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INTRODUCTION

Language is a natural means of communication of humans as social creatures. Apart from its numerous functions it is also a tool through which the law is expressed. Linguistic rules determine the law both in the law-making process and law application, thus they have to be taken into consideration in the process of the discourse about law. The contents of the present volume is determined by its title – language, law, discourse. Its authors, both theorists and law dogmatists in their studies present opinions related to the meaning of linguistic rules in the law as a system, they take up the question of care for linguistic quality of statutory law, its interpretation or law application problems related to this interpretation. Articles included in the volume are divided into two parts. It has to be stipulated that the convention of this division is undoubtedly not equivocal. By assumption, the first one of them envelopes texts devoted to notions of theoretic, philosophic and political character. The second part encloses texts concerning the legal dogmatics showing, among other, linguistic context of specific legal problems and its essential practical role.

Part I entitled 'Language in law – theoretic, philosophic and political considerations' is opened with an article by **Walerian Sanetra** in which the author, referring to jurisdiction activity of the Supreme Court on the basis of chosen regulations of Civil Procedure Rules, attempts to answer an essential question: *The Language of Supreme Court Statements of Reasons as a Variant of the Legal Language?* **Anetta Breczko** in the context of considerations on the subject of social communications and legal discourse raises the issue of the so-called 'good reasons'. She also attempts to elucidate if the professional status and ethos of lawyers implies the necessity to be distinctive (from the ethical point of view) participants of the public discourse. **Sławomir Oliwniak** analyses the change of the role and function of the law as a discourse with connection to political power transformations in modern, European legal culture. Poststructuralist inspirations in legal dis-

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course are the subject-matter of **Marta Andruszkiewicz** considerations. The aim of the author is to answer a question whether the influence of postmodern and poststructuralist tendencies on the theory of law (vide discourse pluralism, situation and contextualism of interpretation) justifies the thesis about transformation of the theory of law into a 'cultural theory of law'. **Beata Kornelius** concentrated on topical utility of the issue of division of the law into public and private which might seem to have landed on the scrap heap. In this part of the volume there are two texts of political studies character. **Mieczysława Zdanowicz** presented the problematic of to date practice of the Polish Constitutional Tribunal in the scope of analysis of conformity of agreements concluded within the European Union to the constitution. **Maciej Aleksandrowicz** pointed to the problems of multilingual organisms (the European Union in view of its potential total integration in a federal form). The author described basic normative regulations related to languages on the basis of the Swiss Confederation, emphasizing the problem of the so-called native tongues and consequences in Switzerland in this scope.

The part entitled 'Linguistic problems in constituting and application of law in Poland' starts with an article by **Lech Jamróz** in which the author analyses the problem of legal definitions. **Leonard Etel** discusses the question of interpretation of phrases 'expert testimony' and 'legal expertise' pursuant to Polish tax law, stressing the essence of the problem related to applications for drawing up a legal expertise by tax organs when complex legal regulations are the subject of decisions. Other authors engaged in a similar subject matter even though different in its essence. **Alina Miruć** introduces a problem of interpretation of the subsidiarity principle from the perspective of the Law on Social Assistance of 12th March 2004. The author considers the question both in terms of the situation of particular individuals (families) who should satisfy their needs individually using their own funds, possibilities and entitlements and from the point of view of the sphere related to organization of the state and such distribution of powers to situate tasks on the possibly lowest level of organization (commune, district). **Teresa Mróz** and **Urszula Drozdowska** worked on the notion of damage in civil law emphasising the dynamics within the sphere of changes in its meaning. Their considerations lead to conclusions about expansion of substance containing the notion of 'damage'. **Ewa Kowalewska-Borys** and **Agnieszka Malarewicz-Jakubów** presented the subject of domestic violence pointing at its linguistic, philosophical, normative and sociologic connotations. **Joanna Sieńczyło-Chlabicz** presented the state of discussion concerning the relation of the law and privacy from a comparatist point

of view. Apart from the characteristics of the very notion the author also described Polish jurisdiction practice in this scope. The article by **Katarzyna Bagan-Kurluta** concerns the issue of international adoption and more precisely impediment to adoption based on racial or religious differences between the child and a potential adopter. **Ewa Kosior** presents the historical shaping of the notion of 'codicil' and its social functions. The texts by **Anna Doliwa-Klepacka** and **Mariusz Popławski** relate to factors influencing the employer (respectively: the EU organs and commune councils) in the law-making process, including irregularities which may possibly cause disturbances of this process and defects in its outcome. Anna Doliwa-Klepacka calls attention on the notion of lobbying which, by assumption, consists in actions undertaken in accordance with the law. The author also points out the legal tools limiting possible abuse on the side of different lobby groups. Mariusz Popławski took up the issue of law-making at the self-government level. Basing on a research material (surveys at the level of Polish communes) he makes a diagnosis related to the quality and the directions to improve it as far as passing local tax resolutions is concerned. The author also draws attention to the legal tools limiting possible abuse of different lobby groups. Finally **Irena Czaja-Hliniak** describes the constitutional status of the National Bank of Poland in view of the accession of our country to the Eurosystem.

This is the next volume of Studies in Logic, Grammar and Rhetoric dedicated to a specialised legal language, in which the authors make an attempt of theoretic approach to the language of law from the point of view of Polish theory in this field. We hope this edition of studies within the broad formula of our journal will enable their authors to participate in an international discourse in this field.

Maciej Aleksandrowicz, Halina Święczkowska

PART I

LANGUAGE IN LAW – THEORETIC, PHILOSOPHIC AND POLITICAL CONSIDERATIONS

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

Walerian Sanetra
University of Białystok

THE LANGUAGE OF SUPREME COURT STATEMENTS OF REASONS AS A VARIANT OF THE LEGAL LANGUAGE?[1]

There are many aspects or facets of the statements of reasons for judicial decisions, including those of the Supreme Court, that may and should be analysed. Here one may distinguish among others the philosophical (general theory) facet, including the ontological, methodological and logical one. A separate facet of the analysis is the normative aspect of judicial statements of reasons, on account of the statutory determination of their content and form, time limits for making them, etc. Another facet is connected with the social function of the statements of reasons for judicial decisions. Another one is connected with the necessity of taking the psychological aspects of making and perceiving them into account. The teaching aspect of such statements is also important. This includes their role in shaping judicial decisions, inspiring and shaping thinking in the science of law, their use in university teaching and indirectly also in influencing the practice outside judicial decisions and the attitudes of citizens and their institutions. It is also important to look at the judicial statements of reasons as an instrument of social communication, and, within its framework, at the role of the language in which they are worded. A separate problem is represented by the issue of the methodology of making judicial statements of reasons including such things as whether they should be concise or lengthy, whether their argumentation should be exhaustive or give only examples, whether it should refer to legal literature and to what extent it should draw on the achievements of other fields of knowledge, e.g. sociology, psychology, ethics, economics, statistics. One may also distinguish a mercantile or market-related aspect

[1] Reprinted by permission of Wydawnictwo Uniwersytetu Wrocławskiego, first published as: *Język uzasadnień orzeczeń Sądu Najwyższego jako odmiana języka prawniczego* in: *Sąd Najwyższy wobec prawa i praktyki UE*, ed. W. Sanetra, Wrocław 2003.

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of judicial statements of reasons, since their publication is also the source of income for people and publishing houses specialising in this. Judicial statements of reasons can also be approached in a slightly different way, i.e. from the descriptive, functional and evaluative-postulative point of view. Apart from that, one can distinguish an IT-related aspect of judicial statements of reasons. The individual facets of such statements are obviously interrelated with each other in different ways, so it is not fully possible to separate them precisely and consistently in the course of the analysis.

Among all the judicial statements of reasons, those made by the Supreme Court are significantly different in many respects. In general, the purpose of a judicial statement of reasons is to rationalise the court's decision. In other words, it is aimed at giving a judicious, convincing explanation for why a certain decision with certain content was reached. However, there is a prevalent opinion that it is not necessary to give the rational reasons and clarification of the grounds for the decision at all and that it is enough to rely on the authority of the court (according to the rule *Roma locuta causa finita*) which should be sufficient justification, assuming that the court always acts reasonably and adjudicates justly, which assumption is well founded or merely imposed on those whom the decision concerns. It is understandable that this cannot be assumed where the possibility of appealing against the reached decision is anticipated. If the actual reasons for it are unknown, the effectiveness of such appeal becomes illusory. This issue is important for the Supreme Court's judicial decisions, since its decisions are not appealable against in due course of instance. A particular problem appears in connection with giving reasons for decisions that are part of the so-called preliminary acceptance. It is given by a single justice whose decision cannot be appealed against and does not concern the case that has already been adjudicated before (the opinion as to whether the last resort appeal should be received for hearing or not cannot either before or, as I suppose, later be given by an authority other than the justice to whom the last resort appeal was referred for preliminary acceptance), as is the case e.g. when the Supreme Court hears the complaint, as well as in the event of rejecting the last resort appeal, since in fact it challenges the position of the court of second instance which did not see any grounds for rejecting it (as part of the so-called proceedings between the first and the second instances). Taking the conditions and the nature of the preliminary acceptance into account, it should be assumed that the positive decision, i.e. the receipt of the case by the justice for hearing, does not require any rationalisation (clarification of the reasons for its adoption, justification), whereas the negative decision may be accompanied only by a concise, in other words formal,

statement of reasons (one that consists only in specifying the relevant provision of the Code of Civil Procedure, a formal provision). It appears from the existing mechanism of judicial procedure that every decision of the Supreme Court reversing a given decision and referring the case for re-hearing must be justified, because it has to specify – even though only indirectly – (under Article 393^{17} of the Code of Civil Procedure, the court to which the case is referred is bound only by the interpretation of the law made in such case by the Supreme Court) – how the court to which the case is referred should act. This consideration does not occur with decisions dismissing an appeal and decisions changing the previous decision. However, there are other reasons why it is necessary to justify them. The lack of the statement of reasons may cause the involved parties' distrust in the factual accuracy of the decision. With Supreme Court decisions, there is another circumstance, namely their social (as regards a positive impact on social relations, the society's legal culture and people's attitudes toward the law) and teaching function. The fuller and more convincing is the statement of reasons, the fuller and more effective is the teaching function of the decision, which [function] generally exists only when the decision is accompanied by a statement of reasons in general. One should also bear in mind that to a certain extent the Supreme Court's decisions may become the subject of a constitutional remedy and a complaint lodged with the [European] Court of Human Rights. In general, the principle of providing judicial decisions with a written statement of reasons should be regarded as the elementary requirement of the state of law. The point is that the decision should be actually – and not merely appear to be – substantiated. However, this does not mean that the statement of reasons cannot be concise. On the contrary, this is its advantage, provided that it is exhaustive in terms of the scope and complexity of the issues that are disclosed in connection with the subject of the case and its determinants in the proceedings.

The role, nature and methodological status of the statement of reasons obviously depend on its subject, and thus on the court's decision. In principle, the judicial statement of reasons is not about hearing the evidence of truth, but merely about rationalising (giving rational prerequisites for) the decision. The law (legal norm) is not a being that can be presented in descriptive terms (which is suggested by the saying that there is a world of duties), or a being about which one can say – just like the Romans used to say – that it is true. The judicial decision – its conclusion – establishes an individual and specific norm, and thus formulates the model of how one should behave and in this sense it does not contain a logical sentence (sentences) (in terms of formal logic), although it uses grammatical sentences.

The legal norm (also individual and concrete, and thus one that is worded in the conclusion of a judicial decision), which expresses the duty of certain behaviour, is neither true nor false. In consequence, the statement of reasons for the decision cannot be based on the assumption that its purpose is to justify the truth of the court's decision. Thus, it is only about its rationalisation which can be better or worse. Therefore, the sense of the statement of reasons for a judicial decision boils down to showing that the decision results from the applicable provisions of law, or legal rules within the broader meaning of that term (in particular, taking into account the rules existing outside the system that the provisions of law clearly refer to). In connection with this issue, a distinction is often made between the normative basis for a decision and the rule of a decision.[2]

However, the rationalising sense of a judicial statement of reasons does not mean that such statement cannot or should not contain descriptive utterances that can be verified as true or false. The process in which the court applies the law consists of many stages. In the model of judicial application of the law one can distinguish in particular the stage of determining the binding force of a legal norm (norms) and its meaning to the extent that is applicable in the adjudicated case; the stage of determining the facts of the case (factual basis for the decision); the stage of subsuming the fact of the case under the predetermined legal norm; and the stage of the binding determination of the legal consequences (as part of the so-called margin of decision) of the facts regarded as sufficiently proved. The findings obtained at each stage need to be justified in a slightly – and sometimes substantially – different way. In particular, in order to determine the factual grounds for the case, in principle it is necessary to hear the evidence of truth (witnesses, experts, other evidence), although in many cases the nature of the truth is specific (therefore, what is referred to is the formal truth), in particular because of the rules of evidence distribution, implications of law and of the facts and fictions of law, or the justice's freedom of evidence appraisal. In general, certain facts of the case either actually occurred or did not occur, and therefore they are adjudicated by means of descriptive sentences which can be true or false. A different nature and methodological status is represented by sentences used in adjudicating on a certain legal

[2] According to J. Wróblewski (*Sądowe stosowanie prawa* [*Judicial Application of the Law*], Warsaw 1972, p. 82 and next), in general, the rule of a decision can be represented by the following: 1. legal norms presented in their direct meaning, 2. legal norms following their interpretation for the purposes of the adjudicated case, 3. norms interpreted irrespective of the adjudicated case, 4. rules of the system of law or of its part, 5. rules or appraisals existing outside the law.

norm and its meaning (way of understanding, interpretation). It is difficult to assume that a sentence stating that a certain legal norm has a certain meaning, i.e. that it should be understood in a certain way, can be valued as true or false, because this among others would mean that the norm can be understood only in a strictly defined and only one way, which is a clearly counterfactual assumption. This arises among others from the fact that the law interpretation process is not about determining the legislator's actual will (of which one can say that it either exists or does not exist, and thus it can be reasonably described using sentences in the meaning of formal logic), but only – as it is often assumed – the will of a rational or perfect legislator representing a mental concept of a particular kind that has little to do with reality. Hence the sense of the line of argument aiming at showing that a certain legal norm should be understood in a certain way does not consist in proving the truth and the existence of any of its objective meaning that is independent from appraisals and adopted rules of interpretation, but in presenting arguments that are more or less rational (judicious) and more or less convincing to those to whom they are addressed. This means that it is possible to restrict the freedom of interpreting the law to some extent, but its full elimination would be unthinkable. This freedom can be restricted to a large extent by means of using good argumentation presented in the judicial statements of reasons. This means that the Supreme Court and the statements of reasons for its decisions have an important role to play here. The correctness of the interpretation results cannot be verified in terms of whether it is true or false. However, such verification generally applies to facts constituting the elements of the so-called factual grounds for the case.

The operation consisting in subsuming the facts of the case under the applicable legal norm is of a specific methodological and logical nature as well. It is accompanied (it can also be assumed to be preceded) by a set of mental operations that consist in the legal qualification of facts regarded as proven, such qualification, as a rule, requiring complex appraisals due to the fact that the legislator uses opinions, vague expressions, or makes reference to notions that exist outside the system. It is difficult to refer to such appraisals and legal qualifications as true or false, whereas they are correct or incorrect, just like the act of subsumption itself. The criterion of truth cannot be applied in establishing the binding legal consequences of the facts regarded as proven, which are established by the court within the margins specified by the law, either. The choice of legal consequences within the justice's margin of decision is grounded (justified, rational, convincing) or ill-grounded, but it cannot be said to be untrue or false. Hence we do not refer to the judgement of a court as false or true, but it may be incorrect,

unlawful (inconsistent with legal norms), it may breach the law or be unjust, or it may satisfy the law and the requirements of justice.

The conclusion of a court's judgement is the expression of an individual and concrete legal norm, however so-called declaratory judgements may give a different impression, namely that they do not determine anything but only ascertain the existence of a certain state of affairs. By declaring that a certain legal relationship or right exists (does not exist), in the conclusion of its judgement the court not only pronounces that such relationship or right exists (existed) or does not exist, but at the same time it orders the litigants, and to a certain extent also other parties, to treat this declaration as legally binding. The special nature of a declaratory decision has certain consequences as regards the manner (technique) of preparing the statement of reasons for it.

In civil procedure, the issues of a duty to give reasons for a judgement, the content of the statement of reasons, the time limit for preparing it, signing the statement of reasons and serving it (judgement with the statement of reasons) upon the litigants is governed by the provisions of Article 326 Section 3, 328–331, 387, 393^{19} of the Code of Civil Procedure. The judgement determines the rights of the litigants and in that case the statement of reasons for it should generally be prepared assuming that it is addressed to those litigants and it should explain to them why the court adjudicated the case in a given way. Among others, the language of such statement should be adjusted to this assumption. In other words, as regards the degree of its comprehensibility, one should take into account the fact that the purpose of the statement of reasons is to clarify the factual and legal grounds for its determination to the litigants, assuming at the same time that they may use professional legal aid offered by competent persons. In the statement of reasons for a reversing judgement one must take into account also the fact that as a result of it the case is re-heard by another court and in this sense the clarifications contained in it are addressed to that court. Under Article 386 Section 6 of the Code of Civil Procedure, the legal appraisal and the recommendations for further procedure made in the statement of reasons for a judgement of the court of second instance are binding for that court to which the case is referred, whereas according to Article 393^{17} of the Code of Civil Procedure that court is bound by the interpretation of the law made by the Supreme Court. This means among others that the judicial statement of reasons may contain not only utterances rationalising its decision, but also include determinations that are binding for the court of lower instance, thereby representing a kind of an individual and concrete norm obliging a specific court to understand (read) the applicable provision(s) of law –

and, in effect, to behave accordingly while hearing the case. Such a special norm expressed in the statement of reasons requires a separate justification, in this case it being difficult to assume that it should consist in specifying the factual grounds for the determination and the legal grounds for the judgement including the provisions of law (Article 328 Section 2 of the Code of Civil Procedure), if the point is exactly (in typical cases, and in the case of Supreme Court judgements exclusively) to formulate the binding interpretation of these provisions, and thus it is necessary for the court of second instance and for the Supreme Court respectively to explain why certain provisions of law should be understood as they are by the court to which the case is referred for re-hearing. Thus, it is correctly assumed that Article 328 Section 2 of the Code of Civil Procedure (just like the whole set of other provisions concerning first instance proceedings) can be applied before the court of second instance only "accordingly". This leads among others to the conclusion that the burden of argumentation presented in the Supreme Court's statements of reasons must shift to issues concerning the interpretation guidelines followed by it, their type, choice and order of application. And this applies not only to reversing judgements, but also to judgements of dismissal and judgements changing the previous decision.

In general, here it is worthwhile to stress – taking into account among others the statement that the application of the law by courts is a means of social control by the law – differences in the subject matter and the objectives of control exercised by the courts of first instance and the courts of second instance and the Supreme Court. The court of first instance directly controls the behaviour of litigants being subject to its decisions in the meaning that its decision is based on the ascertained violation (or non-violation) of the law (rights or legal duties) by them. Its decision is aimed at correcting the behaviour of the subjects of legal relations (litigants) (also by way of compensation given to the litigant whose rights have been violated). However, the aim of the decision of the court of second instance as well as the Supreme Court is generally different, because such decision is directly aimed at correcting the decision issued by the lower instance – and in this sense it means the exercise of control over the operations of the court of lower instance – whereas control over the litigants' behaviour in the case of the decisions of the second and third instance is exercised only indirectly. For obvious reasons, this circumstance influences the way of preparing statements of reasons for decisions made by the first instance on the one hand, and by the second instance and the Supreme Court on the other. From this point of view, there are more similarities between the statements of reasons for decisions made by the court of second instance and the Supreme Court

than between those of the first and second instance. However, this does not mean that there are no differences between statements of reasons for decisions made by the courts of second instance and those of the Supreme Court resulting from the fact that the Supreme Court is the third authority in the hierarchy of the application of the law by courts as a means of social control by law, which means that it directly controls only the behaviour of the court of second instance and indirectly the correctness of the decision of the first instance, and thus indirectly also the legality of the litigants' behaviour.

The specific character of the Supreme Court's decisions, and thus the resulting specific nature of the statements of reasons for them, is also connected with the specific way of regulating the last resort appeal as the instrument of control over the application of the law by the court of second instance. The Supreme Court does not conduct any proceedings to take evidence and it does not establish the facts, which means that the description of the facts of the case presented in its statements of reasons is only important and justified to the extent that it is necessary for explaining the irregularities that occurred in the application of the law by the court of second instance or why its judgement is correct. This leads to the conclusion that in the Supreme Court's statements of reasons the burden of argumentation should be connected with the issues of the interpretation of the law within the broad meaning of that term. Additionally, what calls for this position is the changes that occurred in the provisions governing the last resort appeal, in particular the introduction of the so-called preliminary acceptance. Generally, the last resort appeal (except the cases of invalid proceedings and the manifest violation of the law by the challenged judgement) may be received for hearing only when the case involves an important question of law or there is a need to interpret the provisions of law which raise serious doubts or cause discrepancies in judicial decisions (Article 393 of the Code of Civil Procedure). Such regulation of the issue of receiving the last resort appeal for hearing is based on the assumption that the Supreme Court's judgement should be about more than determining the rights of the litigants in a particular case. Therefore, it is often said that this is about precedent decisions. This means that the statement of reasons for the Supreme Court's judgement is assumed to be addressed not only to the litigants and – in the case of a reversing judgement – to the court to which the case is referred for re-hearing, but also to a wider audience. As a result of this, this circumstance has to be taken into account in the manner of argumentation presented in the Supreme Court's statement of reasons, and this has to be done to a greater extent than it did before the last reform of the last resort appeal procedure. These changes indicate an emphasis on

a particular, separate role of the Supreme Court as the authority supervising the judicial decisions of the courts of lower instances, this supervision being expressed or having to be understood from the constitutional perspective mainly as a set of activities aimed at unifying the interpretation and practice of applying the law by the courts of lower instance. At the same time, it is a circumstance that calls for a wider publication of the Supreme Court's judgements and for taking into account in their statements of reasons the fact that they should influence the practice of judicial decisions and the out-of-court practice to a great extent. This should also be reflected in their language.

Apart from the Supreme Court's judgements, separate attention should be paid to decisions made in the form of resolutions in which the Court answers juridical questions in specific cases (asked by the courts which hear appeals – Article 390 of the Code of Civil Procedure and those referred by the Supreme Court's benches composed of three persons to an extended bench of its justices for re-hearing – Article 393^{14} of the Code of Civil Procedure) and questions concerning the so-called abstract interpretation. The Supreme Court's answer to a juridical question concerning a particular case is binding for the court (bench asking the question), whereas this is not the case with a decision which presents the Supreme Court's position explaining in an abstract way how to interpret a specific provision or provisions of law. By answering the juridical question asked under Article 390 or 393^{14} of the Code of Civil Procedure, the Supreme Court in fact formulates a binding legal (however, interpretative) norm, since it orders the court (bench) presenting the legal problem to understand the particular legal regulation in a specified way. However, the Supreme Court does not formulate such norm in the case of the so-called abstract interpretation. The differences between the resolutions adopted in certain cases and abstract resolutions must be properly reflected in the manner of preparing the relevant statements of reasons and in their content. In general, argumentation presented in the statements of reasons for abstract resolutions should be more extensive and precise, among others because they do not have any binding force, they are addressed to a wider audience, and their impact and practical effect to a great extent depend on the accuracy of arguments used and the skill of convincing and persuasion.

According to Article 393^{17} of the Court of Civil Procedure, the court to which a case is referred for re-hearing is bound by the Supreme Court's interpretation of the law (in fact, it is about the result of mental operations in the form of a predetermined understanding of a legal norm by following certain interpretation guidelines). If one takes the regulation of Article 390,

393 Section 1 Point 1 and 2 as well as 393^{17} of the Code of Civil Procedure into account and also bears other circumstances in mind, it should be stated that the fact of binding the court of lower instance applies to the interpretation of the law within the broad meaning of that term which includes various types of rules of the exegesis of legal texts together with validation rules (concerning the binding force of a certain legal norm rather than the manner of understanding its content, such as lex superior, lex specialis lex generalis, intertemporal rules), the rules according to which certain legal norms arise from other legal norms, as well as the issues of subsumption (e.g. the legal qualification of facts) and the selection of the legal consequence of a fact that is regarded as proven, and not only the results of following the so-called law interpretation guidelines (relating to language and logic as well as systemic, functional, and historical guidelines, etc.), the use of which is limited only to determining the meaning (way of understanding) the legal norm previously declared to be binding (applicable to the established factual state). Since the interpretation of the law understood in this (extensive) way is binding for the court to which the case is referred for re-hearing, it is understandable that it needs to be accompanied by a statement of reasons, at best by specifying the applied rules of interpretation and the adopted reasoning. Since in this case the interpretation of the law is presented in the statement of reasons, one should strive to make sure that what is determined in it by the Supreme Court as the binding interpretation of the law is articulated as precisely as possible and separately (e.g. that the provision or expression used in a given provision should be understood in a particular way, or that the particular provision is not in force or cannot be applied, because it is inconsistent with the provision of a higher order). This should be done through the consolidation and development of the practice of formulating separate theses representing the "interpretation of the law" in the Supreme Court's statements of reasons.

To prevent any possible misunderstanding, the above thesis concerning the understanding of the "interpretation of the law" as a broad concept in the context of Article 393^{17} of the Code of Civil Procedure requires an additional explanation in connection with the comparative analyses of this provision and the provision of Article 386 Section 6 of the Code of Civil Procedure according to which the legal appraisal and the recommendations for further procedure made in the statement of reasons for a judgement of the court of second instance are binding for both the court to which the case was referred and the court of second instance in re-hearing the case. The comparison of Article 393^{17} of the Code of Civil Procedure with Article 386 Section 6 of the Code of Civil Procedure leads to the right conclusion that

the scope of binding recommendations made on the basis of the latter provision is wider than that provided for by Article 393^{17} of the Code of Civil Procedure. The "legal appraisal" should be treated as a wider category than the "interpretation of the law". Moreover, that interpretation does not fall into the notion of recommendations for further procedure. In this context, there is an opinion that the "interpretation of the law" as provided for in Article 393^{17} of the Code of Civil Procedure should be understood as a narrow concept.[3]. It is the right opinion to the extent that one compares the regulation of Article 386 Section 6 of the Code of Civil Procedure with that of Article 393^{17} of the Code of Civil Procedure. It is understandable that the "interpretation of the law" as provided for in Article 393^{17} of the Code of Civil Procedure cannot be identified with the legal appraisal and with the recommendations for further procedure provided for in Article 386 Section 6 of the Code of Civil Procedure and in this respect it should be understood as a narrow concept. However, it would be a mistake to consider the way of understanding the "interpretation of the law" in the context of what the theory of law says about the scope of this term if one limited it only to the interpretation of the law in the strict sense of that word (determining the meaning of the provisions of law using the so-called law interpretation guidelines), ignoring other rules of the exegesis of legal texts, including in particular validation rules, inference rules as well as the rules of specifying the criteria restricting the scope of the margins of decision provided for by legal norms.

Considering the role and function of the Supreme Court's statements of reasons, the demand that their language should be constantly improved and that care be taken to ensure their highest possible linguistic standards is obvious, although, on the other hand, one cannot accept a situation where striving after linguistic perfection has a negative impact on the factual aspect of the statement of reasons. The language of the Supreme Court's statements of reasons should be a model for the statements of reasons issued by the courts of lower instance. It should be precise, but the question arises whether and to what extent it should be vidid and close to the literary language. Although the judgement is passed by the Supreme Court, it is the reporting judge who writes the statement of reasons. The resulting certain

[3] Compare M. Lochowski: *Wiążąca wykładnia prawa, ocena prawna, wskazania co do dalszego postępowania (uwagi na tle art. 386 § 6 i art. 393^{17} k.p.c)* [*Binding Interpretation of the Law, Legal Appraisal, Recommendations for further Procedure (remarks in the context of Article 386 Section 6 and Article 393^{17} of the Code of Civil Procedure*)], Przegląd Sądowy No. 10/1997, p. 26–28.

variety of the ways of drawing up statements of reasons, their argumentation and writing styles should, as I believe, be fully accepted. Striving after some kind of schematism or convention in this respect would impoverish the social expression of the Supreme Court's judicial decisions and its perception by the circle associated with the science of law and the legal didactics (especially at the university level). An important factor that to some extent influences the unification of and greater care for the linguistic correctness of the statements of reasons is the participation of all the justices in the editing work aimed at preparing the decisions of the Supreme Court for publication as an official collection of documents, assuming at the same time that all the decisions are generally sent for publication.

The language – but not only – standards of many statements of reasons prepared by the courts of lower instance are poor. This is even worse as regards writs addressed to the court by attorneys *ad litem*. This should be combated by giving a good example. However, one should not give up pointing out mistakes, but this should be done in a balanced way, without insults or adjectives classifying individual language (or similar) errors in a spiteful and clearly negative way. I think that it is enough to limit oneself – stressing it clearly – to quoting language errors or stylistic ineptitude that can be found in the statements of reasons of the courts of lower instance and in writs drawn up by attorneys. There is obviously a certain dilemma if the Supreme Court's statement of reasons contains utterances that are unacceptable or even compromising from the linguistic point of view. This may cause misunderstandings (treating the "unfortunate" utterances as originating from the Supreme Court or as ones that are accepted by it) or the lack of understanding of the Supreme Court's (teaching) intentions in this case. But the price is worth paying in striving not only after raising the standards of the statements of reasons prepared by the justices of that Court but also by other courts and professional attorneys *ad litem*.

The language of the statements of reasons should be as simple as possible, deprived of bizarre effects and neologisms and concise, while their content should be internally coherent and exhaustive. The Supreme Court gains its actual authority thanks to clear, concise, simple and convincing argumentation that cannot be replaced by bizarre stylistic effects or convoluted and sophisticated terminology aimed at overawing the reader and making him or her wonder whether he or she properly understands the sense of the words and expressions used in the statement. However, at the same time it is necessary to stress clearly that it is extremely difficult to achieve full simplicity and full understanding of the line of argument presented in the Supreme Court's statement of reasons due to the fact that the issues

addressed by it are often extremely complex. As a rule, the Supreme Court expresses its opinion as the court of third instance and hence it is often necessary to build multi-level utterances in its statements of reasons, which take into account what was said (appraised, established, applied) by the courts of first and second instance, as well as what was presented by the litigants in the proceedings before the court of first instance, in the appeal (in the reply to the appeal) and in the last resort appeal (in the reply to the last resort appeal). At the same time, in its line of argument the Supreme Court many times has to use statements qualifying certain behaviour of a given authority as consistent/inconsistent with a given legal norm, because it is necessary for it to make legal qualifications and the so-called appraisal of the facts in the light of the applicable legal norms, as well as assess whether the mental operations of this type conducted previously by the courts of lower instance are correct.

In jurisprudence, reference is made to the language of the law and the legal language, and their existence is associated with the specific character of the language of normative texts and the particularities of the language of the so-called legal practice. Language differences are sought in the area of language phenomena covered by semantics, syntax and language pragmatics. The specific character is mostly discerned in connection with the occurrence of the so-called legal terminology. It is obvious that legal terms (in particular those that usually do not occur in the colloquial language or outside the area of law and jurisprudence, or to which laws lend a more or less modified sense compared with their established meaning) spread to the language of the statements of reasons including those of the Supreme Court. It is doubtful whether one can talk about the existence of the language of those statements as a variant of the language of legal practice (legal language) merely on this basis. However, a question arises whether, because of its specific needs, in its statements of reasons the Supreme Court creates any system of notions or stylistics that is typical of it only. In my opinion, even if this is the case to some extent, the scale of this phenomenon is so small that it does not justify the thesis that there is a separate language of the Supreme Court's statements of reasons; the language used by the Supreme Court is simply the legal language.

A problem that should be taken into account, especially in the future, is the spreading of foreign vocabulary to the language of the Supreme Court's statements of reasons and the resulting popularisation of it by the Court. The influence of different kinds of international legal regulations and the developing internationalisation of our legal relations lead to the invasion of foreign legal vocabulary. It is my conviction that the Supreme Court should

not be in the vanguard of popularising foreign legal terminology. In its word formation activity, which it should not avoid, while supporting the legislator and the science of law in this respect the Court should rather find or create Polish equivalents of foreign terms. A special question arises also with regard to language errors committed by the legislator or where it is necessary to apply a legal act that was passed long ago and contains linguistic archaisms. It is my conviction that the contemporary legislator should not be corrected in the Supreme Court's statements or reasons even if it commits language errors. However, archaisms in the language of law should be approached in a different way.

A separate question is the methodology (technique and tactics) of preparing judicial statements of reasons. One of the issues that occurs here is the question of drafting such statements still before the Supreme Court adjudicates the case. As a general rule, there are advantages and disadvantages of such way of dealing with this. A disadvantage is represented especially by the fact that the early drafting of a statement of reasons often encourages one to defend it at any price, as a result of which one is less open to accepting arguments against what is already written in the draft statement. Another problem is what should be included in the statement of reasons if the bench comes to believe that it made a wrong decision. More frequently the question arising in the process of writing a statement of reasons is not about the repudiation of the Court's own decision, but one that was made in other proceedings before the Supreme Court. This is often about differences resulting from dissimilarities between the adjudicated facts of the case, which should call for an opinion that there is no disparity in expounding the law by the Supreme Court, even if this thesis raises doubts or is only partially justified. In other cases it is necessary to point out to the existing disparity in the Supreme Court's judicial decisions, but it should be regarded as exaggerated e.g. if it were said on that occasion that the Court's previous decision is obviously incorrect, say, due to what arises from the saying that a given case may be handled by the law in this or that, or quite a different way.

S U M M A R Y

The subject of the article is the language of the court decisions, particularly the language of the Supreme Court decision justification. The author presents the thesis that the language used by the Supreme Court while formulating their decision justification is simply a legal language rather than a specific variety of the legal practice language. Presenting this thesis, the author extensively analyzes the aspects and functions

of the judicial decision justification. Due to a specific character of the Supreme Court and its systemic position, determined by the rules and principles of the judicial proceedings which introduce significant differences of the language and justification functions, the author focuses on the Supreme Court decision justification. Not only does he characterize a general-theoretical and normative aspect of the court preparation of the decision justification (judgments), but he also broadly examines a social function of the decisions. What is more, the author discusses their didactic and scientific function. Being an experienced Supreme Court judge and professor of law, the author presents the issue of methodology of judicial decision justification preparation. In his discussion, the author emphasizes that the role of judicial justification, basically, is not to prove the truth, but to rationalize the court decision (to give rational prerequisites) in the process of the law application. This affects the understanding of the decision judgment practice making as a way to interpret the law. The role of judicial judgement, which aims to rationalize decisions taken by courts, also results from the claim, which frequently appears in the paper, that the courts' law application is a means of social control through the law.

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LEGAL DISCOURSE ETHICS

1. *Ius est ars boni et aequi* – comments on the axiology of law

The issue of the axiology of law is one of the most difficult problems of the widely understood jurisprudence. A study of the relationship between the law and morality has fascinated many researchers, constituting at the same time one of the central issues of philosophy, law, politics and other social sciences. A problem of determining a content of the "good law" has always accompanied people. A social life is penetrated by moral judgment. The law is also subjected to such judgment. No legal system can, therefore, be fully neutral axiologically.

Axiology is the knowledge about the values of all kinds, being connected to general and multifaceted reflections on them. Axiology of law creates a set of values, restricted to the valuation standards revealed by a given legal system, or referred to by a given system.

Thus the concept of "value" becomes fundamental when considering axiology. Leaving aside the controversies arising while determining a semantic meaning of the term, value can be defined as an attribute (property) of a thing resulting from its positive assessment.[1] This is a characteristic feature attributed to the thing freely by a given subject (subjective approach) or in accordance with the accepted norms in a particular culture (objective approach). Reasonable is the statement that the essence of our humanity is judged by values.[2] The values that a given legal system declares or incorporates are inevitably relativized to social valuation standards.

[1] W. Lang, *Aksjologia polskiego systemu prawa w okresie transformacji ustrojowej*, (in:) L. Leszczyński (ed.), *Zmiany społeczne a zmiany w prawie. Aksjologia. Konstytucje. Integracja europejska*, Lublin 1999, pp. 47–55.

[2] T. Kozłowski, *Wolność jako założenie pro-wartościujące*, (in:) T. Kozłowski, K. Kuźmicz (ed.), *Człowiek wobec systemów wartości*, Białystok 2006, p. 100.

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There appears a key problem of determining the normative values that are essential for a public order.[3] Is it possible at all to specify a catalogue of universal and permanent values that are common to pluralistic orders?

Since the beginning of human history there has been a debate over the relationship of morality to law. Since ancient times it has been possible to notice the existence of a core of some immutable law, despite its inevitable evolution. Many fundamental principles of law, which are still existing today, were elaborated in ancient times as some immutable standards of law rooted in the relation between law and morality. The eternal conflict of morality and law can be summed up as the opposition of the rules: *dura lex sed lex* and *summum ius summa iniuria*. The first rule states that law is law and it should be respected, regardless of its content. The second rule claims that the highest law may become a "statutory lack of law" and its extremely strict usage leads to injustice.[4]

A basic principle of the law definition taken by contemporary civilizations from the Romans is: *ius est ars boni et aequi*. This rule was created by a jurist Celsus who described law as the ability to do what is good and right. The old Roman paremia states that law is powerless if it is not supported by morality (*leges sine moribus vanae*). However, even in those times people realized the fact that law was not always consistent with morality. Paulus, a jurist, noted that not everything that is permitted under the law is always fair. It was expressed in the formula: *non omne quo licet, honestum est*.[5]

In medieval times, Christian ethics strongly influenced the perception of the "good law" conditions. It was assumed that a positive law was a reflection of a natural law, whose essence was the will of a personal God, regarded as the creator and ruler of the world. A natural law should designate the shape of the law created by humans. A legal doctrine was dominated by static approaches of the natural law.

The Enlightenment thought and liberal views provided the foundations for the contemporary, modern interpretation of the "good law" concept. The theory of I. Kant was of a particular importance. By raising the moral autonomy to the rank of the main principles of social life, he created the foundation for the concept of moral neutrality of the state. Kant linked morality with duty dictated by practical reason to act only according to

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[3] M. Zdyb, *Państwo prawa w perspektywie zaszłości historycznych oraz dokonujących się zmian*, (in:) S. Fundowicz, *Studia z prawa publicznego*, Vol. I, Lublin 1999, p. 18.

[4] See M. Matczak, *Summa iniura. O błędzie formalizmu w stosowaniu prawa*, Warszawa 2007, p. 39 and the following.

[5] W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 135.

such a rule which we want to become common. He clearly emphasized that law does not serve moral improvement. The law should simply guarantee a coexistence of individual freedoms.[6]

A view on the natural law was fundamentally challenged by Kant. There emerged numerous concepts of the natural law which were in the opposition to the traditional approach, the so-called "theories of natural law with variable content" (eg. R. Sammler, G. Radbruch). On their basis, God was no longer the source of the natural law. The source was seen in human nature, in human reason, in cultural products, etc. The minimalist theory of natural law was created by L. L. Fuller who assumed the axiological law involvement (the so-called "internal" and "external morality of law"). With time, dynamic theories of the natural law emerged proving that God is the source of law, but its principles change with the society evolution (for example, J. Maritain). Simultaneously, the positivist approach flourished, totally eliminating axiology from the philosophy of law, declaring that the study of law is mainly based on the analysis of texts and legal concepts (KI Bergom, R. Ihering, G. Jellinek, H. Kelsen, and others).

In modern times, a dispute between supporters of the natural law approach and the positivist approach has a significant impact. The characteristics of the positivist and natural law doctrines refer to their attitude towards duty. One of the most important problems of metaethics constitutes the basis for their opposition: the problem of transition from being to duty, from facts to values, from descriptive sentences to evaluating sentences.

The legal positivism approach proclaims the necessity of obeying any law and accepting the will of any legislator. Breaking the law, as a kind of attack on authority, results in negative consequences. According to the positivists, law should not be evaluated. It is morally neutral. Private views of the law recipients on its validity are irrelevant to the law enforcement. Legal norms do not reveal a character of the sentences in a logical sense. Therefore, it is not possible to state that duties are true (the so-called "non-cognitivism").

The natural law mainstream is based on the thesis that values are material foundations of the positive law. They should embody the law. A legal order should be the order of values. This is the condition for it to become a genuine law, and not an arbitrary order of force. In addition to the positive law, there is a higher law – natural law. Law has a biding power only when it remains in harmony with a moral order. Disobeying a "bad law" may become a moral duty. On the basis of this approach, it is assumed that

[6] M. Szyszkowska, *Etyka*, Białystok 2010, pp. 59–61.

legal norms are sentences in a logical sense, certain obligations are real and absolutely binding (the so-called "cognitivism").

At the turn of the XX century an attempt to reconcile postulates of the natural law and legal positivism was undertaken. Increasingly, even in the theories classified as positivist, there appears axiological entanglement of law, which, as it has been recognized, should refer to morality (eg, H. L. A. Hart, R. Dworkin). It is emphasized that the morality and justice component should be the foundation of every legal system. There is a necessary relationship between law and morality reflected even in the fact that some moral principles are by definition the *ex definitione* components of the law. It is argued that law should be consistent with obvious truths about the human nature.

In the twenty-first century there appeared concepts on the basis of which a search for the so-called "third way", that is a middle way between legal positivism and the natural law ideas, was undertaken. That search constitutes a specific alternative to the eternal dispute between cognitivism and noncognitivism as well as extends the reflection on the law, considering its functioning in specific social systems. Attention is drawn to the role of the law interpretation and the need for rational justification of values and norms (legal realism, hermeneutics, theories of legal argumentation and rhetoric, etc.).[7]

The analysis of the views on law and morality increasingly leads to the conclusion that contemporary differences between legal positivism and natural law trends have almost disappeared. Some researchers even point out that both approaches have come closer to each other, and the boundary between them has ceased to be interesting or important.

Leaving aside the controversy regarding the non-positivist and positivist visions of law, it should be noted that one of the necessary conditions to ensure an effective rule of law is the compliance of the axiology adopted by the legislature with the socially recognized values: "(...) *regardless of whether the legislature seems to realize it, every positive law has at its base an idea of man and a concept of value associated with it.* (...) *law is an important part of the social system, being a continuation of the cultural heritage and a constant result of the efforts of many generations to realize their assumed values – goals*".[8]

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[7] For more information see J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999.

[8] P. Dutkiewicz, *Problem aksjologicznych podstaw prawa we współczesnej polskiej filozofii i teorii prawa*, Kraków 1996, p. 5.

A "good law" is based on the values being the foundations of the civilization and culture of the society. Its axiological approval by the norm recipients makes it the actual regulator of social, political and economic functions.

The process of creating law is largely conditioned axiologically and currently this fact is not subjected to any discussion. Law must be a carrier of values. From the material point of view, a "good law" is the law that protects important values. However, controversial is the choice of values which are to be incorporated into modern legal systems. Undoubtedly, over time there have been significant changes in axiology important for the choice of law-making activities and means to achieve these goals.

Because of the fact that in multicultural societies different views about what is right and what is wrong overlap, the public order construction is possible by basing it on the net of values that are recognized and respected by the majority of the European legal culture.[9] It has worked out some universal standards of the "good law". Common roots of this culture are sought in four civilizations: Greek, Roman, Jewish and Christian. They are the basis for the values which are treated today as axiological foundations of the democratic state.[10] They constitute a solid skeleton because they have helped to make a conscious and cultural choice.[11]

A "good law" can be referred to in purely technical terms. The requirement of a "good law" involves not only the content but also the course of its creation, the design of the legal norms system and institutional mechanism for its secure compliance. Therefore, a "good law" should meet a number of thetic requirements. Among them the most important are: equality, impartiality of law, consistency of the legal system, non-retroactivity, designation of the legal standards possible to meet by citizens, adequate publication, and rule of law.

A "good law" is coherent, logical. Moreover, it does not contain contradictions and gaps. It is important to accurately determine legal consequences referring to the legal norms addressees as well as establish consequences of individuals' failure to obey or break the rules. Along with the establishment of responsibilities and rights, a mode of their implementation should

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[9] T. Zieliński, *Czas prawa i bezprawia. Myśli niepokorne kustosz praw*, Warszawa 1999, p. 60.

[10] A. Chodubski, *Wartości globalne kultury europejskiej*, (in:) R. Rybiński (ed.), *Kultura polska w zintegrowanej Europie. Szanse czy zagrożenia?*, Toruń 2003, pp. 11–36.

[11] P. Winczorek, *Wstęp*, (in:) W. Sadurski, *Myślenie konstytucyjne*, Warszawa 1994, p. 9.

be defined. Normative acts should be understood by their recipients. No law beyond a reasonable need should be created.[12]

Even the legal positivism supporters have recently come to the conclusion that a "good law" is based on the natural law. However, it is being treated somehow differently than in the typical conventional natural law approaches. A. Zoll has given its accurate definition adequate to the needs of pluralistic societies stating that this is the law *"that a person, primarily characterized by dignity, treats as the norm of his conduct. The natural law should be close to the civil one; it should even be the civil law basis"*.[13]

Values, recognized by the law, affect its understanding, which is reflected in the course of the law interpretation. E. Smoktunowicz has repeatedly emphasized the role of interpretation stating that *"Legal regulations are acts of the will. Their interpretation should make them acts of the reason"*.[14] The author concludes that the legal reality is created not only by the legal standards, but mainly by the practice of their application.[15] A legal culture greatly affects the interpretation of law. It is also reflected to a large extent by the awareness of the person using the law and decides on how the rule of law will be understood. It is fair to say that "*our civilization lies at the root of our law content* (...)".[16] *Ius* has the authority to set a framework for interpretation of *lex* from which it takes its legitimacy.

2. A legal dispute over "good reasons" in the context of the reflection on social communication and legal discourse

Recently, the so-called "communication vision of law" has been playing a significant role.[17] Primarily, the significance of social communication was stressed mainly with a reference to different philosophical views: hermeneutical concepts of language games (A. Aarno), universal pragmatics (J. Habermas), new rhetoric (Ch. Perelman), postmodern deconstruction (J. Derrida), the positivist concept of the text openness (M. Hart), integral

[12] P. Winczorek, *Prawo i polityka w czasach przemian*, Warszawa 1995, pp. 24–25.

[13] A. Zoll, *O prawie*, (in:) *Rozmowy na koniec wieku 2*, Kraków 2000, p. 178.

[14] E. Smoktunowicz, *Orzecznictwo Sądu Najwyższego i Naczelnego Sądu Administracyjnego. Kodeks postępowania administracyjnego*, Warszawa 1994, p. 17.

[15] E. Smoktunowicz, *Orzecznictwo...*, *op. cit.*, p. 51.

[16] A. Zoll, *Kultura i prawo*, (in:) E. Kamińska (ed.), *Uniwersyteckie wykłady na koniec starego i początek nowego tysiąclecia*, Warszawa 2004, p. 45.

[17] L. Morawski, *Prawo w toku przemian*, Warszawa 2003, p. 150.

philosophy of law (R. Dworkin), etc.[18] Such a perspective has also entered a broader jurisprudence.

Generally, it can be assumed that communication is a process in which parties (a sender and a recipient) by entering into certain social interaction tend to communicate through a language or other significant symbols.[19] Therefore, transfers of meaning through verbal and non-verbal signs take place. To make it possible, one should know a particular "code". Each communication action is directed to obeying of the intersubjectively accepted social norms which become the basis for understanding.[20] Legal communication has its own characteristics. Its participants are the subjects of law, and the rules of such communication are reflected by boarders of the law.[21]

The communication foundation is the so-called "discourse". This concept should be understood as a unique, individual communication event, in which particular communication partners are involved in a given situation. Axiology, which according to S. Gajda is defined as a "powerhouse" of human life, becomes the basis of any discourse, a legal discourse in particular. The author notes that the multiplicity of values and their rivalry "(...) *releases energy, which gives the world the power of development*".[22] Certainly, the analysis done from a global perspective, through the prism of the development of human history, confirms this thesis. However, observation of specific countries (at a given time and place) leads to the conclusion that values (eg religious) often block the development, posing a barrier to legal regulations. Nevertheless, it does not change the fact that the discourse should be arranged so that it provides communication in an understandable way, consistent with reality, social expectations and universally recognized legal and non-legal norms.

A general framework for the legal discourse is associated with the fact that the basis for decision-making processes cannot be a unilateral imperious decision. Such a decision should be an expression of a social consensus, based on the dialogue compatible with the principles of honest communication. As a result of this dialogue, one goes beyond the boundaries of a given local community and adopts a universal point of view of rational people.

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[18] J. Jabłońska-Bonca, *Prawnik a sztuka negocjacji i retoryki*, Warszawa 2002, p. 11.

[19] L. Morawski, *Prawo...*, *op. cit.*, p. 142.

[20] *Ibidem*, p. 142.

[21] M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, p. 28.

[22] S. Gajda, *Prestiż w dyskursie prawniczym*, (in:) A. Choduń, S. Czepita (ed.), *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, Szczecin 2010, pp. 821–882.

Many years ago E. Smoktunowicz noted that such a discourse may serve to improve the law, both in its creation and use. He emphasized the importance of legal discourse based on J. Habermas's theory of communicative competence. According to Smoktunowicz, the main participants in the discussion should be: the legal doctrine of judicial decisions, legislative bodies, and the subjects who are particularly interested in the quality of law and its application.[23]

J. Stelmach and B. Brozek observe that nowadays jurisprudence (and other humanities) is offered different methods of philosophical interpretation, referring not only to logic, but also, for example, hermeneutics. It provides a kind of the "third way" in the methodology of legal science. Thus, it also becomes possible to justify the normative interpretation theses, by referring not only to the criterion of truth, but also to the criterion of justice, fairness, validity, credibility and effectiveness. Many authors highlight that the basic principles determining the criteria of the practical discourse acceptation ultimately have an intuitive explanation. They claim that argumentation plays a huge role by providing an "ethical minimum" for jurisprudence, that is the minimum of certainty and objectivity.[24]

A legal discourse has been accompanied by a dispute regarding "good reasons" since ancient times when the basis of logic, dialectics, rhetoric and eristics began to develop. The knowledge of the basic replies and the differences between them has had a significant role. For a long time it was considered that descriptive sentences, whose truth is expressed in conformity of the reality with the expressed judgments, was the main type of those replies. With time, it was noted that language can be used not only to describe the external world, but also to change the reality and create new non-linguistic facts.[25]

Dialectics became fundamental to determine what was most probably "right". For Socrates, it meant a method of the philosophical dispute conduct. As a result, through the right argumentation it was necessary to direct the opponent's thesis towards absurd if it was really false. Socrates acknowledged that a person having a discussion should have a special ability to recognize any falsehood. He used the so-called "maieutic methods" based

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[23] E. Smoktunowicz, *Związanie administracji publicznej prawem, wartościami i interesem publicznym. Zarys problematyki*, (in:) *Prawo do dobrej administracji. Materiały ze Zjazdu Katedr Prawa i Postępowania Administracyjnego*, Warszawa 2003, p. 154.

[24] J. Stelmach, B. Brożek, *Metody prawnicze*, Warszawa 2006, p. 161.

[25] M. Pietrzykowski, *Wyzwania moralne. Etyczne problemy prawa*, Katowice 2010, p. 17.

on extracting the truth. Plato also emphasized the importance of the continuous use of reason and practicing it in intellectual activities.

Dialectical methods, allowing for a non-empirical way of accounting of the world, were reflected in the form of eristic dialectics (A. Schopenhauer) and hermeneutics (H. G. Gadamer, E. Kaufmann, Ch. Perelman).[26]

It was already in the ancient times that the so-called "rhetoric" became the basis for the dispute about "good reasons". Its classical definition is attributed to Quintilianus who described it as *ars bene dicendi*, that is the art of good persuasion. Socrates suggested getting out of man what is good or discrediting his false theses through a discussion. For Aristotle, rhetoric was the art of searching for the persuasion means in any situation. Thus, since ancient times it has been understood as an art of fair, earnest, beautiful, persuasive and effective speaking. It was given a legal and judicial pedigree.

Today, rhetoric is a classic area of legal skills based on the speaker's fairness and honesty.[27] It is based on the skills of conducting disputes in a "good" way and persuading listeners. Over time, however, this concept began to refer not only to the art of oratory, but also to a certain type of argumentative philosophy.

According to contemporary encyclopedias, rhetoric is a science of the functional and efficient use of language in speech and writing.[28] This involves an analysis of discursive techniques that aim to stimulate or strengthen the support for the statements used for approval.

Although rhetoric has undoubtedly a judicial pedigree, nowadays it is frequently used in non-judicial dialogues. It is used for flexible and effective formulation of the content of the legal relations by means of voluntary agreements between the parties.[29]

In ancient times, apart rhetoric the so-called eristics began to develop, originally understood as an art of litigation (from Greek *eristyke, eris* – quarrel, dispute). It should be emphasized that the boundary between eristics and rhetoric is very indistinct. Today eristics is frequently understood as the ability to achieve a victory in a dispute. Its goal is to win the debate, regardless of the ways in which it is achieved. Defeating an opponent is an art in itself, no matter who is right and what the truth is. Using eristics helps to win at any price, by means of permitted and prohibited measures

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[26] *Ibidem*, p. 166.

[27] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 11.

[28] M. Korolko, *Sztuka retoryki. Przewodnik encyklopedyczny*, Warszawa 1998, pp. 48–49.

[29] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 12.

(*per fas et nefas*).[30] In ancient times its merits were indicated, if it helped to achieve one's goal, while maintaining the resemblance of being right. Nevertheless, such methods of discussions were criticized already in those times. For example, Aristotle judged them as unfair ways of fight.[31]

Today, eristics is usually treated as "rhetoric of lies." It is emphasized that in case of eristic claims only their form seems correct, but the claims themselves are not true.[32] In case of sophistic reasoning (frequently associated with the eristic argumentation), the very form of reasoning is erroneous although it creates a resemblance of truth.[33]

Classically, eristics is recognized today by using A. Schopenhauer's definition as a kind of "mental fencing" used to prove one's points in a discussion. Its primary role is to win, and not follow the rules. Eristics understood in this way relies on a frequent use of specific "tricks" to prove one' points right, despite the fact that the truth in the dispute lies in the opposite side.

Some time ago in the Polish jurisprudence there appeared a trend to understand eristics as an art of persuasion consisting in the ability to collect facts and *"process them into the wisdom of persuasive statements"*.[34] Still, such an approach characterizes the opinion of some contemporary jurists, especially practicing lawyers.

There are sound reasons to agree with the view that if eristics has lost a primary goal of rhetoric, that is searching for truth, it should be treated as "depraved dialectic" making it extremely dangerous.[35] J. Jabłońska-Bonca highlights that although the eristic discourse has only one goal – winning, and one criterion – efficiency, lawyers may benefit from the knowledge of its rules just to resist dishonest attacks and unmask lies.[36]

3. From ethocratio to etoplebs, or reflections on the role of the lawyer as the legal discourse subject

Lawyers play a special public role. Their work is directly related to the law protection, resolving conflicts in the name of justice, establishment

[30] *Ibidem*, pp. 15–16.

[31] Arystoteles, *Topiki. O dowodach sofistycznych*, Warszawa 1978, p. 264 and the following.

[32] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 171.

[33] *Ibidem*, p. 171.

[34] R. Łuczywek, *Z zagadnień erystyki sądowej*, "Nowe Prawo" 1956, nr 9, pp. 59–72.

[35] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 157.

[36] *Ibidem*, p. 222.

public order, and providing legal assistance for those individuals and organizations whose rights and freedoms are threatened. They make decisions about the highest values: life, health, freedom, dignity, security, prosperity, etc. Lawyers' special status and professional ethos along with their special qualifications oblige them to be outstanding participants of the interpersonal communication. They owe their authority to the legal profession's high prestige, the law authority and deeply established patterns of the legal culture. Hence, the highest level of morality should be a fundamental requirement for this professional group.

Today, lawyers are expected to meet appropriate standards of morality. It has become widely recognized that people who join "the sanctuary of justice" for professional reasons should demonstrate the highest qualities of personality. They become the so-called "theocracy," or "power of moral people." Lawyers should form a new social aristocracy, the so-called "aristocracy of spirit" (not just aristocracy of power and income). As Max Weber imagined, they create a professional product in the form of legal services. They control supplies and demands on the market. They raise their social status among all through supporting their services by highly specialized professional knowledge, indispensable for the society and valued by consumers who do not possess such expertise. Lawyers control and restrict the access to the profession, and their prestige rises with the introduction of new regulations in different areas of life.[37] However, idealistic expectations connected with the "mission" of the legal profession do not always coincide with practice. Today a crisis of the social confidence in the legal profession representatives is obvious. It deepens with the revelation of new cases of corruption, fraud, embezzlement, fraudulent brokerage, nepotism, etc. Moreover, this tendency has been noticeable since ancient times, when examples of the corrupted lawyers were pointed out and heavily criticized. R. Tokarczyk notes that *"contrary to those dreams of lawyers being a moral elite – ethocracio, in many cases, their spirits reach the ethic bottom – a level that can be described as ethoplebs"*.[38] J. Jabońska-Bonca sees reasons for the legal profession crisis in giving primacy to the practical value instead of giving it to the content value. This state of affairs should be regarded as a symptom of the victory of the interest market over the intellect world.[39]

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[37] R. Tokarczyk, *Etyka prawnicza*, Warszawa 2001, pp. 22–23.

[38] R. Tokarczyk, *Etyka...*, *op. cit.*, p. 13.

[39] J. Jabłońska-Bonca, *Autorytety prawnicze. Pomiędzy pragnieniem prawdy i dobra wspólnego a potrzebami rynku wiedzy i władzą*, (in:) A. Choduń, S. Czapita, *W poszukiwaniu...*, *op. cit.*, p. 943.

Legal professions have always been accompanied by a clear contradiction. From a purely hypothetical perspective lawyers are expected to fulfill the "mission" whose execution relies on nobility, special moral sensitivity, etc. Through the prism of their constant practice it is possible to observe their calculation, nepotism, bribery, low moral standards, etc. In view of the professional dilemmas occurring in practice of the legal profession one is forced to agree with the opinion that no social role is associated with so many moral expectations as the legal profession is, and no profession disappoints as much as the profession of lawyer does.

This is not a great exaggeration to make a general statement that the reputation of lawyers is now the lowest in the history of mankind. Lawyers use their position through the linguistic nomenclature. They have created a new language that is not understood by average people. Thus, they place themselves in a position of wise men who possess knowledge not available to the public. Often they use "mental fencing" to achieve their goal – winning – by taking advantage of their superiority, which, among other things, results from their knowledge of the "legal communication code". Bearing in mind the importance of the widespread slogan which states that any profession is a "conspiracy against the average people", lawyers should be regarded as the biggest conspirators.

Barristers comprise the most critically evaluated legal profession. They are often identified with "fallen angels", "fathers of lies," "cunning devils," or simply devil's advocates, the "defenders of vicious cases". Their immoral attitude has been the motive of numerous aphorisms. Here are several examples taken from the work of R. Tokarczyk entitled *Commandments of legal ethics. A book of ideas, standards and drawings (original title: Przykazania etyki prawniczej. Księga myśli, norm i rycin): "A lawyer after the case and a young lady after a party are worthy of the devil"* (Z. Pauli); *"An advocate is not believed, though he is already in a coffin"* (W. Kunysz); *"A lawyer lives on what the legislature cannot express"* (unknown author); *"A bad lawyer can lose a good case; he wants to justify it by the paragraph, which is not suitable for the case when the right one does not come to his mind"* (A. Schopenhauer).[40]

A profession of the judge, which is described as the "crown of legal professions", is also a subject of heavy criticism. A few aphorisms taken from the above mentioned book by R. Tokarczykiem perfectly illustrate this

[40] R. Tokarczyk, *Przykazania etyki prawniczej. Księga myśli, norm i rycin*, Warszawa 2009, pp. 285–287.

fact: *"When you hear the names of the righteous judges, bend your knees dear fellows; such a miracle is rarer than a virtuous wife. Good things are rare."* (J. Dowbor-Muśnicki); *"A fool has heard that the courts in Hades are fair. So when he had a case in the court, he hanged himself."* (Hierokles); *"Even a corrupted judge can be fair when he takes bribes from both sides"* (K. Bunsch); *"The court is a group of people adjudicating which side has a better lawyer"* (J. Tuwim).[41]

Along with a deep crisis of the legal profession ethical standards in society there is a strong belief that it has become very difficult to find a "good" lawyer. Much too often, professional lawyers who know the craft well often remain on the borderline neglecting the profession ethical principles and general rules of morality and decency.[42]

Professions of legal confidence, legal professions being among them, should enjoy a special prestige. The word "prestige" has a Greek origin (from Latin *preastigium*). It means respectability, authority and seriousness. The prestige is one of the fundamental autotelic values. Its aspect places it in the row of important values, especially from the standpoint of the law functioning.[43]

In the face of the growing crisis and collapse of the legal profession, it seems reasonable to pose R. Sarkowicz's questions: "(...) *to which extent is that bad reputation deserved? Do lawyers actually do anything to change that image?*"[44] Perhaps one way to overcome the present situation is to give an adequate education, which, beyond the knowledge of the legal ethics principles, would propagate the knowledge of the legal discourse fair rules so that they are identified with rhetoric, and not with eristics.

4. Expectations towards the contemporary legal discourse axiology

It seems that a current critical assessment of the legal profession is associated with the fact that for centuries lawyers have used the rules of eristic argumentation in their discourse, which they never considered as something wrong. Effective actions were valued above all. The issue of being right

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[41] *Ibidem*, pp. 266–274.

[42] R. Sarkowicz, *O etosie prawniczym*, (in:) A. Choduń, S. Czapita, *W poszukiwaniu...*, *op. cit.*, p. 928.

[43] S. Gajda, *Prestiż w dyskursie prawnym*, (in:) A. Choduń, S. Czapita, *W poszukiwaniu...*, *op. cit.*, p. 813.

[44] R. Sarkowicz, *O etosie...*, *op. cit.*, p. 923.

almost disappeared for it was not about being right but about winning a dispute.[45] Although in contemporary democratic conditions it seems impossible to justify eristic methods, it is possible and necessary to use the achievements of rhetoric in an ethic way.[46]

Representatives of legal professions should have appropriate communication skills. The art of compromising and considering legal and non-legal interests becomes the area of lawyers' necessary skills. Rhetorical competence is the foundation. It is advisable to be proficient in establishing and maintaining social contacts. It allows for a better use of professional practice and skills thanks to the mutual understanding and trust. Effective lawyers should, therefore, appreciate the importance of social competence and cultural dialogue. Only then they have a chance to establish charisma, credibility and authority. They should use the tactics of persuasion so that not to break the law and ethics of their profession. A delicate boundary between justified tricks and unethical manipulation cannot be crossed.[47]

Not only should a "good lawyer" know the law, but he should also be able to persuade clients to accept the proposed solutions and negotiate compromises in the world of diverse interests in the legal framework.[48] A "good lawyer" cannot only be "silent lips of the acts," performing his functions only by using formal and dogmatic methods. A need for integration of legal science with other sciences (including rhetoric and communication theory) becomes clear. A "good lawyer" should be able to "extract" a hidden content of the legal matter, through the appropriate use of non-linguistic interpretation.[49]

It seems that currently a criterion of the practical discourse evaluation should be justness. This term is ambiguous. It is always associated with a certain type of moral values that define only the "ethical minimum" for all types of possible practical discourse.

The role of values in the process of the text legal interpretation is huge. In such situations, to solve a particular case, it is important to grasp the law as a cultural phenomenon. The 'internal' legal culture created by lawyers consists of *"a number of conduct pattern used by lawyers for the purposes of their work, which are not included directly in the legal texts, but without*

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[45] J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2003, p. 14.

[46] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, p. 14.

[47] M. Zirk-Sadowski, *Wprowadzenie...*, *op. cit.*, p. 58.

[48] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.* p. 12.

[49] *Ibidem*, p. 23.

which rules allowing for the legal issues settlement could not be extracted form these texts".[50]

A "good lawyer" is the one who employs the art of applying principles of rightness and justice and is well trained in "the legal craft". At the same time, such a person becomes a philosopher, seeking solutions while taking into account the complexity of social phenomena and the legal culture "framework" established in the course of history.

A growing complexity and unpredictability of social phenomena and axiological pluralism implies the flexibility of the law and 'opening' of many notions of the legal language.[51]

Any attempt to answer the question what is meant by the "legitimate discourse" oscillates around rationality as the foundation of any discussion. Hence, the commonly used "eristic tricks", which have nothing to do with truth, seem to be unacceptable. The majority of eristic methods should be referred to critically for they remain in opposition to the rational discourse principles. Therefore, they may be classified as "immoral practices".

