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AXIOLOGY OF THE MODERN STATE UNDER THE RULE OF LAW

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PREFACE

The issue of the state under the rule of law has frequently been analyzed and presented in the Polish specialist literature. A growing interest in the concepts, models or a constitutional principle of the state under the rule of law was closely connected with a fundamental change of the political system in Poland by the law of December 29, 1989 regarding the change of the Constitution of the Republic of Poland. A previous art. 1 of the Constitution of the Republic of Poland of July 22, 1952 stating that "The Polish People's Republic shall be a socialist state" was changed into "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice". The content of the principle of the democratic state under the rule of law has become the subject of interest for the doctrine of the Constitutional law, the theory of law as well as the jurisdiction of the Constitutional Tribunal.[1] In the Constitution of the Republic of Poland dated 2 April, 1997 a verbal form of the above-mentioned principle was preserved; what was changed was its place in the inner systematics of the Constitution (now it is art. 2). Among many works regarding the issue of the state under the rule of law which have been published since 1997 one may find both theoretical-legal (or even philosophical-legal) works,[2] as well as those which analyze the content of the principle of the state under the

[1] The principle of the democratic state under the rule of law has been described by: K. Działocha, W. Gromski, A. Kubiak, J. Nowacki, J. Oniszczuk, W. Sokolewicz, J. Wróblewski, J. Zakrzewska. Also M. Wyrzykowski discusses it in details in the commentary to art. 1 of the laws obliging by the art. 77 of the Constitutional Law dated 17 October, 1992 (in:) L. Garlicki (scientific ed.), *Commentary to the Constitution of the Republic of Poland*, T. I, Warszawa 1995. It is necessary to mention a collective work ed. S. Wronkowska, *Polskie dyskusje o państwie prawa*, Warszawa 1995.

[2] Among all, L. Morawski, *Państwo prawa w toku przemian*, (in:) L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999; R. Wonicki, *Spór o demokratyczne państwo prawa. Teoria J. Habermasa wobec liberalnej, republikańskiej i socjalnej wizji państwa*, Warszawa 2007.

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rule of law in the light of the Constitution of the Republic of Poland and jurisdiction of the Constitutional Tribunal.[3]

September 11, 2001 changed our contemporary world. The truism of this statement seems to be obvious but it does not refer to the fact itself as much as it does when one considers its consequences. Fukuyama's thesis regarding the "end of the history" and the inevitable victory of liberal democracy expressed in the 90s of the XX Century has lost its meaning. A contemporary world has become dominated by the following words: terrorism, war against terrorism, collision of civilizations. A traditional dictionary of social sciences and philosophy of politics, where the notions "democracy", "state under law", "human rights" had a fixed meaning, requires a new defining. In the name of the fight against terrorism and the need of protection of public safety, modern states or rather western states have reached new techniques and technologies of control over an individual and his life. Once again, a border between what is private and public/political should be re-defined. Once again, there appears a necessity to answer the following questions: what does privacy mean today?, how significant is the principle of human rights' respect and protection? Is is still a guarantee against an arbitrary action of the state? And perhaps the most significant question appears: what do we mean today by the state under the rule of law? It is impossible to give answers to all these questions within one study.

Human dignity has remained one of the most essential values of the state under the rule of law. Being natural, nontransferable, and unsubjected to any limits, human dignity constitutes the basis of human rights. By not negating a need for democracy and rules of law, a contemporary state has greatly changed the perception of a political character. Politics has reached its limits; there has appeared soft totalitarianism, whose totality has acquired a form of diffuse microphysics of power or biopolitics.

Papers comprised in this volume deal with different aspects of axiology of the modern state under the rule of law. Some of them give a special consideration to human dignity in the context of the contemporary world's phenomena and questions which they pose. Such problems are presented from a philosophical and legal perspective (K. Kuźmicz, S. Oliwniak, A. Breczko), a theoretical and legal perspective (A. Jamróz, B. Kornelius, P. J. Suwaj,

[3] W. Sokolewicz, *Commentary to art. 2*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, T. V, Warszawa 2007; S. Wronkowska (ed.), *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warszawa 2006, E. Morawska, *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*, Toruń 2003.

K. Doliwa) and a constitutional perspective (M. Aleksandrowicz, A. Czarnota, A. R. Bartnicki i E. Kużelewska).

K. Kuźmicz analyzes relations of philosophy of politics which constitute an integral part of the Kantian practical philosophy and politics of law comprising the content of the proclaimed law. A proper politics of law treats human rights as a sanctity that should be protected by public authority. The progress of mankind is identical with the progress of law which is to guarantee a moral development of an individual and the society. In this way, a "kingdom of ends" is created, where an individual becomes an end in himself. In this context, the aim of the human actions is to realize a perfect model of the collective life, a "civil state", which is in accordance with a moral law and where no individual is treated in an instrumental way. Therefore, Kant's concept of the "kingdom of ends", based on the respect for human rights and liberties, constitutes an archetype of the modern state under the rule of law.

S. Oliwniak and A. Breczko highlight contemporary threats that individual freedoms may be subjected to by the state. At the age of biopolitics and biopower an individual is no longer "an end in himself" but an object, a subject of normalizing measures of power. Sometimes dignity and human autonomy may seem to be "empty" notions which "exist rather than mean". A contemporary paradigm of the western world is presented neither by the Kantian "kingdom of ends" nor by the state under the rule of law but by the state of exception and territory where it is most visible in a camp. A camp is a territory which, by the decision regarding the state of exception, becomes extracted from the range of the obligatory norms of the legal order. These are the places filled by the contemporary *homines sacri* (refugees, prisoners of Abu Grhaib and Guantanamo). These are also the places where we are constantly controlled by the authority (airports, railway stations, public urban space fixed with industrial cameras). S. Oliwniak, analyzing categories such as biopolitics, biopower, and "bare life" as presented in the concepts of Michel Foucault and Giorgio Agamben, arrives at the conclusion that we are subjected to a permanent, hidden and growing control of our life conducted by the impersonal Power and State.

A threat of the traditionally understood human subjectivity can also appear as a consequence of the legally unregulated development of genetic research and biotechnological progress. Borders between the nature of humanity and the available (from the point of view of technology) possibilities of manipulation of human subjectivity by a man are being washed away. It is inevitably and closely connected with the threat of entering the sphere of dignity, integrality, identity and individual autonomy. A. Breczko high-

lights a clear need of a fundamental settlement regarding the social, legal and political consequences resulting from the application of biotechnology.

A. Jamróz proves that jurisdiction of the idea of human dignity results in the ambiguity of a normative content, at least regarding a normative meaning of this idea. A settlement of the normative content of the notion of human dignity demands a philosophical (doctrinal) account of the notion. At the same time, in the light of the positivization of the human dignity clause in the Constitution, there appears a clear necessity for the analysis of the jurisdiction of the Constitutional Courts in this respect. The author's considerations are referred to the content of art. 30 of the Constitution of the Republic of Poland.

Describing relations of law with the phenomena of a linguistic character, K. Doliwa pays attention to a performative character of the language of the legal norms of the "statements of the will", whose function does not depend on the description but on the creation of a new social reality. The author highlights the role of conventional actions in the process of the creation of law, that is, the sphere of value. The author also emphasizes the fact that J. L. Austin's theory of performatives, adopted by the contemporary theory of law, was already revealed by some legal ideas as presented by Thomas Hobbes, a seventeenth-century writer.

B. Kornelius considers the fact that a clause of the democratic state as comprised by art. 2 of the Constitution of the Republic of Poland orders to consider axiology of the state under the rule of law in the process of law application. Referring to the theoretical and legal settlement connected with the construction of general clauses, the author presents their role in the process of law interpretation as conducted by organs applying law.

P. J. Suwaj highlights the necessity of practical realization of the principles protecting law and civil freedoms against the excessive interference of public administration. The author presents the evolution and content of the principle of publicity of actions taken by public administration in the European and Polish laws. The author considers a possible conflict of the constitutional right to privacy as contrasted to the duty to reveal financial statements by public officials. The author concludes that this duty is justified and remains in accordance with the requirements of the modern state under the rule of law.

This volume is closed by the papers devoted to the realization of the model of the state under the rule of law in the system of Switzerland, some Central European states, as well as chosen post-Soviet republics. M. Aleksandrowicz focuses on both the material and formal character of the concept of the state under the rule of law in the Constitution adopted in Switzer-

land in 1999. A formal aspect is revealed by the certainty of law and basing the activities of public authority on the foundation and limits of law, in the first place, the proclaimed law. A material aspect is revealed by human dignity and freedom, which are leading values in democracy both in the sphere of the positive law and norm-creating activities of the jurisdiction of the Federal Court.

There is a fixed tradition of Rechtsstaat Rule of Law in western states. In the Central and Eastern European states there still exist problems with adaptation or a practical realization of the principles of the state under the rule of law. Controversy appears when faced with a necessity to solve problems connected with the non-democratic past of these states or rather its consequences such as, "de-communization" or inspection. In what way is it to be done in the conditions of the state under the rule of law and respect for the certainty of law? How can possible conflicts between the principles of the state under the rule of law and the principle of social justice be solved? – this is the question A. Czarnota aims at answering in his paper.

The authors of the last but not least paper in this volume – A. R. Bartnicki and E. Kużelewska – represent a perspective of political sciences. They consider the possibility of the perception of the model of the state under the rule of law in post-Soviet republics and arrive at a pessimistic (though true) conclusion that, when faced with the concepts of the state under the rule of law, it is authoritarianism that wins. In the first place, this is conditioned by the lack of a democratic tradition in these states. Undoubtedly, Islam, with its different hierarchy of values, has a great role there. Specific economical and political connections with Russia are also of a great significance in this process.

Hopefully, the articles presented in this volume will enrich a discussion regarding the issue of axiology of the modern state under the rule of law.

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THE KANTIAN MODEL OF THE STATE UNDER THE RULE OF LAW

1. Introduction

In the philosophical system of Immanuel Kant considerations regarding a state under the rule of law are frequently present; they serve a significant role in understanding his complex practical philosophy. That is why they should be captured in a wider context starting from freedom, which is the idea of practical reasoning and the basis of morality, and finishing with "the kingdom of ends" and his idea of perpetual peace. In the Kantian philosophy law is an element which directly links all the fields (ethics, philosophy of law, philosophy of politics, and historical philosophy). That is why Kant has been presented as the one who gave inspiration to many contemporary theoretical and legal trends which differ from one another. On the one hand, he is presented as a precursor of the theory of the law of Nature of a changing content. On the other hand, he is presented as a precursor of legal positivism or normativism. Kant and his critical philosophy has been referred to by almost every following thinker engaged both in philosophy and the theory of law. Therefore, one may and should refer to Kant for his philosophy constitutes a never-ending source of interdisciplinary inspiration.

2. Freedom as a foundation of Immanuel Kant's practical philosophy

Freedom is a leading term in the system of Kant and serves as a key to understand especially a practical part of his philosophy.[1] Freedom is one of the ideas of the practical reason which presumes that an individual has to

[1] See M. Żelazny, *Idea wolności w filozofii Kanta*, Toruń 2001.

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be free for only after receiving that freedom can he be moral. Social freedom for Kant means only a different sphere of realization of moral freedom of an individual as a rational creature.[2] Along with the concept of freedom, treating an individual and every rational creature as "the end in himself" constitutes the main feature deciding about the shape and character of Kant's social philosophy. For Kant, a human being constitutes the center, that is, the highest and also the most important element of his philosophical thought. A human being as an individual member of the human community has to be guaranteed by law an equal measure of freedom and safety through "perpetual peace" among all the nationalities and nations.

The two out of three questions posted in *Critique of Pure Reason* (*what ought I to do?* and *what may I hope?*) Kant answers creating his practical philosophy. It is in the answers to these questions that the very essence of the Kantian practical philosophy is revealed since they tackle the actions of a human being, who is a free moral subject and a citizen at the same time. In this manner Kant takes all considerations regarding the essence of human being into the sphere what should be or, in other words, to the ideal world, determined by nothing external.[3] That approach was the result of the recognition of the primacy of pure possibilities and duties over the factual order.[4] Just as a theoretical reason examines a conditionally determined phenomenon in the natural world, a practical reason, dominating over it, considers everything which is connected with the human world of freedom. Kant's recognition of the autonomy of practical reason in relation to a theoretical reason led the Kantians to the division and opposition of the sphere of existence (*Sein*) and sphere of duties (*Sollen*).[5] Elżbieta Wolicka argues that the basic strain of the Kantian practical thought is mostly obvious in the ethical and social spheres where a boundary between the utopian postulates of a pure reason and a life practice and history of the human being as the culture creator lies. "The philosophy of nature relates to that which is, that of the ethics to that which ought to be".[6] That is why the Kantian philosophy of duties always captures a human being as an individual moral subject and an individual member of the society.

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[2] Compare P. Beylin, *Kanta moralna filozofia wolności*, [in:] *Antynomie wolności. Z dziejów filozofii wolności*, Warszawa 1966, p. 255.

[3] M. Szyszkowska, *Europejska filozofia prawa*, Warszawa 1993, p. 62.

[4] E. Wolicka, *Rozważania wokół Kanta. Prolegomena do filozofii kultury jako krytyki władz podmiotu*, Lublin 2002, p. 95.

[5] Compare M. Szyszkowska, *Filozofia w Europie*, Białystok 1998, p. 156.

[6] I. Kant, *The Critique of Pure Reason*, http://www.gutenberg.org/dirs/etext03/cprrn10.txt (05.12.2009).

In a moral sense, what a human being remains or should remain is dependent on how he will create or has created himself.[7] It is Kant's highest concern that people will never try to establish the rules of duties on the basis on what they actually do, basing on their experience, for the rules of duties cannot be deduced from the factual rules.[8] In a social life a human being has the highest sense and awareness of his own humanity which he constantly builds as a rational, free and moral creature.[9] For Kant, it was accompanied by some sense of pessimism in relation to the individual as the morality subject and optimism as related to the whole mankind.

3. Categorical imperative and its role

Kant used to say that there was only one categorical imperative which could be differently formulated.[10] It was primarily formulated in *Grounding for the Metaphysics of Morals* I: "Act only on that maxim through which you can at the same time will that it should become a universal law".[11] Later in the text he formulates it differently but sticks to its basic character II: "Act as though the maxim of your action were to become, through your will, a universal law of nature".[12] This imperative as a total command should define the aim in itself which could be nobody else but a human being. Therefore, a categorical imperative, being a moral law potentially found in every rational creature as a free and law-making creature, transforms into the so-called practical imperative which was finally defined by Kant as the highest right of his whole moral philosophy.[13] It results from the categorical

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[7] *Werke*, Bd. VI, Berlin 1914, hrsg. E. Cassirer, p. 184; quoted by B. Suchodolski, *Rozwój nowożytnej filozofii człowieka*, Warszawa 1967, pp. 760–761.

[8] Compare L. Kołakowski, *Cywilizacja na ławie oskarżonych*, Warszawa 1990, pp. 73 and 76.

[9] Compare J. Lacroix, *Historia a tajemnica*, trans. Z. Więckowski, Warszawa 1989, p. 45.

[10] Compare F. Copleston, *Historia filozofii*, vol. VI, *Od Wolffa do Kanta*, trans. J. Łoziński, Warszawa 1996, p. 349; See Ch. Horn, *Człowieczeństwo jako cel obiektywny. Kantowska formuła imperatywu kategorycznego jako celu samego w sobie*, [in:] *200 lat...*, op. cit., pp. 255–271.

[11] I. Kant, *Groundwork of the Metaphysics of Morals*, trans. Jonathan F. Bennett, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009).

[12] Ibid. http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009).

[13] Compare B. Andrzejewski, *Inspiracje kantowskie w filozofii teoretycznej Władysława Kozłowskiego*, [in:] *Dziedzictwo Kanta. Materiały z sesji kantowskiej*, J. Garewicz (ed.), Warszawa 1976, p. 260; M. Żelazny, *Idea wiecznego pokoju w filozofii Kanta*, [in:] I. Kant, *Wieczny pokój*, trans. M. Żelazny, Toruń 1992, p. 3.

imperative because the practical imperative[14] expresses what follows III: "Act in such a way as to treat humanity, whether in your own person or in that of anyone else, always as an end never merely".[15] At the same time, this is the most important definition of the categorical imperative being an order of practical way of conduct; it has a decisive influence on the humanistic formulation of Kant's social philosophy, law and individual. Without that practical imperative which supplements it, in that context a categorical imperative would not make sense at all.

Other formulations of the categorical imperative, which are noticed by the researchers of the Kantian ethics, are IV: "Always choose in such a way that the maxims of your choice are incorporated as universal law in the same";[16] as well as V: "Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation".[17] Regardless of different formulations of the categorical imperative, it remains a moral right – as a "right of freedom",[18] resulting from the order of practical reason which allows a human will to behave in accordance with it.

In ethics a respect for law itself was the respect for a moral law, which was to dispose a will to act in accordance with an order of the categorical imperative.[19] It was already the respect for law which was the impulse giving the act a real moral value.[20] The awareness of the duty as obedience towards law has to inform a rational creature about his ability of creating (together with other rational creatures) as well as the obedience of their common law.[21] Indeed, a moral capability of living in accordance with the law is ingrained in human nature. For Kant, the ideal of law constitutes a linking unit in the framework of his practical philosophy and his views on freedom and morality, politics and state as well as the actions of mankind.

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[14] Compare H. Izdebki, *Historia myśli politycznej i prawnej*, Warszawa 1995, p. 177.

[15] I. Kant, *Groundwork...*, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009).

[16] Ibid., p. 79; See V. J. Bourke, *Historia etyki*, trans. A. Białek, Warszawa 1994, pp. 171 and 172; F. Copleston, *Historia...*, op. cit., pp. 338 and following.

[17] I. Kant, *The Critique of Practical Reason*, http://www.gutenberg.org/dirs/etext04/ikcpr10.txt (05.12.2009).

[18] Compare *Encyklopedia filozoficzna*, trans. A. Banaszkiewicz, Kraków 2003, p. 423; See O. O'Neil, *Etyka Kantowska*, trans. P. Łuków, [in:] *Przewodnik po etyce*, P. Singer (ed.), Warszawa 1988, p. 216.

[19] Compare M. Heidegger, *Kant a problem metafizyki*, trans. B. Baran, Warszawa 1989, pp. 177 and 178.

[20] Compare I. Kant, *Groundwork...*, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009).

[21] Compare A. MacIntyre, *Krótka historia etyki. Filozofia moralności od czasów Homera do XX wieku*, trans. A. Chmielewski, Warszawa 2000, p. 248.

According to him, law is the construction of "rational order" in the sphere of human acts.[22] In Kant's system, it has the role which is strictly imposed by reason which subjects people to certain actions. Captured in this way, law, based on practical reason, has several functions; first, it creates and organizes; second, it provides an order and gives orders; third, it provides the aim and sense for both individual life of rational creatures as well as their organized life in communities, under the obliging rule and equal rights based on the principles of freedom and equality.

4. Immanuel Kant's types of laws

Immanuel Kant differentiates between the law of Nature (based on intellect) and moral law (based on reason); next he differentiates between the law of Nature and the proclaimed law with a further differentiation between a private law and a public law. For law to be objective, common and necessary, the source of all the laws, both moral and legal, has to be reason totally freed from all the influences of experience.[23] Apart from that, moral rights have a completely different character than physical and natural rights for the former do not deal with any phenomena; instead, they are guidelines for defining a human way of moral conduct.[24] Therefore, law is an objective principle significant for every rational creature according to which a subject has to behave.[25] In other words, law always indicates regularities both for the determined natural world as well as for the human world of freedom.

Another significant achievement of the Kantian theory of law is a distinction between the interior law and the exterior law. This is a consequence of Kant's isolation of the exterior freedom, which is possible due to the proclaimed law, from the interior freedom, necessary to lead a moral life due to the moral law.[26] Thus, in other words, the interior law is a mo-

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[22] Compare A. Bobko, *Kant i Schopenhauer. Między racjonalnością a nicością*, Rzeszów 1996, p. 59 and following.

[23] Compare R. A. Tokarczyk, *Filozofia prawa w perspektywie prawa natury*, Białystok 1996, p. 106.

[24] Compare J. Urbaniak, *Etyka Kantowska jako wymóg "praktycznego rozumu"*, [in:] *W kręgu inspiracji kantowskich*, R. Kozłowski (ed.), Warszawa – Poznań 1993, p. 57.

[25] Compare Z. Tobor, *Pojęcie legalności w filozofii Immanuela Kanta*, "Folia Philosophica", p. 15, J. Bańka (ed.), Katowice 1997, p. 123; See I. Kant, *Groundwork...*, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009); I. Kant, *The Critique of Practical...*, http://www.gutenberg.org/dirs/etext04/ikcpr10.txt (05.12.2009).

[26] Compare H. Izdebski, *Historia myśli...*, op. cit., p. 177; M. Szyszkowska, *Europejska...*, op. cit., p. 52.

ral law whereas the exterior law is the law regulating mutual relations of people on the social and state levels. The notion of the exterior law (*lex*) results completely from the notion of freedom or, in other words, from the legislation (*ius*) of a pure practical reason.[27] In this way Kant formulates an intellectual notion of the law which, due to practical abilities of reason,[28] is possible to be generalized and make it commonly obligatory pointing out its values of the objective character.[29]

Apart from the proclaimed law, the law of Nature refers to the interior range of human freedom.[30] This is not the Nature's law for it refers exclusively to a human, who, being a rational and free creature, is not determined by any cause-and-effect rules. Kant did not search for its essence in a human, social or natural world as his predecessors did. He searched for that essence in the notions of a pure reason constructed *a priori*.[31] Therefore, it is reason and not a human creature that is the source of this law.[32] Analyzing the relationships between the law of Nature and a moral law, Kant arrives at the conclusion that their subject is basically identical for both of them result from practical reason and are subjected to the application of the categorical imperative. The law of Nature as well a moral law is, therefore, a "general law of freedom", based on obligation, commonness and completeness of obligation.[33] The only difference between them is that the law of Nature is obliging for every rational creature defining the differences between them; on the other hand, a moral law tackles the interior sphere of motivation of an individual only.

The proclaimed law envelopes the norms which are obligatory exclusively due to the decision of the legislator whereas the law of Nature, being expressed in the a priori principles of consciousness, is obligatory due to its correspondence with the reason which discovers it, and does not rely on the

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[27] See I. Kant, *The Saying: That a Thing May Be Right In Theory, but May Not Hold for Practice*, trans. William Hastie, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=358&chapter=56090&layout=html&Itemid=27 (05.12.2009); Compare E. Wolicka, *Rozważania...*, op. cit., p. 183; A. Chmielewski, *Społeczeństwo otwarte czy wspólnota*, Wrocław 2001, pp. 196–197; Z. Kuderowicz, *Kant*, Warszawa 2000, p. 77.

[28] See O. Höffe, *Immanuel Kant*, trans. A. M. Kaniowski, Warszawa 1995, pp. 210–218.

[29] See H. Pawlak, *Absolutyzm i relatywizm wartości. Spór Schelera z Kantem*, [in:] *Wokół Kanta i innych. Zbiór rozpraw*, S. Sarnowski, G. Dominik (ed.), Bydgoszcz 1998, p. 47.

[30] Compare Z. Tobor, *Pojęcie legalności...*, op. cit., p. 129.

[31] Compare R. A. Tokarczyk, *Historia filozofii prawa w retrospektywie prawa natury*, Białystok 1999, p. 284; See M. Szyszkowska, *Europejska filozofia...*, op. cit., pp. 60–61.

[32] See M. Szyszkowska, *Zarys filozofii prawa*, Białystok 1994, p. 118.

[33] Compare Z. Kuderowicz, *Kant*, op. cit., p. 79.

positive legislation.[34] According to Kant, a legal order, just as an order of the world, is the result of the creation by reason which generally commands for the order to be just as the legal reason commands a legal reason to be proclaimed in the world. For this reason, Kant formulates a new type of the imperative, the so-called legal imperative, and makes it a common principle of law: "Act externally in such a manner that the free exercise of thy will may be able to coexist with the freedom of all others, according to a universal law".[35] A relation of the law of Nature to the proclaimed law is expressed in the relation to what is a priori and to what is a posteriori; to what should be and to what remains. The principles of the positive law should be established on the basis of the law of Nature. Therefore, the law of Nature, being both primary and a tool in relation to the proclaimed law, should be its basis, test and the measure of evaluation. "(...) If certain defects which could not have been avoided are found in the political constitution or foreign relations of a state, it is a duty for All, especially for the rulers of the state, to apple their whole energy to correcting them as soon as possible, and to bringing the constitution and political relations on these points into conformity with the Law of Nature, as it is held up as a model before us in the idea of reason (...)".[36]

Additionally, Kant divides a legal system into a private law and a public law due to their different legal subjects. "Private law regulates the relationships between individuals, being legal persons (or subjects) or, in other words, individuals capable of free acts which they take criminal responsibility of".[37] A private law deals with different ways of agreements regarding the usage of items or human talents.[38] This is a law separating something which is exteriory mine from what is yours.[39] For Kant, the exterior possession of mine and yours are: 1) material items (land and goods), 2) service agreements (contracts), as well as 3) a legal situation of another person in his/her relation to me.[40] The above-mentioned considerations are the main

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[34] Compare E. Jarra, *Historia filozofii prawa*, Warszawa 1923, p. 174.

[35] I. Kant, *The Metaphysics of Morals*, trans. Thomas Kingsmill Abbott, http://philosophy.eserver.org/kant/metaphys-of-morals.txt (05.12.2009).

[36] I. Kant, *The Perpetual Peace*, trans. Mary Campbell Smith, M. A., http://files.libertyfund.org/files/357/0075_Bk.pdf (05.12.2009).

[37] Z. Kuderowicz, *Kant*, op. cit., p. 79.

[38] Compare Ibid., p. 79; S. Goyard-Fabre, *Kant et le problème du droit*, Paris 1975, p. 83 and following.

[39] Compare Cz. Porębski, *Umowa społeczna. Renesans idei*, Kraków 1999, p. 125.

[40] Compare O. Höffe, *Immanuel...*, op. cit., p. 220.

fields of the civil law such as: property right (possession), commitment right (agreements) and individual right (marriage, family and family control superior). Interesting is the fact that Napoleon's Civil Code, which appeared in the year of Kant's death (1804), considered the above-mentioned division in its internal system.[41] The Kantian private law is the justification of private possession by the acknowledgment of the agreement as the basis of all legal relations taking place in the state. Therefore, at the beginning of the nineteenth Century Kant, among all, contributed to the grounding of the new capitalistic legal system getting rid of feudal institutions prevailing for centuries.

On the other hand, a public law regulates both the relations between the state and its citizens as well as relations between different states acknowledged to be individual legal subjects capable of the establishment of international law obligatory for them. The Kantian theory of public law deals with the justification of the state under the rule of law concentrating on the legality of the state power in the framework of the state law. When it comes to the rights of nations, it deals with the possibility of finding a durable "perpetual peace". In this context the issues of the philosophy of law start their integration with the issues of the philosophy of politics, their relations with morality and the issues of historiosophia through a further characteristics of the system of "kingdom of ends" and the discussion of the "perpetual peace" project.

5. Politics and the advancement of law

For Kant, politics as the art of ruling people was a practical wisdom[42] which he connected with the theory of morality and a study of law.[43] That is why its basic aim was to build a reasonable society based on law.[44]

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[41] *Civil Code dated* 21.III.1804 consisted of 2281 articles organized into III parts: I About Persons; II About property and different types of human possessions; III About the ways of the possession acquisition; that was the beginning of modern codification.

[42] Compare I. Kant, *The Perpetual...*, http://files.libertyfund.org/files/357/0075_Bk.pdf (05.02.2010).

[43] Compare M. Szyszkowska, *Europejska filozofia...*, op. cit., p. 63; also, *Kantowskie inspiracje w pojmowaniu polityki*, [in:] *Interpretacje polityki*, M. Szyszkowska (ed.), Warszawa 1991, pp. 101–109.

[44] Compare K. Bal, *Wprowadzenie do etyki Kanta. Wykłady z historii myśli etycznej*, Wrocław 1984, p. 85; see A. Kryniecka-Piotrak, *Filozofia prawa a filozofia polityki*, [in:] *Filozofia prawa*, M. Szyszkowska (ed.), Warszawa 2001, pp. 99–109.

True politics should reveal its reference to higher values or, in other words, ideas.[45] Its search for the aim, which was the achievement of that aim in the shape of "kingdom of ends" and "perpetual peace", may take place only when it is expressed in the law to obligate.[46] The highest right as the final aim of all items is at the same time the highest political right,[47] which will be achieved only when a moral politician behaves in accordance with the law. Kant was certain that politics which is in accordance with law is just and useful; the opposite makes it false and ugly.[48]

Philosophy of politics as an integral part of the Kantian practical philosophy is directed rather to the sphere of what should remain instead of what factually remains.[49] As M. Szyszkowska has noticed, the politics of law forms views regarding the subject of the law content which should be obligatory in a given state and in given time and circumstances. Philosophy of politics has a wider task for it prepares a complete vision of the rightly organized state and society. When comprehended in this way, politics should be captured both in its relation to morality and to the obligatory law. In this context the only right politics is the politics which treats legal regulations as sacred and inviolable, especially: "Right must be held sacred by man, however great the cost and sacrifice to the ruling power. Here is no half-and-half course. We cannot devise a happy medium between right and expediency, a right pragmatically conditioned. But all politics must bend the knee to the principle of right, and may, in that way, hope to reach, although slowly perhaps, a level whence it may shine upon man for all time".[50] Law is an explicit element organizing the state and social life; politics has to rely on it and be practiced in its framework.[51] Woe betide him who practices another politics than that which perceives obligatory legal regulations as sacred.[52] Political

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[45] Compare M. Szyszkowska, *Filozofia prawa i jej współczesne znaczenie*, Warszawa 2002, pp. 152 and 155.

[46] M. Zahn, *Kantowska teoria pokoju w świetle najnowszych dyskusji*, trans. M. Poręba, [in:] *Filozofia transcendentalna a dialektyka*, J. M. Siemek (ed.), Warszawa 1994, p. 37.

[47] Compare I. Kant, *The Saying: That a Thing May Be Right In Theory...*, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=358&chapter=56090&layout=html&Itemid=27 (05.12.2009).

[48] I. Kant, *Wznowione pytanie...*, op. cit., p. 188.

[49] Compare M. Szyszkowska, *Filozoficzne interpretacje prawa*, Warszawa 1999, p. 116.

[50] I. Kant, *The Perpetual...*, http://files.libertyfund.org/files/357/0075_Bk.pdf (05.12.2009).

[51] Compare M. Szyszkowska, *Filozofia prawa i jej współczesne znaczenie*, op. cit., p. 151.

[52] I. Kant, *The Perpetual...*; cited after: M. Szyszkowska, *Filozoficzne interpretacje...*, op. cit., p. 118.

decisions should never be optional for morality and higher values together with a human being, who is the "means in himself", should constitute their basis.

In the course of mankind there is a rational aim of Nature hidden, where mankind should find their sense. It is in the history that a cultural advancement also takes place which relies on the improvement of social relations and all mechanisms serving to master Nature by humans and the improvement of human skills.[53] In this context history is captured as the advancement of human culture which, in turn, is captured as a human acquisition of skills to choose their different aims and to be able to realize them.[54] The notion of advancement takes a central place in Kant's historioshophy for it deals with the whole mankind, rather than certain individuals with different aims to fulfill: "Individual perfectionism and happiness of other people" (Eigene Vollkommenheit – Fremde Glückseligkeit): these are the aim and the duty of every single individual.[55]

When considering a type of the advancement described by Kant,[56] it is necessary to highlight that it is the advancement taking place in the field of law. This advancement is to make people: first of all, "morally perfect"; secondarily, members of "a perfect society".[57] "The notion of perfection in a practical sense is the fitness or sufficiency of a thing for all sorts of purposes".[58] In this way a moral aim of a single individual meets the aim of mankind to make one aim of Nature which relies on the treatment of man as "means in himself" and the "final aim of creation" through the realization of the concept of "perpetual peace". Inasmuch as the action of a single human moral subject may be recognized as the realization of moral law in the perspective of the principle of natural advisability, when it comes to the realization of the proclaimed law, it is essential to mention a necessity of the appearance of the organism involving all rational creatures first of all, in the shape of "kingdom of ends", and then their federation.

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53 Compare Z. Kuderowicz, *Filozofia nowożytnej Europy*, Warszawa 1989, p. 529.

54 Compare *Słownik filozoficzny*, Vol. I, I. Krońska (ed.), Warszawa 1966, pp. 296 and 297.

55 I. Kant, *The Metaphysics of Morals*; http://philosophy.eserver.org/kant/metaphys-of-morals.txt (05.12.2009).

56 Compare Z. Kuderowicz, *Czy Kant wierzył w postęp?*, [in:] *Kant wobec problemów współczesnego świata*, J. Miklaszewska, P. Spryszak (ed.), Kraków 2006, pp. 13–17.

57 Compare J. Lacroix, *Historia a...*, op. cit., pp. 39 and 54.

58 I. Kant, *The Critique of Practical...*, http://www.gutenberg.org/dirs/etext04/ikcpr10.txt (05.12.2009).

Kant's history of mankind is a course of law which is constantly improved.[59] Advancement may be only expected from the exterior, for example, in the arrangement of legal relations in accordance with guidelines given by a pure practical reason, therefore, the creation of the states under the rule of law as well as their co-existence in a peaceful community of the whole nations makes the highest task and final aim of mankind's existence. History is a process which has a meaning for it leads mankind towards the advancement in the scope of law: civil, state and international. The end of history will be the achievement of harmony and balance between the freedom of rational creatures with the help of common obligatory law. In the course of actions and its advancement, Kant reconciles two contradictory ideas: the idea of freedom and the idea of law. A historical development of culture points out the final triumph of law which, due to the power and possibilities of practical reason, is in the position to ensure freedom for everybody.

The "royal thinker" did not include a description of the historical process and attempts of periodization of its acts. He limited himself only to the formulation of theoretical premises of his historiosophy in *The Conjectural Beginning of Human History*. Those premises are revealed by ten theses; which hide the plan of Nature regarding mankind: "FIRST THESIS: All natural capacities of a creature are destined to evolve completely to their natural end. SECOND THESIS: In man (as the only rational creature on earth) those natural capacities which are directed to the use of his reason are to be fully developed only in the race, not in the individual. THIRD THESIS: Nature has willed that man should, by himself, produce everything that goes beyond the mechanical ordering of his animal existence, and that he should partake of no other happiness or perfection than that which he himself, independently of instinct, has created by his own reason. FOURTH THESIS: The means employed by Nature to bring about the development of all the capacities of men is their antagonism in society, so far as this is, in the end, the cause of a lawful order among men. FIFTH THESIS: The greatest problem for the human race, to the solution of which Nature drives man, is the achievement of a universal civic society which administers law among men. SIXTH THESIS: This problem is the most difficult and the last to be solved by mankind. SEVENTH THESIS: The problem of establishing a perfect civic constitution is dependent upon the problem of a lawful external relation among states and cannot be solved without a solution of the

[59] Compare Cz. Porębski, *Umowa społeczna...*, op. cit., p. 125; see O. Höffe, *Immanuel...*, op. cit., pp. 242–248.

latter problem. EIGHTH THESIS: The history of mankind can be seen, in the large, as the realization of Nature's secret plan to bring forth a perfectly constituted state as the only condition in which the capacities of mankind can be fully developed, and also bring forth that external relation among states which is perfectly adequate to this end. NINTH THESIS: A philosophical attempt to work out a universal history according to a natural plan directed to achieving the civic union of the human race must be regarded as possible *and, indeed, as contributing to this end of Nature*".[60]

Additionally, Kant gives a distinction between "physical history", which describes events and explains their causes, and "pragmatic history", which reveals the sense of the historical process of human nature perceiving in it a purposeful intention of the very Nature. Nature's plan is not to raise a human through history so that to make such a state where all human skills could be fully developed. In this context the aim of history is the realization of a perfect model of collective life in accordance with the moral law.[61] To answer the question whether mankind (in general) is constantly heading towards the better, the thinker from the Kingdom states that in this case an individual is a part of mankind who is developing by improving the law. For a rational but still limited creature only the advancement towards the infinity is possible, from the lower to the higher degrees of moral perfectionism.[62] The Kantian human, as part of mankind, participates in the continuing and never-ending advancement towards the ideal in the process of history.

While preparing mankind to meet the ideal rules, Kant additionally distinguishes between "the culture of being fit" and "culture of punishment".[63] The former relies on the development of every technical skills, crafts and mechanical arts resulting in the advancement of human skills. The latter, in turn, relies on the discipline and subordination of selfish aims and passions of certain individuals to become obedient to the aims defined by the advancement of mankind as a species. This is a very difficult enterprise for a specific feature of mankind is that it has to find every good in itself and

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[60] I. Kant, *The Conjectural Beginning of Human History*, trans. Rob Lucas, http://www.marxists.org/reference/subject/ethics/kant/universal-history.htm (05.12.2009); See T. Kroński, *Kant*, Warszawa 1966, pp. 176–190.

[61] Por. M. Acewicz, *Sąd teleologiczny a dzieje ludzkości w filozofii Kanta*, [in:] *Idea. Studia nad strukturą i rozwojem pojęć filozoficznych*, M. Czarnawska i J. Kopania (ed.), Białystok 1993, p. 118.

[62] Compare T. Kroński, *Kant*, op. cit., p. 150; see I. Kant, *The Critique of Practical...*, http://www.gutenberg.org/dirs/etext04/ikcpr10.txt (05.12.2009).

[63] See Z. Kuderowicz, *Filozofia nowożytnej...*, op. cit., p. 530; *Słownik...*, op. cit., p. 297.

realize it through its freedom.[64] Basically, the history of mankind is a history which tells us where to go. As a result of this view, Kant's historiosophy considers the history as a realization of general and human values in the shape of aims, the highest point of which is a human.[65] A human is civilized through culture;[66] that culture is the destination of mankind to follow in accordance with the plan of Nature. B. Szymańska argues that the human history is the history of the cultural development which, for Kant, means that a human can realize the aims he chooses himself. For this reason, it is exclusively a human being who is capable of conscious acting and it is only with the reference to humans that sensibleness and usefulness of acting can be discussed.[67]

6. Civil state as a legal state

A civil state (*bürgelicher Zustand*) allows for a legal assurance that people get what they should get. According to O. Höffe, it is characterized by two features. Firstly, a decision regarding the common and obligatory law is not the matter of individuals but it should be handled by public authority. Secondary, it does not deal with any state; it deals with a political harmony, resulting from a legal regulation established on the basis of a practical reason and enabling to combat possible conflicts.[68] Here what is meant is the a priori model of a civil state which, being a legal state, is based on three basic principles: 1) freedom of every member of the society on the ground of being a human person; 2) equality of every member of the society on the ground of being a subject and 3) independence of every member of the community on the ground of being a citizen.[69]

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[64] Compare I. Kant, *Entwurfe zu dem Colleg über Anthropologie*, *Werke*, Bd. XV, Part II, Berlin 1907, p. 784; cited after: B. Suchodolski, *Rozwój nowożytnej...*, op. cit., p. 759.

[65] Compare Z. Kuderowicz, *Kant*, op. cit., p. 91.

[66] See I. Kant, *Anthropologe in pragmatischer Hinsicht*, [in:] I. Kant, *Werke*, Bd. VII, Berlin 1907, p. 119; cited after: B. Suchodolski, *Rozwój nowożytnej...*, op. cit., p. 762; B. Szymańska, *Antoni Lange i myśl kantowska. Recepcja kantyzmu w okresie antypozytywistycznego przełomu w Polsce*, [in:] *Dziedzictwo...*, op. cit., p. 226.

[67] B. Szymańska, *Immanuel Kant*, "Nauka dla wszystkich"1978, nr 289, p. 29.

[68] Compare O. Höffe, *Immanuel...*, op. cit., p. 229.

[69] See I. Kant, *The Saying: That a Thing May Be Right In Theory...*, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=358&chapter=56090&layout=html&Itemid=27 (05.02.2010).

