ADAM MICKIEWICZ UNIVERSITY
LAW REVIEW

The 100th Anniversary of the Faculty
of Law and Administration

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Foreword

Last year we celebrated a significant anniversary as a Faculty community, and the publication of this volume of key texts extends the commemoration of that occasion. The anniversary celebrations bolstered our identity, integrated us around common issues, and connected the past with the future. On the occasion of this anniversary, it was aptly written that in no community is progress, modernity and success so strongly connected with principles rooted in the past, and thus with tradition, as in the university and faculty community. This tradition is also the source of the intellectual potential that the Faculty community has inherited from previous generations of scholars. Furthermore, the centenary celebration provides an excellent opportunity to remind readers from abroad of this rich scholarly legacy.

The creators of the jubilee edition of the Adam Mickiewicz University Law Review direct our gaze to the past, paying homage to the late masters of the Faculty of Law and Administration of the Adam Mickiewicz University in Poznań. The jubilee issue includes English versions of twenty texts by professors who are no longer with us: Antoni Peretiatkowicz, Zygmunt Ziembiński, Czesław Znamierowski, Władysław Bojarski, Zygmunt Lisowski, Bogdan Lesiński, Jan Rutkowski, Alfons Klafkowski, Anna Michalska, Krzysztof Skubiszewski, Bohdan Winiarski, Zbigniew Janowicz, Marian Zimmermann, Teresa Rabska, Józef Jan

Bossowski, Bogusław Janiszewski, Jan Zdzitowiecki, Roch Knapowski and Edward Taylor.

The publication of our masters' works not only serves to commemorate their achievements, but also gives them a kind of "new life". They will be in international scientific circulation, will become an inspiration for further research, and will constitute a source of knowledge about the achievements of our faculty.

Roman Budzinowski
Dean of the Faculty of Law and Administration
Adam Mickiewicz University, Poznań

Editor's Introduction

The jubilee edition of the Adam Mickiewicz University Law Review is part of a series of initiatives dedicated to the centenary of the Faculty of Law and Administration of Poznań University. The pages of the Review commemorate the achievements of deceased professors of the Faculty, with their work taking on a new form thanks to the English language translations. Thus, the homage that we pay to the former masters of the Poznan legal community also allows us to make the historic scholarly achievements of our Faculty accessible to foreign readers.

The jubilee edition of the Adam Mickiewicz University Law Review consists of a set of scholarly papers selected by the department heads at the Faculty of Law and Administration who accepted the invitation to take part in the project: Department of Constitutional Law, Department of Theory and Philosophy of Law, Department of Roman Law, Legal Traditions and Cultural Heritage Law, Department of Political Systems, Department of International Law and International Organizations, Department of Administrative and Administrative Judicial Procedure, Department of Administrative Law, Department of Public Business Law, Department of Criminal Law, Department of Financial Law and Department of Economic Sciences. This review includes the papers of the following late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University in Poznań: Antoni Peretiatkowicz and Karol Marian Pospieszalski, proposed by Professor Witold

Płowiec; Zygmunt Ziembiński and Czesław Znamierowski, proposed by Professor Marek Smolak; Władysław Bojarski and Zygmunt Lisowski, proposed by Professor Wojciech Dajczak; Bogdan Lesiński and Jan Rutkowski, proposed by Profesor Małgorzata Materniak-Pawłowska; Bohdan Winiarski, Krzysztof Skubiszewski, Alfons Klafkowski and Anna Michalska, proposed by Professor Tadeusz Gadkowski; Zbigniew Janowicz, proposed by Professor Andrzej Skoczylas; Marian Zimmermann, proposed by Professor Zbigniew Janku; Teresa Rabska, proposed by Professor Katarzyna Kokocińska; Józef Jan Bossowski and Bogusław Janiszewski, proposed by Professor Justyn Piskorski; Jan Zdzitowiecki and Roch Knapowski, proposed by Professor Andrzej Gomułowicz, and Edward Taylor, proposed by Professor Elżbieta Jantoń-Drozdowska. Although the selection of works presented in the Review only provides a small indication of the rich achievements of the Faculty of Law and Administration, it is our hope that it may become one of the jubilee showcases of the Poznań scholarly community.

The publication is indebted to the institutional and financial support of the Ministry of Science and Higher Education, His Magnificence the Rector of Adam Mickiewicz University in Poznan, Professor Andrzej Lesicki and the Dean of the Faculty of Law and Administration, Professor Roman Budzinowski, to whom we wish to express our heartfelt thanks. We would also like to thank the team of translators who prepared the translation of the works collected here: Stephen Dersley, Szymon Nowak, Ryszard Reisner and Tomasz Żebrowski; the reviewers of this volume for their invaluable observations and comments – Professor Katarzyna Łasak and Professor Jacek Wiewiorowski, as well as the heirs of the copyrights, who agreed to the publication to the selected works.

Paweł Kwiatkowski
Editor-in-chief
of the Adam Mickiewicz University Law Review

Antoni Peretiatkowicz

The Statute and the Judge[1]

Contemporary jurisprudence is witnessing a grave crisis. It is not just that are there numerous disputes and profound discrepancies between the adopted positions. Something else is involved. Nowadays, one casts doubt on the very foundations of legal knowledge, questions the most cardinal, established views with regard to the essence of law, statute, the state, punishment, and the methods and the tasks of jurisprudence. In criminology, the dispute between the classics and the sociological school continues. In legal-political sciences theories emerge which strive to completely transform the current understanding of the state and its functions (Duguit). Philosophy of law is beginning to shift the essence of law beyond the traditionally determined boundaries, into completely separate domains (Petrażycki). The only branch of jurisprudence which relied on the most sound and lasting foundations was the province of civil law. That earliest and most highly developed legal discipline, which became the methodological paradigm for the whole of jurisprudence, was characterized by solid fundaments and lucidity of method, and the two outstanding fruits of legislative activity at the turn of the nineteenth century (German and Swiss codes) offered new proof of the productiveness of pertinent scholarly work.

1 Translated from: A. Peretiatkowicz, *Prąd nowy w prawoznawstwie. Sędzia a ustawa*, Kraków 1916 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

In recent years, we have seen the emergence of a new trend which has significance for the entirety of jurisprudence and is expressed with particular intensity in the studies of civil law. The trend originated from Germany and France, and has spread ever more widely among both theorists and practitioners, and is now penetrating into circles of non-lawyers, becoming a topical issue. The matter in question is not a notion, but a method. Not a difference of views over certain debatable issues, but the very goal of civil law inquiry, the path which leads to the attainment of that goal. Hence the tremendous importance of this novel direction, for as methods of civil law have been applied in other branches of jurisprudence, so a change of these methods entails a reform of jurisprudence in its entirety. A matter of such general nature is no longer restricted to civil law alone, but is now a matter to be addressed by legal philosophy. Both civil lawyers and the synthetic knowledge of the essence and tasks of law and jurisprudence should focus on resolving the above issue, for only joint consideration may bring a felicitous solution to such a complex problem. Setting out from two distinct positions, they should strive for a shared objective that constitutes the lodestar of jurisprudence: a theoretical apprehension of the matter that would simultaneously respond—as well as possible—to the practical demands of social life. The objective of this paper is to outline this new trend (for the sake of convenience referred to as "modernist"), to highlight and characterize its principal properties, and elaborate further on the essential premises, taking into account the crucial elements and requirements of law as such.

One of the theoretical underpinnings of the modern state system is found in the teachings of Montesquieu regarding the separation of power. Admittedly, it has not been consistently and fully implemented, but the principle of making judicial power independent of the legislative and the executive branches currently provides the core factor in the organization of state authority. "The political liberty of the subject," Montesquieu says, "is a tranquillity of mind arising from the opinion each

person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[2] In consequence, Montesquieu assigns judges a role which is utterly passive. They are only required to know the statutes and implement its provisions. Each adjudication is to strictly reflect a statute. Were it to evince the private opinion of the judge, one would live in a society without being aware one's obligations. It is therefore important to make the words of statutes evoke the same thought in all people. "The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."[3] The lawyer in the judge's chair becomes a machine, a subsuming apparatus which matches life's vicissitudes to pertinent, existing provisions.

The above conception is characteristic of the rational thought of the Enlightenment, which looked with great scepticism upon human nature, discerning only egoistic and negative elements within. In order to protect society against the licence of judges, one should make the activities of the latter independent of their character, bring the mental component (which is decisive for rationalism) to the fore, and base everything on the intellect guided by the statute. This was endorsed by the cult of laws that typified those times, which found its expression in the French constitutions and Napoleon's codifications. In statutes (created by the

2 C.L. Montesquieu, *Esprit des lois*, Londres 1777.
3 Ibidem.

members of society themselves) many saw the political salvation of the humankind, a cure to all kinds of social ills. In the then intellectual climate, the position expounded by Montesquieu and his understanding of the tasks of a judge was, at least in principle, universally recognized and adopted.

The historical school contributed to the dethronement of statutes from the pedestal to which they had been elevated by the eighteenth century, and indicated new ways that jurisprudence should follow. Although legislative activity was not halted, the most brilliant legal minds took a historical direction, chiefly turning to studies of Roman law (Windscheid, Dernburg, Ihering). That is as far as theory was concerned. What about practice? Little changed in that respect.[4] The historical school also gave the judge a passive role, acknowledging in principle that the task of the judge is to examine the intentions of the legislator. Given that a statute is only an expression of the national spirit, then it can only be duly comprehended when considering the legal past of the nation in question. Hence the significance of history of the law which preceded a particular statute and the importance of customary law. Essentially, however, Montesquieu's position underwent no change. A judge is expected to seek a solution beyond themselves, and to extract the appropriate norm from the statute in force (or, alternatively, from customary law).

That the provisions contained in statutes are binding on judges in absolute terms has been, and most likely shall remain, a certainty beyond any doubt for lawyers.[5] A question nevertheless arises, namely what should be done in cases involving situations for which a statute does not provide. The legislator is not capable of regulating all the events that may take place in future, might not know the technological and eco-

4 Bülow offers some highly interesting remarks on the approach of practitioners of the historical school. O. Bülow *Heitere und ernste Betrachtungen* über *die Rechtwissenschaft*, Leipzig 1901.

5 Though not without exceptions. Former natural law did not recognize that principle. Opinions to the contrary, albeit few, are heard today as well. "Die Funktion des freien Rechts äussert sich als die Ausserkraftstellung des Gesetzesrechts in Ausnahmefällen." F. Berolzheimer, *Die Gefahren einer Gefühlsjurisprudenz*, paper delivered at the legal-philosophical congress in June 1911.

nomic circumstances, or the cultural and social situations that will arise in the subsequent years and centuries. Therefore, there is a tremendous number of issues (the older the statute, the more numerous they are) regarding which no intention has been expressed by the legislator. We are then faced with loopholes in the law.

However, concluding that lacunae are in evidence is admissible only from the dogmatic standpoint, in view of the sources of law which the judge draws upon when adjudicating a case. From the legal-political perspective, an applicable statute must not be wanting, considering the organization of the judiciary. After all, a judge cannot refuse to issue a verdict. Article 4 of the French code states: "The judge who refuses to judge under the pretext that law is silent, obscure or insufficient, shall be prosecuted as guilty of denial of justice."

We thus arrive at an internal contradiction, a logical collision. The imperative of adjudicating each dispute, issuing a verdict solely on the basis of a statute and the unavoidable imperfection of each statute: those three things cannot be reconciled. Given that consistency is a fundamental postulate of jurisprudence and a prerequisite of its existence as a science, it is necessary to find a way out of the predicament.

The traditional method found a solution based on the fiction of statutory perfection (absence of gaps, completeness of the legal system). Following Montesquieu, it held that the "will of the legislator" is the only authoritative and decisive factor for the judge and the theoretical lawyer. If it is not found in the statute in an explicit form, then one should search for a "conjecturable will" which also arises from the statute. The traditional method negates the existence of lacunae in the statute, which represents a rounded whole, regulating a particular sphere of life exhaustively. Properly understood and accurately interpreted, a statute provides all the legal solutions one requires. Using various interpretive measures (*extensio*, *restrictio*, analogy based on *ratio iuris*, *argumentum a contrario*, *a majori ad minus*, *a majori ad maius*, examination of preliminary material etc.) one can always discover the correct inten-

tion behind the statute, even though it has not been stated in explicit terms. The subtle mind of the lawyer should weave the entire intricate logical fabric, providing for all events and circumstances, as well as regulating human contentions. By way of syllogisms and abstract conceptualization, the lawyer creates a complete, exhaustive system of applicable norms, which offers answers to all the issues occurring in practical life.

That tendency was most vividly accentuated in Bergbohm[6], who believed that acknowledging legal gaps is inadmissible, for in that case judges would themselves become a source of law. Law does not need to be supplemented from the outside, being at any given point comprehensive and complete thanks to its inner prolificacy; thanks to the capacity for "logical expansion" which satisfies all juridical needs. "This is no fiction, but an incontrovertible fact".[7] Statues are not law, they merely indicate legal thoughts which a theoretician should elaborate, complement, and create a rounded legal system. If they are incapable of achieving that, it only attests to gaps in their intellect, but not in the legal system, which at all times remains a harmonious whole. If so-called gaps in the statute do exist, then they have to be filled through the "logical expansion" of the existing norms.

There has been some very lively opposition recently against the direction in jurisprudence which relies exclusively on statutes, logical paradigms and conclusions. Ihering may be considered the spiritual father and the first representative of the modernist current; initially, he subscribed to the traditional method, and it was only later that he spoke against it very forcefully and, given the times, very radically. Already in the third part of his *Geist des roemischen Rechts* there is a chapter devoted to the overestimation of the logical element in law. To Ihering, that cult of logic which seeks to make jurisprudence a kind of legal mathematics fails to understand the true essence of law and loses it from sight. It is not life that exists for notions, but notions for life. These are

6 C. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, Leipzig 1892, pp. 372–393.
7 Ibidem, p. 388.

not the demands of logic which must be reified, but postulations of life, transaction, and legal sense, irrespective of whether they appear logical or impossible. In the satirical-serious work entitled *Scherz und Ernst in der Jurisprudenz* (1884), the author strives to demonstrate—both through irony and in serious articulation—the consequences of the dominant juridical doctrine he calls "Begriffsjurisprudenz" (the designation has become widespread and now constitutes a negative catchword used to signify the modernist trend). Whereas Roman lawyers followed the path of consequence only as far as the boundary imposed by practical needs, and while employing their legal logic always kept life itself in mind, contemporary jurisprudence is unaware of such considerations and not infrequently arrives at a result which is thoroughly at odds with the very aim of law. Therefore, in the opening, programmatic article of the journal he published[8], Ihering formulates the rallying call "Durch das römische Recht über das römische Recht hinaus". This essential idea of the goal in any law, to which Ihering devoted his last, unfinished work, became the chief positive motto of the modernist trend.

One of the earliest and the most vehement opponents of the historical school and the omnipotence of the statute was Professor O. Bülow who, in numerous papers and above all in the treatise *Gesetz und Richteramt* (1885), drew attention to the actual significance of the judicial profession. Highlighting the role of judges in the historical development of law, the principle of the binding power of the ruling even when it contradicted a statute, and the utter impotence of legislation were it deprived of the judicial organization, he demonstrated that the position of the judges in the legal system of any society is by no means passive and receptive. In 1891, in his brilliant rectorial address concerning *Werturteile und Willensentscheidungen*, Rümelin argued that an element of subjective evaluation inevitably accompanies judges' actions, by virtue of which the latter are creative rather than intellectual-mechanistic

8 R. von Jhering, *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Jena 1857.

in their nature, as the application of various interpretive measures is always founded on judgments regarding their value.

However, the above views failed to resonate to any great extent among contemporary lawyers, imbued as they were with the influences of the historical school. It was only very recently that a keener interest in legal-philosophical and methodological issues has been reawakened. In Germany, considerable credit in that respect is due to the works by Kohler and Stammler. The latter in particular, although not a modernist in formal terms, contributed to the development of the new current. Stammler's philosophy tends to be comprehended and assessed in varying ways. Nonetheless, his concept of "das richtige Recht" has spread very widely in Germany, leading to the recognition of the need for the "the right law."

A veritable watershed in the development of the modernist trend came with the splendid work of the French professor, Gény (a pupil of Saleilles's, one of the first representatives and propagators of the new current in France), entitled *Metode d'interpretation et sources en droit prive positif* (1899): a kind of gospel of the new trend in France. Based on a tremendous volume of both theoretical and practical material sourced from French courts, Gény demonstrated the possibility and necessity of reforming the methods of jurisprudence in the spirit of modern requirements. With formidable competence and circumspection, and ,at the same time, a keenly critical and boldly creative approach, the author advocates abandoning the fiction of the "legislative will", which does not correspond to facts, and acknowledging the undeniable existence of legal loopholes, which are to be remedied by liberal research into today's social needs (*libre recherche scientifique du droit*). Relying on the entirety of modern knowledge that takes the social and technological achievement of the human spirit into account, one should look for a norm which would constitute a vital (natural) law that tallies with the demands of our times. To oppose the former position, Gény advances a new motto: "Par le Code, mais au dela du Code!"

One of the most tenacious champions of these novel ideas is professor Ehrlich, whose pamphlet *Freie Rechtsfindung und freie Rechtswissenschaft* (1903) gained considerable renown and became one of the ideological foundations of the modernist movement in Germany. Ehrlich finds the contemporary cult of the statute to be intrinsic to the bureaucratic state (Beamtenstaat) and believes that one should return to historical traditions (Roman, medieval, or those from the Renaissance period), when the authority and the significance of the judge carried much more weight. The new trend aspires to put forward outstanding individuals, who would contribute to the development of law and increase its influence among broad social strata.

Jurisprudence should guide judges along the correct course as they face contemporary issues; it should also examine law in its actual social manifestations. The concern should not lie solely with the wording of a regulation but with how it functions in life, with whether and how it is applied. The year 1906 saw the publication of an anonymous pamphlet: Gnaeus Flavius *Der Kampf um die Rechtswissenschaft* (written by Prof. Kantorowicz from Fribourg, as it later transpired), which thanks to clarity of disquisition, eloquent terms, and the fervour of the author did much to popularize the new ideas, at least among theoreticians. At the same time, it gave name to the entire movement (freirechtliche Bewegung) which was almost universally adopted in Germany. A considerable impact, particularly on German practitioners, was exerted by the writings of the advocate E. Fuchs (*Recht und Wahrheit in unserer heutigen Justiz*, 1908, *Die Gemeinschädlichkeit der konstruktiven Jurisprudenz*, 1909, and other works), who admittedly goes too far at times, but in general very aptly—based on extensive practical material—highlights the shortcomings of the method which holds sway today. As a theoretical-political manifestation of the free-law movement in jurisprudence, the Swiss code (which came into force in 1912) is particularly worthy of mention, as its first article sets forth: “Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung

enthalt. Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde. Er folgt dabei bewahrter Lehre und Überlieferung."

I have mentioned the most important works which in a sense represent stages in the development of the new trend, in view of their influence in various milieus.[9] The final phase of the modernist movement assumed a practical dimension and reached very broad circles, well beyond the domain of the legal profession. In early 1911, two appeals were circulated, whose authors called for a reform of jurisprudence and the judicature; this resulted in the formation of two groups of modernists. The first of these was led by Bozi[10] (a judge in Bielefeld), who also gathered numerous non-lawyers around him; the second was established by Börngen (president of the higher regional court in Jena). In March, both factions united by incorporating as the association Recht und Wirtschaft, whose adopted motto stated: "Forderung zeitgemässer Rechtspflege und Verwaltung." Since autumn 1911, the association published its own periodical in order to kindle interest in the issues in question among the broader public. The matter of the judge's approach to statutes was included in the agenda of the forthcoming congress of German judges, and it is to be expected that it will be resolved in a spirit which favours modernism. One could even say that legal modernism has all too many adherents, that it gained recognition too quickly, that the presence of outstanding opponents would enable the new trend to be expounded better and to become more profound.[11]

9 One of the eminent modernists is Prof. Zoll Junior, whose noteworthy works in this respect are little known in the West due to reasons of language.

10 The author of numerous treaties particularly *Die Weltanschauung der Jurisprudenz*, in which he argues that jurisprudence be made an experimental science, based on foundations derived from natural sciences. A. Bozi, *Die Weltanschauung der Jurisprudenz*, Hannover-Helwing 1911.

11 Modernism has an outspoken and ingenious adversary in Prof. Donati (D. Donati, *Il problema delle lacune dell ordinamento giuridico*, Milan 1910), who resumes Zitelmann's arguments (E. Zitelmann, A. Pestalozza *Lücken im Recht*, Bonn 1903), and elaborates them further. Donati holds that by linking legal effects with certain states of fact, the legal order

We are thus confronted with a trend which is very broad and exceedingly influential with respect to methodology. At the moment, following wider practical propaganda, it has crystallized into a more distinct form and may be deemed a coherent whole. Let us then conduct a concise, legal-philosophical analysis of that new trend, consider the causes behind the emergence of the movement, its chief attributes and its outcomes—which can and should be pursued. Finally, let us delve into that aspect of the new current which may have a special significance for us, Poles. The scope of this paper does not allow the above to be discussed exhaustively, which is why I will confine myself to the essential ideas and the most important observations.

It would be a futile and unproductive endeavour to determine conclusively the actual source of the new turn in legal thought. The scientific and social currents are too complex and comprise too many elements to be considered the outcome of one single cause. One should not even speak of a causal relationship in the strict sense. After all, the relationship presupposes absolute necessity for a given effect to ensue if facts which constitute its cause have occurred. Contemporary psychology has failed to determine the causes which inevitably engender particular human thoughts, therefore when studying intellectual currents one can only speak of factors whose collusion accompanied the emergence of those currents, but we should be aware of the psychological impossibility of arriving at an accurate delineation of the entirety of such factors. In this instance as well, when trying to establish the origins of legal modernism, we may only distinguish the principal types those factors which, as it is usually the case with scientific-social currents, include intellectual considerations on the one hand, and factual elements on the other; theory one the one hand, whereas on the other—life itself.

The theoretical aspects are associated with the orientation of human thought which ever more strongly embraces contemporary philosophy

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excludes the latter with respect to all other possible states. Thus, he recognized the "force of logical exclusion" as opposed to "force of logical expansion."

and presents itself under the name of *voluntarism*. The intellectualism and rationalism of the Enlightenment triggered a reactionary response in the form of the psychology of emotion, which is not so much a particular trend in psychology as a general spiritual current, encompassing philosophy, literature, art, etc. That general philosophical atmosphere was also manifested in the emergence of the historical school, which bore the mark of Romanticism. By way of counterpoise to deliberate, intellectual creation, it attached primary importance to the process of the unconscious formation of law, and display cult-like reverence for folk elements, vital factors which actually operated in life. However, the emotional bias in psychology did not last long, and in more recent times we have seen a distinct tendency for will rather than intellect and emotion to come to the fore. Admittedly, voluntarism does not aspire to account for all inner experience by invoking the elements of will, as intellectualism had one-sidedly done with notions and ideas. Still, it considers that factor to be more consequential and presumes that it plays a role both in emotional and intellectual processes. A complete isolation of the intellectual elements may prove helpful in a more thorough analysis and facilitate better understanding of respective phenomena, but this process is artificial, methodical, and so does not amount to actual psychological phenomenon. The threads of inner experience are a homogeneous whole which can only be divided through abstraction, but in reality they constitute inseparable parts of a single mental entity, in which the elements of will are those of primary importance. "Other elements," Wundt observes, "are always components of the complete process of will and cannot be contradicted with will in a manner resembling the way in which the latter can be separated from notions from the standpoint of psychological analysis."[12] According to Sigwart, "will has an advantage in the theoretical domain as well."[13] "All thought," says Windelband, "remains without exception under the influence of will throughout its

12 W. Wundt, *Logik der Geisteswissenschaften*, Stuttgart 1908, p. 160.
13 S. Sigwart, *Logik*, Freiburg 1889, p. 25.

course."[14] The most extreme expression of this approach is pragmatism (James, Schiller, Jerusalem), which aspires to subject our judgments to the criterion of public interest, and the achievement of certain life's goals. This current attracts increasing numbers of adherents and begins to exert an influence on the whole of contemporary science.

It was not only philosophical thought which drew lawyers' attention to facts that made up the substrate, the fundamental premise of the new trend. It would be misguided to attribute a dominant role in the development of jurisprudence to philosophy. As we know, philosophical knowledge does not enjoy great regard among lawyers and even such an outstanding intellectual as Ihering appreciated its significance only towards the end of his life, and publicly deplored deficiencies in that respect. Still, facts and practical life appeal keenly to lawyers and their impact is much more forceful. The past century and recent years have provided plenty of such facts. Social life has probably never been as dynamic as in that period. The extensive achievements in technology, and the changing economic and cultural circumstances, generate ever new social needs and demands in the legal domain. It becomes evident that statutes fail to keep up with life. Each law is by nature conservative, and it is already obsolete when it is drafted, encapsulating the phenomena and factors operating at the moment of its creation into a permanent norm. However, it is not capable of predicting future facts and changes, nor can it be in line with new relationships. Montesquieu realized this, and therefore advised the frequent revision of laws, so that all issues which might arise could be resolved by statutes. Here, life proved theory false. It demonstrated technical obstacles and the practical impossibility of continual legal reform. Creation of the universal German code was vivid proof that very long and laborious paths lead to statutes which cover more comprehensive domains of social life. It is clear that this measure will not attain its goal and counting on the legislative apparatus

14 W. Windelband, *Präludien, Aufsätze und Reden zur Einleitung in die Philosophie*, Freiburg 1884, p. 265.

alone would be ineffective. One should look for another factor which could mediate between a law and the new demands posed by life, and this function is now discharged in practice (not in theory) by the judicial estate.

On the other hand, the chasm between society and professional lawyers has become increasingly palpable. In the Roman times, in the Middle Ages and in the Renaissance the nation and the law were close; while the bond has been very much preserved in England, Central Europe witnessed the contrary: the absolute—and subsequently the constitutional—state transformed law into a system of abstract norms which were unknown to the public and served officials who enforced the orders of the omnipotent legislator. Although the historical school maintained that law is a product of the national spirit while lawyers are exponents of the soul of nation, the law was in fact shaped after the Roman model without regard for the distinct nature of the matter subjected to regulation. Apart from that, the historical school caused theory to be detached from practice, separated science from the actual administration of justice. Nineteenth-century German jurisprudence showed little interest in the regulations in force and readily concerned itself with the past, with Roman and Old Germanic times, while a similar approach pervaded the system of university studies. History was studied for its own sake, it was treated as a goal, not a means to an end. This had to change as the new code was introduced. A fair number of eminent figures diverted their attention and efforts from history to focus on the law in force, on the present day. The dissonance between science and practice gradually diminishes, giving rise to fitting demands placed on legal knowledge which formerly received so little attention.

Finally, in countries where exhaustive codification took place at an early stage, such as France or Austria, experience has shown that the existence of comprehensive laws does not suffice to ensure the stable and uniform administration of justice. Montesquieu's ideal, where "one judges today, as they will judge tomorrow, and judgments ought to

be fixed to such a degree as to be ever conformable to the letter of the law"[15], was not realized, as it proved impracticable. Both with respect to minor affairs and matters of utmost importance, numerous theories were advanced, which on the grounds of the same state of facts arrived at divergent legal effects. The relative nature of interpretation of the regulations in force became ever more apparent. The history of the application of law demonstrates a gradual evolution, which corresponds to the development of life and its needs. The German code also contributed to exposing the limits of the legislature and disproving the legend of the "logische Geschlossenheit des Rechts" much more effectively than the numerous and dispersed sources of Roman law could have done.

All these factors, as well as many others, caused a breach in the traditional notions, engendered a kind of scepticism towards the alleged objectivity of law, and spurred a critical movement where the tasks and the methods of jurisprudence were concerned. The need for a revision of the foundations on which one had relied so far began to be perceived and acknowledged. The postulation, advanced at first by a few profound minds, aroused increasingly lively interest, and eventually transformed into a universal trend which has spread across broad circles of theoreticians and practitioners, becoming a topical issue. It is quite understandable that the modernist trend, as all novel movements, does not have such distinct foundations and clear-cut contours as the long-standing schools; that there are many extremes there, many ostensible contradictions, many groundless illusions. Let us then use the abundant literature to try and isolate the essential core, the enduring kernel inherent in all—or at least the most modernist—views which have been expressed and possess decisive significance for the entire current.

There are four crucial moments of the modernist movement, or elements of fundamental importance, which provide basis for all its other manifestations: 1) the critical-conceding moment, 2) the teleological-

15 C.L. Montesquieu, *Esprit des lois*, Londres 1777, XI-6.

social moment, 3) the cult of individualism, 4) the idea of natural law (reformed).

The modernist current sets out from the recognition of the vital nature of jurisprudence and adjudication.[16] "The fight," states Kantorowicz, one of the chief representatives of modernism, "has a declarative rather than constitutive significance."[17] One should relinquish the illusion that a law, even the most comprehensive one, is able to provide for all the instances in which it should be applied. Civil codes endure for centuries, while life changes continually, technological and economic circumstances shift, and it is obvious that no legislator is capable of anticipating future forms that social life may assume. Could Napoleon's code have predicted the use of electricity and all the relations it would bring about? Could it have made allowances for the development of factory-based production and modern means of transportation? Even if social conditions were to remain unchanged, no legislator is so brilliant as to envision absolutely all relationships, all conflicts, and all legal needs. Life is always more profuse and more multifaceted that statutes and brings forth instances to which we can find no answer. The existence of gaps in law is a doubtless fact.

According to the traditional school, in such cases one should search for a "presumable legislative will" and fill the apparent gap by means of "logical expansion." The device which serves to do so consists of well-known interpretation methods, which are expected to extract the correct legislative will from the law. One of the chief assertions of modernism is that the "presumable will" is a fiction which should be ousted from science, since it creates the illusion of objectivity that does not exist in reality. After all, it is simply not possible to determine the notions entertained by the legislator from a century ago. Looking for the fictitious will, the commentators actually strive to find a "rational", most "purposeful" will.

16 The modernist movement is primarily concerned with the activities of judges; however, given that scholarly jurisprudence consists largely in conducting preparatory work for the judge, both remain closely linked.

17 H. Kantorowicz, *Kampf um die Rechtswissenschaft*, Heidelberg 1906, p. 9.

Thus they introduce a new moment into their deliberations, a naturally subjective component of rationality and purpose. Hence adjudication in doubtful cases usually includes expression of views regarding the "value" of one decision or another, being always a "Werturteil" (to use Rümelin's language), and conclusions founded on "will".

The use of interpretive means in order to ascertain the legislative will appears to be a scientifically-objective process. However, this is a misconception, for there are no objective criteria as to the choice of such means. There are numerous methods of construction, but when does one use analogy and when should it be *argumentum a contrario*? When should the interpretation be broadening and when restrictive? What should one do when a conflict of laws arises? Which norm should be deemed to prevail? The "rationality" and "equity" of the obtained results come into play when making the choice, and thus we are dealing yet again with the subjective element, with "value judgments" and decisions based on "will."

Finally, one should realize that all statutes operate by employing notions and necessarily have to do so. Indeed, a notion is an intellectual instrument that is indispensable in order to find one's bearings in the tremendous complexity of diverse phenomena, yet it is a very inaccurate and imperfect tool.[18] The substance of notions (abstract ones in particular) is virtually never delineated with such precision that it does not raise any doubt. Apart from the permanent elements inherent to each notion, there is a range of borderline points, phenomena situated at the outer limits of notions which constitute a transitional juncture and can therefore be classified in either category. A question arises here, namely what is the judge guided by as they subsume life's phenomena under this or that legal notion? Undoubtedly other factors (rightness, purposefulness) must be involved, not statutory provisions alone. Here, "value judgments" and decisions based on "will" are in evidence as well.

18 Petrażycki provides some highly valuable observations in this respect. L. Petrażycki, *Wstęp do nauki prawa i moralności*, Petersburg 1907.

Consequently, legal modernism sets out from the assumption that jurisprudence and judgments possess certain properties which consist in the inability to eliminate the subjective element, the value component and the resulting will. Each issue of contention becomes a singular legal problem, for which there is no ready-made solution in statutes, but which has to be created. Fictions that are considered a reality are detrimental to science and life alike. One should critically and openly face the truth and refrain from concealing indisputable facts. Therefore, legal modernism is first and foremost *critical-conceding* in its approach.

The second trait of the new trend is its *social* nature, which is why it adopts the creed of "Die sociale Jurisprudenz" as its modern postulation instead of the traditional "Begriffsjurisprudenz" (as construed by Ihering, where it means the creation of abstract notions without taking into consideration the consequences it may lead to, compounded by their application to resolve legal questions regardless of the usefulness of the results thus obtained). Modernism emphasizes the principle of the purpose of each law, which is only a means of satisfying social needs. In view of the fact that legislation contains numerous loopholes, contradictions and inaccuracies, it should be implemented from the teleological standpoint, i.e. its rightness and social interest. A statute is not an end in itself and the logical perfection of the system is not the goal of jurisprudence. If the judge fails to find a clearly formulated provision in a statute, then they should be at complete liberty to look for the most pertinent norm. *Freie Rechtsfindung! Libre recherche scientifique!* It is not through abstraction and logical analysis, not by way of intricate constructions that the judge should arrive at the right decision, but through thorough knowledge of social life and its needs. Universal benefit and justice should be their directives. Thus the activity of the judge becomes analogous to legislative action, with the exception that the decision of the judge does not produce a general but a specific norm pertaining to the case it regulates. Given such broadly understood tasks of the judge,

the duty to fulfil them adequately becomes a difficult one indeed. The judge cannot limit themselves to in-depth knowledge of laws and relevant literature, as they need to reach beyond the confines of their office and approach life itself. Only thorough knowledge of social relationships, scrupulous examination of the facts and data make a right verdict possible. It is indispensable to be conversant with the factors which yield modern culture, meaning the knowledge of both the actual political system which provides the framework for all institutions and expresses itself in laws and customs, the structure of contemporary economy, as well as moral and religious concepts which function within a society and require being taken into account. In this respect, they may avail themselves of the contemporary achievements of the human spirit and the findings of modern scientific inquiry. The lawyer should also know the yield of economics, ethics and philosophy, psychology as well as take advantage of technological sciences, so as to have a clear idea of the shape of contemporary civilization and its demands. Sociology is of paramount importance here, a science encompassing the entirety of social life which admittedly has not yet gained stable foundations and a sure method, but one of which much may be expected in the future. As Gény asserts, "one should set much less store by logic, in itself utterly fruitless if one does not combine it with real material, and turn to sciences and methods which aspire to discover the active and fertile substance by observing, analyzing, and elucidating the entire social life of humankind." The element of interest, elaborated by Ihering, is very strongly underscored by many modernists. Resolving contentious issues presupposes understanding of the interests involved and striving to bring them into balance from the standpoint of the social good. This means granting state sanction to those interests which carry higher importance. Determination of individual rights can be best facilitated by an examination of the overall economic and social goals, and the subsequent comparison of their significance with the weight of interests that are contrary to those goals. Various teleological moments are given

consideration in practice even today, but this usually assumes the form of a constructive dialectic and is thus hampered and distorted.

Modernists demand that social factors in the above sense are also introduced in the course of university studies. They argue against one-sided historicism and the "jurisprudence of notions", insisting that present-day social relationships should be incorporated to a greater extent. One should look not only outside oneself, but also ahead of oneself and into the future. One should tend to the harmony of the system and consistency of legal constructs as well as their capacity to satisfy existing social needs. Alongside the knowledge of laws, the young lawyer should learn to understand people and social life. Psychology, political economy, sociology and their applications should be an inseparable part of legal studies. This is echoed in the demand which Ehrlich is particularly vociferous about, namely to study legal norms not only in their abstract, theoretical form, but also in real life. "A legal norm is not a rigid dogma, but a vital force." The task of jurisprudence is to present law as it actually applies and operates. One who only knows the "will of the legislator" does not know law which exists in fact. According to Ehrlich, dogmatic understanding should be contrasted with dynamic understanding, which considers law as it operates in practice.

Social nature is also manifested in the postulation calling for the democratization of law, in order to bridge the distance between law and the wider masses. One the one hand, law should be given a form which is accessible and comprehensible to all strata, while on the other its substance should be indicative of society's legal awareness and thus nurture a close bond with the people. Current jurisprudence has turned out a class of spiritual aristocrats, a separate caste who are not understood by the general public and who do not understand the latter either. One should strive for the state which had once existed in Rome. The confidence in law and the cult of law may only ensue if there is knowledge of it. Here, the demand for "Die sociale Jurisprudenz" in lieu of "Begriffsjurisprudenz" applies as well.

The third essential moment in legal modernism, perhaps not as definite as the previous ones but still recurring in various forms, is the conviction presuming the existence of *non-positive law*, a law which exists outside statutes and which should be valid for the judge when rectifying statutory loopholes. "The new understanding of law", Kantorowicz says, "presents itself as a revival of the natural law in an altered form."[19] A curious twist of history! Repressed by the historical school, by the empiricism of the nineteenth century, by modern positivism, natural law seemed to have withdrawn from the realm of law and found shelter in the archives of the past. Towards the end of the last century, Bergbohm dedicated much of his life to the labour—fruitless, as it turned out—of searching for and detecting the remnants of that utopia hidden in various forms, so as to extirpate it from legal science once and for all. Meanwhile, today we see that doomed idea resurface with great vigour. Also, if we look back at history and realize that the idea of natural law never really disappeared, that in society, outside the sphere of professional lawyers, the idea still lives and operates, it would be legitimate to ask whether it is not a sociological fact, a social-psychological phenomenon which not only manifests itself in diverse form but is—in its essence—inseparably linked to human nature. However, we are not going to delve into that question here as it would lead us too far; let us only state that legal modernists constantly invoke non-positive law. The difference between its modern and past variants is easy to capture. It is not considered permanent, immutable, independent from the circumstances of time and place; on the contrary, it is believed to depend on economic, social and political relationships, on the level of civilizational advancement, on the culture of the given period. It does not possess binding force (as the old school maintained) on a par with or even above statutes, having merely certain ancillary significance as it fills statutory loopholes.

Determination of the positive character and positive substance of the modern natural law is less lucid, which is quite understandable consid-

19 H. Kantorowicz, *Kampf um die Rechtswissenschaft*, Heidelberg 1906, p. 10.

ering the difficulties and complexities involved. Prof. Gény—who incidentally combines natural law with the principle of justice—goes farther than anyone else in this matter. He assumes the existence of certain ethical factors which endure unchanged over time. "Beyond and above the positive nature of things, composed of material and mutable elements, there exists a higher order of things which consists of changeless principles of reason and ethical factors."[20] The statute is only one of the expressions of the essential law, which can and should fulfil its role outside the statute. Kantorowicz recognizes the existence of a law "which aspires to binding force irrespective of state power" and calls it "freies Recht". The matter is expounded in most explicit terms by Prof. Zoll, who sees "the right law" in "the principles and rules which at a given moment should, in view of the 'nature of things', be deemed as the best and the most appropriate ones, as an ideal of legal norms", while asserting that "at a given moment and in a given society there can be only one just law."[21] It becomes the source of the applicable law by virtue of interpretation which should make use of it.

The very motto of the new trend, that is "Freie Rechtsfindung!", intrinsically presumes the existence of law outside the statute, one which needs to be found. Strictly speaking, one should rather speak of the "creation of law" in this case, and then "Freie Rechtsschöpfung!"[22] would be a more fitting slogan.

The fourth fundamental moment of the modernist trend is a certain *cult of individualism* in the actions of the judge. In this respect, the new current represents a complete contrast to the age of Montesquieu, when efforts were made to extinguish any traits of individuality in the mind of the judge, and organize the judiciary in such a way that the judge would be a machine, an intermediary apparatus between statutes and the adminis-

20 F. Gény, *Méthode d'interprétation et sources en droit privé positif: essai critique*, Paris 1899, p. 481.

21 F. Zoll, *Austriackie prawo prywatne. Część ogólna*, Kraków 1909, p. 28.

22 See the valuable remarks made by Prof. Radbruch in *Rechtswissenschaft als Rechtsschöpfung*. G. Radbruch, *Rechtswissenschaft als Rechtsschöpfung*, Heidelberg 1906.

tration of justice. Modernists repeatedly invoke the example of England and the importance that eminent judges enjoy in that country.[23] They call for fewer but better selected judges, assuming that outstanding personalities will contribute more effectively to the development of law than average minds. Just as natural law in its time set the inalienable rights of a person against the state, so legal modernism juxtaposes the rigidity and formalism of state norms against the discretion of judges, who may treat each case differently, employ an individualized approach instead of a single, uniform standard. Modernism realizes that such treatment entails subjectivity and certain latitude, yet it believes that this will yield better results than the inflexibility of statutes and template-like adjudication, in which subjectivity cannot be completely eliminated either. Still, there is no doubt that this individualistic bias is associated with confidence in the present-day representatives of the judicial estate.

Besides those fundamental elements, encountered in almost all modernist treatises and uniting the adherents of the new trend into one, tightly-knit camp, there are many other postulations and views which divide the movement into internal factions. Thus, claims are made *de lege ferenda*: to extend the liberties of the judge by virtue of statutes themselves, to create laws in the form of general guidelines rather than detailed regulations, to launch procedural reform oriented towards the elimination of superfluous formalities, a reform of the judicial administration etc. Furthermore, some demand nationalization of the legal language, which should be made comprehensible to the broad public, ensuring older lawyers-practitioners an opportunity of further education, or elevating the social status of the judges. However, as the movement evolves, the fundamental critical-methodological elements come to the fore and gather increasing numbers of supporters, which promotes greater clarity and perspicuity.

23 Prof. Gerland demonstrates that Germans have superficial knowledge of the state of affairs in England and tend to overestimate it considerably. H. Gerland *Die Einwirkung des Richters auf die Rechtsentwicklung in England*, Leipzig–Berlin 1910.

On the other hand, it has been wrongfully alleged that modernists consider it possible to adjudicate *contra legem*. Today, when the general lines of the new trend have already been drawn, this aspect has been set straight as well, while such revolutionary notions—which did previously exist—have been revised or withdrawn.[24] It now becomes evident that that the proposed method of resolving matters was in fact *praeter legem*, not *contra legem*. It would also be unfounded to accuse modernists of seeking to eliminate notions from the legal sciences, when actually the idea is to conceive notions which respond to the social needs as efficiently as possible.

Thus far, I have discussed what occasioned the new trend, outlined its general nature and the crucial moments; I have also attempted to present its chief traits in the most objective manner possible. Now, let us assume a critical position, ask about the rationality and values of the new method with respect to the traditional approach. It should be noted, however, that I by no means pursue evaluation from the legal-political viewpoint, or seek recognition of the necessity for the method to be universally introduced or categorically rejected. The matter remains closely related to the quality of human who is to deliver judgments in accordance with the new rules, to the maturity and impartiality of the judicial estate. Consequently, one set of solutions would perhaps be preferable in the case of Russia, whereas different ones would apply in Germany, Austria or France. Thorough knowledge of the territory should be acquired before any judgments are passed.

Something else is the point here. Next to the legal-political perspective another viewpoint may be adopted, namely the new current may be examined from a legal-philosophical position, which focuses on the essence and the tasks of law. As a result, we will perceive that in order to become a truly juridical current, the modernist trend must become more profound and undergo certain modifications since, though it harbours worthwhile elements, it has failed to formulate them in sufficient detail,

24 Cf. H. Kantorowicz, *Die Contra-legem Fabel*, "Deutsche Richterzeitung" 1911, no. 8.

and goes too far in its critique of the traditional school. While preserving the teleological components, it is imperative that an objective element be introduced, so as to satisfy the requirement of legal security.

Without becoming entangled in metaphysical speculations or rationalist deductions, and relying on the popular legal awareness instead, we may observe that crucial elements of law include not only the social-state sanction, but also two other components, namely social purposefulness and stability, and the determinacy of the normative regulations.

The weakness of the traditional school lay in a certain oversight, in reducing the first of the aforesaid legal factors—social purpose—to an inferior rank. Logic predominated, the endeavour concentrated on the consistency and harmoniousness of the system, on subtle notional analysis. In consequence, actual social needs suffered twofold: firstly because the will of the legislator was constructed using abstract categories which were often unsuited to the specific actual circumstances but did the opposite, forcing life into the mould of a formula; secondly, because the structure and the adjudication were founded on the presumable will of the legislator who was considerably remote from the current times and contemporary conditions, therefore the will could not be pertinent for the present-day relationships. Naturally, I disregard the attempts to construct the "presumable will of the legislator if they had known the conditions today", as this is a contrived procedure resting on the supposition that the legislator would have acted "rationally", whereby the latter notion is defined on the basis of one's own views.

The shortcoming of the modernist trend is that it depreciates the second factor which is nevertheless quite relevant in law, namely the stability and objectivity of the formulated norms (which rectify statutory gaps). Modernism demands that the judge be released from the shackles of the statute, but it does not specify the direction which their actions should follow, and it does not provide objective directives one could use as guidance when resolving disputable issues. Admittedly, modernists do engage in deliberation on factors that need to be taken into account

when drafting laws, and suggest related guidelines. A considerable part of the brilliant work by Prof. Gény consists in enumerating and analyzing all those moments and circumstances which should play a role in establishing a legal norm. Undeniably, all possess certain degree of significance, but one should be aware that all are inherently subjective; even the findings of the social sciences on which Prof. Gény counts so much, once they cease to be theoretical and become practical knowledge (that is, when they no longer study what is but determine what should be), acquire subjective character. Liberal determination of the legal purpose and the subjectivity of assessment are inseparable.

A number of modernists believe that the objective aspect of created law is founded on the inquiry into the "nature of things". "The nature of things, approached as a source of positive law, hangs upon the postulation that relationships of social life harbour the capacity to keep them in balance and identify on their own, so to speak, the norm which should govern them."[25] This view is a reflection of the philosophical-sociological theory developed in France and known by the name of solidarism. The view has been fairly often expressed in recent literature, but its chief flaw is that is presumes knowledge of the essence of a given phenomenon. "The nature of things" describes not only the entirety of actual circumstances relating to a particular area, but also denotes appreciation of their significance from the standpoint of values, and this latter element must necessarily be subjective. It cannot be denied that the study of the nature of things or nature of certain phenomena reduces subjectivity insofar as it generates the knowledge of all related facts, therefore value judgments rely on the same experimental material and their discrepancy thereby is diminished. However, the conclusion that knowledge of those factual circumstances could produce only one objective norm of action is untenable. In this position, subjectivity also remains indelible.

25 F. Gény, *Méthode d'interprétation et sources en droit privé positif: essai critique*, Paris 1899, p. 469.

Other modernists are more radical in their approach. They do not provide any directives nor put forward any criteria. According to them, the judge should be given absolute, unconstrained freedom. Liberated from the fetter of logical constructs, they will find the most appropriate norm on their own. "It is then that the ideal of impartiality (?) will be reified, since the partiality of the judge is due solely to the ignorance of social facts and views."[26] If the judge looks towards life itself as opposed to theory, they will gain the best possible grasp and sense of the vital social needs, determine the most purposeful norm, and find the most suitable law.

However, can such a position be called a juridical one? Does it not contradict a vital quality of law, namely the stability of created norms? Is it not an acknowledgement of the unmitigated licence and subjectivity of the judge? Would it not lead to anarchy in the administration of justice? Modernists expect that taking social needs into account will result in the objectivity of adjudication. This is clearly a delusion which does not stand up to the text of experience. Even among professionals who devote themselves wholly to the study of the issue, life demonstrates a tremendous disparity of views concerning social needs and the tasks of law, not to mention the situation of a layperson. One could go as far as to say: *quot capita tot sensus*. If the opinions on social policy in general are so diverse, then things become even more complex when justice is administered, and not infrequently one can hardly determine the social outcome of one or another ruling. Even if the views regarding social needs are concurrent in many points, how many of those—fundamental though they are at times—are disputed? In its extreme manifestations, the modernist trend enables judges (at least in principle) to deliver judgments which blatantly contradict the foundations of the legal framework today (unless a statute stipulates expressly to the contrary), and negate the universal legal sense, only because it was deemed the most appropriate in the opinion of a given judge. The

26 H. Kantorowicz, *Die Contra-legem Fabel*, "Deutsche Richterzeitung" 1911, no. 8, p. 46.

position of the modernists cannot be reconciled with the principle of legal security. From the social standpoint, bad regulations are preferable—as long as they are definite and stable—to the anarchic licence of judges. Absence of any guidelines and boundaries in adjudication constitutes a major deficit in the new programme. The usual response of the modernists, namely that the traditional method does not preclude subjectivity, does not suffice, as the extent and limits of subjectivity are the chief concern here. In the traditional school, subjectivity is evinced in a different comprehension of statutes, but the goal is to align rulings as closely as possible with statutory provisions, to the *ratio legis*, to the spirit of the law. In the new current, subjectivity results from disparate social views. In the former case, we are dealing with limited subjectivity; in the latter, it is unlimited.[27]

We are thus faced with the dilemma of two directions, either of which satisfies only one of the crucial elements of law. The first safeguards legal security, the second assures social purpose. The question now arises of whether the above conflict is inevitable, whether one of those crucial elements has to be sacrificed. I believe that there is no such necessity, that the modernist trend should retain its merits of realistic-social orientation, but that it requires some elaboration, some modification in order to achieve the quality it has been lacking: objectivity. Nonetheless, if we are to resolve that issue, we need to consider the actual source of all rulings, the basis of all decisions: the psyche of the judge.

If we attempt to analyze the psychology of the judge as it operates when passing judgments, we shall find three essential components corresponding to the three facets of our spiritual life: 1) the intellect (logical reasoning), 2) feeling, and 3) will. Each of these factors plays a certain role, and although one's psychological being represents one in-

27 "The posited freedom in application of law would in reality engender—besides theoretical paralogism—a constant threat to the legal freedom of citizens, whose most fundamental pre-requisite is legal certainty and, in particular, the unassailable authority of the statute." G. Del Vecchio, *Sulla positivita come carattere del diritto, Prolusione al corso di Filosofia del diritto*, Bologna 1911.

divisible whole, in order to examine those psychological processes they need to be isolated by way of abstraction and their nature determined.

The working of the intellect consists on the one hand in comparing the state of fact with the premises expressed in the statute and, on the other, in drawing consistent conclusions from statutory provisions. It is a process of reason *par excellence*, which operates using logical syllogisms. This is also where the search for the legislative will takes place in those cases which are evidently not regulated. This is not a pursuit of the surmisable "rationality, purposefulness" of legislative will—as this is merely camouflaged subjectivity which introduces various elements into play, not only rational ones—but an act of drawing conclusions by means of general principles, foundations deriving from the norms themselves, by means of the *ratio legis* inferred from a given statute. The orientation of this activity is the exact opposite of drawing direct conclusions from existing regulations. It is a process of logical construction which the traditional school held to be the only authoritative mode, an intellectual process devoid of any other elements. In practice, however, it seldom functions in its pure form, but tends to integrate other psychological factors.

Next to intellect, an element which contributes (consciously or unconsciously) to legal decision-making is *will*. It is evinced in deliberating on the goal of a given adjudication or specific norm, whilst being aware of the social aftermath that a rule determined by the judge may cause and having the will to bring such outcomes about. Thus, if a judge, when resolving a contention between merchants, makes allowances for the impact that one decision or another will have on the development of trade (if it became a general norm), they demonstrate that they deem that development desirable from the standpoint of legal policy and have a "will" to support that particular social function. If, in a dispute between workers and their employer, the judge considers the needs of the national industry, the resulting decisions are again based on the moment of "will". In principle, the traditional school negated the existence

of the element of "will" where judicial rulings were concerned, as it reduced everything to logical, rational factors, to examination of the "legislator's will" irrespective of the consequences and subjective assessments. However, things were different in practice, and total elimination of the purpose factor proves impossible in this domain. A principle to which one adheres in England states that the judge is not bound by a statute if it leads to absurd outcomes. The rule which thus applies there is "*lex falsa lex non est*"![28] The rule which in principle operates on the continent in "*lex falsa lex est*", but in practice it is modified by various devices, which is due to the effect of the factor of "will".[29]

The third critical element involved in taking juridical decisions is the intuitive factor of *legal sense*. This consists in reflex-like, impulsive response to human actions from the legal standpoint, in perceiving them to be lawful or unlawful in accordance with the norms universally in force or not. There can be no doubt that the judge, in their appraisal of human actions behind the contentious issue, is subject to spontaneous emotional reaction which is largely unconscious, but which involuntarily induces them to rule in one way or another. Even such a positivist as Ihering, inclined as he is to account for everything by invoking conscious goals, acknowledges that "as a rule, the sense of rightness precedes knowing."[30] Legal sense has a paramount significance for the functioning of social life and the legal framework. One can hardly imagine the normal coexistence of people without that factor, for sustained conformance with the law is by no means dependent on exact knowledge of its provisions—which is impossible—but consists in being guided by the legal sense inculcated by a given environment. Social

28 E. K. Gerland, *Die Einwirkung des Richters auf die Rechtsentwicklung in England*, Berlin-Leipzig 1910, p. 21.

29 From a strictly psychological position, will to adhere to the statute also comes prior to the intellectual function. However, I choose to stress that factor outside the boundaries adopted in the theory, since teleological considerations—objective criteria being absent—will ultimately always depend on the element of will.

30 R. von *Ihering*, *Geist des römischen Rechts* auf den verschiedenen Stufen seiner Entwicklung, Leipzig 1852, p. 353.

education imparts a range of relevant impulses which inform the right way to conduct oneself.

The combination of legal sense with actual conduct that consistently follows a particularly oriented pattern is at the root of the complex phenomenon of customary law, which tends to be explained in such diverse ways. That *optio necessitatis*, which the authors of customary law often cite, relies in actual fact on opinis iuris; this is legal sense. Without this factor, the existence of customary law and its difference from custom cannot be explained. Also, it facilitates understanding of dispositive customary law.

I cannot go into the origins or the formation of legal sense. There is no doubt, however, that Ihering's assertion: "nicht das Rechtsgefühl hat das Recht erzeugt, sondern das Recht das Rechtsgefühl"[31] has no grounds in fact. Anthropologists and sociologists (Tylor, Maine, Dürkheim, Worms etc.) are in agreement that all societies, even those at the lowest level of development, have legal norms which are universally binding, few though they may be. We do not know and we cannot imagine a society without law. Now, given the fact that primitive law is a customary law which by default contains the element of legal sense, therefore there can be no temporal contrariety between law and legal sense, and the question of the emergence of the latter comes down to the question of the creation of law. Nevertheless, this last question cannon be satisfactorily answered with the current state of knowledge, as the origins of the human and the first social groups are uncertain. Only detailed knowledge of human provenance and the formation of human society can enable productive, sociological inquiry into the genesis of law and legal sense. For us, the certainty that legal sense has existed in all societies and in all periods should suffice.

This may be seen in various forms when justice is administered. For the most part, it arises unconsciously, in advance of the arguments of reason. As we know from history, the famed jurist Bartolus would first

31 R. von Ihering, *Der Zweck im Recht*, Leipzig 1877, p. X.

resolve an issue and then ask his friend Tigrinius to find relevant passages in *Corpus iuris* as he "had poor memory". Legal sense often evinces itself in the guise of "general legal principles", "the nature of things", "rightness" etc. The latter notion in particular tends to be identified with legal sense, though somewhat incorrectly, because "rightness" is a much more capacious term, since it relates not only to the procedure but many other manifestations of life (e.g. wrong reasoning, unwarranted wish) and generally denotes approval, the recognition of certain facts which may appertain to law, but may also be independent.[32] Legal sense, on the other hand, is a psychological phenomenon, demonstrating specifically and exclusively in connection with law, and having a significant bearing on adjudication.

Legal sense also plays a momentous role in the domain of legislation. From the psychological standpoint, the creation of laws is influenced by two factors: considerations of purpose and legal sense. The legal sense of a period is especially revealed in its fullness in civil law statutes, which decisively affect the creation of binding norms. Certain authors[33] recommend the enhancement of teleological factors by making civil policy a science which studies the legal means that can enable one to accomplish certain social goals, thus guiding the legislator. If such a branch of knowledge were to develop, it would reduce the role of legal sense but it would not eliminate it entirely, because considerations of purpose also needs to take that factor into account. The historical school embraced legal sense to a considerable extent, but comprehended it onesidedly, disposing completely of the teleological moments and lending it the mystical garb of "national spirit"; this elicited the positivist response which opted for the opposite extreme and began to ignore this factor.

Legal sense has a creative dimension, but it can also be critical and destructive. In the political life of societies, one not infrequently sees how

32 As aptly observed by Prof. Zoll who nonetheless approaches the matter differently. F. Zoll, *Austriackie prawo prywatne. Część ogólna*, Kraków 1909, p. 33.

33 L. Petrażycki, *Die Lehre von Einkommen*, Berlin 1885.

this factor interacts with the applicable law. We often happen to hear that a statute is "unlawful" (e.g. expropriation in the Prussian partition), which does not mean anything other than a contradiction between a law and the existing legal sense of individuals or social groups. Where it generates tension, the conflict between the predominant legal sense and the law in force causes a violent reaction, a powerful outburst that culminates in the phenomenon of revolution. As the previous legal order is abolished, the factor of legal sense—previously critical and destructive—becomes creative, normative, and shows the right path to a new legal framework. One must not claim that this factor is the only one since teleological aspects also play an eminent role, but it is an inextricable element which combines with other factors, either consciously or involuntarily.

It is a matter of some wonder that a factor of such magnitude has thus far not received the scientific appreciation and scrutiny it is due. The existence of the very fact had already been stressed by Grotius, who speaks of law "ad quod a natura nostra nos duci sentimus"[34], but deliberations of that kind have largely been approached by philosophers of law in a rational fashion, the most vivid example of which is Kant's theory.[35] Very often, the phenomenon was reduced to a manifestation of metaphysical being.[36] To date, no one has embarked on a thorough inductive-psychological study of the nature and reifications of legal sense as a real, empirical fact which played a tremendous role at the lower levels of cultural development and still plays it today.[37] One of the possible future sciences that could render invaluable services to jurisprudence

34 H. Grotius, *De iure belli ac pacis*, Proleg. § 18.

35 "Alle sittliche Begriffe völlig a priori in der Vernunft Ihren Sitz und Ursprung haben; in dieser Reinigkeit ihrer Ursprunges eben ihre Würde liege". I. Kant, *Grundleg. zur Metaphysik der Sitten*, 1785 Riga.

36 "L'origine e la natura delia coscienza del giusto é essentialmente un problema d'ordine metafisico". G. Del Vecchio, *Il sentimento giuridico*, Milan 1908, p. 12.

37 Precursory instances of such research may be found in the compelling works by Petrażycki though their critical part is more worthwhile than the positive one. L. Petrażycki, *Wstęp do nauki prawa i moralności*, 1907, L. Petrażycki, *Teorya prawa i państwa*, Saint Petersburg 1907.

is legal psychology, which should remain closely associated with the sociology of law.

It has become customary in contemporary science to classify legal sense among ethical phenomena, in the domain of morality. Petrażycki extensively elaborates on the view that intuitive law (which in Petrażycki's writings denotes a phenomenon closely resembling that which we call legal sense) is identical with justice, that the two notions overlap completely. Both phenomena represent normative psychological experience, namely imperative-attributive emotions which incorporate the element of duty and the element of entitlement but are nonetheless independent from positive regulations. [38] This mingling of two notions which, though linked, are by no means identical, cannot be considered felicitous. Justice is a much broader notion that transcends the realm of law as it refers both to the religious sphere and phenomena that are independent of human will (since injustice is a term we use to describe e.g. physical or intellectual inequality between people). On the other hand, justice displays an individualizing nature while law is universal; hence an act may be in keeping with the legal sense but go against the sense of justice (e.g. demanding payment of debt when the debtor is facing exceptionally adverse circumstances). Legal sense is a social-psychological phenomenon which arises on the grounds of law in the positive sense, therefore it should not become entangled in the domain of morality. Still, they should not be contrasted either, as both constitute two angles of approach to the analogous sphere of human phenomena and actions. Legal and moral sense could be envisioned as two overlapping circles which share a certain surface and have their separate parts as well. Although legal and moral sense are largely (but not always) in concordance, their distinct nature should be emphasized. Underlying both phenomena is a typically human psychological trait—the awareness of the norms of conduct. One of the reasons why the notions tend to be thus confused is language, the linguistic chaos caused

38 L. Petrażycki, *Teorya prawa i państwa*, Saint Petersburg 1907, pp. 500–508.

by the usage of the words “law”, “legal sense” and “moral sense”. However (as Petrażycki adroitly demonstrated), science is concerned with phenomena rather than with names, and linguistic custom is no major indication in the realm of *universitas scientiarum*. In the opinion of this author, legal sense constitutes a something which, *sui generis*, is a phenomenon of juridical nature, regardless of whether individuals call it law or morality.

At this point, we should not delve ay deeper into the philosophical-psychological issues. For the current purposes, it suffices to state the three psychological factors which accompany the exercise of the judicial function: 1) intellect (logical adjustment to achieve alignment with statutes), 2) legal sense, and 3) will (teleological considerations, determination of social goals and legal means).

If we now reconsider the tenets of legal modernism and the historical school, we will clearly see how both trends approach the psychological phenomena we have just discussed. The search for the legislative will, be it explicit or presumable, should proceed by way of reason while dismissing any other arguments. The creation of juridical science should only rely on the objective factor of intellect. Obviously, things were different in practice, but the theory recognized only rational operations, only logical constructions. The drawback of that method (in its pure form) is the necessary rift between social needs and the “will of the legislator”, between the demands of the present day and the position adopted when a law was drafted. Here, law should be inflexible and obsolete. Furthermore, it is a one-sided position, as it does not allow for the remaining two factors which, as we have seen, actually play a momentous role.

Modernism gives precedence to feeling and will. Teleological aspects, the purposefulness of norms, is considered decisive, as law is merely a means for attaining certain social goals, and modern needs should be the sole criterion. Therefore, it emphasizes the necessity to democratize jurisprudence, to introduce harmony between public legal awareness and the regulations in force, as it believes to be able to

achieve that end by leaving judges at complete liberty to rely on their feeling and will. It is a weakness of that trend that it does away with the intellectual element (as we understand it) altogether, relinquishes logical connection with the applicable statute, and thus utterly eliminates the objective factor. This leads to extreme subjectivity and latitude, and also precludes legal security. Apart from that, the position is also one-sided because logical harmony and the link with the existing regulations must be retained if judicial rulings are not to be revolutionary in their nature (which the modernists by no means call for).

As we can see, from the legal-philosophical standpoint as well as in the light of the essence of law, its principal postulations (social purpose and objectivity of norms) display major shortcomings; the flaw of the first is that the norms are all too rigid (do not correspond to life), whereas the others are too subjective (liberal). The appropriate method should allow both for the vital demands of law and actual elements of human psychology which exert their impact in life; it should strive —as far as possible—to reconcile those two facets of legal phenomena. The task of the correct method would thus be to modernize the intellectual factor and render the factors of feeling and will more objective.

First of all, let us see if that is feasible with respect to the most crucial element of the modernist trend, that is the factor of will. Can there be guidelines, or lodestars that would objectively show the judge which relationships they should deem the most valuable and worthy of being endorsed by law? Are there or can there be pertinent criteria which harbour a universal value? Social good is an essential goal that tends to be very widely recognized as such. Yet, as we know, this is a term which speaks volumes but defines little, a flexible notion which can be construed in the most diverse ways. *Quot capita, tot sensus*. Virtually everyone who deliberates on those issues entertains different views with regard to legal means leading to the public good, to the benefit of all. Indeed, there are theories that advance guiding rules which should govern the creation of law. However, should it be Stammler's formula (*Gemein-*

schaft frei wollender Menschen)? The fostering of altruistic impulses and the feeling of love (Petrażycki)? A legal rule based on the principle of solidarity (Duguit)? Or the development of culture of a given period (Kohler, Berolzheimer)? Evaluation of particular institutions in the light of the course of development (Liszt, Makarewicz)? Undoubtedly, many of these factors on which the theories are founded should perhaps be taken into account. Still, I do not believe that any of the suggested directives can be deemed the one and only criterion. This is even more difficult given that the above theories apply to legislative policy rather than the objective we are concerned with—addressing statutory loopholes. Perhaps a science of civil-interpretative policy to advise judges, modelled for instance on Petrażycki's "civil policy", will develop with time. There is also no doubt that accurate knowledge of social life and awareness of the achievements of modern science reduces the difference in value assessments of the factual material. However, the factors of social purpose or will must remain more or less subjective, and this cannot be mitigated by even the subtlest philosophical constructs. Ultimately therefore, the refinement of the judge will be decisive, and that cannot be replaced by any guidelines or norms.

If the factor of will (social purpose) cannot be made thoroughly objective, this does not mean that modernists are right in demanding complete freedom of the judge. Unqualified licence of the representatives of Themis cannot be admissible from the legal viewpoint. The total liberty of judges would result in the universal uncertainty of transactions, allegations of partiality, and severely undermined confidence of the public in the impartial judiciary. If it is impossible to formulate objective, universally recognized directives that would regulate the actions of judges, then one can and should define the boundaries of their discretional manifestations. One should delineate the confines, establish a framework within which lawyers are at liberty to determine social purpose, but beyond which they cannot go for reasons of public security. Such boundaries may be set by two other factors (intellect, feeling), as long as they are correctly construed.

As already noted, the intellectual factor consists in adjusting legal decisions to the existing laws. This consonance with the applicable regulations (when addressing statutory lacunae) must be retained, although it should not mean the fictitious "will of the then legislator" but rather the actual "position of the *contemporary* legislator". The issue here is not devising artificial constructs that serve to examine how the present-day legislator sees a given issue, as that would be impossible due to numerous factors—exceedingly complex and unpredictable in themselves—which affect the enactment of statutes. The matter should be approached in a juridical fashion, using pertinent methods of jurisprudence, so as to determine the position of the contemporary legislator in the light of the entirety of laws, including both codes and more recent acts of legislation. The idea here is to take heed of ratio iuris, or the legal principles and concepts which provide the point of departure, the foundation of statutory provisions. Since social views and legal principles evolve and change over time, the views and legislative principles which are closest to the present times should prevail; in other words, *moderna ratio iuris* decides. For this purpose, a new principle should be introduced alongside the old tenet of *lex posterior derogat priori*: *ratio iuris posterior derogat priori*. For instance, if Napoleon's code stipulates almost unlimited freedom of contract, more recent statutes demonstrate a shift towards protection of the economically disadvantaged classes, and when resolving a particular case, when formulating a legal norm, the latter position of *moderna ratio iuris* is decisive. Thus understood, the intellectual factor is not contrary to the essential postulations of the modernists concerning due regard for the new social relationships, and at the same time has the great advantage of assuring legal security by establishing boundaries for judicial discretion. Most likely, analogous concepts are at the root of Paragraph 1 in the Swiss code which, in the event of statutory loopholes and the absence of pertinent customary law, entitles judges to rule according to a norm they would formulate as a legislator, whilst taking tradition into account. Here, logical compliance and consonance

with the essential foundations of the existing legal order are observed as well.

The second psychological factor, which assumes various forms in the modernist postulations, is legal sense. It is found in all people, in all societies, but its manifestations tend to be very diverse. The legal response to human action is by no means uniform, not only at various levels of cultural development but even in the same civilizational period. Legal sense is a highly subjective moment and, in the form posited by modernists, it cannot be accepted as a principle of adjudication, as an objective norm.

Let us briefly consider the essence and nature of legal sense, referring to our earlier observations in this respect. It is not only psychological but also a social phenomenon, arising in equal measure from social education and life, and the idiosyncratic nature of a given individual. It would therefore follow that legal sense has two components: the individual and the social one. Thus, we can speak of individual legal sense and social legal sense.

The first phenomenon results from a whole plethora of factors, including the influence of the social system and the general conditions in which members of a given social group happen to function, as well as a range of special circumstances affecting the individual, such as family upbringing, one's milieu, the literature one has read, their views, temperament, life experiences and so on. The sum of all those factors makes up the psyche of the individual and the peculiar legal sense marked by their individuality. This leads to differences of opinion and in the legal assessment of the same factual material, which are sometimes very profound.

Still, human beings are social creatures and are therefore not alien to the trends that occur within society. Thus, their psychology is exposed to views, beliefs, and customs circulating in the community which, mirrored in their minds, leave indelible traces. From the earliest years, the entire upbringing of children consists in instilling such patterns of thinking, feeling, and acting which no doubt would not have developed spon-

taneously; all efforts are aimed at making them *social* beings. Even the greatest individualists cannot divest themselves of the spiritual elements and impulses which have been inculcated by society. The very idea of individualism is a product of social life developed over time and which is unknown in the lowest tiers of civilization. As Comte very aptly put it: "L'homme se developpe collectivement et point individuellement." The part of our "self" which is truly autonomous, truly independent from society is so negligible that it plays a more serious role only in exceptional, outstanding personalities. What is more, a powerful manifestation of individualism which is at odds with social notions usually provokes an intense public response, and it is not unusual for the pioneers of novel ideas to become their martyrs. The presence of social-psychological phenomena which occur in the entire society and, in a sense, beyond individuals themselves, is so evident that it became the foundation of a whole sociological school (Durkheim, Bouglé, etc.), which nevertheless goes too far in presuming that these phenomena constitute external compulsion and exist separately and independently of the individual psyche.[39] Among the various social-psychological phenomena, social legal sense takes one of the foremost places. It represents the outcome of the entire legal system within which each citizen lives and develops, the upshot of all conditions created by statutory and customary law, of the whole configuration of social life. It may differ from period to period and from peoples to peoples, but in a given society it remains uniform for all, or at least for the majority of its members. The most eloquent reification of the social legal sense is customary law, whose pre-requisite is the conviction of lawfulness shared not by particular individuals but by the entire community (or specific groups). While customary law cannot exist without social legal sense, the reverse is not out of the question. It is possible for a specifically oriented social legal sense to exist without being actually exercised (e.g. due to statutory obstacles).

39 E. Durkheim, *Les regles de la methode sociologique*, Paris 1910, p. 19ff.

Social legal sense is not independent of the individual psyche. It only means a certain set of psychological elements that are common to the entirety of a given social group. Thus, an individual legal sense is narrower with regard to the subject, being attached to one person only, but it is broader in terms of its object, because it comprises social legal sense as well as particular traits of the individual. It may be conjectured that in the legal sense of an average citizen social elements outweigh individual ones, which is due to the nature of the phenomenon as it tends to create norms imposed coercively on everyone and therefore induces adjustment of one's singular legal sense so that it conforms with the views of the whole social body.

It follows from the above that the psyche of the judge (or theoretical jurist) contains legal sense made up of two elements. The question then is which of those elements proves decisive in the administration of justice: the personal or the popular, the individual or the social one? This, surely, is no major quandary. Judges do not approach jurisprudence from the standpoint of the peculiar emotional traits of particular individuals, but as exponents of the common views and social sentiment. In the administration of justice, social legal sense is the only one which can be taken into account. Thus the factor of feeling, which already plays a serious role today, becomes an objective factor and establishes the limits of discretion for the actions of the judge. The postulation of the modernists concerning integration of the judge's legal sense into the process should be thus modified in order to become a genuinely objective directive and a boundary in adjudication. This is no radical reform but a refinement of the process which is already taking place. Here, one can also refer to Paragraph 1 of the Swiss code, which sets forth that in the case of statutory loopholes the judge shall take customary law into account. If we extend that last notion and exclude the requirement of sustained actual application, we arrive at social legal sense. Undoubtedly, conclusive determination of that condition is severely hindered. It obliges the judge to step outside their office and look into social life so

as to gain insight into its currents. Nevertheless, as a general guideline it is an inevitable consequence of the modernist postulation to make law more social. Perhaps the evolution of the judiciary will lead to greater specialization and produce professionals who are conversant with certain areas of social life and related needs. After all, effective application of the above factor—as well as others—ultimately hinges on judges' knowledge and their tact.

Thus we arrive at the general conclusion of our disquisition: if contemporary social needs are to be duly considered in jurisprudence and the administration of justice, the judge must necessarily be at liberty to make their assessments, which must be more or less subjective. However, for reasons of legal security, certain boundaries to subjective assessments must be introduced, and these will be supplied by two other factors: 1) the intellectual factor (alignment with the existing legal order), and 2) the factor of feeling (social legal sense). If determination of the social purpose or needs is problematic in a given case, the above factors offer directives which facilitate the task of the judge. However, if the assessment of the judge is definite but too individually or subjectively tinged, the above factors ensure the boundaries within which autonomous discretion is not suppressed, but which should not be overstepped. These are safety constraints, put in place in the interest of the stability of the legal order.

We shall therefore formulate our position in the following manner: In situations for which the statute does not provide, the judge should freely determine the norm which will be the most appropriate in view of social needs, taking into consideration the position of the contemporary legislator (moderna ratio iuris) and the social legal sense.

Finally, I would like to touch upon an issue which thus far has not been discussed with respect to the development of the modern trend, but remains closely associated, and even arises from it by way of consequence. We have said that making legal decisions should involve social legal sense. Obviously, this means the legal sense of the social group where a given contention takes place. Thus, in issues relating to industrial

labour one cannot seek legal sense among farmers, nor rely on the conviction of tradesmen in agricultural disputes. However, there is a social group whose significance in terms of legal sense is superior: this group is the nation itself, and the national legal sense is the respective phenomenon. It is not the mystical "Volksgeist" of the historical school, their alleged sole factor behind the creation of law, but a distinct manner of understanding, feeling and responding to the phenomena of the external world. There are various views relating to the issue of nationality, and the definitions are just as diverse. However, as the phenomenon evolves and the thoroughness of dedicated studies increases, it becomes more and more evident that the essence of nationality in the contemporary sense should be sought in the sphere of psychology. The opinion expressed by Renan[40], who states that "Une nation est une âme, un principe spirituel", aptly captures the pivotal moment of that phenomenon. Specific history, different customs, views and beliefs yield a distinct national psyche. Each nation has its peculiar fashion of comprehending things and a dissimilar normative sensibility; each has its national psyche. Bearing in mind that legal sense is a component of the general psychological make-up, each nation possesses a singular national legal sense, which also needs to be contemplated when laws are applied. The existence of that factor becomes even less doubtful when we observe that nations today are a result of joint living in the community of state[41] and thus in a common legal framework, therefore they must harbour that psychological element which is directly associated with the legal organization: national legal sense. The phenomenon should not be approached as an isolated occurrence, since it is linked to all other currents and manifestations of the national spirit, and constitutes an inseparable ingredient in the national culture as a whole.[42]

40 E. Renan, *Qu'est ce que'une nation*, Paris 1882, p. 26.

41 "Eine Vielheit von Menschen, die durch eine Vielheit gemeinsamer, eigentümlicher Kulturelemente und eine gemeinsame geschichtliche Vergangenheit sich geeinigt und dadurch von anderen unterschieden weiss, bildet eine Nation", G. Jellinek, *Allgemeine Staatslehre*, Berlin, 1905, p. 114.

42 "Plusieurs choses gouvernent les hommes : le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passees, les moeurs, les manieres; d'ou il se forme

Under normal conditions, where the state overlaps with the nation, the distinctiveness of the national legal sense does not cause any complications. It is expressed in the legislation, which corresponds with the character of a given nation. States which represent a conglomerate of many nationalities are a different matter. The difficulties seen there owe to the differences between those nationalities, and there is the additional danger of the ruling group forcibly imposing their qualities on all other national groups. "There are two kinds of tyranny," says Montesquieu, "one real, which arises from oppression; the other is seated in opinion, and is sure to be felt whenever those who govern establish things shocking to the present ideas of a nation."[43] Incidentally, this is not merely a theoretical possibility but a very real phenomenon which is seen in Europe ever more clearly.[44]

The modernist current fails to mention these difficulties, passes over them in silence, and that gap needs to be rectified. Legal differences must be taken into account if the law is to be genuinely "socialized", if there is to be harmony between regulations and the legal awareness of the broad public. Quite rightly, modernism places concern for social needs at the fore, but there can be no doubt that one of the most striking social needs is recognition of the national traits by adjusting the law so that it dovetails with the psychology of a nation. This is why the modernist trend requires necessary modification along those very lines. The free reckoning on a judge's part should rely on detailed knowledge of views, feelings, customs and beliefs—all the qualities of a given nation—while legal norms should be formulated accordingly. Most likely, the efforts to rectify lacunae and contradictions in the statutes do not satisfy such bias sufficiently. It is also likely that the overall evolution of law will lead to the adoption of the princi-

un esprit général qui en resulte." C.L. Montesquieu, *Esprit des lois*, Londres 1777, XIX, 4.

43 C. L. Montesquieu, *Esprit des lois*, Londres 1777, XIX, 3.

44 Simon Rundstein makes some interesting remarks on that score in *Freie Rechtsfindung und Differenzierung des Rechtsbewusstseins*. S. Rundstein, *Freie Rechtsfindung und Differenzierung des Rechtsbewusstseins*, "Archiv für bürgerliches Recht" vol. XXXIV.

ple argued by the modernists, namely that statutes should only contain general guidelines which the judge will follow as particular conditions and circumstances allow. In such a case, national differences could be taken into account to a much broader extent. At any rate, the modernist trend requires supplementation with regard to the national aspect. Next to the motto affirming the "socialization of law!", another principle should be posited: the "nationalization of law!"

Of all the stateless nations, the strongest awareness of national distinctiveness has been preserved among Poles. Hence one could assert a priori that the Polish legal sense is characterized by exceptional potency. It is true that the long-lasting abnormal political state has to some degree undermined the cohesion of the national psyche and disturbed the Polish legal sense. Nonetheless, the distinctiveness endures and tends to be very vividly evinced in some regions. However, the phenomenon has not been systematically studied, and the yield of Polish science displays major deficits in that respect. Inquiry into the nature and manifestations of Polish legal sense in the light of our historical past and in connection with the entirety of our national culture should be one of the chief tasks of Polish jurisprudence. Only thorough knowledge of one's society can enable the application of law that is attuned to its needs and national qualities.

With respect to the modernist trend, which is now transitioning into a Europe-wide current, Poland should not be passive and merely receptive but contribute its own postulation, a novel factor, namely the nationalization of law.

Literature

Bergbohm C., *Jurisprudenz und Rechtsphilosophie*, Leipzig 1892.

Bozi A., *Die Weltanschauung der Jurisprudenz*, Hannover–Helwing 1911.

Bülow O., *Heitere und ernste Betrachtungen* ü*ber die Rechtwissenschaft*, Leipzig 1901.
Del Vecchio G., *Il sentimento giuridico*, Milan 1908.
Del Vecchio G., *Sulla positivita come carattere del diritto, Prolusione al corso di Filosofia del diritto*, Bologna 1911.
Donati D., *Il problema delle lacune dell ordinamento giuridico*, Milan 1910.
Durkheim E., *Les regles de la methode sociologique*, Paris 1910.
Gény F., *Méthode d'interprétation et sources en droit privé positif: essai critique*, Paris 1899.
Gerland E. K., *Die Einwirkung des Richters auf die Rechtsentwicklung in England*, Berlin-Leipzig 1910.
Grotius H., *De iure belli ac pacis*, Proleg. § 18.
Ihering R. von, *Der Zweck im Recht*, Leipzig 1877.
Ihering R. von, *Geist des römischen Rechts* auf den verschiedenen Stufen seiner Entwicklung, Leipzig 1852.
Jellinek G., *Allgemeine Staatslehre*, Berlin 1905.
Kant I., *Grundleg. zur Metaphysik der Sitten*, Riga 1785.
Kantorowicz H., *Die Contra-legem Fabel*, "Deutsche Richterzeitung" 1911, no. 8.
Kantorowicz H., *Kampf um die Rechtswissenschaft*, Heidelberg 1906.
Montesquieu C. L., *Esprit des lois*, Londres 1777.
Petrażycki L., *Die Lehre von Einkommen*, Berlin 1885.
Petrażycki L., *Teorya prawa i państwa*, Saint Petersburg 1907.
Petrażycki L., *Wstęp do nauki prawa i moralności*, Petersburg 1907.
Radbruch G., *Rechtswissenschaft als Rechtsschöpfung*, Heidelberg 1906.
Renan E., *Qu'est ce que'une nation*, Paris 1882.
Rundstein S., *Freie Rechtsfindung und Differenzierung des Rechtsbewusstseins*, "Archiv für bürgerliches Recht", vol. XXXIV.
Sigwart S., *Logik*, Freiburg 1889.
von Jhering R., *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Jena 1857.

Windelband W., *Präludien, Aufsätze und Reden zur Einleitung in die Philosophie*, Freiburg 1884, p. 265.
Wundt W., *Logik der Geisteswissenschaften*, Stuttgart 1908.
Zoll F., *Austriackie prawo prywatne. Część ogólna*, Kraków 1909.

Karol Marian Pospieszalski

On the Concept of an Organ of State[1]

Some authors do not analyze the concept of an organ of state at all in their works on this issue[2], others define it on the basis of the area of law they are discussing, some describe it as a separate part of the state apparatus or a separate organizational entity[3], others refer to the personal substrate—for them such an organ is a person or group of people (a collegium) endowed with competence, sometimes it is said to be general competence[4], and, finally, sometimes it is defined as the authority

1 Translated from: Karol M. Pospieszalski, *O pojęciu organu państwowego*, „Ruch Prawniczy, Socjologiczny i Ekonomiczny" 1972 , no. 1. by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 S. Włodyka, *Ustrój organów ochrony prawnej*, Warszawa 1968; Z. Resich, *Nauka o ustroju organów ochrony prawnej*, Warszawa 1970.

3 A. Burda, *Polskie prawo państwowe*, Warszawa 1969, pp. 199, 200: An organ of state: this is a part of the state apparatus that is distinguished from the other parts of this apparatus by the fact that, as part of the whole operation, it fulfills specific tasks and is organized in a special way. M. Jaroszyński, *Polskie prawo administracyjne*, Warszawa 1956, p. 162:

> in a strict legal sense, an organ of state is a distinct part of the state apparatus (an organizational unit) established to perform state-mandated tasks with the help of measures that derive from the states' supreme power (*imperium*). J. Starościak, *Prawo administracyjne*, Warszawa 1969, p. 51, 52, 54: an administrative organ is a separate unit in the state organization, having the scope of its activity established by law (which can be credited to the state in the field of organizing social relations) and undertaking this action through persons specified in law and in specific legal forms […] on the one hand, a separate sphere of competence, but on the other hand it is also a set of material and personal resources …

4 In this way or similarly, C. Znamierowski, *Podstawowe pojęcia teorii prawa. Układ prawny i norma prawna*, Warszawa 1924; C. Znamierowski, *Prolegomena do nauki o państwie*, Warszawa 1948, p. 253; C. Znamierowski, *Wiadomości elementarne o państwie*, Warszawa

or power that is proper to a specific entity. Thus, this is the competence of a minister, but not of an undersecretary of state or a general director, because they only act "on behalf of" the minister, who controls their activity.[5]

Definitions are usually contained in textbooks for the introduction to jurisprudence, state law and administrative law. More space was devoted to this issue in the trilogy of Stefan Rozmaryn, Witold Zakrzewski and Maurycy Jaroszyński, in the context of deliberations on whether a minister or a ministry is an organ.[6] Unfortunately, the arguments of Czesław Znamierowski—a legal theorist—are not based on normative material.[7] Recently, Zygmunt Ziembiński tried to clarify this notion in the draft edition of *Polish Legal Dictionary*, but since his comments are in draft form they are reserved rather for internal discussion.[8]

1948, p. 75; C. Znamierowski, *Zastępca i organ*, "Ruch Prawniczy Socjologiczny i Ekonomiczny" 1963, 2, pp. 221–242; C. Znamierowski, *Grupa społeczna i jej struktura*, "Przegląd Socjologiczny" 1963, 1; C. Znamierowski, *Działanie zbiorowe*, "Ruch Prawniczy Socjologiczny i Ekonomiczny" 1962, 2. Z. Ziembiński in *Polski Słownik Prawniczy* (organ, state action, reguły, the constitutive rules of conventional acts); A. Łopatka, *Wstęp do prawoznawstwa*, Warszawa 1969, p. 125 ff. A person or group of persons who, in accordance with applicable law, undertaking actions of authority considered to be state actions. An organ of state is, for example, the Sejm, the government, the minister, the court, the head of the presidium department; S. Ehrlich, *Wstęp do nauki o państwie i prawie*, Warszawa 1971, p. 65: by an organ of state one can understand a group (sometimes one person) that has been singled out to fulfill the tasks (also differentiated in detail within the group) specified by law. The organ is part of the whole formed by the state organization, and acts on its behalf. Among the organs it is necessary to distinguish those which have powers of authority (imperium); J. Starościak, *Prawo administracyjne*, Warszawa 1968, p. 96. J. Wiszniewski, *Zarys encyklopedii prawa*, Warszawa 1966, p. 30. *Mała Encyklopedia Prawa*, Warszawa 1959; *Słownik Wiedzy Obywatelskiej*, Warszawa 1970 (entry: state organs system); J. Kowalski, *Wstęp do nauk o państwie*, Warszawa 1968, p. 154.

5 See footnote 8.

6 S. Rozmaryn, *O rozszerzeniu uprawnień ministrów w PRL*, "Państwo i Prawo" 1956, ed. 3, pp. 451–460; W. Zakrzewski, *Na marginesie artykułu prof. S. Rozmaryna*, "Państwo i Prawo" 1956, 5–6, pp. 983–993; M. Jaroszyński, Z *problematyki organów państwowych*, "Państwo i Prawo" 1956, 7, pp. 111–120; also in the collection: *Z teorii i praktyki prawa administracyjnego w PRL*, Warszawa 1964, p. 170.