The assumption that even right premises should not be employed if the predicted consequences would be unfavorable for one party of the dispute is morally unacceptable. One should not "juggle" the terms and concepts using a proven thesis as a premise. Asking questions which would aim to get the opponent's answer to prove one's assertion is immoral. Obviously, using deceptive comparisons is unfair. Techniques aiming at forcing the opponent to admit his mistakes, provoking him by returning to the particularly sensitive issues, using paradoxes to confuse him and demonstrate the absurdity of his argument cannot be justified. Pointing to contradictions in argumentation, searching for ambiguity, and employing intentional changes of the subject are morally doubtful. Methods of unreasonable treatment of something that is not the cause as being the cause, fabricating consequences, using deliberate exploitation of ignorance of the people solving the dispute by using unfair arguments, presenting the lack of matter-of-factness, using a stream of senseless words for the purpose to astonish the opponent, and referring to the apparent authority are highly unacceptable.

To conclude, unethical are arguments that are not merits-related, that is using *ad hominem argumentum* instead of *ad rem argumentum*. Additionally, *ad balacum arguments* by which a threat of negative consequences is

[50] M. Zirk-Sadowski, *Wprowadzenie...*, *op. cit.*, p. 16.

[51] J. Jabłońska-Bonca, *Prawnik a sztuka...*, *op. cit.*, pp. 13–15.

expressed by exerting pressure, and *ad personam* arguments in the form of personal attacks employed in order to disqualify one's opponent are not to be accepted from a moral point of view. The same applies to *ad ignorantiam* arguments, relying on the appeal to the opponent's ignorance in order to throw him off balance, thereby weakening his credibility and authority, and the *ad populum* arguments which employ the use of colloquial opinion to convince one's opponent.

In the legal discourse arguments which refer to the so-called "topos" should be considered. This concept is also known as "legal topics". They point out to the "common places" *(loci communes)*, that is universal values and "specific places" (*loci specifici*) which refer to the highly specialized legal issues. Such arguments are very important because they allow for the reference to the well-known reasons which are accepted and legitimized by important traditions (eg. Roman law). At the same time they become difficult to refute. The knowledge of the topos determines the rules of the game in contemporary legal debates. They promote rationality and impartiality, particularly in situations of various doctrinal disputes regarding the so-called hard cases.

It is already at the stage of the law-making process that it is possible to differentiate the category of the so-called "hard" cases".[52] Nonetheless, such situations very frequently arise in the sphere of the application of law. They rely on the ambiguity of the law interpretation or occurrence of gaps in the law.[53] There may be risky regarding the courts' acceptance of the claims which are not supported by scientific justification, and are based only on religion, or being adopted on the basis of dogma.

According to J. Zajadło, such situations highlight the helplessness of *ius* and *lex*.[54] J. Stelmach notes that *"Capturing the sense (essence) of the law is possible by capturing the sense (essence) of hard cases making up this law.* (...) *A hard case is the ultimate goal of the legal knowledge (the law interpretation). Only its proper diagnosis allows for defining the limits of the acceptable law interpretation"*.[55] According to J. Leszczynski, in such

[52] T. Biernat, *"Trudne sprawy" w procesie tworzenia prawa. Pole dyskursu legislacyjnego*, (in:) A. Choduń, S. Czapita (ed.), *W poszukiwaniu...*, *op. cit.*, pp. 472–489.

[53] Z . Pulka, *Podstawy prawa. Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2008, p. 136.

[54] J. Zajadło, *Co to są hard cases*, (in:) J. Zajadło (ed.), *Fascynujące ścieżki filozofii prawa*, Warszawa 2008, pp. 17–18.

[55] J. Stelmach, *Przypadek trudny w prawie*, (in:) A. Choduń, S. Czapita (ed.), *W poszkiwaniu...*, *op. cit.*, pp. 140–150.

cases practice is able to redefine the content of the rules.[56] A "hard case" is interpretatively complex and "open". It cannot be easily predicted. In a given situation there may be more than one decision, so it is difficult to interpret the situation using the standard methods of interpretation.

A current ethical debate has showed that material theories of morality, giving one answer to each question, are deprived of rational justification. It is much easier to justify logical rules of procedure, indicating rules of practical argumentation in a precise way.

Undoubtedly, pluralism should be the basis of legal discourse. Indeed, it constitutes the rule in all areas: religious, philosophical, and moral, which derive their rationality only from their argumentation apparatus – strong points which can be presented in favor of or against the reviewed thesis. The domain of argumentation, dialectic and rhetoric are always the values which are the subject of social consensus. Universal values play a fundamental role in fundamental argumentation. They make it possible to introduce specific values on which the consensus of particular groups is made, being a specific aspect of the universal values.

In conclusion, it is necessary to state that in the first place the ethical legal discourse should be objective, critical and fair from the standpoint of the intellectual perspective. It should be conducted in direct connection with the law, and the restriction regarding the application of the general rules is possible only if it is justified by the law regulations.

Such a discourse should consider factual findings and aim at the target. It is important to have the conviction that one's judgments are right and that they respect the principle of truthfulness. It is also necessary to take into account the basic principles of linguistic communication (transparency, simple verbal means, etc.). The subjects of the discussion should be characterized by their readiness to verify their views. Disputes should also be deprived of stereotypes, myths and prejudices.[57] The legitimacy of the discussion should be restricted to difficult cases. A dispute should take into consideration the generally accepted standards, practices and customs.

The role of the discourse style is especially visible while the process of the court decision legitimating. The opinion that such a style is more desirable that a deductive style seems reasonable.[58] The assumption of a logo-

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[56] J. Leszczyński, *Problem tożsamości prawnika i jego alter ego w teorii prawa*, (in:) M. Błachut (ed.), *Z zagadnień teorii i filozofii. Ponowoczesność prawa*, Wrocław 2007, p. 167.

[57] T. Pietrzykowski, *Wyzwania...*, *op. cit.*, p. 8.

[58] E. Łętowska, *Kilka uwag o praktyce wykładni*, "Kwartalnik Prawa Prywatnego" 2002, z. 1, p. 33.

centric image of the legal text deprived of gaps and contradictions, which L. Morawski defines as an "obsession" with rationality, cannot be justified.[59] A discursive style has higher requirements than a deductive one highlighting the problematicity of the legal issues.[60] A judge should be an interpreter ready for an *axiological case*. He should get out of the "axiological discomfort" situation and overcome the interpretive routine.[61]

Therefore, nowadays the law cannot be grasped as a closed and definite system of norms. It constitutes an "interpretation fact" which does not exist beyond the interpretation. An interpreter creates its sense.[62] A full knowledge of the law is only possible through communication activities, whose criteria create ethical requirements. They result in reaching a consensus. Through the legal discourse a system of the legal law norms is somehow "closed". However, for the law to function as a "good law" it is essential that it should be a tool in the hands of a "good lawyer" who is not only a professional lawyer, but also an "ethical lawyer" professing values commonly accepted in a given social group.

The above considerations can be perfectly summarized by the words of L. Morawski, who in one of his works highlights the following opinion: *"The theory of discourse, though it is formulated very generally and subtractively, seems to implement the basic assumptions of the universal ethics of communication. We can, therefore, conclude that the concept of universal ethics as the basis for the legal order is possible at least from a procedural point of view.* (...) *The evolution of law based on the unilateral and authoritarian decisions towards the law based on negotiations and agreements seems to set the path for the future law development."*[63]

S U M M A R Y

This paper is devoted to the problem of the legal discourse ethics closely connected with the issue of the axiology of law and attempts to find the so-called "good law", that is law which is compatible with universally recognized moral values. There is no doubt that legal reality is

[59] L. Morawski, *Teoria prawodawcy racjonalnego a postmodernizm*, "Państwo i Prawo" 2000, nr 11, pp. 30–31.

[60] *Ibidem*, p. 31.

[61] E. Łętowska, *Kilka uwag...*, *op. cit.*, p. 50.

[62] For more information see L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2005, p. 197; M. Zirk-Sadowski, *Uczestniczenie prawników w kulturze*, "Państwo i Prawo" 2002, nr 9, p. 3.

[63] L. Morawski, *Główne problemy...*, *op. cit.*, pp. 161–163.

not created only by legal rules, but mainly by their interpretation practice and legal norms application. A legal dispute over "good reasons" is realized, among others, through social communication. A legal discourse determines an ideal form of the creation and application of the law, as well as a perfect state of the social relation organization. A unilateral decision-making cannot be the basis for the decision-making processes. A consensus should be based on the dialogue resting on the principles of honest communication. A "good law" should be based on the acceptance by the majority. Nowadays argumentation offers jurisprudence numerous possibilities of justifying theses of a normative character by referring not only to the criterion of truth, but also to the criterion of justice, fairness, validity, credibility and effectiveness. Therefore, it plays a huge role offering jurisprudence a kind of "ethical minimum". A system of civil norms is somehow "closed" through a legal discourse. The role of rhetoric as an art of fair dispute and persuasion based on the argumentative philosophy methods of a particular type should be emphasized in the "morally legitimate" legal discourse. In the legal communication highly controversial seems to be the use of eristic methods which do not seek for the truth but explore argumentative methods in order to demonstrate one's reason, despite the fact that the truth in the dispute lies in the opposite side. Lawyers' special status and professional ethos imply a need to be distinctive participants of an interpersonal communication. Among others, a law may be considered "good" if it becomes a tool not only for a "professional lawyer," but also for an "ethical lawyer", that is a lawyer professing values commonly accepted in a given social group.

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FOUCAULT AND AGAMBEN: LAW AS INCLUSIVE/EXCLUSIVE DISCOURSE

I. Michel Foucault: The discourse of disciplinary power involves a code of normalization. An introduction to biopower

Michael Foucault used the notion of discourse in various meanings and contexts. He began his analyses with an archaeological study of discourse and its structures, and then he went on to study the genealogy of discourses and their relation to power and other forms of domination. Discourses, in his view, were mechanisms of excluding Aliens (i.e. those who do not fit the Norm). Foucault called his methodology of discourse analysis, which involved archaeology and genealogy, problematization.[1]

Foucault's works from the end of the sixties and the beginning of the seventies, *The Order of Things: An Archaeology of the Human Sciences (1966), The Archaeology of Knowledge (and The Discourse on Language (1969, 1971)*, constitute his individual theory of discourse. During this period, Foucault was primarily concerned with "horizontal" relations that develop between various types of discourse, or groups of statements and which are characterized by their discontinuity. In later works, Foucault shifts his focus to vertical relations. These occur between empirical practices, such as the invention of hospitals, mental institutions, prisons, and their respective type of discourse – medical, psychiatric, and legal discourse.[2] *The Order of*

[1] M. Foucault, *Polemics, politics and problematizations: an interview*, (in:) P. Rabinow (ed.), *The Foucault Reader*, Penguin, Harmondsworth 1984, p. 388–390. D. Howard writes extensively on the evolution of meaning of discourse in Foucault's works in: D. Howarth, *Discourse*, Open University Press, Buckingham – Philadelphia 2000. Works in Polish literature include: K. Stasiuk, *Krytyka kultury jako krytyka komunikacji. Pomiędzy działaniem komunikacyjnym, dyskursem a kulturą masową*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2003, p. 106–166; H. Grzmil-Tylutki, *Francuska lingwistyczna teoria dyskursu. Historia. Tendencje. Perspektywy*, Universitas, Kraków 2010.

[2] M. Foucault, *Entretien avec M. Chapsal* (in) *Dits et ecrits*, vol. I, *op. cit.*, 542–546.

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Things: An Archaeology of the Human Sciences focuses mainly on the analysis of the episteme. The term itself, however, does not occur in Foucault's later works – in *The Archaeology of Knowledge*, he substitutes it with the terms: discursive formation and audience. The episteme is a group of social factors, which define and enable historically captured forms of discourse in times of the Renaissance, the Enlightenment, and Modernity. It is a set of a priori rules which determine the way knowledge constitutes itself in a given period. Each episteme had its own autonomously superior rule. The relations between different episteme were discontinuous, and the transfer from one episteme to another had a form of a splitting.[3]

Language forms the world and allows recreating the way in which a given object perceives the world. If we analyze how a culture uses language in a given period, we can reconstruct the ways of perception (the episteme) characteristic to it in that period. These are the fundamental codes of that culture, i.e., that which rules its language, its forms of cognition, ways of exchange, techniques, values, hierarchy of action.[4] We come to all this through the analysis of statements. A statement (*enonce*) is a basic unit of discourse, which is neither a grammatical nor a logical sentence, nor is it a speech act. *Enonce* is a statement deeply rooted in its specific episteme. The episteme is explicated through a description of the correspondence between words and things, and by showing their order (*ordre*). Order is the internal law of things, a hidden web according to which things perceive one another, and it is something that exists only through perception, attention, and language. Foucault argues that the analysis of human existence is only possible through a change and turn of the analysis of representative discourse. The object, by naming things, gives the world meaning. Discourse orders (or, at least, attempts to order) the world of things. Foucault's intuition of the matter is well represented in the English title of the work: *The Order of Things*. An analysis of discourse, and discursive and non-discursive practices, lets the object relate intentionally and reflexively to the subject of the discourse. Discourse becomes then a form of organizing sense and as a directed reflection a form of its objectification. The reflexive attitude

[3] For more detail on episteme, see: G. Gutting, *Michel Foucault's archaeology of scientific reason*, Cambridge University Press 1989, p. 181–260. Polish literature: M. Kowalska, *Dialektyka poza dialektyką, Od Bataille'a do Derridy*, Fundacja Aletheia, Warszawa 2000, p. 277–281. Cf: T. Komendant, *We władzy dyskursu. Michel Foucault w poszukiwaniu samego siebie*, Spacja 1994, p. 113–141.

[4] M. Foucault, *The Order of Things. An Archaeology of the Human Sciences, Preface*, p. XX, Vintage Books A Division of Random House, Inc., New York 1994.

towards discourse and its subject allows the object to grasp their sense and meaning.[5]

In *The Discourse on Language* Foucault openly writes about controlling, selecting, limiting, and redistributing the products of discourse in society through specific procedures: *"There are many systems for the control and the delimitation of discourse,* (...) *they function as systems of exclusion.* (...) *Discipline constitutes a system of control in the production of discourse, fixing its limits through the action of an identity taking the form of a permanent reactivation of the rules."*[6] However, discourse itself is subject to limitation by those who participate in it and form its rules – rules of exclusion. Moreover, discourse does not include silence, which surely is an element of communication space. What is discourse, and what is its role? Foucault was not interested in the sole analysis of language, which clearly situated him outside structuralism. He says: *"My position exceeds that which is called structuralism because I am not that interested in the formal possibilities of a system such as language (la langue). Personally, the issue of the existence of discourses is what interests me more than anything only because the act of talking functions as actions connected with their source situation, and because discourses leave in their historic existence – except some remains which still exist and manifest themselves – a certain number of explicit or implicit functions.*[7] The history of the Western World is a constant game between knowledge (savoir) and power (pouvoir), and indeed, according to Foucault, these two words, knowledge and power, sum up everything:[8] *And for this very reason, we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable. To be more precise, we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated on, but as multiplicity of discursive elements that can come into play in various strategies.* (...) *Discourse transmits and produces power."*[9]

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[5] More in: P. Bytniewski, *Genealogia dyskursu. Problemy niehermeneutycznej koncepcji rozumienia*, Wydawnictwo UMCS, Lublin 2000, page 15 and on.

[6] M. Foucault, *The Archaeology of Knowledge and The Discourse on Language*, transl. by A. M. Sheridan Smith, Vintage Books A Division of Random House Inc. New York, 2010, p. 220, 22.

[7] M. Foucault, *Sur les facons d'ecrire l'histoire, entretien avec R. Bellour*, (in:) *Dits et ecrits*, vol. I, *op. cit.*, p. 623.

[8] M. Foucault, *Verite et pouvoir* (in:) L'Arc 70, 1977, p. 18.

[9] M. Foucault, *The History of Sexuality*, vol. 1: *An Introduction*, transl. by R. Hurley, Vintage Books A Division of Random House Inc. New York 1990, p. 100–101.

The discourses analyzed by Foucault: psychopathology (*Madness and Civilization: A History of Insanity in the Age of Reason*), medicine (*The Birth of the Clinic: An Archaeology of Medical Perception*), grammar, political economics (*Les Mots et les Choses*), were all characterized by unusual ways of organizing notions and ways of stating them, which constitute specific theories. Social practice is not only discourse – there is more to it. Discursive practices exist also on the edges of discourse, and are not the only ways of producing discourse: *"Les pratiques discursives se caractérisent par la découpe d'un champ d'objets, par la definition d'une perspective légitime pour le sujet de connaissance, par la fixation de norms pour l'élaboration des concepts et des theories. Chacune d'entre elles suppose donc un jeu de prescriptions qui régissent des exclusions et des choix.* (...) *Les pratiques discoursives ne sont pas purement et simplement des modes de fabrication de discours. Elles prennent corps dans les ensembles techniques, dans les institutions, dans des schemas de comporement, dans des types de transmission et de diffusion, dans des formes pédagogiques qui à la fois les imposent et le maintiennent."*[10]

Foucault abandons his former notion stating that power only controls, and, in some cases, excludes discourse. In *The discourse on Language* he writes: *"I am supposing that in every society the production of discourse is at once controlled, selected, organized and redistributed according to a certain number of procedures, whose role is to avert its powers and its dangers, to cope with chance events, to evade its ponderous, awesome materiality."*[11] The procedures for exclusion are: prohibition, division, and rejection, truth and fallacy. The desire for truth produces a will to truth, which leads to a will to knowledge (*la volonte de savoir*). Foucault uses these two terms interchangeably. Truth was that which discourse was. The shift of truth into that which discourse states produced a dichotomy: true discourse/false discourse. The will to knowledge first appeared at the turn of the sixteenth and seventeenth century. *"This will to truth, like the others systems of exclusion, relies on institutional support* (...) *This will to knowledge, thus reliant upon institutional support and distribution, tends to exercise a sort of pressure, a power of constraint upon other forms of discourse.*[12]

The issue of knowledge has significant connections with the issue of power. Possession of knowledge enables domination and gives power to sub-

[10] M. Foucault, *La volonte de savoir*, (in:) *Dits et ecrits*, vol. I, p. 1108–1109.

[11] M. Foucault, *The Archaeology of Knowledge and The Discourse on Language*, *op. cit.*, p. 216.

[12] *Ibid*, p. 219.

jugate; power-knowledge (pouvoir-savoir) comes into existence. J. Habermas uses the term "juridification of the", that is, colonization by an increasing number of more and more specific legal norms.[13] Foucault speaks about disciplinarization and normalization, the appropriation of the social world by disciplines, a new type of law. Contemporary power is disciplinary. That does not mean that *"law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory."*[14]

The disciplinarization of the world through production of knowledge corresponds with the disciplinarization of power as such. *"Disciplinary power displays itself in its ultimate mechanisms; it cannot function without shape, without organization and circulation of knowledge, or rather, knowledge devices* (...). *Disciplines have their own discourse. They are extremely ingenuous in ordering the tools needed for the formation of knowledge; they are also transmitters of discourse – but this is not, however, discourse of law, judicial discourse. It is not a discourse of rules, as the effects of the will of the sovereign.* (...) *It is the discourse of natural rules, one can say: norm. Disciplines define a code, which is not the code of law, but the code of normalization."*[15]

Normalization of social behavior through the practices of disciplinary power excludes, seemingly, the grasp of discourse in categories of the procedures of resolving conflicting social norms, described by J. Habermas. The self-subjugated object, subjugated by disciplinary power, is not situated in discourse as an ideal speech situation, or the relations between power and knowledge. What is important are the techniques and rationale of rule, the ways of governing people and the state. The changes in inflicting punishment are accompanied by "swarming of disciplinary mechanisms", or the increase in the number of mechanisms of controlling and using people. Exclusion is substituted with subtle methods of normalization and location of people in a given space. In guiding individuals to strive for optimum performance relative to some norm, disciplines do not have a sense of coercion.

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[13] J. Habermas, *Tendencje jurydyzacji*, trans. J. Czapska, Colloquia Communia 6/1988 – 1/1989, p. 136. Cf: T. Mendelski, *Habermas i Foucault: spory wokół wiedzy jako władzy*, Colloquia Communia 27/1985 – 28/1986, p. 101–120.

[14] M. Foucault, M. Foucault, *The History of Sexuality*, vol. 1: *An Introduction*, *op. cit.*, p. 144.

[15] M. Foucault, *Cours du 14 janvier 1976*, (in:) *Dits et ecrits*, vol. II, p. 187–188.

In *Discipline and Punish* Foucault defines: *"disciplinary power refers individual actions to a whole that is at once a field of comparison, a space of differentiation and the principle of a rule to be followed. It differentiates individuals from one another, in terms of the following overall rule: that the rule be made to function as a minimal threshold, as an average to be respected or as an optimum towards which one must move. It measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the "nature" of individuals. It introduces, through this "value-giving" measure, the constraint of a conformity that must be achieved"* and once again *"the mechanisms of the disciplinary establishments have a certain tendency to become "de-institutionalized", to emerge from the closed fortresses in which they once functioned and to circulate in a "free" state; the massive, compact disciplines are broken down into flexible methods of control, which may be transferred and adapted."*[16] Foucault often uses the terms "power" and "power relations" interchangeably. "Power relations" lead to subjectification (assu*je*ttisement), or placing the subject in a given space. Those who do not fit or do not want to fit their given social roles (the insane, vagabonds, criminals, soldiers, students) are excluded. New and until then unknown institutions of individual control come into being: mental institutions, penal colonies, community homes, prisons, schools, barracks. Some act as a means of binary segregation (the insane, or, later, the mentally ill – the sane; the normal – the abnormal). Other train individuals, uniform and normalize them by diversifying distribution and subjecting them to constant supervision.[17]

The norms created by power "tear" the social body; a division into the normal and the abnormal comes into being. Although this division functioned before (sanctioned by medicine), the seventeenth century changed not only the scale of control (every aspect of bodily functions, moves, gestures, demeanors), the subject of control (the economics of body movements), but also modality. We now have to face a constant pressure establishing a definite course of action in accordance to codification, or regulations, which parcel time, space and gestures. *"The human body was entering a machinery of power that explores it, breaks it down and rearranges it. It defined how one may have a hold over others' bodies, not only so that they may do what*

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[16] M. Foucault, *Discipline and Punish. The Birth of the Prison*, translated by A. Sheridan, Vintage Books A Division of Random House Inc., New York 1995, p. 181–182; 211.

[17] On the origins of disciplinary power, see: S. Oliwniak, *Michel Foucault Genealogia dyscyplin. Wprowadzenie*, (in:) M. Błachut (ed.), *Z zagadnień teorii i filozofii prawa. Ponowoczesność*, Kolonia Limited 2007, p. 97–110. Also, more in: John S. Ransom, *Foucault's discipline. The Politics of Subjectivity*, Duke University Press, Durham and London 1997.

one wishes, but so they may operate as one wishes, with the techniques, the speed and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, "docile" bodies."[18] New disciplines come into being, which are forms of general domination. Law to an increasing degree assumes a regulatory function; the role of normalization increases at the expense of a juridical system of law. Foucault continues in *Society Must Be Defended*: *"The discourse of discipline is alien to that of the law; it is alien to the discourse that makes rules a product of the will of the sovereign. The discourse of disciplines is about the rule: not a juridical rule derived from sovereignty, but discourse about a natural rule, or in other words norm. Disciplines will define not a code of law, but a code of normalization, and they will necessarily refer to a theoretical horizon that is not the edifice of law, but the field of the human sciences. And the jurisprudence of these disciplines will be that of clinical knowledge."*[19]

Disciplinary power was quick to change its character (i.e., by the second half of the eighteenth century). Foucault comes to the conclusion that it was the time when a new – non-disciplinary – technology of power appeared. By using the formed, disciplined, self-subjugated human body, it transmits its actions into a different plane. Its object and subject is now the human, as a biological being. It wants to supervise, control, and exploit the corporate body of individuals, the mass, the population. Its scope of influence involves the population and, within it, birth, sexuality, productivity, and death of the previously individualized persons, now incorporated into a mass. Foucault notices: the period from the latter half of eighteenth century saw the development of state policy in relation to birth control and rate of birth. Other fields of intervention associated with biopolitics included the range of phenomena associated with old age, infirmities. Biopolitical government included various forms of control over the environment: water, swamps, and conditions of urban life. Biopower intervenes in *"the birth rate, the mortality rate, various biological disabilities, and the effects of the environments."*[20]

Disciplinary power transforms into biopower. The subject of sovereign power was the individual and society constituted by social contract of those

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[18] M. Foucault, *Discipline and Punish*, *op. cit.*, p. 138. Cf: J. Rouse, *Power/Knowledge*, (in:) *The Cambridge Companion to Foucault*, ed. G. Gutting, Cambridge University Press 1994, p. 92–111.

[19] M. Foucault, *Society Must Be Defended*, *op. cit.*, p. 38. Cf: B. Golder & P. Fitzpatrick, *Foucault's Law*, a GlassHouse book Routledge 2009, p. 19–39.

[20] *Ibid*, p. 245.

individuals; the subject of disciplinary power was the individual and its body; however, in the case of biopower, its scope of influence is the population, where the process of events occur in series. Thus biopower introduces new mechanisms of power, different from those used by disciplinary power. These are: statistical estimates and forecasts; techniques for decreasing the mortality rate, improving longevity and stimulating reproduction, regulating and optimizing life.[21]

II. Giorgio Agamben: The state of exception has became a paradigm of contemporary democracy

For Foucault, biopolitics is another name for technology of power, a biopower, which needs to be distinguished from the mechanisms of discipline that emerged at the end of the eighteenth century. This new configuration of power aims to take *"control of life and the biological processes of man as species and of ensuring that they are not disciplined but regularized."*[22] Now, while Foucault claimed that biopolitics first came into existence in the modern period, Agamben clearly points out that "bare life" has always been included in the sphere of politics, it has always been the object and the aim of state action, and has always been subjected to elaborate mechanisms of both inclusion and exclusion (as Agamben calls it: *inclusive exclusion*). One more difference between Foucault's and Agamben's terminology is the etymology of the word norm. The former devises it from the Latin *norma*, while the latter uses the Greek term *nomos* as the word of origin. This is crucial for understanding the difference in Agamben's definition of the role of sovereign and the relations between law and bios. The modern form of law, in which bios is completely seized and controlled by law, is characterized by a crisis of normative as well as regulatory discourse. Catherine Mills notices that *"while Foucault's conception of the integration of life and law in biopower maintains an ambivalence toward the role of sovereign power within the emergence of a normalizing society, tied as it is to a preoccupation with death as power over life, for Agamben, it is precisely the logic*

[21] *Ibid*, p. 242–247. I wrote more on Foucault's view on biopolitics in: *Biopolitics and the rule of law*, (in:) *Axiology of the Modern State Under the Rule of Law. Selected Issues*, ed. By S. Oliwniak, H. Święczkowska, Studies in Logic, Grammar and Rhetoric 19 (32), Białystok 2009, p. 33–48. Cf: T. Lemke, *Biopolityka*, trans. T. Dominiak, Wydawnictwo Sic!, Warszawa 2010, p. 42–63.

[22] M. Foucault, *Society Must be Defended*, *op. cit.*, p. 246.

of sovereignty constitutes the limit of the juridical, such that law only finds its force in the very life of men."[23]

Agamben addresses the issue of biopolitics in his 1999 essay, *Form-Of-Life. "What is left unquestioned in contemporary debates on bioethics and biopolitics is precisely what before all else should be questioned – the very biological concept of life."*[24] In *Homo Sacer* he writes: *"Only within a biopolitical horizon will it be possible to decide whether the categories whose opposition founded modern politics (right/left, private/public, absolutism/democracy, etc.) – and which have been steadily dissolving, to the point of entering today into a real zone of indistinction – will have to be abandoned or will, instead, eventually regain the meaning they lost in that very horizon."*[25]

"Bare life"[26], or bios, is now in the center of attention of the state; indeed – it overlaps the sphere of politics. Biopower which uses covert domination and normalization techniques aimed at subjugation of the human body is now clearly in the open.[27] The reason for this is that the contemporary paradigm for the western world is the state of emergency, and the space in which this state is best visible. It is a camp, such as the Nazi concentration camps and its contemporary counterparts like refugee camps or terrorist detention camps (e.g. Guantanamo). The space is "no man's land", the camp is "the new biopolitical nomos of the planet."[28] The state populates it with modern-day homines sacri who today are refugees, or those who are considered a threat to the state's being. Thus originates the *"state of exception, in which bios and zoē are no longer separable – nor are right or fact – but instead enter into a zone of irreducible indistinction"*.[29] This implementa-

[23] C. Mills, *Biopolitics, Liberal Eugenics, and Nihilism*, (in:) *Giorgio Agamben. Sovereignty & Life*, ed. by M. Calarco, S. DeCaroli, Stanford University Press, California 2007, p. 189.

[24] G. Agamben, *Means Without End: Notes on politics*, trans. V. Binetti and C. Casarino, Minnesota University Press, Minneeapolis 2000, p. 7.

[25] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen, Stanford University Press, Stanford 1998, p. 4.

[26] On the translation of Agamben's "la nuda vita" into "bare life"and not "naked life", and relations with „das bloße Leben" by Walter Benjamin see Leland de la Durantaye's, *Giorgio Agamben. A Critical Introduction*, Stanford University Press, Stanford CA 2009, p. 200–205.

[27] For more detail on the different understanding of biopolitics by Agamben and Foucault, see: P. Patton, *Agamben and Foucault on Biopower and Biopolitics*, (in:) *Giorgio Agamben. Sovereignty & Life*, ed. by M. Calarco, S. DeCaroli Stanford University Press, California 2007, p. 203–228.

[28] G. Agamben, *Means Witout End: Notes on politics*, *op. cit.*, p. 45.

[29] G. Agamben, *Homo Sacer*, *op. cit.*, p. 20; idem, *The state of Exception*, (in:) A. Norris (ed.), *Politics, metaphysics, and death. Essays on Giorgio Agamben's Homo Sacer*, Duke University Press, Durham and London 2005, p. 293.

tion of "bare life" into the sphere of politics is indivisibly connected with sovereignty. This means, counter to Foucault's beliefs, that biopolitics (and its techniques) is not a new concept. *"It is not possible to understand the "national" and biopolitical development and vocation of the modern state in the nineteenth and twentieth centuries if one forgets that what lies at its basis is not man as a free and conscious political subject but, above all, man's bare life, the simple birth that as such is, in the passage from subject to citizen, invested with the principle of sovereignty."*[30] Agamben adds in *Homo Sacer*: *"It can even be said that the production of a biopolitical body is the original activity of sovereign power."*[31] And once again: *"The fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, zoē and bios."*[32]

Biopolitics is as old as the sovereign exception. The exception problematizes the possibility of legal norms being in effect. For Agamben, exception is a form of exclusion. It constitutes a state in which legal norm is not annihilated as such, but rather is still in a specific relation with the exception, which is suspension. The norm applies to the exception; however, when it does not, it withdraws from it. The state of emergency is a consequence of suspension of the power of the legal order. The sovereign decrees a state of emergency, and, by the power of this decree, the legal order withdraws with the state of emergency taking its place. That which is outside the law system in a normal situation, is temporarily included in the state of exception. That which was normally discarded (excluded), is by the suspension of legal order temporarily included into it. Thus, the legal order withdraws from the exception, allowing it to exist. The relation of the exception is similar to this: "The original political relation is the ban (the state of exception as zone of indistinction between outside and inside, exclusion and inclusion)."[33]

The state of emergency is the threshold between legal order and chaos; it allows to distinguish that which is outside the legal order, and to distinguish the legal order itself. It is a "seizure of the external", the occupation of the exception. The state of exception is only possible if the power of the legal order is suspended. Exception *(ex-capere) refers to what is taken outside and not simply excluded (Homo Sacer p.18).* If, under "normal" conditions, the decisions of the sovereign are limited by the current legal norms, than

[30] G. Agamben, *Homo Sacer*, *op. cit.*, p. 128.
[31] *Ibid*, p. 8.
[32] *Ibid*, p. 181.
[33] G. Agamben, *Homo Sacer*, *op. cit.*, p. 31.

in a state of emergency law is temporarily suspended, and the two elements of the term "legal order": law and order, exist separately. In a state of exception, the "usual" legal order loses its reference; it exists only as pure possibility. Agamben writes: *"The state of exception is not a special kind of law (like the war law); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept."*[34]

The sovereign exception, being a sphere of indistinction between nature and law, is an assumption of the existence of a legal reference in the form of its suspension. The state of emergency becomes the norm; the norm becomes the state of emergency. The setting of norms and the application of norms are no longer distinguishable. In the camp, this impossibility of differentiating shows its martial face. *"The camp is the space of this absolute impossibility of deciding between fact and law, rule and application, exception and rule."*[35]

The decision on the state of emergency, although, according to etymological reasons supplied by Agamben himself, it would be better to call it a state of exclusion or a state of exception, determines the boundaries between the external and the internal. Outside the legal system (the juridical order in the positivist sense) is the situation of exception (it is excluded by the force of the establishment of the order); inside the legal system are the norms of positive law which, at the same time, display a potency to include that which is outside (the state of emergency). Giorgio Agamben states that *"the paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order, but does not exclude the force of law from this rule"* (Homo Sacer, p. 15).

Exception is in fact a form of exclusion. The norm is applied to the exception, without applying it; the norm withdraws from it. The state of exception is not the chaos from a time before the juridical order, but rather a situation of a suspension of this order. The sovereign, through introducing a state of emergency, tries to constitute that which is external in the internal aspect of juridical order; he interiorizes that which goes beyond the order. A special power of Law is its ability to stay in relation with that which is external. The normalized factual states are the areas of reference of the juridical order, and are included into its scope. The situation of a state of emergency cannot, however, be defined as either factual or legal; it is a relation between Law and fact which is placed on the border of the normal and

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[34] G. Agamben, *State of exception*, trans. by Kevin Atterel, The University of Chicago Press, Chicago and London 2005, p. 4.

[35] G. Agamben, *Homo Sacer*, *op. cit.*, p. 173.

the exception. Agamben argues: *"In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other."*[36]

The state of exception clearly shows the indistinction of the external and internal, life and law. Life is included into the sphere of law but can only be included in it by assuming its inclusive exclusion, and only in the frames of *exceptio*.[37] Through a decision of a state of emergency, that which is external is included into the juridical order not by means of prohibition, but rather by suspension of the force of the order; it is included by allowing the juridical order to abandon it precisely by withdrawing from it.

By writing about Agamben's interest in Carl Schmitt's theory of sovereignty, Steven DeCaroli shows the essence of this specific relation between sovereignty and law: *"the political distinction between inside and outside, inclusion and exclusion, structures the basic logic of sovereignty itself, insofar as sovereignty maintains a boundary not between the legal and the illegal, both of which participate fully in the logic of legality, but between the legal and the non-legal, that is, between the lawful and the outlaw, between the citizen and the exile."*[38]

In a state of emergency law is unenforceable. This allows a space where law and fact, bare life and biopolitics become indistinguishable. In a state of emergency, homo sacer lives under the rule of law which is in force, but is not enforced. *"The state of exception is an anomic space in which what is at stake is a force of law without law."* (The state of exception, p. 39) Law without meaning is in force, or in other words, a clear form of law remains without its content. In the same time, the state of exception, being the rule, determines the execution of law through the act of violence – a law which is indistinguishable from law, yet should be regulated. It is impossible to discern a violation from an execution of law. Behaviors which correspond with the legal norm, and those outside it, converge. *"For law, this empty space is the state of exception as its constitutive dimension. The relation between norm and reality involves the suspension of the norm, just as in ontology the relation between language and world involves the suspension of denotation in the form of a langue"* (The state of exception, p. 60).

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[36] G. Agamben, *State of exception*, *op. cit.*, p. 23.

[37] G. Agamben, *Homo Sacer*, *op. cit.*, p. 44.

[38] S. DeCaroli, *Boundary Stones: Giorgio Agamben and the Field of Sovereignty*, (in:) *Giorgio Agamben Sovereignty and Life*, Stanford University Press, Stanford CA 2007, p. 51.

The camp is a space which, by power of decision on a state of exception, is excluded (withdrawn) from the scope of legal norms in the current legal order. The legal norms of a "normal" legal system are not in force in this space and so they are not applied. They are in force outside the space, but in relation to it they are meaningless. The state of exception is a possibility (potency) of a "normal" legal order. This way a new political and judicial paradigm comes into existence; a paradigm in which the norm and the exception are one. In the camp the legal order of the state of emergency is "normal". Law and fact are no longer distinguishable. Whether the state is in force or not is no longer an issue. The legal (political) subjectivity of an individual becomes one with "bare life". To decide who at a given time and situation is a "bare life" (or *homo sacri*) becomes a subject of a sovereign political decision. It is a situation of "pure violence". The camp is an absolute biopolitical space in which power is exercised not against juridical subjects but against biological bodies. It is a space in which sovereignty exists but law does not.

When Agamben describes the relations between anomy and law in the state of exception, he points to an interesting double paradigm. He writes: *"the real state of exception as the threshold of indifference between anomie and law.* (...) *hence a double paradigm, which marks the field of law with an essential ambiguity: on the one hand, a normative tendency in the strict sense, which aims at crystallizing itself in a rigid system of norms whose connection to life is, however, problematic if not impossible (the perfect state of law, in which everything is regulated by norms); and, on the other hand, an anomic tendency that leads to the state of exception or the idea of the sovereign as living law, in which a force-of-law that is without norm acts as the pure inclusion of life"* (State of exception, p. 73).

S U M M A R Y

The article is a preliminary analysis of the roles and functions of law as discourse in relation to the shifts of political power in modern, European culture of law. It presents the views of Michel Foucault and Giorgio Agamben on the transformation of disciplinary power into biopower, and the consequences of these processes. Foucault describes the change in the code of power and law, the change in the understanding of sovereignty. The juridical model of power and law from the Middle Ages is replaced by disciplinary methods, and then later by the rule of Norm and infra-law. Law is no longer a reflection of the Sovereign's will, but is an element of the microphysics of power. Those who did not fit the role and space defined by the norm/norms became the object of exclusive discourse. In

contemporary democratic states this form of exclusion has been radicalized. The author presents Agamben's famous thesis: state of exception becomes a norm, a paradigm of western contemporary democracies. The state of exception is an anomic space in which what is at stake is a force of law without law. The law-in-force does not have meaning, or, in other words, it is a clear form of law beyond its content. At the same time, as the state of exception is the rule, it defines the execution of law in an act of violence; the law which, as it becomes indistinguishable from life, should be regulated. It is then impossible to distinguish a violation of law from its execution. Those who by arbitrary decision of the sovereign are described as Alien become the modern-day homines sacri.

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POST-STRUCTURALIST INSPIRATIONS IN LEGAL DISCOURSE

The questions implicated in problems of language and discourse in law can be reinterpreted in the light of changes occurring in humanities and induced by post-structuralist trends. The post-structuralist tendencies affecting the theory of law are visible in the light of opposition structuralism with post-structuralism. The backdrop for their studies can also be antinomies: structuralism – post-structuralism, modernism – postmodernism, positivism – postpositivism or naturalism – antinaturalism. The views of Stanley Fish are representative of post-structuralist thinking. In the Polish theory of law changes generated by departing from analytical and positivistic thinking are noticeable in the shaping of a juricentric model of legal practice and understanding law as participating in culture.[1] The aim of this

[1] A. Kozak, *Trzy modele praktyki prawniczej*, (in:) *Studia z filozofii prawa 2*, ed. J. Stelmach, Kraków 2003, pp. 143–158, M. Zirk-Sadowski, *Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania*, (in:) *Studia z filozofii prawa 1*, ed. J. Stelmach, Kraków 2001, pp. 83–95. It should also be added that the justification for taking up the problems of the influence of marked poststructuralist tendencies in humanities on theoretical and legal studies can be the multi-planar study of law and tendencies currently present as part of the so called external jurisprudence integration. See for example J. Wróblewski, *Zagadnienia wielopłaszczyznowości w metodologii współczesnej teorii prawa*, "Studia Prawnicze" 1969, vol. 21, pp. 3–24, K. Opałek, *Interdyscyplinarne związki prawoznawstwa*, "Studia Filozoficzne" 1985, no. 2–3. On the subject of the problems of integration (and its disruption) in the light of post-modernity see J. Łakomy, *Interdyscyplinarność i integracja zewnętrzna nauk prawnych w świetle postmodernistycznej krytyki*, "Archiwum Filozofii Prawa i Filozofii Społecznej, 2011, no. 1. It seems that, in the light of postmodern changes, it is the integration of sciences which emerges as an inspiring prospect because of the existence of discourse in many fields, as well as the overlapping of the humanistic disciplines touched by "the expressions", and the fading of the clear boundaries between them. We must agree with the observation made by Michał P. Markowski, who while analyzing the tendencies caused by postmodern trends states: "In this situation, it seems, that the more promising view is shown not by the inter-studies, but transdiscipline studies: they are heading on the one hand to the identification of subject-problem relationship going across (above, below) the existing discipline boundaries, on the other hand, however, to grasp the historic processes forming and transforming of arts and sciences, processes leading

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article is the portrayal of these post-structuralist changes which concern the problems of meaning, peculiarity of legal discourse, relationships between the subject being studied (law) and the researcher (lawyer), as well as the essence of law itself. These changes bring about the transformation of the paradigm of legal interpretation in the direction of accenting the role of cultural context and interpretive community. This is evident in the pluralism of discourse practices (which was written about by Habermas), reformulation of the idea of the meaning of text as open (but not free) to interpretation, determining the interpretation by the interpretive community, which is simultaneously the source of meaning (which is stressed by Fish), coexistence of local discourses in the common cultural space. The result of these changes may be the formation of a cultural stage in legal theory – similar to literary theory.

[POST-STRUCTURALIST INCLINATIONS IN LEGAL THEORY] The post-structuralist trends written into postmodernity exerted significant influence on those disciplines whose subject of interest is text, putting special emphasis on the communication and discursive aspect of the activity of man within the public domain. The problem of discourse is located in the frame of perception of language in the domain of communication. It is understood as a network of connected texts with similar subject matter, created by subjects which are a part of communication. The subjects of language analysis are texts – elements of the practice of discourse. Characteristic to post-structuralism watersheds or turns – linguistic and political[2] – caused a number of consequences not only in the sphere of literary theory but also in political theory and legal theory. The first is the anti-positivist turning point within the framework of which the linguistic turn[3] established itself, resulting in understanding text as an autonomic object. It prompted the transition from positivistic expression in legal analysis to using hermeneutic and discursive methods. The other is a post-sturcturalist turning point connected with the turns: pragmatistic, ethical-political, expressing law as

today to the slow emergence of outlines of not only new disciplines, but to the gradual discipline reconfiguration of the divisions of the entire field of humanistic knowledge. Idem, *Kulturowa natura, słaby profesjonalizm. Kilka uwag o przedmiocie poznania literackiego i statusie dyskursu literaturoznawczego*, (in:) *Kulturowa teoria literatury. Główne pojęcia i problemy*, ed. M. P. Markowski, R. Nycz, Kraków 2006, p. 30.

[2] Other turns which had an effect on the formation of significant tendencies in the humanities, including cultural literary theory are being pointed to in science. Among them are the narrational or the interpretational turns. A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury XX wieku*, Kraków 2007, p. 26.

[3] On the subject see among others M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, p. 96 and following, A. Burzyńska, *ibidem*, p. 39.

an interpretive fact, and socio-cultural, allowing to look at law as a cultural fact. The turns mentioned accented the discursive aspect of linguistic creations (texts). The linguistic turn permits the highlighting of two issues in language study: constructivist theory of language and discarding of nomenclatural thought. Language is becoming a priority tool with whose help the social reality is being arranged and is being shown within social context as independent from the subject and object.[4] This facilitates the use of tools from different language theories (text theory, discourse theory) for analysis of social reality.[5] The ethical-political trend caused the entanglement of the acts of creation and interpretation into ideological threads.[6] Drawing attention to the affiliations of philosophy and literary theory with politics, which is taken as an element of public cultural domain heavily influencing the condition of modern man, is symptomatic of post-structuralism. The discursive and rhetorical aspect of man's creativity is especially stressed. Stanley Fish, who has pragmatic leanings, shares the conviction that political processes affect not only scientific theory but also the results of humanistic interpretation. The advocates of the contextual perspective, Richard Rorty among others, attribute a particular role to literature, which could replace science and philosophy as a discipline which "recognizes the accidental nature of language and self"[7] to the greatest degree. These changes concern literary knowledge and all humanities, including legal theory. The directions of study which played a key role in this are on the one hand communication theories, revealing the discursive aspect of language creations, and on the other hand interpretationism and contextualism. The common denominator of the different disciplines of post-structuralism is the interpretive approach to studying text.[8] What that means is that counted among the most important problems upon which twentieth century humanities concentrate are the issues of interpretation and the quest for answers to questions about what it is, what its boundaries are, what its meaning and function in the

[4] F. de Saussure and L. Wittgenstein, who employed the game metaphor in describing language, an established set of conventions, rules which decide about the meaning of individual elements, played a significant role in this thought on language (the departure from nomenclatural or representative expressions). See L. Rasiński, *„Reguły" i „gry" świata społecznego – Wittgenstein, de Sausure and linguistic expression in social philosophy*, (in:) *Język, dyskurs, społeczeństwo*, ed. L. Rasiński, Warszawa 2009, p. 11.

[5] *Ibidem*, p. 13.

[6] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 26, 32.

[7] M. P. Markowski, *Pragmatyzm*, (in:) A. Burzyńska, M. P. Markowski, *ibidem*, p. 487.

[8] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *ibidem*, p. 32.

new cultural, ethical or political contexts[9] are in interpretive practices. The structural-analytical study approach was characterized by cognitive fundamentalism[10] and the conviction of the virtues of theoretical studies, which caused the "disappearance of" the subject being studied within theory. Similarly, in the positivistically oriented legal theory interpreting the study subject as a given, ready to use object can divert attention from the internal complexity and dynamism of law as a subject of analysis. The answer to this "theoretical orthodoxy" was the anti-scientistic and anti-theoretical post-structuralism. This resulted in a change of approach to interpretative practices and a new look at the question of interpretation and the source of meaning.[11]

Post-structuralistic turns caused a change in orientation to the study of law as a collection of texts in a defined network of discourse, which are a consequence of acceptance of the speech act theory and the theory of communicative action. Law, which is a system of social control, is a center of discourse.[12] The discourse is connected with the introduction of certain ethical requirements into communication.[13] Practical discourse, characteristic of law, uses arguments based on selection of assessments and norms.[14] The levels of meaning reveal themselves on different planes. Post-structuralism highlighted the fact that discourse(s) reflects contemplation of reality. Institutionalized discourses hold authority over thinking. Law is a system of discourses involved in knowledge and power in such a way that it is "simultaneously constantly participating in the execution of power – knowledge accumulation and being subject to that power/knowledge."[15] Stressing of these elements of language (discourse) which may be useful in analysis of legal discourse is found in the post-structuralist-stage opinions of Michel

[9] *Ibidem*, p. 39.

[10] *Ibidem*, p. 23.

[11] The sense of the theory itself was questioned. It was reflected in the discussion carried on by American scientists centered around the subject of "Against theory", and in the arguments about the boundaries of interpretation. *Ibidem*, p. 24. See also U. Eco, R. Rorty, J. Culler, Ch. Brooke-Rose, *Interpretation and Overinterpretation*, New York 1992.

[12] S. Gajda, *Prestiż w dyskursie prawnym*, (in:) *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, ed. A. Choduń, S. Czepita, Szczecin 2010, p. 820.

[13] M. Zirk-Sadowski, *Dyskurs jako mowa regulowana wymogami moralnymi*, (in:) *Prawo w zmieniającym się społeczeństwie. Księga jubileuszowa Profesor Marii Boruckiej-Arctowej*, ed. G. Skąpska, J. Czapska, K. Daniel, J. Górski, K. Pałecki, Kraków 1992, p. 191.

[14] *Ibidem*, p. 192.

[15] A. Sulikowski, *O ponowoczesnej filozofii prawa*, (in:) *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa*, ed., idem, Wrocław 2006, p. 252.

Foucault.[16] He draws attention to the connection of linguistic constructions with the paralinguistic domain. The hidden internal orders of discourses cause the linguistic mechanisms, so to speak, "go outside" discourse. Such analysis permits the detection of hidden dimensions in language of the law including other mechanisms of authority "hidden" in the order of discourse, which inspired the political and ethical turn in humanities.[17] Along with the formation of the theory of discourse appeared points of view stressing language as having a dominant role in the thinking – acting – language relationship.[18] There is a departure from thinking within the framework of the pattern inclined in the direction from culture (reality social, system) to language, to the direction of thinking along the pattern: from language to culture. Here the subject of study becomes the social dimension of language and its reflection in the political domain.[19] The three planes of discourse of the law distinguished in connection to the distinction done by discourse theorist Teun A. van Dijk, upon which the post-structuralist changes can be analyzed, are: cognitive (problem of subject), interactive (problem of interpretation), and expressive (problem of meaning).

[SUBJECT-OBJECT-MEANING-INTERPRETATION] The differentiating factor of the post-structuralist trends was the departure from the Cartesian distinction of cognizing subject and cognized object which existed in structuralism. Attention was drawn to the active and the creative role of the subject and to striving toward objectivism in perceiving phenomena, which caused that "humanity here understands itself as an active subject, conferring meaning to the surrounding reality and creating a new, personal environment."[20] Objectivism is replaced by conferring meaning to objects through human activity. The problem of this modern subjectivity, stripped of its Kantian relationship of the subject to an abstracted object, is described by Jürgen Habermas as an "unfinished project of the Age of Reason." The concept of the subject, who is the originator of the text, is

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[16] See M. Foucault, *L'archéologie du savoir (English: The Archaeology of Knowledge)*, Paris 1969, idem, *L'ordre du discours (English: Discourse on Language)*, Paris 1971.

[17] This is evident in the structuralist conviction of C. Lévi-Strauss that the appearance of writing in culture is characteristic of those societies in which existed a hierarchy and institutionalization of authority. It also aimed at controlling the natural order through sanctioning of knowledge and gaining control and authority. See C. Charbonnier, *Entretiens Avec Claude Lévi-Strauss*, Plon 1961.

[18] S. Gajda, *Prestiż w dyskursie prawnym*, (in:) *W poszukiwaniu dobra wspólnego...*, *op. cit.*, p. 818.

[19] L. Rasiński, *„Reguły" i „gry" świata społecznego...*, (in:) *Język, dyskurs, społeczeństwo*, *op. cit.*, p. 13.

[20] Z. Kuderowicz, *Dilthey*, Warszawa 1987, p. 81.

reformulated. Structuralism used a distinction in the relationship: linguistic element – system, which originated from the idea of Ferdinand de Saussure, and which could be transferred to the relationship subject – structure. In this comparison the subject is not the holder of meanings/senses. A sign means something by the place which it occupies in the system-structure. The subject, and its role as the originator, is designated through its place within the structure. Post-structuralism brought about changes in the perception of the subject and a depersonalization of the subject who was the originator (author). This kind of abstraction, a conventionality of the originator's construction, can also be connected with the concept of Foucault formulated in the article *Who is the author?* (in which we find reference to the Roland Barthes' concept of "the death of the author"). In his depiction the author is not a real originator (giver) of discourse, but its construction and function. The way a text functions within the social context is dependent upon this transmission instance. The author of the discourse, in the context of language of the law – the originator of the text – is the subject whose intention determines the way of deciphering the meaning of the text (also the sphere of interpretation). He becomes "one of possible instances of order",[21] "a backup of cohesion" of the statement.

Within the scope of these changes the questions of the status of the subject himself, his relationship to the object studied, the autonomy of the object and formulation of its meaning by the interpreter, understanding the meaning as an open category, and the relation to context remain. Reformulated are then "all subjective roles involved into the structure of the work."[22] Language and discourse become tools used by the *Sollen* legislator who creates the world. He is not, as in structuralism, a positioned in the network of relationships and the system structure subject accepting imposed conditions and cultural patterns and rituals. Language does not symbolize social phenomena but can create, change, and abolish them. We are dealing here with a certain turning point in the condition of subject-originator (author) as a creator of meaning and determinant of the interpretation and the administer of the text (work), in the direction of change of understanding interpretation. There is a transition to interpretation determined not through the originator but the context of its accomplishing. This assumption finds grounds for phenomenologically oriented interpretations or based on the theory of literary communication, according to which it is assumed

[21] A. Burzyńska, *Poststrukturalizm*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 326.

[22] A. Burzyńska, *Wprowadzenie*, (in:) *ibidem*, p. 39.

that the role of the recipient in discerning meaning of the text is creative. In accordance with this assumption in the intention of the originator (author) a certain pattern of the correct reading of the text, and at the same time of an expected recipient, is shaped.

These tendencies are evident in the opposition of positivisim-nonpositivism. The consequences of positivistic thinking, based on Cartesian dualism of the subject and object of cognition[23], is the conviction of an unambiguous determining by law of a judicial decision and the exclusion of the creative role of the lawyer. The nonpositivistic assumption permits the acceptance of the conviction that the law is not a finished objective and that its interpretation is creative.[24] There is an "opening up" of the legal system to the norms and values accepted by the normative system of culture. The method of thinking about law is changed by factors from the "outside". This permits the treatment of legal text interpretation as a creative procedure, which is in accordance with the convictions of Ronald Dworkin that legal norms, having the nature of principles, are not "applied" but "balanced." Justification of this interpretation resides not only in the kinship of disciplines dealing with interpretation but also in the drawing closer of legal systems as a result of processes of globalization, as well as due to tendencies of different systems to permeate and convergence on each other within the frame of the processes of international integration and the formation of a multicentric legal systems.[25]

The dynamism and activity of the interpreter as a subject studying law is revealed. In the post-structuralistic perspective the interpreter is not only a recipient (reader) of the text. Differentiation of these two receiving instances permits grasping the substance of changes to thinking which opposes structuralism. The recipient is the person who "receives" (accepts the given content, which is sent to him as something that is finished). The interpreter is the person who creates meanings (extracts that which is hidden, clarifies[26]). As Marek Zirk-Sadowski notices the conviction accepted within Polish practice which says that lawyers have the ability to reveal the "objective" meaning of text contradicts the fact that judges realize a creative

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[23] M. Zirk-Sadowski, *Pozytiwizm prawniczy...*, (in:) *Studia z filozofii prawa 1*, *op. cit.*, p. 88.

[24] *Ibidem*, p. 92.

[25] E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, "Państwo i Prawo" 2005, no. 4.

[26] According to the Latin interpretatio – explanation, interpretation, translation, *Słownik łacińsko-polski, według słownika Hermana Mengego i Henryka Kopii*, compiled by K. Kumaniecki, Warszawa 1986, p. 274.

practice having "authority over meaning of law" expressed discretionarily.[27] There is a shift from the petrified construction of the rational (or perfect) legislator to the discretional role of the judge making interpretations and decisions. Departure from positivistic thinking showed that not only language influences meaning. The source of meaning is not only the language system but a widely understood context – situational and cultural. Contextualism is trying to argue that the law is not a finished petrified object (the legal system "is opening up" to other normative systems), but is established with the participation of social, cultural and historical factors.

From the perspective of legal theory the question about meaning becomes an ontological question (what the law is) and an epistemological question (how it is studied). We can notice this in the opinions of Fish according to whom interpretation at all times is an act of discerning meaning, which is never literal (determined by characteristics of language), but dependent on context and the aim for which it is done. The interpreter in reconstructing the meaning reaches for paralinguistic but also non-system guidelines (other than strictly resulting from the letter of the law). Being part of the interpretive community designates borders for interpretation which, through it, is not arbitrary, even if the meaning of text is not constant or specified. This depiction allows for interpreting texts many times and, through this, to search for and continually create their meaning. This is reflected in the conviction which is promoted by the pragmatist Paul de Man, who claims that a given interpretation of a work can be one of many ways of reading it, as well as that of Umberto Eco who underlines the open character of interpretation, or that of Fish who stresses locality and situational nature of interpretation. A significant role in interpretation is played by situational nature, which is "taken as a literal meaning of some literary or legal text."[28] Situational conditioning of interpretation is justified by the assumption that there does not exist a primary, single established, or assumed in advance meaning or one intention inscribed into a text. This conforms to the opinion of Fish regarding the influence of the act of interpretation and not language characteristics on meaning.[29] That which conditions interpretation is imbedded in the broadly understood situational context, also in

[27] M. Zirk-Sadowski, *Pozytywizm prawniczy...*, *op. cit.*, p. 89.

[28] R. Rorty, *Wstęp do polskiego wydania wyboru esejów Stanleya Fisha*, (in:) S. Fish, *Interpretacja, retoryka, polityka. Eseje wybrane*, ed. A. Szahaj, introduction R. Rorty, foreword A. Szahaj, Kraków 2002, p. 10.

[29] S. Fish, *Introduction: Going Down the Anti-Formalist Road*, (in:) idem, *Doing What Comes Naturally. Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, Dyrham – London 1989, p. 12.

predispositions and norms of the method of deciphering content of a statement accepted by a given group of language users, combining to a certain "collective wisdom" of the interpretive community.[30]

Post-structuralist thought on language and interpretation opened a way to revise the concept of meaning, the role of the recipient, and the essence of interpretation itself, the text as a subject of interpretation. This is based on the conviction about the situation of the subject described as "interpretive location" and on determining meaning (interpretation) through context. Under these conditions the conventions acknowledged as a condition of the effectiveness of the statement are not an adequately convincing premise of influencing with the use of language. The mechanisms of persuasion and rhetoric functioning within the framework of the widely understood political domain have a growing influence on social reality. The influence of the last one (politics) on social reality seems to be strong enough that it determines language and interpretation not only in those domains which are in obvious ways connected with public life (such as law) but also those areas which are seemingly politically neutral (among which is literature). The thought on language and literature influences law and politics and politics influences literature. Changes in thinking about language and literature condition changes in thinking about law. Post-structuralistic tendencies put a legal theorist against new challenges.

[THE CULTURAL PHASE OF LEGAL THEORY?] Post-structuralistic understanding of discourses refers to a certain cultural-institutional domain (also the legal) in which there are connections between knowledge and authority. Cognitive-oriented thinking against structuralism, relying on juxtaposing individual factors with non-individual ones (where the structure is the subject of study), is reflected in methodological individualism defined by Max Weber. Social phenomena are explained by "showing them as results of individual action", through creation of "imaginary" space – deliberative and conditional.[31] In accordance to the convictions of Jürgen Habermas, the public space is a domain of the communicative rationality, within which the public debate occurs.[32] Such reference to cultural space connected to social institutions, which generate styles and discourses, create communicative institutions – "local" discourses (cafe, church, parliament,

[30] M. Dąbrowski, *Etyczny wygłos interpretacji. Rozumienie, warunki, sens*, (in:) *Filozofia i etyka interpretacji*, ed. A. F. Kola, A. Szahaj, Kraków 2007, p. 228.

[31] J. Płóciennik, *Literatura, głupcze! Laboratoria nowoczesnej kultury literackiej*, Kraków 2009, p. 201.

[32] See J. Habermas, *Die Moderne – Ein unvollendetes Projekt*, (in:) idem, *Kleine politische Schriften I–IV*, Frankfurt am Main 1981.

prison) is based on conventional regulations and assumptions. Multiplicity of discourses relies on striving toward the coexistence of "diverse discourses based on the rules of the type of communication which could become free of dogmatisms conversation between various, equal traditions and points of view."[33] Understanding the products of human activity as a plane of pluralistic dialogues/discourses is reflected in the theory of law. It is especially visible in the American philosophy of law, where individual cases and precedents and not an established abstract system can decide about the character of a certain order.[34] The humanistic disciplines, especially those whose subject of study is text and its interpretation (such as law and literature) are based on "various discursive practices which co-create (...) that unique time and space of the discursive reality."[35] The instilment of discursive activity in culture is accomplished with the use of language.[36] In the face of these changes the law becomes a product, a creation of argumentation "within a culturally defined discourse". It is characteristic that this "involvement" in culture is stressed by structuralists as well as by post-structualists.[37] On the other hand, however, from the perspective of the form of language use, a defined "discursive formation", an unconscious general (universal) constructions of thought defined by Foucault as *Épistémé*, referring to the "structures of the mind" of Lévi-Strauss, can be deciphered (extracted). Legal text can be then viewed as an object in which certain structure and cultural order in which that language functions is reflected.

Referring to the cultural space of the coexistence of local discourses is the essence of cultural theory of literature and poetics[38] created on the basis of postmodern theory. A substantial influence on its formation was made

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[33] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 36.

[34] J. Płóciennik, *Literatura...*, *op. cit.*, p. 17. Noticing the ability to study the whole by studying individual threads is confirmed by the popularity of the so called case studies. See R. Nycz, *Antropologia literatury – kulturowa teoria literatury – poetyka doświadczenia*, "Teksty Drugie" 2007, no. 6, p. 45.

[35] M. P. Markowski, *Kulturowa natura, słaby profesjonalizm...*, (in:) *Kulturowa teoria literatury...*, *op. cit.*, p. 33.

[36] The law seen as a subject of meaning is an interpretational and textual entity. See L. Rasiński, *„Reguły" i „gry" świata społecznego...*, *op. cit.* This corresponds to the conviction of Jerzy Leszczyński that it is "the textuality of law visibly separates it from life". Idem, *The problem in discerning law from life*, (in:) *W poszukiwaniu dobra wspólnego...*, *op. cit.*, p. 919.

[37] It is worth underlining that the contextuality of the meaning of text (similarly to cultural associations) is a phenomenon already seen in the works of the "Prague School" which is the quintessence of structuralist thought.

[38] J. Płóciennik, *ibidem*, p. 198.

by the pragmatic turn, through which "questions about the essence of literature decidedly gave way to questions about the way it worked."[39] It is inspired by various discourses, such as cognitive science, history of ideas, philosophy of the mind.[40] Pluralism of discourses existing within a certain cultural space makes it possible to use interdisciplinary (or transdisciplinary – as Markowski would say) research tools. The mixing of discourses gives rise to the mixing of disciplines within humanities and formation of a tendency which the above mentioned author defines as a cultural inclusion of theoretical discourse.[41] In the context of post-structuralist changes the view of the role of cultural context and its influence on social phenomena, including law, has been modified. Influential tendencies in the development of linguistic sciences and literary theory have also been reflected in theory and philosophy of law, which detected the role of "the cultural foundation of language."[42] Interpretive activity of man is rooted in culture. This is connected with the rise in interest within humanities, present since the end of the last century, in generally understood theory of culture and theory of politics. From this results the importance and need of conducting studies in politics, law, literature in the context of reflection on the processes occurring in culture.[43] Artur Kozak, stressing the connections between language, law and culture, claims that "law functions through the socially formed institutional structure which creates unique, professional semantics. Thanks to these semantics it can attribute specific cultural meanings to other elements of the social world and with this generate an intra-institutional reality with its own discourses. It is impossible not to agree with the opinion that "the point of reference of the reality of law is then the reality of culture generated by society."[44] Seeing the law as a semantic subject which is not a "finished" object given to the subject studying it is supported by the fact that law is

[39] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 31.

[40] *Ibidem*, p. 9. See *Kulturowa teoria literatury...*, *op. cit.*, S. Greenblatt, *Towards a Poetics of Culture – text of a lecture given at the University of Western Australia*, 4 September 1986, "Southern Review" 1987, vol. 20, no. 1, p. 3–15.

[41] M. P. Markowski, *ibidem*, p. 31.

[42] Por. A. Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej*, Wrocław 2010, p. 104 and following.

[43] Jarosław Płóciennik shows several threads within post-modernity which permeated scientific theories involved in culture. These are: analytical nature, impartiality (multi-partiality and comparatistic nature), self-reference, localness and peripherality, autonomy, rationality. See idem, *Literatura...*, *op. cit.*, p. 20 and following.

[44] A. Kozak, *Myślenie analityczne w nauce prawa...*, *op. cit.*, pp. 103–104.

also a way to participate in culture.[45] The picture of the "reality of law" is changing. "External" justification of this fact is embedded in the changes of tendencies in social sciences to which belong the turns present in humanities. In turn the "internal" factors are the changes occurring in the paradigm of law conditioned by integration processes (changes in the legal system toward a multicentric system), formation of non-positivistic concepts of law. During interpretation of a legal text the modern lawyer takes into consideration contextual factors, which determine the method of interpretation adopted for a desired outcome. In every interpretation situational determinants deciding about the validity of choosing not the literal, or ordinary, as it would be termed by Fish, meaning, but of that which is justified by the requirements of that particular instance of reading the text. Stanley Fish notices changes in the understanding of law stressing the importance during understanding of a text of the reconstruction of the aim of statement formulation and the author's intention. The phenomena mentioned can be seen as tendencies of the formation of a cultural phase in the theory of law. The cultural theory of law can be the answer in the search for points of reference to the pluralistic concepts of meaning, openness of interpretation, and through seeing its virtues of localness, situational aspect and context. Stressing the role of contextual determinants of interpretation allows also for the reconstruction of the rule *omnia sunt interpretanda*. Because it is not *clara*, when it is *interpretanda*.[46]

The postmodern and post-structuralist trends convince us about changes in perception of the role of law and the lawyer in social reality. The consequence of this is on the one hand a certain universalization of the problems tackled within humanities, but on the other hand the mutual permeation of methodologies of different disciplines studying the same subject treated as a complicated product of a social character. This facilitates referral to the cultural space of coexisting discourses. It is conditional upon the changes taking place not only in the processes of social communication but also on tendencies occurring in scientific disciplines responding to these changes. Along with these modifications occurring within the domain of

[45] M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze*, Łódź 1998, p. 6, 128. The author notices that the processes of integration (including the harmonization of Polish Law and European Law) influence the perception of law as a creation of the communication act. As a result of these phenomena a concept of law as a cultural subject – "a set of certain meanings" – forms.