A Kantian principle of the social equality is revealed by the formula: it is impossible to make everybody be happy but everybody can be guaranteed equal freedom.[70] A principle of equality, in turn, means that everybody is equally subjected to the law; everybody but the highest authority in a state. When it comes to the principle of independence, it emphasizes a member of the community or, in other words, a citizen of the state as a co-legislator. Basically, the above-mentioned principles refer to a civil society where free and equal people, being rational and reliable citizens, are the co-creators of their obligatory laws. In this case, a civil society would mean a structure similar to the structure of a living organism, where every citizen is not only the means but also the end of its existence. M. Żelazny argues that a relation between a life of an individual and the existence of the whole society would remind of a harmonious union of a living organism; what is more, the harmony would fully rely on a complete obedience to the law.[71]

Kant's theory of the social agreement is based on the triple principle regarding the civil society where the law guarantees private freedom, equality in the light of the exterior law as well as civil independence in the state.[72] It is not a historical fact but a pure idea of practical reason imposing a duty on the legislator to establish laws which are the will of the whole nation.[73] Thanks to it, a ruler is obligated to issue laws whose source would be in the united will of the whole nation; on the other hand, a subject, who wants to be a citizen, has to behave in such a way as to co-create that united will of the whole nation.[74] Kant calls such a unification of individuals the highest condition of a duty.[75] It means that every free and equal human can co-create the law which will be obligatory for every citizen in the state. According to Kant, in this way, a touchstone of all the laws, which a ruler can proclaim and establish in the state, is revealed by the following question: "(...) Can a people impose such a law on itself?[76] – if they had such a possibility.

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[70] Ibid., pp. 19–20.

[71] Compare M. Żelazny, *Idea wolności...*, op. cit., pp. 242 and 243.

[72] Compare E. Wolicka, *Rozważania...*, op. cit., pp. 183–184.

[73] Compare I. Kant, *The Saying: That a Thing May Be Right In Theory...*, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=358&chapter=56090&layout=html&Itemid=27 (05.12.2009).

[74] Compare Cz. Porębski, *Umowa społeczna...*, op. cit., pp. 106–107.

[75] Compare M. Szyszkowska, *Zarys...*, op. cit., p. 118.

[76] Compare I. Kant, *An Answer to the Question: "What is Enlightenment?"*, http://www.english.upenn.edu/~mgamer/Etexts/kant.html (05.12.2009).

Kant considered the issue of the appearance of a state in accordance with the concept of the law of Nature; thus, he did it in an individual way, assuming that an autonomous human being was a starting point. The idea of rational creatures in connection with the idea of a rational will as morally legislative should lead the reader to the notion of "kingdom of ends" or, in other words, such a state where a moral aim is achieved; at the same time the aim of Nature is also achieved according to which every human (citizen) will be treated as "the end in himself". In this context Kant distinguishes between the state which is here and now and the state which should be or, in other words, the ideal "kingdom of ends". Therefore, the Kantian definition of the state is described as a realization of legal laws on the one hand; on the other hand, it is described as communion of rational creatures under the rule of those laws.[77]

7. Kant's "kingdom of ends" and the republican system

A "kingdom of ends" (*Reich der Zwecke*) constitutes the idea which is nevertheless possible to realize as a world based on the authority of the reason.[78] A state, where no citizen is treated instrumentally, is a model of an ideal human community which, as M. Szyszkowska argues, will result in a harmonious unification of the idea of homocentrism with the idea of sociocenrism with the help of law. At the same time, the construction of such a state is the state which, being ideal, can only be approached by people to some degree. The world of rational creatures as a "kingdom of ends" will become possible due to the common legislation of every person who is a member of the kingdom.[79] Only a rational, free and moral individual can be a legislator for himself in the sphere of morality as well as a co-creator of law in the "kingdom of ends" as a "kingdom of freedom".[80] Thus, "the kingdom of ends" has a moral character and, as such, it should be based on the postulate of freedom.[81] "Freedom of volition – partly incited,

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[77] See I. Kant, *Groundwork...*, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.02.2010); Compare H. Izdebski, *Historia myśli...*, op. cit., p. 178; M. Szyszkowska, *Europejska...*, op. cit., p. 56; *Zarys...*, op. cit., pp. 105 and 111.

[78] Compare E. Wolicka, *Rozważania...*, op. cit., pp. 166–167.

[79] Compare A. Chmielewski, *Społeczeństwo otwarte czy wspólnota? Filozoficzne i moralne podstawy nowoczesnego liberalizmu oraz jego krytyka we współczesnej filozofii społecznej*, Wrocław 2001, p. 227.

[80] Compare E. Bieńkowska, *W poszukiwaniu królestwa człowieka. Utopia sztuki od Kanta do Tomasza Manna*, Warszawa 1981, p. 46.

[81] Compare P. Beylin, *Kanta moralna filozofia wolności*, [in:] *Antynomie wolności. Z dziejów filozofii wolności*, Warszawa 1966, p. 258.

and partly restrained by moral laws – would be itself the cause of general happiness; and thus rational beings, under the guidance of such principles, would be themselves the authors both of their own enduring welfare and that of others".[82] Kant states that "only through morality that a rational being can be a law-giving member in the realm of ends; so it is only through morality that a rational being can be an end in himself."[83] In such a way the Kantian "kingdom of ends" would also be the idea of "self-organizing morality",[84] both in the dimension of an individual subject and in the common dimension of mankind.[85]

While presenting a picture of such a state, where simultaneously everybody is a co-legislator and obliged to establish and follow the law and respect other members of the union who are also legislators, Kant takes a stand claiming that a man in the state can only be subjected to the laws which he has co-created.[86] "The concept of every rational being as one who must regard himself as giving universal law through all the maxims of its will, so as to judge himself and his actions from this standpoint, leads to the fruitful concept of a realm of ends".[87] As a consequence, a citizen of "the kingdom of ends" has to obey laws proclaimed by himself. That is why only a member of the "kingdom of ends" can be recognized as a citizen with full rights,[88] who follows the law of his own will.

It was already in *The Critique of Pure Reason* that Kant, discussing "ideas in general", stated in relation to Plato: "A constitution of the greatest possible human freedom according to laws, by which the liberty of every individual can consist with the liberty of every other (not of the greatest possible happiness, for this follows necessarily from the former), is, to say the least, a necessary idea, which must be placed at the foundation not only of the first plan of the constitution of a state, but of all its

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[82] I. Kant, *The Critique of Pure...*, http://www.gutenberg.org/dirs/etext03/cprrn10.txt (05.12.2009).

[83] I. Kant, *Groundwork...*, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009).

[84] I. Kant, *The Critique of Pure...*, http://www.gutenberg.org/dirs/etext03/cprrn10.txt (05.12.2009).

[85] Compare E. Wolicka, *Rozważania...*, op. cit., p. 166; See J. Kloc-Konkołowicz, *Kantowskie pojęcie jawności jako kryterium moralności i polityki*, [in:] *200 lat z filozofią Kanta*, M. Potępa, Z. Żwoliński (ed.), pp. 343–355.

[86] Compare L. Dubel, *Historia doktryn politycznych i prawnych do końca XIX wieku*, Warszawa 2002, p. 291.

[87] I. Kant, *Groundwork...*, http://www.earlymoderntexts.com/pdf/kantgw.pdf (05.12.2009).

[88] Compare A. Sikora, *Spotkania z filozofią*, Warszawa 1967, p. 203.

laws."[89] Therefore, ideas, being high values, should be the aims ingrained into the common obligatory law. This is the aim which Nature has given to mankind. This is also the aim which Kant largely concentrates on in his social philosophy.

Kant highlights that a human, being "an intelligent creature", is not only an autonomous legal subject but also, at least potentially, "a state man" or, in other words, the subject of the proclaimed law. While considering a legal status of a human, it is necessary to highlight three levels which he especially activates his performance on. Indeed, these levels correspond with the three types of the legal systems. Firstly, there is a reference to the system in accordance with the state law of every citizen who is a private individual having his own business; secondly, it refers to the system in accordance with an international law of the states regulating their mutual relations; and thirdly, it refers to the system in accordance with a cosmopolitan law where people (and states), remaining in mutual external relations, should be treated as the citizens of the common and international community.[90]

The most perfect system is the republican system or, in other words, a civic system where an individual can be fully realized as a conscious and sovereign political subject. Kant's republican system is an equivalent of the state under the rule of law based freedom, equality and civic subjectivity of every member. Kant claims that a state is a necessary condition of the triumph of the idea of law; similarly, the idea of law is perceived as a triumph of a practical reason. According to Kant, it is only through the state that the advancement of mankind is possible in the direction of what is good; therefore, it implies the realization of the most important idea of his practical philosophy, that is, the concept of "perpetual peace".

A construction of the state under the rule of law in the shape of "common cosmopolitan state" as a "world republic" subordinated by the common law is a conscious aim of Nature and, therefore, the aim of history.[91] In this context law becomes an element which in a rational way gives a direction and sense to mankind in the course of the history. According to Kant, the state has to be based to serve the law which, in turn, guards freedom through

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[89] I. Kant, *The Critique of Pure...*, http://www.gutenberg.org/dirs/etext03/cprrn10.txt (05.12.2009).

[90] Compare I. Kant, *The Saying: That a Thing May Be Right In Theory...*, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=358&chapter=56090&layout=html&Itemid=27 (05.12.2009); I. Kant, *The Perpetual...*, http://files.libertyfund.org/files/357/0075_Bk.pdf (05.12.2009); See. F. Grootenboer, *The Three Principles of Kant's Republic: An Interpretation*, [in:] *Kant wobec problemów...*, op. cit., pp. 41–48.

[91] Compare J. Lacroix, *Historia...*, op. cit., pp. 39–40, 43, 50 and 52.

the assurance of equal limits of freedom for everybody. Being expressed by the above-mentioned statement regarding "social individualism", it appears to be only a temporary stage on the road towards the realization of the project of "perpetual peace". Kant argues that in future, after the "kingdom of ends" is created and "perpetual peace" is achieved, the positive law will become useless. Now it is only human imperfection that decides about the necessity of proclaiming a law; it becomes unnecessary when people start treating each other as "the end in themselves". At the moment when the aim of Nature given to mankind and the moral aim of an individual meet themselves in the framework of the process of the history, it will be possible to recognize a complete realization of both "kingdom of ends" and the project pf "perpetual peace". A road, marked by Kant, is possible to be taken although it is rather long and strenuous. It is only up to people and their law, which is to guide them on this road, how long and in which manner it will be covered.

While mentioning articles definitive for "perpetual peace" as the ideal, which is to unite mankind,[92] in the first place Kant points out a republican system of rules, next, he mentions a federal and peaceful relation of the states, and finally, he refers to a cosmopolitan law (which Kant limited to the explicitness of the conditions of common hospitality).[93] When one tries to develop the thoughts revealed by these articles, one may refer a republican system of rules to the modern model of the so-called democratic legal state as a civil society. A republican state, to Kant's mind, is the "realm of ends where every citizen is exclusively the end of the society which he simultaneously co-creates".[94]

Zbigniew Kuderowicz claims that a republican system creates the guarantees of perpetual peace because it develops the idea of legal order[95] and similarly to it, it should be based on the same premises such as: the principle of freedom of every member of the society who are humans; second, the principle of dependence of every citizen on one law which is created

[92] Compare K. Kuźmicz, *Kantowska koncepcja wiecznego pokoju jako przykład idei jednoczącej ludzkość*, [in:] *Wielokulturowość polskiego pogranicza. Ludzie – idee – prawo*, A. Lityński, P. Fiedorczyk (ed.), Białystok 2003, pp. 411–418.

[93] I. Kant, *The Perpetual...*, http://files.libertyfund.org/files/357/0075_Bk.pdf (05.12.2009); Compare Z. Kuderowicz, *Kant*, op. cit., p. 86 and following.

[94] Compare M. Żelazny, *O historiozofii Kanta – z umiarem*, [in:] I. Kant, *Przypuszczalny początek ludzkiej historii i inne pisma historiozoficzne*, J. Rolewski (ed.), Toruń 1995, p. 14.

[95] Compare Z. Kuderowicz, *Filozofia nowożytnej...*, op. cit., p. 521.

on a common basis, and finally, the idea of common equality.[96] Kant's republicanism was, first of all, a state principle of separation of executive power from legislation.[97] Nowadays this definition can be misleading for it is not about the form of rules but it is about the way of its performance. Therefore, it is possible to state that the Kantian concept of civil state relies on the same principles which shape a modern model of a democratic state under the rule of law. These are the principles of constitutionalism, division of power, national sovereignty, development of civil self-governance, and protection of basic social rights and freedoms. Citizens of the republic understood in this way will never proclaim wars for they are aware of pain connected with them.

The second definitive article is about a federal relation of states as a part of perpetual peace. Nowadays it is being realized in the frameworks of numerous international organizations of cooperation between nations such as the United Nations Organization or the European Union, which have been built efficiently since the end of World War II. These are relations between sovereign states who respect their mutually prepared and proclaimed acts of the international law. Nevertheless, no sooner than at the stage of the establishment of the international society the aim of mankind will be the realization of the project of "perpetual peace" or, in other words, the principle that every nation is not only a means but also the end of the existence of all the other nations who make mankind.[98]

The third and the last definitive condition to lead to perpetual peace is connected with a cosmopolitan law. Looking for some connections with the contemporary world, one may highlight the idea of the world citizenship and a corresponding range of nontransferable rights that every citizen is entitled to in the frame of universal human rights.[99] Together with the realization of perpetual peace being the highest idea in the Kantian practical philosophy, its primary assumption will be fulfilled stating that a man, being a rational, free and moral creature, is always placed at the highest point of this hierarchy. As captured by Kant, the construction of perpetual peace begins from his theory of perception; next, it leads through ethics to finally reach the historiosophical points of the Kantian social philosophy, politics and law.

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[96] Compare I. Kant, *The Perpetual...*, http://files.libertyfund.org/files/357/0075_Bk.pdf http://www.gutenberg.org/dirs/etext03/cprrn10.txt (05.12.2009).

[97] Ibid.

[98] Compare M. Żelazny, *O historiozofii...*, op. cit., p. 14.

[99] See K. Kuźmicz, *Prawa człowieka i ich kantowskie inspiracje*, [in:] *Filozofia Kanta w XXI wieku*, M. Szyszkowska (ed.), Warszawa 2005, pp. 125–134.

The principle of mankind, being the "end in itself", should be realized both on the surface of a state life through "the kingdom of ends", and on the surface of an international life through the idea of perpetual peace. A durable peace can only be fulfilled when the world faces justice, respect for human rights and the establishment of conditions of active and real participation of individuals in the creation of legal norms of the obligatory law.

8. Conclusions

From a theoretical point of view, the Kantian model of the state under the rule of law is very close to modern solutions. The only serious difference is connected with Kant's view on democracy[100] which was not supported by him as it was, for example, by Jean Jacques Rousseau. On the other hand, one cannot be certain that Kant opposes democracy. What is more, he was never in favor of absolutism, even that enlightened one. In his concept the most significant was the rule of the republican system to come true which was understood by him in a specific way, as a system based on law, the principle of constitutionalism; the division of power with a special consideration of freedom of the press (media today) and protection of basic civil rights and freedoms as basic human rights. As captured by Kant, a history of mankind is a history of freedom.[101] Therefore, the idea of freedom strictly connected with law was the foundation on which Kant built his practical philosophy. That connection gave way to the whole Kantian apologia of law.[102] One can notice his rationalism, universality and an unconditional order to follow it as an imperative. Hence, Kant's "kingdom of ends" constitutes an archetype of the state under the rule of law. An individual and his rights are the most important element there.[103] In this context an individual, who does not respect another individual, is deprived of the respect for the law since in "the kingdom of ends" it is every single individual that is the end in himself.

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[100] See R. Kozłowski, *Kant o demokracji (zarys problematyki)*, [in:] *Filozofia a demokracja*, P. W. Juchacz, R. Kozłowski (ed.), Poznań 2001, pp. 105–108.

[101] E. Nowak-Juchacz, *Immanueal Kanta droga do republikanizmu*, [in:] *Filozofia a...*, op. cit., p. 79.

[102] Compare A. Kryniecka, *Kantowska apologia prawa jako czynnika umożliwiającego zaprowadzenie ładu społecznego*, [in:] *Silne państwo*, M. Szyszkowska (ed.), Białystok 1999, pp. 227–230.

[103] Compare K. Kuźmicz, *Jednostka w kantowskim "państwie celów"*, [in:] *Jednostka a państwo na przestrzeni dziejów*, J. Radwanowicz-Wanczewska, P. Niczyporuk, K. Kuźmicz (ed.), Białystok 2008, pp. 24–35.

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BIOPOLITICS AND THE RULE OF LAW

The terms *biopower* and *biopolitics* first appeared in a lecture on March 17, 1976, then again in a few pages at the end of *The History of Sexuality, Volume I* published later that year. Biopower is a new form of power which appeared in the second half of the eighteenth Century. It is an interdisciplinary technology of power which resulted from the disciplinary power shaped on the turn of the seventeenth Century. The new technology of power did not completely replace the former technology of the disciplinary power concentrated on the body of an individual and the economics of its movements. Foucault writes: "It seems to me that one of the basic phenomena of the nineteenth century was what might be called power's hold over life. What I mean is the acquisition of power over man insofar as man's a living being, that the biological came under State control, that there was at least a certain tendency that leads to what might be termed State control of the biological".[1] Biopower, being a new technology of power of the newly developing capitalism, does not place its attention on a single human body, rather it emphasizes the multiplicity – the population. The scope of its interest and influence envelopes biological processes of the population: birth, duration, death, epidemics, control of human sexuality and reproduction, and demographic processes.

Michel Foucault devoted his works entitled *Discipline and Punish: The Birth of the Prison (1975)* and *Society Must Be Defended (1976)* to the issue of disciplinary power.[2] The basic issues in *Discipline and Punish* are: the body as the object under influence of power and authority; prison as

[1] M. Foucault, *Society Must Be Defended. Lectures at the College de France 1975–1976*, ed. Mauro Bertani and Alessandro Fontana, trans. D. Macey, Picador, Nev York 2003, pp. 239–240.

[2] Regarding the foundation of disciplinary power see: S. Oliwniak, *Michel Foucault: genealogia dyscyplin. Wprowadzenie*, (in:) M. Błachut (ed.), *Z zagadnień teorii i filozofii prawa. Ponowoczesność*, Kolonia Limited, Wrocław 2007, pp. 99–111.

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a realization of the disciplinary power; and microphysics of power concentrated on a single human body. Disciplinary power elaborated techniques of spacial parcelization of the bodies based on the division, order, arrangement, placement and, as a result, the increase of control. Those bodies were to be visible at the same time. Later they were described, classified, evaluated, rewarded or possible deviations from the norm were corrected. The techniques of disciplinary power were also based on the repetition, practice, coordination and control of the human body movements. The body was to be economical and efficient. In that way the "disciplinary technology of work" was born. The relations between norms and disciplines were described in a very detailed way by Foucault in his *Discipline and Punish*. In the eighteenth Century there was a change in the way in which a human body was treated. It was no longer a public execution for committing a crime. Punishment was becoming the most hidden element of the penalty process. The practices of inflicting a punishment were becoming a shameful activity. The relation 'punishment – body' was changing: "the body is also directly involved in a political field... Power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out task, to perform ceremonies, to emit signs. (...) caught up in a system of subjection (in which need is also a political instrument meticulously prepared, calculated and used); the body becomes a useful force only if it is both a productive body and a subjected body".[3] The scope of the body control – every gesture, movement, speed and its subject (that is, its economy and the efficiency of the body movements) was changing. "Political economy of the body", which was blocked by the relations of the authority and dominance, was being created. It was introduced into the system of enslavement. The state organs organized the microphysics of power.

The authority keeps producing new, even more subtle methods of objectifying and normalization. Penitentiary systems are being included in the "political economics" of the body, which, being a productive power, is "blocked" by the relations of the authority and dominance. However, to be treated in this way, it *must* be included into the system of enslavement; it has to become a productive body not only by means of indirect constraint. In this way, political technology of bodies, whose realizations are not particular institutions or procedures, appears. There appear "disciplines" which are common forms of dominance. These are methods of the detailed control of the body acts, where its usefulness/susceptibility becomes its criterion.

[3] M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, Vintage/Random House, New York 1979, pp. 25–26.

The changes in the scope of penalty execution are accompanied by the appearance of "mechanisms of discipline", the increase in the control over people and the way of how they are used. The exclusion has been replaced by subtle methods of normalization and localization of people in certain space. The norms created by the authority are "tearing" the social body. The division into something that is normal or abnormal appears. The period from the latter half of the eighteenth Century saw the development of the state policy in relation to the birth control and the birth rate. Other fields of intervention associated with biopolitics included the range of phenomena associated with old age and infirmities. A biopolitical government included various forms of control over the environment: water, swamps, conditions of urban life. Biopower intervenes in "the birth rate, the mortality rate, various biological disabilities, and the effects of the environments".[4]

One has to deal with a continual pressure presupposing a defined course of actions in accordance with the codification and regimen which parcel time, space and gestures. There appear disciplines such as universal forms of dominance. Law's regulation functions are gradually becoming bigger and the role of normalization increases at the cost of the jurisdictional system of law.

Disciplinary power changed its character quickly – in the second half of the eighteenth Century. Foucault concludes that at that very moment a new technology of power appeared, that is, an interdisciplinary power. Using the formed, disciplined and enslaved human body, it transforms its acts on a different surface. A human being, as a biological creature, becomes both its object and subject. It wishes to supervise, control and use the collectivity of individuals, the masses, and population. Its influence encompasses population and, within its reach, birth, sexuality, productivity and death of the previously individualized persons who are now perceived as the masses. For Foucault, biopolitics is another name for the technology of power, a biopower, which needs to be distinguished from the mechanisms of the 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".[5] Biopolitics is juxtaposed in Foucault's analysis to the power of sovereignty leading to the important distinction between them. He writes: "Biopower is the power to make live. Sovereignty took life and

[4] M. Foucault, *Society Must Be Defended*, op. cit., p. 245.

[5] Ibid, p. 246.

let live. And now we have the emergence of power that I would could call the power of regularization, and it, in contrast, consist in making live and letting die".[6] Biopower makes use of two main techniques. Previously there appeared anatomopolitical power over the body whose aim was the integration of powers of the human organism with the systems of the efficient economic control. Around the middle of XVIII Century there appeared and developed biopolitics of population dealing with the regulation of the population processes (problems of the increase of the population, the length of human life, urbanization and migration processes). Those two techniques were still divided in the eighteenth Century. A discourse uniting them had not been developed yet. However, the nineteenth Century constitutionalized the next, consistent technology of power which Foucault called "dispositif de sexualite". Biopower, being an integral element of the development of the economics of capitalism, classified and disciplined the human body with the help of social institutions (family, school, army, the police, collectivity administration, individual medicine). The new techniques of power aimed at the increase of human body's usefulness, the increase of its efforts, and the inclusion of life into the machine of the capitalistic state's structures. The result of the operation of the above-mentioned disciplining power was the "enslaved" individual (assujetissement), subjected to the power of norms and disciplines. As a result of the use of the techniques of enslaving, there appeared a new subject of power – a natural body, power medium and center of duration; the body which is susceptible to certain operations, and which has a specific order, time, internal conditions and constitutive elements. The body, by becoming the target of the attacks of the new mechanisms of power, opens itself towards the new forms of knowledge. The individual shaped in that way (or rather his life) becomes the object of the new economics. Biopower directs the human life processes, controls and modifies them. Hence, the individual is no longer the subject of law; rather, he is a living creature who is to be affected by the influence of biopower at the level of his life.

Biopower becomes a pastoral power. Nowadays the role of a pastor is taken by the state acting in the role of a guardian. "The well-known 'welfare state problem' does not only bring the needs or the new governmental techniques of today's world of light. It must be recognized for what it is: one of the extremely numerous reappearances of the tricky adjustment between political power wielded over legal subjects and pastoral power wielded over

[6] Ibid, p. 247.

live individuals".[7] After the analysis of disciplinary power, Foucault became interested in in the mechanisms of political strategies of the mastery of biological aspects of human existence. At the Collegé de France he delivered a series of lectures entitled *Sécurité, territoire, population (1977–1978)*.[8]

From January, 10 till April, 4 1979, at the Collegé de France Foucault delivered a series of lectures entitled *Naissance de la biopolitique*.[9] Apart from the expectations connected with the title, the term *biopolitics* appeared in the lectures only several times (six times). The reason was explained by the author himself at the end of his first lecture dated 10 January, 1979. Understanding of what biopolitics is requires the explanation of many issues connected with another term: *population*. He added: "Consequently, it seems to me that it is only when we understand what is at stake in this regime of liberalism opposed to raison d'État – or rather, fundamentally modifying it without, perhaps, questioning its bases – only when we know that this governmental regime called liberalism was, will we be able to grasp what biopolitics is".[10] Basically, all the lectures deal with the appearance and development of economic and social liberalism as well as the relations between liberalism and the theory of law. Comprehension of the appropriate character of the German ordoliberalism and structural changes of the bourgeois society does not only depend on the discussion of economic concepts of rivalry in the frames of the free market or the investigation of the sociological history of economics conducted by Weber. It demands the explanation of what it has been and what meaning it has has in the German thought as a necessary guarantee of the individual rights in the conflicts with the organs of the public authority.

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[7] M. Foucault, *Omnes et singulatim: Toward a Critique of Political Reason*, (in:) M. Foucault, *Essential Works of Foucault 1954–1984*, vol. 3 Power, edited by James D. Faubion, The New Pess, New York 2000, p. 307. Regarding Foucault's pastoral power see M. Dean, *Governmentality. Power and Rule in Modern Society*, Sage Publications, London 2001, pp. 73–97. Regarding the concept of biopower see for example: M. Bertani, *Sur la généalogie du bio-pouvoir*, (in:) *Lectures de Michel Foucault. A propos de "Il faut defender la société"*, vol. 1, ENS Editions, Lyon 2000, pp. 15–36; M. Colucci, *De la psychiatrie à la biopolitique, ou la naissance de l'état bio-sécuritaire*, (in:) A. Beaulieu (dir.), "Michel Foucault et la controle social", Les Presses de l'Universite Laval 2005, pp. 91–124.

[8] For more information see: P. Patton, *Agamben and Foucault on Biopower and Biopolitics*, (in:) M. Callarco and S. DeCaroli (ed.), *Giorgio Agamben. Sovereingnty & Life*, Stanford University Press 2007, p. 206.

[9] Edition du Seuil/Gallimard 2004. In the text there is a reference to the English edition: M. Foucault, *The Birth of Biopolitics. Lectures at the College de France 1978–1979*, PALGRAVE MACMILLAN, Nev York 2008.

[10] M. Foucault, *The Birth of Biopolitics, Lectures at the College de France 1978–1979*, PALGRAVE MACMILLAN, Nev York 2008, p. 22.

In England it was on the contrary: if administrative courts were necessary, the rules of law did not exist whereas functioning of such an organ as, for instance, the French Council of the State excluded the possibility of the rules of law. The concept of the rule of law is based on the possibility of judging the conflicts between the citizens and organs of the public authority through common courts. Nevertheless, Foucault is more interested in the role of the rule of law in shaping a liberal economic order. The role of the principles of the state under the rule of law is limited to the establishment of the legal basis of the state interventionism and the admissibility of limiting the free market. A formal economic legislation appears. Referring to Hayek (*The Constitution of Liberty*), Foucault states that "rule of Law, or formal economic legislation, is quite simply the opposite of a plan. It is opposite of planning".[11] Nevertheless, Foucault was more interested in the relationship as a form of rule with individual freedom. In the philosophy of politics there is a common conviction that individual freedom is the most significant value of the liberal social order as well as the basis of democratic states' functioning. However, liberalism has two faces. On the one hand, a liberal system of the rule is based on the freedom of human choices; that is why it requires the existence of free subjects. Individual freedom becomes the right to legal objection to the power abuse by the authority. It constitutes an integral elements of the very rationalism of liberal rules. Interpreted in this manner, liberalism is a system of limited rules. The limits of the state interference are marked by the principles of the state under the rule of law. On the other hand, liberalism hides a danger: in the name of the protection of freedoms and rights or safety of the state it is necessary to limit the freedoms and rights of particular individuals or groups. Liberal democracy may endanger freedom. That interpretation was developed by Agamben.

The continuation of the considerations regarding the nature and tools of biopower is revealed by the first Volume of History of Sexuality published in 1976. Foucault in his earliest works distinguished the juridical and political discourse on sovereignty from the disciplinary techniques employed in the seventeenth, eighteenth, and nineteenth Centuries. According to him, the emergence of the new biopolitical technology of power operates on different objects, at a different level and different scale, and with different mechanisms. These are: anticipations and statistical estimations; techniques whose aim will be to decrease the death rate, to increase life and to stimulate reproduction as well as regulation and optimization of life. There will appear "biopolitics of human population". Biopolitics does not refer

[11] Ibid, p. 172.

only or most prevalently to the way in which politics is captured by life, but also, and above all, by the way in which politics penetrates life. Foucault concludes: "If one can apply the term bio-history to the pressures through which the movements of life and processes of history interfere with one another, one would have to speak of bio-power to designate what brought life an d its mechanisms into the realm of explicit calculation and made knowledge power an agent of transformation of human life".[12] Once again and in a very precise way, Foucault indicates that the emergence of biopower from disciplinary power has been a necessary and indispensable element of the development of capitalism as the economic system. The consequence of the appearance of biopower has been the emergence of the normalization society. The role of law is taken by the Norm. The norm is not understood as a legal norm but as a rule, standard, or a discipline tool. Infra-law is being created which employs different forms of sanctioning: by practicing habits, repeating tasks, and also by rewards. "Standard" is the criterion of the evaluation. The aim is the correction of deviations from the norm. A new type of penalty, based on norms, appears. Normality, as a principle of compulsion, appears in education whereas in the health system and industry norms of hygiene appear. Apart from supervision, it becomes the main tool of power of the classic epoch.

Foucault's concepts of biopolitics and biopower in connection with the category of **bios 'bare life'** controlled by cultural, political and legal norms were used by the Italian philosopher Giorgio Agamben to describe the process of capturing 'bare life' by the norms produced by the modern political system of the end of the seventeenth Century. These and other events can only be understood against the background of the 'biopolitical vocation' of the modern nation-state. Both the totalitarianism and its democratic liberal counterpart remain trapped within a political horizon circumscribed by the convergence of biological and political life. In this condition, "once their fundamental referent becomes bare life, traditional political distinctions (such as those between Right and Left, liberalism and totalitarianism, private and public) lose their clarity and intelligibility and enter into zone of indistinction".[13]

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[12] M. Foucault, *History of Sexuality*, vol I, trans. Robert Hurley, Vintage books, New York 1978, p. 143. Idem, *Bio-histoire et bio-politique,* (in:) "Dits et ecrits II, 1976–1988", QUARTO GALLIMARD, Paris 2001, pp. 95–97. Also Roberto Esposito, *Bios. Biopolitics and Philosophy*, trans. Timothy Campbell, University Of Minnesota Press, Minneapolis 2008, pp. 13–44.

[13] G. Agamben, *Homo sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford, CA, Stanford University Press, 1998, p. 122.

This inclusion of life ('bare life', as Agamben calls it) means its becoming consciously political. Arousing political consciousness in life is characteristic both of totalitarian and democratic states: "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".[14] In the beginning Homo sacer formulated it even in a stronger way: "It can even be said that the production of a biopolitical body is the original activity of sovereign power".[15] Again, he repeats: "fundamental aciticity of sovereign power is the production of bare life as the original political element and a threshold of articulation between nature and culture, zoe and bios".[16]

According to Agamben, politics is the ability of a sovereign and exclusive use of this mechanism of the including disconnection; this is the control of Nature in the cultural sphere. Nevertheless, Nature escapes the techniques of power. Hence, power should rule every sphere of the human existence including the pure human biology; it has to include human biology into the system of political and legal norms. This mechanism of inclusion is at the same time a mechanism of disconnection. Agamben uses the term "inclusive exclusion".[17] It is not a simple relation inclusion/exclusion as it may seem. Sovereign power includes bare life into the sphere of culture, politics and law to subject it to the absolute and total control, hiding it carefully. By one gesture it gives a human subjectivity and human rights. At the same time, these are taken away by the decision of the introduction of the extraordinary state. Bare life becomes enveloped by politics which gradually acquires forms of biopolitics on a bigger scale, in the shape of the exception as something which is included only by exclusion. In his analysis Agamben aimed at this hidden threshold, a point where 'bare life' becomes included by the simultaneous exclusion into the sphere of politics (bio politics). At this point the legal and institutional model (Foucault would call it juridical) crosses a biopolitical model of power. Suddenly, the prevailing analysis of power of the western thought is not enough whereas Foucault's considerations on the subject require some complement. Foucault did not manage to describe the point where these models cross. However, in one of his latest

[14] Ibid, p. 128.
[15] Ibid, p. 8.
[16] Ibid, p. 181.
[17] Ibid., p. 35.

texts Foucault[18] managed to spot that moment. That was the point where totalitarianism political techniques and individualism techniques of themselves meet to make one, being united by a modern democratic state.

Agamben's reformulation of Foucault's thesis continues by attributing to him the suggestion that the politicization of bare life constituted "the decisive event of modernity", and the further suggestion that this signaled "a radical transformation of the categories of classical thought". Agamben's argument consists of the claim that the entry of bare life into the sphere of political calculation and the exercise of sovereign power involved no radical transformation of political-philosophical categories. "The inclusion of bare life in the political realm constitutes – if concealed – nucleus of sovereign power".[19] Nowadays, however, the character of these actions is different. "Bare life" and bios are at the center of the state authority's attention; what is more, it meets the political space. Now biopower, which uses hidden techniques of dominance and normalization whose subject has been the enslaved human body, comes to light.[20] It happens because the state of exception and the territory, where it is most visible, are becoming a modern paradigm of the western world. The camp becomes a paradigm: toward a paradigm of the extinguishing of differences. The state of exception becomes the norm, the norm becomes the state of exception. 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".[21]

The above-mentioned thesis requires some precision and indication of the supplementary theses. The first thesis is: a primary political relation of the modern state is the relation of throwing out (abandonment) which takes place in the state of exception. A state of exception is a zone of non-differentiation between what is external and what is external, between law and factuality. Agamben states that "a pair of notions fundamental for the western politics is not the pair friend-enemy; rather, it is bare life-political existence, dzoē – bios, inclusion – exclusion. Politics exists because

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[18] M. Foucault, *La technologie politique des individus*, (in:) idem, *Dits et ecrits II 1976–1988*, Gallimard, Paris 2001, pp. 1645–1646.

[19] G. Agamben, *Homo sacer*, op. cit., p. 6.

[20] Regarding the differences in the perception of biopolitics by Foucault and Agamben see: P. Patton, *Agamben and Foucault on Biopower and Biopolitics*, (in:) M. Calarco, S. DeCaroli, *Giorgio Agamben. Sovereignty & Life*, Stanford University Press, California 2007, pp. 203–228.

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

a man is a living creature who, in the language, exhales and opposes himself to bare life, at the same time remaining with it in the relation of the including exclusion".[22] The second thesis is rooted in the concept of biopolitics worked out by Foucault. Inclusion/exclusion of bare life is the result of the sovereign power's actions which constitutes the threshold where Nature and culture meet, the threshold dividing into those, whose life has been recognized to be worth to be protected by law, and those, who can be killed without being punished.

It is a camp – a Nazi concentration camp as well as its modern equivalent, refugee camp or a camp for terrorists (the Guantanamo prison). This is "nobody's land". The state has been populated by the contemporary homines sacri, who are now refugees or those who have been recognized as the ones endangering the welfare of the state. "The state of exception has now become, the rule is an intensification of its undecidability, but this also means that the state of exception is no longer able to fulfill the function Schmitt assigned to it in Political Theology: to define the normal situation. The state of exception is not meant to produce or confirm the rule – it tends, rather, to coincide with it, that is to say, to blut with it."[23]

The Agambenian thesis that an exception has become the rule is not brand new. The author himself mentions the works by Walter Benjamin and Guy Debord.[24] What is new is the interpretation and radicalization of the thesis. In the interpretation Agamben uses Carl Schmitt's concept of sovereignty and Kant's "bare form" of law. For Agamben, the Sovereign, empowered with the obligatory law, has the power to proclaim an exceptional state (here one should say a legal ability or the competence of introduction). Therefore, the Sovereign situates himself simultaneously beyond the limits of legal order and within its reach. Here Agamben follows Carl Schmitt's analysis of sovereign as "he who decides on the exception". For Agamben, the word "exception" "according to its etymological root refers to what is taken outside (ex-capere), and not simply excluded".[25] In the legal language

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[22] Ibid., p. 19.

[23] G. Agamben, *State of Exception*, trans. Giorgio Agamben and Kevin Attell, (in:) A. Norris (ed.), *Politics, Metaphysics, and Death. Essays on Giorgio Agamben's Homo Sacer*, Duke University Press, Durham and London 2005, p. 293. See also: A. Norris, *Introduction: Giorgio Agamben and the Politics of the Living Dead*, (in:) A. Norris (ed.), *Politics...*, op. cit., pp. 2–8.

[24] W. Benjamin, *W sprawie krytyki przemocy*, trans. K. Krzemieniowa, (in:) idem, *Anioł historii*, Wydawnictwo Poznańskie, Poznań 1995; G. Debord, *Społeczeństwo spektaklu*, trans. A. Paszkowska, Słowo/obraz terytoria, Gdańsk 1998. Agamben also refers to the essay by J. Derrida reflecting the interpretation of the text by W. Benjamin: J. Derrida, *Force of Law*, "Cardozo Review" 1990, nr 11.

[25] G. Agamben, *Homo Sacer*, op. cit., p. 18.

and the language of law there appear terms: state of war, state of exception and state of emergency. In Agamben's works translated into Polish there appears only "a state of exception". However, it is necessary to refer to the above-mentioned derivation of the notion as given by Agamben. In the English language these differences in meaning are captured. Describing the concept of the state of exception, Carl Schmitt uses the expression "state of emergency" which refers to the endangered welfare, boundaries, internal order of the State. In these circumstances, law gives a way to the state whose existence is acknowledged to be of a bigger value that the values of the legal norms.

A sovereign decision is completely arbitrary. The power of the sovereign is the power to make decisions whether a given state is normal. A sovereign, while creating the law, marks the boundaries of the legal order; he also defines external and internal systems of law. He makes decisions about the scope of obliging by legal norms referring to the "normal" relations between legal subjects. According to Schmitt, this decision regarding the establishment of the legal order is "independent of the legal norm and, paradoxically, power does not need law to establish a legal order". The establishment of the principles of the legal order enables the exception to appear; the situation which is beyond the positive law or, in other words, it is a state of exception. The exception makes the possibility of obliging by legal norms problematic. As Agamben notices, the exception is a kind of exclusion. It constitutes the state where a legal norm is not so much annihilated as it remains in a specific relation: it is suspended. The norm is applied to the exception; when it does not fit, it withdraws. A state of exception is a consequence of suspending the power of the legal order. When a sovereign takes the decision to proclaim a state of exception, a legal order is withdrawn and is replaced by the state of exception. What in a normal situation of the obligation of law remains beyond the system of law, in the state of exception it is temporarily included into it. What was thrown away (excluded) by the establishment of the legal order, is now temporarily included into it by the withdrawal of the power of the power of the legal order. Hence, the legal order escapes the exception; it abandons it, allowing for its existence. This is a "paradox of sovereignty". The sovereign stands outside the normally valid legal order and nevertheless belongs to it. This inside/outside is characteristic of the state of exception that creates a situation in which it is no longer to be decided whether a legal or a factual condition is the issue. Thus, both the fact and law become undecidable. "The sovereign decision traces and from time to time renews this threshold indistinction between outside and inside, exclu-

sion and inclusion, nomos and physis, in which life is originally expected in law".[26]

Carl Schmitt writes: "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitively decides whether this normal situation exists".[27] A state of emergency is a product of the collapse of the normal order, but the normal order itself is to begin with only the absence of the state of emergency.

Sovereignty is primary in its relation both to the constitutional power and the constituted power. The sovereign's violence appears twice. Firstly, when the sovereign power, which captures itself as the state of Nature, creates a legal order dividing chaos from normality. Secondly, when it takes a decision about the state of emergency in an arbitrarily and temporarily withdraws the previously established legal order. It withdraws creating a state of exclusion; it takes certain territory and certain groups of people (homines sacri) out from the scope of obligation and application of the legal norms which make the legal (juridical) order. What is more, it brings camps to life, the territories where the law and violence become one, integrated element.

