontology acquires a tool to extend Husserl's intentionality project to the domain of the *ontological constituency*, which was actually Husserl's intention.

2.3 Constitutive Justice Thesis

The issue of constitutive justice is the question of the *constitution* of our social world. Unlike justice, law belongs to the institutional network, but it also enables it at the same time (enabling thus human action as well) by regulating and protecting an order. Therefore, law is always positive and related to the institutional network of the existing order. Unlike law, the concept of justice is negative, corrective. Naturally, certain just principles can become norms and enter the corpus of fundamental rights or the legal canons. But, the essence of the *idea* of justice tell us also that the justice always partially lies in the absence, in the intended object of consciousness that has yet to be realized.[9] But, what is then the ontology of justice? It is precisely in human association, in the fact that people unite for the sake of collectively intended purposes. Or, in other words, the place of justice in the social reality has to be found in the collective intentionality which forms new groups and new social orders, sometimes through agreement and sometimes through struggle between different social groups.[10] That is why the idea of human rights could have been born. If it was

8 NB – *Personal remark*: We did not include the chapter on authority and representation within a group. It was left for another paper.

9 Another moment that the notion of justice contains in itself, which is difficult to distinguish from positive law, is that justice is *procedural* and has its topos in the procedures through which the ruling group brings new laws and legal institutions. This moment of justice will not be analyzed here.

10 It is always one group, with corresponding collective intentionality, that constitutes government in a society. It seems that the modern understanding of politics is one of the reasons that the government in modern states is seldom occupied by a group which can and want to expand its collective intentionality to the largest possible number of citizens who are under its authority, because the group that comes to power is the one that is politically the fittest and morally the most ruthless. It is therefore necessary for politically and socially engaged groups that would be willing to come to

only the question of positive law and existing institutions, the idea of human rights could never have been documented in the form of the Declaration in 1948 and could not have historically continued to evolve.

However, in order for us to talk about justice in the social-ontological sense, it is necessary to first provide the definition of *freedom*, because without it there is no justice. Social-ontologically speaking, freedom may be defined as the ability to *achieve the just purposes – by collective intentionality – which would become ingredients of the social institutions*. Here we have of a sort of *mutual constitution of freedom and justice*: Freedom that characterizes human beings as such, precedes logically, but not historically, the principles of righteousness, moral norms and enables the constitutionality of justice to constitute freedom in the institutional network of a certain legal order.

In this regard, law should be *self-reflexive*, in the sense to always take into account its social foundation so that justice can be applied fairly and equally. Regarding socio ontological approach to justice, the notion of law should be treated as *responsive law* (perhaps very similar to what Perelman, Coleman and Marmor thought about the nature of law), in the sense that law's foundational conventions have the force to obligate other members of a group to shared intentions and cooperative actions that are not only responsive to the constitutional role of just intentions, but also to the "intentions and actions of others", as Coleman notices (Coleman 2001: 90–92).[11] Moreover, our proposed constitutive justice theory gives priority to relations between social groups – and to the *prescriptive* nature of the social ontology as a kind of quasi contract binding, on the one hand, the collective intended constitutive principles at the foundation of the groups and, on the other, its members (which also determinates a vocabulary that group members use in their interpersonal communication) – through which a society is constituted as just. The essence of the constitutive argument is that justice and its constitution cannot be separated from the totality of the social contexts in which it is produced. It is an open-ended

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power, to be formed in a different way. We shall call this the *theory of group agency organization*: organized groups instead of acting at the level of sovereign states (which are usually closed and formed by a party) or local communities (where their territorial effect would small and with no major consequences for the general population) – the form of the group and its agency that we suggest would try to infiltrate into the international structures and centers of financial and political power. They would necessarily have to consist of academic people, financial center and labor strategists. They would not necessarily have to be groups of the same kind or research groups: they would be interdisciplinary and would require wide publicity (in terms of what Perelman calls "universal audience" [Perelman 1980: 105]) for their actions and their justification; they would try to have their demands represented in the highest bodies of international law. Because in today's world, human rights and the 'policy' of their implementation also have their sovereign. When the time comes for this to end, enforcement of human rights on a global level, i.e. establishment of global justice, we will be able to better ensure the implementation of these stakeholders.