[46] See *„Omnia sunt interpretanda", czyli... o języku prawników"*, interview with professor Jerzy Bralczyk, text available at http://www.edukacjaprawnicza.pl/index.php?mod=m_artykuly&cid=2&id=488.

social communication the perception of law changes. There is a transition to post-structuralist thinking about theory, interpretation or law itself. We are convinced of this by such phenomena as postmodernist subject crisis, reformulation (or crisis) of the concept of authority, creation of the languages of persuasion[47], changes defined as heading in the direction of the dehumanizing of civilization[48], and especially the growing influence of the genre of authority and politics on social life, including scientific theory and interpretational practices.

Researches who explore the law, theory-oriented or practitioners should not ignore the changes occurring in the context of humanities of which theory of law is a part of. Post-structuralist tendencies influence not only our thinking but also the subjects being studied. All *-isms* connected with postmodernity are a certain attempt of refering to and understanding of the transformations which affect the modern world – the omnipresence of narration, the "death of the author" along with the "reactivation" of the interpreter, openness of meanings, reinterpretation of subject and object, the crisis of theory. It is a prospect which the theory of law will confront in the face of changes of the paradigm of interpretation and law itself. Transfer of predominant feature to the creative and constructive role of the subject doing the studying convinces of this and reflects on the localization of the studied object not within the structure (as desired by the structuralists) but within culture with its determinants – localness, situationality, and contextuality.

S U M M A R Y

Locating our considerations in the context of post-structuralist tendencies permits the perception of the permeation of problems of such disciplines as the theory of law and literary theory. This is determined by the dominant thinking trends in post-structuralism: linguistic turn, interpretationism, the reformulation of the problem of meaning, revision of the idea of originator (concept of "the death of the author") and recipient (creative role of the interpreter). These tendencies were especially stressed by the representatives of American neo-pragmatism, including

[47] In an extreme case this phenomenon leads to the formation of the so called impersonal languages whose primary aim is the persuasiveness of the communicated statement. See H. Marcuse, *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society*, Boston 1964.

[48] See C. Charbonnier, *Entretiens Avec Claude Lévi-Strauss*, Plon 1961.

Stanley Fish. Post-structuralist changes relate to categories fundamental to the theory of law: the subject doing the studying, the object being studied, change of the paradigm of interpretation in the direction of stressing the role of context, as well as changes in the understanding of the essence of law itself. This is reflected in the juricentric model of legal practice, the concept of law as participation in culture, reactivation of hermeneutics and the stressing of discourse. The influence of postmodern and post-structuralist tendencies on the theory of law (pluralism of discourses, situationality and contextualism of interpretation) allows us to ascertain that there are changes within it – similarly to the theory of literature – in the direction of the phase of "cultural theory of law."

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THE TOPICALITY OF THE LAW DIVISION INTO PUBLIC LAW AND PRIVATE LAW

This article attempts at the discussion of the important issue, that is the division of law into public law and private law. Arguments referring to the subject have been divided into two parts. The first section is devoted to theoretical aspects whereas the second one discusses practical aspects, that is using the concept of the law division by the law application authorities.

Considering the current law division into public law and private law, in the first place it is necessary to answer the question whether it is possible to divide the widely understood law into two subsystems, or, bearing in mind the increasing specialization of the law in the legal system, is it better to discuss it in terms of its themes instead of the above-mentioned subsystems[1]? The later part of this paper will be devoted to the analysis of the usefulness of the above-mentioned division in the law application process. Moreover, this paper is an attempt to take a stand in the discussion regarding the possibility and necessity of the law division practical use at the horizontal order supported by the justification referring to its appropriate legal regulations, both public and private ones.[2]

In addition to legal theorists' dispute there is a statement that legal norms forming a legal system remain in certain relationships with each other.[3] For if the legal system is treated as an ordered set of elements, the placement of its individual components cannot be accidental. Systematizing

[1] J. Leszczyński, *Dogmatyki prawnicze w dobie globalizacji*, [in:] *Filozofia prawa wobec globalizmu*, ed. J. Stelmach, Kraków 2003, p. 121.

[2] The main opponent in the debate over the usefulness of the division of law in public and private laws is J. Nowacki, *Prawo publiczne – prawo prywatne*, Katowice 1992; see also J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa*, Kraków 2002, p. 107.

[3] For more information on the norm relationships in the legal system see, S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 2001, p. 185 and following.

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treatments of the legal system affect both vertical and horizontal orders. The issue of division of the legal system in the vertical order is not the subject of this paper.[4] Therefore, further considerations will concern the arrangement of the horizontal elements of the law.

A dispute over the current division of law into public and private laws cannot be settled without prior stating what the subject of the division is. J. Nowacki rightly notices that the problem of the justified division cannot be done without a prior determination of the object which is the topic of the discussion. Are they legal norms, legal relations or perhaps different branches of law (eg. criminal law, civil law, administrative law, constitutional law) which are defined as the branches of the subsystem of public law or private law?[5] It seems that discussing a horizontal division of the legal system already presupposes that legal norms are the subject of interest. Recent jurisprudence works take for granted the statement regarding the separation of the terms "legal norm" and "legal regulation" so it is unnecessary to discuss this relationship in the present study, as the author agrees with this statement. In fact, a character of the legal relation as a subject for division could also be discussed. However, it should always be determined whether it is an elementary ratio, irreducible to simple factors, or whether it is a ratio composed of several simple monoline (elementary) relations, connected functionally.[6] For if we accept the legal relationship as a preliminary analysis subject which has a complex character, the thesis of the disjoint division of law into public and private laws will fail.

A significant theoretical-legal aspect of the considerations regarding the topicality of the law division into public law and private law concentrates on the division criterion. Traditionally, the discussion of the subject begins by recalling the words of Ulpian, expressing the sense of the interest application criterion.[7] Hence, a public law is the law that applies to all citizens and the interest of all of them as a community. On the other hand, a private law is the law which serves to protect their particular interests. Since the established criterion presupposes the existence of discrepancies between

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[4] For more information on this subject see K. Płeszka, *Moc prawna a hierarchia w systemie prawa*, ed. K. Opałek, F. Ryszka, W. Sokolewicz, Warszawa 1988, p. 56 and following.

[5] J. Nowacki, *Prawo publiczne...*, p. 50.

[6] Z. Ziembiński, *O metodzie analizowania „stosunku prawnego"*, PiP 1967, Nr 2, p. 207.

[7] *"Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorium utilitatem: sunt enim quaedam publice utilia quaedam priwatim"* (D. 1,1,1,2) referred to by K. Kolańczyk, *Prawo rzymskie*, Warszawa 1976, p. 24.

public and private interests (which may not always occur), it is sometimes used only as an alternative.[8] A frequently employed subjective criterion assumes that a public law is the law which regulates relations between public authorities as well as between public authorities and citizens. A private law is the law that governs relations between individuals and legal persons. This thesis is challenged on the grounds that it is not always so that a public authority acting as a party of the legal relation acts within the limits of the empire (when he uses the power). Such a subject may be a party of the legal relationship under the private law, which happens when dominium is used. The criterion of pursuing claims states that a private law is the law where the interested party shows the initiative to seek protection of one's rights, and the initial sanction has a property dimension. A public law is the law on the basis of which the behavior inconsistent with the legal norms is prosecuted ex officio, and the applied sanction, apart from compensating the damage of the injured party, has also a repressive and preventive dimension. Independence of this criterion is also questionable, it is enough to mention the crimes prosecuted by private prosecution, where the initiative to seek protection lies on the victim's side, despite the fact that the criminal law and its norms are classified as a public law.

The doctrine also formulates the criterion characterizing the nature of the norms regulating the sphere of legal relations. On the ground of private law such a regulation is indirect and conditional, and the predominant type of norms are dispositive norms. In the public law norms of the *ius cogens* character dominate; they do not give the law recipient a possibility of making a derogation from the model behavior predicted by the disposition.[9] These two subsystems are distinguished on the basis of the property or non-property character of the subject. Sometimes a technical-legislative criterion[10] is involved which refers to the codification scope. In this way, placement of certain regulations under the Civil Code, for example, would determine the scope of norms making up a private law.

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[8] Regarding the lack of conflict between individual and collective interests see the Supreme Court Judgement of February 26, 2004 III SK 2/04, OSNP 2004, No. 19, pos. 343; Decision of the President of the Office of Competition and Consumer Protection No. RKT-42/2006 https://fafik.uokik.gov.pl/dec_prez.nsf/0/17301DD7509C69A9C12574F60028D5DC/$file/Decyzja_nr_RKT42_2006_z_dnia_10.07.2006.pdf (March 23, 2011).

[9] Z. Pulka, *Podstawy prawa. Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2008, p. 74.

[10] M. Safjan, *System Prawa Prywatnego. Prawo cywilne – część ogólna*, Warszawa 2007, p. 35.

The usefulness of this criterion is also questionable; a separation of the codification of certain fields has an ideological dimension (sometimes it has a purely practical dimension), which does allow to automatically decide whether the field belongs to the private or public law. It seems that the chosen method of regulation seems to be the most appropriate criterion the adoption of which the doctrine justifies.[11] At the same time, the method of regulation is understood as a way of determining the relation between the legal parties' intercourse on the ground of the appropriate public or private law subsystem rather than the content or character of the norms making it. For it is helpless to look for any significant differences in the sphere of the construction of norms belonging to the private or public law.

What is more, it is impossible to find any differentiation in the regulatory process of the legal provision establishment of a given subsystem. The method of regulation, which is typical for the private law, presumes that the parties of the legal relationship are equal and autonomous. This means that each party of a legal relationship, having complied with certain characteristics to be treated as a party of this relationship, uses corresponding rights and obligations that have been, are or will be associated with any other subject, if it has the same characteristics or, in other words, it has become a party of such a relationship. So regardless of whether it is a public authority (acting under the dominium) or a physical person acting on the basis of the private law as a party of the relationship, they will have the same rights and obligations, and thus no party will be able to impose any obligations on the other. A content of the legal relationship on the grounds of the private law is an expression of the autonomous behavior of the legal relationship parties which, according to the principle of freedom of contract, have accepted certain responsibilities.

Summarizing the above arguments, one should state that further issues can be discussed in the light of the proviso that legal norms (rules of the proper behavior) are the subject of controversy regarding the timeliness and usefulness of the division of law into public and private laws reconstructed in the process of applying the law and considering the method of regulating of a given legal relationship. Is the adoption of such a proposal sufficient to challenge the thesis of the impossible (being inseparable) division into two subsystems of public and private laws? The answer to that question should be preceded by a preliminary consideration of the objection put by J. Nowacki, namely that a qualification of a given norm to the subsystem of

[11] A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 24; S. Grzybowski, *System prawa cywilnego*, Vol. I, Ossolineum 1985, p. 19.

the private or public laws is the result of a prior, arbitrary decision of what is public and what is private.[12]

M. Sajfan was the one to address that objection as well as other issues tackled by J. Nowacki, the main opponent of the need to introduce a division of law into private and public laws.[13] He emphasized the necessity to introduce a primary arrangement of the expectations regarding a formulated concept of the law division. He also highlighted the need to differentiate between a descriptive judgment from a normative judgment. A division of the whole set into certain categories may be held while the determination of certain common features (such as the type of sanction, the status of the subjects of a given legal relationship, or the type of the norms that constitute a legal relationship) which do not require a prior definition of what is public and what is private. It is only later and for various reasons (including ideological) that a certain group is considered to be more appropriate for regulating the behavior of individuals within the sphere of the individual subsystems. At the same time, in this concept the use of the terms "public" or "private" has a traditional dimension rather than bringing any content by itself. The acceptance of certain principles and values determines which sphere is to be acknowledged as the appropriate one for the regulation of the individual's behavior within the private law, and which sphere is to be used for the regulation of the individual's behavior with the participation of the public authority.

The above-presented elements of M. Sajfan's concept seem to be an important argument in reviving the discussion regarding the topicality of the law division into private law and public law. Since the publication of J. Nowacki's monograph in 1992, no Polish-language publications have appeared on the subject which comprehensively relate to these issues (in terms of the legal theory) and which provide solutions. Recently the use of the adjectives "private" and "public" has become noticeable that in the formulation of new concepts which aim to develop the opposing legal institutions (in the relation "public-private"). The direction of such a development is well illustrated by the ongoing discussions in the framework of the administrative law regarding the notions of regulatory subjectivity and regulatory personality as notions which have to show a different status of the subjects (parties) of the legal relation towards their status within the public law relationship.

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[12] J. Nowacki concentrates his argumentation on the unjustified thesis regarding the division of law into public and private laws. See J. Nowacki, *Prawo publiczne...*, p. 85.

[13] M. Safjan, *System...*, p. 30 and following.

A subject of the legal relationship is the one who has been granted certain rights or duties. Basing on the distinction between legal subjectivity and legal personality, the distinction between public law subjectivity and public law personality is made within the framework of public law.[14] The administrative law subjectivity is understood as the ability to participate in the course of the administrative law as a separate subject.[15] The usefulness of this concept on the grounds of the public law is beyond doubt not only because it specifies one of the parties of a legal relationship governed by the public law, but also because it expresses the principle of the subjective integrity of the state.[16] While the concept of the public law subjectivity is accepted by the administrative law representatives, the concept of legal personality results in a number of disputes which are obviously caused by the attempts to automatically introduce the already formed concepts of the private law on the ground of the public law, without taking into account the differences between these two subsystems. In the majority are those who argue that when it comes to defining the characteristics of the administrative subject, as a party of the public law relationship, it is sufficient to use the term of the public-law subjectivity. The construction and use of the public-law personality concept is unnecessary, since through the administrative subject in a legal relationship with an administered subject the state enters itself. Using a concept of the legal-public personality for the assessment of the public law subject is useless to determine its position as the legal relationship party. Each action of such a body is the action on behalf of the state, whereas its acting part in this regard remains inscribed in its structure, and even if it does not fit in this structure, by doing the task assigned, it does so on behalf of the administrative subject and under its responsibility. Therefore, a recognition of such a subject as a subject separate from the state is unjustified.

Opponents of the public law personality distinction also refer to a practical aspect of the constructed concept. The very acknowledgment that a given subject possesses such a status does not allow for making a conclusion that it has some powers, as it is in the private-legal sphere. On the basis of

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[14] The legitimacy of isolating this concept and its usefulness has been discussed among other by T. Rabska, *Podstawowe pojęcia organizacji administracji*, [in:] *System prawa administracyjnego*, Vol. I, ed. J. Starościak, Wrocław – Warszawa – Kraków – Gdańsk 1977, p. 275 and following; S. Fundowicz *Osoby prawne prawa publicznego*, ST 2000, Nr 3, pp. 3–12; P. Radziewicz, *Kilka uwag w sprawie prawnej przydatności pojęcia osoba prawa publicznego*, ST 2000 r., Nr 6, pp. 3–18.

[15] J. Filipek, *O podmiotowości administracyjno-prawnej*, PiP 1961, Nr 2, p. 209 and following.

[16] A. Jamróz, *Wprowadzenie do prawoznawstwa*, Warszawa 2008, p. 113.

the private law, the very statement that a given subject has a legal personality automatically results in the statement that it has a legal capacity to act (as to the principle) in the sphere of the private law relations. Meanwhile, such a statement is obsolete on the grounds of the public law, the authority is entitled to act towards an individual only in terms of such actions which he was authorized to perform.

The use of the public law personality concept to justify the ability to be a party of the administrative-legal relation if the authority has not previously been given powers (competence) to act in this particular case is excluded. These considerations also apply to the position of the administrative subject. Regarding the administered subjected, it always appears as a separate and isolate subject, and the elements that constitute this distinction (legal capacity and capacity to perform legal acts) remain the same as in the civil law, taking into account the differences arising from the nature of the relationship of the public law.[17]

The author of this paper argues that the decision regarding the usefulness of the legal-public personality concept on the basis of the administrative law should be preceded by defining the purpose for which the author uses the aforementioned construction. It is necessary to remember that *the classification of the legal life's part implies its assessment classification in some sense and results in further consequences in the qualification sphere.*[18] Therefore, there is a need to specify whether the author treats the public-legal personality concept as an object of cognition.[19] Using the concept of the public-legal personality as an object of cognition, it is necessary to determine whether such an item exists. Therefore, it is necessary to answer the question whether such a concept, that is subject, has been developed within public law.

On the basis of the administrative law the work on this subject begins by noting that on the ground of the private law the concept of legal personality is already formed. Next, the authors focus on stating the extracts of the relevant normative acts devoted to the status of the subject under consideration (usually the municipality). With regards to the rights and obligations granted to it, the authors concentrate more on the legal-public personality rather than on subjectivity. There is no discussion about whether the sub-

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[17] M. Grążawski, *Podmiotowość i osobowość prawna w prawie administracyjnym*, [in:] *Instytucje współczesnego prawa administracyjnego Księga Jubileuszowa prof. zw. dr hab. J. Filipka*, Kraków 2001, p. 229.

[18] F. Longchamp, *Współczesne problemy podstawowych pojęć prawa administracyjnego*, PiP 1966., Nr 6, p. 890.

[19] F. Longchamp, *Współczesne problemy...*, p. 888.

ject under the analysis satisfies the conditions to be considered a separate entity. What is more, there is no statement what conclusions can be drawn from the fact that the subject has been granted a public-legal personality. In the works devoted to the concept of the public law personality there is an evident reference to the construction of the private law personality, which is often limited to the transfer of certain settlements with regards to the public law personality from the private law. The abnormality of this approach is justified not only by the separateness of the private and public laws, but primarily by the fact that on the basis of the so-called private law the so-called normative theory of legal personality is applied, which means that a legal person is such an organizational entity which is recognized by the law as such.

The statement that a person benefits from the rights and duties usually granted to a legal subject is not sufficient to recognize some organizational entity as a legal person. A liberal understanding of the Civil Code art. 33^{20} is unauthorized as well as the assumption that for the subject to be recognized as a legal person it is enough to find the legal basis in the regulations that a given subject is a legal person.[21] Hence, recognizing that a particular subject has the public law personality because it acquires rights, incurs obligations, and performs tasks on its own behalf and for its own account, remains ineligible as long as within the administrative law the construction of separate legal existence in the shape of a legal person in the private law meaning is not designed. It is necessary to consider whether the use of the public law personality concept is justified in the context of its use as a tool. Such use of the legal personality structure does not add anything to the public law science. Indeed, if what was mentioned above is true, namely that the administrative subject operates only so far and as much as it is allowed by the law, the same statement that it has the public law personality should be regarded as unsuitable. In the absence of the regulations determining the working area of this subject, the statement that it has the public law personality will not be able to justify its activity in this sphere. It seems that the concept of the public law personality is used by administrative lawyers to emphasize the individuality and independence of a given subject, but rather in the ideological dimension.[22]

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[20] Act of April 23, 1964, The Civil Code (Journal of Laws dated 1964 r., Nr 16, pos. 93 later amended).

[21] J. Frąckowiak, *Prawo cywilne – część ogólna*, Vol. 1, ed. M. Safjan, Warszawa 2007, p. 1027.

[22] Among others A. Doliwa, *Podmiotowość prawna jako element prawnoustrojowej konstrukcji jednostek samorządu terytorialnego*, Administracja Publiczna 2010, Nr 2, p. 183.

Using the concept of the public law personality should also serve as the attempts to locate the private law subjects in the structure of the legal relationship of the public law which, through the so-called commission of public tasks, become a party of the public-legal relationship. In this situation, the concept of the public law personality formulated in relation to them would highlight their unique status with regards to the private-legal sphere on the grounds of the public law. The author of this paper thinks that this goal can be achieved using the concepts which are already known and used in the administrative law science. At this point it is worthwhile to draw attention to the notion of the general competence and specific competence of the subject to carry out the case. This construction allows to use the term "administrative subject" not only in relation to the bodies of the state administration but also in relation to the subjects who have been given public tasks.[23]

At this point, it is necessary to address another argument raised by the opponents of the thesis regarding a separable division of the legal system into public law and private law, which relates to the so-called mixed subjects acting as a legal relationship party. This term refers to the private law subjects performing public functions, whose placement among the subjects of the public or private laws is apparently problematic. The above-mentioned arguments concerning the status of the private and public law subjects illustrate that the presence of the private subject as the administrative subject in the legal relationship does not lead to the loss of the previous status of the subject performing a task. Its previous status does not change that is, the subject benefits from the rights reserved for the public administration only in the framework of the task performed[24] and beyond that activity the subject remains the private law entity. Therefore, it does not mean that it becomes a mixed subject whose rights and obligations, being a private-legal subject, mix with the competences that are held in the public-legal sphere. The author of this paper claims that the above-presented view is a reference to the dualistic nature of the public law subjects, visible on the basis of the private law. Yet, it remains indisputable that public authorities may act within the empire (with the use of the power) and dominium (as a party of the private-legal relationship, being a parallel and autonomous subject). The author of this paper argues an analogous structure can be assumed on the basis of the public law when the private law subjects enter the pub-

[23] B. Adamiak, *System Prawa Administracyjnego*, Vol. IX, Warszawa 2010, p. 103.

[24] A. Dajnowska, Z. Kapiński, J. Mirgos, I. Rosińska, R. Stec, D. Strus, *Prawne formy działalności administracji publicznej*, ed. R. Stec Warszawa 2008, p. 129.

lic-legal relationships. This thesis shows that the statements on the mutual penetration of the powers and competences and the existence of the so-called mixed legal subjects are erroneous.

Undoubtedly, the legitimacy and necessity to introduce a division of law in a parallel order is essential in jurisdiction. The Constitutional Tribunal has repeatedly referred to the division of law into public law and private law.[25] Consequently, the division into the public law subjects and private law subjects also plays an important role.[26] The affiliation to one of the above-mentioned categories has to justify the possession of specific rights. Such argumentation, referring to the public nature of the service, was used by the Constitutional Tribunal in its decision of January 25, 2011.[27] The case focused on the public operator, Poczta Polska S.A., and their failure to perform a universal postal service (a postal transfer). The decision aimed at the resolution of a legal question whether limitation of the subject's liability only to the range specified in the Act for doing something which was not a tort was consistent with the Constitution. The Tribunal did not find the investigated regulations to be unconstitutional. The decision was justified stating that Poczta Polska S.A. is a public company whose sole shareholder is the Treasury and it is the sole operator performing the service of postal transfers. The Tribunal held that the privilege of Poczta Polska is justified by its status of the public operator, which has a statutory duty to carry out universal postal services in such a way as to be accessible and affordable.

The above-mentioned division was referred to by the Constitutional Tribunal in its decision of March 15, 2011[28] in which it judged on the legislation constitutionality conferring legal validity of the business account books and extracts from the bank books in respect to the rights and obligations arising from banking activities in the civil proceedings conducted against a consumer. The Tribunal stated that, in principle, the validity of official documents is associated with the performance of their public duties, and not with the activities of private subjects, which are now banks in Poland. In this situation the use of the privilege to grant the official document

[25] For example, the decision of the Constitutional Tribunal dated July 10, 2000, SK 12/99, OTK ZU 2000, Nr 5, pos. 143, the resolution of the Constitutional Tribunal dated May 22, 2007, SK 70/05, OTK-A 2007, Nr 6, pos. 60.

[26] The decision of the Constitutional Tribunal January 18, 2011, P 44/08, http://www.trybunal.gov.pl/Rozprawy/2011/rozprawy.htm (30.03.2011).

[27] The decision of the Constitutional Tribunal dated January 25, 2011, P 8/08, unpublished, see also opposing comments by T. Liszcz.

[28] http://www.trybunal.gov.pl/Rozprawy/2011/rozprawy.htm (March 23, 2011).

power to business account books by the subject who does not perform public tasks is unjustified. Therefore, the Tribunal decided on the separation of the two types of relationships – public-legal relationship and private-legal relationship, and thus on a different nature and status of the subjects – parties of the public-legal and private-legal relation.

A division of law into public law and private law in the parallel order plays an essential role also in the jurisprudence of the Supreme Court. In its resolution of June 26, 2001[29] resolving the legal question posed by the Warsaw Regional Court, the Supreme Court decided on the inadmissibility of the court proceedings in cases in which the parties were related through the administrative relation, thus emphasizing its separateness from the private-legal relationship. It decided that the previous determination of the source of the legal relation was acknowledged as being reliable when deciding on the appropriate investigation procedure.[30] To support the above-mentioned decision[31] R. Szarek highlighted that the decision regarding a separate investigation procedure is a consequence of the prior division of matters into private and public matters.

Significant reflections on the nature of the legal relationship involving public and private bodies have been made in the background of the article 57 of the Energy Law[32] before the amendment was introduced.[33] There is no doubt that a legal relationship between the subject who is a provider of electricity and its recipient is a civil law relation. In this case, the act creating mutual obligations of the parties (the source of the legal relation) is an agreement made according to the norms of the substantive civil law. The above mentioned regulation related to the situation in which an illegal uptake of energy took place. The statement of such facts entitled the supplier of energy to determine the compensation according to the rank or file a claim in accordance with the general principles. In the situations when the debtor

[29] The Supreme Court Resolution of 26 June, 2001, III CZP 30/01, LexPolonica nr 351448.

[30] Also the Supreme Court resolution of November 19, 2010, III CZP 88/10, LexPolonica nr 2412828, in the resolution of October 22, 2010, III CZP 74/10, LexPolonica nr 2399810.

[31] R. Szarek, Glosa do uchwały Sądu Najwyższego z dnia 26 czerwca 2001, III CZP 30/01, ST 2003, nr 3, p. 65 and following.

[32] Resolution dated April 10, 1997 – The Energy Law (Journal of Laws of 2006, Nr 89, pos. 625, later amended).

[33] Art. 57 of the Act dated April 10, 1997 – The Energy (Journal of Laws of 2006, Nr 89, pos. 625, later amended) was replaced by the act of January 8, 2010 regarding the amndment of the law – The Energy Law and other laws' amendmends) (Journal of Laws of 2010, Nr 21, pos. 104, later amended).

refused to comply with the provision, the set compensation was to be taken through the administrative execution. The discussed issue concentrated on the investigation of to which extent a public character of the goods covered by the contract (to be more precise, providing a public service) may justify the preference of one of the relationship parties. Strengthening one party's position was to rely on the possibility of issuing an enforcement order by the supplier (in practice, without the prior settlement of the claim by the court) and the ability to conduct execution in administration.[34] To which extent does a public character of the provided goods determine the departure from the proper methods of the private-legal relation regulations? Is it relevant that, as it was justified by the Supreme Court[35], apart from the parity of the subjects – a principle rule for the civil law relation, the position of one of them, that is the energy supplier, was strengthened by the will of the legislature while claiming for the compensation from the recipient of the illegal intake of energy? In case of the claims being unsatisfied, the supplier did not begin a court dispute with the customer in which, according to the rule of the proof burden, he would be required to illustrate the fact of illegal consumption of energy and the harm resulting from it.

The Constitutional Tribunal gave comments on this matter. In the decision of July 10, 2006[36] it concluded that the private-legal subjects' usage of the possibility to enforce their claims in the enforcement proceeding mode in administration cannot lead to distortion of the nature of the legal relationship based on the agreement. In this situation, a necessary condition to benefit from this privileged form of execution of the claim enforcement is a prior reference of the matter to a general court. Granting special privileges of a possibility of the claim enforcement through administrative execution to the energy supplier as a party of the private-legal relationship cannot lead to the abuse of his position in relation to the customer. Prioritizing the energy supplier as a party of the legal relationship, as the exception from the principle of equality of the parties of the private-legal relationship, should not lead to widening of the powers of that subject. The customer cannot be denied the right to submit the disputed case to the general court's judgment. As a consequence of the Constitutional Tribunal decision, the legislator made an amendment to the article 57 of the Energy Law.

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[34] Act of June 17, 1966 regarding execution proceedings in administration (Journal of Laws of 2005, nr 229, pos. 1954 later amend).

[35] The Supreme Court decision dated November 15, 2002 IV KKN 570/99, OSP 2003, Nr 9, pos. 106.

[36] The Constitutional Tribunal decision of July 10, 2006, K 37/04, OTK-A 2006, Nr 7, pos. 79.

Theorists of law are criticized that they formulate concepts that are not reflected in practice, and their conclusions have a purely scientific value. The above-presented position in the discussion regarding the topicality of the division of law in the parallel order and particularly the jurisdiction referred to in the paper indicate that the considerations in this regard are not only valid but also useful to be implemented in practice. The author of this paper believes that the view expressed by H. Rot[37] that, on the other hand, the dispute about the topicality of this division was an attempt to identify the boundaries of the public authority powers, and, on the other hand, it aimed at the manifestation of the boundaries marking the individual's free activity. Arguing on the need to differentiate between public law and private law, the Constitutional Tribunal[38] highlighted that constitutional regulations of the private law results from the idea of the liberal democratic state which treats freedom of the individual as a primary value, hence each democratic state should notice such a division.

In the literature there are claims regarding the division of law into public law and private law as being outdated. They are justified by the increasing specialization of law, creation of hybrid legal structures, formation of legal relations at the boundaries between public and private legal relations. Decreasing tasks, which so far have been defined as public, have an impact on the scope of what is public and what is private. The evolutionary process of transformation also involves the state, which greatly affects the activity of the economic subjects. However, the economic development control decreases, changing its form and content.[39] A progressive phenomenon of the so-called privatization of public tasks, that is a transfer of public tasks to private subjects[40] has become a necessity for *the one who covers a lot squeezes badly*[41] and vice versa. According to the opponents of the idea of the law division, such shifts were to lead towards disappearance of the borders between private-legal relations and public-legal relations, or towards a mixture of their components.

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[37] H. Rot, *Wstęp do nauk o państwie i prawie. Cz. 2*, Wrocław 1980, p. 198.

[38] The Constitutional Tribunal decision of April 29, 2003, SK 24/02, LexPolonica nr 360504.

[39] B. Kurczewska, *Interwencjonizm państwa i jego rola w gospodarce*, http://mikro.univ.szczecin.pl/bp/pdf/6/0.pdf (March 23, 2011).

[40] For more information see S. Biernat, *Prywatyzacja zadań publicznych*, Warszawa – Kraków 1994, p. 25.

[41] J. Baszkiewicz, *Powszechna historia ustrojów państwowych*, Gdańsk 1998, p. 211.

The author of this paper claims that such statements are inappropriate and result from the simplification of certain statements. To a large extent, all difficulties regarding the correct classification of what public and private are due to the improperly chosen object of study. It is not certainly a complex of elements, but only its individual parts; it is not the group of relations, but the homogeneous relation irreducible into smaller parts. In the situation where such mixing of public-legal and private-legal elements takes place, we deal with a complex relationship which requires to be arranged into smaller elements – elementary relations to be analyzed. The concept of such an approach towards the legal relationship considerations is noticeable in the Constitutional Tribunal jurisdiction referred to above. As it results from the above-mentioned decisions, allowing private subjects to realize a public task or a public service does not mean that this subjects loses its current status. In this respect, such a subject performs given functions using the tools provided for this purpose, bearing in mind that as a result of such modification there should not be a deterioration of the beneficiary's position as the recipient of the service because of the subject performing the task. It is, therefore, essential to mark the limits within which the state and other subjects performing its proper tasks operate and within which individuals exist and within which the division of law into public and private lawa may become useful.

S. Wronkowska writes that horizontal systematizing is necessary for the arrangement of thinking about the law, for its interpretation.[42] Hence, a reference to the division of law into public law and private law is not only *decorum*, but it becomes a necessity. It is not sufficient to acquire the knowledge and practical abilities of the various fields of law. As M. Safjan highlights that *a broader perspective of the existing law overview, a possibility of crossing the boarders of the existing branch rules and search for other points of reference beyond the branch... become a great chance and can lead to a gradual evolution of the whole system in the direction which is friendlier towards people, their freedom and needs.*[43]

[42] S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 111.

[43] M. Safjan, Speech given on 3 March 2003 at a ceremony organized by the editors of "Rzeczpospolitej" to launch the ranking of law firms http://www.trybunal.gov.pl/Wiadom/Prezes/003.htm (31.03.2011).

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The public and private law are two subsets of the legal system isolated pursuant to horizontal organisation, to which, according to classification (as stated by the opponents of the thesis about disjunctive division of the law on public and private law), or solely typological criteria, assignment of separate branches of the law is done. However, the controversy related to the division of the law according to horizontal organisation into both mentioned subsystems is not only a dispute over criteria but also over the importance of such a division in the process of application of the law.

The author of the article aims at demonstrating that the division of the law into public and private is topical and, above all, plays a significant role in the process of application of the law, including its interpretation.

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THE POWERS OF THE CONSTITUTIONAL TRIBUNAL TO VERIFY THE CONFORMITY OF THE LAW OF THE EUROPEAN UNION WITH THE CONSTITUTION

Introduction

The Constitution of the Republic of Poland[1] adopted in 1997 does not determine directly the powers of the Constitutional Tribunal to adjucate cases of the law of the European Union. Only Article 188 of the Constitution determines that the Constitutional Tribunal shall adjudicate regarding the conformity (...) of international agreements to the Constitution. Therefore, this regulation embraces also the primary law of the European Union.

The purpose of this article is to present the hitherto practice of the Tribunal related to the analysis of conformity with the constitution of agreements concluded within the European Union as well as evaluation whether there is a possibility to investigate the conformity of the secondary law of the European Union with the Constitution.

1. Activity of the Constitutional Tribunal in adjucating the accordance of the primary law of the European Union with the Constitution

The Tribunal has been engaged twice in international agreements being the primary law of the European Union. The Constitutional Tribunal emphasized the fact that it is not authorised to autonomous evaluation of constitutionality of the primary law of the European Union. Such a com-

[1] Dz. U. z 1997 r., No. 78, poz. 483 with further amendments.

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petence serves it as far as primary law is concerned to ratify international agreements.[2]

The first of the cases concerned the analysis of the conformity of the accession Treaty and certain decisions of the Treaty establishing the European Community and the Treaty on European Union to the Constitution.

Proceedings before the Constitutional Tribunal were initiated by three groups of Deputies.[3] The applicants reproached non-conformity to the Constitution of the following treaty provisions: tp

- Article 1 (1), Article 1 (3) of the Accession Treaty, Article 2 of the Act of Accession;
- Article 8 , 12, 13 (1), 19 (1), 33, 105, 190, 191, 202, 203, 234, 249, 308 of the Treaty establishing the European Community;
- Article 6 (2) of the Treaty on European Union and;
- Article 17 of the Charter of Fundamental Rights.

To support the reproach of nonconformity of the terms of accession to the Constitution of the Republic of Poland, the applicants referred to the preamble to the Constitution, especially to the part concerning 'the possibility of a sovereign and democratic determination of the fate of Homeland' by the Nation and about the independence of Poland. Furthermore, the Deputies referred to the principle of the sovereignty of the Polish People (Article 4 (1) of the Constitution) and the superiority of the Constitution of the Republic of Poland in Polish legal order (Article 8 (1) of the Constitution). They also indicated the constitutional limits upon transferring 'to an international organization or international institution the competence of organs of State authority in relation to certain matters' (Article 90 (1)), which, according to the applicants, were exceeded.

The Tribunal in the conclusion of the judgment did not state the non-conformity of the quoted regulations of agreements to the Constitution of the Republic of Poland, whereas in the reasons for the judgment it referred to numerous issues concerning the relations between the law of the EU and the national law.

The Tribunal worked on the primary law of the European Union for the second time following an application of parliamentary group and senators

[2] Wyrok Trybunału Konstytucyjnego K 18/04 z dnia 11 maja 2005 roku, Zbiór Urzędowy OTK 2005/5A/49, pkt 1.2 uzasadnienia.

[3] Application of Parliamentary group of April 19 2004 (represented by the deputy J. Łopuszański). Application of a parliamentary group of April 30 2004 (represented by the deputy M. Kotlinowski). Application of a Parliamentary group of September 2, 2004 (represented by the deputy A. Macierewicz).

of PiS (Prawo i Sprawiedliwość). It concerned the conformity of the Treaty of Lisbon with the Constitution. The Tribunal stated that:[4]

- Article 1 Section 56 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty determining the European Community drawn up on 13 December 2007 and determining the tenor of Article 48 of the Treaty on European Union and in relations to Article 2 of the Treaty of Lisbon determining the tenor of Article 2 (2), Article 3 (2) and Article 7 of the Treaty on the Functioning of the European Union is in accordance with Article 8 (1) and Article 90 (1) of the Constitution of the Republic of Poland;
- Article 2 of the Treaty of Lisbon determining the tenor of Article 352 of the Treaty on the functioning of the European Union is in accordance with Article 8 (1) and Article 90 (1) of the Constitution.

The Tribunal has so far worked on investigating the conformity with the Constitution of international agree-ments constituting the primary law of the European Union which have already come into force. In both cases the Tribunal did not state any incompatibility with the provisions of the Constitution. There was no need therefore, to take a decision of how to eliminate a possible discrepancy. According to the fundamental principle of the international law, every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*). In such a situation the state should modify the regulations of the constitution or renounce an international agreement. Therefore, it should be considered whether a preventive control exercised before the final agreement of the state to be bound by a contract would not be more relevant.

2. The Constitutional Tribunal vs. Secondary law of the European Union

Article 188 (1) of the Constitution allows to control the conformity of international agreements to the Constitution, and thus also the primary law of the European Union. This control cannotcomprise, however, the acts of the secondary law. L. Garlicki emphasises that Article 188 of the Constitution adopts enumeration technique and does not mention clearly the secondary law. Accordingly, the secondary law belonging to a different legal order than the domestic law and the international law, is beyond the power of the Con-

[4] Wyrok Trybunału Konstytucyjnego K 32/09 of 24 November 2010, Zbiór Urzędowy OTK 2010/9A/108.

stitutional Tribunal.[5] The author also indicates that the Constitution does not determine the competence of other organs of judicial authority in this scope.[6] B. Banaszak as well, shares the view that competence established in Article 188 (2) provides for that the Constitutional Tribunal as a model of control of Acts may apply norms of such agreements, that is primary law of the EU but not the secondary law.[7] J. Barcz thinks also that the secondary law of the EU is not subject to control of constitutionality by the Tribunal.[8]

The problem of evaluation of the secondary law as an element of Polish legal order, introduced to it as a consequence of implementation of the law of the EU appeared, however, in the arbitration activity of the Tribunal. E. Łętowska emphasised unequivocally that an act of internal law being a transposition of an act of community law may be subject to control of conformity to constitution executed by the Constitutional Tribunal.[9]

The Tribunal has repeatedly worked on such cases, among them: controversy over the bicomponents in fuels[10], participation of foreigners in European Parliament election[11] and application of the European arrest warrant to Polish citizens.[12] In these cases the Tribunal did not investigate directly the acts of secondary law but of domestic law implementing the law of the EU.

The key importance for the analysed subject was related to the provision of the Tribunal concerning the European arrest warrant. The Tribunal

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[5] L. Garlicki, *Sądy i Trybunały*, in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. V, Warsaw 2007, p. 20.

[6] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, 12th edition, Warsaw 2008, p. 435.

[7] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, pp. 825–826.

[8] J. Barcz, *Konstytucyjne uwarunkowania członkostwa Polski w Unii Europejskiej*, in: J. Barcz (ed.), *Ustrój Unii Europejskiej*, 2nd edition, Warsaw 2010, p. VII–94.

[9] E. Łętowska, *Prawo europejskie wobec trybunałów konstytucyjnych państw członkowskich: możliwość rewizji implicite konstytucji?*, in: M. Granat (ed.), *Stosowanie prawa międzynarodowego i wspólnotowego w wewnętrznym porządku prawnym Francji i Polski. Materiały z polsko-francuskiej konferencji naukowej Warszawa 21–22 października 2005 roku*, Warsaw 2007, p. 147. M. Masternak-Kubiak wskazuje na istnienie luki w unormowaniu konstytucyjnym w tym zakresie. M. Masternak-Kubiak, *Zasada autonomii Prawa wspólnotowego praktyka jego stosowania w Polsce*, in: M. Granat (ed.), *Stosowanie prawa międzynarodowego…*, p. 82.

[10] Wyrok Trybunału Konstytucyjnego [Judgment of the Constitutional Tribunal] K33/03 of 21 April 2004, Zbiór Urzędowy OTK 2004/4A/31.

[11] Wyrok Trybunału Konstytucyjnego K 15/04 of 31 May 2004, Zbiór Urzędowy OTK 2004/5A/47.

[12] Wyrok Trybunału Konstytucyjnego P1/05 of 27 April 2005, Zbiór Urzędowy OTK 2005/4A/42.

decided that Article 607t § 1 of the Code of Criminal Procedure[13], in the scope within which it allows extradition of a Polish citizen to a Member State of the European Union on the basis of the European arrest warrant, is incompatible with Article 55 (1) of the Constitution.[14]

The institution of the European arrest warrant was introduced in the Code of Criminal Procedure by the amendment law of 18 March 2004.[15] These actions were undertaken in relation to implementation of framework decision of the Council of 13 June 2002 into Polish law concerning the European arrest warrant and the procedure transferring people between Member States (2002/584). In the reasons for the judgment the Tribunal indicated that its task is to investigate the conformity of normative acts to the constitution, nevertheless this property refers to regulations serving the implementation of the European Union law.

The consequence of such stand of the Constitutional Tribunal was the modification of Article 55 of the Constitution.[16]

On 6 December 2009 the Speaker of the Sejm (Parliament) received a project of amendment of the Constitution connected to enlargement of competence of the Constitutional Tribunal to investigate the conformity of the statutory law of international organisations to the Constitution of the Republic of Poland, if the Republic of Poland conferred upon them competences described in Article 90 (1) of the Constitution of RP.[17]

In fact, it concerns the competence to investigate the conformity of the regulations of the secondary law of the European Union to the Constitution. This is a very complicated and controversial issue. In principle, Member States of the EU have tendency to avoid the 'confrontation' of constitution of a state and the EU law.[18] The Constitutional Tribunal have also emphasised that EU law and domestic law should coexist in a spirit of mutual interpretation and cooperative co-application.[19] However, there also

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[13] Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego, Dz. U. z 1997 r., No. 89, pos. 555.

[14] Wyrok Trybunału Konstytucyjnego P1/05 of 27 April 2005, Zbiór Urzędowy OTK 2005/4A/42.

[15] Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń, Dz. U. z 2004 r., No. 69, pos. 626.

[16] Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej, Dz. U. z 2006 r. No. 200, pos. 1471.

[17] Projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej, druk No. 3399.

[18] P. Chybalski, *Informacja prawno porównawcza w sprawie kognicji sądów konstytucyjnych odnośnie Prawa wtórnego Unii Europejskiej*, BAS WAUiP 2358/10, p. 3.

[19] Wyrok Trybunału Konstytucyjnego K 18/04, point 2.2 of justifcation. For EU law-friendly interpretation See A. Kalisz-Prakopik, *Wykładnia i stosowanie prawa wspólnotowego*, Warsaw 2007, p. 201 and the following.

occurred judgments of constitutional tribunals which admitted the possibility to investigate constitutionality of the community/union law.[20]

The project leads to a question whether such modifications are appropriate and justifiable from the point of view of the European Union law.

According to Article 2 of the Act concerning the conditions of the accession of Poland to the European Union 'from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'[21]. It means that Poland undertook to abide by the law of EC/EU.

By virtue of Article 188 (1) of the Constitution of the Republic of Poland the Constitutional Tribunal is empowered to adjucate on the conformity of an international agreement to the Constitution. The powers of the Constitutional Tribunal in this scope are of special significance if they are performed before expressing the final decision to be bound by a contract. In the case when an inconformity to the provisions of the Constitution is stated, a state may take a decision not to be bound by such an agreement, to negotiate a new contract or to modify the selected provisions of the Constitution. However, when a state agrees to be bound by agreement according to *pacta sunt servanda* principle, it should perform in good will the obligations resulting from the agreement. Article 26 of the Vienna Convention on the Law of Treaties (of which Poland is part) determines that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[22] Thus, 'a state cannot shield itself with the regulations of own internal law, including the constitution, when it breaks an international agreement'.[23] Moreover, according to Article 27 of the same convention 'a party may not invoke the provisions of its internal law as justification for

[20] See principally the judgment of the Federal Constitutional Court of Germany (Solange I formula amended later by Solange II) and judgments of Constitutional Courts of Italy and Spain. J. Barcz, *Wybrane problemy związane z wyrokiem niemieckiego Federalnego Trybunału Konstytucyjnego z 30.06.2009 r. na temat zgodności Traktatu z Lizbony z Ustawą Zasadniczą RFN*, Europejski Przegląd Sądowy 2009, wrzesień, p. 13 and following; R. Arnold, *Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej*, Studia Europejskie 1999, No. 1, p. 95 and following.

[21] Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic to the European Union, signed 16 April 2003, Dz. U. 2003, No. 90, pos. 864.

[22] Viena Convention on the Law of Treaties signed on 23 May 1969, Dz. U. z 1990 r., No. 74, pos. 439.

[23] M. Frankowska, *Prawo traktatów*, Warsaw 1997, p. 103.

its failure to perform a treaty'. As R. Kwiecień indicates, the Permanent Court of International Justice emphasized that the primacy of international law extends not only to common legislation of a state but also to the constitution. The Tribunal justified that a state cannot refer to its own constitution towards another state for the purpose of liberation of duties imposed on it by the international law or treaties in force'.[24]

Also Article 13 of the Declaration on Rights and Duties of States of 1949 elaborated by the International Law Commission declares directly: 'Every State has the duty to carry out in good faith, its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty'.[25]

As indicated above, the Constitutional Tribunal has twice expressed itself concerning the accordance of the primary law of the EU with the Constitution: once in relation to Accession Treaty and again with connection to the ratification of the Treaty of Lisbon. According to the Tribunal, the Accession Treaty (judgment of 11 May 2005, K 18/04) and the Treaty of Lisbon (judgment of 24 November 2010, K 32/09) have been recognised in conformity with the Constitution by the Tribunal. Therefore, the scope of competences transmitted to EC/EU is in accordance with the provisions of the Constitution.

The Union fulfils the conferred competences by accepting legal acts of the Union (the so-called secondary or derivative law). A hypothetical situation resulting in the secondary law being contrary to the provisions of the Constitution of the Republic of Poland, should be considered in two cases:

1) when an act was issued without competence or with shared competences and violation of the principle of subsidiarity and proportionality;
2) when an act was issued according to inherent competences.

Ad. 1)

One of the fundamental principles of the activity of the European Union is the principle of conferral expressed in Article 5 of the TEU.[26] According to this principle '(...) Union shall act within the limits of the competences

[24] R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warsaw 2000, pp. 45–46.

[25] Declaration on Rights and Duties of States 1949, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf.

[26] Consolidated version of the Treaty on European Union, Dz. Urz. UE 2010/C83/13.

conferred upon it by Member States in the *Treaties* to attain the objectives set out *therein*. Competences not conferred upon the Union in the *Treaties* remain with Member States'. The Union therefore has only such competences which were conferred upon it in the founding treaties along with amending treaties. Member States are still the only subjects regulating the fields not mentioned in the Treaties. These are exclusive competences of the states and the European Union in such cases cannot undertake any activity including legislative activity. Competences conferred to the European Union might be divided into:

- exclusive competence of the European Union and
- shared competence.

According to Article 3 (1) of the Treaty on the Functioning of the European Union:[27] 'The Union shall have exclusive competence in the following areas:

a) customs union;
b) the establishing of the competition rules necessary for the functioning of the internal market;
c) monetary policy for Member States whose currency is the euro;
d) the conservation of marine biological resources under the common fisheries policy;
e) common commercial policy.'

These are thus, the areas in which the Union may legislate and adopt binding legal acts. Member States may legislate solely authorised by the Union or in order to execute the acts of the Union.

Shared competences between the European Union and Member States apply in the following principal areas (Article 4 (2) Treaty on the Functioning of the European Union):

a) internal market;
b) social policy, for the aspects defined in this Treaty;
c) economic, social and territorial cohesion;
d) agriculture and fisheries, excluding the conservation of the Marine biological resources;
e) environnement;
f) consumer protection;
g) transport;
h) trans-European networks;
i) energy;

[27] Consolidated version of the Treaty on the Functioning of the European Union, Dz. Urz. UE 2010/C83/47.

j) area of freedom, security and justice;
k) common safety concerns in public health matters, for the aspects defined in this Treaty.

In case of shared competences the Union and Member States may legislate and adopt legal acts binding in a given field.

When realising shared competence the Union functions according to the principle of subsidiarity and proportionality expressed in Article 5 (3) and 4 of the Treaty on European Union. The Union therefore, undertakes activities only when and within such a scope in which the goals of the intentional action cannot be achieved in a sufficient way by Member States (both on the central, regional and local levels), and because of the size and effects of the suggested activity their improved achievement is possible on the Union level. This principle is to be a materialisation of the assumption about taking decisions on the lowest level possible "as closely as possible to the citizen".

If it happened that the institutions of the European Union passed legal acts not having been granted the competence or shared competence in this field, with violation of the principle of subsidiarity and proportionality, Member States might file a complaint on the basis of Article 263 of the Treaty on the Functioning of the European Union. The appropriate court to consider a complaint about the invalidity of an act is the Court of Justice of the European Union. The state courts of Member States are deprived of jurisdiction in this scope. Under Article 263 of the Treaty on Foundation of the European Union, the Court of Justice controls the legality of legislative acts of the Council, Commission and the European Central Bank other than the recommendations and opinions, as well as the Acts of the European Parliament and council aiming at generating legal effects with respect to third subjects. The task of the Court is to determine if the institutions act according to the competence conferred to the European Union. The aim of the complaint filed under Article 263 is to eliminate the defective legal act from legal transactions.

Therefore, according to the law of the European Union, exclusive competence to interpret and control the validity of the acts of secondary law belongs to the Court of Justice of the European Union.

Ad. 2)

A situation when adopted legal acts of the EU comply with the competence vested in the EU and there is some inconsistency with constitutional regulations of the state, should be considered from the point of view of the principle of supremacy of the EC/EU law.

This principle has been formulated in judgments of the Court of Justice. It is confirmed by the Declaration 17 concerning primacy attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.[28]

The principle of primacy of the EU law concerns all legal regulations of Member States independently of the place they occupy in the system of sources of law, including constitutional regulations. The Tribunal had emphasised this principally in its judgment of 17 December 1970 concerning the case C-11/70: 'the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure 2. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law . The validity of such measures can only be judged in the light of community law.'[29]

A similar stand was taken by the Tribunal in its judgment of 2 July 1996 in case C-473/93: 'Recourse to provisions of the domestic legal systems to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that law'. Consequently the fact that the Grand Duchy of Luxemburg refers to the second paragraph of Article 11 of the Luxembourg Constitution, which provides that only Luxembourgers may occupy civil and military posts cannot be accepted.[30]

The essence of the precedence was explained by the Tribunal in the judgment of March 9 1978 in Case 106/77: 'A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation,

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[28] Declaration referring to primacy attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007, Dz. Urz. UE 2010/C83/335.

[29] Judgment of the Court of 17 December 1970. – Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11–70, European Court reports 1970, p. 01125.

[30] Judgment of the Court of 2 July 1996, Commission of the European Communities v Grand Duchy of Luxemburg, Case C-473/93, *European Court reports 1996*, p. I-03207.

even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.'[31] It results from this that a national law regulation contrary to the community law does not loose biding force but cannot be applied in a given case.

The doctrine emphasises that the supremacy principle is a principle of precedence of application and not precedence of operation.[32]

J. Barcz indicates that precedence of EU law over national law of Member States is not of derogatory character, that is, it does not cause invalidity of norms of national law which are contrary to European law. From this principle results the duty of Member States to guarantee the efficiency to EU law and adequate adaptation (amendment, annulment, passing) of the national law (including the constitution).[33]

W. Czapliński emphasises as well, that if conferring competences to EC/EU took place in accordance with the Constitution of the Republic of Poland in fields in which the Community had been granted the competence to act, community law should get absolute precedence over any norm of internal law including constitutional norms.[34]

Conclusion

The Constitutional Tribunal has already twice adjucated the conformity of agreements being elements of primary law of the EU with the Constitution of the Republic of Poland.

The project of amendments to the Constitution of the Republic of Poland relating to the extension of competence of the Constitutional Tribunal to investigate the conformity with the Constitution of the law proclaimed by and international organisation if the Republic of Poland conferred upon them competence mentioned in Article 90 (1) of the Constitution of the Republic of Poland, introduces solutions incompatible with the law of the European Union since:

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[31] Judgment of the Court of 9 March 1978. – Amministrazione delle Finanze dello Stato v Simmenthal SpA. – Case 106/77, *European Court reports 1978*, p. 00629.

[32] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Kraków 2005, p. 112.

[33] J. Barcz, *Konstytucyjne uwarunkowania członkostwa Polski w Unii Europejskiej*, in: J. Barcz (ed.): *Ustrój Unii Europejskiej*, vol. II, 2nd edition, Warsaw 2010, p. VII–88.

[34] W. Czapliński, Gloss to the decision of the Constitutional Tribunal of May, 11 2005 (accordance of the Treaty of Accession with the Constitution of the Republic of Poland) K 18/04 (Glosa No. 3), Kwartalnik Prawa Publicznego 2005, No. 4, p. 210.

– firstly, if the discrepancy of the secondary law acts with the Constitution of the Republic of Poland appeared because of lack of competence, the only organ which could decide about the invalidity of such an act is the Court of Justice of the European Union;
– secondly, if the discrepancy between the act of the secondary law and the Constitution of the Republic of Poland appeared as a result of actions compatible with competences conferred upon the EU, the principle of precedence of the EU law including the precedence over the constitutional norms is applicable.

S U M M A R Y

The Constitution of the Republic of Poland adopted in 1997 does not directly determine the powers of the Constitutional Tribunal to adjucate cases of the European Union law. Only Article 188 of the Constitution determines that the Constitutional Tribunal shall adjudicate regarding the conformity (...) of international agreements to the Constitution. Therefore, this regulation embraces also the primary law of the European Union.

The Tribunal has been engaged twice in international agreements being the primary law of the European Union (the Accession Treaty and the Treaty of Lisbon). In any of these cases the Tribunal has not stated the inconformity of the analysed agreements to the Constitution of the Republic of Poland.

The Constitution does not also adjucate whether the Constitutional Tribunal shall control the conformity of the secondary law of the EU to the Constitution. In practice the Tribunal engaged in cases which concerned the relations between the domestic and EU law. However, in these cases the Tribunal did not examine directly the Acts of secondary law but domestic law implementing the EU law.

Evaluating the project of amendments of the Constitution of the Republic of Poland related to expanding the powers of the Constitutional Tribunal to verify the conformity of the statutory law of international organisations to the Constitution of the Republic of Poland, if the Republic of Poland conferred upon them competences described in Article 90 (1) of the Constitution of RP from the perspective of the EU law, it should be stated that the suggested solutions are questionable since:

– firstly, if the discrepancy of the secondary law acts with the Constitution of the Republic of Poland appeared because of lack of competence, the only organ which could decide about the invalidity of such an act is the Court of Justice of the European Union;

– secondly, if the discrepancy between the act of the secondary law and the Constitution of the Republic of Poland appeared as a result of actions compatible with competences conferred upon the EU, the principle of precedence of the EU law including the precedence over the constitutional norms is applicable.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

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MULTILINGUALISM OF SWITZERLAND – SELECTED LEGAL PROBLEMS

The observation of the European Union integration process, including the EU law-making hypertrophy, entering various spheres of life in an extended and objectively more detailed way, can lead one to the conclusion that a creation of one state or rather a confederation of the European states is inevitable, though it is a matter of time difficult to determine. Certainly, the economic factor is a key element in this process being connected with the need for preservation of a significant place in Europe which is competitive with the economies of not only the United States, but also the Asian tycoons, especially China, India and, continually, Japan. Moreover, the potential and ambitions of Russia are not to be neglected. Finally, important, perhaps even urgent, is the question of the European security in the context of the terrorist threat and dynamic political changes taking place currently in the countries of North Africa.

The efficiency of the activities undertaken within the European Union is limited (by the high cost and time) to a large extent by the difficulties in communication between its individual members (currently there are 23 languages functioning in the EU as official languages: English, Bulgarian, Czech, Danish, Estonian, Finnish, French, Greek, Spanish, Irish, Lithuanian, Latvian, Maltese, Dutch, German, Polish, Portuguese, Romanian, Slovak, Slovenian, Swedish, Hungarian and Italian). Certainly, this is not a matter of typical relations (political, economic or cultural) between the partners in the international arena. The problem tackles the basic tool to regulate a social reality – the law which should be established and applied in relation to its recipients in the language understandable to them. One can probably assume that similar difficulties are likely to appear in the possible future in the "United Europe". This article aims at presenting constitutional state solutions in the related field adopted in the Swiss Confederation, which is a multilingual country. For well over 7 million in-

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habitants, more than 4.5 million citizens speak German as their first (native) language, about 1.5 million people use French, 0.5 million inhabitants speak Italian, over 100 thousand citizens use the Serbo-Croatian language, about 90,000 people speak Albanian and Portuguese, about 70 000 inhabitants communicate in Spanish and English, more than 40 thousand people speak Turkish, and Romansh is used by about 35 thousand. More than 150 thousand inhabitants speak their first languages other languages than those mentioned above.[1]

Switzerland is often described as "Europe in a nutshell," where, as in lens, issues specific to the whole continent are focused, and where, what is interesting, proper solutions have been found to keep a complete democratic freedom of citizens (while maintaining law and order and a high standard of living). Let us, therefore, briefly follow the Swiss Confederation historic development and discuss the adopted issues regarding normative language regulations in the state.

Before considering the above mentioned issues in detail, in the first place, let us focus on the characteristics the Swiss legal literature gives to the notion of language.[2] Language is a cultural system based on signs, phones, gestures and symbols which allows for making and transmitting the outcome of social experience; it is on the language that the intellectual processes of human beings are based. It provides a basis for shaping their views, expression, as well as intellectual development of man individually and collectively. Language allows an individual for the conscious reception of events, as well as feelings; it also makes it possible to determine one's relationship to a given community, including the issue of belonging to its culture. Language in the sphere of intersubjective communication is a tool of communication. Finally, it is a device allowing a (peaceful or non-peaceful) coexistence of people. Last but not least, language is an immanent element of the community culture. It allows for human integration; through language people are able to identify their group identity and shape their sense of community belonging.

The creators of the first Federal Constitution of 1848 did not treat the issue of language in the category of human freedom which would require a separate constitutional regulation apart from defining national languages

[1] Data according to the Swiss Federal Statistical Office: http://www.bfs.admin.ch/bfs/portal/de/index/infothek/lexikon/lex/0.topic.1.htm (Assessed 31.03.2011).

[2] Compare M. Borghi, *La liberté de la langue et ses limites*, in: D. Thürer, J.-F. Aubert, J. P. Müller (ed.), *Verfassungsrecht der Schweiz – Droit constitutionnel suisse*, Zürich 2001, p. 608 as well as the literature referred to there.

in the country.[3] The issue was not a subject of a particular debate. Freedom to communicate in the language was seen as something obvious.[4] Also in the Federal Constitution of 1874[5], (used before the present Constitution was established), it was initially indicated in the art. 116 that there were only three "major" languages being the official languages in the Federation; the issue of language was not treated through the prism of freedom and individual rights. In the late 30-ies of XX century the revision of the Constitution took place, and in the article 116 there was made a record that German, French, Italian and Romansh were the national languages of Switzerland (not the Federation) and a sentence making German, French and Italian languages the official languages was added; freedom of language was pointed out as being of individual importance – "It is unthinkable to have true freedom of soul without freedom of the mother tongue."[6] Nonetheless, a constitutional provision referring to the issue directly was not made. It is necessary to notice that those changes were realized thanks to the initiative of the canton of Grisons (Graubünden)[7] on the eve of World War II and the growing risk of German domination. Ultimately, the view that the freedom of language was connected with personal liberty and did not require additional adjustments prevailed.[8] Art. 107, updated in 1938, stated that the representation of all the three official languages should be considered during the selection of the Federal Supreme Court members and the Federal Assembly should take into account the representation of each of the three official languages.

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[3] Compare art. 109 of the Federal Constitution of the Swiss Confederation of September 12, 1848 "The three major languages of Switzerland – German, French and Italian – are the official languages of the Federation." The German text of the Constitution of 1848 in: A. Kölz (ed.), *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, t. 1, Vom Ende der Alten Eidgenossenschaft bis 1848, Bern 1992, p. 479.

[4] Compare Botschaft des Bundesrates an die Bundesversammlung über die Anerkennung des Rätoromanischen als Nationalsprache. (Vom 1. Juni 1937.) (The Proclamation of the Federal Council to the Federal Assembly dated June 1, 1937 on the recognition of the Romansh language as the official language), BBl 1937 II 13 and following.

[5] The original text of the Constitution of the Swiss Confederation of 29 May 1874 in German in: A. Kölz, *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, Vol. 2, Von 1848 bis in die Gegenwart, Berno 1996, p. 151 and following. The Constitution of 1874 in the last version before it was changed according to its state in April, 20, 1999: http://www.ofj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/bundesverfassung Par.0006.File.tmp/bv-alt-d.pdf.

[6] "Ohne Freiheit der Muttersprache ist eine wirkliche Freiheit des Geistes undenkbar" – The proclamation of the Federal Council dated June 1, 1937, BBl 1937 II 13.

[7] Die Eingabe des Kleinen Rates des Kantons Graubünden (motion of the Small Council of the Canton Graubünden), BBl 1937 II 2–12.

[8] Compare R. Kägi-Diener, Kommentar zu Art. 4 BV, in: B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (ed.), *Die schweizerische Bundesverfassung – Kommentar*, Zürich – Basel – Genf 2002, pp. 44–45.

Therefore, the Constitution of 1874 did not directly intervene in the issue of language freedom (at the cantonian constitution level such freedom was established only by the constitution of Bern[9]). Of course, it did not mean that this freedom did not have guarantees in the sphere of the constitutional law. For the first time, freedom of language was recognized as the unwritten constitutional law[10] by the Federal Court in 1965[11], stating that it made an important prerequisite for allowing the general use of such rights of freedom (Freiheitsrechte) as well as freedom of expression or freedom of the media. It is necessary to add that the doctrine has repeatedly stressed that freedom of language is the basis for a democratic order, leading to full implementation of not only the freedom mentioned above, but also to freedom of religion.[12] Interesting is the fact that the partial amendment of the Constitution of 1874 made in the 90-ies of the last century did not introduce a direct provision on the freedom of language. The changes were limited only to the issue of guarantees and official national languages of Switzerland[13] and the obligation to take into account the representation of the linguistic regions in the process of creating personal composition of the Federal Council.[14]

The Constitution of the Swiss Confederation of 18 April 1999[15] (entered into force on January 1, 2000) makes several comments on the issue of language. Accordingly, the art. 4 states that *the National Languages are German, French, Italian, and Romansh.* Art. 8 law 2 proclaims the prohibition of discrimination on the grounds of language. Art. 18 states that *the freedom to use any language is guaranteed.* Article 31 is devoted to the problem of the liberty deprivation. The first sentence of the law 2 states:

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[9] Compare art. 15 of the Constitution of the Canton of Bern of June 6, 1993, BSG 101.1.

[10] For the concept of the constitutional rights of citizens in Switzerland as well as unwritten constitutional rights see M. Aleksandrowicz, *Kontrola prawa miejscowego przez szwajcarski Sąd Federalny*, in O. Bogucki, S. Czepita (eds.), *System prawny a porządek prawny*, Szczecin 2008, p. 390 and following.

[11] The Federal Court Judgement dated March 31, 1965, BGE 91 I 480.

[12] Compare R. Kägi-Diener, Kommentar zu Art. 18 BV, in: B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (eds.), *Die schweizerische...*, p. 271 and the literature referred to there.

[13] See art. 116 of the Constitution of 1874 – changed March 10, 1996, AS 1996 1492. The recognition of the Romansh language as the official language in relations with people who speak this language was a novelty.

[14] Compare art. 96 par 1 of the Constitution of 1874 – introduced February 7, 1999, AS 1999 1239.

[15] Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101. An English version of the Swiss Constitution: http://www.admin.ch/ch/e/rs/1/101.en.pdf (Assessed 31.03.2011).