The state of exception becomes a threshold between the legal order and chaos; it allows to differentiate what is situated beyond the legal order and the legal order itself. It is the "occupation of the external", the occupation of exception. In comparison to "normal" situations, where the decisions of the sovereign are marked by the obligatory legal norms, in the state of exception law becomes temporarily withdrawn and the two elements of the term "legal order" – law and order – exist separately, "in the opposition as separate terms".[28] In the state of exception "common" legal order loses a point of reference; it obligates purely as a possibility. A sovereign exception, being a sphere of indifferentiation between nature and law, constitutes the assumption of the existence of a legal reference in the shape of its withdrawal.

A basic question arises: what comes first: the establishment of the legal order aiming at the regulation of the state of nature and then in the constitution – the legal act of the highest power – the definition of the con-

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[26] G. Agamben, *Homo sacer*, p. 27. see also Rainer Maria Kiesow, *Law and Life*, (in:) A. Norris, *Politics, Metaphysics, and Death*, op. cit., pp. 248–260.

[27] C. Schmitt, *"Definition of Sovreignty" in Political Theology*, trans. George Schwab, MIT Press, London 1988, p. 5.

[28] Z. Stawrowski, *Teologia polityczna Carla Schmitta*, (in:) R. Skarzyński (red.), *Carl Schmitt i współczesna myśl polityczna*, Dom Wydawniczy Elipsa, Warszawa 1996, pp. 57–60.

ditions under which a state of exception is proclaimed? Or perhaps it takes an opposite direction: the sovereign decides what is a state of exception; an "occupation of the external" takes place to establish the meaning and scope of what is recognized as normal and what should become a rule and consequently, what is to become the content of the proclaimed positive law? Carl Schmitt has pointed out that in the obligatory legal norm the definition of a precise situation justifying the proclamation of the state of exception is impossible. A legislator uses general clauses such as "a state of emergency", "welfare state under threat", and "public safety and order". These clauses are highly under-defined; they do not refer to any specific legal norm; they rather refer to specific situations which may result in the decision regarding the proclamation of the state of emergency if they appear. The definition who is, at the moment, homo sacer, the introduction of the criteria of the classification of a given subject become both the norm and criterion of its application – the norm deciding about the fact of its application. It is the very appearance of such a state that puts a question regarding the subject of sovereignty and, therefore, regarding the essence of being a sovereign. At this moment the constitution with the power of its competence norm points out the organs to take a decision. Agamben writes: "the exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule. ... The sovereign decision of the exception is the original juridico-political structure on the basis of which what is included in the juridical order and what is excluded from it acquire their meaning".[29] Although justified by its connections with the etymology given by Agamben himself, the decision regarding the state of exception would be rather the notion of the state of exclusion or exception; marking the boundaries between what is external and internal. On the external surface of the legal system (legal order in the positivist sense) there apparently exists a situation of exception (it remains excluded by the power of the establishment of that order). Within the legal norm the norms of the positive law remain which, at the same time, demonstrate the potential of excluding what is external (state of exception).

A legal norm regarding the state of exception is a part of juridical order. In the perspective of the juridical order the state of emergency law is still obligatory; in other words, it has not been excluded (withdrawn) completely and given time limits. In the traditional (positivist) legal terminology a de-

[29] G. Agamben, *Homo sacer,* op. cit., pp. 18–19; idem, *State of Exception*, op. cit., pp. 32–37.

cision regarding a state of exception is only the application of the obligatory legal norm referring to the situations which can be proclaimed by a constitutionally defined pubic organ. This is purely factual and real, taking a decision regarding the withdrawal of the duties (in Agamben's terminology – exclusion, abandonment). The law is understood ontologically and not as the law of the juridical order with the reference to certain existence situations and groups of people, called homines sacri by Agamben. A legal norm regarding the state of exception is formally obligatory but when it is applied, the law regarding the normality (law as the juridical order) is temporarily withdrawn. The decision regarding the state of exception results in the law being withdrawn from the state of "exception". The obligation of the juridical order, which refers to normal states, becomes withdrawn and that is why the law may define normal cases as a sphere of its obligation. Indeed, an exception is a kind of exclusion. A norm is applied to the exception; when it is not applicable, it is withdrawn. Thus, a state of exception is not a state of chaos preceding the juridical order but a situation of the withdrawal of that order. By the decision regarding the state of exception, the sovereign is trying to constitute what is external; at the same time, in the interior of the juridical order he interiorizes something which exceeds. A special power of law is revealed by its ability to remain in the relation with what is outside. Normalized factual states are the sphere of reference of the juridical order; they are included in its territory. On the other hand, the situation of the state of exception can be defined neither as a factual situation nor as a legal situation; it is only a relation between the law and the fact, being placed at the boundary of what is normal and what is an exception. "What emerges in the limit figure is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule".[30]

By the decision regarding the state of exception, what remains outside is being included into the juridical order not by the prohibition but by the withdrawal of the obligation of the juridical order, by the approval of the juridical order being suspended or abandoned. It is not the exception that escapes the rule; it is the rule which is being suspended in favor of the exception; it enables the appearance of nihilism and that is why it constitutes as a rule. Agamben recalls the comprehension of the law as "nihilism of Revelation" following Gershom Scholem who captures it as "state which still preserves its position and obligates but it has lost its

[30] G. Agamben, *Homo sacer*, op. cit., p. 25.

significance".[31] It does not mean that the law, understood both as a legal order and Law, disappears or is absent. In the state of exception it is not able to perform. It opens the sphere where the law and fact, bare life and biopolitics, become integrated. In this way, the exception is precisely not the element of law that transcends the positive law in the form of its suspension. The exception is rather an element of the positive law itself. In Homo Sacer Agamben never gives a definition, or any theory of what he understands to be "law".

In the state of exception homo sacer live under the rule of law which obligates but is insignificant. A specific duality appears. There is an obligatory law which is deprived of its significance or, in other words, a pure form of law beyond its content is preserved. At the same time, a state of exception, which is a rule, establishes the execution of the law in the act of violence; law is impossible to distinguish from life, which, in turn, should be regulated by it. It is impossible to distinguish law abuse from its execution. A behavior, which is in accordance with a legal norm, and a behavior, which abuses it, cross. A refugee, who is trying to leave his camp, abuses the norm whereas a guide, who stops him or kills him, executes this norm.

A camp is a territory which, by the power of the decision regarding the state of emergency, is excluded (taken out) from the scope of the legal norm obligation of the legal order. Legal norms of the "normal" system of law are not obligatory and applicable in this territory. They still obligate beyond it; in relation to it they are not significant. A state of emergency is a possibility (potential) of the "normal" legal order. Therefore, a new legal and political paradigm appears where the norm and exception are integrated to make one. In the territory of the camp it is the legal order of the emergency state that is "normally" obligatory. A differentiation between law and fact disappears. Here the exception becomes the norm – or, to be more precise, the distinction between the two is wholly effaced. "The camp is space of this absolute impossibility of deciding (decidere) between fact and law, rule and application, exception and rule, which nevertheless incessantly decides (decide) between them".[32] And He concludes: "When life and politics – originally divided, and linked together be means of the no-man's-land of the state of exception that is inhabited by bare life – begin to become one, all life becomes sacred and all politics becomes the exception".[33]

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[31] W. Benjamin, G. Scholem, *Korespondencja*, trans. A. Lipszyc, "Literatura na świecie" 2003, nr 1–2 (378–379), p. 378.

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

[33] Ibid, p. 148.

The problem of legal validity or its lack in this state has no significance. A legal (political) subjectivity of an individual becomes integrated to make a whole with "bare life". A decision regarding who in this specific situation and at this moment constitutes "bare life" (homo sacer) becomes the subject of the sovereign political decision.

Today, in the waiting rooms of the departure areas of the airports, harbors, train stations, in the ravines of the Balkans, Agamben sees the modern bare life of the lawless, of modern biopolitics. "In its extreme form, the biopolitical body of the West (this last incarnation of homo sacer) appears as a threshold of absolute indistinction between law and fact, juridical rule and biological life".[34]

By making use of the new threats, terrorism being among them, or creating their extraordinary danger for the existence of democracy, a modern state aims at making a state of exception the state of their permanent control of individual privacy. In contrast to a totalitarian state based on a perfect integration between the state interests with individual interests, which is one of the most significant elements, a modern state, with its displacement of political and private boundaries, aims at limiting functioning of the social institutions. A growing arbitrariness of power and the formation of dominant lifestyles (consumption of the consumption), done mainly with the use of the media, replace previous ideologies and aim at a hidden, though efficient, and total control over a human life starting from medical aspects and finishing with consumption. Not negating the needs of democracy and the rule of law, a modern state has greatly changed the perception of politics; whats is more, politics has reached its limits – soft totalitarianism has appeared. Individuals may defend themselves only when post-modern sacrum is profaned; after they disagree to consume the consumption, after they stop pilgrimages to the places perceived as attractive (tourism) and after they free themselves from a manipulation power of the media. A political challenge for every single individual and global manhood is a separation of features which would enable them to survive. The only solution for people is to make a community which would aim at the neutralization of the mechanisms which have been created by authorities and dividing citizens into individuals who are worth living and homines sacri.

[34] Ibid, p. 187.

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BIOTECHNOLOGICAL ADVANCEMENT VERSUS INTEGRAL CONCEPT OF AN INDIVIDUAL (IN THE CONTEXT OF THE CONSIDERATIONS REGARDING DIGNITY AND AUTONOMY)

1. Main directions of the discussion regarding the human subjectivity versus biotechnological advancement

A dispute regarding human subjectivity has been a subject of the analysis in the framework of philosophy since the beginning of mankind. A huge discourse on the subject results from the considerations involving many aspects of the problem. Philosophers' interests take different directions, for example, ontology of human existence, a phenomenon of human duration, human individual identity, etc. Some researchers consider the issue of human subjectivity in a normative way establishing certain norms of humanity; others head towards the establishment of objective and independent criteria of subjectivity.[1]

A panorama of modern philosophical trends reveals two principle ways of capturing a human being as a subject. On the one hand, these are approaches which are classified as "classic" (e.g. philosophical personalism). On the other hand, there are some approaches which are classified as new – "non-classic" (e.g. postmodernism).[2]

Christian anthropology has a significant role among philosophical concepts of a "person". Apart from that, there exist different concepts including the so-called "moral concept of a person" (frequently described as

[1] J. Górnicka-Kalinowska, *Wstęp*, [in:] *Filozofia podmiotu. Fragmenty filozofii analitycznej*, Warszawa 2001, p. 5.

[2] A. Szadek-Bartuń, M. Bartuń, *Personalizm filozoficzny a kultura prawna*, [in:] G. Dammacco, B. Sitek, O. Cobaj (ed.), *Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej*, Olsztyn – Bari 2008, p. 79.

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a neo-Kantian approach). Recently, the so-called trend of "developmental ontology" has been gaining more and more significance.[3]

A human subject is sometimes understood as "a virtuous animal" (person), "manifestation of a divine spirit" (a divine child, *imago Dei*, a spiritual man), "me thinking" (*cogito*), "a mortal witness of his own lot" (mortal), "sensory-motor center" (a rational and feeling body), "surface of unconsciousness" (*ego*), and "appearance of a subject".[4]

Analyzing certain philosophical concepts, one can notice that the very notion of "subjectivity" is not fixed enough. It is frequently discussed from perspectives other than a philosophical one, for example, sociology, psychology, or jurisprudence. Independently from the surface of considerations, a lack of sharpness is visible regarding who or what the subject is and what meaning subjectivity should be ascribed.

On the ground of philosophy, human subjectivity is frequently understood as a certain individuality and integrality as well as a capability of an individual direction to some degree. Apart from the differences, it always links with the awareness of the individual "me".[5] Without it, it is impossible to be "a subject". Regardless whether the definition of a person is taken from the Roman law or the works of St Thomas Acquinas, Descartes or Kant, one will always find: "(...) some thread of independence, autonomy, belonging to oneself, existence because of oneself, life from one's interior, acts from oneself, determination of oneself; in short, some modification of being oneself."[6] Although the character of the discourse of the modern liberalism is different from the doctrines of the religions origins, a necessity to search for the terms for our subjectivity indicates its essential function in the process of thinking about ourselves; what is more, it has significant moral and legal repercussions.

Different ways of the realization of "being oneself" result in the appearance of various formulae capturing *homo sapiens* as a subject performing different tasks aiming at the fulfillment of his humanity. A human being is an existing and functional whole where one can notice different levels of humanity. Apart from the basic terms used to describe a human being, that is *homo sapiens*, there are many others: *homo simbolicus*, *homo religiousber*, *homo ludens*, *homo viator*, *homo creator*, *homo economicus*, *homo politicus*,

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[3] M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, pp. 319–330.

[4] J. Hartman, *Wstęp do filozofii*, Warszawa 2008, pp. 124–126.

[5] L. Witkowski, *Tożsamość i zmiana*, Toruń 1988, p. 11 and following.

[6] J. F. Crosby, *Zarys filozofii osoby. Bycie sobą*, Kraków 2007, p. 11.

homo noumenon, *homo electronicus*, *homo artificialis*, *homo bionicus*, and finally, *homo continuous*.

The newest definitions of humanity are connected with the concept of the so-called "bionic human" (*homo bionicus*) and "continuous human" (*homo cocontinuous*). The essence of *homo bionicus* is that a new hybrid is being created with the help of what is natural and artificial. A human being is being manipulated according to the expectations of the creators and the society. *Homo continuus* wishes to stay alive and fit as long as possible. Some people claim that in the near future *homo sapiens* will be replaced by a new species of man created by science and technology defined as *homo scientificus*, who will be: "(...) to some degree genetically an animal, to some degree a plant, but mainly the creature will be a human supplemented by electronic elements (...)."[7] According to this vision, which is currently treated as science-*fiction*, in some future a human species, which is classically defined as *zoon logon echon*, will totally disappear. As a result of the biotechnological development, a human being will become a *homo artificialis* (technobioton, superrobot).[8] F. Fukuyama, an American researcher of bioethics, claims that mankind is inevitably approaching a temporary era leading to a new species which could be defined as *homo supersapiens*. In such a "post-human" world "(...) the notion »common humanity« will lose its sense because human genes will be mixed with the genes of so many species that it will not be possible to know what a human being is."[9]

There appears a question regarding the limits of scientific research in the age of biotechnological progress. Law has to take into consideration challenges in the areas of the problems connected with human existence. Perhaps today a legal definition of a man as a physical person, understood somehow intuitively and assuming that the subject of law is every person from the moment of birth till the moment of death, is not sufficient. It is necessary to highlight that various medical actions taken so far have been realized basing on the principle, typical for a democratic state under the rule of law, which states that if something is not legally proclaimed or prohibited, it is allowed. The majority of medical interference has occupied the so-called sphere of "legal indifference" so far. However, nowadays people face a clear need of the construction of the explicit legal definition of the notion "human being". Together with the development of medicine, a number of doubts

[7] B. Debre, *Ostatnie dni homo sapiens*, "Wprost" dated 25.02.2001, pp. 76–78.

[8] L. Ostasz, *Rozumienie człowieka. Antropologia filozoficzna*, Olsztyn 2003, p. 503.

[9] F. Fukuyama, *Koniec człowieka*, Kraków 2004, p. 286.

dealing with human reproduction and the end of mankind is constantly growing.

A new legal definition oscillates between the differentiation between a "human person" and a "human creature". Basically, it is connected with the concept of human as a "person", derived from Christian anthropology and basing on the recognition of a man being a certain mental potential (unity between body and soul) capable of collecting experiences, feeling happiness, pain, etc. Here the holiness of every life is *a priori* assumed paradigm. At the same time, there is a reference to the concept of "man-the body", developed by Descartes,[10] and continued by J. O. del La Materie.[11] According to this approach, it is acknowledged that a human organism is a body, constructed according to some unique genome. Parts that are used should be replaced with the new ones to guarantee a life as long and satisfactory as possible. To make it general, it is possible to state that a dispute on legal subjectivity of a human being oscillates between the concepts of "holiness" and "quality of life" elaborated on the ground of the European culture.

2. Human dignity and the principle of human life protection as determinants of legal and extra-legal regulations of the biotechnological advancement

One of the most significant discriminants of the western civilization on the turn of the twentieth Century is a "devotion" of almost all aspects of human existence, starting from birth and finishing with death, to medicine. This process is referred to as a process of "medicalization". It deals with biological, social and spiritual aspects of human existence. Biotechnological advancement is captured by the majority of researchers as a promise to combat illnesses that are thought to be incurable and to correct mistakes and defects of Nature. Others perceive it as a dangerous interference into Nature's laws, which could result in a catastrophe.

It seems that certain legal and extra-legal regulations of biotechnological advancement should be based on a certain concept of human being. Moreover, it should come along with the consideration of not only philosophical and social issues but also values, customs as well as religious norms

[10] R. Descartes, *Człowiek. Opis ciała ludzkiego*, Warszawa 1989, p. 79 and following.
[11] J. O. del La Materie, *Człowiek-maszyna*, Warszawa 1984.

that are prevailing in the state. At the same time, it is necessary to remember that, although the differentiation between "human creature" and "human person" is logical and coherent on the surface of a philosophical consideration, to be able to arrive at legal consequences, it is necessary to take into account the so-called "boundary states" (birth and death) which are not defined precisely at this stage. What is more, it is essential to consider a certain "cultural code" deeply ingrained into a given society. Such a code determines, for example, the recognition that a human embryo, just as a person with an irreversible mental retardation, is a subject who demands legal protection although some could doubt whether they deserve a status of "human" from an anthropological perspective, for example.

The appearance of new medical techniques is accompanied by the appearance of a number of new questions regarding the essence of humanity, which results in the necessity of an inevitable reaction of a state. Unfortunately, disputes which are connected with biotechnological advancement cannot be referred to traditional categories. Together with the progress of medicine, a range of known possibilities of human actions is extended. Boundaries between the nature of humanity and accessible (from the point technical point of view) possibilities of human manipulation of their own subjectivity are being washed away. It is inevitably connected with a a risk of entering the sphere of dignity, integrality, identity and human autonomy. Consequently, it may lead towards a collision with individual and common interests. There appears a clear need of fundamental decisions regarding social, legal and political consequences resulting from the application of biotechnology.

A basis for solutions in the sphere of bioethics is undoubtedly the principle of protection of human life, accepted by the majority of ethical systems and interspersed with the so-called "European cultural code". It is commonly recognized as a basic value which is a starting point for other human rights and freedoms. A right to life is treated as an innate right, whose axiological justification is deeply rooted in the order of the world.[12] Nevertheless, the content of this right results into a growing number of doubts. Soon one may face a necessity of its new defining. It is obvious even today that the norms which guarantee protection of life are acquiring a greater significance. They are also used in the attempts of justifying "a right to death". Therefore, there is a significant change in the essence of the norms

[12] A. Redelbach, *Natura praw człowieka. Strasburskie standardy ich ochrony*, Toruń 2001, p. 164.

protecting life, which consequently results into a change in a theoretical and factual range of this protection.[13]

Human dignity has to be a starting point for protection of human life. It has to be treated as a primary philosophical value and an axiological paradigm of law. Such an approach is closely connected with a legitimization of the above-mentioned "European cultural code" established in the western European culture. Human dignity has a clear status of an inviolable value; its protection and respect should be the duty of public authority. Generally, two notions have been highlighted: "personal dignity" and "individualistic dignity". The former term has a significant role from the perspective of the theory of a democratic state. It has been recognized that personal dignity is revealed by every individual on the ground of being a human person. Individualistic dignity is referred to those properties which are under protection of a legislator.

Although the idea of dignity has a very long history in philosophy and theology, considerations on the subject, taken from a legislative perspective (especially from the point of view of the constitutional law and the theory of law), are rather new.[14] They started to be developed under the influence of the enlightened thought. A modern constitutional and legal history of protection of human dignity started just after the end of World War II. It was at that stage that a position of human dignity in the axiological center of values of principle laws became a distinct feature of constitutional systems. Hence, the category was situated at the highest point of the legal system.[15] Currently, the majority of the EU states make human dignity the foundation of a social and political harmony especially of the constitutional system.[16]

From a semantic point of view, the term "human dignity" (*dignitas humana*) is connected with an abstract capturing of a man, who is perceived

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[13] R. Grabowski, *Opinia prawna do projektu ustawy o zmianie Konstytucji RP z uwzględnieniem pytania, czy możliwa jest inkorporacja art. 4a ust. 1 ustawy o planowaniu rodziny, ochronie płodu ludzkiego w warunkach dopuszczalności przerywania ciąży do art. 38 Konstytucji*, [in:] *Konstytucyjna formuła ochrony życia*, Seminarium Biura Analiz Sejmowych, Warszawa 2007, p. 32.

[14] O. Luchterhandt, R. Bruschske, *Godność człowieka – aktualne kwestie sporne w niemieckim prawie państwowym*, "Państwo i Prawo", Nr 2/2005, p. 34.

[15] F. F. Segado, *Godność człowieka jako najwyższa wartość porządku prawnego w Hiszpanii*, [in:] K. Complak (ed.), *Godność człowieka jako kategoria prawa (opracowania i materiały)*, Wrocław 2001, p. 169.

[16] K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej konstytucji*, "Przegląd Sejmowy", Nr 5(28)/1998, p. 41.

as a specific and central existence.[17] It emphasizes the highest significance of a human being over other creatures independently from his behavior. It means that a human being is distinguished as a "fundamental value" for other values; this value cannot be violated by any subjects who make the state authority.[18]

Nevertheless, it is essential to highlight that the notion of "human dignity" is very difficult to be captured in a precise and explicit way.[19] A way of understanding this term has been changing for years accompanied by the development of societies. It keeps changing, being dependent not only on cultural conditioning and moral, religious and political norms and customs but also on various economical and mental functors. Legal norms have a significant role here. A legal perspective guarantees that people can expect at least an average level of respect from others.[20]

A theoretical basis of human dignity may be found in the thought of the Catholic Church. Individual rights are treated on its ground as a consequence of human dignity resulting from a man's existence as modeled on God.[21]

Secular views on human dignity are deeply rooted in the beginnings of the modern era.[22] It was then that a qualitative dissimilarity of a human being and human superiority in the world of Nature due to human consciousness, reason and freedom of act were emphasized. A contemporary comprehension of the idea of dignity was significantly influenced by Kant's idea that a human being," the end in himself, has been given the highest value based on the ability to establish a moral law and proclaim common rights.[23]

In a modern formulation, human dignity does not allow for discrimination of anybody for any reason. It is attributed to every human being and

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[17] S. Retterer, *Pojęcie godności w obowiązującym i przyszłym prawie wspólnotowym*, [in:] K. Complak (ed.), *Godność...*, op. cit., p. 89.

[18] A distinct between personal dignity and individualistic dignity was introduced by J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, pp. 39–42.

[19] M. Surkont, *Cześć i godność osobista jako przedmioty ochrony prawnokarnej*, "Nowe Prawo", Nr 4/1980, p. 48.

[20] M. Surkont, *Cześć...*, op. cit., pp. 54–55.

[21] Compare *Katechizm Kościoła katolickiego*, Poznań 1994, p. 405 and following.

[22] M. L. Pavia, *Odkrycie godności osoby ludzkiej we Francji*, [in:] K. Complak (ed.), op. cit., p. 135.

[23] M. J. Mayer, *Idea godności u Kanta a współczesna myśl polityczna*, [in:] K. Complak (ed.), op. cit., p. 51.

is an absolute, timeless and stateless value. What is more, it constitutes the basis of every human freedom and constitutional right. It provides constitutional freedoms and civil rights with unity. Moreover, it is the foundation of a democratic state. It also protects the society against a transformation of an individual into the subject of public authority's activity.

A constitutional notion of dignity has a character of a gradation category, functioning as a connection between *ius* and *lex*; a specific "bridge" between justice and the law: the natural law and the positive law. It becomes a determinant of the constitutional interpretation. Moreover, it is an indication of a range of certain human freedoms and rights. M. Kordela has accurately captured this function stating that the imperative of humanism, identical with the principle of protection of human dignity, nowadays has to be recognized as a specific "principle of the principles" of the constitutional catalog of rights, whereas protection of dignity should be recognized as a basic aim of the community organized into a state.[24]

To sum up, human dignity is a foundation of a constitutional order in a logical, ontological and hermeneutical senses. Other principles should be interpreted in its background. Individuals applying law should be aware of its specific burden and the possibility of using the category of dignity in their jurisdiction practice. Facing conditions of a biotechnological progress and new possibilities of manipulation in the spheres of biojurisprudence and biojustanatology, it becomes a necessity. A dispute regarding protection of human dignity in the starting and finishing phases of life seems to be fundamental.

Following legal discussions on the subject, one may state that the issues of the relations between human dignity and a right to life nowadays seem to be the most controversial ones in the dogmatics of law. What is more, possible biotechnological interferences result in a growing number of ethical and legal doubts. Hopefully, the Polish legal system will be extended by instruments which are already present in western democratic states. These instruments prohibit taking actions which could result into a risk put on human genetic legacy and future generations.[25] At the same time, it is not advisable to "close" new possibilities brought by contemporary medicine, especially when the arguments against are of a mere religious nature.

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[24] M. Kordela, *Zarys systemu aksjologicznego w orzecznictwie Trybunału Konstytucyjnego*, "Studia Prawnicze", Z. 1–2/2000, pp. 77–81.

[25] A conversation with M. Safjan, *Prawo nad prawami*, "Rzeczypospolita", Nr 18/2002.

3. Moral implications of the integral concept of a human being

A discussion regarding human integrality and identity should be placed within a contextually wider analysis of the notion of a "person". From a historical perspective, two basic concepts of a human being can be noticed: a monistic concept, rooted in religion; and a dualistic concept, connected with a secular perspective. The former concentrates on capturing a man as an individual, integral substance of a rational soul. It establishes the meaning of human dignity. The latter is reflected by secular considerations started by Descartes and adopted on the ground of utilitarism, consequentialism or deontological theories of rights.[26] It clearly separates the body from the soul and propagates a principle of autonomy.[27]

Nowadays one may observe a growing process of separating the fact of "being a person" from the fact of "being a human creature". Consequently, there appears an additional determinant differentiating individuals of the *homo sapiens* species. More frequently, apart from "persons", some subjects are mentioned that could not be acknowledged to be persons. It means that one "is" a human being whereas one "could be" a person. In a traditional sense, a person ("me" – individual, capable of autonomous and free choices), is frequently interpreted as a specific "product" of genetic, social and psychological conditioning.[28] A distinct between the fact of being "a person" and the fact of being "a human creature" indicates a need of a new insight into the issue of human identity and integrality.[29]

In case of experimental works in the sphere of medicine, the indication of the degree of admissibility of certain intervention becomes necessary which has to be dependent on the way of defining the so-called "humanity criterion" highlighting the beginning where an individual is given a moral right to life and the moment when this rights stops working.[30] It is not easy, bearing in mind prevailing methodological and philosophical views on life. Integrality and identity are a complicated phenomenon whose essence cannot be revealed by a short and synthetical formula.

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[26] F. Ricken, *Etyka ogólna*, Kęty 2001, pp. 194–218.

[27] M. Safjan, *Granice autonomii człowieka w prawie współczesnym*, [in:] E. Kamińska (ed.), *Uniwersyteckie wykłady na koniec starego i początek nowego stulecia*, Warszawa 2004, p. 203 and following.

[28] B. Wójcik, *Spór o tożsamość w polskiej literaturze bioetycznej*, [in:] T. Biesaga, *Bioetyka polska*, Warszawa 2004, pp. 209–210.

[29] B. Wójcik, *Bioetyka i tożsamość człowieka*, Tarnów 2007, p. 121.

[30] K. Szewczyk, *Bioetyka kulturowa wobec sporu o aborcję*, [in:] M. Gałuszko, K. Szewczyk, *Narodziny i śmierć. Bioetyka kulturowa wobec stanów granicznych życia ludzkiego*, Warszawa 2002, p. 101.

Apart from some difficulties which may appear, the author of this article will try to arrive at a basic terminological settlements starting from the notion of "personal identity". There have been numerous attempts to arrive at a semantic meaning and elementary units of this notion. Continuity and certainty of human existence are such basic units.[31] The ability to identify oneself and others seems to be another necessary condition.[32] A human being differs from animals by a degree of his mental capability, rationality and self-awareness. These features are treated as an adaptable characteristic of the *homo sapiens* species. They function while an interaction with a certain biological basis.[33]

The acceptance of the principle of personal identity is connected with a recognition of the fact that a human being is always a human being and while he exists, he can never lose his human properties and dignity. At the same time, he is subjected to a continuous evolution; he is changing, getting older, unwell, etc. Hence, a question arises: are these ongoing changes interfering with a human nature, if yes, to which degree? As it was noticed by a prolific Polish philosopher B. Skarga, "it is there where any time and spacious change takes place that the statement regarding identity becomes of high significance."[34]

If human existence is always connected with "corporality" and "substance", to some degree, personal identity becomes a consequence of the awareness of a human body. According to common assignations, "substance" constitutes a non-material part of a human personality. It is complementary with a body. Primarily, it was easy to define by the reference to the invariable habitation of a spiritual life. An empirical critique questioned a legal validity of that approach. It was acknowledged almost on a common basis that "substance" was not an autonomous idea, verified only through experience. It has to be attributed a status of a metaphysical assumption. Nevertheless, even if the notion of substance is abandoned, a problem of personal identity in the experience of "me" remains.[35]

An integral part of personal identity is that a human being "remembers" his body regardless of the changes which he has been through from the moment of his birth. Through memory people experience a continuity of

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[31] L. Kołakowski, *Moje słuszne poglądy na wszystko*, Kraków 1999, pp. 157–160.

[32] K. V. Wilkus, *Real People. Personal Identity without Thought Experimentes*, Oxford 1988, p. 183.

[33] B. Wójcik, *Bioetyka...*, op. cit., p. 122.

[34] B. Skarga, *Tożsamość i różnica. Eseje metafizyczne*, Kraków 1997, p. 169.

[35] L. Kołakowski, *Moje słuszne...*, op. cit., p. 157.

the organism to which they belong. However, personal identity does not only require the awareness of the past, but it also demands being directed to the future, and a conscious anticipation in a social life. A human being belongs to a specific collectivity whereas collective identity constitutes an indispensable binder of human solidarity.[36]

The ability of self-identification and identification of others results in certain consequences in the biotechnological sphere. Biomedical procedures should consider the issue of personal identity of the people to whom they are to be directed. However, it is difficult to establish explicit criteria of this range. Extending the limits of therapy and introducing its standards, contemporary medicine creates new cases which constantly demand a new interpretation. A search for more adequate formulations of the phenomenon of personal identity emphasizing the complementarity of the empirical and personalistic approaches still remains a starting point.[37]

Nowadays the notion of integrality enveloping a whole complex of laws remains equally controversial. The Latin word *integer* means "intact", "inviolable", "total", "absolute", and "complete". Integrality can be analyzed in the exterior and interior aspects. The former is connected with physical and mental human identity, expressed in his autonomy. It comprises a prohibition of the state interference into that sphere of human life where an individual should have the ability of free choice as to his lot and can be independent in his relations with the environment. Integrality in the interior aspect is revealed by a specific harmony of mental and physical human components which constitute a kind of totality including human freedom of control over one's body as well as personal and corporal immunity.

A concept of integrality serves to highlight the aspects of human existence which are especially essential for human dignity to be respected. Protection of integrality leads to the inviolability of values which became constituent for life and human development in a mental and physical sense. Regulations regarding human rights are its normative expression.[38]

A problem of moral subjectivity of humans as well as philosophical disputes regarding its integrality and identity shed some light on jurisdiction. It is not clear how these issues should be approached by the legislation of democratic states. A variety of views results in uncertainty and lack

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[36] For more information see, for example: A. Gołdanowa (ed.), *Tożsamość człowieka*, Kraków 2000.

[37] T. Nagle, *Pytania ostateczne*, Warszawa 1997, p. 183.

[38] Z. Kędzia, *Prawo człowieka do integralności*, "Ruch Prawniczy Ekonomiczny i Socjologiczny", Nr 3/1997, p. 28.

of consensus in the sphere of defining. These doubts are exemplified by A. Szczeklik who poses a question: "How (if at all) does the human mentality change after a stroke? Does a man still remain himself when, after a period of weeks, he regains his consciousness or, after months or years, he regains his ability to speak, is he still himself? If he is not himself, who is he then? What a trial this must be for our »me« which is intuitively perceived as something permanent, as a core, which makes us be ourselves! But is it true? Especially after a serious illness, are we not going to become somebody else, being only closed in our old wrapping?"[39]

In a classification of contemporary solutions to the problem of human integrality and personal identity there appears a clear problem which could be illustrated with the use of a famous analogy of the "ship of Theseus". The essence of this problem is revealed by the question: to which moment can the parts of a given object (body) be replaced so that it is still the same object (body) identical with itself? Is it really like D. Partif claims that, to be able to survive, one does not have to be exactly oneself; it is enough to stay oneself to a certain degree? The above-mentioned author argues that "Our view on identity in time should be revised. It is not significant that there will exist somebody alive who will be me; rather it is significant that there will exist at least one living person who will be mentally continuous with me as I am now or who has a respectively big part of my brain".[40]

The author of this paper shares the opinion that human integrality and identity cannot be limited to "mental continuous" of a man. The most reasonable solution would be the assumption that a qualification of necessary and sufficient criteria of their preservation should consider the dimensions of both biological and mental life. At some moments of human existence these criteria may overlap; sometimes a greater meaning would only be ascribed to one of them. Nonetheless, any absolutizing decisions of a medical character may lead to doubts of a moral character.[41]

This is the unity of material and spiritual elements that has become the basis for the "integral concept of a human being" established in the European cultural circle. It has been acknowledged under its influence that a human being constitutes an individual and autonomous corporal and spiritual unity capable of rational and free actions.[42] It seems, therefore, that

[39] A. Szczeklik, *Kore. O chorych, chorobach i poszukiwaniu duszy medycyny*, Kraków 2007, p. 33.

[40] D. Partif, *Tożsamość nie jest ważna*, [in:] P. Gutowski, T. Szubka (ed.), *Filozofia brytyjska u schyłku XX w.*, Lublin 1998, p. 464.

[41] B. Wójcik, *Bioetyka...*, op. cit., p. 122.

[42] M. Safjan, *Prawo wobec ingerencji...*, op. cit., p. 320.

this assumption should be of the greatest importance when considering legal regulations of biotechnological interference.

It can be noticed that all contemporary bioethical discussions regarding human subjectivity are concentrated on the principle of autonomy. In the sphere of biotechnology it generally states that a rational man has the right to take medical decisions which influence his life.[43] The principle of autonomy has been accurately captured by I. Berlin: "I wish myself that my life and my decisions are dependent on me and not on any external forces of any character. I want to be the tool of my, and not somebody else's will. I want to be a subject, not an object; I want to be directed by my own opinions and intentions rather than surrender to causative factors, affecting me externally. I want to be somebody, not nobody; somebody who takes decisions for himself and not the one who is being decided for by somebody else; I want to be self-regulating and not directed by the laws of Nature or by other people as if I were an object, an animal or a slave incapable of handling the role of a human being, that is, to set my own aims and directions of my actions."[44] In the medical field autonomy has become a legal fact: "a patient has the right to decide about himself as comprehensively as he can (and not as he is allowed by authority), he has the right to agree or disagree as to a medical procedure in every case (...)."[45] This principle is practically realized in a patient's agreement or disagreement as to a medical operation to be conducted.

Autonomy seems to be a feature which constitutes something which is called "human life". It gives the sense and meaning to the reality surrounding people. A quality of life is not only judged by a human organism; first of all, it is judged by human capability of autonomous acting. Autonomy or its potential possibility is a necessary condition to make somebody's life deserve the status of being a human life.[46] Considerations regarding autonomy oscillate around human privacy. In a medical sphere it is connected among all with a duty to keep a medical secret. An order to respect a patient's dignity and his right to autonomy justifies a respect for an intimate sphere of life.[47]

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[43] D. B. Ingram, J. A. Parks, *Etyka dla żółtodziobów, czyli wszystko, co powinieneś wiedzieć o...*, Poznań 2003, p. 229.

[44] I. Berlin, *Cztery eseje o wolności*, Warszawa 1994, p. 192.

[45] J. Hartman, *Bioetyka dla lekarzy*, Warszawa 2009, p. 100.

[46] W. Chańska, *Nieszczęsny dar życia. Filozofia i etyka jakości życia w medycynie współczesnej*, Wrocław 2009, p. 106.

[47] B. Chyrowicz, *Bioetyka i ryzyko. Argument "równi pochyłej" w dyskusji wokół osiągnięć współczesnej genetyki*, Lublin 2002, p. 59.

An integral part of the principle of autonomy is the "right to control one's body". It is connected with a possibility of a state what is going to happen to us when we stop existing as "persons". It seems that in the context of the considerations regarding an integral concept of a human being one cannot ignore the resolutions included in the so-called "directives for future". Autonomous decisions should preserve their validity even after a person who has taken them has lost his capability of autonomous acting. Such choices have to be valid even for the reason that they have not been annulled.

4. Legal implications of the integral concept of a human being

A difference between the notion of "a human being" and the notion of "a human creature" has a great significance in the language of law. To be a human being means to possess a moral and legal subjectivity, that is, to be the subject of the laws and responsibilities. By the acceptance of the above-mentioned distinction, there is an attempt to reconcile discrepant visions of who a human being is and, above all, when a human life starts and finishes. Significant from the subjectivity point of view, notions such as dignity, identity, integrality, autonomy and privacy are reflected in the legal regulations.

A term "dignity" is revealed by many regulations of the public international law, the EU law and national laws. *The Universal Declaration of Human Rights* emphasized that human dignity is the basis of freedom, justice and peace in the world. *The International Pact of Civil and Political Rights* and *the International Pact on Economic, Social and Cultural Rights* have had a great significance. Human dignity is directly referred to by *The Charter of Fundamental Rights of the European Union* and a project of *The Treaty establishing a Constitution for Europe.*

It is necessary to highlight that the above-mentioned documents do not reveal a detailed description of the essence of dignity. Indeed, it is not possible to define this term precisely on the basis of normative acts. Nonetheless, human dignity has gained a status of being basic in the public international law and the EU laws. In accordance, *the Constitution of the Republic of Poland* has accepted that the notion of human dignity has to be given a central category in the legal system: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."[48]

[48] *Art. 30 Constitution of the RP.*

The principle of human dignity respect is to be found in the justification of the decisions taken by *the European Court of Human Rights*, constituting one of the foundations of *the European Convention on Human Rights*. It was constructed on the basis of the concept of human being with a great emphasis on human freedom.[49] *The European Court of Human Rights* has frequently referred to human dignity to state individual rights in the relations with another subject. "Human dignity" has always been treated as personal dignity with a reference to a certain person.

In connection with biotechnological advancement in the sphere of medicine it is possible to observe an evolution of the interpretive way of the principle of human dignity respect. It clearly heads to the recognition that human dignity cannot be limited exclusively to the attributes of the so-called "person". It becomes more and more commonly accepted that "human dignity also represents a certain collection of norms and values, commonly accepted and acknowledged to be fundamental, which refers to a human life in the most general sense."[50] In the newest jurisdiction of *the European Court of Human Rights* it is possible to notice the necessity of the human life protection in a prenatal phase apart from the fact that *the Convention* leaves a margin of freedom for the nations-sides to establish the standards of human life protection at this stage. It has been acknowledged that an embryo (foetus) belongs to the human species and should be protected in the name of human dignity protection.

The above-mentioned international documents, which qualify legislative directives for the states-members of the European Council (including the Polish legislator), complement and specify various recommendations and resolutions of the *the Committee of Ministers and the Parliamentary Assembly of the Council of Europe*.[51] They confirm that embryos and human foetus should be treated with a rightful respect of human dignity in all circumstances.[52] Although a human embryo undergoes different developmental stages (zygote, morula, blastula, pre-embryo, embryo, foetal) and stages of

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[49] Protection of dignity is closely connected with the regulations of the art. 2, comprising a guarantee to the right to life, and the regulations of the art. 3, which prohibits the use of tortures and inhuman ways of treating.

[50] M. Grzymkowska, *Standardy bioetyczne w prawie europejskim*, Warszawa 2009, p. 273.

[51] For instance, the Recommendation 1046 (1986) of the *Parliamentary Assembly of the Council of Europe* regarding the use of human embryos and foetal for diagnostic, therapeutical, scientific, industrial and commercial purposes or the Recommendation 1100 (1989) of the *Parliamentary Assembly of the Council of Europe* regarding the use of human embryos and foetal for scientific purposes.