7 C. Znamierowski, op. cit.

8 Z. Ziembiński, op. cit.

Our reflections should contribute to a broader and deeper analysis of the concept of an organ, and be based on numerous examples from practice, in order to solve a number of doubts that arise during consideration of this problem, but they will not attempt to provide an exhaustive treatment of the subject. They sometimes refer to the views expressed, they tend to avoid polemics, they even try to reconcile views, and to some extent they go beyond what has been said in our scholarly literature. New questions raise new problems. The topic is challenging and controversial, especially when theoretical arguments are confronted with examples from practice. But can an attempt to classify an extremely rich, diverse normative reality into strict scientific categories ever be entirely successful?

I

An organ of state is made up of two elements: a personal substrate and the competence necessary to exercise power. The personal substrate is either a physical person or a group of people—a *collegium*. Legal provisions usually stipulate how the organ is to be staffed. However, it also happens that the state forms the substrate from a group that already exists in social reality and endows it with competence. For example: the examination board of a private secondary school, in other words a group of people existing outside the state apparatus, receives from the state the right to issue secondary school leaving certificates that have the same validity as state school leaving certificates, and thus in this way the group is drawn into the state apparatus, becoming a collegium performing the duties of a state organ. Similarly, in socialist states, the right to nominate candidates to be deputies (i.e. members of parliament) is vested in the central and local bodies of mass social organizations, so these organizations can perform a very important state function in the election process and thus potentially enter the system of organs in this narrow scope as well.

It is possible to refer to an already existing social substrate; it is possible to attribute a personal element to a social organization, by means of which it can be granted a high level of trust. Sometimes, due to the organ's competence, it is clearly indicated that the personal element is appointed in a social way, that is, in a way that is not directly regulated by legal regulations. This is a familiar phenomenon in our law. On the basis of the decree of 10 November 1954, responsibility for the implementation of the Protection, Health and Safety at Work Act and the Labour Inspection Act was transferred from the Minister of Labour and Social Welfare to the trade unions. Their organs issue administrative acts; for example they adjudicate in criminal-administrative proceedings. Therefore, in the Act of April 14th 1967 on the Prosecutor's Control of Compliance with the Law, the supervision of compliance with law also covers professional, local self-government, cooperative and social organizations within the scope of their state administration functions, or other functions assigned to them by the Acts (Article 3 section 1, item 3). Of course, entrusting such functions to social organizations naturally involves them in the legal system, and thus valid legal provisions on the creation of organs change their character. An organization does not thereby cease to be social, but it does become—as far as these competences are concerned—an organ of state, indirectly.

Our statutes sometimes delegate certain functions generally to any person who may be affected. These include the following provisions:

1. Whoever in necessary defence repels a direct illegal attack without indirectly harming any social or individual interest, shall not be deemed to have committed an offence, especially if he acts in order to restore public order or peace, even if this does not result from an official duty (Article 22 § 1 and 2 of the Polish Penal Code).

2. Everyone has the right to apprehend a person who is in the act of committing a crime, or who has been pursued immediately after a crime has been committed, and to hand him over to the Citizen's Militia if there is a fear of this person hiding, or if his identity cannot be established (Article 205 of the Code of Civil Procedure).

3. It is the duty of every citizen to protect social property against imminent damage. A citizen who has suffered damage to their person or property while protecting social property is entitled to compensation (Article 127 of the Code of Civil Procedure). When a citizen takes a decision on the basis of these provisions, entering the legal sphere of another (this will always be the case in situations 1) and 2), he acts in the place of an organ of state.

When the organ is a group—a collegium—there must be, of course, rules that determine how a decision is made by the collegium as a whole, in particular what the quorum is and what majority is necessary for a resolution to be made, how the chairperson of the meeting is chosen. It is very important for the legal position of the group-collegium whether it provides itself with an organizational statute, in other words, whether it possesses autonomy within the internal system, or whether this statute has been established by another external organ. Within the framework of the supreme organs of state, the former position is held, to a large extent, by the Sejm and also in fact by the Council of State and the Council of Ministers. The latter organs adopt their own regulations, but they could also be given them by the Sejm.

The next issue to address is the element of organisational separation emphasized in the definitions, since there are different levels on which this separation can be distinguished. The problem does not raise any doubts in the cases of the Sejm, the Council of State or the Council of Ministers, because these collegia obviously constitute an "organizational unity" in themselves. Nevertheless, the distinction of smaller groups within them—such as committees—creates new "organizational units". This is a complicated matter when it comes to the Supreme Control Chamber, ministries and courts …

With the Supreme Court, is the issue the organisational division of the Supreme Court is in relation to other organs and other courts? Or is it rather the special chambers of the Supreme Court, or maybe departments within chambers, or finally, about the distinction within them of judi-

cial panels with different numbers of members, or maybe the Supreme Court in full, in the form of a General Assembly? Is the full Supreme Court the organ, or are the individual chambers, or the judging panels within them also organs? Is the organ the First President himself or is it the administrative collegium?

Here we must return to the starting point of our deliberations. The organ is a person or a group of persons; a group treated as a collegium that works together. Thus, it cannot simply be the Supreme Court that is the organ, even as a General Assembly, but only the individual judges, including the First President, the presidents and the administrative collegium, as well as the disciplinary court, the high and highest disciplinary court. The organ is distinguished by the rules of appointing and dismissing the person who holds the function of an organ, and in our case the rules on the appointment of individual judges.

The second important distinguishing feature is the competence conferred on a person or collegium, which is generally established on a permanent basis, i.e. for an indefinite period of time, either by a statute or by further provisions adopted on its basis. Competence could also be established, at least in theory, on a case by case basis. Such would be an ad hoc organ established for a specific case, with an appointed panel of judges. The separation of an organ is, in a way, born of itself—once by establishing this group, and secondly by assigning it, for example, its specific competence.

In our example of the Supreme Court, in addition to the commonly known sources that relate to the organization and competence of this Court, special attention should be paid to the regulations contained in the resolution of the State Council of 22 May 1962. Organizational and competence provisions are closely intertwined therein. The ordinance of the First President issued in agreement with the Minister of Justice specifies the division of the Chambers into departments. When the First President appoints the Presidents of the chambers in the departments (§§ 8 and 4), these are organizational elements, but when the administrative collegium allocates judges to the chambers and de-

partments for the division of activities, these are organizational and competence elements.

Both the personal substrate and competence are essential elements for the existence of an organ. However, there is a difference between them. While for the personal element it can be sufficient to identify an existing social group or body, competence must be regulated *expressis verbis*. When competence is granted to the personal substrate, this creates an organ. In this sense, there is a multitude of organs within the Supreme Court. Each specific panel that is judging, setting guidelines or answering a legal question is an organ.

Such a multitude of organs existing within organizational units or within the machinery of smaller units is a very common phenomenon. In the ministry, alongside the minister, the governing organ, there are undersecretaries of state, directors general and directors of departments. In our opinion, they are organs, because a certain personal substrate has a specific competence based on the organisational statute of the ministry adopted by the Council of Ministers. It has been said that undersecretaries, directors general, etc. are not organs because the concept of an organ of state implies it has its own competence. However, an entity whose scope of activity can be interfered with at will lacks its "own" competence.[9]

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9 M. Jaroszyński, *Polskie Prawo Administracyjne*, Warszawa 1956, p. 16. For example, the minister has the scope of competence specified by law and therefore constitutes a state organ. However, the undersecretary of state (deputy minister) or any other employee of the ministry is not a separate state organ in the strict sense of the word, because they do not exercise their competence as determined by legal regulations, but the competence of the minister as a state organ. For this reason, it is not a state organ in the strict sense of the ministry as a whole, and neither are the internal elements of the ministry, like departments… J. Starościak, *Prawo administracyjne*, Warszawa 1969, pp. 51, 52, 54: How to explain the fact that some employees of the ministry, such as department director, are able to make independent decisions? The fact that the director makes a decision, even if he is authorized to do so by the ministry's regulations, does not make him a separate administrative organ. He is the person who performs the office, who does not have his own competences, performs part of the competences of the minister, and the minister can withhold any part of these competences, can reserve any decision to himself; thus each ministry clerk conducts these matters not on his own behalf, but on behalf of the minister and within the competence of the minister.

If this view were adopted, there would be only one organ in an absolute state—an absolute monarch—who could assume the competence of the organs he created. Almost all the activities of the Vice President of the United States of America or of the Secretary (head of the department) would not be an expression of the competence of the organs of that name. The diplomatic representatives of the state abroad must follow the precise instructions of the Minister of Foreign Affairs, who may at any time rescind their competence by sending a separate representative tasked with dealing with a specific matter. The General Prosecutor may undertake any action that falls within the scope of the prosecutor's office or have the action prosecuted by subordinate prosecutors, unless the law reserves a particular activity exclusively to his jurisdiction. The Council of Ministers may take over the competence of the Presidium of the Government or the commission for matters of the presidia of national councils.

There is no doubt that the composition of the Supreme Court has its own competence, in the sense that no one is permitted to interfere with it, and that the undersecretary of state or the director of the department does not have his "own" competence. However, he has the competence specified in the statutes of the ministry. This is a necessary and sufficient element. Within the organizational units called the "Supreme Court" and the "ministry" there are quite different inter-organizational systems.

II

Are organs only those persons or groups to whom the statute is to be issued in its final form, or is the specific participation provided for by law in the establishment thereof sufficient? Do the Sejm and Senate from the March Constitution form an organ together, or do the Sejm and Senate form separate organs? It seems that when passing laws, the organ is every chamber of parliament, the group of people to whom legislative initiative belongs; and that it is also an organ that

signs the law stating its adoption and the body which orders its promulgation, if the promulgation is a condition for its validity. In all these cases—in accordance with our assumptions—a specific group of persons has a specific competence.

Therefore, a doubt must be clarified. It was said that since the competence to propose a candidate for deputy or to submit a draft law (to implement a legislative initiative) qualifies the entity thus endowed as an organ, a citizen bringing an action should also be consistently recognised as an organ, because in this case he or she forces the court to act. As is well known, Kelsen went even further in his deliberations, to suggest that a citizen concluding an agreement is an organ. Our position is as follows: a group of citizens who propose a candidate or who take a legislative initiative in accordance with legal procedure act within the framework of the state apparatus, thereby act as a subject of a state authority with partial competence, and exercise their political rights. On the other hand, a citizen bringing an action turns to the state apparatus not as a subject of authority that has a political right, i.e. the right to co-determine the state, but as a beneficiary exercising his social right, which means that he can demand assistance from the state in the form of a service. In the first case, the citizen *ad statum reipublicae spectat*, while in the second *ad singuli utilitatem*. In the first case he is a member of a control organ, but is not an organ in the second.

Competence which consists of the functions of only one stage in the process of creating an act sometimes arises through the appointment of a person who holds the function of an organ, and sometimes by election or nomination. Of these acts, the election to the Sejm is obviously the most important. It consists of two sets of state actions—proposing candidates and their election, from which it follows that, under the electoral rules, certain persons were elected as deputies. The nomination of candidates for deputies by the District Committee of the Front of National Unity is an act of a social organisation acting as an organ of state in this respect. All citizens registered in the electoral councils in a given

district operate as a fully-fledged organ. It is this that decides, according to a certain procedure, which of the proposed candidates is to become a deputy. The District Committee must be treated as separate organ, as must the collegium of voters, although the actions of these two groups constitute one decision.

In a similar sense, the appointment of Supreme Court judges by the Council of State is usually the result of two organs—the ministry of justice, which proposes a set of candidates for judges of the Supreme Court, and the selection made by the Council of State. The case is slightly different when the Council of State has its own candidates, from among the judges of either the past or new term. In this case the Minister of Justice issues an opinion on them, which should be considered by the Council of State. There is no significant difference from the previously discussed act of the election of deputies. While for technical reasons the collegium of voters can only elect deputies from the group of registered candidates previously submitted by the district electoral commission, the Council of State may also elect judges from outside the group of persons submitted. Omission of the stage provided for in this case, that is, the Minister of Justice issuing an opinion, would not result in the invalidity of the nominations. Thus, the act of proposing candidates in the election procedure is more important than the act of presenting the candidates for judges by the Minister of Justice, since this stage could be omitted without prejudice to the validity of the final act.

The process of appointing the person who holds the function of an organ can be shaped in other ways: the candidate selected by the organ should be approved by a second organ. The issue here is the two acts of organs of state. Thus the Act on National Councils stipulates that the chairman of the presidium elected by the voivodship national council must be approved by the Council of Ministers. The validity of the act of appointment depends on two unanimous decisions of the two organs.

This question is difficult to resolve: what is the significance of an opinion, provided for by law, being issued in the course of a legal act?

A distinction must be made here between the following cases: either the opinion is issued by a committee selected by a collegiate organ or by a single individual or group that stands outside the organ, or the opinion is an independent act in itself, as in the case of a referendum.

It seems to us that the mere issuing of an opinion, even if prescribed by law, does not itself qualify the person or group that issues it as an organ of state. Moreover, legal regulations should stipulate that as a result of an opinion a given individual or group puts forward specific motions that must become the subject of formal deliberations, e.g. a parliamentary committee submits certain amendments to a bill that the Sejm must discuss and adopt a specific stance on.

This raises the question of how to classify the agreement from the decision-making organ of the Central Council of Trade Unions that is sometimes required when issuing legal acts. The Act on the establishment of the Labor and Wages Committee of 13 April 1960 states that the scope and mode of operation of ZUS (the Social Insurance Institution) will be determined by the Council of Ministers in agreement with the Central Council of Trade Unions. On this basis, the Council of Ministers issued the ordinance of 27 April 1960 (Journal of Laws of the Republic of Poland, item 134) as its own act, stating at the outset that it was issued in agreement with the Central Council of Trade Unions. How to assess the role of the Council here? Did it have to give its full consent as a condition for the act to be valid? Or was it only a matter of issuing an opinion, which the Council of Ministers was obliged to take into account as far as possible? Of course, the Central Council is not the legal co-creator of the regulation. If this is how statutory authorization were to be understood, it would constitute a breach of the Sejm's competence, since the Sejm cannot authorize a social organ to issue or even co-issue such an act. In its authorization, the Sejm only obliged the government to take maximum account of the demands of the Central Council. Therefore, the participation of the Central Council of Trade Unions must be qualified as issuing an opinion. Does such participation in issuing the act draw the

Central Council into the circle of state organs? Our answer is negative. Such an effect could only result from the power to issue normative acts.

Finally, the issue of the organ in a referendum should be clarified. In a capitalist state, it would be appropriate for all those who express an opinion to not qualify a particular body as an organ, because the principle of a free mandate applies there, as a result of which the opinion expressed in the popular vote is only an expression of a state-ordered investigation of social moods that can bind parliament politically, but not legally. However, this is not the case in a socialist state: the result of a referendum is binding on the people's representatives, so all citizens should be considered as an organ. On the basis of the Act of 27 April 1946 on People's Voting, such an authority once existed in Poland, because at that time—in the times of the National Council—the rule of a deputy's binding mandate was in force.

However, an organ of state is not constituted by a meeting of the electorate before which a deputy reports on his or her activities and which makes demands of him or her, because there is no specific resolution expressing confidence in a deputy or demanding a certain action from him or her. This would be an organ of the electorate, which decides on the dismissal of a deputy or councilor. As it is well known, only the dismissal of a councilor was regulated in the electoral ordinance of October 31, 1957, which entails that the deputy's dismissal is no longer valid, due to the lack of implementing provisions in relation to the Constitution.

It turns out that the multiplicity of organs of state is caused not only by the fact that the competence to issue acts is diffused in such a way that the organs only have a small scope in this area, but also by the fact that the decision-making process is divided between different organs.

Just as in the Supreme Court there are many organs—as we have seen, and just as in a ministry there are a significant number of organs, in another inter-organizational system, we can also identify many organs in the entities that go by the name of faculty chairs. Here in the

university there are numerous examination boards for the admission of candidates for studies (the admission of students is of course an administrative act) or a Master's examination (awarding diplomas is another such act). The Faculty Council awards the degree of Doctor or habilitated Doctor, the senate makes the decision of the university—the faculty council and the senate are organs of public authority, while also being the organs of a legal person. In the departments of the state health service, a doctor has the right to issue administrative documents confirming the inability of patients to work, which automatically results in the person being excepted from the obligation to work.

III

Of course, order needs to be brought to this multitude of organs, and we have a remedy for this purpose in the legal system.

It is well known that the act of individuals or group-collegia is attributed to the state, and thanks to this attribution the unit or group constitutes a state organ. In a collegium, this is a very complicated matter. First, there must be rules that must be followed in order for the acts of individuals forming the group to be considered the acts of the group itself. The question here is what the quorum is to be, and what majority—ordinary absolute or qualified—is to be adopted by the collegium as a whole; secondly, this conventional act is attributed to the state. The collegium adopts the resolution—the state issues the legal act.

In addition to this attribution, which—as we have seen—in the case of the collegiate body is double in the above conception, there may be a third attribution, which in the case of the collegiate body falls between the first and second. The verdict of the Supreme Court panel ruling begins—as we know—with the words: "the Supreme Court consisting of …". In other words, the ruling which the majority of the members of the panel arrived at is uttered first of all by virtue of the legal rules assigned to the entire panel, in other words the judging collegium, is at

the same time is attributed to the Supreme Court as an organizational unit, which is expressed in the saying: "the Supreme Court consisting of …, at the same time"—and this is a further attribution—"of the state". Thus, the judging panel issues a judgment, the Supreme Court issues a judgment, the State issues a judgment.[10]

The case of a minister and his undersecretary of state etc. is similar (with a different inter-organizational arrangement, of course). Since it is a one-man organ of public authority, one degree of attribution is not necessary. The activities of the department director are by law assigned to the minister and the state.

The same goes for the multiplicity of organs in university chairs. The act of the Master's examination committee is attributed to the university—this is expressed, not very precisely, in the words: X obtained a Master's diploma at the university, which places the emphasis not so much on the constitutive decision of the organ as on the element of the candidate's own work. The act of awarding a doctoral degree is attributed to the Faculty Council acting on behalf of "the university". In this way the number of organs is reduced to one organisational unit. The administrative act of a doctor should be attributed to the health care institution for whom the doctor works. In the case of teaching or health care institutions, the attribution is not as verbally precise as in the case of court rulings.

It seems that on this basis one can say that the word "organ" has two meanings. When we say that the Sejm meets during a plenary session, we mean an organ in the first sense; when we say that a minister has issued a decision that was in fact taken by the director of the department and attributed to the minister, it is an organ the second sense; when the Supreme Court issues a judgment, it is an organ in the second

10 This is not a new concept: A. Merkl, *Allgemeines Verwaltungsrecht*, Wien–Berlin 1927, p. 305: With these individual bodies, the functions of the state are assigned to the state through a collective organs built into the state as a transition point, they are somewhat indirectly state organs. Our remark: the author distinguishes between collective and collegial bodies; the collective body is the ministry.

sense, because, after all, the verdict was issued by one of many of its judges.

Such attribution brings welcome order to our considerations, but it does not solve all the difficulties. It is impossible to attribute all the acts issued by the Supreme Court to this Court as an organ in the second sense, nor all acts in a ministry to the minister. The First President does not act "on behalf of" the Supreme Court, which thereby decides to submit a motion on the interpretation of the provision and thus sets in motion the composition of the court, the chamber, the general assembly. Neither does this apply to an administrative collegium or higher or supreme disciplinary court. These organs do not act on behalf of the Supreme Court, but in their own name as organs with predominantly internal functions. It would be contrary to reality to attribute the resolution of the ministerial collegium to the minister.

Therefore, one more meaning of an organ must be created: an organ as a group of organizationally closely-linked organs: those to which the construction "on behalf of" can be applied, as well as others (internal). In the last sense, the ministry is obviously an organ. Thus we come to the solution employed by Professor Rozmaryn in his 1956 article *O rozszerzeniu uprawnień ministrów w PRL* (On Extending the Powers of Ministers in the People's Republic of Poland). A minister is an organ of state in the first sense when he acts alone, in the second sense when a department director acts on his behalf, this director being in the same sense an organ as the judging panel of the Supreme Court, although in a quite different inter-organizational system.

The legal sciences are usually of the view that a minister is an organ of public authority, because he is attributed the decisions issued by the ministry's employees (on behalf of the minister). Legislation very stubbornly uses term "ministry" (Article 32 of the Constitution: "The Council of Ministers shall coordinate the activities of ministries and other subordinate bodies. …"); uses "central office", also the "central administrative body" as a synonym for the central office (not in the sense of:

head of office); and uses the terms “department” (not head of department - see the Act on National Councils), “customs office”, etc. The legal sciences use the term “organ” in the first and second sense, while the legislation uses it in the third sense.

Within our framework, it is not easy to classify organs that are combined together. And so the Labour and Wages Committee established by the Act of 13 April 1960 (JL RP, item 119) consists of the chairman appointed by the Sejm (Council of State), deputy chairmen appointed by the president of the council of ministers, two representatives of planning committees and the Minister of Finance, the president of ZUS (the Social Security Board) and five representatives of the presidium of the Central Council of Trade Unions appointed and dismissed by them. The Committee operates in three forms: the chairman, the presidium composed of the chairman, deputies and members appointed by the Council of Ministers (Resolution of the Council of Ministers of 23 June 1960—Monitor Polski item 259), and the plenary session. The distribution of competence between these three bodies is as yet not known, as the statutes of the Committee adopted by the Council of Ministers have not been announced. There is the clear competence of the Chairman, who not only chairs the Plenary and Presidium (and probably coordinates the work of these bodies), but first and foremost sits on the Council of Ministers and represents the Committee there, and also has the right to issue orders and regulations on matters falling within the scope of the Committee’s activities in cases specified by law. In this respect, he is equated with ministers. It is not the Committee, but he that issues executive regulations to the Acts, and it is likely that the internal regulations specify what influence the presidium or the Committee has on their content. The latter, defined in the Act as a collegiate organ, is an organ in the first sense when it acts in its full form (at least with the quorum), in the second when the presidium or the Chairman acts on its behalf (e.g. at a meeting of the Council of Ministers), and in the third when it concerns a set of organs regulated in the organisational statutes of the unit called the Committee.

IV

Collegiate organs must, by their very nature, have internal organs, at least in the form of a chairman. Such an internal structure is already provided for by the three-person judging panels. Larger organs have a more complex internal organization, and in particular they include further smaller groups, such as committees, among their members. The chairman has two functions: he represents the organ externally, and also acts behind the collegium in certain internal cases, e.g. in urgent ones, like chairman of the presidium of the national council, subject of course to the approval of the plenary, but in principle his competence, like that of other internal bodies, is directed inwards. Commissions prepare the decisions and in particular deliver opinions to the plenary.

In the Sejm, a presidium operates as a representative organ, and as such for the internal organization of its work (it seems, however, that the Marshal as the chairman of the meeting is a separate organ, a fact which is omitted in the regulations), while the organs preparing decisions and issuing opinions are the Sejm committees. What happens when the group selected by the collegium has the power to issue acts outside? This can either be clearly seen by the organizational structure of the state, an example being the Council of State in relation to the Sejm, and then of course a new organ exists, or the collegium confers upon the committee it selects the right to act independently, being empowered to do so by law. Then this committee, although it draws its competence from the authority of the collegium, ceases to be an internal organ, in terms of self-empowerment. When the parliamentary committees issue desiderata to the supreme state organs, they act as an independent organ, since the desiderata are not subject to the approval of the plenum, neither before nor after they are forwarded to the addressee, and furthermore, the representatives of the committee do not submit at any plenary meeting reports on its activities in this field. In this way, the committees have become autonomous and external organs at some point in their work, operating externally. This role should be reflected in the Constitution it-

self. The committees of the Council of State are exclusively internal organs of public authority, since the Council of State always acts outside.

The so-called internal organs of the Council of Ministers are also independent organs, which are usually established by its resolution, but are not always composed only of its members. Only the National Defence Committee has a statutory basis. The Resolution of the Council of Ministers of 30 June 1969 on the procedures for the operation of the Council of Ministers and the Presidium of the Government does not even provide for the Council of Ministers to confirm the resolutions of the Presidium, nor does it provide for the Presidium to report on its activities to the plenary session. The Council of Ministers may, of course, take over the competence of the Presidium, but will only do so in practice if the Presidium itself takes the initiative.

The question arises of whether the Council of Ministers is allowed to establish such organs and entrust them with some of its competences. Our answer is affirmative. The executive and managing organ must be resilient. It seems that the power to create such organs is implicitly contained in the general executive and managing competence of the Council of Ministers. The competence also stems from life's necessity. It would, of course, be advisable for such power to be granted to the government *expressis verbis*.

V

The authors of the definition of an organ of state repeatedly assert that such an organ acts on behalf of the state. There is no doubt that the act of a person or collegium constituting an organ is imputable to the state and as such is a state act. However, in our view, this does not always mean that it can be said that the organ acts on behalf of the state. The legal acts of organs can be divided into two groups: some are legal acts that have an effect within the state apparatus in the continuous process of concrete shaping of the legal system and the system of state organs; at other

times they are acts issued by state organs in relation to natural and legal persons standing outside the state apparatus, addressed to the citizen as a subject or a ward. An example of the first group is the election of deputies in a multi-mandate constituency by a collegium of those with political rights, or the self-organization of the Sejm in the form of the election of the Presidium of the Sejm, etc. An example for the second group is the issuing of judgments and administrative acts to citizens in the form of granting certain powers or imposing obligations. Here the organ addresses the citizen on behalf of the state as a whole, as an empowered entity in relation to a person who in this case is not empowered. It seems that only in this (second) category of acts can the expression "on behalf of" be used, in line with the accepted meaning of the word.

The situation is somewhat different (but at the same time there are some similarities) in the case of acts of state organs under civil law—the conclusion of agreements between the state and the citizen, i.e. between two formally equal entities, in legal terms. The same applies *mutatis mutandis* to relations in the field of international law, where one entity acts in relation to another. And here we can say that an organ acts "on behalf of" the state.

Finally, this term is used for cases where the operation of an organ is attributed to one of many bodies in a complex organisational unit. It can probably be reasonably said that the panel of the Supreme Court acts on behalf of the Supreme Court. From these considerations it follows that the concept of attribution is broader than the concept of "on behalf of". One should consider whether it would be advisable to abolish this term taken from civil law (currently it is used by Article 734 of the Civil Code), as its meaning in state law is after all different.

In our law, the term "on behalf of" has been aptly used twice: once in Article 47 of the Constitution—the courts issue judgments on behalf of the Polish People's Republic (this is repeated by the relevant ordinary statutes), and, second, in the acts of ratification of the Council of State, which, on behalf of the Polish People's Republic, makes it known to

the public that such and such an international convention has been concluded and that the Polish People's Republic undertakes to apply it after its enactment. The term "on behalf of" refers, in essence, to this very obligation.

VI

Finally, the last thing to be addressed in these considerations is the names for groups of organs or the organs themselves in our law. Thus we have the organs of public authority, state administrative bodies, and among them the chief executive and managing bodies; with regard to the Supreme Control Chamber (NIK), and the courts (the Constitution uses the name "Court" in the title of Chapter VI, in the singular form), the term "organ" has not been used in our Basic Law. The title of Chapter VI our Constitution mentions the prosecutor's office and not prosecutors, yet in the final provision about the prosecutor's office it mentions the organs of the prosecution. Does this mean that the Constitution treats the Court and the prosecutor's office as organs, but not courts and prosecutors? Of course, this conclusion cannot be drawn from such formulations. The name "prosecutor's office" is equivalent to "administration". Therefore, the term "prosecuting body" ought to have been used in the title, since the name "administrative bodies" was used, as was, similarly, "judicial bodies". The Supreme Court Act states that the Supreme Court is the supreme judicial body, the Act on the prosecutor's office that the Public Prosecutor-General is the supreme body of the prosecutor's office according to the title of the act itself, and the term "prosecuting bodies" is already used in the Constitution. The term "organ" of the Supreme Control Chamber (NIK) is not used in the Act on State Audit Office, or in the Sejm's resolution on the relations between NIK and the Sejm, nor does the term "organ" appear in the law on common courts (Articles 1 §2, 40 §2, 93, 125 §1 do not apply to courts). This is the best proof that it is possible to write laws without using this word, which often helps the editor of normative texts steer clear of trouble.

In our Constitution there is no general term that is used for all the organs of public authority at the highest level, i.e. the Sejm, the Council of State, the Supreme Control Chamber, the Council of Ministers, and for the ministers and committees that perform the functions of supreme administrative bodies, the Supreme Court, the Prosecutor General. One could use the words "supreme organs of public authority" or "supreme administrative bodies" when referring to supreme supervisory bodies, the judiciary, prosecutors in general, and even more generally all together as "supreme organs of state". However, a certain obstacle to the use of such terminology is the fact that the legislator said of the Polish Academy of Sciences that it performs the function of a supreme organ of state, and the fact that we cannot include the constitutional organs listed above in the same plane as the Polish Academy of Sciences, where the name "supreme organs of state" is undoubtedly the best.

What does the term "organs of public authority" mean? Are they not all organs, because they perform the functions of authority? They are, of course, organs of authority in the usual sense. If the Constitution, following the Act of 20 March 1950 on local organs of the unified state authority, applied this name to the Sejm, the Council of State (not very consistently), and national councils, it is because the elected bodies should also be terminologically elevated above others, as the being at the head of the entire state organization. The Council of State was given this name rather because it is an emanation of the Sejm and may replace the Sejm in certain spheres, but the use of this name is not as justified as it is with the Sejm and councils. The term "organs of public authority" is appropriate for the "organs of the nation" of a capitalist state. In the March Constitution, the "organs of the nation" were the Sejm and Senate, the President of the Republic, ministers and independent courts. The name "organs of the nation" can still be found in the first acts of the Legislative Sejm of People's Republic of: the Sejm is "the supreme organ of the nation", but this no longer applies to the President, Council of State, the government and Courts.

Some doubts may be raised by the name "the chief executive and governing organ of public authority" when it is used to refer to the Council of Ministers. At the level of national councils, the appropriate organ, i.e. the presidium, is defined differently: it is the organ of the national council (Article 42 sec. 1 of the Constitution). If we apply this structure consistently, it should be said that the Council of Ministers is the executive and governing organ of the Sejm and the Council of State, or better still, the executive and governing organ of the organs of public authority. This stylistic clumsiness probably led to the name being simplified and distorted.

What is the situation in other socialist constitutions? The model of the Soviet Union is followed by the constitutions of Bulgaria (1947) and Czechoslovakia (1960); while the constitution of Yugoslavia (1963) is within the framework of the construction of "organ of the organ", thus the Federal Executive Council is the organ of the Socialist Federal Republic of Yugoslavia; while, rather differently, in the constitution of Albania the government was called the chief executive and governing organ of the Albanian People's Republic; and then in the constitutions of Romania (1965) and Hungary (1949), the Council of Ministers is the supreme administrative organ, the term which was used and in our Constitution in the title of Chapter 4.

Is the issue really the organ of the organ—organ of the Sejm or the national council? The Sejm and the Council of Ministers, the national council and the presidium (the latter, despite being regulated in a single law) are organs in a separate division, the national council in the division of organs of public authority, the presidium in the division of administrative bodies. There is no indication that an act of the Council of Ministers is to be attributed to the Sejm, and the act of the presidium to the national council. The term "executive and governing organ of the council" is simply a name that expresses very political and legal content. The executive and governing bodies are to maintain a close relationship with the organs of public authority, and through them with the work-

ing people. We also encounter the construction "organ of the organ" in the Sejm's regulations—the organs of the Sejm. Despite this name, it is a completely different issue here—namely the internal bodies whose acts are not attributed to the collegiate organ within which they exist.

In the past, the name "organs" was often used instead of the term "authorities". This name was still employed (this is probably at the end of its career) in in the Act on the Organizational Changes of Supreme Authorities of the National Economy of February 10, 1949. The Act of March 20, 1950 refers for the first time to "local organs of uniform public authorities" so not "authority" as "organ", but as "public authority". The use of the term "authorities" to denote "organs" will be gradually and completely removed from the Polish lexicon. Clear proof of this is the terminological change which was reflected in the amendment of the law on the Common Court System of 19 December 1963. In Article 1 § 2 of this law, which reads "the common courts do not administer justice in matters transferred by special laws to other courts or authorities", the word "authorities" was replaced by the word "organs". However, "authorities" remains in Articles 93 and 125.

VII

The name "organ of state" is ambiguous. We use it in the following meanings: it means a person or collegium endowed with a certain competence; it also means a person (e.g. a minister) or an organizational entity (e.g. the Supreme Court) to whom the acts of a certain group of organs are attributed; and lastly, it means a set of organs connected to each other in terms of organization and competence, a set that includes both organs operating in the name of a person or entity in the sense mentioned above, as well as all other (internal) organs. In the last sense, we can also speak of the Sejm as an organ, when we mean not only the Sejm during a plenary session, but also the group of organs in the Sejm existing together with the Sejm during a plenary session. Lastly, it can be

said that an organ is a part of the state apparatus composed of very different systems of many organs. The second and third meanings derive from the first meaning. One has to start from the fact that an organ is a person or a collegium …

In addition, the name is used inaccurately in other meanings.[11] The name "organ" is very useful, and we resort to it when a better term does not come to our mind.[12]

Literature

Burda A., *Polskie prawo państwowe*, Warszawa 1969.
Ehrlich S., *Wstęp do nauki o państwie i prawie*, Warszawa 1971.
Jaroszyński M., *Polskie prawo administracyjne*, Warszawa 1956.
Jaroszyński M., *Polskie Prawo Administracyjne*, Warszawa 1956.
Jaroszyński M., Z *problematyki organów państwowych*, "Państwo i Prawo" 1956, 7.
Kowalski J., *Wstęp do nauk o państwie*, Warszawa 1968.
Łopatka A., *Wstęp do prawoznawstwa*, Warszawa 1969.
Merkl A., *Allgemeines Verwaltungsrecht*, Wien–Berlin 1927.
Resich Z., *Nauka o ustroju organów ochrony prawnej*, Warszawa 1970.
Rozmaryn S., *O rozszerzeniu uprawnień ministrów w PRL*, "Państwo i Prawo" 1956, 3.
Starościak J., *Prawo administracyjne*, Warszawa 1968.
Starościak J., *Prawo administracyjne*, Warszawa 1969.
Starościak J., *Prawo administracyjne*, Warszawa 1969.
W. Zakrzewski, *Na marginesie artykułu prof. S. Rozmaryna*, "Państwo i Prawo" 1956, 5–6.
Wiszniewski J., *Zarys encyklopedii prawa*, Warszawa 1966.

11 *Słownik Języka Polskiego* entry: organ, second meaning.

12 This article is almost identical to the paper delivered by the author on May 21, 1971 at the session of state law institutions in Ustroń near Kępno. The author supplemented his work with considerations on the third meaning of the word "organ", to some extent referring to the statements of A. Mycielski.

Włodyka S., *Ustrój organów ochrony prawnej*, Warszawa 1968.
Znamierowski C., *Działanie zbiorowe*, "Ruch Prawniczy Socjologiczny i Ekonomiczny" 1962, 2.
Znamierowski C., *Grupa społeczna i jej struktura*, "Przegląd Socjologiczny" 1963, 1.
Znamierowski C., *Podstawowe pojęcia teorii prawa. Układ prawny i norma prawna*, Warszawa 1924.
Znamierowski C., *Prolegomena do nauki o państwie*, Warszawa 1948.
Znamierowski C., *Wiadomości elementarne o państwie*, Warszawa 1948.
Znamierowski C., *Zastępca i organ*, "Ruch Prawniczy Socjologiczny i Ekonomiczny" 1963, 2.

Czesław Znamierowski

Preliminaries to the Study of Morality and Law[1]

Universal Benevolence

However, secondly, an individual may behave socially by feeling universal benevolence. It is by no means true that an individual is always driven by their own interest and always and only strives for what brings them a personal gain. Human nature can be driven by disinterested pursuits that are aimed towards something that is neither one's own pleasure nor a lessening of one's own distress. An individual often pursues something that does not bring them any personal gain and that they must pay for with considerable or even great distress: they work for others, renounce their own joys, risk their life to promote the welfare of others or to spare them from suffering. Admittedly, having achieved their unselfish aim, the individual often feels very great joy; but the joy is only secondary and it is not because of it that they continue their pursuit that has somebody else's welfare in view. The joy is a shadow, as it were, that follows an outgoing pursuit.

There are various outgoing pursuits. A mother's love strives to provide her child a maximum of joy and pleasure, and spare the child as much suffering as possible; in other words, she strives to maximise the

1 Translated from: C. Znamierowski, *Rozważania wstępne do nauki o moralności i prawie*, Warszawa 1966 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

child's happiness or, to put it differently, to ensure the child receives the greatest share of happiness possible. The same pursuit is shown by sexual love; the same, but perhaps not so strong, by friendship and that kind of goodwill that is distressed to see others suffer and rejoices in somebody else's joy. This goodwill is colloquially called benevolence. It is more or less active, depending on how ready it is to contribute to the happiness of the person to whom it faces.

Benevolence may be directed at a specific individual: it is individual then. Moreover, Peter may show benevolence to many people, to every person individually, when they find themselves in need of protection or help. In an extreme case, the individual's heart may be so sensitive as to make them show benevolence to all who get into trouble or are harmed. Then their benevolence will be general, because it will be shown to every person individually and separately.

Such general benevolence is clearly distinguishable from consciously universal benevolence. It is absolutely aware of the fact that it turns towards every individual, values the existence of all people equally, desires the greatest share of happiness for each of them and, finally that it is ready to support and make this desire come true through its own action and effort. What is more, when the benevolence gains some life experience, it will know that the happiness of some entails positively or negatively the happiness of others: the happiness of a mother follows largely from the successes of her child, while the happiness of one contestant is limited by the success of another. Hence, in the mind of universally benevolent Peter, all people become one mass of whom he thinks and must think jointly when he pursues the maximum happiness of all people: due to this, he may not go too far in their desire of happiness for individuals considered severally, and thanks to this, universal benevolence has an inherent restraining factor that emotions and pursuits usually lack. Moreover, benevolence may turn consciously and intentionally not only towards every individual, but also towards every living creature capable of rejoicing and suffering.

In a primitive closed community, benevolence extends to every fellow tribesman; in a nation, where bonds can be clearly seen, it covers every compatriot; at the highest level of spiritual development, it turns towards every individual and is universal in the strict sense of the word and thus it transcends the boundaries of any and all closed communities. Its way has been paved by free thought, which indicated that one individual resembles another and that everyone rejoices and suffers in the same way. This simple idea has effectively and gradually brought down the wall of megalomania within which various nations enclosed their communities. It must be added that benevolence is truly universal only when it is fully conscious that its object is every individual, wherever on earth they live.

Universal benevolence is the most certain and reliable foundation of socialisation; whoever feels it will most likely show consideration for others, sympathise with and offer help to them. Therefore, we put the greatest confidence in the people of whom we know that they feel universal benevolence that is vigilant and strong. It is such people that we call good, which means that they love their neighbours; actually, universal benevolence and love of one's neighbour are one and the same thing.

Admittedly, many writers think that someone who judiciously takes care of their business reckons equally well with others' business, as a good person does. In other words, they say that judicious personal calculation produces the same guidance as universal benevolence; what is more, that the judicious love of one's own self brings the same share of happiness as love of one's neighbour. This last-mentioned thesis though, is a risky generalisation that cannot possibly be sufficiently confirmed; nor can one claim that love for one's 'self' is always judicious. Therefore, it is reasonable that good people enjoy greater confidence than judicious egoists do; and that almost everybody at least wants to be regarded as good by others, if only to dull their vigilance. Everybody knows that sharp claws are a great gift of nature if they can be hidden in soft paws. That is why, since time immemorial hypocrisy has been paying due tribute to universal benevolence.

This benevolence, in turn, is a natural umpire, a superordinate arbitrator, in communal life. Other pursuits and emotions often vary greatly from person to person. Love of one's own "self" in one person often entails that they deliberately wish harm to another person. One person's ambition strives towards the exact opposite objective than that of another person. By the same token, one person's greed easily runs afoul of the greed of another.

A quite different story is that of universal benevolence in various people: it pursues the same objective in all, namely, to maximise everybody's share of happiness. Thereby universal benevolence develops a natural bond between people, that is, a unity of purpose. This emotion does not divide; it rather unites people and easily draws an emotional response from others that increases and amplifies benevolence. That is why disapproval by universal benevolence is so grave a judgement in communal life, for it is always highly probable that it will spread in the community. Thus, although universal benevolence is an emotion, generally speaking, of moderate strength, the social response amplifies it greatly and awakens it anew in various situations, making it vigilant and providing it with a great penetrating force: only rarely does it explode in violent outrage, it rather makes itself felt through a reproach that nags stubbornly like a minor but unbearable pain.

Universal benevolence, it is true, may sometimes apparently divide people in an extreme case, where Peter and John do not agree on the means to the same end. Such a conflict, however, is not a deep rift, because there are no pursuits here that cannot be reconciled. It is easy to agree on means when people are bound by the same emotion, especially universal benevolence. It is enough to have the same knowledge on the laws of nature.

Moral Judgement

Universal benevolence is interested only in people or, at best, those living creatures whose fate elicits a strong emotional response from

humans. It is pleased with all that reduces human suffering or brings people joy. This is judged by it as positively valuable. It is displeased by all that brings or increases suffering or reduces or destroys joy. This is judged by it as negatively valuable. In the eyes of universal benevolence, various things may be positively or negatively valuable; positively valuable things are, for instance, a medication which radically contains an epidemic, a highway that makes travel easy for everybody, a forest that offers beautiful views and supplies timber for furniture and heating homes; negatively valuable things are, on the other hand, a drought that destroys crops or a flood that washes houses away.

However, universal benevolence focuses in particular on the attitude of the individual towards others. For it is in a community that the life of every individual is lived; their joys and suffering largely depend on the conduct of others. For this reason, universal benevolence scrutinises what emotions an individual feels towards their neighbours, what secret pursuits are hidden in such emotions and what actions and pursuits result from such emotions that have a positive or negative impact on the share of happiness of other people.

The judgement passed by universal benevolence, whose object is an emotion felt by one person for another, a pursuit concerning another or an action that influences the fate of another or other persons—this judgement is known as a moral judgement. At the same time, the only generator of moral judgements is universal benevolence: this makes such judgements stand out sharply and distinctly from others. Emotions, pursuits and actions concerning other people may be also triggered by other emotions than universal benevolence; these other emotions may also generate judgements, not moral ones though – judgements of some other kind. Let's say Peter likes the courage with which John defends Adam against danger. Peter, therefore, positively judges John's conduct: the judgement in this case is aesthetical and not moral. Here again Eve is angry with John, because he has punished her son; she bears a grudge against him: the generator of the judgement is ma-

ternal love; this judgement is not a moral one either. The same emotion or action, however, may be the object of two or more emotional reactions at the same time and in the same individual. Peter's universal benevolence may morally approve of the courageous way that John helped Adam and, at the same time, Peter may like that courage.

The closest object of moral judgement for every individual is their own experiences and actions. An individual may judge them right after they happen, when they are still fresh in their mind or later when they have already moved into the past from which memory brings them back. In addition, every person, as a rule, can judge more deeply and justly their own experiences, because they can, if they so wish, probe them more deeply and notice what is completely inaccessible to others. Universal benevolence as a generator of moral judgements, which concern one's own experiences and actions, is called conscience. As mentioned earlier, universal benevolence provokes rather moderate emotional reactions, or even weak ones, but often they are persistently recurrent: this is the source of their strength and role in consciousness.

Universal benevolence places a positive value on emotions and actions that are favourable or friendly to other people. In turn, it assigns a negative value to the emotions and actions that are unfavourable or unfriendly. A sound conscience, however, one not selfishly directed at one's own self and person, does not pay equal attention to its emotions and actions, either morally positive or negative. Universal benevolence above all intends to prevent other people from being harmed; hence, it is quick to nip in the bud even those experiences and predispositions to experiences that may beget injurious actions. Moreover, it scrutinises actions that have already caused harm, but gives less attention to the emotions and actions that are friendly to people. Hence, conscience very rarely praises but frequently reprimands, because under its inquisitive eyes there is a lot of wickedness in a human soul when viewed from the inside.

Social Moral Judgement

When Peter's universal benevolence judges his own experiences and actions, it is his own internal concern, touching his person, and may not be known to anybody else: thus, it is an individual judgement. Peter's benevolence though, may also be interested in the experiences and actions of other people, because they may be highly relevant for those whom they concern. Peter may be really worried by John's hatred for Adam as it may beget an action harming Adam. Stemming from universal benevolence, Peter's judgement of John's experience or actions directed at Adam, is a social moral judgement.

In the judgement, three persons are involved: Peter who judges, John whose experience or action is being judged and, finally, Adam whom John's experience or actions concern. This may be presented in a schematic manner as follows: A in their universal benevolence judges an experience or action of person B directed at person C. Moreover, it is possible that the experience or action concerns not just one person C, but many people or an entire group: thus B hates Egyptians or the monarchy of Ramses XII.

In this case, too, universal benevolence is a generator; but it keeps an uneven eye on persons B and C; specifically, it preferentially turns towards C and person B is subordinated to the interests of C, because the experience or action of B is judged in terms of the welfare of C. Especially when A negatively judges the experience or action of B, it may appear that A, contrary to universal benevolence, has an unfavourable attitude towards B, while A's attitude towards C is biased and preferential. Actually, however, A remains benevolent in respect of B as well; they only demand of him what universal benevolence lets him demand or rather tells him to demand. What is more, if John and Adam traded places in the triad, Peter would subordinate Adam to John, or C to B in the same manner. In fact, people do this all the time in real life, alternating between judging the experiences and actions of one or the other.

When Peter judges his own experience or action, he splits, so to speak, into two persons, A and B. Since, however, the judgement concerns his own experience, it quite naturally enjoys a considerable causative power in Peter's soul and produces an impulse that amplifies the force of the experience further or weakens and restrains it, depending on whether it is positive or negative. The moral judgement, thus, of one's own experience or action always has a smaller or greater impact on Peters experiences and attitude.

However, Peter's judgement concerning John's experience does not have to have any causative power in the soul of the latter. In an extreme case, John may not care at all what Peter thinks about his experience or emotion, and he may not care about Peter as a person either. It may not matter at all, either, that Peter's judgement was engendered by universal benevolence, since John may not know this emotion and does not heed its suggestions. Then, Peter's judgement does not elicit any emotional response in John's soul.

John himself though, may feel universal benevolence to some degree. As the voice of conscience, it could have already passed judgement on a given emotion or action before John learned of Peter's judgement. If it is consistent with his, it will elicit a positive emotional response and amplify it considerably. If there are many—or very many—such Peters who judge a given experience in the same way as John does, the consistency takes away relativisation from the moral judgement in his eyes: it appears to John that his own judgement and the judgements of Peters who agree with him do not depend on their experiences, but they rather appear and suggest themselves to them in the manner in which descriptive truths do, irrespective of any emotions and pursuits. This is a common and almost unavoidable illusion whereby in a group we stop noticing or simply do not notice the factors that make up the sufficient cause of that factor which is invariably given in the group. It is only natural that John forgets that it is universal benevolence that tells him and all his Peters to pass the same judgement, and that it appears to

him that he finds and notices the values of experiences and actions in the same way as he does the shapes and colours of objects. Nonetheless, there are no absolute values; there are only values here invariably stemming from some emotion that is common among given people.

Hence, when a judgement is expressed in words, it is always necessary to indicate what emotion or pursuit it stems from. To indicate, thus, that a given judgement is moral, it must be mentioned that it stems from universal benevolence. This emotion, roughly speaking, always and in every person dictates the same judgement; in principle, therefore, it is not necessary to indicate each time in whose soul universal benevolence forms a given judgement. It often happens, though, that a global judgement of some object or event depends largely on Peter's knowledge of the laws of nature and the entire set of factors that come into play in a given case. It is desirable then to indicate the person who forms the judgement, because in this way one implicitly indicates what knowledge of the object the person has when making the judgement in question.

A consistent judgement by many Peters may have a persuasive power over John even when he does not spontaneously formulate a moral judgement of his experience or action. It is quite probable that John either has, albeit deeply hidden, a predisposition to be moved by universal benevolence or at least, he may imagine the attitude taken by this emotion by analogy to his other emotions. He himself feels at least equal benevolence towards his family members or friends. He may thus imagine how he would judge somebody else's experience or action if he extended his benevolence to all people. In the first case, a universal judgement will uncover their own universal benevolence and stir their conscience; in the second case, the judgement will at least tell him how to behave so as not to incur universal disapproval. Further, if he continues to heed this guidance and behave as if he were guided by universal benevolence, it is likely that he will learn to look with the eyes of universal benevolence, either because this emotion, hitherto unknown to him, will rise in him,

or because he will develop a habit of action consistent with the directions of this emotion.

An important aspect for communal life is the fact that John may adopt ready-made judgements from his Peter or Peters. Imagine that because of a lack of experience or any relevant knowledge, John is not suggested any judgement by universal benevolence in a given case. John though, learns that Peter, whose universal benevolence is tested, judges a thing in a specific manner. If John generally believes that Peter's moral judgements are right, his judgement will easily elicit a response from John's soul and will become his judgement, one of credit, so to speak, based on the belief in the rightness of Peter's judgements. It often happens that Peter praises the moral value of Adam's deed, who has brought about many momentous changes in communal life. John is not able to judge these changes by himself, but eagerly adopts Peter's judgement, deeply moved by admiration or outrage or contempt. Furthermore, John may continue to uphold this induced judgement, although Peter may later modify his.

The Peter who suggests a judgement may be not just a person, but also a being of a higher order than a person—a being in whose existence and goodness John believes. In the lively imagination of the ancient Greeks, gods told them, often in detail, what was right and wrong. Whereas Christianity makes God the principal source of fundamental moral precepts and makes divine judgements a model and touchstone. This religious belief lends much support to the suggestive power of moral judgements: they may not give rise to any doubt, because they come from an absolutely perfect Supreme Being who is an embodiment of universal benevolence.

The Object of a Moral Judgement

As already said, universal benevolence scrutinises emotions, pursuits and actions that are directed at other people. These experiences and ac-

tions, however, are treated by universal benevolence in two ways, depending on how they are treated by the person who undergoes or performs them.

Emotions and pursuits arise in consciousness spontaneously, without permission. In the eyes of conscience, they are valuable either positively or negatively. Those that are favourable or friendly to people are generally judged positively, while unfavourable or unfriendly—negatively. It is good when an individual feels sympathy, benevolence, gratitude and respect for other people; it is bad when they feel envy, anger and hatred. Even emotions and pursuits favourable to people though, may come into conflict. To name two examples, love for a wife may sometimes stand in the way of the love of a child. Love for a villain may morally infect the whole nation. In the eyes of universal benevolence only universal benevolence is the emotion that is always valued positively, because it always has in view the welfare of all people, not only some selected ones as other emotions favourable to people do. The latter may want too great a share of happiness for their chosen ones.

The spontaneous appearance of an emotion or pursuit in John's soul does not depend on John's will but on the entire structure of body and soul on which he had little influence, or none at all. Nevertheless, already here Peter judges these experiences and, possibly, from judging them he goes to the judgement of the whole person of John if these experiences can be seen to have been borne out of a deep and lasting predisposition. Peter judges then that John is good by nature if predispositions favourable to people predominate in him, especially universal benevolence; whereas Peter judges him to be bad by nature if predispositions unfavourable to people predominate in him.

Even though an individual receives a considerable legacy of ready-made emotional predispositions, they have, after all, some power over their emotions and pursuits. As we shall soon see, they can by acts of will allow or not allow for the experiences that have already arisen, or prevent them from arising. Anger at Adam may arise spontaneously in

John's soul, but John may allow it to burst out, or he may oppose and contain it so that it will subside and disappear without doing any harm to Adam. In the latter case, Peter, while judging Adam, will consider as less important the appearance of anger as such since universal benevolence will effectively control it. Furthermore, John may, knowing himself, fend off the thoughts that arouse anger at Adam in time to prevent one of the most unfriendly emotions from arising.

This power over one's experiences is enjoyed, to some degree and within certain limits, by every normal individual: they interrupt the course of thoughts that leads to an undesirable emotion or pursuit, or restrain or weaken the undesirable experience by directing their thoughts at something else or changing their situation so that it disappears by itself or is replaced by another experience that will cover and eclipse it. If John does not make these efforts to oppose his experience and allows it—being negatively valued by Peter—it will grow even more negative, as the one that John has allowed and consciously made as one of his experiences. Universal benevolence scrutinises these experiences that our will has allowed by giving them a privileged position in our consciousness, the reason being the fact that these experiences may spawn actions, the effects of which will encroach on the ambit of other people's existence.

Actions, in turn, are an especially important object of a moral judgement, because in the eyes of universal benevolence what counts most is stopping one individual from harming others by their action and making them contribute the most to their happiness. A hidden and contained emotion does not have a chance yet to harm anybody or make them happy. It may harm or make happy by the very fact of its divulgence; the more so when it is realised in an unfriendly or friendly action.

We have split the person of Peter in two by carving John out of him so as to make clear that Peter may morally judge not only his experiences and actions, but also somebody else's. It must be remembered, however, that a moral judgement is above all the inner voice of conscience that looks into experiences directly, not having to pierce the armour of

another person's mortal coil, and that it judges not actions alone, which can be viewed from without, but the very motives of these actions within that grow out of unseen experiences.

The insight into one's inner life may sometimes be misleading, however, because every individual tries to show themselves in the best possible light, even to themselves. Unwittingly, they find ways to hold back from their own self, in the inner split that is created in the soul when conscience sits in judgement, amidst the stirrings of emotions and motives of action that would cast a negative light on their person or their action. Considerable moral discipline is needed, as well as inner honesty and correct insight into one's emotional experiences, to summon the available courage to bring to light the inner experiences that lower one's self-esteem. Individuals shield themselves from this with hypocrisy, which even creates an inner show of semblance and illusion to hide the foul stench of their moral entrails.

Peter's universal benevolence is not able to look into somebody else's experiences with certainty and perspicacity. Every John screens his spiritual sanctum from the piercing eyes of others, and even when he himself has a clear and undistorted view of his inner life, he tries to draw a cobweb of falsely favourable appearances over it. Peter, therefore, as a judging spectator, can only carefully watch observable behaviour and draw cautious conclusions. He can never determine the measure of their probability with accuracy. The average Peter tends to be insufficiently cautious in his presumptions regarding other people. When he is cautious enough, he must necessarily place his moral judgements of others on two levels. On one level, there are judgements that are moral in the strict sense, where Peter believes himself to be looking into somebody else's inner life and almost sees the stirrings of John's emotions and the motives of his actions. On the other, there are judgements of actions themselves and their socially relevant effects.

These judgements will not be moral in a strict sense; they will pass judgment only if an action by John has conformed to the guidance that

would be given by universal benevolence in a given case. This does not rule out that the action was born out of cold selfish calculation, which would deprive it of any moral value. In everyday life, we usually do not notice the difference between these two kinds of judgement and do not appreciate its weight. An individual who always behaves like a good individual seems to be good to us, although in reality they might be only calculating, cautious and cunning. Again, people are ashamed to show their goodness and even conceal the soft and sensitive stirrings of their hearts, thus they make their good deeds look like the business-like performance of an external duty. In addition, sometimes it takes special circumstances, those breaking the daily routine, for a cold calculation or a downright undesirable moral emotion to come out from behind an action overtly consistent with a moral norm. Although it is usually not conceived out of universal benevolence, the stinging wit of a satirist is aimed at prudes and hypocrites.

However, in terms of social needs, the second, less demanding kind of judgement is sufficient for communal life. It is by no means a bad thing when people follow moral norms in their conduct, even if when they do so they are not guided by moral motives.

The Principal Moral Norm

Universal benevolence, as was mentioned earlier, strives to ensure an equal share of happiness to all people. Thus, it believes that it would be good only when the general conditions in which people live were such that all would have an equal chance to get a maximum of pleasure with a minimum of suffering. Living conditions depend largely on the environment and human action cannot influence them. However, they depend not in small part on how people treat one another and what they do for one another. Importantly, the larger the number of powerful tools people have at their disposal, the greater the impact their action has on their happiness. Thus it is only natural that universal benevolence would like every

individual to meet all the conditions necessary for making the greatest contribution to the enlargement of the share of happiness of all people. Hence, it is natural that universally benevolent Peter values universal benevolence most in people, as it is the only emotion that is focused on all people and wants happiness for them.

Universal benevolence concludes, therefore, that the human world would be good only if all people were universally benevolent. Hence, it believes that every individual should be universally benevolent and that this benevolence should effectively guide them in every action. Hence, the only principal norm that universal benevolence sets is the precept that every individual should be universally benevolent and should be guided by this benevolence in every act of their will, as either a positive impulse to act or an impulse restraining other actions.

This norm tacitly assumes that every individual has at least the germ of this emotion, which they may develop fully and make an important component of their constellation of emotions. This assumption is not fully justified, as there certainly are people who are unlikely to ever allow universal benevolence to develop in their soul. These are extreme cases, however; people who are completely lacking in this emotion whatsoever are considered abnormal and morally underdeveloped. They are unable to give moral judgements or even imagine them by an emotional response, since they lack this predisposition that by response could be actualised in an experience.

However, in spiritually normal people, benevolence a universal feeling, sometimes only embryonic or weak, sometimes strong, pervading the entire constellation of emotions. The principal moral norm makes it an individual's obligation to give benevolence a decisive say in their decisions.

By a deliberate effort of will, this emotion may be given a dominant position. All that is needed is to form a habit of imagining the joys and suffering of other people. The habit usually gives rise to, and increases the capacity for, an emotional response to somebody else's joys and

suffering. Will, therefore, may affect this emotion to an extent. In that case, it may be an individual's obligation to develop and strengthen this emotion in themselves.

Since, however, every individual ought to be universally benevolent, universal benevolence should ipso facto extend its control to their entire behaviour. The principal moral norm then takes on another form that clearly and in detail sets out what a universally benevolent individual should do and what they should refrain from doing. It says now: "every individual should as best as they can": first, "refrain from any action that contributes to somebody's suffering, second, actively reduce the sum of suffering of other people" third "refrain from any action that kills other people's joys" and fourth, "actively increase the sum of contentment of all people".

The principal moral norm has split into four component norms that are independent from one another. The first two concern the person's attitude in the face of human suffering, while the second two—somebody else's joy. The first and third prescribe omission while the second and fourth—an active attitude.

For human happiness, all four prescriptions are important, because to achieve it a person needs a maximum of joy and a minimum of suffering. Indeed, universal benevolence, in its desire for happiness for all people, in principle, puts the four obligations on an equal footing. However, to direct human conduct really effectively, universal benevolence must realistically judge what can be effectively demanded of people. It cannot demand too much and must reckon with what response somebody else's joy and suffering usually draws from a given individual.

Actually, even the most universally benevolent Peter is unequally vigilant and sensitive to the pleasant and unpleasant experiences of other people. His eye and attention are caught first of all by the suffering of other people, and he strives above all to prevent the suffering of others and remove that which has already arisen. He will be morally shocked and outraged when he sees John deliberately contribute

to Adam's suffering. He will also think badly of him when he sees that John is indifferent to Adam's suffering and that he does not offer him any help. He will not be so shocked and outraged, however, when John stays indifferent to the joy that Adam experienced: he can be left alone when he is joyful. However, in this case too, Peter will be worried by John's moral attitude if he sees that he is in the habit of not responding emotionally to the joyful experiences of other people. He will think then that John's sources of universal benevolence are limited after all, and that he cannot be counted on to take some action to give others joy. John's benevolence will appear cold and incomplete to him, although he will not deny him any moral value for this reason, provided that John is sufficiently vigilant and sensitive to other people's suffering.

Reckoning realistically with the diverse nature of various people, Peter will cautiously create a gradation of moral requirements. He will judge that John is not bad if he does not deliberately do any harm to anybody, in particular, if does not even have an impulse to harm somebody: you do not have to be on your guard against a John like this. In this case, he respects the first of the mentioned norms that establishes a minimum of moral requirements. The individual who breaches this norm and deliberately adds to the suffering of others acts already in a morally wrong way.

Higher moral requirements are set in the second norm that prescribes an active contribution to the alleviation of other people's suffering. John does not show universal benevolence, at least not actively, if he does not offer help when he sees Adam's suffering. Even if this suffering has elicited some response from John's soul, it attested to only a flicker of universal benevolence in his soul, obviously not strong or lively enough to make him act; it is like a seed incapable of germinating. Hence, an individual is not actively good if they do not live by this second norm; externally, they do not differ much from one who is simply not bad. In contrast, a person is visibly good if they are effectively stimulated by benevolence to give help in suffering.

The next place in the gradation of moral requirements is occupied by the third norm. It can be said that it, too, extends and supplements the moral minimum whose foundation is the first norm. It is clearly wrong for John to remove Adam's source of joy or deprive him of it, even though he has not caused Adam to have a painful experience, due to his regretting that an awaited joy has not come. For instance, John is wrong to block Adam's beautiful view with a high wall, or to withhold news from him that would make him very glad. For taking somebody's joy away means limiting and reducing their share of happiness. With this kind of behaviour, the bad intention does not differ much from that characterising an action that causes deliberate suffering.

However, universal benevolence is fully embodied only in the fourth norm that prescribes the active multiplication of other people's joy, which involves effort. They who do this prove beyond doubt they care a lot about the happiness of other people, elevating to the highest level of universal benevolence. Only by doing good to others with the aim of increasing thereby the sum of happiness of all people does an individual become really good.

Comments on the Principal Norm

At a first glance, these four norms that extend the concise principal norm seem to place too great a burden on an individual. It is still relatively easy to take care not to add to other people's suffering by direct action – that is, not to inflict injuries or cause immediately visible damage. However, it is very difficult to anticipate accurately and for a more distant future if indirect effects and distant actions may unexpectedly become detrimental to one individual or even many. Even if a person knows very many laws of nature, the most perspicacious mind is not able to make accurate forecasts for the distant future, especially ones concerning the communal life of great groups of people. Similarly, it is very hard to predict if somebody will not be deprived of a dose of happiness by some incautious, albeit

good, action. If John latches a door through everyday habit, he will spoil Adam's bicycle ride as he will be unable to fetch his bicycle from the flat. So to avoid harming somebody and detracting from their pleasure, an individual must be constantly vigilant and make use of their entire knowledge of the world to avoid harming others.

A still greater effort is necessary—greater because active—to give help to every person who cannot cope with the burdens of life without it. There are too many people in need of such help in the world. To ask an individual to give help to all is to ask too much. The question thus arises of how far the obligation to provide help extends. In addition, marking the limits of the obligation, an individual may easily, as it seems, narrow their universal benevolence to some restricted community, against the prescription of the principal norm.

Finally, the fourth norm imposes such a great burden that is seems to be unrealistic. How can individuals, who are always so restricted in what they can do, actively multiply the happiness of all humanity? They do not have enough knowledge or power for that, so that cannot truly be their obligation. Therefore, the prescriptions of these norms must be made more specific so that they do not become hollow desires.

First and foremost, it must be realised that moral norms concerning actions extend only as far as the power to act of a given individual extends. Moreover, this power is very limited. First, the knowledge of an individual and their power of prediction, necessary for any rational activity, are very limited, especially when an activity affecting large communities is involved. The knowledge of the broadest and most perspicacious mind is so limited that it is incapable of predicting the diverse plurality of effects that every action generates. An unguarded remark may sometimes weigh heavily on the life of an individual or their entire circle. An unwary signature of a statesman may bring misery to a whole nation. However, to reach with our mind into the future so as to be able to see clearly the entire growing sequence of effects is not possible.

Second, the power of action, the bodily and mental energy necessary to make bodily movements and mental efforts, indispensible for any action, is very limited in human beings. Even the best individual cannot watch over a bedridden person day and night; even the most self-sacrificing person will not feed a million of the hungry alone, because they will tire out and run out of the food that they would be able to distribute. It is these physical aspects, which are the necessary material and means of action, that often greatly limit the possibility of action. These limits shall be called the human range of power.

The range of power varies from individual to individual; it depends on their start in life, including the conditions for their bodily and spiritual development, and the range of things that may be its material. Sometimes the power is so limited that even with the greatest inner goodness an individual is practically unable to affect, especially positively, the fate of others. Given the structure of the community in which they live, they can barely survive on hard work, which consumes all their energy. This individual can only refrain from harming others. At the other extreme, an individual may, by means of a decision, release ever greater forces of nature or human energy, which are invisibly accumulated in organised groups. Here, again, they are short of the knowledge necessary to be able to produce only intended effects by their action and to make predictions concerning them, looking as far into the future as their range of power extends. Examples include an inventor who builds machines of great power or a statesman who, with a single stroke of his pen, sets in motion millions of people who begin fighting for their freedom.

What specific obligations are imposed on an individual by the principal moral norm depends on their range of power. Impossibilium nulla oligatio; there is no obligation to do impossible things. Hence, the weak and the powerless should respect only the first and third norm unconditionally: not to add deliberately to other people's suffering and not to deprive them intentionally of their joys. Besides, however narrow the range of their choice is, they should take care that their actions enlarge

the global sum of human good as much as possible. The most powerful and mighty, however, who can still affect and do affect the fate of numerous people are burdened with great obligations, as they should be concerned with the level of human misery on a world scale.

Even the most powerful, however, cannot be obliged to extend their thoughts and actions to every human being individually. They can care for the happiness of human masses only in a general way, using the organisational structure of human communities as a tool. The communities, being united in one way or another, can be acted on as entities, thus indirectly and secondarily lowering or raising the share of happiness of individuals. Imagine a minister of finance ordering the salaries of officials to be raised: he/she does not know personally even the smallest portion of those whose remunerations will rise. Imagine, a great lawmaker reforming the government system of a country to improve governance: he/she does not know at all that great mass of citizens who one way or another will benefit from the reform.

The reformer still does not satisfy the obligation imposed on them by the fourth of the four norms, because their benevolent intention encompasses, admittedly, all the citizens of their country but does not encompass all people. This reformer, too, however may be driven by a universally benevolent thought: I do my best for the universal welfare of all people, namely, I improve the fate of those whom I can affect by my action. I would do the same for others if I had the power. This thought and intention can drive not only a powerful statesman, but also the smallest element of the human multitude: this thought and intention, in some humble and timid, in others proud or even haughty, give the sense of participation in the great collective work of all people of good will. To participate in this enterprise, no consent from anybody is necessary. It is in this intention as well, even if it concerns a very minor action, that the fourth norm prescribed by universal benevolence is already satisfied. It also hides a superordinate thought about not making a given action detract from the general sum of happiness; hence, the first and third norms are satisfied as well.

However, it must be said and emphasised at this juncture that the principal moral norm does not demand at all that any human action be driven by a thought about universal happiness or that every action follow from universal benevolence. There are many actions that belong solely to the personal domain of a given individual and whose effects do not go outside this domain in any observable manner. It is marked and approved by universal benevolence itself. Hence, it is John's absolutely personal matter if he spends the time off he deserves, in the eyes of universal benevolence, taking a walk or playing chess. What is more, he does not have to walk or play chess having in mind the global sum of happiness of all humanity or perform these actions at the behest of universal benevolence. This emotion by no means dictates all actions, but only exercises general supervision over all impulses and actions in accordance with its fourfold norm.

If according to John's understanding and knowledge, tea and coffee are equally harmless to him, universal benevolence does not provide any guidance in this case. If, however, John knows that coffee is very harmful to him and may shorten his life, which is precious to his small children, universal benevolence exercises its supervisory veto. Under its eyes, John should care about the welfare of his children. It interferes in every human matter only as much as the matter, through its causal ties, comes into conflict with the interests of other people. Luckily for human freedom, there are many things in the world that are mutually independent of each other. The ripples made by a stone thrown at one shore of a lake will not reach the opposite shore. The fact of John sneezing in his room in Poznań will not have any consequences in Warszawa.

The Severity of the Principal Norm

Upon closer scrutiny, it thus appears that the principal moral norm does not impose unrealistic requirements. Nonetheless, its demands are quite stringent, as it requires that all impulses and drives, even the strongest

and most spontaneous, be subjected to its supervision. Furthermore, it demands that an individual should always actively care for somebody else's interest and suffering and take every possible effort to maximise the overall sum of happiness. In the light of these requirements, there is not a single individual that would be morally perfect, i.e. an individual that would scrupulously and without any exception discharge all the duties imposed on them by the fourfold principal norm. Every person actually driven by universal benevolence feels their moral imperfection. The more vigorous their universal benevolence, the stronger this imperfection is felt, and the more insistently it demands respect for its prescriptions. For they see clearly that they are incapable of the vigilance and dedication that universal benevolence demands of them and that, what is worse, they resort to various tricks to cheat themselves so as to be able to forget conveniently about their moral obligations. Sometimes, facing a moral dilemma, they have to tell themselves that they do not know where the line between their right and their obligation is.

Obligations related to earning a living meet with the approval of universal benevolence, which prescribes that everybody should work in order not to be a burden on others. Earning a living consumes a huge portion of an individual's energy and makes rest necessary, to which an individual is morally entitled. Imagine that John wants to sit comfortably to continue reading a novel he has started, because he has an absolute right to do this, when he remembers at this very moment that his neighbour Adam, an old and sick man, does not have anybody who could help him with an urgent grain harvest. John realises that if he does not help Adam, his neighbour will suffer a huge loss. His universal benevolence keeps nagging him: a sense of obligation has arisen in him that somehow does not respect his right to rest. If this universal benevolence is insistent enough, the new sense of obligation will prevail over the apparently unshakeable sense of the right to rest: John will continue to expend energy working on his neighbour's field instead of recuperating it.

Universal benevolence cannot always tell John how far he should go in helping his neighbour, or more generally, with the resignation from his right. Why, it is possible that the help for others, using up his energy, will lower his capacity for work, which is his set and unquestioned moral duty. This will be clearly seen when his neighbourhood attracts many such Adams in need of help. The problem will become acute, to the extent that so many hungry people would turn up around him that in order to feed them, if only to stave off their hunger, John would have to starve to death himself. At this point, universal benevolence will find itself in an extreme, really tragic dilemma: it will have to answer the question of whether one can morally save one's life when others perish; or, further, is it a moral obligation to lay down one's life for others to live—or even to live happily?

This is the eternal question of heroism. For those are heroes who, sacrificing their moral rights, go far beyond the average demanded by universal benevolence. It sets people obligations in moderation so that their satisfaction does not overtax the average ability of a human being. If, thus, such a directive of moderation is adopted in setting obligations, a heroic act will not be an object of a moral obligation, but a generous and particularly valuable extra: evidence that an individual gave clear priority to loving their neighbours over loving their own self. Generally, universal benevolence gives credit to John if he makes a greater effort and exposes himself to a greater loss of happiness than a moral norm tells him to.

Since, however, people on average are not very prone to heroism and do not care much about moral credit, they do good to others only out of the surplus and leeway left to them after the love of self, possibly extended to the next of kin. As a rule, the surplus is rather small in particular in societies with few material resources, in which people are overburdened with duties. Nonetheless, it has a value, not a moral but a social one, because what is useless for overfed John might have a high value for extremely unfed Adam. Nevertheless, universal benevo-

lence considers the philanthropic act of John to be of little moral value, because it did not cause him almost any loss of happiness and even if it did, it was triggered by a mild surge of universal benevolence. For in terms of morality, an act is more valuable when more effort and self-denial had to be put in it by the doer.

However, the vast majority of people satisfy their obligations only out of that extra at best. These are the obligations that follow from the second, third and fourth norms: for others, they deny themselves cakes that they had no room for anyway. If they carefully record in memory such stirrings of love for their neighbours, if in hindsight they view their trivial sacrifices in a certain magnification and if, what is more, they see the suffering of other people only at a very short distance, like the short-sighted, and even then they know how to discreetly pass over them, they feel morally just, or to put it differently, they feel that they satisfy all their moral obligations and demand from their community that they be given credit and respect. However, they will be denied that credit and respect by universally benevolent Peter, if he clearly sees how they have salved their conscience, which is as shallow as a rainwater puddle. He will call them by the name of Pharisees known from the Gospel. Despite not knowing the word yet, Plato wrote about such people with bitter irony.

The opposites of these pseudo-perfect people are those of uncomfortable conscience, who see clearly that they do not fully satisfy their moral obligations. They vigilantly and sensitively notice the suffering of other people and, realising its immense amount, find themselves helpless. Although they know, when they think dispassionately, that they are unable to help everybody who needs help, when they make concrete, direct contact with somebody else's suffering, they have the feeling that they have not done everything that their conscience dictates. They are not calmed either by the thought that by their work, which is their moral obligation, they make a certain contribution in kind to the overall sum of happiness. Such people will never feel morally perfect. They may come to terms, to an extent, with themselves if they take an active part in an

organised or unorganised collective effort aimed at arranging the communal life so as to make the global sum of suffering continue to fall by itself, without any philanthropy. The very social system should, under the eyes of universal benevolence, be free from the causes of suffering and factors detracting from human joy.

Along the long frontline of struggle against suffering, people of good will keep taking positions voluntarily. This still does not make them morally perfect, but the thought and feeling of taking an active part in the great work of perfecting the human world, brings them relief from suffering on account of the suffering of other people and salves their conscience, to an extent.

In this case, too, universally benevolent Peter, but cautious due to experience, is circumspect in judging people. For he knows that the actions that were originally a means can easily become an end; to put it differently: an instrumental action easily becomes a consumerist action. Moreover, he is acutely aware of the tragically recurrent fact in the history of the human community that to improve a social system and to struggle against suffering, social power is necessary. In other words: it is necessary to have power to affect human relations by action. Power, being merely a means in the original intention, so easily provides so many benefits and self-satisfaction that it becomes a passionately desired end, which is often achieved through the mass suffering of other people. Furthermore, power is craved for itself, and not out of universal benevolence, by ambitious people whose poor emotional nature does not provide them with sufficiently diverse and strong joys and who, therefore, supplement the balance of their happiness by outpacing others and gaining a dominant position. Even the ambitious however, know that goodness wins the confidence of other people. Hence, they try, by word and action, to appear as if they have the happiness of all people at heart.

Zygmunt Ziembiński

Lex and Ius in the Period of Transformation[1]

1. In legal Latin, neither *lex* nor *ius* is an unequivocal term; if the discussion were broadened to cover philosophical literature, examples could be given in which the meanings of the terms overlap.[2] We know of such expressions as: *lex duoedecim tabularum, lex Rhodia de iactu, lex scripta, lex perfecta, lex naturalis,* or even *lex carnis seu lex fomitis,* but also *ius civile, ius itendi, ius cogens, ius naturale.* In contemporary disputes over the relationship between *lex* and *ius,* an intuition emerges, albeit vaguely in terms of their meaning[3], whereby *lex* is used for strictly interpreted legal provisions, whereas *ius* refers to a certain body of legal norms considered equitable on the grounds of some acceptable morality.

In tranquil times, when legislation is judiciously enacted and its interpreters are willing to employ the historical interpretation of legal texts, the relationship between *lex* so construed and *ius* so construed may not lead to passionate disputes over discrepancies between the "letter" and "spirit of the law". Obviously, the times we live in are not of

1 Translated from: Z. Ziembiński, "*Lex*" a "*ius" w okresie przemian*, "Państwo i Prawo" 1991, no. 6 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 Cf. S. Thomae, *Aquinatis Summa Theologica, pars 1a 2ae, quaestio XCV, Art. IV*: *Lex humana (…) dividitur in ius gentium et ius civile.*

3 An example is provided by a comment of Andrzej Zoll, who discusses (never mind categorial abbreviations) "the relationship between *ius* and *lex* or the law we might identify with justice and the enacted law that might violate justice". A. Zoll, *Pomiędzy lex a ius*, "Tygodnik Powszechny" 1991, no. 7, p. 5.

that ilk. On the contrary, these are the times of unusual and unprecedented transformations. A largely evolutionary passage from the legal system formed in the state euphemistically called the state of "real socialism" to the legal system of a democratic state, founded on a social system making use of the market economy and political pluralism, is an entirely new phenomenon.

Furthermore, the underlying principles of a new social system are not yet clear; what is more, think tanks have not established themselves yet as centres capable of drawing up detailed but realistic political plans. It would seem that social practice shows that it is easier to impose a totalitarian system on a country than to undo such a system. One of the reasons for this is the atrophy, as a result of many years of paternalism,[4] of some social attitudes that are necessary for a democratic society to function, followed by the disturbance to the healthy circulation of elites, not to mention the economic situation the country was in at the outset of the transformation.

2. For the system of legal norms to function properly in a specific social system, it is necessary that the former meet two kinds of requirements. Firstly, the norms of the system must find axiological grounds in appropriately ordered values and, therefore, the system must be internally cohesive in terms of content. Secondly, and this is only less relevant at first glance, the norms of this system must enjoy a clear legitimacy based on rules determining the normative conception of the sources of law in the system. Known as validation rules, they determine what facts, in particular what issued acts must be considered as law-making facts in the system. Exegesis rules, in turn, specify what norms of conduct should be associated with the finding of given facts (acts) to be law-making facts. These two requirements are closely related, because specific value judgements prove to be indispensable as premises for the exegesis of recognised law-making facts.

4 For a broader discussion v. Z. Ziembiński, *Wstęp do aksjologii dla prawników*, Warszawa 1990, pp. 247–249.

Both kinds of requirements are met only to a very limited extent by the law of the Republic of Poland currently in force. The law-making acts from the period of the Polish People's Republic are superimposed by new acts, referring explicitly or implicitly to an entirely different system of values, or rather to a sketch of such a system. It is only a provisional system because its values have not settled yet in the minds of the political elites, even those of a similar pedigree at one time. Agreement in verbal declarations and condemnation of the system of values that used to be officially proclaimed are not enough to obtain agreement on the merits of a positive action. On the other hand, the interim constitution, namely the 1952 Constitution that has been amended many times, accompanied by a "wobbling" conception of the sources of law, noticed earlier, and new doctrinal disputes over this matter following from the absence of properly drafted transitional provisions, raises numerous doubts about the binding force of a number of regulations and the content of the legal norms in force.

3. To determine whether *lex* conforms to *ius* or not, one has to specify precisely what norms are taken into consideration in a given case. When speaking of *lex*, having in mind a set of norms of conduct formulated in the literally interpreted, properly enacted and not abrogated legal provisions of a given country, the composition of this set of norms may be determined with only marginal doubts. In contrast, it can be only vaguely determined what set of norms is to be binding in a state community, as legal norms considered morally equitable on the grounds of some acceptable morality. Any comparison of the component elements of both sets of norms, which are rarely formulated in a precise manner, is possible only in a very broad outline.

If, however, such a comparison is made, then it must be observed that the non-conformity of respective norms is not, as a rule, a logical inconsistency or a contradiction, wherein one norm, under certain circumstances, prescribes that something be done while another prohibits the same. Rather more often it is an opposition, wherein that which one

norm prescribes in certain circumstances prevents the performance of other norms enacted in a given system.[5] Faced with a contradiction between the norms enacted by Creon and the others recognised by Antigone, or faced with the commands of Nazi law to kill innocent people, which is forbidden by any legitimate law, every man of good will settles the question of such a non-conformity of *lex* and *ius* in the simplest possible way: by denying grossly iniquitous norms of written law—even if secretly enacted—the name of law. Incidentally, this is a classic technique of persuasion.[6]

However, disputes arise most often when the non-conformity of norms is not so blatant, for instance, in cases of limited praxeological non-conformity. They involve situations where it is indeed possible for the addressee to conform with all the relevant norms but the fulfilment of some of them completely destroys[7] the results of the fulfilment of the other norms —or negates this fulfilment to a significant (but how significant?) extent. In other words, these are the cases when relevant norms can, admittedly, be fulfilled together but some thereby waste the effort put in the fulfilment of the others.

It is this character that may be shared by the norms designed to attain divergent economic, political or educational objectives. Moreover, while it is possible to reconstruct in a rather uncontroversial manner the objectives of the clearly worded norms of written law, the premises serving to specify *ius* often give rise to ethical and political disputes. They revolve around not so much the non-conformity between *lex* and *ius*, but rather the determination of what "breed" of *ius* is to be compared with *lex*.

4. With a noticeable rift between *lex* and *ius* construed as mentioned earlier, two different and radically opposing solutions present them-

5 For a broader discussion, v. M. Piotrowski, *O rodzajach i odmianach niezgodności norm*, "Studia Filozoficzne" 1978 no. 11, pp. 93–103.

6 For a broader discussion, v. T. Pawłowski, *Tworzenie pojęć i definiowanie w naukach społecznych*, Warszawa 1978, pp. 223–243.

7 Cf. G. H. von Wright, *Norm and Action*, London 1963, p. 147.

selves. On the one hand, there is a solution of extreme positivism (normativeness) and, on the other, solutions relying on something that could be called "revolutionary legal consciousness" or the juridification of the conception of natural law. The latter make this or that version of natural law not a standard of the moral rightness of specific positive law norms, but a set of directly applicable legal norms.[8]

Both solutions may be questioned and, what is more, they cannot be consistently put into practice. A simplistic positivism, which is located in the grotesque imagination of its opponents rather than in actual practice, supposedly identifies enacted legal provisions with the norms of the legal system, ignoring all the highly complex issues of interpretation. This interpretation is considered to be an operation of an exceptional character, because the majority of legal provisions are believed to be "directly understood". Thus interpretation is reduced to the simplest linguistic rules and the construal of some generally worded directives which, lacking a careful specification of their sense, do not provide sufficient grounds for adjudicating actual cases. Without referring more or less overtly to the values of the "lawmaker" construed by legal dogmatics, who is idealistically and clearly counterfactually believed to be fully competent (proficient) linguistically, the majority of legislative texts cannot be unequivocally interpreted. Moreover, the rules of natural language used to formulate directive expressions are, as a rule, related to specific ways of making value judgements, due to the emotionally tinged expressions they employ. In the long periods of socio-political stability, certain evaluative assumptions become stereotypes *sui generis*; hence, they are disregarded. This, however, does not stop them from playing the role of peculiar enthymemes in legal reasoning. In crises or at turning points, disregarding such elements of legal reasoning may only seem to eliminate difficulties, which, however, will resurface in many specific instances of the application of law.

8 For the position of Thomists see H. Waśkiewicz, *Prawo naturalne – prawo czy norma moralna*, "Roczniki Filozoficzne KUL" 1970, v. XVIII, no. 2, pp. 22 ff.

Disregarding *lex scripta* in the name of revolutionary legal consciousness may be attractive from a demagogical point of view, but it deprives law of its role of the guarantor of a specific social order. The social effects of such disregard are known from Soviet experiences with "Court Decree No. 1" and this subject need not be discussed any further.[9] Incidentally, the revolutionary legal consciousness supposedly showed connections to the quite clearly outlined political doctrine of Marxism, although its details were only taking shape at that time. Apart from this example, a reflection by St. Thomas Aquinas illustrates the point well. He observed that it was easier to find a small group of reasonable lawmakers than a large number of people who were to apply the law.[10]

The radical juxtaposition of natural law and positive human law is, at least according to Thomism, largely wrong. Natural law, in Thomism, is understood to comprise above all fundamental principles, and even if they are immutable, they nonetheless do not pre-determine unequivocally further consequences that are derived from the principles.[11] Moreover, positive law is, in the natural order of things, a necessary supplement and although, as a rule, positive law is derived from the precepts of natural law, its norms derive their binding force from the fact of being properly enacted by a legitimate authority. If a norm of positive law contravenes natural law, the contravention makes the norm non-binding in conscience, although it has to be abided by if failure to do so were to bring about a greater evil such as public outrage (*scandalum*) or riots (*turbatio*).[12] Furthermore, it is not the task of human law to command the performance of any good deeds, nor to forbid all evil deeds.[13] Besides, St. Thomas allows reasonable dispensation from the observance

9 Cf. *Obshchaya tieoria gosudarstva i prava, v. II*, *Obshchaja tieoria prava*, eds B.C. Petrov & L. S. Yavich, Leningrad 1978, pp. 148 ff.

10 *Summa Theologica 1a 2ae, qu. XCV, art. I.*

11 Cf. C. Strzeszewski, Źródła naturalno-prawne harmonii rozwoju gospodarczego, "Roczniki Filozoficzne KUL" 1970, v. XVIII, no. 2, p. 68.

12 *Summa Theologica 1a 2ae qu. XCVI, art. IV*: *tales leges non obligant in foro conscientiae, nisi forte propter vitandum scandalum vel turbationem.*

13 *Summa Theologica 1a 2ae, qu. XCVI, art. II, III.*

of the commandments of human law by those in authority, in those cases where the common good requires this. Hence, in St. Thomas" opinion, invoking natural law when challenging the binding force of a positive law norm as wrong is allowable only in some cases.[14] Finally, natural law does not provide detailed solutions, for instance procedural ones, which are indispensable for the proper functioning of the contemporary legal system.

5. The ongoing transformation of the axiological premises and the social doctrine on which the legal system of the Republic of Poland is to be founded is unusually quick and spontaneous. In the early years of Polish People's Republic, the introduction of socialist legislation was spread over several years, with the appearances of democratic law-making being maintained until 1949 ("the actual realisation of the objectives of a bourgeois revolution"). In addition, successive legal institutions were introduced, presumably according to a well-thought plan. The transformations occurring now in the opposite direction are being conducted, to a considerable but indeterminate degree, under the pressure of fear that society will grow impatient. As a matter of fact, society demands not so much a change of law as the end to onerous social relations. Thus, in our contemporary legislation there are frequent departures from the prudent approach of legislative conservatism[15] in favour of a more reckless approach to lawmaking; one guided by the desire to achieve a specific political objective at a given moment. In fact, this kind of "emergency legislation" has been operating since as early as 1981, rather than 1989; however, its earlier purpose had been to save the existing political order through reform, and after 1989 its aim has been—as has become increasingly evident—to radically restructure this order.