11 Cf. Murphey, 1986; cf. Marmor 2006: 365: Unlike 'surface conventions', 'deep conventions' are "responsive to [...] deep aspects of human society and human nature..."

approach proposing that human beings are responsible for actively creating their *own* world with others, the world which simultaneously acts back, shaping their own identity. Regarding that, the concept of *collective action*, which should actualize the just principles, should include the following taxonomy: *plural self-determination* (opposite to coercion), *we-mode intentionality* (opposite to blind reaction), *sociality* (opposite to privatized nihilism), *creativity* (opposite to sameness) and *rationality* (opposite to blind chance).[12]

3 Constitutive Justice and Human Rights

At this point we would like to examine how our proposed theory of social ontology refers to the problem of human rights, and whether it can provide a more complex account of the way in which human rights exist in our social reality.

Human rights belong to the domain of justice – when considered from a moral standpoint; but also some of the human rights belong to the institutional network – when considered from a legal point of view. When a positive law of one group codifies certain corpus of human rights, then those rights become fundamental rights, which are recognized and institutionalized as inherent to each group member as a human being. Thus, they also meet Searle's requirement for a universal obligation, but, like the positive law, only within some particular group. As long as they are not codified and recognized by the group as fundamental rights, i.e. inherent to a human being as such, human rights remain in the realm of moral rights, which yet *ought* to be established in a positive and legal manner. They therefore also represent the criteria for assessing the legitimity of the existing legal institutions of a certain legal order. A similar distinction between is put forward by Alexy with his introduction of 'dual thesis' which claims that "law necessarily comprises both a real or factual dimension and ideal or critical one," which is defined by 'moral correctness' (Alexy 2012: 3). A similar distinction, which allows the introduction of moral norms in the context of conventional understanding of law as a social fact, is made by Lindahl, distinguishing between 'legal understanding' and 'legal interpretation' (Lindahl 2013). However, both of these proposed distinctions fail to take into account the key, and for social ontology the most important characteristic of moral norms – namely, their role in the *constitution* of new institutions. It seems that Searle's concept of the 'background' allows such strategy towards greater acceptance of the role of moral normativity in social ontology. A significant step in this direction made Schmid by introducing the concept 'plural pre-reflective self-awareness', which represents background condition of collective intentionality. As "normative pressure that drives us towards a unified *shared* perspective with a coherent set of attitudes that commit us, jointly" (Schmid

12 The establishment of the concept of collective action in Marxist philosophy was the one of the characteristics of Yugoslav Praxis school, which through its insisting on concepts of practice, intentionality and sociality lies close to the proposed definition of collective action (Cf. Marković 1974).

2014: 18), it is possible through plural self-awareness to understand why individuals could act at all on the basis of normative standards as the objects of their shared intentionality. If joint attentions, thus, "is a background awareness of plural selfhood" (Schmid 2014: 18), committing oneself to shared beliefs and shared goals can inhabit the just perspective of the normative foundations of groups and institutions. Moreover, although the role of the human rights and the constitution of new institutions would be *artificial*, it does not necessarily mean that it would be *arbitrary*, as Hume properly argue. (Hume, 2000: 311ff.)[13] Even though human beings can subsist only through shared communality, the principle of justice – which "takes its rise from human conventions [...] intended as a remedy to some inconveniencies, which proceed from the concurrence of certain qualities of the human mind with the situation of external objects" (Hume 2000: 317) – is necessary to coerce the forces of egoism in a society, which can jeopardize collective actions and shared intentionality directed towards just foundations of a society. However, in regard to this point made by Hume, it is necessary that joint epistemic attitudes are not "limited largely to joint *perceptual* beliefs", as Schmid rightly notice, because joint beliefs about human rights belongs "to non-perceptual or inferential beliefs" of a more complex kind, which need "some form of joint commitment" (Schmid 2012: 416).

Thus, the other members of the group are considered to have normative reasons to stand in joint intentions under the obligations of protection and active promotion of human rights. As supporting elements of the structure of the new institutions, human rights, as the basic form of justice, would truly be normative in the sense of reason-giving and obligation-grounding. However, it would certainly be wrong to interpret all kinds of groups that are characterized by shared collective intentionality[14] as groups whose we-mode intentionality is based on deep constitutional conventions, which can be justified only by reference to the moral normativity. Nevertheless, although the institutional fact of 'corporation' could be interpreted as self-centered and not on moral norms established group – which is almost agonistic in facing the other groups in the same context of unity – it would still be wrong to view such groups as immoral communities that are characterized only by a legal normativity.[15] Because within these groups too it is necessary to have a certain moral code that maintains these groups in existence, and, perhaps most importantly, does not allow collective intentionality of the group to collapse due to mere selfish interests of individual members. Therefore, we think it can be argued that moral

13 For a discussion on Hume's reconstruction of objectivity of justice and natural law 'without debating moral realism', cf. Westphal 2016.