[52] Point 10 of the Recommendation 1046 (1986).

differentiation, it has been pointed out that it keeps a continuous biological and genetic identity.[53]

A formulation of this kind is visible in *the Biomedical Convention*, which clearly refers to the notion of "human dignity" and not the traditionally formulated "dignity of a person". Therefore, the protection resulting from the regulations of this document also envelopes a human embryo. Apart from the term a "human being" there also appears a term a "human creature".[54] Thus, the creator of law concentrates on the notions of human dignity and identity. Human dignity constitutes an identificator of the inadmissibility of certain practices (e.g. manipulations on the human genome are forbidden). It is understood as an attribute of the humanity itself, which is connected with the acknowledgment that an interest of an individual has a priority over the interest of the society.[55]

What is more, *the Charter of Basic Rights* in its regulations also uses the *human dignity* formulation. Therefore, dignity, captured in this way, is treated as an autonomous value. A further confirmation that the principle of human dignity respect is understood in its broad sense, not only as a mere personal dignity, in the EU jurisdiction is revealed by the decisions of *the European Court of Justice*.

It is possible to state that in the light if the newest scientific research in the field of biology and medicine the principle of human dignity respect has been interpreted in a new way. Human dignity is not merely a personal dignity but also a certain collection of values acknowledged as basic in the society. The principle of human dignity respect should be considered in a cultural and civilization sense, referring it to a broader context of a social life. The above-mentioned regulations lead to the statement that inborn dignity is not only an ethical category but also a legal one. Human dignity is a normative feature, possessed by everybody, even by a human in a prenatal phase. The term "human being" has been used to highlight the necessity of protection of dignity and identity of all human beings (in every phase of life) and not only "persons".[56]

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[53] Point 7 of the Recommendation 1100 (1989).

[54] A reference to the notion which is wider than a "person" takes place in case of art. 14, 15 and 18. Also the preambule of the document clearly indicates a need to protect every form of human life in its biological dimension, regardless its ontological status.

[55] M. Grzymkowska, op. cit., p. 277.

[56] L. Bosek, *Opinia. Jakie zmiany w polskim ustawodawstwie zwykłym są niezbędne dla zapewnienia ochrony godności i podstawowych praw istoty ludzkiej w okresie prenatalnym w sferze zastosowań biologii i medycyny, wyznaczane przez standardy międzynarodowe*?, [in:] *Konstytucyjna formuła...*, op. cit., p. 50.

Furthermore, from the point of view of this paper, another key notion – "human integrality" – is nowadays revealed in the international law although it was understood somehow intuitively for a long time. Influenced by biotechnology, especially by genetic engineering, a legal principle of human integrality protection has been introduced into an international normative order. It is expressed by, for example, *the Bioethics Convention*, *the Universal Declaration on the Human Genome* and *the Charter of Basic Rights*. Nonetheless, it is necessary to highlight that nowadays there is no tendency (neither on a universal scale nor on an European one) to establish a right to integrality as a separate human right.[57] However, any attack on human physical integrality can be subjected to appeal to *the European Court of Human Rights*. A state has a right to provide every person who faces a medical interference with a respect of human integrality.[58]

In connection with the principle of human identity, it is necessary to note that no act of the international law obliging in Poland guarantees than an embryo has a protection in the shape of any subjective right to life. *Nasciturus* is not given a right to life that could be equal to the international and constitutional right of every human being. Nonetheless, it deserves to be under a suitable subjective protection. In a prenatal phase a human being is protected in accordance with general rules of human rights.[59]

Apparently, the international law provides a human being in a prenatal phase (embryo and foetal) with a sufficient protection of human dignity and basic rights in the fields of biology and medicine.

The European Union regulates protection of human being from the application of medicine and biology only in an indirect way. Among the regulations, art. 6 of *the Treaty establishing the European Union* deserves a special attention. It obliges the EU institutions and states-members to respect basic rights and freedoms. *The European Court of Justice* in its jurisdiction recognizes a principle of inborn human dignity as a basic right of the EU legislation which unquestionably obliges to respect human

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[57] A. Michalska, T. Twardowski, *Prawo człowieka do integralności genetycznej*, "Państwo i Prawo", Nr 5/1999, p. 40.

[58] M. Grzymkowska, op. cit., p. 165.

[59] It was already stated in the *International Pact of Civil and Political Rights* that every human being has an inborn right to life and this right should be protected by law. Also in *the Universal Declaration on the Human Genome* accepted by the General Conference UNESCO on November 11, 1997 it was recognized that all members of the human species had an inborn dignity (art. 1). A right of every human being, that is a man at every stage of his development, to dignity respect is independent from genetic features (art. 2). Practices which contradict human dignity should be banned.

dignity.[60] Numerous directives of *the European Parliament* and *the Council of the European Union*, which emphasize the significance of the principle of human dignity, constitute essential acts in the field of biotechnology. They exclude the possibility of using embryos for industrial and commercial purposes. What is more, they highlight a prohibition of an instrumental treatment of a human body and its parts.[61]

It is necessary to highlight that the European standards mark only the minimum requirements in the field of protection of human rights in the process of the reproducing which is medically enhanced, including the protection of an embryo. Normative formulations define only a direction for the interpretation of certain regulations. A duty to protect human dignity and the primacy of human good over a social and scientific interest should be recognized as a primary interpretive directive.

5. Bioethical issues in the regulations of the Polish legislation

The Polish legislation regulates bioethical issues only partly and indirectly. It is subjected to the critique of both supporters of protection of subjectivity and human dignity and its opponents. The majority of theorists of law highlight an absolute necessity of the ratification of *the Biomedical Convention* which (together with additional records) defines the minimum of the European requirements in the field of protection of human being in a prenatal phase. The ratification will not limit a legislative freedom of Poland to establish higher standards of protection of human being if they are necessary. A necessity of changes of the Constitution of Poland, widely discussed in the media, aiming at the verbalization of protection of human life starting from a prenatal phase, seems to be unjustified. Adding a few expressions would result in a fundamental change of the status of an embryo and foetus in the system of the Polish law; additionally, legal consequences referring to the fields that are difficult to anticipate would appear.

Nowadays it seems that a human embryo cannot have a status equal to the status of a physical person. Unquestionable protection of a human embryo does not find support in the international norms. It contradicts the

[60] Decision dated 14 October, 2004, C-36/02, point 34; decision dated 9 October, 2001, C-377/98, points 37–38.

[61] E.g.: Directive dated 6 July, 1998 nr 98/44 regarding a legal protection of biotechnological discoveries; Directive 2004/23/WE of the European Parliament and Council dated 31 March, 2004 regarding the establishment of norms of quality and safe giving, taking, testing, processing, conserving, preserving, and distribution of human tissues and cells.

minimum European standard of protection of rights of a born person which also results from the jurisdiction of the court.

The author of this paper claims that in the Polish legal system a life of a person before birth is protected in accordance with the international and EU law. Undoubtedly, it is protected in a weaker way than the life of a born person. Nonetheless, it is absolutely in accordance with the canons established on the ground of theoretical considerations and reflected in the legislations of modern states.

Apart from the fact that the Constitution of Poland does not discuss a legal protection of an inborn life directly, it does not mean that such a protection is not given to *nasciturus*. *The Polish Constitutional Court* pronounced for the recognition of its existence in 1997. It stated that a human life has a character of a constitutional value also in a prenatal phase and should be protected as such. At the same time, it recognized that it does not mean that the intensity of such a protection should be the same in every phase of life and in all circumstances.

Abstracting from the constitutional protection of a human embryo, nowadays it is necessary to provide a precise regulation at the legal level of the principles of medically supported reproduction. In this respect gaps in law may appear to be highly destructive. Apart from the fact that worldwide *in vitro* is a standard method of treating infertility, in Poland it is subjected to a public debate highlighting huge differences connected with people's outlook on life and dividing the Polish society into its supporters and opponents. An absolutist religious justification, growing in the Polish legal system and rooted in the consciousness of the Poles under the influence of the Catholicism, contributes to the lack of rationality of the discourse in this field. International standards should be subjected to a correction especially at the level of legislation, including the Polish civil and penal laws.

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NORMATIVE SIGNIFICANCE OF HUMAN DIGNITY ON THE BASE OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

1. Ideological inspirations of the article 30 of the Constitution of the Republic of Poland

Article 30 of the Constitution of the Republic of Poland, published in 'general principles' of the second chapter of the Constitution and devoted to 'of freedoms and rights of persons and citizens', seems to be the subject of heated discussions in the law area, especially, what is justifiable, among constitutionalists. It states that 'the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities'. The very situation of this article in the constitutional systematic and the content of this regulation indicate its particular significance for understanding the issue of the rules and freedoms of people. Art. 30 of the Constitution makes the introduction to the catalog of freedoms and rights of persons, defined in the following constitutional regulations in the chapter II. The formulation placed in the very first sentence of this regulation and stating that human dignity is inherent and inalienable and determines a source of all human freedoms and rights forms a reference to the concept of legal and natural rights and freedoms of persons as the base of the constitutional doctrine, which constitute the foundation of the character of laws and constitutional freedoms; this article also constitutes general instructions concerning the comprehension of basic rules and freedoms resulting from the instructions involved in the Constitution.

The reference to the legal and natural concept reveals the connection of the constitutional model of rights and freedoms with the currently accepted and grounded on the model of a democratic state the doctrinal legal and natural concept, which lies at the base of the comprehension of the essence

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and character of rights and freedoms of an individual in a democratic state. The standard catalog of individual rights and freedoms in a democratic country is inspired by legal and natural concepts, underlining the fact that fundamental rights of an individual are treated as basic values situated beyond the positive law, since they resulting from the unusual and unique human nature; the essence of such a unique human nature is human dignity, natural for every human being, innate and inalienable.

The Constitution of the Republic of Poland dated 2 April, 1997 remains in a common current of the contemporary democratic constitutionalism, frames of which are described especially by such international law acts as the Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November, 1950, as well as the International Pact on Civil and Political Rights dated 19 December, 1966. These two legal and natural acts, ratified by Poland, in their preface appeal to the Universal Declaration of Human Rights dated 10 December, 1948 by the United Nations General Assembly. The above-mentioned pact of 1966 almost cites word-by-word the content of the extract of the preamble to the General Declaration of 1948, stating that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Quoting the above-mentioned extract of the Declaration, the relevant extract of the preamble of the Pact among others highlights that these rights result from the 'human inherent dignity'.

There is no doubt, that the Polish Constitution of April 2, 1997, falling into the after-war democratic standards in the sphere of rights and individual freedoms, is inspired by legal and natural ideas, among which, the idea of innate and inalienable human dignity and the resulting rights and freedoms, united by the general idea of individual freedom, takes the leading place. The legal and international acts were a direct inspiration and examples for the Constitution of 1997. It is necessary to add, however, that the idea of human dignity and its legal and natural inspiration, found the reflection not only in the after-war international legal acts, making the standards of a democratic country, but also in various constitutions of the European countries.[1] Some of them, even earlier than the Constitution of 1997, had certainly had an influence on the Polish constitutional discussions before

[1] More about human dignity in the international legal acts and the European Constitutions see, for example: J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, (ed.) L. Wiśniewski, Warszawa 1997, Seym Edition; J. Zajadło, *Godność i prawa człowieka (Ideowe i normatywne źródła przepisu art. 30 Konstytucji)*, Gdańskie Studia Prawnicze, volume III, 1998.

the resolution of the homogenous constitution of the democratic country took place in 1997.

The position of the central notion of human dignity in the international and legal acts and the constitutions of the countries as well as the rule of the protection of dignity makes, apart from the already existing different formulations, 'the finish of the process of transformation of the notion of human dignity from the philosophical sphere to the juridical one. The consequence of the jurisdiction of this concept is a subjective side of the individual in the public law and the recognition of the constitutional individual rights, basic for the legal system' – it is stated even in the doctrine, underlining the particular significance of the innate idea and inalienable human dignity.[2] But the jurisdiction of the idea of human dignity causes numerous problems and questions. Before they are approached, it is necessary to notice in the very beginning that doubts concerning the character and direction of such jurisdiction result from the fact that in the philosophical field there is a fundamental difference between ideas concerning human dignity. It is understandable, as it is the reflection of the differences in various philosophical areas. The jurisdiction of the idea of human dignity has result in uncleanness as to the normative contents, at least as to the normative meaning of this idea. It is difficult to accept the idea that it is possible to assign normative contents of the idea of human dignity without the earlier assignment of the philosophical (doctrinal) content of this idea, at least concerning its essence. The necessity of general description of the essence human dignity appears also when one accepts that 'the positivism of the clause of dignity and basic rights of an individual consists of the fact that pointing at the extra-positive source of these rights and assuming their primary character, the Constitution does not simultaneously refer to certain concept of natural law'.[3]

J. Zajadło was right when he predicted that assigning the normative contents of art. 30 of the Constitution and normative functions of the article, the Constitutional Tribunal will have to define the content of the idea of human dignity. It is also impossible for the Tribunal to separate from 'the sources of ideal inspiration, which forejudged the genesis and stylistic of art. 30 of the Constitution'.[4]

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[2] P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (Wybrane problemy)*, Kraków, edition Zakamycze, pp. 106–107.

[3] P. Tuleja, op. cit., p. 127.

[4] J. Zajadło, op. cit., p. 53–54.

In the professional literature two meanings of the idea of human dignity usually function. The first one, objective, resting on the attribution of certain special features, unique for every human being, independent of its subjective sense of dignity – is usually called **personal dignity**. The second meaning refers to **private dignity**, also called by some people **individual dignity**.[5] This meaning refers to the subjective sense of dignity expressed in the imagination of a certain human being about himself through 'such attributes as veneration, honor, likeness, opinion and so on..., in other words, it is the awareness of self-consciousness. Numerous legal regulations have served to provide its defense, especially criminal law, protecting for example, personal immunity – and civil law, responsible for the protection of personal property. Differently from the personal dignity (constitutional), it is easy to violate this kind of dignity, it is enough, for example, to abuse another person. It is not enough to violate the dignity of one person or some people to violate the personal dignity. According to K. Complak, 'the act of this type has to hit a man as the representative of the human race'.[6]

Human dignity, perceived as private or individual dignity, is therefore 'an adventurous attribute or, in other words, a value, which a person may acquire, develop through his work or lose' as J. Krukowski assesses, who accurately reveals, that personal or individual meaning of human dignity is connected with a certain philosophical or theological inspiration.[7]

There is no doubt that human dignity, which is referred to in the art. 30 of the Constitution, being innate and unalienable, is personal dignity, connected with every representative of the human race, inviolable, and not amenable to restrictions. K. Complak suggests understanding the essence of human dignity (personal) in the Christianity context; this suggestion is possible to agree with for its essence, even if one does not accept this context. The author writes: 'Individual dignity means the distinction of a human being as the most important and ideal value for other values and their final test. It is possible to describe it briefly as holiness of a human being. Dignity exists independently of subjective conceptions one has about

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[5] J. Krukowski, op. cit., p. 39, M. Piechowiak distinguish 4 types of dignity; personal; private defined as good name; individual, connected with moral perfection; dignity grounded in the circumstances, depending on the fact whether the conditions correspond to personal dignity – M. Piechowiak, *Filozofia praw człowieka*, Lublin 1999, pp. 343–351.

[6] K. Complak, *O prawidłowe pojmowanie godności osoby ludzkiej w porządku R.P.*, [in:] *Prawa i wolności obywatelskie w Konstytucji R.P.*, (ed.) B. Banaszak and A. Preisner, pp. 66–61.

[7] J. Krukowski, op. cit., p. 39–42.

himself. It is firmly connected with every human being. What is mote, it is not lost even when the old age or illness put a person into the so-called vegetative state'.[8]

2. Standardization of the art. 30 of the Constitution in the jurisdiction of The Constitutional Court of Justice

The Constitutional Court of Justice, being the constitutional court applying, which is obvious, the regulations of the Constitution takes a special significance in revealing the normative contents of the art. 30 of the Constitution. However, while analyzing the art. 30 of the Constitution, the Court of Justice in its jurisdiction not only had to deepen the understanding of the idea of dignity in the constitutional area, but also to answer some questions connected with the practice of its constitutional and legal assignments. Especially, it was necessary to decide whether it was possible to construct norms on the basis of the article 30; and whether the subjective law results from the art. 30, which is essential especially for the description of the admissible patterns of the constitutional control in the procedures initiated by the constitutional complaint; what role the art. 30 of the Constitution has in the constitutional systematic.

The Court of Justice introduced into its jurisdiction the view dominating in the doctrine regarding the inviolable, objective human personal dignity and subjective dignity, individual one, also stating in the verdict dated 5 March, 2003 (signature act K7/01[9]) that both personal dignity, described by the Court of Justice as 'transcendental', as well as private dignity, supported by the art. 30 of the Constitution. The Court of Justice claimed that the art. 30 can make the model of the constitutional control. Simultaneously, assessing relations between the violation of the right to private life (art. 47 of the Constitution) and the violation of dignity described in the art. 30 of the Constitution, the Court of Justice stated, that 'not every sign of the violation of the right to private life is equal with the violation of personal dignity or, more precisely, the rights which result from this dignity. The right to the protection of private life as well as every kind of freedom and rights of an individual, finds its axiological consolidation in

[8] K. Complak, op. cit., p. 65.

[9] OTKZ.U.2003/3A/19.

the dignity of a person, however, the identification of the violation of every rule and freedoms with the violation of dignity would deprive the guarantees comprised in the art. 30 of the Constitution of their individual application area. In fact, it would make it shallow and would excessively simplify the sense and the normative content included in the concept, which operates art. 30 of the Constitution. It involves the most important values which do not use other separate guarantees in the constitutional area, but they touch the matter of the position of the individual in the society, the individual's relations with other people and the public authorities. The acceptance of another attitude would question the formed line of the jurisdiction on the basis of the art. 47 of the Constitution, which clearly assumes that the right to a private life cannot be treated in absolute categories and it can also be restricted according to the criteria described by the rule of proportion – at the same time, assuming that every violation of a private sphere also violates human dignity, such an attitude could not be accepted'.

In the verdict of March 7, 2007 (signature act K28/05[10]), the Court of Justice clearly underlined that the art. 30 of the Constitution can make a separate pattern of the constitutional control. The Court of Justice recalled its assignments in the matter K/01, and two more aspects of the dignity interpretation, which slightly modified the terminology and emphasized a clear distinction of dignity as the unchangeable value and human dignity, were introduced. The Court of Justice stated: 'On the basis of the jurisdiction of the Constitutional Tribunal, it is possible and essential to distinguish two aspects of human dignity – the dignity as the innate and inalienable value and the dignity perceived as 'the private right', 'including the values of every person's psychical life as well as all these values which describe the subjective position of an individual in a society and which comprise, according to the general opinion, the respect necessary for every person'. In the first meaning, a man retains dignity in every condition, but dignity understood as 'the private right' can, in practice, be the subject of violation – 'it can be touched by the behavior of other people and law regulations' (verdict of the Constitutional Tribunal in the above-mentioned case K 7/07). This kind of phenomenon should be always negatively judged as being contradictory to the constitutional standards. On no account should their vindication or doubts regarding dignity as an innate and inalienable value be accepted on such a base. In the case under investigation it is possible to consider only the objection of violation of dignity in its second meaning by the accused regulation'.

[10] OTKZ.U.2007/3A/24.

Additionally, when it comes to the case SK 50/06[11] and its verdict dated 10 July, 2007, the Court of Justice recalled the two aspects of dignity included in the art. 30 of the Constitution, repeating the terminology included in the verdict K 7/01. By doing so, the generally accepted categorization in the doctrine was one more time departed from. However, in the verdict the Court of Justice reminded some regulations made in the verdict of October 15, 2002 concerning the case SK 6/02[12] and objective treatment of a man included in the art. 30 of the Constitution, which resulted from the verdict. The case SK 6/02 deserves a special attention, especially because of the fact that the Court of Justice clearly stated that the art. 30 of the Constitution can result in the objective right of an individual, qualified as one of necessary requirements of the appeal; the Court of Justice, appealing to the views in the doctrine, indicated what functions in the constitutional systematic the art. 30 of the Constitution has. 'Human dignity, referred to in the art. 30 of the Constitution, has some functions in the constitutional rule: it is a link between the Constitution (the act of the positive law) and the legal and natural order; it determines the interpretation and application of the Constitution; it determines the system and the range of particular rights and freedoms and, finally, it has the function of the objective right of an individual of a separate legal content (L. Garlicki, The Commentary to the art. 30 of the Constitution, to be published). Therefore, the art. 30 of the Constitution can be applied as a separate constitutional pattern when investigating the consistence with the Constitution as well as in case of the constitutional appeal (compare K. Wojtyczek, *Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej*; M. Jabłoński, *Pojęcie i ochrona godności człowieka w orzecznictwie organów władzy sądowniczej w Polsce*, [in:] *Godniość człowieka jako kategoria prawna*, (ed.) K. Complak, Wrocław 2001, p. 210 and p. 304). However, because of the specific character of this right, the frequency of its use may be low. The Trubunal has stated that the opposite standpoint, which questions the position of dignity among the individual objective rights of an individual, limits the constitutional protection of an individual in the way which does not appeal to one's interpretation (K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej Konstytucji*, "Przegląd Sądowy", Nr 5/2998, p. 44, L. Urbanek, *Pojęcie godności człowieka w Konstytucji RP z 1997 r. a problem definicji*, "Prawa Człowieka", Nr 7/2000, p. 67).

[11] OTZK.U.2002/5A/65.

[12] OTKZ.U.2002/5A/65.

In the verdict of September 30, 2008, signature act K 44/07[13], the Court of Justice went further in the interpretation of the normative content of the art. 30 of the Constitution, showing a central place of that regulation in the constitutional axiology and its particular role for the expression and application of other constitutional regulations describing rights, freedoms and duties of an individual. 'According to the art. 30 of the Constitution, "inherent and inalienable human dignity determines the source of freedom and rights of men and citizens. It is unchangeable and its respect and protection is a duty of the public authorities" (see also the verdicts of the CT dated 5 March, 2003, signature K 7/01, OTK ZU number 3/A/2003, position 19 and the one dated 24 October, 2006, signature SK 41/05). On the base of the art. 30 of the Constitution, the idea of human dignity should be attributed the character of the constitutional value with a central meaning to build the axiology of the current constitutional solutions. A democratic country under the rule of law is a country based on human respect, especially, on the respect and protection of life and human dignity. These two values are correlated in a direct way. The art. 30 of the Constitution is a leading resolution for the interpretation and application of all other decisions concerning rights, freedoms and duties of an individual. This is also underlined in the preamble to the Constitution, which appeals to everybody applying the Constitution to 'do this taking care of the preservation of inherent human dignity...', also the art. 233 item 1 of the Constitution orders to avoid the violation of human dignity even in case of states of emergency in the country. The tribunal stated that similar conclusions were introduced on the basis of the previous art. 1 of the constitutional regulations (see also the decision of the CT in the regulation of March 17, 1993, signature W. 16/92 as well as a different opinion presented by L. Garlicki for the verdict of the CT concerning the case: signature K. 26/96)'.

In the above-mentioned verdict the Constitutional Tribunal underlined that the art. 30 of the Constitution results in the order to treat every man in an objective way, directed to the state organs. At the same time, there is a prohibition of a certain behavior, resulting from this particular situation. The acceptance of the inalienable human dignity was recognized by the Tribunal as a constitutional principle: "The confirmation of the inalienable human dignity as a constitutional principle as well as the objective right of every human being – independently from his/her

[13] OTZK.U.2008/7A/126.

qualifications or psycho-physical state and actual life situation – constitutes the base of the acceptance of their objectiveness. This statement marks a certain way of behavior for the state organs, including the legislator and the executive organs. A man ought to be treated as a free, autonomic object, able to develop his/her personality and create the way of his/her behavior'.

The Tribunal evaluated the art. 122A of the air law contradicting the art. 30 of the Constitution on the ground that the article, allowing to shoot a civil airplane with passengers and the crew on board if the reasons of security demand this when the airplane is used against the law, especially as a means of terrorist attacks in the air, treats people on the board of the plane in an objective and impersonal way, aiming at their personal dignity. The Tribunal explained it in the following way: 'From the point of view of the analyzed pattern of the control the questioned rule of of the art. 122a of the air law would not cause such serious constitutional doubts if it only allowed for shooting the plane with only assassins on board; they have chosen and caused the situation; it was their will to die, exposing the lives of innocent people to danger. If they are shot, they will die in fight, which has been caused by them. Therefore, it is not possible to say about them that they are treated as objects. When aimed at people on board who are nor aggressors – passengers and personnel, this type of extreme legal measures aims at their personal dignity. Taking into consideration the formulation accepted by CT in the verdict of January 15, 2006, it is possible to say that the result of the application of the questioned regulation is 'dispersonification' and 'reification' of the people on the board of the plane RENEGADE, who were not aggressors (passengers and crew members). These people become only the subject (object) of the rescue action, aimed at the prevention of some hypothetical and further losses, which a planned terrorist action could cause. In fact, it is a false argument that the passengers and the crew of the RENEGADE plane found themselves in such a situation only because of the illegal action of the terrorists; indirectly, it is a symptom of the state failure in the realization of the positive protection duties'.

Stating that the above-mentioned regulation contradicts the art. 38 of the Constitution, which guaranties a legal protection of life to every person, the Tribunal has also admitted explicitly 'the priority of values, which are life and human dignity'. The Tribunal has also underlined that 'these values constitute the foundation of the European civilization and form the idea of humanism, the meaning of which is primary in our culture (also legal culture)'.

3. Some final remarks

The jurisdiction of the Tribunal confirms that showing the full normative contents of the art. 30 of the Constitution is a very difficult activity. From a constitutional point of view, it is not a necessary activity because the principle of the protection of dignity plays a guarantying role in the relations with other rights and freedoms of an individual; it determines the uncrossable protection barrier in the relation with other rights and freedoms, among which personal dignity and the right to protection of life take a special place. P. Tuleja accurately writes that the specification of the normative constitutional content of the principle of dignity takes place through showing its violation in specific situations, enabling the precision on the ground of particular areas of law orders and restrictions essential for its realization. The principle of the protection of dignity is somehow described from a negative side because it is not possible to reveal all elements of dignity subjective to protection in advance but it is possible to show the situations in which the violation of dignity appears, especially in a severe way. This is the way all courts practise, not only the constitutional ones. Their starting point is the prohibition of the subjective treatment of men.[14] It is worth mentioning that such an approach demands defining the matter of this inherent and inalienable human dignity because without such an agreement the proof of the violation could be impossible. Certainly, such an element of the issue of human personal dignity is the right to self-description, deciding about themselves, based on their own, autonomic act of the will.

The center of gravity in the assignment of the normative content of the art. 30 of the Constitution in its connection with certain legal situations in 'a negative way' lies on the relations between the principle of human dignity and its protection and other constitutional rights, as well as particular rights and freedoms. The obvious difficulty in a positive description of the normative content of the protection of human dignity result in the opinion, presented by some people, that human dignity should be treated as 'the premise of the commentary and content of the remaining rights of the Constitution'; it plays a supplemental function for obeying certain rights and freedoms. The idea of human dignity should not be inserted in any structure of the regulations of the Constitution, only in its preamble; the art. 30 of the Constitution should not form the basis for judging

[14] P. Tuleja, op. cit., p. 110–111.

in the Tribunal.[15] Generally, it is possible to notice that in the ideas of the doctrine the approval for the accepted direction of the jurisdiction chosen by the Tribunal, treating the art. 30 of the Constitution as a possible example of the constitutional control, including the constitutional principle of the protection of human dignity, and at the same time, the objective right for the protection and respect of human dignity. On the other hand, the first sentence of the article 30 of the Constitution states that human dignity determines the source of freedom and rights of citizens. It means that the right for the protection of human dignity protection includes all the rights and freedoms. K. Wojtyczek remarks that it is not possible to exclude a situation, especially because of the technical and medical development, in which the organs of public authorities would violate human dignity without violating simultaneously other rights of an individual guaranteed in the Constitution. This is why it is not possible to exclude the situation of the constitutional appeal, in which the only pattern of control would be the art. 30 of the Constitution. It is necessary to highlight the point of view presented by K. Wojtyczek that 'the order to respect and protect human dignity can be perceived as the directive of the dynamic commentary of the Constitution. This regulation creates the possibility of the adaptation of the protection of human dignity to threats, which have not been anticipated by the creators of the constitutional regulations concerning human rights'.[16]

The professional literature highlights the significance of the art. 30 of the Constitution in a different way. J. Potrzeszcz, showing his approval for the jurisdiction accepted by the Tribunal, assesses that the principle of human dignity, described in the Constitution of the Republic of Poland 'marks axiological direction for the interpretation of all the system'. In the summary of the analysis of the jurisdiction of the Tribunal Court connected with the art. 30 of the Constitution the author claims: 'To finish the consideration concerning human dignity in the jurisdiction of the Polish Constitutional Tribunal it is necessary to pay a tribute to this court because, making the use of the doctrine, it tries to involve the theoretical and philosophical bases of the idea of dignity, which results in a more effective use of the art. 30 of the Constitution as a pattern of the constitutional control of law'.[17]

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[15] M. Jabłoński, *Rozważania na temat znaczenia pojęcia godności człowieka w polskim porządku konstytucyjnym*, [in:] *Prawa i wolności obywatelskie w Konstytucji R.P.*, op. cit., pp. 92–97; also the literature concerning such a point of view presented there.

[16] K. Wojtyczek, *Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej w polskim systemie prawnym*, [in:] *Godność człowieka jako kategoria prawa (articles and materials)*, (ed.) K. Complak, Wrocław 2001.

[17] J. Potrzeszcz, *Godność człowieka w orzecznictwie polskiego Trybunału Konstytucyjnego*, "Roczniki nauk prawnych", Towarzystwo Naukowe KUL, volume XV, nr 1/2005.

To finish this synthetic consideration, it is necessary to say that a particular role of the art. 30 of the Constitution is that in the very first sentence of the regulation, it determines a general clause for the perception of legal and natural concept of human dignity for the source of human dignity is the natural law and not the proclaimed law. L. Garlicki concludes, 'it gives a supra-constitutional significance to the principle of human dignity because all the norm of the positive law (including the text of the Constitution) have to respect this principle; if they collide with it, they lose their feature of legitimacy'.[18]

Translated by Katarzyna Dolińska-Jóźwiak

[18] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*. Issue 12, Warsaw 2008, p. 91.

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 19 (32) 2009

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THOMAS HOBBES AS A PRECURSOR OF J. L. AUSTIN'S THEORY OF PERFORMATIVES

John Langshaw Austin remains one of the most influential philosophers of the philosophy of colloquial language of the second half of XX Century and the author of the famous work *How To Do Things With Words* (Oxford, 1962). The aim of his study was the search for the real construction and function of the colloquial language which was to be arrived at by a close observation of different manners in which it was used. A natural language, having been shaped by many generations and revealing their experiences, was seen by Austin as a totally independent, complete and governing by the rights of economy. The principles of the language's completeness and economy constitute a starting point for his studies of the linguistic phenomena. The critique of the sense-datum, the theory of performatives and the theory of illocution are the most significant results of his studies. Austin made the critique of the commonly accepted statement regarding the truthfulness or falseness of all meaningful sentences a starting point of the new philosophy of language and the concept of linguistics.

In case of the majority of statements serving a descriptive function (also known as communicative or informative-reporting function) the existence of objects they inform about does not depend directly on the very statements, or their formulation (articulations). These statements do not make the reality. They only report about it accurately or not accurately describing it. As Austin proves, there are statements, only apparently descriptive, which are connected with the very creation of a given fact, a direct creation of the new reality. A distinctive feature of such statements, which Austin called performative, is that their articulation constitutes the basis for performing a certain act, here "speech" becomes "act".[1] The very articulation of certain

[1] Having arrived at the consideration that basically every utterance may reveal a per-

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words in strictly defined circumstances by certain people causes a certain act to take place, a certain event to happen.[2] An example of such a statement is the following statement: *I name this ship "Bolesław Chrobry"*, which is a part of the christening procedure or *I promise to be punctually at 12.00* as well as *I apologize*.[3]

Although Austin was the first to observe and describe the theory of the performative function of certain statements, it had always been present in speech. It was also distinguished by many religions in a special way where gods had a mighty power to change the reality with the help of words. The extract describing the beginnings of the world taken from the Bible reveals a classic example: *Let there be light: and there was light.* A human longing for God's omnipotence and the ability to change the reality with a mere help of word are revealed by many legends, myths and tales.[4] The statement under consideration is also revealed in taking actions of a magic character whose element was the articulation of a verbal spell – a strictly defined formula where no changes were allowed.

A typical performative statement usually contains the first person singular verb in the Present Tense in the active indicative mood, the so-called performative verbs (eg. I give, I promise, I command, I accuse).[5] It has an open form. Nevertheless, performatives appear in very different forms. They may contain the third or the first person performative verbs plural in the Present Simple passive voice or an impersonal form. Performative statements often have no performative verb at all but they may be expressed in one of the above mentioned forms. For instance, a statement *Open the door* may mean *I am giving you a command to open the door.* What it really means in this statement is to be deduced from the context, intonation of the voice or a gesture accompanied. (Zygmunt Ziembiński, having considered the above mentioned points, has proposed to call performative

formative element, in his later works Austin incorporated the previously independent theory of performatives into the new theory of locutionary and illocutionary acts. Locutionary acts are connected with the articulation of certain sounds or making certaing inscriptions which, being meaningful, are the the expression of a certain language. Illocutionary acts are connected with the function of the utterance articulated in a certain situation. A perlocutionary act, in turn, is connected with the effect the utterance has on its receiver. This division was further established by the continuators of Austin's thought – J. R. Searle and L. W. Forguson. Austin's theory of speech acts, which replaced his theory of performatives, found many enthusiasts among philosophers and theorists of law just as it was in case of his earlier theory.

[2] J. L. Austin, *How to do things with words*, Harvard 1975, p. 5.

[3] M. Hempoliński, *Brytyjska filozofia analityczna*, Warszawa 1974, p. 116.

[4] E. Grodziński, *Wypowiedzi performatywne*, Wrocław 1979, pp. 12–13.

[5] J. L. Austin, *How to do things with words*, op. cit., pp. 5–6.

statements "statements which fulfill a performative function in a given context"[6]). When one doubts whether a given statement is performative, he should check whether the statement can be preceded by the word *hereby* (as in the formulation "I hereby name you") since it is articulated an applied till the moment of its utterance.

Among performative statements Austin often mentions the statements of legal significance. Some of them may be called legal acts of general significance (eg. *announce*, *interpret*, *declare*), others constitute legal acts of individual significance[7] (eg. *promise*, *sentence*). When a Sovereign (eg. Parliament) accepts new regulations, in accordance with the presented concept, a law, which has a common power, is established. In a similar manner, when one utters the words "I bet", he enters into a contract.

It was layers who noticed the existence and significance of the performative utterances long before they were discovered and given a theoretical description. The sphere of legal relations reveals a great majority of them. Certainly, the language of legal norms reveals a creative character for it generates new social phenomena which were absent before. The creative character is also revealed by legal "declaration of will", which in its historical origins contained the elements of magic acts.[8] Therefore, in accordance with Austin, in the theory of law among the performative utterances of legal significance there may be distinguished two groups: the first one being of general significance and the second one individual significance. The first group creates a new legal reality for all citizens (examples of these types of speech acts are to be revealed by constitutions or codes or laws) or for some citizens, for example, occupying a certain post (the advocacy act may serve as a good example here). Every new act or, in other words, speech act, takes its part in creating a new reality. It also repeals the already existing legal relations by replacing them with the new ones. It also creates a new collection of rights and duties for a certain group of legal subjects. A specific group of performative utterances of general significance (having a great influence on the mankind in the process of history) is represented by the formula used when declaring peace or war.[9]

The second group of performatives distinguished in the contemporary theory of law are legal acts (legal activities), speech acts of individual significance, which create a new reality for a certain individual or, groups of

[6] Z. Ziembiński, *Logiczne podstawy prawoznawstwa*, Warszawa 1966, pp. 26–27.

[7] E. Grodziński, *Wypowiedzi performatywne*, op. cit., pp. 15–19.

[8] Z. Ziembiński, *Logiczne podstawy prawoznawstwa*, op. cit., p. 27.

[9] E. Grodziński, *Wypowiedzi performatywne*, op. cit., pp. 15–16.

people connected in some way, usually financially). These acts are based on the performatives of general character which give them a legal power. A declaration made in agreement by the man and woman in presence of the appropriate state official who declares them to be a married couple is the example of a performative utterance of individual character which is based on a certain legal regulation or, in other words, performative of general significance. Entering into a contract is another example of performative of individual significance since every party gets new rights and duties. A single person can also create new social facts by the power of words: making testaments, gifts or soldier's oath.[10]

The acts of speech of performative character presented here may appear to be unsuccessful. A substantial discrepancy with performatives of higher order or lack of the forms foreseen by those superior acts are among the reasons why they may appear unsuccessful.

Performative utterances are a kind of conventional acts (distinguished along with natural acts) which are taken in accordance with certain norms which are described or not and obligatory in a given society. The author of the first theoretical study of performatives often highlights that the articulation of the performative utterance is already "making". J. L. Austin notices that such making has a conventional character. Therefore, they are to follow a strictly defined procedure. In the study mentioned above Austin gives a detailed account of the conditions which decide whether performatives are efficient or faulty. He also divides them into successful or unsuccessful and efficient or non-efficient. They are "unhappy" when the fact which was to be realized at the moment of a given utterance does not take place.

A specific character of the performative utterances does not allow to attach a category of being true or false for they do not describe the reality, they only shape it[11] (this is one of the reasons why performatives in the form of descriptive sentences are different from those expressing ascertainment – sentences which state something). Austin argues that utterances of this type do not reveal an informative-reporting function at all, a performative function being their basic and the only function. Z. Ziembiński agrees with this view highlighting the significance of the performatives in law. He also claims that the only criterion of the evaluation of the utterance is to be judged by its significance. Insignificant, non-efficient performatives give only the appearance of some conventional act being done; they are over-

[10] Ibid.

[11] See J. L. Austin, *How to do things with words*, op. cit., p. 5.

burdened by the "insignificance sanction".[12] According to Ziembiński, two types of utterances have a performative character: those by means of which a given act is established (eg. Seym resolution) as well as those which are the means to inform about the establishment of the norms of a given content (eg. a collection of statements in the publication which is to acknowledge the texts of the resolution). Ziembiński rejects the thought that the utterances of the second type which are the means to declare norms should be treated as utterances formulated in the metalanguage, "normal" utterances of the legal language or, in other words, they are true sentences (when revealing the content of the resolution in accordance with its formulation accepted by Seym) or false when containing an error. A necessary condition for a legal act to be accepted is the fulfillment of the "act of publication" which has to be fulfilled "properly". The legislation process is therefore characterized by the mutual existence of at least two performatives, neither of which can be recognized as true or false. The author evaluates another performative of legal significance – the act of giving a sentence and the act of its publication[13] in an analogical way.

On the other hand, Austin's way of thinking is being criticized at this point by one of the Polish researchers of philosophical literature devoted to the study of performative utterances. In E. Grodziński's opinion, performatives of legal significance or, as he calls them, "*quazi*-legal" (he means utterances such as *I make a bet* or *I accept the bet*) apart from their performative function have a descriptive, informative-reporting function, or in other words, they are true or false. When a performative utterance is efficient or, in other words, it creates a new reality in a social sphere, it is therefore true. When it is non-efficient, a new social fact does not take place for some reasons, it is false. Grodziński argues that if one assumes that such performatives have only a creative function and no descriptive function, one would also have to accept that his every single creation of any fact would have to be additionally reported in a different utterance.

The theory of performatives, articulated by John Langshaw Austin, was accepted and developed by the 20th-century lawyers. Now incorporated into the modern theory of law, it appeared for the first time in the works of Thomas Hobbes, a seventeenth-century political writer. Hobbes, who highly valued the issue of language, was perfectly aware of the immanent relationships between law and language. When this English thinker

[12] Z. Ziembiński, *Logiczne podstawy prawoznawstwa*, op. cit., pp. 30–31.

[13] Ibid., pp. 31–32.

describes the way in which in a newly organized state legislation appears or when he analyzes the concept of agreement, he anticipates later solutions as proposed by Hobbes and his commentators.