14 *Summa Theologica 1a 2ae, qu. XCVI, art. IV*; *Summa Theologica 1a 2ae, qu. XCVI, art. VI*: *Semper ei qui legi subditur, verba legis servanda sunt, nisi adsit periculum publici boni, quod si subitum sit, non patiens tantam moram, ut ad superiorem recurri possit, praeter verba legis agere licet.*

15 *Summa Theologica 1a 2ae, qu. XCVII, art. II*: *Quoniam mutatio legis communi saluti detrimentum adferre solet, non semper lex mutanda est, quando aliquid melius occurrit, nisi adsit evidens necessitas, aut maxima reipublicae utilitas.*

A remedy for the inadequacy of the system of legal norms that are formally considered binding, one that will work in favour of values that are acknowledged by society or its political elites, is primarily viewed as consisting in changes to legislation, although this is obviously not the only means. In some cases it is enough to abrogate some hitherto binding provisions, which brings about, depending on the nature of these provisions, various changes in the system of legal norms. In many cases, a way out can be sought not so much in changes to the exegesis of legislative texts (rules of interpretation, inference and collision) but simply in a change in the reasons for the use of these rules. Finally, the legal doctrine of *desuetudo* can be elaborated on. This is a doctrine that has been left underdeveloped or even suppressed until now. An auxiliary remedy may be to make proper use of general clauses included in the provisions binding hitherto.

Furthermore, it must be remembered that the norms of the legal system originate not only from legislative enactments; they are also produced in a complex manner by "general rules of law" developed by the authoritative juristic literature and teleological directives based on the observed regularities of phenomena in society. Such rules and directives are sometimes hardly distinguishable from the principles of social coexistence or fair trading or—from another perspective—the principles of good management or the proper exploitation of specific resources, etc. The non-conformity between *lex* and *ius* may thus be eliminated in practice by changing the way in which reference is made to such secondary factors which shape the legal system.

5.1. The most radical means of eliminating discrepancies between *lex* construed according to undisputed linguistic rules and *ius* postulated on the grounds of a new system of values is of course the enactment of new legislation. However, in practice, this is not a simple solution in Poland's case. Even with highly efficient parliamentary legislative procedures, it is not practically possible to change substantial elements of the legal system in a technically correct manner in a short period of time.

The system has been shaped by the legislation and decrees of the Polish People's Republic and in part by the legislation of pre-WWII Poland. Taking into account the extent to which law interferes in all the spheres of contemporary social life, a general abrogation of some category of this legislation would cause legal chaos. Besides, the legislation of the Polish People's Republic was enacted in changing political situations and, thus, a distinction should be made between the legal acts that we find useful according to contemporary criteria and others that are detrimental or lack any axiological grounds.

However, the necessity of gradually changing legislation brings about the discrepancy mentioned earlier between axiological grounds, either declared *expressis verbis* or clearly implied, affecting norms formulated in provisions from different periods. Such phenomena occur to some extent even in periods of longer stabilization of the socio-political system and become especially troublesome in the periods of radical transformations, making it necessary to develop transitional provisions with caution, and to suitably elaborate on the rules of exegesis used in such periods of upheaval.

Legislation undergoing such gradual, fragmentary but radical transformations requires much more work on the part of legislators than legislation enacted on a "virgin territory" even if matters of fundamental importance are concerned. Incidentally, the drawing up of the Constitution proceeded perhaps more efficiently in 1921 than in 1991. More work is required now because legislators need to anticipate what legal problems may arise when new provisions interact with similar ones which date back to an earlier period and remain in force. Of course, legislative work can be accelerated without worrying about possible structural loopholes or obvious incompatibilities between system norms, but the social price of such haste turns out to be very burdensome, as can be seen with local government legislation.

Alongside such general praxeological problems that arise with law-making activity, there are particular difficulties that are specific to Po-

land now, stemming from the way legislative work is organised. The inefficiency of departmental legislative services working on draft bills was noticed in the times of the Polish People's Republic. Incidentally, the work on the Lawmaking Act, conducted without prior definition of any of its assumptions, will soon enter its third decade. As a matter of fact, this legislative crisis, aggravated by the inflation of provisions, is not limited to Poland or other former socialist countries. In the case of Poland, however, the crisis involves a dysfunctional legislature, which is not only due to the unusual composition of the 10th Sejm and the small number of parliamentarians with legislative experience. Another reason is the sheer amount of proposed legislation. When this state of affairs is combined with the absence of clearly outlined general political concepts and the political pressure being exerted by various social groups lobbying for quick changes to individual fragments of existing legal institutions, it entails that the changes in question are not always beneficial for society in general.

5.2. The abrogation of specific hitherto binding provisions may remove incompatibilities between *lex* and *ius* in various ways, depending on their formal character.

If the provisions served the purpose of formulating substantive norms, either prescribing or prohibiting the performance of specific acts, understood simply as psychophysical, their abrogation makes the acts, previously prescribed or prohibited, indifferent *pro futuro*. Thus, the original freedom of conduct is restored in a given field, provided, of course, that other norms in the system do not prescribe the performance of these acts or prohibit them, if only indirectly.

If abrogated provisions formulate norms granting competence (authorisation) to a person to perform specific conventional acts, having a legal effect—starting from law-making competences and ending with the capacity of natural persons to perform acts in civil law—the abrogation of such a provision makes acts of this kind, performed from a given moment on, suffer from the sanction of nullity, unless the rules

for performing such acts become established, for instance, by custom. The abrogation of rules constructing certain acts in law at a certain moment does not affect the legal effectiveness of acts performed earlier, if the abrogation of a relevant provision is not combined with an amendment to the regulations hitherto binding in this field. This, in turn, may entail intricate problems of retroactivity and retrospection.

From the point of view of the problem at hand, particularly complex are those cases involving abrogated provisions that do not directly formulate norms prescribing or prohibiting the performance of some acts, or which do not specify the circumstances in which some acts are to be performed—as is the case with competence-granting norms—but rather establish the general assumptions on which the institutions of a given system are to be founded (by formulating so called "principles of law in a descriptive sense"),[16] or formulate *sui generis* definitions of legal institutions by referring to their purpose or expected function (role). Provisions of this kind are vital for the exegesis of legislative texts, since they provide the premises for interpretation and inference rules. The abrogation of provisions of this kind—one example is offered by the abrogation of the provisions of Chapter II of the Constitution of the Polish People's Republic—creates the freedom to choose premises for the application of the rules mentioned above, because it eliminates the premises of the old legislative text (although the result is by no means obvious due to the intricacies of the relationship between these provisions and the results of exegesis).

5.3. The issues associated with the exegesis of legislative texts (i.e. their interpretation, juristic reasoning and elimination of conflicts), performed as acts of humanistic historical (static) or adaptive (dynamic) interpretation, are elementary and as such are discussed in law textbooks (in a manner often indicating connections to methodological works by J. Kmita and L. Nowak today). Hence, there is no need to discuss ba-

16 For a broader discussion, v. S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe*, Warszawa 1974, pp. 28–52.

sic problems here in detail.[17] The changes made to the system of legal norms without amending legislative texts, solely through a different exegesis of texts issued earlier, are entirely possible, although changes of this kind are usually accompanied by amendments to legislative texts so that hitherto binding provisions are given a modified context.

Such phenomena were popular in the early years of the legal system of the Polish People's Republic, when official declarations maintained that previous interpretations handed down by the Supreme Court were to be considered as having only historical relevance.[18] In addition, the changes in the officially adopted results of the exegesis of legislative texts followed not so much from the adoption of different rules of interpretation or inference (although linguistic rules of interpretation or formalised rules of inference were ostentatiously disregarded at that time)[19] as from changes in the premises adopted when applying the traditional rules. When referring to both "static" and "dynamic" interpretations, legal dogmatics assumes that the idealizationally construed "legislator" is semiotically, praxeologically and axiologically rational. However, this "legislator" is attributed, at least in part, different knowledge and different values in these cases, on the basis of better or worse documented guesses as to what premises were once adopted by the drafters of given provisions or what values and knowledge are attributed to the "current legislator" (often identifying reality with proclaimed postulates).

The issue of reconstructing the knowledge and values attributed to the "legislator" by legal dogmaticians is a rather complex one, as it may rely on drawing conclusions that are in a certain sense deductive, or on formulating hypotheses about the assertions and values that supposedly served as axiological grounds for the norms expressed unambiguously in

17 J. Kmita, *Z metodologicznych problemów interpretacji humanistycznej*, Warszawa 1971, pp. 81 ff.; L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973, pp. 25 ff.; M. Zieliński, *Interpretacja jako proces dekodowania tekstu prawnego*, Poznań 1972.

18 Cf. Resolution of the General Assembly of the Supreme Court of 25 November 1948.

19 Cf. S. Ehrlich, *O metodzie formalno-dogmatycznej*, "Państwo i Prawo" 1955, no. 3, pp. 374–404.

legal provisions. Alternatively, such reconstructions may have recourse to the clear wording of legislative texts, specifically their separate preambles or introductory provisions (internal preambles), defining the "purpose" and/or "objective" of a statute. In the cases of the first kind, it is easy to question an explanatory hypothesis by appealing to the "dynamic" (adaptive) conception and showing in this or that way how "today"s legislator" may perceive and judge specific social phenomena. However, when the intellectual and judgemental premises of a statute are formulated *expressis verbis*, they ought to be rejected if they are inadequate.

Otherwise the same wording, in a different situation and the altered context of other provisions, may take on a substantially different sense. The phrase used in Article 85 of the Constitution of the Polish People's Republic stating that trade unions "are a school of civil activism" had a totally different meaning in the context of the political doctrine prevailing in 1952. It assigned to trade unions the role of one of many "transmission belts from the Party to the masses". The meaning changed radically in the wake of the transformations that took place towards the end of 1989, if only owing to the change of context whereby "and commitment to the building of a socialist society" was replaced with "and commitment to the building of a civil society".

The key issue in fulfilling the requirements of the rule of law and legal culture in the course of interpretation is not to employ functional interpretation in cases where the result of the linguistic interpretation is unambiguous. Likewise, if cases of extensive and restrictive interpretation are allowed, as well as those of rejecting the result of literal interpretation *ab inutili sensu*, they must be treated as absolute exceptions, only to be used when the wording of the text is obviously inadequate to the unquestionable directive intentions of the legislators. In the case of adopting the conception of static (historical) interpretation, the problem is relatively clear. In the case of dynamic (adaptive) interpretation, which is of greater interest to us here, there is a particularly strong temptation to see the inadequacy or at least "ambiguity" of a legislative text

and, in view of this, a temptation to see if it could be interpreted in such a way as to make it contain the norms that could find axiological grounds in prevailing knowledge and values. In such situations, the problem arises of the choice between the reliability of the legal order and the adequacy of axiological grounds. It is a dilemma with regard to which a specific doctrinal stance should be taken, instead of obliterating the heart of the matter by seeing linguistic ambiguities where otherwise the legislative text would be considered sufficiently clear.

The question of the applicability of such or other interpretation rules, or rather their relationship in respect of cases involving clear incompatibility between literally interpreted *lex* and postulates concerning *ius*, must not obscure the most crucial problem in Poland"s situation. This problem concerns the organization, at least in a general outline, of the system of values to which the law of the Republic of Poland is to be subordinated. The enumeration of these values in a rather general way does not suffice, unless more accurate evaluations are formulated. They should provide guidance in the cases of conflict between the freedom and equality of citizens, social justice (in some more specific meaning) and market economy principles, the reliability of the legal order and the flexibility of law, the consideration of merit and social utility, etc.

The question arises of how such a systematisation is to be implemented? Parliamentary bodies may adopt some general resolutions in this area but cannot make more detailed decisions, determining the way the law is to be applied. With evolutionary changes to the legal system, the decisions of the Supreme Court and other courts may modify the officially adopted system of values step by step, leading to its rough systematisation. It is not known how the Supreme Court is to formulate preferences of this kind when faced with radical changes to officially recognised values, when systemic and political conceptions change month by month, and legislative processes do not proceed in an orderly manner, in accordance with suitably clear and distinct main premises.

At the same time, this is somewhat understandable in such periods of upheaval.

5.4. In times of social upheaval, the role of *desuetudo* comes to the fore as a factor that can bring order to a legal system. Appealing to *desuetudo* as a negative validation rule accepted by the authoritative juristic literature should have perhaps been discussed earlier, before discussing the role of exegesis rules in resolving the problems under discussion. However, it has to be realised that *desuetudo* applies not so much to legal provisions as to the legal norms that have been derived through interpreting these provisions, or to norms accepted as legal norms and deriving their binding force from custom (in the latter case, the discontinuance of implementing the norms in question is decisive). The authoritative Polish juristic literature lacks any fully-fledged conceptions concerning *desuetudo*,[20] but it can be nevertheless assumed that the concept covers situations of two types: actual failure to implement specific norms (the failure of their addressees to obey them and failure of state authorities to impose sanctions for their breach) and the conviction embraced by a growing number of lawyers that failure to implement given norms deserves to be tolerated or even approved. In traditional jurisprudence, which is suitable for a different rate of social transformation than that we are faced with today, stress was laid on the element of the "oblivion" of antiquated regulations, because it was mainly concerned with customary regulations, dating back to the distant past. Today, this element has lost its relevance, while in the times of the Polish People's Republic "campaigns to organise departmental regulations", conducted in ways that can hardly be considered properly legitimated, resulted in finding tens of thousands of regulations invalid, despite the fact that they had not been explicitly abrogated. *Desuetudo* can thus take place without referring to the criterion of particular "antiquity", but the criteria for finding norms to be "antiquated" should not be arbitrary either.

20 Cf. Resolution of the Entire Civil Chamber of the Supreme Court of 12 Feb. 1955, I CO 4/55.

Furthermore, it is necessary to distinguish a category of norms that, admittedly, do not directly and logically contravene the constitutional norms or others found in high-ranking legislative acts, or that are even not praxeologically or flagrantly inconsistent with those norms, but which find no axiological grounds in the new understanding of knowledge and values. It is pointless for this category of norms to continue to be in force, and consideration must be given to whether should still be binding just because they have maintained their thetic justification by reason of their being formulated in provisions enacted in accordance with competences granted by the Constitution.

5.5. Provisions may be formulated in a general way that is inappropriate to the demands of the present day, but they still may provide leeway for law-applying bodies by explicitly authorising them to use evaluations of the concrete consequences of a particular decision when resolving cases (type I general clauses) or general assessments and norms with an axiological ground (type II general clauses).[21] A role analogous to classic general clauses may be played in a legislative text by the use of indefinite phrases, ones that, to be precise, are not evaluative in character but in practice are used to evaluate or estimate some state of affairs ("major damage", "serious harm", "important reasons", etc.).[22]

In cases of this kind, especially ones involving type II general clauses, evaluations declared in judicial decisions or even formulated in the juristic literature may help correct the inadequacy of *lex* to the postulated *ius*.

Of course, the policy of using the general clauses contained in the provisions of the past cannot be considered as a means of reforming the axiologically outdated *lex*. However, it may serve as a palliative of sorts when the collisions are less radical.

6. A review of issues related to the inadequacy of *lex* in relation to postulated *ius*, or actually to the often varied postulates of the legal

21 Cf. *Summa Theologica IIa IIae*, qu. CXX, art. I.

22 For a broader discussion v. Z. Ziembiński, *Stan dyskusji nad problematyką klauzul generalnych*, "Państwo i Prawo" 1989, no. 3, pp. 14–24.

community as to what legal system should be built under a new system of government, has revealed the great complexity of problems encountered in this field. What may be embarrassing in this context is the ease with which some jurists, who did not limit themselves previously to describing the theoretical assumptions of historical materialism but declared their full acceptance of it, now disavow the social theories of Marxism and change their declarations about the preferences they have. Even more dangerous is the fact ideological training, which lasts for an entire generation, may cause some individuals to go from one extreme to the other. Specifically, the conception of the "state will of the ruling class" deciding until recently what law is, may be replaced with advanced legal nihilism, while formalistic dogmatics (which is actually caricatured, rather than described informatively) may be replaced by "good judge" moralising. Such a person could in fact be very useful, but only hearing cases as a magistrate or sitting on a community conciliation committee.

The historical juncture at which the Polish legal system is undergoing radical transformations, incomparable to any restoration of an *ancient régime*,[23] is far more complex than in other former socialist countries, making it necessary to conduct a profound theoretical analysis in great haste. Without this, ad hoc legislative changes will be chaotic.

This situation leads to the formulation of a number of postulates in respect of Polish law studies and associated organisational matters:

(a) It is necessary to conduct a profound theoretical study of the axiological foundations of the contemporary Polish legal system. To do this it is first necessary to deliberate on the systematisation of the values the law would have to serve and define the intellectual premises concerning the regularities of social life to which the axiological grounds of system norms would have to refer.

23 Cf. K. Sójka-Zielińska, *Zasada słuszności wobec teoretycznych założeń kodyfikacyjnych XIX w.*, "Państwo i Prawo" 1974, no. 2, pp. 30–44.

(b) It is necessary to develop a clear doctrine on *desuetudo* and the exegesis[24] of former provisions in the times of social upheaval, specifically on collision rules and the relationship between the application of linguistic and functional interpretation rules in such situations.

(c) It appears to be necessary to allow for a broader use of institutional decisions on the scope of the binding force of individual former provisions on account of their incompatibility with the axiological premises of a new or extensively amended constitution. What is more, such institutional decisions should be relatively easy to procure, and efficient.

7. Finally, a metaethical reflection is in order. From the position of ethical acognitivism and the Weberian assumption about the axiological neutrality of learning, a scholarly discussion of values is difficult to conduct, as everybody knows, in a concise way. Any practical activity is usually based on taking a cognitivist stance and thus, a non-relativist one, as ethical relativism provides much weaker stimuli for action. This is absolutely understandable. Though it must be remembered that by taking a cognitivist stance various people, adopting different premises, may reach different conclusions in this field and if they cannot be made to change their minds by persuasion or democratic procedures, and thus to thereby arrive at decisions on a common course of action, the temptation easily arises to deploy *argumentum baculinum*, which is remembered with resentment.

Literature

De Aquino Thomae S., *Aquinatis Summa Theologica*, Bologna 1927.

Ehrlich S., *O metodzie formalno-dogmatycznej*, "Państwo i Prawo" 1955, no. 3.

24 Out of caution, it must be stressed that in this article the term "exegesis" is used in a technical meaning to describe the entirety of interpretation, inference and collision-elimination measures ("annotation of a legislative text") without any reference to the 19th-century "school of exegesis".

Kmita J., *Z metodologicznych problemów interpretacji humanistycznej*, Warszawa 1971.

Nowak L., *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973.

Pawłowski T., *Tworzenie pojęć i definiowanie w naukach społecznych*, Warszawa 1978.

Petrov B.C., Yavich L.S. eds, *Obshchaya tieoria gosudarstva i prava, v. II, Obshchaja tieoria prava*, Leningrad 1978.

Piotrowski M., *O rodzajach i odmianach niezgodności norm*, "Studia Filozoficzne" 1978 no. 11.

Resolution of the Civil Chamber of the Supreme Court of 12 Feb. 1955, I CO 4/55.

Sójka-Zielińska K., *Zasada słuszności wobec teoretycznych założeń kodyfikacyjnych XIX w.*, "Państwo i Prawo" 1974, no. 2.

Strzeszewski C., Źródła naturalno-prawne harmonii rozwoju gospodarczego, "Roczniki Filozoficzne KUL" 1970, v. XVIII, no. 2.

Waśkiewicz H., *Prawo naturalne – prawo czy norma moralna*, "Roczniki Filozoficzne KUL" 1970, v. XVIII, no. 2.

Wright G.H. von, *Norm and Action*, London 1963.

Zieliński M., *Interpretacja jako proces dekodowania tekstu prawnego*, Poznań 1972.

Ziembiński Z., *Stan dyskusji nad problematyką klauzul generalnych*, "Państwo i Prawo", no. 1989.

Ziembiński Z., *Wstęp do aksjologii dla prawników*, Warszawa 1990.

Zoll A., *Pomiędzy lex a ius*, "Tygodnik Powszechny" 1991, no. 7.

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Critical Remarks on Roman Law in the Prussian Correction[1]

Ius terrestre nobilitatis Prussiae correctum, commonly known as the Prussian Correction, is—as we know—a partial codification of the Prussian land law, enacted by the *Sejm* (diet) and endorsed by the king in 1598.[2] It was brought about after very protracted and extraordinarily inept preparatory work, if one can even apply that phrase to the repeatedly adjourned or forgone conferences and gatherings during which the reform was to be developed. The reform itself stemmed from the demands of the Prussian nobility who, under the charter issued by Kazimierz Jagiellończyk in 1476, had been governed by the law of Kulm. This was municipal law, and the nobles deplored its uncertainty and lack of precision, though most of all they were unwilling to accept

1 Translated from: Z. Lisowski, *O prawie rzymskim w korekturze pruskiej. Uwagi krytyczne*, "Czasopismo Prawno-Historyczne" 1954, t. 6, pp. 194–220 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This paper, being a fragment from a more comprehensive work by this author, was to have been published in the previous volume, dedicated to the 500th anniversary of incorporation of Prussia into Poland. The editors include the article in this volume, all the more readily since as a model of critique and analysis of a source text it may contribute substantially to a more profound and vigorous study of the important issue of the reception of Roman law in Poland during the age of the Nobles' Democracy.

2 Promulgated in print several times, also in Polish and German translation.. the Correction was included in vol. VI of the Piarist edition of *Volumina Legum*, and from thence reprinted in Ohryzko's edition, vol. VI, pp. 270–281. I have used this latter edition V. S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. II, Lwów–Warszawa–Kraków 1926, p. 39 ff.

the community of property it imposed and the resulting regime of succession *ab intestato*.[3]

In the scholarly literature, the authorship of the Correction is attributed to two royal secretaries, Reinhold Heidenstein and Mikołaj Niewieściński. In reality, however, according to the testimony of Lengnich—who may be relied on, given his thorough knowledge of the history of Royal Prussia—things were different. At the Prussian diet in Grudziądz held on January 22 1598, both presented their drafts following the request of the Prussian estates (Heidenstein personally and Niewieściński in writing). Their projects became the object of day-long discussion[4], but at the Sejm which began on March 2, 1598, only Heidenstein's draft was deliberated on and subjected to vote,[5] subsequently receiving royal approval.[6] Thus the current text of the Correction originates solely with Heidenstein.

Heidenstein had some grounding as far as codification was concerned. After a short stay in Königsberg and Wittenberg, he registered in October 1575 with the Alemanian nation of jurists in Padua where he spent over four years (until November 1579).[7] He therefore had enough time and sufficient opportunity to gain considerable knowledge of Roman law. Although a substantial lapse of time—19 years—divides his studies and the drafting of the Correction, the text of the statute clearly shows that at the time of writing the author was still fairly conversant with Roman law. Without such knowledge, his draft of the statute would not have defined the capacity of a minor to act by means of a formula modelled on I. 1, 21: *omnibus autem in rebus wardlus meliorem suam*

3 A detailed account of the preparatory efforts may be found in vols. III and IV of G. Lengnich, *Geschichte der preussischen Lande königlichen Anteils*, Gdańsk 1727.

4 G. Lengnich, op.cit., vol. IV, pp. 255–256.

5 In the course of deliberations of the Prussian deputies, Niewieściński went as far as making certain allegations against Heidenstein's draft. V. G. Lengnich, op.cit., vol. IV, p. 262.

6 G. Lengnich, op.cit. Based on Lengnich, a correct account of the affair is presented in E. Nehring, *O życiu i pismach R. Heidensteina*, Poznań 1862, p. 12 ff.

7 On Heidenstein's studies in Padua see Barycz in *Pamiętnik Literacki*, XXVI, 1929, pp. 213—223.

conditionem etiam sine tutorum authoritate facere poterit, deteriorem non (Title III, 18) nor conveyed the principle which sanctioned the revocation and modification of the testament using the sentence: *ut ad mortem cuiusque voluntas ambulatoria et libera sit*, which paraphrases Ulpian's statement in D. 24.1, 32.3 and 34.4; he would not have justified the institution of usucaption with *ne rerum dominia in incerto sint* (Title IV.1), taken verbatim from I. 2.6pr, which in its turn derived from somewhat differently formulated text in Gaius I.44; finally, he would not have determined *culpae latae* as *dolo proxima* had he not had guidance in that respect in three sections from Ulpian, which incidentally had all been interpolated in any case (D. 11.1, 11.11; 43.26, 8.3; 47.4, 1, 2).

That general, Roman-like wording in the Correction might have given the impression and engendered the conviction that the statute as a whole was under considerable Roman influence, which may be termed as reception. This conviction was formulated in an unpublished work by one of the students of Prof. Taubenschlag, Sygierycz, whose findings Prof. Taubenschlag included in his valuable volume on the reception of Roman law in Poland,[8] which otherwise relied on the latter's own comprehensive research. Mentioning the name of the author, Prof. Taubenschlag indirectly intimated that he did not intend to bear full personal responsibility for the findings that his student had arrived at. I am therefore even more encouraged to make some critical remarks regarding Sygierycz's assertions where they concern private law in the Correction, though they are not materially addressed to the scholar whose body of works comprises a fair number of publications on Polish court law in the Middle Ages.

I

First and foremost, two misunderstandings have to be clarified. The author whose findings were communicated courtesy of Prof. Taubenschlag

8 R. Taubenschlag, *La Storia della recezione del diritto romano in Polonia fino alla fine del secolo XVI*, in: *L'Europa e il diritto romano*, vol. I, Milan 1953, pp. 227—242.

identified, for example, influences of Roman law in the Correction's provisions concerning the testamentary inventory and the admissibility of action for inheritance (*hereditatis petitio*), not only against the possessor but also against one *qui dolo desiit possidere*. Sadly, both these assertions are completely erroneous.

As we know, *beneficium inventarii* had been introduced into the Roman legal system by Justinian, by virtue of the constitution of 531 contained in C. 6.30,22 and summarized in I. 2.19,6. Justinian's creation triumphed over the centuries, surviving until today.[9] It is therefore possible that it found its way into the Prussian Correction, just as it was included in the 1580 edition of the Kulm law in which, despite having been formulated in general terms, it concurred in its premises and effect with Justinian's law.[10] However, there is no trace of it in the Correction. Indeed, the final section of Title I is provided with the heading *de inventario*, and it is concerned with the inventory in the context of succession, but this is not the inventory of Justinian. As is known, and as follows from the designation itself, *beneficium inventarii* is a privilege or an entitlement of an heir who, having accepted the inheritance without recourse to the so-called *tempus deliberandi* and having compiled a list of all assets and liabilities in a manner and time prescribed by law (90 days in total), would be liable to the creditors only to the amount of inheritance stated in the inventory, and have to satisfy such creditors as they come forward until all assets are exhausted. In contrast, the inventory in the Prussian Correction is not a privilege but an obligation. The obliga-

9 E.g. in chronological order: Napoleonic code: Art. 793–813, Austrian code: §§ 800–807, German code: §§ 1993–2012, Swiss code §§ 380—B92, Italian code: Art. 484–611; Polish inheritance law: Art. 34, 49 § 2. In Soviet law, the estate regulated in § 100 of the Instruction of the Ministry of Justice of the Russian Soviet Federative Socialist Republic of March 2nd, 1948, has a different foundation and purpose, given that Art. 434 of the code sets forth—rightly so in my opinion—that the heir is liable only to the amount of the assets inherited.

10 Cap. 147: *Haeres .. . sin autem, uti par est. inventarium cum scitu et consensu iudicis conscripserit, explorandi causa, quantae sint haereditatis illius facultates, et quantum ex ea creditoribus debeatur, hoc casu nulla cogitur necessitate, qua cui tum ultra vires haereditatis exsolvat.* P.J.W. Bandtkie, *Ius Culmense cum appendice privilegiorum et jurium selectorum municipalium et dissertatione historicojuridica exhibitum, cura*, Warszawa 1814.

tion rests with the one *quicumque haereditatem vel etiam usumfructum possederit*, in other words on the possessor of the testamentary estate.[11] Within four months from succession (*post mortem defuncti intra mensem quatuor*), such a holder should make an inventory (*inventarium facere tenebitur*), for which act they should request the presence of both suitable witnesses as well as heirs, or at least one of them (*testibus fide dignis suae conditionis adhibitis, haeredibusque aut aliquo ex illis vocatis*). Should they fail to discharge the obligation, or the inventory they have made is deemed unreliable (*quod nisi fecerit aut fides inventario habita non fuerit*), they shall be summoned to appear before land court within a peremptory time-limit[12], where they would confirm under oath that they have made the inventory with due honesty and without seeking to conceal anything (*peremptorium terminum habebit atque ad primam citationem respondere tenebitur, corporaleque iuramentum praestabit omnia bona fide in inventarium a se relata nihilque ex bonis defuncti a se celatum vel celari*). Thus the differences with respect to the inventory in the constitution C. 6, 30, 22 are striking: 1. there, the successor is entitled in a particular manner, here, the holder of the testamentary property is under an obligation; 2. the Justinian inventory encompasses all the active and passive components of the estate, while the inventory in the Correction specifies only the property held by the person obligated to compile the inventory; 3. the time set forth for making the inventory is different, with 90 days in the Justinian Code and 4 months in the Correction; 4. finally, the goals of the inventory differ—there the aim is to protect the heir in case of excessive debt on the estate, while here the objective is to facilitate the determination of its components for the heir. In all fairness, one remark is due regarding the last sentence. The Prussian Correction is not an exhaustive codification. Even in those domains which it regulates, numerous matters are left without

11 Naturally, I understand that possession most generally, not in the sense of the Roman possession *ad interdicta*, which in principle the user did not have.

12 On the meaning of *termin zawity* (peremptory time-limit) v. O.M. Balzer, *Przewód sądowy polski*, Lwów 1935, p. 96.

pertinent statutory provisions. In the land law of Royal Prussia, the said affairs were no doubt governed by the law of Kulm, in accordance with the charter of 1476. It is therefore likely that the obligation to make an inventory of testamentary property which is imposed on its holder was linked to the heir's exercise of the right which they had been granted under cap. 147 of the aforesaid digest of the Kulm law, and was intended to ease the task of surveying the assets. However, detailed provisions of the 531 constitution do not mention any obligation compelling anyone to aid the inheritor in the task of making the inventory, while it remains unknown whether such obligation had existed in Roman law. It is therefore difficult—even in such a hypothetical, indirect fashion—to presume the influence of Roman law. At any rate, the discussed regulation in the Correction does not in itself reproduce the provisions of the constitution C. 6, 30, 22 and cannot therefore attest to the reception of Roman law into that statute.

Much the same is the case with the Roman legal principle of passive locus standi of the possessor or one *qui dolo desiit possidere* upon *hereditatis petitio*, which had allegedly been received into the Correction. This assertion was advanced most likely in connection with Section 6, Title II of the Correction: *de donationibus et testamentis*. However, when the provision is examined more closely, it is easy to demonstrate that it is not at all concerned with the petition of a claimant to the succession against the holder of the estate or with the dispute regarding succession. Its factual state is rather similar to what one finds in Gaius II, 167 i.f.[13] Namely, it is founded on the fact that the heir appointed to the succession renounces it (*si haereditati, in quam debebat succedere, quis renunciaverit, sive filius sive quicunque alius*). In consequence: 1. not having acquired the status of successor they will not be liable for the liabilities of the estate (*ad debita quidem solvenda, aut alia onera haereditatis non tenebitur*); and 2. the estate should be handed over to the creditors so

13 *Solet praetor postulantibus hereditariis creditoribus tempus constituere, intra quod si velit (sc. heres) adeat hereditatem, si minus, ut liceat creditoribus bona defuncti vendere.*

that their claims may be satisfied (*bona autem omnia creditoribus dimitiere debet*). However, there may arise the suspicion that the inheritor withholds a portion of the estate. In such a case: *a creditore ad ludicium Terrestre vocatus, terminum peremptorium habebit, in quo corporale iuramentum praestet, nihil ex bonis dejuncti se possidere, aut dolo malo possidere desiisse, quod si praestare recusaverit ac liquidum debitum, quod petetur, fuerit, ad solvendum cogatur*. Thus it is not the successor who becomes the claimant in the dispute, but the creditor of the estate; the would-be successor, as opposed to the holder of the estate, is the respondent; the object of the action is to determine whether the respondent withheld any part of the estate rather than recover the estate and, should the respondent fail to swear that they do not possess any portion of the estate, to award it to the claimant in respect of liquid debt, obviously not exceeding the amounts possessed or the malevolently disposed components of the estate (to use the terminology of the Code of Obligations).[14] The reference to Roman law can only be seen in the application—with a different state of fact at hand—of the principle of liability for property possessed and malevolently disposed, which had in fact existed in Roman law in connection with inheritance claims (cf. D. 5, 30, 20, 6c and 27 pr.).[15] However, the Correction is in no way concerned with a claim against the estate and passive locus standi.

II

Another untenable proposition is that the Correction's system of succession *ab intestato* derives directly from Justinian's Novels 118 from 543, supplemented in one point by Nov. 127 from 548. The former piece of legislation is known to have introduced order into the tangle of Ro-

14 The content of the respective provisions in the Correction was accurately reconstructed by P. Dąbkowski, *Prawo prywatne polskie*, vol. II, p. 39.

15 I ask that Roman law scholars forgive me for not discussing the difference between the time before the contestation of suit and after, and—prior to *litis contestatio*—between the possessor in good and bad faith. The matter is irrelevant to our deliberations.

man intestate succession, since the Senate's resolutions and imperial constitutions (beginning with Sc. Tertullianum under Hadrian) disrupted the precisely delineated boundary between agnatic *ab intestato* inheritance based on the Law of the Twelve Tables and the praetorian *bonorum possession* which allowed for cognation by granting civil rights of succession to some cognatic relations before civil law successors or on a par with the latter.

Justinian's reform is founded on two principles. First, it utterly abolished any distinction between agnation and cognation and based statutory inheritance law solely on natural, cognatic kinship. The principle is conveyed already in the preface to the Novels[16] (*omnes simul cognationis ab intestato successiones per presentem legern clava et compendiaria distinctione definire*), and stated even more clearly and precisely in c. 4, as follows: *in omnibus successionibus adgnatorum et cognatorum differentiam cessare… atque omnes sine ulla eiusmodi differentia secundum cognationis suae gradum ad cognatorum ab intestato successiones vocare iubemus*. The second principle, also a fundamental one, establishes complete equality of male and female persons in both the paternal and maternal lines with respect to succession law. Here, one should refer yet again to the general formulation in c. 4, which stipulates that: *nullam autem differentiam esse volumus in ulla successione aut hereditate inter eos qui ad hereditatem vocantur masculos et feminas, quos communiter ad hereditatem vocari constituimus, sive per masculum sive per feminam defuncto coniungebantur.* It may be added that the abrogation of differences between men and women in terms of succession was such an important and momentous principle to Justinian that he did not content himself with the just cited general formulation, but reiterated how it applies in each of the four classes,[17] into which he grouped the consecutive cognates appointed to the succession (c. 1, class I: *neve ulla differentia inducatur utrum masculi an feminae sint*; c. 2. classes

16 In view of the now fading knowledge of Greek, I provide the text of the Novels in Latin.

17 The Novels mention only three classes in any case, combining classes II and III (in c.2).

II and III: *tam masculos quam feminas, neve ulla differentia inter eas personas observetur utrum masculi an feminae sint*; c. 3. class IV: *sive masculi sive feminae*).

Of those four classes, the first encompasses descendants of all sexes without restriction as to the degree. The inheritance is divided among offspring of the same degree, essentially *in capita*. But there is no exclusion of the more remote by the more immediate one; next to sons and daughters, the issue of the deceased son or daughter is entitled to inheritance for instance; however, they jointly receive and subsequently divide between themselves only such portion of the estate that would have fallen to their parent, had they been alive (succession *in stirpes*). Should there be no inheritors of the first class, the second class succeeds. The latter comprises the ascendants and full siblings of the deceased. Among the ascendants, those of the nearest degree take precedence over those farther removed. Should there be individuals entitled on both the father's and mother's side, the inheritance is divided into two halves (*in lineas*), one of which goes to the paternal ascendants while the other to the maternal ones, who then divide it among themselves as their number requires. This applies if there are only ascendants. Where there are surviving brothers and sisters of the deceased, the estate is divided among the nearest ascendants and siblings *in capita*; also, under Nov. 127, the children of the deceased brother or sister are entitled to a share of inheritance after the deceased ancestor (*in stirpes*). Class III, the least numerous, includes step siblings of the deceased. The offspring of the deceased brother or sister, but not more distant descendants, inherit with the siblings, *in stirpes* of course. Finally, in class IV, all more remote collaterals are called to succession, without restriction as to the degree, but with the exclusion of the more distant degree in favour of the nearest of kin.

The reason why I have recalled the foundations and the system of the Justinian succession so extensively and in such a textbook fashion is to make it easier to demonstrate how vastly it differs from *ab intestato* succession in the Correction when the two systems are compared.

Namely, with respect to the fundamental elements of the system, provisions of the Correction relating to the succession of collaterals still embrace the distinction between agnatic and cognatic kinship, which Justinian had abolished, though not in the sense of kinship based on paternal power, present or past, but in the sense of kinship in the male and female line, on the spear and distaff sides. Then, most importantly and in stark contrast to the absolute equality of men and women with respect to succession rights which Justinian had so forcefully emphasized, the Correction considerably disadvantages the female sex with respect to males. Even the first sentence of Title I, *de successionibus*, leaves no doubt in that matter. It reads as follows: *In quaecunque bona, tam mobilia, quarn immobilia, si filii supersint, aequis sortibus filii tantum succedant: masculis deficientibus, filiae*. Thus, if the decedent leaves sons, daughters are entirely excluded from succession, being solely entitled to a dower. If it had not been established or paid by the parents, this should be done within a year and six months by the brothers inheriting after the deceased, with the assistance of two relatives in the paternal line and two in the maternal as well as two lay magistrates appointed by the land court (*quae — sc. dos — nisi a parentibus assignata fuerit, per fratres et duos proximos ex parte patris, et duos ex parte matris, duosque Scabinos Terrestres illius districtus, in quo habitabunt, per ludicium Terrestre electos, intra annum et sex menses assignari et constitui debebit*). In this case, the nature of things—as it is with every obligation resting on a person—may give rise to two possible outcomes. The brothers may fail to discharge the obligation in the designated period of time; then and only then can the sisters come into inheritance after the deceased parent (father or mother) on a par with their brothers (*portiones suas una cum fratribus aequo iure in paternis, quam maternis bonis habebunt*). Most often however, acting in their own interest, brothers will not neglect to establish a dower for the benefit of their sisters. Consequently, the daughters will have no rights to succession, not only after parents but also all ascendants in

general (*Dote autem ita illis assignata, nullum ultra eam sibi ius haereditarium, in bonis paternis vel maternis, aliorumve ascendentium … vendicare poterunt, licet nulla eo nomine renunciatio facta sit*). What is more, where a succession after a deceased brother is concerned, dowried sisters will neither be entitled to claim increase of the endowment, nor to succession after him, unless no brother of the decedent or none of their male offspring survive (*nec ut dos ratione decedentium fratrum sibi augeatur o fratribus petere, sed illae sortes fratrum steriliter decedentium, ad fratres solos, aut fratrum masculini sexus liberos, qui supervixerint, pleno iure devolventur*). Only when all brothers of the deceased had died before him without issue can the sisters or possibly their children inherit after him (*quod si fratres omnes steriliter décédant, sorores earumque liberi in stirpes in bonis succedent*). Finally, women's rights are also restricted in favour of other collaterals, as they can succeed together with brothers only after sisters and female kin, but have no rights of succession after agnatic relatives (*sororibus itidem amitis*,[18] *materteris, avunculis, aliisque cognatis, non tamen patruis vel patruelibus aliisque agnatis una cum fratribus sorores earumque successor es in stirpes itidem succedent*). This basic rule which handicaps women in the event of intestate succession is evinced in the Correction for all classes of successors, just as in Justinian's legislation the reverse principle of equality of both sexes applies to all classes of successors.

Four such classes are distinguished in the Correction, just as had been done in Justinian's law. The first—again, as in Justinian's law—encompasses descendants of the first or more remote degrees, with an essential division of the estate *in capita,* whereas *per stirpes* mode is employed only when next to descendants of a certain degree there are children of one of those, who may succeed as their parent had predeceased the decedent. However, unlike in Justinian's regulations, class II does not com-

18 An evident mistake must have occurred in the statute, since *amita*, father's sister, may be female, but is not a relative on the distaff side.

prise siblings and ascendants but siblings exclusively, again with a division *per stirpes*, where next to brothers or sisters succeeding by way of exception there are the inheriting children of the deceased brother or sister. Ascendants, in accordance with the sequence of degree, are included only in class III. Given that the statute does not specifically provide in that respect, it should be surmised that in this case—in contrast to Justinian's law—division *in capita* will invariably ensue. If the decedent also left no ascendants, more distant collaterals—other than siblings—become entitled to succession. The range of persons entitled to inheritance in this class IV is not restricted, just as Justinian would have it, but unlike in the Novels, near degree of kinship does not mean exclusion of the more remote ones: next to relatives of a certain degree the issue of a relative of the same degree who had died earlier may inherit as well; naturally, division *in stirpes* would then apply.

If one is willing to draw final conclusions from that comparison of the two systems, one will inevitably have to state that the purported influence of Justinian's legislation on the Correction is hardly in evidence. The fundamental principles governing the entire order of succession in both systems are diametrically different (the equal rights of men and women in Justinian, the disadvantaged position of women in the Correction; solely cognation in the Justinian Code, the distinction between agnation and cognation in the Correction). In the Correction, the composition of persons entitled to succession in classes II and III differs from what had been adopted in Justinian's law. Also, the Correction approaches the range of entitled collaterals in a different manner (the possibility of division *in stirpes*) than Justinian's regulation had done. It is only the division of inheriting persons into four classes which may be surmised to have been derived from the Novels and modelled on it, but was any model required there at all? After all, when one grants the right to succeed to the descendants, ascendants and collaterals, whilst distinguishing the siblings in the latter group—as the nature of things dictates—the division into four classes is an inevitable outcome, is it not?

III

It is a prevailing notion in the scholarship that testaments were introduced into the Polish legal system from Roman law through the intermediary of the Church.[19] There are no grounds to suspect that Royal Prussia was any different in this respect. If one adopts that explanation of the origin of last will dispositions, then it should also involve the principle of their revocability until the death of the testators, a rule which, as I have already stated, is expressed in the Correction by means of a purely Roman, general formula. Given the unambiguous wording of the statute, one can hardly disagree that despite its origins, the content of the testament according to the Correction departs from the Roman norm, as it may only contain dispositions pertaining to chattels while clearly excluding immovable property (*testamenta, autem de bonis mobilibus quibuscunque, non autem de immobilibus . . . condere liberum erit*, Title II, 2). The contention or, to put it more cautiously, doubt may arise only when one embarks on an examination of forms of last will dispositions. Namely, it has been said that in the Correction, the three admissible forms of testator's expression of their will correspond closely with the three forms of Justinian's: *testamentum tripertitum*, *apud acta conditum, principi oblatum.* Let us then discuss them individually. Justinian refers (I. 2, 10, 3) to the a written private testament of his period as *testamentum tripertitum*, since in his opinion it constitutes an amalgamation of three elements: civil law, which required *uno contextu* the presence of witnesses summoned to the drafting of the will, imperial constitutions which prescribed that the testament be signed by the testator and the witnesses, and praetorian law, which stipulated that seals of the signatories need to be affixed to the testament and the number of necessary witnesses established for the document to be valid, of whom there should have been seven. A written testament in the Correction also

19 See P. Dąbkowski, op.cit., vol. II, p. 67ff., S. Kutrzeba, *Relazioni fra l'Italia e la Polonia*, Rome 1936, p. 71; from earlier authors, see P.J.W. Bandtkie, *Prawo prywatne polskie*, 1851, p. 335.

requires the signatures and seals of the testator and the witnesses, but the number of the latter is reduced to three (Title II, 33). If, therefore, one of the *partes* of that three-partite testament of Justinian's is lacking in the Correction, then both testaments can hardly be deemed identical, and the testament in the Correction be qualified as a *tripertitum.* Other than that, the remaining components of that form of testament are perfectly obvious. Namely, it is natural that the testator and the witnesses have to sign the drafted will and, in accordance with the custom at the time, affix their seals. A model for such a straightforward form does not have to be sought elsewhere.

The second form of testament defined in the Correction is a declaration of will made before a court followed by its being entered into court records (*si etiam in iure id testator facere maluerit, integrum illi erit, ad acta quaecunque authentica ultimam voluntatem suam disertis verbis profiteri atque in acta referendam curare*, Title II, 3). It cannot be denied that it is thoroughly analogous to the Roman testament *apud acta conditum* (C. 6, 23, 18; 19, 1, cf. D. 28, 4, 4). Still, having noted the analogy, it has to be remembered that the Middle Ages in Poland saw the widespread practice of recording various uni- and bilateral legal acts—testaments in particular—in court books. The custom existed both in land law and, to an even greater degree perhaps, in municipal law,[20] while the Prussian nobility had for over a century (since 1476) been subject to the municipal law of Kulm. It is custom rather than Roman law which should be seen as the source of that form of testament.

Finally, there is the third form, whereby the testator deposits their sealed testament—signed and with their seal affixed—with the court for safekeeping (*testamentum sua solius manu subscriptum et sigillo obsignatum, clausum ad eadem acta offerre; cuius oblationis et traditionis actus, actis Officii inscribi debet*, Title II, 3). Undoubtedly its equivalent

20 See S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. I, Lwów–Warszawa–Kraków 1925, p. 53 ff., 140; for municipal books vol. II, p. 252 ff., regarding the testament specifically see P. Dąbkowski, op.cit., vol. II, pp. 82, 407.

is the Roman testament *principi oblatum* (C. 6, 23, pr. 1). Whether the former is genetically linked to the latter may be difficult to prove in my opinion, but to argue successfully to the contrary would be just as hard.

IV

Roman law is also the alleged source of guardianship over women for which the Correction provides. At the same time, it is unclear whether the assertion was advanced with respect to the institution as such or its specific formulation. As for the first possibility, one should immediately counter it with a rebuttal, since lack of legal autonomy of women, that is their being hindered in legal life by virtue of subordination to a more or less extensive power of men is a phenomenon which emerged in numerous legal systems at some stage of development. Already Gaius, discussing Roman *tutela mulierum*, which he contrasted with the relationships among the peregrini, could not deny that after all *plerumque quasi in tutela sunt, ut ecce lex Bithynorum*[21], *si quid mulier contrahat, maritum auctorem esse iubet aut filium eius puberem* (Gai. I, 93). In Attic law, statutory tutelage over a woman is exercised by her *κύριος*: father, husband, alternatively brother or paternal grandfather, and it is widely assumed that a similar arrangement functioned in other legal systems of ancient Greece.[22] *Κύριος* as a woman's guardian also exists in the law of Greco-Roman Egypt, as may be reconstructed from Greek papyri.[23] The fact of women being subject to custody can be determined in the law of the Sixth Dynasty (2625–2475 BCE). [24] The Old Germanic *mundium* over women may be mentioned as well, as an institution that is well known to historians of law.[25] Those several examples, cited com-

21 A country in north-western Asia Minor.

22 P. Lipsius, *Das attische Recht und Rechtsverfahren*, Leipzig 1905–1915, p. 482 ff., 520, 534 ff.; Taubenschlag, *Vormundschaftsrechtliche Studien*, 1915, p. 69 ff.

23 Taubenschlag, *The Law of Greco — Roman Egypt*, vol. l, p. 128ff. and *Archives du Droit Oriental*, vol. II, p. 293 ff.

24 Pirenne, *Histoire des institutions et du droit privé de l'ancienne Egypte*, vol. III, pp. 351–353.

25 R. Hübner, *Grundzüge des deutschen Privatrechts*, Leipzig 1930, p. 71 ff.

pletely at random, suffice to warrant the conclusion that just as tutelage over women developed without the influence of Roman law in Old Egyptian, Attic, Bithynian or Germanic law, Polish law, including the Correction, did not need to rely on a foreign model to subject women to certain restrictions in legal life.

It is therefore very likely that the purported influence of Roman law was identified in the specific framework of the tutelage of women established in the Correction. Still, the view is also seriously dubious. In order to substantiate it, one should recall—in a general outline—the pertinent norms of Roman law.[26] When did a woman as such need a guardian in Rome? Only upon the end of puberty and attainment of autonomous legal status, *sui iuris.* She was not *sui iuris* as long as she stood under the power (*potestas*) of the father or grandfather or when in a *cum manu* marriage—while it remained valid—she became subject to her husband's control (*manus*) in one of the ways which resulted in such a status. Thus, in no case could the power of the husband and that of a tutor (*tutela*) be simultaneously in effect with respect to one woman. Also, whilst remaining under continual tutelage for as long as it endured, a woman *sui iuris* could by no means be subject to curatorship (*cura*), even though there may have been reasons to establish such custody, such as being a spendthrift or suffering from a mental illness. Hence the power of the husband and the power of the guardian, the tutelage of the tutor and the custody of the curator were mutually exclusive terms where women were concerned. One could be appointed for guardianship based on one of the consecutively considered titles: designation in the testament of the father or husband, agnatic kinship and, from a certain period onwards, appointment by authority. In the classical period, the guardian of a woman did not manage her property; the woman administered her estate on her own, and only some of the actions required the sanction (*auctoritas*) of the tutor (Gai. I, 190, Ulp. XI, 25, 27). Already at an early stage, the guardianship of agnates proved the sole viable option,

26 Cf. Kozubski, *Opieka nad kobietami w prawie rzymskim*, Kraków 1922.

as according to the account of Gaius (I, 192) they were the only ones who could not be compelled to grant *auctoritatis*. However, that type of tutelage is also the first to disappear. With respect to free-born women it was abolished as early as mid-first century by *lex Claudia*, which meant that henceforth they would only have guardians appointed under a testament or decree of the authorities. The significance of the latter modes of guardianship gradually diminished as well, disappearing ultimately in the Theodosian code[27], not to mention Justinian's codifications, where the excerpts from legal writings collected in the Digests were meticulously purged of any mentions of them.

How does the above compare with the norms contained in the Correction (Title III, 20) which are alleged to have had Roman provenance? It sets forth that women are always subject to another's power, but that power combines *tutela* and *cura (mulieres in aliena tutela et cura semper sint)*. The statute further draws a distinction between unmarried women, referred to as *filiae familias*, and married ones. That peculiarly called authority over unmarried women is to be exercised by fathers, and upon their death by adult brothers; where there are no such brothers, the power should be assumed by agnates, and in their absence by the nearest cognates (*et filiae familias quidem in parentum aut fratrum, si adulti sint, tutorumve agnatorum, vel iis non existentibus cognatorum*). However, the statute does not specify what the *tutela* and *cura* of an unmarried woman consists in, nor does it determine the scope of rights of the guardian. Only through *argumento a contrario* applied to the sentence discussed below can one infer that unmarried women were completely deprived of the right to dispose of their property, as the latter was entrusted solely to the person who held the custody of the woman. The position of married women is regulated even more perfunctorily. It is with only one single sentence that the statute grants women the capacity to dispose of their property with the consent of the husband and

27 With the probable exception of Constantine's constitution C. Th. 3, 17, 2, discussed by Taubenschlag, *Vorm. Studien*, p. 84.

with the guardian in attendance (*uxores cum maritorum consensu, tutore adhibito, liberam desponendi habeant facultatem*). As for the question which immediately arises here, namely of whether the guardianship of married women involved the same persons who held it with respect to *filiae familias*—within the meaning of the Correction—the statute does not provide an answer. It merely follows that a married woman who personally disposes of her property must have two supervisors while doing so: the husband and the guardian.

There is no need for a detailed recapitulation of that comparison between Roman norms and the norms in the Correction to warrant the conclusion that the latter differ utterly from the former. Although provisions of the Correction do contain certain Roman notions and terms, they are curiously mixed and peculiarly employed. *Filia familias* is not a daughter remaining under her father's authority, but an unmarried woman; the power of the father over his daughter is not *potestas* but *tutela et cura*; the same terms, mutually exclusive in Roman law, serve to define the rights of the guardian; relatives appointed to guardianship also include kin in the female line, the cognates; the validity of decisions relating to the property of a married woman require the consent of the husband and the participation of the guardian. Finally, the Correction refers to only one of the three types of guardianship distinguished by the mode of appointment, which was also the first to disappear in Rome. Thus one can hardly speak of the provisions of Roman law on guardianship of women having been adopted in the Correction.

At this point, another observation suggests itself. Today, direct information concerning the guardianship of women in Rome is derived chiefly from Gaius' Institutes and the so-called *Regulae* of Ulpian's. As is known, the Veronese manuscript of the Institutes was discovered in 1816. Previously, one had only known the Visigothic synopsis of the Institutes, where guardianship of women is not mentioned at all. Admittedly, Ulpian's *Regulae* were published in 1549 by du Tillet from a manuscript which went missing and was later rediscovered only by

Savigny.[28] It was used by Cuajcius, Heidenstein's contemporary (1522–1590), who took advantage of it as a source in his disquisition concerning the guardianship of women.[29] On the other hand, Cujacius's frequent adversary—Donellus (1527–1591), who paid less attention to the historical development of Roman law to focus on its systematics instead, never mentioned that guardianship in his writings. And Heidenstein was not Cujacius, after all. With all due respect for his studies in Padua, one cannot overlook the fact that the knowledge of private Roman law among average students of Bologna or Padua was based primarily on Justinian's collections which provided a basis for the scholarly work of glossators and, often indirectly through glosses, commentators as well. Also, we must not forget that the time when the Correction was drafted was the heyday of humanism, when the speeches and writings of Cicero and Livy's History were part of the usual reading of an educated person. It has to be admitted that even before the discovery of Gaius and the possibility of perusing Ulpian's *Regulae* one had been able to read—in general terms—about the legal dependence of women and their being subject to guardianship both in Cicero (pro Murena 27: *mulieris omnis propter infirmitatem consilii maiores in tutoris potestate esse voluerunt*),[30] and in Livy (in Cato's speech of 195 in defence of *legis Oppiae: maiores nostri nullam ne privatavi quidem rem agere feminas sine tutore auctore voluerunt, in manu esse parentium, fratrum, vivorum*, 34, 2).[31] Without doubt, it was Cicero that the contemporaries

28 P.F. Girard, F. Senn, *Textes de droit romain*, 1937, p. 401 f.

29 See e.g. in the Neapolitan edition from 1722 *Observationum et emendationum*, liber VII, cap. XI (vol. III, col. 172/3), liber XXII, cap. XX (vol. III, col. 648); *In libros 9 responsorum Julii Pauli*, vol. VI, col. 555/6.

30 The tutelage of women, *auctoritas tutoris* in particular, is mentioned by Cicero in several other speeches; *pro Caecina* 25, 72: *quod mulier sine tutore auctore promiserit, teneri* (ironically, referring to the legally impossible state of fact); *pro Fiacco* 34, 84: *nihil enim potest de tutela légitima nisi omnium tutorum auctoritate deminui*; 35, 86: *quaecunque sine hoc auctore est dicta dos, nulla est*; as well as in one of the letters to Atticus: *id mirabamur te ignorare de tutela légitima in qua dicitur esse puella, nihil usu capi posse*, *Ad Att*. 1, 5, 6.

31 Livy's story about Hispala Fecenia is in fact an indirect reference to the tutelage of women; the Senate granted her the right to choose her guardian (*tutoris optio*) in reward for her help in exposing the Bacchanalian Conspiracy.

relied on when developing their Latin style; it was from him that they learned eloquence and gained knowledge of the systemic instruments of Rome, but in the work of codification, when one sought to formulate legal norms whilst availing themselves of the Roman model, they would certainly not have looked for it in the monumental pieces of antique rhetoric or history, but in the body of Roman law which was expressed in Justinian's codification. The latter, however, says nothing about the guardianship of women.

V

With respect to the tutelage of minors, the influence of Roman law was detected in a whole range of elements. These include grounds for appointment to guardianship, the need of permission for the alienation of property of the ward, the distinction between *tutores gerentes* and *honorarii, accusatio suspecti tutoris,* statutory lien on the estate of the guardian in respect of claims of the former ward arising from the exercise of guardianship, and finally the liability of the guardian for *dolus* and *culpa lata.* On top of those, one should also add the inventory made by the guardian, which for incomprehensible reasons is not listed in Prof. Taubenschlag's treatise, although it may have offered a major, albeit only ostensible argument in support of the reception of Roman law into the Correction.

Before the respective provisions of the Correction are compared with the pertinent norms of Roman guardianship law, it must be stated that here the author demonstrates an erudition in Roman law which surpasses any other section in the Correction. It is here that we find the aforecited (p. 1), purely Roman description of the scope of the ward's own capacity for action (title III,18), as well as the rationale for the guardian's liability for *culpa,* which arises from the fact that it constitutes *dolo proxima.* Besides, the title *de tutelis* (III) is replete with Roman designations and terms in any case. However, given the results of

our analysis so far, it would be legitimate to ask whether those expressions and terminology are not merely a facade, but indeed harbour and must harbour equally Roman substance.

The question arises immediately with the first issue: the appointment of the guardian. Just as Roman law had done, the Correction discerns a hierarchy of three grounds for appointment and describes them using Roman terms: *tutores testamentarii, legitimi* and *dati* (Title III, 6). But even the first does not quite correspond to the actual state of affairs. While in Rome testamentary guardianship was indeed founded on the will of the potestate expressed in the testament, the Correction permits *omnibus liberos impuberes habentibus* to appoint guardians for minors, but they may do so either by means of testament or a request registered with a court (Title III, 1).[32] Thus, despite the Roman name used in the Correction, the second type of tutelage will not be a testamentary one, although it will be based on the will of the potestate. The second category of guardians, appointed where there are no tutors appointed by the potestate, are the so-called statutory guardians or consanguineous guardians, as they are referred to in Polish law.[33] In Rome, agnates used to become such guardians for a number of centuries, and it was only Justinian who, having based statutory succession exclusively on cognation, extended his reform to include guardianship as well, and enacted appointment of cognatic relatives (Nov. 118 c.5). In Rome, therefore, cognates historically succeeded agnates in terms of eligibility for appointment. The Correction approaches the matter differently, with a distinct sequence of appointment where cognates follow agnates, as *tutores legitimi* are in the first place *proximi agnati, qui nimirum masculino sexu wardlis coniuncti sunt*, and in the absence of those *proximi cognati, qui per feminam wardlos cognatione attingunt* (Title III, 2). Again—a Roman name, but not strictly Roman substance. If a minor had no relatives

32 The matter is therefore regulated in the same way as in Polish Crown law, see P. Dąbkowski, op.cit., vol. I, p. 490.

33 P. Dąbkowski, op.cit., vol. I, p. 493.

in the male and female line, or if such relatives refused guardianship for statutory reasons (*si legitimis causis a tutela se excusent*), the land court would, at anyone's solicitation (*a quocunque eo nomine appellatum*), appoint two or three appropriate guardians (*idoneos et sufficienter ibidem possessionatos*, Title III, 4). Concerning the successive bodies of authority which were tasked with appointing guardians in Roman law, see I. 1, 20.

Drafting the inventory of the ward's estate as a basis for accounting for the custody after it ceased is a fundamental duty of the guardian, in Roman law and in the Correction alike, and the concurrence of pertinent norms in both legal systems is exceptionally substantial. According to the Correction, it is the first action of each guardian (*sive testamentarii fuerint, sive legitimi, sive dati*), which they should undertake within a month from assuming guardianship (*tutelae suae administrationem a confectione inventarii ordiantur*, Title III, 6). In Justinian's law, prior to making the inventory the guardian may only engage in actions of the most urgent concern (*nihil itaque gerere ante inventarium factum eum oportet, nisi id quod dilationem nec modicam exspectare possit* D. 27, 7, 7 pr. i. f. and C. 5, 51, 13). Pursuant to the imperial rescript, the inventory must be made with a representative of the authority in attendance (*sub praesentia publicarum personarum*, C. 5, 37, 24 pr.), whereas the Correction sets forth that at the request of guardians, competent land judge will dispatch two lay magistrates to the estate of the ward, who, having made the inventory, will sign it and affix their seals (*Iudex Terrestris loci illius a tutoribus requisitus, duos Scabinos in bona wardlorum delegabit, qui confectum inventarium manibus suis subscribant, et sigillis muniant*). In the Correction, failure to discharge the obligation on the part of the guardian will entail dire consequences, because when their custody expires, they may be liable to recompense loss to the amount which will be determined, within the limits decreed by the court, by the oath of former wards or their inheritors (*quod si a tutoribus prometer mis sum, fuerit, quanti a wardlis aut haeredibus eo-*

rum, moderatione iudicis praecedente, in litem iurabitur, tantum damni nomine praestare illis tenebuntur). The rule in Roman law is no different: the guardian who deliberately (*dolo*) fails to make the inventory: *in ea conditione est, ut teneatur in id quod wardli interest, quod ex iureiurando in litem aestimabitur* (D. cit.). On the judge's determination of the maximum amount to which one may swear, see D. 12, 3, 5, 1.

Furthermore, the Correction echoes Roman law in its restriction of the guardian's powers to dispose of the ward's estate. Nonetheless, they agree only as to the principle of limitation, whose core idea—to maintain the most important components of the estate intact for the benefit of the ward—is so natural that it is also found in Kulm law (c. 166) and in Polish Crown law.[34] Also, there are substantial differences between the systems as far as the scope of restrictions is concerned. In Roman law, the first limitation was introduced by the resolution of the Senate of 195, passed on the initiative of Septimius Severus (*Oratio Severi* D. 27, 9, 1 pr. — § 2). It was concerned only with rural and suburban land (*praedia rustica et suburbana*) and permitted the guardian to alienate it only in two cases: 1. necessarily, when sale was directed in a testament or codicil; 2. when approved by competent authority (praetor or province governor), if sale or hypothecation proved necessary to satisfy the debts which could not be paid from other portions of the ward's estate. Constantine went much farther in the constitution of 326 (C. 5, 37, 22), where the prohibition was extended to include all major component of the ward's estate, such as urban property and more valuable chattels (*aurum, argentum, gemmas, vestes, ceteraque mobilia praetiosa, urbana etiam mancipia*), making an exception for used pieces of attire and superfluous animals (§§ 6, 7). Disposal which violated this prohibition, i.e. occurred without the consent of authority, was invalid (*venditio tutoris nulla sit sine interpositione decreti*, § 6). The Correction approaches the issue differently. The limitation imposed on the guardians in Section 9, Title III, pertains only to immovable property, while the exception as-

34 See P. Dąbkowski, op.cit., vol. I, p. 508 f.

sociated with the request of the father, provided for in *Oratio Severi*, is not taken into account at all. Alienation or a pledge always require authorization from the land court, which is granted provided that admissible grounds are stated (*immobilia bona non nisi ex sequentibus causis, et decreto Iudicii Terrestris causa aliqua earum in ludido Terrestri prius probata*). These reasons, exhaustively enumerated, include: 1) payment of dowry (*dotis solvendae*); 2) upkeep of the ward, if there are no other means to cover it (*alimentorum wardlis, si aliter ea expediri non possunt, constituendorum*); 3) avoidance of losses which may arise from failure to satisfy a lien or pay usurious interest rates (*damna ex obligationibus aliquibus, aut usuris, si ea non explicarentur, provenientia*); and 4) payment of liquid debts (*liquidorum debitorum solutio*). If alienation took place without such reasons in evidence and without a court decree, it would be invalid as in Roman law, and the ward would not lose their property (*dominium non transferetur, recteque postea a wardlis vindicari poterunt*).

If one guardian seems to have been a rule in Roman law, though undoubtedly there may have been several as well, the Correction gives preference to multiple guardians, both statutory and those appointed by court. Thus, if there is a greater number of relatives in one degree who solicit guardianship, the court *tres ex ipsis, si tot sint, deligat* (Title II, 3), and where there are no relatives, the court is to appoint the guardian *tutores duos aut tres dare tenebitur* (Title II, 4). Naturally, the father was also entitled to appoint more numerous guardians. Nevertheless, in such cases the paucity of the ward's estate or the purposefulness of its administration may have required that it be placed in the hands of one, or possibly a couple of guardians. The others, whom the Correction does not name as *tutores honorarii* as it had been observed in such circumstances in Rome (see e.g. D. 26, 7, 3, 2; 23, 2, 62), will be obliged to supervise that guardians adequately discharge their custodial duties since, as in Roman law, those inactive guardians will be jointly responsible for the care over a ward or its inheritors (*wardlis tarnen hae-*

redibusve eorum omnes coniunctim . . . in solidum, Title III, 10). Also, it does not follow from the text of the statute whether the liability should only be a subsidiary one, as under D. 26, 7, 3, 2 (*excussis prius facultatibus eius qui gesserit conveniri oportere*).[35] Meanwhile, reimbursement of losses incurred as a result of poor administration on the part of the guardian or guardians may be sought by the ward or their inheritors after guardianship expires, through an action analogous to the Roman *actio tutelae*, with a period of limitation of three years and three months (Title III, 19). However, that is as far as the analogy goes. In spite of what has been claimed, the extent of liability of the guardian differs between the Correction and Justinian's law. According to the Correction, the guardian is liable for malevolent intent and gross negligence (*nihil praeter dolum et culpam latam, quae dolo próxima est, tutor praestare debet*, Title III, 17), while Justinian's law obliges them to exercise the same due diligence in the affairs of their ward as they would in their own (so-called *culpa levis in concreto* D. 27, 3, 1 pr). The analogy returns in the provisions related to securing claims of the ward against the guardian in respect of the tutelage. As in Roman law following Constantine's constitution of 314 (C. 5, 37, 20), the pupil is entitled in the Correction to a general pledge on the entire estate of the former guardian (*et ipsi et bona eorum in solidum obligata erunt*, Title III, 10).[36]

This is how matters will stand once the tutelage ceases, but still while it lasts it may turn out that the guardian is not up to the task; in such a case they may be removed from the guardianship (*decreto ludicii a tutela removeatur*, Title III, 11). This *remotio tutoris* does indeed resemble the analogous Roman institution that usually ensued the so-called *accusatio suspecti tutoris*.[37] The latter originates from the Twelve Tables, but it seems to have been limited at the time to testamentary tu-

35 The responsibility of guardians who are not involved in administration is also a subsidiary one in the Kulm law, cap. 172.

36 A lien of that kind had already existed in the Kulm law, cap. 171.

37 Regarding this procedure see R. Taubenschlag, *Vormundschaftsrechtliche Studien*, Leipzig 1915, p. 30 ff.

tors and guardians appointed by the authority, while under Justinian's law it could be applied to all guardians (D. 26, 10, 15 = I. 1, 26, 2). A guardian could be denounced before a praetor or province governor (I, 1, 26, 1) or—in the Correction—before a land court by anyone, for as Ulpian states in D. h. t. 1, 6, *sciendum est quasi publicam esse hanc actionem, hoc est omnibus patere*. Similarly, the Correction sanctioned summoning (*vocare*) of the guardian by anyone, close persons and strangers alike, if they were concerned about the care over the ward (*vel propinquo, vel etiam alieno, qui cura pupilli tangatur,* Title III, 11). The grounds for removal also appear to be similar, but there is a significant and, from the standpoint of our deliberations, characteristic difference. In Roman law, *tutor suspectus* is a general notion[38] (*genus*) which may encompass various states of fact (*species*). Therefore, considering the casuistic nature of Roman jurisprudence, jurists elaborate on the causes which could justify finding a guardian *suspectus* and lead to their removal from guardianship. Consequently, a suspected guardian is wasteful with the ward's estate, administers it negligently or to the detriment of the ward (*si forte grassatus in tutela est aut sordide agit vel perniciose pupillo,* D. 26, 10, 3, 5); furthermore, they have misappropriated something belonging to the estate (*aliquid intercepit ex rebus pupilaribus,* ib.); failed to provide means for the upkeep of the ward (*qui ad alimenta praestanda copiam sui non faciat*, D. h. t. 3, 14); or have disposed of things whose disposal is prohibited without a decree of a competent authority (*qui res vetitas sine decreto distraxerit,* D. h. t. 3, 13) etc. Among those examples, many more of which could be cited from the Digests, the first one is the most important for us. It suggests that to the Romans, careless administration of the ward's estate was only one of the possible manifestations of the suspected character of the guardian. Things are altogether different in the Correction, as suspected character of the guardian and their poor administration are deemed equal notions there. The statute specifies two causes which sanction calling the guardian to account: the suspected character of the guardian and their deficient manage-

38 This follows both from Gai. I, 182 and above all from I. 1, 26, pr. § 1.

ment (*si tutor tutoresve suspecti sint vel bona pupilli male administrent*, Title III, 11). Moreover, this is not random, imprecise wording which occurs only once, because again the Correction states two causes which may justify the decree to remove the guardian: if the guardian is suspected in the light of the revenue account or certain other circumstantial evidence, or if it turns out that they have administered the estate poorly (*si ex rationibus proventuum vel certis aliis indiciis suspectus juerit, aut tutelam male administrare reperietur*). One may well ask whether those are indeed two causes for removal. After all, if the first cause is reflected in the revenue account, this means that the books demonstrate poor administration. The first cause is identical with the second, while the whole notion of *suspecti tutoris* is left hanging in the air. What does this prove? It proves that the author of the Correction remembered that under Roman law it had been possible to remove the guardian as *suspectus*, but failed to appreciate the crucial, generic significance of the notion and did not realize that he merely introduced the Roman term into the statute and used it to denote content he expressed in other words.

This is how the Correction stands with respect to Roman law in the domain of guardianship over minors, the part of the statute which echoes Roman law the most. In the above analysis of particular institutions, I have deliberately cited source texts quite extensively, so that an impartial reader may determine for themselves where the truth lies. Still, in that detailed disquisition the essential threads of the issue might have been lost. Therefore, though not wanting to incur the accusation of repeating myself needlessly, I may perhaps be allowed to go over the similarities and differences between the examined systems once again, to conclude that here as well as in other sections of the Correction certain Roman notions and terms do occur, but either they do not appear in the pure Roman form, or do not bear significantly on the institutions to which they were applied. Thus—successively recapitulating particular issues—the will of the father may appoint a guardian for his children, but it may be conveyed not only in a testament, as in Rome,

but also in a request registered with a court. Statutorily, relatives are appointed to tutelage, but unlike in Justinian's Novels, a distinction is made between kin in the male and female line, whereby the former takes precedence. Guardians are restricted in their disposal of the estate of their ward, but the objective scope of the limitations and the reasons for which alienation or encumbrance are admissible differ from what is set forth in Roman law. The guardian may be removed from their position either because they administer the estate of their ward poorly, or because they are *suspectus*, whereas in Roman law the notion of *tutoris suspecti* is a *genus* which may manifest in various actions of the guardian, including negligent administration. Guardians who are not involved in the management are equally liable to the ward or their inheritors in equal measure as the administrators but, in contrast to Roman law, their responsibility is not a subsidiary one. The two systems adopt a different me sure of diligence whose inadequate exercise will incur liability on the part of the guardian. It is only with respect to the obligation and manner of making the inventory and consequences of failure to discharge it, the essential possibility of removing the guardian while the guardianship lasts and the securing of claims to which the ward is entitled in respect of the guardianship through general pledge on the estate of the guardian that Roman law and the Correction show significant correspondences. But here, perhaps with the exception of the latter point, actual reception cannot be easily argued, if reception is taken to mean the adoption of an institution from a foreign legal system with its foundations and specific form. Because even obliging the guardian to inventory the estate whose administration they assume with a view to handing it over later to the estate's proper owner seems so natural that the introduction of the obligation into the statute did not require drawing on the Roman model.[39] Relating to this subject, *iusiurandum in litem* is undoubtedly a purely Roman term, but it should be remembered that

39 The obligation exists in the Kulm law (cap. 167) and in Crown land law, see P. Dąbkowski, op.cit., vol. I, p. 502 f.

the oath of a party was a standard mode of demonstrating the extent of loss in a Crown lawsuit as well[40], and it is thence that it could have been adopted into the Correction. The removal of a guardian while they still hold guardianship is not much different. After all, the guardianship can sometimes last very long, as according to the Correction one comes of age at 18 (Title III, 13). The guardian may prove to be an inept or a dishonest administrator. It is true that after guardianship ceases they will be held accountable for all their misdeeds to the ward or their inheritors, but would it not be more reasonable to have them removed from administration immediately when their ineptness or dishonesty have been determined? Did one really need to look to Roman law for such a straightforward concept? *Post hoc* does not always have to be *propter hoc*. Obviously, this observation does not preclude that certain details in what is most likely a naturally developed institution[41] may have been based on the Roman model (e.g. the catalogue of persons entitled to report their suspicion and the resulting "popular" aspect of the procedure).

VI

In the area of substantive law, it has been claimed that Roman law has influenced the institution of usucaption, in particular the inadmissibility of usucaption on property acquired *vi et clam*. I admit that I find the assertion made with regard to the latter incomprehensible. The grounds for acquisitive prescription in Justinian's law are conveyed in the following, well-known medieval hexameter: *res habilis, titulus, fides, possessio, tempus*. In the Correction, prescriptive acquisition of ownership to immovables (because this is not the only element at stake here) will ensue if someone *per triginta annos non vi, non clam, non alieno sed suo nomine, et titulo bonaque fide, pacifice sine ulla uiusquam interpellatione*

40 See O.M. Balzer, op.cit., p. 157 f.

41 It should be recalled yet again that the removal of the guardian *qui malo more gessit* is provided for in the Kulm law (cap. 162) and in Crown law, see P. Dąbkowski, op.cit., vol. I, p. 520 ff.

possederit (Title IV). Let us leave aside the stipulation of the Correction that the usucaptor must possess the thing in their own name, otherwise they would be no proprietor, as well as the condition that the possession cannot be interrupted (*interpellatio*), because obviously if a hiatus in usucaption takes place, then according to general rules the entire past period of possession is void, meaning that only new usucaption can begin where suitable circumstance occur. If, however, we omit those two elements and compare the catalogue of conditions in the hexameter and the Correction, then we will be compelled to state that the statute sets forth too many or too few. There are too many in the sense that if the proprietor is to have a title, i.e. such a legal event which usually, were it not for the absence of rights of the predecessor, would lead them to acquisition of ownership, then obviously he could not have acquired the things either *vi* or *clam*. Conversely, there are too few in the sense that the catalogue of the Correction does not mention the condition listed in the first place in the hexameter, in other words it does not require that the thing be suitable for usucaption, a *res habilis*. However, perhaps the omission is only apparent, a conjecture one can arrive at by way of the following reasoning. *Res habilis* in Roman law has not been stolen or taken by violence, because if it is encumbered with such a *vitum*, then not only the thief or the violent individual but also no one else—up to a certain moment (so-called *reversio ad dominum*)—will be able to acquire its ownership by prescription (I. 2, 6, 2, ff.). Theft after all is perpetrated clandestinely (*clam*) or using violence (*vi*). The same applies to unlawful takeover of somebody else's land. Therefore, by introducing the requirement that the usucapted thing be acquired *non vi non clam*, the author of the Correction may have wanted to exclude things acquired by violence or clandestinely from usucaption. However, he did not realize that by formulating the condition using words cited above he changed the objective qualification of the usucapted property into the subjective qualification of the owner. He would have done better to have adhered to the Kulm law he sought to correct, which in the

edition of 1580 concurs with Roman law by laying down the principle that a thing *furto vel rapina oblata… furto vel rapinae ma neat obnoxia, quantumvis diu possederit* (cap. 109) and such a thing, though it may have been acquired in good faith, cannot be subject to usucaption.

If we approach the Correction by making allowances based on the above reasoning, then it has to be admitted that conditions of usucaption in that statute are indeed copied from Roman law. Such an assortment cannot be found in the Kulm compilation of 1580, which for usucaption to take place requires only *bona fide sine contradictione iudiciali* (cap. 108) nor in Polish Crown law which, setting out from the so-called prescriptive loss of right, did not in consequence require either title or good faith for the acquisition of ownership.[42]

However, the influence of Roman law on the conditions of usucaption we have determined here does not include the period of time it requires to ensue. The periods of ordinary prescription in the Correction are different than in Justinian's law. Unlike the latter, which requires 3 years for movable property, 10 or 20 (depending on whether usucaption occurs *inter praesentes* or *absentes*) for immovables (C. 7, 31, un.), the Correction posits 3 years and 3 days for chattels, and 30 years for realty, as in Justinian's extraordinary usucaption with good faith but without a title (C. 7, 39. 8, 1).

We have thus reached the end of our deliberations. Their findings may be summarized in several sentences. The Correction cannot demonstrate the influence of Roman law on provisions relating to estate inventory and passive locus standi in an action for succession, because the Correction is not concerned with either of those institutions. There is no trace of influence of Roman law on succession *ab intestato*, which in the Correction is founded on principles which are contradictory to Justinian's legislation, or on the guardianship of women, which despite using Roman terms in respective provisions is utterly at odds with its Roman counterpart. No indication of influence can be found in the ex-

42 P. Dąbkowski, op.cit., vol. I, p. 298 ff.

tent of liability of the guardian, which the Correction determines differently than Justinian's law. It is unlikely that Roman law had influenced restrictions of the powers of the guardian by prohibiting alienation of certain components of the ward's estate, in view of the natural basis of the institution and the scope of limitations adopted in the Correction, which differs from the Roman regulations. However, the influence of that law is probable in the case of the origins of testament and the set of conditions posited for usucaption of immovables. Also, some influence may have possibly been exerted on the procedural details relating to the guardian's inventory of estate and removal from guardianship, although both institutions are likely to have been based on domestic solutions. Perhaps the influence is also reflected in the provisions on securing claims of the ward against the guardian by means of general pledge on the estate of the latter, and the form of the testament deposited with the court for safekeeping. With the exception of the origin of testament and the conditions for usucaption, these are all matters of secondary importance and even if one conclusively proved that the provisions in question do draw on Roman law, its broader reception into the Correction could hardly be acknowledged as true. It might have been suggested by the Roman formulations of certain legal rules which the author had included in the statute and the Roman terms he had employed. But the terms—as I have attempted to demonstrate—were often not used in their erstwhile Roman sense (*filia familias*, *tutela et cura*), and at times the author failed to comprehend their actual meaning (*tutor suspectus*). They only prove that the creator of the statute had become acquainted with Roman law and remembered some of it, but they do not warrant the conclusion that the author sought to introduce Roman institutions into the statute he had conceived. Instead of reception, it would probably be more accurate to speak of reminiscences of Roman law in the Correction. The use of Roman terminology was in any case also due to the fact that the author drafted the Correction in Latin, therefore he was compelled to refer to Roman legal nomenclature order to

describe domestic institutions. As for the substance of the provisions, that external linguistic form cannot be any indication.

While I define the relationships between Roman law and the Correction in the above manner I still have to admit that Royal Prussia—except for the areas where the Second and Third Statutes of Lithuania were in force[43]—was the part of the Polish state whose land law offered the most discernible threads linking that legal system, if only in terminology, with Justinian's great achievement. In the land law of the Crown, the connections with Roman law were always fairly loose and expired with the Statute of Warka of 1423. It is true that when in the early sixteenth century a need for codification emerged to address the uncertainty and particularity of domestic law, the inclinations to take the principles of Roman law into account were by no means meagre. Some went as far as Śliwnicki who, having been called upon to codify municipal law wanted to Romanize it completely (around 1524), and to endow the transformed municipal law with an ancillary function to land law.[44] However, his draft did not become a statute. Also, no later codification relied on the work by Przyłuski (1553), who did not have so far-reaching designs as Śliwnicki, but wished that Roman law may at least serve to explain and systematize land law.[45] Little or no heed was given to Roysius, who counselled supplementing the rules of domestic law with the more refined Roman norms.[46] The appeals were in vain due to essential reluctance towards any foreign law on the part of the nobility, whose champion in that matter was such an emblematic representative of that estate as Orzechowski.[47] Besides, attempts at the codification of sub-

43 Cf. R. Taubenschlag, *Wpływy rzymsko-bizantyńskie w II Statucie litewskim*, Lwów 1953; and *La Storia della recezione*…, op.cit., p. 239 f.

44 P. Kutrzeba, op.cit., vol. II, s. 266 ff.; P. Estreicher, *Polska kultura prawnicza XVI wieku*, in: *Kultura staropolska*, 1933, p. 57. It may be noted that Śliwnicki made unsuccessful efforts to convince the Prussian council to his draft at the congress held in Grudziądz, in October 1524, see article by J. Dworzaczkowa in this journal, vol. VI, 1 p. 178 ff.

45 P. Kutrzeba, op.cit., vol. I, p. 252 ff.; P. Estreicher, op.cit., pp. 57–58.

46 P. Dąbkowski, op.cit., vol. I, p. 25.

47 P. Estreicher, op.cit., p. 58 f.

stantive law, both those undertaken in the seventeenth century as well as later, in the eighteenth century, were ineffectual[48] and Crown land law remained legislation based on medieval foundations until the end of the Commonwealth.[49]

In contrast, what Śliwnicki wanted to achieve through legislative process happened of itself, in a sense, in Prussia. As I have previously emphasized, the Correction was a partial codification. It regulated substantive law to a minor extent, and left out obligations completely. In those domains, the nobility had to rely on the applicable Kulm law which, as an offshoot of the Magdeburg law, did avail itself of the norms of Roman law when it had to be supplemented, just as its parent body of laws had done. This did not provoke opposition from the Prussian nobility who, being more involved in trade than in other provinces, understood that for the sake of their own interest it is better to have those relationships governed by international Roman law rather than particular domestic law.

Literature

Balzer O.M., *Przewód sądowy polski*, Lvov 1935.

Bandtkie P.J.W., *Prawo prywatne polskie*, Warszawa 1851.

Bandtkie P.J.W., *Ius Culmense cum appendice privilegiorum et jurium selectorum municipalium et dissertatione historicojuridica exhibitum, cura*, Warszawa 1814.

Dąbkowski P., *Prawo prywatne polskie*, vol. II, Warszawa 1851.

Estreicher P., *Polska kultura prawnicza XVI wieku*, "Kultura staropolska" 1933.

Girard P.F., Senn F., *Textes de droit romain*, 1937.

Hübner R., *Grundzüge des deutschen Privatrechts*, Leipzig 1930.

Kozubski W., *Opieka nad kobietami w prawie rzymskim*, Kraków 1922.

48 P. Kutrzeba, op.cit., vol. I, p. 221 f.

49 P. Estreicher, op.cit., p. 76.

Kutrzeba S., *Historia źródeł dawnego prawa polskiego*, vol. I, Lwów–Warszawa–Kraków 1925.

Kutrzeba S., *Historia źródeł dawnego prawa polskiego*, vol. II, Lwów–Warszawa–Kraków 1926.

Kutrzeba S., *Relazioni fra l'Italia e la Polonia*, Rome 1936.

Lengnich G., *Geschichte der preussischen Lande königlichen Anteils*, Gdańsk 1727.

Lipsius P., *Das attische Recht und Rechtsverfahren*, Leipzig 1905—1915.

Pirenne J., *Histoire des institutions et du droit privé de l'ancienne Egypte*, vol. III, Brussels 1932.

Taubenschlag R., *La Storia della recezione del diritto romano in Polonia fino alla fine del secolo XVI*, in: *L'Europa e il diritto romano*, vol. I, Milan 1953.

Taubenschlag R., *The Law of Greco-Roman Egypt in the Light of the Papyri 332 B. C.-640 A. D*, New York 1944.

Taubenschlag R., *Vormundschaftsrechtliche Studien*, Leipzig 1915.

Taubenschlag R., *Wpływy rzymsko-bizantyńskie w II Statucie litewskim*, Lwów 1953

Władysław Bojarski

Speculum Saxonum and *Ius Municpale* as Sources of Law in the Works of Tucholczyk[1]

1. Tucholczyk published his works as *Joannes Cervus Tucholiensis*. His actual name was Jan Jelonek. In accordance with the widespread Renaissance custom, he assumed a humanistic surname, *Cervus*, as the Latin equivalent of Jelonek (deer). The author came from Tuchola, but no source information on his date of birth and death is available. It has been presumed that he was born in 1500 in Tuchola and died around 1557 in Kraków. He was a graduate of the University of Kraków, and did not study anywhere abroad. He obtained his bachelor's degree (*baccalaureus artium*) in 1523 and then the master's degree (*magister artium*) in 1531, but was never awarded a doctorate. Tucholczyk taught at the Cistercian school in Jędrzejów and was a lecturer at the University of Kraków. For several years, he was the head of the cathedral (capitular) school in Lvov. Although a clergyman, he remained ordained under lesser vows for a long time. During his life, he held a number of ecclesiastical offices: parish priest, canon, provost (*praepositus*), and episcopal official (*oficialis*).

As a scholar, Tucholczyk devoted himself to a variety of subjects, to which the legacy of his writings visibly attests. His published works included three theological volumes, three pieces on Latin grammar and

1 Translated from: W. Bojarski, *Speculum Saxonum i Ius municipale jako źródła prawa w dziełach Tucholczyka*, "Annales Universtitatis Nicoli Copernici. Prawo" 1987, no. 25, pp. 63–84 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

syntax, and two treatises on law. Tucholczyk is the first writer-lawyer who turned his attention to municipal law in Poland, and made the attempt to embark on a compilatory study of that law. Subsequent works in that field would be written by Mikołaj Jaskier, Jan Kirstein Cerasinus, Stanisław Eichler, Bartłomiej Groicki and Paweł Szczerbicz, to name only sixteenth-century authors. Some of those, such as Jan Kirstein or Bartłomiej Groicki, took ample advantage of Tucholczyk's oeuvre, though without mentioning him by name.

The legal treaties of Tucholczyk include *Farrago actionum civilium iuris Maydeburgensis* and *Epitome pontificii ac caesarei iuris*. The first edition of *Farrago* was published in Kraków in 1531. It is the earliest study of municipal law in Poland and, until 1607, it saw nine further editions. The fourth edition from 1540 differs substantially from its predecessors. Already the title betokens that changes had been made, as it reads *Farraginis actionum iuris civilis et provincialis Saxonici, municipalisque Maydeburgensis libri septem*… It is also considerably more extensive, comprising seven books instead of three, as in the first edition of 1531, or four as in the second of 1535. First and foremost, however, it is permeated by Roman law, which the author indicated in the title (*ius civile*). The following five editions are essentially copies of the fourth, and this paper will rely on this version of the work.