Anyone deprived of their liberty has the right to be notified without delay and in a language they can understand of the reasons for their detention and of their rights. According to art. 69 law 3, the Federation is obliged to take into consideration *linguistic diversity of the country* during the realization of its tasks in the sphere of culture. Art. 70 is entitled "Languages". Interesting is the fact that it has been placed in *Section* 3 devoted to *Education, Research and Culture* of the *Chapter* 2 – *Powers*, in the *Title* 3 – *Confederation, Cantons and Communes.* This provision concerns the definition of Switzerland's *official languages* (these are German, French and Italian, with the provision that, when dealing with people who speak the Romansh language, that language is the official language of the Federation). *The Cantons shall decide on their official languages. In order to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take account of indigenous linguistic minorities*). *The Confederation and the Cantons shall encourage understanding and Exchange between the linguistic communities. The Confederation shall support the plurilingual Cantons in the fulfillment of their special duties. The Confederation shall support measures by the Cantons of Graubünden and Ticino to preserve and promote the Romansh and the Italian languages.* Finally, art. 175 point 4 obliges the *Federal Assembly* to make sure that *geographical and language regions of the country are appropriately represented* while selecting the *Federal Council.* It should be added here that since January 1, 2007 there has been adopted a constitutional order to consider the official languages of the Federation while choosing the judges of the Federal Court.[16]

Constitutional regulations on the issue of language can be classified according to the category of the language used: any language (Article 8 par. 2, Art. 18 and. 31 par. 2) and one of the four "Swiss languages," German Schweizersprachen (Article. 4, Art. 69 paragraphs. 3, Art. 70 and. 175 paragraph. 4), or a criterion type of the social relationships: between individuals and between individuals and the state bodies.

Constitutional guarantees of freedom in the sphere of language relate to its use by the individual in any form (orally or in writing), both for their own use (writing a diary, taking personal notes), as well as to communicate with others. The use of language is possible while maintaining two fundamental premises: it should be learnt (cognition) and used. An active aspect

[16] Bundesbeschluss über das vollständige Inkrafttreten der Justizreform vom 12. März 2000, (The Federal Resolution dated. 8 March 2005 regarding a complete introduction of the justice reform adopted March 12, 2000), AS 2006 1059.

of the language freedom is manifested in the guarantee to freely choose the language in which an individual wants (or can) communicate regardless of one's nationality. In its passive aspect, freedom of language is the claim of the (physical[17]) person for the use of language that is understandable for him/her, or the use of which s/he claims in relation to oneself (or – often – a person is required to use a particular language because of other people's freedom of language established by the principle of territoriality – this principle is going to be discussed later). The protection regarding the ranges indicated above includes primarily natural languages (both in the versions of literary language, as well as any existing dialects), and potentially artificial languages (eg. Esperanto), including professional languages (eg. computer languages).[18]

While the question of the use of any language in private relations does not raise doubts[19], the situation is different in the contacts of a public nature since it is ambiguous. In the sphere of lawmaking at the federal level there applies the principle of simultaneous publication of normative acts (different categories of these acts are specified by the statute[20]) in German, French and Italian, with the proviso that all versions are equally binding for the authorities applying the law. Hence, while interpreting the language, the authority applying the law should refer to the three equivalent official texts.[21] Both administrative and jurisdictional procedures should be conducted in the official languages (Art. 31 paragraph 2 of the Constitution is only applied to inform a detainee about the grounds of the state and his rights). Therefore, according to this principle, freedom of language in the sphere of legal application requires the obligation to use one of the official languages in the relations with the authorities. On the other hand, an indi-

[17] However, the Federal Court judgment dated October 31, 1990 acknowledged the legal person's right (here, a joint stock company' rights) to raise claims to restrict freedom of language because of the constitutionally guaranteed principle of economic freedom (the case concerned the necessity to translate an Italian commercial billboard hanging on a building in the municipality with the official Romansh language) BGE 116 Ia 345. Hence, according to the doctrine, the possibility of legal persons' relying on freedom should not be excluded. Compare U. Häfelin, W. Haller, *Schweizerisches Bundesstaatsrecht*, Zürich 2001, p. 150.

[18] Compare R. Kägi-Diener, Kommentar zu Art. 18 BV, in B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (eds.), *Die schweizerische...*, p. 273.

[19] Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 151 and the literature cited there.

[20] Art. 14 Bundesgesetz vom 18. Juni 2004 über die Sammlungen des Bundesrechts und das Bundesblatt (Federal Act of 18 June 2004 regarding the Collection of Federal Laws and Federal Official), SR 170.512.

[21] Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 31 and following

vidual may claim the right to manage the affairs in his native language.[22] Let us, therefore, explain the meaning of the mother tongue (German – Muttersprache) in the Swiss framework.

Freedom of language is seen primarily as the right to use one's mother tongue. It should be emphasized that this power is related to the principles of territoriality, including the (relative) homogeneity of the various linguistic regions of Switzerland.[23] Not only do the Swiss citizens protect their national languages, but they also preserve a kind of traditional balance between them. This specific quality is maintained through keeping the status quo in terms of territorial distribution of languages in the cantons (including municipalities), which manifests itself in their powers to regulate the relations of language in their territories. Cantons themselves define their own official languages (there may be more than one).

A particularly delicate issue within the sphere of the language freedom is the possibility of its teaching. The already mentioned sentence of the Federal Court in 1965 stated that the cantons are free to regulate issues of the language use in education (the case concerned the administrative discretion to limit the admissibility of the French language in the German-speaking canton of Zurich by imposing a duty to continue their education after two years of teaching in a private French school in the German-speaking schools). With time the adjudication line has evolved[24] towards a wider understanding of the mother tongue in Switzerland. This was perfectly expressed by the Federal Court Judgement of 15 July 1996[25], which repealed a decision obliging a child residing in the German-speaking local municipality Mörigen to attend to a local German school, and not to a French school in another municipality. The Federal Court held that this decision violated the freedom of the mother tongue spoken by the person (as opposed to the official language in the municipality of his residence), which resulted in giving the priority to his individual freedom of language at the expense of the principle of territoriality and linguistic uniformity of the individual areas (municipalities here.) Finally, it was indicated that education authorities do not have power to order an individual to attend a school with the language of instruction official in this region. On the other hand, a school in another

[22] Compare ibid., p. 414.

[23] Compare R. Kägi-Diener, Kommentar zu Art. 70 BV, w: B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (eds.), *Die schweizerische...*, p. 811 and following

[24] Compare the proclamations: ZBl 83/1982 356, BGE 100 Ia 462, BGE 106 Ia 299; BGE 121 I 196.

[25] BGE 122 I 236.

municipality with a different language of instruction is not required to offer a place to the student in such a situation. Nevertheless, this situation is not banned – in this case the costs of education even at primary level will be handled by parents/guardians of the student.

It should be clearly stressed that the above mentioned cases concern only the possibility to apply the mother tongue protection towards the languages situated in the catalogue of the Federation official languages (German, French, Italian, Romansh). In relation to non-official languages, such protection is not guaranteed.

The above remarks on the constitutional regulation of the major languages of the Swiss Confederation may lead to the conclusion that the guaranteed freedom of language is subjected to important limitations due to the functioning of the official languages categories in the public sphere. As a result, this freedom can be practised fully only by the people speaking German, French, Italian, or Romansh (only to a limited extent in this case) with the consideration of the territoriality principle.

The above presented historical outline as well as contemporary solutions regarding the issue of language in Switzerland, which is frequently called "Europe in a nutshell" as it was already mentioned in this paper, leads to a rather skeptical conclusion regarding a possible future language unification of the "United Europe". Such unification has never been introduced in Switzerland. Jealously guarding their language differences (which is shown by a significant preference of the Swiss four languages), they have repeatedly noticed that the "Swiss nation is not a product of the language community. It is rather a community of spirit, the fruit of the will of multilingual ethnic communities who wish to live as a nation that is willing to preserve and defend their historically acquired freedom and mutual community of interconnectivity to preserve and defend it. A peaceful coexistence of the multilingual nation within a single nation in the federal state is guaranteed by the principle that everyone should be free to develop their national language in accordance with its distinctiveness preservation".[26] Building a community of "the spirit of Switzerland" has been taking place for over 700 years. Even after such a long time, there have been no attempts to blur the linguistic diversity of the country. What is more, during the German threat in the 30-ies of the last century, it was decided to strengthen the normative position of the minority language, that is, Romansh.

[26] Compare the Proclamation of the Federal Council dated June 1, 1937, BBl 1937 II 12–13.

It can be presumed that the problems faced by modern Europe, especially economic and terrorist threats as well as fears of immigration from non-European countries, will contribute to the nationalist feelings intensity, including a consistent defense of the linguistic distinctiveness of the individual EU Member States, as well as to attempts to preserve a diversity within them.

S U M M A R Y

The article aims at the presentation of the selected political solutions of Switzerland as a multilingual body in the background of the similar problems faced by the integrating European Union. A historical development outline of the Swiss regulations and current Federal Constitution basic provisions have been presented. A special consideration has been given to the issue of the so-called native languages in Switzerland, which have special privileges in relation to other languages used by the inhabitants of this country. A direct reference is also made to several decisions taken by the Federal Court that clearly reflect the importance of resistance towards weakening of "the Swiss languages" position as related to each other. At the same time, the importance of the territoriality principle as a solid basis for the preservation of the linguistic diversity of Switzerland has been highlighted.

PART II

LINGUISTIC PROBLEMS IN CONSTITUTING AND APPLICATION OF LAW IN POLAND

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

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LEGAL DEFINITIONS. AN OUTLINE OF THE PROBLEM BASED ON CHOSEN EXAMPLES OF POLISH LEGISLATION

Introduction

The problem of defining terms is one of the basic characteristics of language. In everyday life we can observe many negative occurrences in the use of ordinary language. I especially mean the improper use of certain notions (expressions) which very often is the result of the incorrect understanding of their meaning. The chaotic, often inconsistent, application of names to such public spaces as: square, roundabout, or plaza can be given as one of numerous examples. Improper use of expressions unfavorably affects the state of social awareness, introducing unnecessary confusion and impairing the basic function of language, that of interpersonal communication. Additionally, it has a destructive effect on language itself.

The language of legislation (language of the law) is also not free from definition problems. Furthermore, as a specialized language, it includes numerous notions (expressions) whose explanation demands not only the analysis of individual legal system solutions and application of different methods of interpreting regulations, but especially the necessity to make explanations using common language. Incorrect understanding of certain legal language expressions can lead to erroneous subsumption of the legal norm.

Various situations occur in Polish legislature: sometimes there is no simply stated legal definition of an expression (a definition of a certain institution or mechanism of the law). Often the legislator makes a decision to create a definition of the law himself. At other times, within the regulations of the law exist scattered elements which, when collected into a whole, form the basis of a definition. It also occurs that within regulations there is no definition of the law; however, the characteristics of a certain institution or its role (responsibilities) are mentioned.

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The subject of this work consists of chosen key threads connected with the definitions of notions and expressions occurring within normative acts. The interpretive function of the organs of court authority should be underlined within the scope of this matter, especially that of The Supreme Court, which has been granted by the Constitution of the Republic of Poland[1] the privilege to safeguard the uniformity of case law in courts of general jurisdiction and in military courts.[2] When it comes to the interpretation of the regulations of the Constitution it is worthwhile to present case law of the Constitutional Tribunal of the Republic of Poland. An indispensable complement to the inferences dealing with definitions in legislature is the presentation of doctrine positions.

This text, in accordance with the author's intentions, is to have a more practical quality. Therefore, strictly theoretical issues are only mentioned.[3] It was also not the author's intention, primarily due to the character of this work, to solve all the complicated issues dealing with the problem of defining notions and expressions existing in the language of law.

The examples upon which the analysis was based serve the purpose of illustrating the problem of defining in law and are only a contribution for further in-depth study. The doubts connected with the following expressions: "incapacity to work", "obligation of compulsory national insurance for non-agricultural business activity", "farmer", "close person", "personal right", and "freelance profession" will be considered.

General information about legal definitions

In the beginning we must state that the problem of legal definitions also concerns the definitions themselves, since an explanation of the meaning of this expression does not exist within Polish law. It is, however,

[1] Dz.U. from 16 July of 1997, No. 78, item 483.

[2] Regulations of article 183, sections 1 and 2 of the Constitution stipulate that the Supreme Court oversees the activity of courts of general jurisdiction and military courts within case law, as well as performing other tasks described in the Constitution and statutes.

[3] More about the problem of the legal definition with the inclusion of the theoretical and legal aspects see for example: A. Malinowski [in:] *Zarys metodyki pracy legislatora*, edited by A. Malinowski, Warszawa 2009, pp. 295–309; L. Nowak, *Spór o definicje legalne a sposób pojmowania „prawodawcy"*, Państwo i Prawo 1969, vol. 3, pp. 510–515; J. Wróblewski, *Zasady tworzenia prawa*, Warszawa 1989 (especially chapter 8); L. Morawski, *Zasady wykładni prawa*, Toruń 2010 (especially chapters VI and X). See also: P. Saługa, *Sposoby wyodrębniania definicji legalnych*, Państwo i Prawo 2008, vol. 5, pp. 76–86.

stated that the legal definition is the definition contained within the text of a law-making act, usually at its beginning.[4] Since it takes the form of a regulation, it is forbidden to formulate a meaning of the expressions which is contradictory to the meaning established by the legal definition because that would result in violating the law. We can indicate, among others, different types of legal norms by assuming as a criterion their essence: authorizing, material, procedural and competence norms. The character of regulations stipulating legal definitions is different, however, since they concern themselves with the meanings of the words used within the text of a legislative act and not with behaviors regulated by the norm.[5] Nevertheless, in this case also, the regulation containing the definition (or regulations upon which it could be constructed) has a prescriptive meaning.[6]

The legal definition primarily designates a definite way of understanding of expressions used within a legal text.[7] Regulations which are in the form of a legal definition have a supporting nature: they define the sense of the words and expressions used within the text of a legislative act, while the determination of the definition can generally assume two forms: clear, meaning a directly expressed definition, or through using a word in parentheses. They constitute a supplement, modification or limitation of the content of basic (classic) norms.[8]

Legal definitions can adopt different forms: a) a clear definition, when within a legal article the *definiendum* and *definiens* of a given term are directly stated; b) a context definition, when there is a lack of a direct specifying of meaning of the term in one regulation, but it can be inferred from the way it has been used in various regulations, of which every one can be used to reconstruct the meaning of the term being defined; c) an enumerative (range) definition, when the legislator defines the range of a defined notion by enumerating the objects which create that range.[9]

That being so we can distinguish, depending on the method of edition of definitional regulations, several types of legal definitions: a) when within

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[4] S. Kaźmierczyk, *Wprowadzenie do nauk prawnych. Leksykon tematyczny* (edited by A. Bator), Warszawa 2010, p. 202.

[5] *Ibid*, pp. 202–203.

[6] It is not a common opinion. The positions within this subject were examined by J. Gregorowicz. See, idem, *Definicje w prawie i w nauce prawa*, Łódź 1962, pp. 22–25 and 39–52.

[7] Z. Ziembiński, *Wykładnia prawa i wnioskowanie prawnicze*, (in:) *Zarys teorii prawa*, S. Wronkowska, Z. Ziembiński, Poznań 2001, p. 148.

[8] *Ibid*, p. 153.

[9] See more L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 104–106.

one editorial unit (an article for example) a few terms are defined; b) when a separate editorial unit of a legal text is devoted to defining one term; c) when the definition of a term is an element of the content of a given editorial unit of a legal text; d) if one term is defined in a few separate elements of a legal text (articles).[10]

Language forms of legal definitions also vary. Type "A is B" definitions have the simplest form. We also encounter other formulas "A equals B" and "A is ABC", "A within the understanding of the given act is B", "A is considered to be B", "the term A means B", "by A is understood B", "A includes B", "A defines B", however the problem lies in that not all of the formulations of this type have a definitional quality.[11]

1. Incapacity to work

In accordance to article 12 of the statute from 17 December of 1998 about retirement pensions and disability pensions from the National Insurance Fund[12], a person who is incapable of working, as understood within the law, is a person who has fully or partially lost the ability to be gainfully employed because of an injury to the body and who does not show any prospects of regaining the ability to work after retraining. A person who is fully unable to work is a person who has lost the ability to do any kind of work. A person who is partially unable to work is a person who, to a large degree, lost the ability to work consistent to the level of qualifications possessed. The above definition of incapacity to work, as well as the level of incapacity to work (full or partial), in practice creates many interpretational problems.

First of all, it should be stated that, within the scope of the above definition of incapacity to work, it was within case law that the elements which contribute to the meaning were revealed – the biological element, meaning the injury to the body, and the economic element, or the loss of the ability to be gainfully employed. According to the current legal position the injury to the body is evaluated from the point of view of the possibility of returning function to the body as a result of treatment and rehabilitation (article 13, section 1, point 1 of the above statute). Injury to the body,

[10] Z. Pulka, *Podstawy prawa. Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2008, p. 66.

[11] See more: J. Gregorowicz, *Definicje w prawie...*, op. cit., pp. 32–36.

[12] Consolidated text: Dz.U. from 2009, No. 153, item 1227 with revisions.

depending on the level, causes partial incapacity to work (loss of ability to work consistent with the level of qualifications), full incapacity to work (loss of the ability to do any kind of work) or the incapacity to remain self-reliant. The incapacity to work caused by other reasons than injury to the body to the level causing incapacity to be gainfully employed is not incapacity to work within the understanding of article 12, section 1 of the above statute.[13]

Taking into account the elements making up the definition of incapacity to work, we should also consider the phrase "expectancy of regaining the ability to work after retraining". In the event of positive "expectancy of regaining the ability to work after retraining", recognizing a given person as incapable of working is ruled out. The inconsistency of such a legislative regulation with the remaining regulations of the statute from 17 December of 1998 about retirement pensions and disability pensions from the National Insurance Fund has been pointed out in doctrine.[14] In the regulation of article 14, section 1, point 5 of this statute it has been stated that the assessment of incapacity to work, its level and appropriateness of professional retraining, is completed, in a form of a medical certificate, by the certifying physician of the National Insurance System. Since the legal definition of the incapacity to work rules out regaining the ability to work through retraining, then it is impossible to qualify a person as unable to work and at the same time to recommend his retraining for work in a different field, with a decision of the certifying physician of the National Insurance System that a person is unable to work, it is aimless to perform the assessment of the possibility of professional retraining.

Similarly, in article 60 of the above mentioned statute, it has been stated that a person who fulfills the requirements defined in article 57 of said statute (including, among others, incapacity to work), and with whom it has been determined that he/she should be retrained because of incapacity to work in their current occupation, is entitled to a six month training allowance, withholding statutes 2 and 4. In this event it should also be said that since the notion of incapacity to work is separated from the ability to retrain to a different profession, then there is no possibility to simultaneously qualify this person as unable to work and to have any expectations of regaining this ability after retraining. The above interpretational dilemmas

[13] Supreme Court ruling from 28 January of 2004, II UK 167/03 (OSNPUSiSP 2004, no. 18, item 320).

[14] Compare M. Bartnicki, B. Suchacki, *Komentarz do art. 12*, [in:] *Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych – commentary*, ed. K. Antonowa, Wolters Kluwer Polska 2009, p. 101 and following and cited literature.

require the involvement of the legislator and the unification of the legal definition of incapacity to work within the scope of that legislative act – the statute from 17 December of 1998 about retirement pensions and disability pensions from the National Insurance Fund.

This involvement is even more necessary because within case law it is shown that the incapacity to perform the tasks of a position currently being held is not enough to determine incapacity to work, if the age, level of education and psychophysical predispositions justify expectations that, despite disability of the body, the person will obtain other work, weather within the same profession or through retraining.[15] Furthermore, in the event when the person in question has lost the ability to work in accordance with his/her qualifications, obtaining any work does not mean retraining resulting in regaining the ability to be gainfully employed, as mentioned in article 12, section 1 of the above stated statute.[16] The ability to retrain is understood in case law as retraining of basic qualifications or obtaining a completely new profession.[17]

In the judiciary a person who is partially unable to work is understood to be a person, who due to injury to the body, is not able to correctly perform the tasks connected to their profession[18], has retained the ability to perform some sort of work (for example one requiring lower or no qualifications), but at the same time has lost to a great degree the ability to perform work for which he/she possessed qualifications, whereas, in order to judge the level of these qualifications, we must consider weather real abilities have been obtained, ones which influence the person's professional career, for example, ones which would decide: about gaining a higher salary than workers formally possessing the same qualifications, about obtaining promotions or the ability to find new places of employment.[19] Also, performing

[15] See Supreme Court ruling from 11 January of 2007, II UK 156/06 (OSNPUSiSP 2008, no. 3–4, item 45); Appellate Court in Katowice ruling from 14 August of 2007, III AUa 1300/06 (Lex no. 339737); Appellate Court in Bialystok ruling from 27 April of 2011 regarding III AUa 933/10 (unpublished).

[16] Compare Appellate Court ruling in Lodz from 14 November of 2000 about III AUa 836/2000 (OSA 2001/6 item 26, p. 83).

[17] Compare Supreme Court ruling from 15 September of 2006, I UK 103/06 (OSNPUSiSP 2007, no. 17–18, item 261) with gloss of U. Jackowiak.

[18] Compare Supreme Court ruling from 2 February of 2006, I UK 188/2005 (LexPolonica no. 2422990).

[19] Compare Supreme Court ruling from 17 November of 2000, II UKN 59/2000 (OSNAPiUS 2001/10 item 8); Supreme Court ruling from 15 September of 2006, I UK 103/2006 (OSNP 2007/17–18 item 261); Supreme Court ruling from 17 April of 2008, II UK 192/2007 (OSNP 2009/15–16 item 206); Supreme Court ruling from 25 January of 2010, I UK 215/2009 (LexPolonica no. 2439905).

work at a position specifically adapted to the abilities of the worker cannot be treated as gaining new qualifications and does not mean that the person has regained the ability to work.[20]

2. Obligation of compulsory national insurance for non-agricultural business activity

According to article 6, section 1, point 5 of the statute from 13 October of 1998 about the national insurance system[21], persons who, within the boundaries of the Republic of Poland, conduct non-agricultural business activity as well as those who cooperate with them, are subject to compulsory retirement pension and disability pension insurance.

The term "non-agricultural business activity" has not been defined for the needs of the statute from 13 October of 1998 about national insurance system. The content of article 6, section 1, point 5 is correlated with article 8, section 6 of that statute in which have been listed the entities and the conditions under which these entities are subject to national insurance. Within the scope of being subject to national insurance the notion of conducting non-agricultural business activity is a wider notion than those defined in article 2 of the statute from 2 July of 2004 about freedom of business activity[22], like manufacturing, construction, sales, service, or prospecting, recognizing and exploitation of mineral deposits with consideration of professional activity, and which are carried out in an organized and uninterrupted manner.[23] The systemic act refers to the definition included in article 2 of the statute from 2 July of 2004, about business activity freedom only in article 8, section 6, point 1, while in the remaining points it refers to persons conducting business activity in various organizational and legal forms with only a part of them conducting business activity in the strict sense of the meaning. In many cases the legislator, sometimes in an arbitrary manner, decides about qualifying a given activity as business activity, which has been noted

[20] See Supreme Court rulings from 7 October of 2003, II UK 79/03 (OSNPUSiSP 2004, no. 13, item 234); from 8 May of 2007, II UK 192/06 (OSNPUSiSP 2008, no. 11–12, item 173); compare also Apellate Court ruling in Warsaw from 21 October of 2009, III AUa 458/2009 (LexPolonica no. 2348154).

[21] Consolidated text: Dz.U. from 2009, No. 205, item 1585 with revisions.

[22] Consolidated text: Dz.U. from 2010, No. 220, item 1447 with revisions.

[23] B. Gudowska, *Komentarz do art. 6*, [in:] *Ustawa o systemie ubezpieczeń społecznych. Commentary*, edited by B. Gudowska, J. Strusińska-Żukowska, C. H. Beck, Warszawa 2011, p. 105 and following.

in fine in article 8, section 6, point 1 by identifying the insured persons as conducting non-agricultural business activity on the basis of regulations about conducting business activity or special ruling.[24]

The essence of conducting business activity in the light of regulations of the statute from 2 July of 2004 about business activity freedom is its professional, constant nature, its recurrent activity, adhering to the rule of rational activity and participation in the economic turnover. Business activity should be conducted in a constant and organized manner, with the owner using his/her own funds and assuming the risks. However, this concerns only natural persons – entrepreneurs. Other business entities such as partnerships are not legal entities and do not conduct business activity in the light of regulations of the statute from 13 October of 1998 about national insurance system; however, partners of these are subject to it individually. The partners are entitled to national insurance as individuals and this is dependent upon conducting personal non-agricultural business activity within the partnership.[25] Since conducting business activity in an organized and uninterrupted manner is one of the indispensable attributes of conducting business activity, then being a part of a civil law partnership, not connected with the activity of this partnership, is not enough for obligatory national insurance, established by article 13 point 4 of the statute from 13 October of 1998 about national insurance system.[26] Beyond the scope of this paper is the thread of obligatory national insurance for authors, artists, freelance professionals, persons conducting a non-public school, facility or a group based on regulations about education system.

It should be emphasized that conducting business activity encompasses not only the periods of generating profits from such activity, but also all other periods, including intervals of awaiting freelance agreements or repairing equipment. It is commonly regarded that a person conducting business activity is not subject to anyone else's authority, therefore can freely decide how to manage his/her schedule. In practice, during a period of fewer freelance agreements, entrepreneurs take care of other necessary tasks – they search for new clients, take care of administrational matters, and through these activities attempt to continue their business activity. This

[24] *Ibid*, p. 106.

[25] See Supreme Court ruling from 26 March of 2008, I UK 251/2007 (OSNP 2009/13–14 item 179).

[26] Compare Supreme Court ruling from 12 May of 2005, I UK 275/2004 (OSNP 2006/3–4 item 59) and Supreme Court ruling from 21 May of 2008, III UK 112/2007 (LexPolonica no. 2143301).

method of understanding of conducting business activity, and hence being subject to national insurance, is established by case law.[27] According to article 13 point 4 of the statute from 13 October of 1998 about the national insurance system, persons subject to mandatory retirement, disability, health and accidental insurance are natural persons who conduct non-agricultural business activity – from the day of starting this activity to the day of ending it. Since, according to article 6, section 1, point 5 and article 12, section 1, being read in connection to article 8, section 6, point 1 of the above quoted statute, persons subject to obligatory national insurance are persons conducting business activity on the basis of the regulations about business activity, the time boundaries of conducting this activity, and the compulsion to have national insurance are determined by the Entry into the Business Activity Register, performed and defined according to the rules provided by the, at times disputed, regulations of the statute from 19 November of 1999 – The Business Activity Act.[28] The decision weather business activity is being conducted (as well as weather there has been an interruption of business activity) should be made based on facts, hence, weather there has been an entry into the business register does not determine weather business activity is actually being conducted. However, such an entry leads to a legal presumption according to which the person entered into the register who has not reported the interruption of business activity is treated as someone conducting it. As a consequence, it is presumed that since there has not been a striking from the register, then business activity is actually being carried out and there is an obligation to make contributions for national insurance.[29]

The presumption can be overturned if the assertions of the presumption are disproved. Since neither the Business Activity Act nor the regulations of the act about national insurance system foresee for the suspension or interruption in conducting business activity, then registering such an interruption with the titling jurisdiction, or especially only with the pension authority, does not apply the legal presumption from which the temporary interruption of business activity would result. As a result, the responsibility of evidence of premises that there is no need to carry national insurance

[27] Compare, for example, the Supreme Court ruling from 15 March of 2007, I UK 300/2006 (LexPolonica no. 1390819) and the Appellate Court in Warsaw ruling from 7 February of 2007, III AUa 39/2007 (LexPolonica no. 2013072).

[28] Dz.U. from 1999, No. 101, item 1178 with revisions.

[29] Compare Supreme Court rulings from: 11 January of 2005, I UK 105/2004 (OSNP 2005/13 item 198); 25 November of 2005, I UK 80/2005 (OSNP 2006/19–20 item 309) and 30 November of 2005, I UK 95/2005 (OSNP 2006/19–20 item 311).

(actual interruption in business activity) belongs to the side which derives legal effects regarding responsibility to carry such insurance.

According to article 8, section 11 of the statue from 13 October of 1998 about national insurance system, a person who cooperates with persons conducting non-agricultural business activity and contractors, mentioned in article 6, section 1, points 4 and 5 of the statute, is a spouse, biological children, children of the other spouse and adopted children, parents, stepmother and stepfather and adoptive parents if they remain with this person in the household and participate in conducting business activity or in fulfilling an agency agreement or contract of mandate; this does not concern persons with whom a work agreement has been signed as a part of professional training. In the definition of the collaborator stated above the legislator has shown that the circle of cooperators generally includes relatives and persons distantly related. This, then, concerns close family relationships. These persons must remain with the person conducting non-agricultural business activity in a common household, a fact which is an essential element of the definition. Remaining in the common household should be understood as living together, and mutual fulfillment of current needs connected to everyday life, as well as being fully or partially supported by the person with whom the household is maintained. These elements should be constant. The element of living together under the same address seems to be insufficient to classify a person as a collaborator, especially since, very often, separate families live together.[30]

Another premise of the definition above is collaboration in conducting business activity. It should be stressed that the term "collaborate" gives this activity an element of being constant and prolonged, which means that only occasional involvement in business activity of the relative will not be understood as collaboration. This should rather be classified as family help.[31]

3. Farmer

According to article 6, point 1 of the statute from 20 December of 1990 about national insurance for farmers[32], whenever the term farmer is used it

[30] Supreme Court ruling from 2 February of 1996, II URN 56/95 (OSNP from 1996, no. 16, item 240).

[31] Compare K. Dziwota, *Komentarz do art. 8*, [in:] *Ustawa o systemie ubezpieczeń społecznych. Commentary*, edited by J. Wantoch-Rekowski, Toruń – Warszawa 2007, pp. 74–75.

[32] Consolidated text: Dz.U. from 2008, No. 50, item 291 with revisions.

is understood as an adult natural person living and personally conducting agricultural activity using his own funds within the borders of the Republic of Poland, on a farm being in his/her possession, this including also being a part of a group of agricultural producers, as well as a person who has allocated the lands of their farming business for reforestation.

A person who fits the above definition will fulfill two conditions. One of them is the ownership of a property which is a farm, or actual management of this property (article 336 of the civil code).[33] The other condition is to personally conduct and use own funds in agricultural activity. In accordance with article 6, point 3 of the statute about national insurance for farmers as agricultural activity is understood plant or animal production, including horticulture, fruit-growing, bee keeping and fish farming. The regulation of article 6, point 1 of the statute does not require that the farmer make on the farm the place of his permanent residence, and this requirement, with some exceptions, only applies to the householder (article 6, point 2 of the statute). The only condition which pertains to the farmer is that he reside within the territory of the Republic of Poland. However, it is required that the person personally and as a principal carries out production in accordance to the profile of his farm. This signifies personal management, or decision making, about the type and size of production, bearing the financial burden and reaping the benefits. The tasks leading to the production of agricultural products do not have to be performed personally by the farmer and he/she can employ the help of family members or hired workers. The presence of the farmer on the farm is necessary because of the need of performing or overseeing the work, incurring necessary expenditures and reacting in matters requiring immediate decisions. This need is created by the specific character of agricultural production but is not a statutory requirement. Task organization on the farm is the responsibility of the farmer and he can perform this task in such a manner that it functions even during his/her absence. Hence a holder of the farm does not cease to be farmer, as understood within article 6, point 1 of the statute about national insurance of farmers, as a result of temporary absence from this farm, if he/she has not lost possession of it and had not caused the interruption of agricultural activity within the scope organized by him/her. The farmer ceases to be a farmer when the possession of the farm has been transferred to a different person; the current holder has been deprived of its possession, or when the farm is not used by the holder for agricultural activity. The

[33] Dz.U. from 1964, No. 16, item 93 with revisions.

requirement of personal management is also not fulfilled when the farm holder hands over its management to a different person, allows this person to make the decisions regarding production and only takes advantage of potential profits.

According to the position, confirmed by the Supreme Court, conducting agricultural activity as understood within the above regulation means conducting by the holder of the farm professional agricultural activity as a principal connected to that farm, constant and personal, and having the character of employment, or of other common tasks connected with its management.[34] Telephone contacts and occasional visits, even ones connected with making decisions about some matters dealing with the farm, cannot be regarded as conducting professional, constant and personal activity of such a farm. They especially cannot be qualified as employment or as other common duties connected with its management. These behaviors can be at best regarded as a form of owner supervision, which cannot be identified as performing common duties connected with running a farm. At the same time it should be stressed that the holder of a farm does not cease to be a farmer within the understanding of the above regulation as a result of a temporary absence from the farm if he has not lost possession of it and did not cause it to stop performing agricultural activity within the scope established by him/her.[35]

Possession of a farm, as understood within the above regulation, is not limited to formal ownership, regulated by law. Also possession without legal title and management of such a farm results in being subject to national insurance for farmers[36] if the person conducting agricultural activity on this farm meets the other premises resulting from article 6, point 1 of the above mentioned statute. During establishing weather a person is subject to national insurance for farmers it is assumed that the owner of properties regarded as farm land, or the lessee of such properties if the lease is registered within the Land and Property Register, conducts agricultural activity on these properties.[37] The above interpretation results directly from the wording of article 6, point 1 and article 38, point 1 of the statute. In case law it is also stressed that managing a farm should have a personal

[34] Supreme Court ruling from 29 September of 2005, I UK 16/2005 (OSNP 2006/17–18, item 278).

[35] Supreme Court ruling from 6 December of 2007, I UK 139/2007 (OSNP 2009/1–2, item 24).

[36] Supreme Court ruling from 28 May of 2008, II UK 303/2007.

[37] Appellate Court in Kraków ruling from 8 November of 2005, III AUa 2385/2004 (LexPolonica no. 394995).

nature, hence management of a farm owned by a non-adult child by the parents of this child who is under their parental supervision (article 101 § 1 of the family and guardianship code)[38] does not qualify as personal and as a principal managing of agricultural activity of the insured within the understanding of article 6, point 1 of the statute about national insurance for farmers.[39]

4. Close person

The civil code refers to the notion of a close person, closest person or the closest family member. However, it should be pointed out that within the regulations of the civil code as well as within the family and guardianship code legal definitions of these terms do not exist.[40] However, the legislator does use, within the content of some regulations of the civil code, the notion of a close person (with possible modifications): this concerns the following regulations: article 446 § 2–4 of the civil code (the right to apply for disability pension is granted to the close person of the deceased, whom the deceased voluntarily supported, if the circumstances show that it is mandated by the rules of cohabitation, while in § 3 and 4 of article 446 the legislator uses the term closest family members who can receive appropriate compensation if, as a result of the death, their life situation has significantly deteriorated (§ 3), or financial compensation for harm done (§ 4)) article 527 § 3 of the civil code (if, as a result of a legal action performed by the debtor with harm done to the creditor, a person having a close relationship with the debtor benefited, then it is assumed that this person was aware that the debtor was acting with the intention to harm the creditors); article 832 § 2 of the civil code (if at the time of death of the insured there is no beneficiary, then the benefit is transferred to the closest family of the insured in order established by the general conditions of the insurance unless other arrangements were made); art. 923 § 1 of the civil code (the spouse and other close persons of the bequeather, who have lived with him until the day of his death are entitled to use the dwelling for three months under current conditions);

[38] Dz.U. from 1964, No. 9, item 59 with revisions.

[39] Supreme Court ruling from 25 January of 2000, II UKN 341/99 (OSNAPiUS 2001/11 item 397).

[40] A definition of a "close person" is included in the penal code in article 115 § 11 (Dz.U. from 1997, No. 88, item 553). This definition, however, can only be applied within penal law. It is quite narrow and correct application of it within civil law is impossible.

article 1008, point 2 of the civil code (the legislator allows for disinheriting in an event of premeditated crime perpetrated against the life, health, freedom or the blatant dishonoring of the bequeather or one of the persons closest to him). The entity defined in article 691 § 1 *in fine* of the civil code should be mentioned meaning a cohabitating person who after an amendment act replaced the close person with regard to rental agreements in the event of the death of a lessee of living premises.

In regards to the regulation covered by the family and guardianship code the following should be considered: article 149 § 2 of the family and guardianship code (if a person designated by the father or mother did not become the guardian, a guardian should be chosen from the relatives or other close persons of the child under guardianship or his/her parents) and article 617 of the family and guardianship code (relatives in direct line are persons who are directly descended from the other; lateral relatives are persons who have a common ancestor but are not relatives in direct line). The lack of a legal definition of a close person creates the necessity to refer to the position of legal doctrine. Fitting to the decisions of its majority it should be added that clearly determining within its scope a list of persons who should be counted among close persons is not possible.[41] For the use of individual regulations mentioned above a wide range of persons is accepted who are entitled to the rights established by the legislator at a given circumstance.[42]

5. Personal rights

Within Polish legislature there is also a lack of a legal definition of the term "personal rights". However, judicature and doctrine interpret this term as a certain value of an non-material nature, to which every man is entitled to, and which refers to moral values.[43] It is an individual value, inalienable, non-transferable. It exists as an absolute right – it applies to everyone. It is also defined as an individual and subjective understanding of value of feelings and the psychological state of a particular man.

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[41] H. Dolecki, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, edited H. Dolecki, T. Sokołowski, Warszawa 2010, p. 801.

[42] J. Haberko, *Pojęcie osoby bliskiej w prawie cywilnym*, Przegląd Sądowy 2011, no. 3, p. 65 and following.

[43] S. Dmowski, S. Rudnicki, *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2009, p. 106 and following.

In article 23 of the civil code there is an open catalogue which includes especially personal rights such as: health, freedom, honor, freedom of conscience, name or nickname, image, privacy of correspondence, immunity of residence, scientific, artistic, inventive and rational creativity. However, case law has additionally established many personal rights which are legally protected.

While distinguishing them the emotional sphere of man was taken into consideration, assigning great value to the non-material right, often solely sentimental. For example, apart from the catalogue in article 23 of the civil code, such things like: violation of the right of the employee to rest[44], veneration of the deceased[45], the right of a pregnant woman to information about the fetus, its possible diseases or defects and their treatment options during pregnancy[46], the login name of an internet service user[47], the right to be married, have offspring, have a father, the right to be part of a family in which the husband of the mother is the father of the children are taken to be personal rights.[48]

However, the article 24 of the civil code introduces the presumption of unlawfulness[49] of those who violate the legal right of others, which means that the violator is obliged to show circumstances which exclude the unlawfulness of his behavior (the burden of proof is his). The victim must only demonstrate the behavior of the perpetrator and identify the damage or possible wrongdoing and show the causation between them.[50]

Also with the term "personal right" the content of its meaning is determined by case law and doctrine.

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[44] Supreme Court ruling from 18 August of 2010, II PK 228/2009 (LexPolonica no. 2359661).

[45] Compare Supreme Court ruling from 23 September of 2009, I CSK 346/2008 (OSNC 2010/3 item 48); Supreme Court ruling from 6 February of 2008, II CSK 474/2007 (LexPolonica no. 2136365); Supreme Court ruling from 20 September of 2007, II CSK 237/2007 (OSNC 2008/C item 71).

[46] Article 19, section 1, points 1 and 2 of the statute from 30 September of 1991 about health care facilities (Dz.U. No 91, item 408 with revisions); and Supreme Court ruling from 12 June of 2008, III CSK 16/2008 (OSNC 2009/3 item 48).

[47] Supreme Court ruling from 11 March of 2008, II CSK 539/2007 (OSNC 2008/D item 125).

[48] Appellate Court in Gdansk ruling from 14 December of 2007, I ACa 1137/2007 (Przegląd Orzecznictwa Sądu Apelacyjnego w Gdańsku 2008/1 item 6 p. 50). See also: A. S. Tokarz, *Zdrada małżeńska. Zadośćuczynienie za zerwanie więzi rodzinnych*, Przegląd Sądowy 2011, no. 4, p. 102 and following.

[49] Compare Supreme Court ruling from 12 September of 2007, I CSK 211/07 (LexPolonica no. 1574861).

[50] Compare Appellate Court in Warsaw ruling from 9 January of 2007, VI ACa 659/06 (LexPolonica 1491637).

6. Freelance profession

Within regulations there is also no statutory definition of the term freelance profession. Doctrine representatives show that the essence of a free-lance profession is performing services which are essential from the standpoint of the basic rights of an individual, such as health, protection of personal property, personal rights and others; intrusting information vital for his/her rights by the person for whom the service is being performed; the responsibility of official secret; special requirements as to professional qualifications, including different forms of professional training; functioning of a disciplinary judiciary within the profession and the existence of a self-government acting upon mandatory union and equipped with ruling instruments to exact its authority with its members, including the right to exclude from the business function. These elements of the self-government's power are to be used to ensure the proper practice of the profession.[51]

Similarly, the Constitutional Tribunal, while defining the essence of professions in this category, isolated three of their elements: free access of every person to perform the profession, conditioned only by their talents and qualifications; real possibility of performing this profession; and the lack of subjection to the rigors of subordination which characterize performing work.[52]

The rule accepted in the process of regulating the rules of performing a freelance profession is that the legislator directly defines the scope (subject) of a given profession, in this manner creating its legal definition. For example, in accordance with the statute from 11 April of 2001 about patent agents,[53] this profession basically consists in granting legal and technical aid in matters of industrial property to natural persons, corporate bodies, and organized entities which do not possess a legal personality.[54] An essential characteristic differentiating professional activities performed within the

[51] Compare *Konstytucja Rzeczypospolitej Polskiej – komentarz encyklopedyczny*, edited by W. Skrzydło, S. Grabowska, R. Grabowski, Warszawa 2009, p. 530; B. Banaszak, *Prawo konstytucyjne*, Warszawa 2008, p. 759 and following; D. Dudek (ed.), *Zasady ustroju III Rzeczypospolitej Polskiej*, Warszawa 2009, p. 361 and following, P. Sarnecki, *Pojęcie zawodu zaufania publicznego (art. 17 section. 1 Konstytucji) na przykładzie adwokatury*, [in:] *Konstytucja. Wybory. Parlament*, edited by L. Garlicki, Warszawa 2000, p. 149 and following.

[52] See justifications to the ruling of the Constitutional Tribunal from: 19 October of 1999, SK 4/99 (OTK ZU 1999, no. 6, item 119) and 2 July of 2007, K 41/05 (OTK ZU 2007, no. 7A, item 72).

[53] Dz.U. No. 49, item 509 with revisions.

[54] J. Borowicz, *Wykonujący wolny zawód jako pracodawca w rozumieniu art. 3 kp*, Praca i Zabezpieczenie Społeczne 2011, no. 3, p. 17 and following.

scope of a freelance profession is substantial independence. This especially signifies freeing the person performing the so called freelance profession within the scope of professional activity, from the authority of another entity, for example, an employer who uses orders, instruction, and guidelines and so forth, in case of performing a profession in a form of employment.

The term "freelance profession" corresponds to the constitutional expression "professions of public trust" (article 17, section 1). It is worth mentioning that basic law, besides general indications: "being responsible for the proper performance of these professions" and activity which should be directed at securing "public interest", does not specify the premises which would make it possible to differentiate these types of professions from others. Furthermore, the Constitution of the Republic of Poland does not, even through examples, indicate a catalogue of professions of public trust.[55] In the opinion of P. Sarnecki behind classifying certain professions as "professions of public trust" are such supporting premises as: the fact of entrusting to the people performing such professions information regarding the private lives of people using their services, closely connected with releasing them from responsibility of not disclosing them; having very high professional qualifications; diligence of adhering to ethical standards during performing the duties of the profession.[56]

A few summarizing remarks

Based on the examples presented above it is worth making a few summarizing remarks.

Foremost, the fact that, during drawing up legal regulations, the legislator relatively often does not exploit the possibility of explaining terms or expressions, or does not make the decision to formulate the so called legal definitions, should not be surprising. J. Wróblewski stresses that they are

[55] "This trust consists of a number of factors, of which the most important seem to be: conviction that the person performing this profession retains goodwill, proper motivation, and adequate professional care as well as belief in keeping to the values essential to the make-up of the given profession. When it comes to practicing of the legal professions of public trust, then the essential values include also full and integral respect of the law, especially – keeping to the constitutional values (within their hierarchy) and conduct directives (this especially pertains to the profession of lawyer)". See substantiation in the matter P 21/02 (OTK ZU 2004, no. 8A, item 90).

[56] P. Sarnecki, *Pojęcie zawodu zaufania...*, op. cit., pp. 155–157. This author aptly stated that the meaning of the term "profession of public trust" cannot be determined by statutory regulations; however, the statutes can become a supporting material in deliberations weather the certain profession should be so qualified.

not an ideal means of specifying the meaning of the expressions being used since it is not permitted by the considerations of legislative technique, and additionally it is not possible to define all terms mostly because the words which we employ also may not possess a sufficiently precise meaning.[57] The legislator should make use of the possibility of determining a legal definition if it is necessary.[58] The Polish legal system is of course familiar with many examples contrary to this, for instance, the employment by statutes of the so called dictionaries which explain the most important notions or expressions. Introducing dictionaries into legal texts is the most classic method of clarifying notions. The clearer legal regulations are, the easier it is to base upon them the construction of legal norms and, which follows, the easier it is to understand them by the entities who mean to use them.

Legal definitions serve to define the meaning of the expressions seen in legislative acts and it can be said that the legislator has priority in this matter, but not exclusive right to it. Undoubtedly, in specifying the meaning of legal notions the leading role is that of the authorities which execute the law. The absence of legal definitions particularly affects the decisions of some of these authorities, especially that of the Supreme Court, and that of law doctrine. It can be said that the more doubts are connected with the interpretation of a regulation, the greater the area of operation for courts and jurisprudence within the matter.

The usefulness of legal definitions is decided by – in my opinion – primarily their general aim. This aim is the uniformity of the understanding of regulations and, as a result, uniformity of their application. It should be expected from the legislator that he employ precise expressions within legislative acts. The greater the precision of the expressions used in language of the law, the lesser is the freedom for the authority (person) who interprets them. However, even in the event of an existence of a legal definition (this is illustrated by the examples of "incapacity to work", "conducting non-agricultural business activity", "farmer"), it becomes necessary to call upon judicial decisions and case law to make the "decoding" of the legal norm possible. In this way a very large superstructure based on the interpretation

[57] J. Wróblewski [in:] K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969, p. 43.

[58] In § 146, section 1 of the Ordinance of the Prime Minister of Poland from 20 June of 2002 about "Rules of legal technique" (Dz.U. from 2002, No. 100, item 908) designates the following reasons to establish legal definitions: a) if a given expression is ambiguous; b) if a given expression is unclear and it is necessary to limit this lack of clarity; c) if the meaning of a given expression is not commonly understood, d) because of the field of addressed cases, there is a need to establish a new meaning for the given expression.

of the regulation, formulated upon definite factual states, is constructed. Despite the fact that a statutory definition of the term "farmer" does exist, it has become necessary to explain the expressions which form this definition. A farmer must conduct constant business activity on the farm. The statute however does not specify what this activity should consist in.

There does exist a different way of approximating the meaning of terms and expressions being employed. Sometimes, when there is a lack of a definition, then within the statutes a catalogue which serves to explain them is indicated. This situation can be illustrated by the term "personal right" from article 23 of the civil code, or another, defined in article 32, section 3 of the statute from 17 December of 1998 about retirement pensions and disability pensions from the National Insurance Fund, where a list of employees hired under special conditions was established.

Very important is the fact that the interpretation of specific notions and expressions performed by the courts (Supreme Court, appellate courts) very often deviates from the terms used within the definition itself (from that which is included within the definition). The solution of approximating their meanings by using common language (colloquial) does not, in this case, seem to be the correct one. However, it is acceptable by the entity to recall in an individual matter a specific interpretation of a term or expression performed by the courts. The meanings of legal terms can, however, be the same as corresponding expressions in common language but can also be different. There is a possibility of a situation occurring where the meaning of a certain term existing in one branch of law is not identical with the meaning used in another branch.[59]

Functioning within the structures of the European Union also provides many new experiences connected with establishing the meaning of terms used in legislative acts, since the aim becomes the uniform execution of regulations issued by European Union authorities in different member countries. For example, recently there have been doubts about the meaning of the term "entrepreneur".

In the end it is worth pointing out that also the Constitution partially includes the definitions of certain institutions (such as for example "marriage", which is – according to article 18 – a relationship between a man and a woman). There are, however, many examples of differences in the wording of constitutional regulations, meaning those in which there is a lack of directly expressed definition: professions of public trust (article 17, section 1),

[59] J. Wróblewski [in:] K. Opałek, J. Wróblewski, *Zagadnienia teorii...*, op. cit., pp. 42–43.

local government (article 16), decentralization (article 15), administration of justice (article 177), direct application of the constitution (article 8, section 2), and many others. In presented cases the legislator included only those characteristics by which a certain mechanism, institution, structure (for example in referring to a local government), or tasks which it is supposed to fulfill (for example in referring to the administration of justice), or aims which it is to reach (for example when referring to decentralization), are characterized. Through the angle of these characteristics, tasks or aims, the definition of the institution (mechanism, structure) can be constructed, but it is not a definition which is directly stated within the regulation.

S U M M A R Y

The problem of defining terms is one of the basic characteristics of language. The language of legislative acts (language of the law) is not free from definitional problems. Various situations occur in Polish legislature: sometimes there is no simply stated legal definition of an expression (a definition of a certain institution or legal mechanism), at other times within the regulations of the law exist scattered elements which, when collected into a whole, form the basis of the definition. Often within regulations there is no legal definition, but instead the characteristics of a certain institution or its roles (tasks) are defined. The subject matter of this work consists of chosen key threads connected with definitions of the notions and expressions occurring within texts of normative laws using as examples such statutory expressions as: "incapacity to work", "obligation of compulsory national insurance for non-agricultural business activity", "farmer", "close person", "personal right", and "freelance profession". The article discussed the interpretative function of judicial organs (especially that of the Supreme Court) within the scope of explaining notions and expressions included in normative acts. On the basis of the examples given the output of case law also has been presented.

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AN EXPERT OPINION VERSUS LEGAL EXPERTISE IN TAX PROCEEDINGS

Increasingly, tax law regulations concern a number of tax subjects which for various reasons reveal a very complex character and require some specific knowledge that tax authorities may lack to conduct a necessary expertise. This does not mean the knowledge of the detailed regulations of other branches of law, but the specific knowledge of certain phenomena or things (facts), which is necessary to determine tax liability in the correct amount. An example of a building as a subject of property tax can serve as a perfect example here.[1] A building object is recognized as a building and consequently given a property tax when it meets legal requirements. Having foundations by such a building is one of the legal requirements. Who and how can check whether a given building has foundations? It is simple when the foundations (or their elements) are visible and the taxpayer does not deny their existence. A case becomes complicated when a given object is situated in such a way that its foundations are invisible or the taxpayer claims they do not exist. This is important because building objects without foundations are not buildings. Consequently, if these objects are owned by people who are not engaged in any economic activity, they are not taxable. How can the tax authority conducting the proceedings explain such a matter? In fact, in the absence of the construction documents the only way to prove that the object has foundations is to ask for an expert opinion.[2] A further discussion will be devoted to the problems connected with the expert opinion usage.

[1] There are many similar examples regarding different taxes. It is often problematic to determine "gross vehicle weight" or "kind of suspension" of a vehicle while deciding on the motor vehicle tax. In case of farm tax, the notions "livestock building" or "an object that serves to protect the environment" are similar examples. In the forest tax it is difficult to determine what "sale of unchanged products" means.

[2] This view in a very similar case was confirmed by the Administrative Court in its decision dated 3 February 2006 (I SA / Gd 385/03) published www.orzeczenia.nsa.gov.pl, stating that due to the highly specialized nature of the equipment it was necessary to

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Is the authority obliged to appoint an expert?

In the doctrine and jurisprudence there is a common view that in case when special knowledge is needed to establish or evaluate facts and this action is beyond the scope of knowledge and life experience of people having general education, the organizing body should appoint an expert.[3] A further opinion was expressed by the Supreme Administrative Court in one of the verdicts stating that in cases of complicated factual states, which can be explained only with the help of special knowledge, the tax authority is required to use an expert's opinion.[4] The author of this article strongly agrees with this view. Nevertheless, it is not directly reflected in the Tax Code. According to the art. 197 of the Tax Code[5], if some special knowledge is required, the tax authority may appoint an expert who has this special knowledge in order to state an opinion. Therefore, the above-mentioned article states the possibility (not obligation) of appointing an expert when a case requires some special knowledge. Despite appearances, the provision is properly constructed because "special knowledge" should not always be the opinion subject of the expert appointed by the tax authority. It is also possible to consider the opinion presented by the tax payer or experts appointed by him. If the tax authority does not dispute the taxpayer's explanations (reviews submitted by him) regarding the complex nature of the factual state, it is not necessary to appoint an expert in accordance with art. 197 of the Tax Code. On the other hand, an expert can be appointed when there are doubts about the presented explanations or their completeness. The legislator did the right thing leaving the tax authority a possibility to decide whether there is a need to appoint an expert even when a case reveals some special knowledge. The appointment of another expert does not always make sense when a case can be explained in a different way.

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appoint appropriate experts to determine whether objects carry the characteristics of buildings in the light of the definition contained in the regulations of the Construction law.

[3] See M. Szalewska, M. Masternak, *Rola eksperta i jego opinii w postępowaniu administracyjnym*, (in) J. Niczyporuk (ed.), *Kodeks postępowania administracyjnego. Na 50-lecie K.P.A.*, Lublin 2010, p. 800. Such a view was expressed by the Administrative Court in its decision dated 4 March 2004 (III SA1917/2002) published in "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2004, nr 10. The court stated that if the dispute with the taxpayer applies to complex processes and requires expertise, the tax authority should appoint an expert. The tax authority cannot accept any cursory knowledge of things.

[4] See the decision of the Administrative Court dated 25 January, 2001 V SA 1085/00 – unpublished.

[5] The Act of August 29, 1997 Tax Law (consolidated text. Laws of 2005, No. 8, pos. 60 later amended).

Findings resulting from the expert's opinion are not binding for the tax authority in a situation when not all doubts and relevant questions are explained.[6] To deal with them, the authority may appoint another expert.[7] It is possible to get rid of doubts by asking for an oral opinion of an expert, or some written clarification (supplementary opinion).[8] In this context it should be noted that in case of the expert oral opinion, the tax authority is obliged to inform the party about the place and date of the expert examination not later than 7 days in advance (art. 190 of the Tax Code). This aims at allowing a party to participate in the activity (to ask questions or provide explanations.) A party can also refer to the expert opinion within a seven-day period regarding the collected evidence being informed about it by the tax authority.

Can a taxpayer appoint an expert?

The above-mentioned regulations of the Tax Code show that only the tax authority is entitled to appoint an expert to give an opinion on the complicated factual states. Thus, only the opinion given by a person appointed by the order of the tax authority under art. 197 of the Tax Code has a value of the expert opinion evidence. However, this evidence is not a proof of some special power, which involves a certain presumption, or has a priority over other items of evidence.

Appointing an expert, the tax authority may act ex officio or upon request. There are no obstacles for the taxpayer to apply an expert during the procedure stating that the case requires some special knowledge. This right results directly from the art. 188 of the Tax Code, under which the party's request to examine evidence should be considered if the evidence investigation could explain circumstances relevant to the case, unless these circumstances are sufficiently identified by some other proof/evidence. Therefore, the tax authority may either consider the taxpayer's request as right and appoint or refuse to appoint an expert on the ground that the issues raised by the taxpayer can be explained by using other items of

[6] The authority is not bound by the opinion of an expert, because it constitutes the same material as any other evidence gathered in the case – see. A. Skoczylas, Gloss to sentence WSA (I SA / Ld 1875/2000) "Orzecznictwo Sądów Polskich" 2002, z. 9, Pos. 118 and the decisions cited.

[7] See the decision of the Administrative Court dated 19 February 1997 SA/Sz 189/96; unpublished.

[8] P. Pietrasz, *Ordynacja...*, op. cit., p. 860.

evidence (eg. the above-mentioned construction project or another official document).

The taxpayer may also present the opinions prepared by people who have the expertise needed to clarify the case facts. Such an opinion is not the opinion of an expert in the meaning of the art. 197 of the Tax Code for formal reasons for it is not an opinion written by the expert appointed by the tax authority in the form of provision. However, substantive considerations revealed by both types of the opinion concern the same problem.[9] An opinion of the "specialist" presented by the taxpayer is one of the evidence range referred to in the art. 180 of the Tax Code according to which anything that might help to clarify the matter, and is not contrary to the law, can be accepted as evidence. Undoubtedly, an opinion prepared by the "expert" constitutes such evidence and should be analyzed by the tax authority in accordance with the principle of the evidence free assessment during the proceedings. Such an opinion has the same probative value as the opinion established by the expert nominated by the tax authority. The tax authority is obliged to consider the arguments in both opinions and determine which of these opinions is to be treated as the correct one, justifying it accordingly. In some extremely difficult cases it is possible to appoint another expert who will refer to the previous opinion.[10]

Who can be an expert?

According to the 197 of the Tax Ordinance any person who has special knowledge can be an expert. Such a person does not have to meet any special requirements (unless required by specific provision) meets specific formal requirements (for example, being entered on the list of certified property valuers). The tax authority decides itself whether the person has special knowledge, and thus may be an expert in the field which is the subject of the opinion, the tax authority decides itself.[11] At the same time, it is not explained what is meant by "special knowledge". The literature indicates

[9] In general understanding these two opinions are the expert opinions.

[10] However, this is not an obligation for the authority – see the decision of the Administrative Court in Warsaw dated September 13, 2007 (III SA/Wa 402/07; unpublished). The Court decided that none of the procedural law regulations imposes the obligation on authorities to carry out further evidence of the expert's opinion only because contradictory opinions have been issued. A different view would result in the need to conduct further expertise, simply because there are differences between the experts' opinions.

[11] B. Brzeziński, M. Kalinowski, A. Olesińska, M. Masternak, J. Orłowski, *Ordynacja podatkowa. Komentarz. Vol. II*, Toruń 2007, p. 320.

that this includes not only scientific knowledge in the field of individual branches (eg, art, construction, agriculture, accounting), but also practical skills, based on years of experience.[12] Therefore, a person who has received no specialized education attested by a diploma, but having the relevant professional practice may have such special knowledge. Hence, there is no basis for questioning the expert's qualifications on the ground of the lack of proper training or certification.

A person who has special knowledge has to agree to be an expert in the tax proceedings. Before taking a decision on the appointment of a particular person as an expert, the tax authority has first to obtain the confirmation that the person is willing to be an expert and is ready to present his opinion. Only if the person has agreed to be an expert but refused to issue an opinion, an ordinal penalty referred to in the art. 262 of the Tax Code can be used. This penalty cannot be used (which sometimes occurs in practice) to the people who refuse to be the experts and prepare a report. This is indirectly confirmed in the art. 262 § 2 of the Ordinance, which states that punishment can be used to the person who has agreed to act as an expert but then refused to give an opinion.

Sometimes rules of the tax law foresees the obligation to appoint an expert having special powers. Art. 4 paragraph 8 of the Act on Local Taxes and Fees May serve as an example.[13] According to it, in certain cases if the taxpayer does not specify the value on the building being the subject of taxation, the tax authority appoints an expert among certified property valuers referred to in the Act on real estate dated August 21, 1997.[14] It should be noted, however, that this provision applies only when determining the value of buildings; it cannot be applied when dealing with other traits influencing the principle of taxation. It should be noted here that in the light of the above-mentioned provision it is allowed to establish the value of the building by the expert opinion, although the rules for determining this value are defined in the rules of the income taxes. This indicates that due to the complexity of the procedure the legislature orders that this value should be established by the expert, although the tax authority could do the same applying the law.

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[12] H. Dzwonkowski, Z. Zgierski (in:) H. Dzwonkowski (ed.), *Ordynacja podatkowa*, Warszawa 2008, p. 883; P. Pietrasz (in:) C. Kosikowski, L. Etel, R. Dowgier, P. Pietrasz, M. Popławski, S. Presnarowicz, *Ordynacja podatkowa. Komentarz*, Warszawa 2009, p. 854.

[13] Act of 12 January 1991 on local taxes and charges (uniform text Journal of Laws of 2010, No 95, pos. 613 later amended).

[14] Journal of Laws of 2004. Nr 261, pos. 2603 later amended.

What is a subject of the expert opinion?

The subject of the expert opinion should be the explanation of the particular facts considered in the proceedings.[15] It is the opinion about the state of things, phenomena, technical processes or dependencies between them. What is more, a task of the expert is not only to determine the facts of the case, but also to explain the problematic circumstances which require expertise.[16] In any case, which is highlighted in the literature on the subject, a subject of the opinion cannot be the analysis of the legislation rules.[17] The tax authority is obliged to apply the law and it is not in the position to replace this statutory duty on the expert. This does not mean that the body applying the law has no possibility of using the interpretation of law made by professionals (eg. legal expertise). In the context of the ongoing consideration, it is useful to return to the example regarding the building foundation mentioned at the beginning of this paper. The subject of the expert opinion should be the existence (or not) of these foundations and not the analysis of the provisions of the Tax Act for determining whether the object should be taxed as a building. As it has been highlighted in professional literature, an expert can make an expertise referring to the facts and he is not supposed to interpret the provision. Contrary to appearances, this principle is sometimes very difficult to put into practice. Art. 7 of the already mentioned Act on Local Taxes and Fees ordering the appointment of an expert to determine the value of the building can serve as an example. This value is determined on the basis of the statutory provisions governing the income taxes procedure. An expert opinion in this case must therefore be based primarily on the analysis of legislation, which regulates the rules for determining the value of the building. Is it an opinion about facts or about the law? According to the author of this article, the principal purpose is to solve the problem complex enough to require special knowledge.

In some situations, the expert opinion has to be based on the analysis of the law. Cases dealing with "creative" accounting which can only be solved with the use of the expert opinion pointing to illegal accounting operations (in opposition to the factual state) which are completely regulated by the

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[15] An expert opinion cannot enter into the legal norm interpretation sphere. See the decision of the Supreme Administrative Court dated April 11, 2007 (I GSK 1056/06).

[16] Similarly, Ł. Matusikiewicz, *Rola i znaczenie dowodu z opinii biegłego w postępowaniu podatkowym*, "Przegląd Podatkowy" 2009, nr 9.

[17] "Evidence from the expert opinion to establish the current legal status and rules for the application and interpretation of existing legislation is not admissible." See E. Wengerek, (in:) *Kodeks postępowania cywilnego z komentarzem*, Warszawa 1989, p. 459.

law can serve as an example. A mixture of facts and law in this case is unbreakable, and the expert opinion should be conducted in connection with the interpretation of the law. The difficulty of such cases is illustrated by the judicial decisions in which the court decides whether the disputed fact in the case is a factual state or a legal regulation that requires an interpretation.[18] Frequently in practice there are opinions where considerations regarding factual states are supported by the law interpretation.

An expert opinion versus legal expertise

Basically, an expert opinion should relate to the facts that are the subject of the evidentiary hearing. What if the subject of the expert opinion, apart from the factual circumstances, is also the law interpretation? The author of this paper believes that it does not mean a total loss of the probative value of that opinion. Legal reasoning revealed by such an opinion can be taken into account by the tax authority when deciding on the case, but it does not constitute evidence in the tax proceedings. The evidence is only the findings made by an expert regarding the facts. However, in many cases, legal justification of such an opinion "reinforces" the tax authority's reasons for the decision. The expert opinion on the legal analysis should be treated like any other legal expertise. It does not constitute an expert opinion or other evidence,[19] but there is nothing to prevent the tax authority or the court from considering the arguments in the expertise. The tax authority acceptance of the views revealed by the legal opinions is advisable for the sake of protecting the rights of the parties in the investigation and the authority's seeking to issue an accurate decision.[20] Hence, there is no legal obstacle for the tax authority to base their decision on the effects of the law interpretation revealed by the opinion present in the case materials.[21] There are at least two possibilities here. It is possible to consider the views

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[18] For example, the decision of the Supreme Administrative Court dated July 12, 2007 (II FSK 903/06), publ. www.orzeczenia.nsa.gov.pl. It states that that deciding whether a disputed building object is a building or not constitues the issue of determining the factual state and not the interpretation of the substantive law.

[19] "Investigation should only relate to the factual state and not the law" – B. Brzeziński, W. Nykiel, *Ekspertyza prawna w postępowaniu w sprawach podatkowych*, "Przegląd Podatkowy" 2002, nr 11. B. Dauter rightly notices that this is not a legal document – See B. Dauter (in:) S. Babiarz, B. Dauter, B. Gruszczyński, R. Hauser, A. Kabat, M. Niezgódka-Medek, *Ordynacja podatkowa. Komentarz*, Warszawa 2010, p. 797.

[20] B. Brzeziński, W. Nykiel, *Ekspertyza...*, op. cit.