In his famous *Leviathan* Hobbes proves that the aim of the social agreement is the constitualisation of the state. The state's aim, on the other hand, is to ensure safety for its citizens. The essential guarantee of safety is the establishment of equal moral rules obliging every individual. Only the Sovereign chosen by the power of social agreement introduces a binding differentiation between moral and immoral acts, he is also the one to distinguish between good and evil. In the preceding state of Nature there was no objective criterion of good and evil, what was good for somebody could be bad for another person. Everybody wanted to be the "source" of moral judgment and everybody wanted to prescribe a different meaning to the words "good" and "evil". *For these words of Good, Evill,* (...) *are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves* (...).[14] In the state of Nature there were a great number of private laws, each of them was deprived of even a relative attribute of permanence.

According to Hobbes, the sovereign selected in accordance with the will of citizens and acting on their behalf executes something which is more than giving a mere opinion in moral issues. The sovereign's decisions, known as orders, become a common law. At the moment of their formulation, the sovereign shapes, not describes, the legal reality. The moment the sovereign's orders are proclaimed, the law becomes. Therefore, they constitute classic, Austinian performatives. When by the power of social agreement a state appears and the person of the sovereign is appointed, by the power of the sovereign's word the legal order appears from non-existence.

It seems that Hobbes would be likely to recognize the fact that sovereign orders do not take a logical value (sovereign orders cannot be false – he declares exclusively the "truth", he has its monopoly), they have only a creative function. (A descriptive function is revealed by the sentences included in the special affair registers – they describe facts which started existing due to the will of the sovereign[15]).

Calling some acts moral by the sovereign constitutes a legislative and creative act, the point of reference to be applied to evaluate future behavior

[14] T. Hobbes, *Lewiathan*, Oxford 1909, s. 41.

[15] Ibid., p. 211.

of the citizens. This operation is amazingly similar to the process of defining. Hobbes claims that this process is characterized by arbitrariness which also characterizes legislative acts of the sovereign. As long as a properly, although arbitrarily, formulated definition should not cause controversy or discussions, similarly the sovereign's legislative acts should not become the subject of a public dispute.[16] According to Hobbes, similarly to the way in which proper definitions give the beginning to understanding and building of the system of scientific knowledge, legislative acts (laws in which the sovereign proclaims what is good and legal and what is evil and illegal) constitute the foundation of the state and create a new social reality.

Just as Austin, Hobbes describes the conditions of the efficiency of the performative utterances noticing that, for instance, to be obligatory, the state legislation has to be proclaimed. *From this, that the law is a Command, and a Command consisteth in declaration, or manifestation of the will of him that commandeth, by voyce, writing, or some other sufficient argument of the same, we may understand, that the Command of the Common-wealth, is Law onely to those, that have means to take notice of it.*[17] In this manner, an individual who has been deprived of the ability to become acquainted with a given order of the sovereign for some reasons beyond his control is justified; what is more, this law is not the law for him. An order-performative which is to create a new reality is inefficient and unsuccessful as related to him.

Hobbes also analyzes the utterances which are legislative acts of individual significance. For example, he highlights that in some circumstances a legal act is performed by the mere power of word *I give*.[18] The philosopher observes the difference between the usage of this verb in the Future Tense *I will give* and its usage in the Past or Present Tenses: *I gave* or *I give*: *Words alone, if they be of the time to come, and contain a bare promise, are an insufficient sign of a Free-gift and therefore not obligatory* (...) *But if the words be of the time Present or Past, then is my to morrows Right given away to day; and that by the virtue of the words, though there were no other argument of my will.*[19]

In XX Century the theorists of law became aware of the fact that the utterances of the language constitute the essence of the phenomena analyzed and described by them. Legal norms are expressed by the language.

[16] Ibid., p. 136.
[17] Ibid., p. 208.
[18] Ibid., p. 103.
[19] Ibid.

Therefore, the research of any essential problems of the theory of law has to be preceded by the analysis of the phenomena of the language of law. Anticipation of J. L. Austin's concept in the works of T. Hobbes shows that immanent relations between law and language were perceived a long time ago, in the seventeenth century, the epoch when relationships between certain scientific disciplines were constantly searched for.

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GENERAL CLAUSES IN THE PROCESS OF LAW APPLICATION. CHOSEN ASPECTS

Referral clauses in the Polish legal system have been frequently discussed. It is enough to mention the literary output of L. Leszczyński, the author of two monographs entitled *Tworzenie generalnych klauzul odsyłających*[1] and *Stosowanie generalnych klauzul odsyłających*[2] and many publications devoted to the topic. Due to this fact the considerations presented in this paper aim at neither verification nor duplication of the observations done by the above-mentioned author. Instead, the article aims at showing certain features of the general clause as a certain type of the referral clauses in the context of its role to express the axiology of the modern state under the rule of law. These considerations are going to be extended by a few recommendations with a special regard to general clauses which arguments should be taken into consideration by the adjudication organ in the process of law application.

H. L. A. Hart has noted that the language of law, being a natural language, is characterized by its lack of sharpness. He calls that feature "open texture". Hart motivates that by the illustration that relative lack of knowledge of the facts as well as relative under-qualification of aims makes explicit qualification of legal consequences impossible. He also highlights that open texture and the use of general concepts enable a legislator and the organ of law application to adopt legal regulations to actual needs. Therefore, it clearly reveals that at the level of the language of law the appearance of under-defined concepts is not an extraordinary phenomenon. What is more, doubts at to the interpretation of the concept may appear not only on its

[1] L. Leszczyński, *Tworzenie generalnych klauzul odsyłających*, Lublin 2000.

[2] L. Leszczyński, *Stosowanie generalnych klauzul odsyłających*, Kraków 2001.

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ground[3] for, as M. Zirk-Sadowski has noted, "a new situation may potentially appear even for the well-defined concepts so that their application in that new situation should be decided upon".[4]

On the ground of the issue of referral clauses the legislator's usage of under-defined concepts may somehow take place in three dimensions: in the form of the reference to the customary norms, to the estimated valuation or to the systematic valuation (the so-called general clauses).[5] The direction accepted for the article's considerations excludes referral clauses to customary norms since the norms presented there fail to be axiologically justified.[6] The subject under consideration will not include the so-called comparative terms (evaluation). Comparative terms (evaluation) are, for example, strong reasons, appropriate benefits or striking loss. Although their understanding depends on the valuation (estimation, to be more precise) and requires the application of a differential method which relies on the comparison of the factual state with the desired one. The evaluation arrived at in this manner deals with only the case under consideration in the way that it is impossible to talk about the existence of strong reasons as such, or appropriate benefits in general, *in abstracto*. What is more, the evaluation is not of the principle type restricted to approval or disapproval for some state of things,[7] rather this is a statement as to reach some degree, weight or quantity through that state of things. In this manner judgments about the existence of "striking loss" on the side of the loser are based on or the existence of "complete and durable failure" between a married couple who are seeking a divorce. In this sense, the interpretation of the estimated phrase is not linked to evaluation but to estimation. In a different manner than in the case of general clauses, the legislator does not point to the rules and principles which should be applied to measure the level of "striking loss" or "strong reasons".[8] Many works show the differences between general clauses and estimation phrases. To differentiate between the concepts of general clauses and estimation phrases, S. Grzybowski points out technical and legislative background for the creation of the concept (in cases of the so-called estimation phrases) as

[3] H. L. A. Hart, *Pojęcie prawa*, Warszawa 1998, p. 174.

[4] M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, p. 195.

[5] For more information see L. Leszczyński, *Stosowanie generalnych...*, p. 23 and following.

[6] For more information see L. Leszczyński, *Stosowanie generalnych...*, p. 24.

[7] M. Zieliński, Z. Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie*, Warszawa 1988, p. 43.

[8] L. Leszczyński, *Pojęcie klauzuli generalnej*, Ann. UMCS 1991, nr XXXVIII, p. 162.

well as political and legislative motivation of the legislator addressing in the legal text the regulations appropriate in the general clauses.[9]

Bearing in mind the above-mentioned reasons, the subject under consideration should be limited to general clauses while discussing the axiology of the modern state under the rule of law. Before a detailed analysis of the concepts with a special regard to the construction of general clauses, in the introduction it is necessary to make a reservation as to the two ways in which the construction of general clauses is understood: one is a theoretical and legal way and another is a normative way. Considering these two ways of dealing with the definition of the institution under consideration, it will allow to introduce some order in the discussion how to define general clauses. If the restriction regarding the author's approach towards the construction is not made, the reader may be left with the impression that the discussion about general clauses is chaotic. In reality, this is not like this for any time a different author emphasizes a different feature of the general clause, it does not usually result from their discovery but this is a result of the direction given to the author's considerations, determining the necessity to emphasize this particular construction of the general clauses.

Many approaches and dimensions of the consideration of the definition of "general clauses" are revealed by the collective study of the theory of law. Some researchers define by this term any use of the expression generating a freedom of decision in a the text of the legal act. Others claim that any situation where legal regulations establish the necessity to give evaluation to fix the content of the concept should be treated as general clauses. Yet, other researchers define a general clause as the expression of language which refers to a certain system of evaluation which is beyond the scope of law.[10] The position of Z. Ziembiński and the opposing positions of A. Stelmachowski and L. Leszczyński are the most representative positions among these concepts. Z. Ziembiński[11] is a supporter of defining a general clause in the functional dimension which has been the most broadly discussed definition of the term under consideration. In his opinion, a general clause, resulting from the text of the legal act, is any basis for the application of the decisive margin by the organ applying law.

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[9] S. Grzybowski, *System prawa cywilnego. Vol I Część ogólna*, ed. W. Czachórski, Wrocław, Warszawa, Kraków, Gdańsk, pp. 114–115.

[10] For more information on the subject see L. Leszczyńskiego, *Pojęcie klauzuli...*, p. 158.

[11] Z. Ziembiński, *Stan dyskusji nad problematyką klauzul generalnych*, PiP 1989, nr 3, p. 17; Z. Ziembiński, *Etyczne problemy prawoznawstwa*, Ossolineum 1972, p. 160 and following.

This concept envelopes any situation where a legislator acknowledges referring to the aspects beyond the scope of law to be significant and necessary. At the same time, the concept of general clause includes expressions which refer to the system of rules beyond the scope of law and rely on the evaluation. It also includes the expressions which do not reveal such a direction but, because they reveal the features of an under-defined expression, they need to be referred to with the criteria beyond the scope of law to decide upon the content of the concept (such as, for example, "striking loss", "strong reasons"). In this group the author places the so-called evaluation expressions (estimation). Bearing in mind the risk of general clause being washed away and their boundaries being erased when broadly defined, Z. Ziembiński sees a greater risk in the intuitive defining of the general clause as the expressions addressing to the evaluation characteristic for the classic approach to general clauses. The author points out a chaotic use of the concept "evaluation" highlighting that the apparently clear definition according to the classic approach becomes as imprecise as a functional capturing of the general clause by a free use of the concept "evaluation". A. Stelmachowski captures clause in a significantly narrower way and marks that this is a "a regulation of the positive law which, aiming at giving elasticity to the law application, contains addressing to the system of norms beyond the limits of law",[12] leaving out the scope of the term of the so-called estimation expressions. Therefore, a general clause is not only applying an under-defined concept but also referring to the collection of regulations beyond the scope of law acknowledged by the legislator to be right, which demand evaluation, the features which are not revealed by comparative (estimation) expressions.

Some chaos of defining appears from the state of the above-mentioned considerations. While discussing the definition of general clause and to make this part of the article precise, it is necessary to mention two dimensions of capturing the definition of general clause – theoretical and legal and normative – described earlier in this paper.

The first dimension, which could be called theoretical and legal, captures a general clause in a technical way, in other words, it points to its structural elements. In this sense a general clause is an editorial unit of a legal act or a legal regulation or its extract comprising the reference to the norms and values which are beyond the scope of the text and whose ba-

[12] A. Stelmachowski, *Znaczenie klauzuli generalnej zawartej w art. 386 k.c. w obrocie uspołecznionym*, PUG 1968, nr 6, p. 185.

sic constructive element is expressed by the under-defined expression. This theoretical and legal way seems to be the way to capture the majority of definitions of general clause in which expressions are defined in the literature devoted to the issue of general clauses. Here it is necessary to make a reservation that making a division and choosing the two dimensions of understanding general clauses are not enough to illustrate and, above all, to solve the actual legal problems connected with the character of general clauses in the theory of law. Within the theoretical and legal formulation some questions remain troublesome. These are, among others, issues connected with the fact whether a legal regulation comprising a reference to the norms which are beyond the scope of the law (e.g. a general clause in its narrow formulation) should be called general clauses or whether the only imprecise expression in the text of the legal act with a reference to the norms beyond the scope of the law should be called general clauses (the so-called clause in a narrower formulation).[13] To show this doubt in the framework of this paper in the description of the theoretical and legal formulation of general clauses a statement is used that a clause is "a legal regulation or its extract". Z. Ziembiński argues that neither the first attempt nor the second one is correct. He explains it by the fact that the most precise point would be that a certain legal regulation reveals a general clause, the use of the expression (term) "social coexistence" or "social and economic purposes" alone does not make a general clause for the relations of the reference to these values are given only by the legal regulation within which they are expressed.[14] In a similar way the incorrect defining of the conception of general clause shows that this is a legal regulation for not every legal regulation is a clause; only the use of the under-defined expression in the text of the legal act allows for defining a given technical unit as a general clause. In different publications there is a widely held view that a general clause is the very under-defined expression in the regulation, rather than the very regulation revealing the expression.[15]

Basing on the considerations regarding the axiology of the modern state under the rule of law adopted in this paper, the second dimension of the discussion about the the definition of the concept of general clause defined as normative will be more useful. In accordance with the normative for-

[13] J. Czarzasty, *Przyczynek do problematyki klauzul generalnych*, PiP 1978, nr 5, p. 84.

[14] Z. Ziembiński, *Stan dyskusji...*, PiP 1989, nr 3, p. 16.

[15] Z. Radwański, M. Zieliński [in:] *System Prawa Prywatnego. Prawo cywilne – część ogólna. Vol. 1*, Warszawa 2007, p. 332.

mulation, a general clause is a normative construction,[16] the order of the legislator directed to the organ applying the law in the process of legal reconstruction of the legal norm including a general clause to refer to the criteria beyond the scope of the text or, in other words, unexpressed in the text of the legal act. The aim of that procedure is to establish the range of application or the scope of usage of the legal norm and its consequent application.[17] Depending on the circumstances of a given case, there may appear a situation when the criterion beyond the cope of text may become the only source of the reconstruction of the decision which, in this case, has only its axiological basis. However, usually a decision is taken on the basis of legal criteria. During the reconstruction of the basis of the legal decision, the organ of law application, apart from the criteria beyond the scope of text, also considers textual criteria or, in other words, obligatory legal regulations.[18] In this formulation a general clause enables the organ of law application to consider the criteria beyond the scope of the text in the process of taking a decision. This formulation of general clause results in pointing the addresses of the legal norms the necessity of taking into consideration those criteria while their performance for they will also be taken into consideration while taking a decision regarding the legal situation of the legal norms' addresses.

It is necessary to highlight here that law application with the use of general clause is not an extraordinary process which requires principles different from those which govern the processes of law application without the use of general clauses. The only characteristic feature is that the interpretation of general clause requires evaluation in the degree bigger than that employed to interpret other words revealed by legal regulations. Basically, these axilogical complexities observed in the process of law application with the use of general clause constitute the biggest difficulty for both the law appliers and researchers of this phenomenon. For the sake of the considerations adopted in this paper, the issue of the creation of general clauses and their application mainly in the context of the article 2 of the Constitution of RP, as well as the subject of further reference and the way of deciding upon criteria seem to be the element of the discussion about general clauses which deserve a special consideration.

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[16] L. Leszczyński, *Stosowanie...*, p. 22.

[17] See also Z. Radwański, M. Zieliński, *Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym*, „Przegląd Legislacyjny" 2001, nr 2, p. 11 and following.

[18] For more information see L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001, p. 328 and following.

It is assumed that general clauses refer to moral, political and economic norms.[19] It is necessary to add that these norms are obligatory in a given area, acknowledged and respected in the society which have an axiological basis. This observation is significant because it is possible to talk about general clause only when in the text of the legal act there is a reference "to" something or, in other words, to the collection principles and values and not in every case of the interpretation margin. In this sense, it is claimed that on the ground of general clauses one deals with a direction reference.[20] Basically, it has no significance whether the reference is directed to the system of norms (for example, moral norms) or to broadly understood values which have been not classified in any system so far. At this point one may ask whether "the exegesis of the legal texts of a general character is in any way the construction of the system"?[21] Is it true that thanks to general clauses the legislator leaves the organs of law application with the possibility of giving an unlimited evaluation and the adjudgement basing on the criteria which are not expressed in the legal act, making it unexpected, optional and frequently non-verified?

In the first place it is necessary to refer to the issue whether the subject of the reference of the general clause are collections of norms beyond the system or only beyond the text. It is significant from the point of view of the above-mentioned freedom of the law application adjudging on the basis of the norm reconstructed with the use of legal regulations with general clauses. Many authors seem to neglect this problem. They employ interchangeable adjectives "extra-systematic" and "extra-textual". Although others consequently point out that a clause is an extra-textual reference, they do not comment on the definition of the system and the definition of what is "systematic" or, in other words, what is an element of the system, and which is "extra-systematic" or, in other words, beyond the element of the system. Paying no attention to the debate between positivists and non-positivists and giving no support to any of the trends, it is necessary to state that, to be able to define whether the criteria of the reference are "extra-systematic", first, it is necessary to identify the elements of that system. To decide whether something remains beyond the limits, it is necessary to mark the limits. Certainly, a Classic positivist will argue that the position of the limit

[19] For more information see L. Leszczyński, *Tworzenie generalnych...*, p. 30 and following.

[20] A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe*, Warszawa 2006, p. 40.

[21] R. Stefanicki, *Dobre obyczaje w prawie polskim*, PPH 2002, nr 5, p. 23.

is obvious and the elements of the system are only those norms which are comprised (expressed) in the official legal texts.[22] However, it can easily be observed that the law structures have been eased which results in the observation of the evolution of legal systems from the closed systems (absolute systems) to the open and indefinite systems (*prima facie systems*).[23]

A positivist ideal of law in this context seems to be deceptive. Taking a step further, since the legal system is open and indefinite, it means that the law does not make a system; it becomes a system with an active participation of lawyers. Therefore, a system is not given once for all, declared the absolute truth, but it constitutes the area of law created by the community of lawyers. An argument from the system in the law is, therefore, a tool on the basis of which one may formulate almost any commentator-friendly thesis[24]. As it has been rightly noted by M. Błachut, J. Kaczor, P. Kaczmarek and A. Sulikowski, in this manner one may try to explain to the person eaten by a cannibal that the fact that he is being eaten in accordance with the art of cooking and with the use of cutlery makes his situation completely different.[25] Equipped with the awareness of the point that an argument of the system of law is deceptive, the statement that general clauses refer to certain "extra-textual" values or, in other words, not expressed in the legal act, has been consequently accepted within the framework of this paper.

Therefore, it proves that the observations of those who state that the law application organ with the use of general clauses exceed the law itself are incorrect and premature. On the contrary, if one assumes that the system of law is not something which is given one for all and does not have a closed structure, the statement that the values expressed with the help of general clauses are extra-systematic becomes unjustified. It allows to assume that the law application organ does not exceed the system structure and still is connected with its elements as in case when the law is applied with no general clauses. Being obliged to respect other elements of the law system, the organ of law application as well as the legislator are subjected in their sentences to the norms revealed by the Constitution. While considering general clauses, a basic regulation which should be referred to while

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[22] For more information see L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2003, p. 305 and following.

[23] For more information see L. Morawski, *Główne problemy...*, p. 197 and following.

[24] The statement is cited after M. Błachut, J. Kaczor, P. Kaczmarek, A. Sulikowski, *Systemowość...*, p. 106, while the interpretation of the statement of J. Boyle is included in J. Boyle, *The politics of reason, Critical Legal Theory and local social thought*, University of Pensylvania Law Review (1985), www.law.duke.edu/boylesite/politics.htm.

[25] Ibid., p. 107.

creating and applying the law with the use of general clauses is the art. 2 of the Constitution which states that the Republic of Poland is a democratic state under the rule of law which practises the principles of social justice. It is controversial whether the above-mentioned art. 2 of the Constitution expresses the principle of a state under the rule of law or it is a general clause of the democratic state or perhaps, as S. Wronkowska argues, it is a reference of a different type.[26] Without going into details, the author supports the terminology used by the Constitutional Court. It is observed that the Constitutional Court is abandoning a directive formulation of the principle of the state under the rule of law and seems to be linked to the construction of general clauses.[27] The acceptation that the art. 2 of the Constitution reveals a general clause of the democratic state under the rule of law poses an actual question: in which way is a general clause of the democratic state under the rule of law, being general, to serve "to direct the interpretation and application of detailed regulations",[28] including regulations with general clauses, since the very art. 2 is such a clause?

Apparently, in this situation one has to deal with the so-called vicious circle or, in other words, return to the zero point. This statement cannot be agreed with. A clause of the democratic state under the rule of law is a clause of the second degree, the so-called meta-clause, also called a "characteristic general clause" by some researchers.[29] This extraordinary character is made by a specific range and types of reference, adjudging practice of the Constitutional Court as well as the location of the art. 2 in the system of the Constitution. The qualification of the clause of the democratic state under the rule of law as a general clause does not mean that its understanding can be optional. The direction of such an interpretation is marked by the collection of the Constitution regulations, the output of the European democratic constitutionalism, as well as the so-called "hard basis" of the concept of the state under the rule of law which emerged as a result of balancing of the two values: individual and autonomic dignity and the social agreement constituting the relations between the individuals characterized in that manner

[26] S. Wronkowska, *Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej)*, [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warszawa 2006, p. 104.

[27] For more information see E. Morawska, *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*, Toruń 2003, passim.

[28] Cytat za E. Morawska, *Klauzula...*, p. 341.

[29] M. Kordela, *Zasady państwa prawnego w wystąpieniach Rzecznika Praw Obywatelskich*, [in:] *Polskie dyskusje o państwie prawa*, ed. S. Wronkowska, Warszawa 1995, p. 118.

and public authority.[30] The above mentioned elements constitute the content minimum of the concept of the state under the rule of law. Discussed in this way, the clause of the democratic state under the rule of law can be acknowledged to be an open construction but not indefinite on for its is necessary to consider that, although generality allows for the obtaining of its new meaning, the substance attributed to it is connected with other constitutional principles which give it a substance or concretisize it. For this reason in the opinion of the Constitutional Court a clause of the democratic state under the rule of law should be reached on the scale of only those regulations and values which are not reflected in more detailed regulations of the Constitution; in case of lack of such a regulation, the clause under consideration should be the point of reference while the constitutionality control.[31]

Apart from a description function, the art. 2 of the Constitution also creates a certain model which is the basis of educing derivative principles. Hitherto the following principles have resulted form the jurisdiction of the Constitutional Court: a principle of protection of confidence in the state and its law, *lex retro non agit* principle, the obligation to preserve appropriate *vacatio legis*, the obligation to respect the so-called interests in the progress, a ban on the introduction of changes into the tax law before a fiscal year finishes, a principle of the protection of the rights rightly obtained, and the order of definiteness of legal regulations.[32] Bearing in mind the fact that the art. 2 of the Constitution presents a directive addressed to the legislation organ but also a directive addressed to the law application organ, the principle of protection of confidence in the state and its law as well the the order of definiteness of legal regulations deserve a special attention while discussing the issue of general clauses. The order of definiteness of legal regulations results from the principles of the certainty of law and protection of the citizens' confidence in the state. It is a directive ordering the legislation organs to edit legal regulations in such a manner so that they are correct, clear and precise. Because they refer to the extra-textual values, general clauses are often deprived of the latter feature which is precision. The Constitutional Court has had a great impact on solving this matter and

[30] W. Sokolewicz, *Komentarz do art. 2*, [in:] *Konstytucja RP. Komentarz, Vol. V*, Warszawa 2007, p. 9.

[31] The decision of the Constitutional Court of June 2, 1999, K 34/98, OTK ZU nr 5(27)/1999, p. 482; E. Morawska, *Klauzula...*, p. 341 and following.

[32] E. Morawska, *Klauzula...*, passim.

possible doubts[33] indicating that **the order of sufficient definiteness of law does not mean that the legislator should indicate the designation of the notions each time they are used**. The Constitutional Court has frequently showed that the legislator's use of under-defined expressions or evaluation does not violate the principle of editing the text of the legal act inasmuch as:[34]

- there exist objective criteria to qualify the circumstances which are referred to the expression;
- organs of law application as well as the addressee of legal norms who are under the application of a given norm may foresee the direction of the decision in the case; in this sense, they have a possibility to qualify one's behavior as being (or not being) in accordance with the subject of reference expressed by the general clause;[35]
- the use of the under-defined expressions in the process of law application cannot lead towards giving a law-creative role to the courts.

The statement of non-constitutionality of the regulation revealing a general clause may take place only when the expression is to be interpreted in the way which is not in compliance with the Constitution or when a shaped line of jurisdiction gives a clause a non-constitutional meaning.[36]

A second significant principle taken from the art. 2 of the Constitution is the principle of protection of confidence in the state. This principle results in the directive aimed at the legislative organs and organs of law application which regulates the creation and application of law "so that it does not become a characteristic trap for a citizen and so that a citizen may arrange his affairs in confidence that he will not face legal consequences which he was unable to predict at the moment of taking his decision and actions".[37] Additionally, the Constitutional Court has highlighted that the principle of protection of confidence in the state and its law remains current also in the process of law application for the content of the law is established by citizens

[33] The decision of the Constitutional Court of October 9, 2007, sign. SK 70/06, OTK ZU nr 9/A/2007, point 103; The decision of the Constitutional Court of July 8, 2008, sign. P 36/07, OTK-A 2008/6/103, Journal of Laws of RP 2008/123/804.

[34] The decision of the Constitutional Court of November 22, 2005., sign. SK 8/05, OTK-A 2005/10/117.

[35] The decision of the Constitutional Court of October 17, 2000, sign. SK 5/99, OTK 2000/7/254.

[36] The decision of the Constitutional Court of July 8, 2008, sign. P 36/07, OTK-A 2008/6/103, Journal of Laws RP 2008/123/804.

[37] Cyt. za E. Morawską, *Klauzula...*, s. 347.

mainly due to the practice of law application.[38] Referring the content of the above-mentioned principle to the problems of law application with the use of general clauses, it is necessary to take notice that the very application of them by the law application organ does not mean that a citizen cannot foresee legal effects of his enterprise because of the use of the under-defined expression in the legal act. On the ground of the private law, where general clauses are frequently found, a successful performance of legal acts should be accompanied by an appropriate doze of legal awareness reduced to the knowledge of legal regulations among which those revealing general clauses remain. This knowledge is logically primary over the performance itself.[39] Therefore, inasmuch as a citizen is equipped with a minimum of knowledge of the regulations of how to perform legally, he can and should foresee the consequences of his performance (on condition that the legislator has not abused the limits of decent legislation).

From the points mentioned above it appears that a clause of the democratic state under the rule of law may be understood also as a directive addressed to the organs of legislation and law application which orders to legislate and apply law with the respect of the content of the clause. Because of the incorporated values as well as the possession of the attribute of meta-clause, it constitutes a "safety valve" marking the boundary of the interpretation of general clauses.

The above-mentioned observations allow for making two points regarding the situation of the organ of law application with the use of general clauses. The argument of the system has appeared to be deceptive. Consequently, it has been adopted that on the ground of the institution of general clauses one should not talk about extra-systematic reference. Only extra-textual reference should be discussed. The law application organ does not take decisions on the basis of any extra-systematic rules. The second argument influencing the situation of the law application organ with the use of general clauses results from the clause of the democratic state under the rule of law revealed by the art. 2 of the Constitution which comprises the order to consider the essence and axiology of the legal state in the process of law application.[40] The content of the clause also closes the possibilities of the interpretation by the jurisdiction organ so that no application of the

[38] The decision of the Constitutional Court of December 21, 1999, sign. K 22/99, OTK ZU nr 7(29)/1999, p. 905.

[39] A. Bator, *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, Warszawa 2006, p. 282.

[40] The decision of the Constitutional Court of November 25, 1997, sign. K. 26/97, OTK ZU nr 5–6 (14–15)/1997, p. 445.

referral criterion which is not in compliance with the axiology of the state under the rule of law is possible.

Further considerations will be taken to arrive at the answers what gives the limits to the jurisdiction organ judging on the basis of legal regulations revealing general clauses and also what practical aspects of inducing the evaluation as based on the extra-textual reference are.

The first limit seems to be the jurisdiction of the Highest Court and lower courts. Although nowadays such jurisdiction does not have a binding power and precedents are not the source of law in Poland, from 1949 to 1989 the commentary done by the Highest Court had a binding power which was called the guidelines of the Highest Court in the range of the legal instructions and application of law (before 1986 it was the guidelines of the administration of justice and judiciary practice). The guidelines of the Highest Court were to standardize the jurisdiction of all courts in their interpretation and application of law. Because all courts were tied by those guidelines, they were obliged to judge in accordance with the direction and interpretation offered by them. Nowadays the Highest Court does not have the competence to offer binding guidelines. Nevertheless, it would be fiction to state that apart from the lack of the *stare deisis* rule, the jurisdiction of courts, especially the Highest Court, does not affect the process of law application. On the contrary, appeals to other courts' decisions are common in the Polish process of law application even though it is done in a "soft" way or, in other words, the decision is not directly based on the past jurisdiction of another court but on the general line of jurisdiction.[41] In this way the law application organ does not base its decision on the jurisdiction in another case but on the legal norm reconstructed from the legal regulations whose understanding and guidelines have been established on the basis of the argumentation comprised by the shaped jurisdiction line. It leads towards the conclusion that on the ground of the Polish jurisdiction the so-called non-law-creative precedents oblige.[42] Therefore, the jurisdiction of other courts, especially the Highest Court, significantly influences the establishment of the content of the criteria of the reference by the law application organs.

Discussing the arguments due to which the law application organs establish the meaning of the reference on the ground of the case under consideration, additionally, it is necessary to indicate the subject of regulation

[41] L. Leszczyński, *Stosowanie generalnych...*, p. 202.

[42] L. Leszczyński, *Zagadnienia teorii...*, p. 303.

to which that clause is devoted. A model example of the establishment of the content of the general clause in the process of law application is the argumentation given by the Constitutional Court in the decision of November 22, 2005[43] and presented in the part devoted to the evaluation of the agreement of conditioning of the way of removal of the co-ownership from the social and economic purpose of the thing (the art. 211 of the Civil Law) with the standards of the democratic state under the rule of law. The Court in its justification pointed to the subject of the clause reference and stated that a social and economic purpose of the thing as the limitation of the possibility to physically divide the thing is a very accurate criterion which does not allow for any interpretative margin for the members of jurisdiction. The reference of the clause of social and economic purpose to the thing results in the evaluation which is objective and easy to foresee. A lack of the perspective to cooperate to keep a part of the mutually possessed thing or a degree of conflict and a growing hostility between the two owners (as it was in the case commented by the Constitutional Court) can be measured objectively and results in the clause of "social and economic purpose" with its reference to the thing; it cannot be recognized to be abused in terms of interpretation. Such evaluation of the regulation cannot constitute the basis of formulating an objection to the legislator regarding the precision of editing the text of the legal act since a great deal of the correct understanding of the meaning of the clause depends on the part of the law application organ which is obliged to conduct a logical analysis to be able to justify the choice of the evaluation.

A life-long experience is a necessary tool which allows the law application organ to decide upon the content of the reference and on the basis of which the evaluation is given. While editing the text of the legal act with a general clause, the legislator in the intentional way places the burden of deciding upon the content of the notion *ad casu* on the law application organ[44] or, in other words, every single case should be treated separately. The fact that the application of general clauses should be reserved exclusively to independent courts is a kind of "guarantee of procedural justice and legal governing".[45] Form the points mentioned above, one can conclude that the

[43] The decision of the Constitutional Court of November 22, 2005, sign. SK 8/05, OTK-A 2005/10/117.

[44] The decision of the Constitutional Court of July 8, 2008, sign. P 36/07, OTK-A 2008/6/103, Journal of Laws RP 2008/123/804.

[45] The decision of the Constitutional Court of May 8, 2006, sign. P 18/05, OTK-A 2006/5/53.

legislator assumes that the people applying law have a necessary life experience, an appropriate level of knowledge and abilities to think logically. These expectations go together with the nature of the profession and are indispensable elements of the general education of the judges. Confidence in the reliability of these expectations constitutes the basis for constructing a range of institutions, especially of the formal law. Such assumptions are revealed by the freedom of evidence evaluation present in the process law. If the legislator had doubts about the above-mentioned predispositions of the people who make jurisdiction as well as about the reliability of the administrative control, it would be necessary to return to the binding evaluation of evidence as well as establish a net of legal definitions and re-edit the content of legal acts so that they were free from general clauses and under-defined expressions and so that every case could be directed to a legal norm. Even if that way was accepted, courts would frequently have to deal with cases which would be impossible to be qualified as a case regulated by the law and the law application organ would not be able to refuse giving a decision.

In such a situation the reference to some extralegal values would be necessary which would be reflected in legal principles or general clauses.

From the point of view of the law application process, it is also necessary to state in which way the evaluation of the agreement of a given case with the collection of the regulations to be referred to is done. Is it a kind of evaluation objectified by the society or perhaps the evaluation is established by the judge who is overburdened by his own vision as to what is moral, correct or not? In other words, will it be a subjective evaluation or an objective one, deprived of the circumstances of the given case? Due to the existence of individual views of the people who make the judiciary group, it is often highlighted that general clauses create the risk of erasing the boundary between objective and subjective evaluation and the result of the law application process in this situation may depend on the individual beliefs of the group. The author of this paper argues that these doubts are not well-grounded.

This is not about the ethos of ideal judges and idealizing the jurisdiction organ (although it is necessary to highlight that they are people who are free from the influence of external subjective beliefs and weaknesses). The point is to identify a specific of having the occupation of the judge which is based on objectivity. Secondly, it is necessary to observe that the administration control (and further extra means of prosecution) is to verify the evaluation of decisions. Thirdly, the way of evaluation circumstances of the case promotes the control of the decisions taken by the jurisdiction organs. Frequently many publications point out that the decision taken in the law

application process cannot exclusively be the result of individual views of the law application organ. On the other hand, their statement cannot be general enough to be only the proclamation and repetition of the general clause of the regulation. A complete objectivity of the evaluation contradicts the very essence of general clauses.[46] It should be "a characteristic resultant of the preferences of the model law-applying subject".[47] Basing on the above-mentioned point, it is assumed that general clauses do not reveal full powers of confidentiality.[48]

Attention should also be paid to the fact that the court's declaration regarding the agreement of some behavior with the references revealed by the clause demands their experiencing and feeling of certain phenomena connected with the case under consideration.[49] Therefore, it is not possible to formulate a judgment abstractly or with no reference to the situation under evaluation for the declaration of the judgment relies on some previous experience, which is only possible *ad casu*. It is also necessary to highlight that the evaluation of the behavior presented by the legal norm's addressee applies to every individual case and cannot lead towards the generalization of certain judgments. Every factual state exists and is created in different circumstances. Therefore, when discussing general clauses, one cannot in advance state that the principle of legal equality has been violated since this violation can only be stated when in the same conditions legal subjects cannot enjoy equal rights. The above-made reservation that general clauses concern every single case and are dependent on the existence of particular circumstances of the case[50] allows to claim that the application of the evaluation deduced on the basis of the general clause cannot lead towards the deprivation or concession of the entity law in a definite way. A refusal to admit the justness of the judgment which is formally correct but not fair is dictated exclusively by the circumstances of the case under consideration and in case of some changes may lead towards a different judgment. The application of the general clause in this case does not lead towards the deprivation of power of the existing regulation. It leads only to non-application in this case due to the circumstances which have implied the establishment

[46] M. Safjan, *Klauzule generalne w prawie cywilnym. Przyczynek do dyskusji*, PiP 1990, nr 11, p. 54.

[47] L. Leszczyński, *Optymalizacyjny...*, p. 2.

[48] B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne*, Toruń 2004, p. 76.

[49] L. Leszczyński, *Pojęcie...*, p. 161.

[50] B. Wojciechowski, *Dyskrecjonalność sędziowska...*, p. 74.

of such a preference evaluation whose values are refereed to by the general clause.[51]

There is no fear that the law application organs use general clauses to "get clear of" the necessity to give judgment in difficult cases and in this way to fix a desired content for this special case protecting themselves by the content of the general clause. One should notice that the application of general clauses does not relieve anybody from the obligation to employ legal thinking. What is more, it does not change the regularities governing this process. As L. Leszczyński has noticed, the application of general clause cannot lead to the resignation from the linguistic interpretation. The interpretation of the law conducted with the use of general clauses should take place simultaneously to the linguistic and extralinguistic arguments.[52] First, such a process demands establishing the entity law that the side is entitled to. Then, there should be the establishment of the principle which has been violated by the application of this law and its naming. Next, there should be the establishment of the evaluation of the agreement of the behavior of the side with the principle applied. Finally, there should take place the declaration of the judgment (corrected or not) on the ground of the evaluation established.[53]

It is necessary to highlight the deceptiveness of placing a bigger meaning on the verbal dimension of general clauses. One has to remember that the legislator editing the text of the legal act with a general clause has meant to refer to something that is not significant. Thus, how can anything be written down that remains unwritten? L. Leszczyński has successfully captured this aspect of the under-defined notion claiming that the search for the designations of the under-defined expressions by referring to facts or empiricism demands the reference to the reality, to the phenomena that are observed in the external world. On the other hand, the search for the designations of names that are under-defined expressions giving evaluation (general clauses are among this group) takes a different way. The establishment of such designations takes place by the so-called "acting" or, in other words, a previous experience of the phenomenon.

The above-made considerations result in the conclusion that conducting a thinking processes in an accurate way and its consequent justification

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[51] The decision of the Highest Court of June 20, 2008, sign. IV CNP 12/08, LEX nr 461749.

[52] L. Leszczyński, *Optymalizacyjny...*, p. 8.

[53] The decision of the Highest Court of May 7, 2003, sign. IV CKN 120/01, LEX nr 141394; the decision of the Appeal Court in Katowice of March 4, 2003, sign. II AKa 33/03, 2003/10/29.

make a very significant element of the law application process. The law application process should base its judgment on the argumentation making reference to a particular rule or regulation on the basis of which the decision has been taken. What is more, the evaluation of the circumstances, which has been drawn due to the application of general clause so that the addressee of the legal norm could evaluate which values have been primary in the judgment and which ones the jurisdiction has emphasized, has to be made public. Such edition of the justification promotes the publicity of decisions and enables the addressees of the legal norms to foresee the decision – the feature which has been emphasized by the Constitutional Court while commenting on the accuracy of editing of the texts of the legal acts with the use of the under-defined expressions. Furthermore, it is essential to remember that the clause is not the aim in itself; it remains only the means allowing for the certainty of making use of the extra-textual virtues in relation to which the behavior of the legal norm addressees has to be judged. Therefore, there is a clear need to get rid of the conviction that the application of the general clause is the legislator's mistake, omission or weakness. This is an intentional action of the legislator who, being at the point of editing of the legal act text, should foresee the future consequences of its application on the ground of individual decisions. The motivation of such a practice may be different starting from the lack of possibility to foresee all possible cases, the will to generalize regulations and a consequent avoidance of its casuistic formulation and finishing with the intentional granting of complete freedom on the law application organs regarding the adaptation of a legal regulation to the changing reality. By the application of such a construction, the legislator clearly defines the scope in which the law application organ should use the clause. In this manner the art. 211 of the Civil Code,[54] which tackles the subject of "social and economic purpose of the thing", deals with not every social and economic purpose of anything but only social and economic purpose of the thing which constitutes the subject in possession. Secondly, the legislator does not refer to any evaluation, to something which "is just in my opinion" but to the principles which are commonly established and accepted.

Apparently, a negative attitude towards general clauses mainly results from the past experiences of the former system with a common distrust in the institutions leaving the law application organs with some decisive margin and institutions based on the under-defined expressions. General

[54] The Law dated 23 April, 1964 – Civil Code, Journal of Laws Nr 16, item 93, later changes introduced.

clauses frequently revealed a political dimension; in the democratic state their aim was to elasticize the process of law application and ensured the possibility of correcting of the decisions formally unjust; in the totalitarian system they were a tool used by the obedient judges to subordinate political opponents of the system and destroy the acts of insubordination. Organs of law application, faced with the expectations of the system, were acting with the awareness that they could be deprived of the status on the basis of their failure to guarantee a proper execution of the occupation. The sign of these anxieties is also revealed by the blame formulated from the point of view of social living including the one concentrating on the literal implication of the name of that clause. These doubts have not been shattered by even the Constitutional Court which has stated that although historically the name of the general clause of the principle of social living is modeled on the Soviet example, the way of dealing with the evaluation with the use of the clause has been changed due to the change of the epoch.[55] Therefore, the name of the clause alone should be used to deduce its pejorative meaning or its deceptive role in the process of law application.