Tucholczyk's second volume dedicated to law is *Epitome pontificii ac caesarei iuris.* The work was printed twice (in May and November) 1534, also in Kraków. As the title suggests, Tucholczyk is concerned with canon and Roman law. Moreover, the author also informs the reader that each chapter is supplemented with *appendices* containing provisions of the statutes of Polish and Saxon land law administered in the courts of the Kingdom of Poland. It is a textbook as well as a scholarly work. Tucholczyk refers to *Epitome* in the fourth edition of *Farrago* of 1540. Both books by Tucholczyk were intended to be used by both practitioners and students.

The legal content in these works follows a different arrangement, which is due to the fact that they are concerned with distinct matters, although certain sections from *Epitome* are included with hardly any modification in *Farrago* (1540). This is how the structure of the works is laid out:

The aforesaid edition of *Farrago* (1540) comprises seven books, whose translated titles are as follows: *On law, justice and jurisprudence*, *On the acquisition of ownership*, *On covenants*, *On kinship and familial relations*, *On the judicial process*, *On the meaning of words and things*, *On the rules of Roman and canon law*. *Epitome* consists of ten chapters entitled (in translation) in the following manner: *On carnal kinship*, *On familial affinity*, *On legal kinship*, *On spiritual kinship*, *On marriage*, *On dowry law*, *On donations*, *On testaments*, *On succession*, *On legal rules.*

Tucholczyk's legal works derive from the sources of Roman, canon, Polish, and German law. In this paper, we are interested in the sources of German (Saxon) law, which include *Sachsenspiegel* and *Sächsisches Weichbild*. In the 1540 edition of *Farrago*, Tucholczyk cites the above books of law from Mikołaj Jaskier's editions of *Speculum Saxonum* and *Ius municipale*, but unlike in the previous versions of *Farrago*, chooses not to rely on the so-called *versio Sandomiriensis.*

In total, *Farrago* contains approximately 247 quotations from German law; 123 of those originate from *Speculum Saxonum*, and 20 from its gloss; *Ius municipale* is quoted 80 times, while its gloss is referred to 16 times.

In *Epitome*, Tucholczyk quotes the *Saxon Mirror* and the gloss according to the so-called *versio vulgata*, i.e. the edition on which Mikołaj Jaskier had relied, whereas *The Saxon Weichbild* (*Liber Ottonis iuris Maydeburgensis*) follows the so-called *versio Sandomiriensis.* German law is cited in *Epitome* 87 times, with 33 quotes from *Speculum Saxonum* and 3 from its gloss; *Ius municipale* is quoted 22 times and *Liber Ottonis iuris Maydeburgensis* 19 times. As for other German sources trans-

lated into Latin, Tucholczyk cites distinction 2, chapter XII, part I of the so-called *Magdeburgen Fragen*.[2] This is a ruling (*Urteil*) concerning testamentary freedom.

The above applies to the procedural and substantive law discussed by Tucholczyk. In this paper, I will focus on the elements of German law in the area of substantive law that the author collated and examined in *Farrago* and *Epitome.*

With respect to the division of law, Tucholczyk states that human law is divided into papal and imperial law. Papal law is established by the pope in order to govern spiritual and ecclesiastic affairs, whereas imperial law, laid down by the emperor, serves to regulate earthly and secular matters. Based on *Speculum Saxonum*[3] and *Ius municipal*[4], the author elucidates that God entrusted two persons in the Church with two swords that stand for two-fold—spiritual and secular—powers to rule and defend the Church: the pope holds spiritual authority—the emperor secular. The swords denote the exercise of power or courts. The secular sword is wielded to curb and punish malefactors and the wicked, while the spiritual sword serves to constrain immoral souls. If the pope is unable to improve one by bringing the spiritual sword to bear, the emperor is obligated to come to his aid with the secular sword. Still, they do so reciprocally, helping one another for the sake of defending the Christian church.[5]

Having discussed the compilations of Roman law, Tucholczyk—relying on *Speculum Saxonum*[6]—observes that Saxons and Poles are not subject to Roman law, that they have their own laws as well as the municipal Magdeburg law. However, since the latter is not written down in its entirety, both Saxons and Poles may in particular cases draw upon

2 C. XII, dist. II, part. I *Iuris Maydeburgensis in Alamanico*. V. *Die Magdeburgen Fragen*, ed. J. F. Behrend, Berlin 1865, p. 124 f; Cf. K. Koranyi, *Joannes Cervus Tucholiensis i jego dzieła. Z dziejów praw obcych i literatury prawniczej w Polsce*, Lwów 1930, p. 18.

3 *Speculum Saxonum*, Book I, Article 1. Hereinafter: SS I.

4 *Ius municipale*, Article 7. Hereinafter: IM.

5 *Farrago*, Folio 3, Verso 4. Hereinafter: F.

6 SS II, 36; III, 44.

Roman and canon law. Still relying on that custumal[7], the author asserts that when confronted with absence of written law, judgements should be made in accordance with customary or similar law.[8]

When discussing the causes of loss of privileges[9], Tucholczyk notes that privileges may be lost for numerous other reasons, and advises one to refer to the gloss to *Speculum Saxonum*.[10]

In his account of personal law, Tucholczyk refers to Saxon law only to a minor degree. Addressing the question of maturity (*pubertas*) and majority (*perfecta discretio*) in *Farrago*[11], the author draws on *Ius municipal*[12], concluding that according to Saxon law and municipal Magdeburg law men become mature on reaching the age of 14, and women do so at 13, while one comes of age—*iure nostro*[13]—at 21.

After a detailed overview of issues relating to consanguinity (*congation carnalis*) in *Epitome*[14], Tucholczyk provides Appendix 15, in which he outlines the degrees of kinship in Saxon law whilst relying on *Speculum Saxonum*.[15] He finds that blood relations in Saxon law end at the seventh degree. It is therefore necessary that the inheritor should prove in the succession proceedings that their relationship to the decedent does not go beyond those seven degrees.[16] Tucholczyk further observes that according to Saxon law husband and wife married under ecclesiastic law, as well as sons and daughters of such parents, do not establish degrees of kinship. In Saxon law, Tucholczyk emphasizes, the first degree

7 SS I *in prologo*.
8 F 9.
9 F 10.
10 Gloss in SS I, 9.
11 F f 287 v 288.
12 IM 26.
13 This statement indicates that Tucholczyk considers the law in IM to be Polish law or, rather, a law which applies in Polish towns (*ius nostrum*). A similar notion is later espoused by Jan Kirstein Cerasinus. Cf. L. Pauli, *Jan Kirstein Cerasinus (1507–1561), krakowski prawnik doby Odrodzenia*, Kraków 1971, p. 74.
14 *Epitome*, Folio 17 (hereinafter: E 17).
15 SS I, 3.
16 Roman law recognized the existence of kinship up to the tenth degree, See I. 3, 5, 5 (4).

arises with the grandchildren (*nepotes*), the second with the great-grandchildren (*pronepotes*), the third with the great-great-grandchildren (*abnepotes*) and so on. Kinship terminates with the seventh degree.

Having discussed the legal family ties (*cognatio legalis*) which are established as a result of adoption, Tucholczyk observes in *Epitome*[17] that Saxons do not practice adoption and that succession ensues on the basis of natural kinship.[18]

Compared with personal law, Tucholczyk relies more extensively on the German customaries in his survey of family law. With respect to personal marital law, Cervus refers to *Speculum Saxonum* on two occasions. He notes that if a married woman gives birth to offspring too early before a particular time elapses, the issue may be questioned, and adds that the same happens with the children of a widow who were born too late after her husband's death.[19] Tucholczyk further observes that under Saxon law the husband, having consummated the marriage, is a guardian of his wife who, given the unequal status, is subject to his law. Upon the death of the husband, the wife is liberated from the law of the husband and regains her original status, i.e. the one she had had prior to marrying. Furthermore, her guardianship is assumed by her nearest agnate as opposed to an agnate of the husband.[20]

Even more Saxon provisions are found in Cervus's disquisition on marital property law, in which he informs us that the husband's gift to the wife, which is known in Roman sources as *ante nuptias, propter nuptias*[21], *dotalicium*[22] in canon law, and *wiano* [counterdowry] in Polish, is called *Morgengabe* or *Leibzucht*[23] in German law.

17 E 36 Appendix XVIII.
18 SS III, 30.
19 SS I, 30; E 77 v.
20 SS I, 45; E 77 v. Tucholczyk states that under Roman law (C. 5, 4, 10; 5, 9, 2) the widow keeps the dwelling, the honour, and the dignity of the husband until she marries another.
21 C. 5, 3, 20.
22 C. 4, X, IV, 20.
23 SS I, 20; E 78; F 138–138 v.

Tucholczyk observes that under Saxon law, a husband and wife's estate is owned indivisibly by the married couple.[24] The woman receives the dowry through her oath and without witness, but the possession requires witnesses.[25] As for paraphernal property in the light of Roman law, the author draws on the gloss to *Speculum Saxonum*[26], stating that the husband should not interfere in the administration of such estate without the wife's consent, although it would seem, he notes, that the wife who entrusted her person to her husband should also surrender her belongings to his care. However, since equity demands something to the contrary, it prevails in this case.[27] Based on the gloss to *Speculum Saxonum*[28], Tucholczyk observes that husbands secure it on their property or provide guarantors to ensure the return of the dowry by the husband himself, or his father, to the wife, so that the wife does not incur loss in her dowry estate. Even without a dowry, the wife should be supported by the husband in his house for as long as she takes care of her husband. Upon her husband's death, her support should continue but outside the dwelling of the late husband if she had been badly treated there. Within a year, during which the dowry should be returned, her upkeep is to be borne by the inheritors of the husband from the proceeds of her dowry. If, the wife having consented, the husband pledged the dowry or alienated it in any other way, and after his death the wife recovers it, an action may be brought against her for deceit, in view of that fact that she had consented to it previously.[29]

In connection with marital property law, Tucholczyk also discusses the *hergewet* and the *gerade*.[30] The wife of a military man (*mulier militaris*) was to leave her *utensilia* to her nearest female distaff relative, and the estate to the nearest man or woman of kin. The military man leaves

24 SS I, 31; E 82; F 143.
25 SS I, 20 *et ibi nota*; I, 24; III, 74. E 82; F 143 v.
26 Gl. SS I, 20.
27 E 82–82 v, 143 v–144.
28 GI. SS I, 45; JI, 24 gl.
29 E 82 v–83.
30 F 144–145 v.

his war gear (*arma bellica*) to the nearest agnate, and the estate to the nearest relative of the same sex, provided that they are of equal birth. Other individuals who do not wear the military belt leave only their estate. Peasants who do not serve in the army do not receive the gear, otherwise known as *hergewet*.[31] These accoutrements include a horse (*dextrarius*), or the best beast saddled by the husband, the sword, the shield, his best armour (*pro corpore unius viri*), daily attire, *lectisternium bellicum*, i.e. field cot, bolster, two changes of linen, bowl, basin with a towel, stove, etc. All this is called military gear (*arma bellica*) though other items, as Tucholczyk writes, might be added to this equipment.[32] This is to go into the hands of the nearest relative of the husband on the spear side. By way of compensation, the nearest relative of the wife on the distaff side obtains the *gerade*.[33] If the deceased male did not have an item belonging to the gear, and the wife confirmed under oath that no such thing was left upon his death, she was not obliged to provide it.[34] The *gerade* comprises garments, cloth, fabrics the woman used, items women would wear as ornaments and which they kept hidden away under their care; furthermore, it included all gold and silver fashioned into female ornaments, all kinds of rings, bracelets and belts; also silk, cauldrons, utensils, stools, tablecloths, bedlinen, bath linen, coverlets, the bed, bowls, pillows, tables, pans, the stove and books.[35] As Tucholczyk concludes, the *gerade* or *parapherna* are nothing else than domestic furnishings (*supellex domestica*).[36]

In his discussion of tutelage and curatorship in *Farrago*[37], Tucholczyk relied chiefly on Roman law. Nonetheless, he refers once to *Speculum Saxonum*[38], twice to *Ius municipale*[39], and quotes the gloss to the

31 SS I, 27.
32 IM 25; SS II, 24.
33 SS I, 22–23.
34 IM 25.
35 IM 23.
36 SS I, 27.
37 F 185–187 v.
38 SS I, 10.
39 IM 26.

latter on five occasions.[40] The author underlines that among the three types of guardianship (testamentary, statutory, and juridical) the testamentary type is the most important and the most privileged. Where a guardian has not been designated by testament, the judge—*ex officio* appoints the nearest agnate, a relative on the spear side, to be the guardian. If there is no such agnate to be appointed, the judge may compel an unrelated individual to assume guardianship. The guardian should take care of their ward until the latter reaches maturity, unless they refuse guardianship by invoking statutory impediment.[41] As the guardian bears the burdens and losses associated with the administration of the ward's estate, it is just—Tucholczyk stresses—that they should have benefits as well. If the ward owns e.g. a vineyard, garden etc. and the guardian incurs expenses for their cultivation, he might derive profit (*fructus*) free of charge (*census*), unless they have obliged themselves to one. Whatever property the guardian accepted on assuming guardianship, they are obliged to return the same, for instance if a field had been sown, a similarly sown field shall be returned.[42] Tucholczyk also observed that under Saxon and Magdeburg law, the guardianship terminates when a man reaches 14 and a woman 13 years of age, thus reaching maturity.

With respect to real rights, Tucholczyk again relies primarily on Roman law, but he also takes advantage of the Saxon custumals. Having presented and explained almost all divisions of property in Roman law, this is how he speaks of the division into movables and immovables: the movables are such property that can be easily relocated from one place to another, such as slaves, cattle, clothing, money, and others; immovable property cannot be easily relocated from one place to another, and of that we have to kinds: some are standing, as for instance a house, while the other recumbent, as for instance fields or meadows.[43]

40 IM 26 gl.; 23 gl.
41 IM 26; F 185.
42 IM 23 gl.; F 260.
43 SS I, 3; F 86.

Speaking of ownership, the author draws on *Ius municipale* to state that it possession cannot be taken away from anyone, even if the owner possessed a thing in bad faith, unless they have been charged in court, defeated and lawfully banished following the judgment.[44] Using the gloss to the *Saxon Mirror*[45], the author explains that bad faith occurs when a person consciously possesses a thing belonging to another or deceitfully incites a seller to sell it, or purchases something despite prohibition, or purchases a thing from a ward without the consent of the tutor.[46]

Regarding usucaption, Tucholczyk outlined it in accordance with Justinian's law. However, when addressing periods of limitation, he also provides those stipulated in Saxon law for the sake of comparison. Thus, under Saxon law, the period of limitation for usucaption of chattels is one year, whereas for immovables it is 30 years, one year and one day *contra absentes*, and one year and a day *contra praesentes*; 40 years against the Church, 5 years against the empire; against the emperor or empress effective immediately (*in instanti*); no acquisitive prescription operates with respect to towns.[47] Usucaption of donated items ensues after three days (*triduum*).[48]

Discussing *actio familiae erciscundae* in the light of *Speculum Saxonum*, Tucholczyk observes that the division of inheritance between two beneficiaries is carried out by the elder of these, whereas the younger is entitled to choose between the portions; if the individual who has the right to effect the division does not wish to do it, the division is made by a judge.[49] The author also refers to the *Mirror* addressing the division of leasehold estate (*bona censualia*).[50]

44 IM 29; F 88 v.
45 SS I, 29 gl.
46 F 89.
47 SS I, 28; II, 42; IM 20, 140; F 92 v.
48 SS III, 81; IM 30; F 92 v.
49 SS III, 29; F 189 v.
50 SS III, 29; F 190.

As for the vindication action, Tucholczyk also devotes some attention to the possibilities of defence available to the owner, noting that in Saxon law the defence may be threefold. One may claim that they received the thing through donation, but then they are obliged to appoint the *warendator* (guarantor); if they claim that they have purchased the thing at a marketplace (*in communi et libero fo*ro) and cannot provide a *warendator*, they lose the money and pay a fine (*mulcta*) to the judge. They may claim that they have raised the animal or made a thing themselves, but a third party should provide proof to that effect. They may claim that they have inherited the thing, but in such a case they are expected to prove it.[51]

Still on the topic of the vindication claim, Cervus discusses *arrestum*, or pre-emptive detention, relying on the Saxon custumals. He explains that *arrestum* simply means preventing displacement of a person or their property until that person has responded to the plaintiff. Because *arrestum* is a severe measure, it must not be employed by the judge for trivial reasons. Tucholczyk recalls the principle of *odia restringi, favores convenit ampliari*, to assert that one should comply with the infallible rule whereby *arrestum* is applied first to property and only then to persons. With respect to the wealthy and the land-owners who are solvent, *arrestum* is not to be employed. In the case of persons who do not possess land nor meaning, such as gamblers, drunkards and wastrels whose assets do not suffice to pay the debts, such people as well as their effects can be placed under *arrestum*, provided that the things are detained first and the persons only after that.[52] As to the manner of the detention (*arrestatio seu vendicatio seu allocutio*), Cervus also draws on the Saxon compilations.[53]

Underlining that emphyteutic contract should be concluded in writing, Tucholczyk makes references to *Speculum Saxonum*[54] and *Ius municipale*.[55]

51 IM 136; SS II, 36; F 94–94 v.
52 IM 53; F 94 v.
53 SS II, 36; IM 132, 138; F 94 v.
54 SS III, 79; F 198 v.
55 IM 7; F 198 v.

As is known, obligations had not been sufficiently covered in the German customaries, therefore in *Farrago* Tucholczyk discussed them extensively whilst relying mainly on Roman law and, with respect to some of the institutions, drew on that legislation exclusively. However, even here he took ample advantage of the information contained in *Speculum Saxonum* and *Ius municipale*, as well as their glosses.

Tucholczyk writes that there are two types of guarantors: judicial and non-judicial. Non-judicial guarantors swear oaths and guarantee out of court; they may deny having given guaranty and may be released upon oath where there is no sufficient proof. Judicial guarantors vouch for a person at court in civil and penal proceedings; those cannot be released and are obliged to pay the defendant's liability in the amount for which they have guaranteed.[56]

As for the effects of guaranty, Tucholczyk observes that its consequences in civil cases are graver than in penal ones. In the former, if a person has guaranteed for another and the primary debtor who is to be held liable in court fails to appear, the guarantor by default assumes the liability as the accused (*accusatus*) and has to pay should they lose. In contrast, in penal cases the guarantor is not under obligation to suffer punishment for the person they have guaranteed for, but has to pay *wergeld*, if the complaint seeks capital punishment (*in vitam*); when the complaint seeks corporal punishment (*ad carnem et cutem*), they are released for half of the *wergeld*, which then belongs to the plaintiff, not the judge who receives the payment of the fine.[57] Tucholczyk notes that no one is obligated to appoint guarantors above the amount of their *wergeld*, unless the matter concerns debts which have been recognized or confirmed under law.[58]

Based on the gloss to the *Saxon Mirror*[59], Tucholczyk discusses five privileges (*documenta*) of non-judicial guarantors. The plaintiff should

56 SS III , 9 gl.; IM 27 and 117. F 180v-181.
57 SS III, 9; IM 117; F 181.
58 SS II, 10; F 181.
59 SS III, 9 gl.; IM 31; F 181 v.

first sue the primary debtor if they are in the country (*provincia*); if the latter is absent, a period of time (*induciae*) should be designated within which they are to appear; it is only then that the guarantor can be held liable. Satisfaction from the estate of the primary debtor that has been encumbered to the benefit of another cannot be sought (*impeti et alloqui*) prior to an action being brought against the guarantor. If the primary debtor promised money and is unable to raise it but possesses inherited estate, then the creditor is obligated to find a purchaser or accept the estate in accordance with the estimation of the judge. Where there are several joint guarantors (*manu coniuncta*), if one of them has satisfied the obligation, the others are released from it, while the former is entitled to action seeking compensation of parts (*partes*) from the latter. The creditor who accepted a pledge and the guarantors at the same time, cannot sue the guarantors unless such a creditor returns the pledge to them beforehand. Tucholczyk observes that under Roman law[60] obligations rest not only with the guarantor but also their successors, whereas the laws of the Saxons stipulate otherwise.[61]

When discussing the elements of validity (*perfecta, firma, valida*) of sale-and-purchase in the light of Roman law[62] (*consensus, pretium, res*) as well as proofs of agreement (*arrha*, *mercipotus*), Tucholczyk states that Saxon law[63] requires that the handover of goods (*resignatio*), and in particular real estate, happen before a court. As Tucholczyk explains, *resignatio* denotes the legal act of surrendering (*traditio*) property which has been sold, or else inherited from the father with the consent of successors, or without the consent if the property has been acquired with money.[64] Relying on *Ius municipale* [65], the author subsequently discusses admittance (*intromissio*). *Intromissio* should take place before lay

60 I 3, 20, 2.
61 SS I, 6 gl. F 181v–132.
62 D. 18, l, 12–14.
63 IM 140.
64 IM 20; F 153 v.
65 IM 20.

magistrates (*quattuor scamna*), i.e. in the presence of a convened bench (*iudicium bannitum*) with jurisdiction over the estate, so that the sale is confirmed and the handover promulgated in accordance with the law (*prout iuris est*). The purchaser, together with the judge and the lay magistrates go to the site to perform the *intromissio*. The judge enters the house, or premises of the property (*area*) if no house is there, the others remain outside; he takes the purchaser by the hand and, with the magistrates in attendance, ushers the purchaser in whilst saying the prescribed formula, after which all return to the court.[66]

Regarding the liability of the seller, Tucholczyk remarks that in Saxon law the seller is obliged to indemnify (*varendare*) the purchaser for a year and a day *contra praesentes* and for 30 years, a year and a day *contra absentes*.[67] Meanwhile, Tucholczyk notes, according to the custom established in the Kingdom of Poland the seller of a horse must make the three following promises: that the horse is not short-winded, that it does not suffer from rheumatism, and that it is not skittish.[68]

When discussing a contract of lease as provided for in Roman law, Tucholczyk supplies the information that within one and a half years (*anno medio sive quartali*) all effects that the lessee (*homo censualis vel inquilinus*) has brought into the rented house automatically become a pledge (*pignus*) or surety (*vadium*) for the owner.[69]

In relation to loan agreements, Cervus devotes some more attention to debts in general, also drawing on the *Saxon Mirror*.[70] For instance, he lists five ways of settling a debt: by paying the kind of money that constituted the object of the obligation; if the type of money has not been specified in the agreement, then the amount should be repaid with the currency which is in widespread circulation in the country (*provincia*), which is used

66 F 154.
67 SS II, 29; SS III, 4; IM 140 gl.; F 155.
68 IM 140 *in marg*; F 155 v. Tucholczyk provides a specimen of an *in perpetuum* entry for a house.
69 IM 140; F 158.
70 SS III, 40.

there and serves to purchase bread and beer. The remaining four methods of clearing a debt are discussed on the basis of Roman law.[71]

Tucholczyk relies on Saxon law in his description of the action (*querella*) of debt. If recovery is sought in court (*fit querimonia iudicialiter*), a two-week period is decreed (*quindena*) in which the obligation is to be performed; if the debtor fails to perform it by the designated deadline, the judge imposes a fine and sets another time limit of eight days, then three, then two, and eventually one day (*ad crastinum*). Each successive failure to meet the obligation involves a fine imposed by the judge. Ultimately, if the debtor has not fulfilled the obligation and has not paid the fine to the judge, then their chattels are considered a pledge so as to force the debtor to fulfil the obligation to the creditor and to pay the fine to the judge. In the absence of chattels, the creditor is admitted into property (*ad proprium*). The judge should make an assessment of the pledge to determine whether it is equivalent to the amount of the debt. If so, the judge may sell it and settle the claim of the creditor, or give the creditor exactly as they require and the creditor, perforce, has to agree. If the pledge is below the amount of the debt, the debtor may be compelled to provide surety. If the debtor has no assets or guarantors, the judge should place them at the disposal of the creditor. If the latter is an alien (*advena*) they can take the debtor with them, if they are unable to support them in the town (*municipium*). In such a case, however, the creditor has to provide guaranty (*fideiussoria*) that the person will be returned without harm to body and health. Should the creditor be unable to give such guaranty, the debtor must remain in the town, in the house of the judge, who may put them in fetters (*compedes*), ensure the provision of work and food as for their own family, since the debtor was neither a thief nor an accomplice of thieves; they cannot call for another punishment for the debtor, given that the debtor went to prison voluntarily.[72]

71 F 162–162v.
72 IM 34, 93; F 163 v.

Tucholczyk also considers other instances of the action of debt. If a person sued for debt declares that the plaintiff has remitted their debt but fails to prove it, the plaintiff takes an oath. Similarly, when the defendant responding to the complaint (*quaerimonia*) of the plaintiff (*querulator*) declares that they have fulfilled the obligation, then they have to prove it, assisted by two others (*mettertius*); the latter must be conversant with the affairs and have heard and seen the fulfilment of the obligation. This procedure applies to a debt which has not been stated in writing. If the debt has been certified in writing, the debtor has to prove that the obligation has been settled by means of a document, or aided by five witnesses. For an obligation owed to a deceased person (*post mortum manum*), the attestation of seven witnesses is required.[73]

Tucholczyk discussed yet another related case: a situation when a person sues another for debt before a judge and the debt is recognized, e.g. through the testimony of witnesses; here, the debtor has to fulfil the obligation on the same day.[74] Where the action is concerned with a debt of money, one should demonstrate on what grounds the debt is due; if it has been incurred due to playing dice or entertainment (*ex alea vel ludo*), the debtor does not have to pay it, and nor is the judge obliged to award repayment.[75]

If a suit (*actio*) concerns due payment (*merces merita*), one files a plea with the court against the successors of the deceased owner or against the owner. If repayment is claimed from a successor who refuses to acknowledge it, the creditor should substantiate their claim with an oath; if the debtor defaults on payment for over a year, the creditor should prove it with an assistance of six others (*metseptimus*). If a payment is sought from a living owner, the creditor should support their claim with an oath (*ad sacra*). The owner, wishing to prove that the obligation has been ful-

73 SS I 65; SS II, 6; SS III, 85; IM 27, 68; F 164.
74 IM 46, 93; F 164.
75 IM 103; F 164 v.

filled, has to do so through an oath with two other persons (*mettertius*). When an employer dismisses their hired labourer (*mercenarius*), they are to pay the entire consideration. If an employee insolently abandons their work, they need to pay their principal as much as they would have been paid by the principal; if a portion of their wage has already been paid, the employer must pay back twofold.[76]

With regards to successors' obligation to settle debts, Tucholczyk also takes advantage of the provisions of Saxon law. An inheritor, the author writes, whether man or woman, must pay back legally corroborated debts, provided that the movable estate allows it. However, debts need not be paid by a successor from their own estate or the inherited estate which has been transferred to another person, because ownership cannot be alienated without the consent of inheritors. Debts owed to the decedent should be paid to the successors.[77]

Concerning loans for use (*commodatum*), which Tucholczyk discusses chiefly on the basis of Roman law, it is noted that according to the *Saxon Mirror* a person who received anything as a loan for use, borrowed anything, or promised anything by way of *stipulatio*, is obligated to return or fulfil it; and whatever they happen to do, they should consider it valid and gratuitous (*ratum et gratuitum*). If they subsequently wish to deny, they may seek release by means of an oath, until the case is brought before a judge, where the plaintiff can defeat them through the testimonies of two witnesses and the judge.[78]

Based on *Speculum Saxonum*, Tucholczyk states that the item loaned can only be recovered from the commodatary. A person who lent a horse, garments or any other things for use, or pledged them, or a thing found itself in any other way—albeit upon consent—beyond their control and the recipient sold it, made it an object of another obligation, disposed of it, lost it through gambling, theft, or robbery, the commodator

76 IM 78, 79, 80; F 165.
77 SS I, 6; IM 24; F 165 v.
78 SS I , 7; F 167 v.

can only claim it from the commodatary, and if the former is dead, their successor may assert the claim pursuant to the law in court.[79]

In his discussion of pledges, Tucholczyk relies mainly on Roman law, but on several occasions refers to the Saxon compilations as well.[80] As for deposits, the *Saxon Mirror* is cited only once, in connection with the liability of the depositary.[81]

In *Epitome*, the author elaborates very extensively on donations, availing himself almost entirely of Roman law (as he takes canon law into account as well, albeit to a minimal degree). However, the appendices provided at the end of the chapter contain Saxon regulations pertaining to donations. Those are sourced from *Liber Ottonis iuris Maydeburgensis* although no detailed notes were provided. Thus, with respect to *donatio ante (propter) nuptias*, Tucholczyk observes that under Magdeburg law women received their counterdowry for life. After the husband's death, the wife does not hold any portion of the estate, unless she has received such an endowment from the husband or was promised a dower before a convened bench (*iudicium bannitum*). He also adds that neither the dower nor the counterdowry are hereditary, and upon her death such estate returns to the husband's successors. If anything has been donated or waived to the benefit of a man or woman before a convened court, the donee is at liberty to do what they like with their portion of the gift. Tucholczyk writes that Saxons have their own and particular laws governing donations. If anyone wishes to make a donation from their own estate of inherited immovable property, they are prohibited from doing so without the consent of the successors and without allowing for a statutory period, as they would unlawfully alienate that which they must not alienate, and a successor would be entitled to claim recovery in court.[82] Whatever a husband donates before a convened bench in the presence of a judge and lay magistrates, the recipient gives one solidus to acknowledge the

79 SS II, 60; F 168.
80 SS II, 24; III , 5; II, 60 gl.; III, 5; IM 20 gl. F J69–169 v.
81 SS III, 5. F 172 v.
82 SS I, 52. E 90 = 107 v.

gift, which the magistrates take for themselves.[83] Whatever a husband might give in a court, though he may have possessed it in peace for a year and a day, it is better to do so before the judge and lay magistrates rather than alienate it on one's own.[84] A wife cannot donate, sell or relinquish estate without the consent of the husband, as it is presumed that they own it jointly.[85] The wife cannot transfer her effects to another person.[86] If a husband or wife receives a donation before a convened court, they may do with their gift as they please.[87] If a husband possessed chattels and, together with his wife, added to the inventory thanks to work or good fortune, he may grant it for life (*in valitudinem vitae*) to the wife or another person.[88] A husband cannot donate movable possessions (*mercimonia*) inherited after his father to his wife without the consent of his successors, unless he does so before a judge and lay magistrates.[89] If a husband donated to the wife buildings erected on leased land (*bona censualia*) with the knowledge of the owners as well as the neighbours, and introduced the wife into possession, then following his heirless death a successor cannot recover them without the consent of the recipient of the gift. In turn, if a stead (*fundus*), i.e. buildings and the stock were the property of the husband and have been given to the wife as a gift, a successor may recover them, unless the donation has been executed in court with the consent of that successor. If a leasehold estate (*bona censualia*) is hereditary, a husband cannot donate them to his wife without the consent of the successors or the owner of that estate (*dominus proprietatis*).[90] If children attempt to take away the counterdowry from a widow, she can retain it by calling upon seven witnesses who were present as the gift was being made. If a husband did not grant his wife any portion in his estate,

83 *Liber Ottonis iuris Maydeburgensis.* Hereinafter as: LO.
84 LO. E 90, ap. II.
85 SS I, 45. E 90, ap. III.
86 SS I, 31. E 90, ap. IV.
87 LO. E 90, ap. V.
88 LO. E 90, ap. VI.
89 LO. E 91, ap. VII.
90 LO. E 91, ap. VIII.

she is to remain on its premises, and the children should provide her with all the necessities as long as she stays a widow.[91] Donation can only be proved by the donee.[92] A son is a guest (*hospes*) on the estate of his mother and vice versa.[93] If a widow remains without a division of profits for a longer or shorter period of time, then when such a division is made, the widow shall receive as much as she would have obtained at the time of the death of her husband.[94] If a widow continues to abide on the estate of her husband with her children, and a son is married and then dies, the son's widow takes precedence over the mother in terms of return of the dowry and homestead effects (*utensilias*) as well as the provisions of food (*cibaria domestica*), while the fact that the mother has not yet received her dowry is immaterial. If a married son dies on the estate of the mother, and the latter is able to prove peaceful possession, then she takes precedence over her daughter-in-law as to the return of the dowry.[95] It is fair for women to obtain dower from the estate of their husbands with the consent of the successors in courts which hold jurisdiction over the estate, provided that a judge with royal mandate (*bannus*) sits there.[96] Women cannot be deprived of their dower, either by natural successors or children born posthumously.[97] If a person has sold or donated anything and subsequently seeks to recover them, the purchaser or the donee shall lawfully keep those things if they take oath with two others (*mettertius*) swearing that the thing has been sold or given to them as a gift.[98]

Tucholczyk again draws on Saxon law when discussing delictual obligations, though only to a limited extent, as his disquisition in this respect relies chiefly on Roman law. Having cited the Roman definition

91 LO; E 91 v, ap. IX.
92 SS III, 83; E 91 v, ap. X.
93 SS I, 20; E 91 v, ap. XI.
94 SS I , 20; E 91 v, ap. XII.
95 SS I, 20; E 92, ap. XIII.
96 SS I, 21; E 92, ap. XIV.
97 SS I, 21; E 92, ap. XV.
98 SS III, 4; E 92–92 v, ap. *ultima*.

of theft, Tucholczyk refers to *Speculum Saxonum* to state that a thief is an individual who takes a thing belonging to another for their own use, without consideration of the owner of that thing.[99] He further observes that according to the laws of the Saxons and municipal Magdeburg law, a thief should be hanged; if, however, they have committed theft below the value of three solidi, then they should be punished in skin and hair (*in cute et crinibus*).[100] Punishment in skin and body (*in cute et carne*) consists in flogging under the pillory (*ad statuam virgis caeditur*) and cutting off an ear; if they have no ear, they should be branded on the face; if they have had their face branded twice already, then they should be hanged (*patibulum*).[101] A stigma is branded on thieves who have committed theft in daylight. Thieves of purses (*bursae*) are branded on the face, with subsequent offence their ears are cut off, then branding iron is used to mark them with a cross on their forehead, and they are flogged each time. The marks are branded so they may be recognized and avoided. If a branded individual commits repeated theft, they should be hanged (*insigniri fune vel catena in patibulo*). This is because theft is more widespread than other crimes and hence should be punished more severely. Once hanged, a thief is seldom buried, in order to deter others.[102]

Punishment for robbery (*rapina*) is discussed from the standpoint of Roman law and the *Saxon Mirror* to some extent. Tucholczyk thus notes that according to our laws, capital punishment or mutilation (*mutilatio membri*) are inflicted depending on the severity of the crime. Robbers should be pursued with clamour and may be killed when committing the crime or escaping.[103]

Tucholczyk also relies on *Speculum Saxonum* when he addresses the offence of unlawful damage (*damnum*) to somebody else's property.

99 SS I, 61; F 190 v.
100 SS II, 13; IM 38; F 131 v.
101 IM 38 gl; F 191 v.
102 SS II, 13; F 192 v.
103 SS II, 68; F 193.

No liability attaches to the mentally ill and children who are incapable of being guilty because they cannot sink so low as to face extreme penalty; therefore, if a boy kills or maims a person, his guardian is to pay compensation in the amount of the wergeld from the estate of their ward; this also applies to other damage that boys may cause, provided that it is proved.[104]

As for liability for damage caused by animals, Tucholczyk states that if a domesticated animal (e.g. pig or bull) inflicts damage, then compensation—corresponding to the wergeld or value—is paid by the owner of the animal if they keep it in their possession after the damage has arisen; however, if they have banished the animal and no longer feed nor water it, compensation need not be paid; the aggrieved party can take the animal, if they want, by way of compensation for the damage.[105] If a person keeps wild animals (bears, wolves, foxes, panthers, lions, deer, monkeys) and they have caused the damage, then compensation must be paid by the owner. If they do not renounce the ownership following the damage by driving them out and refusing them feed, they are not released from the obligation to pay compensation when the aggrieved party proves, aided by two others (*mettertius*), that the former owned them until the day when the damage arose.[106] Still on the subject of indemnification for damage inflicted by animals, Tucholczyk writes that if such damage has been caused by a dog, its owner may prove that they were unaware that the dog bites. If the dog was chained, guilt lies with the one who has been bitten. If a person has set a dog on somebody else's cattle and the animals were bitten, they are not obliged to compensate for it. If a dog bites animals on a road, the owner of the dog is to pay compensation. If a person kills a dog that is causing damage to them, they are not required to pay compensation if they swear that they have done it out of necessity.[107]

104 SS I, 40; II, 45; F 193 v.
105 SS II, 40, 55, 60; F 194 v.
106 IM 122; F 195.
107 IM 122; F 195.

Cervus cites Saxon laws on three occasions when discussing liability for insults (*iniuria*), stating that *actio iniuriarum* requires seven witnesses.[108] He then observes that the abused party may file a penal or civil complaint in respect of any insult; in the case of a civil suit, an assessment is made and subsequently a financial penalty is imposed on the offender; in penal suits, the judge sentences the defendant to punishment in body or humiliation.[109] The author also refers to the *Mirror* in connection with insulting one's wife and children.[110]

With respect to succession law, whose overview is again based chiefly on Roman legal sources, Tucholczyk does not fail to note how Saxon laws provide in that respect. He therefore states that the testaments made whilst being of legal age, sound in mind, without fraud and deceit, cannot be invalidated.[111] One learns that neither husband nor wife—while incapacitated by reason of health—may spend more than three solidi out of their estate without the consent of the successors; a wife cannot do so either without the consent of her husband.[112] At the end of the chapter devoted to succession law which, as already noted, relies primarily on Roman sources (and to a very limited extent on canon law), the author supplies 23 solutions relating to succession law found in the Saxon compilations, by quoting the provisions contained in *Speculum Saxonum* and *Iiber Ottonis iuris Maydeburgensis*.

The above outlines the regulations recorded chiefly in *Speculum Saxonum* and *Ius municipale*, which Jan Jelonek Cervus from Tuchola chose to cite in his two legal treaties, that is *Farrago* from 1540 and *Epitome*, published in 1534. The degree to which they were taken into consideration by the author may not be all too extensive, particularly in comparison with

108 SS I, 70; IM 91; F 196.

109 SS I, 68; IM 90; Cf. I. 4, 4, 10; F 196.

110 SS I, 68; III, 45; F 197.

111 SS I, 52. E 119 v; 121 v.

112 IM 65; F 130 v; E 113 v. Tucholczyk cites a judgement of a Magdeburg court concerning legacies made while in a sick-bed (C. 12, D. II, p. I *in Almanico*), and observes that the provisions of the Magdeburg law were condemned by canon law as godless and contrary to Roman law. Cf. C. 6, 22, 3. F 130.

Justinian's codification or even canon law. Nonetheless, Tucholczyk does take advantage of Saxon law to a varying degree when discussing each branch of personal, procedural and substantive law.

Literature

Behrend J.F. ed., *Die Magdeburgen Fragen*, Berlin 1865.

Koranyi K., *Joannes Cervus Tucholiensis i jego dzieła. Z dziejów praw obcych i literatury prawniczej w Polsce*, Lwów 1930.

Pauli L., *Jan Kirstein Cerasinus (1507–1561), krakowski prawnik doby Odrodzenia*, Kraków 1971.

Farrago.

Iuris Maydeburgensis in Alamanico.

Ius municipal.

Speculum Saxonum.

Bogdan Lesiński

Precedents as a Source of Land Law in Poland's Past[1]

> Our law is founded more on custom et in communi praxi, for which examples are to be found in the decrees of kings, the forebears of His Majesty ultimarum instantiarum, rather than in writing.
>
> Jan Łączyński, *Kompendium sądów Króla Jegomości*, 1594

The State of Research

Among the sources from which Polish land law derives, one distinguishes two foremost ones: *consuetudo* and *lex*. In modern times, that is since the sixteenth century, the latter occurs in our law under the name of *constitutio*, which was enacted by the Sejm, though other designations also happened to be employed.[2] The predominance of custom and

1 Translated from: B. Lesiński, *Prejudykaty jako źródło prawa ziemskiego w dawnej Polsce*, "Czasopismo Prawno-Historyczne" 1990, 42, pp. 9-49 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This article was written by the author on the basis of his work *Podstawowe problemy prawne likwidacji skutków wojny 1939–1945 a dwa państwa niemieckie*. Chapter 5 of the monograph, *Umowa poczdamska a traktat pokoju z Niemcami* offers a number of major comparative conclusions presented in this article. The author also draws on his monograph *Umowa poczdamska z dnia 2 VIII 1945*, Warszawa 1960, p. 629, which was updated twice for the purpose of publishing it in English (1963) and French (1964). On account of a thorough source documentation in the published monograph and because a new work is going to be published soon, the author forgoes—having approval of the Editorial Board—the convention of scholarly referencing in this article.

2 S. Grodziski, *Sejm dawnej Rzeczypospolitej jako najwyższy organ ustawodawczy. Konstytucje sejmowe — pojęcie i próba systematyki*, "Czasopimo Prawno-Historyczne" 1983, vol. XXXV, fasc. 1, pp. 168–169.

statutes as *fontes iuris oriundi* seems so obvious that we tend to forget that other sources of land law existed as well. And yet the awareness of a greater variety of sources was not altogether alien to past legal authors. Describing the ways in which laws were established among Poles in his *Institutiones*, Tomasz Drezner lists not only *constitutio* and *consuetudo* but, in the chapter entitled *De aliis iuris constituendis modis apud Polonos*, mentions other factors as well. According to the author, the latter include decrees (judicial rulings);[3] Drezner also recognized the possibility of applying analogy, noting that: — *denique ex contitutionibus similibus, ad similes casus incidentes proceditur*.[4] Also, there is evidence that legal lacunae arising due to lack of pertinent provisions was to be rectified in early Polish law by regulations formulated under the principle of equity (*aequitas*).[5] Still, the various law-building factors cited here receive little attention in our scholarly literature.

This paper sets out to revisit and inquire more extensively into the importance of judicial rulings as sources of land law in Poland.[6] It does not aspire to be the conclusive and complete study of the issue, but it does collate material which even now may serve to gain better insights into the problem. Let us note that in the latest synthesis of the history of Polish statehood and law, court judgments are hardly ever mentioned

3 T. Drezner, *Institutionum iuris Regni Poloniae libri quatuor*, Zamość 1613, pp. 10–11, Hereinafter: *Institutiones*; Cf. K. Bukowska, *T. Drezner, Polski romanista XVII wieku i jego znaczenie dla nauki prawa*, Warszawa 1960, pp. 103–104. The text relating to decrees is cited below in footnote 60.

4 T. Drezner, op.cit.

5 Ł. Górnicki, *Rozmowa Polaka z Włochem o wolnościach i prawach polskich*, in: *Pisma*, ed. R. Pollak, vol. II, Wrszawa 1961, p. 408: *But those jurists of yours tell you to resort to ad equitatem only when ius scriptum fails. Aequitas* was also referred to by S. Sarnicki.

6 The importance of precedents in municipal law also awaits a thorough study. As we know, the decisions of the higher courts (*ortyle*) played the role of precedents in municipal law (S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. II, Lvov 1925, p. 214), but the observation is all too general. We do not know whether those were *ortyle* or precedents in the distinct yet broader sense that B. Groicki had in mind when he wrote that Saxons and Poles with respect to municipal law: *also judge sometimes in accordance with age-old custom or a similar case which had earlier taken place before the court.* B. Groicki, *Porządek sądów i spraw miejskich prawa majdeburskiego w Koronie Polskiej*, "Biblioteka Dawnych Polskich Pisarzy Prawników" vol. I, Warszawa 1953, pp. 25–26.

as sources of law.[7] Z. Rymaszewski stated recently that "the issue of the precedential nature of judicial rulings in Poland is little explored."[8] The problem remains uninvestigated even though it has been referred to, even addressed directly and analyzed, but the scope of inquiry has been for the most part very narrow. The views on how precedents functioned in land law tended to vary as well.

The researchers who (in the nineteenth century) studied the statutes of Kazimierz Wielki, wondered whether the so-called precedents in the Lesser Polish compendium had derived from the actual judgments of courts.[9] Many of them believed that they did indeed originate from judicial practice, but no reliable evidence to that effect was provided. J. Lelewel found them to have been judgments made under Władysław Łokietek at *sąd wiecowy* (higher court colloquia),[10] A. Stadnicki also maintained that the precedents contained in the statutes derived from judicial practice, going as far as to assert that they were formulated at the colloquium of 1347.[11] The most comprehensive argument to prove the judicial provenance of those precedents was advanced by F. Piekosiński, who claimed—without any evidence to support this—that the precedents reflect the rulings made during sessions of the Lesser Polish *sąd wiecowy* after 1362.[12] In a somewhat later treatise he con-

7 J. Bardach ed., *Historia państwa i prawa Polski*, 2nd edition, vol. I, Warszawa 1964 and Z. Kaczmarczyk, B. Leśnodorski ed., *Historia państwa i prawa Polski*, Warszawa 1966. It is only in vol. I that one can find one general statements concerning the role of precedent in the period of early feudal monarchy. J. Bardach ed., op.cit., p. 159.

8 Z. Rymaszewski, *Instrukcje syndyków gdańskich w sprawach rozpoznawanych przed sądami zadwornymi (od końca XVI do połowy XVIII w.)*, "Czasopismo Prawno-Historyczne" 1985, vol. XXXVIII, fasc. 2, p. 201107.

9 An overview of such opinions may be found in S. Roman, *Geneza statutów Kazimierza Wielkiego*, Kraków 1961, pp. 96–102.

10 J. Lelewel, *Krytyczny rozbiór statutu wiślickiego*, in: *Polska wieków średnich*, vol. III, Poznań 1859, pp. 300- 301.

11 A. Stadnicki, *Przegląd krytyczny rozporządzeń tzw. statutu wiślickiego podług przedmiotów ułożonych*, Warszawa 1860, pp. 68, 244, 279.

12 F. Piekosiński, *Uwagi nad ustawodawstwem wiślicko-piotrkowskim króla Kazimierza Wielkiego*, "Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny" 1892, vol. 28, pp. 231–233.

sidered it almost a certainty.[13] Only R. Hube, speaking in favour of the judicial provenance of precedents in the debate concerning statutes, was able to cite factual instances of judicial precedents in medieval Poland and their use in drafting legal compilations.[14]

Next to R. Hube, there were more nineteenth-century scholars who approached the question of precedents as sources of early Polish law in a rational manner, attempting to provide evidence in favour or against it. No longer as part of the debate on the statutes, Hube was joined by M. Bobrzyński[15] and O. Balzer[16], both of whom supported the thesis that precedents constituted a source of land law.

Nevertheless, opposing views were also expressed. J. W. Bandtkie was of the opinion that the provision on judicial rulings in the 1454 Statutes of Nieszawa (analyzed in greater detail further on in this text) had no major significance and that "prejudices", as Bandtkie called precedents, did not serve to create new law.[17] A. Z. Helcel also devoted some attention to the question in his unfinished and otherwise excellent work on Polish law[18], assuming a position similar to Bandtkie's. According to Helcel, judicial decisions were not considered law that

13 Writing: *(…) namely, I have demonstrated (in Remarks) that precedents may only have emerged in the era of the colloquium courts*, F. Piekosiński, *Jeszcze słowo o ustawodawstwie wiślicko-piotrkowskim króla Kazimierza Wielkiego*, "Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny" 1896, vol. 33, p. 127.

14 In a paper delivered in 1853 R. Hube drew on the role of precedents with regard to *Constitutiones et iura terrae Lanciciensis*. R. Hube, *Przyczynek do objaśnienia historii statutu wiślickiego*, in: *Pisma*, vol. II, Warszawa 1905, pp. 276–277.

15 M. Bobrzyński expressed his opinion in the preface to *Decreta in iudiciis regalibus tempore Sigismundi I. regis Poloniae a. 1507–1531 Cracoviae celebratis lata*, "Starodawne Prawa Polskiego Pomniki" vol. VI, pp. 11, 460, Hereinafter: *Decreta* or D. and in the introduction to *Puncta in iudiciis terrestribus et castrensibus observanda anno 1544 conscripta*, "Starodawne Prawa Polskiego Pomniki" vol. VII, fasc. 2, pp. 202–203 Hereinafter: *Puncta*.

16 O. Balzer, *Geneza Trybunału Koronnego*, Warszawa 1886, p. 327; O. Balzer, *Uwagi o prawie zwyczajowym i ustawniczym w Polsce*, in*: Studia nad prawem polskim*, Poznań 1889, pp. 96–97, 106–107, 110.

17 J. W. Bandtkie-Stężyński, *Prawo prywatne polskie*, Warszawa 1891, pp. V-VI.

18 A. Z. Helcel, *Dawne prawo prywatne polskie*, Kraków 1874, written 1849–1853, p. 21f. Working on his synthesis P. Dąbkowski found that among the works of his predecessors only Helcel's "met the requirements of modern science to the greatest extent" P. Dąbkowski *Prawo prywatne polskie*, vol. I-II, Lvov 1910–1911, p. 68 I.

applied universally, as evidenced by numerous constitutions of the Sejm which were aimed against precedents. Helcel recognized precedents to have been no more than guidelines for judges who—according to somewhat self-contradictory observation of the author—were obligated to "judge similar cases consistently as they had earlier been judged." W. Dutkiewicz was also inclined to agree that judicial rulings had not been sources of law.[19]

Later scholars spoke on various occasions either for or against the existence and applicability of precedents, though they attached varied degrees of importance to the latter. Authors who wrote on the subject include B. Grużewski[20], M. Goyski[21], P. Dąbkowski[22], J. Makarewicz[23], S. Kutrzeba[24], S. Estreicher[25], J. Michalski[26], S. Roman[27], H. Grajewski[28], W. Maisel[29], and Z. Rymaszewski.[30] We need not summarize their observations at this point, especially given that they were often highly marginal. Recently, this Journal featured a paper devot-

19 W. Dutkiewicz, *Prawa cywilne jakie w Polsce od roku 1347 do wprowadzenia Kodeksu Napoleona obowiązywały*, Warszawa 1809, p. 14. Dutkiewicz expressed a similar view in other works as well, cf. J. Michalski, *Studia nad reformą sądownictwa i prawa sądowego w XVIII w.*, Part 1, Wrocław–Warszawa 1958, p. 29039.

20 B. Grużewski, *Sądownictwo królewskie w pierwszej połowie rządów Zygmunta Starego*, "SHPP" vol. II, fasc. 4, Lvov 1906, pp. 77–78, 100–101.

21 M. Goyski, *Reformy trybunału koronnego*, "Przegląd Prawa i Administracji" 1909, XXXIV, pp. 307–308, 664–665.

22 P. Dąbkowski, op.cit., p. 44.

23 J. Makarewicz, *Polskie prawo karne. Część ogólna*, Lvov—Warszawa 1019, pp. 12–14.

24 S. Kutrzeba, *Preface*, in: *Cautelae quaedam in iure terrestri tentae et observatae*, "Archiwum Komisji Prawniczej", vol. IX, pp. 200, 207–209; also in: *Historia źródeł*, vol. I, pp. 157–158, 268–270.

25 S. Estreicher, *Kultura prawnicza w Polsce XVI wieku*, in: *Kultura staropolska*, Kraków 1932, pp. 68, 79, 101,

26 J. Michalski, op.cit., pp. 83, 180, 200–210, 290–291,

27 S. Roman, op.cit., p. 100.

28 H. Grajewski, *Prawo zwyczajowe w Leges seu statuta ac privilegia Regni Poloniae omnia Jakuba Przyłuskiego*, "Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne" 1967, series 1, vol. 82, pp. 122–123, 140, 144.

29 W. Maisel, *Trybunał Koronny w świetle laudów sejmikowych i konstytucji sejmowych*, "Czasopismo Prawno-Historyczne, 1982, XXXIV, vol. 2, pp. 91- 92, 101.

30 Z. Rymaszewski, op.cit.; also in: *Sprawy gdańskie przed sądami zadwornymi oraz ingerencja królów w gdański wymiar sprawiedliwości XVI – XVIII w.*, Wrocław 1985, pp. 156–157.

ed to an unknown compilation of royal judgments from the sixteenth century, which added to our knowledge of precedents. I. Dwornicka and W. Uruszczak, the authors of that valuable contribution, stated that "the question whether adjudications of courts, in particular the rulings of higher courts of Polish law, were a source of law in Poland of the past centuries is a problem that science still needs to resolve."[31] However, they claim elsewhere (in the conclusion) that "it would seem appropriate […] to consider them [i.e. rulings of the royal courts – B.L.] one of the sources of law."[32] Such observations only confirm that the matter deserves to be examined.

The Statute of Nieszawa of 1454 on Precedents. Its Reflection in the Compilations and Treatises of Historical Polish Jurists

A number of researchers (J.W. Bandtkie, A.Z. Helcel, R. Hube, P. Dąbkowski, I. Dwornicka and W. Uruszczak) drew attention to the provision on precedents included in the Statute of Nieszawa. This is the only statutory regulation (besides the inoperative provision in the Correction of Laws of 1532)[33] which prescribes use of precedents as a source of law; therefore it deserves particular attention.

In the complex structure of the Statute of Nieszawa[34], the article pertaining to precedents appears twice: in the Greater Polish Nieszawa edition (I) of November 12th, 1454,[35] and the standard version (II) contained in the alleged charter of Kazimierz Jagiellończyk issued in

31 I. Dwornicka, W. Uruszczak, *Nieznany zbiór wyroków sądów królewskich (Decreta regia) z lat 1517 - 1550 w rękopisie Biblioteki Jagiellońskiej*, "Czasopimo Prawno-Historyczne" 1988, XL, vol. 2, p. 183.

32 Ibidem, p. 193.

33 Cf. p. 5 below,

34 S. Roman, *Przywileje nieszawskie*, "SHPP" 1957, VII, vol. 2, Wrocław 1957, p. 213f.

35 Ibidem, p. 27–28. The entire text of that edition was published by B. Ulanowski, *Najdawniejszy układ systematyczny prawa polskiego z XV wieku*, AKP vol. V, pp. 61–69.

Nieszawa on November 23 1454[36], but which in fact was drafted in 1496 as part of the confirmation of Jan Olbracht at the Sejm of Piotrków.[37]

Thus, according to our current knowledge on the charters of Nieszawa, the origins of the article on precedents should be sought in Greater Poland. R. Hube, having found it to be absent in the Lesser Polish editions, attributed it even to certain unique character traits of Greater Poles.[38]

The content of the article is cited after the standard version (II) of 1496[39], as this very redaction (the aforesaid first version differed little from the second)[40] was incorporated into Łaski's edition that Polish legal writers relied on later, as well as reprinted in *Volumina Legum*.[41] The article reads as follows:

> De libro iudiciorum
> Item statuimus, quod pro iudiciis iuste expediendis et negotiis in iudicium deductis scribendis ideliter, fiat unus liber iudiciorum seu actorum in qualibet districtu. Et dum in aliqua causa in iudicium deducta super aliquo articulo causa in iudicium deducta super aliquo articulo audita propositione et responsione, fuerit in iudicio sententiatum, quod ilia sententia in librum actorum inscribatur, ut postea super eodem articulo vel ei simili, similis sententia proferatur.

36 On that charter see remarks by S. Roman, op.cit., pp. 55–60; ibidem, the entire discussion concerning the so-called universal charter.

37 Ibidem, pp. 28 and 56–60.

38 R. Hube, *Statuta nieszawskie z 1454 roku*, Warszawa 1875, p. 48: "In any case, the predilection of Greater Poles for a formal, strictly determined order and the abhorrence of indeterminacy is most vividly manifested in the demand they have advanced and which they continually support, namely to adhere to written laws and to grant binding force to precedents." V. also ibidem pp. 44, 46.

39 J. Łaski, *Commune incliti Poloniae regni privilegium*, p. 93v. Łaski used the text of the original, cf. S. Roman, *Przywileje nieszawskie*, p. 28.

40 The only difference is that version I reads *sit unus liber*, whereas in version II this is *fiat unus liber*. However, sections *De dissimili sententia cause equalis* (I), *De libro iudiciorum* (II) are indeed distinct.

41 *Volumina Legum*, I, p. 115, f. 250. Hereinafter: VL. I quote *Volumina* following the Petersburg edition by Ohryzko, additionally providing pages of the Piarist edition.

The text is lucid and does not arouse any particular doubt. According to the provision, each district should have one—one could say special[42]—court ledger in which the ruling should have been entered after a case had been adjudicated, so that in an identical or similar case the same (literally: similar – *similis*) decision would be made. The article thus provides with respect to two issues: 1) the establishment of a ledger, 2) formulation of a judgment based on earlier rulings. The latter clearly seeks to recognize precedent as a basis for adjudication: in the same case (*super eodem articulo*) one should deliver a similar (which, considering the intention of the legislator, is likely to mean "the same")[43] judgment. What is more, it goes even further as it provides for the use of ruling in similar cases (*vel ei similii*), aiming for admission of the principle of analogy.

The practical application of precedents, initially provided for only in the Greater Polish charter (I) was to take place—as followed from the article—already at district level, i.e. in land (*ziemski*) or municipal (*grodzki*) court. Thanks to the universal charter of 1496 (II) it came into effect nationally, meaning that the courts throughout Poland were to comply with the rule. This should be reflected in the sources relating to those courts, but no such evidence can be found.[44] What is more, the injunction to establish a ledger in which rulings would be entered should also be manifested in the structure of court books after 1454. However, court books show no traces of a separate ledger for which the Statute of Nieszawa provided.[45] One may therefore suspect that the

42 Most likely, this is how the provision was understood by J. W. Bandtkie and P. Dąbkowski.

43 Obviously, such an interpretation may give rise to objections: in the literal sense, *similis sententia* merely means similar rather than the same ruling. However, it was probably the intention of the legislator—evinced in the directive to record judgments separately—to have identical rulings in the same cases. At any rate, the principles of modern interpretation should not be applied to medieval texts.

44 Cf. I. Bielecka, *Inwentarze ksiąg archiwów grodzkich i ziemskich wielkopolskich XIV-XVIII wieku*, Poznań 1965, pp. 9–10.

45 Ibidem, passim, does not observe any changes in the court books in the wake of the Statute of Nieszawa. Books such as *Decreta* began to function as separate ledgers in the courts of Greater Poland much later (e.g. as of 1592 in the land courts of Poznań. Ibidem,

1454 article concerning precedents remained a dead letter, were it not for the fact that it is very tangible in the later compilations of land law and works focusing on that law.

The first to interpret the Nieszawa article was Jan Łaski, who in a note on the margin of the text wrote: *Sententie inscribantur libris iudiciorum, ut in futurum pari modo casus similes iudicentur*.[46] In a chronological sense, Łaski was closest to the provision; admittedly, it had been formulated in 1454 but it became universally applicable (throughout the Crown lands) only after 1496. His opinion is thus extremely valuable, not to mention that it is quite unequivocal: judgments are to be entered into court ledgers so that in the future similar cases may be judged in the same manner (*pari modo*).[47]

Relatively soon, a provision recognizing precedent as a source of law found its way into the grand project of the ultimately rejected Correction of Laws of 1532, but it stipulated that precedent applies only where there is no pertinent provision in the statutes, C. 2, *in fine*: *Nisi casus novus in iudiciis emerserit, qui in statutis non esset expressus, talis enim aliorum statutorum et sententiarum authenticarum similitudine* [emphasis added] *erit iudicandus*.[48] It may be conjectured that the regulation was inspired by the substance of the Nieszawa article[49] but

pp. 418, 422), and therefore in a manner unrelated to the Nieszawa article. Kraków ledgers of that type were created in 1525 (land courts) and 1562 (municipal courts), which again shows no association with the Statute of Nieszawa (on the introduction of separate ledgers. Cf. S. Kutrzeba, *Katalog krajowego archiwum aktów grodzkich i ziemskich w Krakowie*, with copies from: *Teka grona konserwatorów z Galicji Zachodniej*, vol. III, Kraków 1907, pp. 15, 35, 138.

46 J. Łaski, op.cit.

47 Naturally, the expression *pari modo* is assumed to refer to identity in the material sense (identity of the ruling) as opposed to the identity of the lawsuit. If the latter had been meant, the citing of the judgment would not have sufficed.

48 *Correctura statutorum et consuetudinum Regni Poloniae…*, ed. M. Bobrzyński, "Starodawne Prawa Polskiego Pomniki", Kraków 1874, p. 10. Cf. remarks by W. Uruszczak, *Próba kodyfikacji prawa polskiego w pierwszej połowie XVI wieku*, Warszawa 1979, pp. 220, 222. also idem, W. Uruszczak, *Korektura praw z 1592 roku. Studium historycznoprawne*, vol. I, Warszawa–Kraków 1990, p. 62.

49 In his notes to C. 12 of the Correction, M. Bobrzyński does not mention Art. 15 of the Nieszawa charter as a source.

the limitation of scope to *casus novi* set it apart from the latter, which did not contain such a stipulation.

Jakub Przyłuski cited the text after Łaski, and remarked on the note which Łaski added on the margin. As for the Nieszawa article, he focused solely on the second directive, omitting the fragment concerning the establishment of a ledger of rulings in each district.[50] More importantly, however, Przyłuski provided the section containing the Nieszawa article with a brief yet significant commentary: *Uno iure, unis etiam consuetudinibus ac similibus praeiudicatis* [emphasis added] *omnes terrae totius Regni iudicentur*.[51] Thus Przyłuski mentions three principal sources of law: statutes[52], custom, and precedent (in similar cases). The description could not have been at odds with the realities at the time, because one can hardly imagine such an experienced jurist as Przyłuski—who envisioned his work to be a compilation that would become binding[53]—confabulated and falsely asserted the fundamental principles of the validity of law.

Jan Sierakowski, Przyłuski's contemporary, states in his *Układ* (Art. 7) that: *Novus casus non expressus in statutis regni similitudine aliarum sententiarum autenticarum in simili promulgatorum iudicandus est. Casim. in Niesh.*[54] Sierakowski thus ascribed the Nieszawa article a sense it clearly had not had (limitation of precedents to *casus novi*), although it coincided with the aforementioned provision in the unenacted Correction of Law and—perhaps—with the customary law at the time.

We do not learn anything special from the work by J. Herburt. In the Latin abecedary, the excerpt from the Nieszawa article (from *Et dum* — —) was included in the entry for *Decretum*, under the title

50 J. Przyłuski, *Leges seu statuta ac privilegia Regni Poloniae omnia*, Kraków 1553, p. 589.

51 Ibidem, p. 588.

52 Przyłuski understood *ius* to mean *leges, constitutiones*, just as S. Sarnicki, cf. note 57.

53 C. H. Grajewski, op.cit., pp. 117–118.

54 *Jana Sierakowskiego Układ systematyczny prawa polskiego z r. 1554*, ed. B. Ulanowski, AKP, p. 105, Art. 7 Sierakowski refers once again to the Nieszawa article in Art. 94 p. 114: *Sententiae per iudicem latae debent in librum actorum inscribí, ut postea in simili articulo similis sententia proferatur.*

Similia simili decreto decernentur.[55] J. Łączyński did not mention the Nieszawa article at all, yet he observed that when grounds for judgment are lacking in the written Crown law, one should adjudge: — — *pursuant to the custom that is in concord with justice, which from the decrees of the first kings should be taken*.[56] The works of Stanisław Sarnicki and Tomasz Drezner offer more in this respect.

Sarnicki quotes the Nieszawa article in Polish: "An when in such a case that is brought before the court the matter is judged there having heard the complaint and the response, that sentence shall be entered into a book of records, so that later such a matter or one that is similar may receive a similar judgment."[57] However, what Sarnicki observes elsewhere is the most important. Further on in his work, the author returns to the Nieszawa article in the section entitled *Decreta in simili sequi iudices debent*, writing that: *Casimiri statutum in Nieszowa mandat decreta, quae feruntur, in unum librum conscribere, ut postea in simili super eodem articulo decernantur. Verum enim vero consentire debet.* He then offers the following piece of advice: *The wise judge needs to be indulged so that through him all is duly satisfied: the law*[58], *consuetudinibus, decretis in simiłi. Yet the sacred justice should be satisfied first and foremost.*[59] Sarnicki thus recommends that judges treat statutes, custom and precedent equally, but emphasized that—as a fundamental element of judgment—justice (*aequitas*) takes first place.[60] To Sarnicki, precedents (*decreta in simili*) are therefore one of the essential sources

55 J. Herburt, *Statuta Regni Poloniae in ordinem alphabeti digesta*, Kraków 1503, p. 72.

56 Z. Kolankowski, *Zapomniany prawnik XVI wieku – Jan Łączyński i jego "Kompendium sądów Króla Jegomości"*, Toruń 1960, p. 103.

57 S. Sarnicki, *Statuta i metryka przywilejów koronnych*, Kraków 1594, p. 790. Further on, on p. 974, Sarnicki adds: *There should be separate books to enter the judicial sentence*—invoking the Nieszawa article. Sarnicki was therefore of the opinion that the Nieszawa article provided for special ledgers to record judgments, as already noted above.

58 For Sarnicki this meant *leges*, *constitutiones*.

59 Ibidem, p. 1293.

60 Sarnicki was very sensitive about adherence to the principle of justice (or equity, one might guess) and often returned to the issue in his work: pp. 783–789. *Aequitas. As the judges rule, they should first take heed of justice*. Cf. also p. 1287 where he criticizes the fact that judges pay more attention to the letter of the law than to justice, pp. 1291, 1292.

of law, just as they were for Przyłuski. What is more, by offering judges advice, he situates them in the domain of practice, as something that is actually employed.

Drezner approaches the issue in a similar way in his *Institutiones*, stating that one of the sources of law in Poland—other than *constitutiones*—was the judges' consistency (*constantia*) of adjudication in judicial matters. This used to be called "similar rulings" which were subsequently applied in similar cases.[61] In another one of his works, Drezner also states that precedents (*decreta in similibus causis*) were considered law, meaning that in the same cases their legal force was on a par with statutes.[62]

The awareness of the applicability of precedents survived among legal writers until the end of the Commonwealth. Andrzej Lisiecki, author of a 1638 work on the Crown Tribunal, referred to the knowledge and use of law among its deputies, stating: *And where there are praeiudicata, those must not be ignored, for this law clearly provides* — — (here Lisiecki cites the Nieszawa article).[63] Stanisław Ochocki, a seventeenth-century jurist whom our scholarly literature unfairly fails to appreciate[64], wrote that *similia simili decreto seu preaiudicato decernantur*.[65] In the eighteenth century, Michał Słoński asserted the same, invoking the Nieszawa article[66], and adding elsewhere that under that statute a special

61 T. Drezner, *Institutiones…*, pp. 10–11: *Sunt etiam nonnulli iuris constituendi modi apud Polonos, nempe magistratus qui iurisdictioni praesunt, constantia de rebus iudicata; quae similia decreta appellantur et ad similes postea causas trahuntur*. Cf. K. Bukowska, op.cit., pp. 103–104.

62 T. Drezner, *Processus iudiciarius Regni Poloniae*, in: *Proces sądowny ziemskiego prawa koronnego*, ed. G. Czaradzki, Warszawa 1640, p. D2: *De re iudicata: Appendix. Decreta in similibus caussis alegata pro legibus habentur, ubi est rerum iudicatarum constantia*. Drezner also mentions precedents in *Similium iuris Poloni cum iure Romano centuria una*, Paris 1602, p. 39, erroneously ascribing the Nieszawa article to Kazimierz Wielki, which was not corrected by K. Bukowska, op.cit.

63 A. Lisiecki, *Trybunał Główny Koronny siedmią splendorów oświecony*, Kraków 1638. Cf. J. Makarewicz, *Polskie prawo karne*, Lvov—Warszawa 1910, p. 13.

64 S. Kutrzeba, *Historia źródeł…*, vol. I, p. 281; Kutrzeba assumed Łochowski to have been an eighteenth-century author, and found the latter's *Regulae iuris* to be a work of minor value.

65 S. Łochowski, *Regulae iuris et loci communes forenses…*, Kraków 1644, p. 110.

66 M. Słoński, *Accessoria, statut i konstytucje*, Lvov 1765, p. 38.

ledger should exist in which rulings could be recorded.[67] In his renowned treaty, Teodor Ostrowski complained of the absence of a book of Polish laws (*a civil law of the crown provinces thus far separately enacted we do not possess* — —), and noted that — — *its knowledge* [i.e. of the law – B.L.] *must be gained by great labour from massive volumes, and even from precedents* [emphasis added] *and customs*."[68] A little further on, describing the shortcomings of the then civil law (the law applied at courts, in other words), the author observed as follows: "in the aforesaid and in similar deficiencies of our law the statute of 1454 provides that one should be guided by praeiudicatis vel similibus decretis. In our country, they constitute the law of custom whose authority was sacred in all civil societies."[69]

The works and the compendia written by historical Polish jurists do not yield much information about precedents. This is not surprising, because early Polish jurisprudence of land law was exceedingly meagre and suffered from lack of reflection on almost every issue. With few exceptions, this was a pursuit resembling collectorship (compendiarism) rather than science. Even so, one does obtain some information. Almost all of the jurists cited here (Łaski, Przyłuski, Sierakowski, Herburt, Sarnicki, Drezner, Lisiecki, Łochowski, Słoński, Ostrowski) either referred to the Nieszawa article or relied on it, subscribing to the view that in land law the principle of precedent could be applied when making a judgment, in other words that a previous ruling offered grounds for another judicial decision in an identical or similar case. Even codifiers (Correction of Laws) adopted a similar approach.

Some authors went as far as to state that precedents were a fundamental source (besides custom and statutes) of land law (Przyłuski, Sarnicki, Drezner, and to some extent Ostrowski). It was also stressed that precedents are to be created for *casus novi*, thus rectifying legal gaps

67 Ibidem p. 73.
68 T. Ostrowski, *Prawo cywilne narodu polskiego*, 2nd edition, vol. I, Warszawa 1787, pp. 8–9.
69 Ibidem, p. 13.

(for which the Nieszawa article did not provide). Such a view was expressed by the codifiers of 1532, Sierakowski, as well as Ostrowski. Few authors (Łączyński, Ostrowski) classified precedents among the sources of customary law, an opinion which might seem debatable today[70], but which does not bear significantly on these deliberations. Most importantly, however, the writings of past jurists decidedly corroborate the existence and application of precedents in Polish land law. They also attest to the operation of precedents in yet another way, which will be discussed later on (see V, VIII below).

Precedents in Constitutiones et Iura Terrae Lanciciensis

According to the Nieszawa article, special books for judicial rulings were to be kept in each district. Thus in the mid-fifteenth century it was presumed that even the judgments of the lowest-level nobles' courts could become precedents that would be applicable later. Still, court books show no evidence of such practice. At any rate, there are no mentions of such a mode of adjudication, where the judge invoked an earlier ruling in a similar case.[71] It was not uncommon that the bench did not know how to resolve a case and resorted to *ad interrogandum* (i.e. solicited a solution with higher-ranking land officials) yet no information can be found that they ever fell back on a previously passed judgment. If so, were there any grounds for the Nieszawa article and was it associated with an existing (or perhaps only postulated) practice, whereby a verdict could become a law?

70 It is much the same problem as the question of whether English common law should be considered customary law, which one could hardly agree with given that law deriving from precedents developed in an altogether different way than customary or enacted law. On that subject cf. M. Sczaniecki, *Powszechna historia państwa i prawa*, Warszawa 1973, pp. 217–218.

71 This applies to court records prior to 1454 and later ones. V. the selection of records by Helcel tittled *Starodawne Prawa Polskiego Pomniki* and the collection of records in AGZ.

Although court books cannot corroborate the practice, the question should be answered in the affirmative, meaning that land (or municipal) courts did shape law through their decisions even prior to the Nieszawa charter. Here, one cannot rely on the so-called precedents in the statutes of Kazimierz Wielki, as all indications seem to suggest that they had nothing to do with actual rulings and represent fabricated cases.[72] However, the significance of precedents is validated by the provisions of *Constitutiones et tura terrae Lanciciensis*, a compilation from the first half of the fifteenth century.[73]

Already R. Hube, in a paper delivered at Biblioteka Warszawska (1853, I), found that *Constitutiones* consist largely of precedents.[74] The matter was investigated in greater detail by S. Kutrzeba. Nevertheless, his disquisitions on the subject lack clarity at times and do contain occasional errors. At one point, Kutrzeba stated that *Constitutiones* contain four precedents, namely Art. 18, 23, 29, and 30[75], whereas later he argues that there are only three: Art. 18, 23, 39[76]. In fact, five articles in that compilation are based on judicial rulings[77], which for the purposes of this text will be designated with numbers according to the edition of the manuscript Ptrb. III published by R. Ulanowski[78]. The numbering of respective articles is as follows: 16(18), 21(23), 27(29), 28(30),

72 Cf. p. 2. Admittedly, some researchers believed that precedents in the statutes originated from judicial practice, but they were unable to prove it reliably. Sufficient arguments against judicial provenance of the precedents in the statutes were advanced by A. Winiarz, *Prejudykaty w Statutach Kazimierza Wielkiego*, "Kwartalnik Historyczny" 1895, IX, pp. 195–206; S. Roman, *Geneza statutów…*, pp. 98–107.

73 S. Kutrzeba, *Historia źródeł…*, vol. I, op. Cit., pp. 102–103, 268–270.

74 R. Hube, *Przyczynek…*, op.cit., p. 277. Hube also states there that the later (1505) *Consuetudines terrae Cracoviensis* were based on precedents, but there is no evidence to support this, cf. S. Roman, *Geneza statutów…*, p. 100115.

75 S. Kutrzeba, *Introduction to Cautelae…*, p. 200.

76 S. Kutrzeba, *Historia źródeł*, vol. I, pp. 268–269.

77 Five precedents were also identified by S. Roman, *Geneza statutów*, p.100, notes 114 and 115.

78 AKP IV, p. 435 - 492 (in the notes, Ulanowski provided modified versions of the text according to Sier. IV). The volume also includes the compilation of Łęczyca from another manuscript (Jag. II) where the articles are designated with different numbers (pp. 619–628).

41(42).[79] As it appears, Kutrzeba was closer to the truth in the first, earlier assertion, than in what he stated later, where in addition article (39) was erroneously classified as a precedent.

A more detailed analysis of the above five articles may shed some light on how precedents were formulated and employed.

Art. 16(18): *Domina — — Drogochna de Birzwyenna nomine sui kmethonis acquisiva in Iacussio de Slupcza pro medietate genitalium quinque marcas, sicut pro medio homine*.[80] By repeating the ruling of the court, the article demonstrates convincingly that an adjudication had set a precedent which was subsequently adopted in a compilation of customary law. It must have been included there because it was in effect in practice, while the compilation was to ensure that it remained in force in the future. Let us add that in Art. 16 (and very likely in the articles quoted below) there are no fictitious elements: the parties to the action actually lived and were involved in a suit towards the end of the sixteenth century (which means that the verdict was delivered at that time), therefore the judicial ruling originates from a proceeding which did in fact take place.[81]

Perhaps the precedent gave rise to doubt or required subjective and objective extension, because the following article, 17 (19), essentially a continuation of the previous one, states that

Statutum est igitur per omnes dominos in colloquio generali, quando aliquis alteri abscidit testiculos, alias mąda, sicut pro capite iudicamus, seu ipsa genitalia extrahet qualiscunque violenter, solvat cum pena septuaginta et actori quinquaginta.[82]

79 Given that Kutrzeba referred to the articles of the Łęczyca compilation following the numbering in J. W. Bandtkie, *Ius Polonicum*, Warszawa 1831, pp. 194–200, the convention he used is provided here in parentheses. S. Kutrzeba, *Historia źródeł…*, I, p. 270, reports that Bandtkie relied on the text in the manuscript Sier. IV, but the numbering deviates from the published version of Sier. IV. Cf. AKP II, p. XXXVII and AKP IV, pp. 433–452. and the synoptic table by A. Kłodziński, Tab. VIII. Cf. also AKP II, p. LXXI. How then did Bandtkie arrive at such a different numbering?

80 AKP, IV, p. 438.

81 As demonstrated by S. Kutrzeba, who studied the court books of Łęczyca published by A. Pawiński.

82 AKP, IV, p. 438.

Thus the dignitaries at the colloquium (or in a court of that nature) confirmed the precedent of "Drogochna vs Jakusz" but was that the point? The ruling of the precedent (i.e. that the removal of the genitals of a peasant entails a fine in the amount of wergeld) was clearly made more general, because without doubt the resolution of the dignitaries pertained to the nobility, and furthermore provided for additional public (*spetuaginta*) and private (*actori quinquaginta*) penalties in the event of a violent or rather intentional (*violenter*!) criminal act. Hence the colloquial decision—which might be conjectured in view of the two articles being connected—does not mean that precedents had to be endorsed by land authority; it only proves that in a specific case judicial precedent inspired a norm with a wider scope of application.

2) Art. 21(23): *Citavit Malsky fratres pro porcione hereditatis post mortem fratris ipsorum in Lythwania sine prole mortui, quem evaserunt prescripcione unius anni et sex septimanis, ideo pro bonis derelictis pusczina servatur prescripcio unius anni cum sex septimanis; et hoc intelligas de illis hominibus, qui simul trahunt in una terra*.[83] Here, one first quoted the ruling in the case of the Malksi brothers concerning the prescription of claims to succession after persons who died without issue, which certainly functioned as a precedent (otherwise it would not have been taken into consideration); subsequently, a general rule was derived which for editorial reasons of was better suited to a compilation of laws.

3) Art. 27(29): beginning with: *De prescripcione nota, Slavantha conquestus est contra Raphaelem de B. — —* , and ending with: *diiudicatum exstitit: ex quo litteras non habuit super caucione fideiussoria, ob prescripcionem annorum trium causam huiusmodi amisisse*.[84] Here, only the content of the ruling in a particular dispute is provided; having been included in the compilation it became one of its provisions (namely: an undocumented guaranty for a woman receiving dowry that she would not make any claims against the family estate was effective only for three years).

83 Ibidem, p. 439.
84 Ibidem, p. 441.

4) Art. 28(30) *Statutum est, quod omnis spoliatus de quacunque re sive hereditaria sive alia quacunqua ipse spoliatus fuerit, in possessionem idem spoliatus debet restitui vel tenetur ad possessionem ante omnia, et postea agat, qui vult, contra ipsum possessorem*. This apparently statutory provision (*statutum est*) pertaining to restoration of ownership had in fact been based on a precedent: *Et hoc contingit Dorothee relicte de R. contra suam socram Stachnam* — — (followed by the description of the case).[85]

5) Art. 41(42) is structured similarly to Art. 28: first, the provision is stated using abstract wording, only to observe that such had been the verdict in a particular lawsuit: *Quando frater germanus sorori vendit hereditatem, et postea alter frater conclenodialis illam hereditatem vellet aquirere, dicendo: ego sum proximor quam soror habens maritum de clenodio alio, iudicatum exstitit, quod talis sorror est proximior; et hoc fuit inter Katherinam Hunslay et Otham de D., et multi domini iudicaverunt causam istam.* The latter passage (*multi domini*) seems to underscore that it was no ordinary ruling in a suit where proximity to estate was argued, but a judgment of more momentous significance.[86]

The unknown author (or perhaps authors) of the compilation entitled *Constitutiones et iura terrae Lanciciensis* took a twofold advantage of judicial rulings: either they incorporated the content of the ruling in the compilation, thus making it a binding regulation (Art. 16, 27) or drew on the judgment but used it to formulate a general principle, a provision of abstract nature (Art. 21, 28, 41).[87]

The above articles of the compilation of Łęczyca are proof that certain decisions of the courts were particularly well remembered. Those may have been judgments which created something new, a novel *ius*. They were remembered (and most likely recorded in writing) while stating the parties involved and providing description of the case, as verdicts

85 Ibidem.
86 Ibidem, p. 444.
87 Cf. S. Roman, *Geneza statutów…*, p. 100, notes 114, 115.

that were to be relied on in judicial practice and as rulings which became the basis for more refined legal provisions befitting a compilation.

Consequently, judgments of land courts had law-making significance even before the Nieszawa article was issued. The latter only confirmed the existing state of affairs and sought to safeguard it by statutory means. Still, the judgments of the various local land and municipals courts did not become precedents that had a major impact on the shape of law. Royal courts (during the sejm or *in curia*) as well as the later Crown Tribunal played a much greater role in this respect.

The Creation of Precedents in the Royal Courts In Curia and In Conventu

When M. Bobrzyński published the judgments of the royal court and demanded that conclusive judicial rulings be delivered, he primarily meant those "which possessed the authority of precedents for all other courts, that is judgments of the royal court delivered *in curia* or at the Sejm, as well as the judgments of the tribunal."[88] Bobrzyński had therefore no hesitation in attributing the power of precedent to the rulings of the royal courts and the Tribunal. P. Dąbkowski did likewise later on, stating that the decisions of the royal Sejm courts in the first place gained the authority of precedent.[89] Similarly, S. Kutrzeba argued that the verdicts of royal courts, in particular its Sejm sessions, had the power of precedent.[90]

The above authors were thoroughly conversant with the sources of Polish law, while two jurists worked on precedents directly: M. Bobrzyński edited and published a compilation of royal judgments,

88 M. Bobrzyński, *Introduction to Decreta…*, op.cit., p. 11.

89 P. Dąbkowski, *Prawo prywatne….*, I, op.cit., p. 44.

90 S. Kutrzeba, *Historia źródeł…*, I, op.cit., p. 157 "Among judgments those of the royal courts were the most important, the superior of which were those pronounced at the Sejm, given that the king was a source of law. Hence such rulings had the nature of precedents."

which he provided with an entry for '*praeiudicata*' in the index[91], whereas S. Kutrzeba studied legal norms which had their origins in the judicial rulings contained in *Constitutiones* (*Lancicienses*) and *Cautelae*.[92] However, both writers—not to mention Dąbkowski—failed to provide any conclusive source evidence to support their assertions. Only S. Kutrzeba founded his reasoning on the premise that royal judgments had the power of precedents because the king was a source of law.[93] The authors thus formulated their observations based on the general impression gained from the knowledge of sources rather than on specific evidence.

On the other hand, finding incontrovertible proof that judgments delivered by the royal courts had the power of precedents is extremely difficult. We do not know any provision which would affirm the precedential force and significance of the royal court rulings. It is possible than no such provision had ever existed, which means that the matter is likely to have been governed by custom. In a project of judicial procedure from 1611, J. Swoszowski concluded that the jurisdiction of royal courts was based primarily on custom, examples and the authority of the rulings.[94] The "examples" and "authority of the decrees" are probably the elements we are looking for, since they relate to precedents. However, these are only conjectures, therefore other sources have to be drawn upon.

A certain amount of material—which is decisive in my opinion—may be found in *Decreta*, published by Bobrzyński, and the aforementioned index with which they are supplied. Several acts contained in the volume were also determined by B. Grużewski to have been sources attesting to the creation of precedents.[95] For various reasons, the infor-

91 M. Bobrzyński, *Decreta…*., op.cit., p. 460.

92 S. Kutrzeba, *Cautelae…*., op.cit., pp. 200, 207–209.

93 Cf. footnote 89 above.

94 VL III, p. 35, f. 67: *The first jurisdiction of ours is the royal one at the sejm or in curia. 3. Great though it is and governed by various statutes and constitutions, its judgments take greater heed of the custom, the example and the authority of the decrees.*

95 B. Grużewski, *Sądownictwo…*, op.cit., p. 788.

mation cited by both authors cannot be accepted without reservations[96], but it offers valuable hints nonetheless. It would therefore be worthwhile to examine the volume edited by Bobrzyński from this standpoint.

There was a practice in the royal courts that the monarch suspended the proceedings in the assessorial court or referred it from that court to the Sejm court where, aided by advisors, he would arrive at a decision of a broader significance, because it would have the force of statute in the future.

(D. 81 – 1515 – p. 83) – J. I. sues J. B, as according to the plaintiff the latter unfairly brought action against the former before the ecclesiastical court alleging usury. The king with his assessors (*consiliarii*), probably unable to settle the case straight away, suspends it — — *ad conventionem generalem proximam — —. Et quicquid Maiestas regia cum consiliariis in eadem conventione laudaverit seu adinvenerit in eadem causa, hoc pro statuto* [emphasis added] *perpetuo firmiter tenere debent.* If the two final words referred only to the parties to the action (as is argued by B. Grużewski, who in a sense deprives the decision of a more general import)[97], then one can hardly understand why efforts were made to establish a norm with the virtue of perpetual statute solely for the benefit of the parties. The intention therefore was to formulate a provision which in the future would be binding for others as well.

(D. 244 — 1523 — p. 227) — J. B. accuses K. G., land clerk of Chełm, that the latter made an erroneous entry concerning the adjournment of a court-decreed period, as a result of which J.B. incurred losses. J. B. solicits mainly—it would seem—a *restitutio in integrum. Et sacra Maiestas regia, volens ne quisquam circa iudicia in suis causis opprimeretur et etiam cupiens, ut quilibet suam causam custodiret, et attendens hoc negotium non fore parvi momenti, volensque desuper statutum condere* [emphasis added] *qualiter postea tales actiones et negotia iudicari*

96 B. Grużewski took only one of the precedents in the index into account, but at the same time cited another two which Bobrzyński did not include in the index. D. 244

97 B. Grużewski, op.cit.

et conservari in toto regno habebunt, hanc causam ad conventionem generalem — — remisit — — (and appointed a date of hearing for the parties). There can be no doubt here that the king anticipated, through the issuance of the proper ruling in the Sejm court, the establishment of a universally binding norm (in land law) in the future.