[21] In this area judical decisions are very diverse – See B. Dauter, *op. cit.*, p. 797.

expressed in the survey and indicate their source while giving the reasons for the decision. In this case, these are the views of the tax authorities which justify their decision. In the section giving reasons for the decision it is also possible to include a reference to the attached legal expertise indicating that the law interpretation included there is accepted by the authority. In both cases, this expertise is an element of the reasons for the decision made by the tax authority with the use of the legal expertise.

The author of his paper claims that asking for legal expertise by the tax authorities is a rational way of conducting the tax proceedings in the situation where complex legal regulations are the subject of the decision making. Certainly, it would be best for the tax authorities to solve individually all legal problems that occur during the implementation phase of the tax liabilities. Theoretically, this is possible when one condition is fulfilled, that is improving the quality of the tax law. As long as this condition is not fulfilled, the tax authorities should use an expertise of specialists also when it comes to the interpretation of the law difficult points. In many cases, this prevents from making erroneous decisions and paying the costs connected with it. There are a few cases which have lasted for years and have had several conflicting judgments. In such a situation, it is reasonable and beneficial to ask for the opinion of the person specializing in a particular segment of the tax law and being an excellent expert on the matter. The author of this paper believes that this is a duty of the tax authorities deciding on the matter, who are obliged to take all necessary measures to settle the matter in the tax proceedings. Asking for a legal expertise when the case complexity requires so is such an action.

It must be concluded that the tax authority conducting the proceedings should use all means authorized by the law which can help to arrive at a correct decision. These measures (which are more frequently used by the authorities) include opinions of the experts and legal expertise. They serve to clarify problems that occur at the stage of the tax proceedings. However, they should be used skillfully with a special consideration of their specificity and evidential asset. An expert opinion as evidence does not need to exist in its pure form being only the opinion of the facts. More frequently, because of the complexity of the proceedings, such opinions reveal legal considerations. The author of this paper maintains that it does not discredit such an opinion. On the contrary, the tax authority should take advantage of it. A legal analysis of this opinion can be used in the proceedings not as evidence, but just as one of the arguments supporting a decision.

S U M M A R Y

The aim of the present publication is to bring closer the essence of two very similar and frequently confused means of evidence namely expert opinion and legal expertise. Expert opinion is done by specialists in a given domain (construction, informatics, accounting) and its aim is to clarify doubts concerning certain facts which influence the result of a proceeding in progress. The subject of legal expertise is different. In an expertise the opinions of the author are presented which relate to an interpretation of a definite legal regulation. Both an expert opinion and legal expertise might and should be used in proceedings. However, their specific character and mode of use must be emphasised. Confusing these two institutions leads to unnecessary problems in application of the law.

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INTERPRETATION OF THE PRINCIPLE OF SUBSIDIARITY IN THE LIGHT OF THE LAW ON SOCIAL ASSISTANCE OF 12 MARCH 2004

1. Introduction

The principle of subsidiarity (Latin *subsydium* – help, support) which originated from Catholic social teaching[1] is an essential principle of functioning of state organs. It constitutes the subject of concern of many branches of science, especially philosophy (including ethics), law, economy. It became the basis for building social order in a country. It is treated as a principle of international, state, regional and local politics and moreover, it is considered a legal doctrine.[2]

As far as the legal aspect is concerned, the principle of subsidiarity assumes that legal regulation of the situation of citizens and groups of citizens should ensure them maximum independence and participation in public duties, with the state as an auxiliary. Thus, the state should not take over the duties which may be realised by individuals and their families.[3] The crucial justification of imperious influence of the state and of supranational organisations, on the range of operations of lower social structures, individuals, families, is undoubtedly the lack of their self-sufficiency in satisfying necessities of life especially with regard to limited economic, organisational possibilities or other important conditionings.

[1] *Encyklika Quadragessimo Anno*, Znak 1982, No. 7–9, p. 691 and the following; A. Klose, *Katolicka nauka społeczna*, Warsaw 1985, p. 30; J. Auleytner, *Nauka o polityce społecznej. Wybrane problemy teorii i praktyki*, Warsaw 1990, p. 56; J. Krucina, *Myśl społeczna Kościoła*, Warsaw 1993, p. 20–21; J. Wierusz-Kowalski, *Zasada subsydiarności*, Człowiek i Światopogląd 1981, No. 5, p. 62.

[2] T. Bąkowski, *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Warsaw 2007, p. 57 and next.

[3] M. Sthal (ed.), *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warsaw 2004, p. 136.

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One should remember that legal doctrine does not have to be expressed *expressis verbis* in a normative act since it cannot result from the existing system of law. In Poland the principle has been included in the Constitution of the Republic of Poland[4] and expressed in ordinary acts, among others in the Law on Social Assistance of 12 March 2004.[5] Placing the principle of subsidiarity in the Preamble to the Constitution of the Republic of Poland requires developing it in ordinary legislation and in the process of application of law. Public organs are obliged to strive for creating, interpretation and application of the law in accordance with the principle of subsidiarity. It also constitutes the basis for definition of public tasks and their distribution between various entities of state power and determining the principles of execution of these tasks.[6] It is indicated that this is one of the principles organising the life of a community which is of directive character. It is of fundamental importance in the sphere of interpretation of the Constitution and laws in which it is reflected. It is in the Constitution of the Republic of Poland, that political dimension of this principle is defined. If the principle of subsidiarity assumes the activity of local and regional community then it should be regulated in the sphere of substantive law. The Law on Social Assistance is such an example.

The principle of subsidiarity is of considerable significance in the relation between public administration – individual as far as it concerns administrative culture. Polish Law on Social Assistance obliged public administration organs (governmental and self-governmental) to completion of tasks in the sphere of social assistance in cooperation, according to the principle of partnership, with non-public subjects, especially associations, foundations, Churches and religious associations. Whereas individuals receiving social assistance benefits pursuant to the Law on Social Assistance have been obliged to active cooperation in solving difficult life situations (dysfunctions).

The principle of subsidiarity in relation to institutions of social assistance should be, above all, considered from two perspectives: first, connected to the situation of particular units (families) which should satisfy their life needs individually[7], second, connected to organization of the state and

[4] Dz. U. Nr 78, pos. 473 with subsequent changes.

[5] Uniform text from 2009, Dz. U. Nr 175, pos. 1362 with subsequent changes, hereinafter called L.S.A.

[6] A. Dylus, *Zasada pomocniczości a procesy transformacji*, Polityka Społeczna 1993, No. 9, p. 4.

[7] S. Nitecki, *Prawo do pomocy społecznej w polskim systemie prawnym*, Warsaw 2008, p. 96 and I. Sierpowska, *Prawo pomocy społecznej*, Warsaw 2007, pp. 53–54.

such a distribution of powers which would situate tasks on a possibly lowest level of organisation. Within such interpretation it is of crucial importance to social assistance institutions.

The described principle assumes the responsibility of an individual (human) to satisfy their needs and anticipates interference of community with the state on the forefront when an individual is not able to satisfy their needs independently. Undoubtedly, it is a principle related to broad relation, individual – community – state. It could be reduced according to E. Popławska to two fundamental postulates: as much freedom as allowed, as much socialisation as necessarily needed; as much society as allowed, as much state as necessarily needed.[8] The content of the principle of subsidiarity refers to independence of citizens and communities in performance of public tasks and is shaped by the law in force.

2. The principle of subsidiarity as general principle of social assistance

In the opinion of G. Szpor constitutional principles (materialising social justice, innate and inalienable human dignity or subsidiarity), principles provided for in the Law on Social Assistance and general principles of administrative proceedings are, above all, related to institutions of social assistance according to the form of benefits granted.[9] Due to the fact that social assistance is granted by organs of public administration it is possible to speak about the principles of organisations and activity of social assistance administration (subsidiarity, decentralisation, legality, dualism, principles of administrative proceedings as searching for the objective truth, ex officio principle, information, active participation of parties in administrative proceedings, decision permanence, double-instance, rapidity and simplicity, the right to go to court), as well as about the principles characteristic of the social assistance system, namely the principle of subsidiarity, individualisation and typisation, discretion and demanding attitude, protection of personal goods and chattels, financing aid from public resources, payment, cooperation of entities benefiting from social assistance with so-

[8] E. Popławska, *Wpływ zasady subsydiarności na przemiany ustrojowe w Polsce*, in: *Subsydiarność*, edited by D. Mielczarek, Warsaw 1998, p. 126.

[9] Cz. Martysz, S. Nitecki, G. Szpor, *Komentarz do ustawy o pomocy społecznej*, Gdańsk 2001, pp. 11–13.

cial workers.[10] General principles which relate to institutions of social assistance are not uniform and may be singled out on the basis of diverse criteria.[11]

Summing up, both political principles resulting from regulations in the Constitution of the Republic of Poland and laws defining the functioning of public administration and principles *sensu stricto* related to social assistance are of crucial importance for social assistance.

The principle of subsidiarity is the legal key construction of social assistance. Despite the fact that the legislator in the Law on Social Assistance does not use the term 'principle of subsidiarity' the principle may be without effort interpreted in its Article 2 Section 1. An interdiction to replace individuals in tasks they can realise independently results from the above description. The state and its organs provide aid to people in need to some extent, as a last resort, and when it is necessary. The analysis of the above-mentioned regulation leads to a conclusion that it is a policy regulation. It expresses as well the general principle of social assistance.[12]

The discussed principle is reflected in the very statutory definition of social assistance. According to Article 2 of the Law on Social Assistance social assistance is an institution of social politics of the state aiming to enable individuals and families to overcome difficult life situations they are not able to overcome using their own possibilities, resources and rights. It is organised by organs of public administration (governmental and self-governmental) in cooperation with non-public subjects based on partnership. Moreover, individuals (families) benefitting from social assistance are obliged to adopt an active attitude in solving difficult life situations. It is then an aid organised by organs of governmental and self-governmental administration in cooperation with numerous non-public subjects in the form of diverse and time-changing benefits (both material and non-material) financed, above all, from public sources, realised according to the principle of subsidiarity

[10] I. Sierpowska, *op. cit.*, p. 45 and the following and R. Michalska-Badziak, *Prawo pomocy społecznej*, rozdz. IV, in: *Materialne prawo administracyjne, Pojęcia, instytucje, zasady*, edited by M. Stahl, Warszawa 2005, pp. 246–248.

[11] A. Miruć, J. Radwanowicz, *Zasady ogólne pomocy społecznej w orzecznictwie Naczelnego Sądu Administracyjnego*, in: *Polski model sądownictwa administracyjnego*, edited by J. Stelmasiak, J. Niczyporuk, S. Fundowicz, Lublin 2003, p. 237. and A. Miruć, *Pomoc społeczna*, rozdz. 7, w: *Administracyjne prawo materialne. Zagadnienia wybrane*, edited by E. Smoktunowicz, Białystok 2003, pp. 222–224.

[12] K. Stopka, *Zasada subsydiarności w prawie pomocy społecznej*, Warsaw 2009, p. 99 and the following.

and individualization of benefits justified by difficult life situation of these people (families).[13] Its goal is to satisfy the indispensable needs as well as to prevent difficult life situations.

In the sphere of social assistance the discussed principle comes down to formulating some important assumptions. Firstly, society should not deprive the individual (family) of what they are able to do themselves, the so-called interdiction to deprive, secondly the state should support the individuals (families), the so-called subsidiary accompaniment, thirdly, the assistance should be of temporary character mobilizing the individual (family) to stimulation and self-reliant activity, the so-called subsidiary reduction.[14] Subsidiary accompaniment means that in matters which individuals are not able to achieve on their own society assistance should be provided to them to help them become independent. However, the postulate of subsidiary reduction means that if a person is already independent, the society should cease helping them since it could damage the whole order and we would deal with excess of assistance activity.

The discussed tenet is based upon two grounds. The first is that appropriate organs of public authority are obliged to enable individuals (families) to overcome exceptional life difficulties. Secondly, the principle is implemented only if an individual (family) touched by difficult life situation (dysfunction) makes adequate efforts to cope with this situation unaided and this proves to be insufficient.[15]

According to the legislator, the principle of subsidiarity should be treated as a legal principle and a general principle of social assistance. It should be remembered that the notion of legal principles is not considered in unequivocal manner (J. Wróblewski, S. Wronkowska. M. Zieliński, Z. Ziembiński).[16] According to J. Wróblewski, the notion of legal principle designates exclusively the norms of the law in force or their logical consequences, considered as fundamental to the legal system.[17] The author distinguishes postulates of legal system from the principles. However, in the light of the concept of Poznan law school the notion of legal principles includes not only norms inferred from the texts of legal acts but also norms the binding force of

[13] A. Miruć, *Pomoc społeczna...*, op. cit., p. 221–222.

[14] A. Dylus, *Zasada pomocniczości...*, op. cit., p. 4.

[15] I. Sierpowska, *op. cit.*, pp. 46–49 and S. Nitecki, *op. cit.*, pp. 96–101.

[16] Because of the fact that the principle of subsidiarity is directly expressed in the L.S.A. and is expressed in the above concepts, I omit a detailed analysis of the above-mentioned views within the theory of law.

[17] J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego*, Warsaw 1959, p. 257.

which has not direct justification in legal acts, solely in judicial doctrine unanimous as far as the fact of their binding force is concerned.[18]

Substantive considerations, namely objective criteria, support recognising the principle of subsidiarity as a general principle. Since subsidiarity indicates situations in which social assistance is generally applicable, it also expresses socially significant legal content. It defines the field of operation of social assistance and its basic objectives. Undoubtedly, it also constitutes substantiation and development of the principle of subsidiarity consolidating the right of citizens and their communities determined in the preamble to the Constitution of the Republic of Poland. This significantly influences further provisions of the Law. Other principles in the Law on Social Assistance, among others the principle of individualisation and facultative character of benefits, correspond with its content[19]; the principle of the duty of participation of individuals benefitting from social assistance in solving dysfunctions.[20]

The principle of social assistance has features of legal norm and the obligation to observe is comprised in the general obligation to observe the law and influences significantly the content of its remaining regulations, permits its precise definition, modification and correction. The principle of subsidiarity in social assistance expressed in the Article 2 Section 1 of the Law on Social Assistance as a general principle, is of legally substantive character. This requires substantial proceedings of specified type and indicates the range of operation of social assistance that is *ratio legis* of the Law. This also determines values which should be realised by means of the regulations of the Law, it formulates basic estimations for interpretation of its particular provisions and decides on the content of the remaining substantial norms which it contains.

The content of the Article 2 Section 1 of the Law on Social Assistance and the principle of subsidiarity which it formulates:
firstly – it should be applicable in all institutions provided for in the Law on Social Assistance,
and secondly – any breach of the principle should be treated as a breach of law with all the resulting consequences.

It should be indicated that the question of practical application of the principle of subsidiarity in the process of granting benefits under social assistance is crucial.

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[18] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warsaw 2002, p. 35.
[19] Art. 3 Section 3 and 4 of the L.S.A.
[20] Art. 4 of the L.S.A.

3. Subsidiarity characteristic as significant aspect of the principle of subsidiarity

In accordance with the legislation in force, among the traits assigned to contemporary social assistance in Poland, the subsidiarity characteristic is mentioned next to individualisation and facultative character of benefits, financing of benefits from public funds, determining the amount of benefits on the minimum level, social justice. Social assistance functions in situations in which conditions of basic subsistence of the individual (family) are endangered. Difficult life situation is not sufficient, there has to occur an impossibility to manage with own funds, possibilities and rights (the characteristic of subsidiarity). The characteristic of subsidiarity appears to be the most important element of the principle of subsidiarity.

As mentioned above, the principle of subsidiarity in social assistance may be interpreted in several aspects.

Firstly, social assistance should be treated as a last resort in the whole system of social security. Social assistance is an element closing the system of social security in Poland, its specific 'life belt'. According to this principle, an individual (family) has the right to individual initiative and action in satisfying their needs individually, and the state cannot replace them in doing this if it is unnecessary. This approach is convergent with the principle of subsidiarity expressed in the preamble to the Constitution of the Republic of Poland.[21] It results from one of the legal decisions of the Supreme Administrative Court (SAC) that ascertainment of the fact alone that a subject applying for financial benefit from social assistance did not use own possibilities and rights, constitutes a prerequisite for dismissal of the complaint and refusal to grant assistance.[22]

In this situation it became necessary to create legal norms determining the objective and subjective scopes of the right to social assistance.

To the right to benefits from social assistance, if international agreements do not stipulate otherwise, are entitled Polish citizens if they live and reside on the territory of the Polish Republic, foreigners living and residing in Poland on the basis of settlement permit, having the permit for tolerated residence or a refugee status granted on the territory of RP and citizens of member states of the European Union or European Economic Area residing

[21] A. Miruć, *Zasada pomocniczości w prawie pomocy społecznej*, Administracja. Teoria. Dydaktyka. Praktyka, 2008, No. 3 (12), pp. 26–41.

[22] SAC sentence of 12 April 1994., SA/Gd 84/94, unpublished.

on the territory of RP with settlement permit.[23] The scope of subjects entitled to benefits has been determined and is subject to substantiation with relation to particular forms of assistance.

The individuals (families) who found themselves in a difficult life situation (dysfunction) and are not able to overcome it with their own financial resources and rights may apply for benefits from social assistance. The legislator, formulating the regulation of the Article 2 Section 1 of the Law on Social Assistance, employs underdetermined phrases since 'the notion of difficult life situations, possibilities of entitlement and resources' is not precisely defined. In order to determine the right content of the principle of subsidiarity the interpretation of the above-mentioned notions should be done.

The phrase 'difficult life situation' used by the legislator should be broadly interpreted and the limits of this interpretation are indicated by the Article 7 of the Law on Social Assistance which enumerates exemplary dysfunctions, among others: poverty, orphanhood, homelessness, unemployment, disablement, domestic violence, alcoholism, drug addiction, natural or ecological disaster, long-lasting or dangerous illness, the need for protection of motherhood or large family protection, helplessness in care and education, and household problems (especially in large and incomplete families), lack of skill in adaptation to life of young people leaving special education centres, difficulties in integration of people who were granted refugee status, difficulties in adaptation to life of people released from penal institutions. The exemplary list means that there may exist other premises for granting assistance e.g offence against property and that they cannot constitute a self-contained basis for refusal of instituting proceedings and granting benefits.[24] They are called social risk or social situations.

The types of situations justifying assistance indicate that the circumstances generating life difficulties are above all the reasons of individual character that is resulting from the fact of being a human, as well as environmental reasons resulting from membership to a society. Assigning a specific status quo to one of the mentioned groups of causes is not an easy task and depends on the circumstances of a specific case.[25]

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[23] Art. 5 of the L.S.A.

[24] G. Szpor, C. Martysz, S. Nitecki, *Komentarz do ustawy o pomocy społecznej*, Gdańsk 1999, p. 30.

[25] They are defined as social risk or social situations.

It should be emphasised that the scope of the notion of difficult life situations will be subject to change according to transformations occurring in socio-political and economic relations in the country.

However, the fact of using the phrase 'entitlements, resources and possibilities' underlines the fact that social assistance is applicable in such life situations which are estimated from the angle of resources, entitlements and possibilities of people applying for benefits from social assistance. Thus, an individual (family) should satisfy their needs individually using own resources, possibilities and entitlements.

The notion 'entitlement' appears to be an elementary notion of legal and law language constituting a determined term. The doctrine of the theory of law understands under the term entitlement a legal situation occurring for a given subject according to the obligation of the addressee of the norm of attitude directed towards the rights of the same subject.[26] In principle, the right to which a specific subject is entitled is connected to a possibility to claim from the addressee of the legal norm the realisation of the required behaviour.

The term 'resources' used in the Law relates to property situation of the entitled which determines the income, regardless of its title and source, mainly remuneration, savings interests and material goods and especially valuable objects like works of art, jewellery, cars and immovables. However, the term 'possibilities' should be understood mainly as psychophysical features, occupational qualifications, skills.[27]

According to the law in force, granting multiple forms of support (especially financial benefits) demands the fulfilment of definite formal requirements (revenue criterion) to avoid formation of a system of simple distribution of money and services. Granting financial benefits requires complying with income criterion which enhances the role of the principle of subsidiarity and the assistance really gets to people in need. This aspect of the principle of subsidiarity is reflected in regulations which concern determining property situation of persons (families) applying for benefits and return of benefits and bearing charges by beneficiaries of social assistance. The principle of subsidiarity relates both to financial benefits and care services provided in the environment or social assistance organisational units.

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[26] S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, pp. 163 and 165.

[27] J. Staręga-Piasek, *O roli prawa i wartościach w pomocy społecznej*, Polityka Społeczna 1998, No. 7, p. 10.

It should be added that limitation or refusal to grant a benefit might occur only in situations provided for in the Law on Social Assistance, that is mismanagement of benefits granted, intentional destruction of benefits, inappropriate use, mismanagement of own funds.[28] A person serving a penalty of deprivation of liberty is not entitled to benefits from social assistance and temporarily arrested persons are suspended from entitlement to benefits. Social assistance has the possibility to refuse a claim to return expenses for granted benefits which is also connected to the principle of subsidiarity. Organs of social assistance in particularly justified cases, especially if a request constituted a heavy burden for an obligated person or frustrated the results of assistance rendered, might abandon the return of unduly collected benefits on a request of social worker.

According to Polish legislation individuals and families who comply with the criteria defined in the Law on Social Assistance are entitled to claim for social assistance. Z. Leoński emphasises the fact that they may be treated as subjective law.[29] If the needs of individuals (families) correspond with goals and possibilities (especially financial) of social assistance they should be taken into account (Article 3 Section 4, Law on Social Assistance). Other solutions provide that a commune and a district (legally obliged to perform the task of social assistance cannot refuse social assistance to a person in need despite the existing obligation of private and legal persons (Art. 16 Section 2, the Law on Social Assistance).[30]

In connection with the fact that social assistance benefits are realised by public authorities the right to social assistance benefits can be defined as subjective right. The public subjective right of a person (family) means that in a situation when their needs cannot be satisfied with own resources, possibilities and rights they can legally and effectively request social assistance benefits from administrative organs after having complied with the statutory criteria.[31]

The right to social assistance is a public subjective right of persons (families) which gives rise to an obligation and not a favour when it comes to satisfying their needs. The right to social assistance results from the content of the Constitution of the Republic of Poland, the Law on Social

[28] Art. 11 and art. 12 of the L.S.A.

[29] Z. Leoński, *Materialne prawo administracyjne*, Warsaw 2003, p. 280.

[30] Subjects to which tasks in the sphere of social assistance were commissioned by the local government units cannot also refuse assistance – Art. 16 Sec. 3 of the L.S.A.

[31] J. Boć, A. Błaś, *Publiczne prawo podmiotowe*, in: *Prawo administracyjne*, edited by J. Boć, Wrocław 2005, p. 526–527.

Assistance and other legislative acts. The fact that in the Law on Social Assistance we find many regulations giving the possibility to grant benefits is the result of that Poland does not have sufficient financial resources for that purpose. In this situation discretionary rules demanding the sense of responsibility for the effects of social assistance from the workers of public administration (social workers) may serve better the achievement of its goals than inflexible regulations defining in detail the premises for granting social assistance. Discretionary rights do not transform a right into a mercy but increase the possibility to take into account different life situations and satisfying the most justified needs. When recognising the right to social assistance as public subjective right, protection procedure of its realisation should be ensured.

In the Law on Social Assistance the analysed principle was not regulated in the context of family relationships and duties.[32] Therefore granting social assistance does not in principle depend on the possibilities of support from closest relatives. Solely in the case of care services the problem of the so-called family help is brought up. The essential indication of the discussed principle is the question of assuring protection to children deprived entirely or partly of parental care as well as legal obligation to bear expenses for a stay in foster homes or other care institutions which is imposed on parents. When a family is not able to ensure care the duty is taken over by the district. The form of assistance defined by the law depends on personal situation of the child and final judicial decision on placing the child in a foster family is brought out by proper family courts.

4. Organisational aspect of the principle of subsidiarity

Another aspect of the discussed principle is expressed in the division of tasks in the sphere of social assistance between the state and local government and also between particular levels of local government.

In principle in Poland, local government is in charge of social assistance, especially on the level of communes and districts. The tasks of government administration are in this case of supervisory, programme, planning and legislative character. The duty of local government is satisfying the needs of local and regional communities, whereas social assistance is undoubtedly part of these needs. The significant part of tasks in the discussed field falls

[32] S. Golinowska, *Pomoc społeczna w koncepcjach współczesnego państwa opiekuńczego*, Polityka Społeczna 1998, No 7, p. 4.

to the commune. The tasks which exceed the financial and organisational possibilities of a commune are entrusted to bigger communities, the district and voivodship council.[33]

The main charge of realisation of social assistance tasks lies on local-government administration, since more complete recognition of occurring needs of citizens and selection of more effective forms and methods of administrating social assistance is possible on the level of local communities.[34] A commune (and also a district) being the closest to the people in need and providing social assistance, implements the above-mentioned principle of subsidiarity.

The tasks effectuated in the discussed sphere by the units of local self-government (commune, district) are generally connected to factual administering social assistance in financial and non-financial form to people in need. On the other hand, tasks performed by units of regional self-government (voivodship self-governments) are of more general, strategic character and are related above all to supporting communes and districts in their activity connected to granting social assistance benefits.

Tasks and competence of voivodes in the domain of social assistance involve above all reviewing the quality of services and control and coordination of activities in this sphere undertaken by the units of local government and have been limited significantly.

However, legislative and supervising functions (minister in charge of social security) and consultative-advisory functions (Council for Social Assistance) have been attributed to the central administration level.

The fact that organs of public administration performing tasks in the domain of social assistance, in the more and more broad scope cooperate on the basis of partnership with other subjects from outside the administration sphere. It is connected to a more and more developed specialisation of certain tasks, extension of range of operation of assistance granted, as well as the necessity to a more precise definition of the needs in this scope. Hence, organizational model of social assistance existing in Poland evolves in the direction compatible with the principle of subsidiarity determined in the Constitution of the Republic of Poland and the Law on Social Assistance.[35]

If an individual is unable to overcome life difficulties individually, they should turn for help to the communities closest to citizens. These com-

[33] I. Sierpowska, *op. cit.*, p. 48.

[34] Such a status quo occurs in practice in all Western European countries.

[35] A. Miruć, J. Maćkowiak, *Administracja pomocy społecznej w Polsce*, in: *Jednostka w demokratycznym państwie prawa*, edited by J. Filipek, Bielsko-Biała 2003, pp. 425–439.

munities, apart from local governments, may be, above all, non-governmental organizations. These institutions complement and frequently replace self-government administration in organizing help, take actions in favour of activation of people profiting from benefits, develop social initiatives, integrate people sharing the same problems. The cooperation of public authorities with non-governmental organisations is beneficial for administering and administered subjects. In this way the effectiveness of public tasks realisation and access to specific social assistance benefits and their quality are improved. It has measurable benefits to the citizens and their communities. The Supreme Administrative Court in one of sentences stated that according to the constitution, the principle of subsidiarity of the organs of commune with relation to community, individual citizens and their non-governmental organisations, the statutory duty of a commune, is to find optimal methods of cooperation with subjects administering social assistance.[36]

The problematic of including non-public subjects into realization of social assistance tasks is connected tightly to organizational aspect of the principle of subsidiarity. It is a beneficial phenomenon both to social assistance administration and to beneficiaries. Thanks to involvement of non-public subjects in social assistance, the access to specific forms of support is increased and the standard of services provided is elevated. Furthermore, commissioning tasks gives administration organs benefits in form of financial savings.

Many subjects offering direct help to people in need operate in Poland. According to a criterion of legal basis of operation the most significant role is played by associations, foundations and churches and religious associations. They are the most full expression of the idea of civil society and should constitute an equivalent partner to the local government. It appears that their involvement in performing social assistance tasks became necessary because of fast development of administration tasks in this sphere which administration is not able to carry out. Their activity fills the space between public administration and the citizen. Generally, their services are cheaper and more professional. First of all, they express social needs better.

The above discussed issue lets us repeat after I. Sierpowska[37], that the principle of subsidiarity may also be analysed in the sphere of administering assistance by the state and the units of local government to non-governmental organizations and other non-public subjects which fulfil vital social

[36] SAC sentence of 14 June 2001, II SA/Kr 911/01, Samorząd Terytorialny 2002, No. 6, p. 49.

[37] I. Sierpowska, *op. cit.*, p. 48.

assistance tasks. Therefore, we deal in this situation with the so-called indirect support of citizens whose needs are frequently satisfied by non-governmental organizations.

5. Final remarks

The principle of subsidiarity is the key legal construction of social assistance. Its multi-faceted character is, above all, the evidence of its complexity. Despite rich literature on this subject, a uniform, generally accepted definition of this principle has not yet been created. Even in the literature appear the views that it is an open notion and the principle is recognized as one being in continuous formation.[38]

The reflection of the discussed principle is found in the very legislative definition of social assistance. In the context of administrative-legal regulation, the postulate of enhancement of the rights of citizens and their communities which requires entrusting the right to individual realisation of any public task to lowest institutionalised local forms of social life, ensues from the assumptions of the principle of subsidiarity. Communities of higher rank and the state are to be a *subsydium* and should not perform public tasks which can be performed on a lowest level. The legislator, while creating the principle of subsidiarity wanted to avoid promoting people, who according to their own will would restrain from indispensable activity aiming at improvement of own life situation, being convinced that a proper organ of social assistance will replace them in supporting financially their family.[39]

The described principle has both positive and negative aspects. On the one hand, it requires helping those who are not able to get over the difficulties with their own funds, rights and possibilities and on the other, it forbids the state to hinder individuals (families) from their individual actions.[40]

The principle of subsidiarity appears to be a principle having significant importance in shaping the relation individual – community – public administration and which belongs to the so-called principles of administra-

[38] A. Dylus, *Idea pomocniczości a integracja europejska*, Państwo i Prawo 1995, No. 5, p. 61 and P. Haberle, *Das Prinzip der Subsidiaritat aus der Sicht der vergleichen Verfassungslehre*, Archiv des oöffentlichen Rechts 1994, Vol. 119, No. 2, p. 172.

[39] W. Maciejko, *Instytucje pomocy społecznej*, Warsaw 2009, p. 24.

[40] S. Nitecki, *op. cit.*, p. 96.

tive culture.[41] It may be analysed in the context of duties of the individual, assistance duties of third persons, and relations of social assistance to other benefit systems. The Article 2 Section 1 of the law on Social Assistance quoted repeatedly in the present study plays the role of a programme regulation, expressing the multifacetedness of the principle of subsidiarity as general principle of social assistance.

S U M M A R Y

The fundamental, multifaceted principle of social assistance provided for by the Constitution of the Republic of Poland and expressed in Article 2 Section 1 of the Law on Social Assistance is the principle of subsidiarity. Even though the legislator does not use the notion of subsidiarity it is easily interpreted from the Article. In the present study the principle is considered, above all, from two points of view: the first one related to situation of individual units (families) which should satisfy their needs individually using their own means, possibilities and entitlements, the second one connected to such organization of the state and such distribution of powers to situate them on the lowest level of organisation possible (a commune, a district).

[41] G. Łaszczyca, Cz. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, vol. 1, Warsaw 2007, p. 95.

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THE DYNAMICS OF THE DAMAGE CONCEPT IN THE CIVIL LAW – SELECTED ISSUES

1. Introductory remarks

The concept of "damage" appears in the language of different communities, regardless of what kind of values the operating law is subordinated to in the spheres where it functions. Without going into detailed theoretical issues, it should be noted that this concept goes beyond the area of social relations regulated by law. It has an interdisciplinary character and a long history. One can discuss damage not only in terms of economic and legal categories (although this is the most common aspect which appears in the colloquial language), but also in the moral and ethical dimensions and many other aspects. In all these areas, this is an important concept, but in the legal system in many cases it can constitute the essential category. Damage is associated with a universally accepted principle whereby a caused damage should be fixed. This is one of the fundamental assumptions protected by both public and private laws.

It should be emphasized that in both legal language and language of law damage is an abstract concept and as a generalization it requires filling with the content.[1] Referring to the role of this concept in the sphere of private law, it is necessary to clearly indicate that the key issue is to determine what damage is because it constitutes a basic premise of liability for damages.

Focusing on the issue of damages in the sphere of private law, it is worth remembering that, despite many wars and turmoil, private law is

[1] M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2008, p. 173 and the literature referred to there.

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characterized by stability of "the core of its fundamental institutions".[2] It is difficult to talk about this attribute in case of the law branches belonging to public law. This does not mean that private law has a static nature. The law operation is a specific process. Social relations are shaped by the law; at the same time, they affect its content – one deals with a feedback compression here.[3] The same can be said about the mutual influence of the environment, in which the law operates, on different concepts and solutions adopted by the legal order, including the concept of "damage".

It should be noted that particularly in the systems of positive law there is an unquestionable need to study the dynamics and content of the legal solutions. Such a need arises even because law regulates its own creation, in contrast to other systems of norms. The process, during which a legal norm is created, is governed by another legal norm. Typically, not only do they define the creation process, but by constitutional regulations they also indicate values which should be protected by the system of the created values. In the professional literature it is noted that the law cannot be defined otherwise than as a rule and order which should together serve to realize the idea of justice.[4] In other words, an act cannot be considered to be law if it is deprived of a legal nature. The law should not be associated exclusively with the operation of the state. As it has been pointed out by A. Stelmachowski, the identification of legal norms with the state's legislative activities and leaving all those standards of conduct that are not secured by the state compulsion result in the two very serious dangers: 1) cutting off the historical roots, 2) departure from the system values which constitute the immanent content of law.[5]

Having these general observations at the background, it is worth considering the content of the "damage" concept in the light of the provisions of the Civil Code, as well as the views presented in the literature and jurisprudence.

In the Polish legal literature, similarly as in the literature of other countries (especially those of the German legislation), damage is most commonly referred to as harm or legally protected property (interests). It is about injury expressed in the difference between the state property, which already

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[2] A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 11.

[3] A. Stelmachowski, *Zarys teorii...*, p. 16.

[4] G. Radbruch, *Rechtsphilosophie*, Stuttgart 1950, pp. 353–357; E. Bulygin, *Normative Positivism vs the Theory of Legal Argumentation*, in: T. Gizbert-Studnicki, J. Stelmach (eds.), *Law and Legal Cultutes in the 21st Century: Diversity and Unity*, Plenary lectures, Warszawa 2007, pp. 226–227.

[5] A. Stelmachowski, *Zarys teorii...*, p. 16.

existed and which could subsequently arise in the normal way of things, and the state created as a result of the event causing a change in the existing state of things, which is legally associated with liability for damages.[6] In case of damage we deal with the imbalance in the sphere of legally protected goods and interests. The weight of that balance restoration has been moved by the legislature on a subject other than the victim. The rule is that a legal provision or an agreement indicates who is responsible for fixing a damage. In case of the classical design of the liability for damages, it is not important whether the person responsible has benefited from the event causing the damage.

Based on the above definition of damage, it can be concluded that the content of the damage concept has a significant impact on which property (interests) are classified by law into the sphere protected by it. Basically, a sphere of legally protected property is dynamic. A characteristic feature of this phenomenon is the fact that with the development of civilization the area of the legally protected property expands. Moreover, in retrospect, there appear directions of growing protection. It is enough to mention that in the beginning in the Roman law the concept of damage included a property damage experienced by someone as a result of certain acts, abandonment or coincidence. Only easily visible changes in the surrounding reality (eg. destruction of things) were considered to be a damage.[7]

Reflecting on the type of the protected property, even without a detailed study it can be stated that especially in recent decades, it is clear that more attention is paid to the protection of intangible property. This remark applies to physical and legal persons, consumers and businesses and other legal entities. Various considerations determine that intangible property are becoming increasingly important in legal transactions. Entrepreneurs perceive primarily an economic dimension of this property. Other people recognize its unique importance (especially personal property) and a frequent practical impossibility of their natural restitution.

In addition, there arises one more general remark. The experiences of the so-called countries of people's democracy clearly indicate that the nature and extent of the legally protected property and interests are dependent not only on the progress of civilization, but also on the political system, which

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[6] T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego. Prawo zobowiązań – część ogólna*, Wrocław – Warszawa – Kraków – Gdańsk – Łódź 1981, p. 214 and the literature referred to there.

[7] A. Szpunar, *Odszkodowanie za szkodę majątkową. Szkoda na mieniu i na osobie*, Bydgoszcz 1998, p. 45.

affects the content of the damage concept. It is also worth noting that in the unacceptable system sooner or later there appears a sharp discord between a social sense of damage (injury) and the values protected by law.

2. Evolution of the general concept of damage

In the Civil Code provisions[8] the concept of "damage" appears repeatedly, which highlighted the necessity of determining its content by means of various techniques of legal interpretation.[9]

Bearing in mind legal solutions accepted by the Code of obligations[10], in the professional literature[11] two concepts of damage are present: the first one, narrow, marks only damage to property; the second one, broad, also envelopes moral damage or moral harm. As it has been stressed, property damage is determined by comparing the financial status of the injured person to the state that would have existed had it not been for the fact of the damage caused. In this comparison it is visible that the essence of the problem is either some reduction in the property, or the lack of the increase which could be expected in the ordinary course of affairs. On this basis, within the property damage concept it was possible to distinguish between the loss (*damnum emergens*) and the expected benefit or the lost profit (*lucrum cessans*). Decades ago, F. Zoll stressed that, according to the legal concepts (not to the science of economics which does not consider the individual as property), property damage also includes injuries caused to the body, freedom and honor if it involves reduction of labor force which the individual presents or will present.[12]

In terms of the Code of obligations a moral damage involved only pain (suffering) which was experienced by the victim (physical pain and mental-moral pain). Compensation for the pain by paying a sum of money was justified by the thought that the pain should be compensated by ple-

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[8] The Law dated April 23, 1964. The Civil Code, Journal of Laws Nr 16, pos. 93 with later amendments.

[9] On the relationship between interpretation and law see J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999, p. 7. Paraphrasing the words of the author – "there is no law before interpretation", one can say that in terms of law there is no damage before its interpretation.

[10] Regulation of the President of the Republic of Poland dated October 27, 1933 The Code of Obligations, Journal of Laws Nr 82, pos. 598 with later amendments.

[11] F. Zoll, *Zobowiązania w zarysie według polskiego kodeksu zobowiązań*, Warszawa 1945, p. 80.

[12] *Ibidem.*

asure to those who suffered, and in the absence of other means it can be an adequate sum of money. In the legal literature it was pointed out that this sum should be big enough to be perceived as the equivalent for the experienced pain.[13]

There is a similar tendency of listing the types of damage both in the Code of Obligations and the Civil Code when it entered into force. Often damages are divided into different groups according to their causes. Given this criterion, one can distinguish: 1) damage caused by one's own actions, 2) damage caused by the acts of other person, 3) damage caused by animals and stuff, 4) damage caused in connection with the use of natural forces.

Certainly, the idea represented by the majority of the representatives of the science[14] that the damage concept has not been strictly defined in the regulations of the Civil Code is right. It should be noted that in the professional literature there are also opposing views, according to which the general concept of damage has been formulated in the art. 361 § 2 of the Civil Code. Its content is revealed by the statement that in the absence of the separate provision of the Act or the provisions of the agreement, fixing the damage includes the loss which the victim has suffered and the benefits that he could have achieved if the damage was not done to him. However, these views do not consider the fact that this provision focuses only on the issues of the damage eligible for fixing, and not damages in general.[15] In this situation, the question arises whether in the absence of the legal definition it is not enough to understand the term "damage" as it is accepted in everyday language? It is necessary to admit that this direction of interpretation is not excluded by many representatives of theory and jurisdiction.[16] (However, this does not mean the principle *clara non sunt interpretanda*).

It seems that there are arguments to defend the position that a statutory definition of damages is not necessary. First of all, the validity of such a definition would provide a basis for formulating a plea of the excessive content narrowing due to the dynamism of the concept. Nevertheless, some doubts remain. T. Dybowski has expressed the opinion that a colloquial understanding of damage does not solve the problem due to its ambiguity and

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[13] *Ibidem.*

[14] M. Kaliński, *Szkoda na mieniu...*, p. 173 and the literature referred to there.

[15] *Ibidem.*

[16] See, for example M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, p. 362; J. Winiarz, *Obowiązek naprawienia szkody*, Warszawa 1970, p. 19; W. Czachórski, *Odpowiedzialność odszkodowawcza w ramach tzw. ujemnego interesu umowy*, Ruch Prawniczy Ekonomiczny i Socjalny 1968, nr 3, p. 118.

multiplicity of the events which are attributed to this word.[17] W. Warkałło has presented the view that in the civil law damage should be recognized as a technical-legal concept.[18]

Pointing to the examples of different views on the concept of damage, one cannot forget the criterion of the damage disadvantageousness evaluation when applied to property and legally protected interests. In this regard, in the Polish literature one may highlight the opinion according to which the damage caused to the victim should be objectively disadvantageous[19] and the view that the negative assessment of the difference in the estate of the victim is to be made from the standpoint of the interests of the injured person, that is, taking into account the subjective criterion.[20] It seems that this problem should be settled by the court in each case after taking into account the state of things existing at the time of sentencing. A schematic approach to this issue could affect the realization of the idea of justice.

Goods enjoyed by the entities of the civil law have a dynamic character and their scope is subjected to changes. Consequently, a similar dynamic character is revealed by damage. In this situation it seems that the most appropriate and reasonable concept of damage is offered by T. Dybowski.[21] The author concludes that property and interests that have been affected by damage should be understood as everything that satisfies material and spiritual needs and goals of the victim. Harmfulness of changes in the property and interests means reducing the ability to satisfy the needs and legally protected goals of the victim by the damaged property and interests. While damage is determined, legally protected property and interests are mentioned so that, for example, lost illegal profits are not regarded as a damage.

This definition reveals a value of versatility. Reflecting on the practical consequences of adopting a universal definition of damage, it is easy to notice that the lack of clear regulatory guidance may affect a broader "judicature creativity". At this point one can repeat after A. Stelmachowski[22] that here we are dealing with a fundamental contradiction that occurs in the legal system: the postulate of a stable legislation adapted to the social needs

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[17] T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego...*, p. 213.

[18] W. Warkałło, *Odpowiedzialność odszkodowawcza. Funkcje. Rodzaje. Granice*, Warszawa 1972, s. 123.

[19] M. Kaliński, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6, *Prawo zobowiązań – część ogólna*, Warszawa 2009, p. 77 as well as the views presented there.

[20] T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego...*, p. 215.

[21] *Ibidem*, p. 217.

[22] A. Stelmachowski, *Zarys teorii...*, p. 305.

alongside the need to flexibly adapt the law to ongoing changes and an active role played by law. The author highlights that the inevitable consequence of this situation is and must be the court legislation. Recognizing the real state of things should primarily lead to the intensification of the judge's sense of responsibility. Bearing in mind the fact that such a sense was always strongly present in English judges (leading to a far-reaching abstinence in the use of the ability to create precedents), there is no reason why it should be different in case of Polish judges.[23] The authors of this paper believe that there is no need to justify the statement that promoting a stronger position of judges implies much higher requirements put on the holders of the judicature offices. Incidentally, it is worth pointing out the importance of the issue illustrated by the role of the judge in times of law-making floods, the rules which are very far from perfection, and the increased use of "legislative machinery" to "fix" the problems of temporary character and faith that the very issue of regulations will solve prevailing problems. In this context the remark that to a great extent the value of the judiciary standards is established by good judges rather than by laws is very valid today.[24]

3. Some classifications of the "damage" concept

In the legal literature there is no uniform and static criteria for the classification of "damage". This problem is still the subject of keen interest because of the need for understanding and clarifying the matter being the subject of the legal regulation. In addition, it results from the fact that along with technical advances invading every sphere of life, an individual damage can be seen increasingly in other aspects and dimensions.

In the professional literature and judicature, in addition to the typical division into property and non-property damage or damage to the name and damage to the person, there are new classifications and interpretations of damage formulated on the basis of diverse criteria.

In theory and judicial decisions of the courts a classification of damage into direct and indirect damages has been accepted. A direct damage appears when the harm caused to legally protected property and interests applies to people directly affected by it, whereas indirect damage affects other subjects. In other terms, the criterion of distinction of these two types of damage

[23] *Ibidem*, p. 306.

[24] *Ibidem*, p. 308.

is the category of causation, and so direct damage is the damage which is related by direct causal relationship (*causa proxima*) with the event causing the damage. It is usually indicated that the direct damage characteristic feature is the ability to fix it by means of restitution, while generally indirect damage can only be repaired by money.[25] In principle, natural restitution is also impossible in case of damage to a person.

Other variants of damage have a shorter history. For example, it can be indicated that literature uses the term "future damage" in the context of art. 444 § 2 of the Civil Code which foresees a claim for a pension (due installments and unmatured installments)[26] in the situation where the victim has fully or partially lost his earning capability, or if his needs or future chances of success have decreased. One can argue with such a way of defining a future damage noting that this provision tackles generally the damage that already exists, since according to the art. 444 § 2 of the Civil Code, the victim has already lost the property specified in that provision.

It seems that a future damage can be discussed clearly in the context of the resolution of the Supreme Court, which includes the thesis that in case of damage repairs resulting from the body injury or harm to one's health the award of a certain benefit does not preclude a simultaneous determination of the defendant's liability for any damage that may arise in the future due to the same event.[27] The above-mentioned decision refers to the state of affairs that may arise in the future in the sphere of the property protected by law; it does not refer to the ways of how to repair the damage which already exists.

A frequently used controversial concept of a "possible damage" including the loss of chances or hope is worth noting.[28] A possible damage differs from the lost benefits by the degree of probability of the realization of chances or hope. The boundary between these two concepts is usually very delicate and difficult to establish. A possible damage resulting from the loss of chances is dealt with when the probability of its beneficial realization is less than highly probable. Therefore, the problem is concentrated in the proof of the probability degree of the benefit obtaining – the task which belongs to the court. Previously, it should be established whether the damage was

[25] T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego...*, p. 217.

[26] A. Śmieja, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6..., p. 686.

[27] Resolution of the Supreme Court dated April 17, 1970, III PZP 34/69, OSNC 1970, nr 12, pos. 217.

[28] M. Kaliński, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6..., pp. 103–104 and the views presented there.

covered by the indemnity obligation. While considering the issue whether a future damage should fall within the indemnity obligation, it is necessary to point out that already a few decades ago in the jurisdiction there was a case of the compensation liability of the exclusion from the competition participation[29], negligence by a legal representative for the purpose of litigation who failed to introduce attempts to realize the claim the victim was entitled to.[30] It should be emphasized, however, that in these situations the court found a high degree of probability of obtaining specific property values by the victim. Again, it is possible to conclude that there can be no question of a schematic approach to a practical significance of the possible damage.

In connection with the unification processes in Europe the terms "purely property damage" and "purely economic damage" have appeared in the professional literature. This type of damage appears as the effects of unfair competition or violation of *know-how*. In practice, determination of the damage can be very difficult. It is recognized as an injury resulting regardless of the violation of any subjective law meant to serve the victim. In the framework of the protection criterion established in art. 361 § 1, 415, 471 of the Civil Code, determination of purely property damage award under the Polish law is relevant only if the regulations limit the compensation for damage to the property or person, which excludes a purely property damage from the scope of indemnification.[31] In the framework of the Polish regulations such cases are rare. Moreover, in the Polish professional literature one can notice the view that a purely property damage is a kind of damage to property.[32]

Bearing in mind its practical importance, it is necessary to mention the term "commercial damage" functioning not only in everyday language. This concept was formed in Poland on the basis of the judicial decisions dealing primarily with the damage caused to motor vehicles (cars). So, in 1971 the Supreme Court stated that if, as a result of the repair, the damaged car was restored to its original state, the car owner could not claim the award in addition to the sum of money equivalent to the lowering of the car

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[29] Decision of the Supreme Court dated April 28, 1969, II CR 72?69, OSPiKA 1970, nr 3, pos. 63.

[30] Decision of the Supreme Court dated November 16, 1962, III CR 8/62, PiP 1964, nr 7, p. 167.

[31] M. Kaliński, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6..., p. 100.

[32] B. Lewaszkiewicz-Petrykowska, *Szkoda jądrowa na osobie i mieniu*, in: S. Sołtysiński (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy)*, Poznań 1990, p. 311.

"commercial value".[33] And in 2001 the Supreme Court resolved that, apart from the car repair expenses, the compensation for the car damage can also cover a sum of money, corresponding to the difference between the value of the vehicle before it was damaged and after it was repaired.[34]

In connection with the damage caused by traffic accidents and covered by transport insurance there has also appeared the concept of "total damage". This concept occurs in the judicial decisions of the courts[35] and concerns a way of repairing the damage in cases when the perpetrator of the accident and the insurer are fully responsible for the damage.

Considering different classifications of the "damage" concept made by the judicature and professional literature and especially justified by the so-called current needs of practice (as demonstrated by the examples above), it should be noted that they focus mainly on the damage to property. In the sphere of the normative matter, it is characteristic that changes made to the Civil Code in recent years did not relate directly to the concept of "damage" itself, but they generally relate to the issues of personal damage and financial compensation.[36] It is enough to mention here the provisions of articles 446 § 4, 445, 448 included in the title of VI Civil Code – Unlawful acts.

4. The dynamics of the "non-property damage" term in the background of the Civil Code regulations and judicial decisions of courts

Within the category of damage to person, it is possible to distinguish property damage (any costs associated with fixing the harm) and non-property damage (pain and moral suffering). The terminology used in relation to non-property damage is not uniform. In the legal literature and judicial decisions of courts one can find such terms as "moral damage", "non-material damage," and "harm.[37] The latter term to denote

[33] Decision of the Supreme Court dated February 3, 1971, III CRN 450/70, OSNC 1971, nr 11, pos. 205.

[34] Resolution of the Supreme Court dated October 12, 2001, III CZP 57/01, OSNC 2002, nr 5, pos. 57. An approbative note was written by A. Szpunar, OSP 2002, nr 11–12, pos. 61.

[35] Decision of the Supreme Court dated January 29, 2002., V CKN 682/00, LEX nr 54343.

[36] For more information about compensation see J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.

[37] See A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, Bydgoszcz 1999, p. 64 and following.

non-property damage is used by the legislator in the above-mentioned provisions of the art. 446 § 4, 445, 448 of the Civil Code. It is worth referring to their content in order to present the property and interests protected by law under the Civil Code because, as it has already been stated, in the development of the Polish civil law there is a tendency to expand the scope of application of the damage compensation institution as an instrument of rewarding the non-property damage resulting from a civil offense.

According to § 1 of the article 445 of the Civil Code, in cases specified in the art. 444 of the Civil Code, and therefore in cases of injury or harm to health, the court may award the victim an adequate sum in compensation for the damage suffered. The second paragraph of the art. 445 of the Civil Code states that the court may also award compensation in case of deprivation of liberty and persuasion to conduct an indecent assault through deception, violence or abuse of dependence. In addition to life and health, which are the most important personal values of individuals, the Polish legislator also gives a special legal protection to such personal rights as freedom and sexual integrity.

One of those provisions, Art. 446 § 4 of the Civil Code, introduced the possibility to claim the damage award in the event of harm arising from the death of a close family member. It should be noted that the previous regulation[38] relating to the situation of indirectly affected persons allowed only for the appropriate compensation if, as the result of a close family member's death, there appeared a significant deterioration of one's living situation (art. 446 § 3 of the Civil Code). Although the jurisdiction based on that regulation indicated that it could also be used with non-material damage involving the deterioration of the objective living position of the victim in the external world[39], many representatives of the legal doctrine[40]

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[38] Amendment of the art. 446 of the Civil Code was introduced by the law of May 30, 2008 (Journal of Laws No. 116, pos. 731), it entered into force on August 03, 2008.

[39] As a result of the Supreme Court decision dated July 22, 2004, II CK 479/03, Prawnik nr 24010, Also see the decision of the Supreme Court dated February 17, 2004, II CK 17/03, LEX nr 328991, and the decision of the Supreme Court dated November 30, 1977, IV CR 458/77, LEX nr 8032.

[40] Particularly, A. Szpunar, *Wynagrodzenie szkody wynikłej wskutek śmierci osoby bliskiej*, Bydgoszcz 2000, p. 145 and following.; W. Czachórski, in: *System prawa cywilnego*, Vol. III, Part 1, Wrocław – Warszawa 1981, p. 676; Z. Radwański, *Zobowiązania – General Part*, edition 4, Warszawa 2003, p. 231; Differently S. Garlicki, *Odpowiedzialność cywilna za nieszczęśliwe wypadki*, Warszawa 1971, p. 472; M. Wałachowska, *Wynagrodzenie szkód poniesionych na skutek doznania wstrząsu psychicznego spowodowanego śmiercią osoby bliskiej*, Przegląd Sądowy 2004, nr 7–8, pp. 63–64. These authors pointed to the mixed nature of the claim specified in § 3 of the art. 446 of the Civil Code, seeing in it the elements of both property and non-property elements.

claimed that the regulation contained in § 3 art. 446 of the Civil Code applies only to compensation for intangible and unquantifiable special property damages related to a general deterioration of the situation caused by a close family member's death. It was indicated[41] that the regulation does not foresee a possibility to mitigate or reduce pain after losing a close family member. A personal property, that is attachment to a close person, should not be protected by financial means (eg. pecuniary compensation).[42]

The recently introduced amendments to the Civil Code relating to the possibility of awarding damages in the form of an appropriate sum of money in the event of the loss of a close family member has removed the discrepancies presented above, clearly indicating that a feeling of attachment to a close family member can be a personal property. Thus there was created a situation in which it became necessary to establish the boundary line between property damage and non-property damage which results from the loss of a close person.[43] In many cases, the establishment of a significant deterioration of a living situation referred to in § 3 will involve the same facts that would justify an infringement of a personal interest under § 4 of the art. 446 of the Civil Code. For example, in case of the parent's death a child loses support and a sense of security, parent's help in organizing everyday life and a chance to be supported in the future. A similar situation takes place when, as a result of a close family member's death, a person loses his care and signs of daily concern, which, according to psychologists, has a positive influence on the personality development. These circumstances can justify *in casu* the claim for compensation on the basis of a serious deterioration of a living situation as well as compensation under the art. 446 of the Civil Code which can lead to the phenomenon which is undesirable from the standpoint of law, that is an award of the double benefit.[44]

It should also be noted at this stage that before the introduction of a compensation in the form of an appropriate sum of money for those indirectly affected (the art. 446 § 4 of the Civil Code), there were attempts

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[41] A. Szpunar, *Wynagrodzenie szkody wynikłej wskutek śmierci…*, p. 143 and following.

[42] According to the saying *"Les larmes ne se monnaient pas" – Money cannot dry one's tears.*

[43] In the foreign literature this type of damage is called the ricochet damage: "*le dommage par ricochet*", because the claim is entitled in connection with the death of the person directly injured. See Y. Lambert-Faivre, *Droit du dommage corporel. Systèmes d'indemnisation*, éditions Dalloz, Paris 2004, p. 283 and following.

[44] Therefore, much will depend on the assessment of the court, the so-called judicial law will decide not only on the amount of the awarded claim, but also on their appropriate qualifications. See Z. Strus, *Uwagi o odszkodowaniu w razie śmierci najbliższego członka rodziny*, Prawo i Medycyna 2010, nr 3, p. 86 and following.

to compensate the harm resulting from the death of a close person under the provisions of the art. 448 of the Civil Code, which gives the victim the opportunity to claim compensation in case of infringement of any personal property (including property in the form of attachment to the dead person).[45] Without going into details regarding the mutual delimitation of these regulations[46], it should be noted that under the article 448 of the Civil Code the interpretation of the term "personal property" is essential. Jurisdiction arising in connection with this provision allows to grasp dynamic changes taking place in relation to the concept of non-property damage of the person.

It is possible to distinguish one of the decisions taken by the Supreme Court on February 28, 2007[47], in which it was stated that serving prison sentences in overcrowded wards with an unseparated toilet, poor sanitary facilities, insufficient bedroom capacity and inadequate ventilation can be a manifestation of humiliating treatment, leading to the violation of the dignity of persons deprived of their liberty. Under the Polish law it can justify the request of compensation award under the article 24 of the Civil Code[48] in conjunction with the article 448 of the Civil Code as a violation of the offender's personal rights, that is dignity and the right to privacy. To support the decision, the court emphasized that under the article 30 of the Polish Constitution the inherent and inalienable dignity of man is inviolable, and its respect and protection is the duty of public authorities. This obligation should be implemented by public authorities, especially wherever the state acts within the empire, carrying out their repressive tasks, whose exercise

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[45] As a result of the decision of the Appeal Court in Gdańsk dated August 23, 2005, I ACa 554/05 with the note by M. Wałachowska, Przegląd Sądowy 2007, nr 1, p. 135 and following. This view was shared by several representatived of the legal doctrine, See B. Lackoroński, *Zadośćuczynienie pieniężne za krzywdy wynikłe ze śmierci najbliższego członka rodziny na podstawie art. 446 § 4 k.c.*, Palestra 2009, nr 7–8 (Part 1), p. 19 and following and nr 9–10 (Part 2), p. 36 and following.

[46] Regarding a mutual relation between the art. 445 of the Civil Code and 448 of the Civil Code see M. Safjan, *Ochrona majątkowa dóbr osobistych po zmianie kodeksu cywilnego*, Przegląd Prawa Handlowego 1997, nr 1, p. 10 and following; A. Szpunar, *Przesłanki przewidzianego w art. 448 k.c. zadośćuczynienia*, Przegląd Sądowy 2002, nr 1, p. 7; B. Lewaszkiewicz-Petrykowska, *W sprawie wykładni art. 448 k.c.*, Przegląd Sądowy 1997, nr 1, p. 7. Regarding a mutual relation of the art. 448 of the Civil Code and 446 § 4 of the Civil Code see. B. Lackoroński, *Zadośćuczynienie pieniężne za krzywdy wynikłe ze śmierci najbliższego członka rodziny na podstawie art. 446 § 4 k.c.*, Palestra 2009 nr 9–10 (Part 2), p. 37 and following.

[47] V CSK 431/06, OSNIC 2008, nr 1, pos. 13.

[48] In accordance with the art. 24 of the Civil Code and according to the principles given there, the one whose personal interests have been violated, may demand a financial compensation or an adequate amount of money for the charity.

should not lead to a greater reduction of human rights and dignity, than the one resulting from the protective tasks and measures of repression.

In another decision[49] the court pointed out that providing inaccurate information regarding the collection and storage of personal data may justify the protection provided for by the art. 23 and 24 of the Civil Code, if it resulted in the violation of personal property. In this case the personal property subjected to protection was the informative autonomy of the person who was several times denied a bank loan in different banks because of the report sent by the defendant bank, which concluded that the plaintiff was an unreliable debtor. At the same time the sued bank assured the plaintiff that there was no data regarding her repayment of the bank loan. In that factual state the court additionally found violation of the plaintiff's reputation by disseminating false information about the accumulations of the repayment of the loan, as well as violation of her property in the sense of confidence and security, understood as the ability to understand one's own situation and direct it on the basis of reliable information. Therefore, there appeared damage caused by violation of the personal rights which required a compensation.

An interesting case regarding the determination of the type of damage was dealt with by the European Court of Human Rights[50] which decided that the Polish court, basing on the repeated psychiatric examination (a total of five times) in a relatively short period of time in trivial and similar cases, did not keep a due balance between the right to respect the private life of individuals and the interests of justice, hence, the aggrieved had to be compensated.

In the decisions of May 29, 2007[51] and October 14, 2005[52] the Supreme Court expressed the view about the possibility of awarding the damages in the event of patient rights violation, and not only when the damage is a consequence of the caused injury or health disorder. A patient has the right to compensation even if non-property damage is the result of the lack of his consent to treatment, and if, in connection with the offered health care violation of his dignity and intimacy takes place. Currently, the basis

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[49] Decision of the Supreme Court dated February 15, 2008, I CSK 358/07, OSNIC 2009, nr 4, pos. 63.

[50] See the decision of ECHR of November 27, 2003, the case of W. against Poland, Rzeczpospolita 2003, nr 283.

[51] V CSK 76/07, OSNIC 2008, nr 7–8, pos. 91 with the note by M. Wałachowska, Przegląd Sądowy 2009, nr 5.

[52] III CK 99/05, OSNIC 2006, nr 7–8, pos. 137 with the note by K. Bączyk-Rozwadowska, Przegląd Sądowy 2008, nr 5 and M. Świderska, OSP 2008, nr 6, pos. 68.

for awarding compensation in the event of culpable violation of patient's rights is the article 4 of the Act of November 06, 2008 on the rights of the patient and patients' rights spokesman[53] in connection with the article 448 of the Civil Code.

The issue of the damage to a person as well as the recognition of new features and positions within this concept is evident particularly against the background of judicial decisions in the so-called medical cases. It is worth considering some of the court decisions for they undoubtedly determine the future directions of the doctrine and judicature in the sphere of the damage to a person.

5. The concept of damage in the so-called medical cases

The first decision[54], which dealt with an unusual damage to a person, was taken in case brought by Małgorzata A., who claimed that due to the incorrect diagnosis of the stage of her pregnancy she was prevented from obtaining a prosecutor's certificate that the pregnancy was the result of rape. The plaintiff argued that a medical error involving an erroneous interpretation of the ultrasound caused her deprivation of the right to abortion.[55] These events are in an adequate causal connection with the birth of the unwanted child, and therefore the *wrongful birth* damage. The plaintiff claimed the defendant to order 20 000 zł to be paid as a compensation for violation of her personal rights (Art. 448 of the Civil Code), compensation for the loss of earnings amounting to 15 000 zł and a pension of 800 zł per month equivalent to the cost of the baby's living.

The factual state presented in this way has become a canvas for considerations regarding the admissibility of the complaint for *wrongful birth* in the Polish law, and, in case of its admission, the scope of compensatory claims.

First of all, the establishment of non-property damage was problematic. The Supreme Court in justifying its decision mentioned the violation of the plaintiff's freedom as a result of forcing her to give birth to a child born of

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[53] Journal of Laws dated 2009, Nr 52, pos. 417.

[54] Decision of November 21, 2003, V CK 16/03, OSNC 2003, nr 7, pos. 104 with the notes by S. Rudnicki, Monitor Prawniczy 2004, nr 10; T. Justyński, Państwo i Prawo 2004, nr 9; M. Nesterowicz, OSP 2004, nr 10, pos. 25.

[55] Article 4a. Act 1 item 3 of the Act of January 7, 1993 on family planning, protection of the human fetus and conditions for the admissibility of abortion, Law Journal Nr 17, pos. 78, later amended.

the rape crime. In the Polish law, abortion is permissible only before the fetus completes 22 weeks of age, for this age makes it possible for the child to survive outside the mother's body.[56]

S. Rudnicki questioned the accepted construction of damage resulting from the violation of the woman's right to decide about her personal life (the right to abortion). The author argued that the right to abortion is not identical to personal property in the meaning of the article 23 of the Civil Code. The right to abortion is an exceptional solution; it constitutes a deviation from the principle of respect for the life of *nasciturus*, and, therefore, it is considered to be a "lesser evil". Hence, it cannot be any "property". Since the right to abortion is not a personal property, then a claim resulting from the violation of personal property cannot appear here.[57]

In contrast, T. Justynski emphasized the fact that the right to abortion is a legal right, that is a legal sphere of certain conduct granted and protected by the legal norm, the violation of which should have legal consequences. The right to abortion is the result of the legislator's decision to solve the conflict taking place between the woman's right to self-determination and the unborn child's right to life. Therefore, it has been granted to protect the right to self-determination which is a personal property.[58]

Obviously, the statement of the above-mentioned author reveals an extremely positivist approach to the civil law (if the legislator has regulated certain issues, they have to have certain legal consequences) as well as disregarding the system of values which constitute the immanent content of the law.

In this context it is necessary to notice the valuable argumentation presented in the resolution of the Constitutional Tribunal of May 28, 1997[59], which points out the collision of the two rights, which is typical for the counter-type. On the one hand, there is the right to abortion, on the other hand, there is the unborn child's right to life. In the Polish law a permission to abortion is reserved to exceptional situations. Hence, treatment of the

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[56] The court dismissed the claim for compensation, but only for the reason that the events on which the plaintiff relied, took place under the art. 448 of the Civil Code; in its previous formulation it did not provide the possibility of awarding compensation to the injured party. However, since the content of the provision was changed, now, depending on the determination of whether there is a violation of personal property, an award of compensation for the victim in such cases remains an open question.

[57] See the author's note cited in the footnote 54.

[58] See also T. Justyński, *"Wrongful conception" w prawie polskim*, Przegląd Sądowy 2005, nr 1, pp. 43–44. See also M. Nesterowicz, in the note to the decision of the Supreme Court dated November 21, 2003, see the footnote 54.