The application of general clause always demands giving evaluation. Many a time there appears a direct statement that general clauses' designations are some grades. It is already at the point of the initiation of legislative process the legislator, by giving a reference to the extralegal criteria, conducts the evaluation of some extralegal rules acknowledging them to be significant inasmuch as to make the criteria of the evaluation of certain types of behavior of the legal norms' addressees. The motion deduced in this manner demands a former legislator's establishment as to which extra-legal criteria remain in agreement with the axiology of the system and are significant enough to become the measure to refer the types of behavior of the legal subjects to. In the next step the law application organ decides which rule should be established as relevant on the ground of the case under consideration and then decide whether the element to be verified with the evaluation remains in agreement with it. Therefore, the evaluation alone does not prejudge the law that the addressee of the legal norm is entitled to or the justness of its execution. It is a legal regulation which demands the acknowledgment of some circumstances of the factual state to be relevant if they are (or not) in agreement with the regulation expressed by the legislator in the reference to the evaluation.

[55] The decision of the Constitutional Court of October 17, 2000, sign. SK 5/99, OTK 2000/7/254.

It was already Portalis who wrote: "Even the most complete Code is never finished and the judge faces thousands unexpected situations for the laws, being once edited, remain as they are written but people are never stuck in one place; they constantly act".[56] Therefore, the organ of law application faces a real challenge of having to deal with judging the case which has not been foreseen by the legislator. This can be exemplified by claims of the so-called *wrongful conception*[57] or claims which are the results of the agreements regarding substitute maternity with the so-called substitute mothers where in practice there is first the claim to judge the case frequently based on the regulations expressing the axiology of the modern legal system (including the regulations based on general clauses) and only after that the legislator starts successive regulations of such cases. It was in case of a growing number of substitute mothers whose task was to carry a baby of other people in their womb for nine months for a fixed payment. It resulted in the dispute which lady should be treated as the mother of the baby. It was only in the law of November 6, 2008 where the legislator stated that the woman who gives birth to the child is the mother of the child.[58]

Consequently, the legislator is always a step behind the advancing dynamics of the development of legal relations which can suddenly become the subject to be judged by the law application organs. In such a situation as well as in case when a formally correct decision could lead to materially unjust result, general clauses entitling the law application organ to consider the indication of justice referred to by the regulation are helpful. Undoubtedly, one cannot fail to observe that general clauses, when compared with some other concepts, remain expressions which allow the law application to use a wide range of interpretation. In this manner, extra-textual arguments are included in the process of law application. Nevertheless, one can notice that such a clause is part of the legal system and should be used together with its other elements. Additionally, as T. Zieliński has highlighted, in the evaluation of the institution under consideration the conditions in which the law (including general clauses) is practised and who is responsible for that enterprise matter.[59] In the system of respecting the indications of general clauses of the democratic state there is a smaller risk of degeneration of the

[56] Quoted after K. Sójka-Zielińska, *Zasada słuszności a założenia kodyfikacyjne w XIX w.*, PiP 1974, nr 2, p. 34.

[57] The regulation of the Highest Court of October 27, 1983, sign. III CZP 35/83, OSNCP 1984, nr 6, item 86.

[58] The law of November 6, 2008 regarding the change of the law – Family and Custody Code and other laws, Journal of Laws Nr 220, item 1431.

[59] T. Zieliński, *Klauzule generalne w prawie pracy*, Warszawa 1988, p. 281.

institutions with some margin of interpretation than in the system which does not respect such principles. That is why general clauses are often called a bridge between the use of the static and dynamic law; they are also called a necessary evil.[60] Perhaps the indication that general clauses are lesser evil would be the most appropriate indication. Indeed, there is nothing worse than a judgment which, although in agreement with the positive regulations, is nevertheless unjust, according to the principle *summum ius summa iniuria*.

[60] Ibid., p. 289

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 19 (32) 2009

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TRANSPARENCY AS VALUE AND PRINCIPLE OF THE PUBLIC AFFAIR MANAGEMENT IN A STATE UNDER THE RULE OF LAW VERSUS PUBLIC OFFICIALS' DUTY TO PRESENT FINANCIAL DECLARATIONS

Introductory remarks

In a legal dimension, values which are appreciated, desired and finally accepted and adopted in societies are usually translated into a more or less formalized set of general principles of either individual branches of law or common branches of the whole democratic system in a state under the rule of law. Nonetheless, as M. Sajfan notices, in a democratic state a sphere of public life is strongly determined not only by "a certain democratic standard conditioned by the legal system axiology – the basic principles of the obligatory law or a legal tradition and civilization, shaped by customs", but also by something which could be defined as "principles of decency and customs in a public life".[1]

Observations regarding the universalism of law and democratic values in the European administration area result from the review of the normative principles of the public administration in a state under the rule of law, present in the European as well as in the Polish legal order on the ground that these values as well as their reflections in the normative principles are mutual: legality, equality, proportionality, fairness, protection of legitimate trust and expectations, openess and transparency, etc.

In the Polish legal administrative scholarschip a series of general principle classifications has been introduced being a certain system of values for the public administration. Considering different criteria, they have given

[1] M. Safjan, *Wyzwania dla państwa prawa*, Warszawa 2007, p. 24.

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certain norms a fundamental character. In the doctrine of the administrative law the principles of the administration organization[2] and the principles of its functioning[3] have been emphasized. The principles of the administrative law and administration, the principles of the financial law[4] as well as the principles of the administrative procedure[5] have been pointed out. In the study of the administrative law there is a view according to which its principles are not the norms of the administrative law, having a character of "specific praxiologic directives".[6] There have been several attempts to work out a law regarding general regulations of the administrative law.[7] The last attempt took place in 2008 and resulted in the project prepared by the team appointed by the Ombudsman.[8]

In the European area a canon of the principles supporting the public administration in their strive to operate on the one hand, and to protect citizens' rights from an excessive interference of the public administration on the other hand, constitute the principles worked out by the Legal Co-operation of the Council of Europe (CDCJ) as well as the the Court of Justice of the European Union. These principles (distinguished by the Legal Co-operation of the Council of Europe as *substantive principles* and *procedural principles*,[9], and recognized by the Court of Justice of the EU generally as *principles*) are largely common for the majority of the orders of the contemporary democratic states although their realization as well as the degree of protection in the sphere of legal instruments of guaranty may be different in different countries. Essential principles, emphasized in the practice of the Court of Justice, are as follows: rule of law (legality) of

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[2] See also J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990.

[3] See also J. Filipek, *Prawo administracyjne. Instytucje ogólne, Part I*, Kraków 1995.

[4] See E. Ura, ed. Ura, *Prawo administracyjne*, Warszawa 1999.

[5] See Z. Kmieciak, *Ogólne zasady prawa i postępowania administracyjnego*, Warszawa 2000, p. 43 and following.

[6] Z. Cieślak, Chapter III, in: Z. Cieślak, I. Lipowicz, Z. Niewiadomski, *Prawo administracyjne. Część ogólna*, Warszawa 2000.

[7] See Z. Leoński, *Projekt ustawy o przepisach ogólnych prawa administracyjnego*, OMT 1988, Nr 2 and following.; J. Świątkiewicz, *Koncepcja projektu ustawy – przepisy ogólne prawa administracyjnego*, PiP 1988, Nr 8, p. 18 and following; J. Borkowski, *Przepisy ogólne prawa administracyjnego a porządkowanie legislacji administracyjnej*, in: Legislacja administracyjna, Gdańsk 1993, p. 7 and following.

[8] The project of the law: www.brpo.gov.pl.

[9] Project Group on Administrative Law (CJ-DA), Legal Co-operation of the Council of Europe (CDCJ), *The Administration and You. A Handbook. Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons*, Council of Europe Publishing 1996, pp. 13–27.

the public administration, the principle of proportionality, the principle of the certainty of law, prohibition of discrimination, protection of the right expectations, and the right to be heard in the administrative process.[10] This catalog can be completed by the principles comprised by the European Code of Good Administrative Behaviour whose source is the right to good administration as present in the article 41 of the Charter of Fundamental Rights of the European Union established in December, 2000 in Nicea,[11] embracing the principle of administrative transparency.

This paper aims at presenting the principle of transparency of the public administration acting which undoubtedly corresponds with the canon of the principles of the democratic state under the rule of law and constitutes the principle of governance basic for the public administration functioning.

This principle fulfills the postulate of openess and transparency of the public administration and constitutes the component of the principles ensuring the ability to foresee and confide in the law on the one hand, and the ability of the public administration to act on the other hand. It also formulates the standard of an ideal functioning of the public administration. In the context of public officials' duty to reveal different types of declarations and statements it is opposed by their right to privacy.

On the other hand, the very presence of the above-mentioned principles, including the transparency, in certain legal systems does not guarantee their application and effectiveness. As M. Safjan rightly notices: "it is not enough to put a formal decree on some state of affairs; a normative petrification of principles and values is not enough because it is their realization on the level of real state acts, functioning of their structures, that may lead towards the transformation of the reality".[12]

The principle of transparency

Openess and transparency (also called publicity[13]) as regarding the performance of administration constitutes one of the canons of the administra-

[10] Compare J. Schwarze, *European Administrative Law*, Luxembourg 1992.

[11] www.europa.eu.int.

[12] M. Safjan, op. cit., p. 25.

[13] See also Z. Kmieciak, op. cit. p. 32, E. Olejniczak-Szałowska, in: Z. Duniewska, B. Jaworska-Dębska, R. Michalska-Badziak, E. Olejniczak-Szałowska, M. Stahl, *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warszawa 2000, p. 107, T. Górzyńska, *Prawo do informacji i zasada jawności administracyjnej*, Kraków 1999, J. Lang, *Zasada jawności w prawie administracyjnym*, "Studia Iuricica" 1996, Vol. XXXII.

tive process.[14] It would be difficult to mention all the aspects of openess and transparency as respected by administration; they can all be exemplified within the boundaries of a specific case. This principle is usually linked to the right to information access[15] or the right to know[16] in its broad sense, as well as corresponding duties imposed on administration: a duty to give information and a duty to justify a decision taken.

Openess and transparency are necessary tools to achieve the principles of legality, equality regarding the law, protection of trust and impartiality of the administration. Openess of administration may be defined as their accessibility or the ability to "examine" administration "from outside" as a whole. Thus, transparency should be referred directly to the way that administration acts. On the one hand, the openess of administration and the ability to act in a clear way allow anybody "involved" in the performance of administration to recognize the basis of their acting. On the other hand, it allows for an easier control taken by supervising institutions.

As a rule, the performance of public administration should be clear and open. Only in case of emergency and within the boundaries of the law should information confidentiality take place (usually it involves personal data or exceptional information which endangers safety or public order).[17]

In the process of the performance of public administration specific examples illustrating the use of the principle of openess and transparency can be found (e.g. an administrative act should be issued by the administrative authority competent to undertake such actions; information confidentiality, justification of the the administrative decision against the will of the party involved; a duty to reveal financial declarations by certain categories of the officials).

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[14] See T. Gorzyńska, *Zasada jawności w administracji*, PiP 1988, z. 6, p. 14 and following, T. Górzyńska, *Prawo do...*, op. cit., p. 19, J. Lang, op. cit., p. 159 and following.

[15] J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990, p. 144.

[16] H. Barnett, *Constitutional and Administrative Law*, Cavendish Publishing Limited, London 1998, p. 421, H. B. Jacobini, *An Introduction to Comparative Administrative Law*, New York 1991, p. 37.

[17] Compare F. Cardona, *European Principles for Public Administration*, SIGMA Papers No. 27, 1999, www.oecd.org/puma/sigmaweb, p. 12, who claims that in reality just few cases (information) demand protection although public authorities tend to exaggerate and overuse the term "confidential information". The author also mentions the fact that starting from the end of XVIII Century there has been a tradition of practising discreet and confidential administration (Sweden being an exception). It was not until the sixties of the XX Century that the principle of frankness of administration in Western democracies started developing. Nowadays this principle has gained the status of the highest standards of administration.

The professional literature pays attention to the important aspect of the principle of openess and transparency of the administration which is information access.[18] The term "information" has not been legally defined yet.[19] In the Polish doctrine the definition of information was proposed by W. Taras who captured information as a form of performance conducted by the administrative authorities: "information transmitted to citizens by administration is a declaration of knowledge by the official of the administrative authority or else another administrative subject which deals with certain factual state, legal state or their resulting legal consequences. Such a declaration of knowledge does not directly cause any legal effects; however, it may affect the realization of certain competences or duties of the information receiver or the third party".[20] T. Górzyńska claims that it can be accepted that publicity means a state where citizens have a relatively free access to information possessed by the organs of public authority and those subjects who perform the functions of public authority, a state which enables the ability to have an insight into private and, therefore, individual and social cases, or, in other words, state, local and regional cases.[21]

The principle of openess and transparency as a principle of public access to information as practised by the administration was given a legal basis in the Constitution of the Republic of Poland (art. 61 item 1). In this context the principle of openess and transparency as practised by the administration constitutes a tool enabling the realization of the citizens' right to information access on the on hand, and, on the other hand, it results in the duty imposed on the administration to inform citizens about their performance. In accordance with the content of the art. 61 item 1 of the Constitution of the Republic of Poland, this right also embraces receiving information regarding charring self-governments and professional bodies as well as other people and organizational units on the scale in which they perform the tasks of the public authority and manage the municipal estates or the State estate. A performance of the public authority should be

[18] In the Polish doctrine the principle of openness (publicity) has been emphasized especially in the aspect of information access. Compare for example Z. Kmieciak, op. cit., p. 32, E. Olejniczak-Szałowska, op. cit., p. 107.

[19] The statement regarding the access to public information from art. 1 item 1 from the Act accepted in September 6, 2001 cannot serve as a definition of the information (Of. G. 2001., Nr 112, Item. 1198), according to which "any information regarding public affairs constitutes public information as understood by the Act (...)".

[20] W. Taras, *Informowanie obywateli przez administrację*, Wrocław – Warszawa – Kraków, Ossolineum 1992, p. 50 and following, see also W. Taras, *Informacja w postępowaniu administracyjnym*, (in:) G. Szpor (ed.), *Informacja i informatyka w administracji publicznej*, Katowice 1993.

[21] T. Gorzyńska, *Prawo do...*, op. cit., p. 19.

understood as all kinds of activities undertaken to realize legal competences of their organs. The concept of public authority is wide and encompasses legislative, executive and judicatory powers. Within their executive power, this concept envelopes central and local administration: governmental and self-governmental. Individuals who perform public functions do not have to be elected. They can also be appointed or promoted to their post. The actions should be connected with public performance. As I. Lipowicz highlights, the aim of the regulation is not to satisfy the interest of the citizens but to ensure the society's control over the representatives of the authority.

Extended informative rights concern those organs of public authority which, being council, are elected in general elections: Seym, Senate, commune councils, administrative districts, and province councils. The significance of the decisions taken by these organs justifies direct and rather intense control undertaken by citizens. In comparison to the previous legal state, this is a new regulation when it comes to the organs of the administrative districts.

In accordance with art. 61 item 3 of the Constitution of the Republic of Poland, limited rights to information access may occur exclusively in cases regulated by law and dealing with the protection of freedom and rights of individuals and economic subjects as well as the protection of public order, safety or a significant economic interest of the State. According to B. Banaszak and M. Jabłoński, the issue of the protection of freedom and economic subjects cannot be questioned bearing in mind its specific and objective character, which also applies to cases involving the order and safety of the state. On the other hand, the notion of significant economic interests of the state may lead towards some misinterpretation and may consequently result in the inability to ensure the information access.[22]

In the Constitution of the Republic of Poland there is a base for imposing a duty on the administrative organs to give information to citizens. The principles of direct application of the general law along with a high degree of the jurisdiction of the decisions as accepted in art. 8 of the Constitution constitute a turning point in the process of making an effective mechanism in the field of the protection of the right to information and the realization of the principle of openess and transparency as practised by the administration.

The introduction of regulations regarding the access to public information dated 1 January, 2002 aimed primarily at the specification of the right

[22] B. Banaszak, M. Jabłoński, in: J. Boć (ed.) *Konstytucje Rzeczypospolitej oraz Komentarz*, Wrocław 1998, p. 115.

of an individual to public information access formulated in art. 61 of the Constitution of the Republic of Poland and was conducted by defining the rights making the law. The regulations accepted that the right to public information was to be conducted through the access to information which should be ensured by the organs of the public authority and other subjects performing public tasks. By developing and specifying the principle that public information should be open (and, therefore, accessible when not limited by legal regulations or by the protection of privacy (art. 5), the regulations mark the scope of the information publicity as well as the right to access to such information on a legal basis in the Republic of Poland.[23] The scope of public information as marked by the regulations does not only clarify the structure, organization and competence of the public administration organs, their performance, manners of receiving and dealing with cases, the state of the reception of cases, the order of dealing with cases and taking decisions. Such legal regulations lead towards the assumption that, provided the organs of the public administration have to reveal the principles and rules of receiving and dealing with cases, it would result in a smaller risk of their dealing with cases using different criteria (considering the priority of cases applying criteria which are not necessarily legal, for example, friendship).

The problem of the flow of information handled by the organs of public authority along with the access to public information as a principle are closely connected with the issue of protection of personal data. In the European countries it became the subject of legislative measure on the turn of the 1960s in connection with a rapid development of computers. The Convention of the Council of Europe NR 108 taken in January 28, 1981 regarding the protection of individuals with the account of automatic data processing of personal character was a legal act which marked universal standards, fore-judging the direction of the development of national legislation. Those regulations were developed and clearly defined in September 24,

[23] The decision dated 11 January, 1996 (III ARN 57/95). Considering the mater of revealing the information regarding the district self-governments to the media, the Highest Court decided that the regulation did not exclude the insight into the acts of the organ if the law allowed for that; especially on the ground of the protection of the state secrets and other secrets regulated by law as well as individual well-being remaining in the sphere of privacy and not connected with public performance. The Highest Court stated that the ban placed on the employer to reveal a salary on the ground of the interference into the individual well-being would only be justified when such information was to be called private. Additionally, in accordance with the art. 14 item 6 of the press law, it is possible to publish information and data regarding personal sphere of one's life without the acceptance of this person if it corresponds with the public performance of that person. (OSNIAPiUS 1996/13/179).

1995 in the European directive NR 95/46/EC regarding the protection of individuals considering automatic data processing of personal character and a free data flow by the European Parliament and the European Council.[24] The above-mentioned norms are not self-executive norms. They are directed to nations whereas their resolutions formulate duties for local legislators.[25] In Poland the regulations regarding the personal data protection were defined in the regulations regarding the personal data protection accepted in August 29, 1997.[26] In accordance with the European standards, the regulations regularized the following issues: the principles of personal data processing, the rights of individuals whose data is under consideration, the protection of data collection as well as its registration and passing abroad. The organ responsible for the personal data cases – the Inspector General of Poland for the Protection of Personal Data – was nominated.

The principle of transparency of administration is further supported by regulations allowing control of activities of the individuals holding public functions by reducing the scope of the law protection to privacy. Such a solution involves introducing a duty to provide a financial declaration[27] (providing a financial declaration applies to the public administration officials) and reporting information to the Register for Benefits, which is open,[28] or a possibility to publish the information or data concerning private spheres of life if connected directly with the public performance of this person.[29]

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[24] Text: Journal officiel des communautés Européennes, nr L281 dated 23 November, 1995.

[25] For more information see Z. Kmieciak, op. cit., pp. 91–97.

[26] Journal of Laws of the Republic of Poland 1997, Nr 133, item 883, later changes provided.

[27] For example, art. 10 of the Journal, August 21, 1997 regarding the limitation of the organization of economic enterprise undertaken by individuals with public functions (Journal of Laws 1997 , Nr 106, item 679, later changes provided).

[28] Art. 12 of the Law of August 21, 1997 regarding the limitation of undertaking economic enterprise by the people holding public offices (Journal of Laws, 1997 r., Nr 106, item 679; later changes provided).

[29] Art. 14 reg. 6 accepted in January 26, 1984. The press law (Journal of Laws of the Republic of Poland 1984, Nr 5, item 24, later changes provided). A verdict brought in May 6, 1997. The Supreme Administrative stated that the salary of the members of the board of the commune councils (voyt, mayor and their assistants) doe not belong to the private sphere of the individuals with those functions since it is connected with performing their public function. Basing on art. 4 reg. 2 and in connection with 14 reg. 6 of the law accepted in January 26, 1984 – the press law (...) commune councils' organs cannot escape revealing information to journalists as to the money they charge for their functions. A duty foreseen art. 4 reg. 1 of the law – the press law to reveal information to the press regarding any enterprise is bound from May 27, 1990 and also involves organs of the commune councils (...). According to art. 61 of the law of district administration (now commune administration – footnote by P.J.S.), the economy of the commune is open and applies to different types of the commune's profits and expenses (II S.A./Wr 929/96, ONSA 1998/2/54).

The principle of openess and transparency of administration serves the protection of public interest through the reduction of the probability of *maladministration* and corruption as well as the realization of the civil right to information and freedom and their corresponding rights. Although it may be legally limited, it does constitute a kind of opening of the mechanism of public performance, being simultaneously a measure of democracy and law and order.

Transparency in financial declarations and statements

Here it is necessary to give some remarks regarding a general approach of the EU nations to revealing the interests and statements conducted by public officials. Revealing of any types of declarations and statements as applied to all groups of public officials is characteristic, for instance, for the British, Spanish, Portuguese, Bulgarian, Romanian and Latvian regulations whereas in Poland, for example, only statements provided in the district administration are to be revealed. In Sweden, for example, revealing has an optional character and is dependent on the will of a public official. A lack of regulations in this field is characteristic for France and Hungary.[30]

As it has been pointed out by the authors of the report regarding the research on the regulations of the conflict of interests in the countries which are members of the EU, "recent observations show that the policy in the field of revealing private interests of the officials has become one of the significant tools of the policy applied to the conflict of interests".[31] As it was mentioned above, almost every European nation has been introducing a duty of private declaration (including financial) of their officials' interests into their order. Here it is necessary to observe different approaches taken by legislators to reveal (or not) different types of statements as well as placing them (or not) in respective registers. Whereas in some countries public officials are imposed with a duty to provide a statement regarding their financial interest, the majority of the countries impose an "assisting" duty referring to their additional activities (such as employment, honor membership in different types of institutions, performances, etc.) which should be put in the registers publicly available.

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[30] Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, *Regulating Conflicts of Interest for Holders of Public Office in the European Union*, European Institute of Public Administration, 2007, Annex III, p. 157 and following.

[31] Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, op. cit., p. 67.

As G. Carney shows, the popularity of public revealing of such information "seems to be the right way to make the introduction of the protection easier as well as clear for the environment that there is a common approval from the governors for their public authority to be open".[32] Additionally, the formulation of the duty to provide statements and declarations of private interests in public results in creating an opener public sector, which is a key to the society's growing trust in public institutions.

Apart from the popularity of the introduction of these tools, in the European countries and their institutions numerous debates have taken place which aim at presenting the advantages and disadvantages of such duties. Similar debates apply to registering financial interests. Among the arguments *pro* there appears the following: public officials (including members of parliament and judges) are to serve the public interest, not private – this makes the core argument. It has been pointed out that contemporary public officials have a full-time job, which implies a defined, rather a high level of income of a public official. It has been highlighted that public officials' salaries should satisfy their needs so that they do not have to be involved in additional activities which always influence (to some degree) the function of a public official and, sooner or later, result in the conflict of interests. The consequence of this situation is the fact that private interests change the approach of an official to the realization of public interests. Another argument supporting the design of registers as well as public statements and financial declarations is to appeal to the electorate. It has been emphasized that electors have the right to know what the people they have chosen do, how much they earn, who and why brings benefits to them and finally, whether their political decisions are influenced by their private interests. The need for being open and clear as a basic and key element of democracy has been highlighted. The summary of the arguments in favor of the idea of revealing private interests is the recommendation that it constitutes the best form of control and testing of public officials. Additionally, it is the means to monitor the way how a given mandate has been used since self-determination (establishing self-limiting rules) tends to fail in many cases. The role and necessity of external control have been emphasized.

On the other hand, arguments against revealing private interests have a different character and refer both to specific problems and general remarks. For instance, it has been emphasized that such limits cannot be applied to

[32] G. Carney, Working Paper: *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International, Berlin, 1998, the Internet source: http://ww1.transparency.org/working_papers/carney/index.html.

the members of parliament since they are not officials. A well-granted belief that a too detailed duty to reveal private interests interferes with the basic rights (e.g. one's right to privacy) has often been mentioned. Moreover, as experience shows, the registers do not fulfill their functions fully. Indeed, media show their interest in registers. Nonetheless, it does not affect public opinion who does not show much interest in politics, politicians and the media themselves. Among the *contra* arguments there appear observations that the introduction and monitoring of the register of benefits results in additional bureaucracy; extra activities do not have to lead to the conflict of interests. Finally, revealing public statements does not cause a decrease in the conflict of interests. It has even been pointed out that additional activities allow public officials to have a contact with "reality" and activities previously done. In this light, a duty to reveal interests may have a negative influence on the types of the activities which demand confidentiality (e.g. a situation when a public official used to be a barrister in the past). When these limits are applied to members of parliament and councilors, it is often argued that they do not need a full-time engagement to perform their tasks. To summarize this group of arguments, one may refer to the statement that too much openness may affect civil rights. What is more, elected people should be evaluated by their electors and not by registers.[33]

The main criticism of the declaration of interests in registers refers to the manner, much too often simplified and generalized, in which these interests are informed about. An interesting illustration is a comparison of the financial declarations revealed by the members of the European Commission and the European Parliament. Whereas commissars are obliged to provide a rather detailed declaration, almost every member of the European Parliament does it in a general manner (or just providing information "Nothing to declare").[34] A similar shortcoming can be observed in the statements provided by public officials in accordance with the requirements of the Polish law regarding the limits of economic enterprises as practised by individuals holding public functions. Apart from a few attempts to amend the regulations, the above-mentioned law still reveals serious errors which have been pointed as the lack of information which organ should take a financial dec-

[33] Compare Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, op. cit., p. 68

[34] Ch. Demmke, M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker, A. Salminen, op. cit., Annex IV, Conflict of Interest profiles of EU Institutions, p. 325 and following.

laration of the president of RIO (Regional Chamber of Auditing) or misinformation as to the person obliged to provide a statement (instead of the president of SKO (Local-Government Chamber of Appeal) the law obliges the leader of SKO – art. 10 reg. 6 item 1) and a false addressee of this statement (according to this law the SKO chairperson provides a statement to the chairperson of the province municipal seymik – nota bene such a body was canceled in January 1, 1999).[35]

Thus, it is obvious that the tools in the form of the statements and their register are efficient as long as the requirements regarding what should be declared are clear and comprehensive. Secondly, there should exist a mechanism of control over such registers which are effective and able to guarantee freedom. Thirdly and finally, effective sanctions regarding the abuse of the above-mentioned duties seem to be necessary. The lack of these necessary conditions results in the difficulties to reveal and authorize wrong behavior, misunderstanding or only partial fulfillment of one's duties. On the other hand, the politics of revealing private interests of public officials and registers of benefits should anticipate such collection, storage and management of the gathered data so that it does not result in new conflicts of interests.[36] The requirement to provide and reveal statements, information and declarations of the public officials should be treated as one of the most significant conditions of the fair administrating and fair public service. As it was mentioned above, such a requirement, also in the light of the Polish regulations, may be in opposition to the constitutional right to privacy according to art. 47 of the Constitution of the Republic of Poland as well as freedom not to reveal information concerning private affairs of an individual according to art. 51 reg. 1 of the same Constitution. Nonetheless, the author of this paper argues that this conflict should be solved in favor of declarations since the status of public people is closely connected with their "depart" from privacy.

These difficulties affect the way how detailed different countries and their legislation choose the statements to be and how they address the duty to different addressees to provide such statements (including the families

[35] The author of this work discussed this problem in *Gwarancje bezstronności organów administracji publicznej*, Wrocław, 2004.

[36] Considerations regarding evaluation of the effectiveness of financial declaration in the Polish legal system was undertaken by the author of this paper together with P. A. Borowska i P. Sitniewski, Compare P. A. Borowska, P. Sitniewski, P. J. Suwaj, *Declarations of Income and Assets: an Assessment of Polish Initiatives*, in: Post-Communist Public Administration: Restoring Professionalism and Accountability, D. Coombes, L. Vass (ed.), Bratislava, NISPAcee, 2007.

of the public officials). It is easy to observe that in some countries detailed requirements to be published in registers are not accepted on the ground of the conviction that registers lead towards a conflict with the basic civil rights.

Summary

Identifying the vision of the state and its principles regulated by the normative acts with the practice of the state functioning should be acknowledged as wrong in its assumption. The reality may be fundamentally different form the postulated state or, the idealized state, which is consequently unreal. It is necessary to bear in mind that there are types of behavior and actions which are not and do not have to be regulated by law but they may constitute the code of behavior and evaluation of the officials and state institutions.[37] This applies to the behavior and activities which are ethically dubious on the one hand, or those, which may rise doubts when it comes to the requirement to regulate them normatively, on the other hand.

Nonetheless, the way of thinking about the state, its institutions and values as captured by normative regulations and legal mechanisms only in strict categories of law, its semantic content and from a formal point of view drives our attention away from something what is often forgotten in the contemporary state under the rule of law: a way of looking at the institutions in the democratic state should grasp a wider semantic context, the intention of authors, good faith, the aim and sense of the institution – in other words, the axiology of the state under the rule of law, the values which constitute the foundation of the democratic system.[38]

The principle of transparency, being one of the fundamental principles of the contemporary state under the rule of law, is a special principle. On the one hand, it gives citizens a guarantee that all the actions of the public administration and its officials are fundamentally open and there is an access to information about them. On the other hand, the same principle becomes a burden for public officials and provides serious limits as to their right to privacy. Just because of this burden, some legislators decide not to reveal any information, statements and declaration of their public officials arguing that the right to privacy has the priority over the right of citizens to know.

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[37] Compare M. Safjan, op. cit., p. 23.

[38] Ibidem, p. 20.

However, it seems that such solutions, accepted by some countries and based on the assumption that public officials should be trusted and protected in a special way by rejecting a duty to present declarations and statements (e.g. Financial declarations), are only possible when accompanied by high ethical standards as reflected by public officials' behavior and not only expressed by high expectations of the normative regulations. This is to be accompanied by a high level of civil awareness in the sphere of rights and social habits, the way of thinking about the state and dependencies between the choices of individuals and those taken at a public level. If these two elements go together, it is possible to resign from legal regulations of certain official duties and embrace this issue by the solutions offered by the so-called "soft law".

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FEW REMARKS ON THE STATE UNDER THE RULE OF LAW AND INDIVIDUAL RIGHTS IN THE SYSTEM OF SWITZERLAND

This paper aims at the attempt to discuss the idea of the state under the rule of law and the issue of individual rights in contemporary Switzerland, especially after the Federal Constitution was accepted in 1991.[1] Due to the fragmentary character of the paper resulting mainly from its limited content, the paper will focus only on a few interesting issues which are, nevertheless, discussed in a somehow limited manner.

One of the principal aims of the state under the rule of law is to bind it legally. Therefore, in this paper, although in a limited manner and with a special consideration of the role of international law in Switzerland, the author will deal with normative assumptions of the system of the proclaimed federal law including practical solutions basing especially on the judiciary practice of the Federal Court (*Bundesgericht*). On the other hand, the author aims at drawing the reader's attention to the change of the Swiss approach to the constitutionality of some norms remaining in the sphere of individual rights and freedoms.

Being conditioned historically, the Swiss Confederation is characterized by a great deal of stability. When evaluated with the comparison to its previous solutions, the actual federal Constitution does not reveal any revolutionary character. It is the effect of the pragmatic actions of its citizens. The former constitution was obligatory for 125 years. The Constitution of 1874[2] was a collection of regulations from different periods (it

[1] The Federal Constitution of the Swiss Confederation dated 18 April, 1999, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, SR 101. Further general references in the paper will refer to this Constitution.

[2] The Federal Constitution of the Swiss Confederation dated 29 May, 1874, *Bundesverfassung der Schweizerischen Eidgenossenschaft*; cited after A. Kölz, *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, t. 2, *Von 1848 bis in die Gegenwart*, Berno

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was changed 163 times);[3] it was written in a rather archaic language and presented regulations containing a different degree of details.

The system of the Swiss Federation is based on several pillars. These pillars are given different names by Swiss. For instance, in the proclamation of the Swiss Federal Council regarding the new Constitution they call them "structure-defining basic solutions" (*strukturbestimmende Grundentscheidungen*).[4] U. Häfelin and W. Haller define them as "leading basic values" (*tragende Grundwerten*)[5] whereas P. Tschannen calls them "structural principles of the Federal Constitution" (*Strukturprinzipien der Bundesverfassung*).[6] Independently of the accepted terminology, they reveal the basic leading ideas which significantly influence the system of the state, interpretation of individual regulations of the Constitution as well as the process of law application. What is more, the jurisdiction organs are obliged to consider the basics of the Federal Constitution of the Swiss Confederation in their practice.

It is necessary to highlight here that these principles are not always directly expressed in the Federal Constitution. One cannot find a regulation which is a direct content equivalent of the art. 20 Law 1 of the Constitution of the Federal Republic of Germany: "The Federal Republic of Germany shall be a social democratic welfare",[7] or art. 2 of the Constitution of the Republic of Poland: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".[8] It is necessary to add here that the Cantonal Constitutions comprise a "similar" recording. It can be illustrated by the art. 1 of the Constitution of the Canton of Bern: "The Canton of Bern shall be a politically independent, democratic and welfare state ruled by law".[9]

1996, p. 151 and following. The Constitution of 1874 in its latest shape before it was cancelled (accessed April 20, 1999): http://www.ofj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/bundesverfassung.Par.0006.File.tmp/bv-alt-d.pdf.

[3] Compare The Federal Department of Justice (*Bundesamt für Justiz*), *Reform der Bundesverfassung*, http://www.ofj.admin.ch/d/index.html.

[4] Compare the Proclamation of the Federal Council of November 20, 1996 regarding the new Federal Constitution, *Botschaft über eine neue Bundesverfassug*, BBl 1997 I 14.

[5] Compare U. Häfelin, W. Haller, *Schweizerisches Bundesstaatsrecht*, Zurych 2001, p. 51 and following.

[6] Compare P. Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, Berno 2004, p. 81 and following.

[7] The Constituion of Germany, *Konstytucja Niemiec – Grundgesetz für die Bundesrepublik Deutschland*, Warszawa 1993, p. 32 and following.

[8] The Constitution of the Republic of Poland dated 2 April, 1997, The Journal of Laws of 1997, nr 78, item 483, later changes provided.

[9] Th Constitution of the Canton of Bern dated 6 June, 1993, *Verfassung des Kantons Bern*, BSG 101.1.

Generally, the Swiss literature highlights the following basic principles of the Swiss system: a democratic state, a state under the rule of law, a federal state and a welfare state. Sometimes this catalogue is extended by the principles of respect and protection of human dignity, a free competition as the basis of the economic system, subsidiarity of political authority's actions as well as an international cooperation.[10]

In Switzerland there is a close link between the ideas of democracy and the state under the rule of law. A discrepancy between them would only be marked when one assumed that the power was to be permanently held in an unlimited way by the actual majority. However, such an assumption cannot be accepted in the light of the necessity to protect human dignity, individual freedoms and interests of the minorities in the contemporary civilized states penetrated by the ideas of humanism.

A state under the rule of law is the state in which the formation of national life and a great deal of social life is achieved with the use of a specific subordinating medium – law. A state under the rule of law is also the state where the actions of public authority are limited by law,[11] where one has to deal with its rule – law and order (Compare art. 5 of the Constitution). Since Switzerland is a state under the rule of law, the powers and obligations in the relations between an individual and the government result from the Constitution or law; the organization of its authority and their functioning are based on the binding law. Authority is bound by law whereas in relation to individuals there is a presumption of the freedom of their actions.[12]

Generally, the Swiss literature considers the concept of the state under the rule of law on two grounds: material and formal. Here the authors frequently relate to the considerations of Z. Giacometti. "A material state under the rule of law should provide each individual with the protection of their personality (*Persönlichkeit*) in the organized society. This is done through the recognition of their sphere of freedom in relation to the authority in the sense of the constitutional guarantee of their particular rights and liberties. When considered from a material point of view, a state under the rule of law guarantees the development and support of particular

[10] Compare R. Rhinow, *Die Bundesverfassung 2000, Eine Einführung*, Bazylea – Genewa – Monachium 2000, p. 31 and following as well as the literature mentioned there.

[11] Compare G. Schmid, F. Uhlmann, *Idee und Ausgestaltung des Rechtsstaates*, in: D. Thürer, J.-F. Aubert, J. P. Müller (ed.), *Verfassungsrecht der Schweiz Verfassungsrecht der Schweiz – Droit constitutionnel suisse*, Zurych 2001, p. 224.

[12] Compare P. Tschannen, *Staatsrecht...*, p. 87.

individuals in the social community which is understood as a sum of these individuals. A politically independent system of values defined in the Constitution should be realized in the whole legal order of the system. A material state under the rule of law conditions the democracy of a given system where freedom and human dignity are primary values.

When considered from a formal point of view, a state under the rule of law should protect an individual against authority's abuse of power, especially when it comes to the acts of lawlessness of their organs. This is possible due to the binding of the state organs in their activities by the norms of general and abstract character. By doing so, the range of these organs' power is limited whereas the treatment of individuals with an equal and defined by law measure protects against authority's lawlessness. The scope of property of an organ and the content of its tasks are determined by legal norms. In other words, a state under the rule of law from a formal point of view means the rule of law or, more precisely, the rule of the Constitution and its regulations".[13]

Let us consider the model which should be applied by the legislators and law applicants in their actions. Undoubtedly, these are acts of the positive law such as the Constitution or laws.[14] While considering the structure of the competence relationships between the acts of law on the federal level, it is necessary to notice that this structure is hierarchical and takes a clear shape: Constitution – laws – regulations; or: Constitution – international agreement – law – regulations; or (in case of autonomous regulations): Constitution – regulations.

However, if one studies the relations between norms being the code of conduct in the aspect of derogation relations, it is obvious that in this aspect the legal power of norms constructed on the basis of regulations included in normative acts does not correspond with the hierarchical position of these acts when examined on the ground of the competence relations. Here the description of the very interesting and rather complex system of relations between norms of the proclaimed law in its narrow sense (Constitutional norms and norms constructed on the basis of different categories of laws or regulations) is not going to be developed. Even a brief characteristics of these solutions would have to be extensive. Therefore, here the author has

[13] Compare Z. Giacometti, *Rechtstaat und Notrecht*, (in:) A. Kölz (ed.), *Ausgewählte Schriften*, Zurych, 1994, p. 233 and following.

[14] Compare Y. Hangartner, *Kommentar zu Art. 191 BV*, (in:) B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (ed.), *Die schweizerische Bundesverfassung – Kommentar*, Zurych – Bazylea – Genewa 2002, p. 55.

chosen to tackle only one problem. The author has decided to concentrate on the illustration of the position of international law, especially international agreements being acts of the proclaimed law in its wide sense, in the legal system of Switzerland as the state under the rule of law.

"A weighty interest of Switzerland – a small country – is for law to have priority over force in its international relations".[15] The Constitution of 1999 fulfils this postulate. Its preamble – "(...) We, the Swiss People and Cantons (...) in solidarity and openness towards the world (...) now, therefore, we adopt the following Constitution", art. 2 law 1 – "The Swiss Confederation (...) shall protect the liberty and the rights of the people and shall ensure the independence and security of the country, art. 5 item 4 – "The Federation and the Cantons shall respect international law", art. 54 item 2 – "The Confederation shall strive to preserve the independence of Switzerland and its welfare; it shall, in particular, contribute to alleviate need and poverty in the world, and to promote respect for rights, democracy, the peaceful coexistence of nations, and the preservation of natural resources", as well as numerous detailed competence regulations – especially art. 54–56 and art. 189 item 1 l. b giving the Federal Court the competences to have jurisdiction over violation of international law or art. 190 giving the Supreme Court and other law application authorities to follow the federal statues and international law which are to be the measure (*massgebend*) for them, reflecting a friendly attitude of the Federation towards foreign countries and their respect for this category of law.