The referral of ongoing proceedings from *curia* to *conventio*, as it was briefly and somewhat inaccurately recorded in those acts, did not of course mean that the cases were debated at the Sejm but that they were heard by the Sejm court.[98] After all, the king resolved the matter *cum consiliaris* (with the senators) as opposed to *cum conventu.* In any case the question was elucidated sufficiently by B. Grużewski.[99]

The decisive factor for the resolution of a dispute and the substance of the judgment—both in the courts *in curia* and *in conventu*—was the person of the king (at least during the reign of Zygmunt Stary).[100] Still, why did the king not content himself with delivering a fitting judgment in the assessorial court (*in curia*)? One can justifiably presume, as B. Grużewski did, that the cases referred to the Sejm court were chiefly new ones (*casus novi*) which thus far had not been regulated by law.[101] In such circumstances, law-making (*statutum condere*) through judicial ruling was safer for the king in view of the authority of the Sejm court and less blatant when viewed from the standpoint of the *nihil novi* principle. A later constitution (from 1607) quite clearly affirmed the exclusive competence of the Sejm court with respect to *casus novi*, stating that *nova emergentia shall however be decided at the Sejm*.[102]

98 In this case, the phrase *ad conventionem* meant "for the duration of the Sejm" on that subject cf. W. Uruszczak, *Sejm walny koronny w latach 1506–1540*, 1981 "SHPP" XVI, p. 141.

99 B. Grużewski, op.cit., p. 798.

100 Ibidem, pp. 78–79. Regarding the decline of the position of the monarch in the Sejm court during the reign of subsequent kings cf. remarks by Bobrzyński in the *Introduction to Decreta*, p. 141.

101 B. Grużewski, op.cit., pp. 77–78.

102 VL II, p. 439, f. 1609. Cf. Z. Szcząska, *Sąd sejmowy w Polsce od końca XVI do końca XVIII wieku*, "Czasopismo Prawo-Historyczne" 1968, XX, fasc. II, p. 104 and W. Uruszczak, *Sejm walny…*, p. 142.

The information which the above sources provide concerns only the king's intention to establish a new law by way of a judicial ruling. We do not learn anything about the content of the expected precedents though we do have an idea of what that content pertained to in general. However, *Decreta* also offer sources from which one finds out about precedents already created.

Occasionally, the king created precedents concomitantly, as it were, to an ongoing proceeding.

(D. 385 — 1527 — p. 348) —acting as an appellate instance, the king confirmed the judgment of the assessorial court *in curia* and — — *preterea* — — *dignata est* [i.e. *Maiestas* – B.L.] *decemere: si et in quantum pars aliqua appellationem suam coram Maiestate sua infra spatium trium dierum attentare noluerit seu tardaverit, iam ipsa sententia, a qua appellaverit, transit in rem iudicatam.* Admittedly, the excerpt does not state that the king established a new law, but there is no doubt[103] that a new precedent-like norm emerged, at least in the sense that it was incorporated into the royal adjudication. The norm imposed a limitation of three days for appeals from the judgment of the assessorial court (*in curia*) to the king.

At times, precedent developed in a manner of ordinance: it was not associated with a particular case but rather with an issue which recurred repeatedly in numerous cases. Consequently, the court, acting upon special instruction from the king (*ex informatione et interrogatione sacrae Maiestatis regiae*), who had been solicited for advice, formulated a suitable decision in the nature of a precedent.

(D. — 1527 — p. 340) – The act, relating to enforcement of court rulings, does not mention the names of the parties to litigation, nevertheless — — *iudicium regium assesorium ad informationem Maiestatis regiae decrevit* — —, it states when the earlier provisions on enforcement should be applied and when the new ones (most likely specified in *Formula processus* of 1523) should take effect.

103 Both Bobrzyński and Grużewski failed to take note of that ruling.

Naturally, the creation of a precedent was most often associated with the substance of an individual, particular case heard before the royal court.

(D. 458 — 1530 — p. 407) – Andrzej Lipski accused Jan of Ocieszyn, land clerk of Kraków, that the latter refused to issue a copy of the document relating to the division of an estate without a special, additional fee. The clerk responded that certain irregular entries into the registers were involved, i.e. other than provided for in the applicable formularies (most likely in *Formula processus*). (*Maiestas*) — — *decernere dignata est, prout praesentibus decernit, quod quicumque* [emphasis added] *voluerit alio modo et forma inscriptiones facere, vel inductiones earundem tam in acta regalia quam etiam terrestria Cracoviensia a notario inscribi et induci optare preter eum modum et formam, quae in statuto est descripta, extunc — — quantitas salarii percipiendi in arbitrio ipsius notarii dependebit, vel prout tales personae cum dicto notario condictamen facere potuerint.* Here, we find a precedent (to which *quincumque* attests)[104], which is to apply in identical cases in the future.

(D. 470 — 1530 — p. 415) — In a contention between brothers Paweł and Mikołaj K., and Adam Cz., the question of whether a court-decreed deadline was correctly adjourned proved crucial for the dispute. The king decided that — — *suspensio et prorogatio termini per suam Maiestatem absque consensu partium nulla est, nec fieri potuit — —*. The ruling does not bear any distinct traits of a precedent, yet it is formulated in such general terms that it most likely functioned as one.[105]

(D. 478 — 1530 — p. 419) — Jan of Ocieszyn, land clerk of Kraków, sues Stanisław L. for alleging unjustly that the clerk entered into the register a non-existent pledge on the estate of Stanisław L. to

104 A precedent with identical content is quoted by T. Zawacki, *Processus iudiciarius Regni Poloniae*, Kraków 1619, p. 3. It was nevertheless established in 1539 at the Sejm court in Piotrków.

105 M. Bobrzyński in the index to *Decreta* defines the quoted act as a precedent, but for a different reason: it allegedly contained a clause stating that the ruling should be applied in similar cases. On that issue cf. further in this text.

the benefit of A.L. Having proved falsehood of the allegation, the clerk turned to the king: — — *ut sua Maiestas contra ipsum S. L. extenderet statutum regni de inordinatis citationibus editum et ut ipsum iuxta hoc idem statutum punire dignaretur* — —. The king's adjudication was directed not only against the defendant: — — *preterea sua Maiestas eidem S. L. et omnibus aliis severiter mandare dignata est, ne amplius quispiam post hoc in futurum* [emphases added] *audeat officiales suae Maiestatis terrestres talibus inordinatibus querimoniis lacessere, et si aliquis in contrarium huic decreto et mandato suae Maiestatis fecerit, iuxta dispositionem statuti de inordinatis citationibus per suam Maiestatem irremissibiliter punietur.*

One could argue that the king did not create a precedent in this case, but merely substantiated his ruling by citing a statutory provision (most likely the Statute of Nowy Korczyn from 1465, which concerned persons who levelled false accusations).[106] That, however, would be an oversimplified explanation. The very fact of recognizing the binding force of the statute was precedential, for instance because one might have been unaware that the statute was still in effect or, even more importantly, whether the protection it provided for also applied to situations in which unfounded complaints were made against officials (after all, the clerk requested that the scope of the statute be extended to include the aforementioned cases as well). At any rate, the ruling of the king was not only a judgment but also formulated a general norm that was to apply in the future.

It follows from certain acts contained in Bobrzyński's publication that the adjudication of a case involved the practice of invoking previous rulings, which thus operated as precedents.

(D. 370 — 1527— p. 336) — At an appellate hearing: *Iudicium itaque regium assessorium ex interrogatione ac informatione Maiestatis regiae — — praesertim eo attento, quia pars citata* [here: the party bringing the appeal] *se defendebat contra actores praescriptione ter-*

106 VL I, p. 72, f. 1158: *De falsariis citationum puniendis*.

restri, atque etiam inhaerendo decreto Maiestatis regiae [emphasis added] *in conventione Pyotrkoviensi inter nobiles — — lato ac facto — —* (rules that the appellants shall continue to hold the estate against which their adversaries made claims by virtue of the right of proximity).

Grużewski and Bobrzyński (in the index) note other information of that kind. Grużewski[107] mentions an act (D. 323 — 1523 — p. 293) which contains the following decision — — *aliae autem controversiae huis similes, ut* — — [relevant judicial disputes are enumerated here] — — *iuxta nostrae Maiestatis informationem in causa superiore fiendam sic pariformiter conservabunt et sic eidem conformabuntur.* In turn, Bobrzyński counts it as a precedent that someone (D. 470 — 1530 — p. 415) quotes a similar dispute (— — *parte actorea paratam controversiam ex actis — — in simili causa factam reproducente — —*). However, in both instances the *causae similes* were limited to the circle of persons associated with litigation, or even those involved in it (in the latter case, the party invokes a dispute in which the plaintiffs were the same, the substance of the case was identical and only the defendant was different, probably an accomplice in the committed crime). Consequently, a ruling neither acquired the power of precedent (in the first case), nor did one invoke a ruling which already had the power of precedent (the second case). After all, judgments which function as precedents are expected to apply not only to all entities engaged in the same disputes, but they should be binding in cases where the subjects involved are altogether different. It would therefore be difficult to recognize the above as instances of precedents.

Leaving Bobrzyński's publication aside, one can observe that other, albeit regrettably rare sources, corroborate the practice of quoting previous royal judgments. One such example is provided by H. Grajewski, who reports that in a lawsuit taking place in 1585 (Jakub Niemojewski vs Krzysztof Zborowski) invoked a very well-known ruling of 1537—more on which below—that pertained to *inordinata citatio*. It may be

107 B. Grużewski, op.cit., p. 783.

noted that we owe our knowledge of the ruling to J. Przyłuski.[108] Another example of invoking precedent—this time in the domain of municipal law—is supplied by Z. Rymaszewski.[109]

The above source material from the volume published by M. Bobrzyński to some degree contributes to understanding the mechanism behind the emergence of precedents. First and foremost, they show that the monarch and the Sejm court (alternatively the court *in curia*) endowed a ruling with a distinctly precedential character by virtue of asserting that they aim to make law (*statutum condere*) or by providing it with a clause that in the future it would apply to everyone who acts contrary to its provision. This was in fact a deliberate legislative activity, with the exception that it was pursued by the Sejm court. Ultimately, it gave rise to *decreta regia in vim statuti*, as they were called in the sixteenth century.[110]

As it follows from the cited sources, they would apply to cases as yet unresolved by law or to doubtful ones; to put in the most general terms, they pertained to *casus novi* (which arose chiefly in the course of lawsuits). In any case, one can hardly imagine the creation of a precedent without the element of novelty; therefore, an adjudication of the royal court which did not possess that component would probably have not qualified as a precedent. Novelties were remembered and recorded,[111] to be taken advantage of in other cases, i.e. by citing a ruling delivered earlier, a measure to which Bobrzyński's publication explicitly refers.

108 H. Grajewski, op.cit., p. 14017.

109 Z. Rymaszewski, *Sprawy gdańskie…*, pp. 156–157.

110 Cf. below.

111 A later example, dating from 1690: the Sejm court held that persons staying outside the country may take an oath in writing, which they are to sign; the clerk noted that this ensued *vi praeiudicati iudiciorum comitalium*, J. Rafacz, *Z dziejów prawa rzymskiego w Polsce. Księga pamiątkowa ku czci Leona Pinińskiego*, Lvov 1936, p. 200. Cf. J. Michalski, op.cit., pp. 180–287, who also takes note of and comments on that precedent.

Precedents in sixteenth-century legal compilations

The significance of precedents as sources of law is validated—albeit to a varying degree—by the numerous legal compilations written in the sixteenth century, whose authors (with the probable exception of J. Sierakowski and his *Układy*) expected that they would be adopted as binding. Those are works by J. Przyłuski, J. Sierakowski, J. Herburt, S. Sarnicki and J. Januszowski. Among the diverse provisions of land law, the jurists also cite those which originated with the adjudications of the royal courts.

Przyłuski's compilation is particularly important as far as the matter discussed here is concerned; by and large, the remaining jurists followed his example with respect to the selection of material.[112] The four precedents which Przyłuski incorporated into his compilation[113] pertained to distinct legal issues: *inordinata citatio* (precedent from 1537),[114] abolition of the penalty of two oxen for failure to appear for trial (also from 1537),[115] proof of nobility of a deceased (killed) noble (date unknown)[116], and court prosecutors (1548).[117] We shall discuss the two first precedents, as they offer some insight into how judicial rulings came to acquire the force of statute.

The first precedent is associated with *citatio inordinata*, a petition which employed defamatory language to describe the defendant. The king prohibited such suits under the penalty of a week's incarceration in

112 For example, J. Herburt's *Statuta Regni Poloniae* plagiarizes Przyłuski's compilation, cf. H. Grajewski, op.cit., pp. 123–129.

113 Likewise, H. Grajewski, op.cit., p. 122, who also identified four precedents in the work by Przyłuski.

114 J. Przyłuski, op.cit., pp. 48, 647. Cf. H. Grajewski, op.cit., pp. 122, 14017. H. Grajewski meticulously lists all the writers who cited that precedent as well as others after Przyłuski.

115 J. Przyłuski, op.cit., p. 637. Cf. H. Grajewski, op.cit., pp. 122,14430.

116 J. Przyłuski, op.cit., p. 287; cf. H. Grajewski, op.cit., pp. 122, 15248.

117 J. Przyłuski, op.cit., p. 598. One may doubt whether the regulation stemmed from a royal judgment, but this is very probable. H. Grajewski found a mention that the act was referred to as *edictum iudiciarium*, op.cit., pp. 12238, 13915.

the tower.[118] The ruling features a technical term denoting precedent: *decretum (regium) in vim statuti*. Naturally, the word *decretum* refers to the judgment rather than any legislative act of the monarch.[119] In an addendum in the margin, Przyłuski even provides the names of parties to the litigation (*Sigismundus. Decretum inter Strzałkowski et Kołaczkowski*),[120] while S. Sarnicki reported later that the judgment followed a dispute *between two nobles of Ruthenia*.[121] The regulation was to apply in the future (*perpetuis temporibus*) in all land law courts; thus it pertained not only to the aforementioned dispute but also to all prospective contentions of that kind. It was formulated in the refined form of an abstract provision, without any case-related details of the lawsuit; this, however, is a matter of minor importance, as we may be certain that this piece of

118 J. Przyłuski, op.cit., p. 48: *Maiestas Regia decereto suo in vim statuti perpetuis temporibus duraturi, omnibus passim tam procuratoribus quam etiam aliis personis cuiuscumque status et conditionibus existentibus mandare et inhibere dignata est, ne quispiam citationem inordinatam et verba in eadem quae alicuius honorem et bonam famam tangerent descripta, et ad praesentiam Maiestatis Regiae et iudicium suae Maiestatis et ad quodlibet iudicium terrestre sive castrense deferre, et de eadem proponere audeat, sub poena sessionis unius septimanae in turri, per omnes in contrarium decreti suae Maiestatis praesentis facientes sustinendae*. Przyłuski quotes the ruling yet again on p. 647. S. Sarnicki, op.cit., p. 750, provides it in Polish translation, and mentions it on p. 1304 as well.

119 For instance, in his *Corpus Iuris Polonici* O. Balzer employs the term *decretum* to denote various royal ordinances and even Sejm constitutions, cf. vol. II no. 3, 12, 22, 44, 242 and passim as well as vol. IV, no. 21, 40, 83. The criteria governing the use of *decretum* in the titles of particular acts are unclear; Balzer does not explain it in the preface to CIP, while concerning the selection of legislation for that volume he refers the reader to p. XXI of another work of his, *Corpus Iuris Polonici medii aevi*, "Kwartalnik Historyczny" 1801, vol. V, pp. 49–82, 314–358, where no information on decrees can be found. Even acts whose contents are virtually identical are called either *decretum* or *edictum*. However, in several cases the acts Balzer defines as *decreta* are indeed royal adjudications in disputes, but those are disputes of the administrative kind, as we would say today. CIP III, no. 4, 5, 43, 105; CIP IV, no. 3, 6, 79. On the other hand, decrees (rulings) pertaining to court law are lacking in Balzer's compilation.

120 J. Przyłuski, op.cit., p. 48 ; J. Herburt, op.cit., p. 37 v. Let us note that when quoting the *inordinata citatio* for the second time, Przyłuski attached an addendum typically used by sixteenth-century writers to designate constitutions of the Sejm. Had it not been for the addendum on p. 48, we would not know that the regulation is based on precedent. This only shows how difficult it may be to ascertain the basis of a regulation.

121 S. Sarnicki, op.cit., p. 1304.

land law found its source in precedent which, incidentally, enjoyed great popularity among contemporary jurists.[122]

The second of Przyłuski's precedents demonstrates how problematic it is for a researcher to determine the provenance of a regulation. The provision which ultimately revokes the penalty of two oxen for failing to appear in court, dating as far back as the statutes of Kazimierz Wielki, is indeed called a ruling,[123] but since no further details are stated[124] the source should be approached with caution. Fortunately, the act is cited with a description of the case in Jan Sierakowski's *Układ*, from which we learn that the provision originated with the verdict in a litigation between Stanisław Słupski and Jan Dębiński,[125] thus lending credibility to the information in Przyłuski.[126]

Thus, the sixteenth-century compendia, most of which aspired to become official compilations of laws, confirm that the royal courts turned out *decreta in vim statuti*. They also confirm that jurists at the time found the *decreta* to be a source of applicable law; otherwise, they would not have included them in their compilations. Nonetheless, there were only few: the four aforementioned authors (Przyłuski, Herburt, Sarnicki, Januszowski) did not go beyond the four cited precedents, while some of them did not even take all four into account.[127] Those precedents can

122 It was cited not only by J. Przyłuski, but also Sierakowski, Herburt, Sarnicki, Łączyński, Januszowski, as well as seventeenth- and eighteenth-century compendiarists. Cf. H. Grajewski, op.cit., p. 14017.

123 J. Przyłuski, op.cit., p. 637; *Decretum Sigism Cracov 1537*. The essential text of the provision reads as follows: *Sacra M. R. decernere dignata est, quia prefatae poenae a condemnatione in contumacia, a nulla parte citata, in nullis iudiciis, tarn regalibus quam terrestribus etiam castrensibus per iudicium necque per partem actoream, necque pecuniis, necque pignorationibus exigi, nec quovis modo recipi deberunt, nunc et in posterum decreto praesenti mediante*.

124 For instance J. Herburt, op.cit., p. 62 v, did not remark that the act was a judicial ruling.

125 B. Ulanowski ed., *Jana Sierakowskiego Układ…*, Art. 934, p. 223. Cf. H. Grajewski, op.cit., p. 14430.

126 The provision in question was also found to have been a ruling by M. Zalaszowski, *Ius Regni Poloniae*, vol. II, Poznań 1702, p. 503.

127 For instance, the proof of the nobility of a murdered noble was taken into consideration as a precedent only by Przyłuski, cf. H. Grajewski, op.cit., p. 15248.

also be found in Sierakowski's *Układ*, although it is possible that the latter volume also includes another one.[128]

The Creation of Precedents in the Crown Tribunal

The end of the sixteenth century saw precedents established by a new court, namely the Crown Tribunal. The fact that the Tribunal created precedents does not seem to have had any explicit legislative foundation in the acts relating to that court. The aforementioned A. Lisiecki argued that relevant grounds had been provided by the Nieszawa article[129], but they may also be sought in a statement in the Sejm enactment of 1578 which established the Tribunal. It was declared at the time that the rulings of the Tribunal *are to carry such weight as those of the Sejm*.[130] The formula most likely sufficed to make the Tribunal feel competent to deliver precedential judgments. If there was a rule that royal courts (especially Sejm ones) were able to create precedents, then, by virtue of that formula, the Tribunal could be invested with the same powers. O. Balzer observes that the act of 1578 set forth that the judges were to adjudicate following written law; however, the same author finds that the directive operated only when such law existed.[131] What is more, Balzer writes that the 1578 enactment does not include the provision from the initial drafts of the Tribunal act from 1574, which stipulated that a matter unregulated by law (*novum emergens*) was to be referred from the Tribunal to the Sejm. According to Balzer, that was a deliberate measure aiming to extend the competence of the Tribunal to cases that were

128 J. Sierakowski, *Układ*, Art. 168, 188, 412, 475, 934. It is possible that art. 269, on the perpetuity of entries executed in Cuiavia before a *starosta*, is based on precedent (the provision relies on *litterae regiae in conventu generali in vim statuti obtentae*). M. Bobrzyński, *O nieznanym układzie prawa polskiego przez Jana Sierakowskiego z r. 1554*, "Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny" 1877, vol. VI, Kraków 1877, pp. 274–275, writes that Sierakowski quoted 3 precedents.

129 Cf. page above.

130 VL II, p. 183, f. 964.

131 O. Balzer, *Geneza Trybunału…*, p. 327.

beyond the scope of statute and custom, thus granting the Tribunal powers to deliver judgments *in vim statuti*. Let us also note that the later constitution of 1607 ensured exclusive jurisdiction of the Sejm court over *nova emergentia*,[132] but its effectiveness seems doubtful given that the Tribunal—which is further discussed below—continued to establish precedents.

A number of facts demonstrate that the Crown Tribunal made rulings which had the force of statute.

In his work on the tribunal, A. Lisiecki wrote that next to written law, members of the Tribunal — — *shall observe the praeiudicata of their antecessors as well, for also iuris scripti auctoritatem obtinent et sunt iuris scripti vivae voces*.[133] Lisiecki thus attributed the force of the written (statutory) law to the precedents issuing from the Tribunal and concluded that they are the living voice (i.e. interpretation as I understand it) of that law. He wrote that in 1638, three decades after the constitution of 1607 had been passed and some years after the 1627 constitution prohibiting creation of precedents,[134] which shows that despite proscription the Tribunal continued to establish precedents.

A number of other facts offer further evidence that precedents were both created at the Tribunal and used. Its rulings were quoted by various authors (chiefly seventeenth-century ones), whose disquisitions about the applicability of a given norm relied on the substance of judgments delivered by the Tribunal (cf. below, VIII). Finally, let us note that seventeenth-century references to the rulings of the Tribunal mention that they had a "legislative taste",[135] or—as some happened to put it—"exuded the force of statute" (*vim legis sapiunt*). Efforts were undertaken to curb them and, from 1627, they were pronounced invalid, but the campaign against such decrees of the Tribunal—waged to little effect in any case (cf. IX below)—confirms that for a long time after its establish-

132 Cf. page above.
133 A. Lisiecki, op.cit., p. 179.
134 Cf. page below.
135 The expression comes from W. Maisel, op.cit., p. 91.

ment in 1578 that judicial body continued to deliver judgments that had the force of precedent.

Compendia of Judgments and Use of Judgments in Private Collections of Law

The significance of judicial rulings as sources of law is eloquently attested by two practices witnessed chiefly in the seventeenth century: 1) the creation of special compilations of judgments and legal rules based on such verdicts[136], 2) the inclusion of rulings in private collections of land law.

When publishing the 1544 *Puncta*, M. Bobrzyński drew attention to the existence of several sixteenth-century manuscripts four of which (labelled by the publisher as B, C, D, E) contain an assortment of judgments and, occasionally, legal rules based on verdicts from that century.[137] Most of those are *decreta* of the court *in curia* or the Sejm court held in Kraków, but a number of rulings and rules originate from outside that town. While discussing the contents of those manuscripts, for which he also collated a synoptic table, Bobrzyński speaks of a collection (as opposed to collections) of judgments, as if he meant only one work which was modified as the body of relevant material increased. This probably warranted S. Kutrzeba's conclusion that "the compilation was subsequently revised and expanded, so that several redactions exist as a result" (further on Kutrzeba mentions four, as there were four manuscripts).[138] The fifth text has been discovered only recently.[139] In a valuable paper devoted to the issue, the authors presume—just as Kutrzeba did—that the original collection was mechanically expanded in the successive redactions.[140] Moreover, the authors consider the newly discovered text to have been linked

136 As already observed, the provisions which established a legal rule assumed a more abstract and refined form in comparison with the ruling on which it was based.

137 M. Bobrzyński, *Puncta…*, op.cit., pp. 195–203.

138 S. Kutrzeba, *Historia źródeł…*, op.cit., p. 157.

139 I. Dwornicka, W. Uruszczak, op.cit., p. 186.

140 Ibidem, p. 185.

to the previously mentioned and provide a diagram—though not a very clear one—showing how they are interrelated.[141] And yet, it follows from Bobrzyński's argument and the table he collated that only manuscripts B and C are closely interconnected (C is an expanded version of B, in that it includes other, chiefly later rulings), but that no particular cohesion can be observed in other relationships between the four texts (which indeed display marked differences).

The issue certainly requires expert source studies, but even at this point it would seem more appropriate to state that in the sixteenth century there was no one uniform collection but that diverse (and numerous) compilations of rulings were in fact made.[142] Similarities between them are understandable, given that they relied on a homogenous body of material (the judgments of the royal courts) and the technique employed in their making (the compilers are likely to have copied the text from one another).

Clearly, the rulings of the royal courts were an object of interest in the sixteenth century and, as may be inferred from the numerous surviving manuscripts, lists of such judgments were compiled for practical reasons. As J. Rafacz observes, "a number of examples demonstrate that jurists-practitioners strove to have such collections of contemporary and earlier decrees, so as to be able to substantiate pleas as patrons [attorneys], judges, or instigators [prosecutors]."[143]

Later on, however, making compilations of rulings of the royal courts did not become a more widespread practice. No seventeenth- or eighteenth-century collections of that kind are known to date. If, therefore, J. Makarewicz writes that "in order to record precedential rulings, they were promulgated in print",[144] the assertion carries little relevance as it refers only to a minor brochure from 1689 published in Lublin by

141 The diagram lacks a detailed description and explanation, ibidem, p. 191.

142 Cf. also J. Rafacz, *Dawne prawo sądowe polskie w zarysie*, Warszawa 1936, p. 29.

143 Ibidem. Cf. also S. Sarnicki's views on the usefulness of compilations of rulings in educating legal professionals.

144 J. Makarewicz, op.cit., p. 13.

the Jesuits. It merely contained three decrees of the tribunal of Lublin from 1687–1688, issued in diverse cases against religious dissenters and Jews. Admittedly, its title[145] endorses the significance and usefulness of Tribunal judgments for prospective cases of the same kind, but its publication does not attest to a broader publishing activity dedicated to the rulings of the highest courts.

Another fact suggesting that judgments became sources of law is that they were used for private compilations of applicable law. This has already been noted with respect to the fifteenth century compendium of laws and customs of Łęczyca, which comprised a range of judgments delivered by land and municipal courts (see III). The trend continues in the sixteenth century: norms deriving from the decrees of the royal courts are integrated into legal compilations, as exemplified by two Lesser Polish compendia: *Cautelae*, created in the first half of the sixteenth century (between 1521 and 1550)[146] and *Puncta* from 1544.[147]

Two (out of 22) articles in *Cautelae* are based on judicial rulings, namely articles 18 and 21. The first of those draws on the judgment of the royal court of June 13 1521,[148] according to which royal confirmation cannot render an invalid act in law valid and, specifically, a royal decision cannot convalidate the testamentary appointment of a guardian when such an appointment has not been executed before the king or land court.[149] The second case (Art. 21) is formulated into a legal rule which stipulates that a widow with an assured dower has to accept money from relatives wishing to recover the dower by purchase not in the first but only in the second court-decreed period. The rule was supplemented with the typically phrased justification, worded as follows*: inter con-*

145 *Ad perpetuam rei memoriam trina decreta tribunalitia Ecclesiae Romanae viris ecclesiasticis et praesertim curam animarum administratibus, religionem catholicam zelore promotentibus, haeresim calvinisticam et scandala iudaica prosequentibus utilia*, Lublin 1689.

146 AKP IX, pp. 199–216.

147 For the full title of the compilation v. footnote 14.

148 The exact date is known thanks to M. Bobrzyński, *Decreta…*, p. 179.

149 The description of the case in S. Kutrzeba, *Zastępcy stron w dawnym procesie polskim*, Kraków–Warszawa 1923.

sortem Pauli Mruk et lohannem Zabawski Regia Maiestas iudiciumque decrevit sic.[150]

Even more regulations deriving from judgments are found interspersed throughout the *Puncta*. This is a collection of provisions taken from diverse sources and laws: land law rulings, customary law, canon and Magdeburg law, from the 1532 Correction of Laws and constitutions of the Sejm.[151]

The compilation comprises 169 articles, but upon examination only several can be qualified as having originated with judicial rulings. The articles in question contain more or less precise information that they had been derived from judgments. The information, provided as a kind of rationale which sanctions the binding force of a given provision, is formulated in a variety of manners. The most frequently used phrase is *ut est* (or *fuit*) *decretum inter* (after which the names of parties to the respective lawsuit are supplied).[152] One also encounters other justifications, such as *quod hoc fuit practicatum in conventione — —* (which refers to the Sejm court)[153] or phrases which in a sense highlight the exemplary nature of the ruling: *— — ut est exemplaris probation*,[154] or *exempli gratia ut est factum*.[155] Based on such indications, fourteen out of 169 articles can be identified as regulations conveying legal norms derived from judgments.[156] Apart from that, there are five articles which consist of rulings incorporated into the compilation.[157]

150 Ibidem.

151 M. Bobrzyński, *Introduction to Puncta*, p. 199. However, the author does not mention constitutions of the sejm.

152 *Puncta*, Art. 19, 40, 87, 88, 94, 112, 166. On this subject cf. I. Dwornicka, W. Uruszczak, op.cit., p. 189.

153 *Puncta*, Art. 22.

154 Ibidem, Art. 24.

155 Ibidem, Art. 48.

156 Art. 12, 13, 19, 22, 24, 40, 48 (the rules they contain are also to be found in the source discovered by I. Dwornicka, W. Uruszczak, op.cit., pp. 194–195; note: unlike the aforesaid authors, I believe that the *Puncta* proper do not go beyond Art. 169; Cf. also M. Bobrzyński, *Introduction to the Puncta.…*, p. 195) and further: Art. 87, 88, 92, 94, 111, 112, 166.

157 Art. 150–154, all in one column: *Decreta quaedam per dominum olim Lyubomirski protunc iudicem Cracoviensem pro informatione tenenda. Anno Domini 1509*. M. Bobrzyński in

The table drawn up by I. Dwornicka and W. Uruszczak for the source they discovered (BJ, Cim. F. 8048) enables broader identification, as it demonstrates that further nineteen articles in the *Puncta* originated with precedents.[158] This is a splendid example of how a newly discovered source offers better insights into the already known ones. Thanks to a comparison of both sources, one can conclude beyond any doubt that at least thirty eight articles (22%) in the compilation known the *Puncta* had their origins in precedent. There is another observation that this situation occasions, namely that many provisions of law very swiftly—as the example of the nineteen articles demonstrates—became detached from the foundation which rendered them binding, i.e. from the judicial ruling.

We are not going to delve here into the contents of particular judgment-based articles in the *Puncta*. The substance of most can be inferred from the aforementioned table collated by the Kraków authors and in this reference.[159]

Precedents in the Commentaries of Historical Polish Jurists

As a basis for Polish land law, precedents were also used by the commentators on that law. Discussing the latter, they would not infrequently cite the judgments of the royal courts and tribunals, thus treating them as

Puncta identifies them as rulings of the municipal court. It may therefore be conjectured that judgments of the lower courts were able to become precedents in the early sixteenth century as well.

158 Art. 10, 14, 15, 16, 20, 21, 23, 31, 32, 33, 35, 36, 41, 44, 51, 56, 57, 59, 106. Cf. I. Dwornicka, W. Uruszczak, op.cit., pp. 194–195.

159 I. Dwornicka, W. Uruszczak, op.cit. I provide table locations for the precedent-containing articles which are not found in the newly discovered manuscript, BJ, Cim. F. 8048. Art. 87—*De summa excedente decem marcas*; Art. 88 — *De citationibus indivise factis*; Art. 92—*De praescriptione dominae dotalitialis*; Art. 94 — *De probatione vulnerum*; Art. 111—*De poena kocz in indicio commissariali*; Art. 112—*De exemptione dominae dotalitialis*; Art. 166—*De termini concitati dilatione in indicio petenda*. As already observed, Art. 150—154, being copies of judicial rulings, are entered into one column. Cf. footnote 156.

a source of law. This approach is evident in the writings of S. Sarnicki, T. Zawacki, G. Czaradzki and M. Zalaszowski.

Sarnicki (in the commentary following his compilation of laws) quotes only five precedents, including one discussed in greater detail above,[160] as well as a decree stating that a petition for the payment of dower is not subject to prescription, a decree on the division of immovable property and two precedents taken from the statutes of Kazimierz Wielki.[161] This is not an extensive set and, given its contents, not a very significant one either. It could be omitted in these deliberations, were it not for the remark of Sarnicki's regarding the importance of precedents. Sarnicki describes the training of a beginner legal practitioner whom he calls a novice at law (*novitius iuris*). The author writes thus: *The second method of practicing. They divide it* [i.e. that method – B.L.] *into four. First, the forms of various records are gathered by those who wish to proficere expeditiously. Then the forms of diverse pleas and suits, the munimenta maiora et interlocutoria come third, and fourth, the decrees before the royal court, the tribunal, as well as land and municipal courts — —.*[162] It follows that the study of rulings delivered at the various courts of nobility was one of the fundamental methods (next to other three) in the education of a legal professional. This is stressed by Sarnicki himself in connection with the precedents he cited: *It would have been fitting to supply more such decrees here, for they may be a source of ample knowledge for the novitius, yet it is odiosum to mention persons by name, which is why one should refrain therefrom. However, the novitius may sit with the land judges and municipal ones, at royal courts and the tribunals and there take note, in especial when a singular casus happens to occur — — .*[163]

160 Precedent relating to inappropriate petition, cf. p. 18 above.

161 S. Sarnicki, op.cit., p. 1304.

162 Ibidem, p. 1301.

163 lbidem, pp. 1304–1305. Sarnicki justifies the meagre assortment of decrees by explaining that one should not cite more for fear of disclosing the names of persons involved in the disputes, which would be *odiosum*. Other authors, such as Zawacki as well as Czaradzki

The use of precedents in legal education indicates that they were indeed employed in legal practice. After all, one can hardly imagine a situation where "novices" were required to learn something that was irrelevant to the application of law at the time.

The works of Teodor Zawacki deserve particular attention. As we know, he published a volume based primarily on judicial practice and the rulings of the Crown Tribunal, encompassing rules within land law which the author provided in alphabetical order.[164] The author discussed Polish law whilst relying on judgments but the entire material was supplied in a spruced-up form, without citing the original source. Hence we do not learn about the actual substance of rulings nor the time when the Tribunal delivered them, but this does not undermine Zawacki's credibility. We do believe that he took advantage of *sententiae seu praeiudicata* to which he refers in the title. The fact is evinced in his thorough knowledge of numerous verdicts of royal courts and tribunals, a splendid sample of which may be found in his chief work on the judicial process. Even in the preface to the work, dedicated to Feliks Kryski, the author remarked that he used royal judgments as well as adjudications and precedents of the Tribunal.[165] Although subsequent editions feature no such mentions, the fact that judgments are so frequently quoted proves that Zawacki did see them as the mainstay of land law, alongside custom and statutes. Let us illustrate this assertion with the material in the most comprehensive (and the most convenient to cite) edition of *Processus* from 1619.[166]

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and Zalaszowski did not have such scruples and provided numerous precedents along with the names of the litigating parties.

164 T. Zawacki, *Flosculi practici ex communi praxi et forma ac consuetudine iudiciorum frequentibusque summi Tribunalis Regm Poloniae sententiis seu praeiudicatis decerpti*, Kraków 1623; Cf. M. Bobrzyński, *Introduction to Puncta.…*, p. 203; S. Kutrzeba, *Historia źródeł.…*, I, op.cit., p. 158.

165 T. Zawacki, *Processus iudiciarius Regni Poloniae*, Kraków 1612: *Adhibitis itaque statutorum et constitutionum Regni Poloniae libris, regum decretis, summique R. P. Tribunalis sententiis et praeiudicatis, tractatum collegi et collustravi.*

166 Contrary to the truth, S. Kutrzeba, *Historia źródeł.…*, I, p. 280 states that Zawacki revised and expanded his work with each successive edition, "until it reached very substantial vol-

The latter edition includes as many as ninety two references to the rulings of the nobility courts, i.e. the royal courts and the Tribunal.[167] Predominant among the decrees of the royal courts are those delivered by the Sejm court (*in conventu*) while judgments of the assessorial (*in curia*)[168] or relational court (*in relationibus*) occur only sporadically.[169] Certain mentions do not specify which type of court was involved.[170] In total, there are seventy two references to particular rulings of the royal courts dating from 1519–1599.[171] The remaining mentions refer to the judgments of the Tribunal. There are twenty of those, including four delivered by the Tribunal in Piotrków[172], and nine by the Tribunal in Lublin[173], while the remainder (seven mentions) do not indicate the seat of the Tribunal.[174] The Tribunal decrees quoted by Zawacki were made between 1579 and 1596.[175] The names of the parties are provided with a portion of the decrees (twenty two in total), but for

ume". For instance, the fourth edition of 1637 is less extensive than the edition of 1619; it is similar to the 1612 edition, both of which are the abridged versions of *Processus*. The editions of 1619 and 1647 represent the extended versions (I have not seen the 1616 edition). The volume published in 1619 is more convenient, because—unlike the one from 1647—it features numerical pagination. The extended version differs from the abridged in that it includes twelve titles (as opposed to ten in the shorter editions). The additional titles are: *De iuramentis* VIII, *De poenis* XI. Title II *De actionibus* was supplemented with material entitled *De citationibus*.

167 *Processus iudiciarius Regni Poloniae*, Kraków 1619: pp. 3(2), 4(3), 503), 6(1), 7(2), 8(2), 9(1), 10(2), 11(3), 16(2), 23(1), 24(2), 30(1), 32(1), 30(3), 34(1), 38(3), 42(2), 43(1), 44(1), 45(2), 50(3), 51(2), 52(2), 53(2), 54(1), 55(5), 56(2), 57(4), 58(5), 59(1), 60(1), 61(2), 66(1), 67(2), 69(2), 71(1), 85(2), 123(2), 126(1), 131(1), 132(1), 144(1), 157(11), 161(1), 172(1), 184(1), 187(3), 190(1), 191(1). The ruling of Zygmunt August cited on p. 211 is concerned with a distinct jurisdiction, i.e. municipal. The numbers in parentheses above indicate the quantity of decrees on the respective pages.

168 Ibidem, p. 4.

169 Ibidem, p. 32.

170 Ibidem, pp. 5, 55.

171 Cf. ibidem, pp. 4, 56, 67.

172 Ibidem, pp. 50, 59, 123.

173 Ibidem, pp. 4, 16, 24, 33, 50, 91, 53, 144, 190.

174 Ibidem, pp. 10, 16, 24, 44, 59, 66, 161.

175 Cf. ibidem, pp. 59, 161.

the most part Zawacki kept the judgments anonymous and chose not to disclose the parties.

A fair number of decrees (thirty nine) were included in Title I of the work: *De obligationibus et eas sequentibus inscripcionibus* (pp. 1–46). Despite what the heading may suggest, the title is concerned with both obligations and related entries into court ledgers, as well as cases which, according to the current systematics, would belong elsewhere. Besides that, the only area that Zawacki's work does not cover are matters of litigation; in the present-day classification, many of those are recognized as part of substantive law. For this reason, the aforementioned title (as well as others) the precedent-based material is quite diverse. In Title I, court decrees resolve such issues as: the form of entries into court records (books), so-called personal entries, the legal capacity of wards and unmarried girls, the legal capacity of married women, the disposal of immovable property, dower and dowry, or security (*vadium*) in obligations.

The majority of decrees (forty one in total) were included in Title II, *De actionibus et citationibus* (pp. 47–127), with judgments pertaining to succession, forcible ejectment from estate (*violenta expulsio*), domestic invasion, buyout of property (in the broadest sense, i.e. under various legal titles), fugitive peasantry, actions and their filing, or the legal status of the wife of an outlaw. Title III, *De processu* (pp. 128–148), contains only three judgments, concerning the *lucrum* of the plaintiff, the purchase of minor liabilities on the estate of the debtor by a major creditor, and the procedure with *citatio ad banniendum*. Three further rulings are cited in Title V, *De dilationibus* (pp. 153–183); two pertain to trial adjournments and one to warranty. Another judgment, this time on the contestation of suit, is found in the title dedicated to that very issue (*De litis contestatione*, pp. 183–184). Three decrees are quoted in Title VIII, *De iuramentis* (pp. 185–189), two of which are connected with oath and one with the liability of the depositary. Two final decrees

were included in Title IX, *De appellationibus* (pp. 189–196); both focus on appellate instruments of *mocja* [recusal] and *gravamen.*

This brief overview of the decrees cited by Zawacki demonstrates the importance that the author attached to the yield of adjudication,[176] as the substantial part of his foremost work relies precisely on judicial rulings. Clearly, that outstanding jurist[177] was thoroughly convinced that judgements of the royal courts and the tribunals establish law, that those are *decreta in vim legis*. The fact that Zawacki acknowledged rulings as sources of law is a cogent argument in favour of recognizing the precedential import of verdicts delivered by the royal courts and the Tribunal.

A number of decrees, fifteen to be precise, were quoted by Grzegorz Czaradzki. The rulings may also be found in Zawacki's *Processus*, which is probably where Czaradzki took them from.[178] Thus, while appreciating the value of precedents for the law at the time, Czaradzki—unlike Zawacki—did not contribute anything new in that respect.

A considerable number of precedents established by the royal courts and the Crown Tribunal were used by Mikołaj Zalaszowski: seventy-six according to my calculation. However, the majority are rulings associated with municipal law, usually quoted after Lipski,[179] although in some instances it is difficult to determine whether a given precedent

176 And, in a broader sense, to practice and custom, to which he conspicuously referred using phrases such as *secundum stylum practicorum*, *talis est praxis*, *usus et praxis*, *sic intelligunt practici*, *consuetudo*.

177 In the field of land law, Teodor Zawacki was arguably the best jurist of pre-partition Poland in view of his ingenuity and independent juridical thought, many examples of which may be found in his writings. These are also highly regarded by S. Kutrzeba as well as earlier authors, such as K. B. Steiner. Cf. S. Salmonowicz, *Krystian Bogumił Steiner (1746–1814), toruński prawnik i historyk*, Toruń 1962, p. 110103.

178 G. Czaradzki, *Proces sądowny ziemskiego prawa koronnego…*, op.cit., Warszawa 1640. Three rulings on p. 4 (pp. 4, 5 in Zawacki, edition of 1619), six rulings on p. F1 (Zawacki, pp. 5, 6. 8, 9, 10), three rulings on p. F1v (Zawacki, pp. 10, 16, 33) and three rulings on p. F2 (Zawacki, pp. 33 and 38). Czaradzki had already borrowed precedents for the first edition of his work (1614) from the abridged version (Cf. footnote 165 above) of Zawacki's volume, i.e. from the 1612 edition, which is evinced in how the former cites the dates of judgments and the names of the involved parties.

179 On that issue cf. also remarks by I. Malinowska, *Mikołaj Zalaszowski*, Kraków 1960, p. 81.

pertains to municipal or land law. It seems that thirty four precedents are linked to land law, but again most of those were sourced from Zawacki's work, whom Zalaszowski credits in half (seventeen) of the cited judgments.[180] In one case, Zalaszowski drew on J. Przyłuski,[181] whereas for the remainder the author most likely availed himself of the papers left by his uncle, the royal notary Jan Oktawian Wacławowicz, to which he alludes quite explicitly.[182]

As a result, the judgments quoted by Zalaszowski do not offer as much material as Zawacki's work. Taken largely from the latter and other authors, they date back to the sixteenth century, while only a few originate from the seventeenth century. Their informative value is modest, yet they attest that Zalaszowski, a late seventeenth century jurist, considered them a part of the land law in force.

Prohibition on the Creation of Tribunal Precedents

The assault on the decrees *in vim legis* began in the seventeenth century. It is likely to have been directed against the Tribunal decrees, because neither local diets (*sejmiki*) nor the Sejm ever turned openly against the decrees of the royal courts, i.e. the Sejm and the assessorial court.

The first attack followed in the wake of a case which in 1627 incensed—to judge by the response of the *sejmiki*—a substantial part of

180 Here are the pages in the work by M. Zalaszowski, *Ius Regni Poloniae*, vol. II, Poznań 1702, where one can find the land law precedents; information in the parentheses indicates where those precedents are cited in T. Zawacki *Processus* from 1619, pp. 79, 113, 236 (two precedents), 354 (Zawacki, p. 51), 362 (Zawacki. p. 50), 363 (Zawacki, p. 51), 389, 404, 410 (Zawacki, p. 33), 425 (Zawacki, p. 33), 431 (two precedents), 433 (two precedents), 441 (two precedents — in Zawacki both on p. 3), 444 (Zawacki, p. 9), 446 (Zawacki, p. 5), 448 (Zawacki, p. 11), 450 (two precedents — in Zawacki both on p. 16), 458, 481, 496, 499, 503, 536 (three precedents — one allegedly after Zawacki), 661 (Zawacki, p. 24), 670, 677 (Zawacki, p. 69), 679 (Zawacki, p. 66).

181 M. Zalaszowski, op.cit., p. 503 (decree of King Zygmunt of 1537, on the abolishment of oxen penalty for contumacy (cf. pp. 18–19 above); this one in indeed cited in Przyłuski's work, op.cit., p. 637.

182 M. Zalaszowski, op.cit., pp. 489–490: *ex cuius connotatis plurima decreta in curia regali lata passim hic adferro*. Cf. I. Malinowska, op.cit., p. 82.

the nobility. That year, the Calvinist Samuel Świętopełk Bolestraszycki was sentenced by the Tribunal in Lublin to six months of incarceration and four hundred *grzywna* for publishing a Polish translation of Pierre du Moulin's work on the papacy.[183] The sentence was vehemently opposed in the instructions for the Sejm deputies issued by the sejmiki of the following provinces and regions: Poznań and Kalisz in Środa (August 31st)[184], Kraków in Proszowice (August 31st)[185], Ruthenia in Wisznia (August 31st),[186] Zator and Oświęcim in Zator (August 28th).[187]

As one can infer from the protests of the local assemblies, the Tribunal in Lublin appended the future effect clause (*in vim* legis) to the decree in Bolestraszycki's case, as a measure intended against Protestants.[188] The instructions for the voivodeships of Poznań and Kalisz suggest that the provision prohibited the prospective establishment of dissident associations.[189] The opinion of the sejmiki was unequivocal: the decree against Bolestraszycki, or rather that fact that it had been granted the force of statute, was condemned, using a variety of justifications, such as the need for internal peace[190] or the Tribunal's groundless usurpation of the power to deliver rulings *in vim legis*, which it did not possess.[191]

183 V. *Akta sejmikowe województwa krakowskiego*, ed. A. Przyboś Hereinafter: ASWK. Cf. W. Sobociński, *O historii sądownictwa w Polsce magnackiej XVIII w.*, "Czasopismo Prawno-Historyczne" 1901, XIII, fasc. 1, p. 145.

184 *Akta sejmikowe województwa poznańskiego i kaliskiego*, ed. W. Dworzaczek — hereinafter ASWPKJ, I, 2, no. 311, p. 249; cf. W. Maisel, op.cit., p. 91.

185 ASWK, vol. II, 1, p. 89; cf. W. Maisel, op.cit.

186 *Akta grodzkie i ziemskie* Hereinafte: AGZ.

187 ASWK, vol. II, 1, p. 74.

188 The addition of the clause stating that the judgment has the force of statute is mentioned in the resolution of the sejmik of Wisznia and the Sejm constitution of 1627, also cited below.

189 ASWPK: *Hence the decrees in vim legis abolishing associations inter dissidentes de religione in futurum must not be introduced, for so much depends on having internal peace undisturbed*.

190 Instructions of Poznań and Kalisz cf. preceding footnote. W. Maisel, op.cit., observes somewhat exaggeratedly that the position of the Greater Polish diet was presented "in a splendidly substantiated legal argument". Meanwhile, the rationale was limited to keeping internal peace.

191 The Instruction of Zator: "and since the tribunal court usurps greater autoritatis that the written law permits, and creates new actions that lie outside it purview;" instruction of

However, the demands went further than revoking the future statutory effect of Bolestraszycki's decree. The postulations of the nobles were more general: the Tribunal should no longer deliver judgments with the force of statute or adjudicate in matters beyond its competence. This was clearly what the instruction of the Kraków voivodeship aimed for;[192] Greater Polish[193] and Ruthenian[194] instructions were formulated along similar lines.

The Sejm of 1627 took those demands into account. In the constitution dated November 23rd (*On the tribunal decrees*), it held as follows: "The Tribunal, having no potestatem condendarum legum, should judge in pursuance of the laws enacted by the whole of the Commonwealth, whereas matters that are not described in law must not be admitted for adjudication, nor poenas irrogare and aggravare anyone with those beyond that which is laid down in universal law; and where there should be such decrees or clauses which vim legis saperent or interfere with popular peace, as did happen with some additamenta in certain decrees of the past Tribunal of Lublin, then none shall be liable under those, for they are to be nullitati subesse instead."[195]

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the Kraków voivodeship: "by which [i.e. the decree in Bolestraszycki's case – B.L.] the tribunal supra concessam sibi it is granted by R. P. potestatem and the powers described in law, sinned contra maiestatem publicam in that it condendo a law, which is the exclusive prerogative of R. P.;" instruction of the voivodeship of Ruthenia: "may a constitution prescribe that the Tribunal courts and its decrees be germane only to those cases that they were delegated under the late lamented His Majesty King Stefan and which were laid down for them in later constitutions, so that the gentlemen deputies may not make the decrees into laws to be used conveniently against us, who are not in lite; which is what they now usurparunt in appendice of the decree with Right Honourable Mr Samuel Bolestraszycki, for these maiestatem et potestatem are held exclusively by the Commonwealth in the assembly of three estates at the sejm."

192 ASWK: "If in time to come any tribunal dares to make and issue such decrees that vim leges saperent, may they have no consequence."

193 ASWPK: *The decrees of the tribunals, whose focus is on the litigantes partes themselves yet to other honori may prove detrimental, it shall be restricted that they may solely be valid inter partes litigantes.*

194 Cf. footnote 190.

195 VL III, p. 263, f. 547; Cf. M. Goyski, op.cit., pp. 307–308.

Thus the Sejm took three important decisions: 1) the Tribunal has no legislative powers; 2) the jurisdiction of the Tribunal extends as far as the existing law, but it cannot hear new cases ("not described" in law); 3) if the Tribunal delivers judgements "exuding" the force of statute or provided with the clause *vim legis*, then such rulings shall be ineffective.

The constitution of 1627 was to put an end to the Tribunal's practice of passing judgments *in vim legis*, and simultaneously resolved—to the disadvantage of the Tribunal—with respect to new cases (or "new actions" as they were called at the time).[196] The effect, however, must have been quite exiguous because in a constitution of 1638 (*On the tribunal decrees in the Crown and the Grand Duchy of Lithuania*) the Sejm observed that: — — *since in that* [i.e. the matter of decrees regulated by the 1627 enactment – B.L.] *popular law is not satisfactorily obeyed* — —, and pronounced that: — — *the Tribunal must in all adhere to the aforesaid law* [of 1627].[197]

It would appear that reaffirming that provision did not achieve the results that the nobility wished to see. In an instruction for deputies dated January 11th, 1645, the nobles of the Ruthenian voivodeship demanded as follows: — —*the decrees in genera whereas under the constitutional 1627 ferre the tribunal does not possess iura legis sapientia*.[198] The nobles of the Wołyń voivodeship called for strict observance of the constitution of 1627 in as many as three instructions (in 1632, 1645 and 1646).[199] The instruction which the sejmik of Kraków issued on November 29th, 1678, stated that the Tribunals abuse their powers so much that — —*not only do they dare to pass decrees in vim legis sapientia, which contravene the strict laws and constitutions, but also go against brevia Sedis Apostolicae* — —.[200] This suggests that the Tribunals continued to resolve in the aforesaid new cases and—in the opinion

196 Cf. the instruction of Zator in the footnote 190.
197 VL III, p. 444, f. 935; Cf. W. Maisel, op.cit., p. 92.
198 AGZ XX, no. 223, 28.
199 M. Goyski, op.cit., p. 3082.
200 ASWK IV, p. 98; Cf. W. Maisel, op.cit., p. 92.

of the sejmik—violated the law in force by delivering judgments which contradicted that law.

Such inference is also corroborated by the royal instruction of the sejmik of Kraków of 1680. The king, promising to abolish conflict between the Sejm court and the Tribunal in certain criminal cases, stated as follows: "Bearing in mind that tribunals are wont to engage in cognitionem of the sejm constitutions, through which suprema iurisdictio et potestas of the sejm convellitur, this needs to be submitted ad censuram R. P. and et ad correcturam, for if it is unbecoming to pass such judgements which vim legis sapiunt, then it is even less fitting to revoke public laws and constitutions through one's decrees."[201] It may be worthwhile to add that the royal instruction refers to the fact that both courts employed precedents in the criminal cases which were the object of contention (*ex utraque parte there are constitutions and praeiudicata invoked*), demonstrating that tribunal precedents were still established and used in the late seventeenth century, despite having been prohibited by the constitutions of 1627 and 1638.

Consequently, non-compliance with both constitutions—at least in the seventeenth century and perhaps later as well—is evident. This is supported to some degree by another constitution relating to decrees *in vim legis*, which was enacted almost on the centenary of the first, in 1726, with the aim of reforming the Crown Tribunal. The constitution stated that: "The decrees which vim legis sapiunt, must not be adopted at Tribunals to be in effect in futurum as earlier laws dictated, and indeed reassumendo constitutiones annorum 1627 et 1638 they shall not be enforced, but at the future Tribunal shall be annulled with the exception of those which in parte, satisfactione aliqua, have already been accepted."[202] Thus the constitution, drawing on the two previous ones, held the decrees *in vim legis* to be invalid, and laid down that they should be revoked during the next

201 ASWK IV, p. 132; Cf. W. Maisel, op.cit., p. 92.
202 VL VI, p. 224, f. 435; Cf. J. Michalski, op.cit., p. 83.

session of the Tribunal. The only exception was made for the judgments which had already been accepted by being fulfilled.[203]

The constitution of 1726 is the final act with respect to precedential rulings of the Tribunal. The question of the decrees "exuding the force of statute" (*vim legis sapientia*)[204] returned in the constitution of 1768, but the underlying reasons were different. Perhaps already in the seventeenth century, particularly after the promulgation of the Constitution of 1726, the allegation that a tribunal verdict "exudes the force of statute" began to be used to overturn verdicts. It was from that very standpoint that the Constitution of 1768 regulated the efficacy of the novel legal measure which had been unknown before the seventeenth century, but which tended to be abused by the litigating parties and exacerbated barratry.[205] However, that is an altogether different story of the judicial process in the declining Commonwealth, discussed exhaustively in the scholarly literature.[206] As for the history of precedents, use of that measure meant weakening the legislative role of the Tribunal and, most likely, the end of its precedential contribution.

Conclusions

Finally, some remarks are due by way of recapitulation, and perhaps a few general reflections need be made regarding the sources of land law.

Precedents had already been established in the fourteenth and fifteenth century, as suggested by *Constitutiones et iura terrae Lanciciensis*. There was also a statutory basis which the sanctioned creation and application of precedents (the provision in the Statute of Nieszawa of

203 W. Maisel, op.cit., seems to interpret the text similarly, stating that one made: "exception for the rulings which were sanctioned by their execution."

204 Polish translation of the expression taken from S. Estreicher, who nevertheless uses "laws" instead of "statutes". Estreicher, *Kultura prawnicza…*, p. 79.

205 The constitution of 1768, VL VII, p. 330, f. 706, regulated the validity of those tribunal decrees which were alleged to *vim legis sapiunt*, in that it upheld the validity of the accepted rulings, as in the constitution of 1726, and those which were pronounced twice in the same case and were consistent in their content.

206 V. J. Michalski, op.cit., pp. 83, 200–211; Cf. also W. Sobociński, op.cit., pp. 145–146.

1454), corroborated later—until the eighteenth century—by various Polish legal writers. One can also find direct evidence that judicial rulings became a source of law, as they established new norms that would be binding in the future. This activity was particularly tangible in the area of *casus novi*, issues unregulated by law, in which a major contribution should be credited to the Sejm court. Courts delivered judgments which possessed the force of statute, called *decreta in vim statuti*, *decreta in vim legis*,[207] *decreta vim legis sapientia* or simply *praeiudicata*.[208] Also, it was an established practice to invoke earlier rulings in court.

Precedents also served to formulate respective provisions in legal compilations. Moreover, the judgments of the royal courts were collected in special compendia (sixteenth century), while numerous Polish jurists (Teodor Zawacki in particular) considered rulings equal to constitutions, citing the provisions deriving from the former as applicable law. Given the available sources, the sixteenth century was particularly propitious for precedents, quite likely marking the peak development of court law in Poland. It was then that a leading jurist of the century observed: *uno iure, unis etiam consuetudinibus ac similibus praeiudicatis omnes terrae totius Regni iudicentur*.

The late sixteenth century saw the creation of the Crown Tribunal, a judicial body which also pronounced judgments that had the force of law. Soon enough, in the seventeenth century, such rulings began to be fiercely opposed, but the constantly reiterated demands of the nobility that the tribunal precedents be considered invalid shows that they continued to be a source of law in the seventeenth century as well. The

207 Cf. footnote 188. Precedents in seventeenth-century Spain were referred to in a similar manner: *sententiae Tribunalium supremorum vim legis habent*. V. J. M. Scholz, *Spanien. Rechtssprechungs—und Konsilien Sammlungen*, in: *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, ed. H. Coing, Munich 1976, pp. 1287–1288; cf. W. Uruszczak, *Europejskie kodeksy prawa doby renesansu*, "Czasopismo Prawno-Historyczne" 1988, XL, fasc. 1, p. 79.

208 Cf. footnote 164 and page above, as well as Przyłuski's statement cited below.

view expressed by T. Ostrowski[209] suggests that the practice of establishing precedents in other courts lasted until the end of the Commonwealth.

The material presented in this paper suffices to confirm that the rulings of land courts as well as the highest courts (court *in curia*, the sejm court, and tribunals) were a source of land law. It may be presumed that they filled a tremendous gap in that law. After all, each researcher studying land law is all too well aware of the very minor role that legislative acts played in its development. Following some sweeping undertakings in the fourteenth (the statutes of Kazimierz Wielki) and the fifteenth century (the Statute of Warka of 1423 and others), legislative activity in the area of court law, especially where civil law was concerned, began to wane and die down. It had never been intense, nor was it dogmatic; it failed to regulate all elements of particular legal institutions in an exhaustive and accurate fashion.

In the sixteenth century, legislation in the domain of court law is nothing short of negligible. "A highly negative phenomenon that one observes", Stanisław Estreicher noted, "is stagnation in the field of litigation, criminal, and private law. Constitutions of the Sejm say virtually nothing about this area of law."[210] Estreicher refers to the sixteenth century, when such constitutions were concerned with law more often. What would he have said about the seventeenth century in that case? An examination of *Volumina Legum* for the period from 1601 to 1668 (the subsequent years are unlikely to improve the picture) yields only several acts pertaining to civil law, all of which carry little importance from the standpoint of legal dogmatics.[211] Seventeenth-century Poland—though

209 Cf. p. 8 above.

210 S. Estreicher, op.cit., p. 117.

211 I have counted 12 in total: 1 . *Cudzoziemcy dóbr ziemskich kupować nie mają*, VL II, p. 304, f. 1510, 1601; 2. *Ordynacja Jaśnie Wielmożnych Myszkowskich*, VL II, p. 396. f. 1515–1516, 1601; 3. *Ordynacja J. W. Janusza księcia Ostrogskiego, kasztelana krakowskiego*, VL II, p. 466, f. 1668, 1609; 4. *Miasta, aby dóbr ziemskich nie kupowały*, VL III, p. 11, f. 4, 1611; 5. *Indemnitas ludzi młodych w województwie sandomierskim*, VL III, p. 141, f. 289, 1616; 6. *O dobrach ziemskich dziedzicznych*, VL III, p. 319, f. 666. 1631; 7. *O preskrypcji dóbr szlacheckich przeciw duchownym*,VL III, p. 378, f. 797 - 798, 1633; 8. *De prole illegitima*, VL III, p. 385, f. 812, 1633; 9. *Ordynacja Rzeczypospolitej dóbr ziemskich dziedzic-*

not exclusively—was a legislative wasteland, deprived almost entirely of legislative regulation in the domain of civil law (and, in a broader approach, court law).[212] There were no new developments and everything relied on custom and *communis praxis*, as Jan Łączyński stated towards the end of the sixteenth century in the observation cited at the beginning of this paper. By and large, c*ommunis praxis* meant a judicature whose precedents served to rectify the deficiencies of the law, and offered solutions to *casus novi* (*nova emergentia*).

A hundred years ago Oswald Balzer wrote that between the sixteenth and the eighteenth century "the provisions pertaining to court law are […] exceptional and can be easily counted, including those which are concerned with minor details."[213] We seem to have forgotten recently about that legislative drought in Poland of the past centuries[214] which, besides custom, paved the way for a broad application of legal rules established by courts, whose contribution to past Polish law was significant and by no means insubstantial.[215]

znych, VL III, p. 405, f. 854–856, 1635; 10. *O widerkauffach*, VL III, p. 406, f. 856–857, 1635; 11. *Declaratio preskrypcji w dobrach duchownych* (VL III, p. 443, f. 933, 1638); 12. *O kuratoriach*, VL III, p. 452, f. 002, 1638.

212 The researcher of historical land law in Poland will not find a single institution of civil law which owed its existence solely to normative acts.

213 O. Balzer, *Uwagi o prawie*, p. 106, similarly in the study entitled *O obecnym stanie nauki prawa polskiego i jej potrzebach*, in: *Studia nad prawem polskim*, Poznań 1889, p. 58.

214 Z. Kaczmarczyk, *Historia państwa i prawa Polski*, 2nd edition, vol. II, Warszawa 1966, pp. 17, 185, argued that constitutions played a major role in the development of court law in the Nobles' Commonwealth, but his assessment, presuming constitutions to be the fundamental source of law is exaggerated. J. Bardach followed in his footsteps, claiming that enacted law predominated in that respect. J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia państwa i prawa polskiego*, Warszawa 1976, p. 193.

215 A similar view was espoused by O. Balzer, *Uwagi o prawie*, op.cit., pp. 106–107 110–111. In contrast, S. Estreicher attributed a minimal role to precedents, op.cit., pp. 68, 79, 101, 116.

Literature

Balzer O., *Geneza Trybunału Koronnego*, Warszawa 1886.

Balzer O., *Uwagi o prawie zwyczajowym i ustawniczym w Polsce*, in*: Studia nad prawem polskim*, Poznań 1889.

Bandtkie J. W., *Ius Polonicum*, Warszawa 1831.

Bandtkie-Stężyński J. W., *Prawo prywatne polskie*, Warszawa 1891.

Bardach J. ed., *Historia państwa i prawa Polski*, 2nd edition, vol. I, Warszawa 1964.

Bielecka I., *Inwentarze ksiąg archiwów grodzkich i ziemskich wielkopolskich XIV-XVIII wieku*, Poznań 1965.

Bielecka I., *Inwentarze ksiąg archiwów grodzkich i ziemskich wielkopolskich XIV-XVIII wieku*, Poznań 1965.

Bobrzyński M. ed., *Starodawne Prawa Polskiego Pomniki*, Kraków 1874.

Bobrzyński M., *Decreta in iudiciis regalibus tempore Sigismundi I. regis Poloniae a. 1507–1531 Cracoviae celebratis lata*, "Starodawne Prawa Polskiego Pomniki" vol. VI.

Bukowska K., *T. Drezner, Polski romanista XVII wieku i jego znaczenie dla nauki prawa*, Warszawa 1960.

Dąbkowski P. *Prawo prywatne polskie*, vol. I-II, Lvov 1910–1911.

Drezner T., *Institutionum iuris Regni Poloniae libri quatuor*, Zamość 1613, Hereinafter: *Institutiones*.

Drezner T., *Processus iudiciarius Regni Poloniae*, in: *Proces sądowny ziemskiego prawa koronnego*, ed. G. Czaradzki, Warszawa 1640.

Dutkiewicz W., *Prawa cywilne jakie w Polsce od roku 1347 do wprowadzenia Kodeksu Napoleona obowiązywały*, Warszawa 1809.

Dwornicka I., Uruszczak W., *Nieznany zbiór wyroków sądów królewskich (Decreta regia) z lat 1517–1550 w rękopisie Biblioteki Jagiellońskiej*, "Czasopimo Prawno-Historyczne" 1988, XL, vol. 2.

Estreicher S., *Kultura prawnicza w Polsce XVI wieku*, in: *Kultura staropolska*, Kraków 1932.

Goyski M., *Reformy trybunału koronnego*, "Przegląd Prawa i Administracji", 1909, XXXIV.

Górnicki Ł., *Rozmowa Polaka z Włochem o wolnościach i prawach polskich*, in: *Pisma*, ed. R. Pollak, vol. II, Wrszawa 1961, p. 408.

Grajewski H., *Prawo zwyczajowe w Leges seu statuta ac privilegia Regni Poloniae omnia Jakuba Przyłuskiego*, "Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne" 1967.

Grodziski S., *Sejm dawnej Rzeczypospolitej jako najwyższy organ ustawodawczy. Konstytucje sejmowe – pojęcie i próba systematyki*, "Czasopismo Prawno-Historyczne" 1983, vol. XXXV, fasc. 1.

Groicki B., *Porządek sądów i spraw miejskich prawa majdeburskiego w Koronie Polskiej*, "Biblioteka Dawnych Polskich Pisarzy Prawników" vol. I, Warszawa 1953.

Grużewski B., *Sądownictwo królewskie w pierwszej połowie rządów Zygmunta Starego*, "SHPP" vol. II, fasc. 4, Lvov 1906.

Helcel A. Z., *Dawne prawo prywatne polskie*, Kraków 1874, written 1849–1853.

Herburt J., *Statuta Regni Poloniae in ordinem alphabeti digesta*, Kraków 1503.

Hube R., *Przyczynek do objaśnienia historii statutu wiślickiego*, in: *Pisma*, vol. II, Warszawa 1905.

Hube R., *Statuta nieszawskie z 1454 roku*, Warszawa 1875.

Kaczmarczyk Z., *Historia państwa i prawa Polski*, 2nd edition, vol. II, Warszawa 1966.

Kaczmarczyk Z., Leśnodorski B. ed., *Historia państwa i prawa Polski*, Warszawa 1966.

Kolankowski Z., *Zapomniany prawnik XVI wieku – Jan Łączyński i jego "Kompendium sądów Króla Jegomości"*, Toruń 1960.

Kutrzeba S., *Historia źródeł dawnego prawa polskiego*, vol. II, Lvov 1925.

Kutrzeba S., *Preface*, in: *Cautelae quaedam in iure terrestri tentae et observatae*, "Archiwum Komisji Prawniczej" vol. IX.

Lelewel J., *Krytyczny rozbiór statutu wiślickiego*, in: *Polska wieków średnich*, vol. III, Poznań 1859.

Lisiecki A., *Trybunał Główny Koronny siedmią splendorów oświecony*, Kraków 1638. Cf. J. Makarewicz, *Polskie prawo karne*, Lvov–Warszawa 1910.

Maisel W., *Trybunał Koronny w świetle laudów sejmikowych i konstytucji sejmowych*, "Czasopismo Prawno-Historyczne" 1982, XXXIV, vol. 2.

Makarewicz J., *Polskie prawo karne. Część ogólna*, Lvov–Warszawa 1019.

Ostrowski T., *Prawo cywilne narodu polskiego*, 2nd edition, vol. I, Warszawa 1787.

Piekosiński F., *Uwagi nad ustawodawstwem wiślicko-piotrkowskim króla Kazimierza Wielkiego*, "Rozprawy Akademii Umiejętności. Wydział historyczno-filozoficzny" 1892, vol. 28.

Przyłuski J., *Leges seu statuta ac privilegia Regni Poloniae omnia*, Kraków 1553, p. 589.

Rafacz J., *Dawne prawo sądowe polskie w zarysie*, Warszawa 1936.

Rafacz J., *Z dziejów prawa rzymskiego w Polsce. Księga pamiątkowa ku czci Leona Pinińskiego*, Lvov 1936.

Roman S., *Geneza statutów Kazimierza Wielkiego*, Kraków 1961.

Roman S., *Przywileje nieszawskie*, "SHPP" 1957, VII, vol. 2, Wrocław 1957.

Rymaszewski Z., *Instrukcje syndyków gdańskich w sprawach rozpoznawanych przed sądami zadwornymi (od końca XVI do połowy XVIII w.)*, "Czasopimo Prawno-Historyczne" 1985, vol. XXXVIII.

Rymaszewski Z., *Sprawy gdańskie przed sądami zadwornymi oraz ingerencja królów w gdański wymiar sprawiedliwości XVI–XVIII w.*, Wrocław 1985.

Sarnicki S., *Statuta i metryka przywilejów koronnych*, Kraków 1594.

Sczaniecki M., *Powszechna historia państwa i prawa*, Warszawa 1973.

Stadnicki A., *Przegląd krytyczny rozporządzeń tzw. statutu wiślickiego podług przedmiotów ułożonych*, Warszawa 1860.

Ulanowski B., *Najdawniejszy układ systematyczny prawa polskiego z XV wieku*, AKP vol. V.

Uruszczak W., *Korektura praw z 1592 roku. Studium historyczno-prawne*, vol. I, Warszawa–Kraków 1990.

Uruszczak W., *Próba kodyfikacji prawa polskiego w pierwszej połowie XVI wieku*, Warszawa 1979.

Winiarz A., *Prejudykaty w Statutach Kazimierza Wielkiego*, "Kwartalnik Historyczny" 1895, IX.

Zalaszowski M., *Ius Regni Poloniae*, vol. II, Poznań 1702.

Zawacki T., *Processus iudiciarius Regni Poloniae*, Kraków 1619.

Jan Rutkowski

Economic Origins of the Partitions[1]

The underlying causes of the partitions of Poland have, as we know, been discussed in abundant works, yet they have not arrived at a consensus. The most intensely debated matter is the question of the internal and external causes of the collapse of Poland. The most extreme theory concerning the internal origins of the downfall of the erstwhile Commonwealth was formulated in the well-known sentence by Bobrzyński, who asserted that "neither the boundaries nor the neighbours, but internal disorder drove us into loss of political existence."[2] The most extreme counterclaim came from Balzer, who opposed this theory vehemently, stating that "the view according to which the deficiencies of our system were allegedly the major cause of the decline of Poland proved erroneous," as "the actual, decisive reason behind the collapse of our statehood, the crucial *causa efficiens* of that event is the covetousness of

1 Translated from: J. Rutkowski, *Gospodarcze podłoże rozbiorów Polski*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1930, 1, pp. 236–245 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This paper is an abridged version of the lecture given in Poznań in 1926. In view of the limited space, half of the original text and all notes had to be removed. I hope that despite those deletions the essential course of the disquisition has not lost its clarity. As far as circumstances allow, I shall substantiate the views expressed here more extensively elsewhere, in particular those which at first glance may appear insufficiently supported due to the aforesaid deletions.

2 M. Bobrzyński, *Dzieje Polski w zarysie II*, Kraków 1890, p. 348.

the united and therefore superiorly potent neighbours, who conspired to bring about the doom of Poland."[3]

The first of the views cited above would suggest that the direct cause of the annihilation of the Polish state was not the incursion of external foes, but an internal breakdown that the neighbours readily exploited. Meanwhile, the arrangement of social and state structures—not only under Stanisław August when it witnessed thorough reorganization and revival, but also in the Saxon period—managed quite satisfactorily, given the times, to meet the needs of the society with respect to safety, the judiciary and other internal affairs of the state.

Admittedly, certain destructive forces were there, particularly in the East, but confronted with the strength of the State they were so weak that in themselves they would not have brought about its collapse. The Bar Confederation cannot be considered such an internal breakdown, since confederations against the Crown had been formed quite often well over a century prior to the first partition. They had weakened the state structure, but did not led to its collapse.

The partitions of the Commonwealth are first and foremost a page in the diplomatic history of the states which participated in it, and a page in the history of the armed forces of those states which enforced the occupation. The entire deliberations on the causes of Poland's collapse should set out from the facts which are "external" to its history and constitute the direct cause behind the downfall of the old Commonwealth.

This does not mean, however, that the "covetousness of conspiring neighbours" is a sufficient explanation for the catastrophe, and that Poland's internal system was not one of the key contributing factors of the partitions. The state organization of the Commonwealth in the eighteenth century was strong enough to fulfil the internal tasks with respect to its own society, but too weak to withstand the external pressure.

The military weakness of the Commonwealth is indubitably the direct internal cause of its collapse. As is known, the military strengths of

3 O. Balzer, *Z zagadnień ustrojowych Polski*, Lwów 1916, pp. 73, 75.

Poland and the neighbouring states were greatly disproportionate. From 1717 until the first partition, the Crown and the Lithuanian forces had merely several thousand men all told. What could such a small army do against the vast numbers of the Austrian, Prussian and Russian armies? Therefore, conducting the partitions, especially the first one, was an undertaking which entailed no risk from the military standpoint. The Commonwealth was in a situation which virtually provoked the neighbour to invade and partition a country which carelessly ignored the fact that its frontiers were in no way secured.

Even the greatest physical and material effort on the Polish part would not have availed given an analogous effort made by the three neighbours, but one can hardly presume that in the eighteenth century those states would have embarked on partitions and that the undertaking would have been executed consistently and successfully if it had required great sacrifices, and above all, whether they would have agreed on uniform diplomatic and military action precisely at a moment when they confronted no hindrance from other states in Europe.

In a variety of ways, Poland's military weakness is directly and indirectly associated with the democratic political system of the Nobles' Commonwealth. One of the incentives to keep the numbers of the standing army so low, particularly in the Saxon period, was that the *Sejm* (national diet) feared that the king would use the armed forces to introduce absolute monarchy, such as those which had long been established or were just emerging at the time among the near and more remote neighbours of Poland. Particularly during the reign of August II, who would return so often to the idea of imposing absolute monarchical rule, even at the expense of the partial partition of the Commonwealth, those fears were not without some serious foundations.

However, following the death of that king the concerns subsided, and under August III the augmentation of the army was discussed at the Sejm on numerous occasions. However, until the first partition no serious measures were implemented, again due to internal-political rea-

sons. With the in-fighting between the magnate houses which at the time held Poland's fates in their hands, there were fears that—should the circumstances change—a larger army may boost the political significance of the opponents, therefore no decisive steps were taken. At any rate, the efforts made during the reign of August III did not reach the stage where the financial difficulties involved would have become evident and, having penetrated into the minds of the political circles, presented a real obstacle to building up the army.

After the first partition, and in particular during the Four-Year Sejm, the appreciation of military situation considerably increased. Awareness of the necessity of having a large army as a foundation of an independent political entity became more widespread, but new difficulties arose when the idea was to be pursued in practice, which became evident in the weakness of the treasury.

Issues of a financial nature had become immediately apparent as early as 1775, when one began to consider enlarging the army—to the very modest number of 30,000 men for the time being—in more specific terms. With the planned military reform in mind, the preliminary revenue envisaged at the beginning of the Four-Year Sejm was 18,000,000, but since only 13,500,000 was collected, the military budget had to be reduced from 12,000,000 to 6,000,000. By enacting a "perpetual contribution" as a financial mainstay of the army, it was hoped that the tax would yield 35,000,000. However, only 9,000,000 was effectively levied. Conducting income assessments on a different basis, a special tax adjustment committee increased that revenue to 14,500,000, which was still below half of what had been envisaged. It was therefore necessary to revise the plan for an army of 100,000 soldiers. By virtue of an enactment, the strength of the army was reduced to 65,000 but even that could not be accomplished. When Russia declared war on Poland in May 1792 and invaded its territory with two armies of 100,000 men, the Commonwealth had merely 56,000 people under arms, but not all of them could be fielded.

The weakness of the Polish exchequer at this time, which hindered the creation of an army that would have been strong enough to face the challenges of those times, is linked to the political organization of the Commonwealth on the one hand, and its economic system on the other. Absolute monarchs can more readily and promptly decide to impose high taxes on their subjects then diets can on their voters. On the other hand, the rulers of Austria and Prussia found it much easier to exact money from the countries they had subjugated than was possible with respect to Poland, whose economic constitution was much feebler.

Poland's economic weakness was particularly evident in industrial production, trade, and credit framework—in short in the economic organization of its towns and cities. Admittedly, Russia's economic system was not more developed or stronger than Poland's, but when comparing economic relationships in Poland and Russia from the standpoint of the ability to raise a strong military structure, we must not forget about the differences in population. A lower tax burden levied on a greater population enabled Russia to create a larger military force than was possible in Poland, where a relatively substantial portion of the social revenue went to the state.

As for the causes of the Commonwealth's economic weakness, one should in the first place mention the very numerous hostile incursions which had ravaged the country so much since the mid-seventeenth century. However, it would be entirely erroneous to presume that the Commonwealth owed its economic deficiencies in the eighteenth century solely to the devastations of war. There was another factor which adversely affected the economic system and its reconstruction after the ruinous wars: the economic policies adopted by the Sejm and regional assemblies (*sejmik*), which were subsequently enforced by the administrative authorities.

The Sejm and sejmik were institutions where the class interests of great estate owners were furthered. The differences boiled down to greater or lesser short-sightedness of the policies or contradictory eco-

nomic positions adopted among the nobles themselves. On the one hand, there were the disparate interests of the magnates and the lower nobility or gentry (*szlachta*), and the equally incongruent interests of agrarian groups from different provinces across the Commonwealth.

Within the legislative bodies, the economic programme aiming to concentrate the largest possible portion of the social revenue in the hands of the great landowners encountered no opposition. It was only the shortage of an adequately robust administration that caused the policies to be less far-reaching than envisioned in theory and legislation.

The policies yielded short-term and thoroughly tangible outcomes. It enabled great landowners to enjoy a standard of living which, given the defeats and ravages that the country had suffered, would have been impossible if the development of economic relationships had relied on the free competition of particular strata of the society. Nevertheless, the high living standard—in relation to the overall production capacity at the time—available to owners of large estates came at a cost, weakening the economy of the Commonwealth across various domains: agriculture, industry, trade and taxation.

Peasant serfdom was the chief manifestation of the agrarian policies espoused by the nobility, enabling great landowners to effect a complete economic restructuring of their estates. The peasantry of the fourteenth and fifteenth century had in fact been minor independent agricultural producers and constituted the majority of the rural population of Poland, but over time they were converted into labourers at manorial farms, as serfs or hired labour force. The interest of the manorial farms became the chief factor shaping relationships in agriculture.

The impact of serfdom on economic relationships on was evinced most vividly and directly in the era of serfdom. Without bondage, or attachment to land whilst retaining peasants' rights to it, without the omnipotence of the unappealable patrimonial jurisdiction, without the subjects being unable to bring action against their lord in Crown courts, the economy based on manorial demesnes and corvée would not have

developed. In tenant villages serfdom was felt as well. The rents agreed under a voluntary contract were usually lower than the compulsory rents decreed for bonded peasants. This may be demonstrated by comparing fixed rents with the rates for the voluntary, mostly one-year leases that as a rule amounted to less than the usual dues of the same villages. Also, foreign peasants who took land under a contract paid lower rents than the Polish rural population who had lived there for centuries. The servitude was there not only in the duties one was supposed to pay, but also when gainful work was undertaken. Those hired compulsorily would receive less substantial remuneration than labourers hired on a free basis.

This constant increase of the obligatory burden of labour inevitably resulted in the diminishing economic independence of the peasant population; the farmland they held was split into smaller plots while the number of small-holders and landless grew: *zagrodnicy* (who owned a house and farm buildings), *chałupnicy* (owned only a cottage) and *komornicy* (who had to rent a room in a farmhouse). This gradually diminishing economic independence meant that revenue from land estates soared, whereas the former prosperity of the peasants dwindled.

Experience teaches us that reducing the share of agricultural workers in the yield of their labour, once it exceeds a certain limit, will have an adverse effect on production, causing it to deteriorate. Rather than with hired labourers, this occurs relatively faster with the serfs who are entrusted with the draught animals and farm equipment to cultivate the fields of their landlord. Agricultural production had been on the decline since the seventeenth century, especially since the latter half, so that agriculture in the eighteenth century was in a worse state than it had been in the sixteenth. Eighteenth-century authors attribute this decline mainly to serfdom, but there can be no doubt that the military defeats sustained in the mid-seventeenth and early eighteenth century played a role.

After all, the reduction of the area of arable land which corresponded to the sparsity of population owing to warfare and the epidemics which followed cannot be imputed to serfdom alone. However, the latter

factor did contribute to the lower birth rates among the peasants caused by their poverty.

It is more difficult to account for the decreased productivity of the grain and soil. The phenomenon may been resulted from the poorer quality of cultivation and agricultural technology in general, reflecting a shortage of financial resources due to wartime destruction and the diminishing efficiency of serfdom-based work.

As for the industrial policy in the sixteenth and seventeenth century, one should invariably distinguish between the policies pursued by the rulers and those supported by the Sejm and regional sejmiki. The monarch would often attempt to introduce new types of industry, especially where the branches catering to the refined needs of the upper classes were concerned. Meanwhile, fixing prices for ready-made craft products or craft work were the most important matters debated at the diets and local assemblies. From the perspective of the class interests of agricultural producers, striving for the lowest possible prices is perfectly understandable, as the income from their estates would enable them to purchase more industrial-made goods and enjoy a higher standard of living.

As a result of the financial relationships at the time, there was a general tendency for the products—agricultural and industrial alike—to grow more expensive. The dominant policy was to curb the increases in price of the latter, which it sought to achieve by two means: through a liberal customs policy and by dictating prices for craft work and craft products, which were determined in voivodeship-level tariffs.

Although municipal authorities intervened to some extent where the rates were concerned, the policy is quite correctly considered a manifestation of the designs and goals of the nobility. Opinions are divided as to whether the policy was effective. There can be no doubt, however, that it failed to stop the price increases, although one should not—in my opinion—draw the conclusion that a policy of fixed rates is utterly ineffectual. It operated jointly with and in the same direction as the customs

policy, therefore studying the outcomes of either policy separately is severely limited. At any rate, it is doubtless that in conjunction they managed to slow down the increases of prices for craft labour and craft products. Price growth rate in that area was considerably lower than in the case of rural products.

The consequences this entailed were very significant indeed. The nobles were able—ceteris paribus—to purchase more and more industrial products, in other words to elevate their standard of living or, at the time of the calamities of war and universal impoverishment, they did not need to reduce that standard as much as they would have had to if that price policy had not operated. If, by and large, a peasant was not able to do likewise, it was due solely to the increasing duties that nullified the positive effect which the price policy might have had for the peasant estate. The nobles benefited even more, deriving both the aforementioned direct as well as indirect advantages from the policy. The cost of it all was borne by the town-dweller, the craftsman in particular, who had to content himself with constantly diminishing earnings from his work. This compelled him to reduce his standard of living and prevented any progress in industrial production, which the impoverished craftsmen simply could not afford. This may also explain why the attempts to introduce the capitalist system in the field of industry seldom originated with the particular producers or merchant-bourgeois. It was the land-owning estate, magnates in particular, who played a key role here. It was a class that had much more substantial capital at its disposal which could be invested in industrial enterprises.

We may now return to the question of whether the treasury ailed because the economic system was weak or whether the potential of the latter was insufficiently exploited; alternatively, what role was played by each of those factors. It is obvious that the Polish economy, conspicuously weaker than the economies of our Western neighbours, prevented our treasury from becoming as affluent as theirs. However, the fact that treasury legislation—even during the period of the Four-Year Sejm, when the revenue was raised to unprecedented amounts—did not

exhaust all possibilities, becomes evident upon comparing the history of the Polish exchequer in the final years of the Commonwealth with history of the same in the early years following the partitions. The very substantial increase of that revenue had already been noted by Staszic. Under duress, we were able to afford to maintain the armed forces of the partitioning states, yet we could not afford to make voluntary contributions to keep an army capable of defending the independence of the Commonwealth.

That phenomenon is strictly linked to the centuries-long tradition of treasury policy and legislation. During the reign of Kazimierz Jagiellończyk, a watershed period for both treasury and military history, when a regular army instead of a levy en masse became the chief instrument of waging war, the nobles had to contribute a portion of their income towards the regular forces, unless they took part in the war themselves. The concept of a tax being an equivalent of military service is clearly highlighted in a number of conscription universals from the first half of the sixteenth century, especially in their provisions regarding the gentry.

However, thanks to their political consequence, the nobility at the time, i.e. at the turn of the modern era, gained fiscal freedom. Towards the end of the fifteenth century they were exempted from customs duties, while direct taxation became less and less important in the early sixteenth century, only to cease after 1521.

The fiscal freedom of the nobility endured until the first partition. It was only sporadically interrupted in the latter half of the seventeenth century and three quarters of the following century by several enactments introducing capitation and general customs tax. This was the terrible tragedy of the development of our state—that great landowners, having seized control of public affairs, directed economic policies in a way that delivered a vast portion of the revenue into their hands, at the expense of the townspeople and peasants. At the same time, they were unwilling to surrender an adequate part of that income which

would go towards defence of the state, and thus indirectly their security as well.

The tax statutes enacted under Stanisław August placed an incomparably greater fiscal burden on the landowning class. This applied in particular to the general customs tax, vastly increased quarter tax and the perpetual contribution. Very serious results thus ensued. When the resolutions of the Four-Year Sejm had been promulgated, the revenue of the Commonwealth's Crown treasury from a territory diminished by the first partition was six times larger than the analogous revenue in the Saxon era. It was a major effort, yet it was still too modest to save the state from the partitions. That the effort could have been more substantial was demonstrated by the Prussian tax policy after the collapse of the Commonwealth. Had its economy been stronger, had it not been exhausted by the wars and fatigued by the economic policies described above, fiscal legislation, which entered into force thanks to the endeavours of the Four-Year Sejm, would have yielded even more revenue, sufficient to build an army exceeding even 100,000 men. However, given the economic situation at the time, there was a need for laws that would have imposed even higher levy on the income from the great estates for the benefit of the State, but the representatives of the landowning class of whom the Four-Year Sejm was composed could not bring themselves to do so.