[59] K. 26/96, OTK 1997, nr 2, pos. 19.

right to abortion as a component of the right to family planning is unauthorized. It is not possible to consider whether to have a child (family planning) when the child is already conceived.[60]

This argumentation is shared by A. Górski[61] who also indicates that a collision of different values and interests in the sphere of legal protection should lead to their proper balance. Giving priority to a given permission cannot lead to the destruction of the competitive property, that is the unborn child's life. The author concludes that in the jurisdiction the observed trend is to identify specific powers granted by law (the right to abortion) with the content of personal rights is not justified.[62] Such a trend is sufficient on neither normative nor theoretical grounds.[63]

The above-mentioned case had its continuation. In connection with its withdrawal to be re-examined, Małgorzata A. expanded her claim demanding covering the child's living expenses until the child reached the capacity for an independent living. She indicated that the child requires constant care due to his sickliness; the mother could not work and pay both for the child's care and their maintenance costs. The plaintiff also claimed the reimbursement of the expenses and costs associated with pregnancy and childbirth, and her lost income.

The presented claims resulted in considerable controversy at various stages of the case. At the center of the discussion there was a question of the scope of compensation, which is due in cases resulting from *wrongful birth*.

In the professional literature and jurisdiction[64] there is a position that

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[60] See also M. Wild, *Roszczenia z tytułu "wrongful birth" w prawie polskim (uwagi na tle wyroku SN z dnia 21.11.2003 r., V CK 16/03)*, Przegląd Sądowy 2005, nr 1, p. 49 and following.

[61] A. Górski, *Roszczenia związane z uniemożliwieniem legalnego przerywania ciąży w aktualnym orzecznictwie Sądu Najwyższego*, Przegląd Sądowy 2007, nr 5, p. 29 and following.

[62] Also A. Górski, J. P. Górski, *Zadośćuczynienie za naruszenie praw pacjenta*, Palestra 2005, nr 5–6, p. 89.

[63] For example, see P. Sut, *Problem twórczej wykładni przepisów o ochronie dóbr osobistych*, Państwo i Prawo 1997, nr 9, p. 31 and following.

[64] See the literature and jurisdiction referred to by T. Justyński in: *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Kraków 2003; Z. Pepłowska, *Odpowiedzialność cywilna lekarza z tytułu "wrongful life, wrongful birth, wrongful conception" w prawie USA*, Prawo i Medycyna 2004, nr 1, p. 100 and following; M. Nesterowicz, *Odpowiedzialność cywilna lekarza wobec narodzonego dziecka z tytułu "wrongful life" w prawie francuskim*, in: *Prawo, społeczeństwo, jednostka. Księga. Jubileuszowa dedykowana Prof. Leszkowi Kubickiemu*, eds. A. Łopatka, B. Kunicka-Michalska, S. Kiewlicz, Warszawa 2003; by the same author, *Odpowiedzialność cywilna lekarza i szpitala za "wrongful conception, wrongful birth, wrongful life" w orzecznictwie europejskim (2000–2005)*, Prawo i Medycyna 2007, nr 3, p. 19 and follwoing

compensation should envelope all the costs resulting from the fact of the child's birth.[65]

In particular, the following costs are mentioned: the costs related to pregnancy and childbirth, reduced earnings of parents and the child's living expenses. The adoption of this compensation concept is possible with the distinction of the person of the child (as a specific value) on the one hand, and the maintenance costs – on the other hand. It is indicated that these values are not mutually exclusive. The violation of legal interests should not be left without a civil penalty only because the damage occurred in connection with the birth of a person.[66]

The decision of the Supreme Court dated February 22, 2006[67] partly referring to the above-mentioned concept considered that the subject responsible for unlawful preventing from the abortion procedure in case of pregnancy resulting from rape when the perpetrator has not been detected will cover the child's cost of living which the mother is not able to pay for.

Justifying its decision, the court emphasized that when deciding to give birth a child, the mother agrees to bear partly the cost of the child's living. A damage is the dimension of the cost of living and education, for which social support is needed. Hence, the court referred to the social argumentation. Recognizing the mother's need to face certain costs, the court decided that, because of her financial situation, part of the costs should be borne by the subject responsible for unlawfully preventing the mother from the abortion procedure after the rape. Justification for the claim limitation may be questionable because it was dependent on the specific financial situation of the mother. In addition, using social argumentation in the case where the defendant is a municipality as a *statio fisci* of the healthcare institution can be understood. However, a similar reference in the relation between the patient and independent healthcare institution would be ineligible. Therefore, the above-mentioned judgment cannot determine a generalized model of conduct in other cases regarding *wrongful birth*.

In another decision of the Supreme Court of October 13, 2005[68] it was stated that if parents are prevented from taking the opportunity of having

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[65] M. Wild, however, rightly advises caution when reaching for the foreign literature in such cases because of the diversity of legal systems, especially when it comes to setting the boundaries of the right to abortion, M. Wild, *Roszczenia...*, *op. cit.*, p. 50.

[66] See T. Justyński, *Poczęcie i urodzenie się dziecka...*, *op. cit.*, p. 56.

[67] III CZP 8/06 OSNC 2006, nr 7–8, pos. 123 with the note by P. Justyński, OSP 2007, nr 2, pos. 16.

[68] IV CK 161/05, OSP 2006, nr 6, pos. 71 with the notes by M. Nesterowicz, T. Justyński, W. Borysiak, PiP 2006, nr 7.

an abortion in the situation when a prenatal testing or other medical examinations indicate a high probability of severe and irreversible impairment of the fetus and, as a result of this, the birth of a handicapped child contrary to their will, they are entitled to claim an appropriate compensation from the person responsible for that state. Justifying its decision, the Supreme Court clearly stated that the right of parents to family planning is a personal property subjected to legal protection. On the other hand, regarding the scope of the damage, the Supreme Court held that parents of the disabled child were entitled to the reimbursement of the costs of living resulting from the difference between the cost of maintaining a healthy child and a disabled child.

These decisions indicate serious problems with defining the concept of damage for it is difficult to treat the birth of a child in terms of the damage caused to legally protected property, even if the aforementioned differentiation between the fact of the child's birth and child's living expenses is applied. Referring to the issue, M. Wild argues that virtually from the moment of childbirth a property damage associated with having a child loses the characteristics of the damage and becomes a cost (voluntary property loss).[69]

It is also difficult to determine the scope of damage compensation claims. It seems that the Supreme Court is aware of that fact since in the justification of the above-cited resolution dated February 22, 2006 a precedential nature of the case requiring a flexible approach was highlighted. Obviously, the problem goes far beyond the sphere of legal regulation, which is emphasized even by the question whether the use of instruments of the civil law, and in particular the sanctions in the form of liability in this type of "damage" are legally and ethically justified?

6. Conclusions

On the basis of the civil law the concept of "damage" is dynamic and multidimensional. This term has a clear link with the values highly appreciated in the civilized societies. Usually, statutory rules do not keep pace with the needs that arise with the development of the new discoveries and technologies made by man.

[69] M. Wild, *Roszczenia...*, *op. cit.*, p. 57.

It is worth noting that the dynamics of the term 'damage' is shaped differently in the area of the damage to property, and otherwise in the field of personal damage. In the area of property damage there appear still new concepts shaped by the judicature and legal literature. So far, they have no adequate reflection in the legislation and this state of things does not seem to justify the need to multiply the principles governing the matter of property damage, in particular the principles of its compensation.

More sensitive to civilization, constitutional, mental, and ethical changes is the issue of personal damage and protection of non-property damage. In theory and practice, there are numerous discussions and debates about the ways how to repair such damages. Unlike the property damage, the issue has become the subject of important changes in the regulations of the Civil Code, as it was mentioned above.

It should be noted that the tendency to broaden the area of legally protected property and interests meets with a social approval. Unfortunately, the process is accompanied by dysfunctional phenomena, such as the commercialization of specific goods and values, whose roots stem from the ideas which are far from the property dimension. Life experience shows that usually the dynamics of positive phenomena is accompanied by such dysfunctional processes.

Generally, the direction of the "damage" concept changes and the resulting process of expanding the area of assets or interests protected by law must be regarded as a positive phenomenon, stemming primarily from the need to protect the individual.

S U M M A R Y

The problematic of damage occupies an important place in the sphere of the law of obligations. A damage is a basic prerequisite for compensation responsibility and delimits the indemnification liability. That is why determining the content of this notion is of fundamental significance not only at the stage of establishing the actual state justifying legal duty to repair a damage but also it decides about the dimension and the content of the duty.

A damage is a dynamic notion. This feature is related to various phenomena influencing formal changes in private law and the system of values which the law is to serve. The analysis of legal regulations, opinions presented by judicature and observations of the sphere of legally protected goods taking shape, unequivocally indicates that the content of the notion of damage is clearly expanding.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

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THE CONCEPT AND SEMANTIC SCOPE OF THE DOMESTIC VIOLENCE PHENOMENON

I. The concept of domestic violence

The issue of violence is one of the oldest phenomena. Unfortunately, it is constantly evolving, taking various forms and intensity. For years it has been the subject of interest of psychologists, psychiatrists, sociologists of law, doctors, politicians and mass media. Colloquially, the term violence means influence put on another person, his process of thinking, behavior or physical conditions without his agreement or in order to impose one's will or force a type of particular behavior.[1] Therefore, violence is primarily divided into physical and mental. What is more, one can distinguish violence in relations between the sexes, violence in family, also known as domestic violence, cyber-violence, parliamentary violence, political violence in international relations, and violence at school.

This general division of violence illustrates that it is a dynamic phenomenon which is closely linked to the evolution of social relations. This social phenomenon is highly detrimental from the standpoint of both the smallest social unit, that is the family, as well as from the perspective of larger social groups and society as a whole. Finally, it is dangerous from an international perspective. Obviously, violence is accompanied by other negative social phenomena. For this reason, a number of new national and international initiatives, projects, programs and laws attempting to prevent

[1] *Encyklopedia* [1] *Słownik języka polskiego*, Wydawnictwo Naukowe PWN, Internet version, http://sjp.pwn.pl/; B. Gruszczyńska, *Przemoc wobec kobiet. Aspekty prawnokryminologiczne*, Oficyna a Wolters Kluwer business, Warszawa 2007, pp. 20–23

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violence in its broad sense will be established. One can even venture to say that there is a new autonomous legal branch – anti-violence law. This is undoubtedly related to the change of social relations which, unfortunately, go in a very worrying direction. It is also connected with the increase and qualitative change of the direct impact that the state power and various national and international organizations international organizations have on such relations.

In recent decades, this process has accelerated even more, which is a consequence of the legal consciousness evolution that our societies undergo (eg. protection of individual rights and freedoms), as well as the public authority scope expansion with the emergence of new forms and institutions of international cooperation. Finally, it is a consequence of the technical development (the Internet, mobile phones, etc.).

While discussing violence as defined by law, one should highlight the phenomenon of the so-called violence in families which was regulated by the Act of 29 July 2005 on preventing domestic violence.[2] The content of the preamble revealed in this Act, which provides a general guide interpretation of all its provisions, states that domestic violence violates basic human rights, including the right to life and health and respect for personal dignity. Therefore, public authorities are obliged to ensure equal treatment for all citizens and their rights and freedoms should be respected. Moreover, their duty is to increase the effectiveness of violence prevention.

According to the legal definition included in the provision of the article 2 point 2 on preventing family violence, domestic violence means a single or repetitive intentional acts or ignorance resulting in violation of family members' personal rights (that is the rights of the close relatives or partners referred to in the article 115 § 1 of the Penal Code[3]), but also the rights of other people jointly living or running a common household. It should be understood as a single or repetitive intentional action or nonfeasance that violates the rights or personal goods of persons, and particularly exposes those persons to danger of losing their life, health, destruction of their dignity, personal inviolability, violation of their freedoms, including sexual freedom, harms their physical and psychic health, as well as causes their suffering and moral damage. In the very beginning it should be noted that the term "domestic violence" suggests that the above-mentioned patterns of behavior can occur only in the family in relation to the so-called closest

[2] Journal of Laws of 2005, No. 180, item. 1493, later amended.

[3] Act of July.6 , 1997 – Penal Code, Act No. 88, item. 553 with later amendents.

people – a spouse, ascendant, descendant, sibling, relative to the same line, or extent, the person remaining in the adoption relationship, and cohabitation partners.

Meanwhile, the article 2 point 1 does not state that a family member should be only the closest person in the meaning of the article 115 § 11 of the Penal Code. It also mentions another person jointly living or running a common household. Therefore, victims of violence can become not only persons who are actual members of the perpetrator's family but also those who are connected with him by the so-called "dependency ratio" (eg. renting a flat together with the person who uses violence). Hence, it is necessary to refer to such a broad understanding of persons who may be potential victims of domestic violence. Consequently, a functional criterion is essential here, that is a relationship of dependency. Additionally, a victim of violence should be characterized by his helplessness to resist any acts of aggression or mental harassment, but it is not about his physical capability to repulse such attacks, but rather his inability to influence the perpetrator so that he does not undertake harmful patterns of behavior aimed at others.

II. Normative regulations concerning domestic violence in the Polish law

Due to the multiplicity of violence forms and its intensity the Polish legislator has not standardized "domestic violence" offenses *per se* in the Penal Code. As a result, it should be noted that judicial decisions should also be considered from that viewpoint adopted in the actual legal classification. However, in practice, the article 207 of the Penal Code regarding the offense of abuse is the most commonly used legal rule of justice dealing with domestic violence. According to § 1 of this Article, anybody who torments his closest person or another person remaining in a permanent or transient relationship dependence on the perpetrator, be it an underaged person or a person who is either physically or psychologically inadequate, is punishable by imprisonment for a period of time from 3 months to 5 years. According to § 2, if physical or mental abuse is accompanied by particular cruelty, the perpetrator is subjected to imprisonment for a period of time from 1 to 10 years. On the other hand, if the consequence of the abuse referred to in § 1 or 2 is a victim's suicidal attempt, the offender is subjected to imprisonment for a period of time from 2 to 12 years (§ 3). Offenses of this type are prosecuted ex officio because of their high social harm.

Physical abuse is often accompanied by psychological violence. Violence can be defined as a psychological influence on the process of thinking, behavior or physical condition of a person without his consent using the so-called means of psychological violence. These include threat, invective, and psychological harassment.

However, aggressive acts of people using violence can be treated separately although they may be committed for the same purpose. The following offenses may serve as an example of this point: using force (Article 191 of the Penal Code), rape (Article 197 of the Penal Code), sexual abuse of persons under the age of 15 (Article 200 of the Penal Code), having a sexual intercourse with an ascendant, a descendant, an adopted person, a brother or a sister (Article 201 of the Penal Code), neglecting legally imposed duties to support financially a dependent person (people) (Article 209 of the Penal Code), accusing another person of committing a tax or disciplinary offense in the presence of the Tax Office or employers (Article 190 of the Penal Code), discrediting people to humiliate them in the opinion of other people (Article 212 of the Penal Code).

At this point it is necessary to refer to the one of the most important amendments to the Penal Code introduced in the form of provision of the article 190a of the Penal Code, which defines and creates legal protection in response to the phenomenon functioning as *stalking*. This term envelopes a collection of repetitive, malicious and oppressive conduct patterns that result in the victim's sense of fear and danger. This particularly includes:

- persistent personal contacts using the phone,
- sending correspondence in any form (written or electronic),
- tracking,
- distributing false information,
- being present in the victim's work place or residence
- closest persons' harassment.

Such types of behavior are subjected to imprisonment for a period of 3 years.

A similar penalty applies to individuals who, using another person's image or his personal data, cause personal or financial damage. This provision is a response to the increasing phenomenon which involves posting pictures of different people in Internet with comments, ordering various goods and services at the expense of other people, and, above all, distributing personal accounts of other people in popular social network sites without their agreement and knowledge. If stalking results in the victim's suicidal attempt, the offender will be subjected to imprisonment for a period of time from 1 to 10 years. Moreover, the Polish legislator has accepted that in the framework of the new qualification indicated above legal pro-

secution of the perpetrators of these crimes will follow at the request of the victim.

Violence perpetrators can also commit actions that are apparently misdemeanors, that is disrupting one's spouse's sleep a night, making noises at the window of a sleeping person (Article 51 of the Petty Offenses Code[4]), disturbing somebody in a malicious way (Article 107 of the Petty Offenses Code), forcing one's child or another dependent person to beg (Article 104 of the Petty Offenses Code), and embittering a person with a dog (Article 108 of the Petty Offenses Code).

In the context of these considerations, it should also be noted that the perpetrator of violence can act in the way that makes it impossible to punish him on the basis of the provisions of the Criminal Code and Petty Offenses Code. A very popular example illustrating this type of behavior is the situation when the offender changes door locks of the jointly occupied apartment and "forgets" to convey a new set of keys for the victim. Because of the diversity of the perpetrator's possible patterns of violent behavior it should be pointed out that a separate qualification of such behavior patterns can lead to the discontinuation of the case or its wrong track placement. It is, therefore, important that the person submitting a notice of the offense should describe in detail the perpetrator's behavior and avoid making legal classification of the act on his own. Furthermore, it should be pointed out that stalking can also be accompanied by deeds which do not aim at the victim's anguish, but to avoid criminal liability. The perpetrator may request the police intervention and submit a notice of the victims' commission of various crimes (including criminal harassment, etc.). This aims at the creation of materials which prove the victim's unreliability. The perpetrator may also threaten his victim by promising, for example, just to force him not to give evidence. The victim can also be forced to give false statements as a witness. Such acts are also crimes.

While discussing the development of a new branch of the anti-violence law, significant amendments to the Penal Code of November 5, 2009 and of June 10, 2010 should be pointed out. According to the amended provision of the article 275 § 2^5 of the Penal Code, a person under supervision may be obliged to have no contacts with the victim or other people; he

[4] Act of May 20, 1971, Code of Offenses, Journal of Laws of 2010, Nr 46, pos. 275, later amended.

[5] Amended by the article 2 point 6 and the Act of November 5, 2009 amending the Act of the Penal Code, the Act of the Criminal Procedure Code, the Act of the Executive Penal Code, the Act of the Fiscal Penal Code and other laws, Journal of Laws of 2009 No 206 pos. 1589, the Code of Criminal Procedure dated June 8, 2010 amending the Act.

can also be banned from visiting certain places. However, in accordance with the amendment of the Act § 3[6], if there are presumptions for the temporary arrest of the accused person for a crime committed using violence or threats to harm a closest person or other people living together with the perpetrator, instead of temporary arrest detention can be used, provided that the accused leaves the premises occupied jointly with the victims and gives the whereabouts of his new location within the expected period of time.

In addition, the provision of the article 275a[7] § 1 of the Penal Code, as added by the Amendment Act of November 5, 2009 should be indicated. It enriches the catalog of the existing preventive measures by introducing a new measure of coercion by ordering the accused who has committed a crime of violence to the detriment of the person with the same place of residence to leave the occupied dwelling if there is a reasonable fear that the accused will commit a crime of violence against that person once again, especially when he has issued such threats. In preliminary proceedings this measure is used at the request of the police, or ex officio (§ 2). However, in cases when the accused, who was arrested on the basis of the article 244 § 1a (having reasonable assumptions that the arrested who had committed a violence crime to the detriment of people living together may commit a similar crime once again, especially in the presence of his threats to do so[8]) or 1b (in a situation, referred to in § 1a, when the crime has been committed using a gun, knife or other dangerous objects, and there is a fear that the detained will commit a crime of violence against persons living with him once again, especially in the presence of his threats to do so[9]), there are grounds for introducing a preventive measure ordering the accused for committing a crime with the use of violence towards the person having the same residence to leave a dwelling shared with the victim immediately. The police request the prosecutor to apply this preventative measure within 24 hours starting from the moment of the offender's detention (§ 3). Such a request should be recognized within 48 hours starting from the accused person's detention. It can be used for no longer than 3 months. If the conditions of its application have not changed, having jurisdiction at the request of

[6] Added by the article 2 point 6 of the act referred to in the footnote 5.

[7] Added by the article 6 point 2 of the act dated June 10, 2010 amending the law on preventing domestic violence and other acts, Journal of Laws No 125, pos. 842, amending the law – the Criminal Code dated August 1, 2010.

[8] Added by the article 6 point 1 of the act referred to in the footnote 6.

[9] Added by the article 6 point 1 of the act referred to in the footnote 6.

the prosecutor, the court of the first instance may extend its application for further periods, but not longer than 3 months (§ 4). By issuing a decision to order the accused to leave his dwelling, the authority may indicate a new residence in the institutions providing accommodation at the request of the accused (§ 5). Institutions designated to provide the accused with accommodation cannot be the places where the domestic violence victims reside.

III. Sociological determinants of the domestic violence phenomenon

Many societies approve of domestic violence. This fact is well illustrated by widespread myths, stereotypes, proverbs and sayings hampering a proper response to the acts of brutality or cruelty towards closest persons. All these myths justify a lack of reaction on the part of the violence witnesses; they also force victims into silence and convince perpetrators that their acts are not harmful or punishable.[10]

Popular myths about domestic violence:[11]

1. Domestic violence is a private matter, nobody should interfere.

Violence, abuse, beatings, and harassment of relatives are a crime, just as dangerous and punishable as violence against strangers. The fact of being married or sharing one house is not a circumstance allowing for violence; it does not take out one's responsibility for committing acts punishable by law.

2. Violence occurs only in the families form the social margins.

Domestic violence occurs in all social groups, regardless of one's education level or financial situation.

3. Violence is when there are visible marks on the body of the victims.

Violence is not only an act of leaving bruises, fractures and burns. It also involves humiliation, insults, forcing certain behavior, threats, and intimidation.

4. Victims of domestic violence accept help.

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[10] A comparison of the study results conducted in Poland, and data from other members of the European Union states – 2010 see Domestic Violence against Women, http://ec.europa.eu/public_opinion/archives/eb_special_en.htm#344.

[11] J. Herman, *Przemoc – uraz psychiczny i powrót do równowagi*, Gdańsk 2003, pp. 11–14; Sh. Herzberger, *Przemoc domowa. Perspektywa psychologii społecznej. PARPA*, Warszawa 2002, p. 10 and following. See also http://www.statystyka.policja.pl/portal/st/944/50863/Przemoc_w_rodzinie.html.

Victims of domestic violence always try to defend themselves, but their actions are ineffective. They try out different, often irrational defensive strategies, which consequently results in the intensification of violence.

5. It was a single incident that will not happen again.

Domestic violence is rarely a single incident. Unless decisive actions are taken against the perpetrator, violence persists.

6. The victim would leave the offender, if he was really hurt.

Victims are really hurt. Nobody likes being beaten and humiliated. The fact that the victim does not leave the offender usually results from his dependence on the offender, accommodation difficulties, beliefs about the status of marriage, and pressure they are subjected to on the part of the perpetrator, family, colleagues, and neighbors.

7. Alcohol causes domestic violence.

Even alcohol dependence does not exempt the offender from his liability for the acts performed under its influence. Alcohol only facilitates the use of violence; perpetrators often drink in order to bully and beat their loved ones, and they use a state of intoxication to justify their behavior to avoid liability.

8. People who use violence must be mentally ill.

There is no direct link between violence and mental illnesses. Violence is a demonstration of one's strength and willingness to take total control of power over another person.

Domestic violence is not a single act. Often it has a long history which may last even for several years. Domestic violence is repeated in accordance to a noticeable regularity. A cycle of violence is composed of three consecutive phases:

1. A phase of the tension increase – at the beginning of the phase there is a rise of tension; there appear more conflicting situations. The causes of tension may reside outside the family, sometimes these are trifles, little misunderstandings resulting in the increase of tension; aggression begins to appear.

2. A phase of extreme violence – an explosion of aggression in which the perpetrator performing as a normal human being is transformed into the executioner; he may make terrible deeds without paying attention to the suffering of others. This is the phase in which victims frequently decide to complain and call for help.

3. A phase of honeymoon – this is the phase of showing pity and love, the phase of the victim's seduction. The perpetrator begins to see what has happened. He tries to smooth things over; he apologizes and promises to improve. The situation becomes helpful and nice. The offender convinces

the victim that from now on it would be different and a similar situation will never happen again. The victim believes him, because, contrary to his common sense, this is what they want in the heart. And even if a moment ago the victim was ready to escape, he stays. The perpetrator cannot stand performing such a role for a long time. For some reason, the tension rises again and everything starts anew.

Such cycles can last for many years. Violence escalates over time and the situation gets worse. The perpetrator usually begins by making an insulting comment, a slight push, a curse, but after some time he can cause serious physical harm, sophisticated psychological torture, permanent injury or murder. A lack of witnesses of domestic violence is a very important phenomenon. The perpetrator is able to effectively isolate the victim from the sources of support; he can effectively persuade the victim to be silent – if anyone knows or guesses to make attempts to intervene, he will be effectively intimidated.

Behavior of the domestic violence victims.

Psychologists point out that the behavior of victims may sometimes be confusing, frustrating, and discouraging. Victims of domestic violence suffer from various psychological disorders. They get depressed often and suffer from anxiety, uncontrollable outbursts of crying, laughter, aggression, frequent and confusing changes of decisions, uncertainty, unjustified reaction of fear, and a constant sense of danger. It is difficult to expect rational and coherent behavior from them, because their minds are ruled by a permanent fear of the perpetrator.

All those who help victims of domestic violence should be aware that they are unpredictable emotionally and their behavior is a swing: I want to be helped – I do not want to be helped, I am going to apply for a divorce – I am withdrawing my decision, I blame the perpetrator – I stand in his defense.

Increasingly, the situations of domestic violence victims are compared to the situation of the terrorist attack victims. The analysis of what happens to the psyche and behavior of hostages, and how devastating the situation in which one's life is being threatened even for several hours or several days is, helps to understand the irrational behavior of victims.

The victim of domestic violence faces such a threat often for several years, and the perpetrator is not a strange criminal, but the man who is expected to show support, respect, and love. The victim is connected with the offender by various constraints, such as affection, marriage, children, shared housing, and property.

The psyche of the hostages, often adults and serious people reliant on

the mercy of the terrorists, is affected by amazing changes which are more shocking than the tragedy of the situation. It has been observed that in many cases even after their release, the victims remained in a strange incomprehensible emotional connection with their torturers. This connection deprives them of the ability to rationally assess the events, defense, and demand a severe punishment for terrorists. Victims released from terrorist attacks begin to engage in actions aimed at the terrorist's acquittal; they collect funds for the best lawyers for the terrorists. They forget the humiliation resulting from the terrorists' gaining control over their lives and skillful manipulation they have suffered when they were restricted to the position of small and powerless children grateful for every grimace of a smile or a little less menacing look, less frequent beatings or putting down a gun. Where is the consistency? They are usually expected to show anger, revenge, and unambiguous indictment.

Post-Traumatic Stress Disorder (PTSD) is a term enveloping a collection of psychiatric disorders that victims of terrorists, victims of domestic violence, and victims of other crimes threatening health and life suffer. This concept was formally introduced into the professional vocabulary of health care in 1980 by the American Psychiatric Association. Nevertheless, this does not mean that it was only since 1980 that such disorder syndromes occurring in people who survived extremely difficult life-threatening events have been recognized.

External situations in which a person is exposed to the loss of one's life or health or if a person observes injuries, sudden death or life threatening of the people he loves encourage the development of these symptoms. Natural disasters, war, traffic accidents, crimes, physical violence, sexual abuse and other forms of life-threatening violence can be the source of such situations.

In case of violence, a mere threat of using it is enough to shock the victim, for example, the offender does not have to shoot to the victims to make them really endangered; his presence and demonstration of his hostile intention would be enough. Often, the violence perpetrators are able to evoke a paralyzing fear and submissiveness in the closest people by a particular gesture, word, look, or a characteristic behavior. For the victims the conviction of the imminent danger is enough.

Not only victims but also witnesses and emergency services officers are exposed to the occurrence of PTSD. It can affect even people who have been carefully selected to serve in severe, extreme situations, who have adequate medical and psychiatric qualities, and have been adequately trained.

The Criteria of the PTSD diagnosis:

– occurrence of highly traumatic events,

– experiencing trauma in memories, dreams, feelings, and situations resembling traumatic events,
– insensitivity to the environment, specific emotional numbness, a tendency to isolation, alienation, and avoidance of everything that might resemble the experienced shock,
– excessive agitation, anxiety, touchiness, difficulty in concentrating, and uncontrollable outbursts of anger.

IV. Final remarks

In conclusion, for the consistency of the above considerations, philosophical connotations of violence should be referred to Leszek Kolakowski, a Polish philosopher, who survived the experience of World War II, described them. He did not condemn the phenomenon of violence stating that violence is part of the culture, not nature. In nature, when an animal kills another animal to get food, it is not violence. On the other hand, violence as part of social life partly justifies the work of the police and courts. Without violence, the work of these institutions would be greatly reduced and unnecessary. It is hard to imagine the world in which nothing would be punishable, that is, in which there would be no evil. L. Kolakowski is also concerned about the concept of "moral violence" that is, blackmail.[12] However, it seems that in Kolakowski's opinion violence is primarily collective violence, the war that accompanied human beings from the beginning, which, of course, does not mean that war must be praised and commended. In a word, to condemn absolutely all violence without any distinction is to condemn life.

Similarly, Emmanuel Levinas, a French philosopher, after his experience of World War II, believed that the European culture is a culture of violence, the culture that led to Auschwitz.[13] According to him, violence and a desire to subjugate the world remain at the core of our culture. Violence manifests itself in our attempts to understand the world in terms of science and in our desire to make unfamiliar and alien things understandable. It is also visible in our practical use of such knowledge to transform the outside world. What is more, exploitation of knowledge is, according to E. Levinas, an attempt to impose one's will on other people, including our lack of acceptance of

[12] L. Kołakowski, *Mini wykłady o maxi sprawach*, Kraków 2003, chapter on violence.

[13] About E. Levinas in *Powszechna Encyklopedia Filozofii*, ed. M. A. Krąpiec, Lublin 2005, pp. 350–352.

otherness. This is an antagonistic attitude, an attitude that leaves no room for compromise, hence wars, crusades, and mass murders in the name of the idea. The Western civilization is one of the most possessive civilizations in the history of mankind which can even destroy the planet. Hence, according to Levinas, perhaps the very essence of our culture directs our action towards violence. However, it should be noted that both L. Kulakowski and E. Levinas, being the witnesses of World War II, conceived violence primarily as the element of the society civilization development.

While discussing violence in general and domestic violence in particular, it is also necessary to emphasize the stand of the highest moral authority of the recent decades respected by people of different nations and religions – Pope John Paul II. He was also a philosopher, phenomenologist with the experience of World War II. John Paul II's concern for the family, expressed in his speeches and documents[14], was associated primarily with the recognition of the family as the common value of the humanity, the beginning and at the same time basis for the individual and social life of every human being. In he light of John Paul II's thought, protection of family from destructive violence, especially protection of children against all forms of violence, corruption, cruelty and pornography promoted by the media is one of the primary tasks of dissidents responsible for shaping our social order. Hence John Paul II saw threats to the family whose origins lie in the very institution of family. He pointed out various forms of violence whose perpetrators and victims are family members. Violence directed against children in forms of abuse, abandonment of children, or leaving children unattended is its most radical manifestation. The Pope appealed to the whole societies not to remain inert and passive. He also encouraged states to create appropriate structures, aiming at providing assistance to families affected by this kind of misfortune. Therefore, he also warned against a distorted picture of the family, the educational function of physiognomy and pedagogical function distributed by the media. In his opinion, it constitutes a particular challenge for the Polish politicians and individual states. Finding appropriate solutions in this area is essential.

[14] Letter to Families Gratissimam sane by Pope John Paul II in Rome, at St. Peter, on 2 February 1994, in the sixteenth year of his pontificate, John Paul II, Message for the World Day of Peace – January 1, 2000. http://www.opoka.org.pl/biblioteka/w/wp/jan_pawel_ii/przemowienia/dzien_pokoju_01012000.html/; Jan Paweł II, *Prawda i sprawiedliwość fundamentem wolności i pokoju*, http://www.opoka.org.pl/biblioteka/w/wp/jan_pawel_ii/audiencje/ag_11092002.html/.

S U M M A R Y

The article raises the problematic of domestic violence phenomenon indicating its notional, philosophical, normative and sociological connotations. The multifacetedness and permanence of the phenomenon of violence suggests it is unfortunately a pejorative part of our culture taking various forms and intensity. This dynamic social phenomenon tightly related to evolution of social relations takes increasingly alarming shapes also implying other disadvantageous social phenomena. It is very harmful from the point of view of the smallest social unit which is a family as well as from the point of view of larger social groups, a whole society or finally from the international point of view. Therefore, it constitutes a special challenge for the legislator in the field of new acts and legal tools, projects, programmes, as well as domestic and international initiatives. In the article the authors describe the trends of the latest normative changes as anti-violence.

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LEGAL DISCOURSE SURROUNDING THE INSTITUTION OF THE RIGHT TO PRIVACY – A COMPARATIVE APPROACH

1. General remarks

The analysis of the issue regarding the right to privacy is of particular importance in the information society era captured by modern and global technologies. The right to privacy and its protection is a contemporary and challenging issue. At the same time, it is an interesting and intriguing problem. It has a contemporary character, since the development of technology, particularly in relation to the collection, processing and dissemination of information means that the interference in people's privacy is becoming more and more effective. The importance of this problem stems from the fact that increasingly the privacy of especially the so-called public people is violated by the media. The media's aggressive and illegal encroachment in the sphere of private life of persons engaged in the widely understood public activities is largely becoming a common phenomenon not only in the so-called tabloid press, but also in the so-called serious press. This applies in particular to politicians, government members and other persons performing public functions, as well as to people commonly known in the spheres of social, cultural, and artistic life, especially actors, singers, television presenters and sportsmen.

Privacy is a concept grown on the basis of the Anglo-Saxon law, established on the American continent. Representatives of the doctrine generally agree that the beginning of its broader discussion and analysis was in 1890, when Samuel D. Warren and Louis D. Brandeis published their article on privacy in *"Harvard Law Review"* entitled *"The right to privacy"*.[1]

[1] S. D. Warren, L. D. Brandeis, *The Right to Privacy*, Harvard Law Review 1890, vol. 4, nr 5, p. 193 and following.

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The representatives of the doctrine recognized the article as the foundation of the privacy institution in the U.S. and worldwide.[2] The article written by Warren and Brandeis was a response to the excessive and embarrassing attention given by the Boston press "Saturday Evening Gazette" to Warren's private life, especially to the social gatherings organized by his wife, the daughter of Senator Thomas Francis Bayard. The authors highlighted the fact that technological advances resulted in the increasing danger of invasion into privacy of the individual; they emphasized the need to indicate legal measures in the common law which could be used to protect the value called privacy. The authors examined a number of judgments relating to defamation, intellectual property, implied contract, copyright and found that it was necessary to recognize the existence of the right to privacy. They defined privacy as a *general right of the individual to be let alone*, which protects the inviolable human personality. They emphasized that this right should be treated as an independent and individual tort.

There is an increasing concern of the doctrine representatives for the issue of privacy. According to the U.S. statistics, in 1930 there were about 3–4 articles published annually in law journals which dealt with the issue of privacy. But in the mid 60s a number of published articles on privacy rose to over 30 per year.[3] In Poland, it was only lately that a range of publications concerning the issue of privacy in its different aspects appeared. In recent years there has been a marked increase in the number of lawsuits regarding the violation of privacy by press brought by people exercising a public function. This is reflected by the Supreme Court jurisprudence, as well as by the appellate courts in Poland.

2. Concepts regarding the notion of the right to privacy

The concept of privacy has not been included in the rigid definition by the representatives of legal literature or judicature. Undoubtedly, the doctrine and jurisprudence remain certain that such a task is neither possible nor necessary. This view should be absolutely accepted. The right to privacy

[2] See for example I. P. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, Cath. U. L. Rev. 1990, vol. 39, pp. 703–704; H. Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, Law & Contemp. Probs. 1966, vol. 31, pp. 326–327.

[3] P. A. Cain, *Symposium article: The right to privacy under the Montana Constitution: sex and intimacy*, Montana Law Review 2003, vol. 64, p. 100.

is a broad concept, formulated by the most general expressions of the general clause character, including several components. Any attempt to create a definition of the right to privacy seems to be ineffective because of the complexity of the concepts and diversity of its components. The legislation of Poland and other states does not define the notion of privacy. This is not an exceptional phenomenon for the establishment of the legal concept meanings is done by a particular legal doctrine and jurisdiction rather than by legislature. Characteristic for the right to privacy is that nobody has a clear idea of what it is.[4] Some representatives of the doctrine argue that privacy is accompanied by a conceptual void[5] and that privacy is a kind of the conceptual chimera.[6] It is a term used in many senses and defined in various ways. It is not possible to identify a proper definition of the concept of privacy due to the fact that literature points to different components of the concept of "privacy".[7]

2.1. Concepts of the right to privacy in the light of the foreign doctrine representatives

The analysis of the concepts formulated in the foreign doctrine results in the recognition of privacy, particularly as:

1) one's right to be let alone;
2) a limited access of others to an individual, eg. protection from the unwanted interference by the third parties;
3) control over private information;
4) respect for a private secret, eg. not disclosing secret information about themselves to the third parties;
5) respect for intimacy.[8]

Warren and Brandeis emphasize that the basis of privacy and its most important element is integrity, invulnerability of the inviolate personality. Protection of thoughts, feelings and emotions, expressed by individual creative and artistic work and consisting in preventing it from a public disclosure, is performed under people's general right to be let alone. The authors argue that the law which protects literary works and other creations of

[4] J. J. Thomson, *The Right to Privacy*, Philosophy and Public Affairs 1975, vol. 4, pp. 295–314.

[5] See J. Rubenfeld, *The Right of Privacy*, Harvard Law Review 1989, vol. 102, p. 739.

[6] Compare R. Wacks, *The Protection of Privacy*, London 1980, pp. 10–11.

[7] J. Sieńczyło-Chlabicz, *Naruszenie prywatności osób publicznych przez prasę*, Zakamycze 2006, pp. 74–75.

[8] D. J. Solove, *Conceptualizing privacy*, California Law Review 2002, vol. 90, p. 1094.

the individual and other personal products not against theft or appropriation but against their publication is not the principle of protection of private property. This is a principle of protection of the personal inviolability and individuality.[9] They notice that the value of privacy is not reflected in the right to profits from the publication, but for peace of mind or the relief felt by the individual because of the possibility of preventing one's product from any unwanted publication.[10] Warren and Brandeis observed that interference with privacy usually caused pain and mental suffering of individuals, which was usually much more severe than the injury of the body.[11] The authors emphasized that this type of injury was not subjected to protection under the law of tort. The provisions regulating the institution of defamation protected against attacks on the good name of the individual, while the privacy involved injury caused in the individual emotional sphere which resulted in mental pain and suffering. In those days it was very difficult to explain harm on the basis of the existing law which focused on different property damage cases.

In the case *Olmstead v. United States*[12] Brandeis uttered his famous opinion regarding privacy protection. The Supreme Court held that the use of eavesdropping did not result in violation in the light of the Fourth Amendment to the U.S. Constitution because it was not based on a physical invasion into the dwelling (house) without the owner's agreement. While presenting his opposing point of view, Brandeis highlighted that it resulted in the violation of *the right to be let alone*. The Constitution creators recognized that right as the most extensive and valuable for a civilized society. The position presented by the author had a huge impact on the further development of the right to privacy. U.S. courts often referred to the construction of privacy as the right to be left alone in the case of Katz v. United States[13] as well as in many other resolved cases.[14] In the jurisprudence judges expressed their individual opinions by offering a variety of concepts to determine the right to privacy. For example, in the case of *Time, Inc. V. Hill*[15] Fortas, a judge, emphasized that it is the right of individuals to live

[9] S. D. Warren, L. D. Brandeis, *op. cit.*, p. 205.

[10] *Ibidem*, p. 200.

[11] *Ibidem*, p. 196.

[12] 277 U. S. 438 (1928).

[13] 389 U. S. 347 (1967).

[14] See also Eisenstadt v. Baird, 405 U. S. 438, 454 n. 10 (1972); Stanley v. Georgia, 394 U. S. 557, 564 (1969).

[15] 385 U. S. 374, 413 (1967).

according to their own choice, without interference and attacks from other subjects, except when there are circumstances justified by a clear social need (public interest) and a reasonable law application. A similar position was taken by the judge Douglas in the Doe v. Bolton[16] case, stating that this right includes the privilege of individuals to make decisions about their personal matters, shaping their lives according to their own choice, without any interference of the third parties.[17]

The concept of control of personal information is one of the well-known theories concerning privacy. Several representatives of the doctrine recognize privacy as the authority to control the disclosure of people's matters of a personal character. A. F. Westin is a creator of the classic definition of privacy. In his opinion, privacy is a demand, request of individuals, groups or institutions to determine to what extent information about them is transmitted to the third parties.[18] Consequently, the individual is deprived of privacy when he loses control over the ability to decide when, how and to what extent the information about him is available to others. Westin defines it as a claim (the right to claim or demand a certain behavior from others), or as a psychological state of the individual. According to the author, privacy can also be protected in public places. However, in principle, in such places as shops, hotels, restaurants and other public places one cannot expect solitude, total freedom and a complete lack of observation by the third parties. Nevertheless, this does not mean that individuals can expect a secret surveillance monitoring their behavior at times and in places which usually guarantee a certain standard of privacy, even if they are public places.[19]

Many representatives of the doctrine define privacy in a similar manner. A. Miller argues that *"privacy is defined in terms of control over who has information about or access to the individual"*.[20] C. Fried believes that privacy can be interpreted very generally as control over information about the individual. In his view, privacy is not merely the absence of information about us, but it is primarily the individual right to control such information.[21] A similar position was also taken by the U.S. Supreme Court arguing

[16] 410 U. S. 179, 213 (1973).

[17] D. J. Solove, *op. cit.*, pp. 1100–1101.

[18] A. F. Westin, *Privacy and Freedom*, New York: Atheneum 1967, p. 7.

[19] *Ibidem*, p. 112.

[20] A. R. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers*, New York 1972, p. 25.

[21] Compare C. Fried, *Privacy*, Yale Law Journal 1968, vol. 77, pp. 482–483.

that privacy is the people's performance of control over the information that relates to them.[22]

T. Gerety believes that privacy should be recognized as the right to autonomy and control over intimacy, identity and individuality of the individual.[23] According to him, *privacy is defined as autonomy and the right to control over the intimate sphere*. T. Gerety recognizes privacy as a sphere of human life that should not be violated[24] or as a form of control.[25] Privacy is closely related to the amount of information about the individual that is known by others. Gerety indicates that information is part of privacy only if it has a private character, that is it relates to intimacy, identity and autonomy of the individual.[26] Violation of privacy occurs when the individuals are deprived of their spiritual and physical intimacy in a manner inconsistent with the generally accepted standards of autonomy.[27] According to the author, specific information falls within the sphere of privacy only if it reveals a personal and private character and, therefore, relates to intimacy, identity and autonomy of the individual.[28]

In the French doctrine, there are three areas of privacy sharing one common center in which the individual is placed. The first area is limited to the most intimate aspects of the individual which are thoughts, beliefs and values. The second area, which can be represented graphically as a wide ring around the individual, includes external characteristics of the individual, as well as intimate aspects of social life which also relate to other people, mainly family and friends. These two areas of privacy should be widely protected for they are very vulnerable when it comes to the interference from outside. The third area (the second ring), whose boundaries are circled less clearly, covers the outside part of private life. It concerns the relationship of the individual with others and, therefore, it also refers to the presence of privacy in public places. This area is a reflection of those aspects of the individuals' private lives which are realized publically and which also benefit from legal protection.

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[22] United States Dep't of Justoce v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 763 (1989).

[23] Compare T. Gerety, *Redefining privacy*, Harvard Civil Rights – Civil Liberties Law Review 1977, vol. 12, pp. 236–237.

[24] See R. Gavison, *Privacy and the Limits of Law*, The Yale Law Journal 1980, vol. 89, nr 3, p. 426.

[25] See R. B. Parker, *A Definition of Privacy*, Rutgers Law Review 1974, vol. 27, pp. 280–281.

[26] See T. Gerety, *op. cit.*, p. 281 and following.

[27] *Ibidem*, p. 236.

[28] *Ibidem*, p. 281 and following.

The French doctrine distinguishes between two dimensions of privacy, namely internal and external dimensions. The first one is formed by the individual and his closest surroundings. This dimension of privacy requires seclusion and isolation of the individual and should be protected from the third parties. However, a complete separation of the privacy external dimension is not fully possible. The second one concerns relationships of the individual with the society, but only those relationships that are necessary to conduct a private life. The external dimension of privacy assumes that the third parties can see and learn only what is visible to others. However, they should not disclose this to the public, unless the individual involved agrees to do so or at least tolerates it.[29]

In the German law, privacy is implemented under the general right of personality and is known as *Schutz vor Indiskretion* which literally means "protection against indiscretion". Privacy includes protection against the dissemination of truthful information about individuals.[30] The essence of protection against indiscretion, which constitutes the equivalent of Polish privacy, includes protection from entering the sphere of one's intimate and private life unlawfully by the third parties. It concerns publishing all bits of information that the individual wishes to preserve for oneself and not to disclose them to the surroundings.[31] The Bundesgerichtshof decision dated May 25, 1954, which first acknowledged the existence of a general right of personality, concerns protection against indiscretion.[32] Privacy protection is a direct expression of the self-determination and information autonomy right of individuals and provides a transformation of the constitutional law of self-determination under the art. 2 par 1 GG onto the civil law ground.[33] Privacy protection was formulated by Bundesverfassungsgericht in the decision regarding the case of Lebach.[34] Bundesverfassungsgericht highlighted that the right to one's free development and human dignity, which are the basic rights guaranteed by the German Constitution (Grundgesetz), are the

[29] É. Picard, *The Right to Privacy in French Law*, (in:) *Protecting Privacy*, ed. B. S. Markesinis, Oxford University Press 1999, pp. 60–61.

[30] E. Wanckel, *Der Schutz vor Indiskretion*, (in:) *Handbuch des Persönlichkeitsrecht*, ed. H.-P. Götting, Ch. Schertz, W. Seitz, München 2008, p. 332 and following; K. Rehbock, *Die Ausprägungen des allgemeinen Persönlichkeitsrecht*, (in:) R. Damm, K. Rehbock, *Widerruf, Unterlassung und Schadensersatz in Presse und Rundfunk*, München 2001, p. 33.

[31] G. Neben, *Triviale Personenberichterstattung als Rechtsproblem*, Berlin 2001, p. 193.

[32] Decision BGH dated May 25, 1954, I ZR 211/53, NJW 1954, z. 38, p. 1404.

[33] E. Wanckel, *Der Schutz vor Indiskretion*, (in:) *Handbuch der Persönkeitsrecht*, red. Götting H.-P, Schertz Ch., Seitz W., München 2004, p. 333.

[34] decision BVerfG dated June 5, 1973, 1 BvR 536/72, NJW 1973, z. 28, p. 1226.

basis for a general constitutional right of personality, which commonly guarantees an autonomous sphere of private life where each individual can shape and protect his individuality. In this area the individual can "belong to himself," with the exclusion of interference of other persons.[35] The area of privacy is the ability to dispose of one's image and decide on the disclosure of the circumstances of one's private life. This is an area where basically everyone should be able to decide independently whether and to what extent he would like to share information about his life as a whole or only about its specific events.[36]

The sphere of privacy includes the circumstances that are classified as private on the basis of their character, and their disclosure is perceived as painful, embarrassing or awkward.[37] Typical examples placed in this area are diary notes[38], confidential conversations between spouses, matters relating to sexuality[39], sexual orientation or health status.[40] These events belong to the private sphere because of their content, regardless of the place in which they occurred. Therefore, protection may be granted even if those circumstances appeared in a public place, unless it happened in the way that drew attention of many people. Privacy is also to cover events of religious worship, showing sensitivity towards each other also in public unless it is done in the way that draws attention and aims at provocation. According to the Bundesverfassungsgericht jurisdiction, sexuality belongs to the protected sphere of privacy. Hence, in the civil law aspect reports of events that belong to this sphere are unacceptable. Similarly, speculation and gossip, particularly assumptions about people's weddings, separations and divorces[41] and relationship between two people (including sexual relationship), do not justify any violation of the right to privacy.[42] Among the protected sphere of privacy the doctrine dominant view includes information about people's property, earnings, income, debts or other financial problems.

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[35] Decision of BVerfG dated June 5, 1973, 1 BvR 536/72, NJW 1973, z. 28, p. 1226.

[36] E. Wanckel, *op. cit.*, p. 332.

[37] Decision of BVerfG 15 XII1999, 1 BvR 653/96, NJW 2000, z. 14, p. 1021.

[38] Decision of BVerfG 14 IX 1989, 2 BvR 1062/87, NJW 1990, z. 9, p. 563.

[39] Decision of BVerfG 21 XII 1977, 1 BvL 1/75, 1 BvR 147/75, NJW 1978, z. 16/17, p. 807; decision of BVerfG 11 X 1978, 1 BvR 16/72, NJW 1979, z. 12, p. 595.

[40] Decision BVerfG 8 III 1972, 2 BvR 28/71, NJW 1972, z. 25, p. 1123.

[41] Decision BGH 15 XI 1994, VI ZR 56/94, NJW 1995, z. 13, p. 861.

[42] E. Wanckel, *op. cit.*, p. 336.

2.2. The right to privacy on the ground of Polish doctrine representatives

It is not an easy task to construct the notion of the right to privacy on the basis of the Polish doctrine representatives and their views. There is a convergence of views that privacy is a very wide and complex issue. Despite the difficulties involved in constructing its definition on the basis of the civil law, it is possible to point out a number of repetitive elements.

The majority of the Polish doctrine representatives emphasize and develop the American concept of privacy formulated by S. D. Warren and L. D. Brandeis. Some authors only add new elements to it. A. Kopff was the first to make a detailed comment on the right to privacy in Poland. While designing his concept of privacy, the author based it primarily on the American considerations of privacy as a right to be let alone and the German theory of spheres. By the right to protect a private life Kopff understands "rights of the individual to live his own life, arranged in accordance with one's will where any outside interference is limited to the minimum".[43] Kopff argues that the sphere of private life is a personal value protected by the personal right, which most accurately can be called the right to seclusion. According to Kopff, "personal value in the form of private life is everything that encourages a person's physical and psychological development as well as helps to preserve one's achieved social position as a result of one's reasonable isolation from the general public".[44] The isolation of the individual in order to develop his own personality and preserve his social position is a protected value here. According to Koppf, the sphere of private life "includes one's family and neighborhood life, as well as one's social life and relations to colleagues at work".[45] It is very difficult to define the boundaries of privacy and separate it from the sphere of universal accessibility.

In the Polish doctrine, it is possible to differentiate the following ways to approach the right to privacy:

1) privacy, understood as the right to be left in peace and the right to freedom from the interference of others;
2) privacy as the right to self-determination and personal development;
3) privacy as one's autonomy, especially one's information autonomy;
4) privacy of the human being recognized as a catalog of particular circumstances embraced by the privacy sphere.

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[43] A. Kopff, *Koncepcja praw do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne*, Studia Cywilistyczne, Vol. XX, Warszawa – Kraków 1972, p. 30.

[44] A. Kopff, *Ochrona sfery życia prywatnego jednostki w świetle doktryny i orzecznictwa*, ZNUJ Prace Prawnicze 1982, z. 100, pp. 33, 37.

[45] A. Kopff, *Koncepcja praw*, *op. cit.*, p. 34; See M. Rehbinder, *Die öffentliche Aufgabe und die rechtliche Verantwortlichkeit der Presse*, Berlin 1962, p. 86.

While discussing this subject, it is necessary to highlight the role of the Constitutional Court jurisprudence which enriches it semantically. Determining the content of the right to privacy, the Court decided that privacy concerns primarily one's personal, family, social, and sociable life and sometimes it is defined as the right to be left in peace. It can also be understood as the right to keep secret information about one's private life. Privacy refers to protecting information regarding a given person and guarantees a certain standard of independence under which the individual can decide on the scope and range of sharing and communicating information about one's private life.[46]

3. The right to protect one's sphere of intimacy

Most countries recognize that the sphere of intimacy should be subjected to absolute protection. It does not matter what kind of status the individual has and whether he is a private or public person. The sphere of intimacy of public people is a principle. Nevertheless, it does not offer absolute protection. It is necessary to opt for relative protection of the intimacy sphere.

In light of the American law there are certain circumstances when the publication of intimate details of one's personal life regarding his orientation or sexual preferences is allowed only if:

1) it is justified by a legitimate public interest;
2) a certain person is unable to exercise a high public office because of the intimate nature of the circumstances;
3) the disclosed information was already widely known, and so it has passed from the sphere of intimacy to the public sphere.

In view of the American jurisprudence there is a rule that intimate details of the celebrities' sexual life should not be exposed by the press.[47] It was already more than 100 years ago that Warren and Brandeis pointed out that issues concerning sex and sexuality constitute the sphere of the individual which should be given particular protection.[48] Perhaps it is because

[46] See the Constitutional Tribunal decision dated 24 VI 1997, K 21/96, OTK 1997, nr 2, position. 23; the Constitutional Tribunal decision dated 19 V 1998, U 6/97, OTK 1998, nr 4, position 46.

[47] See Diaz v. Oakland Tribune, 188 Cal. Rptr. 762, 773 (Ct. App 1983).

[48] S. D. Warren, L. D. Brandeis, *op. cit.*, p. 216 – the authors emphasized that the individual relationships with others are one of the issues that should not be published and publicly disclosed; see. also T. Gerety, *op. cit.*, p. 233, 280 – the author stated that the sphere of intimacy is most associated with the human body and human sexuality.

sex has a vital role in the development of individuals' personality, family and society[49], people are not willing to disclose their sexuality. People protect facts about their emotional relationships, both heterosexual and homosexual.[50] The American courts emphasize the importance and relevance of maintaining such information as secretive.[51] Sexual orientation should be distinguished from the individual behavior. Regardless of the cause of the individual sexual preferences, sexuality lies in one's psyche and will never be disclosed in a manner visible to others.[52] As a rule, American courts decide that the disclosure of the individual sexual preferences is not justified by the public interest protected by the First Amendment to the U.S. Constitution.[53]

There are certain exceptions from the rule according to which public figures should be treated as individuals in relation to the facts regarding their intimate life and sexuality. They particularly concern the disclosure of matters related to one's sexuality in the context of the individual public controversy, or a dispute in which the person is involved. This rule applies in particular to high-ranking officials, whose sexual preference has a major influence on their performance of public functions, public activities, as well as their behavior in the public sphere. For example, a government official who has publicly commented the problems of homosexual people in a disrespectful and contemptuous manner or has introduced a discriminatory program may be the subject of such a disclosure. The apparent hypocrisy in that official's behavior reduces his credibility and calls his honesty into question. Consequently, information on the sexual orientation and preferences of such a person is related to the assessment of his ability to perform public functions.[54] In the case of *Gertz V. Robert Welch, Inc.* The Supreme Court held that a legitimate public interest approves of the press information disclosure concerning not only the assessment of the high state offi-

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[49] See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63, *reh'g denied*, 414 U.S. 881 (1973).

[50] See Young v. Jackson, 572 So. 2d 378 (Miss. 1990) – the case involved the information disclosure about the surgery which a certain person underwent; Y.G. v. Jewish Hosp. Of St. Louis, 795 S.W.2d 488 (Mo. App. 1990) – the case concerned filming the couple involved in in-vitro fertilization.

[51] See Thorne v. City of El Segundo, 726 F.2d 459, 469 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984) – in that case the questions asked by the police regarding a sexual life of the individual were acknowledged to be unconstitutional.

[52] For more information see G. M. Herek, *Myths about sexual orientation: a lawyer's guide to social science research*, Law & Sexuality 1991, nr 1, p. 133, 165.

[53] Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).

[54] See Gertz v. Robert Welch, Inc., 418 U. S. 323, 344–45 (1974).

cials and their functions. It also covers all matters relevant to the ability to be appointed to high positions in the state. The requirement of being "newsworthy" was revealed by the information regarding the homosexual preferences of the high-ranking official in the Department of Defense, who was personally responsible for the policy which excluded homosexuals from the military force.[55]

Among the representatives of the Polish doctrine there is no uniform position on the admissibility and disclosure of the data from the sphere of privacy revealed by the press. Generally, the doctrine can be divided into two positions.

In the light of the first position the sphere of intimate life is always subjected to absolute legal protection. Absolute protection applies to private figures as well as to figures acting in the public sphere. Such an approach has been advocated by A. Kopff, A. Szpunar[56], S. Rudnicki[57], and P. Sut.[58] The only circumstance in which the press can act legally are the circumstances in which the person concerned has given his agreement. This was confirmed by the Appeal Court in Rzeszów in the decision dated 17 III 1994[59] stating that the sphere of intimate life is subjected to absolute legal protection, but it was also pointed out that the victim's consent was one of the circumstances which excluded the unlawfulness of the deed and, consequently, the responsibility of the perpetrator.

Supporters of the second position claim that privacy protection should be highly intensive in the sphere of individual intimacy[60], however, it is not absolute protection. The rule is to protect the sphere of intimacy for both private and public individuals, but there are several exceptions. The advocates of this position are in favor of the relative protection of the intimacy sphere with regard to public figures. M. Safjan also supports such relative protection. He claims that in certain exceptional circumstances it is necessary to allow the possibility of the press interference in this sphere with

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[55] See B. Gellman, *Cheney rejects idea that gays are security risk*, Washington Post dated 1 VIII 1991, p. A33.

[56] A. Szpunar, *Ochrona dóbr osobistych*, Warszawa 1979, p. 153.

[57] S. Rudnicki, *Ochrona dóbr osobistych na podstawie art. 23 i 24 k.c. w orzecznictwie Sądu Najwyższego w latach 1985–1991*, Przegląd Sądowy 1992, nr 1, pp. 59–60.

[58] P. Sut, *Ochrona sfery intymności w prawie polskim – uwagi de lege lata i de lege ferenda*, RPEiS 1994, nr 4, p. 104.

[59] I ACr 19/94, decision from the database of the Monitoring and Press Freedom Centre.

[60] Compare I. Dobosz, *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym*, Kraków 1989, p. 61.

respect to public figures. Unfortunately, the author does not give details of such circumstances.[61]

Exceptionally, the press interference into the intimacy sphere of public figures may be regarded as permissible, but it should consider only persons holding the highest offices in the State (President, Prime Minister, and leaders of political parties). The boundaries of this intervention should be considered taking into account the following criteria:

1. criterion of the highest public office performance and execution the mandate of public trust in the state;
2. the public interest criterion justifying the publication of information from the intimacy sphere;
   2.1. the criterion of one's suitability and ability to perform public functions;
   2.2. the criterion of one's direct relation to the performed activities.

4. Infringement of public figures' privacy by media

Generally, there is a consensus between the Polish and foreign jurisdiction doctrines that public figures are given a greater privacy protection in comparison with private figures. In the world literature and jurisdiction one can distinguish three positions regarding the scope of the protection of the public persons' right to privacy:

1) a position according to which both public and private persons should be treated equally in this respect (For example, France advocates this approach);
2) a position in the light of which the scope of the right to privacy of public figures is greater in comparison with private figures, but the press intrusion is permissible only under certain specified conditions (eg. Poland and Germany);
3) a position according to which it is considered that basically all the facts from public figures' private lives meet the requirement of being *"newsworthy"*; hence they may be disclosed by the press (eg. the USA and the UK).

The most common means of privacy violation are:

– information disclosure regarding one's private and family life, such as information about one's marriages, engagement, partner separations,

[61] See M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych*, KPP 2002, z. 1, p. 239.

arguments and returns, pregnancy, relationships prevailing in the family, maintaining intimate relationships, sexual preference, leisure activities, and places of one's residence;
- publishing information about one's state of health, illness, addictions, surgeries, especially plastic ones;
- information disclosure concerning the amount and sources of one's earned income, assets, financial status and debts;
- publication of one's personal data and image in connection with the ongoing criminal proceedings.

In recent years, courts of different instances, including the Supreme Court, have given several decisions declaring violation of public persons' privacy resulting from the information disclosure which concerned their private life published in the press and illustrated by their images. The vast majority of cases have been resolved in favor of the claimants and resulted in the award of high gratifications, treated both as a means of compensation and prevention of such violations.[62] These are the examples:

- by the sentence of the Supreme Court of 11 April 2006 (I CSK 159/05) a sportsman and his girlfriend (Agnieszka G. and Mateusz K.) received a total of 75 thousand zł compensation for the dissemination of rumors about their planned wedding and the expected child by the tabloid "Życie na gorąco";
- as a result of the Appeal Court sentence of 29 September 2006 in Warsaw (I ACa 385/06 – the case concerning Edyta G. and her husband) the famous singer and her husband were granted 75 thousand zł for spreading rumors about her personal life and family;
- the Appeal Court gave a decision of 25 January 2007 (VI ACa 809/06) to award an actress (Anna M.) 75 thousand zł for publishing her topless image taken while she was in Egypt; the image was published without her consent;
- the Warsaw Regional Court gave a decision of 6 March 2010 in the case regarding violation of privacy, image and honour (reputation) claimed by a popular journalist and his wife; they were granted a record amount of compensation of a total of 250 thousand zł.

The Supreme Court and lower courts in Poland provide legal protection to popular people in case of publication of the information regarding their private life, illustrated with images of theoe people published by the press

[62] T. Grzeszak, *Celebryci kontra tabloidy, czyli o nowych funkcjach zadośćuczynienia*, (in:) *Prawo własności intelektualnej wczoraj, dziś i jutro*, (ed.) J. Barty, A. Matlaka, Prace Instytutu Prawa Własności Intelektualnej 2007, z. 100, p. 128.

and made in public places in the absence of their consent. The examples of such cases include:

- The Warsaw Appeal Court judgment of 20 May 2009, VI A, Ca 1601/08 (the case claimed by a well-known television presenter Magda M. against Alex Springer Poland Ltd. The case concerned publications illustrating the well-known presenter's private and professional life and giving inaccurate information about her life without her consent – for example, rumors regarding her alleged pregnancy; the District Court upheld the claim and found violation of privacy, image and honor of the plaintiff, the Appeal Court agreed completely with the decision of the District Court;
- The Warsaw Appeal Court decision of 13 October 2009, VI ACa 337/09 (the case claimed by Jolanta M., famous for a number of entertainment programs, against Alex Springer Poland ltd.) for the publication of the photographs taken at the plaintiff's ladies night, with her name and offensive comments suggesting improper behavior of the plaintiff and presenting her in an unfavorable light. The District Court upheld the claim for violation of privacy, image and honor; The Appeal Court approved of the decision that the plaintiff's personal interests were violated;
- The Warsaw Appeal Court judgment of 16 October 2009, VI ACa 317/09 (the case claimed by Paweł W., an actor, against Alex Springer Poland ltd.) for the publication containing information about his personal life, such as relationship with his partner, presenting him in an unfavorable light, using the terms "reveller" and "gadabout"; The District Court upheld the claim for violation of privacy and reputation; the Warsaw Appeal Court shared the decision of the District Court;
- The Warsaw Appeal Court decision of 17 December 2008, VI A Ca 997/08 (the claimed by the actress Joanna B., known for television series, against Alex Springer Poland ltd.) for the publications of the actress and her partner which were published in the period of three years in the tabloid "Fakt"; the published articles related to the actress's personal (intimate) relationships with other actors, including divagations regarding the plaintiff"s feelings, her low level of morality, her state of health, life plans, and her body; the District Court upheld the claim of the plaintiff for the privacy violation;

Cases of severe press interference in the lives of well-known people' private lives constitute most of the cases dealt with by the Polish courts. Press publications illustrate an intimidating level of the press entrance into the sphere of private and even intimate life of widely known people through the publication of false, derogatory information concerning their private lives. One of the examples is the case of gossip distribution by "Życie na gorąco"

about a famous sportsman Mateusz K. and his partner; the gossips related to their planned marriage and pregnancy of the famous sportsman's girlfriend (the cover of the weekly magazine entitled "Życie na gorąco" published their photo under the titles "soon to be married?" and "Mateusz K. will be a father?"). The magazine published false information about the plaintiff's pregnancy, and the cover of the magazine was advertised 14 times weekly through TV channels such as TVP, TVN and Polsat.[63]

5. Closing remarks

The right to privacy is a dynamic and changing notion, impossible to to be grasped in the definition within the normative framework. Certainly, it is neither possible nor necessary to construct such a definition, since the right to privacy is a broad concept of a complex character, usually formulated with the use of general and vague expressions of the general clause character and covering a wide variety of elements. Any attempt to create a definition of the right to privacy will be doomed to failure because there is no way to predict the enumerative catalog of the situations that make up the sphere of private life Leaving privacy to be an open notion allows for its adapting to the constantly changing and developing needs. It also allows for the protection of the rights which are not expressed and provided directly in the text of legislation. Their protection results from the need of the essential human values protection. This allows for a flexible development of the privacy law range and adapting it to the changes in the system of social relations.

It is necessary to opt for a position of the intimacy sphere relative protection. The doctrine and jurisdiction provide many examples in which disclosing information relating to that sphere is justified because of the overriding public interest. At the same time, right is the view that because of the highly delicate character of the information relating to the intimacy sphere it should be subjected to special protection, which is characterized by greater intensity than the protection of the information belonging to the private sphere of the individual life.