In comparison to the regulations of the Constitution of 1874, one may notice some changes. Among all, the above-mentioned Constitution stated that the aim of the Confederation was to ensure safety of the nation (Compare its art. 2) or that the Federation might proclaim war (Compare art. 5 and 85 item 6). It was the indication of the contemporary concept of the Swiss international politics, or even its international relations, as a sphere of potential threat to the existence of the young nation and permanent state of war as *bellum omnium contra omnes.*[16]

On margins one should note that those regulations were not reflected by practice. Apart from the fact that the Constitution of 1874, just as the

[15] Compare the Report of the Fedaral Council of June 29, 1988 regarding the Swiss politics of peace and safety, *Bericht des Bundesrates über die Friedens- und Sicherheitspolitik der Schweiz*, BBl 1989 I 680.

[16] Compare T. Cottier, M. Hertig, *Das Völkerrecht in der neuen Bundesverfassung: Stellung und Auswirkungen*, (in:) U. Zimmerli (ed.), *Die neue Bundesverfassung. Konsequenzen für Praxis und Wissenschaft*, Berno 2000, p. 2.

preceding one,[17] did not directly define the relations between international and national law, on the Swiss ground there had appeared the practice of a favourable attitude towards international law. The final effect of that evolution was the act of binding the organs of public authority by that law. A sign of positive attitude of the Swiss nation towards that law was a wide foundation of the conviction in the doctrine as well as in the jurisdiction of the Federal Court that it constitutes an integral part of the national law and order and is obligatory as such. The consequence of that assumption was the acceptance of the principle corresponding with international law in the interpretation of national law. For the first time the Federal Court referred to it *expresses verbis* in 1968 when it was stated that "in case of doubts national law should be interpreted in accordance with international law so that the result of its interpretation does not contradict with that law".[18] If it is impossible to reach the meaning of the national regulation which does not contradict the regulations of international law, the legal norm of international law gets the priority.[19]

The priority of international law over the law of Cantons, inter-Cantonal and federal law, which is not subjected to referendum, is recognized on a common basis. Doubts appear when considering the relation of international regulations of federal law, which is accepted (or can be accepted) directly by people, with the Federal Constitution and federal laws.

T. Cottier and M. Hertig have noticed that the issue of the relation of international law with the Federal Constitution has not been explicitly regulated so far. A perspective of the European integration and the subordination of national law to the primary (and secondary) law of the European union has not encouraged the legislator to acknowledge the unconditional priority of international law.[20]

During works on the actual Federal Constitution it was suggested to state directly that "international law has a priority over national law in

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[17] The Constitution of the Federal Confederation of Switzerland dated 12 September, 1848, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, tekst pierwotny za A. Kölz (ed.), *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, vol. 1, *Vom Ende der Alten Eidgenossenschaft bis 1848*, Berno 1992, p. 447 and following.

[18] Compare the decision of the Federal Court of November 22, 1968, BGE 94 I 669, 678.

[19] Compare T. Cottier, M. Hertig, *Das Völkerrecht...*, p. 11, see also D. Thürer, *Prawo międzynarodowe a prawo krajowe*, (in:) Z. Czeszejko-Sochacki (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r.*, Białystok 2001, p. 115 and following.

[20] Compare T. Cottier, M. Hertig, *Das Völkerrecht...*, p. 18 and following as well as the literature mentioned there.

case of contradictions".[21] Finally, a less explicit notation was made: "The Federation and the Cantons shall follow international law" (art. 5 item 4 of the Constitution of 1999). This formulation does not make an interfering rule. The legislator was aware of the fact that a great deal of international law is made of agreements which do not have a self-executing character which may lead to controversy over the issue of priority of such regulations when related to national law. The acknowledgement that a given agreement does not reveal a *self-executing* character allows for the avoidance of questioning its position in relation to the national regulations.[22] According to the Federal Court, a norm of international law can be applied directly when its content is well-defined and clear enough to constitute the basis for judging an individual case. The norm has to reveal a jurisdiction character (*justiziabel*), "ready to apply" – define somebody's rights and duties and should be addressed to the law application organs.[23]

The Constitution of 1999 clearly anticipates some changes if there are obligatory regulations of international law (*zwingende Bestimmungen des Völkerrechts*) – compare 139(alt) item 3, art. 193 item 4 and 194 item 2. They have the priority over the regulations of the Federal Constitution. The Swiss frequently highlight that such solutions do not interfere with such values as the certainty of law and, therefore, they do not contradict the concept of the state under the rule of law. Other cases of a possible conflict between the norms of international law and the Constitution demand a careful consideration. Undoubtedly, a constitutionally defined guarantee of the basic individual rights are given a more important place in the hierarchy of the legal norms when compared to the international resolutions of the administrative character. It goes without saying that federal authority while making or accepting their international agreements should follow the resolutions of the Federal Constitution.[24]

What are the above-mentioned "obligatory regulations of international law"? According to U. Häfelin and W. Haller, they are solutions which, because of their significance in international law and order, should unconditionally and directly bind in the system of a given state as normative

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[21] Compare art. 4 item 4 Vorlage B, of the project of the Constitution of June 26, 1995, http://www.admin.ch/cp/d/1995Jun26.150836.4270@idz.bfi.admin.ch.html.

[22] Compare R. Patry, *Le Tribunal fédéral et le droit international*, (in:) F. Antoniazzi (ed.), *Mélanges Assista*, Geneva 1989, p. 528.

[23] Compare the decision of the Federal Court of December 22, 1997, BGE 124 III 90, 91.

[24] Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 564.

regulations of arbitrary obligation (*ius cogens*). They include the prohibition of genocide, torture, slavery, or expulsion of refugees for the reason of racial, religious, national, social or political threats refugees would face in their countries. The resolutions of international law are not the only source of these regulations; they may originate from common law.[25]

It is necessary to highlight here that the recognition of the obligatory norms of international law as the ones marking the boundary of changes in the federal constitutions took place even before the actual Constitution was accepted. The literature often relates to the example of the events of the first half of the nineteens of the twentieth Century. Following the Constitution of 1874, which, as it was mentioned before, did not directly relate to the position of international law in the legal system of Switzerland, the Federal Assembly (*Bundesversammlung*) acknowledged people's initiative regarding "sensible refuge politics" (*vernünftige Asylpolitik*) to be intolerable. It suggested that illegal immigrants should be repelled from the territory of Switzerland without the possibility of appeal. According to the deputies, such a solution would severely interfere with the obligatory norms of international law.[26]

Let us present the relations between international agreements and federal resolutions. In case of their collision, later international agreements have the priority over federal resolutions which have come into force in accordance with the rule – *x posterior derogat legi priori*. However, it is necessary to note here that the decision of the Federal Court as to which act should have the priority – later resolution or earlier international agreement – has changed. In the jurisdiction of the inter-war period the Federal Court advocated the use of national law.[27] By the end of the sixties of the twentieth Century the Federal Court had pointed out that collisions between resolutions' norms which had come into force and the later norms of international agreements should be sorted out according to the interpretation of the national law which was in agreement with international law.[28] In 1973 the Federal Court decided that the legislator had the right to consciously pro-

[25] Compare Ibid., p. 509.

[26] Compare the proclamation of the Federal Court dated 22 June, 1994 regarding the people's initiative of "sensible refuge politics" and "against illiegal migration", *Botschaft über die Volksinitiativen "für eine vernünftige Asylpolitik" und "gegen die illegale Einwanderung"*, BBl 1994 III 1495.

[27] Compare the decision of 1933, BGE 59 II 331, 337 referred to by U. Häfelin and W. Haller, *Schweizerisches...*, p. 564.

[28] Compare especially the above-mentioned decision of the Federal Court dated 22 November, 1968, BGE 94 I 669.

claim laws which are in disagreement with international law.[29] They did not mean deviations from the law and duties of the state in the relations with other countries. What they meant was the matter of regulations; although contradictory with the agreement, they would be applied exclusively within the state. The opinion was heavily criticized by the doctrine.[30] Later the Federal Court stated that the norms of the international agreements are to preserve the priority in case of their collision with resolutions' norms independently of the fact which act was accepted earlier and which one was accepted later.[31] A direct continuation of this thesis was revealed by the decision in 1999.[32]

As it was mentioned before, in accordance with the Constitution, federal resolutions and international law are authoritative for the Federal Court as well as other authorities applying law. It results in the order for the law applicants to apply the federal resolution even if it is certain that it contradicts the Federal Constitution (assuming that its interpretation in accordance with the Constitution is impossible). The order of its applications does not mean prohibition of the constitutionality control understood as the law application organs' expressing their views on the disagreement of a given resolution with the Federal Constitution and encouraging the legislator to correct the mistake; the Federal Court remains the most active agent in this field.

Contemporary the common acceptance on the Swiss ground of the priority of international agreements over federal resolutions enables the control of resolution norms. Interesting is the fact that it is not the Federal Constitution that is the model. The model is revealed by international agreements where Switzerland in one of the sides. The most significant here is the European Convention on Human Rights[33] as well as the International Pact on Civil and Political Rights.[34] When it comes to the International Pact

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[29] Compare the decision of the Federal Court dated 2 March, 1973, BGE 99 Ib 39.

[30] Compare T. Cottier, M. Hertig, *Das Völkerrecht...*, p. 13 and following as well as the literature mentioned there.

[31] Compare the decision of the Federal Court dated 25 August, 1993, BGE 119 V 171; dated 27 June, 1996, BGE 122 II 234 or dated 1 November, 1996, BGE 122 II 485.

[32] Compare the decision of the Federal Court dated 26 July, 1999, BGE 125 II 417.

[33] Convention for the protection of human rights and fundamental freedoms dated 4 November, 1950, *Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, SR 0.101, was accepted in Switzerland in November 28, 1974.

[34] International Pact on Civil and Political Rights dated 16 December, 1966, *Internationaler Pakt über bürgerliche und politische Rechte*, SR 0.103.2, was accepted in September 18, 1992.

on Economic, Social and Cultural Rights,[35] the Federal Court expresses its doubts regarding the self-executive character of its resolutions and, what is more, the possibility to base individual decisions on this act.[36] Potentially, although obligated to apply norms of the federal resolution which, in their opinions, contradict the Constitution, every organ applying law, especially the Federal Court, can withdraw the norm of the federal resolution if it contradicts the norms of international law in the framework of their accessory norm control.[37] Within accessory control one deals with annulment of the application of certain norms in the case under consideration with no influence on the obligation of this regulation with *erga omnes* effect.

In the doctrine the Swiss Federal Constitutions are described as rigid. The procedure of their change has been complicated and long-term. This procedure is conducted not only with the participation of the state authority and the Cantons but also citizens who take part in referendum to make the accepted solutions durable. Young as it is, the actual Constitution has already faced changes of 62(!) of its regulations. 12[38] constitutional referendum have taken place in the state (the last one took place in May 17, 2009).[39] Among numerous changes the change regarding the extension of jurisdiction competences of the Federal Court (art. 189) deserves a special consideration. Now the Federal Court does not only deal with appeals regarding violation of international agreements but also judges litigation resulting from the violation of international law (this point was already discussed above). It was already some time ago that U. Häfelin and W. Haller highlighted that such a change would result in long-term consequences. Apart from the agreements that the Federation or particular Cantons have with other countries, the source of international law is international convention or commonly accepted principles. Thus, a "new opening" that is faced by the Federal Court as well as by international courts and views of the

[35] International Pact on Economic, Social and Cultural Rights dated 16 December, 1966, *Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte*, SR 0.103.1, was also accepted in September 18, 1992.

[36] Compare the decision of the Federal Court of February 11, 1994, BGE 120 Ia 1 or the decision of the Federal Court of September 22, 2000, BGE 126 I 240.

[37] Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 564 and following.

[38] Compare Federal Department of Justice (*Bundesamt für Justiz*), *Änderungen/Aufhebungen Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999*, http://www.admin.ch/ch/d/sr/1/a101.html.

[39] Compare the resoultion of the Federal Court regarding the results of the referendum dated 17 May, 2009, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 17. Mai 2008*, BBl 2009 7539.

doctrine regarding the issue of defining which rules of the procedure are in agreement with international law.[40]

Continuing the consideration of the activity of the Federal Court in Switzerland as in the state under the rule of law, it is necessary to highlight that it constitutes a reflection of the concept of constitutional democracy which is perhaps best realized in France.[41] Similarly to the Constitutional Council of France, which has created the so-called constitutionality block, fr. *bloc de consttitutionnalite*, (comprising the resolutions of the Constitution of the French Fifth Republic of 1958, the decisions of the organic resolutions, certain resolutions of the preamble of the Constitution of 1946, resolution of the Declaration of Rights of 1789 as well as "basic principles acknowledged by the rights of the Republic"[42]), the Swiss Federal Court has extended the constitutionality subject with the principles formulated on their own. A special role has had the notion of "constitutional rights of citizens" as defined by the Federal Court. The Federal Constitution (Compare art. 164 item. 1 l. b) uses the formulation constitutional rights (*verfassungsmässige Rechte*) without giving a further explanation of its meaning. W. Kälin, having carefully analysed the jurisdiction of the Federal Court, gives the name of "constitutional rights of citizens" to "pursuits of claim to be pursued in the court regarding the protection of not only public interest but also individual interests whose importance is big enough to be protected in accordance with the will of a democratic state or with a compatible (*konsensfähig*) stand of the Federal Court to demand such a protection".[43] First of all, the basic rights defined in the Federal Constitution (art. 7–34) or in the Constitutions of the Cantons as well as principles constituting the picture of the federal state under law such as the principle of the division of authority, derogative power of federal law (art. 49 item 1) or the prohibition of double taxation between the Cantons (art. 127 item 3) fall under the category of constitutional rights in Switzerland. The Federal Court, being the "guard of the principle of the democratic and federal order in the state under law",[44]

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[40] Compare U. Häfelin, W. Haller, *Schweizerisches...*, s. 583, passim.

[41] For more information on the constitutional democracy see M. Granat, *Od klasycznego przedstawicielstwa do demokracji konstytucyjnej (ewolucja prawa i doktryny we Francji)*, Lublin 1994, p. 135, passim, see also A. Jamróz, *Demokracja konstytucyjna – kilka konsekwencji dla systemu prawa*, in: Z. Czeszejko-Sochacki (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji...*, Białystok 2001, p. 17 and following.

[42] Compare S. Oliwniak, *Wpływ orzecznictwa Trybunału Konstytucyjnego na system prawa*, Białystok 2001, p. 25 and following.

[43] Compare W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, Berno 1994, p. 39 and following, especially p. 67.

[44] Compare J. P. Müller, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1981, p. 69.

has also acknowledged guarantees revealed by the European Convention on Human Rights[45] and the International Pact on Civil and Political Rights[46] to be constitutional rights of the citizens.

It is worth noticing that nowadays the legislator in the Federal Constitution, which is the act of the proclaimed law, guarantees a range of values which were not included before at that level of regulation.

Before the Constitution of 1999, the issue of human dignity (see art. 7) was tackled only in the European Convention on Human Rights (compare its art. 3) as well as in the International Pact on Civil and Political Rights (compare its art. 7, 8 and 10). The Constitution of 1874 in a somehow casual manner commented on the right to a decent funeral (art. 53 item 2), abolishment of arrest for debts (art. 59 item 3), abolishment of death penalty for political crimes (art. 65 item 1) as well as the application of corporal punishment (art. 65 item 2), protection against abuses in the field of reproduction and geneticist engineering (art. 24novies) and transplantation medicine (art. 24decies). The right to life and individual freedom (compare art. 10 of the Constitution of 1999), apart from the regulations indicated above referring to the sphere of human dignity, was perceived as an unwritten constitutional law.[47] The issue of the existence protection (today's right to help in difficult situations – art. 12) was treated directly as the basic individual right for the first time in 1995.[48] Protection of private life (art. 13) was regulated at the constitutional level only as a guarantee of post and telegraph confidentiality (art. 36 item 4 of the Constitution of 1874), whereas protection of personal data was only a resolution matter.[49] The Federal Court has been recognizing the freedom of expressing one's views (now art. 16) as the unwritten constitutional norm since 1961,[50] a similar situation has had freedom of speech (since 1965)[51] (art. 18) or freedom of gathering (since 1970)[52] (art. 22).

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[45] The Federal Court refereed to in, among others, in the decision dated 19 March, 1975, BGE 101 Ia 67, 69 and following, or the decision of the Federal Court dated 15 November, 1991, BGE 117 Ib 367, 371 and following.

[46] Compare the decision of the Federal Court dated 22 August, 1994, BGE 120 Ia 247.

[47] Compare the decision of the Federal Court dated 20 March, 1963, BGE 89 I 92 and 25 March, 1964, BGE 90 I 29.

[48] Compare the decision of the Federal Court dated 27 October, 1995, BGE 121 I 367.

[49] Federal law dated 19 June, 1992 regarding personal data prtotection, *Bundesgesetz vom 19. Juni 1992 über den Datenschutz*, SR 235.1.

[50] Compare the decision of the Federal Court dated 3 May 1961, BGE 87 I 114.

[51] Compare the decision of the Federal Court dated 31 March 1965, BGE 91 I 480.

[52] Compare the decision of the Federal Court dated 24 June 1970, BGE 96 I 219.

The acceptance of the Constitution of 1999 has not affected the activity of the Federal Court in the issue under consideration (since the Constitution of 1874 its jurisdiction has been actual). It has been the author of norms of conduct. It is possible to state that up to some degree its jurisdiction has had both a normative meaning and character. Thus, it has been developing the Swiss constitutional law.

Discussing the system of the Swiss Federation, it should be concluded that the Swiss people have been very pragmatic. The history and contemporary situation have proved that not only can they use the output of the doctrine and experiences of other nations but they are capable of creating rational solutions. While characterizing the state under the rule of law in Switzerland, it is impossible to point out explicitly a complete or exclusive realization of some grasp of that concept. Here the state under law is understood in a formal sense because of its emphasis of the certainty of law; hence the basis for the organs of public authority is to be found in the essence and boundary of law, in the first place, in the proclaimed law. On the other hand, it also guarantees individual freedom and dignity as leading values in democracy in the sphere of both positive law and norm-creative jurisdiction activity of the Federal Court.

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Adam Czarnota

TRANSITIONAL JUSTICE AND RULE OF LAW. OBSERVATIONS ON CENTRAL-EASTERN EUROPEAN EXPERIENCES*

Introduction

Transitional justice is nowadays well known term widely used in relation to situation of societies in transition. It has been first used in relation to countries in South America which embarked on the democratization road. Later on it started to be used to post-conflict situations. One of the crucial problems in transitional justice approach is what to do with the difficult past and abuses of human right in order not to further divide but to integrate deeply divided society? Problem of justice to the past, to the victim and also the problem if institutions building are in the centre of this approach. Rule of law is one of these public goods which societies in transition want to see installed. Can we do this by ignoring the past? Or rather by building on normative reservoirs of the existing society?

In this short text I will try to explore these issues from using the empirical examples from post-communist transformation in Central-Eastern European countries.

In the Western legal tradition law was not a tool for dealing with historical justice. It was a well-designed instrument for coping with injustice on smaller scales. At the same time in Western culture another concept of historical justice was present but conceptually separated from normal justice. That distinction was represented by two different goddesses dealing with justice. In ancient Greece these were *Dike* and *Themis*; in ancient Rome *Nemesis* and *Justitia*.

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The first dealt with the historical and/or divine dimensions of justice, quite often referred to as providence or fate. Realisation of that dimension of justice was left in God's hands. It appears that criteria for that type of justice were perceived as different from those applied and developed by human reason. Realisation of that type of justice was left to other times, usually outside human time. It was about the apocalyptic character of total justice. Nemesis was presented as the goddess of justice and revenge, a personification of that goddess's wraths and punishment.

This year we celebrate twenty years since the transfer of power from communist regimes started in Poland's first (semi-free) election of 4th June 1989, which ushered in Europe's first post-communist, non-communist, government. It had snowball effects in other countries. With the exception of Romania the transfer of power was peaceful and based on agreements usually called 'round table talks'.[1] The western liberal world praised this type of transfer of power as a model for a liberal and constitutional state. Twenty years later, the societies in the countries in question are deeply divided in opinion about the present and the future.

There is no doubt that each of these countries has made substantial progress. Apart from the Balkan states, all have become members of the European Union. The standard of living has improved and more importantly some important modernising changes have taken place. Despite all these changes the states do not function as expected by their citizens, basic institutions of administration of justice do not work as they should, the level of corruption is too high and the politics, while passionate operates rather as a façade, with a great deal of real activity happening behind the scenes and elsewhere. Citizens do not believe in their impact on the political processes and plenty of them complain that the institutions of the administration of justice do not act properly.

Why is this? A substantial number of citizens and observers of the affairs of the region claim that remnants of the past, unsatisfactory dealing with legacies from the former regimes, are responsible for the contemporary state of affairs. It is not our aim to confirm or falsify such claims, but in order to consider the contemporary state of affairs in the democratic law-governed states, as the post-communist regimes call themselves, we have to focus our attention on the extremely complicated problem of the relations between legality, the rule of law, institution-building and dealing with the past in the process of transition from communism over these twenty years. In the

[1] See J. Elster (ed.), *Round Table Talks and the Breakdown of communism*, Chicago University Press, Chicago 1996.

paper I will describe legal strategies adopted in particular countries in their attempt to deal with one only, but the most controversial, element of dealing with the past. I will then show the relationship between discourses about these strategies and the discourse and institutional change connected with implementation of legality and the rule of law.

This paper will discuss the overlapping issues of 'lustration' and 'decommunisation' (the meaning of which will be explained below), often lumped together under the first of these terms, lustration. The first post-communist country which adopted the law of lustration was the Czechoslovak Republic on 4 October 1991. In Hungary the Parliament adopted a lustration law on 8 March 1994 with changes adopted in 1996 (Law XXIII from 1994 and Law LXVII from 1996 on lustration of persons holding some important positions). Poland adopted its lustration law on 11 April 1997 with subsequent amendments. In Bulgaria elements of lustration law are in the Statute on Administration adopted by the Bulgarian parliament in May 1998. In Lithuania two statutes were passed, one adopted in July 1998 regulating participation in public life of the KGB officers and the second adopted in November of that year in relation to secret collaborators with the secret services. The Romanian Parliament as the latest in 1999 adopted the so-called Dumitrescu's law which regulates the question of lustration in that country.

In empirical presentation of the introduction of lustration and decommunisation, I do not cover all countries but choose case studies since the shape and the scope of what is involved differs in particular countries. Nevertheless, it seems to me that the chosen case studies are representative for presentation of the lustration issue in the entire region. What is missing is comparison with the situation in countries such as Ukraine which did not introduce any attempt at lustration.

Lustration and decommunisation

The last twenty years changed the evaluation and approaches to the problem of the past in the former communist states of Central-Eastern Europe. At the very beginning of the change not many participants stressed the need for:

- doing justice to the victims and family of victims of crimes committed by the institutions and officials of the communist regimes,
- addressing the problem of participation by functionaries of former communist regimes and secret collaborators in public life after the transfer of power,

- access to the files of the secret services of the former communist regimes,
- restitution of and/or recompensation for property nationalised by communists after 1944,
- general historical evaluation of the communist regime.

Generally those who wanted some sort of transitional justice measures applied immediately come from the right of the political spectrum, and at the time they did not have a big presence in the media and especially public media. That was a time of euphoria about the negotiated transition and change of the regimes. Later, after the initial euphoria was over, the discussion and demands for justice gained momentum.

The most controversial of these issues was and is the problem of lustration. The term lustration became an integral part of the post-communist discourses. The term comes from the Latin *lustratio* which means ritual cleaning through sacrifice, and related terms, *lustrare* – cleansing, sacrifice, review of the army, and *lustrum* – the cleansing sacrifice performed every five years in ancient Rome. The etymological meaning has a positive connotation, as cleaning from accusations. Some would suggest that it also has a negative one understood as requiring cleansing. In discussion about lustration there are in fact two expressions: negative lustration – which means that the person is freed from accusation and 'positive' lustration – meaning that the person indeed cannot occupy some positions due to their past collaboration with the secret services.

It is impossible to reconstruct one universal meaning of the term lustration, present in all countries. Each country possesses its own specific meaning due to the multiplicity of solutions to the problems of dealing with the communist past. This problem of uniform meaning cannot be restricted only to semantics but is also connected with the ways in which issues of lustration and decommunisation are interwoven.

Generally, by lustration we mean:

1. The procedure conducted by authorised institutions of checking the candidates for some position in the state, from the point of view of their security credential broadly conceived – this is classical *vetting*;
2. Lustration proper is the process of making public the names of people who consciously and secretly collaborated with the organs of the secret services
3. The procedure making possible elimination for some time from public life of groups of people who in the past occupied some position in the state and/or communist party apparatus.

In the specific context of post-communist Central-Eastern Europe lustration is just a small, but the most important and at the same time con-

troversial, part of all strategies of dealing with the communist past in the process of re-building social and state institutions, in order to establish the institutional and social bases for democracy and the rule of law.

The terms 'lustration' and 'decommunisation' are often confused with each other and confusing for everyone. At its broadest, decommunisation can refer to all political and legal strategies the aim of which is eradication of the legacies of communism in a social and political system. This would include both a narrower conception of decommunisation (focussing on elimination of personnel), and lustration (focussing on informers). But these terms are often used interchangeably. Wojciech Sadurski injects some clarity on these matters, by reconstructing the meaning of these categories in political discourse in Central-Eastern European post-communist countries:

> 'lustration' applies to the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus), while 'decommunisation' refers to the exclusion of certain categories of ex-Communist officials from the right to run for, and occupy, certain public positions in the new system. However, in the public debate on the moral and legal rationales for and against the policies covered by these concepts, the two have been often lumped together.[2]

Even this does not get us all the way, for the question formulated broadly as 'lustration' usually includes three problems, namely lustration proper (screening of former collaborators and members of secret services), access to secret service files, and decommunisation. Quite often it is very difficult to separate them even analytically, especially lustration from decommunisation. Quite often lustration is presented wrongly in the literature in the West as a process of 'vetting'. It does have some elements of vetting but it goes further, because it is connected with the process of decommunisation which means a conscious attempt at removal of the remnants of communism from the public life of the societies and states embarked on the process of democratisation and creation of a law-governed state.

In some countries, such as the Czech Republic, the term 'lustration' actually includes also decommunisation while in others as in Hungary it is merely 'soft' lustration: no sanctions are applied apart from making the lustrated persons' past service known to the public.

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[2] Wojciech Sadurski, *Rights before Courts. A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, Springer, Dodrecht 2005, p. 245.

Lustration from the very beginning was a controversial issue and quite often in the public discourse the opponents of lustration claim that it is in principle contrary to the very concept of a democratic law-governed state. They argued that lustration is based on collective guilt, contrary to the presumption of innocence and the principle of non-retroactivity of law – to mention only the most important accusations.

The supporters of lustration and decommunisation did not deny that it involved some retroactivity of law and departure from strict formalistic legalism. However they claim that lustration is necessary for a substantive and robust rule of law, and for the legitimacy of the new legal system. In order to understand the controversy one central element of the character of the regimes before the transfer of power took place needs to be understood.

Law and dealing with the past

As mentioned at the start of this chapter, *Themis* and *Justitia* were goddesses of the human dimension of justice. In their administration of justice, they were more understanding of or softer to human errors. They are usually presented as blind in the application of justice, which shows on the one hand commitment to principles of human justice, impartial application of law. At the same time that blindness shows the limitation of justice embodied in human legal systems. Those limitations of human legal systems are due to limitations of human knowledge. How can we do justice when our knowledge about events and especially past events is limited? That is why human legal systems contain so many principles which limit the ways we may seek to do justice to the past, such as statutes of limitations, the presumption of innocence etc. But that is only part of the issue. Another is the apocalyptic character of the *Nemesis* and *Dike* type of justice. Until our contemporary time there was no attempt to resolve legally questions that were formerly only subjects of the *ethics* of memory, if they were subjects at all; not of law. That was a matter of fate and divine justice. The demand for legal redress for the communist past is based on a refusal to accept blind fate.

It seems to me that in discussions of the extremely complicated problem of dealing with the past the line is still, as it used to be, between those who have a limited concept of human justice – as represented by *Justitia* and *Themis* – and those who look from the point of view of historical justice, Justice with a capital J based on principles considered universal in time and space, which have to be implemented regardless of social costs.

I argue that 'dealing with the past' is based on a combination of two perspectives and that the process of building bridges between these two perspectives requires a new approach in legal thinking and institution-building. A combination of two very different strategies and institutions is needed in order to deal with the wrongs of the past. The traditional legal approach focused on individual allocation of guilt and responsibility based on law's limited internal epistemology is not satisfactory, and we can observe the creation of new types of quasi-judicial institutions designed to deal with the past, such as truth commissions, institutes of national memory, special international tribunals such as the International Tribunal for Former Yugoslavia or for Rwanda in Arushia, Tanzanina, the International Criminal Court or mixed national/international tribunals.

For "transitional justice" or "dealing with the past" is not for itself only. It is about the future of those societies. The problem of coming to terms with the communist past in post-communist societies is constitutive for these societies. It is a constitutional problem for the new post-communist system. The different approaches to the problem have had an impact on the form and structure of new regimes in the region.

It appears that difficulties, and in some substantive circles of society unwillingness, not only to adopt a strategy of dealing with the past but even to opening up public debate on dealing with the past in post-communist societies is caused, one the one hand, by the contemporary political struggle and composition of the political forces, and on the other hand by the character of communist society in the past. The communist system was characterised by moral compromise, changes of role from perpetrators to victims and again to perpetrators. A lack of morally clear borders, change of roles, moral compromises engaged in by all but a few righteous ones, all create a situation in which dealing with the past in the form of public cleansing cannot be done by the generation which grew up during communist times.

That does not mean that it cannot be tried in the form of creation of a new type of legal institution which will accommodate elements from both *Justitia* and *Nemesis* – only in such a way is dealing with the past as a constitutional process possible. Restriction of dealing with the past only to traditional legal mechanisms, based mainly on criminal law and retributive justice: these are not good tools. There is a need for a new type of quasi-judicial institution which will be able to take into account the operation of the quasi-totalitarian communist regimes; new institutions and procedures which will be able to overcome epistemological limitations inherent in the contemporary legal systems; institutions which will preserve the authority of

courts and will be able to overcome their limitations in dealing with different shades of guilt and involvement in operation of the communist system.

Rule of law – some more universal lessons

Lustration usually has been criticised as based on the concept of collective guilt, and not on the presumption of innocence but on the presumption of guilt, that it is over inclusive and does not take into account the individual circumstances of a particular case, that files of the secret services are incomplete and inaccurate, that lustration is used and abused for political motives and leads to witch hunts. And indeed it is possible to show plenty of deficiencies in particular pieces of legislation regarding the lustration issue in particular countries. However I would like to defend the process and claim that generally lustration plays a positive role in laying down foundations for a cleaner public sphere and rule of law and democracy, and also that debates which lustration stimulated have played a very positive role in building rule of law cultures in the countries in question.

Somebody, and especially lawyers, might ask what is the point in discussing all these problems of dealing with the past, especially lustration? What do they have to do with the rule of law? That is quite an important question. The problem with transformation of political and social regimes in Central-eastern Europe has shed a new light on the rule of law question. The experiences of all post-communist countries 20 years after the transfer of power from communist to non-communist forces have shown that though legal institutions are important, even very important, legal institutions consist of both rules and personnel, and it is much easier to declare new rules than to change people. The lustration procedure focuses on eliminating some groups of people who potentially could harm the new democracy and rule of law.

The experiences of almost 20 years in this part of the world show that the rule of law is a substantive, not merely a formalistic concept. The rule of law includes values, and to talk about a formalistic or thin concept of rule of law it is necessary first to have a thick concept of the rule of law. On the normative desert of communist regimes it is impossible to build even a minimum of trust for the institutions of law unless this law expresses popular concepts of justice. What citizens learned during the former regimes is cynicism and distrust of legal institutions, how to abuse them and avoid them. A formal concept of rule of law, a thin one, would become the object of manipulation and abuse in practice. Citizens have to see and experience that law is not only for the powerful and those with financial or other resources

such as personal connections or status, but that law is also an institution which protects their rights, can return dignity to them, provide tools not only to complain but defend their rights.[3]

We can also learn from 20 years of experience that the rule of law is not simply a legal transplant but requires development of a social and normative structure in society and that is a necessary but of course not sufficient precondition for its existence. Mature societies which craved for democracy, liberty and rule of law require and deserve truth about their difficult past not because the 'truth will set you free' but because it is necessary for normal public life. Open discussion about the substance of the secret services archives, knowledge about the names of collaborators and justice done to former perpetrators are necessary for a normative switch in these societies.

Legal scholars could learn from observation and studying the process of transformation in former communist states in Central-Eastern Europe, that implementation of rule of law requires a peculiar social base or social and normative ontology. That means a peculiar type of social relations and a peculiar type of public morality. It is difficult to advance rule of law in societies based on secrecy and societies in which patronage, not equality of citizens, is the norm. We do not know how to bring public morality into society even if is it possible to do this – but certainly we know that some institutional and procedural strategies could at least help a bit. This means that rule of law is not only a lawyer's matter but requires socio-legal specialists. In this way we can argue that careful observation of the eastern European experiences can provide socio-legal scholars with material of universal significance from the point of view of building rule of law and democracy.

The problem of the relation between rule of law and lustration was addressed by the decisions of the Czech Constitutional Court, which expressed a substantive concept of law-governed state or *Rechtsstaat*. At stake was interpretation of the principle of legal certainty. Should it be interpreted in a formalistic or more substantive way? The Czech court made a departure from a narrow formalistic and positivistic way of understanding the principle of rule of law and underlying it the principle of legal certainty, and formulated it in a substantive way which actually provided ammunition and arguments for these who defend lustration. The court took into account the

[3] For problems in communist and post-communist societies with law, rights and rule of law see Jacek Kurczewski, *The Resurrection of Rights in Poland*, Clarendon Press, Oxford 1993, and Brian Galligan and Marina Kurkchiyan (eds.), *Law and Informal Practices. The Post-Communist Experience*, Oxford University Press, Oxford 2003.

peculiarity of the post-communist transition and expressed directly the social needs for the rule of law in post-totalitarian society.

The Court stated that 'In contrast to the totalitarian system, which is founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria ... each state, or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by totalitarian regime, has the right to enthrone democratic leadership and to apply such legal measures as are apt to avert the risk to subversion or of a possible relapse into totalitarianism, or at least to limit those risks. ... As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist of certainty with regard to its substantive values. Thus the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt ... criteria of formal-legal and material-legal continuity which are based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken'.[4] The court made a reference to the concept of democracy which has to defend itself.

This is even more evident in the Lustration case II. The Court wrote that it 'considers it necessary to add to these data that determination of the degree of development of democracy into a particular state is a social and political question, not a constitutional law question'.[5] What we can add is that not only does democracy have a right to defend itself, in accordance with the German concept of *werhafte* or *streitbare Democratie*, but that in the Lustration I case the Czech Constitutional court formulated a concept of rule of law which is able to defend itself and this is based on non-continuity and a material concept of rule of law. It seems to me that the jurisprudence of the European Court of Human Rights in lustration cases also confirms this principle of rule of law able to defend itself. All these statements are very important because they go against the arguments of critics of lustration

[4] http://angl.concourt.cz/angl_verze/cases.php.

[5] Pl.09/01 Lustration II, unofficial translation at http://angl.concourt.cz/angl_Verze/cases/php.

that in its nature it is based on violation of the principles of rule of law and democracy. These Courts adopted the more reasonable position that democracy and rule of law need some extraordinary measures in order to be established. This cannot be done by routine imitation of the institutions and procedures from countries with long democratic and rule of law traditions.

Not all lawyers, commentators and actors who actively participated in the process of transformation support the idea of retroactive legislation and connected with it lustration. Among the strongest opponents of lustration have been Adam Michnik[6] and Vaclav Havel. In a public lecture delivered at the London School of Economics on 20 October 1999, for example, Adam Michnik said "The principle of de-communising ... is that a certain number of Communist functionaries of the Communist regime, or of the Communist Party, would be stripped of their constitutional rights en bloc, only for [the] reason that they held certain positions in the Communist Party. The lustration idea is that using the materials of the political secret police, the past of various personalities active in public life would be examined... This philosophy of de-communizing was drawing directly on the Bolshevik principle according to which so-called representatives of the bourgeois order and the Tsarist regime would be deprived of citizens' rights. In other words, the only ones entitled to run for a seat in parliament were those permitted to do so by the new rulers".[7]

On the legal ground opposition is expressed by the former and first Polish Ombudsman, Professor Ewa Letowska, who claims that it would be unjust and will contradict existing already rule of law if retroactive legislation is to be adopted.[8] This legal position, which defends a total ban on retroactivity of law, is based on naivety in my view and ignores the situation where crimes were committed under the umbrella of legality. I agree with the Czech-British socio-legal scholar Jiri Priban who wrote that 'Lustration has to be treated rather as a controversial element of the emerging rule of law and not as its mere denial due to the retrospective character".[9]

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[6] See A. Michnik, *Letters from Freedom: Post-Cold War Realities and Perspectives*, edited by I. Grudzinska-Gross, Berkeley, London, Los Angeles: University of California Press 1998.

[7] Adam Michnik, The Rebirth of Civil Society, public lecture presented by Adam Michnik at the London School of Economics on 20 October 1999 as part of the 'Ideas of 1989' Public lecture Series; available at: http://www.lse.uk/Depts/global/Publications/PublicLectures/PL10_TheRebirthOfCivil Society.pdf.

[8] See E. Letowska and J. Letowski, *Poland: Towards the Rule of Law*, Warsaw, Scholar, 1996 see also M. Safjan, *Transitional Justice: The Polish Example, the Case of Lustration*, 1 European Journal of Legal Studies, No. 2 pp.

[9] J. Priban, *Oppressors and Their Victims; The Czech Lustration Law, Decommunisation and the Rule of Law*, in: A. Mayer-Rieckh and P. de Grieff, op. cit.

Lustration is strictly connected with the issue of human rights. Democratisation, rule of law and the practice of lustration are inseparable.[10] Exit from, and restructuring of, the peculiar matrix of communist state required extraordinary strategies in order to block the communist networks of power to start to control crucial areas of public institutions and public life. Crucial it seems to me is the positive evaluation of lustration by the European Court of Human Rights especially if we take into account that the European standards of human rights are very high in comparison to other regional standards in the world. The European Court of Human Rights, in its several judgments mentioned below, though it criticised extension of lustration to the private sphere, never declared lustration illegitimate from the point of view of the standards of the European Convention of Human Rights and jurisprudence of the Court.

In the Grand Chamber of the European Court of Human Rights' judgement in Zdanoka v. Latvia, the court confirms the legitimacy of lustration and of a 'democracy capable of defending itself'.[11] In two cases from Lithuania the court stated that too far-reaching lustration, barring employment in some jobs in the private sector, is violation of human rights. The European Court of Human Rights gave its first ruling in the lustration case in 2004. It was a case against Lithuania. In *Sidbras and Dziautas v. Lithuania*,[12] the court found that the Lithuanian lustration law had affected the private life of the claimants as well as also violating the prohibition against discrimination. Similarly in the next case from Lithuania, *Rainys and Gasparevicius*,[13] the Court stressed again that limitation imposed in private sector, in private life, is in violation of Articles 14 and 8 of the European Convention on Human Rights. This view has been confirmed in *Matyjek v. Poland*[14] and *Turek v. Slovakia*.[15] The Court stated that 'the State-imposed restrictions on a person's opportunity to exercise employment in the private sector for reasons of lack of loyalty to the State in the past could not be justified from

[10] Magdalena Zolkos, *The Conceptual Nexus of Human Rights and Democracy in the Polish Lustration Debates 1989–1997'*, "Journal of Communist and Transitional Politics", vol. 22, No. 2, June 2006, p. 238.

[11] ECtHR Case No. 58278/0016 March 2006, *Zdanoka v.Latvia* [GC].