Our reasoning so far has reached a point where the various internal causes behind the decline of the Commonwealth become combined and form an inextricable nexus. The weak economy itself does not account for the collapse and cannot be considered its sole cause, as it would not have prevented the creation of a strong fiscal apparatus and a strong army, if a tax policy suited to the political circumstances had existed. The latter could have been introduced by an absolute ruler or Sejm whose members had higher standards of public morality and a greater capacity to sacrifice the interests of the estate they represented for the sake of the common good than was actually the case.

The political system of the Commonwealth, with its omnipotent assembly of the nobles would not have been detrimental if the economy had been stronger, or if at critical moments its members had demonstrated a higher spiritual level.

The moral condition of the then community of nobles, which cannot be considered to have been inferior to the condition of the nobility in other countries who at each turn displayed the same economic inclinations, would not have contributed to the collapse if the rights of the nobility had been limited, that is, if its overwhelming influence had already been undermined by absolute monarchy.

It was only the concerted working of those three factors: economic deficiency, the political system, and the morals of the ruling estate, that constituted—as an integral whole—the internal cause of the partitions. Even so, all that taken together would not have been a sufficient reason, had it not been for the collusion of external factors, meaning the rapacity of the neighbours.

Thus, we arrive at the conclusion that neither external nor internal causes considered separately permit one to resolve why the partitions happened, just as none of the internal factors alone cannot be deemed to have been critically decisive. Only when combined into an entirety can they offer an explanation for the political disaster of the Commonwealth.

Literature

Balzer O., *Z zagadnień ustrojowych Polski*, Lwów 1916.
Bobrzyński M., *Dzieje Polski w zarysie II*, Kraków 1890.

Bohdan Winiarski

On the Codification of International Law[1]

On 13 March 1930, the first conference on the codification of international law will convene in The Hague. In the first Place, is this a feasible task and, if so, can it be performed in our times? If it is possible, then in what scope and using what method?

The word "codification", through the most immediate association, brings to mind the idea of a code, which is to say, a statute that systematically and exhaustively regulates some large segment of community life; it is used to refer to a uniform statute, relying on a single conception, subordinated to a single guiding idea and, finally, free from loopholes and internal contradictions. France boasts eight codes, the most illustrious being the Napoleonic Civil Code of 1804, which encompassed this huge domain of human relations in 2,281 articles; the Austrian Civil Code of 1811 managed to subsume this domain in as few as 1,502 articles. Only one hundred years later—we ignore here Italian, Spanish and Portuguese codes—one can mention other monuments of legislation which equal the previous ones in importance: the German Civil Code, in force since 1 January 1900, the Swiss Code that came into force as of 1 January 1912 and, finally, the last one, which will be counted among

1 Translated from: B Winiarski, *O kodyfikacji prawa międzynarodowego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1930, 1, pp. 144–159 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

the greatest: *Codex iuris canonici* of 1917, encompassing the entire legal life of the Church in 2,214 canons.

If those codification enterprises succeeded, it was first of all possible because the legal norms that were to be included in the codes had reached a high degree of perfection. For thousands of years, millions and millions of events, and human relations had been regulated by norms, which for this very reason were able to attain a high degree of generality. How many sale and purchase transactions were needed, and in what diverse conditions, involving a great variety of objects and transacting parties (e.g. from buying a wife, serfs, or an office, etc. to securities, an insurance policy or a lottery ticket), to be able to capture the entire institution of sale-purchase in a few sections of a civil statute! For thousands of years, they had been worked on by creative juristic minds. Customary law was written down, systematised, supplemented and amended by way of legislation until the norms became so certain and the institutions had crystallised to such an extent that codification was only a natural crowning of the work of centuries. It can be said that the Napoleonic Code had existed in all its details, before it was drafted. How then, did the Code of Canon Law arise? Pope Pius X commanded *ut universae Ecclesiae leges, ad haec usque tempora editae, lucido ordine digestae, in unum colligerentur, amotis inde quae abrogatae essent aut obsoletae, aliis, ubi opus fuisset, ad nostrorum temporum conditionem propius aptatis.*

The mainspring of all codification enterprises is almost always a powerful extra-legal factor: aspirations for greater political unity. The Napoleonic Code is an affirmation of a new France, which emerges from the revolutionary turmoil as not only "one and indivisible", but also strongly centralised. The Austrian Code was meant to reinforce the Habsburg monarchy, which was held together as a patchwork. The German Civil Code, in turn, capped the unification of Germany. It is for this very reason that the Congress Kingdom of Poland instinctively defended its civil code as a sign of its separate identity vis-à-vis Russia, and the Poles now yearn for a Polish civil code for the same rea-

son, since it will not only crown the process of national unification, but also serve as a powerful unifying factor and the surest safeguard of unity for the future.

International law, the body of legal norms regulating relations between states, is an entirely different matter. The number of states who are its subjects is very limited indeed; it now stands at only about three score. Relations between them, despite the huge development of international communications, economic and cultural exchange, and despite their ever-closer interdependence on each other, are far less intensive than between individuals. Moreover, not all these relations are governed by international law: vast domains are found outside its limits. They belong to internal matters and as such are exclusively subject to domestic jurisdiction. The number of facts regulated by international law is relatively small; these are events and relations of a very diverse character and not recurrent. The abstracting mind of a jurist has not extracted enough elements from them yet that would allow him to reduce the body of international law norms to a number of institutions arranged in a logical system.

These norms are distinguished by a low degree of generality, they are very specific and detailed, and bear clear signs of the circumstances to which they have been adapted; the international law systematics in question is still in its infancy.

It is to custom that we owe the most ancient and consolidated and the most broadly adopted norms of international law. If they share all the advantages of customary law, however, they share its disadvantages as well, such as uncertainty if a rule has already become a binding norm and to what extent, or if it already has perchance ceased to be one, not to mention the inconsistency of norm construction and application. These disadvantages are aggravated by the fact that in international relations there is no authority that would resolve doubts and establish norms. Almost everything depends on the discretion of states, which are guided by not only their national sense of law, but also their national interest. The

other source—treaties—admittedly gains in importance, as relations developing at a hitherto unknown rate demand to be quickly systematised legally, while customary law is of no help. Conventional norms, however, often established under the supremacy or even pressure of a group of states, sometimes of a single power, too often bear the mark of a moment or political circumstances; they jar the sense of law of some societies, infringe the interests of others and are far from the authority that legal norms ought to enjoy. When, however, as it often happens, each party, approving some compromise wording of a provision, readied an interpretation of its own in advance, then it transpires as soon as the agreement comes into force that each party had signed something else: instead of one there are actually several treaties.

Where can an authority be found that could impose uniformity here? We should not deplore the absence of such, because it follows from the very nature of international law, which is based on recognition—express or implied—by states, i.e. the subjects of international law. This is the principle that in ancient times in Poland was expressed by the classic formula: "nothing on us without us". Or even more: with the exception of few minor cases (e.g. certain resolutions of the League of Nations of an organisational character) that must be clearly provided for, the states enjoy a clear *liberum veto*, i.e. they may block resolutions on matters in which they are involved. This state of affairs may cause some inconvenience and attempts are made to limit this *liberum veto* at least where this is possible: in international organisations. For instance, the charter of the International Communications and Transit Organization at the League of Nations stipulates that a 2/3 majority of votes of states represented at a general conference is necessary for the adoption of any draft resolution. Hence, a single state may not block the adoption of the text of a convention, but the convention, of course, will bind only the states that ratify it. It may even happen that the text of a convention will be adopted but the convention will not be validated or will not come into force due to the insufficient number of ratifications.

The principle of "nothing on us without us" is only a natural consequence of state sovereignty and the surest palladium of national liberty, but does not—for that matter—make the formulation of international law any easier. As a result, it must be said that international law has relatively few universally binding norms; many more norms belong to particular international law. The latter are recognised by only some groups of countries. The renowned Italian scholar Anzilotti was right when he wrote that "the largest part of international law is made up of particular law".

Finally, the codification of international law has no powerful stimulus comparable to an aspiration for political unity; quite on the contrary, every state adamantly defends its independence that—alongside differences in the sense of law and different interests—sets limits on the efforts at legal unification in the area of international relations, which are quite frequent nowadays. Hence, these international movements and organisations that have as their objectives the foundation of some kind of an European or world federation, a universal "super-state", see the codification of international law as one of the roads towards this objective. Nevertheless, it is quite obvious that the introduction of such a political factor to the question of codification should make governments extremely cautious and demands the utmost prudence.

Over one hundred years ago, two outstanding German scholars clashed over the question of civil law codification. As a matter of fact, both the scholars were of French descent and the echoes of this clash have reverberated ever since. In 1814—right after the victory over Napoleon, when national enthusiasm was at its peak—Thibaut published the pamphlet *On the Necessity of a General Civil Law for Germany.* A barbarian patchwork of Germanic laws, Church law and Roman law was no longer fitting for a victorious nation; a single model act was necessary, one independent of the will of the governments of particular German states, and unifying all Germans in a sense of brotherhood. It is not only a patriotic tendency that is discernible in this approach, but also a large dose of rationality and an exaggerated cult of the Statute famil-

iar to us from the French Revolution. A similarly patriotic response to Thibaut's views was provided by Friedrich Carl von Savigny. The latter, if not the most profound then the most celebrated representative of the young historical school in jurisprudence, published his views in the pamphlet *Vom Beruf unserer Zeit für Gesetzgebungund Rechtswissenschaft* (1814). The national genius creates law in the same way as it produces language, custom, poetry and entire folk art. It is customary law that is always alive, perfectly suits society's sense of law and therefore is the best. Admittedly, there must come a time when people's direct legal creativity is no longer possible, and this is when learned jurists come into play. However, the role of the legal profession is rather what we would call today legal technique. The sources of law still spring from the depths of national genius. A statute does not create law, but rather formulates law that is alive in society's sense of law or even in its awareness of law. A code should be a perfect expression of this law, hence it ought to be preceded by a thorough study of the nation's past, character, work and needs, as well as the careful cultivation of jurisprudence; even language must be prepared for this task. Every statute carries a risk of interrupting the development of living law, of petrifying it. A codification that would not suit completely the nation's sense of law or would be simply premature could do irreparable harm to society.

It is easy to notice the affinities between this view and the general trend of romanticism, which is well illustrated by a portrait of Savigny, drawn by Miss Claude (as early as in 1826) in a very romantic manner. A beautiful face lost in thought, eyes looking into the distance, hair falling down in soft curls, a cloak casually draped around shoulders – all this speaks volumes about the times… This view prevailed: uniform civil law for Germany came to pass almost one hundred years later. Since then, however, supporters and opponents of codification have been returning to the ideas set out in essays by Thibaut and Savigny.

How did people envision the question of international law codification? We ignore a draft of the "Declaration of the Law of Nations"

(or rather states) submitted to the Convent by deputy Fr. Grégoire (1795); it began with a statement that "peoples (or rather states) remain with respect to one another in a natural state joined by the ties of universal morality" followed by 21 articles formulating not so much the international law norms in force as the postulates of revolutionary philosophy. It never went beyond the drafting stage.

The necessity of codifying the law of nations was mentioned first, I think, by Jeremy Bentham, who saw it as a road to permanent peace. In his ideas, however, the great Utilitarian turned out to be a utopian. The formulas included in von Traitteur-Luzberg's *Skizze zu einem Völkergesetzbuche* (1814), which seem to be of little value, were dissected in a book by Zenon Przesmycki, to which I shall return. The first draft of a code of international law, comprising 414 articles, was published by a Spaniard, de Ferrater, in 1846; an Italian, Paroldo, followed in his footsteps in 1851. The declarations made by Garden (1852) were never fulfilled, while works by Weiss (1854 & 1858) are codes of neutrality law and maritime law in name only. Only in 1861 did the Austrian jurist von Domin-Petrushevecz publish *Précis d'un code de droit international*, a critical and thorough compilation—though not free from mistakes—of formulas in which he captured positive international law, both public and private.

The *Instructions for the government of armies of the United States in the field* drafted by Francis Lieber in 1863, were different in nature, codifying the rules of land warfare in 157 sections. The *Instructions* was commissioned by the US government for the use by the Union Army in the Civil War. The work by the outstanding scholar paved the way that led to—via Brussels and Oxford attempts—to The Hague Rules of Land Warfare of 1897. Lieber was followed by Bluntschli, who in 1868 published a work entitled *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt.* Over-praised and translated into over a dozen languages, this work, later subjected to critical dissection, turned out to be weaker than expected. Next to its undeniable advantages, among which

the great erudition and broad horizons of its author must be mentioned first, we find in it not only serious drafting mistakes but also major shortcomings in the system, internal contradictions and, finally, a confusion of the author's personal views with the objectively existing norms pertaining to international law. Nevertheless, Bluntschli's work, made a great contribution to the popularisation of the law of nations, unmatched by the works attempting to advance codification written by his successors. Their number is quite considerable. Dudley Field (1872), Fiore (1890), Duplessix (1906), Internoscia (1910), the former president of Brazil, Epitacio Pessoa (1911), not counting the authors of incomplete or partial attempts, such as Farnese (1873) and others. Their codification attempts had one trait in common—perhaps with the exception of that by von Domin-Petrushevecz—their aspiration was not to codify precisely existing positive international law, but rather to supplement it; to create new law in agreement with their views and preferences. Hence, they could be called philanthropists in the meaning given to this word in the 18th century: friends of humanity (*amis de l'Humanité*).

A Polish jurist will find with justified contentment that, among the few works on the subject, an extensive dissertation written by Pole—though in Russian—came out as early as in 1886, which addressed the history and provided a critical analysis of codification attempts in international law. The Polish character of the work can be detected in the first place in the way its author discusses issues, and in the direction he searches for answers to questions posed; the reader senses, knows, that the author is thinking all the time of the Polish question in international law. The juvenile author, Zenon Przesmycki, was awarded the Warszawa University Gold Medal for this dissertation. Certainly, few know today that Miriam (Przesmycki's pen name) began his writing career with a juristic dissertation, having studied international law. Only later did he become a prince of Polish poets and make unforgettable contributions to Polish culture. He covered the same road as the great Grotius but in the opposite direction, for the latter began his amazing writing career that

earned him the name of the Father of international law with a volume of poetry.

More fruitful than individual efforts, the work of the Institute of International Law has continued now for almost six decades.

As early as 1855, Prof. Kaufmann from Bonn published a work entitled *Die Idee und der praktische Nutzen einer Weltakademie des Völkerrechts*. Ten years later, this idea was taken up by the well-known Belgian jurist Rolin-Jaequemyns, but only in 1871 did Francis Lieber, already mentioned earlier, write him a letter in which he recognised the advantages of regular congresses of international law scholars; congresses that would be independent of governments and purely academic. Their purpose would be to prepare the partial and gradual codification of the law of nations. Now, backed by Lieber's authority, encouraged by the Swiss Moynier, Rolin-Jaequemyns was in the position to approach over a dozen of the most eminent international-law scholars with specific proposals. In September 1873, in one of the halls of the historical Ghent City Hall, in the presence of almost twenty participants, the Institute of International Law was founded and immediately set out to study systematically selected questions of our discipline. The founding of the Institute was welcomed by international law scholars as a historical event of great importance. The founder of the Italian School in international law studies, Stanislao Mancini, greeted the founding of the Institute in a lecture with a title similar to one von Savigny delivered many years earlier: *Vocazione del nostro secolo per la codificazione e la riforma del diritto delle genti*.

Realising that the study of international law required a lot of time and that any ideas regarding codification called for extreme caution, the Institute has always exercised praiseworthy prudence in embarking on the study of selected questions of the law of nations. In the several dozen volumes of its yearbooks, there are invaluable materials for the codification of international law, both public and private.

Besides this Institute, the American Institute of International Law has been active for over ten years. I shall return to it in a moment.

Founded in 1919, *Union juridique internationale* was not viable. The unification of maritime law, though for the most part private, was greatly helped by the Maritime Committee in Antwerp. Interest in the issues of international law and its codification is stimulated widely by the International Law Association, which was founded in 1873 as the Association for the Reform and Codification of International Law and remains under British influence. Similar but less effective efforts are undertaken by the Inter-Parliamentary Union (since 1889), League of Nations Union and finally diverse pacifist organisations.

Finally, it must be observed that research into international law that has been flourishing for several decades now also paves the way for steps towards its codification.

How do official attempts undertaken so far look? Since almost the first day of its existence, the Institute of International Law has focused its studies on the questions of peaceful settlement of international disputes, and extradition. A convention on the former question was not signed until the Peace Conference in The Hague in 1899, before it was expanded and supplemented at a second conference in 1907. The convention is largely a record of the customary law that had developed in this field, but it does list certain innovations as well (special mediation or international commissions of inquiry). After the war, the Permanent Court of Arbitration was set up at The Hague and conciliatory proceedings have been widely adopted. However, various countries are parties to various conventions; even The Hague arbitration procedure is only auxiliary in nature. Is it possible to speak in this respect of codification at all? As regards extradition, which has been regulated by countries from time immemorial through numerous—and as a rule—boilerplate bilateral agreements, it has been recently assessed as … not ripe for codification by a League of Nations commission.

In 1880, the Institute, encouraged by the success of Lieber's *Instructions* and not discouraged by the failure of the Brussels Conference in 1874, embarked on the codification of the laws of land warfare that

only came to be written down in the form of a convention in 1899 (the so-called Hague Rules) and subsequently revised in 1907. Curiously enough, there are countries that have not adopted the Rules; there are certainly others that have acceded to the 1899 Convention but not to the revised Convention of 1907, while the Convention is applicable only if all belligerent states are parties to it, or else customary law comes into play. The "codification" of the laws of sea warfare (the London Declaration of 1909) has never ripened into an agreement.

The rules of navigation on rivers dividing or crossing two or more countries laid down in Articles 108–116 of the Final Act of the Vienna Congress have been the subject of many later agreements that by no means always followed the 1815 Treaty. The Final Act was followed by others in 1856 (Danube) and 1885 (Congo and Niger); the Institute took on this question in 1883. The Versailles Treaty brought further provisions in this respect and only in 1921, at the Barcelona Conference, was the Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern adopted, which was meant above all to be the codification of norms applicable to these questions. The Convention has introduced many worrying innovations such as provisions on river works and river administration; it has not been ratified by many countries of prime significance for international navigation. Finally, yet importantly, the Convention, similarly to others, has not supplanted customary law, thus it is not an instance of codification in the proper meaning of this word.

Similarly, one can speak of Hague conventions on private international law as codifications, but only with some reservation. The same is true for Brussels conventions on maritime law.

America seems to be moving at a faster pace along this path, however.

Since 1826, when the first congress of a number of American republics, which had been convened in Panama on the initiative of the great Bolivar, resolved in favour of the codification of the international law they had adopted, the idea of codification has enjoyed sustained popularity. The codification of private international law was the purpose

of congresses in Lima (1877) and Montevideo (1888). A major preparatory step in this direction was taken by Pan-American conferences (1st, Washington 1889, 2nd, Mexico 1901, 3rd, Rio de Janeiro 1906, 4th, Buenos Aires 1910, 5th, Santiago 1923, 6th, Havana 1928). Implementing the resolutions of the 3rd Conference, a congress of American jurists gathered in Rio de Janeiro in 1912. It is to this congress that we owe the draft codes of public (Pessoa) and private (Pereira) international law. The 5th Conference approached the task from a different angle: having given up on complete codification, it resolved to strive for a partial and gradual one. The prime mover behind these efforts is the renowned Chilean jurist Alejandro Alvarez, residing mainly in Paris. The American Institute of International Law adopted 30 draft conventions that covered almost all public international law (Lima 1924) and discussed a draft code of private international law, drawn up by the excellent Cuban jurist de Bustamante (Montevideo, 1927). The new congress of American jurists (Rio de Janeiro, 1927) approved 12 draft conventions concerning public international law and the draft of an overall convention, covering all private international law. Curiously enough, the word "codification" is not used there; instead, it has been replaced by the "development" of international law. The 6th Pan-American Conference adopted seven agreements, concerning public international law and de Bustamante's code of private international law. The American efforts at codification are accompanied by enthusiasm and optimism unknown elsewhere. True, it is all about particularly American law and the republics of the New World are not divided by so many and such deep differences as the countries of Europe are. But again, on the Old Continent, worries are expressed that this American impetus, ignoring the state of other parts of the world, will hamper, if not prevent, the work on bringing international law to universal unity…

Supposedly, this last task is to be given to the League of Nations, which is repeatedly accused of delaying tactics by the enthusiasts of quick and complete codification of the law of nations.

When, in the summer of 1920, the committee of ten jurists was drafting the Statute of the Permanent Court of International Justice, it had to allow for the imperfect state our branch of law was in. For this reason, it adopted a resolution on 21 July in which it argued that security called for extending the rule of the law of nations to new domains and advancing further the international judiciary, which was hampered in its development by the imperfections of the law. Hence, the committee proposed that, following the pattern set by the first two Hague conferences, periodic conferences be held in The Hague *pour l'avancement du droit international*. The proposition was not acceded to by the 1st Assembly of the League. However, already in 1924, the Swedish delegate to the 5th Assembly proposed a motion to draft conventions in matters in which states, recognising fundamental legal norms, differ in their interpretation and application, and, if possible, in matters that had not been regulated at all by the law of nations until then. Since then, the matter of international law codification was on the agenda of the League. A committee of experts was appointed that in four annual sessions (1925–1928) and during intervals between the sessions prepared materials for the future conference. The committee, following the example set by other consultative bodies of the League, addressed governments twice: for the first time to learn about their views on the questions and methods of codification in general and find out what their stance was on a number of issues with regard to which codification appeared desirable and feasible. For the second time, the committee addressed governments after it had selected three issues to be discussed at a future conference. By sending out questionnaires, it intended to collect information on the views the states had on the legal status of these issues, the state of international practice and, finally, ideas and postulates of the states regarding these issues.[2]

2 The work and methods of the commission of experts are discussed at length in the article by S. Rundstein, member of the commission on behalf of the Polish Government. S. Rundstein, *Kodyfikacja prawa międzynarodowego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1928, vol. 1.

The selected issues cover citizenship, territorial waters and the responsibility of a state for damage done to foreigners and their property on its territory. The materials collected for the use of a conference (mainly government replies to the questionnaires) make up three bulky volumes.

The 9th Assembly of the League (1928), being very cautious in making plans for the immediate future, adopted a resolution nonetheless in which it expressed the wish that the Council would appoint a committee of three jurists to draw up a list of all international law issues suitable for codification without predetermining the order in which they were to be worked on. The Assembly also expressed that these same jurists would explore the possibility of publishing existing general conventions (i.e. open for all states) in the form of a code or rather a corpus juris systematically organised and kept à jour. This was done and the 10th Assembly of the League (1929); having taken cognizance of the list of issues suitable for codification, it expressed the wish that the commission of experts should continue their work after a future conference. Furthermore, the Assembly, approving the opinion of the three jurists that a systematic publication of general conventions in the form of a corpus juris would not be possible now, found it to be beneficial to determine the texts of agreements concluded by various states on certain matters and specify which states were bound by these agreements. Thus, the League did not swerve from the course it had taken and along which it intends to proceed slowly and cautiously as before.

4. The second Hague Conference ended its proceedings with a resolution that after a certain time, similar to the period that had lapsed between the first and the second Conference (1899–1907), the third Conference would be convened, preceded by long and thorough preparations, involving matters suitable for international regulation in the near future *(susceptibles d'un prochain règlement international)*. The term "codification" was not used there and probably rightly so, because it would have to mean something else with respect to international law and domestic law. Indeed, this is about very different things. First, the

issue concerns writing down in the form of an agreement the customary law in force, which in domestic relations has always been treated as only one of preparatory works for codification. Next, the aim might be to supplant many bilateral agreements on a certain subject with a single general multilateral agreement. This is sometimes necessary for practical reasons and technically possible if general rules embodied in analogous provisions can be derived from a multitude of bilateral agreements: the Universal Postal Convention or the Berne Convention concerning the Carriage of Goods by Rail attest that such a manner of proceeding serves the purpose. But then again, the example of the Barcelona Convention or the abandoning of the general extradition convention shows that a general convention does not always mean progress. Finally, the purpose is often not to compile the existing rules in force in an agreement, but rather to introduce new things, often contravening the law in force, that is to say, to "reform" international law. The mere compilation of customary law norms in an agreement could not be achieved without negotiating them, that is, without making some changes: deleting some norms and introducing others. As long as this concerns subordinate norms of, let say, an organisational, technical or executive nature, the matter may not raise any doubts; but what about more fundamental norms that touch the foundations of international law?

In this connection, supporters of "codification" indicate the advantages of establishing what the law is. The certainty of legal norms is indeed a serious argument for written law; the necessity of removing ambiguities, differences or contradictions follows naturally from the legal ordering imposed by an agreement. However, these advantages are not absolute. Experience shows that states often refuse to accede to a convention, disapproving of the approach it takes and the technical implementation of the principles that they by no means question. Pillet, the the old Paris Professor, had earlier noted the danger threatening the entire convention when one of its clauses is breached. In customary law, there is no such relationship. Finally, one should not disregard the

consideration that although the principle *pacta sunt servanda* is a foundation of international law, customary law as a rule enjoys greater esteem than conventional one.

Admittedly, conventional law is easier to learn about, and it is more accessible for the general public than customary law. Besides, conventional law makes the task of international courts of arbitration easier. However, it must not be forgotten that law having an agreement as its source may be abolished by conflicting customary law.

One can hardly agree with the excellent Belgian jurist de Visscher, who claims that written law gives smaller and weaker states greater guarantees than customary law. After all, international law is an outcome of clashes between different senses of law of various nations, their different ethical views and conflicting interests. However the forces at play here are distributed, as it were, in time and space; ultimately, those norms remain that best suit the needs of all members of the international community. Those who have taken part in concluding great international agreements know what a great role the pressure of great powers plays on such occasions, the more so as it is concentrated in time and space. They ruthlessly pursue their political and economic goals. On other occasions, pressure comes from the public opinion stirred by agitation; let's say, from the organised and more active segment of the general public, for instance pacifist societies. Do I have to remind you of the revolutionary appeal made by Lord Robert Cecil from the rostrum of the League of Nations to "working-class and peasant masses" concerning disarmament? Furthermore, pressure is exerted by League agendas, including its Secretariat itself at times; when the text of a convention is adopted by a majority of votes, do I need to remind you of the relentless pressure brought to bear by the League on the states to ratify the convention that does not suit them? Frequently, pressure comes from the highest international financial circles, secret societies, the press doing their bidding, and finally the pursuit of popularity or even electoral considerations at home play a part. Therefore, the value of international agreements as the source of law by

no means grows in proportion to their constantly growing number and the ease with which they are concluded now, owing to the technical and organisational assistance of the League of Nations. Sometimes, the legal value of today's agreements makes one long for the quality of, let's say, the Hague conventions.

Usually, a distinction is made between lawmaking agreements, being a source of international law (the Germans call them *Vereinbarung*), and contracts representing ordinary transactions between states (*Vertrag*). Sometimes, in a brutal play of interests, the distinction is obliterated, which by no means adds moral authority to lawmaking agreements. Under these conditions, it must be considered exceedingly dangerous to try—as the Ministry of Foreign Affairs seems to approve—to "preclude the imposition of any time limits on agreements and the possibility of their termination … to make agreement-based norms override agreements … A norm overriding the fluctuations of the will of the parties is the objective of the League of Nations, wishing it to be a characteristic feature of lawmaking conventions".[3] There is a fear that the codification of international law may be used for political ends.

Not only states may bring "politics" to "codification". This can be done—and is done quite openly—by international movements and organisations working towards the fundamental "reform" of the law of nations. They take every opportunity to try to undermine the "fetish of sovereignty"; in closing legal "loopholes" and extending international regulations to domains hitherto not covered by them, they see a means to restrict the domestic jurisdiction of the state. Frequently, they consider this exclusive jurisdiction as the range of activity "conceded" or "delegated" to states by the international community. They push for obliterating borders, eliminating differences between states and imposing universal unification. In opposition to the state as a subject of international law, they put forward the individual and class. They impose an

3 S. Rundstein, *Kodyfikacja prawa międzynarodowego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1928, z. 1.

obligatory judiciary, regardless of the consent of the parties, demand that particular states disarm but also that penal measures and an international executive be introduced. Behind this agenda lies the idea of a "superstate" and single government that would be so powerful that nobody can or dare resist it. This would be the end of international "anarchy" but also the end of independent nations and the end of states, which would be reduced to the markings of territorial divisions. This would be the end of international law as well.

Both the countries that impose their interests and the international movements or organisations that impose their conceptions… and surely interests as well, know what they want, what their objectives are and are capable of realising their plans step by step with admirable determination and enviable persistence. The situation is worse for those countries that do not have a guideline, are incapable of consistency in their actions, or ca not muster up persistence in their aspirations. Great Britain is a paragon in this respect. After all, any action ought to be based on this assumption: know international law and have some policy on international law.

Bringing order to international law may and should be supported in the areas where this is needed and feasible. I do not see any harm in this, if this is called the "partial and gradual codification" of international law. Caution and absence of haste are crucial: after all, it is not only about the sense of law that nations have and that cannot be violated, not only about interests, but many a time about the very existence of a country. Instructions given in this spirit by the US government to its delegation to the 2nd Hague Conference are full of wisdom. It is necessary to choose carefully the matters for codification conventions and give up total codification, following a plan set in advance. Moreover, we should stick to practical, concrete matters without going into fundamental questions. In every detail, however, we should bear in mind the fundamental principles of the law of nations. For this reason a convention on the "fundamental rights and duties of states" would be dangerous, although the "Declaration on Rights and Duties of States" adopted

by the American Institute of International Law in 1916, is very useful, representing a warning, steeped in the spirit of freedom, against universalist, cosmopolitan and anti-state tendencies.

One of the authors of the Napoleonic Code, Portalis, said: *Les codes des peuples se font avec le temps, mais, à proprement parler, on ne les fait pas.* The same is true, *a fortiori*, about international law. When an outstanding legal scholar, Th. Niemeyer, was writing three years ago *Vom Beruf unserer Zeit zur Kodifikation des Völkerrechts*, he asked himself two questions: Is the matter ripe enough for codification? and, Are our times capable of performing this codification task well? His answers demanded rather… prudence. Another German international law scholar, K. Strupp, remembering the discussions held in the Institute of International Law 50 years ago said in 1929, not without melancholy, that *heute wie vor fünfzig Jahren die Methode der Kodifikation noch immer höchst unvollkommen ist.*

For a long time Poland did not participate in the shaping of international law, which had once developed with her commendable participation. Now, when she stands again among nations equal to all others, she has not only a right but also a duty to be present and active in all the places where international law is forged in a bitter struggle or a peaceful debate. Not only because she has the right to demand that the developing norms of international law not infringe her interests and not insult her sense of law, but also because in her millennium-old tradition of international relations, in her legal culture and political thought, she has high moral and legal values that she is obliged to contribute to the common treasure trove of the law of nations. This is Poland's duty to herself and the international community.

Literature

Rundstein S., *Kodyfikacja prawa międzynarodowego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1928, 1.

Alfons Klafkowski

The Potsdam Agreement as Reflected in Peace Treaties[1]

The United Nations had already laid down the conditions for ending the Second World War and provided for the legal form of repairing the damage left in its wake before it actually ended. In doing so, it ruled out the possibility of concluding a separate peace treaty with the aggressor states, in particular the German Reich. These norms are included in both acts of common international law and multilateral agreements concluded by the United Nations. The relevant provisions can be found in the following legal acts:

A. The United Nations Declaration of 1 January 1942 states: "Each Government pledges itself to co-operate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies". This is an open act as it provides for the possibility of adher-

1 Translated from: A. Klafkowski, *Umowa poczdamska a traktaty pokoju*, "Państwo i Prawo" 1966, no. 3, pp. 443–454 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This article was written by the author on the basis of his work *Podstawowe problemy prawne likwidacji skutków wojny 1939–1945 a dwa państwa niemieckie*. Chapter 5 of the monograph, *Umowa poczdamska a traktat pokoju z Niemcami* offers a number of major comparative conclusions presented in this article. The author also draws on his monograph *Umowa poczdamska z dnia 2 VIII 1945*, Warszawa 1960, p. 629, which was updated twice for the purpose of publishing it in English (1963) and French (1964). On account of a thorough source documentation in the published monograph and because a new work is going to be published soon, the author forgoes—having approval of the Editorial Board—the convention of scholarly referencing in this article.

ing thereto by other states "[…] which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism […]".

B. The Moscow Declaration of 30 October 1943 on General Security refers in its preamble to the United Nations Declaration of 1 January 1942. It goes on to say that the Great Powers, for the purpose of maintaining international peace and security, will consult with one another and, as occasion requires, with other members of the United Nations both before and after the war ends, with a view to 'joint action on behalf of the community of nations'. Another Moscow Declaration of the same date sets out the principal measures to be included in the future Italian Peace Treaty. The Moscow Declaration on Austria, defining the legal position of this country, was later cited in the preamble to the State Treaty on the Reconstruction of Independent and Democratic Austria signed in Vienna on 15 May 1955. The Declaration, referred to by the date of its proclamation—that is, as an act of 1 November 1943—regards the annexation imposed on Austria by the German Reich on 15 March 1938 as null and void.

C. The Yalta Conference Agreement of 11 February 1945 also announces common action by the United Nations towards the German Reich after it is defeated "[…] to ensure future world peace and security". In the chapter on the post-war organisation of Europe, the Yalta Conference Agreement refers twice to the Atlantic Charter.

D. With regard to Japan, the Yalta Agreement of 11 February 1945 announces united action by the Allied Powers to end the war with Japan. In addition, the Agreement provides for the territorial reorganisation of Japan after the Second World War.

E. The Potsdam ultimatum of 26 July 1945 defines the terms for the reorganisation of Japan after the country's unconditional surrender and

announces that the Allied Powers will also cooperate after the military operations against Japan end.

F. The Potsdam Agreement of 2 August 1945 includes two groups of clauses, which refer to peace treaties to be concluded after the Second World War. The first group comprises formal or procedural provisions, while the second substantive ones that pre-decide—in a pre-treaty manner—what future peace treaties will provide for. The formal law of peace treaties is closely related to the establishment of a Council of Foreign Ministers composed of the representatives of the Five Great Powers (i.e. China included) and authorising it to "[…] prepare treaties of peace with the European enemy States, […] consider such other matters as member Governments might agree to refer to it". The Potsdam Agreement commissions this international body to "[…] draw up, with a view to their submission to the United Nations, treaties of peace with Italy, Romania, Bulgaria, Hungary and Finland". It is also authorised to draft a peace treaty with Germany. The Council of Foreign Ministers may invite any State not represented therein to participate in the discussion and study of questions of direct interest to that State.

As regards the substantive law of peace treaties—that is, pre-treaty decisions recorded in the Potsdam Agreement—this covers both matters concerning enemy States and others of interest to States—members of the United Nations. The pre-treaty decisions of the Potsdam Agreement cover such fields as reparations, certain economic issues, the disposal of the German fleet, questions of territorial trusteeships, etc. Some Potsdam Agreement provisions are related to the activities of the United Nations Organisation that was being organised at that time after the text of the UN Charter had been adopted at a conference in San Francisco.

The Yalta Conference Agreement, the Agreement regarding Japan and the Potsdam Ultimatum do not repeat the expression which mentions ruling out the possibility of concluding a separate armistice or

a peace treaty. There was no specific need to repeat these kinds of rules, laid down by the United Nations, in all other legal acts, because this series of legal acts is bound together in two ways: first, by the fact that they were made by the same States or Great Powers, acting on behalf of the United Nations and second, by their continuing binding force being underscored by invoking them in almost all the texts of these documents. The consolidation of these legal acts is so obvious that their basic phrases were copied almost unaltered from diplomatic acts and multilateral agreements to bilateral agreements. This is particularly true of the rule precluding the possibility of making a separate armistice or a separate peace treaty.

The Potsdam Agreement as Reflected in Seven Peace Treaties

Peace treaties following the Second World War were made by the United Nations, on behalf of which a significant portion of preparatory work was done by the Council of Foreign Ministers. The States concluding peace treaties invoked the Potsdam Agreement directly or declared interest in implementing its provisions.

In two cases, the Great Powers, parties to the Potsdam Agreement, have not signed a peace treaty with an enemy State from the time of World War II. The peace treaty with Finland has not been signed by the United States, because it was not in a state of war with Finland. The Japanese Peace Treaty has not been signed by the USSR for reasons detailed at a conference in San Francisco in 1951. Generally, however, it can be claimed that the Great Powers, parties to the Potsdam Agreement, also continued the work of giving a concrete form to acts of international law from the time of World War II by concluding peace treaties.

All the peace treaties—with the exception of deviations in the treaty with Japan—are based on the Potsdam Agreement. However, in the course of a separate peace conference with Japan, the Potsdam Agree-

ment was at the centre of discussion, as was the question of implementing this Agreement through the 1947 peace treaties. Established by the Potsdam Agreement, the Council of Foreign Minsters immediately set out to draw up peace treaties with enemy States. The unavailability of Council records prevents their legal analysis. All that can be said is that the work of the Council produced the draft texts of six peace treaties, namely, with Italy, Romania, Bulgaria, Hungary, Finland and—much later—Austria. The work took a great deal of time and effort to reach compromise solutions, which could be seen in many different political pronouncements. The solutions were reached by the consensus of all the Great Powers and signed by all the Great Powers, parties to the Potsdam Agreement and by those States, members of the United Nations, that were parties to the peace treaties. This leads to the conclusion that the formal law of the peace treaties, as laid down in the Potsdam Agreement, not only should but also may be applied to all other peace treaties aimed at repairing the damage left by World War II. This conclusion is vital for preparatory work on a peace treaty with Germany, which can be drafted only according to the Potsdam Agreement.

All the peace treaties concluded after 1945 refer to acts of international law from the time of World War II. This must be stressed, especially as the treaties are distinguished by exceptional brevity. The Italian Peace Treaty has 90 articles, the treaty with Romania—40 articles, with Bulgaria—38 articles, with Hungary—42 articles, with Finland—36 articles, Austrian State Treaty—38 articles, and a separate treaty with Japan—27 articles. This brevity of the peace treaties is possible mainly because they invoke the Potsdam Agreement or other legal acts from the time of World War II on many occasions. A single reference to these acts often replaces the whole treaty chapter, which would run into dozens of articles. The Italian Peace Treaty refers in several articles to pretreaty decisions on reparations and economic matters. The peace treaty with Romania makes such references in Articles 16, 17, 18, 26 and 28. It is worth mentioning that in Article 26, the peace treaty with Romania

makes reference to the activities of the Allied Control Council over Germany and in Article 28 it states that Romania will provide for the restitution of property in accordance with the "regulations that will be made by the Powers in occupation of Germany". The peace treaty with Bulgaria refers to legal acts regulating the situation of "Germany as a whole" in Articles 15, 16, 17, 21, 24 and 26. These provisions define the relation of Bulgaria to the Allied Control Council over Germany and its legislation. In the peace treaty with Hungary, the following articles refer to legal acts concerning "Germany as a whole": 17, 18, 19, 28 and 30. The peace treaty with Finland makes such references in Articles 19, 20, 21 and 28. The Austrian State Treaty invokes the Potsdam Agreement in Articles 11 and 22. The Japanese Peace Treaty does not invoke any legal act of the United Nations, but does contain a general definition of its relation to selected matters concerning Germany, provided for elsewhere. The above list supports the conclusion that references of this kind not only make for the brevity of the peace treaties, but above all bind them with the legal acts of the United Nations into a single legal system.

The uniformity of peace treaties after World War II is evident in the clause contained in these treaties on the mutual recognition of the peace treaties that have been concluded pursuant to the Potsdam Agreement. The Italian Peace Treaty says in Article 18:

> Italy undertakes to recognise the full force of the Treaties of Peace with Romania, Bulgaria, Hungary and Finland, and other agreements or arrangements which have been or will be reached by the Allied and Associated Powers in respect of Austria, Germany and Japan for the restoration of Peace.

Article 7 of the peace treaty with Romania recognises the peace treaties concluded with Italy, Bulgaria, Hungary and Finland, as well as—in the future—with Austria, Germany and Japan. Article 6 of the peace treaty with Bulgaria recognises the peace treaties with Italy, Ro-

mania, Hungary and Finland and promises the recognition of peace treaties with Austria, Germany and Japan in the future. Identical clauses are contained in the peace treaty with Hungary, in Article 7, the peace treaty with Finland, in Article 10, and the Austrian State Treaty, in Article 11. The Japanese Peace Treaty does not have such a clause. These clauses are almost identical in all the peace treaties except for the treaty with Japan.

It must be stressed that in the peace treaties the enemy States undertook to recognise the peace treaties that would be concluded with Germany and Japan in the future. In 1947 and 1955, the content of a peace treaty with Germany could not be known since the treaty had yet to be signed. This blind legal obligation is based, no doubt, on the enemy States recognizing the Potsdam Agreement and all the legal acts related thereto. Furthermore, they also recognised that these legal acts would serve as the principal basis for a future peace treaty with Germany. The close connection between these peace treaties and the Potsdam Agreement could be seen especially clearly in the diplomatic records concerning the revision of some provisions of the Italian Peace Treaty.

A future peace treaty with Germany should include a clause about the recognition of peace treaties made with Bulgaria, Finland, Romania, Hungary and Italy. Such a clause—which is in fact included in Article 6 of the Soviet draft of a peace treaty with Germany—will complete the chain of mutual obligations of World War II enemy States. A peace treaty with Germany should also entail the recognition of the full force of the Austrian State Treaty. Detailed provisions in this respect are made in Article 13 of the Soviet draft.

The Potsdam Agreement Sets the Procedure for all Peace Treaties

All the procedural issues of all the peace treaties of 1947 and 1955 were settled pursuant to the Potsdam Agreement.

The Italian Peace Treaty is based on the provisions of the Potsdam Agreement. Poland is also a party of this peace treaty. It does not invoke directly the Potsdam Agreement, but refers on several occasions to legal institutions established by the Agreement. By way of example, Article 21(3) of the treaty may be cited, in which the competence to perform certain legal acts is transferred to the Council of Foreign Ministers. The procedure of the Italian Peace Treaty deserves more attention, as this is the first peace treaty drafted by bodies established for this purpose in the Potsdam Agreement.

The procedural connections between the Potsdam Agreement and the peace treaties with Romania, Bulgaria, Hungary and Finland can be described globally. Poland is not a party to any of these four peace treaties. These treaties are based on the procedural rules set by the Potsdam Agreement, all were drafted by the Council of Foreign Ministers and invoke legal institutions established in the Potsdam Agreement.

The Austrian State Treaty of 15 May 1955 was signed by the Four Great Powers. From the formal point of view, this treaty differs from the others in both its name and the principal purpose of its conclusion. The concept of 'state treaty' was introduced for the purpose of emphasising that it was not an international agreement identical with a peace treaty. After its annexation, Austria was *de facto* a part of the German Reich. It did not participate in the war as an independent state out of its free will. Therefore, the main purpose of the so-called Austrian State Treaty is the restitution of the *status quo ante bellum* announced in fact in the legal acts from the time of World War II. The issue of repairing the damage left by the war, as pertinent to the relations between Austria and the United Nations, were discussed at the Yalta and Potsdam conferences. The groundwork for the Austrian State Treaty had been laid by the Moscow Declaration of 30 October 1943. The preamble to the Treaty confirms the principles specified in the Declaration. The Treaty itself was drafted by the Council of Foreign Ministers pursuant to the Potsdam Agreement. When the Western Powers attempted to transfer the drafting of the Treaty to the UN, the USSR government protested by stressing that the rules of cooperation be-

tween the Four Powers ruled out any possibility of drafting a treaty with Austria otherwise than is specified in the Potsdam Agreement.

The Japanese Peace Treaty was signed in San Francisco on 8 September 1951 after a short conference convened by the United States and a group of cooperating states. The USSR took part in the conference, but refused to sign the Treaty. Poland was represented at the San Francisco Conference but did not sign the Treaty either. The Japanese Peace Treaty should have been drawn up according to the same Potsdam Agreement rules that governed the conclusion of all the other treaties after World War II. When the Potsdam Agreement came into force, the war with Japan was still raging and the terms of its termination and the rules for post-war relations had been set out and announced in other legal acts. There is no doubt, however, that the formal law established for peace treaties in the Potsdam Agreement also applies also to the Japanese Peace Treaty. On these grounds, the Polish delegate to the San Francisco Conference demanded that the same procedure be used that had formed the basis of the Paris Peace Conference in 1946–1947. The legal arguments presented at the San Francisco Conference are crucial for assessing the grounds of all the peace treaties after World War II. The San Francisco Conference breached the procedure for concluding peace treaties established by the Potsdam Agreement and the United Nations Declaration of 1 January 1942, including an undertaking not to make a separate peace with enemy States.

The Pre-Treaty Decisions of the Potsdam Agreement as an Integral Part of Peace Treaties

When analysed, the peace treaties concluded after World War II reveal that in terms of substantive law they have adopted the pre-treaty decisions included in the Potsdam Agreement or in other legal acts of the United Nations.

The Italian Peace Treaty adopted pre-treaty decisions concerning such issues as colonial territories, reparations, boundaries, etc. A consid-

erable number of these decisions were incorporated into the provisions of the Potsdam Agreement. Thus, it can be generally said that the Potsdam Agreement, when it comes to pre-treaty decisions regarding Italy, has been performed by this peace treaty.

The peace treaty with Romania adopted all the pre-treaty decisions of the Potsdam Agreement which were, as a matter of fact, respected in the preparatory work done by the Council of Foreign Ministers. These decisions concerned changes to Romania's state borders, the legal status of the Danube, some military issues, reparations, etc.

The peace treaty with Hungary incorporated pre-treaty decisions included, among others, in the Potsdam Agreement. They concerned such issues as changes to state borders, the legal status of the Danube, reparations and some military, and economic matters.

Analogous regularities can be found in the peace treaties with Bulgaria and Finland. Pre-treaty decisions were also incorporated into the Austrian State Treaty.

The Moscow Declaration of 30 October 1943 is invoked in this treaty several times. Article 11 of the Austrian State Treaty is an undertaking to recognise the full force of the peace treaties made with Italy, Romania, Bulgaria, Hungary and Finland. In Article 3, in turn, the Four Great Powers undertake to "[…] incorporate in the German Peace Treaty provisions for securing from Germany the recognition of Austria's sovereignty and independence, and the renunciation by Germany of all territorial and political claims in respect of Austria and Austrian territory". The legal nature of this undertaking by the Four Great Powers is analogous to the pre-treaty decisions in the Potsdam Agreement. In Article 22, the Austrian State Treaty invokes the Potsdam Agreement three times. Other articles of the Treaty adopt the pre-treaty decisions of the Potsdam Agreement word for word, often without citing it. As regards substantive law, the Austrian State Treaty thus implements the pre-treaty decisions of the Four Great Powers included in the legal acts of the United Nations.

The provisions of the Japanese Peace Treaty were drawn up by one country, i.e. the United States. The draft of the Treaty was presented by the US government in the *aide-mémoire* of 26 October 1950 addressed to the USSR government. This document does not make any reference to a legal act of the Four Powers from the time of World War II. The note of the US government of 27 December 1950 on the Japanese Peace Treaty takes issue with the United Nations Declaration of 1 January 1942, Cairo Declaration of 1943 and legal acts of the United Nations. The draft of the Treaty released by the US and UK governments on 13 August 1951 cites the Potsdam Declaration of 26 July 1945. Article 20 of the draft refers to the Potsdam Agreement in the context of the rights of the Powers to dispose of the property assets of the former German Reich. Article 26 mentions the United Nations Declaration of 1 January 1942. The interpretation given to World War II legal acts by the US government in the preparatory work leading to the Treaty is inconsistent with both the letter and intention of these acts. Therefore, the USSR government and other members of the United Nations—Poland among them—rejected this interpretation. Legally, only the Council of Foreign Ministers is the body called upon to draw up a peace treaty with Japan. In such a case, on this international body—next to the Four Powers, parties to the Potsdam Agreement—China should be represented as well. At the San Francisco Conference, the Polish delegate demanded that all pre-treaty decisions included in the legal acts of the time of World War II be incorporated in the Japanese Peace Treaty. In sum, it can be claimed that the substantive law of the 1951 Treaty contravenes the legal acts of the United Nations. The contraventions also involve a unilateral breach of the pre-treaty decisions included in those legal acts.

To present the complete picture of the connections between the peace treaties and pre-treaty decisions included in the legal acts of the United Nations it is necessary to observe that some countries protested against specific provisions of the peace treaties they had signed. Italy lodged

a formal protest against the selected provisions of the peace treaty after its signing. The protest, read out on the radio by the Italian Foreign Minister, said that the Italian government had not taken proper part in the drafting of the final version of the peace treaty. The Italian note protested against some territorial, economic and military provisions and said that Italy would make efforts to have some provisions of the treaty revised.

Formal protests were also lodged by other countries. Romania called some provisions of the treaty it had signed too far-reaching or unjust. Bulgaria, in turn, in a protest note, criticised some provisions of the peace treaty it had signed, relating to borders, reparations and certain economic matters. Hungary lodged a protest note against some decisions relating to state borders, the deportation of minority populations from Czechoslovakia, etc. All these countries announced that they would make efforts to have indicated provisions of respective peace treaties revised. The only World War II Axis state that signed a peace treaty without protest was Finland.

As regards the question of adopting pre-treaty decisions by the above-mentioned peace treaties, it is worth mentioning that the question involves not only the Potsdam Agreement. The peace treaties adopted also pre-treaty decisions from armistice agreements. In World War II, hostilities ended in two kinds of armistice agreements.

One kind comprises the armistice agreements with Italy and the German Reich. They are distinct in that they were issued by the United Nations after the signing of unconditional military surrenders to provide for the situation of the surrendering states. Having been announced in the preceding military acts, these additional agreements settled issues other than military ones, such as territorial, political and economic, and others concerning transportation, reparations, general rules of occupation and control, etc.

The other kind is made up of the armistice agreements with Romania, Bulgaria, Hungary and Finland, which in a single legal act include all provisions: both military and territorial, political, occupation ones, etc.

When analysed, the connections between the armistice agreements and peace treaties made after 1945 help reveal a certain regularity. The peace treaties adopt the provisions of the armistice agreements and elaborate on them in more detailed provisions. Worthy of special attention are the armistice agreement provisions on changes to the borders of enemy States. A study of the peace treaties made after 1945 shows that the pre-treaty decisions of armistice agreements are an integral part of these treaties. The armistice with Italy of 3 September 1943 is a military act, but its Article 12 announces additional political, economic and financial terms to be imposed on Italy later. This announcement was performed in an annex to the armistice agreement with Italy of 29 September 1943. It changed Italy's borders as well. The final territorial changes were made in the Italian Peace Treaty, in this sense that the Treaty adopted the pre-treaty decisions in this respect. The Romanian Peace Treaty adopted the armistice agreement provisions of 12 September 1944. The nature of the armistice agreement in this case differs from the armistice with Italy. The armistice agreement with Romania is a provisional, so to speak, peace treaty, containing all kinds of provisions focused on the damage left by the war, including changes to state borders. These pre-treaty decisions form an integral part of the Romanian Peace Treaty. The Bulgarian Peace Treaty, too, adopts territorial decisions made in the armistice agreement with Bulgaria of 28 October 1944, with the exception of one change that was additionally introduced to this peace treaty. The Hungarian Peace Treaty adopts the pre-treaty decisions on changes to state borders made in the armistice agreement with Hungary of 20 January 1945. In contrast, the Finnish Peace Treaty is different. Independently of the armistice agreement of 19 September 1944, which provides for changes to state borders, the Treaty makes reference to a previous peace treaty concluded between Finland and the USSR prior to 1940. An annex to the armistice agreement with Finland, signed in Moscow on 19 September, mostly covers territorial matters.

Certain differences can also be found also in the Austrian State Treaty. As regards the territory, it follows the principle of *restitutio ad integrum* by stating in Article 5 that the borders of Austria will be those which had existed on 1 January 1938.

The 1951 Japanese Peace Treaty does not make any references to the legal acts of the United Nations nor to the unconditional surrender of Japan. It makes territorial changes in comparison to the borders of Japan that until the commencement of World War II hostilities had not been formally questioned. These territorial changes are based on the legal acts from the time of World War II announced after the conferences in Cairo, Yalta and Potsdam. In this regard, the view has been expressed that a peace treaty very often makes territorial changes that in the course of normal peaceful international relations could not be made in this manner.

The finding that peace treaties concluded after 1945 adopt pre-treaty decisions made in the legal acts of the United Nations as their integral part is of major importance for the drafting of a future peace treaty with Germany. All pre-treaty decisions should be taken into account in such a treaty and introduced to it in a form meeting the requirements of the legal acts of the United Nations and following the practice of concluding peace treaties after World War II. This refers in particular to the pre-treaty decisions made in the Potsdam Agreement. It is obvious that a peace treaty with Germany may not constitute an exception in this regard. This is crucial for Poland, because the Polish-German border is delineated in the Potsdam Agreement. Its pre-treaty decisions on this matter—as all pre-treaty decisions made in it and concerning many other countries—should be implemented in a peace treaty with Germany in the same manner as the pre-treaty decisions of the armistice agreements and other legal acts of the United Nations were implemented by all the other peace treaties.

Poland Considers the Potsdam Agreement to be the Foundation of a Peace Treaty with Germany

The records documenting Poland's attitude to preparations for making a peace treaty with Germany show that Poland abides by the provisions of the United Nations Declaration of 1 January 1942 that ban its signatories from making a separate armistice or peace with the Axis states from the time of World War II. The Treaty between Poland and the USSR of 21 April 1945 on Friendship, Mutual Assistance and Post-War Cooperation states in Article 5 that the two countries will not conclude, without mutual agreement, an armistice or peace with the Nazi government or any other authority in Germany that may pose a threat to the territorial integrity or security of the two countries. The renewed treaty between Poland and the USSR of 8 April 1965 also invokes the Potsdam Agreement.

The legal grounds of post-war relations between Poland and Germany are by and large the Potsdam Agreement. It is on these grounds that many matters have been regulated. The state of war between Poland and Germany has been ended. Poland maintains diplomatic and consular relations with one German state and has made clear its readiness to normalise its relations with the other German state. A final settlement has been reached on such matters as the Polish-German border and many other matters listed in the Polish memorandum of January 1947. Many other matters are still outstanding and await regulation after establishing relations with the FRG. It is obvious that a future peace treaty with Germany may include above all provisions embodying pre-treaty decisions recorded in the Potsdam Agreement or other legal acts, repairing the damage left by the war between Poland and "Germany as a whole".

Poland has consistently recognised and upheld the full legal force of the Potsdam Agreement and demands that all states do the same. The Polish government has done its duty with respect to the preparation of a peace treaty with Germany. Poland is not responsible for not hold-

ing a peace conference until this day or not drawing up such a draft of a peace treaty with Germany that would be agreed by all powers. The Polish position has been clarified in the following statement by Władysław Gomułka:

> The Western countries reject our draft treaty, without proposing—so far—their own. Adenauer speaks in a tone as if in that war, it had not been Germany that was defeated. A treaty with Germany will be concluded anyway regardless of the position taken by the Western countries and Adenauer. Germany is represented now by two German states: the GDR—a peace-loving socialist German state governed by German workers and farmers for the first time in history—and the FRG—a capitalist state in which German militarism is gaining ground. The former is willing to make a peace treaty, the latter is not. Thus, we shall make a peace treaty with Germany represented by the GDR if the FRG does not go along with it. It is not our fault that two German states came into being. It was not the socialist states that proclaimed the cold war. It was proclaimed by the West. The FRG was both: a product of the cold war and an instrument to inflame it.

Polish diplomacy emphasises that it is ready to make a peace treaty with both German states. Such a treaty should cover all outstanding matters as well as those that have been already settled otherwise. The Polish government has declared on many occasions its readiness to normalise state relations with the FRG, treating such a normalisation seriously and not for the sake of appearances. However, the point of departure for any normalisation of relations between the FRG and Poland is that the FRG government should renounce its programme of territorial revisionism.

The principal document relating to a peace treaty with Germany is a memorandum submitted by the Polish government at the conference of deputy foreign ministers on Germany, convened in London in January 1947. The speech by the Polish delegate at that conference, made on 27 January 1947, at the outset drew the attention of the participants to

the difficulties faced by the conference. It was entrusted with the task of preparing materials for a peace treaty with Germany by the Council of Foreign Ministers. Assessing the role of Great Powers in the task, the Polish delegate said: "[…] We are fully aware that the main burden of sustaining peace falls on the Great Powers and that it is their unanimity that guarantees most significantly and realistically our own and common security […]." In his speech, he cited many times the Potsdam Agreement and the legislation of the Allied Control Council over Germany. The speech also referred on several occasions to the Yalta Agreement and the Declaration by the Three Great Powers published after the Tehran Conference. The memorandum said that "the decisions made at these conferences have been received by the peoples of the world with confidence as the chief principles of the international order".

The Polish memorandum set out the chief principles of a planned treaty with Germany in 24 points. The Potsdam Agreement and legislation of the Allied Control Council over Germany are cited over a dozen times in the 24 points. In addition, the memorandum cites the following acts of international law: the Moscow Declaration on the Punishment of War Crimes of 30 October 1943, London Agreement on War Criminals of 8 August 1945, the United Nations Declaration of 1943 and certain legislation of the Allied Control Council over Germany.

This principal document submitted by Poland in January 1947 has the form of an outline peace treaty with Germany. It is a catalogue, so to speak, of issues of particular interest to Poland to be covered by the treaty. For every issue listed by Poland, legal grounds are provided. In the conclusions, the Polish government says it is ready to present its point of view on the issues raised, as it believes to be necessary, 'in the course of further work on the drafting of a peace treaty'. Finally, the Polish government proposes that a peace treaty with Germany be signed in Warszawa. It must be emphasised that this is the principal Polish published document on which work can proceed to draft a peace treaty with Germany.

Krzysztof Skubiszewski

Responsibility for Currency in an Occupied Territory[1]

Terminological Explanation

Responsibility for a currency in an occupied territory is to be understood as the obligation to pay the equivalent of coins and notes withdrawn from circulation, which had a fixed rate of exchange during the occupation. If during an occupation, the occupying power withdraws one currency and replaces it with another, it by itself sets the terms of the exchange of one currency for another. If the exchange is so designed that it breaches the provisions discussed in the previous chapters, a space opens up to enforce the occupying power's liability for the dereliction of its duty. This chapter shall clarify the situation when an occupation ends. An occupying power always leaves behind some currency: local, its own, or that of the occupation. The sovereign of a territory sometimes sets about a currency reform and withdraws from circulation legal tender, which had a fixed rate of exchange during the occupation. Thus, the question arises: who is to bear the cost of this operation?

1 Translated from: K. Skubiszewski, *Odpowiedzialność za pieniądz na terytorium okupowanym* [w:] *Pieniądz na terytorium okupowanym. Studium prawnomiędzynarodowe ze szczególnym uwzględnieniem praktyki niemieckiej*, Poznań 1960, pp. 327–349 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

Responsibility for Local Currency

An occupying power will never bear responsibility for a local currency. The question of responsibility for a local currency belongs to internal law. As a rule, the responsibility will be borne by the local central bank. It may happen that the occupying power has caused such rampant inflation of the local currency that once the occupation is over, the sovereign must replace it. If the replacement entails losses to the state treasury, central bank or holders of the legal tender being replaced, then there will be grounds for making an international claim for damages against the occupying power. However, it will not be a claim based on the responsibility for the local currency at the time of occupation. In this case, the occupying power will answer for the neglect of some of its duties with respect to the local currency system. If the inflation and necessity of a currency reform can be tied to the monetary policy followed by the occupying power, there will be grounds for bringing action for damages against it. Whether the country that has suffered damage succeeds in recovering any damages is another question.

Responsibility for One's Own Currency

An occupying power is responsible for its own currency left in the occupied territory after the occupation is over.[2] The former occupying power is obliged—on the demand of the former occupied country—to apply

2 F.A. Mann, *Money in Public International Law*, "British Yearbook of International Law" vol. 26, 1949, p. 275. Cf. E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Washington 1942, p. 78; F.A. Southard, *The Finances of European Liberation with Special Reference to Italy*, New York 1946, p. 23. K. Neumayer, *Internationales Verwaltungsrecht*, München–Berlin–Lepzig 1930, vol. 3, part 2, p. 256 is of a different opinion and believes that an occupying power is not responsible for its own currency brought into circulation in the occupied territory. Neumayer distinguishes between the responsibility of a state for its notes in the occupied territory and the responsibility of a state for its notes in third countries. This distinction appears to be wrong even if we note that Neumayer made it to deal with the case when a former occupying power withdraws its notes from circulation at home.

the same rate of exchange as was used during the occupation.[3] The circumstance that the occupying power had introduced its currency into the occupied territory to supplement the local circulation and thereby made the currency a component of the local monetary system does not affect the responsibility of the occupying power for its own currency.

Law Versus Practice. Responsibility for an Occupation Currency

The question of responsibility for an occupation currency is, in practical terms, the most important. In the case of a local currency or the occupying power's own currency, we deal with funds that are not a war phenomenon. The issuer of such notes and coins does not close down its agencies as an occupying power retreating before a sovereign does. The uncertainty surrounding responsibility for an occupation currency largely stems from the fact that an organ or a bank that has issued occupation notes and coins ceases to exist or operate when the occupation is over.

The question arises of whether there is a connection between the rights and duties of an occupying power in the money sphere and its responsibility for an occupation currency. The situation in which an occupying power acts within its rights and duties is meant here. It is assumed that an occupying power issues an occupation currency in accordance with The Hague Regulations. Since an occupying power complies with the law, the question arises of whether its responsibility for an occupation currency is an issue at all. It could be claimed that in such a situation a change in the monetary system of the occupied country took place according to international law. The maintaining or removing of the effects of change is already a matter that does not concern the former occupying power once the occupation is over. Ditto the other way around:

3 This position was taken by Belgium towards the Reich with regard to marks withdrawn by the Belgian government after the end of occupation in 1918. F. van Langenhove, *L'action du gouvernement belge en mati*ère économique *pendant la guerre*, Paris–New Haven 1927, p. 184.

if it has breached international law with its monetary policy, then its responsibility arises in the same manner as in the case of the breach of any other provision of law.

The practice of countries, however, consistently departs from the above rules. Thus, it can hardly be claimed that these rules reflect the actual legal framework, although in theory they follow from the law on international responsibility, in particular from Article 3 of The Hague Convention IV.

In fact, the practice of countries in relation to the issue at hand is best studied by scrutinising agreements concerning reparations for war damage. Peace treaties often pass over the question of the responsibility of an occupying power in the money sphere. If an occupying power has lost the war and pays damages under a treaty, there are grounds for speculating as to whether the overall amount of the damages covers compensation for the issue of an occupation currency. There are, however, peace treaties or other agreements or documents that explicitly deal with responsibility for an occupation currency. In them, the following rule is recurrent: responsibility for an occupation currency is borne by the defeated country that on one occasion is the occupying power and the occupied country on another. Hence, this regulation provides no guidance as to what the law on responsibility is because in one case it could be claimed that the issue of a currency by the occupying power was legal, while in another it raised doubts. Meanwhile, there is only one answer: the defeated country has to pay.[4] This regulation reflects the domination of the victor at the moment when signatures are affixed to a treaty. It follows that responsibility for an occupation currency is regulated on a case-by-case basis, according to the wishes of the winner, and not whether The Hague rules have been breached while issuing an occupation currency.[5] The fact that the "will" of the winner finds its expres-

4 Cf. F.A. Mann, op.cit., p. 275.

5 "From the question of the legality of the currency system adopted by the occupant for the occupied territory, it is necessary to distinguish clearly the problem of responsibility." Ibidem, p. 275. Whereas, G.G. Fitzmaurice, joins both problems to a degree. Specifically,

sion in an international treaty is of no significance for the legal aspect of the matter under discussion. Recently, while repairing certain types of WWII damage, the winners have felt so free to dictate their "will" to the defeated countries that they have availed themselves of a unilateral act. This conduct—despite its crudeness—could be reconciled with the law under the special conditions prevailing in Europe and Asia in 1945 when the hostilities ended. However, the fact that the binding force of various documents related to the end of the war is not questioned does not mean that such documents are a source of universally binding law on responsibility for a currency in an occupied territory.

The legal aspects of responsibility for an occupation currency were discussed by Germany and Belgium, as well as Germany and Romania, after the First World War. Agreements concluded by these countries settled Belgian and Romanian claims,[6] which arose out of German monetary regulations enforced in those countries during their occupation. Each party viewed the question of responsibility differently. In both cases, each party kept to its legal point view, which is made explicit in the preambles to the agreements.[7] For this reason, these agreements—similarly to peace treaties sanctioning the domination of a winner—do not allow us to learn what the law is in the matter under discussion.[8]

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he makes the legality of an occupation currency dependent on guaranteeing its possible exchange. G.G. Fitzmaurice, *The Juridical Clauses of the Peace Treaties, Académie de Droit International. Recueil des Cours*, vol. 73, 1948, pp. 342–343.

6 German-Romanian Convention of 10 November 1928, G. F. de Martens, *Nouveau recueil général de traités, 3e série*, vol. 21, 1929, p. 484; German-Belgian Agreement of 13 July 1929, League of Nations Treaty Series, vol. 104, 1930, p. 201.

7 The Belgian-German Agreement: "Le Gouvernement belge et le Gouvernement allemand… tout en maintenant chacun leur point de vue juridique…"; "Die Belgische Regierung und die Deutsche Regierung…unabhängig von dem beiderseitigen Rechtsstandpunk…".

8 This aspect is rightly considered by the memorandum of the U.S. Department of Treasury of 24 September 1943. Hearings before the Committees on Appropriations, Armed Services, and Banking and Currency, United States Senate, Eightieth Congress, First Session on Occupation Currency Transactions, Washington 1947, p. 80. A different view is represented—wrongly as it seems—by B. Nolde; B. Nolde *La monnaie en droit intenational public*, "Académie de Droit International. Recueil des Cours" 1929, vol. 27, p. 311.

As far as The Hague Regulations are concerned, responsibility for breaching them is provided for by Article 3 of The Hague Convention IV:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This provision was absent from the 1899 text; it was included in the Convention only during the Second Hague Conference. It was then that the German delegation submitted a draft annex to the Regulations concerning responsibility. The annex consisted of two articles. The first laid down the rule that if the aggrieved person was a national of a neutral country, the duty to pay damages was to burden the belligerent party that perpetrated the damage. As regards damage inflicted on persons being the nationals of the hostile party (*personnes de la Partie adverse*), the German draft in its Article 2 said only that "damages will be settled during peace negotiations".[9] The German stance was thus close—as regards responsibility for an occupation currency—to the practice of the countries summarised above: responsibility is allocated on a case-by-case basis and shifted to the defeated country since a peace conference is the best opportunity to do it. The German draft was approved by the Conference as a step towards an explicit regulation of the question of responsibility.[10]

At the same time, however, doubts were raised as to the merits of the draft. The French delegation had twofold objections. First, they believed that the German draft limited responsibility to the cases provided for in the Regulations, therefore, any breach of other duties would not incur the obligation to redress damage. Second, they criticised the draft

9 *Deuxième Conférence Internationale de la Paix, La Haye, 15 juin – 18 octobre 1907*, "Actes et Documents", 1907, vol. 3, p. 247.

10 Ibidem, p. 144. A statement by the chairman of a subcommittee, Beernaert.

for distinguishing between nationals of neutral and hostile countries, claiming that both categories should be accorded the same protection. The British delegate, in turn, observed that under the German draft any award of damages to hostile nationals would depend on the terms of a peace treaty while the terms would be a result of negotiations between the parties.[11] Although the text that was finally adopted—quoted above—does not make responsibility for any breaches dependent on the result of peace negotiations, the practice in the area in question has evolved in the opposite direction. So far, Article 3 of the IV Convention has not been relied upon by countries in determining responsibility for an occupation currency.[12]

The Responsibility of the Occupying Power for an Occupation Currency

The academic literature has expressed the view that an occupying power bears the responsibility for an occupation currency by the operation of law.[13] It appears, however, that neither from the Hague Regulations nor the practice of states can such a rule be deduced.

In certain cases, an occupying power did bear responsibility for the new currency it issued in the occupied territory. However, in the majority of these cases, there are circumstances that prevent the formulation of the general rule about the responsibility of an occupying power.

11 Ibidem, pp. 146–148.

12 For responsibility for an occupation currency viewed mainly from an economic point of view v. F.A. Southard, op.cit., pp. 49–55.

13 B. Nolde, op.cit., p. 311; W. J. Ronan, *The Money Power of States in International Law*, New York 1947, p. 16. The latter author draws a false conclusion about the existence of such a rule from the practice of states. Out of the three examples he gives, two are imprecise—Belgium and Romania during WWI—while the third example—the Japanese occupation of Korea and Manchuria during the war with Russia—concerns not as much an occupation currency as requisition pay vouchers. Cf. K. Neumayer, *Internationales Verwaltungsrecht*, München, Berlin–Leipzig 1930, vol. 3, part 2, p. 252: "Die besetzende Macht haftet für eine Ausserkurssetzung nach Ablauf ihrer Herrschaft nur, wenn sie dies besonders übernommen hat".

During the occupation of Korea and Manchuria in 1904–1907, the First Bank of Japan exchanged military pay vouchers issued by the Japanese authorities for cash (p. 57). It must be remembered, however, that the pay vouchers were substituted for cash at requisitions and purchases made by the Japanese army. They were not contemplated as legal tender *sensu stricto*, albeit in practice they did play this role.

Issuing mark notes in the Warszawa General Governorate, pursuant to the Regulation of 9 December 1916, the German occupation authorities pledged that:

> The German Reich vouches that the banknotes of the Polish National Loan Association at their withdrawal (§ 16) will be paid for with Reichsmarks at face value. (§ 5 of the Regulation, p. 47). The notes of the Association bore the following inscription:
> The German Government accepts responsibility for the redemption of the notes of the Polish National Loan Association in German marks at face value.

Warszawa General Governorate Board followed by three signatures. Between the Regulation and the inscription on notes, there were major differences. The Regulation made any payment in *Reichsmarks* dependent on the withdrawal of the notes, which in turn could take place only in the event of the Association being disbanded, pursuant to § 16 of the Regulation. It read:

> The Polish National Loan Association shall be disbanded on the orders of the Chancellor of the German Reich two years after the foundation of the formal Kingdom of Poland at the latest.

As it turned out, the rebirth of an independent Polish state prevented the application of § 16.[14] To estimate the duties of the occupying pow-

14 The difference between § 5 of the Regulation and the inscription on banknotes is noted by Zygmunt Karpiński, *Gospodarcze i prawne podstawy pierwszej emisji marek polskich*

er, § 5 of the Regulation could be relied on more than the inscription on banknotes. Nevertheless, the *Reichsbank*, on the orders of the German government, exchanged the occupation issue notes of the Loan Association for *Reichsmarks* during a few months in 1919.[15] However, the exchange was put on hold in 1919, and in 1921 the Reich's legislation and court decisions argued against the duty to exchange. A provision to this effect was included in the so-called *Verdrängungsschädengesetz*.[16] As regards court decisions, the Reich's Treasury won an action brought against it by a holder of Association banknotes for their exchange into German marks. The Reich's Supreme Court in the judgement of 28 November 1921[17] held *inter alia* that an owner of notes issued by the Association could not make a claim to have them exchanged until the notes were in circulation. The guarantee given by the Reich in respect of the note issue by the Association meant only that the Reich would redeem the notes that would not be covered by the Association's assets at its disbanding. On 18 December 1922, Poland and Germany signed a treaty settling the matter of Kries notes.[18] In Article 1 of the treaty, the parties agreed that:

> Poland and the Polish National Loan Association, on the one part, and the German Reich, on the other part, shall not make any claims against each other by reason of the guarantees for Kries notes taken over by the German Reich.

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tzw. "not Kriesa", "Ruch Prawniczy i Ekonomiczny" 1923, vol. 3, p. 412.

15 Ibidem, p. 415. It follows from Art. 3 of the treaty between Poland and Germany of 18 December 1922 that 110,000,000 Polish marks—about 1/8 of the issue—were exchanged.

16 Ibidem, pp. 417 and 418.

17 S.W.J. w den deutschen Reichsfiskus, VI 282/21, Entscheidungen des Reichsgerichtes in Zivilsachen, vol. 103, p. 231. The decision is discussed in Z. Karpiński, op.cit., p. 415–416.

18 League of Nations Treaty Series, vol. 34, 1925, p. 283. The term "Kries notes" referred to the occupation issue of banknotes by the Polish National Loan Association. The term derived from the name of the head of the Civil Authorities in the Warszawa General Governorate whose signature appeared first on the Association"s notes.

Under Article 3 of the treaty, the sum of 110,000,000 marks was debited against Association accounts in Berlin banks. The sum represented the value of Association notes exchanged by the Reich after the occupation ended. Hence, the operation of a partial exchange encumbered the Association or the institution that by virtue of the 1916 Regulation was not to bear any responsibility for the issue. With respect to the rest of the issue, the Association took a stance analogous to that adopted by the Reich Treasury and refused to exchange occupation notes for *Reichsmarks*. The stance of the Association was borne out by German judicial decisions.[19] However, the Association was ready to exchange occupation notes for its post-occupation notes, which it had already issued as an issuing institution operating in Poland.[20] With time, inflation in Poland and Germany deprived the whole issue of any practical significance.[21] Nevertheless, it must be said that in the case in question, the responsibility of an occupying power for an occupation currency was not enforced. In part, the responsibility was shouldered by the Polish National Loan Association, that is, an institution which after the occupation—despite the fact that it kept the same name as during the occupation—was not a foreign entity anymore but a Polish association and a legal person organised under Polish law.[22]

Banknotes issued by the British Army in Archangelsk during the intervention and civil war in Russia bore an inscription saying that they could be exchanged in London at a fixed rate. The limitation as to the place of exchange made it illusory for banknote holders residing in the occupied territory.

During World War II, the German occupying power did not assume any responsibility for occupation currency. On the other hand, the defeat of Germany facilitated or should have facilitated the enforcement of

19 Z. Karpiński, op.cit., pp. 420–421.

20 Ibidem, p. 420.

21 Ibidem, p. 423.

22 The occupation-time Association was, in contrast, a legal person governed by German law. V. the decision quoted in footnote 16.

German responsibility. The agreement on German reparations of 2 August 1945 reached by the United States, United Kingdom and USSR at the Potsdam Conference did not mention any claims arising from the issue of occupation currency.[23] However, the Agreement on Reparation from Germany opened for signature at Paris on January 14, 1946 contained a clause stipulating that the respective shares of reparation as determined by the Agreement covered all the claims, "including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the *Reichskreditkassen*" (Part I, Art. 2, para. A).[24] Thus, reparation covered, in the Agreement at least, a significant portion of claims arising out of the exchange of occupation currencies. On the other hand, a later agreement, concluded already with the participation of the Federal Republic of Germany, leaves no doubt that a future peace treaty will revisit the question of reparations despite earlier agreements.[25] Hence, the question of German reparations also for the issue of an occupation currency may be still considered open. However, the quoted clause from the 1946 Agreement, as well as rules concerning reparations in treaties repairing damage caused by the war with Germany, do not contribute much to the question of German responsibility for occupation currency. For it is not known whether the overall sum covers claims arising out of the issue of currency or whether former occupied countries waived respective claims—in full or in part—in return for settling other claims against defeated Germany.

During the occupation of the Philippines, the Japanese government accepted "full responsibility" for military banknotes and declared that it "had a sufficient sum to cover them".[26] However, in the Treaty of Peace

23 Collection of documents edited by Julian Makowski, 1946, no. 1, p. 19.

24 United States Treaties and Other International Acts Series, No. 1655.

25 V. Chapter VI, Art. 1, para. 1, of the Convention on the Settlement of Matters Arising Out of the War and the Occupation signed at Bonn on 26 May 1952 and revised at Paris on 23 October 1954, ibid. no. 3425 and *American Journal of International Law*, vol. 49, 1955, Supplement, pp. 55 ff.

26 Proclamation of 3 January 1942 quoted in the judgement of the Philippines Supreme Court in re Haw Pia v. China Banking Corporation, *The Lawyers's Journal* vol. 13, 1948, p. 173;

with Japan of 8 September 1951[27], no provision enforced Japanese responsibility, unless this was done in separate agreements on war reparations announced in the Treaty, Article 14, para.(a), item 1.

During the occupation of Italy in 1943 and in the following years, the Allied Powers did not accept any responsibility for the occupation currency. Actually, this was the rule in the occupied Axis countries. However, in the case of Italy, the U.S. and British governments took steps which suggested that they were contemplating the exchange of the military lira, possibly carried out by themselves. Specifically, these governments paid sums in their currencies into special accounts. The sums corresponded to the occupation lira currency expended in the occupied territory.[28] The Peace Treaty of 10 February 1947 encumbered Italy with the exchange of this currency. However, in 1944 the U.S. government paid Italy a sum in dollars equal to the net amount of remuneration paid to military personnel in the occupation lira.[29] Hence, to a limited degree, the U.S. government did accept responsibility for an occupation currency.

The Cases of Romania and Belgium After WWI

The question of Romanian and Belgian claims against Germany arising out of the occupation currency issued during the First World War must be discussed separately, because the settlements reached then can hardly be considered an illustration of the responsibility of an occupying

the proclamation is quoted in the judgement on page 180.

27 *American Journal of International Law*, vol. 46, 1952, Supplement, p. 71.

28 V. the press reports in the *New York Times* of 11–12 October 1944 quoted by Donald L. Kemmerer, "Allied Military Currency in Constitutional and International Law" in collective work *Money and Law, Proceedings*, The Institute on Money and the Law, New York 1945, p. 91. V. also F.A. Southard, op.cit., p. 25 and F.A. Mann, op.cit., p. 273.

29 F.A. Southard, op.cit., p. 30. C.C. Hyde, *Concerning the Haw Pia Case*, "Philippine Law Journal"1949 vol. 24, p. 150 claims that the U.S. government contemplated the reimbursement of Italy in dollars for the expenses not only on personnel remunerations but also on provisions. Hyde believes that such a limited responsibility for occupation currency is consistent with The Hague Regulations.

power or an occupied country. These cases rather resemble the principle of occupying power responsibility. Finally, Germany did accept certain financial obligations that repaired at least in part, or were to repair, the damage Belgium and Romania sustained due to the issue of an occupation currency in their respective territories (pp. 31 & 54). On the other hand, Germany consistently took the view that it had no duty to former occupied countries and for this reason any concessions to the other party were an expression of good will on the part of Germany and followed from all new international relations concerning reparations, etc. As mentioned earlier (p. 331), the German-Romanian and German-Belgian agreements explicitly said that each party kept to its different legal point view. Thus, despite the financial obligations incurred by Germany, it can hardly be said that either of the agreements enforced an occupying power"s responsibility for an occupation currency as a rule following from the law.

The question of occupation currency in Romania was settled first by an additional legal and political treaty added to the peace treaty with Romania of 7 May 1918.[30] The peace treaty ended the war between Romania and the Central Powers, and reflected their domination over defeated and occupied Romania. In Article 3(2) of the additional treaty, Romania undertook to exchange the notes of the General Bank of Romania for the notes of the Bank of Romania or other legal tender within six months from the ratification of the peace treaty. The exchange was to take place at Romania"s expense. Romania undertook not to put into circulation the withdrawn notes. The cover for the occupation issue, deposited in the *Reichsbank*, was released (but of course remained at the occupying power"s disposal and was not applied towards the exchange).[31]

30 1063. der Beilagen zu den stenogr. Protokollen des Abgeordnetenhauses—XXII Session 1918, Regierungsvorlage betreffend die Friedensschlüsse mit Russland, Finnland und Rumänien, p. 149.

31 From the theoretical point of view, the following questions could be asked: Did Article 3(2) of the additional treaty apply the general principle of the responsibility of the occupied state? Was Article 3(2) an exception to the rule that currency is the responsibility of the occupying power? Was Article 3(2) a provision to plug a loophole in the law? There are no

The occupying power only undertook not to issue occupation banknotes after the ratification of the peace treaty. However, in the Armistice Convention of 11 November 1918, Germany considered the treaty in question to have lapsed (Article XV: "Renouncement of the treaties signed in Bucharest and Brest-Litovsk and additional treaties").[32] In actual fact, the exchange of occupation legal tender encumbered Romania. The Versailles Treaty did not provide for responsibility for occupation currencies. When Romania, already after the signing of the Treaty, filed claims against Germany, the government of the Reich replied that it did not have other duties apart from those stemming from the Versailles Treaty provisions on reparations. Ultimately, on 10 November 1928, after reaching a compromise, the parties signed a convention[33] that settled the dispute. The settlement was not based on legal provisions: each party maintained its point of view on the legal aspect of the dispute. The crucial point of the convention was Germany"s undertaking to help stabilise the Romanian currency.[34]

Once the occupation of Belgium was over in 1918, Germany paid Belgium 1,600,000,000 M deposited until then in a *Reichsbank* account and earmarked for covering the occupation issue of the General Society. Soon, however, the deposit in marks was devalued. Had it not been for this circumstance, Belgium would not have had any claims against Germany because of the occupation currency. Germany long opposed Belgian claims, using arguments similar to those it invoked in the Romanian case (there was an additional circumstance that Belgium accepted the deposit in marks, hence it could be claimed that the country had done so at its own risk). Finally, the two countries concluded an agreement on 13 July 1929 whereby Germany undertook to pay Belgium

doubts, however, that Article 3(2) was the codification of a practice independent of the law, namely, that responsibility was to be borne by the defeated state.

32 B. Winiarski, *Wybór źródeł do nauki prawa międzynarodowego*, Warszawa 1938, p. 144.

33 G.F. de Martens, Nouveau recueil général de traités, 3e série, vol. 21, 1929, p. 484.

34 By awarding Romania 75,500,000 RM. As regards German objections to Romanian claims prior to the convention v. G. Antipa, *L'occupation enemie de la Roumanie et ses conséquences économique et sociales*, Paris–New Haven 1929, pp. 163–164.

600,000,000 RM in many instalments.[35] The question of Belgian claims was discussed by experts during the negotiations over the Young Plan. Germany was told then that the new reparation plan would not come into force, unless Germany settled Belgian claims.[36] It is not surprising that the Reich"s government yielded to the demand in this case but at the same time made a reservation that it did not do it out of a legal duty.[37]

The Responsibility of the Occupied State for an Occupation Currency

The scholarly literature has advanced the view that an occupying power may decline any responsibility for an occupation currency.[38] The shifting of responsibility to the occupied state was considered "only natural and convenient" by one author.[39] Invoking the practice of states, some authors criticised the opinion that the law, supposedly, provided for the responsibility of an occupying power.[40]

In certain cases, the parties involved indeed adopted the rule that the occupied state was responsible for an occupation currency. However, in every such case, the occupied state was also the defeated state. Hence, it

35 League of Nations Treaty Series, vol. 104, 1930, p. 201.

36 Amtlicher deutscher Text des Schlussberichts der Pariser Sachverständigenkonferenz vom 7. Juni 1929 mit Allen Anlagen, Anlage VI, reprinted in F. Raab, *Young-Plan oder Dawes-Plan?*, Berlin 1929, p. A 101.

37 A German expert attending the conference on the Young Plan, Hjalmar Schacht, in a letter to Owen D. Young of 3 June 1929, mentioned a German proposal to settle the dispute with Belgium. Having described the proposal, Schacht wrote: "Vorstehender Vorschlag ist von der Deutschen Regierung in Geiste des Entgegenkommens und aus dem ehrlichen Bemühen heraus gemacht worden, dieses Hindernis für die normale Entwicklung freundnachbarlicher Beziehungen zwischen den beiden beteiligten Ländern zu beseitigen" ibid. Anlage VI A, p. A 103. A mention on this matter included in the agreement itself was quoted already above, footnote 6.

38 R.A. Lester, *International Aspects of Wartime Monetary Experience*, Princeton 1944, p. 2.

39 G.G. Fitzmaurice, op.cit. p. 343, writing about the settling of the matter in the peace treaties of 10 February 1947. For the responsibility of the sovereign of the territory v. A. Nussbaum, *Money in the Law. National and International. A Comparative Study in the Borderline of Law and Economics*, Brooklyn 1950, pp. 497–498.

40 F.A. Mann, op.cit. p. 275 – criticism of Nolde's view quoted above, op.cit., p. 311.

was easy for the victorious powers to impose such a responsibility on it. The fact alone that a defeated state yielded to the "will" of a victorious power, does not justify the conclusion that the "will" reflected the law.

Above, mention was made of a clause in the additional treaty to the peace treaty with Romania of 7 May 1918, wherein responsibility for the exchange of an occupation currency was shifted to occupied Romania by the Central Powers. The defeat of Germany abrogated the clause.

During the Second World War, Germany left the care for the fate of occupation currencies to the former occupied states. The agreements on German reparations quoted above are not—at least from a theoretical point of view—the last word on the matter. The fact that Germany was defeated in the war and already has had to pay certain reparations prevented Germany, as it seems, from implementing its war-time demand that the issuance of occupational currencies would be borne in full by the occupied countries.[41]

The adversaries of the Reich—the Allied Powers—adopted the same policy in this respect as their German opponent. They did not shoulder responsibility for the occupation currency they issued. This is how it was decided the issue should be dealt with when the Allies only intended to use occupation currency in various territories.[42] There were subsequently only a few exceptions to this rule: the covering by the United States of a part of a lira issue by making a payment in dollars to the Italian government and the honouring of occupation currency transfers to the United States made by the U.S. military, where they were paid out in dollars.[43]

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41 The local authorities on the Isle of Jersey accepted responsibility for the exchange of German marks left in bank deposits after the end of German occupation, v. *Banking in Jersey under German Occupation*, "Journal of the Institute of Bankers" 1946, vol. 67, p. 209. It is not known if this was the end of the matter or if Germany had to cover the value of the exchanged currency pursuant to the Agreement of 14 January 1946.