14 In our project of social ontology, we discuss only groups that are built on the normative and institutional network of mutual obligation, and leave out what we call *natural* groups (family) or *existential* groups (happenings, movements, rallies, Occupy movement, etc.).

15 One of the authors has defended this position in one of his previous papers (cf. Jovanov 2015). Now he admits that it is clearly wrong if one allow the existence of purely immoral groups.

normativity and principles of justice are at least co-constitutive for the identity and interests of any existing group.

And this is true for human rights as well. Each member of any group that is formed on the legal and moral normativity as an integral part of the collective intentionality expects that other members of the group act in accordance with the expected outcome, and of which the individual member of the group becomes aware when in her/his actions s/he takes the first-person plural perspective. As a rational animal, to every human (provided that he is capable to autonomously, i.e. without the help of others, leads his activities in the society) belongs a feeling that he has the 'right' to certain rights: freedom of speech, not to be disturbed by others, the right on private property, etc. These fundamental rights are implicit in the core of every we-mode intentionality, i.e. in the core of every existing social institutions (except in societies that are under the dictatorship of one group, for example, in the case of North Korea). And most importantly, they remain valid even if they are not immediately recognized. Because a human being is capable to, through forces of reason, but also on the basis of the level of civilization reached by modern states, *judge* whether human rights within some groups are threatened or not, i.e. to judge whether the existence of the group is still justified. Therefore, we believe that positive law should be *responsive* and reflect the just foundational conventions which must be the basis of each group.[16] For, only in this way positive law could have introduced some of the basic human rights in the constitution as the highest legal institution. That means that law's validity can only be correctly measured against the moral standards that are present and recognized. Accordingly, human rights can be recognized as universal because moral normativity is present in the basic and *non-explicit* conventions on which modern society is built. However, if we consider human rights only from the legal-institutional manner as Searle do, the problem of universal obligations will remain reserved for members of one group only in which human rights are introduced into the positive legal institute. The problem of universal obligation for human beings as such, that human rights, by definition, require, cannot be resolved by any theory of social ontology if it fails to include into its considerations those deep conventions that *precede* each institution and whose normativity cannot be reduced to the legally understood norms. As a result, such social-ontological projects are forced to reject as irrelevant any issue of the rights that resist reduction to 'game rules'. But they do not recognize at the same time the problem and the question: Do such rights constitute the 'game' as such?

16 The position we are advocating here is clearly directed at the current rigorous formalization of rights (which is clearly visible in the structures of the EU), and it was noted by Weber when he described the law as a technological medium, which enforces social order by strictly regulating interpersonal relations (Weber 1954: 63)

References

Alexy, Robert (2012), "Law, Morality, and the Existence of Human Rights", *Ratio Juris* 25(1): 2–14.

Beitz, Charles R. (2007), "Human Rights", in R. E. Goodin, P. Pettit, T. W. M. Pogge (eds.), *Companion to Contemporary Political Philosophy*, Oxford: Blackwell, pp. 628–637.

Bojanić, Petar (2015), "Taking the Human out of Human Rights", *Filozofija i društvo / Philosophy and Society* 26(3): 703–709.

Buchanan, Allen (2013), *The Heart of Human Rights*. New York: Oxford University Press.

Coleman, Jules L. (2001), *The Practice of Principle*. Oxford: Oxford University Press.

Corlett, Angelo J. (2016), "Searle on Human Rights", *Social Epistemology* 30(4): 440–463.

Fotion, Nick (2011), "Searle on Human Rights." *Analysis* 71: 697–706.

Hindriks Frank (2011), "Restructuring Searle's Making the Social World", *Philosophy of the Social Sciences* 43(3): 373–389.

Hume, David (2000), *A Treatise of Human Nature*. Oxford: Oxford University Press.