It is generally accepted that the so-called public figures enjoy the right to privacy to a lesser extent than private persons. Even in the U.S. there is a dominant position that well-known people have a right to protect their

[63] The Supreme Court Decision of April 11, 2006, I CSK 159/05, unpublished judgement.

privacy, but on a smaller scale. The more famous a person is, the smaller the area of privacy is given to him. First of all, courts considering cases concerning the press interference in the privacy of public persons examine the purpose of publication. In addition, they look for the link between the published embarassing information from one's private life and the significance of the published material. The fact that a person is a public figure does not mean a legal possibility of the interference into his private life. It does not also give a simple and clear answer to what extent a plaintiff is entitled to the protection of private life spheres. Hence, politicians' private matters may be disclosed as being associated with a public assessment of their activities by the society, but at the same time, the question arises, what circumstances of their private life should be published and to what extent? In order to answer this question, American courts apply a test to check whether a certain publication addresses a legitimate public interest. While determining the existence or absence of a public interest, American courts consider the following aspects:

– customs in a given community;
– rules of conduct in a given community.[64]

The basic criterion which guides the Polish and foreign courts while resolving the conflict between freedom of the press and the so-called privacy of public figures is a public interest justifying the publication of the press material of a specific content. In assessing whether the publication of information is in the public interest, a number of circumstances is taken into account, including the content of the press material, information qualification whether it tackles public or private spheres of life, the status of the person, the degree of making the private information public by a person engaged in public activities, the need to verify the attitude of the individual and, finally, the ways of getting information and the results of its publication. The crucial factor is attributed to the content of the press material. Distinction is made between information whose subject contributes to the public debate, and information that provides only information about famous figures' private lives without any meaning and impact on the public debate.

A legitimate public interest speaks in favor of the publication of information relating to private spheres of the lives of politicians, government members and other persons holding a public office to a greater extent than in relation to the so-called celebrities – actors, singers, models and TV presenters. Depending on the impact that the different categories of people

[64] See Virgil v. Time, Inc., 527 F.2d 1122 (1975).

have on the whole of social life, different is the scope of protection of their privacy: the more "public" a person is, the greater impact on social life he has, the more reduced the scope of protection of privacy he enjoys.

S U M M A R Y

The analysis of the problematic of the right to privacy is particularly significant in the era of a society controlled by modern global technologies. The development of technology with relation to gathering, processing and spreading information in particular, means that encroachment into human privacy is increasingly effective. The aggressive and unlawful invasion of the media into private sphere of life of the so-called public figures becomes increasingly frequent not only in the yellow journalism but also in serious press. This problem concerns politicians, members of government and other people holding public offices as well as those commonly known from social, cultural life, artists, especially actors and singers, TV presenters and sportsmen. The right to privacy is a variable, dynamic notion impossible to define precisely. There is a uniformity of opinions, both in the theory of Polish and foreign judicial decisions, that public figures benefit from a limited privacy protection compared to private individuals. The basic criterion by which Polish and foreign courts are guided while settling the conflict between the freedom of the press and protection of public figures privacy is public interest justifying publication of a press article of a definite content. The public interest justification supports, to a larger degree, the publication of information from the private sphere of politicians, members of government and other people holding public offices rather than in relation to the so-called celebrities – actors, singers, TV presenters and sportsmen.

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SHOULD RACE AND RELIGION BE IMPEDIMENTS TO ADOPTION?

Introduction

Some years ago I watched a TV documentary about a Korea-born woman who, having been adopted in the 1960s by an American couple, 30 years later made an attempt to find her biological parents and, in fact, her identity. She was filmed on her trip to Korea, trying to decipher falsified information about her. This story inspired me to advance my research into various aspects of intercountry adoption. It also triggered discussion on two questions: whether sharp differences between adoptive parents and children may increase controversies connected with international adoption, and if it is the state that should eliminate such possible dissimilarities before the adoption process starts.

Child's identity as a source of a problem

It seems that the answer to the former question is connected with the importance of a child's identity for his further development. Here, an initial observation may be that it was until adoption was seen as a shameful proof of one's infertility or childlessness – and something to be kept secret – that the problem did not exist because adopted children were convinced of being natural children of their adoptive parents and neither their identity, nor differences of any kind could be a source of anxiety. Obviously, that made transracial adoption impossible to hide and, consequently, unpopular. Now, when children have the right to know and learn about their roots and when it is widely believed that they should be informed about being adopted at the earliest possible stage, the question of the importance of a child's identity as distinct from his adoptive parents' is more prominent. On the

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one hand, for a few decades the number of transracial adoptions has been getting larger, while on the other – there emerges an idea of open adoptions where the role of birth parents is not limited to being eliminated from their children's lives and thus hiding their origin. This means that adoption is no longer a shameful fact but rather, it is an institution whose principal aim should be to serve the best interest of the child, no matter if with the help of biological parents or not.

Dissimilarities between adoption parties?

Another observation involves dissimilarities between adoption parties. Can we determine which ones could bring results adversely affecting mutual relations between the parties or the said best interest of the child? Can the same be possible for the legislator that makes adoption law? Or maybe one should wonder if we are able to assess in any single case whether the parents would expose the child to these differences in a way so as not to compromise their future relations and the child development? Ideally, the most evident dissimilarities should be determined (bearing in mind that these may be perceptible at the first glance or not) before we proceed to identify the role of the state in this matter. Here, the most obvious, yet most difficult to conceal is race, along with religion, nationality, ethnicity and cultural background.

Adoption impediments

The differences, if laid down in adoption rules, are not likely to be seen as conditions for adoption – rather, they should be called adoption impediments. To determine the array of such differences and possibilities of circumventing them in adoption procedures for certain reasons is in most countries the responsibility of the legislator (or, to put it simply, the state). It is the state that decides on the adoption procedure and, most of all, on granting adoptive legitimation to certain persons. Adoption between parties of different national (ethnic, cultural) background than the child frequently means intercountry adoption as it involves different citizenship. In such cases the question of preservation of the child's identity is approached cautiously: may the child's cultivated unique identity hamper his adaptation to a new country? On the other hand, a popular solution (based on 1993 Hague Convention on Protection of Children and Co-operation in Respect

of Intercountry Adoption and the Convention on the Rights of the Child) is the principle of subsidiarity in respect of intercountry adoption. The state, when not able to provide the child adoptive family in the child's country of origin, agrees that the child leaves for another country to be taken care of (so, a child can be adopted abroad only if there is no one willing to adopt him in a country of his origin) – which will certainly result in breaking the ties with the child's homeland. However, there are also solutions preventing foreign adoptions: for instance, in South Africa it was not until the judgment in Minister for Welfare and Population Development v. Fitzpatrick and others that intercountry adoptions were allowed. Before, adoption was only possible for South African citizens or non-citizens eligible for naturalization.[1] In the Federal Capital Territory of Nigeria, adoption decree may only be made with reference to adopter who is a Nigerian citizen, in the case of joint adoption the aforementioned principle applies to both adopters.[2] Intercountry adoption is forbidden by the laws of Argentina[3], Cuba[4] and Paraguay (exception to this ban is the countries that ratified the Hague Adoption Convention of 1993 or signed bilateral adoption agreement with Paraguay). Cuban law does not allow intercountry adoptions, including adoption by persons with multiple citizenship – as it does not allow for having more than one citizenship.[5] In Philippines[6] an alien is not allowed

[1] According to Constitutional Court, (CCT08/00) [2000] ZACC 6; 2000 (7) BCLR 713 (31 May 2000).

[2] L. O. C. Chukwu, *Adoption of children in Nigeria under the Child's Rights Act 2003: Problems, pitfalls and prospects*, in: L. Wardle, C. S. Williams (eds), *Family Law: Balancing Interests and Pursuing Priorities*. Buffalo, New York: William S. Hein, 2007, pp. 225–231.

[3] Código Civil de la República Argentina, Actualizado al 20–9–05, Biblioteca del Tribunal Superior de Justicia, http://www.jusneuquen.gov.ar/share/legislacion/leyes/codigos/codigo_civil/CC_art0311a0340.htm, Ley 24.779 Adopcion of 1997 r., Legislación Argentina, No. 626, April 1997, p. 3–8, Filiation and Adoption, 23 Ann. Rev. Population L. 1996–1997, p. 69.

[4] Family Code, Ley no. 1289, 14/02/ 1975, Gaseta Oficial 15/02/1975, W. Skierkowska, *Prawo rodzinne Republiki Kuby*, "Nowe Prawo" 1983, no. 7–8, pp. 146–147.

[5] US Department of State, US Department of State (http://travel.state.gov/family/adoption/country/country_3092.html), UK Department of Education and Skills http://www.dfes.gov.uk/intercountryadoption/index.shtml and Adoption Council of Canada http://adoption.ca/ can be treated as a source of information concerning the bans on intercountry adoptions in Cuba, Sri Lanka, Croatia, Finland, Panama, Pakistan and Haiti.

[6] Civil Code of 1987 (art. 183–193), changing Civil Code of 1949 and The Child and Youth Welfare Code of 1974, Executive Order No. 209, July 6, 1987, as amended by Executive Order No. 227, July 17, 1987, http://www.weddingsatwork.com/culture_laws_family-code01.shtml, http://www.abogadomo.com/main.html (26.10.09) and also Intercountry Adoptions Act of 1995 (Republic Act No. 8043), Official Gazette, Vol. 91, No. 32, 7/08/1995, pp. 5006–5011, www.gov.ph/laws/ra8043.doc (18/07/07), Filiation and Adoption, 21 Ann. Rev. Population L. 1994–1995, p. 118.

to adopt, except a former Filipino citizen who seeks to adopt a relative by consanguinity, one who seeks to adopt the legitimate child of his or her Filipino spouse, or one who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter.[7] In Sri Lanka local children must not be adopted by Sri Lanka-based foreigners. In Croatia intercountry adoption must be approved by the Ministry of Health and Social Welfare, which is not an easy task because of the ministry's belief that intercountry adoptions, since they make children torn away from their original moorings, are contrary to the best interest of the child. It is also in Finland that children cannot be adopted by foreigners, and Greece only allows for intercountry adoption when the adopter is of Greek citizenship or origin and does not live abroad.[8] According to the Slovenian Marriage and Family Relations Act of 1976, it is a principle that a Slovenian child can be adopted by a Slovenian citizen[9], under Ukrainian law unmarried foreigners cannot adopt Ukrainian children.[10]

Religious differences between parties of adoption

Religious differences between adoption parties are regulated by relatively few legal systems, however, adoption is not allowed in the majority of muslim countries. This stems from the interpretations of the Koran that claim it prohibits establishing of artificial family bonds. The interpretations in question are based on Koranic parable of the prophet Mohammad's marriage to his adopted son's ex-wife: a relationship traditionally conceived as unchaste. The idea of no true family ties resulting from adoption was *de facto* the springboard for acceptability of such marriage[11] – hence the

[7] Although aliens not included in the foregoing exceptions may adopt Filipino children in accordance with the rules on inter-country adoptions as may be provided by law.

[8] D. Rachford, *Statistically Speaking: Intercountry Adoption, Political Sensitivity, and the United States*, 25 Child. Legal Rts. J. 2005, p. 65.

[9] Ur 1 SRS, no 15/76, 30/86, 1/89, 14/89; Ur 1 RS, no 13/94, 82/94, 29/95, 26/99, 70/00, 64/01, 110/02, 42/03, 16/04, also S. Kraljić, *Legal Regulation of Adoption in Slovenia – Do We Need Changes?*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2006, pp. 395–406.

[10] Ukrainian Family Code of 2002, Vidomosti Verhovnoi Rady Ukrainy, 2002.#21–22. St 135, Siemiejnyj kodeks Ukrainy, Informacjonno-prawwoj centr Ksilon, Charków 2005, Law no. 2562 On Legislative Amendments to Ukraine's Laws (regarding adoptions) of March 20, 2007, U. S. Department of State http://travel.state.gov/family/adoption/intercountry/intercountry_3175.html.

[11] N. Anderson, *Islamic Family Law*, in: A. Chloros, M. Rheinstein, M. A. Glendon (ed.), *International Encyclopedia of Comparative Law*, Vol. IV. *Persons and Family*, Mohr Siebeck, Tübingen, Leiden, Boston, 1980, p. 74.

bans on adopted children's taking the family name of the adopters, on inheritance and succession, creation of impediments to marriage between parties and treating the adopted child as a natural child of the adopters, or simply adoption bans. However, guardianship institutions (*kafalah*, *sarparasti*), that in a way substitute for adoption, are available only to the Muslims: pursuant to Algierian Law no. 84–11 of 9 June 1984 – Family code[12], a person entitled to legally take care of a child (*kafil*) should be a reasonable, venerable Muslim able to maintain and protect the child (*makfoul*) – the origin of the child may be known or unknown. Similarly, the Iranian Civil code stipulated that Muslims may only taken care of (*sarparasti*) by Muslims.[13]

According to currently binding Libyan religious codes regulating personal status of the Catholics, Orthodox and Protestants, both the child being adopted and the adopter should belong to the same religious community, but not necessarily the same rite.[14] In Israel, the adopter should be the same religion as the child being adopted[15], in India (according to Hindu Adoptions and Maintenance Act of 1956 (for Hindus, Buddhists, Jainas or Sikhs by religion) and The Juvenile Act of 1986), any Hindu has the capacity to take a son or a daughter in adoption and no person shall be capable of being taken in adoption unless he or she is Hindu.[16] In Northern Ireland, it is required that all persons who must give consent to adoption, before giving the same know the adopter's religion – consent may be denied for the reasons of religious differences between the adopter and the child being adopted.[17] Russian Family Code of 1995 only allows for adoption of the minor and only if this is justified by his best interest and intended with the purpose of the child's full physical, mental, spiritual and moral development, with his ethnic origin, religion, cultural background, language and education taken into account in order to guarantee suitable education in keeping with the

[12] Loi no 84–11 du 9 juin 1984 portant Code de la famille, modifée et Complétée, Por l'Ordonnance no 05–02 du 27 février 2005, ONTE 2005, s. 25 bis.

[13] Text of the code: http://www.iranwd.com/laws/ltr-r226.htm.

[14] C. Mallat, *The Lebanese Legal System*, The Lebanon Report No. 2, Summer 1997, pp. 1–3.

[15] Adoption of Children Act of 1981 (5741), Book of laws of 5741 (1981), 293, of 5755 (1995), 399, of 5756 (1996), 354, of 5758 (1998), 20, 295, 296, of 5764 (2004), 445, 476, Law – executory rules to the adoption of children law (verification of applicant's capacity) of 1998 (5758), Book of laws of 5758 (1998), 304 and also E. D. Jaffe, *Introduction. Cooperative global adoptions: a new east-west partnership*, in: E. D. Jaffe (ed.), *Intercountry adoptions. Laws and Perspectives of "Sending" Countries*, Martinus Nijhoff Publishers, Dordrecht/Boston/London 1995, pp. 1–6, 12–14.

[16] K. Lilani, *Adoption of children from India*, in: E. D. Jaffe (ed.), *op. cit.*, pp. 25–26.

[17] B. Doolan, *Principles of Irish Law*, Gill and Macmillan, Dublin 1991, p. 280.

child's heritage.[18] According to Arkansas Code, court of law may, on petition of parents or guardians, place the child in a family whose religion is the same as the child's (9–9–101 to 9–9–701), while according to Delaware Code (Title 13. Domestic Relations, Chapter 9. Adoption (§ 911)), if either natural parent, in a notarized statement made prior to the placement for adoption, specifies the religion in which he or she desires the child to be raised, the Department or licensed agency shall make placement in accordance with such statement. If the natural parents declare indifference to the religion in which the child should be reared, or if their religion is not known, or if there is none, then the Department or licensed agency shall make placement without regard to religion. Although whenever the provisions appear to create a hardship for the child to be adopted in obtaining a suitable and prompt placement, the Family Court, in its discretion, may waive these requirements in the best interest of the child. A similar regulation is laid down in the Wisconsin Statutes (Charitable, Curative, Reformatory and Penal Institutions and Agencies, Chapter 48. Children's Code, § 48.82): when practicable and if requested by the birth parent, the adoptive parents shall be of the same religious faith as the birth parents of the person to be adopted, but the act also bans discrimination and hence no person may be denied the benefits of adoption because of a religious belief in the use of spiritual means through prayer for healing, because the person is deaf, blind or has other physical handicaps, because of his or her race, colour, ancestry or national origin.

More about a race as an impediment to adoption

The issue of race was of special importance especially to the southern states – there, racial dissimilarities were treated as impediment to adoption only in the 1970s. Now it is assumed that such factors as race and religion should be viewed only in respect of the best interest of the child. However, specific solutions adopted by particular states may be different – for instance, in some state statutes it is provided that religion, race, colour or origin, along with blindness, deafness and other physical handicap (Wisconsin, Florida – disablement or disability) cannot be impediments to adoption, while in others – that the court may, on petition of parents – match the child with adoptive parents of the same religion (Arkansas, De-

[18] Sobranije zakonodatielstwa Rosijskoj Federacji, 1996, No 1, cm. 16, Semejnyj Kodeks Rosijskoj Federacji, Biblioteka Kodeksow, Moskwa 2002, pp. 61–62.

laware). As a rule, adoption agencies try to match children with adoptive families of the same race, ethnicity, culture and religion, which is in part caused by Afro-Americans' protests against the so-called "transracial adoptions" and some experts' opinions on personality disorders in black children brought up in white families.[19] In the USA in 1987 transracial adoption constituted 8 per cent of overall adoption – of which 1 per cent was adoption of black children by white women and 5 per cent – children of different races by white women and 2 per cent – white children by women of other races.[20]

Race and religion as elements of group of adoption impediments

In this context, what can be said about other prerequisites of adoption? The following picture emerges from the profusion of worldwide solutions. The most common are the prerequisites of age (minimum and maximum) of an adopter and difference in ages between an adopter and an adoptee. Apart from these, there are also: the ability to provide the child with proper education, moral values, marital status, sex (as a rule – men are not allowed to adopt girls[21], legal capacity, no children born of the marriage or childlessness (Haiti, Lebanon, Venezuela, Indie – at the time of adoption, the adoptive father or mother cannot have a Hindu son, son's son or son's son's son (when adopting a boy) or a Hindu daughter or son's daughter (when adopting a girl)), full legal age, preadoptional period, remaining in bonds of marriage for certain period of time, good health condition, and consanguinity. As for consanguinity, it can be a prerequisite of adoption (according to South Dakota Codified Laws, it is possible that the father of an illegitimate child by publicly acknowledging it as his own, receiving it as such into his

[19] H. D. Krause, *Family Law In a Nutshell*, West Publishing Co., St. Paul, Minn. 1977, p. 155, A. Bahl, *Color-Coordinated Families: Race Matching in Adoption in the United States and Britain*, 28 "Loyola University Chicago Law Journal" 1996–1997, p. 45, E. Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 "Duke Journal of Gender Law & Policy" 1995, pp. 99–105, S. Maldonado, *Racial hierarchy and international adoptions*, in: L. Wardle, C. S. Williams (ed.), *op. cit.*, pp. 263–264, D. S. Rosettenstein, *Trans-Racial Adoption in the United States and the Impact of Considerations Relating to Minority Population Groups on International Adoptions into the United States*, in: N. Lowe, G. Douglas (ed.), *Families Across Frontiers*, The Hague, Boston, London 1996, pp. 605–623.

[20] K. Mannino, *Statistically Speaking*, 22 "Children's Legal Rights Journal", Spring 2002–2003, pp. 26–27.

[21] H. Thompson-Ahye, *Exploring Virgin Territory: Family Law in the British Virgin Islands*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2006, pp. 112–114, B. A. Lambert Peterson, *An Overview of Trinidad and Tobago Family Law*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2004, pp. 462–463.

family, with the consent of his wife if he is married and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth – § 25–6–1), it can be also an impediment to adoption: in Brazil it is prohibited to adopt one's siblings; in Panama there are bans on intra-family adoptions: grandparents cannot adopt their grandchildren, siblings – their minor brothers or sisters; in Australian New South Wales a court must not make an adoption order in favour of a relative of a child unless the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child and the child has established a relationship of at least 2 years' duration with the relative (Adoption act of 2000), in Australian Victoria a court shall not make an adoption order in favour of a person who is, or persons either of whom is, the mother of the child or a putative father of a child (Adoption Act of 1984), in Bulgaria adoption bans apply to adoption by lineal relatives, brothers and sisters, with grandparents (or one of them) allowed to adopt their grandchildren only if the child was born out of wedlock or is a full- or half-orphan and if such adoption serves the best interest of the child (Family Code of 1968); in Spain it is forbidden to adopt one's descendants or close relatives – in lineal consanguinity, while up to the second degree in collateral consanguinity[22]; Lithuania bans adoption of one's own children, brothers or sisters (Civil Code of 2000), while in Norway it is allowed to adopt a biological child only if such adoption will be of significance for the child's legal status, or in the case of a new adoption of a child who has been adopted (Adoption Act of 1986); in Romania there is a ban on adoption by siblings[23]; Serbia has its impediment of close consanguinity[24], adoption is not possible between ascendants and descendants, siblings and stepsiblings, and so does Slovenia: a child cannot be adopted by his close relative, or his brother or sister[25]; it is not possible to adopt a person younger than an adopter, unless such person is adopter's wife or husband, or brother, sister, uncle or aunt, of the whole or half blood in Massachusetts.[26]

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[22] K. Bagan-Kurluta, *Adopcja dzieci. Rozwiązania prawne w wybranych państwach*, Białystok: Temida 2, 2009, pp. 29–42.

[23] *Ibidem.*

[24] M. Draškić, G. Kovaček Stanić, *The New Family Act of Serbia*, in: A. Bainham (ed.), *The International Survey of Family Law*, Bristol 2006, pp. 358–360 and 367–368, O. Cvejić Jančić, *Reform of adoption according to the new Serbian Family Act*, in: L. Wardle, C. S. Williams (ed.), *op. cit.*, pp. 252–259.

[25] S. Kraljić, *op. cit.*, pp. 395–406.

[26] *Religious Matching Statutes and Adoption*, 51, "New York University Law Review",

It is not often that a legal regulation sets forth a wide array of detailed adoption impediments, which is the case of article 116 of the Armenian Family Code of 2004 (adults can become adopters except for: a) the persons recognized incapable or restrictedly capable by court, b) spouses, one of who is recognized incapable or restrictedly capable by court, c) persons deprived of parental rights by judicial procedure or with restricted parental rights, d) persons discharged from the obligations of a guardian for the reason of not fulfilling properly the obligations put on them by law, e) former adopters, if adoption was terminated by their fault, f) the persons who cannot implement parental rights because of health reasons, g) persons, who at the moment of adoption do not have sufficient income to provide minimal living needs of a child, h) persons, who do not possess permanent place of residence, as well as an accommodation which corresponds to the established sanitary and technical requirements; i) persons who at the moment of adoption have convictions for grace or particularly grave crimes against a human being or public order and morality), also of 1999 Azerbaijanian Family Code[27], Belarusian Code of marriage and family of 1999[28], Russian Family Code of 1995[29] or of Vietnamese law (adopters must not be people who have certain parental rights toward minor children restricted or who have been sentenced for one of the crimes of deliberately infringing upon the life, health, dignity and honour of another person; ill-treating or persecuting their grandparents, parents, spouses, children, grandchildren and/or fosterers; inciting, forcing juvenile people to commit offenses or harbouring juvenile offenders; trafficking in, fraudulently exchanging or abducting children; committing the crimes of sexual abuse against children or acts of enticing and/or forcing their own children to act against law or social morality, but have not yet enjoyed criminal record remission (Marriage and Family Law of 2000) or of Illinois law (a person can be recognized as an

1976, pp. 262–284, *Religious Factors In Adoption, Notes*, 28 "Indiana Law Journal" 1952–1953, pp. 401–409, *Religion as a Factor In Adoption, Guardianship and Custody, Notes*, 54 "Columbia Law Review" 1954, pp. 376–403, St. Thomas More Institute for Legal Research, *Matching for Adoption: A Study of Current Trends*, 22 "Catholic Lawyer", Winter 1976, pp. 70–86, A. R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 "Boston University Law Review" 1995, pp. 997–1060.

[27] Siemiejnym Kodeks Azierbajdżanskoj Respubliki utwierżdien Zakonom Azierbajdżanskoj Respubliki ot 28 diekabria 1999 goda (wstupił w siłu s 1 ijunia 2000 goda), Izdatelstwo "Juridiczeskaja literatura", Baku 2001, pp. 68–78.

[28] Vedomosti Natsionalnogo Sobrania Respubliki Belarus, 1999.#23. St 16, W. G. Tichinia, W. G. Gołowanow (ed.), *Kommentarij k Kodeksu Respubliki Biełaruś o brakie i semje*, Mn.: "Swietocz" 2000.

[29] Sobranije zakonodatielstwa Rosijskoj Federacji, 1996, No 1, cm. 16, Semejnyj Kodeks Rosijskoj Federacji, Biblioteka Kodeksow, Moskwa 2002, pp. 61–62.

unfit to have a child in a case of 1) abandonment of the child, 2) failure to maintain a reasonable degree of interest, concern or responsibility, 3) desertion of a child for more than 3 months next preceding the commencement of the adoption proceeding, 4) substantial neglect of the child – continuous or repeated, 5) extreme or repeated cruelty to the child, 6) failure to protect the child from conditions within his environment injurious to the child's welfare, 7) depravity, 8) open and notorious adultery or fornication, 9) habitual drunkenness or addiction to drugs, 10) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth, 11) failure by a parent to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the, or to make reasonable progress toward the return of the child to the parent, 12) evidence of intent to forgo parental rights, 13) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter, 14) inability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment, mental illness or mental retardation, 15) a finding that at birth the child's blood, urine, or meconium contained any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant was the result of medical treatment administered to the mother or the newborn infant, and that the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor.[30]

A solution adopted in the USA yet rare elsewhere in the world is to minimize the number of conditions or refrain from indicating the same in favour of assessing each adoption case in respect of the best interest of the child[31] – in Alabama, Hawaii, Kansas, Maine, Michigan, Oregon).

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[30] C. Benson, C. Godsil Cooper, J. Handler, R. Walters, *The Best Interests of the Child – The Illinois Adoption Act In Perspective*, 16 "DePaul Law Review" 1974–1975, pp. 100–126.

[31] *Joint Adoption: A Queer Option?, Note*, 15 "Vermont Law Review" 1990–1991, pp. 197–226, D. E. Abrams, S. H. Ramsey, *A Primer on Adoption Law*, 52 "Juvenile and Family Court Journal", Summer 2001, pp. 23–43, A. R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 "Boston University Law Review" 1995, pp. 997–1060, K. E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 "California Western Law Review", No. 1, Fall 2003–2004, pp. 1–77, K. Bennison, *No Deposit No Return: The Adoption Dilemma*, 16 "Nova Law Review" 1991, pp. 909–935.

Role of the best interest of a child principle

The notion 'the best interest of a child' or 'child's welfare' is broad and general-in purpose. It is uneasy to define, even when creating an illustration of a certain ideal state, value, situation or status of a child. The concept to leave the notion undetermined seems to be correct, suitable to enable flexible application of the principle in numerous situations and cases. The question is whether a creation of a catalogue of factors, to be taken into consideration during the process of accomplishment of the best interest of a child, would be more useful? Leaving a notion undefined makes the practitioners interpret it subjectively – strictly or broadly – according to a given situation, while a *numerus clausus* catalogue of factors would limit the possibilities to be considered. Regardless, the creation of this kind of list seems to be impossible, taking enormous diversity of cases to be dealt with into consideration. The formation of a list, that can be called a minimum catalogue is quite another matter. A proper organ dealing with a case and deciding about child's future should deliberate factors from the list, at the same time not being limited to do so and being obliged not to omit them. For instance, a notion can be related to one of the aspects of child's upbringing in a regular family – securing a proper psychophysical development for a child by formation of optimal educational conditions. Assessment of this factor should result in prevention from child's 'psychopathisation' and so called social heritage. When resuming the preparation of factors to be considered in intercountry adoption cases, one should list the physical, mental and emotional needs of a child, on an intellectual level. The physical, mental and emotional levels of the child's development should also be considered, such as his/her ability to understand situations and to form opinions regarding them and the consequences of organ's decisions. Being a member of a certain family has also a great importance, as well as possibility to become a member of a new adoptive family as a person with recreated family bonds. Additionally factors connected with the child's feelings, like safety, love and relations with all persons concerned in a case, need to be addressed. Especially in cases of a child's placement in future adoptive family one should consider an issue of continuity of custody/care or consequences of a late decision in a case (e.g. breaking the continuity). The decision of adoption should be the best solution in given circumstances, concerning a particular child's welfare. It should not be treated as a problem solution consisting in choice of the better from two disadvantageous options. That is why every possible option and its consequences should be also considered by an organ deciding in a case. Being more specific, if we will consider religious, cul-

tural (also language), racial origin and traditions of a child as important factors, as they are, we should pay attention on future family's attitude towards them.

Nevertheless an attempt to define 'the best interest of a child', can be understood as the ideal situation, in which a child is able to develop normally. 'Normally' means referral to certain system of moral values, but also an ideal value to be achieved. So the best interest of a child can be described both as a value and as an element of evaluation, i.e. evaluation factor in every activity (decision) concerning children. Carrying on an analysis of the notion – it can be looked upon as a conjunction of values or just one value, accomplished by numerous, impossible to take place in a closed catalogue of elements, like: sense/feeling of psychical, emotional and property comfort, or the ability to develop leading to finding a place in a society as an adult. Objective comprehension and universally accepted elements create a standard (framework) containing the subjective feelings of a child.

Adoption impediment versus the best interest of a child standard and principle of subsidiarity in intercountry adoption

Above reflections regarding the best interest of a child standard concern cases when a certain choice has to be done. Let us take a look at possible options coming into play. The first situation is when a choice is between two or several adoptive families, and the second one concerns the adoptive and foster families, the third – the adoptive family and institutional form of care (orphanage). A choice between biological and the adoptive families is possible, but infrequent – it takes place when a court decides to place a child in foster/adoptive family without parents' consent, usually depriving them of parental rights.

In every case mentioned an organ (court) has to decide on dealing with two standards: the best interest of a child and subsidiarity. It should also analyse adoption impediments, in the light of the two mentioned standards. Dealing with the best interest of a child standard means that a court should choose the best solution for a child, application of the second standard results in permission to adopt a child abroad only if there is no one willing to do so in a country of child's origin – or people willing to adopt nationally do not assure, in the court's opinion, accomplishment of the first standard. Even if foreigners are more able and willing to create the perfect conditions for a child, their application will be considered only when no one from the country of the child's origin, even less able and willing, will appear.

In the case of obligatory application rules concerning the same race and religion of both parties of adoption, a result of choice can be different, which means that even if there are many families in a country of child's origin, a child can not be adopted by any of them because of lack of similarities prescribed by law. Then intercountry adoption cannot be fulfilled, unless someone from the same race or religion as the child will appear. The solution, when strictly applying the impediments, will be placing a child in foster family or in institutional care. Although they should provide the proper care, predominance of adoption in this sphere is obvious. Also from the point of view of accomplishment of the best interest of a child standard – this solution is unjustified. The situation repeats itself when there will not be any people of the same race or religion willing to adopt a child both in a country of child's origin and abroad. The question is – should this situation lead to child's placement in another form of care rather than to permit to adopt a child despite the impediments? If one accepts the latter solution – who should be allowed to adopt a child – a family from the child's country of origin or foreigners, according to the standard of subsidiarity?

The analyses of application of rules shows that accomplishment of both standards is rare. In fact application of them at the same time is impossible – intercountry adoptions are never compared with national adoptions, that is why there can not be a comparison concerning potential welfare of a child in the two kinds of adoption. Application of race or religion impediment can make a procedure more complicated and inconclusive.

Who is the one to decide about adoption?

The aim of all rules concerning intercountry adoption is to protect a child to be adopted. Their application sometimes brings into question, whether to reconsider how the limitations of adoption are created. The first way of their creation is by the law strictly prohibiting certain activities, as adoption by the adopter of a different race or religion than the adoptee or allowing only to adopt a child of the same race or religion. A legislator, doing so, limits a possibility to adopt, and at the same time – to be adopted. Strict bans on adoptions of this kind usually lead to situation when a court is not allowed to postpone a rule in the name of child's welfare.

Although the above situation is questionable, the next one is even more striking. The same effect can bring a regulation allowing biological parents of a child to decide about race or religion of a future adopter. It goes without

saying that both a relation between parents and children and a parental authority justify a role of parents in a family and in a child's life. It is also the autonomy of a family unit and its scope containing parents' possibility and ability to decide about a child – that justifies it. But in any given case a parent is the one willing to finish the relationship with a child – giving a consent for adoption. If an adoptive procedure is quick and there are many potential adopters to choose from, a way to limit the possibility for adoption can look like a method to assure that the chosen adopter would be the best one, i.e. with the same attributes as the child. But if a child is sick or older and additionally placed in an orphanage or when there are not too many potential adopters – it is a method of making the life of parents' biological child even harder.

Conclusion

To sum it up, the main purpose of adoption (as of any action taken in relation to an orphaned child) should be to serve the best interest of the child – hence the necessity of determining whether adoption is truly the best solution for a particular child, or maybe there are better, alternative ways. The above statement, when confronted with the differences between potential parties of adoption that have been scrutinized in this paper, may be encapsulated as follows: it should be well considered if adoption by a person of different nationality, ethnicity, culture, religion or race would be of greatest benefit to the child?

Since intercountry adoptions are usually subsidiary to domestic adoptions, it may be assumed that such adoption is preceded by extensive efforts to find adoptive parents for the child in his country and that adoption in this light is the alternative to the child's further stay in an institution. In such an instance it may be asserted, even with no reference to any particular case, that adoption is a better option for the child and therefore in his best interest.

On the other hand, racial and religious clashes, as not necessarily directly related to intercountry adoption, are handled in a different way and for them the subsidiarity principle does not hold. If it did, however, what would that mean in practice? The application of subsidiarity principle would require people in charge of the adoption process to seek prospective adoptive parents of the same race or religion as the child's, and only if this appeared impossible, they could consider candidates without regard to the race/religion criterion.

Currently binding adoption regulations do not stipulate race as an impediment; rather, they propose bans on racial discrimination. This is typical especially of American regulations, and supported by a totally different practice – that of searching for a child of the same race (so the likelihood of a black child adopted by a white couple is as little as that of a white child adopted by a black couple). By contrast, when children are sought outside the US, racial differences play no part, to take frequent adoptions of Asian children by non-Asian families as an example. Thinking of racial differences as an impediment to adoption while leaving aside the questions of discrimination and political correctness, it must be noted that race is the only feature that may obviously make the adoption parties differ. It is therefore in the child's interest to scrutinize what impact such a visible (for both the child and his environment) dissimilarity may have on his further development.

Religious difference, by contrast, is not visible and its importance depends on whether or not one identifies their identity with religiousness. Besides, it is allowed to adopt infants and young children with no religious awareness, and older children, whose awareness is undoubtedly stronger. Again, it seems justifiable to refer to a child's best interest: if religion is of vital importance to a child, maybe we should strive to find him parents who can guarantee continuity of the child's upbringing with regard to his religious background.

On the other hand, if there are no established bonds, should the state (via statutory ban on such adoptions) deprive the child of the opportunity to find a new family? If not a state, than who should? Here, there are three practical solutions: the state, or rather the legislator making particular laws, court passing judicial decisions in adoption cases, and birth parents. While the two former ideas do not raise so much controversy, the latter seems bizarre. It is also worth consideration who is to decide if a child should be adopted by parents of the same religion. Why should parents who for any reasons deny further care of their child, decide on his future to such an extent that in effect the child is placed in an institution or in frequently changing foster families instead of having a stable family environment?

Different race or religion, if included in legal acts, are part of the legion of impediments or prerequisites present in adoption regulations. Each of them may be justified – they are here to safeguard stable and natural character of family relations resulting from adoption. However, would it be right in this context to treat the impediment of race or religion equal with those of sex or minority?

The purpose of adoption is to improve a child's wellbeing (which is proved at least by the fact that it is allowed to adopt one's own extramarital children or relatives, assuming that adoption has better effects on the child than other forms of care or guidance). All impediments should only exist to protect the child and they should be treated as such. Consequently, they should all be considered in terms of serving the best interest of the child – each particular child.

The principle of "best interest of the child" may justify a given solution introduced as a response to the social need, as exemplified by the American "open adoptions". Judicial decisions are determined by the best interest of a particular child in the context of particular case. Social needs, on the other hand, are determined by American reality with its relatively weak opportunities of the adoption of infants unaware of their roots, and birth parents' consent to adoption of their child is often conditioned by the possibility of future contacts with or information about the child.[32] However, it is hard to expect that social needs may result in the necessity of adoption impediments of race and religion to be introduced and used in the best interest of the child.

S U M M A R Y

During the twentieth century adoption became a tool ensuring a foster family environment to children. The increase of its popularity was accompanied by passing legal regulations related to adoption limitations which were to serve achieving various goals with child's best interests in the foreground whereas applying two principles, the above mentioned the best interest of the child and subsidiarity results from international regulations. The first one means that the best interest of the child should dictate the decision about adoption while the second one implies that a child might be adopted abroad only when there are no adopters from the child's mother country. In this context adoption limitations may be treated in two ways, firstly as an expression of protection of child's interests (in the form of an impediment to adoption), secondly, as factors which should be taken into account when evaluating the fulfilment of child's interest. Indicating whatever circumstance or a trait of a person as an impediment to adoption may in general stop the adoption proceeding since occurrence of such a trait will make the adoption impossible. Indicating religious or racial differences between a child and a potential adopter as an impediment makes it impossible to evaluate the fulfilment of child's interest in

[32] A. R. Appell, *Increasing Options To Improve Permanency: Considerations In Drafting An Adoption With Contact Statute*, 18 "Children's Legal Rights Journal" No. 4, Fall 1998, pp. 36–37, D. E. Abrams, S. H. Ramsey, *op. cit.*, pp. 23–43.

adoption since it makes the adoption impossible. If we assume that racial or religious differences are factors which should be taken into consideration while estimating the best interest of the child in adoption then there exist no doubt as for the possibility to apply the two principles governing adoptions. A child would be provided with a family environment abroad (if there are no adopters in the country) in a family of different race or religion (confession) if it was for the child best interest. Treating the above mentioned differences as impediments to adoption does not guarantee the fulfilment of the principle of the best interest of the child.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

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THE NOTION OF CODICIL. ORIGINS AND CONTEMPORARY SOLUTIONS

1. Codicil in Roman Law

Legal systems of countries in Continental Europe are based, to a significant measure, on solutions taken from Roman law. It is especially noticeable in the sphere of private law. The force of effect of Roman law did not reside only in the power of ancient Rome and the power of enforcement of its laws but in the rationality of legal construction which managed to satisfy, to a large degree, the needs of Europe at that time. Many of them are still valid. One of the institutions drawn from Roman law is that of the 'codicil'. The concept of a codicil has undergone many changes in the space of hundreds of years, adjusting to the legal orders in which it has functioned.

A codicil is related to the notion of a will. The ancient Romans started to differentiate very early between inheritance based on the will of a testator from not testamentary, statutory succession. It is worth underlining that archaic Roman law preferred succession based on the will of a testator.[1] In Roman law a will was a unilateral, formal, revocable and personally made declaration of will in the event of death which comprised the appointment of an heir. According to the principle *heredis institutio caput testamenti*, the appointment of an heir was a necessary prerequisite for the validity of a will. Inadmissibility of conjunction of testamentary succession (with a few exceptions) and statutory succession should be included among the characteristic traits of Roman law. A will should have contained clear indication of an heir or heirs of the entire property of a testator. There was no legal possibility of constituting an heir in relation to a defined object. Only in the west Roman vulgar law was the inheritance of a specific object

[1] After W. Wołodkiewicz, *Europa i prawo rzymskie: szkice z historii europejskiej kultury prawnej*, Warsaw 2009, p. 568.

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– *heredis ex re certa*[2] permitted. Later, with regard to the principle of *favor testamenti*, a testator's will was maintained so that an heir to a specified object or objects was treated as a universal heir.[3] In the case of multiple heirs to particular objects, succession in parts was adopted, correspondingly to the value of the objects received.

A codicil (*codicili*) appeared with the beginning of the Roman Empire under Augustus. It was a very comfortable and useful institution in legal practice, established by virtue of a custom rather than a legislative act. Originally, a codicil was a written demand (*codicillus*) submitted by a testator to his heir or a person vested in the will to execute specific testamentary dispositions.[4] A codicil was treated exclusively as an informal disposition, not including *heredis institutio*. Only the after-classical Roman law allowed the possibility to disinherit and constitute heirs also within codicil.[5]

The essence of a codicil is described by Gaius who stated that what is specific of the law of a codicil is the fact that everything which was written in it is treated as if it was written in a will (*codicillorum ius singulare est, ut, quaecumque in his scribentur, perinde haberentur, ac si in testamento scprita essent* – D. 29, 7, 2, 2).

The institution of a codicil in Roman law undermined the basis of formalised Roman will favouring an informal disposal of the last will of an administer. The later possibility of coexistence of two wills originated from a codicil. A codicil copied a will in some points, its essence and nature, however, were different from the will.[6] A codicil required a written form (even though later nuncapative oral form sufficed). Justinian required the presence of five witnesses for a codicil. The aim of a codicil was not the disposal of entire property; which constituted the essence of this legal action as opposed to a will.

It is impossible to appoint an heir through a codicil.[7] A codicil might have been left by an intestate person, the so-called *codicilli ab intestato*, which aimed at complementing intestacy. It could have also complemented testamentary succession, in the case of the so-called *codicilli testamentarii*.[8]

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[2] W. Litewski, *Podstawowe wartości prawa rzymskiego*, Cracow 2001, p. 134.

[3] R. Taubenschlag, *Rzymskie prawo prywatne na tle praw antycznych*, Warsaw 1955, p. 285.

[4] R. Taubenschlag, *op. cit.*, p. 291.

[5] W. Litewski, *op. cit.*, p. 135.

[6] W. Bojarski, *Prawo rzymskie*, Toruń 1999, p. 257.

[7] L. Piętak, *Prawo spadkowe rzymskie*, Lwów 1882, p. 140.

[8] R. Taubenschlag, *op. cit.*, p. 291.

In principle a will could not be subject to conversion; however, putting a codicillary clause resulted that an invalid will – according to a testator's will – should have been treated as a codicil. This clause resulted in the fact that appointing heirs in a codicil was treated as universal fidei-commissum[9] (*fideicommissum hereditatis*) that is, an informal legacy on the basis of which a testator instructed an heir (a trustee, namely an intestate as a rule) to bequeath the entire estate to an indicated third person (that is a fidei-commissum) as if the entire inheritance was a fidei-comissum. Such a situation was disadvantageous for an intestate heir since in reality it caused consequences of appointment of a testamentary beneficiary.

Maintaining the validity of a will as a codicil depended from fulfilment of criteria indispensable for the validity of a codicil. Later, formalism required for a codicil was withdrawn and special importance was attached to clear manifestation of the intention of a testator.

Since the times of Constantine (326 B.C.) the so-called *divisio parentum inter liberos*, namely decisions of a testator determining the division of an inheritance between heirs was also subject to codicil forms. It was not about appointing somebody an heir or assigning a part of inheritance to heirs but only about determining a method of distribution of pieces of property to testamentary heirs or *ab intestato* during partition of inheritance. Since Justinian, such dispositions could be included in a will or a codicil.[10] The difference between a will and a codicil blurred gradually but finally, in Justinian legislation, codicil was maintained as a distinct institution.[11]

2. Codicil in Medieval Europe

In Medieval Europe the inheritance on the basis of a will was initially unacceptable since it had been thought for a long time that inheritance of e.g. a family property should in an unchanged state become the property of the closest relatives of the deceased, who had the right to expect due inheritance. Therefore, inheritance served, above all, to increase patrimony. The function of concentrating the property goods of patrimony was of fundamental importance. It is worth pointing out here that medieval law, in

[9] It was conferred a meaning which converted legal action, *ibidem*, p. 292.

[10] L. Piętak, *op. cit.*, p. 241.

[11] K. Kolańczyk, *Prawo rzymskie*, Warsaw 2000, p. 475.

principle, did not consider legal action related to the disposal of property, the results of which would occur in the event of the death of a testator. It was explained that, as a consequence of the death of the testator, his or her will expired and could not *eo ipso* have legal consequence.[12]

The development of the individualisation of property and the influence of the Church which struggled for liberty to bequeath at least part of a property, counting on its own property benefits, resulted that at the turn of the 20th century (in Poland and in Russia even earlier) wills and testamentary succession started to appear.[13]

A medieval will, at first, could only include the disposals of movables and of goods acquired from immovables.[14] The Roman understanding of a will as an action of which an indispensable element was the appointment of an heir survived in the south of France from where in the 15th century it was introduced to German legislation. In central and southern France (the so-called common-law countries) it was not allowed to appoint an heir in a will, but only to dispose of a specific part of an inheritance, the rest belonging to testamentary heirs.[15] This Roman construction of a will was formally introduced in the German Empire by notarial act (1512); however, in the first half of the 16th century it did not have a widespread application. Other European countries still used a construction of a will understood as any disposal of the last will.[16] Gradually a will could, but did not have to, appoint a general heir and what is more, could be limited to the disposition of specified objects or a part of the property.

Testamentary inheritance in Poland was not of such importance as in the western Europe, which was related to domination of family interests.[17] Roman law did not function within Polish legal order in a direct way but solely influenced formulation of laws and forming of legal practice through institutions.

Testamentary inheritance appeared in the 12th century along with the stronger influence of Roman law and, indirectly, of canon law. A medieval Polish will did not have to include the appointment of an heir and to a con-

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[12] See more: J. Hube, *Wywód praw spadkowych słowiańskich*, Warsaw 1832, p. 17.

[13] After S. Płaza, *Historia prawa w Polsce na tle porównawczym Part 1 – X–XVIII century*, Cracow 1997, p. 302.

[14] R. Dembska, *O testamencie w polskim prawie średniowiecznym*, [in:] (ed.) H. Olszewski, *Studia z historii i ustroju prawa*, Poznań 2002, p. 59.

[15] S. Płaza, *op. cit.*, p. 304.

[16] *Ibidem.*

[17] O. Balzer, *O zadrudze słowiańskiej, Uwagi i polemika*, Lwów 1899, p. 7.

siderable degree resembled a codicil in its form; it could especially contain the so-called legacies for different purposes such as the salvation of one's soul, merciful deeds, or the Church.[18] Thus the Church influenced the content and functions of dispositions in the event of death. Moreover, the object of a legacy could be movable articles, sums of money and rights. Polish law thus, as opposed to Roman law, did not recognise the difference between an inheritance and a legacy, nor between a will and a codicil.

The influence of the legislation of neighbouring countries did not instil the institution of a codicil in Poland even though this law, at first partly taken over, was imposed on Poland at the end of the 18th century. This concept was not known by the Civil Code in force in the lands of the Kingdom of Poland, since it defined solely the possibility of disposing the property in the event of death in the form of a will.[19] Appointment to inheritance could concern the entirety, part or some objects of a testator's property. The Napoleonic Code did not differentiate between a will and an heir from the legacy and the legatee, since all dispositions in the event of death were called legacies. A particular form of legacy was a general legacy described in Article 1003 of the Code which corresponded to the notion of a will. Under the Prussian partition, the Domestic Law Landrecht from 1721 did not envisage the notion of a codicil. Moreover, the law was unrestricted in indicating the method of selection of an heir, for he or she could be indicated clearly or implied.[20]

A will, apart from appointing an heir, could only contain legacies, that is claims on an heir. On the other hand, in accordance with the German Civil Code (BGB) in force from January 1st 1900, a will was any unilateral last will disposition of the testator, no matter if it contained an appointment of the heir or not. The code did not introduce the distinction between a codicil and a will.[21] In the eastern districts a will was a rarely applied institution considering the low community awareness of peasants in this area. Farms with plot division were transferred during the parents' lifetime on a large scale.[22] According to the Collection of Laws it was possible to dispose of acquired goods since patrimony goods should have been vested

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[18] R. Dembska, *op. cit.*, p. 65.

[19] D. Makiłła, Z. Jaworski, *Historia prawa na ziemiach polskich: zarys wykładu 2, Polska pod zaborami*, "II Rzeczpospolita", p. 44.

[20] *Ibidem*, p. 45.

[21] (Ed.) F. Zoll, J. Wasilkowski, *Encyklopedia Podręczna Prawa Prywatnego*, Warsaw, p. 2156.

[22] D. Makiłła, Z. Jaworski, *op. cit.*, p. 71.

in the so-called necessary heir.[23] In relation to the poor development of the law of succession, it is not surprising that in these regions the institution of a codicil was not adopted.

3. Codicil in selected legal systems

Austrian legislation as one of the few introduced the institution of a codicil in its legal system. This institution, according to practice developed in ancient Rome, determines the division of last will dispositions into wills and codicils. According to the Art. 553 of the Austrian Civil Code (hereafter: ABGB[24]) only a disposition of the last will of a testator, by force of which the heir was appointed, might be called a will.[25] Whereas dispositions comprising other dispositions not consisting in appointing an heir are called a codicil.[26] Confirmation of the above distinction results also from the concept of declaration of the last will elaborated in Austrian law which according to the Art. 552 of ABGB[27] is a disposition in which the testator irrevocably transfers his or her property or a part of it to one or more people in the event of death. Expressing the last will is not tantamount to making a will. What is more, making a codicil in Austrian law requires keeping all formalities indispensable for making a will, thus from formal point of view the difference between the two acts is inexistent. However, when a codicil and not a will is left, heirs are those indicated by the law.[28] Therefore, appointing an heir is in Austrian law a necessary element of the will (there is not a will without an appointment of an heir).

In relation to the above-mentioned, a codicil in Austria does not constitute an alternative for a will since it does not comprise the appointment

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[23] S. Płaza, *Historia prawa w Polsce na tle porównawczym Part 2, Polska pod zaborami*, Cracow 1998.

[24] Stand BGBl. No 118/2002, source: http://www.ibiblio.org/ais/abgb1.htm z dnia 14 kwietnia 2011 r. along with translation, source: http://upload.wikimedia.org/wikipedia/commons/9/9d/ABGB_%C2%A7%C2%A7_551–603.pdf from April 14th 2011, original regulations of ABGB quoted below originate from the source indicated in this footnote.

[25] *Wird in einer letzten Anordnung ein Erbe eingesetzt, so heißt sie Testament; enthält sie aber nur andere Verfügungen, so heißt sie Kodizill.*

[26] After: J. St. Piątowski, *System Prawa Cywilnego*, vol. IV, Wrocław – Warszawa – Kraków – Gdańsk – Łódź 1986, p. 178.

[27] *Die Anordnung, wodurch ein Erblasser sein Vermögen, oder einen Theil desselben Einer oder mehreren Personen widerruflich auf den Todesfall überläßt, heißt eine Erklärung des letzten Willens.*

[28] After: K. Osajda, *Ustanowienie spadkobiercy w testamencie w systemach prawnych common law i civil law*, Warsaw 2009, p. 52.

of an heir, and it is not its part, it only complements or modifies a will to a certain degree. Differences between a codicil and a will are also visible in the context of the Art. 713 ABGB[29], according to which a valid subsequent will revokes an earlier will not only in terms of appointing an heir but also in terms of the rest of dispositions, as far as the testator in the last of the wills did not give to understand that the earlier will had to be maintained in whole or in part. This regulation is also important if in a subsequent will an heir was appointed only to a part of inheritance. The remaining part is not vested in heirs appointed in the earlier will or in statutory heirs. However, the Art. 714 ABGB[30] institutes that a subsequent codicil revokes all the earlier legacies and codicils only if they are contradictory. According to this principle several codicils should be interpreted together. A newly added codicil does not have any influence on the validity of a will made earlier. A will and a codicil are two institutions treated separately. A will is something more than a codicil, thus making a new will cancels all previous dispositions, both testamentary and codicillary. On the other hand, a new codicil might only modify a will, it cannot cancel it. Its power and importance are thus limited.

The remaining European systems in principle do not know the distinction between a will and a codicil. Today, apart from Austria, codicils survived solely in Catalonia and Navarra. It is not possible solely to appoint an heir within them thus similarly to Austrian law they are not a method of appointing an heir. Codicils cannot be at variance with wills and changes in specific testamentary provisions are only possible in form of a will.

The difference between codicils and wills is visible in *common law* system. The name 'will' is polisemantic depending on what meaning is conferred to it by a given legal system. The Anglo-Saxon system uses the name 'a will' to define a testament. This notion is formulated as broader from the notion of 'testament' in *civil law* systems. The fundamental difference lies in the fact that in *civil law* countries a will is one document drawn up in accordance with requirements of one of the acceptable forms of will (hence one

[29] *Ein früheres Testament wird durch ein späteres gültiges Testament nicht nur in Rücksicht der Erbseinsetzung, sondern auch in Rücksicht der übrigen Anordnungen aufgehoben; dafern der Erblasser in dem letztern nicht deutlich zu erkennen gibt, daß das frühere ganz oder zum Teil bestehen solle. Diese Vorschrift gilt auch dann, wenn in dem spätern Testamente der Erbe nur zu einem Teile der Erbschaft berufen wird. Der übrig bleibende Teil fällt nicht den in dem frühern Testamente eingesetzten, sondern den gesetzlichen Erben zu.*

[30] *Durch ein späteres Kodizill, deren mehrere nebeneinander bestehen können, werden frühere Vermächtnisse oder Kodizille nur insofern aufgehoben, als sie mit demselben im Widerspruche stehen.*

person might leave several valid wills). Whereas in Anglo-Saxon culture *will* concerns all documents revealing the last will of the deceased that is all of them are treated as one will.[31] It is clearly presented for example in a definition of a will from the Art. 1 Succession Law Reform Act[32] (SLRAO) in force in Ontario according to which a will includes: (a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of a will in exercise of a power, and (d) any other testamentary disposition.

In the Anglo-Saxon system a necessary element of the content of a testament is the appointment of an heir and the minimum content of a testament is at least a minor disposal of property that is an appointment of an heir or an executor of a testament. In the *common law* system everyone who obtains anything on the basis of a will is treated as an heir and is denominated as *beneficiary*.

A codicil is an institution applied in case of testamentary inheritance to explain, make amendments or add new provisions to a will and therefore should be considered as part of a testament. Thus, it does not exclude appointing an heir also in a codicil. Codicil constitutes a part of the proper will, it should be drafted in compliance with requirements for a will. All elements of testator's last will constituting a testament in the full sense of the word – accepted in Anglo-Saxon system – that is main document of a testament and all drawn up codicils and other dispositions should be interpreted and analysed at the same time during inheritance proceedings.[33]

On the one hand, a codicil is a separate document to a will – a will as a document, on the other hand, it constitutes its non-obligatory element – a will as a declaration of the last will. The concept of a codicil was elaborated by the Anglo-Saxon system especially because one person can leave exclusively one testament which includes the entirety of wishes of that person *mortis causa*. The construction of a codicil allowing to uphold both new dispositions *mortis causa* as well as previous dispositions resulting directly from the will was an optimum solution to avoid disagreements if a given disposition constituted a will and made it possible to fully interpret the testator's will. According to a definition of last will accepted in Anglo-Saxon law a codicil is a part of a testament, its element, supplement.

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[31] After: K. Osajda, *op. cit.*, p. 37.

[32] *Will includes (a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of awill in exercise of apower, and (d) any other testamentary disposition*, quoted after: K. Osajda, *op. cit.*, p. 37.

[33] Decision *Re Wilcock* of 4.12.1897, Ch. 1898, p. 95.

Apparently, the notion of codicil in Anglo-Saxon system is not equivalent to the notion elaborated in Austria where every act of last will which does not contain the appointment of an heir is a codicil.

The meaning of codicil accepted in *common law* system is more broad and more liberal than Austrian since it considers a codicil every amendment made to a testament (regardless of its content) thus also a modification concerning a previously appointed heir.[34] In this sense a codicil is a new will which does not however, revoke the previous one, solely modifies it. A codicil should start with reference to a definite will which it modifies, however, if the will is not found it does not question the validity of provisions of codicil.[35]

A stand similar to the one in force in Austria was adopted by legislation of the United States (except for Louisiana where application of a codicil is inadmissible). In case when a testator wants to modify specified testamentary legacies by adding new heirs or to remove previous heirs because of e.g. their death, all of these should be made in a will, not in a codicil.[36] Similarly to Austrian legislation successive codicil does not revoke the previous ones except for its specific decisions unless a will to revoke previous dispositions in the event of death results from it. If a document does not revoke the previous will or if it does not involve full power of disposal of testator's property it is presumably treated as a codicil. Today, in principle, conditions which a codicil has to fulfil correspond to conditions provided for wills. A codicil may be added to a will directly below its content. In certain states it is required that it is drawn up in print writing not handwriting. A codicil may also be attached to a will on a separate sheet of paper, however, it always has to indicate the will to which it is related.[37]

In all of the *common law* systems codicil in principle has to satisfy all requirements of a will from the formal point of view. Drawing up a valid codicil does not cause validation of an invalid will and decisions included in it may be affirmed no matter if a will to which it refers was declared invalid.

When a codicil is drawn up, it comes to inheritance on the grounds of one will modified by a codicil. It seems that in case of unification of law of succession such a concept would correspond to all legal systems considering

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[34] K. Osajda, *op. cit.*, p. 18.

[35] Decision *Gardiner v. Courthope* from 25.10.1886, L.R.P. & D. 1887, no 12, p. 14.

[36] Codicil to Last Will and Testament, Global Wills 2007, p. 3–5, source: http://books.google.pl/books?id=0n43KdCn8GkC&pg=PT2&dq=codicil&hl=pl&ei=Z5umTco9jew5tZzlwAk&sa=X&oi=book_result&ct=result&resnum=2&ved=0CCwQ6AEwAQ#v=onepage&q&f=false z dnia 14 kwietnia 2011 r.

[37] See more: D. Clifford, *Quick & Legal Will Book*, 5th edition, USA 2008, p. 97.

that some of them do not provide for inheritance on the grounds of several wills together. A codicil would be then treated – following the Anglo-Saxon concept – as an element (a part, a surrogate) of a will and thus appointing an heir within a codicil should be treated as appointing an heir in a will.

Two factors are suggestive of maintaining the institution of codicil in different legal systems. Firstly, it was adopted in Austrian and *common law* systems because of the impossibility to leave more than one will by one testator. In this aspect a codicil modifies the last will of a testator keeping at the same time original dispositions *mortis causa*. Secondly, treating a codicil as a correction to a will argues for maintaining this institution in force. Thus its function is to make the formalised principles of dispositions in the event of death more flexible. Thus, it should be considered separately from a will but as part of testator's last will – its modification concerning a specified field.

4. Conclusion

A codicil in Roman law was an extremely important element of the law of succession, serving to complement or modify a will. Its popularity originated from restrictions related to the form of a will. Such strict formal requirements resulted in recognising many wills as invalid. The restrictions were eased by codicillary clause construction. Liberalisation of requirements concerning the form of a will along with the possibility to inherit on the grounds of any number of valid documents caused an almost complete disappearance of the institution of a codicil. However, in certain legal systems it is still permitted to leave only one will; whether it be in relation to rigorous regulations as in Austria or with regard to the global understanding of a testament as a last will in Anglo-Saxon systems.

The existence of a codicil in contemporary circumstances is conditioned by various factors. Firstly, it results from different definitions of the notion of a codicil. On the one hand, language shapes our perception of the world; on the other, social reality influences the language and the significance conferred to its content. Every language contains some specific presentation of the world and its structures as well as its proper ontology.[38] People using different languages perceive the reality in different ways and define their experiences differently. This definition corresponds to the notion of lin-

[38] W. von Kutschera, *Sprachphilosophie*, Munich 1975, p. 289.

guistic relativism according to which lexis and syntax have an unquestionable influence on the image of the world.[39] Legal language is also subject to linguistic relativism.

From the perspective of the history of the transformation of codicils presented here, it transpires that Anglo-Saxon systems conferred a different significance on it than in continental systems. Certainly adopting a *favor testamenti* principle was highly important for the final form of the notion of a codicil. In my opinion it was the definition of a testament in *common law* systems which had a decisive influence on the significance conferred to a codicil. A broad understanding of the notion of a codicil, along with a recommendation to interpret the last will of a testator in connection with all his testamentary dispositions did not allow the codicil to be maintained in such a strict form as in ancient Rome.

Initially the introduction of a codicil abolished numerous rigorous rules and contributed to softening the law of succession. Changes occurring subsequently manifested in particular an abandoning of excessive formalism. It was a consequence of the influence of Roman law and also the Church on making dispositions in the event of death. The importance of the institution of the law of succession remained unchanged for a long time and became consolidated with the beginning of the Renaissance. In the majority of normative systems the institution of a codicil did not stand the test of time and the notion became blurred definitively in social consciousness. A codicil proved to be a needles legal instrument and was quickly absorbed by more flexible rules in the law of succession. The codicil survived only in Austrian legislation in a slightly archaic form. It is hard to give a simple justification for this phenomenon. It seems that we should look for it in relations between the language and especially between legal language and the needs in the practice of law, with a vision of the world being its point of reference. In my opinion a certain strictness and rigidity in Austrian law, its model of obedience and subordination decides the preservation of the institution of the codicil. In practice there are voices promulgating a view of giving up the notion of a codicil in the Austrian system, especially from the perspective of unification of the regulations of European Civil Law.

Summing up, it should be stated that significance conferred by a given legal system to other institutions undoubtedly had a considerable influence on the notion of a codicil immanently related to a codicil, namely a will. From this point of view the importance of a codicil depended on a discourse

[39] See more: T. Gizbert-Studnicki, *Język prawny a obraz świata*, [in:] ed. G. Skąpska, *Prawo w zmieniającym się społeczeństwie*, Cracow 1992, p. 150.

comprising the significance of a will. The relations between a codicil and a will functioning on the basis of feedback could lead to giving a codicil the significance of an element or amendment to a will, or could lead to complete elimination of a codicil in the practice of the law of succession.

S U M M A R Y

The notion of a codicil is immanently related to the notion of testament and is origins date back to ancient Rome. At that time deformalisation of inflexible principles of testamentary succession was the determinant of formation of a codicil. The definition and significance of a codicil has changed over the centuries adapting to legal orders within which it has functioned. Today the institution of a codicil has survived only in common law system countries and in Austria. As far as the principle is concerned, a codicil became a redundant legal instrument and was quickly absorbed by flexible regulations of the law of succession. Nowadays, depending on the conception of the last will statement, a testament and a codicil are treated separately (Austria) or globally, as forms of liability for expression of such a will by a testator (common law system). It appears that the significance of a codicil depends to a large extent from conducting a discourse including the meaning of a testament. Relations between a codicil and a testament functioning on the basis of feedback have lead to giving to a codicil a meaning of an element or an amendment, a modification of a testament or have caused elimination of a codicil in the law of succession practice.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

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WAYS OF INFLUENCING THE PROCESS OF LAW ESTABLISHMENT BY LOBBY GROUPS IN THE EUROPEAN UNION

The notion of lobbing

Lobbying turns out to be hard to categorize a phenomenon, both in the sphere of "field" it belongs to and also in social assessment of such activity. As Bernard le Grelle, French expert on lobbying points out, effective lobbying comprises: 20% of law, 20% of politics, 20% of economy, 20% of diplomacy, and 20% of communication".[1] However, because of multi-dimensional character of activities involved, there is no widely accepted definition of lobbying.

Common understanding of the term *lobbying* carries the idea of influence on the decision process, where one side persuades authority representatives to use specific legal, administrative, etc, solutions that are beneficial for the employer of lobbying.[2] It is the ability to persuade a policy-maker to do something which he would not normally do without this persuasion. *Lobbying* is also defined as a tool, technique of formulating and presenting arguments and reaching policy-makers[3], and as direct contacts between representatives of organized pressure groups and policy-makers.[4]

Lobbying is a complex phenomenon and its definitions depend on the field that serve as a point of reference. Nevertheless, one could attempt to

[1] B. le Grelle, *Profession lobbyman: le pouvoir des coulisses*, Paris 1988, p. 8.

[2] K. Jasiecki, M. Molęda-Zdziech, U. Kurczewska, *Lobbing. Sztuka skutecznego wywierania wpływu*, Kraków 2000, p. 16, P. Kotler, *Marketing*, Warszawa 1994, p. 621.

[3] M. Molęda-Zdziech, *Lobbing a inne formy komunikowania*, (in:) *Media, komunikacja, biznes elektroniczny*, ed. B. Jung, Warszawa 2001, p. 108.

[4] M. Gajda, K. Tarnawska, *Lobbing a budżet Unii Europejskiej*, Zakamycze 2002, p. 11. More on the definition of lobbing see: M. Romanowska: *Co to jest lobbing?*, http://artelis.pl/artykuly/6197/co-to-jest-lobbing, access date 11.02.2011.