42 Cf. e.g. the objections of the USSR to possible responsibility for occupation marks, Hearings […] on Occupation Currency Transactions, op.cit., p. 231.

43 The matter of transfers was a major issue in the cited hearings in the U.S. Senate, *Hearings (…) on Occupation Currency Transactions*, passim. Only for a short time was the amount of

Before reviewing the decisions of the Allied Powers concerning the responsibility of occupied countries for an occupation currency, the form in which the decisions were taken in two cases ought to be scrutinised. The form could be used as an argument in favour of the view that by operation of law, the occupying power, and not the occupied country, is responsible for occupation currency. Specifically, the following two cases are meant here: the Treaty of Peace with Italy and the State Treaty with Austria. The former, signed on 10 February 1947,[44] provides for the responsibility of Italy for the occupation lira currency in its Article 76(4). The Article is to be found in Part IV, Section III of the Treaty, entitled "Renunciation of Claims by Italy". In turn, the State Treaty for the Re-establishment of an Independent and Democratic Austria signed on 15 May 1995[45] provides for the responsibility of Austria for the occupation schilling currency in its Article 24(4). The Article is entitled: "Renunciation by Austria of Claims Against The Allies".

A question arises as to how significant is the fact that provisions about the responsibility of the occupied country are placed in the context of norms making the country renounce the claims it has. Does it mean that if Italy and Austria had not been explicitly made responsible for the occupation currency, the responsibility of the occupying powers would have arisen automatically? Do Italy and Austria renounce in the respective treaties claims having grounds in international law and assume obligations they would have never been burdened with, had it not been for the treaty provisions? Viewing these issues from the point of view of the Allies, one can ask the question: did the victorious powers believe that the silence of the Treaty on the problem of responsibility would mean that Italy and Austria could lodge a lawful claim and that the Allies, consequently, would have to bear responsibility for occupation currency? An answer in the affirmative to these questions will support the

transfers unlimited. As regards responsibility for occupation mark currency in this respect, v. ibidem, pp. 8, 95.

44 United Nations Treaty Series, vol. 49, 1950.

45 United Nations Treaty Series, vol. 217, 1955.

thesis that legally, responsibility for occupation currency is to be borne by an occupying power. However, this argument will not suffice to invalidate all that has been written in this chapter on the practice of states and their actual discretion in regulating the question of responsibility for an occupation currency on a case-by-case basis.

The following international documents concern the responsibility of the occupied Axis Powers for the currency issued by the Allies:

The Instrument of Surrender of Italy of 29 September 1943[46] provided in Article 23 that Italy would withdraw occupation currency from its territory issued by the Allied Powers and pay its equivalent in the Italian currency. The Allies were to give time limits for, and the terms of, the exchange. Whereas in the Treaty of Peace, Italy assumed "full responsibility" for all Allied military currency issued in Italy by the Allied military authorities (Article 76(4)). Between these two instruments, there is a difference: the Instrument of Surrender speaks of the holdings of occupation currency held in Italy (which means that it could be other occupation currency than the lira), whereas the Treaty of Peace mentions the currency issued in Italy (hence, irrespective of the fact of whether it currently was held within the Italian borders or not). The difference was of little practical significance in the sense that at the moment the Treaty was signed, there were no other occupation currency notes in Italy apart from lira ones. However, there could have been sums of the occupation lira abroad and Italy was responsible to the parties to the Treaty for the exchange of such sums as well.[47]

46 "American Journal of International Law" 1946, vol. 40, Supplement, p. 2.

47 In the British-Italian Agreement expressed in the notes of 20 and 21 March 1950 Italy undertook to exchange all East-African currency in circulation in former Italian Somaliland. Italy lost sovereignty over Somaliland after WWII. It concluded the Agreement in a new capacity, namely as a United Nations Trustee. British Armed Forces occupied Italian Somaliland during WWII. The Agreement, however, is not representative of the relation under discussion between the sovereign and occupying power in matters of the responsibility for an occupation currency. Nonetheless, the Agreement illustrates a tendency to shift responsibility for military currency to that party which stays in and administers the territory in which the currency circulated. Great Britain Treaty Series, 1952, No. 14.

In the peace treaties of 10 February 1947, Romania[48] (Article 30(4)) and Hungary[49] (Article 32(4)) assumed responsibility for the respective occupation currencies issued in their territories.

The Allies shifted responsibility for occupation mark currency to Germany. A duty to this effect was imposed on Germany in the Allied Control Council Proclamation No. 2 of 20 September 1945 (Section VI, Article 20).[50] In 1948, three western occupation zones witnessed a currency reform (in the eastern zone it took place later). It involved the exchange of occupation marks. The legal provisions introducing the reform considerably limited the amount of old currency that could be exchanged for a new one.[51] Thus, it was not the German treasury, but rather the inhabitants of the German territory that directly bore the financial burden of the occupation issue.[52] The currency reforms in Germany caused the occupation mark to disappear from circulation. Hence, responsibility for an occupation currency is not covered by agreements providing for the duties of both German states in their changed—with respect to the period of occupation—legal situation. The question of responsibility for Allied marks must be considered closed.

In Austria, the occupation schilling currency was withdrawn from circulation as early as in 1945. The so-called schilling law of 30 November 1945[53] provided for the exchange of occupation notes and coins for a new currency. The exchange covered only a part of the cash, the rest was deposited in accounts which were completely or partially blocked.

48 United Nations Treaty Series, vol. 42, p. 3.

49 Ibidem, vol. 41, p. 135.

50 "American Journal of International Law" 1946, vol. 40, Supplement, p. 21.

51 Excerpts from the British military law no. 60 on currency reform were reprinted in *Documents on Germany under Occupation 1945–1954*, ed. B.R. von Oppen, London 1955, p. 292. Cf. the case of Eisner v. United States, U.S. Court of Claims, Federal Supplement, vol. 117, 1954, p. 197.

52 Above, it was mentioned that the United States had exchanged a certain sum in occupation marks for dollars in connection with money transfers from Germany to the United States. The sum, however, was so small that it can be ignored altogether while studying the economic aspects of the exchange of occupation marks.

53 *Staatsgesetzblatt für die Republik Österreich*, 1945, p. 419.

In the already quoted State Treaty of 15 May 1955, the Austrian government assumed:

> […] full responsibility for Allied military currency of denominations of five schillings and under […]. Notes issued by the Allied Military Authorities of denominations higher than five schillings shall be destroyed and no claims may be made in this connection against any of the Allied or Associated Powers (Art 24(4)).

In the Treaty of Peace with Japan, signed on 8 September 1951[54], there are no provisions on an occupation currency.[55] No Allied Power, in particular the United States, took responsibility for the occupation yen currency vis-à-vis the Japanese state or yen note holders.

The fact that the occupied country, even when the occupation is over, keeps an occupation currency in circulation for some time does not mean that it assumes responsibility for it and that the former occupying power does not have any duties in this respect.[56] Everywhere where an occupation currency has supplanted the local currency, continuing the former in circulation after the occupation ends is an economic necessity. Such a situation could be witnessed for instance in Poland[57] and Lithuania in 1918[58], or in Poland in 1944 and in early 1945.[59] In 1918 and 1919 in Poland, the Polish government continued to print mark banknotes using

54 "American Journal of International Law" vol. 46, 1952, Supplement, p. 71.

55 Article 14(b) invalidated any claims for direct military costs of occupation. In Article 19 (a) Japan waived all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory.

56 A similar situation holds when a formerly occupied country exchanges occupation notes and coins. An exchange is an act of domestic law and does not prejudice its right of recourse in the international forum.

57 Z. Karpiński, op.cit., pp. 413–414.

58 O. Lehnich, *Währung und Wirtschaft in Polen, Litauen, Lettland und Estland*, Berlin 1923, p. 168.

59 V. Art. 4 of the Decree of the Polish Committee of National Liberation of 24 August 1944 on the issue of bank notes, keeping in circulation the notes of the Issuing Bank in Poland, Journal of Laws, 1944, no. 3, item 11. The provision was abrogated as of 10 January 1945 pursuant to Art. 1 of the Decree of 6 January 1945, ibid., 1945, no. 1, item 2.

occupation plates, because at first the printing of new-design banknotes was not possible for technical reasons. Of course, any issue after 11 November 1918, similarly to any further issue in Lithuania after its occupation ended, encumbered solely the sovereign of the respective territory.

The last comments bring us to a more general observation. Regardless of how the question of responsibility for an occupation currency is settled on the international arena, the sovereign of the occupied territory is competent to regulate currency matters freely once the occupation is over. Admittedly, the view has been advanced in the literature that the sovereign is obliged to recognise those currency changes (made by the occupying power) that stayed within the limits set by Article 43 of The Hague Regulations.[60] By no means can this view mean that the sovereign must uphold in force the regulations and enactments of the occupying power in currency matters.[61] Hence, depending on its policy and the facts in a given case, the occupied state lets occupation currency notes continue in circulation (the above-quoted example of Poland and Lithuania) or exchanges occupation currency notes for its own notes at par value (Belgium in 1918) or exchanges occupation currency notes for its own or new currency at a rate set by itself or carries out a currency reform, exchanging only a certain amount of the occupation currency (this last situation took place after World War II).[62]

The citizens of the occupied state who sustained property losses cannot defend themselves—under the international law as it stands now[63]—

60 K. Neumayer, *Internationales Verwaltungsrecht*, München–Berlin–Leipzig 1930, vol. 3, part 2, p. 252.

61 This is how Neumayer understands his position himself, loc.cit., p. 254.

62 Cf. C. A. Fraleigh, *The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights*, "Cornell Law Quarterly" 1949–1950, vol. 35, p. 108.

63 A protocol to the European Convention on Human Rights signed in Paris on 20 March 1952, in its Article 1 provides for the protection of ownership. The text of the Protocol can be found in *Annuaire Européen*, vol. 1, 1955, p. 341. Thus, the mechanism created by the Council of Europe for the protection of human rights safeguards also ownership and may be used—on the terms laid down in the Convention—in a relation between a state and its own citizen. As of now, this system encompasses a very small number of states and only begins to function. Hence, it has little practical significance as yet.

against the monetary policy of their own state. As regards foreigners, they may of course always avail themselves of the diplomatic protection of their state if the measures taken by the sovereign of a territory can be held to be a denial of justice or to constitute expropriation.[64] The chances that the interests of foreigners will be protected are meagre or almost non-existent in the situation in question. As a rule, the sovereign of the occupied territory repudiates the occupation currency in the interest of sound economy. For any occupation currency is a manipulated currency and the occupying powers have almost always used it as an instrument of exploitation of the occupied country. In particular, this policy was pursued by Germany as an occupying power. Economists are right to observe that currency circulation during an occupation is characterised by the existence of speculation centres among the population having access to large banknote and coin reserves. Occupying powers always left behind a monetary system in shambles. This system needs to be eliminated before the former occupied state begins to build a new one. Since from the point of view of the occupied state the occupation currency is bad currency, the occupied state starts a post-occupation reconstruction with a sharp deflation measure. In this way, the state does away with speculative currency reserves and clears the way for a new issue, and a new financial system in general.

The sovereign of a territory is competent to take currency measures having legal effect in the territory upon the recovery of real power in it. This means that any acts concerning currency matters issued by a government having power only over a part of the territory of a state during

64 Cf. the decision of the U.S. Court of Claims in Eisner v. United States. The plaintiff claimed that her property was unlawfully taken away through the conversion of her bank deposit in Berlin at a conversion rate of 1 = 20 –currency reform in Germany. The Court held that the currency reform involving such a conversion rate was “a sovereign act, reasonably calculated to accomplish a beneficial purpose, and if it did have any adverse effect upon the plaintiff, she cannot, under well-settled principles, shift that effect to the public treasury”. Federal Supplement, vol. 117, 1954, p. 199. Although the plaintiff was an American citizen, the U.S. government collaborated in carrying out the currency reform in Germany as a co-holder of the supreme authority in that country and not as the subject of authority in an American territory.

a war or by a government in exile become effective in the territory occupied by the enemy only when the occupation comes to an end.[65]

Literature

Emmendörfer A., *Geld und Kreditaufsicht in den von Deutschland während des 2. Weltkrieges besetzten Gebieten*, Tübingen 1957.

Feilchenfeld E. H., *The International Economic Law of Belligerent Occupation*, Washington 1942.

Fitzmaurice G.G., *The Juridical Clauses of the Peace Treaties, Académie de Droit International. Recueil des Cours*, vol. 73, 1948.

Fraleigh C.A., *The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights*, "Cornell Law Quarterly" 1949–1950, vol. 35.

Karpiński Z., *Gospodarcze i prawne podstawy pierwszej emisji marek polskich tzw.* "*not Kriesa*", "Ruch Prawniczy i Ekonomiczny" 1923, vol. 3.

Langenhove F. van, *L'action du gouvernement belge en matière* économique *pendant la guerre*, Paris–New Haven 1927.

Lehnich O., *Währung und Wirtschaft in Polen, Litauen, Lettland und Estland*, Berlin 1923.

Lester R.A., *International Aspects of Wartime Monetary Experience*, Princeton 1944.

Mann F.A., *Money in Public International Law*, "British Yearbook of International Law," vol. 26, 1949.

Martens G.F. de, *Nouveau recueil général de traités, 3e série*, vol. 21, 1929.

65 A. Emmendörfer, *Geld und Kreditaufsicht in den von Deutschland während des 2. Weltkrieges besetzten Gebieten*, Tübingen 1957, pp. 56–57 (an unpublished dissertation of submitted to *Institut für Besatzungsfragen*) writes about an attempt to invalidate—by virtue of the decree of the King of Norway—all notes and coins circulating in that part of Norway that had already been occupied by German forces. Such a decree would not have been effective in the occupied territory as long as the occupation continued.

Neumayer K., *Internationales Verwaltungsrecht*, München, Berlin–Leipzig 1930, vol. 3, part 2.

Neumayer K., *Internationales Verwaltungsrecht*, München–Berlin–Lepzig 1930.

Nolde B., *La monnaie en droit intenational public*, "Académie de Droit International. Recueil des Cours" 1929, vol. 27.

Nussbaum A., *Money in the Law. National and International. A Comparative Study in the Borderline of Law and Economics*, Brooklyn 1950.

Ronan W.J., *The Money Power of States in International Law*, New York 1947.

Southard F.A., *The Finances of European Liberation with Special Reference to Italy*, New York 1946.

Winiarski B., *Wybór źródeł do nauki prawa międzynarodowego*, Warszawa 1938.

Anna Michalska

The Autonomy of Treaty Terms[1]

In accordance with the conception of the autonomy of treaty terms, an international body exercising monitoring functions should assign treaty terms specific meanings, irrespective of the meanings they have in the national law of particular State parties.

International monitoring involves the comparison of a treaty norm establishing a given human right with a respective norm of national law. Both norms are often worded in a similar or identical manner. The identical or similar wording of a treaty norm and a corresponding national norm does not entail that meanings assigned to terms used in them are identical, however. This is due to the fact that they are interpreted by different bodies.[2] The reasons for divergent interpretations are many. For instance, the general provisions of the International Covenant on Civil and Political Rights on the protection of minorities (Article 27) or on political rights (Article 25) are more susceptible to divergent interpretations than the detailed and precise provisions on the administration of justice (Article 14). Firstly, it must be remembered, however, that national law

1 A. Michalska, *Autonomiczność pojęć traktatowych*, "Toruński Rocznik Praw Człowieka i Pokoju" 1993, 2 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 V. P. Daranowski, *Międzynarodowa ochrona praw obywatelskich i politycznych in statu nascendi. Międzynarodowy Pakt Praw Obywatelskich i Politycznych*, Łódź 1993, p. 240. Author develops the theory of objective regime against the backdrop of the discussion of the autonomy of treaty terms.

is enacted through reliance on specific philosophical, political and legal conceptions that determine what this law means and how it should be interpreted. Agreement on the content of international instruments is not underpinned by a common conception of human rights. Consequently, provisions on the freedom of speech or the freedom of association are considerably more often subject to divergent interpretations than, for example, provisions on personal freedom or a ban on torture.

The autonomy of certain terms is sometimes provided for in treaties themselves. For instance, the provisions of the European Convention on Human Rights on the freedom of assembly and association (Article 11(1)), by establishing the right to form and to join trade unions, pre-determine that the trade-union freedom is covered by this provision, regardless of whether trade unions are considered associations by national law. An analogous wording has been adopted by the drafters of the Covenant on Civil and Political Rights in its Article 22(1).

The decisions of international bodies monitoring how signatories implement human rights treaties show a rather clear tendency to assign the terms used in the treaties an autonomous meaning. In the decisions of the Human Right Committee, the tendency was first observed in relation to the application of Sandra Lovelace v. Canada.[3] The Committee took the position that it was necessary to differentiate between the protection of minorities provided for under the Indian Act and the international protection of minorities guaranteed under the Covenant, Article 27. As a result, the Committee held that in spite of the fact that the Indian Act guaranteed a number of rights and privileges for members of ethnic groups, there were no justifiable reasons for denying the author of the application the rights provided for in the Covenant, Article 27. This decision is cited in an illustration of the thesis that "… the protection provided for under the Covenant is *international protection* which is to be distinguished from national standards of protection".[4]

3 Communication no. 6/24, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1981.

4 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights*, Dordrecht–Boston–London 1989, p. 31.

In relation to the case of Gordon C. van Duzen v. Canada, the Human Rights Committee found that:

> The Committee further notes that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning.

The object of interpretation was the term "penalty" within the meaning of the Covenant, Article 15(1). The question at issue was whether the term also covered "administrative" penalties. The Committee, opting for an extensive interpretation, stressed that it took into consideration not only the literal wording of the relevant provision, but also its object and purpose.[5]

The conception of the autonomy of treaty terms can also be easily found in the decisions of the European Commission of Human Rights and the European Court of Human Rights. An example of this is provided by the interpretation of Article 11, mentioned previously, of the European Convention on Human Rights, which establishes the freedom of assembly and association. Article 11 stipulates that political parties are treated as associations, regardless of whether they enjoy this status under national law. This position was taken by the European Commission of Human Rights in relation to the application by the German Communist Party v. the Federal Republic of Germany, which questioned whether the decision to ban the party was compliant with the European Convention.[6] P. van Dijk and G.J.H. van Hoof write that:

5 Communication no. 12/50, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1982.

6 Application no. 250/57, Yearbook of the European Convention on Human Rights, 1955–1957, p. 222.

> An autonomous meaning should be assigned to the word "association". The legal form chosen, and the legal consequences attached thereto by national law, cannot be decisive here, since otherwise the guarantee provided for in Article 11 would be illusory and the scope of the guarantee granted in particular State parties would differ.[7]

This is not only a theoretical demand, but also a conclusion following from a study of the decisions of European bodies.

In the cases referred to above by way of example, international bodies recognised the autonomy of the meanings of treaty terms vis-à-vis national law systems. A question arises, however, of whether national law is the only point of reference for assigning treaty terms autonomous meanings, or whether such a reference point is afforded also by other human rights treaties. In other words, is a given treaty to be interpreted as an autonomous instrument or as one of the elements in the international system of human rights protection. It is by no means just a theoretical problem; on the contrary, it has arisen in relation to the varied practice of international bodies.

European case law refers to treaties binding on the state-members of the Council of Europe and to both Human Rights Covenants and ILO Conventions. For instance, the phrase "forced or compulsory labour" (European Convention, Article 4) was interpreted by the European Court of Human Rights in the light of the provisions of ILO Conventions nos. 29 and 105.[8] When interpreting trade-union freedom, European bodies have regularly referred to relevant ILO Conventions. For instance, the European Commission maintained—referring to ILO Convention no. 87—that the freedom of assembly and association guaranteed in Article 11 of the European Convention, meant that any form of intimidating employees to stop them from par-

7 P. van Dijk, G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Deventer–Boston 1990, p. 431.

8 Judgement of ECHR of 23 November 1983, Van der Mussel v. Belgium, European Court of Human Rights, Judgements and Decisions Series A, vol. 70, 1983, pp. 16–17.

ticipating in trade-union activity was a breach of this freedom.[9] The Commission took the position that the right to form trade unions included, *inter alia*, the right of unions to draw up their own rules and to make decisions on trade-union matters. These rights are explicitly recognised in ILO Convention no. 87, which "must be taken into account in the present context".[10]

The most troublesome problem in the context of trade-union freedom was the right to strike. The organs of the European Convention recognised, admittedly, that strikes were an important means of protecting trade union interests, but not the only one. The Court, invoking the European Social Charter, held that the right to strike—assuming that it is guaranteed under Article 11 of the European Convention —could be always restricted by national legislation.[11]

The Human Rights Committee did not invoke—besides the last-mentioned case—other international instruments. The Committee, however, heard many applications involving decisions on pensions, unemployment benefits, and state subsidies to cover tuition in private schools, that is, ones whose subject matter went beyond the scope of the Covenant on Civil and Political Rights. The authors of these applications alleged that the principle of equality before the law had been breached (Covenant, Article 26).

Article 26 of the International Covenant on Civil and Political Rights states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law". The Committee has consistently held that this provision is not a repetition of the guarantees given in Article 2(1) that obligates State Parties to respect and ensure to all individuals "rights recognized in the present Covenant, without distinction of any kind…". The Committee has held that Article 26 of

9 X v. Ireland, Application no. 4125/69, Yearbook of the European Convention on Human Rights, Vol. XVI, 1971, p. 198.

10 Cheall v. United Kingdom, Application no. 10550/83, Decisions and Reports of the European Commission of Human Rights, 1985, p. 185

11 Judgement of ECHR of 6 February 1976, Schmidt & Dahlström v. Sweden, Judgement delivered by the Court on 6 February 1976, European Court of Human Rights Series A, vol. 21, 1976, p. 16.

the Covenant imposed a ban on "discrimination in all spheres that fall within the competence of state organs and not only in respect of rights provided for in the Covenant".

Characteristically, in cases alleging infringement of the International Covenant on Civil and Political Rights, Article 26, in relation to decisions on social matters, the Committee did not invoke the Covenant on Economic, Social and Cultural Rights, whereas the parties to disputes did. It will be worthwhile to present here, by way of example, arguments given by individuals and States, and grounds for the Committee's decision, as they have several interesting aspects.

A female Dutch national, Broeks, alleged the infringement of Article 26 of the Covenant by arguing that a decision of competent state organs to deprive her of an unemployment benefit was tantamount to discrimination by reason of sex. Under national legislation, a male in an identical personal and social situation is paid such a benefit. The *ratio legis* of these provisions was the fact that a male was held to be the main breadwinner.

The State questioned the admissibility of *ratione materiae* application by arguing that (a) the principle of non-discrimination in the area of social security and insurance is guaranteed in Articles 2 & 3 (equality of rights) and Article 9 (right to insurance) of the Covenant on Economic, Social and Cultural Rights; (b) the Dutch government applied these provisions in compliance with Article 2(1) of the Covenant that obligates State Parties only to undertake "steps […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights"; (c) the process aimed at achieving progressively the full realization of the rights was well under way and discriminatory provisions were gradually being eliminated from legislation; (d) the International Covenant on Economic, Social and Cultural Rights put in place its own system of monitoring and the Netherlands periodically submitted the required reports.

What follows is the commentary submitted by the author of the application. The preambles to both Covenants stress a close connection

and relationship between civil and political rights, on the one hand, and social and economic ones, on the other. The fact that these two categories of rights are guaranteed by separate international instruments does not weaken these connections. Article 26 of the International Covenant on Civil and Political Rights, laying down the overall principle of equality before the law, does not relate it—unlike Article 2(1)—to the rights provided for in the Covenant. Furthermore, the Dutch legislator, in the grounds attached to its ratification resolution maintained that "the provisions of Article 26 are applied also in areas not covered by the Covenant". When the Human Rights Committee was discussing a periodical report submitted by the Netherlands, the Dutch representative said that Article 26 of the Covenant was also applicable to economic, social and cultural rights. In the light of this statement of the government representative, all that could be debatable was the question of direct application of Article 26 by the courts. It is also worth mentioning that the author of the application, arguing in favour of a close connection between the two categories of human rights, invoked not only the preambles to both Covenants, but also a 1950 resolution of the UN General Assembly that had outlined the main principles of the future Covenants.

The Committee held that equal treatment in the area of social rights did not differ at all from equal treatment in the area of civil and political rights, and that a different interpretation would make Article 26 of the Covenant an idle declaration. Consequently, finding that the varying of benefits had no rational grounds, i.e. it was arbitrary, the Committee ruled that Article 26 of the Covenant on Civil and Political Rights had been infringed.[12]

In an analogous case, the Netherlands enhanced its arguments by claiming that the State was not obligated to eliminate all discriminatory provisions from its national law. It was maintained that time was necessary to perform a comprehensive analysis of legislation.

12 Cf. S.W.M. Broeks v. the Netherlands, Application no. 172/1984, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1987.

Moreover, changes in morals, ethical standards and public policies may make certain distinctions, once acceptable, look discriminatory. The author of the application invoked in her submissions the statement by the Dutch government submitted at the ratification of the Covenant. In it, it was maintained that the period of legislation adjustment did not apply to the norms that could be directly applied. One of them, unsurprisingly, is the norm laid down in Article 26 of the Covenant, which is borne out by the practice of the Dutch courts followed hitherto. The Committee expressed the view that Article 26 of the Covenant had been violated, because the distinction drawn between women and men in their entitlement to an unemployment benefit was unreasonable and irrational.[13]

It transpired that the Committee found that the distinctions made in social insurance benefits were not discriminatory, as for instance between spouses and unmarried persons cohabiting together.[14] Importantly, however, the Committee did not find such applications to be inadmissible *ratione materiae*.

The pretext for filing applications in the cases cited above was, admittedly, the protection of the principle of equality before the law, but the result of the monitoring procedure was the restoration of social and economic rights to an individual. What is more, the State announced that it would make amendments to its national legislation. One can wonder if these precedents related to Article 9 of the Covenant on Economic, Social and Cultural Rights open the door to the procedure before the Human Rights Committee for protecting other rights provided for in the Covenant. This is even more likely as in connection with the principle of equality before the law, the authors of the applications invoked other rights as well. In none of these cases, however, did the Committee cite the Covenant on Economic, Social and Cultural Rights, or other

13 F. G. Zween-de Vries v. the Netherlands, Application no. 182/1984, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1987.

14 L. G. Danning v. the Netherlands, Application no. 180/1984, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1987.

treaties for that matter. It did so for the first time in the case referred to below.

Several Canadian public employees filed an application, claiming a breach of the Article 22 of the Covenant (freedom of association). They alleged that the statutory prohibition of a strike by public employees contravened the provision in question. The alleged victims of the statute, which imposed penalties for participating in a strike, were—in the opinion of the application authors—members of the trade union of public employees.

Several years earlier, the trade union of which the application authors were members, had lodged a complaint with the Committee on Freedom of Association of the International Labour Organization (ILO), alleging that the statutory prohibition breached ILO Convention no. 87 since "it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members". The Committee on Freedom of Association suggested that the legislation in question be amended and the prohibition of strike be confined only to "essential services". The trade union lodged complaints twice with the ILO in later years, because the legislation had not been amended.

In the proceedings before the Human Rights Committee, the State raised in the first place the allegation of inadmissibility of a *ratione materiae* application. The Canadian government took the stance that Article 22(1) of the Covenant—which enacts the right for everyone "to form and join trade unions for the protection of his interests"—did not guarantee the right to strike. A State party is only obliged to permit and make possible trade-union action. However, in giving effect to this obligation, a State party is free to choose the means that it considers appropriate. Interestingly enough, the Canadian government cited the Covenant on Economic, Social and Cultural Rights, Article 8(1)(d), which provides for the right to strike but used this provision as an argument for the inadmissibility of a *ratione materiae* application.

In their commentary to the statement by the State, the application authors invoked Article 22(3) of the Covenant, which says:

> Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The Committee, considering the admissibility of the application, in the first place posed the question of whether Article 22 of the Covenant guaranteed the right to strike. This was its line of reasoning: since the right to strike is not guaranteed *expressis verbis*, the interpretation of this provision should answer the question of whether the right to form trade unions implies the right to strike. The Committee admitted that on the grounds of the ILO Convention and the decision of the Committee on Freedom of Association quoted above, the right to form trade unions implied the right to strike. The Committee continued:

> The Human Rights Committee has no qualms about accepting as correct and just the interpretation of those treaties by the organs concerned. However, each international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner, if so provided, by the body entrusted with the monitoring of its provisions.

The Covenant on Economic, Social and Cultural Rights provides for the right to form trade unions and the right to strike (Article 8). Having analysed in detail the drafting of both Covenants, the Committee concluded that the drafters of the Covenant on Civil and Political Rights had consciously and purposefully left out the right to strike from its Ar-

ticle 22. Consequently, it decided that the application was inadmissible *ratione materiae*.[15]

As many as five Committee members signed an individual opinion. They believed that the intentions of the drafters of the provisions of both Covenants under discussion were not absolutely clear. In favour of the admissibility of the application, they offered two main arguments. First, to further and defend trade-union member interests, various means are used, none of which is listed in Article 22 of the Covenant on Civil and Political Rights. Hence, any means similar to a strike could be questioned. Second, there are no reasons to interpret the right to form trade unions, provided for in both Covenants, differently. Nor are there any reasons for the Committee to understand the right to form trade unions differently than the International Labour Organization does, especially in the light of Article 22(3) of the Covenant quoted above.

The line of reasoning presented in the individual opinion merits complete approval. The Committee based its decision on a formal-dogmatic interpretation of Article 22 of the Covenant, while it should have adopted a teleological interpretation. Social and economic rights are taken into consideration in the General Comments when they discuss, for instance, State obligations in relation to the reduction of infant mortality rate or the elimination of hunger and malnutrition, etc.

The Committee has invoked other international instruments when considering reports, for instance, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in relation to Article 7 of the Covenant) and the Standard Minimum Rules for the Treatment of Prisoners (in relation to Articles 7 & 10). Hence, there are no reasons for ignoring other treaties when considering individual applications.

The conception of autonomy of treaty terms vis-à-vis the national law of State parties is understandable and necessary. An international body must apply a "supranational" interpretation in the name of the universal nature of

15 J. B. et al. v. Canada, Application no. 118/1982, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1986.

human rights, which may have a regional or global dimension. The segregation, in turn, of human rights by the international instrument in which they are provided for is artificial and incompatible with the idea of the indivisibility of all human rights. Finally, this author believes that the autonomy of a treaty from other international instruments is a misguided legal construct.

Literature

Ramcharan B.G., *The Concept and Present Status of the International Protection of Human Rights*, Dordrecht–Boston–London 1989.

Daranowski P., *Międzynarodowa ochrona praw obywatelskich i politycznych in statu nascendi. Międzynarodowy Pakt Praw Obywatelskich i Politycznych*, Łódź 1993.

Broeks v. the Netherlands, Application no. 172/1984, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1987.

Cheall v. United Kingdom, Application no. 10550/83, Decisions and Reports of the European Commission of Human Rights, 1985.

Communication no. 12/50, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1982.

Communication no. 250/57, Yearbook of the European Convention on Human Rights, 1955–1957.

Communication no. 6/24, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1981.

Danning L.G. v. the Netherlands, Application no. 180/1984, Rapport du Comité des Droits de l"Homme, Assemblée Générale, Documents Officiels, 1987.

Dijk P. van, Hoof G.J.H. van, *Theory and Practice of the European Convention on Human Rights*, Deventer–Boston 1990.

J.B. et al. v. Canada, Application no. 118/1982, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1986.

Judgement of ECHR of 23 November 1983, Van der Mussel v. Belgium, European Court of Human Rights, Judgements and Decisions Series A, vol. 70, 1983.

Judgement of ECHR of 6 February 1976, Schmidt & Dahlström v. Sweden, Judgement delivered by the Court on 6 February 1976, European Court of Human Rights Series A, vol. 21, 1976.

X v. Ireland, Application no. 4125/69, Yearbook of the European Convention on Human Rights, Vol. XVI, 1971.

Zween-de Vries v. the Netherlands, Application no. 182/1984, Rapport du Comité des Droits de l'Homme, Assemblée Générale, Documents Officiels, 1987.

Marian Zimmermann

On the Definitions of Administrative Law[1]

Defining legal institutions is conventional and relative. It is relative in a double sense. First, an author may, to be sure, describe and classify existing legal matter according to arbitrarily chosen criteria, but the definitions arrived at in this manner will closely depend on the criteria, and the scope of their validity will thus be relative. Second, the very choice of criteria, and consequently the scope of obtained definitions, will be limited by the requirement that they be useable for analysing and explaining objectively existing matter. To achieve this purpose, the matter must be adequately approached, the institutions that are specified must be "clear-cut", relationships and differences must be better explained, characteristics joining or dividing legal institutions into certain groups must be exposed, etc.

For this reason, the definitions of legal institutions are as a rule of the regulating type. Their usability depends on the degree to which they can explain an existing legal contrivance. In this context, purely stipulative definitions have, as a rule, a merely speculative value.

Furthermore, an attempt to define a certain group or kind of legal contrivances may actually resemble an operation of drawing distinc-

1 Translated from: M. Zimmermann, *Z zagadnień definicji prawa administracyjnego*, "Acta Universitatis Wratislaviensis" 1964, 19 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. A paper delivered at the Symposium of Administrative Law Chairs held in Wrocław on 12 December 1956.

tions and making a classification, thus, requiring at least two definitions. Its purpose may be to indicate, for instance, the distinctive features of some sphere of governance. In such cases, as any classification, this, too, must use uniform criteria, lying on the same plane, i.e. a uniform dividing principle. This is to ensure an exhaustive and disjunctive division. Interestingly, the adoption of such a principle cannot be entirely arbitrary either: its scope and usability depend on objectively existing matter as well. For in legal studies, too, account has to be taken of the fact that the purpose of a division is to create segments grouping legal institutions that are similar in some respects that are relevant for a jurist. Moreover, the division has to best suit the intended objective. Hence, legal institutions will be classified above all according to their organisation, differences in, and methods of, operation, etc.

Division criteria have to be uniform but only at the same classification tier. For instance, the well-known definition of administration formulated by Otton Mayer: "Verwaltung ist die Tätigkeit des Staates […] unter seiner Rechtsordnung, außerhalb der Justiz" is actually a form of dual and two-tier classification that could be broken down in the following manner: governance is divided into enacting a legal order (in the sense of enacting statutes, i.e. legal norms of the highest order) and an activity subject to the former. The division criterion in this case is the relation to statutes: either their enactment or implementation. In turn, the subordinate activity is divided into the judicature (administration of justice, *Justiz*) and the activity that is not judicature. The latter is called administration. Here, the division criterion is different. It can be for instance some characteristic of organisation and forms or methods of action, or so-called substantive criteria. In this approach, administrative law is the law regulating administration thus conceived.

This classification can be expanded further, on one or several planes, depending on the adopted criteria. Administrative law, in such a broad sense, can be subdivided into financial law and administrative law in the strict sense, and the latter may be divided further still into agricultural, wa-

ter, mining, industrial, transportation administrative law, etc. Here again different division criteria for division will be used than on the higher tier. In the last-mentioned case, we are dealing with many definitions that have a common *genus proximum* and together make up a non-exhaustive division. Within the same tier, division criteria must not be mixed.

The criteria that are used in such a classification can thus vary: their choice usually depends on the set objective. They may be formal, concerning the form and character of an activity, or substantive, concerning the substance of regulated relations. What follows is a few examples from very different times.

Roman jurists divided law (for didactic purposes) into public and private primarily in accordance with the purpose of the legal institution: safeguarding a public interest or the interest of an individual.

For Montesquieu, the chief criterion of division was the nature of subjects whose legal relations a given legal institution was to regulate. Montesquieu called the relations between the governing and the governed "political law", whereas he called the relations between the governed among themselves "civil law".[2]

The Vienna School (especially František Weyr, 1908, and later Hans Kelsen and Adolf Merkl) took the stance that the division of law into public and private, according to the criterion of the protection of interests (public or private) and on the criterion of the equality or inequality of subjects, does not satisfy the postulate of the so-called science of economy. This discipline calls for a legal division to join what is legally homogeneous and divide what is legally diverse. Therefore, the Vienna School believed that the issue of dividing law into public and private may concern only specific legislation that adopts such a division by enacting separate regulations for each of these segments of law that are usually left undefined.[3]

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2 According to Montesquieu "political" law is: *les lois dans le rapport qu'ont ceux qui gouvernent avec ceux qui sont gouvernés*, while private: *les lois dans le rapport que tous les citoyens ont entre eux*. C.L. Montesquieu, *Esprit des lois*, Londres 1777, L. I. Ch. 3.

3 V.A. Merkl, *Allgemeines Verwaltungsrecht*, Wien–Berlin 1927, pp. 80–85.

With the above reservations, the author of definitions and classifications is free to choose his criteria. Their legitimacy is based solely on fitness for their intended use and obviously their logical correctness. From this point of view, the adopted criteria should not be rejected beforehand, although they may and should be critically judged in terms of research or practical utility. It must be remembered in this connection that no definition or division will satisfy all postulates or will remedy all the problems of jurists as no definition may at the same time account for all the elements that may prove useful for various needs.

It seems advisable to test these simple propositions by applying them to several oft-disputed issues from the theory of administrative law.

A. "Positive" or "negative" definition of administration. It must be noted first that so-called negative definitions are not negative in any literal sense. Let us take for instance the classic definition that takes administration to be part of state activity that is not legislation or judicature (or administration of justice). It is necessary, in this case, to specify three concepts, making up this definition: to know if some state activity constitutes administration, we must define first what state activity is in general. Next, we must define what legislation and judicature are. Hence, administration will be such (already defined) state activity that has the characteristics of neither legislation nor judicature. Since the classic definition assumes beforehand the separation of powers, the definition of administration itself—until it is demonstrated that, relying on a uniform foundation, it is possible to divide the three kinds of state activity existing in a given system: legislation, administration of justice and administration—must refer to the rest of state activity besides legislation and the administration of justice, following from a dichotomous classification. Otherwise, the division would be erroneous: it would not be exhaustive. If we introduced a partial positive definition, making use of some specific characteristics and not exhausting the scope of administration as the "rest of state activity", we would have to introduce the rest as the fourth category to stay in agreement with the principles of a logical division. Incidentally, as of now, it appears that there is no definition of administra-

tion that would be able, using the same criterion of division, to differentiate it from legislation and administration of justice at the same time. It looks as if it were necessary to use here a two-stage classification as per Otto Mayer"s definition mentioned earlier.

Can one rule out beforehand the possibility of a "positive" definition of administration (as well as legislation and judicature), one based on a common criterion and confined to the separation of powers into three branches? Any known "positive" definitions do not fit into such a division and are, as a matter of fact, based on different criteria for each of the three branches. Of course, they may also be usable to an extent, but since they are not a segment of division, their usability will be limited inasmuch as they will not be able to explain relationships between various kinds of state activity. If, for instance, administrative law is defined as law regulating "public service", this may have some significance for the organisation of such an object of study as the attitude of state organs to the satisfaction of citizens" needs. However, this will not be helpful in determining the scope of what colloquially and in legal provisions is called administration, nor in explaining the relationship of administration thus defined and the law that regulates it to other kinds of state activity.

Furthermore, if it is observed that the state performs more and more tasks and that new fields of legal regulation emerge, it can be said beforehand that a regulating positive definition of administrative law, which would differentiate it from other branches of law, i.e. one that would fall into the division and correspond to new legal institutions at the same time, could quickly lose its usability.

B. Formal or substantive criteria. The attempts to define or distinguish administration and administrative law according to substantive criteria (concerning the subject matter of the relations being regulated) have not produced any usable results, as it seems, especially as far the major kinds of state activity are concerned. Social and economic life is subject for the most part to legal regulation in all its forms. Substantive criteria may, however, come in useful to some extent at the lower tiers

of classification, in particular for didactic purposes (e.g. division of administrative law into the special branches mentioned earlier: agricultural, mining, water, industrial, construction, transport law, etc.).

In addition, reasonable doubts could arise as to whether it is necessary or even advisable for defining administrative law to define substantively state administration in advance. An answer to this question, however, would call for a special study.

C. Formal criteria: concerning the entities involved or the subject matter regulated. Methodologically, it is of course equally correct if the realm of administrative law is specified by reference to the entities involved or the subject matter regulated. In either case, some portion of the law usually called administrative (or perhaps provisions regarded as belonging to administrative law) will be left out. In the former case, we will leave out law regulating the administrative activity of judicial and legislative organs. It is another question if in this case it should not be assumed that judicial organs are in this respect simply administrative organs and if the administrative organs of the Sejm can be identified with the Sejm itself as a legislative organ; after all they are organisationally subordinate, following the principles proper to administrative organs. If, in turn, subject-matter criteria are used, we will leave out the law regulating the norm-giving activity (in the sense of issuing general provisions of law) of the organs commonly considered administrative (e.g. ministers), and decisions in certain areas (e.g. penal-administrative decisions, decisions on compensation for expropriation, etc.).

In practice, the former omission is less strongly felt. For instance, the administrative activity of organs commonly believed to be legislative and judicial, and recognised as such in the Constitution, is as a rule not discussed in the systems and textbooks of administrative law. However, the omission of penal-administrative decisions and ones concerning compensations, or leaving out the norm-giving activity of organs believed to be administrative, is unthinkable.

Obviously, for special-purpose research, e.g. studies of an administrative act, or even for defining an administrative organ, subject-matter criteria may also prove useful. However, to present the subject-matter in its entirety, the entity-related criteria are believed to be more useful for the simple reason that constitutions themselves create grids of state organs divided into various types, differing in structure, and thus adapted to perform various tasks. First and foremost, however, with respect to state administration, constitutions, as a rule, lay down only the principles of an administrative organ system, while the nature and forms of activity of individual organs are regulated only in very general and fragmentary terms.[4] On this foundation, however, various "subject-matter" definitions can be built as well, but in order to specify the types of state activity, it is best to rely on the grid of state organs provided for in a constitution. There are indisputable benefits: practical, didactic and research ones as well.

The above examples show that attempting to define, for instance, administrative law—even for historical and comparative purposes—we are always limited by the existing legal material. However, within the material there is always the possibility of defining a given legal institution using various criteria, i.e. in various ways. There is no single all-explaining definition that only needs to be found. Hence, if the possi-

4 Admittedly, it could be claimed that the very diversity of tasks that makes constitutions set up various bodies adapted in their structure to the tasks to be performed is conceptually superior. In this context, one could cite the origins of the separation of powers that must have stemmed not only from the opinions of jurists or politicians. The separation must have been a result of not only political tendencies: it must have satisfied some objective needs of performing certain state tasks at a certain stage of state development. If, however, we say that the task of administration of justice is to determine the forms of a certain portion of state activity, somebody could rightly claim that the administration of justice exercised by a single-person administrative body—hierarchically subordinate, that is, not independent—is not proper administration of justice, but rather a *sui generis* act of state coercion. It could be further claimed that true administration of justice is exclusively exercised by an independent body. Moreover, if penal-administrative decisions and ones concerning compensations, issued by an administrative body, are not popularly believed to be "administration of justice", it is a reflection of this claim. This attests to the weight of the organisational aspect that a theoretician must not ignore.

bility of providing a definition of administrative law is doubted (there are many authors who do, recently for instance Forsthoff), the question must be asked: what definition? For there may be many definitions, and many may have some value. A definition may be broad and precise enough at the same time to be considered useful under given conditions, for example, because of the practice of state organs or for didactic reasons. Conversely, there is no definition that could resolve all difficulties posed by practice, the demands of research and didactic needs.

What then does the question of defining administrative law look like in the context of our legislation? Of course, here too, various definitions and classifications are possible, depending on the adopted criteria. However, the foundation of any regulating definition will be rather heavily restricted by our positive legislation.

Let us take the possibilities our Constitution offers in this respect. Providing for a specific grid of organs, the Constitution defines their structure and in part their hierarchy. By doing this, it also provides a foundation for an "entity-related" definition of particular realms of state activity. The organisational structure and character of individual state organs, however, are rather noticeably connected with the nature of tasks they are made responsible for; it is also easy to see how important the tasks are for determining the subject matter and kind of their activity.

Let us try to divide the state organs listed in the Constitution according to their relation to citizens, in particular, the competence of particular organs to regulate their rights and duties.

If the organs listed in the Constitution are viewed and classified from this point of view, what will immediately meet the eye is the division into two groups. One comprises the legislative organs that enact general legal norms of the highest order independently of other organs, and authoritatively. This means that they decide in general terms *pro futuro* the scope and content of the legal acts of all other organs of the state.[5] The other

5 If the foundation of the construction were expanded to include the People's Council Act, it would be necessary to include the local organs of authority that issue independently—but

group consists of all the other organs that are bound by legislative acts when issuing legal acts.

Among the latter organs, again two groups can be distinguished. One comprises organs that only declare what the law is and in that activity they are subject only to statutes and decrees (Article 52 and Article 25(1)(4) of the Constitution). The other group is comprised of the organs that whenissuing legal acts (general and individual) are in that activity not only subject to statutes and decrees but also, in some scop and manner, to acts issued by superior organs.[6]

Once legislative organs are thus eliminated, we will be left with—as far as the issuing of legal acts is concerned—two types of constitutional organs: organs that in their decision-making are subject only to statutes and decrees, and organs that in their issuance of legal acts (general or individual) are subject also to the acts of superior organs.[7]

Thus, from the adopted point of view, the organs provided for in the Constitution and issuing "executive" legal acts may be divided into

within competence granted by statutes—local provisions of law.

6 The separate question of subjection to ordinances is purposefully left out of the discussion. For administrative organs, however, an ordinance has, it is believed, the force of an instruction.

7 This kind of division is known in the literature (Merkl) and, as can be seen, can be inferred from the positive-law material. A certain peculiar difficulty arises in it in respect of the Council of Ministers that issues (executive!) legal acts independently of any administrative bodies, while it is neither a legislative nor judicial body, is it? This is, however, a necessary consequence of the hierarchical organisational system (although in our system, a strict hierarchy can hardly be spoken of). The Council of Ministers, after all, is the highest tier of the system (*see* A. Merkl, *op. cit.* pp. 42–43). A definition based on the element of subordination to a superior body must contain a suitable reservation in this respect. With such a reservation, from the point of view of the adopted criterion and with the limitation to the organisational grid of state bodies provided for in the Constitution, the division will be exhaustive. Difficulties will arise only when the grid is expanded to include all legislation: it will be seen then that a statute at times assigns to bodies of a particular type competences characteristic of the remit of bodies of a different type. It could be assumed sometimes in such situations that acting in a different capacity, a given body acts in this remit as an body of a different type. With such an expanded foundation, a need to substantially modify the division would arise if, for instance, administrative procedure or penal-administrative provisions eliminated any influence of superior bodies on decision-making bodies or if the provisions on People's Councils would give them, as organs of authority (session), the right to independently—and not executively ("executive powers", Art. 16 of the Act of 1950)—enact local law. This is, however, a different question.

judicial organs and others. The latter are called administrative organs in the Constitution. Relying on this division, we can further distinguish by analogy administrative law from "judicial" law (civil and criminal) and administrative-law relations from "judicial-law" relations, i.e. ones of civil and criminal law.

As can be seen, the constitutional "entity-related" division of organs, based on their structure, is related to a certain extent to the nature and content of tasks assigned to them. The obtained division, admittedly, will not correspond from our point of view to the entire grid of organs provided for by the Constitution, as it will be too narrow: first, it will not cover all the organs provided for in the Constitution (public prosecutor's offices!); second, it will not encompass the full range of their activity. Instead, it will allow for making the legal nature of their activity more specific, for instance, to set apart the administrative activity of judicial organs. A definition thus obtained may prove to be useful for the interpretation of the nature of a studied legal act. In this case, the definition of an administrative organ and administrative law—administrative law in the broad sense, because as it can be immediately seen it also includes financial law and other cognate branches—may play a role in clearing away doubts concerning interpretation.

The adoption, in reliance on the grid of organs provided for by the Constitution, of the "entity-related" division into judicial and administrative organs—or along the same lines, the division of law into judicial and administrative in the broad sense—does not mean, naturally, that no other equally reasonable divisions and definitions could be made using different criteria. This is especially true for the traditional division of law into public and private. Its legitimacy, as supposedly following from the very nature of law, has been questioned several times already to be sure in the bourgeois theory of law (e.g. Gumplowicz, Vienna School, and Bordeaux School); using new arguments, the theory of socialist law is departing from it as well.[8] As a rule, legitimate criticism, however, is

8 The point of departure for the Soviet theory is most of the time a sentence by Lenin from a letter to D. J. Kursky of February 1922: "We do not recognise anything "private", for

usually directed from specific positions at certain specific ways of understanding this division. It appears that appropriately understood: either as a conventional didactic division used by Roman jurists or as a relative division, based on formal criteria, e.g. on the difference in the situation of parties to a legal relation regulated by law or the manner it is protected,[9] the division, within certain bounds, is not only entirely correct, but may be useful as well.

Courtroom practice and attempts to replace the term "public-legal" with "administrative-legal" (in a broad sense) still suggest this. The latter is different from the division into judicial and administrative law above all in that it includes criminal-judicial law as part of public law. Although, one certainly could make do without this division, it is valuable for research and practice. It explains well certain differences in the way the branches of law distinguished in this way work. For instance, the division of law into public and private maintains a certain homogeneity of judicial and administrative criminal law (concerning the legal nature of operation and, to a certain extent, also the social function of decisions), whereas the division into administrative law in the broad sense and judicial law undeniably breaks this relationship, admittedly, in favour again of the homogeneity of judicial law.

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us everything in the sphere of economy is public-legal and not private […], therefore, it is necessary to expand state interventionism in private-law relations, to expand the right of the State to abolish "private" contracts …" etc. (Cit. per: S. Strogovitch, *Teoriya gosudarstva i prava*, Moscow 1949, p. 441—based on the 3rd edition of Lenin's works; in the 4th edition, I have not found this letter. The 4th edition carries instead another letter to Kursky of 28 Feb. 1922: "It is necessary to increase still further the intervention of the State in private-law relations, in "civil matters"". Essentially, Lenin"s idea is, in the opinion of Strogovitch, that in the socialist economy there is nothing "private", i.e. inaccessible to regulation by the State. Strogovitch believes that in the system of Soviet law there are no grounds for such a division as there is no private ownership of means of production and, consequently, no private law. In turn, what has been called public law in the bourgeois system has a different content and sense in the Soviet system. A. I. Denisov also comments by, based in part on the statement by Marx and Engels on the "illusory nature" of this opposition. A. I. Denisov, *Teoriya gosudarstva i prava*, Moscow 1948, pp. 407–413; K. Marx, F. Engels, *German Ideology*. *Writings*, IV, pp. 53, 227.

9 A review of older theories: J. Hollinger, *Das Kriterium des Gegensatzes zwischen dem öffentlichen Recht und dem Privatrecht*, Zürich 1904.

Literature

Denisov A.I., *Teoriya gosudarstva i prava*, Moscow 1948
Hollinger J., *Das Kriterium des Gegensatzes zwischen dem öffentlichen Recht und dem Privatrecht*, Zürich 1904.
Marx K., Engels F., *German Ideology*. *Writings*, IV.
Merkl A., *Allgemeines Verwaltungsrecht*, Wien–Berlin 1927.
Montesquieu C. L., *Esprit des lois*, Londres 1777.
Strogovitch S., *Teoriya gosudarstva i prava*, Mocow 1949.

Zbigniew Janowicz

The Evolution of General Administrative Proceedings[1]

General administrative proceedings[2] have a rich and interesting history in the twenty-five years of the Polish People's Republic.[3] It is especially worth remembering as Poland has been a leader in the field of administrative proceedings for a long time. The point of departure for their postwar evolution was provided, as in many other branches of law, by the legal institutions developed in the twenty years of the interwar period.

The Decree of the President of the Republic[4] of 22 March 1928 on Administrative Proceedings, similar to today's Code of Administrative Procedure[5], was not the only piece of legislation regulating administrative proceedings; however it was the principal legislation in this field—a codification of administrative proceedings (although it was not formally called this). The DPR was to a very large extent modelled on the 1925 Austrian procedure, the first ever code of administrative proceedings;

1 Translated from: Z. Janowicz, *Rozwój ogólnego postępowania administracyjnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1970, 3, pp. 121–139 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. Translation and proofreading was financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This is just a brief overview of the evolution of administrative proceedings after WWII. Its conciseness is also the reason behind relatively scarce references to the rich literature on the subject. In 1966, publications on the new codification of administrative proceedings numbered over 200 items; *see* J. Litwin, *Bibliografia KPA*, "GiAT" 1966, no. 4–10.

2 Hereinafter: administrative proceedings.

3 Hereinafter: PRL.

4 Hereinafter: DPR

5 Hereinafter: CAP.

the DPR was practically its copy. The model was excellent and, moreover, it drew on many years of experience; in particular on the rich collection of decisions handed down by the Vienna Administrative Tribunal and the equally rich juristic literature. Besides Poland, the Austrian model was adopted by the countries that used to belong, if only in part, to the Austro-Hungarian Empire and felt the impact of Austrian law and juristic literature: Czechoslovakia (1928) and Yugoslavia (1930).[6] Since that time, these countries led the world as regards the codification of administrative proceedings. The 1928 DPR remained in force for a long time after WWII—until the end of 1960. Interestingly, it remained in force without any formal amendment, which does not mean that it did not undergo certain indirect modifications under the conditions of the new political system, especially when the so-called complaint and grievance procedure was introduced.

The procedure, modelled on Soviet law, was introduced in 1950/51[7] as a broadly conceived means of supervising the decisions and other activity of state administration. Complaints and grievances could be filed by any citizen with any organ, regardless of its instance (even if directly to the supreme organ) in both one's own (individual) interest and that of another person, and in a community interest (*actio popularis*); filing of a complaint or a grievance was not restricted by any time limit.

The procedure of complaints and grievances, later sanctioned by the PRL Constitution of 22 July 1952[8], undeniably played a positive role

6 M. Zimmermann in the collective handbook: M. Jaroszyński, M. Zimmermann, W. Brzeziński, *Polskie prawo administracyjne. Część ogólna*, Warszawa 1956, p. 361, points out that many old Austrian regulations were still in force in these countries at that time.

7 The Resolution of the Council of State and of the Council of Ministers of 14 December 1950 on considering and disposing of appeals, letters and complaints of people and press criticism, M.P. no. A-1 of 1951, item 1. The Executive Instruction issued by the Council of Ministers to this Resolution of 10 January 1951, M. P. no. A-2, item 16. Below, the term "complaints and grievances" shall be used for short, which is almost universally used in the literature and practice. Moreover, "complaints and grievances" are expressly mentioned in the Constitution of the Polish People's Republic, Article 73.

8 Article 5(2) and Article 73.

in strengthening the supervision of administration (covering the law, including internal self-imposed rules of administration and actual activities) by the population at large. It affected administrative proceedings as such by enabling (together with the legislation on people's councils) to set aside some decisions of departments. This could be done as a form of supervision by "horizontally" superior organs, i.e. council presidia, or by deactivating certain procedural institutions such as information and submission (so-called "imperfect" remedies) as well as referring a case to a higher instance.[9]

However, the procedure had certain, even serious shortcomings. For one, a major error lay at the inception of the procedure of complaints and grievances; it was not brought into line with the rules for administrative proceedings then in force. Actually, it was introduced as if the rules did not exist at all (this can be seen, as a matter of fact, in the very form of the relevant acts: resolutions and an instruction).[10] Hence, a bizarre and difficult situation arose in practice, namely a duality of proceedings (administrative proceedings in the strict sense, and "complaint" proceedings) and an unlimited right to file complaints and grievances with all organs (as a matter of fact not only state ones) regardless of their instance. The situation undermined the permanence of administrative decisions and thus lowered the reliability of legal transactions, leading to breaches of legality. Of course, the efficiency of administration suffered, too.

Moreover, the early 1950s witnessed extensive personnel changes in the civil service, related to the reform of people's councils (the foundation of the local organs of unitary State authority, the abolishment of the so-called general administration authorities and self-government authorities).[11] New civil servants, including also the personnel of first-tier local organs—council presidia—often were not familiar with

9 Cf. M. Zimmermann, op.cit., pp. 329, 381, 388, 394.

10 Cf. ibidem.

11 Act of 20 March 1950 on Local Organs of Unitary State Authority Journal of Laws, no. 14, item 130.

administrative proceedings or knew little about them. At the same time, there appeared (especially in practice) views questioning the usability or even the validity of the 1928 DPR, because of its provenance from a different political system. In these circumstances, provisions on administrative proceedings were often not applied and less complex (and hence more "available") "complaint" proceedings were settled for.

The raising of the status of administrative proceedings commenced in 1956–1957, with a new People's Council Act being enacted on 25 January 1958. Article 55 of this Act,[12] providing for the possibility, by way of supervision, of setting aside or reversing any decision made by a department head, stipulated unambiguously that "if, however, the decision made by a department head granted any right to an individually specified person(s), the presidium may set aside the decision by way of supervision only in cases provided for in administrative proceedings or separate statutes". There appeared suggestions to draft a new codification of administrative proceedings that would—besides the procedure of complaints and grievances—take into account other new institutions of the socialist State such as, in particular, the structure of people's council presidia and departments, founded on the principle of dual subordination, and supervision by public prosecutors. The new codification was also expected to ensure that social organisations could take part in proceedings, etc. A preliminary draft of the code was submitted by the Association of Polish Lawyers. In January 1958, the President of the Council of Ministers appointed a commission to draft provisions on administrative proceedings.[13] At almost the same time—and this is worth stressing—extensive work was begun on systematizing administrative legislation.[14]

12 Consolidated text: Journal of Laws no. 29 of 1963, item 172.

13 Disposition by the President of Council Ministers of 28 January 1958. For more information v. S. Rozmaryn, *O projekcie kodeksu postępowania administracyjnego*, "Państwo i Prawo" 1959, vol. 4, p. 629, who assigns the commission composition and course of work. The draft was presented by Prof. E. Iserzon and Prof. J. Starościak.

14 The Central Commission for the Systematisation of Administrative Legislation was appointed by Disposition no. 114 of the President of the Council of Ministers of 11 June 1958. Drafted by the Commission, the plan of its work was approved by the Resolution of

The new codification was underpinned by the conviction that "only honest bilateral cooperation between the authorities and citizens as well as citizens and the authorities is the best guarantee that proper social conditions will develop and socialist legality will thrive".[15]

The Code was very carefully drafted as result of over two years of work by the Commission.[16] The drafters could take advantage of the vast experience accumulated when the 1928 DPR was in force: older (prior to 1939, including the decisions of the Supreme Administrative Tribunal) and newer (especially after the procedure of complaints and grievances was introduced and the reform of local administration was carried out), the extensive Polish literature on the subject and comparative law information[17] such as new legislative solutions adopted by some socialist countries (Yugoslavia, Czechoslovakia, Hungary). A lot of valuable information was gathered as a result of a broad public discussion of the bill.[18] No inconsiderable contribution to the bill was made by the Sejm's Internal Affairs Committee, either.[19]

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the Council of Ministers no. 421 of 15 October 1959. For more information v. Statement by the Chairman of the Central Commission for the Systematisation of Administrative Legislation, *Rada Narodowa*, 1959, no. 45, p. 5.

15 From the speech by a deputy, M. Żurawski, delivering the report of the Internal Affairs Committee on the cabinet bill—Code of Administrative Procedure at the session of the Sejm on 14 June 1960. (Shorthand Report of the 46th session of the Sejm on 14 June 1960. Warszawa 1960, PRL Sejm, 2nd term, 7th session, p. 7, col. 1).

16 Just how very intensive the work of the Commission was can be seen from the fact that in a relatively short time for drafting a codification, eight draft bills were drawn up. Extensive information on the work of the Commission is given by S. Rozmaryn, *O projekcie kodeksu postępowania administracyjnego…*, op.cit., p. 629 ff. and W. Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*, Warszawa 1962, pp. 17 ff.

17 S. Rozmaryn says "Le c.p.a. a été préparé sur la base des vastes matériaux de droit comparé, entre autres français". S. Rozmaryn, *Principes généraux de la procedure administrative en Pologne*, "Deuxièmes Journées Juridiques Polono-Françaises" 1951.

18 The fifth draft of the bill was subjected to discussion after it was published in 1959. The wording of the bill amended after the discussion is the subject of S. Rozmaryn, *Projekt kodeksu postępowania administracyjnego — w nowej postaci*", "Państwo i Prawo" 1960, vol. 4–5, pp. 609 ff.

19 V. the quoted speech by the deputy-rapporteur M. Żurawski delivering the report of the Commission in the Sejm.

The code adopted by the Sejm on 14 June 1960 is—in the words of Franciszek Longchamps—"a work of mature political prudence and high legal culture". It undoubtedly ranks among the most important legislation defining the relations between state organs and citizens and their organisations (professional, self-government, cooperative and others). What is more, it paves the way for the requisite relations to take proper shape not only in the domain of law, but also politics (cf. certain general principles).

II

What then are the principal characteristics of the new codification and what is its role in the evolution of administrative proceedings in Poland?

1. The Code covers two separate proceedings: administrative proceedings in the strict sense and the so-called "complaint" proceedings.[20] The former aims at issuing a decision granting certain rights (e.g. a decision to allot a flat, industrial license, water permit) or imposing certain responsibilities (e.g. an order to demolish a house in imminent danger of collapse, a decision to recognise a natural object as a nature monument). In the course of proceedings, a party enjoys specific rights, as for instance the right to present evidence, inspect files and pursue remedies (appeals, complaints, etc.). These proceedings resemble judicial (civil) proceedings; they are sometimes called jurisdictional proceedings.[21] However, the purpose of the "complaint" proceedings[22] is not the issuing of a decision (albeit they may many a time lead to the reversal or

20 This term is not used in the Code, but is widely used in the relevant literature.

21 *V.* M. Zimmermann, Z *rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego* in: *Księga pamiątkowa ku czci prof. dr K. Stefki*, Wrocław 1967, pp. 433 ff.

22 It is well known that a complaint may be filed not only by every citizen, but also by a professional, self-government, cooperative and other organisation. As complaints are to be considered and investigated the press articles and notices and other items of news having the nature of a complaint that have been sent by editorial offices to the competent organ – CAP, Article 177.

setting aside of a decision); their purpose is rather to draw the attention of superior organs to the failure of inferior organs to carry out their tasks properly (breaches of law, neglect, procrastination, a negative attitude to the people who want to have their case heard, etc.), i.e. it is about initiating supervision. A competent body is obliged to investigate a complaint and give an answer to the complainant within a specified time limit. In certain cases, these two separate types of proceedings "meet", for instance when administrative proceedings are pending (e.g. for granting a license) and one of the parties takes advantage of the right enjoyed by every citizen to file a complaint. The Code, abolishing the former duality in such situations, stipulates that complaining about a decision is tantamount to filing an appeal. Thus, no two separate proceedings run concurrently: the "complaint" proceedings morph into administrative ones (a "transformation" of the complaint and complaint proceedings takes place). "Complaint" proceedings have thus become an institution supplementing administrative proceedings and not competing with them with respect to matters that are (or may be) settled by a decision. In the "complaint" proceedings" themselves, a rule has been laid down that complaints are to be filed with the competent bodies. Thereby a defect has been removed that caused a lot of trouble in the pre-Code times.

2. The Code regulates administrative proceedings not only before state administration bodies and bodies of state administration units, but also before the bodies of professional, self-government, cooperative organisations and other social organisations when by operation of law they are given the authority to deal with individual cases coming within the purview of state administration (e.g. the Bar Council admitting to the Bar or disbarring advocates and trainee-advocates). The organs of the named organisations are treated then on an equal footing with state administration organs.

In agreement with the principles of the political system of the socialist State, the Code provides for the possibility of admitting a social organisation, granted the status of a party, to participate in proceedings

involving another person "if such participation is justified by the constitutional objectives of the organisation, and the interest of the community calls for it" (Article 28); a social organisation, pursuing its constitutional objectives, takes on the capacity of a spokesman for the social interest (even a broader right of participation was granted to social organisations in the new civil-court proceedings).[23]

3. Another novelty in our administrative proceedings, the provision for the participation of a public prosecutor[24] that grants him/her (a) the right to address a motion to the competent organ of state administration to institute proceedings for the removal of non-conformance with the law (the public prosecutor may act in this case on his own initiative or follow up a complaint by the citizen who feels aggrieved), (b) the right to participate in any stage of administrative proceedings to ensure that the proceedings themselves and the decision reached are lawful; public prosecutors notify the body in question about their taking the place of a party in proceedings and since then they are their participant (i.e. their participation in proceedings does not depend, as is the case with a social organisation, on the will of an organ); (c) the right to file an opposition in the cases provided for in the Code (Articles 127, 137, 141) or elsewhere after proceedings end, that is, after a final decision is issued. Public prosecutors enjoy all the rights of a party to proceedings and, on top of that, they may pursue the extraordinary remedy of opposition. This extraordinary remedy is enjoyed by a public prosecutor not only in the same cases as it is by party: they are slightly privileged as well. The organ with which the opposition was filed has to consider it forthwith and determine if it is necessary to postpone a decision until the opposition is dealt with. The code has extended the general supervision by the public prosecutor"s office to cover partially decisions issued

23 Cf. CAP, Articles 3 and 61–63.

24 The participation of a public prosecutor in administrative proceedings—albeit in a much narrower scope—was already known earlier. Cf. Regulation by the General Public Prosecutor of 19 June 1957 based on the very general provisions of the Public Prosecutor's Office Act of 20 July 1950.

by the supreme authorities of State administration (approach procedure, Article 150).

The solutions adopted in the Code were not only taken over later by the new 1967 Public Prosecutor"s Office Act,[25] but also extended to other types of proceedings.[26]

4. One of the most characteristic traits of our new codification, and as a matter of fact of the codifications of some other socialist countries (Yugoslavia, Czechoslovakia),[27] is the setting out of the general principles of administrative proceedings. What is meant here is certain general (fundamental, central) rules of procedure considered as such by the legislator and set out in Chapter I of the Code (Articles 4–12).[28] When compared with the other codifications, the Polish legislator has worded the general principles in the most exhaustive manner.[29]

These are the following principles: legality (Articles 4 & 5; some authors additionally distinguish the principle of lawfulness), the administration bodies taking into account, on their own motion, the state and social interest and the reasonable interest of citizens (Article 4 & 5), searching for the objective truth (Article 5), active participation of the

25 Act of 14 April 1967 on PRL Public Prosecutor's Office, Journal of Laws, no. 13, item 55).

26 V. Article 44 ff. of the Act of 14 April 1967 on PRL Public Prosecutor's Office.

27 The Yugoslav codification of 1953 (consolidated text, 1965) and Czechoslovakian of 1960 (and later of 1967); quoted after J. Starościak, *Wprowadzenie do prawa administracyjnego europejskich państw socjalistycznych*, Warszawa 1968, p. 237. Whereas the Hungarian codification of 1957 took a different stance, v. J. Martonyi, *La protection du citoyen dans les procédures administratives*, Szeged 1968, p. 6, which says: *Les dispositions de la loi hongroise sur les règles générales de la procédure administrative reposent sur les principes généraux régissant toute codification socialiste de la procédure administrative. Sans être énumérés comme dans les codes de procédure administrative de la Pologne, de la Tchécoslovaquie et de la Yougoslavie, ces principes ressortissent plus ou moins directement soit des dispositions de la loi, ou de l'exposé des motifs qui l"accompagne.* V. p. 7 ff.

28 Articles 1–3, which were included in Chapter I, General Principles, do not lay down any fundamental rules of procedure but concern (together with some final provisions, in particular Article 194) only the scope of application of the Code. This drafting inaccuracy is a source of misunderstandings.

29 "While the first prize for the legal drafting of the general principles of administrative proceedings goes to the Yugoslav codification of 1953, the most exhaustive wording of the principles has been offered by the 1960 Polish codification of administrative law in its introductory provisions". J. Starościak, *Wprowadzenie do prawa administracyjnego…*, op.cit., p. 238.

parties in proceedings (Article 8), boosting the confidence of citizens in state organs (Article 6), providing legal aid to parties (Article 7), persuading parties (Article 9), quickness and simplicity (Article 10), conducting proceedings in writing (Article 11), and the permanence of final decisions (Article 12).[30] Some of these principles were known to the former administrative proceedings, with the Code modifying them to a higher or lesser degree and expressing them as a rule more forcefully (and, of course, isolating and giving them the status of general principles). A more forceful wording, for example, was given, to the principles of *audi et alteram partem* and permanence of final decisions (they were hedged with sanctions, too—Articles 127(1)(4) & 137(1)(3)); the impact of judicial proceedings can be easily discerned here. Today, a different political tenor is shared by the principle administrative bodies taking into account, on their own motion, the state and social interest and the reasonable interest of citizens, etc.[31] Instead of the orality of proceedings prevailing previously, conducting proceedings in writing is now the rule.

Some principles are a complete novelty and it is they that merit greater attention. Article 7 of the CAP states that "state administration

30 In the relevant literature, these principles are somewhat differently classified. Cf. S. Rozmaryn, *O zasadach ogólnych kodeksu postępowania administracyjnego*, "Państwo i Prawo" 1961, vol. 12, pp. 890 ff.; E. Iserzon in: *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*, eds E. Iserzon, J. Starościak, 3rd ed., Warszawa 1965, pp. 24 ff.; E. Iserzon, *Prawo administracyjne. Podstawowe instytucje*, Warszawa 1968, p. 213; W. Dawidowicz, *Ogólne postępowanie administracyjne.*…, pp. 101 ff., M. Zimmermann, *Institutions fondamentales du code de procedure administrative polonaise loi du 14 juin 1960*, "Études sur le droit polonais actuel", Paris–La Haye 1968, pp. 69 ff.

31 This principle is laid down in Article 4 ("State administration organs shall act pursuant to the law, being guided by the interest of working people and objectives related to the building of socialism") and Article 5 ("In the course of proceedings, state administrative organs shall guard people"s legality and shall take any necessary steps to establish facts in the case scrupulously and to dispose of it, having in mind the social interest and the reasonable interest of citizens"). S. Rozmaryn, who sees in Article 4 the principle of teleology, says that this principle "may never give a pretext to breach the law. The CAP does not sanction any exceptions to the principle of legality, nor does it permit any "deviations" from, or relaxations of, this principle in the name of teleology". S. Rozmaryn, *O zasadach ogólnych kodeksu postępowania administracyjnego.*…, op.cit., p. 891.

bodies, in the course of proceedings, shall take care that the parties are not harmed by their ignorance of the law and for this purpose the organs shall give the parties all necessary explanations and guidance". This principle, referred to above as the principle of giving legal aid to parties, departs significantly but favourably from the old legal maxim *ignorantia iuris nocet* that usually applies. A similar departure—albeit not so distinct—was made in the new Code of Civil Procedure several years later.[32] The principle of legal aid no doubt seeks to put a party on a par with the organ as far as possible.

The principle of persuasion makes state administration bodies explain to the parties "the legitimacy of the reasons that the organs are guided by when disposing of the case so that, as far as possible, they make the parties abide by the decision without the need to resort to coercion". Specifically, the principle of persuasion requires that decisions be justified as carefully and exhaustively as possible in respect of the law and facts, and that their expediency or even social necessity (as for instance with the so-called expropriation of a right, Article 141) be indicated.

Under the principle laid down in Article 6: "State administration bodies should conduct proceedings in such a way so as to boost the confidence of citizens in the organs of the State". Stefan Rozmaryn maintains that:

> The provision of Article 6 is actually the kingpin that holds together all the general principles of procedure. For this is the principle of the broadest scope and the greatest political impact. The Code makes the political assumption that the strength of the State and the efficiency of its operations turn on the confidence of citizens in the state authority. Given that

32 Cf. especially the CCP, Articles 5 and 212. For more information v. W. Siedlecki in the commentary to the code of civil procedure. W. Siedlecki, *Kodeks postępowania cywilnego. Komentarz*, Warszawa 1969, pp. 88, 384 ff. A different approach is found in employee claim actions: Article 460(1). V. also the decision of the Supreme Court of 20 January 1966 and comments by Z. Resich.

> it is the administration bodies that are the venue where the state authority meets the citizen in proceedings in a myriad of cases every day, their judicious operation vis-à-vis citizens may bring a great political advantage. Conversely, if the operation is not up to the mark (bureaucratic, repulsive, unfair, etc.), it may cause a lot of political damage. The above principle, therefore, is even broader than a mere warning against red tape.[33]

These comments—as a matter of fact by one of the Code drafters—hit the nail on the head. Specific proceedings before an administration body may take their correct formal course, i.e. in compliance with the law. If, however, they take place in an atmosphere that is unfavourable (or impolite) for a party, their social impact will be negative.[34]

All the principles listed above are, in agreement with the will of the legislator, general and fundamental to the entire administrative proceedings. Their catalogue, again at the legislator's behest, is closed. However, the juristic literature records an attempt to extract "fundamental principles" and "auxiliary principles" from the general principles catalogued in the Code and from its further provisions. Such an attempt was made by J. Starościak in the well-known handbook of administrative law.[35] He believes that "the general principles laid down in the introductory provisions of the CAP may not be identified with the full list of the CAP's fundamental principles".[36] It is quite obvious that the road to juristic classifications is always wide open and that it is arguable whether the catalogue of the fundamental principles of administrative proceed-

33 S. Rozmaryn, *O zasadach ogólnych kodeksu postępowania administracyjnego*…, op.cit., p. 903.

34 Politeness in dealing with cases is also de rigueur pursuant to the Act of 17 February 1922 on State Civil Service, Journal of Laws no. 11 of 1949, item 72; Article 25, and our latest official practice: the Act of 15 July 1968 on People's Council Officials, Journal of Laws no. 25, item 164; Article 5, in particular subparagraphs 8 and 14.

35 J. Starościak, *Prawo administracyjne*, Warszawa 1969, pp. 261 ff. The same attempt, as a matter of fact, had been made in an earlier handbook published together with E. Iserzon. Due to the nature of this article, it is hardly possible to offer any longer polemic, hence, only a few comments shall be given.

36 Ibidem, p. 263.

ings, contained in Articles 4–12, could be supplemented with others deduced from the detailed provisions of the CAP. One such additional fundamental principle could be that of two-instance proceedings (which, by the way, Starościak counts among auxiliary principles). However, not only the will of the legislator argues in favour of considering all the general principles laid down in Articles 4–12 as fundamental – so does the analysis of their legal content. For instance, the principle of permanence of final decisions, fundamental, after all, to any (not only administrative) trial, can hardly be considered auxiliary.[37]

All the CAP general principles are legal norms, and not mere declarations or guidelines, which is emphasized strongly in the relevant literature. Taking these principles to be legal norms gives rise to a number of inconsistencies. In particular, the breach of a principle must be treated as any breach of the law, with all its consequences. Proving such a breach is relatively simple when a general principle has been expressly implemented by relevant detailed provisions (as is the case, for instance, with the principles of objective truth, quickness and simplicity, the active participation of parties, and others). Difficulties may arise when it is alleged that the principle which has been breached is rather inconcrete, such as, in particular, the principle of enhancing citizens' trust in state organs. It would not be an easy task for a party to prove that, for instance, the impolite and unkind attitude taken by an official in a state administration body has adversely affected—despite adhering to any and all procedures—the manner in which the case was dealt with. This is where judicial decisions could greatly help: in the absence of general administrative judiciary the task falls to supreme state administration bodies and the Council of Ministers Office.

In this context, a significant question arises. Is the applicability of the general provisions limited to matters regulated by the CAP? Pointing to separate administrative proceedings ("excluded proceedings" in the

37 Ibidem, p. 265.

CAP, Article 194, for instance, tax, disciplinary and other proceedings), Rozmaryn had already claimed long ago that

> although administrative proceedings in these matters are not regulated by the CAP, […] the general principles may and should be by analogy applied in an auxiliary capacity to the "excluded" matters. This is especially true for cases where the excluded proceedings lack the proper regulation of specific matters. Moreover, the CAP general principles may serve as interpretation guidelines in the excluded matters, too.[38]

Longchamps went even further, by claiming that:

> Since we do not have general provisions of administrative law (as there are, for instance, in civil law), it can be claimed that Chapter I contains general principles whose significance is not necessarily limited to purely procedural matters. Actually, they may be more broadly applied to our today"s administrative law, specifically, to the interpretation and assessment of particular legal situations.[39]

The general principles must of course be applied first and foremost wherever statutes (or other normative acts) expressly provide for the application of the CAP as appropriate. For example, Article 17 of the Act of 17 June 1966 on Executive Proceedings[40] states: "Unless the provisions hereof provide otherwise, the provisions of the Code of Administrative Proceedings shall apply as appropriate to executive proceedings".

At this juncture, note must be taken of a very interesting case of the impact of the CAP general principles on our recent administrative legislation, and in the "non-procedural" sphere, for that matter. The Act of 15 July 1968 on People"s Council Officials sets out their major respon-

38 A different stance is taken by J. Jendrośka, *Zakres obowiązywania k.p.a. w postępowaniach szczególnych*, "GiAT" 1967, no. 2, p. 42.

39 F. Longchamps, *Problem trwałości decyzji administracyjnej…*, p. 911.

40 Journal of Laws, no. 24, item 151.

sibilities, clearly following the model of the CAP general principles. Under Article 5 of the Act:

> […] official is obliged to: […] (8) act thoroughly, quickly, impartially, and in a manner boosting the confidence of citizens in the organs of people"s power, making use of possibly simple means to dispose of the case properly,[41] (9) give necessary help with the settling of cases to citizens,[42] (10) take care that the citizen is not harmed by his ignorance of the law, provide necessary information and explain the principal objectives and policies of people"s power […].[43]

(5) The CAP administrative proceedings are another step in the direction of bringing this type of proceedings closer to a court trial. As a matter of fact, this follows the general line of evolution of administrative proceedings in many countries (and not only those with old codification traditions).[44] The degree of convergence is *toute proportion gardée* rather high. The reason why administrative proceedings were fashioned in the CAP in this manner was the desire to strengthen legality. The desire was particularly strong after certain negative experience related to the protection of the rights and interests of citizens prior to 1956. In addition, it was no doubt strengthened by the absence of a comprehensive judicial review of the administration.

41 Cf. CAP, Articles 6 and 10.

42 The formulation of the duty to give help is even broader here, as it seems, than in CAP, Article 7.

43 Cf. CAP, Article 7, and Article 8(4) of the Act of 25 January 1958 on People's Councils, Journal of Laws no. 29/1963, item 172.

44 Possibly the most characteristic of this development line is the evolution of administrative proceedings in England and the United States of America (Federal Administrative Procedure Act of 11 June 1946) and in Scandinavian countries. For more information v. J. S. Langrod, *Uwagi o kodyfikacji postępowania administracyjnego w niektórych państwach*, "Państwo i Prawo" 1959, vol. 5–6, pp. 908 ff.; *Moc obowiązująca aktu administracyjnego i domniemanie jego ważności*, "RPEiS" 1965, vol. 1, pp. 51 ff. and E. Iserzon, *Prawo administracyjne…*, p. 210.

The problem of the considerable "judicialization" of administrative proceedings was raised in discussions on the draft code by pointing to its obvious advantages, but certain shortcomings of this option were not ignored either. The shortcomings are in fact slight: the introduction of certain new trial institutions or the expansion of existing ones entails sometimes a greater formalisation of proceedings (still, however, incomparably lower than that of a court trial). However, Dawidowicz was right to observe on a different occasion:

> The more developed procedural provisions in a given system of administrative law are, the less leeway and randomness there is in the operation of individual state administration organs or their officials, the more efficient administration is and the better protection is ensured to the rights and interests of citizens.[45]

Better protection of the rights and interests of citizens in proceedings is ensured today by the broader definition of the concept of a party (which provides grounds for adopting the "subjective version" of this concept, similar to the concept of a party in a civil action)[46], and by the enhancement of impartiality (significant expansion of provisions on the recusation of officials; entirely new provisions on a challenge to an organ), the granting of broader rights to a party in the course of explanatory proceedings (e.g. when it comes to the disclosure of the case file), and especially in the course of examining evidence (the right to participate actively in the proving of allegations; the adoption of the rule that a fact may be considered proven, provided that a party has had an opportunity to comment on the evidence introduced), new

45 The role of codification of administrative procedure. Theses mimeographed for the symposium on administrative procedure organised by the Legal Studies Committee, Polish Academy of Sciences, Warszawa, 4–6 September 1961. *See* also Janowicz's report from this symposium, "RPEiS" 1961, vol. 4, p. 329.

46 The concept of a party is possibly the most controversial issue in our administrative proceedings. A review of the literature on this matter is given in M. Zimmermann, Z *rozważań nad postępowaniem jurysdykcyjnym.*…, op.cit., pp. 434 ff.

provisions on interlocutory decisions and complaints, a favourable amendment of provisions on instituting proceedings de novo (obligatory institution de novo, adding to the catalogue of reasons for instituting proceedings de novo), etc. All these novelties are modelled to a lesser or greater degree on a court trial.[47]

A complete comparison of a court trial and administrative proceedings is hardly possible, for obvious reasons, but the "crucial idea of administrative proceedings—the active participation of a party in the proceedings, specifically, its cooperation in the making of the findings of fact and law in a case—is consistent with the key idea of a court trial" (Iserzon).[48] After all, the goals and tasks of the judiciary and administration do differ, as do, consequently, their structure and *modi operandi*. For example, administration bodies are as a rule connected with one another by the relationship of hierarchy or supervision, which entails the possibility, which is not available to the judiciary, of setting aside a decision as a form of supervision. It is characteristic of administration—unlike the judiciary—to be able to institute proceedings the motion of an organ. Finally, the position of an organ in administrative proceedings is very different and peculiar: it is also a judge "in its own cause".[49] Therefore, it cannot be expected that administrative proceedings become like a court trial in almost all aspects. Nonetheless, the point is, and the Code is clear about this, to ensure to the citizen or other party due process of law and consequently—if

47 The CAP has not acquiesced to the demands that administrative proceedings "resemble as much as possible" a court trial. Hence, the proposals to "legislate a formal interlocutory decision of instituting proceedings or a formal act of presenting collected evidence to a party prior to the issuing of a decision" etc. have been rejected; S. Rozmaryn, *O projekcie kodeksu postępowania administracyjnego…*, p. 638.

48 E. Iserzon, *Prawo administracyjne…*, p. 209.

49 Cf. E. Iserzon, *Prawo administracyjne…*, p. 209; F. Longchamps, *O pojęciu stosunku procesowego między organem państwa a jednostką, Księga pamiątkowa dla uczczenia pracy naukowej K. Przybyłowskiego*, Kraków- Warszawa 1964; J. Filipek, *Stosunek administracyjno-prawny*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace prawnicze" 1964, vol. 34, p. 155 ff.; J. Starościak, *Prawo administracyjne*, op.cit., p. 17.

this is at all possible—to make the relationship between the organ and party one of "equality of arms".[50]

A fact which deserves separate mention is that Poland ranks among the countries that have for a long time attached much importance to administrative proceedings (even when administrative judiciary existed). There were no hesitations in calling them a trial;[51] this stance finds even more support under the rule of the CAP. To this very day, in some legal systems (e.g. Italy, West Germany), as a rule the term "administrative trial" is avoided when referring to proceedings that take place before administration bodies. It is believed that a "trial" takes place only before a court (*processo*, *Prozess*), while only "proceedings" take place before administrative bodies (*procedimento amministrativo*, *Verwaltungsverfahren*).[52]

50 E. Iserzon devotes much attention to "equality of arms" in administrative proceedings. E. Iserzon, *Prawo administracyjne…*, op.cit., pp. 230 ff.

51 As early as in 1947, J.S. Langrod wrote in the foreword to the quoted commentary by J. Pokrzywnicki, *Postępowanie administracyjne*, Warszawa 1948, p. V: "To stop treating administrative proceedings as some kit of purely technical instruments, left basically to the good will of administrators, and instead to probe the logical consequences of conceiving of them as a "trial relation", i.e. without any logical gap between them and a court trial (e.g. before an administrative, civil or criminal court, etc.), is of the utmost importance. When in 1911, Fierich juxtaposed "administrative road" with the "road of law" (court trial), he approached the question in a manner that today seems completely antiquated and downright wrong. When today, in turn, reasonable suggestions emerge to treat the entire trial as a single whole, as a family, so to speak—admittedly branching out and diversified, but a whole nonetheless—we are exposed to a set of concepts that may shed some new light onto jurisprudential systematics and indirectly into legal life as well. V. also J.S. Langrod, *Uwagi o kodyfikacji postępowania administracyjnego w niektórych państwach.…*, pp. 893 ff.

52 F. Becker writes: "Wie ein Teil der spanischen, so versucht auch die italienische Verwaltungsrechtsliteratur, einen Wesen unterschied zwischen dem Verwaltungsverfahren (procedimento amministrativo) und dem gerichtlichen Prozess (processo) zu finden. Dieser besteht nach der Lehre Benvenutis darin, dass das Verwaltungsverfahren der Interessenbefriedigung des Urhebers des Verwaltungsaktes und nicht der Parteien dient. Aus dieser Begriffsbestimmung folge, dass das Beschwerde- und das Disziplinarverfahren Prozessdisziplinen und nicht ein "mere procedimento" seien, da in ihnen das Interesse des Beschwerdeführers bzw. des disziplinarisch verfolgten Beamten grösser sei als das der Verwaltung". F. Becker, *Das allgemeine Verwaltungsverfahren in Theorie und Gesetzgebung — Eine rechtsvergleichende Untersuchung*, Stuttgart–Bruxelles, 1960, p. 99. As far as the Federal Republic of Germany is concerned v. F. Becker, op.cit., pp. 130 ff. and Z. Janowicz,

III

The 1960 codification has been highly commended both at home and abroad.[53] What attracts praise above all is its, advantages such as the skilful inclusion in the system of administrative proceedings (or even the organic incorporation into the system) of three new legal institutions: "complaint" proceedings, the participation of a public prosecutor and the participation of a social organisation that has been granted the status of a party. Other advantages deserving praise include the formulation (and expansion when compared to cognate codifications) of general principles and ensuring due process of law to parties, which of course entails a more detailed definition of the rights and duties of an organ in proceedings than before.