[12] ECtHR, Cases Nos. 55480/00 and 59330/00, EHCR 2004–VIII *Sidbras and Dziautas v. Lithuania.*

[13] ECtHR, Cases Nos. 70665/01 and 74345/01, 7 April 2005 *Rainys and Gasparavicius v. Lithuania.*

[14] ECtHR 24 April 2007, Case No. 38184/03, *Matyjek v. Poland.*

[15] ECtHR 14 February 2006, Case No. 57986/00, *Turek v. Slovakia.*

the Convention perspective.'[16] Generally the European Court on Human Rights confirmed the rights to defend the public sphere but also stated that lustration should be limited in the private sphere.

Difficulties in dealing with the past in transformation from communism shows that the thin concept of rule of law is adequate when we talk about well established systems of rule of law and when we operate on the taken for granted social and normative background. Because of the argument enumerated several times above, I claim that in transformation only a thick concept which includes some hard substantive values is adequate.

Dealing with the past and quite specific measures quite often contradictory to the established view on the underlying principles of the rule of law, such as legal certainty or non-retroactivity of law, are necessary to clean up the ground for the rule of law. What is worth remembering is that it is only part of 'transitional justice' and as such represents two very important features:

- Operation of such law is limited in time and,
- It is not limited to a narrow view of law but includes its social and political dimensions.

It is necessary also to touch at least the issue of the impact of lustration law in the countries in question. The aim of dealing with the past in post-communist societies and especially its lustration laws, which constitute an original post-communist institutional design to deal with the past of communist regimes, was not only truth-telling and reconciliation as in the cases of transitional justice in other post-conflict societies but also about building a solid social background for democracy, rule of law and observance of human rights. In the transitional period law shows its Janus double face. It is on the one hand an instrument of change and also is used as a source for rule of law regimes. It is quite interesting that lustration in all the post-communist countries mentioned stimulated more serious treatment of law as a source of basic rights and freedoms of citizens, as a source of the duties of the states and also as a source of restraint imposed on excessively discretionary powers or arbitrary acts of governments. Both procedural and substantive dimensions of the rule of law have been increasingly invoked in discussions around lustration and in constitutional adjudication regarding the issues of constitutionality of lustration law. Even if the law had the limited impact of cleaning up the public sphere from former collaborators of communist apparatchiks it would be difficult to exaggerate its impact on

[16] ECtHr 17 July 2007, Case No. 68761/01, *Bobek v. Poland*, paragraph 63.

public opinion and building of a rule of law focused culture. Paradoxically lustration law and the debates this legislation created became substantial sources for a rule of law culture in post-communist societies.

Lustration is an example that in order to establish rule of law it can be necessary, not merely to rely upon established principles but to swim in uncharted waters. The construction of new moralities, new institutions and the rule of law itself are not separable from the process of the construction of the past. The lustration law plays a very important role in this process of constructing a new identity.[17] Without lustration law, one has the situation observed by Lavinia Stan that "it is insulting and improper to bunch together Jaruzelski and Jacek Kuroń, Gustav Husak and Vaclav Havel... and deny the many shades of guilt and innocence separating them".[18] I would conclude with Vojtech Cepel's expression that the aim of dealing with the communist past was 'transformation of hearts and minds in Eastern Europe'.[19] But such a transformation cannot happen by itself. Law is on the one hand an instrument in transformation and on the other has to act as stable base opening up some closed doors. Law as a mechanism for systematic remembering and forgetting in dealing with the past, paraphrasing Friedrich Nietzsche, should always act in the service of life – for a better present and future. The best way is to deal with the past as part of a constitutional process.

As the moral and political philosopher, Hanna Fenichel Pitkin says, constitutions are not only something that we *have* but they are also what we *are* and more importantly something that we *do*. By *do* she made reference to 'the action or activity of constituting – that is, of founding, framing and shaping something anew'.[20] Legal facing and dealing with a difficult past is part of 'what we do' – reshaping ourselves and our societies. Rule of law in countries where it exists is a product of rather unconventional reshaping themselves by these societies.

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[17] For what can happen with self identity when there is no attempt even to face a difficult past, see Nanci Adler, 'The Future of the Soviet Past Remains Unpredictable: The Resurrection of Stalinist Symbols Admits the Exhumation of Mass Graves', EUROPE-ASIA STUDIES, Vol. 57, No. 8, December 2005, pp. 1093–1119.

[18] L. Stan, *The Vanishing Truth? Politics and memory in Post-Communist Europe'*, East European Quarterly, XL, No 4. December 2006, p. 396.

[19] V. Cepl, *The Transformation of Hearts and Minds in eastern Europe*, "CATO Journal", 17, 2, 1997.

[20] Pitkin, H. F., *The Idea of a Constitution*, "Journal of Legal Education" 37 (1987), p. 168.

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AXIOLOGICAL FOUNDATION OF NON-DEMOCRATIC REGIMES IN SELECTED POST-SOVIET REPUBLICS

Introduction

Building an independent country based on the model of the presidential system was a characteristic legacy of the Communist period in most post-Soviet republics. Although their regulations reflected the traditions of a given country, the newly born independent countries in Central Asia accepted the declarations of independence and constitutions largely based on western countries. The Constitutions of Turkmenistan, Tajikistan, Kazakhstan, Kyrgyzstan and Uzbekistan define explicitly a democratic character of the state, political and ideological pluralism as well as the principle of three-division of authorities. In some principal laws the role of political parties has been exhibited. Apparently, the constitutions of the Central Asian countries do not differ much from the constitutions of the countries belonging to the consolidated democracy. In the principal laws of the post-Soviet Asian republics one can find a solid catalogue of individual rights and liberties. However, the way the authority is held differs greatly from the standards defined in the constitutions. In the post-Soviet republics there has shaped a hybrid model of political relationships where the institution of free elections has been carefully fixed gaining the range of the primary assumption of democracy. At the same time, other principles of the democratic state under the rule of law have been marginalised, especially the character and scope of the responsibility put on those who govern the countries. The authority have failed to create the socio-political structures which take part in in the process of formation of the state policy. They have also failed to create party forms of the political life. Finally, they have not managed to properly ensure and strengthen the base, forms and institutions of the democratic state. In the atmosphere of intensive political, religious,

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social, and ethical conflicts, a further building of democracy has become impossible. What is more, its principles, ignored or instrumentally abused by the majority of the members of the political life, have failed to ingrain into the society.

This article aims at highlighting the axiological and political foundation of non-democratic regimes in the Central Asian states. The system of ruling the country in the Central Asian republics results in their approach towards a clearly authoritarian model of authority[1] and their depart from the democratic standards guaranteed by the constitutions. It seems, therefore, that a key meaning for a relatively easy acquisition of authoritarianism in the states under analysis are revealed by the following factors: historical, cultural and religious traditions, the legacy of the Soviet totalitarianism, their structural foundation, as well as constitutional and international conditions.

1. Historical and cultural conditions

The understanding and perception of the way the authority is held are greatly rooted in the historical and cultural basis which applies both to those governing and the ones being governed, the consequences of which are both heterogeneous and difficult to combat. Firstly, authority seems to be the most stable element of the social system from a historical perspective. While it is true to say that intense conflicts do change its composition and form, they do not change the very character of the regime. Secondly, the thesis that authority is based on historical and cultural premises as accepted by the regime and society discourages the authority to undertake deep changes which could disturb that historically based understanding. It results in the inadequacy of the regimes to undertake a deep auto-reflection and inner reformations. Probable changes are caused by a growing discrepancy between the authority's demand and what they can really execute (e.g. Tajikistan, Kyrgyzstan). In case of the Central Asian republics, historical and cultural experiences are characterised mostly by despotic relations on the level of those who govern and those who are governed connected mostly with numerous conquests of the regions by Arabs, Persians and Mongols in the XIX Century by the Russian Empire, as well as a specific clan-organisation of the society.

[1] А. Ю. Мельвиль, *О траекториях посткоммунистических трансформаций*, "Полис" 2004, № 2, pp. 64–75.

In the area of Central Asia there were independents states such as Khorasm (XI–XII Centuries), the Shaybanid Khanate (XVI Century), Khanate of Bukhara (XVI–XX Centuries), Kokand (XVIII–XIX Centuries) and Khiva (XVI–XX Centuries). They were conquered and destroyed by stronger neighbours form the south and north.[2] In XIX Century Central Asia became the area of the "Great Game" penetration[3] and new conquerors – Russia and England – appeared. When England, with a poor effect, was penetrating Afghanistan, Russia concentrated on its southern neighbour: the Emirate of Buchara, Khant of Khiva and Kokand. In 1862–1868 the Emirate of Buchara was in war with Russia. In 1866 the Russian Army occupied the area situated in the south of the contemporary Tajikistan – Khodjent. Two years later a Russian – Bucharian agreement was signed which declared Russia the owner of the conquered lands and the Emirate was to remain under the Russian protectorate. In 1867 the Russian-occupied Turkestan governorship was created in the area conquered by Russia. An intense Russian colonisation had begun which was intensified in 1899 when the Central Asia railway was opened.

After the Bolshevik revolution in February 1917 in the areas of the Russian Central Asia there was a series of "pro-independence" activities. In April the Russian-occupied Turkestan governorship was cancelled. The victory of the Revolution of November, 1917 in Central Asia made the Bolsheviks active. November 15, 1917 the third district meeting of the Soviets gathered which proclaimed the victory of the Soviets in Turkestan. In reality, it was not until 1920 that, with the help of the General of the Red Army, Mikhail Frunze, who fraternally "helped" the Communists in the Emirate of Buchara, the Soviet rule was declared in Central Asia. In September, 1920 the foundation of the Bukhara People's Republic was proclaimed. Earlier, in February, 1920 the People's Republic of Khorazm was founded.[4] The Soviet authority faced an armed resistance of the inhabitants. Resistant fights of the so-called "basmaches" continued till the beginning of the 30s in Central Asia.

A lack of historical continuity of the state authority and a native political centre (which, even if it appeared, was relatively weak) made the process of the creation of nationalities difficult. As a consequence, it was

[2] The history of the Central Asia states is described in: G. R.Capisani, *Nowe państwa Azji Środkowej*, Warszawa 2004.

[3] See P. Hopkirk, *The Great Game: The Struggle for Empire in Central Asia*, Kodansha International 1992.

[4] M. Haller, A. Niekricz, *Utopia u władzy*, Vol. I, Polonia Book Fund LTD, p. 90.

till the beginning of XX Century that clan-feudal relations of the Central Ages remained. Their continuation can also be found (although in a changed form) in the period of the rule of the Soviet where republics where represented by political dignitaries mostly represented by the local clans' heads In those circumstances an advancing state centralism, previously difficult to achieve in nomad tribes, constituted the essential *novum*. A cultural model of the political authority concentrated in the hands of the governor and the elite (clan) associated with him revives nowadays. It has specific implications. The leaders of the Central Asia states try hard to establish the image of their nation's leaders and tutors rather than their political leaders. Their power rests in a wide social legitimization as well as the system of mutual informal connections with "clients". Regime's support conditions various concessions and benefits. The lack of that support may result in the possibility of their deprivation. What is more, it has become the specific elements of the majority off the post-Soviet states whose system has been described as *patronal presidentialism* by Henry Hale.[5] In Central Asia a vertical stratification of "clientism" reaches whole societies. In this mechanism almost everybody can lose. That is why the president is supported.

Cultural traditions are another principle issue conditioning the functioning of non-democratic regimes in the Central Asia republics. Orient traditions (among which are clan mechanisms of politics, system of general law, Muslim law), customs and traditions do not only mark one's lifestyle but they greatly influence a political process in that region and forming of the elements of the system which is far from democratic. Tribalism and mechanisms of clan politics as well as the appeal to a traditional way of life and religion are unfamiliar with democracy. The apparent danger for a democratic style of governing are strong renationalisation and strong tradition of giving somebody an official post on the basis of clan connections or the potential of army conflicts instead of candidates' skills. Apart from that, there is an apparent inclination of the Central Asia political elite to deal with conflicts with the help of hand rather than conciliation (the so-called kalaschnikov culture). Cultural traditions result in a growing aggregation of the authority in the hands of the presidents. Kyrgyzia remains an exception where, after the "Tulips Revolution", the president Askar Akajev's authoritarian regime was subverted in 2005. However, it is necessary to remember that in the Republic of Kyrgyzia social protest was not based on

[5] See: H. Hale, *Regime Cycles: Democracy, Autocracy, and Revolution in Post-Soviet Eurasia*, "World Politics" 2005, Vol. 58, No 1, Oct, pp. 133–165.

the attempt to overthrow a non-democratic way of governing and anti-democratic character of elections as it was in case of Gruzia and the Ukraine. In Kyrgyzia the protesters were supporting their local leaders affected by family and clan bonds.[6] After Akajev was overthrown, the novelization of the constitution took place which significantly strengthened the role and position of political parties in the political system. Nonetheless, one may feel anxiety while observing a gradual return to Kurmanbek Bakijev's presidential quasi-dictatorship.

In the Central Asia states there has been present a tradition of individual's subordination to the hierarchy which has been emphasised by the institution of family. There is a clear attempt to achieve the state of safety (social and physical) which was previously guaranteed by the system of the USSR. In the eyes of the society safety is more significant than a few apparent disadvantages of the previous system such as lack of freedom of speech, inability to travel internationally, a ban on the contacts with strangers or administrative limits in daily life. Therefore, the fact that social trust has been given to politicians who promise to guarantee stability should not be surprising. An official discourse, where slogans such as "strong state", "strong leader" and "strong power" are common, is to face a very positive feedback. Democracy in this context is not a priority. Freedom of word and pluralism in the conditions of domestic problems remain a secondary issue. Moreover, freedom remains an empty term which is not completely and properly understood. Its meaning is only limited to the possibility of using it without a deeper reflection whether it is a real possibility or an illusive one. A distrust to democracy is additionally intensified by the fact that the policy of liberalization and the values which accompany it seem to be socially strenuous. Individualism and freedom strike the culturally ingrained values, which may discredit a social traditional model based on the family, patriarchal authority, obedience to the elderly and the primacy of the community over an individual. Moreover, in the public opinion, liberalization and democracy are accompanied by a great deal of corruption and growing social inequality. It results in a great frustration for the departure from the model of "general equality" has not been accepted by everybody.

Cultural traditions influence the way of granting the authority. It is typical that only small groups of opposition demand democratic elections

[6] W. Baluk, *Republika Kirgiska*, [in:] W. Baluk, A. Czajowski (ed.), *Ustroje polityczne krajów Wspólnoty Niepodległych Państw*, Wrocław 2007, p. 254.

to nominate a leader.[7] Both political elites and clans (representatives of the traditional structure of the local society) find it natural for the governing presidents to appoint a follower. Bearing in mind the fact that the Central Asian societies are patriarchal and Muslim, male offspring as well as male leaders are of great value. The Presidents of Kazakhstan and Uzbekistan do not have sons. Therefore, the main role in the local politics is given to their daughters. Dariga Nazarbajew in Kazakhstan and Gulnar Karimov in Uzbekistan lead an active public life; the former is a founder and a leader of the political party "Asar";[8] the latter is a political adviser of her father. As Andrzej Lomanowski has noted, the system of authority built on traditional values contradict these values.[9] It is not known what the reaction of the patriarchal society, leaders of the local clans and regional groups will be when faced with the attempt to give the authority to women. Nonetheless, it does not change the fact that the above-mentioned presidents have made the attempt to change it, probably basing on the Russian variant where first one gets the functions of the President and then confirms that in a referendum or elections.

Although the Presidents of Turkmenistan and Tajikistan have sons, they have not been preparing them to overtake the authority. The President of Turkmenistan, Saparmurat Nijazov, was thinking of empowering his son Murad but he was not interested in governing the country. After Nijazov's death there were presidential elections won by Gurbanguly Berdymuchamedov who has remained the Chairman of the Parliament ever since.

The Soviet totalitarianism has had a great impact on non-democratic characteristics of the Central Asian regimes. The system which was built in the conditions of the domestic war and the Bolshevik elimination of independent moods constitutes the basis of the artificial division of the Central Asia in 1924 and marked the frames of the structural evolution of the Soviet Republics in the following decades.[10] As a result, the republics were built somehow in an "outer" way and their structural models were mostly based

[7] Interesting is the fact that in the Central Asian states only oppsition political parties and Muslim groups demand free elections.

[8] Dariga Nazarbajev holds 80% of the media. Her political party, "Asar", has had poor results in the parliamentary elections: A. Orzelska, *Kazachstan*, [in:] *Systemy polityczne oraz polityka wewnętrzna i zagraniczna w państwach postkomunistycznych Europy i Azji w latach 2004–2005*, J. M. Fiszer, (ed.), Warszawa 2005, p. 152.

[9] A. Łomanowski, *Wpływ dzieci przywódców Azji Centralnej na sytuację polityczną i gospodarczą państw regionu*, "Bezpieczeństwo Narodowe" II, 2006/2, p. 63.

[10] T. Bodio, T. Mołdawa, *Konstytucje państw Azji Centralnej. Tradycje i współczesność*, Warszawa 2007, p. 15.

on the borrowed models with a homogeneous system of power, democratic centralism, monopolistic role of the Communist party and sovietisation, denationalization and displacement of nations.

The Central Asian Republics were born in the minds of the Bolshevik commissars. They were deprived both of any national traditions and state structures. On the other hand, they had a very complicated demographic situation intentionally increased by the actions of the Bolsheviks. The old imperialistic principle "divide and rule", which was the creed of the Soviets, deprived Tajikistan of the two most important cultural centres: Buchara and Samarkand. Both cities with their inhabitants were given to Uzbekistan by Stalin. Whole Central Asia was greatly colonized by Russians. Building national states has remained an ideologically consolidating element of the regimes of Central Asia after 1990/91.[11] Even communists, initially negating the meaning of independence, and Muslims, referring to pan-Islamic visions from the past, have made the national ideology their primary message. It contradicts the actual ethical structures of the post-soviet republics of Central Asia. For instance, the ethnic Kazachs constitute less than half of the inhabitants in their country. Twice the number of Tajiks live out of their nominal republic. A considerable minority of the Uzbeks live in their neighbouring republics[12] which results in numerous international conflicts.

The period of the USSR rules shaped not only the boundaries of the states but also their political, economic and social life. The collectivisation and chaotic industrialization resulted in the collapse of the traditional social structures and irreparable ecological losses (e.g. drying out of the Lake Aral). The economy of the Central Asian republics was treated as a a reservoir of raw materials by Moscow. A strong dependence of the local enterprise (industrial and agricultural) from the centre and dependence of republics on financial transfers resulted in a dramatic economic crisis at the beginning of the 90s. A rapid increase of unemployment as well as pauperization of people caused even more negative phenomena. Social marginalization pushed people towards a criminal net of connections. There was a rapid growth of corruption, nepotism, organized crime and, consequently, a growth of Mafia's influence which was illegally acting in the economy of the states and collaborating with the state officials to control

[11] A few months before the end of the USSR the Soviet Republics of Central Asia did not show their will to leave the USSR. Michail Gorbaczow was strongly supported by both the leaders of the Central Asian republics and their inhabitants who explicitly supported functioning of the USSR in the referendum regarding the future of the Russian Impire held in March 17, 1991.

[12] L. Włodek-Biernat, *Po co dziś państwo narodowe*, "Gazeta Wyborcza" 13.06.2006.

the state raw materials. A large scale corruption weakened the legitimization of the government and their ability to control the situation within the state. Groups and clans representing different interests were competing to get control in the state and promote Muslim, democratic or authoritarian principles which governed their rules. In such circumstances the consolidation of power in the hands of the local political leaders, who were getting the real power and independence, took place. As a matter of fact, the institution of president was being built basing on the remains of the local communist party's structures.[13] Communists' actions have had a negative influence on the local customs and community resulting in the collapse of some of the traditional social institutions such as "the elders" or *Mahallah* – a gathering of citizens who constituted (and still constitute) an informal element of stability thanks to which there was a relatively low crime rate. Stalin's expurgation deprived local clans of their leaders of the family elite or, in other words, aristocracy. It was replaced by the new, sovietized elite who had a syndrome of totalitarianism and unconditioned obedience to the central power ingrained.

2. Foundations of the governmental systems

To define a specific character of the structures of the governmental systems after the collapse of the USSR, T. Carothers employs the term "grey zone of democracy". This term has been applied to the states which have failed to ingrain democracy and have strong authoritarian tendencies. Such states remain in a kind of suspension between full dictatorship and stable liberal democracy. They neither head towards dictatorship nor aim at complete democracy. They are in a transient state. In some states there has shaped a model of "irresponsible pluralism", in others the model of "dominating power" (authority) remains.[14] The second model has been dominating in the states of Central Asia. It is expressed by the existence of limited political space, limited participation of opposition parties, dominance of the political leader or leading party over the political system, governors' ownership of the state, lack of competitors in elections, and frequent falsification of elections.

[13] М. Олкотт, *Центральная Азия: перспективы смены власти*, "Pro et Contra", том 09, 2005 год, № 1, июль-август, p. 53.

[14] T. Carothers, *The End of the Transitional Paradigm*, "Journal of Democracy" 2002, vol. 13, nr 1, pp. 5–21.

The presidential system (in reality, authoritarianism) was to guarantee a successful departure from "anarchic democracy" which had occupied the post-Soviet lands just after the collapse of the USSR. The leaders of the states had serious advantages. In the collapsing post-communist world observed by the society they remained a guarantee of stability and consolidation of the state; they were a point of reference and reliability. In the initial period they had a true and public legitimization. The appearing authoritarianism was seen not as an individual form of political regime but only as an active and necessary supplement of the democratic system conditioning the improvement of its success. Undoubtedly, a significant point of reference for the character of the presidential power in the states situated in post-soviet lands was the example coming from Moscow. Russia was gradually leaving the principles of democracy evolving in the direction of quasi-authoritarianism. The post-Soviet states were not only following that direction of political changes but they also had a clear support from Moscow where presidential authoritarianism was seen as s significant element of political stability and control over the states of the region.

The Central Asian republics have gone through the revival of authoritarianism in different forms and shapes. The reason for this phenomenon is the lack of tradition or their own democratic models. This has been supplemented by the issue of periodical political instability for the post-Soviet regimes were copying the governmental models through political experiments or domestic wars (in Tajikistan there was a domestic war from 1992 to 1997). The post-Soviet republics adopted governmental solutions of the western democracy although the institution of president was based not on the western model but on the way of how Mikhail Gorbaczov was the president. The way of understanding the presidential power and its role in the state was modelled on the USSR. A departure from the democratic standards was seen not only in the legitimized concentration of power in the hands of the president but also in the model of sharing the power with the follower in the framework of some "family" connections or, in other words, basing on the Russian script of "inheritor".

In Kazakhstan in 2002 a new law regarding political parties was accepted which introduced rigid criteria of political parties' registering. As a result, out of nineteen groups only eleven asked for registering and only seven were acknowledged as fulfilling the criteria of the law.[15] The Constitution of

[15] A. Czajowski, *Republika Kazachstanu*, (in:) W. Baluk, A. Czajowski (ed.), *Ustroje polityczne krajów Wspólnoty Niepodległych Państw*, Wrocław 2007, p. 231.

Uzbekistan states that the social life of the state is based on the "foundations of pluralism of political institutions, ideology and views". As a matter of fact, the system of holding the authority is strongly repressive. The opposition is weak and infiltrated by special services. In the country there are neither independent non-governmental organizations nor independent mass media. Muslims, accused of radicalism by the regime, are especially subjected to repressions. Constant limits of the opposition in the Central Asian states have made the appearance of alternative elites impossible who, with the help of political means, could express the interests of social and regional groups. As a result, the opposition has gone through islamisation as well as radicalization which have caused a growing terrorism.

3. Constitutional conditioning

The constitutions of the independent states of Central Asia were dictated by the presidents who, being acquainted with the only model of holding authority, declared for the presidential system for their personal interest. The Constitution of Kazakhstan of December 16, 1991 in art. 2 states directly that Kazakhstan is a state of a presidential form of governing. It goes without saying that these constitutions are often treated instrumentally.

In the states of "grey sphere of democracy" there is a change of the constitution before a possible change of the head of the state. The reasons of this situation are different. Inner divisions which are one of the essential elements of the power alternation have started to take place in the pro-presidential groupings. The president, who is going to resign and who has concentrated the great deal of power so far, starts reaching for the balance in the division of power (president – parliament – government). Such events took place in Kyrgyzia where in 2003 the President Askar Akajev initiated the constitutional referendum ratifying the growth of the importance of the parliament and the president-parliamentary form of governing. The reason for doing so was that Akajev had a personal interest rather than he was worried about the state clearly advancing towards authoritarianism.[16]

However, changes of the constitution are more commonly carried out to strengthen the position of the president or/and to guarantee him a the ability to hold the post longer. The fact that constitutions or their novelizations have been accepted by people in a referendum has a significant

[16] W. Baluk, op. cit., p. 253.

importance. The President of Kazakhstan Nazarbajev (whose post was to finish in 1996) decided to extend it till 2000. To do that in March, 1995 he proclaimed a national referendum regarding the extension of the term of his obeying the president till December 1, 2000. In August, 1995 he declared a referendum to adopt a new constitution. With the approval of Nazarbajev in 1998 changes were introduced into the constitution which enabled the Parliament to shorten the term of holding the presidential post. As a result, presidential election ahead of time were conducted in 1999. Simultaneously, other profitable changes for the president were introduced into the constitution: the term of the presidential post was prolonged to seven years, the lowest limit as to the age of the candidates was changed from the age of 35 to the age of 40 years old whereas the highest limit of age was cancelled; the requirement of the 50% frequency for elections to be valid was cancelled. In June, 2000 Nazarbajev was given full powers of unlimited duration (life-long) to govern the state (as well as life-long financial and personal security). By the novelization of May, 2007 the term was shortened to 5 years and the regulation was accepted that the article limiting the presidential office up to two terms does not apply to the first President of Kazakhstan.[17]

The referendum regarding the extension of the presidential office of the President Emolala Rachmanov from 4 to 7 years took place in Tajikistan in September, 1999.[18] One more referendum was carried out in June, 2003 to adopt some changes into the constitution so that Rachmonov could stay two more consecutive presidential terms;[19] in June 22, 2003 respective changes were introduced into the constitution.

The extension of the presidential office term of the President of Uzbekistan, Islam Karimov, was approved in the referendum in 1995. Karimov, elected to be the president in 1991, on the strength of the referendum was given the right to extend his term till 2000. After the elections in January, 2000 he officially started his "first" term. In 2002 one more referendum was conducted on the strength of which his term was extended to 2007; in April, 2007 the constitution was changed to extend the presidential term to 7 years although the limit of only two terms of holding the presidential

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[17] M. Czerwiński, *Prezydent jako głowa władzy wykonawczej – model Białoruski*, (in:) *Władza wykonawcza w Polsce i Europie*, (ed.) M. Drzonek, A. Wołek, Kraków – Nowy Sącz 2009, p. 200.

[18] *В Таджикистане прошел референдум. Предполагается внесение достаточно существенных поправок в действующую Конституцию*, "Независимая газета" 28. 09.1999.

[19] К. Дэвис, *Рахмонов сможет править до 2020 года*, http://news8.thdo.bbc.co.uk/hi/russian/news/newsid_3012000/3012084.stm (10.07.2009).

office was not annulled. Apart from that, in 2007 Karimov participated in the elections, won them and started his "second" term.

Aparent "tinkering" of the head of the state with the constitution took place in Turkmenistan. In 1994 a referendum was conducted whose results approved the extension of the President Saparmurat Nijazov, elected in 1992, to 2002. Then the presidential elections, which were to take place in 1997, were cancelled. In 1998 the ban regarding limiting the presidential office term was annulled. In 1999 the Parliament took a decision to grant the president a life-long office term. After Nijazov died in 2006, there appeared a necessity to introduce immediate changes into the constitution because the factual law did not allow for the election of the next president.

4. International conditioning

The collapse of the USSR in 1991 resulted in numerous consequences not only for the international system but first of all for the inhabitants of the post-Soviet lands. The collapse of the USSR started the processes of disintegration. The states which appeared in the ruins of the Soviet Empire had to choose the orientation of their international policy and safety. The definition of their policy and relations with the former leader – Russia – was of primary significance. However, economic relations were of no less importance. The economics of Kazakhstan, Kyrgyzia and Tajikistan are greatly dependant on the exchange of goods with Russia. Economic and political bonds have resulted in the process of reintegration, which is exemplified by the foundation of the Union of Independent states in 1991, the Taxation Union in 1995, in 2000 it was reorganized into the Eurasian Economic Community and in 2002 into the Collective Security Treaty Organization.

After the collapse of the USSR Russian strategists faced the dilemma: to stay directly in the region or to support the creation of the buffer sphere in Central Asia, protecting "south flank" from the dangers coming from Asia (drug trade, organized crime, and terrorism). Finally, the middle variant was chosen. Together with the Central Asian states Russia created a economic sphere which was collective, although controlled by Russia (WNP) as well as military sphere (the Taschkent Pact). From the Russian perspective, the condition of successful function of the post-Soviet sphere was not to allow alien world-powers (UE, USA, China) to intervene in the the domestic affairs of the states under the control of Russia as well as to continue political solutions in accordance with the will of the Kreml. Personal (authoritarian) power of the president in Central Asia was seen as a more beneficial (for

it was easier to control, addict and manipulate) than collective power of the Parliament (democracy). Therefore, the local leaders could rely on the Russian help in their conflicts with the political opposition, which made them even more addicted to Moscow.

In the second half of the 90s the Russian control over the region decreased. In some states attempts to weaken the relations with Moscow appeared. The post-Soviet states started advancing in the direction of Turkey, Iran and Pakistan. The interests of China, and later the USA and UE, were focused on whole Central Asia.

At the beginning of this century the political role of Central Asia increased significantly. It was influenced by some aspects. Firstly, the region had become important for the USA because of their anti-terrorist operations in Afghanistan. Secondly, Russia's control over the region had decreased because of the engagement of the USA and China. Thirdly, it appeared that the region could become the alternative for the Near East in the production of energetic material. The fourth reason was that Central Asia had become the area of penetration of the Muslim terrorists. An anti-terrorist union of Moscow and Washington against the Talibs in Afghanistan was the chance to introduce deep changes in the situation in Central Asia.[20] The Central Asian states bordering with the front-line were necessary as a logistical base of the coalition army. By allowing the American forces to use their lands, those states could expect not only financial help but also they could treat the presence of the USA as a counterbalance for the influence of Russia. The change in the layout of the force encouraged formulating demands addressed to Moscow. Coolness in the relations with the USA and the increase of political and economic pressure in the states were Russia's reactions to the changes in the region. It resulted in breaking the agreement of leasing the bases by Americans in Uzbekistan and Kyrgyzstan as well as a quite sudden distance to the decision of building ways of transmitting oil and gas alternative to Russia.

"Colourful revolutions" were a decisive impulse pushing some states back to cooperation with Moscow. Authoritarian of the post-Soviet states presidents came to the conclusion that their cooperation with the USA encourages democratic revolts which could deprive them of their force. Nonetheless, leaders of the states in that region are constantly searching for alternative solutions for the deep relations with Russia, China and the USA.

[20] Read more: М. Олкотт, *Второй шанс Центральной Азии*, Москва – Вашингтон 2005.

The European Union is one of the possible partners. In 2009 Brussels activated the force to initiate the Nabucco gas main, which was greatly approved of, for example, on Turkmenistan, Kazakhstan and Uzbekistan. A deeper penetration of the EU politics in Central Asia can stimulate certain limited social and political reforms.

5. Religious traditions

In the territory of Central Asia Islam is a dominating religion although its power does not affect political power. The position of religion on the margins of social and political life is certainly one of the indications of the Communist legacy. In the Soviet Union the issue of Islam was marginalized in the interest of the regime. Soviet scientists in accordance with the suggestion of the authority were interested in Islam only in the context of their anthropological and religious research.[21] What is more, it was "Soviet" Islam or, in other words, totally deprived of identity and paralysed by the governing system. The extermination of the Muslim clergy and two changes of the alphabet in the period of twenty years (firstly, from Arabic to Latin, and then to Cyrillic) accompanied by the ban on the possession and popularization of any religious literature destroyed the chance of cultural growth of the local people for many years. The majority of Muslims adapted themselves to the new conditions, which resulted in the society's secularization and sovietization in many cases. In the Muslim Central Asian republics, just as it was in the Soviet Empire, there prevailed a universal Communist system and legalized atheism. Islam was generally practised by the elderly. It was rather the element of tradition with no influence on the course if action.

After the collapse of the Soviet Union a revival of the religion and politicizing of Islam took place. The Renaissance of Islam was mainly caused by the search for Muslim identity and individuality, occasional becoming the weapon in a political fight. Yet, those who governed were Moscow's deputies; they quickly adopted themselves to the new conditions replacing the red flag of communism with the green flag of the Prophet. It allowed them to preserve the power in already independent states which had quickly changed the past image from the universal Soviet and atheist to the national, Muslim, more or less subordinated to Islam. The power in the regions was

[21] Compare Н. Азыров, *Эволюция ислама в СССР*, Москва 1973.

being overtaken by the local elites replacing ethnically (and religiously) alien Russians. The consequence of that was republics' deprivation of significant channels of political representation on a central level.[22] At the same time it appeared that the local leaders frequently used Islam in a shallow way. They did not hesitate to fight Muslim parties and groupings when it came to the fight for power.

Undoubtedly, the neighbouring Muslim countries, especially Iran and the Saudi Arabia and to certain degree Turkey, have had a significant influence on the expansion of Islam in the post-Soviet republics of Central Asia. It has been estimated that a total number of Islam believers in the independent states of Central Asia (and in autonomic republics of Russian Federation – Volga Federal district and North Caucasus) has reached over 60 millions. So far, apart from the active infiltration and help coming from the Afghan Talibs as well as the aids from such countries as Iran and Pakistan, the attempts to ingrain the Islam fundamentalism in any of the Central Asian states have failed. Nevertheless, it is necessary to remember that Islamic fundamentalists, wahabits, who constitute the young counter-elite fighting for "souls' governing" with moderate "traditionalists" are the main source endangering the safety of the states.[23]

In Central Asia Islam appears in three main dimensions. Firstly, it is an element of the individual and group identity. Secondly, it is a national and state-building factor. Thirdly, it constitutes an ideological and logistical base to fight for the change of the political, social and cultural order.[24] Nowadays Islam is a significant aspect of building and defining of group and individual identity of the regional societies.[25] Muslim elites and structures are enjoying a good social reputation. Such a situation is perceived by the authority as a kind of endangered *status quo*. For this reason the activities of the Muslim political parties and religious organizations is frequently limited or even combated. The Constitution of Tajikistan 1994 introduced a ban on the activities of the parties of a religious character which stroke the main source of the Tajikistan opposition, Islamic Renaissance Party of

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[22] D. Glinski, *Russia and Its Muslims: The Politics of Identity at the International-Domestic Frontier*, "East European Constitutional Review" 2002, nr 1/2, vol. 11, p. 75.

[23] Read: А. А. Казанцев, *"Ваххабизм": опыт когнитивного анализа институтов в ситуации социокультурного кризиса*, "Polis" 2002, nr 5.

[24] A. Jerska, *Rozdroża islamu*, "Recykling Idei", nr 2/2004.

[25] *Ислам на постсоветском пространстве: взгляд изнутри*, под ред. А. Малашенко и М. Брилл Олкотт; Моск. Центр Карнеги. – М.: Арт – Бизнес – Центр, август 2001.

Tajikistan.[26] The Constitution's novelization of 1999 introduced a permission to organize religious parties. However, in June, 2004 the Parliament of Tajikistan passed a change in the suffrage law according to which on the day of elections there was a ban on the presence of armed outsiders and representatives of political parties taking part in the elections in polling stations.

The influence of Islam in the region is growing together with the intensity of a political situation in some states.[27] Crushing the democratic and nationalistic opposition makes Islam, with its structures and deep roots in the society, an attractive alternative to corrupted and compromised political groupings connected with the regime. Occasionally, religion has been serving as the strongest base for the opposition fighting not only for their traditions but also for the religious state.

6. Dangers brought by terrorism

The states of Central Asia are nowadays facing dangers brought by terrorism. Central Asia has become the area which is deeply infiltrated by terrorist groups and organizations penetrating from the lands of Afghanistan in the northern direction to Russia. A very intense situation is taking place on the boarders of Afghanistan and Tajikistan[28] and in the Fergana Valley divided between Kyrgyzstan, Tajikistan and Uzbekistan. Due to the density of the population, their poverty, unemployment, as well as ethnical, economic and social conflicts this region has become the place especially susceptible to the influence of Muslim radicals. By the end of the 90s the Fergana Valley had become the place of the activities of the Islamic Movement of Uzbekistan, founded in 1998 by the Tajikian veterans of the domestic war and the soldiers fighting in Afghanistan in 1979–1989 (including Russians). The main aim of the Islamic Movement was to create the Islamic state in the Fergana Valley.[29] The priority and a long-term goal involved overthrowing the government in Uzbekistan and creating the Islamic state "Kalifatu Buchary" including the area of Central Asia. There were attempts

[26] Z. Cierpiński, *Republika Tadżykistanu*, (in:) W. Baluk, A. Czajowski (ed.), *Ustroje polityczne krajów Wspólnoty Niepodległych Państw*, Wrocław 2007, p. 286.

[27] A. Jerska, op. cit.

[28] J. Wendle, *How Afghanistan's War Is Spilling into Central Asia*, "Time", 22.07.2009.

[29] H. Głębocki, *Radykalizm islamski w Azji Środkowej jako czynnik zbliżenia między Rosją a Chinami*, "Biuletyn", Polski Instytut Spraw Międzynarodowych, 2005, p. 186.

to achieve that goal by the use of force: attacks on Uzbekistan and Kyrgyzstan (in August, 2000) which were to initiate a common Islamic revolt as well as attacks of terror in Zacaucasus. The Islamic Movement has been thought to be responsible for the attacks in Buchara as well as the ones taking place nearby the Embassies of the USA and Israel in Tashkent. In 2006 mudzaheadins attacked Kyrgyzia.[30] Uzbekistan is especially exposed to the Islamic Movement actions. In the governmental propaganda the movements of the Islamic groups are thought to be the biggest inner enemy. All anti-governmental performances are thought to be organized by the Islamic grouping Hizb ut-Tahrir (Party of Liberation). The intensification of repressive action as referred to the opposition results in the growth of its population. It is difficult to state explicitly which direction the above-mentioned conflict is going to take. Certainly, terrorism and the ways of fighting it constitute one of the most significant aspects of the legitimization of power as refereed to the local political leaders.

Summary

The struggle of authoritarianism with democracy in Central Asia leads towards the victory of the former. However, it is necessary to remember that authoritarianism in the region is internally differentiated, taking different forms and shapes: anocracy appears in Kazakhstan and Kyrgyzia;[31] authoritarianism in Uzbekistan and Tajikistan, in Turkmenistan there was totalitarianism connected with the cult of the president Saparmurad Nijazov. The political system in Kyrgyzia seems to be the closest to the democratic one. It is partly explained by the specific character of the Kyrgyzian society which reveals ancestral and tribal structure characterized by the absence of authority uniting all nomadic groups and tribes.[32] Ironic is the fact that the constitutional procedures of democracy are being successfully used to strengthen the powers of the president, which increases authoritarianism.

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[30] W. Jagielski, *Mudżhedini rozlewają się po Azji*, "Gazeta Wyborcza" 02.07.2009.

[31] In 2003 there was a novelization of the Constitution of Kyrgyzia. The newly accepted regulations made a huge step towards democracy. First of all, only two presidential terms taken by the same person were maximally accepted and the institution of a spokesperson of civil rights was established. In 2005 in Kyrgyzia there was the "Revolution of Tulips" which resulted in the abolishion of Akajev's regime.

[32] A. Wierzbicki, A. Zamarajewa, P. Załęski, *Problemy transformacji, integracji i bezpieczeństwa narodowego w badaniach naukowców z Azji Centralnej*, "Studia Politologiczne" 2008, vol. 12, p. 58.

Apart from the declared civil rights and freedoms and the division of power, the constitutions of the Central Asian states in fact remain a collection of catchwords interpreted by the heads of the states in accordance with their needs. In turn, referendum, being one of the strongest forms of indirect democracy, in a sophisticated way is being used to build a stronger position of the president abusing democracy at the same time.

The failure of a democratic system in the majority Central Asian states has many sources. Lack of people's trust to the authority makes a successful democratic foundation of the state impossible. People do not trust the authority because the political elite to a greater extent is recruited among the bureaucratic nomenclature created at the times of the Soviet Union (therefore having nothing common with a democratic system). Additional, modern political classes in the region are characterized by the absence of ideas, fear of the new, and trust in the market economics rather than trust in democracy.

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