Jhering, Rudolph v. (1897), *Die Jurisprudenz des täglichen Lebens. Eine Sammlung an Vorfälle des gewöhnlichen Lebens anknüpfender Rechtsfragen*. 11. Auflage, Jena: Fischer.

Jovanov, Rastko (2017), *Hegel and National Socialism*. Novi Sad: Akademska knjiga [forthcoming].

–. (2015), "Solidarität und Gruppenidentität: Mimesis, Gesetz, Kampf", in H. Zaborowski, R. Jovanov, Ž. Radinković (eds.) *Phänomenologische Ontologie des Sozialen*, Belgrade: IFDT, pp. 116–136.

Kelsen, Hans (1967), *Pure Theory of Law*. Berkeley: University of California Press.

Lindahl, Hans (2013), *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*. Oxford: Oxford University Press.

Marković, Mihailo (1974), *From Affluence to Praxis*. Boston: Beacon.

Marmor, Andrei (2006), "How Law is like Chess", *Legal Theory* 12: 347–371.

Murphey, John (1986), "Social Ontology and Responsive Law", in J. Golden, J. Pilotta (eds.) *Practical Reasoning in Human Affairs. Studies in Honor of Chaim Perelman*, Dordrecht: Reidel, pp. 341–355.

Nickel, James (2007), *Making Sense of Human Right.* Oxford: Blackwell.

Perelman, Chaim (1980), *Justice, Law, and Argument*. Dordrecht: Reidel.

Schmid, Hans Bernhard (2014), "Plural Self-Awareness", *Phenomenology and the Cognitive Sciences* 13(1): 7–24.

–. (2013), "Trying to Act Together: The Structure and Role of Trust in Joint Action", in B. Kobow, H.B. Schmid and M. Schmitz (eds.), *The Background of Social Reality: Philosophy of Sociality*, Dordrecht: Springer, pp. 37–56.

–. (2012), "Sharing in Truth: Phenomenology of Epistemic Commonality", in Dan Zahavi (ed.), *The Oxford Handbook of Contemporary Phenomenology*, Oxford University Press, pp. 399–419.

Searle, John (2010), *Making the Social World*. Oxford: Oxford University Press.

–. (2001), *Rationality in Action*. Cambridge, MA: The MIT Press.

–. (1995), *The Construction of Social Reality*. New York: Basic Books.

Thompson, Michael J. (2017), "Collective Intentionality, Social Power and Reification", *Journal of Social Ontology* 3(2): 207–229.

Weber, Max (1954), *Law in Economy and Society*. Cambridge, MA: Harvard University Press.

Westphal, Kenneth R (2016), *How Hume and Kant reconstruct natural Law. Justifying Strict Objectivity* without *Debating Moral Realism*. Oxford: Clarendon Press.
Zabel, Benno (2014), "Das Recht der Institutionen. Zu einer Kultur der Freiheit jenseits von Individualismus und Kollektivismus", in B. Zabel, K. Sellmann (eds.) *Autonomie und Normativität. Zu Hegels Rechtsphilosophie*, Mohr: Tübingen.
Zaibert, Leo and Barry Smith (2007), "The Varieties of Normativity: An Essay on Social Ontology", in Savas L. Tsohatzidis (ed.) I*ntentional Acts and Institutional Facts: Essays on John Searle's Social Ontology*, Dordrecht: Springer, pp. 155–174.

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Apstrakt

Da bismo pokazali valjanost ovde predložene koncepcije socijalne ontologije i njene prednosti u odnosu na deskriptivne teorije društvene stvarnosti, koje u analizi socijalno-ontološkog statusa ljudskih prava nalaze samo pravno shvaćenu normativnost kao prisutnu u društvenoj stvarnosti, na prvom mestu (1) iznosimo Serleovo tumačenje ljudskih prava. Zatim (2), uvodimo metodski pristup i osnovne pojmove našeg socijalno-ontološkog shvatanja i objašnjavamo strukturu odnosa pravde, zakona, morala, društvenih institucija i kolektivne intencionalnosti. Te na kraju (3) pokazujemo na koji način ovde iznesena teorija socijalne ontologije intuitivnije i sa opširnijim argumentima objašnjava ontološki status institucije ljudskih prava od Serlovog pravnog pozitivizma.

Ključne reči: konstitutivna pravda, kolektivna intencionalnost, ljudska prava, socijalna ontologija, Džon Serl