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recapitulate and focus on the common elements of existing definitions:

- lobbying bases on exertion of influence on decisions made by the bodies of public authority (state and above state ones),
- its specific target are policy-makers and their associates from the institution of public authority,
- lobbying is an activity that does not break the law,
- lobbying bases on communication with various groups, persuasion, giving and obtaining information for the promotion of specific solutions.

Lobbying is connected with the whole issue of exerting influence on the decision-making process in the institutions of public authority. Other than that, this phenomenon is difficult to define. It could be considered in a wide and in a narrow scope. In the widest view, lobbying will mean actions taken by individuals or groups to influence decisions of public authority bodies. In the narrowest view it will refer to the network of institutional connections which aims to prepare action strategy and to exert influence on the content of legislative solutions (here lobbyist is a formalized representative of third party interests – employer of lobbying).

The main feature of classic lobbying must be stressed here, i.e. actions of registered lobbyist who gets paid and works for a third person (employer of lobbying) and whose actions are only in accordance with the law. Thus, "illegal lobbying" or "black lobbying" is against the nature of lobbying because its more or less secret influence is exerted in order to meet particular interests.[5] Also, illegal actions of political corruption, bribery or paid protection are only seemingly similar to lobbying. Lobbying is also confused with the right to petition the authority, which attempts to influence political decisions for the sake of own interest of a given subject.

Finally, it is worth mentioning the definition officially used by the European Commission. Since the terms "lobbyist" and "lobbying" are sometimes perceived pejoratively, the Commission adopted neutral terminology based on the terms "interest groups" and "representing interest groups". Green Paper from 3 May 2006 and announcement from 21 March 2007 introduce definition of "representing interest groups", which is used by the Commission for the sake of European initiative for transparency. In the documents the Commission adopted a view that representation of interest groups (which requires registering) means actions aiming to exert influence on the policy-making processes and decisions-making by the European institutions.[6] The definition does not encompass:

[5] M. Clamen, *Lobbing i jego sekrety*, Warszawa 2005, p. 16.

[6] COM (2006) 194 final version: "Green Paper – »European Transparency Initiative«".

- activity based on legal and specialist consultancy when it refers to fundamental right of the client to a fair trial, including the right to defence in administrative proceedings, conducted by lawyers or other specialists;
- activity of community partners within community dialogue, e.g. trade unions or employers' organizations (however, if these subjects get involved into activities beyond the ones specified in the founding treaties of the Union, they are expected to enter them into the register to guarantee equality of all represented interest groups);
- activities resulting from direct instructions of the Commission, such as one-time or regular applications to obtain information, to enable access to data, to prepare expert opinion, to invite to participate in public hearing, in consultation committees or such other forums.

Activities of most organizations that represent interest group are varied and often reach beyond registered activities. Nevertheless, the Commission assumed that activities which are based on preparation of analysis, statistics, or documentation, or which involve training services for either members or clients also fall into the definition category of "representing interest groups", provided the activities are connected with representation of interest groups.[7]

The definition used by the Commission was created on the basis of activities of interest groups. They aim to exert influence on the policy-making and on decision-making processes. The character of the subject or the kind of represented interests is not taken into account for classification of a given interest group. Consequently, the definition is quite capacious and encompasses all possible subjects – domestic, European, and international associations functioning in sectors of social and economic life – companies, law offices, consulting companies relating to public affairs, but also non-government organizations and groups of experts (so called think-tanks).

Specification of lobbying in the European Union

On the level of the states lobbying is often treated as representation of partial, particular interests which are a threat to public interest.[8] Institutions of the European Union have a more lenient approach to lobbying. In its

[7] Commission announcement – European Transparency Initiative. *Principles on relations with representatives of interest groups (register and code of conduct)*, SEC(2008) 1926, Brussels 2008, p. 4.

[8] K. Jasiecki, *Lobbing w USA, Europie Zachodniej i Polsce*, "Studia Europejskie" no. 4/2002, p. 118.

circles, a lobbyist is considered as a non-treaty partner in passing Union bills and their activities are thought to be an element of specific social dialogue. In Union's institutions lobbying (differently than in European states[9]) has been well known and quite commonly accepted since the beginning of the Higher Authority in the European Coal and Steel Community.[10] Actually, ever since the creation of European Communities, all subsequent reforms have led to constant growth of areas of their activities. This unavoidably involved growth of legal rights of their institutions. When the decision-making centers moved up onto the Union level, directly influencing rights and duties of individuals, the Union institutions became targets of more and more intensive lobbying.

Because of the role of particular institutions and organs in the creation of the Union's law, lobbying groups focus their activity around the European Commission, the European Parliament, the Social-Economic Committee and the Region Committee. Union procedures that form legislative and executive acts are very complex and that is why lobbying activities specialize in simultaneous monitoring of a few institutions.

Due to mentioned growth of influence of the Union's bodies on various areas of activities, regional authorities of member states, companies, international organizations, or third states create branches in Brussels or hire professional consultants. Obviously, all these actions aim to gain influence on the decision-making process and on the collection of information relating to interest areas. Lobby organizations that function on the Union level can be divided into the following groups:[11]

– European associations – e.g. Association of Industry and Commerce Chambers – EUROCHAMBRES[12], General Confederation of Agricultural Cooperatives– COPA/COGECA, Union of Industrial and Employers' Confederations of Europe – UNICE[13], European Trade Unions

[9] This is the result of the fact that lobbyists' actions focus around executive bodies which have the greatest influence on legislative issues. Such contacts are often kept secret, groups representing specific interests do not operate openly which intensifies distrust of the public towards such activities. What is more, in majority of member states the issue of lobbying is not regulated and each state differ in their assessment of the character and scale of lobbying activities.

[10] See more: S. Mazey, *Conception and evolution of the High Authoritie's administrative services (1952–56): From supranational principles to multilateral practices*, "Yearbook of European Administrative History", Baden-Baden 1992, pp. 31–48.

[11] See S. Mazey, J. Richardson, *Interests*, in: *Developments in the European Union*, ed. by L. Cram, D. Dinan and N. Nugent, St. Martin's Press, INC 1999, p. 108.

[12] Polish Trade Chamber is one of the members.

[13] Confederation of Polish Employers is one of its many members.

Confederation – ETUC[14], The European Consumers' Organization – BEUC[15], Association of European Airlines, European Chemical Employers Group,
- national associations – e.g. American Chamber of Commerce to the European Union, Asociación Sindical Española de Técnicos de Mantenimiento Aeronautico, ASSILOB – Associazione Italiana Lobbisti, Brazilian Association of Vegetable Oil Industries, British Chambers of Commerce, Confederation of Danish Industry, Polish Banks Association, Turkish Business Association – Brussels,
- individual firms – e.g. AB Volvo, AIR FRANCE, American Airlines, Bayer AG, BONDUELLE, AXA, Colgate-Palmolive Sarl,
- lobbying consultancy firms – e.g. Butler Kelly Ltd, BXL Consulting s.r.o., Central Lobby Consultants Ltd, Hill & Knowlton International Belgium, The Whitehouse Consultancy Ltd,
- public bodies – as regional governments and local authorities – e.g. The Norwegian Association of Local and Regional Authorities, Conference of European Cross-border and Interregional City Networks, Municipal Government of Trento, Union of the Baltic Cities,
- ad hoc coalitions for a single issue[16] – e.g. Association for Organics Recycling, European Council for Construction Research, Development and Innovation, Vision and Strategies around the Baltic Sea, World Expert Centre for Climate Change Vulnerability Studies,
- organisations of experts and epistemic communities – e.g. Association of Independent Tobacco Specialists, Architects' Alliance, Council of Bars and Law Societies of Europe, Council of European Dentists, European Heat Pump Association.[17]

In recent decades the activity of lobbying groups has considerably grown. According to the data of the European Commission[18] in 1992 there existed about 3.000 various interest groups in Brussels (lobbying sector employed around 10.000 people). Among them, about 500 subjects were the

[14] For example, NSZZ "Solidarność" is one of the members.

[15] Polish Federation of Consumers is a member.

[16] On this specific form of lobbying see interesting remarks of B. Pijnenburg, *EU Lobbing by ad hoc coalitions: an exploratory case study*, "Journal of European Public Policy" 1998, Vol. 5, No. 2, pp. 304–308.

[17] Groups of interest based on the official Interest Groups Register of the European Commission – https://webgate.ec.europa.eu/transparency/regrin/welcome.do, access date 11.02.2011.

[18] *An Open and Structured Dialogue Between the Commission and Interest Groups*, SEC (92) 2272 final, Brussels, European Commission, p. 1.

European and international federations. Länder, regional and local authorities had 50 offices in Brussels and, according to the Commission's records, there were over 200 individual firms with direct representation, about 100 consultants (management, and public relations) with offices in Brussels and many others dealing with Community affairs. In Belgium itself there were about 100 law firms specializing in community law.

Among the above mentioned, it is the European associations that are the most significant and that are in a way preferred by the Commission during the consulting process. In 1985 there were about 500 of such associations[19] and in 1997 the number rose to almost 700.[20]

The present estimations prove that there are 15 to 20 thousand lobbyists working around the main institutions of the European Union – Councils, Commissions and European Parliament. It is also estimated that in Brussels there are offices of about 2600 interest groups. In February 2011 official Register of interest groups of European Commission[21] there were 3664 subjects divided into the following categories and subgroups:

- professional consultancies/law firms involved in lobbying EU institutions – 244
  - law firm – 19
  - public affairs consultancy – 119
  - independent public affairs consultant – 46
  - other (similar) organisation – 60
- «in–house» lobbyists and trade associations active in lobbying – 1.735
  - company – 456
  - professional association – 972
  - trade union – 85
  - other (similar) organisation – 222
- NGO/think–tank – 1.177
  - non-governmental organisation/association of NGOs – 916
  - think-tank – 117

[19] Given after A. Butt Philip, *Pressure Groups In The European Community*, London 1985, p. 1.

[20] *Directory of Interest Groups*, Brussels, European Commission 1996, p. 4.

[21] Internet Register of interest groups representatives was enacted by the Commission on 23.06.2008. The Register is open to all citizens. It was created within European Transparency Initiative. Organizations that enter the register must specify whom they represent, what are their objectives and tasks, and with which areas of politics they are mainly concerned. Moreover, they will be able to describe their basic activities connected with representation of interests and creation of contact network. They will also have to present financial information to dispel any doubts about their lobbying motivation. Organizations involved in lobbying for third parties will be asked to disclose their clients.

  - other (similar) organisation – 144
- other organisations – 508
  - academic organisation/association of academic organisations – 122
  - representative of religions, churches and communities of conviction – 17
  - association of public authorities – 65
  - other (similar) organisation – 304

The European Parliament introduced its own accreditation system for lobbyists. In February 2011 it featured almost 1800 organizations representing interest groups and over 4000 representatives of various interest groups. Special IDs allowing access into the Parliament building were given to over 2800 people from that list. Each organization may select up to four members who will gain the right to hold the lobbyist ID in the Parliament.[22]

In May 2008 the Parliament proposed creation of obligatory public register of lobbyists which would be common to the Council, the Commission and the Parliament. Three institutions formed a common working group which is to prepare a proposal on the common register.[23]

Due to the specificity and incredibly wide scope of decision competences, information has become one of the most important "goods". Actually, it is perceived as such by the lobbyists. It must be remembered, however, that decision-making process is always linked with some degree of "uncertainty" about the effects and their acceptance by the subjects designated for their realization. As a matter of fact, a decision-maker never has all objective knowledge at their disposal – thus, actions of an effective lobbyist may have crucial significance for the final outcome of the decision-making process.

In the European Union lobbyists operate on various levels depending on the realized goal. They may take forms such as:

- participation in advisory committees and expert groups by the Commission and the European Parliament (including Social-Economic and Committee of the Regions),
- cooperation with MPs reporting on the proceedings of the parliamentary committee,
- informal contacts on the expert level

[22] European Parliament Register, http://www.europarl.europa.eu/parliament/expert/lobbyAlphaOrderByOrg.do?language=PL, access date: 07.04.2011.

[23] European Parliament resolution from 8 May 2008 on defining the framework for the activity of interest groups (lobbyists) in European institutions (2007/2115(INI), final version – P6_TA(2008)0197, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0197&format=XML&language=PL, access date 07.04.2011.

– participation in consultations connected with the Green Papers of the European Commission
– lobbying on the forum of the European institutions (mainly European Commission and the European Parliament).[24]

Lobbying frequently is considered a specific form of consulting which, according to its specificity is also defined as *public affairs*, *government relations*, *parliamentary relations*.[25] Lobbying organizations function in a way which, in return for access to European institutions (in order to exert influence on the decisions), provide the Union bodies with[26]:

– specialist knowledge necessary to prepare and assess the effectiveness of Union's legislature in a given field,
– information on the general interest on the European Union in a given sector,
– information on the general interest of the representatives of the given branch in a specific country.

Apart from the already mentioned increase in the number of interest groups, another tendency becomes apparent – lobbyists in the European Union tend to direct towards lobbying in the Union institutions, which is perceived as a much more effective form of influence on the decision-making processes. As a result, the role of advisory committees as Union's institutions for informal contacts with lobbying groups decreases.[27]

The phase of optimal influence of lobbyist on the decision process of the European Union is the phase of initial preparation of the legal act project by the Commission and the stage of the report preparation by the reporter of the European Parliament Commission.[28]

As early as at the stage of initial consultations on the future bill, the Commission aims to get to know the viewpoint of all potentially interested

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[24] See. K. Kukier, *Lobbing w Unii Europejskiej*, "Biuletyn Analiz UKIE" no. 1/1999, pp. 2–3.

[25] K. Jasiecki, *Lobbing...*, p. 121.

[26] P. Bouwen, *Corporate Lobbying in the European Union: Towards a Theory of Access*, EUI Working Paper SPS 5/2001, p. 7.

[27] See. J. Greenwood, *Representing Interests in the European Union*, Palgrave Macmillan 2002, pp. 33–50.

[28] R. van Schendelen, *Machiavelli In Brussels. The Art of Lobbying in EU*, Amsterdam 2002, p. 213. See also remarks on the specificity of "national" lobbying – *ibidem*, pp. 119–128. On the effective lobbying in European Parliament, for example see: B. Kohler-Koch, *Organized Interests in the EU and the European Parliament*, (in:) *Lobbying, Pluralism and European Integration*, ed. by P.-H. Claeys, C. Gobin, I. Smets, P. Winand, Brussels 1998, pp. 144–157. See also assessment of M. Tenbücken, *Corporate Lobbing in the European Union. Strategies of Multinational Companies*, Peter Lang GmbH 2002, pp. 98–100.

subjects by the policy of so called "open doors".[29] Interest groups have got the opportunity of presenting their opinions on the consulted issue. If their stand differed from the proposition of the Commission, they may come forward with their own concepts.[30] Functioning of this mechanism may be best illustrated on the example of consultations regarding the Green Paper "European Transparency Initiative".[31]

Since May to August 2006 Commission held extensive consultations, mainly by means of generally accessible internet site. What is more, in June 2006 European Economic-Social Committee called a meeting for representatives of over 60 subjects, including European groups of interest. Within the internet consultations, the Commission obtained answers from over 160 interested subjects. The answers included opinions presented by some member states, groups of interest representing the private sector, numerous non-government organizations and many individual citizens.[32]

During work on specific project, lobbyists concentrate their actions on the lower clerks of the Commission (so called bottom-up lobbing), since this is where the regulations are written down in the form that formally or politically depends on the officers. Also, since during the work numerous expert committees are used, they also become the target of lobbying actions which aim to prepare, in the best and fastest way, all information materials so that experts are warmed towards a specific concept.[33] Officials and politicians have always been subjected to various form of pressure and influence, regardless of the structure (domestic or Union), very often with limited possibility of analyzing a lot of data. Nevertheless, because of its crucial role, the information must be precise, coherent and concrete.

Lobbyists base their actions on "persuasion", convincing a decision-making representative of the arguments of the represented group. The information may be passed in various ways – that is why a lobbyist's actions may be of direct or indirect lobbying character and may take different forms. Direct methods include meetings, telephone calls, public appearances, receptions and conferences, auditions in commissions, presentations, preparation

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[29] See. B. Woszczyk, *Lobbing w Unii Europejskiej*, Toruń 2004, p. 174 and next.

[30] Only a few percent of all initial legislative projects examined by the Commission comes from the Commission itself – quoted after F. Fries, *Spór o Europę*, Warszawa 1998, p. 26.

[31] COM(2006) 194 final version from 3.05.2006, European Communities Commission, Brussels.

[32] Commission announcement Green Papers "European Transparency Initiative – secondary actions, KOM(2007) 127 final version from 21.03.2007, Brussels, p. 3.

[33] U. Kurczewska, M. Molęda-Zdziech, *Lobbing w Unii Europejskiej*, Warszawa 2002, pp. 27–31.

of argumentation, information materials, internet or traditional mailing. Indirect lobbying may use so called "grassroots lobbing", media campaigns with leaders of social organizations, circle authorities, experts (sponsoring, conferences, publications), mobilization of public opinion through petitions, demonstrations, and e-lobbying with the use of the internet.[34]

As it has already been mentioned, most lobbying actions base on methods of direct lobbying which is perceived as the most effective form of influence. A lobbyist is required to skillfully choose appropriate methods so that his actions were most effective.[35] Lobbyist is expected to warm his target to the stand represented by a specific group of interest. He accomplishes it by winning the recipient over, by arousing his interest and gaining his understanding and approval. Such actions will be effective in the following circumstances:

- common interests of both sides (in case of lobbying in the Union bodies, it can be justified by the will to make a decision that will be supported by most member states),
- positive intentions of the sender (a lobbyist cannot assume taking actions for the disadvantage of the side that is being persuaded),
- no time pressure,
- the level of the recipient (lobbyist arguments must be well suited so that the recipient accepts and understands them),
- situational context (circumstances in which a lobbyist contacts the recipient cannot relate to any kind of conflict, prejudice, or distrust, etc.)[36]

Conclusion

The institutions of the European Union are quite open towards interest groups whose actions facilitate and complete decision-making processes ("expert" function of lobbyists). Additionally, such actions facilitate access of citizens to information and aspirations to even greater openness and transparency of Union institutions. Lobbying activity specificity, including informal contacts with workers of Union institutions and the value of information, can arise suspicion that lobbying leads to corruption of officials

[34] R. van Schendelen, *Machivelli In Brussels. The Art of Lobbing in EU*, Amsterdam 2002, pp. 220–227.

[35] See, for example J. N. Gardner, *Effective Lobbing in the European Community*, Kluwer Law and Taxation Publishers 1991, p. 72.

[36] J. Fras, *Język propagandy politycznej*, (in:) *Teoria i praktyka propagandy*, Wrocław 1997, pp. 46–47.

and their violation of professional ethics. Thus, it is crucial that maximum transparency and precise rules of conduct in contacts with interest groups are ensured.

Improvement of contacts and guarantee of greater transparency requires systematization and formalization of mutual contacts of lobbyists and representatives of Union's institutions. It must be noted that there have already been some achievements in this field, such as European transparency initiative, creation of public register of interest groups, the code of conduct for interest representatives, or the code of conduct for Commissioners etc.[37] It seems that the most difficult task that lies ahead is the full unification and systematization of the sphere of lobbyists' activity in the Union institutions, in the same way they are regulated in the United States.

S U M M A R Y

Lobbying is a complex phenomenon difficult to define. In the European Union it is a highly significant element of the decision-making process. In its essence lobbying is always an activity in accordance with the law in force, conducted for the benefit of a specified subject. However, there are various forms of representation of interest groups in the European Union institutions, European associations and individual experts, as well as fixed groups working on definite areas and ad hoc coalitions. Due to the role of particular institutions in the decision process in the European Union lobbyists activity is focused, above all, on the Commission and the European Parliament. In order to increase transparency of the activity, both organs created own public lobbyists register at the same time working on their standardisation.

[37] Documents defining rules of conduct towards lobbying, https://webgate.ec.europa.eu/transparency/regrin/infos/codeofconduct.do?locale=pl#pl, access date: 07.04.2011.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 26 (39) 2011

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PRACTICAL TAX LAW-MAKING PROBLEMS AT COMMUNE-LEVEL

Tax law-making process takes place above all at the central level. However, with relation to taxes constituting the revenue of communes, legal acts are constituted at local level (tax resolutions). Their important role is justified in Article 168 of the Constitution of the Republic of Poland.[1] According to this regulation the units of local government have right to determine the amount of taxes and local charges in the scope determined in the Act. It is impossible not to notice that conferring certain legislative competences in the sphere of local taxes to local level, constitutes an important element of self-government of these subjects. The possibility to form the rates of taxes or tax preferences by the communes gives them the opportunity to pursue, among other things, their own tax policy.

Tax resolutions are formed as a result of discussion. On the one hand, the discussion is carried on between the subjects involved in the process of constituting the acts of local law. At this level, the polemics takes place between town councillors and also between councillors and village-mayor. The discussion in this field may occur between the employees of commune council responsible for preparation of bill drafts and legal advisers employed in the council. This may concern the evaluation of the target of tax policy of communes, which is to be implemented by the introduced resolutions relating to tax rates or tax exemptions. In this aspect, in countries respecting the principles of a democratic legal state the debate is an element of a natural political dispute. The dialog between the above mentioned subjects might as well relate to the correctness of adopted measures of realisation of a defined tax policy. In this context, the exchange of views aims at creating

[1] Constitution of the Republic of Poland of 2 April 1997 (Dz. U. [Journal of Laws] No. 78 item 483 as amended).

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best law possible where such criteria as transparency or consistency of the created law should be of high importance.

On the other hand, the dialog on the basis of tax resolution passed, should take place between the representatives of a commune passing the acts and organs supervising the legislative activity, that is, above all the Regional Chamber of Auditors and the President of the Office of Competition and Consumer Protection. At this level the discourse is based, above all, on the criteria of legality of passed local law acts.

The present study was elaborated on the basis of the research conducted as part of research grant 'Local tax law reform in Poland' (Reforma lokalnego prawa podatkowego w Polsce) financed by the Ministry of Science and Higher Education.[2] The research attempted to explain the process of creation of tax resolution from the point of view of individuals employed in city and commune offices and people involved in this problem. Evaluation of the quality of the discourse within and beyond communes from their point of view, concerning tax resolution created by communes will be subject to analysis. It seems that a study in this scope has not yet been conducted in Poland.

The above mentioned activity may contribute to indication of practical functioning of determined legal law-making mechanisms at local level in Poland and of the way they are evaluated by people involved directly in this activity. It seems that information obtained this way might contribute to appropriate diagnosis of the quality of procedures of creation of tax law in communes and could help to identify the weak points in this field.

1. Research Material

In this part of the study we will present findings which are based on a survey conducted among employees of communes and city offices involved in tax cases. For 500 questionnaires 160 respondents gave an answer. We adopted a principle which consisted in directing one questionnaire to a given commune (thus 160 units answered). The communes of almost all voivodeships of diverse character (42 communes of urban character, 83 rural and 35 urban-rural) are represented in the questionnaires except opolskie voivodeship. The data obtained seems to be representative since 6,45% of 2479 existing Polish municipalities took part in the survey.

[2] Nr N N110 183637 directed by prof. dr hab. Leonard Etel and realised at the Faculty of Law at the University of Białystok.

Information provided by the survey may be divided into several categories: preparation of resolution projects, supervision and control of resolutions, tax exemption, tax rates differentiation, tax collection, the period for which resolutions are passed, special resolutions.

2. Preparation of resolution projects

Commune employees were asked, among other things, who prepares tax resolution projects. In the majority of cases (134) it is an employee of a unit responsible for assessment and collection of taxes, in 22 cases it was a treasurer, and in only 2 it was a secretary or a municipality council service inspector. It shows that in communes there are no specialised units involved in tax law creation. Apart from that, people responsible for execution of taxes, are also responsible for preparation of tax resolution projects. The fact that, in certain cases, preparation of resolution project is based on cooperation of various subjects does not change this image. From the research it results that such cooperation occurs sporadically between the employees of administration and the treasurer (3 cases), employee and legal adviser (6 cases), employee, treasurer and legal adviser (3 cases). Legal advisers' assistance in the field of preparation of tax resolution projects leaves much to be desired. In 30% of answers cooperation with legal advisers (41 cases) was negatively rated by respondents and in 19 situations the opinion was even worse. The assistance obtained good and satisfactory opinion respectively in 41 and 51 cases.

The situation of the process preparation of tax resolution projects does not look good if we look at it from the point of view of education of people involved in this activity. From the answers obtained it results that in majority of cases (93) people responsible for preparation of tax resolution projects do not have specialist knowledge in the field of creation of legal acts. Solely in 30% of questionnaires contrary answers to this question appeared. In this situation the analysis of answers to the question concerning the sources from which the employees responsible for preparation of projects draw the basic knowledge on tax law, provides valuable data. Decidedly, the most significant role is played by information obtained from professional trainings (139 cases), then specialist periodicals (70 cases) and Internet (60 cases). The results show the awareness of the need to improve knowledge in the field of creation of tax law and the existence of serious needs in this scope as well.

On the other hand, general application of principles of legislative technique in the domain of resolution projects should be appraised positively.

To the question whether while preparation of projects of tax resolution the requirements imposed by the Ordinance of the President of the Council of Ministers of 20 June 2001 concerning 'Principles of Legislative Technique' are observed, decided majority (138 respondents) gave a positive answer and 10 negative. The fact that in 12 cases the question was left unanswered, which can be interpreted as lack of knowledge of this act, cannot change this rating.

Communes may obtain essential assistance in preparing tax resolution projects from Regional Chambers of Auditors. Despite the fact that such type of cooperation did not trace into regulations during the survey, it was still applied according to the information from the questionnaires. We should call attention to Article 13 Section 1 of the Law on Regional Chambers of Auditors in force from 1 January 2010.[3] According to this regulation, it comes within the Chamber's duty to provide explanations to the subjects mentioned in Article 1 Section 2 concerning application of regulations in public finance. This regulation might currently constitute a formal basis for communes to address the Chambers to evaluate their projects of tax resolutions. 76 communes answered positively to the question whether a prepared tax resolution project is consulted with a Regional Chamber of Auditors. Only in 37 cases a negative answer was given and 47 municipalities did not give any answer. This data is the evidence of pragmatic approach of both communes and chambers which, with their assistance in this scope, limit the number of questioned resolutions. On the other hand, a considerable number of local government units do not use the possibility to consult the projects, maybe because they are unaware of such possibility. That is probably why this question was left unanswered in so many cases.

Commune employees when analysing tax resolution projects from the point of view of difficulty of their preparation stated that preparing vehicle excise duty resolutions (110 cases) and property tax resolutions (45 cases) gives them most trouble. Interesting conclusions may be drawn from the answers to the question concerning the basic problem of preparation of tax resolution projects. The fundamental cause of this status quo are external pressure e.g. lobby groups, councillors (52 cases) as well as poor quality of tax law regulations (48 answers). Councillors who, pursuing to a specific goal, may introduce amendments to project of resolution, give the final form to resolutions. Such an activity may deform the original project and even generate incorrect solutions, especially if we take into account the fact that

[3] Act of 7 October 1992 on Regional Chambers of Auditors (Dz. U. [uniform text: Journal of Laws] of 2001, No. 55, item 577 as amended).

that councillors seemingly do not frequently have the necessary knowledge to shape certain legal solutions correctly from the point of view of the law. It would be then relevant to introduce a mechanism which would penetratingly assess councillors' resolution project modification before the final voting or resolution. Significant element influencing preparation of project of tax resolutions is the lack of knowledge in the field of creation of legal acts (34 cases) and short time limits for project preparation (36 cases). The issue of time limit is connected to the fact of late minimum tax rate announcement in vehicle excise duty.[4]

3. Supervision and control of tax resolutions

It results from this research that in the field of tax resolution, the supervision of the President of the Office for Consumer and Competition Protection and also Regional Chambers of Auditors is particularly important. Minor role in practice is played by the Minister of Agriculture, Voivodeship Administrative Courts acting among others on the initiative of tax-payer, prosecutor or Regional Chambers of Auditors. Certain activities of consultative character belong also to Agriculture Chambers.

In determined majority of cases the President of the Office for Consumer and Competition Protection and Regional Chambers of Auditors did not have reservations about tax resolutions (133 cases). They appeared only in 15 cases which gives 9,37% of all the examined units.

The supervising activity exercised by Regional Chambers of Auditors did not establish much irregularity in assistance resolutions for investment. To the question whether the Regional Chamber of Auditors questioned the resolution of commune council concerning property tax exemption within regional assistance, the majority answered negatively (94 cases) and 3 positively. In supervising activity exercised by Regional Chambers of Auditors doubt arose whether this is a proper subject in the field of resolutions concerning zoning fee and betterment levy. Relating to these issues in the law, the same number of respondents stated that they send such resolutions to Regional Chambers of Auditors (33 cases) and to the voi-

[4] See Article 12b Section 4 of the Act on local charges and taxes of 12 January 1991 (Dz. U. [Journal of Laws] of 2010, No. 95 item 613 as amended – hereinafter referred to as ALTC according to which the competent Minister in charge of Public Finances announces not later than 31 October of each year by official announcement in the Official Journal of the Republic of Poland 'Monitor Polski' rates mentioned in Section 1 in force in the following year calculated according to the rules defined in sections 1–3 rounding them up.

vode (36 units). However, the majority of municipalities did not answer this question (96 cases).

The activity of the President of the Office for Consumer and Competition Protection being an organ of supervision is not positively assessed. To the question of how perceive the assistance of the Office for Consumer and Competition Protection in passing tax resolutions is perceived the answer was: well, in 4 cases it was: very well. The majority judged this cooperation not very favourably: satisfactory (40 cases), bad (13), very bad (7 cases). Prosecutor who can appeal against tax resolution to an administrative court plays a relatively unimportant role. Almost all communes (156 cases) answered negatively to the question whether such a situation arose. It does not mean that such situations did not occur at all. The prosecutor appealed against a resolution concerning visitor's tax which varies according to age and is different for children and young people and pensioners. On tax payer's application the prosecutor undertook to appeal against a resolution in the matter of mixed exemption concerning pensioners' immovable property. There were similar incidental situations in which tax payers appealed against tax resolutions to the Voivodeship Administrative Courts. Only 3 units gave positive answer to this question and 149 units negative. Questioned resolution under Article 101 of the Act on commune self-government of 8 March 1990[5] concerned immovable property tax rates and market fee rates. Any case of appeal to VAC was stated in questionnaires concerning tax issues under Article 101a of the Act on commune self-government.

The duty of agriculture chambers to give an opinion about resolutions related to agriculture tax is not very often realised. To the question whether resolution projects related to farm tax exemption on arable lands on which production was ceased and to lowering rye prices were given opinion by the agriculture chamber, the answer was negative in 99 cases and it was positive in only 22.

4. Immovable property tax relief

Resolutions concerning immovable property tax relief play a significant role in the context of legislative activity of commune councils. To the question whether resolutions introducing immovable property tax relief are passed on the basis of the entitlements from Article 7 Section 3 of the Act

[5] Dz. U. [Journal of Laws], of 2001, No 142, item 1591 as amended – hereinafter referred to as ACF.

of 12 January 1991 on local taxes and charges, decided majority of communes answered positively (93 cases) while 54 communes answered negatively.

Most problems within this resolution were stated by employees preparing resolution projects concerning mixed exemptions and public assistance, among others, the opinion of the President of the Office of Competition and Consumer Protection on a project. Moreover, ambiguity of regulations, jurisdiction discrepancies, problems with correct determination of tax exemption and precise definition of conditions of tax exemption, problems with definition of item entitled to exemption, preparation of resolution projects by employees who do not have sufficient knowledge, controversies among councillors concerning application and tenor of exemptions, lack of educational materials useful for preparation of resolution projects, councillors' objections. Issues occurring not only at the stage of passing a resolution but also its application were also raised by those surveyed, who accentuated, above all, the problem of control of entrepreneurs from the point of view of fulfilment of exemption conditions.

When introducing exemptions these preferences were most frequently addressed to immovable property belonging to communes, volunteer fire brigades, and culture institutions. Apart from that, various criteria was applied in creating resolutions related to exemptions. They may be divided into two following categories:

– immovable property connected to business (types of business, buildings used for collective water supply, for entrepreneurs opening business enterprises for the first time, new investments and employment connected to new investment),

– immovable property not related to business (libraries, country halls, sport facilities, community centres, museums, show and sport halls, immovable property belonging to fire service units, cellars, immovable property being a commune property not transferred to other subjects, cemetery immovable property, immovable property occupied by farmers' social-professional business, farmers' residential buildings, grounds marked in evidence as roads, shelters, country common rooms, joint property of lands, social assistance, expanded residential buildings to which heating was connected or in which heating method was changed to geothermal, gas, oil or electricity, year of construction of a building, immovable property of subjects which are financed from commune budget, grounds occupied by parks, age of tax payer, considerable level of disability certificate, farm buildings seated on 1 h land).

More than half of communes which introduced exemptions, recognised them as of public assistance character, in 40 cases they were treated as

preferences of *de minimis* aid character, in 17 as exemptions of regional assistance character. Solely in one case they were treated as horizontal assistance. Consequently, it results that more than half of exemptions is of public assistance character. Out of 93 communes which passed resolutions concerning exemptions 57 indicated that these were resolutions of the above mentioned character. On the other hand, communes judge the most simple mechanism of granting assistance as the best. The proof of that is the fact that a vast majority of assistance resolutions was of *de minimis* character characterised by, on the one hand, a relatively low increment amount which may be assigned to an entrepreneur and on the other, a simple construction and relatively limited formal requirements at the stage of passing and execution of these resolutions.

5. Immovable property tax rate differentiation

Commune councils' entitlement to immovable property tax rate differentiation finding its legal basis in Article 5 of the Act on the Protection of Tenant's Rights, was applied by smaller part of communes (58 cases). Vast majority does not apply the mechanism (98 cases). Communes applied different criteria to differentiation of rates, among them related to:

- character of buildings or lands (resorts, individual pastime facilities, holiday homes and lands, residential buildings on farms, garages),
- purpose of buildings or lands (buildings occupied by public tasks organisations, lands and buildings used for farming, living purposes, lands occupied by ski lifts, meant for construction works),
- type of business (physical education, public security, seasonal),
- tax payer's situation (source of income, place of residence, status of pensioners who transferred their farms to the State Treasury),
- location of a land or building (urban, country area).

It is characteristic that in majority of cases, assistance provided by majority of communes in relation to property tax rates differentiation was not recognised as public assistance. Out of 58 units which answered the question whether resolutions related to rates which introduced differentiation constitute public assistance, 46 gave a negative answer. The remaining stated that the assistance was provided as *de minimis* aid. It results from that, that majority of communes, while differentiating rates, introduce preferences of non-assistance character. These preferences are related to, above all, buildings and lands not connected to business. The answer given may mean that communes did not recognise differentiation of rates related to

entrepreneurs as of assistance character which is not necessarily a correct approach. On the other hand communes are conscious of the fact that by introducing preferential rates related to buildings, lands connected to business they may grant assistance solely in form of *de minimis* aid.[6] The proof of that is the lack of answers expressing that assistance through differentiation of rates was granted as other than *de minimis* aid. Awareness of social assistance problems concerning differentiation of tax rates is expressed also in the answer to the question asking what are basic problems connected to differentiation of property tax rates. Most communes pointed that these are related to problems of public assistance and limits resulting from them. Moreover, the following answers appeared: necessity of precise definition of the type of business, definition of holiday buildings rates, councillors' striving for maximal lowering of rates, pressure of specific groups of tax payers for lowering rates.

6. Tax collection

Collection as a form of commune tax execution is widely applied in Poland. The fact that in vast majority of communes which took part in the survey this tool is used proves that. Most frequently it is applied in agricultural tax (116 cases), property tax (111 cases), market fee (110 cases), forest tax (108). In majority of the above mentioned benefits introduction of tax collection facilitates execution, while absence of this mechanism in market fee in practice means depriving communes of income. It is difficult to assume that people selling at market places will individually pay the benefit into tax organs' accounts.

A basic problem connected to tax collection and zoning fees, in the opinion of communes employees who are in charge of these benefits, is correct construction of collection resolution. Such a problem was noticed in 41 cases. Another issue was non-execution of collections by collectors (20 cases), but also non-transferring collected taxes and fees by collectors (13 cases). In questionnaires problems appeared related to functioning of this institution in practice, more important than preparation of objective resolution: not accounting for collection on term, limited possibilities of control of reliability of collected market fee by the collector, faulty filling in

[6] See Art. 20c ALTC where it is indicated that in cases mentioned in Art. 5 Section 2–4, in Art. 10 Section 2 and Art. 19 point 1 and 3 if a resolution of commune council provides for granting public assistance the assistance is then granted as de minimis aid.

receipt books, accounting errors of collectors, finding people for pet/dog fee collection – appropriate traits of character that is, emotional intelligence, ability to continuously fill in pre-numbered forms, purchase and stamping of market fee tickets by a commune, resistance of market sellers who do not want to pay due payment to collectors.

7. Period to which tax resolutions are passed

From the analysis of questionnaires it results that in decided majority of cases tax resolutions are passed for a definite period of time (110 cases). 47 units declared passing resolutions for indefinite period of time. It may be the evidence of interest of communes in annual, even though insignificant, since at most by inflation level, increase of tax rates in force in a given commune.

Part of communes which did not pass resolutions for the following year used mechanism included in Article 20 of the ALTC. To the question whether in the analysed period there were situations in which commune/city council did not pass compulsory resolutions concerning tax rates and zoning fees, which in consequence led to a situation when on the basis of Article 20a of the ALTC previous year rates remained in force, 31 units gave a positive answer. It means that vast majority of communes understand correctly this regulation as a specific safety valve which should only be applied in exceptional situations. As for the rule, commune councils should determine rates for a given year or for a definite period. The mechanism from Article 20a of the ALTC was most frequently applied to property tax rates (19 communes) and vehicle excise duty rates (21 cases). In certain units it concerned more than one tax. In one of the questionnaires this regulation was applied to 4 resolutions, in 6 it was indicated that it was applied to 3 resolutions and in 9 to 2 types of resolutions.

8. Special resolutions

Almost half of the surveyed communes introduced a resolution enabling to collect a pet (dog) fee (71 cases). In 81 communes the resolution was not passed, which was caused by too small number of employees, too low income from this fee compared to the amount of work and costs connected to collection, problems with execution of the fee, lack of instruments for verification of dog data, statutory tax exemption in rural communes, lack

of dogs in general, lack of will of councillors, public opinion stand finding this fee contrary to animals protection, taking in homeless dogs etc.

A resolution concerning the course and specific conditions related to farm tax exemption on arable lands on which production was ceased (82 cases) functions in almost half of communes. In 70 units such an act was not passed. The number of communes which passed a resolution related to lowering the prices of rye is proportional. In 70 communes these acts are in force, in 85 they were not introduced.

In 83 communes resolutions related to extension fee were not passed. In 51 communes the amount was defined at the level of maximum rate 50% rate for delay. In some of the communes lower rates are in force that is 10% (4 communes), 20% (4 communes), 25% (4 communes), 30% (9 communes), 37% (1 commune), 40% (2). In two units differentiation of rates was enacted depending on whether maturity postponement or spreading the payment into instalments concerned arrears or tax. In the first case rate 50% is in force for arrears and 30% for tax, in the second 50% for arrears and 20% for tax.

Communes not very often decide to extend the term of payment for collectors. Such a situation occurred in 29 units. The following solutions are applied in this case: prior to the lapse of the 10^{th} day after payment time limit, prior to the lapse of the 17^{th} day of each quarter, prior to the lapse of 20 March, May, September and November, prior to the lapse of the 25^{th} day of the month during which the collection was done, 5 days after the day on which the collector collected the charge (only collectors serving country areas, since they have to commute to communes), 3, 4, 5 or 7 days after the day of collection, 14 days after the payment time, until the end of the month during which the tax was collected.

Part of communes introduced or intends to introduce resolutions which make possible to file an e-statement (28 cases). It shall relate to farm, forest, and property tax altogether. There is considerably lower interest in vehicle excise duty, which actually might intrigue taking into account the existing electronic model defined by the Minister of Finance.

There were incidental situations in which commune council moved a proposal to voivodeship assembly to include the commune into another tax district. Only two communes referred to the question concerning this issue affirmatively. It also results from the survey that self-taxation resolutions were enacted (5 cases) in certain communes. It shows little interest in this method of acquisition of funds for coverage of public expenses.

Conclusions

In the light of the results of the above presented research concerning legislative activity of communes in the field of tax law done by employees of communes being in charge of taxes, certain problems appear. On the other hand, it is possible to indicate certain actions which are or could be undertaken in communes to improve this situation. Among the problems, the most significant are the following:

- employees of local units give negative opinion of the dialogue within the internal structures of these subjects concerning creation of resolution projects; the proof of that is the fact that the opinion about the assistance of legal advisers employed in communes in preparation of tax resolutions is not very flattering,
- commune workers who take care of preparation of tax resolutions draw attention to the fact that there is no dialogue at all concerning this issue between them and councillors, as a consequence incorrect modifications of tax resolutions are introduced by councillors,
- dialog with certain control organs concerning creation of local tax law is judged insufficient by employees of communes; cooperation of communes and the President of the Office of Competition and Consumer Protection in the field of evaluation of tax resolution projects is not very well evaluated,
- the same people in communes are involved in tax execution and preparation of tax resolution projects,
- lack of proper education of employees who prepare tax resolution projects,
- there are problems with correct construction of exemptions resolution connected to contesting mixed exemptions by the Regional Chambers of Auditors, vagueness of regulations, among those related to the problem of public assistance, discrepancies in jurisdiction, difficulty in definition of purely subjective exemption, precise definition of conditions of exemption, problems in defining the type of object which is to be exemptible, arguments among councillors as far as acceptance and tenor of exemptions is concerned, lack of educational materials for preparation of resolution projects,
- problems connected to differentiation of property tax rates and related to necessity of application of public assistance regulations and resulting limitations, necessity of precise definition of the type of business, councillors striving for maximal lowering of rates, pressure of specific groups of tax payers to reduce the rates,

– problems with collection connected to the fact of not executing collection by tax collectors, non-transferring collected taxes and payments,
– Agriculture Chambers duty to give an opinion on farm tax resolution scarcely fulfilled,
– short terms for project preparation.

The following elements might be or are applied in communes to improve the quality of tax law resolution passed by the communes:

– the role of professional trainings in the field of preparation of tax resolutions is very important, as a consequence this method of improvement of commune employees' knowledge (councillors and legal advisers) involved in this issue should be developed; trainings in this field organized above all by units supervising the resolution-passing activity that is the Regional Chamber of Auditors, the President of the Office of Competition and Consumer Protection, Administrative Courts, and the Ministry of Agriculture should constitute an important element of this system,
– increase of activity of communes in finding support from the Regional Chambers of Auditors in preparing tax resolution projects should be suggested,
– introduction of mechanism which would help scrutinise projects of resolutions modified by councillors from the point of view of requirements of conformity with law before the final voting on a given resolution.
– introduction of assistance exemptions most frequently under a relatively transparent and simple *de minimis* formula,
– reduction of situations in which differentiation of rates concerns entrepreneurs, this mechanism should be used with relation to buildings or remaining lands and will lead to elimination of public assistance problem,
– communes should be suggested to pass resolutions for an indefinite period of time.

S U M M A R Y

The article is an attempt to evaluate the process of creation of tax resolutions in Poland from the point of view of people employed in commune and town offices and those engaged in this problematic. The quality of the existing discourse related to tax resolutions created by communes was also evaluated. The discourse takes place between subjects which take part in the process of creation of these domestic legal acts, that is councillors, and also between these people and the village-mayors, or mayors, employees of the commune office responsible for preparing resolutions projects and legal advisers employed in offices. On the other hand, a dialog

in accordance with tax resolutions passed should take place between the representatives of a commune passing these acts and organs controlling the legislative activity, namely the Regional Accounting Chamber and the president of the Office of Competition and Consumer Protection.

The present study was elaborated on the basis of research based on a survey carried out among employees of town and commune offices engaged in tax affairs. 160 respondents out of 500 questionnaires answered the questions.

On the basis of the research related to the legislative activity of communes in terms of tax law done by the employees of the communes in charge of tax issues certain problems appear. These problems were described in detail in the topical article. Specific actions which could be taken in the communes to eliminate the above-mentioned problems are also indicated in the article.

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THE CONSTITUTIONAL STATUS OF THE NATIONAL BANK OF POLAND ON THE THRESHOLD OF THE EUROSYSTEM

1. The current constitutional status of the National Bank of Poland (NBP) as the central bank will inevitably change in the perspective of joining the European Monetary Union. In such a case, the range of regulations that should be included directly in the Constitution, is an essential issue. Leaving aside the question of other countries' practice concerning the matters expressed directly in a constitution, the issue of the guarantees provided by the direct regulation in the Constitution for a particular public-legal body, in this case the NBP as the central bank, is worth emphasizing in the specific conditions of the Polish democracy.

It is also worth bearing in mind the historical aspect of the issue. Some questions are naturally treated differently in countries where the tradition of functioning thoroughly democratic solutions is long and well-established. Yet, the matter is different in countries coming back to democratic procedures after a long period of real socialism and activity forms characteristic of it. After the dependency of the NBP from the executives organs, lasting from the end of the Second World War until 1981, the separation of the NBP from these organs, was perceived as a success and it was also a premise for the implementation of a modified model of its activity. Therefore, a relatively extensive regulation of the bank's status, and especially the guarantee of its independence directly in the Constitution[1], was of a prominent importance. The Constitution and the NBP Act have placed the NBP among the most independent central banks in the world.[2]

[1] Article 227 of The Constitution of Republic of Poland of 2nd April 1997 (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.) – (Dz. U. No. 78, item 483 of 1997 with changes).

[2] W. Baka, *Niezależność i odpowiedzialność banku centralnego*, Prawo Bankowe, no 5 of 2002, p. 21.

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Including in the Constitution the regulation of some basic issues, such as the independence of the NBP (personal, institutional, functional, and financial), its aims and role, guarantees the actual functioning of these aspects in practice, obviously providing that those regulations meet the requirement of precision and complete substantive correctness, as well as the conformity with the Treaty Establishing the European Community (TEC), the Treaty on the Functioning of the European Union (TFEU), the Statute of the European System of Central Bank (ESCB), the Statute of the European Central Bank (ECB) and other Community regulations. Such practice will make the infringement of the independence and competence of the NBP impossible by means of regulating ordinary statutes. The creators of acts will need to keep in minds whether the Constitutional Tribunal will relatively easily be able to decide on particular laws' unconstitutionality. Constitutional regulations and their range will essentially determine the quality of making new legal regulations and, consequently, their application.

Nonetheless, even the best formulated but limited in their range constitutional regulations may, in reality, increase the tendency to limit the role of the NBP with acts without the possibility of finding the adequate protection in the Constitution. Therefore, in the current situation, a wider constitutional regulation is justified not only by factual but also non-factual merits. This line of reasoning is supported by the incidents occurring in the regulations from the recent period. It seems that a peculiar threat is posed particularly not by a direct and distinct limitation of the NBP's role, but by an indirect limitation, introduced when other issues from the widely-understood banking law are regulated with acts.

One of the first examples for such practices might be the 2001[3] deprivation of the NBP's President of the right to participate in the meetings of the Council of Ministers, the right which he originally had, together with the right to participate in the sessions of the Sejm.[4] Although the Constitutional Tribunal recognized the amendment to the NBP Act as constitutional[5], it does not change the fact that the powers of the President of the NBP are

[3] Article 29 of the Act of 21st December 2001 on the amendment to the act on the organisation and mode of the Council of Ministers and the extent of the Minister's activities, the act on department of government administration authorities and the amendments to some acts (ustawa z dnia 21 grudnia 2001 r. o zmianie ustawy o organizacji i trybie pracy Rady Ministrów oraz o zakresie działania ministrów, ustawy o działach administracji rządowej oraz o zmianie niektórych ustaw) – (Dz. U. No 154, item 1800 of 2001).

[4] Article 22 of the National Bank of Poland Act of 22nd August 1997 (ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim) in the original wording (the original wording Dz. U. No 140, item 938 of 1997, consolidated Dz. U. No 1, item 2 of 2005 with changes); later referred to as the NBP Act.).

[5] Ref. no K. 9/02.

limited. Interestingly enough, at the same time the right for a representative of the Council of Ministers to participate in the session of the Monetary Policy Council was maintained, indeed without the right to speak but with the possibility to present proposals for the Council's consideration.[6]

Yet another typical example is the limitation of the NBP's role, and in particular the role of its President, in connection with the new concept of bank supervision, reflected in the replacing of the sector supervision with integrated financial supervision.

Personal independence was also reflected in the fact that the President of the NBP presided *ex officio* over the former Commission for Banking Supervision until the enactment of the Financial Market Supervision Act from 21st July 2006.[7] In this respect, the role of the NBP was weakened, and since 2008, after the Polish Financial Supervision Authority (PFSA) received the supervision over the whole financial market, it has only been able to influence commercial banks using some instruments of monetary policy.

The present Commission for Banking Supervision is an administrative body, subordinated to the President of the Council of Ministers. Contrary to the recommendations of the European Central Bank, expressed in the opinion from 09.03.2006 to the Supervision Bill, the influence of the NBP on the CBS is too little.[8] The ECB recommended granting the President of the NBP with decisive rights in the issues concerning essential supervision decisions for the banking sector, e.g. to make it impossible to take a decision to grant or withdraw licenses for banks with the opposition from or absence of the President of the NBP. According to Article 5 of the Supervision Act, the President of the NBP is only a member of the Commission, however not obligatorily, as he may delegate the Vice-President of the NBP. The ECB's opinion also pointed out the need for cooperation between the CBS and the President of the NBP. Nevertheless, Article 17 of the Supervision Act includes only a requirement of mutual exchange of information between the Chairman of the Committee and the President of the NBP in the scope indispensable for carrying out their tasks and activities specified in the Act; and a resolution about a possibility of making an agreement concerning their cooperation and exchange of information.

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[6] Article 15 in the original wording.

[7] (Ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym), Dz. U. No 157, item 1119 of 2006; later referred to as The Supervision Act.

[8] See the critical opinion of L. Góral of 04.07.2006 to the Supervision Act Bill (Bureau of Research Chancellery of the Sejm).

Financial supervision should be more independent, and the NBP should undoubtedly – taking into consideration the importance of the banking sector for the economy and other sectors of the financial market – play in it a more important role. The limited in the very nature of things role of the NBP after the access to the Eurosystem should not mean that the influence of the NBP on the activities of commercial banks is limited and that the security and safety of this activity is not guaranteed. It seems that the authority of the NBP (in the person of the President) should be connected with the Polish Financial Supervision Authority's granting permissions to found banks and commence their activities, as well as branches of foreign banks. It is, however, worth remembering that, on the other hand, the limited role of the European Central Bank in supervision has been provided for in the TEC. It can be seen in two aspects. The European System of Central Banks is to contribute to the proper authorities' efficient policy of banks' prudential supervision and the stability of the financial system. Moreover, with the Treaty's authority conditions, the European Central Bank can carry out clearly defined tasks connected with prudential supervision over banks and some other financial institutions. The European Central Bank is also entitled to issue opinions about the Community Law on prudential supervision over banks and the stability of the financial system.

Yet another example of the considerable limitation of the NBP's authority is the latest amendment to the regulation on Bank Guarantee Fund.[9] It has been expressed, above all, in the composition of the Fund Council and the way it is appointed. The composition of the Council has been reduced from eleven to eight persons. Previously, the Chairperson of the Council was appointed and dismissed by the President of the Council of Ministers on the proposal agreed with the proper minister of financial institutions affairs and the President of the NBP, and after the proper Sejm committee had given its opinion. Currently, this authority has been granted to the proper minister of financial institutions affairs, after only consulting the President of the NBP and the Chairperson of the Commission for Banking Supervision. Formerly, the President of the NBP appointed four members of the Fund Council, presently – only two. Generally, also in cases where previously the consent of the President of the NBP was indispensable, this requirement has been changed to only expressing an opinion of the President of the NBP. Si-

[9] The Act of 23rd October 2008 about the amendment of the Bank Guarantee Fund Act and the amendment of other acts (ustawa z dnia 23 października 2008 r. o zmianie ustawy o Bankowym Funduszu Gwarancyjnym oraz o zmianie innych ustaw) – (Dz. U. No 209, item 1315 of 2008); later referred to as the BGF Amendment Act.

milarly, the statute of the Fund was granted by the Council of Ministers on the proposal agreed with the proper minister of financial institutions affairs and the President of the NBP, and currently – by the minister after consulting the President of the NBP and the Chairperson of the Polish Financial Supervision Authority. After all, the statute defines, among others, the way of creating own funds and the principles of the Fund's financial economy. What is more, the financial report of the Fund is subject to the analysis by an authorised body chosen by a way of tender by the Fund's Council itself, and formerly by the President of the NBP, after only consulting the Fund's Council. The defining of the rules for liability turnover or additional activities in the area of helping subjects included in the guarantee system is only subject to opinion.

It is worth emphasising, however, that the Bank Guarantee Fund Act has introduced the European Union's requirement for a prohibition on financing certain obligations by the central bank and a privileged use of its resources. The NBP's obligation to pay to the Fund the equivalent of the reduction sums of fees paid by subjects included in the guarantee system[10] has been revoked. The regulation providing for the resources from the loan given by the NBP on the conditions agreed with the Fund as one of the sources of financing the Fund[11] has been maintained; however, the BGF Amendment Act introduced limitations of short-term loans. It concerns a situation, provided for in the BGF Act, when after the resources for the payment of the depositor's claims provided for in the Act have run out, the President of the NBP is allowed to grant the Fund with a loan of the maximum statutory amount.[12] The amendment has introduced the conditions for granting a short-term loan in the form of a threat to the stability of the banking system as a premise for granting a loan and the necessity to establish the proper security. Granting of the short-term loan in a situation when the stability of the banking system is under threat cannot be perceived as contradictory to Article 101 of the TEC[13] as the European Central Bank takes the view that there is no prohibition on the financing of the home system

[10] Article 13 (3a and 3b) of the Bank Guarantee Fund Act of 14th December 1994 (ustawa z dnia 14 grudnia 1994 r. o Bankowym Funduszu Gwarancyjnym) – (consolidated Dz. U. No 70, item 474 of 2007 with changes) before the amendment of 23.10.2008; later referred to as the BGF Act.

[11] Article 15 Point 6 of the BGF Act.

[12] Article 34 (3).

[13] Article 101 of the TEC prohibits national central banks from granting loans for covering deficit or loans to governments, local authorities or other public bodies and Corporation, as well as from aquiring debt securities directly from those subjects.

of insuring deposits by the central bank as long as it is short-term financing when the stability of the system is threatened.[14]

Maintaining the role of the central bank as a creditor in order to secure the stability of the country's financial system in a broad sense requires the constitutional financial independence of the NBP. It is, above all, guaranteed under Article 220 (2), providing for a ban on covering the budget deficit by taking out loans in the central bank of a country. Financial independence also consists of such elements as the principles of founding and dividing own funds, making it impossible for the government or parliament to wield financial influence on the bank's decisions[15], on the division of profit and its allotting to the country's budget, and on connections with commercial banks, regulated in the NBP Act.

The recent regulation of 2008, setting up the Committee of Financial Stability[16] is to ensure effective cooperation in the area of supporting and maintaining the stability of the country's financial system through an exchange of information, opinions, and assessments of situations in the financial system in the country and abroad, as well as coordinating activities within this scope.[17] The Committee consisting of three persons includes the Minister of Finance, the President of the NBP, and the Chairperson of the Commission for Banking Supervision; and the Chairperson of the Committee is the Minister of Finance by the force of law. Taking into consideration various rights and responsibilities of the Committee and its individual members, and especially the President of the NBP, it is dubious whether the position and role of the NBP in respect to the whole banking system have been sufficiently considered in the Act.

Another issue, resulting from the current regulation of the 2009 Public Finance Act[18], should not be omitted: it is the possibility of restricting one of the basic roles of the NBP – the role of the central bank of the state. Once Poland adopts Euro as its currency, the handling of the basic accounts run for the bank handling of the state's budget (the central current account of the state's budget, the current accounts of the state budgetary unit, and the current accounts of the offices attending to tax authorities)

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[14] See *The ECB Convergnece Report of 2006*.

[15] W. Baka, *Niezależność...*, *op. cit.*, p. 23.

[16] Later referred to as the Committee.

[17] The Committee of Financial Stability Act of 7th November 2008 (ustawa z dnia 7 listopada o Komitecie Stabilności Finansowej) – (Dz. U. No 209, item 1317 of 2008); later referred to as the Committee of Stability Act.

[18] The Public Finance Act of 27th August 2009 (ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych) – (Dz. U. No 157, item 2104 with changes).

will alternatively be put in the hands of Bank Gospodarstwa Krajowego.[19] This could in effect lead to a full take-over of this handling by BGK and depriving the NBP of this role, provided that the presently possible rights in the area of handling other types of accounts connected with the bank handling of the state budget are maintained.

2. The necessity for changes in the Constitution is indisputable in connection with the intention to join the Eurosystem. Consequently, the only thing that could be disputed is the general scope of changes, the scope of issues regulated directly in the Constitution, the scope delegated for regulation in ordinary statutes, and the dates for these regulations. It seems that a part of the discussion concerning this topic is pointless as the requirement for the particular range of changes is determined by Poland's membership in the EU and by detailed regulations of the Community law concerning the position, role, and scope of each central bank in the countries of the Eurosystem. On joining the EU, Poland automatically committed itself to accepting the regulations for the Economic and Monetary Union, fulfilling the conditions of convergence, adopting the Euro and joining the European System of Central Banks by the NBP. Taking into consideration the above-mentioned premises, the inclusion of the basic regulations directly in the Constitution could be called for also in the matter of the monetary system. A relatively early amendment to the Constitution might be beneficial when the Council of Europe makes a decision on the revoking of derogation. Yet, it is important to bear in mind that one of the aspects that are taken into consideration is the regulation concerning the conformity of the national central banks' aims with those of the ESCB, and the independence of these banks in all its aspects.[20] It is therefore advisable to call for the regulation of the status of the NBP as a member of the ESCB carrying out its tasks; the regulation of the NBP's independence and the functioning of the Euro in the monetary system to be included directly in the Constitution. It is also important to take into consideration the fact that although the NBP will make over the competence for emission and for carrying out monetary policy to the European Central Bank, the President of the NBP will enter the decisive body of the ECB, that is the Board of Presidents. In this way, the NBP will participate in carrying out the monetary policy of the Eurosystem. Making decisions in the scope of monetary policy is centralised, however, carrying out of these decisions is done in compliance with

[19] Article 196 of the Act.

[20] C. Kosikowski, *Prawne aspekty wejścia Polski do strefy euro*, Państwo i Prawo, no 12 of 2008, p. 25.

the Community subsidiary principle and is decentralised. Therefore, it is not only the ECB that carries out the monetary policy, but also all the National Central Banks of the Eurosystem. The NBP will be emitting the Euro in the scope defined by the ECB and it will be responsible for carrying out the operations of the open market and the deposit-loan operations, although it is the ESCB which defines the very principles of these operations. All of the mentioned activities require constitutional independence of the NBP. Due to the presently complex legislative process, a prompt undertaking of the necessary action should be called for.

Taking into consideration the premises for establishing the Monetary Policy Council, the course of its activity, and the relation to other bodies and institutions, it seems reasonable that the Council should be completely eliminated, or at least it should not be active in the NBP structures, and, at the same time, its competences should be changed.

The need for a far-fetched amendment to the act regulating the status and activity of the NBP is similarly indisputable. Some issues, such as the basic aim of its activity stemming from the fact of being a member of the ESCB and the requirement to carry out the tasks appointed by the ESCB (including the emitting of the Euro under the ECB's directive), need to be accommodated to the requirements of TEC, TFEU and the Statutes of the ESCB and the ECB. It is especially important to pay attention to formulating a precise amendment to Chapter 6 of the NBP Act concerning the instruments of monetary policy, used by the NBP with regard to commercial banks. The instruments connected directly with monetary policy will be automatically eliminated and they will fall within the scope of the ECB's responsibility and, due to this fact, the act should ensure a possibility for effective use of the remaining instruments of influencing commercial banks by the NBP in the role of the bank of banks. These instruments need to, even more than presently, be accommodated to the instruments currently used by the central banks of the Euro zone and by the ECB.[21]

The new regulations should precisely define the competences of individual bodies of the NBP, their mutual relations, the relationship of the NBP with the state authorities, and especially the scope of the responsibilities of the NBP's President. It is necessary to point here to the doubts present in the published literature and connected with the responsibility to the State Tribunal.[22]

[21] It is worth mentioning the differences arising from the fact that the EU banks lack in financial liquidity, while Polish banks often have over-liquidity.

[22] C. Kosikowski, *Pozycja Narodowego Banku Polskiego i jego organów w prawie polskim (stan obecny i postulaty na przyszłość)*, Państwo i Prawo, no 11 of 2002, p. 27.

It seems that while amending the Constitution it is important to look at the issue of the character and the legal force of normative acts issued by the bodies of the NBP, and particularly by its President, who should be entitled to issue directives.[23] It might be worth noticing that the issue will not be of such an importance as it is at present, when the competences in the area of currency and monetary policy will be transferred to the ECB. However, a large scope of the subject needing legal regulations to be introduced by the NBP's bodies and the Financial Supervision Authority will be maintained. It should be mentioned that the State Tribunal has dismissed the possibility of treating the NBP Act as binding norms entitling the NBP to issue executive acts that would be universally and legally binding. The Tribunal has recognised the right to issue by the NBP's bodies (the Monetary Policy Council and the Board) acts of internal law within the framework of the banking system, assuming that the functional subordination of commercial banks to the central bank in the area of monetary policy arises from the character of the constitutional entitlements of the NBP.[24] The doctrine presents the opinion about the lack of organisational subordination of banks towards the NBP[25] and supervision authorities. Currently, the acts issued by the President of the NBP are inter-bank acts which do not bind banks like typical acts of internal law.[26] Therefore, this issue should be clearly regulated. The easiest solution would be to constitutionally equip the NBP with the right to issue executive directives and to formulate appropriately the statutory entitlements.[27]

3. Summing up, the Article 227 concerning the NBP should be maintained in the Constitution. The Section should include the expression of the bank's status concerning the personal independence of the bank's bodies, and in particular that of the President, as well as the institutional independence. The principle of carrying out the aims and tasks of the ESCB and the participation in it of the NBP should be taken into consideration. Moreover, the principle of the Euro as the single currency should be expressed and the

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[23] E. Fojcik-Mastalska, *Ocena aktualnego stanu prawa bankowego i rysujące się kierunki jego zmian*, Prawo Bankowe, no 3 of 2006, pp. 35–36.

[24] Decision of 28.06.2000 (K25/99), OTK ZU, no 5 of 2000, item 141.

[25] See E. Fojcik-Mastalska, *Ocena...*, *op. cit.*, pp. 35–36.

[26] E. Fojcik-Mastalska, *Podstawowe źródła prawa bankowego po nowelizacji*, Prawo Bankowe, no 4 of 2002, p. 51.

[27] A. Bałaban, *Glosa do wyroku TK z dnia 28 czerwca 2000 r.* (sygn. akt K 25/99), Przegląd Sejmowy, no 1 of 2001, p. 83.

regulation providing for the supervising the activities of the NBP by means of an act should be maintained.

The guarantee for the NBP of the appropriate position in financial (banking) supervision and the bodies of particular Commissions, Committees, or Funds should also be considered.

The liquidation of the Monetary Policy Council, or at least its isolation from the NBP's structures with an obvious amendment to the scope of its competences seems legitimate.

The Constitution should maintain the regulations concerning the guarantee of the NBP's financial independence, especially in the form of a ban on covering the budgetary deficit.

A clear regulation of the responsibility of the NBP, and in particular of its President, seems appropriate.

The regulation concerning the legal order in the form of including in it the directives of the President of the NBP and defining the object of the regulation by means of directives should be broadened.

S U M M A R Y

The constitutional status of the National Bank of Poland (NBP) will change in the perspective of joining the European Monetary Union. In such a case, the range of regulations that should be included directly in the Constitution, is an essential issue.

Including in the Constitution the regulation of some basic issues, such as the independence of the NBP (personal, institutional, functional, and financial), its aims and role, guarantees the actual functioning of these aspects in practice.

It seems that a peculiar threat is posed particularly not by a direct and distinct limitation of the NBP's role, but by an indirect limitation, introduced when other issues from the widely-understood banking law are regulated with acts.

The principle of carrying out the aims and tasks of the ESCB and the participation in it of the NBP should be taken into consideration.

The liquidation of the Monetary Policy Council, or at least its isolation from the NBP's structures with an obvious amendment to the scope of its competences seems legitimate.

The Constitution should maintain the regulations concerning the guarantee of the NBP's financial independence, especially in the form of a ban on covering the budgetary deficit.

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