Equally indisputable, as shown by already nine years of practice, is the enormous significance of the Code for the development of proper relationships between the state administration and citizens, social organisations and state organisational units. The Code has helped tremendously to develop the proper "working style" of administration bodies and improve the "administration culture". These highest accolades are not diminished—in the belief of the present author—by various and quite frequent shortcomings, and mistakes in the application of the Code.[54] These are in fact rather rare and stem from the provisions of the Code

Tendencje rozwojowe ustroju administracyjnego Niemieckiej Republiki Federalnej, Poznań 1969, pp. 160 ff.

53 For foreign opinions on the Code v. A. S. Angełow, *Administrativnoto proizwodstwo w Czechosłowakia*, *Ungaria i Polsza*, Sofia 1962, p. 96; F. Becker, op. cit., who discusses a CAP draft; W. Gellhorn, *Protecting citizens against administrators in Poland*, "Revue internationale des sciences administratives" 1964, no. 7, G. Langrod, *La codification de la procédure administrative non contentieuse en Pologne*, "La Revue administrative", 1960, no. 6; W. Meder, *Die Verwaltungsverfahrensordnung der Volksrepublik Polen*, "Verwaltungsarchiv" 1961, Heft 4.

54 They were spoken of in the course of a very interesting discussion held under the title *The CAP in practice*, "GiAT" 1965, no. 5, pp. 4 ff; Wendel, Executive Director of the Office of Council of Ministers said that CAP detailed provisions "are applied with lesser or greater accuracy, but the "spirit of CAP" enshrined in its general principles, still "does not hover" freely over our offices" (p. 17). Since then, however, the application of CAP has witnessed some changes for the better; this a result of improving professional skills of administration officials.

themselves (there is still a shortage of trained officials, substantive administrative legislation has not been fully systematised yet, and there is an excess of "departmental legislation", etc.).

Any new codification precipitates a wave of judicial decisions and publications, which in the case of the 1960 codification of administrative procedure deserves a special mention. Already *in statu nascendi*, the Code provoked a great surge in pertinent literature and the general public's increased interest in administrative procedure. The broad, lively and very fruitful public discussion is a convincing proof of this. The literature on the Code numbers now several hundred publications,[55] written by academics, public prosecutors[56] and quite a few administration practitioners.[57] Of particular interest are the increasingly accessible decisions of supreme state administration bodies, which stimulate the relevant literature and vice versa—draw a lot from it.

As in any statute, in the Code there are some expressions that are insufficiently comprehensive and clear. Hence, a number of ambiguous and contentious issues have emerged. Some reach back to the preparatory work on the Code; one such issue is the concept of a party, which–as is well known–is a compromise between the diverse tendencies that clashed within the drafting commission. A number of problems are caused by the rather unfortunate wording of some causes of invalidity (Article 137(1)(1 & 2). The greatest difficulties, actually quite formidable ones, are posed by the interpretation of the scope of application of the provisions on administrative procedure. All the legislator has said is that the Code "regulates proceedings in individual cases coming within the purview of state administration" (Article 1). It is traditionally believed that the provisions on administrative proce-

55 They include a systematic study (W. Dawidowicz), commentary (E. Iserzon and J. Starościak), monograph (J. Borkowski, *Zmiana i uchylenie ostatecznych decyzji administracyjnych*, Warszawa 1967), collections of decisions, studies and articles (apart from those quoted above, works by L. Bar, T. Bigo, W. Brzeziński, J. Jendrośka, J. Litwin, J. Służewski) and many other minor but nonetheless valuable contributions.

56 J. Świątkiewicz, H. Starczewski and others.

57 B. Bogomilski, L. Jastrzębski, Z. Młyńczyk, E. Stobiecki, S. Surowiec and others.

dure only apply to so-called external matters, i.e. when state administration bodies (and the bodies of state organisational units and social organisations, Article 2) perform imperious acts with respect to citizens, legal persons, social organisations and state organisational units located outside these organs; examples include a change of name and surname or a grant of a water permit to a state enterprise, etc. What does not fall within the application scope of the provisions is all kinds of internal matters such as ones related to the operation of state enterprises, service relations and others.

Almost from the very moment the Code came into force, there has been a readily observable tendency to interpret Article 1 broadly. An interesting example of this tendency is a desire to extend the operation of the Code, albeit in part only, to the matters related to the nominated employees of state administration (i.e. persons bound by a service relation, former "officials"). Such tendencies, although they could be charged with contaminating the "purity of theoretic construction", have strong arguments in their favour drawn from life. One such argument is no doubt a desire to extend better legal protection to this category of employees. After all, employees on an employment contract may take advantage of the protection provided by arbitration commissions and, additionally, litigation is open to them, while former officials could avail themselves—if only in part—of the protection provided by administrative courts. Thus, it would be hardly possible to question the position taken on this matter by the CAP Advisory Committee at the Office of Council of Ministers in its well-known opinion.[58] This opinion could—it seems—serve as grounds for issuing suitable internal regulations adapted to such matters. Anyway, it testifies to the great attractive power of the Code.

58 Opinion no. 12 of the CAP Advisory Committee of 29 April 1963 text with a commentary by L. Jastrzębski, *Funkcjonowanie administracji w świetle orzecznictwa*, eds. J. Łętowski, J. Starościak, Warszawa 1967, pp. 150 ff.

An example of other, possibly equally far-reaching tendencies, involves views suggesting the possibility of applying the Code to matters arising in relations between state enterprises and their superior units.[59]

In the entire "Code" period—if it can be called thus—beginning with the commencement of the work on the bill, there were demands that a judicial review of administration should be set up.[60] It is observed that the administrative judiciary could play a role in making administration body decisions uniform, as the Supreme Court does in respect of common courts of law. Moreover the ingenious activity of administrative courts postpones for years the need to amend the Code. Any amendment (at least one made too soon) is rather inadvisable, at least in the case of fundamental legislation, as it could warp the leading lines of legislation. Last but not least, such legislation should be given an opportunity to take root in the popular mind. It is worth remembering here that the judicial review of administration—taking various forms and scope—has become increasingly popular in socialist countries (USSR, Bulgaria, Hungary, Romania and—in a fully-fledged manner—Yugoslavia).[61]

Furthermore, demands have been made on many occasions to set up a commission or some other supra-departmental organ, e.g. at the President of the Council of Minsters or the Office of Council of Ministers, that would take care of the uniformity of administrative decisions. The foundation of such an organ encounters, however, certain difficulties, because of the constitutional powers of the Council of State (Constitu-

59 V. L. Bar, *Przedsiębiorstwo państwowe wobec decyzji administracyjnych*, "PUG" 1966, no. 8; E. Iserzon, *Przedsiębiorstwo państwowe jako strona w postępowaniu administracyjnym*, "Państwo i Prawo" 1967, vol. 2; W. Dawidowicz, *Kierowanie przedsiębiorstwami państwowymi a kodeks postępowania administracyjnego*, "Państwo i Prawo" 1968, vol. 1.

60 Such demands are almost universally made by administrative jurists. Among the representatives of other branches of law, such a demand was made by S. Rozmaryn (cf. the quoted report of a symposium on CAP-related issues in 1961, p. 334 and A. Burda, A. Burda, *Demokracja i praworządność*, Wrocław 1965, p. 228.

61 For more information v. J. Starościak, *Prawo administracyjne*, op.cit., pp. 387 ff.; J, Starościak, *Wprowadzenie do prawa administracyjnego…*, op.cit., pp. 282 ff., 351; N. Saliszczewa, *Administratiwnyj process w SSSR*, Moskwa 1964; I. Vintu, *Rola sądów powszechnych w dochodzeniu roszczeń spowodowanych bezprawnymi aktami administracyjnymi w SR Rumunii*, "Państwo i Prawo" 1968, vol. 2, J. Martonyi, op.cit.

tion, Article 25(1)(3)).[62] So far, this role has been fulfilled to an extent by the CAP Advisory Committee at the Office of Council of Ministers.[63] In the current situation where "ministries and central offices are practically the ultimate interpreters of statutes"[64], it is crucial to make their decisions (in particular ones involving precedents) as widely available as possible by publishing them in juristic journals or as freestanding publications. Much of this has already been done in recent years. Special attention is deserved by the publication of collections of decisions with glosses. Pride of place is taken by *Orzecznictwo naczelnych organów administracji państwowej* published by the General Public Prosecutor's Office in 1964[65], followed by two volumes (the third is forthcoming) of *Funkcjonowanie administracji w świetle orzecznictwa* published by the Institute of Legal Studies, Polish Academy of Sciences;[66] 1969 saw the publication of *Orzecznictwo wodno-prawne* by the Central Water Management Board.[67] Crucial for ensuring the uniformity of decisions, the streamlining of so-called departmental regulations has embarked on its second stage, commenced by the Disposition of the President of the Council of Ministers of 1968.[68] Reducing the number of all kinds of instructions, circulars, etc. and imposing limits on their "binding force" will certainly have a favourable effect on the administrative decisions of local organs. It must not be forgotten either that advantage

62 V.J. Litwin, *Drogi ujednolicenia wykładni prawa administracyjnego*, "Państwo i Prawo" 1965, vol. 10, pp. 478 ff.

63 Cf. the discussion "CAP in practice" quoted earlier, especially comments by A. Wendel, p. 177 ff.

64 J. Starościak, *Prawo administracyjne*, op.cit., p. 371; J. Litwin, *Drogi ujednolicenia wykładni prawa…*, op. cit., p. 479.

65 The second volume is edited by H. Starczewski, J. Świątkiewicz, M. Starczewska, B. Czapski and S. Rakowski, Warszawa 1968.

66 Edited by J. Starościak, J. Łętowski in 1967 and 1969.

67 R. Paczuski, I. Centlewska & E. Górski, eds., *Special supplement to Biuletyn Informacyjny, no. 10–11*, Bydgoszcz 1969; it gives only a collection of decisions.

68 Disposition no. 14 of the President of the Council of Ministers of 30 January 1968 on the systematisation of departmental regulations and limitation of their number, "GiAT" 1968, no. 4 p. 5 ff. and S. Rozmaryn, *Drugi etap prac*, "GiAT" 1968, no. 4, p. 7 ff.

may be taken of the broader powers of public prosecutor's offices conferred upon them by the Act of 14 April 1967.

Finally, matters are improved by the ever-greater professionalism of our administration officials. Almost at the same time as the Code came into force, administration officials began to be trained on administrative courses of study (first vocational, later M.A. programmes) and finally on post-graduate courses.[69] The curricula of such courses of study, it should be noted, give prominence to lectures on administrative procedure.

Literature

Angełow A. S., *Administratiwnoto proizwodstwo w Czechosłowakia, Ungaria i Polsza*, Sofia 1962.

Bar L., *Przedsiębiorstwo państwowe wobec decyzji administracyjnych*, "PUG" 1966.

Becker F., *Das allgemeine Verwaltungsverfahren in Theorie und Gesetzgebung — Eine rechtsvergleichende Untersuchung*, Stuttgart–Bruxelles, 1960.

Borkowski J., *Zmiana i uchylenie ostatecznych decyzji administracyjnych*, Warszawa 1967.

Burda A., *Demokracja i praworządność*, Wrocław 1965.

Dawidowicz W., *Kierowanie przedsiębiorstwami państwowymi a kodeks postępowania administracyjnego*, "Państwo i Prawo" 1968, vol. 1.

Filipek J., *Stosunek administracyjno-prawny*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace prawnicze" 1964, vol. 34.

Gellhorn W., *Protecting citizens against administrators in Poland*, "Revue internationale des sciences administratives" 1964, no. 7,

Iserzon E., *Prawo administracyjne. Podstawowe instytucje*, Warszawa 1968.

69 Post-graduate Administration Studies are designed for people occupying as a rule a managerial position in administration and holding a degree in other field than law.

Iserzon E., *Przedsiębiorstwo państwowe jako strona w postępowaniu administracyjnym*, "Państwo i Prawo" 1967, vol. 2.

Iserzon E., Starościak J. eds, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*, 3rd ed., Warszawa 1965.

Janowicz Z., *Tendencje rozwojowe ustroju administracyjnego Niemieckiej Republiki Federalnej*, Poznań 1969.

Jaroszyński M., Zimmermann M., Brzeziński W., *Polskie prawo administracyjne. Część ogólna*, Warszawa 1956.

Jastrzębski L., *Funkcjonowanie administracji w świetle orzecznictwa*, eds J. Łętowski, J. Starościak, Warszawa 1967.

Langrod G., *La codification de la procédure administrative non contentieuse en Pologne*, "La Revue administrative" 1960, no. 6.

Langrod J. S., *Uwagi o kodyfikacji postępowania administracyjnego w niektórych państwach*, "Państwo i Prawo" 1959, vol. 5–6.

Litwin J., *Bibliografia KPA*, "GiAT" 1966, no. 4–10.

Litwin J., *Drogi ujednolicenia wykładni prawa administracyjnego*, "Państwo i Prawo" 1965, vol. 10.

Longchamps F., *O pojęciu stosunku procesowego między organem państwa a jednostką, Księga pamiątkowa dla uczczenia pracy naukowej K. Przybyłowskiego*, Kraków–Warszawa 1964.

Meder W., *Die Verwaltungsverfahrensordnung der Volksrepublik Polen*, "Verwaltungsarchiv" 1961.

Paczuski R., Centlewska I., Górski E. eds, *Special supplement to Biuletyn Informacyjny, no. 10–11*, Bydgoszcz 1969.

Rozmaryn S., *O projekcie kodeksu postępowania administracyjnego*, "Państwo i Prawo" 1959, vol. 4.

Rozmaryn S., *O zasadach ogólnych kodeksu postępowania administracyjnego*, "Państwo i Prawo" 1961, vol. 12.

Rozmaryn S., *Principes généraux de la procedure administrative en Pologne*, "Deuxièmes Journées Juridiques Polono-Françaises" 1951.

Rozmaryn S., *Projekt kodeksu postępowania administracyjnego – w nowej postaci*", "Państwo i Prawo" 1960, vol. 4–5.

Saliszczewa N., *Administratiwnyj process w SSSR*, Moskwa 1964

Siedlecki W., *Kodeks postępowania cywilnego. Komentarz*, Warszawa 1969. J. Jendrośka, *Zakres obowiązywania k.p.a. w postępowaniach szczególnych*, "GiAT"1967, no. 2.

Starościak J., *Prawo administracyjne*, Warszawa 1965.

Starościak J., *Wprowadzenie do prawa administracyjnego europejskich państw socjalistycznych*, Warszawa 1968.

Vintu I., *Rola sądów powszechnych w dochodzeniu roszczeń spowodowanych bezprawnymi aktami administracyjnymi w SR Rumunii*, "Państwo i Prawo" 1968.

Zimmermann M., Z *rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego*, in: *Księga pamiątkowa ku czci prof. dr K. Stefki*, Wrocław 1967.

Teresa Rabska

Public Administration Activities in the Light of the Contemporary Conception of Public Business Law[1]

Reflections on Contemporary Dilemmas in Public Business Law

The conception of public business law in the Polish legal system has been shaped through an evolutionary process. Its origins can be found in the industrial law[2] that became separate under administrative law and in pressing pre-war legal issues concerning state and local self-government enterprises (public enterprises).[3] These issues were driven by spe-

1 Translated from: T. Rabska, *Działania administracji publicznej w świetle współczesnej koncepcji publicznego prawa gospodarczego*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, B. Popowska, K. Kokocińska, Poznań 2009, pp. 15–34 by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 Eg. T. Bigo, *Prawo administracyjne polskie – prawo przemysłowe*, Lwów 1939; T. Bigo, *Ewolucja prawa przemysłowego*, "Państwo i Prawo" 1947, no. 6–7; M. Zimmermann, *Nauka administracji i polskie prawo administracyjne, Part II*, Poznań 1949, in particular Chapter II *Administracja przemysłu i handlu*, p. 15 ff. Earlier: J. Buzek, *Administracja gospodarstwa społecznego. Wykłady z zakresu nauki administracji i austriackiego prawa administracyjnego*, Lwów-Warszawa 1913; numerous articles from scientific journals from the pre-war period. In *Reglamentacja prawna i administracyjna stosunków gospodarczych*, "Ruch Prawniczy, Socjologiczny i Ekonomiczny" 1922, facsim. 4, L. Caro wrote: "The state cannot be limited to the tasks of the night guard; of course, it should include all those areas in which the interest of the individual is contrary to the general interest, and where the action of the individual does not pay off, and which, for the reasons above, is not to be left out." The leading position in Western legal science was taken by the book: E. R. Huber, *Wirtschaftsverwaltungsrecht*, vol. 1–2, Tubingen 1953/1954.

3 L. W. Biegeleisen, *Teoria i polityka przedsiębiorstw publicznych samorządu terytorialnego i państwa*, Warszawa 1931; B. Helczyński, *Komercjalizacja przedsiębiorstw państwowych na tle polskich przepisów prawnych*, Warszawa 1929.

cific economic needs and hence it became necessary for the distinction to be reflected in law. At the same time, this process also led to the construction of a new basis for the law.

In Poland, further legal development of this legal sphere was brought to a sudden halt due to the wartime occupation, and as a result of total reconstruction of the socio-economic system after the war, which affected the nature of this branch of law. Economic relations, however, always required that special regulations be subordinate to the changes taking place, taking into account both political assumptions and the economic system.

As a special object of reference, the economy, with all its determinants, has influenced and decisively influences the choice of legal mechanisms specific to this particular field, which deviate from the regulation of other social relations. This is reflected in the selection of different legal institutions, in the structures of organization, and the emergence of new forms of action (legal acts) of state organs. The basis for these are: changing constitutional norms[4], ordinary statutes[5], and executive acts, which in their entirety determine the legal character of not only individual acts (various types of decisions, contracts, agreements, etc.), but also general ones, made by the public administration within the framework of this administration, in contacts with economic entities, as well as in cooperation with non-governmental and social organizations.

As a consequence, public business law, which undoubtedly reflects the various changes taking place, had to undergo frequent changes in

4 It is quite characteristic that neither the Constitution of 1921 nor of 1935 contained any provisions defining the economic system of Poland. The Constitution of the Polish People's Republic (PRL), in rejecting the prevailing economic system, introduced a centrally managed state economy (Article 7 ff.) with all of the negative consequences this entailed. V. *Konstytucje Rzeczypospolitej*, ed. J. Boć, Wrocław 1998. In 1989, the rejection of the system formally introduced in 1952 required new constitutional regulation.

5 Only in terms of the sphere of undertaking business activities, see further changes to the legal basis: the President's ordinance of June 7 1927 on Industry Law, the Act of December 23 1988 on Economic Activity, the Act of November 19 1999 – The Law on Business Activity, the Act of July 2 2004 on the Freedom of Economic Activity as amended, and further draft changes.

its content and scope. At the same time—within the system of law—the borders and mutual relations between particular branches of law in the regulation of economic relations are outlined in different ways. In particular, this applies to the relationship between public law and private law.[6] The overlapping of these legal norms in economic matters is also characteristic.[7] Public law itself is not uniform in its structure, in the sense that it includes both systemic legal norms, norms of substantive business law, as well as specific procedural norms.

All these dilemmas affect the nature of public business law and determine scholarly interests, the scope and methods of analyzing phenomena, and research methods. It is also necessary to refer to the causes of legal solutions, which in turn requires reference to non-legal sciences.

From the historical perspective, one can treat theoretical discussions on public business law as a separate branch of the current system of the law in force.[8] The specific stages of shaping its foundations were influenced above all by further fundamental changes related to the reconstruction of the country's political and economic system[9]. However, analysis of such changes lies beyond the scope of this study.

Currently, in the system of law in force, the position of public business law is well-established, as is evident from its place in legal science and university didactics, and from forms of institutionalization (inde-

6 The division of law into public and private spheres was only restored in legal science after the transformation of the political system in 1989.

7 V. in particular M. Safjan who, raising the problem of the interpenetration of public and private law regulations, states that in a number of areas "private and public law elements are very strongly intertwined". V. *System prawa prywatnego. Prawo cywilne. Część Ogólna*, ed. M. Safjan, Warszawa 2007, p. 49.

8 From the extensive literature of the past period see in particular discussion in: *Co jest prawo gospodarcze*, "Ruch Prawniczy, Socjologiczny i Ekonomiczny" 1995.

9 From the formal-legal point of view, the limit of the new system is set by the Constitutional Amendment Act of 29 December 1989 (JL RP 1989, No. 75, item 444) and its Article 6: "The Republic of Poland guarantees the freedom of economic activity regardless of the form of ownership; restriction of this freedom can only take place in the act".

pendent chairs or departments).[10] This is clearly confirmed by the First Congress of the Chairs of Public Business Law.[11] It is understandable, however, that the constant development of this branch of law, encompassing the ever-expanding range of matters subject to legal regulation, also poses new challenges, especially to legal science.

Nowadays, it is paradoxical that (apparently) contradictory aspirations exist, and yet at the same time there is need to make proper connections between them. Thus, the postulate assigned to law since the systemic transformation has been deregulation,[12] and the economy is increasingly subject to economic principles. On the other hand, it is obligation of the state to introduce new laws and control their implementation in the name of the common good. At the same time, it is also expected that the interests of individuals be protected, and these may be at odds with the interests of the collective. Therefore, it is necessary to enact new regulations and special forms of action for their protection. It follows from this that recourse to general guarantees of individual human rights may prove insufficient in the economic world.[13]

Another contemporary challenge is achieving harmonization with European Community law. Along with the changes in the legal system caused by fundamental systemic restructuring (the domestic legal system) the influence of Community law is growing, and the Community governs itself, to a certain extent, with its own rules. The bodies of the

10 For several general remarks on this subject see: T. Rabska, *Rozwój nauczania publicznego prawa gospodarczego – przyczynek do dyskusji*, PUG 2005, No. 9, p. 2 ff.

11 Zjazd Katedr Prawa Gospodarczego Publicznego – Konferencja nt. "Instrumentów i form prawnych działania administracji gospodarczej". Gniezno 20–22 September 2007, see the report in RPrEiS 2007, facsim. 4, pp. 194–196.

12 "Deregulation" – understood as a direction aimed generally at limiting legal regulations in the economy, i.e. is aimed both at repealing legal provisions that hinder the operation of economic laws, or which are incompatible with them, and at counteracting the emergence of new legal acts of this type that hinder business operations.

13 See the statement of M. Safjan: "The constitutional principle of economic freedom […] does not completely fit in the area of the principle of individual freedom […]. The principles of both these principles intersect" – and later: "constitutional guarantees of individual freedom do not translate in a direct or necessary way into a specific economic model" in: *System prawa cywilnego. Zasady prawa prywatnego*, p. 275.

State, which is a member of the economic community, are obliged to implement this law. Community law, which in its broadest scope refers to the economy, thus exerts the strongest influence precisely on business law, on the application of this law and the control of its observance.

The study of business law is therefore at a crucial turning point. The wide range and diversity, as well as the high degree of difficulty associated with new problems that are constantly arising, have a fundamental influence on the constant development of the discipline, its subject matter and scope of research. Its task cannot only be to resolve current dogmatic-legal problems, which in itself—in the face of dynamically emerging changes—constitutes an important challenge: legal science must go beyond the description and analysis of applicable law in particular fields of the economy, and address theoretical issues associated with new legal phenomena.[14]

A special role in determining the institution of public business law and the so-called general parts, addressing the basic issues of this discipline, is played by textbooks that cover the whole issue of this law in a general manner.[15]

A valuable contribution is made by (monothematic) collective scientific works that focus on selected problems and legal institutions specific to this branch of law. It is worth mentioning books on the function of contemporary economic administration[16] and legal measures of public business law[17]. This role is also fulfilled by the present collective work

14 On the issue of particular legal sciences (the science of particular branches of law) and their tasks v. Z. Ziembiński, *Szkice z metodologii szczegółowych nauk prawnych*, Warszawa–Poznań 1983, p. 7 ff.

15 In effect, each university center has a textbook based on its own concept of the discipline. The differences are due to the degree that Community law has been introduced. For example, the textbook of C. Kosikowski already announces in its title "Public Business law of Poland and the European Union". C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warszawa 2005. However, differences in the titles of textbooks, such as choosing "administrative" rather than "public business law", does not entail fundamental changes concerning their thematic scope.

16 *Funkcje współczesnej administracji gospodarczej*, ed. B. Popowska, Poznań 2006.

17 *Środki prawne publicznego prawa gospodarczego*, ed. L. Kieres, Wrocław 2007.

devoted to the instruments and legal forms of the activities of economic administration, which is the result of the debate of the Congress of the Chairs of Public Business Law mentioned above.

Taking into account the extent of the rich literature of this discipline, the monographic works that shape the multi-segment system of public business law[18], it can be safely assumed that there are already grounds for building a system of public business law.

The Assumptions and Goals of Public-Law Regulation of the Market Economy System

It is necessary to define a new perspective on the role of public business law, and the place of public-law norms in the economy, which essentially runs on economic rules. The goals of legal regulations change along with the growing transformations in economic relations. In contemporary terms, this entails a total rejection of the concept of business law as the law of "managing the economy". This is because the State has ceased to be an economic entity—an entity engaged in an economic activity. The continued existence of state enterprises or the one-person company of the State Treasury does not undermine this thesis, although the legal position of these units in the economy is undoubtedly specific. The constitutional foundations of the economic system have fundamentally changed relations in this sphere. In its public activity, the State cannot legitimize itself by entitlements derived from its own means of production[19], neither is it the addressee of constitutional freedoms and economic rights—it rather became their guarantor.[20]

18 It is not possible here, even as an example, to enumerate all the positions outlined in the literature of the subject. This would require a separate study that would cover both books and scientific articles addressing a broad spectrum of economic problems.

19 In *Prawny mechanizm kierowania gospodarką*, Wrocław-Warszawa-Kraków 1990pp. 11–69, completed in 1987. Characterizing the critical stage of the past economic system, I indicated the determinants of the State's position in the economy, namely: the ownership of the means of production, managing the economy on the basis of the central planning, and the introduction of a centralized organisational structure of the state economy adjusted to these factors.

20 V. in particular: Chapter II of the Constitution, Article 64, Chapter I of the Constitution, and Articles 20–21.

The fundamental breakthrough in these relations, as I have already emphasized, took place in 1989. However, this did not entail an automatic one-off derogation of all the then-existing legal provisions. Since it is accepted that there must be a certain degree of continuity in the legal system,[21] only subsequent amendments and the introduction of new legal acts made it possible to gradually build appropriate legal structures that could serve to resolve problems associated with the appearance of new phenomena in the functioning of the economy. The obligation to bring Polish legislation closer to Community legislation (Article 68 of the European Treaty), and then the obligation to "implement" Community law (Article 2 of the Accession Act) set new goals and directions for further transformations.

Without going into the successive reconstruction of the legal bases, it must be assumed that, first and foremost, the assumptions and objectives of applying the rules of public business law in economic regulation had to be changed.[22] In a market economy system, the purpose of these rules is not to 'regulate' all the actions of economic entities. Neither is their objective to guide economic processes. However, it is significant that after the rejection of the State-run economy and with the abandonment of direct economic management by the central party apparatus, the proper role of business law returns—a role completely different to the previous one. What is more, its significance grows with the continual emergence of new economic phenomena.

The causes of such a state of affairs should be sought in the new systemic conditions—with the adoption of the division of the public and private economic spheres—there is an urgent need for a clear legal determination of the tasks of the State and the scope of its necessary interference in economic relations (which is justified in certain situations), and on the other hand, the legal situation of entities engaged in economic activity (also under public-law) and the protection of their

21 On this subject inter alia: T. Rabska, *The Transit from a Centrally Planned Economy to a Market System*, in: *Public Administration in the Nineties: T-ends and Innovations*, Wienna 1992.

22 For very convincing remarks on this subject v. M. Safjan, op.cit., p. 44.

position and economic rights.[23] This area of public legal protection also requires the individual be treated as a "consumer".[24] Due to Poland's membership in the European Union, new state obligations arise, both with regard to the Community's organs, as well as the need to shape internal relations accordingly. Thus, it is the State apparatus and its tasks that are subject to a wide range of legal regulations[25] and, consequently, the control of their implementation.

All these factors shape the basic assumptions of public business law, both with regard to the material of regulation and the subjective scope. The needs of the modern system of regulation involve the necessity of determining legal relations on different levels, in various relations and mutual interconnections. In addition to the typical relations in vertical arrangements, between the State organs and the individual (which are still very important), there are also links between individual State bodies involved in general economic problems, with legal provisions allocating various tasks between these bodies and social (civic) partners, as well as the cooperation in this respect with Community organs.[26] The aim of legal provisions is therefore to achieve full coordination of actions taken, to ensure their clarity and, above all,

23 L. Kieres conceives this differently in the book *Administracyjne prawo gospodarcze*, Wrocław 2005, p. 23.

24 Just as an example one can refer to the appointment of such institutions as the "consumer ombudsman". V. the Scope of activity and tasks of the county Article 4.1, item 18 of the Act on County Self-Government)

25 On the extensive functions of the State in the economy, see: *Funkcje współczesnej administracji gospodarczej*, in particular: B. Popowska, *Klasyfikacja funkcji administracji w nauce publicznego prawa gospodarczego*, p.61 ff., also K. Kiczek, *Funkcje administracji gospodarczej jako przedmiot badań*, p. 39 ff.

26 When analysing "systemic administrative business law" K. Strzyczkowski writes *inter alia*: "The advantages of separating the systemic administrative business law are increased by the effects of European integration based on the Europeanisation of administration structures […]. Of key importance is cooperation between Community bodies and the administration of the Member States (vertical relations), and between administrative bodies of the Member States (horizontal relations)" in: K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2007, p. 43. For more detailed discussion v. I. Lipowicz, *Europeizacja administracji publicznej*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, p. 5.

to ensure the responsibility of the State for the common good, defining the space of activity of its organs.[27]

The delineation of the general principles of public-law regulation also determines its place in the entire legal system with reference to the modern economy, as well as relations in this area with other legal disciplines. The aim of public business law is not to "appropriate" economic relations at the expense of other regulations, nor replace them. It is therefore necessary to correct the still erroneous views of a special kind of competition between ways of shaping economic relations, in particular between public and private regulations. Thus, it has to be emphasized that establishing public-law norms may also aim at both guaranteeing legitimate economic rights and the proper implementation of other types of legal relations.[28] The complexity of various economic phenomena and the need for their multi-level solutions emphasize even more strongly—from the theoretical point of view—the aims and functions of public business law, its place in the legal system and necessary connections with other regulations.

A separate issue that lies beyond the scope of this study, concerning rather the sphere of law-making, is the question of whether and to what extent applicable legal provisions implement this model of regulating economic relations and ensure the coherence of internal and proportion between various regulations.

Considering public business law, and in particular its objectives and the complexity of its subject matter, the problem of the methods of application and interpretation become fundamental, and above all, the type and legal character of activities undertaken by the State authorities.

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27 V. A. Chełmoński, *Realizacja dobra publicznego a ochrona interesów jednostki*, in: *Administracyjne prawo gospodarcze. Zagadnienia wybrane*, ed. A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, Wrocław 2000, p. 65.

28 When providing a broad analysis of the "publicizing of private law", M. Sajfan describes the current situation very fittingly: "the encroachment of proprietary methods […] is a kind of support in relation to these (private law) solutions (it is complementary to them), and is not directed towards the elimination of the private-law method as such and its replacement by public-private regulation", p. 49.

The conference of the Congress of the Chairs of Public Business Law and the works published in this volume are devoted to this fundamental issue.

Determinants of the Correctness and Effectiveness of Public Business Law

The attempts made in legal science to assess the correctness of legal solutions generally refers to a selected legal act, or group of legal provisions, and focuses on a specific issue that is subject to a given regulation of public law. In this context, the correctness of legislation is analyzed, and the provisions that are supposed to contribute to achieving a specific objective are assessed. On the other hand, these issues are rarely considered in relation to the system of public business law as a whole, and in relation to the object of this law, which is the economy.[29] This is due to the fact that individual segments (subsystems) of public business law concern various areas of the economy and serve various interests (collective, group, individual), or focus on only specific entities (be it entrepreneurs, groups of entrepreneurs, consumers, or only on public administration bodies), or they concern specific business activities, etc. The criteria for assessing these individual legal acts and their effectiveness may, therefore, vary from case to case.

Another issue is that public business law, which is a component of a uniform legal system, as well as individual legal acts included in this branch of law, are subject to evaluation from the point of view of the principles which are generally applicable for the whole legal system, both constitutional and doctrinal. These principles will not be analyzed here.[30] On the other hand, the entity indicated above, which is subject to

29 On the criteria for differentiating the legal system and its consequences, see in particular Z. Ziembinski, pp. 114 ff.

30 However, it should be noted that some of the general principles are ascribed special importance as principles of public business law, v. K. Strzyczkowski, *Zasada państwa*

legal regulation— n this case, the economy[31]—tends to make particular demands of business law.[32] It is necessary to refer to the scope of law-making activity, the activity of public bodies and the legal position of the individual – entrepreneurs. These factors necessarily have an influence on legal regulations. Consequently, they should be reflected in the process of law-making, in the substantive content of legal acts, and they should also influence the interpretation of law and the methods for its application.

In my view, the following should be included among the particular deteminants:

1) the necessity of linking normative content with the requirements of business law, derived from essence of commerce (in the broad sense of the term).
2) taking into account the principle of subsidiarity in determining the limits of state interference in economic relations,
3) basing public business administration on the principle of decentralization, leading to the selection of the competence and responsibility appropriate for the case.

These factors seem to be of diverse nature, defining the various levels of events. However, in shaping activities and legal relations they complement each other. The degree to which they are considered may have a significant impact on the mechanism of the functioning of public ad-

sprawiedliwości społecznej jako zasada publicznego prawa gospodarczego, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, p. 11.

31 The concept of "economy" is employed in a broad sense here, with all its determinants. It is not possible to clearly define the boundaries of "economy" in advance, as the legal reference framework for legal regulations. For different ways of defining the economy, v. K. Strzyczkowski, *Gospodarka jako przedmiot regulacji prawnej*, in: *Prawo gospodarcze publiczne*, Warszawa 2003, p. 23.

32 A. Chełmoński, *Swoiste zasady administracyjnego prawa gospodarczego*, in: *Administracyjne prawo gospodarcze*, ed. L. Kieres, Wrocław 2005, p. 61. In particular, the principle of "protecting the proper functioning of a market economy" should be emphasized (p. 62), and the "principle of the protection of interests" (p. 64). However, they primarily define the objectives behind law-making. In another conception of "principles of public business law" are presented by K. Strzyczkowski, op. cit., pp. 49–98; v. T. Rabska, *Gospodarka rynkowa i jej zasady*, Warszawa 1995.

ministration bodies and the activities undertaken by them, depending on the specific circumstances, in forms (legal and factual) adequate to the given situation. These are therefore requirements for the correct application of the law.

1. The question of taking economic principles into account in legal regulations is complicated both doctrinally (the issue of two separate sciences) and from the legislative point of view (various methods of expression). In the simplest terms, it concerns the boundaries between market mechanisms and legal norms; above all, what issues (and matters) should be subject to legal regulation at all, and then the scope of legal regulations that regulate or limit the operation of economic laws, the degree to which legal provisions interfere. These issues are additionally influenced by a whole range of non-legal factors, primarily economic policies and the social situation.

The issue of linking law with economics is addressed in the literature in many respects, such as in the "economic analysis of law".[33] Regarding the content of the provisions of business law—from a juridical viewpoint—it is essential to ultimately and properly link the necessary economic requirements (at various scales) with the content of legal regulations. In the case of public business law, it is primarily to guarantee the effectiveness of the functioning of the economy as a whole, in line with the public interest.

The requirements should therefore be implemented in the course of law-making, in its successive stages—drafting legal acts, seeking and expressing opinions, consultations ("cooperation between social partners") and passing legal acts.[34] Lack of due diligence (or even negli-

33 On this topic, see the review article of R. Tokarczyk, *Jednostronność ekonomicznej analizy prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, p. 175 and the literature cited therein. J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007.

34 This is how K. Strzyczkowski understood the issue, arguing that "economic analysis should […] precede the intention to subject a specific field of (economic) life to legal regulation"; K. Strzyczkowski, Prawo gospodarcze publiczne, Warszawa 2011, p. 31 ff.

gence) at this stage may be the cause of many distortions and contradictions between the actual state of affairs and the legal regulations.

Because various views are expressed, it should be clearly emphasized that when referring to economic requirements the point is not to encourage "economic efficiency", in the sense of maximizing wealth as the "sole purpose of law".[35]

For the implementation of these assumptions—it must be stressed once again—the stage of the law-making process is of fundamental importance. At the same time, it is important that, despite the multiplicity of legal acts regulating the economy, coherence between them is maintained, so that their goals—from the point of view of the assumptions behind them—do not conflict with each other, or are not mutually exclusive, but are rather complementary to each other.

Only such a procedure for enacting legal acts can ensure the coherence and transparency of provisions and shape a unified legal system. As part of the system, it is necessary to use a uniform conceptual apparatus which will give a uniform legal sense to the constructions adopted.[36] Otherwise the process of their uniform interpretation and application will be very difficult.

In passing, it should be mentioned that the introduction of the concepts and terminology of Community law is a new element that is not simple to apply. Community laws do not always coincide with well-known national laws and the constructions employed in domestic legal science. However, this is a separate issue and requires the investigations of scientific analyses.[37]

2. Although it is more difficult to apply the principle of subsidiarity to all legal situations to the same degree, it seems justified that it

35 See the critique of this position: R. Tokarczyk, op. cit., pp. 176–177.

36 The details of the legislator's the misuse of the term 'nadzór' (control, supervision), and the lack of appropriate legal content and means of action associated with it, should only be used as an example.

37 For example R. Blicharz addresses the problem of European regulation of the criteria for supervision of the capital market.

should find proper application in business law. It should be taken into account in the law-making process and fully respected in the application of law. It should be attributed the status of a legal principle, because it is referred to in the Polish Constitution, as well as the Treaty establishing the European Community and the European Charter of Local Self-Government.[38]

Its meaning derives from the fact that the State and its organs are to serve the citizens. Therefore, the law should not interfere in those relations and those activities which, due to their nature, may exist without legal interference, without the unnecessary actions of public bodies undertaken independently by interested parties. However, in situations in which, for the fulfilment of certain objectives and when public interest requires it, legal regulation is necessary, it would be essential to seek to ensure that legal actions—depending on the issues—be taken "as close as possible to the citizen", and thus at the lowest levels of the power structure.[39]

The observance of these requirements guarantees not only the rational behaviour of interested entities (public and private), but also creates the conditions for developing initiatives and provides closer insight into a specific market.[40]

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38 The principle of subsidiarity is expressed in the preamble of the Constitution of the Republic of Poland, which refers to "strengthening the powers of citizens and their communities". With regard to the actions of public authorities, "a self-governing community" is referred to; Article 16, Article 163 of the Constitution of the Republic of Poland. With regard to the European Union, see Article 5 TEU and Article 4, sec. 3 of the European Charter of Local Self-Government.

39 This is clearly expressed in the European Charter of Local Self-Government: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy" (Article 4 point 3).

40 On the subject of subsidiarity: W. Łaczkowski, *Ekonomiczne i socjalne prawa człowieka a dobro wspólne*, Warszawa 2003, p. 6; L. Bar, *Publiczna subsydiarna działalność w gospodarce rynkowej. Wybrane zagadnienie prawne*, "Państwo i Prawo" 1994, no. 6; A. Szpor, *Państwo a subsydiarnośc jako zasada prawa w UE i w Polsce*, "Samorząd Terytorialny" 2001, no. 1–2, p. 3 ff.

3. The provisions of public business law are addressed in a broad scope to public administration authorities—economic administration entrusted with the execution of various types of public function. This is related to determining the scope of public tasks and proper competences to undertake actions. Thus, the exercise of public authority in the economic sphere requires a choice between appropriate organizational structures for the tasks (organs, agencies etc.), as well as appropriate methods of action for these entities, and the relations between the participants of these activities.

The matter of the proper organization of the State apparatus in the context of exercising economic functions is quite rarely considered in the literature.[41] Yet this is an important issue, taking into account the specific economic system. The organization of the administration should be determined by the tasks, not vice versa. Unreformed structural solutions can be incompatible with a given system; they may inhibit its proper functioning. For example, a centralized system of public administration is contrary to a system based on the principle of freedom of economic activity. It can lead to actual interference through the concentration of power in one center. Delegating all public tasks and competences, and their concentration only at high levels of public authority (and without them thereby being burdened with responsibility), does not provide any guarantee that the governing policy will not have an effect on the functioning of the economy.

41 The need to properly adapt organizational structures to the requirements of the market economy was addressed at the beginning of the systemic transformation. V. *Wstępne założenia przebudowy administracji publicznej*, Warszawa 1992, p. 19: "VIII. Warning forecast. The system of public administration functioning so far in itself has constituted an obstacle to implementing necessary reforms of the economy and the State. The urgent decision concerning the direction of reform of the public administration, and the principles of their introduction therefore determines the further implementation of the transformation policy and its success". I addressed this issue in the article *Zasada gospodarki rynkowej a samodzielność jednostek samorządu terytorialnego*, in: *Ex iniuria non oritur ius*, Poznań 2003, p. 91 ff. On the subject of the company's links with the region see: A. Szronnik, *Przedsiębiorstwo a region - relacje i współzależności rynkowe*. "Samorząd Terytorialny" 2008, no. 7–8, p. 101 ff.

For the above reasons, it is appropriate to enact decentralizing arrangements in legal provisions, concerning individual sectors of the economy. They ensure that individual entities at the local levels of management have—depending on the type of issue—the necessary independence in performing their functions.[42] The rationality of actions and their effective undertaking requires a coherent conception of institutional solutions and, when necessary, of the whole economic apparatus.

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The extent to which these particular requirements are considered in the content of provisions will undoubtedly have an effect on the level of applying the law and the direction of its interpretation. This should be conducive to the uniformity of interpretation. It would also have great significance for the multiplicity of legal subsystems, with regard to various segments of the economy[43].

In passing, an important legislative issue is worth mentioning at this point, namely the lack of codified regulations in this area, including the comprehensive and exhaustive sphere of legal relations.[44] Therefore, determining some general rules is an even more urgent task of legal science.[45]

42 The scope of activity of the voivodship self-government includes, *inter alia*, "raising the level of the competitiveness and innovativeness of the voivodship's economy". Act of June 5, 1998, On Voivodship Self-government, Article 11. Without assuring the autonomy of the voivodship authorities in the legal provisions concerning various sectors of the economy, this statutory provision cannot be fully implemented.

43 The oft-referred to separation of particular areas of business law is reflected in how the content of academic textbooks and in numerous monographic works is organised.

44 There is no "Code of Public Business Law" or a code covering economic issues of private law. This is to a large extent a problem of legal theory, resulting from the tendency to maintain the basic unity of legal systems. With regard to private law issues. V. M. Safjan, *Status prawa gospodarczego*, in: *System prawa cywilnego*, op.cit., p. 57 ff.

45 Z. Ziembiński, *Problematyka dogmatyczna nauk prawnych – rdzeń nauk szczegółowych*, in: *Szkice z metodologii szczegółowych nauk prawnych*, Warszawa 1983, p. 10 ff.

The General Characteristics of Public Administration Activities in the Economic Sphere

One of the most important issues of the application of public business law is the right selection, broadly speaking, of the "instruments of action" made by the organs of public administration (and other public entities), upon which this law imposes certain tasks.[46] For the sake of simplicity, this group of public entities can be defined as pertaining to "economic administration", indicating both the subject and object of interest. It is an issue that is still current, considering the continuing development of economic relations and public business law.

Nowadays, the issues are so extensive that it is difficult to find an adequate concept covering all of these activities which would emphasize their legal nature. Various terms have been adopted, e.g.: "the legal means of public business law",[47] "the means and legal forms of economic administration bodies",[48] "the legal forms of economic administration activity"[49] and, maybe the most encompassing, "the instruments and le-

46 The issue of legal instruments and the actual actions of public administration bodies is constantly valid at all stages of the development of public business law (previously administrative law of economic relations). Just by way of example, reference can be made to the first words of the *Introduction* to *Formy prawne oddziaływania naczelnych organów zarządzania gospodarką narodową na organizacje gospodarcze* (Warszawa 1974). The results of research conducted by INP PAN under the direction of L. Bar and T. Rabska: "One of the most important problems associated with the contemporary system of management is the appropriate selection of instruments for management, i.e. the issue of how to manage, by what means, and in what forms" It should be mentioned that in 1974, due to the prevailing economic system, analysis of actions referred to management.

47 This is the title of the collective work: *Środki Prawne Publicznego Prawa Gospodarczego*, with an Introduction by L. Kieres: "the contemporary administration and its organs find a legal approach to relations with entities which associate their status with its activity".

48 K. Strzyczkowski, *Środki i formy prawne organów administracji gospodarczej*, in: *Prawo gospodarcze publiczne*, Warszawa 2011, s. 179, begins with these words: "The effectiveness of functions of public authorities (administrations) realized in the economic sphere, to a large extent depends on the use of appropriate legal measures and legal forms of operation".

49 K. Pawłowicz, *Prawne formy działania administracji gospodarczej – kierunki zmian i próba oceny*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, eds B. Popowska, K. Kokocińska, Poznań 2009.

gal forms of the activity of economic administration".[50] The latter term is so broad that—one may conclude—it concerns not only legal acts aimed at directly realizing legal effects, but also of another type of action. It is also possible to talk generally about "the legal mechanism of administration", in particular by including the legislative and planning-strategic activity of public authorities.[51]

In view of the factual diversity of "institutions", "forms" and "measures", it seems advisable to accept a broader scope of the concept of "the activity of economic administration".[52] In general, the point is to adapt the activities of public authorities, on the one hand, to the manner and scope of necessary State interference in economic relations, and, on the other hand, to match activity to the properties of these relations and the actual demands of the market's functioning.

These actions (legal and factual acts), and their character, result from the essence of public business law—its function in the economic system. The provisions of this law determine the public-law nature of the actions taken, and the object of the law—the economy—shapes their content. Therefore, they are aimed primarily at the implementation of State tasks by empowering individual bodies to undertake different activities and determine their form. These provisions are generally provisions of the type *iuris cogentis*. Their legal effect is usually the obligation to take action.

The law also places special measures of an economic type at the disposal of the organs— means of material support, at the same time establishing the procedures and ways of applying them.[53]

50 This is the title of the collective work *Instrumenty i formy prawne działania administracji gospodarczej*, eds. B. Popowska, K. Kokocińska, Poznań 2009.

51 T. Rabska, *Prawny mechanizm kierowania gospodarką*, in relation to the activities of public administration bodies.

52 The proposal to develop a broader scope of the concept of "administrative action" was put forward by F. Longchamps in 1965. F. Longchamps, *Węzłowe problemy podstawowych pojęć prawa administracyjnego*, "Państwo i Prawo" 1966, p. 895. From this it is evident how important the diverse activities of the administration were for legal science.

53 K. Strzyczkowski writes about "financial incentives" in: *Prawo Gospodarcze Publiczne*, p. 182. In the collection *Instrumenty i formy prawne działania administracji gospodarczej*,

In general, therefore, in terms of public business law, taking into account its general conception, one can in some sense talk about the legal shaping of economic relations (in various sectors of the economy, to varying degrees), the content and scope of which should correspond to the contemporary conditions of market functioning and public interest, while at the same time protecting the sphere of properly understood individual interests.[54]

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Economic relations, which are increasingly complex and change under the influence of various factors, entail the necessity to look for the effective actions which are most adequate to these relations and general political assumptions. For this reason, the traditional public-law forms that create the basic catalogue of administrative-legal activities—the appeal to which was, in principle, the rule in the initial period—become insufficient. Public business law starts to become a set of specific activities, which are different in its various segments (subsystems). The striving to establish the legal character of activities in relation to particular functions performed, concrete tasks limited to specific sectors of the economy etc. becomes characteristic.[55] If attempts at general characterization and classification are made, they generally do not cover the entirety of administrative activities.[56]

eds B. Popowska, K. Kokocińska, Poznań 2009 on the subject of various forms of granting public aid v. B. Popowska.

54 A very deep analysis of the conditions for implementing economic freedom and the principle of autonomy of the will, which find expression in the principle of contractual freedom, can be found in: M. Safjan, *System Prawa Prywatnego*, Chapter VI *Zasady prawa prywatnego*, section 25.1 *Zasada autonomii woli*, p. 273 ff.

55 This is fully reflected in the collection *Instrumenty i formy prawne działania administracji gospodarczej*, eds B. Popowska, K. Kokocińska, Poznań 2009, as well as in textbooks of public business law and in monographic studies.

56 V. the collective work: *Publiczne prawo gospodarcze – Zagadnienia ustrojowe, materialnoprawne i proceduralne Struktura wykładu i materialy źródlowe*, ed. B. Popowska, Poznań 2006, in particular the chapter *Formy i metody dzialania organów administracji publicznej w sprawach gospodarczych*, p. 24 and p. 90 ff.

One cannot overlook the fact that the organs of public administration are permitted to undertake actions in a private-law mode—bilateral acts, based on the parity of parties. In addition to administrative (public-law) contracts, as a new, developing form of action, they are subject to the rules of civil law. The provisions of public business law may, however, introduce specific restrictions or special requirements precisely due to the fact that these activities are undertaken by a public entity—with a purpose determined in advance—for the performance of specific tasks. Due to differences, some of these activities may take on a specific form.

It is becoming increasingly difficult, due to the variety of issues to be regulated and the very different (and imprecise) way of determining the authorities' competences to take action, to establish their comprehensive catalogue and—on the basis of a uniform criteria—introduce a transparent classification. This is not facilitated by legal provisions, due to the lack of uniform conceptual apparatus concerning the forms of activity. In addition, some legal acts contain the content of private and public law norms, with various relations between them. The state of law in this area—the multiplicity of legal acts, the lack of coordination between them, and the endless revisions—should be assessed critically.

It is necessary to add that the basic element which decides on the correctness and effectiveness of actions concerns the procedures for their undertaking and the mode for controlling them—instance and court. In view of the fact that the legal route (generally ordinary courts instead of the administrative courts) is not always adequate to the nature of the proceedings, the criterion for explicitly defining the legal character of some forms of activity is blurred. This would require the development of new concepts and proper determination of the limits of court cognition.

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The comprehensive organization of the very important sphere of public business law is a serious challenge for the study of this law. The

undertaken analyses and scholarly works, including those in this collection, lead to the establishment of specific legal forms in this field, appropriate for this type of law. Both individual and general forms taken in economic matters—generally speaking—in the public-law mode, are characterized by particular features. Although with many of them it is possible to refer to features typical of administrative acts (decisions), acts of administrative law or (as in the case of public-law contracts) features of civil law contracts, they are always based on specific legal grounds that provide them with additional requirements.

Therefore, the fundamental assertion is that there are separate forms of action proper to public business law. The variety of activities, their forms and diverse methods of operation entail a number of further consequences.

One can, of course, discuss whether the multiplication of different types of legal forms is appropriate, and also from the point of view of the systematics of law, the clarity and uniformity of rules for the application of the law, and the protection of the rights of the individual subject. At the present stage, however, this has been determined by the rapid development of social relations, new forms of business—which completely disrupted the traditional framework. This was also helped by the introduction of the regulations of Community law into the domestic order. An unavoidable consequence of these phenomena was also the establishment of new tasks of State organs, new relations between organs (also Community organs), and above all between them and business entities, and in relations between these entities and consumers. This exerts an impact on all areas of law, including the multiplication of various categories of contractual relations that exceed the limits of the Civil Code. This disturbance in the system is not unique to public business law.

It required rather fundamental transformation of the relations of the authorities to new phenomena. The appearance of new types of activities found expression in legal provisions. Thus, the need arose to establish their legal classification and criteria for division. Traditional divisions,

despite the continuation of traditional forms of action, no longer fulfill their role adequately.

In general, the centre of gravity of activities has shifted from individual acts of power, which decide on the possibility of individuals undertaking economic activities, to actions and general acts (legal and factual), preferring directions of activity (information, strategies, directions of development policy). Such tendencies are indicated by studies published in this collection.[57] This is in line with the general conception of public business law. As far as individual acts (decisions) are concerned, they are far from typical forms.[58]

In no way does this entail the diminished importance of individual administrative acts (decisions) shaping the legal situation of individuals and having—in individual cases—an impact on the actual scope of the principle of freedom of economic activity.[59] On the other hand, in these forms, public administration organs issue prescriptions to forbear certain activities or prohibitions of certain behavior.[60] They can also find application in the process of proprietary transformations, such as commercialization.[61]

However, the activities of public administration organs that are particularly characteristic for this area are those specifically aimed at supporting economic development, creating conditions for running a business, and ensuring the efficient functioning of the market. They result from specific duties of these organs, stipulated in legal provisions.[62]

57 V. the collection edited by A. Walaszek-Pyzioł, K. Kokocińska, M. Będkowski-Kozioł.

58 V. *inter alia*: L. Kieres et al., *Instrumenty administracyjnoprawne w systemie oceny zgodności z zasadniczymi wymaganiami*, Wrocław 2009.

59 In addition to typical legal forms, such as concessions, permits, permits, there are also specific types of decisions; see K. Kiczka, *Administracyjne akty kwalifikujące w działalności gospodarczej*, Wrocław 2006.

60 For example, prescriptions in the case of applying restrictive practices or prohibitions on acting in concert; see: C. Banasiński, *Publicznoprawne aspekty ochrony konkurencji*, in: *Prawo gospodarcze. Zagadnienia administracyjnopraune*, Warszawa 2007, p. 270.

61 V. A. Trela, *Nowe formy działania ministra właściwego do spraw Skarbu Państwa w procesie komercjalizacji i prywatyzacji*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, eds B. Popowska, K. Kokocińska, Poznań 2009

62 The problem of state obligations in the economic sphere is addressed in the literature, for example K. Kiczka writes: "the involvement of the State in the economy of […] must be

This group of acts is on the increase. Legal provisions introduce new forms, giving them new names and content, and—significantly— they stipulate specific procedural requirements.[63]

The relationships emerging between different categories of legal acts and formalized factual relationships (to a greater degree factual than formal-legal) make up this very extensive system of public authority activity. Lack of consistency between them may have a negative impact on the functioning of the economy, its individual sectors, and hinder the implementation of individual rights in this area.

The general characteristics of the legal forms of economic administration require that attention be paid to one more of their specific characteristics associated with the application of the law—the development of particular types of legal forms will remain under the influence of specific methods of action, appropriate to public business law and corresponding to its fundamental assumptions. It is very characteristic for this sphere of relations and influences the way the administration operates in this area. It especially concerns the continual introduction of new acts of law application.

For example, a great deal of significance is attributed in economics to a method that can be conventionally described as a "method of regulation" and, which may be surprising from the theoretical point of view, "regulation" is actually not a concept with strictly defined legal content.[64] It serves first and foremost, however, to highlight the change (or modification) in the methods by which state authorities execute their tasks, and their impact on selected sectors of the economy. This where its cog-

considered […] in terms of a legal obligation and the resulting legal liability of the public authority for acts or omissions in that field of social relations."

63 For example, legal provisions often impose an obligation for economic administration bodies to take legal acts or actions in cooperation with other public entities, as well as, for example, in consultation with business entities or other entities.

64 A detailed analysis of the concept of "regulation" is provided by T. Skoczny, *Stan i tendencje rozwojowe prawa administracji regulacyjnej w szczególności*, in: *Ius Publicum Europeum*, Warszawa 2003, pp. 115 ff, Warszawa 2008, especially p. 148 ff. T. Kocowski, *Reglamentacja a regulacja*, in: *Administracyjne prawo gospodarcze*, p. 504 ff.; *Regulacja rynku telekomunikacyjnego*, eds M. Kulesza, A. Szpor, Warszawa 2005.

nitive significance lies.[65] As a consequence, even in the State structure, "regulatory authorities" are appointed to carry out specific special tasks. Their implementation thus serves a properly selected form of action.[66] From a formal point of view, this does not necessarily mean a total rejection or change of the legal forms that have existed in the system thus far. The issue really concerns the purpose of the activity and its adaptation to specific needs. Full reflection is found in the performance of State responsibilities in the broadly understood sphere of public utility.

A separate issue is the characterization of the legal basis (sources of law) of the undertaken forms of activity of economic administration. Of particular importance, particularly in the field of economic relations, is the application of the principles of Community law, both in particular legal acts (primary and secondary law), and in the extensive jurisprudence of the European Court of Justice. This leads to consequences for the adoption of domestic legal acts. This, however, falls beyond the scope of issues discussed here.

To sum up, the development of public business law has led to the formation of its own network of legal forms of public administration activity. On the other hand, it is the specific nature of these measures that determines the separation and essence of public business law. These separations are indicated by the significant breakthrough in the dogmatic and doctrinal framework of this branch of law. With this borne in mind, it does not seem justified to identify its genesis as lying in administrative-law.[67] Nevertheless,

65 In passing, it should be mentioned that the concept of "regulation" is not the opposite of "deregulation."

66 V.P. Lissoń, *Formy oraz instrumenty prawne działania organu regulacyjnego na przykładzie Prezesa Urzędu Regulacji Energetyki Instrumenty i formy prawne działania administracji gospodarczej*, eds B. Popowska, K. Kokocińska, Poznań 2009.

67 V. the current names of textbooks: *Administracyjne prawo gospodarcze*, Wrocław 2005; *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, Warszawa 2007; v. J. Boć, *W sprawie zakresu administracyjnego prawa gospodarczego*, in: *Prawo administracyjne*, ed. J. Boć, Wrocław 2007, p. 49; K. Kiczka, *Prawo administracyjne gospodarcze w systemie prawa administracyjnego*, in: *Koncepcja systemu prawa administracyjnego*, ed. J. Zimmermann, Warszawa, 2007, p. 67 ff. While fully respecting the various concepts used for grasping economic issues, I do not think it is advisable to equate the following names and use them interchangeably: "administracyjne prawo gospodarcze" (administrative business

emphasizing the public character of this law[68] does not entail breaking the links between administrative law and public business law, either in terms of the theoretical foundations and positive sources of law. Similarly, there are close links between public and private business law. This also constitutes the specific nature of public business law and the methods of its application.

In the study of public business law a wide range of research is undertaken into particular forms of activities of economic administration organs in selected areas of the economy. They confirm the specific nature of certain legal acts. Therefore, another challenge should be to develop a comprehensive scheme and introduce a uniform conceptual apparatus that would facilitate their full comprehension.

However, the legislator's attention should be drawn to the existence of excessively complex legal provisions, with the recommendation that there should be greater precision and transparency, and the development of uniform concepts to form the basis of legal science.

Literature

Banasiński C., *Publicznoprawne aspekty ochrony konkurencji*, in: *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, Warszawa 2007.

Bar L., *Publiczna subsydiarna działalność w gospodarce rynkowej. Wybrane zagadnienie prawne*, "Państwo i Prawo" 1994.

Biegeleisen L.W., *Teoria i polityka przedsiębiorstw publicznych samorządu terytorialnego i państwa*, Warszawa 1931.

Bigo T., *Ewolucja prawa przemysłowego*, "Państwo i Prawo" 1947.

law) and "publiczne prawo gospodarcze" (public business law). From a theoretical point of view, the term "public" indicates the place of this law more closely in the legal system and more fully reflects its essence and the objectives of its regulation.

68 Without returning to the discussion on public business law, since this is not the subject of this study, it is worth referring to the discussion that took place in the pages of "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1993; see in particular the arguments for distinguishing public business law – C. Kosikowksi, *Idea prawa gospodarczego i jego działy*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1993, p. 13, 17.

Bigo T., *Prawo administracyjne polskie – prawo przemysłowe*, Lwów 1939.
Boć J., *W sprawie zakresu administracyjnego prawa gospodarczego*, in: *Prawo administracyjne*, ed. J. Boć, Wrocław 2007.
Buzek J., *Administracja gospodarstwa społecznego. Wykłady z zakresu nauki administracji i austriackiego prawa administracyjnego*, Lwów–Warszawa 1913.
Chełmoński A., *Realizacja dobra publicznego a ochrona interesów jednostki*, in: *Administracyjne prawo gospodarcze. Zagadnienia wybrane*, eds A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, Wrocław 2000.
Chełmoński A., *Swoiste zasady administracyjnego prawa gospodarczego*, in: *Administracyjne prawo gospodarcze*, ed. L. Kieres, Wrocław 2005.
Helczyński B., *Komercjalizacja przedsiębiorstw państwowych na tle polskich przepisów prawnych*, Warszawa 1929.
Huber E.R., *Wirtschaftsverwaltungsrecht*, vol. 1–2, Tubingen 1953/1954.
Kiczka K., *Administracyjne akty kwalifikujące w działalności gospodarczej*, Wrocław 2006.
Kiczka K., *Prawo administracyjne gospodarcze w systemie prawa administracyjnego*, in: *Koncepcja systemu prawa administracyjnego*, ed. J. Zimmermann, Warszawa, 2007.
Kieres L. ed., *Środki prawne publicznego prawa gospodarczego*, Wrocław 2007.
Kieres L., *Administracyjne prawo gospodarcze*, Wrocław 2005.
Kocowski T., *Reglamentacja a regulacja*, in: *Administracyjne prawo gospodarcze*, *Regulacja rynku telekomunikacyjnego*, eds M. Kulesza, A. Szpor, Warszawa 2005.
Kosikowski C., *Idea prawa gospodarczego i jego działy*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1993.
Lipowicz I., *Europeizacja administracji publicznej*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008.
Lissoń P., *Formy oraz instrumenty prawne działania organu regulacyjnego na przykładzie Prezesa Urzędu Regulacji Energetyki Instrumenty*

i formy prawne działania administracji gospodarczej, eds. B. Popowska, K. Kokocińska, Poznań 2009.

Longchamps F., *Węzłowe problemy podstawowych pojęć prawa administracyjnego*, "Państwo i Prawo" 1966.

Łaczkowski W., *Ekonomiczne i socjalne prawa człowieka a dobro wspólne*, Warszawa 2003.

Pawłowicz K., *Prawne formy działania administracji gospodarczej – kierunki zmian i próba oceny*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, eds B. Popowska, K. Kokocińska, Poznań 2009.

Popowska B. ed., *Funkcje współczesnej administracji gospodarczej*, Poznań 2006.

Rabska T., *Gospodarka rynkowa i jej zasady*, Warszawa 1995.

Rabska T., *Rozwój nauczania publicznego prawa gospodarczego – przyczynek do dyskusji*, "PUG" 2005.

Rabska T., *The Transit from a Centrally Planned Economy to a Market System*, in: *Public Administration in the Nineties: T-ends and Innovations*, Wienna 1992.

Safjan M. ed., *System prawa prywatnego. Prawo cywilne. Część Ogólna*, Warszawa 2007.

Skoczny T., *Stan i tendencje rozwojowe prawa administracji regulacyjnej w szczególności*, in: *Ius Publicum Europeum*, Warszawa 2003.

Stelmach J., Brożek B., Załuski W., *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007.

Strzyczkowski K., *Gospodarka jako przedmiot regulacji prawnej*, in: *Prawo gospodarcze publiczne*, Warszawa 2003.

Strzyczkowski K., *Prawo gospodarcze publiczne*, Warszawa 2007.

Strzyczkowski K., *Środki i formy prawne organów administracji gospodarczej*, in: *Prawo gospodarcze publiczne*, Warszawa 2011.

Strzyczkowski K., *Zasada państwa sprawiedliwości społecznej jako zasada publicznego prawa gospodarczego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007.

Szpor A., *Państwo a subsydiarnośc jako zasada prawa w UE i w Polsce*, "Samorząd Terytorialny" 2001.

Szronnik A., *Przedsiębiorstwo a region – relacje i współzależności rynkowe*, "Samorząd Terytorialny" 2008.

Tokarczyk R., *Jednostronność ekonomicznej analizy prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007.

Trela A., *Nowe formy działania ministra właściwego do spraw Skarbu Państwa w procesie komercjalizacji i prywatyzacji*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, eds B. Popowska, K. Kokocińska, Poznań 2009.

Ziembiński Z., *Problematyka dogmatyczna nauk prawnych – rdzeń nauk szczegółowych*, in: *Szkice z metodologii szczegółowych nauk prawnych*, Warszawa 1983.

Ziembiński Z., *Szkice z metodologii szczegółowych nauk prawnych*, Warszawa–Poznań 1983.

Zimmermann M., *Nauka administracji i polskie prawo administracyjne, Part II*, Poznań 1949.

Józef Jan Bossowski

Theory and Practice in Criminal Law[1]

A lawyer, and especially a professor of law, should not speak in paradoxes, because paradoxes arouse mistrust and may undermine the authority of the person who uses them. However, it is not always the case that a paradox is merely a flashy display of words; occasionally it may convey some real meaning. Hence, when writing on theory and practice in criminal law, I shall use a formulation that I consider right, relying on my experience and having given it a lot of thought, although it will take the form of a paradox.

First, however, I shall make a few comments that are in part personal and in part relate to the subject at hand. I cannot assume the role of a representative of this or that side, I rather stand between them, in the middle, as my current position does not abrogate my work as a judge for over a decade. I am, therefore, equally close to both sides. By 'practice' I do not mean people (judges, defence counsel, public prosecutors) but rather the current legislation together with the judicial decisions, with regard to which statutory provisions leave little room for discretion. Therefore, my comments cannot concern the so-called practitioners of criminal-law, but I may only mention that I would like to see more criticism on their part than is evident in the current state of affairs.

1 Translated from: J.J. Bossowski, *Teoria i praktyka w prawie karnym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1924, 6 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

By theory, I mean law as it should be *in statu nascendi*. Now I come to the point, that is, to the paradox I mentioned. At present, theory is practical, and practice is theoretical. Before anyone takes aim at me, let them read the subsequent comments on which I base my views, with each of these comments deserving to be made the subject of a dissertation.

The practice of law still demands that punishment should be based on guilt and retribution.[2] Thus, it is on a wild goose chase, because the determination of guilt (degree of guilt) in a specific case and the adjustment of retribution (intensity of retribution) to the degree of guilt is not humanly possible. This is a hangover from the times when criminal law was based on philosophical abstractions, or was derived from them. Theory demands that criminal law be based on the aspect of purposefulness: criminal law is bring about the defence of society against criminals, while the nature and limits of this defence are to be indicated by experience (criminal statistics) and the observation of life (in particular the observation of the *milieu criminel*, i.e. the sociological aspects and the observation of a criminal's psyche). This entails a transition to the 'straightforward story' of facts and conclusions based on facts.

Duo si faciunt idem, non est idem. This necessary principle of justice is recognised by practice, with some reservations, not due to any fault of its own, but because it is compelled by statute. In the case of murder,[3] it does not matter for either the terminology of the act or punishment (the death penalty is always prescribed, without exception) whether the crime was committed purely due to inhuman savagery or for some quite different reason (e.g. unhappy cohabitation, jealousy, etc.), or whether it was the result of a criminal psyche (an individual posing a constant threat to society, one who will commit another murder soon

2 Retribution as an element of revenge is the backbone of present-day law, with some of its provisions strongly emphasising this aspect. For instance, French regulations accord priority seats to the parents of a victim at the execution of the murderer.

3 Under the statute in force in the Recovered Territories; analogous instances can be found in other provincial statutes.

if they remains at large). Moreover, whether the above resulted from an unhappy coincidence that upset the perpetrator's moral balance (the so-called occasional criminal whose trials and tribulations before and after the act and the act itself break them down completely, an individual who will not commit a second murder even if, due to the circumstances, they are not punished and remain at large).

I have chosen a particularly extreme example but nevertheless, practice must (because it is compelled by statute) squeeze crimes into the statutory formulae that only conventionally take into account the perpetrator-related aspects (kinds of guilt) and ignore the whole gamut of the perpetrator's mental properties. On the other hand, theory follows the following line of thought: punishment will be purposeful, i.e. it will serve its purpose of social defence if an individually designated criminal (person A or B) is either deterred, corrected or neutralised. To find out which of these goals is achievable and advisable, it is necessary to get to know the criminal who is on trial as a living person and classify their psyche (occasional criminal, habitual criminal, incorrigible criminal or one capable of being corrected). It is not enough to establish that the facts in the case, established in evidentiary proceedings, fit the statutory construction of the crime. Obviously, only a purposeful punishment may constitute an effective punishment, i.e. serving its function.

An alcoholic offender, or a criminal with diminished responsibility will receive a more lenient punishment than that given to a normal criminal, because their guilt is less than that of normal criminals. This is right and logical, as long as guilt is held to be the cornerstone of criminal law. But what results does this bring for society? Such a criminal is undoubtedly more dangerous to society than a normal criminal, hence social defence must be stronger in this case, not weaker. A reaction to the criminal act will be purposeful only if the criminal is either cured or (if this is not possible) neutralised. Whether this reaction will be called a sanction (as in the Italian draft), a preventive measure, or

will be referred to by some other name, is for the editors of the code to decide. The content does not depend on the name, and this content must replace the completely pointless punishments hitherto meted out in such cases.

There is a similar state of affairs with incorrigible criminals. Today's legislation has no cognisance of this type of criminal, but it does nonetheless exist. Criminal statistics and the experience of judges show this quite clearly. Practice will mete out a harsher punishment for a repeat offence or compulsive criminality than in ordinary cases, but the punishment will not attain the goal it must necessarily pursue, for it will not neutralise an incorrigible criminal. The sentence will come to an end, and the state authorities will, in Liszt's words, set this criminal free like a wild animal about to attack society. Such criminals are eternal revolutionaries, harming the legal order. The chances that they will adapt to social life are nil; they are the incarnation of imminent danger to society. Impossible to deter or correct, their murderous energy must simply be incapacitated. Therefore, in this area, theory juxtaposes the completely ineffective and overly lenient treatment accorded to incorrigible criminals with the practice of casting them outside society (artificial selection) through long-term or even life sentences (Liszt's opinion).

There is great divergence in the views on juvenile delinquency. For theory, the only purposeful response lies in educational and educational-correctional measures, and this maybe accompanied by favourable results obtained by such measures in other countries. Moreover, theory can claim that some of its postulates have been realised in the current legislation. In contrast, practice tends to take a rather sceptical stance, with practitioners sometimes calling for corporal punishment (these are not isolated calls). I will avoid joining the general discussion as to whether corporal punishment is a suitable penal measure (personally, I am certain that it is not). I shall only mention important mental aspects. In the era when the average citizen of a state was accorded only 'limited capacity for reasoning, as a subject', while the absence of political life, or restric-

tions in this regard, prevented any development of individuality, thus forcing an individual to content themselves with a predefined career, a certain effectiveness was enjoyed by exclusively coercive measures, as they proved effective for weak individuals. Now, when political life is fully developed (or even hyper-developed), as respect for individuality has been introduced into all walks of life, no brutal measure (such as flogging) can be used, and it will not be acknowledged that putting constant pressure on the will of the individual has any pedagogical or penal value. Only such measures that have a lasting and positive effect on the psyche (character training, improvement of conduct) can be described as effective. Corporal punishment does not belong to such measures; nor can it attain another goal of punishment, namely neutralisation.

The negative opinions of German courts and public prosecutor's offices concerning the conditional suspension of sentences are well-known (in this, case, practice was supported by some representatives of theory). However, suspended sentences are supported not only by the favourable experiences of Western-Romanic and English-speaking countries, but also by psychological aspects. In the case of a suspended sentence, the rehabilitation of criminals (at least, so-called civic rehabilitation) coincides with their obvious interests, as a result of which the impulse of a criminal instinct meets with a strong counter-impulse. Moreover, the State makes prudent use of the deterrent power of imprisonment on individuals who have not suffered this punishment before (it is such individuals that are at issue here). The deterrent power, if used reasonably, is a strong positive factor acting on the criminal whose sentence has been suspended, while it is lost forever without effect once a sentence is served. A criminal who has served time in prison is like a traveller in the Latin proverb who *cantabit coram latrone* as he has already nothing to lose.

The measure of the value of current legislation is its construction, while the measure of the value of new law must be its effectiveness, i.e. criminal statistics. Attempts have been made to coin the term 'law to

combat crime' (Thomsen) to underscore the law's practical character. On numerous occasions, overestimating[4] the aspect of legal construction has led to practice being uselessly overburdened. I shall restrict myself to one example. Theft and embezzlement are so close to each other in terms of content and social significance that Liszt believed they could be fused into a single offence. However, their different constructions, based on a doubtful criterion of differentiation, forced the courts, in a great number of instances, to conduct painstaking findings of fact (despite the offence being self-evident) and cite convoluted legal arguments, theoretically often valuable and subtle, but not producing any positive social effect. The purposefulness and effectiveness of punishment was not and cannot be helped by such work.

Theory demands that the languages of the criminal code and of the courts be made more democratic. The language of the code should be intelligible to a citizen of the State. The current style of statutes does not fulfil this criterion. Many clauses in this or that provincial statute require comments by legal scholars and judicial decisions; even a lawyer would not be able, relying on the text of a local statute alone, to determine what the following are: a commencement of execution, violence to the person, concentration, insult, etc. The definitions of fraud are excessively complicated in all provincial statutes, despite the fact the essence of act is quite straightforward. The establishment of juries in those provinces where they are unknown (former Russian and German ones) will probably occur in the near future. When this happens, throughout Poland we will encounter a phenomenon all too familiar to practice in Małopolska, namely that of jurors being unable to comprehend questions posed to them, due to their muddled and unintelligible formulation. This is unavoidable, since it is due to the language of a statute. If the formulation of a norm itself

4 I use the word 'overestimate', because construction is necessary; if it were not there, pernicious arbitrariness would arise; overestimating construction, in turn, is pernicious, too, as it overshadows other aspects that are equally important and relevant for criminal law. In addition, it leads to excessive subtlety in defining legal concepts, which is believed to be the hallmark of legal studies and judicial decisions.

(a statutory prohibition) is not felicitous, the need to use the statutory definition of an attempt to aid and abet exacerbates this defect further and produces the following question: 'Is A guilty of intentionally making person B, with a gift or otherwise, divulge his intention to take the life of person C through intentional acts, but done without premeditation, that comprise the commencement of the execution of the crime of homicide?' (An example given by Rosenberg in his dissertation on juries). I do not think that any lawyer will call this question overly clear and easy. Hence, it is vital to simplify the language of statutes. Equally vital is the need to simplify the language of the courts, both in terms of speech and writing. In this case, the change is straightforward, as it depends solely on the will of practitioners, whereas the language of statutes and a defective statute are inherited by humanity (as Mephisto correctly explained to a scholar), as chronic diseases from generation to generation.

Nonetheless, no tendency towards change can be noticed in practice, or even a sense of how much a change is needed. The language of the courts (especially the language of interviews and records) should be flexible and capable of adjusting to the intellectual and linguistic level of the interviewee. Instead, only too often do we come across legal expressions in the interview records whose colloquial meaning differs considerably from their legal meaning, or which are practically unknown to those outside the legal profession. We encounter such expressions as 'criminal decision', 'consideration', etc. And yet it is the witness who is responsible for the contents of a record, on pain of criminal liability; while the defendant has the procedural right to have their explanations faithfully recorded, and it is this faithfulness that is so easily distorted when these explanations are pointlessly translated into legal-judicial jargon. That this is not just a shortcoming of our practice is evident from the many comments by Anatole France on French practice. It goes without saying that putting a question to a witness that contains a legal term may lead to many results other than actually revealing the truth.

Theory assigns criminalistics (or forensics—scientific crime detection) an important place in criminology and demands that a university chair be founded for this science, along with other criminological sciences. Meanwhile, as a rule impractical practice does not care much[5] about this body of decidedly practical knowledge, despite the availability of accessible literature (French works by Reiss, Goddefroy, Locard, Gardenat, German ones by Gross, Gross-Höpler and Heindl, a valuable pamphlet in Polish by Olbrycht *O postępowaniu z dowodami rzeczowymi*, and books by Łukomski and Stepek-Krystańczyk). Criminalistics is not part of a judge's examination and I have absolutely no knowledge (I would prefer to be wrong) of opinions emanating from the circles of practitioners that demand a change. Thus, you can be an examining magistrate with no knowledge of forensics. In effect, the best pieces of evidence (so-called exhibits) are wasted, because the judge either does not take any notice of them or 'misreads' the material placed before the court, instead of making effective use of it. Knowledge of forensics therefore is a must for a judge (an examining magistrate or a judge hearing criminal cases), defence counsel and public prosecutor.

How radically theory has given up the old method of abstract treatment of problems can be seen in the fact that opinions are voiced by its representatives (Dernburg, Zitelmann, and recently Kantorowicz in: *Zukunft des Strafrechtes by Dehnow*) suggesting that law studies should be divided into three stages, by inserting between the initial theoretical course and final theoretical-practical course, a two-year practical programme of study. A curriculum which is—evidently—clearly not theoretical.

5 Of course, I have to recognize that in some cases forensic knowledge is used. However, the view expressed in this text is based on personal observations made while reviewing many statutes, coming from various provinces and information communicated to me by several professors of forensic medicine (v. also the pamphlet by Prof. Olbrycht mentioned in the text). I would consider it normal if every case were examined from the point of view of criminalistics, because only then would it be guaranteed that many and the best pieces of evidence are not lost to no avail.

Practice is concerned with the course of criminal proceedings from the moment they are instituted until their valid termination. What happened before the proceedings, because of a specific crime, and what will happen once they are terminated is of no concern to practice. The period when a criminal was on the skids, as it were, drifting towards crime, the individual or social factors that bore upon them at this time, the effectiveness or ineffectiveness of punishment once the proceedings are over, in particular finding that the criminal has improved or they are incorrigible, or indeed the ethical and mental experiences of the convict while serving time in prison—these are the aspects which a judge believes to be only loosely related to his profession.

This is a highly undesirable narrowing of horizons, because criminal proceedings are only an intermediate link between the time when a crime is imminent, and the sentence is carried out. This is the link that is the most closely tied to the preceding and following ones. The purposeful dimension of punishment is not possible without learning about the individual and social aspects of a criminal's life prior to a crime; criminal proceedings are a quite unnecessary outlay of labour if they do not bring any results over a longer period. Therefore, criminology broadens the horizons in two directions: it shows that it is necessary to deal preventively with the individual who is falling into crime, and demands that the stage of administering punishment be considered equally important with court proceedings.

Rejecting prevention would be just as unreasonable as rejecting hygiene in medicine and limiting oneself to treatment. Prevention saves not just individuals, but also interests that would fall victim to a crime. What bodies should be entrusted with prevention? Perhaps it should be made the responsibility of civic patrons or administrative authorities or, possibly, court divisions set up for this purpose. This is a question of the legislative technique, but it must be admitted that punitive measures alone will not suffice to combat crime. Theory (Roux) pins hopes on creating administrative prohibitions, removing

opportunities to commit crimes due to a lack of self-control or because of an easy opportunity (*facilités criminelles*, for instance public sales in great department stores).

The administration of punishment is still considered a mechanical enforcement of the letter of the sentence; facts revealed during the administration of punishment or events that happened in the course of it may not (unless they reveal a miscarriage of justice) have a retroactive effect on the judgment; the only thing they can do (provided they are positive and important) is bring about an administrative pardon. And yet only in the course of the punishment that it is possible to determine if it is effective, or what other punishment would be needed and effective. Such a diagnosis can only be made after a long observation of the convict's psyche and the effect punishment has on them. In the course of a trial such observations cannot be made, hence the strict administration of punishment defined by the sentence (which is the provision of the current legislation) has too many characteristics of a conjectural and accidental nature.

These practical considerations gave rise to the idea of moving the exact determination of the severity of the punishment to the stage of its administration and requiring that the sentence indicate the punishment approximately, by specifying its lower and upper limits (so-called indeterminate sentences). Then, the final determination of punishment would have to be preceded by a detailed examination and observation of the convict. In this way, accidents and conventional solutions could be avoided. This idea was born in a country of thoroughly realistic concepts: America. It is being applied in the Polish draft bill on juvenile courts to the determination of the severity of correctional measures.

I would like these comments to help rectify false opinions on criminal law that are in the making. It is assumed that it will be a theoretical construct, a utopian one in its humanitarianism, and thus ineffectual. I wish to dispel this myth. It will be much harsher than the current one

where needed (with respect to incorrigible criminals) and if it brings about a shift in other fields from the current pointless and ineffective harshness (e.g. the use of penal measures with respect to juvenile offenders) to crime prevention, it will satisfy the demands of culture for the benefit of society.

In a few years' time, a unified criminal law, based on new ideas, will be ready. Then practice will face a difficult task: it will have to bridge the huge gap between the old and new law, reject the dogmas that have run in its blood for generations, and absorb new ideas to be able to put them into action. We all hope that this task will be completed in the best way possible, for the benefit of the State. It would be beneficial to cast off now everything that is not required by the present statute but which is merely an inherited anachronism.

Perhaps now the paradox with which these comments started will not seem too shocking. Besides, paradoxes and criminology are genetically closer than it seems; after all, the modern master of paradox left his mark (albeit a sad one) on the history of criminology.

A few more words. It is all too easy to be misunderstood and unwillingly strike the chord of one's professional or personal sensitivity in spite of the fact that one speaks with an eye to objective reasons and arguments. I do not want my comments to be taken as the criticism of those who administer the law (judges or state prosecutors) that under difficult conditions, struggling against the shortage of personnel, perform their important tasks. That the point here is not criticism I mentioned at the outset; the lion's share of the above-mentioned shortcomings is a result of the current legislation. I must emphasise that it is the new law (and its supporters) that demands that those who administer the law be assigned a still more important and independent role than their current one. Those who administer the law are to be not only (as today) 'servants of the statute' or an instrument that blindly applies a statutory provision. Instead, knowing, understanding and assessing

life, in all its manifestations and living people, they should be a factor in the development of law[6]—next to statute drafters—and not only guard the provisions of statutes, but also achieve its long-term objectives. It is my strong desire and wish for the law enforcement authorities to muster and find the 'will power' necessary for future actions. It is only fitting to apply to my comments the motto: *honny soit qui mal y pense*.

6 For instance, a German draft bill leaves to the judge's discretion, in the case of an inapt attempt, not only what kind and the severity of punishment should be inflicted, but also if it should be inflicted at all. Moreover, there is an observable tendency to institute and expand the so-called judge-granted pardon. It is found in the Polish territory only in the former Russian partition by virtue of the Transitional Provisions.

Bogusław Janiszewski

On "Rationality" in Criminal Law[1]

Questions regarding the most desirable criminal policy and the reform of criminal law constitute one of the fundamental aspects of the rule of law. In answering them, both professionals and non-professionals argue that criminal law and criminal policy (with respect to both law enactment and application) should be rational and effective. This comes as no surprise if it is borne in mind that rationality and effectiveness are among the principal criteria for assessing any social activity. Moreover, citing "rationality" and "effectiveness" in social practice has become one of the most powerful means of persuasion, and the charge of irrationality in making a decision, similar to the charge of non-sequitur in drawing conclusions, is one of the strongest rhetorical arguments.[2] More important than their persuasive power, however, is the fact that the two concepts are used to legitimate enacted law. Regardless of what can be said about the ambiguity of the concept of rationality and its inadequacy for legal phenomena, it must be remembered that

> […] the directive which states that when describing someone's behaviour, or the products of their activity, one must assume that this behaviour is

1 Translated from: B. Janiszewski, *Rozważania o "racjonalności" w dziedzinie prawa karnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1996, 4 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe*, Toruń 1988, p. 51.

> rational from a human point of view, is a methodological directive common to much of the humanities. What is more, it is posited that this assumption is a distinguishing factor for the humanities.[3]

The argument that law is in need of "rationalising", which has been made in Poland with particular insistence since 1989, obviously concerns not only criminal law, but also the legal system and legal policy as a whole.[4] When applied to criminal law, however, it is associated with some very specific problems. From among all the legal disciplines, it is in criminal law that any shortcomings in rationality and effectiveness become particularly pronounced. Paradoxically, as Karl-Ludwig Kunz—the Austrian criminal law expert—stresses, it is in this field that such requirements are formulated in the strongest possible terms.[5]

Undertaken from the perspective of criminal law expertise, the following considerations attempt to assess the necessity and feasibility of evaluating criminal law and criminal policy by using the criterion of rationality. The attempt is conducted with an awareness of the controversies currently associated with the understanding of "rationality", and of the issues presently animating the development of philosophical and legal thought.

2. In the explanatory memoranda to the successive versions of the draft criminal code which have been published in recent years, mention is often made of the need to develop a "rational criminal policy". The 1995 memorandum reads: "… the draft designs the penal consequences of a prohibited act and principles for sentencing, taking into account the needs of a rational criminal policy, in order … that the court will be able to make a rational choice of punishment or criminal

3 Z. Ziembiński, *Metodologiczne zagadnienia prawoznawstwa*, Warszawa 1974, p. 115. Cf. K. Szaniawski, *Racjonalność jako wartość*, "Studia Filozoficzne" 1983, no. 5–6.

4 S. Wronkowska in: A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa*, Warszawa 1993, p. 164 ff.

5 K. L. Kunz, *Einige Gedanken über Rationalität und Effizienz des Rechts*, in: *Strafgerechtigkeit, Festschrift für Arthur Kaufmann zum 70. Geburtstag*, ed. F. Haft, Heidelberg 1993, p. 192.

policy measure”.[6] Some of the statements made by the drafters suggest a rather “procedural” understanding of rationality, in the sense that the authorities which apply the law should adhere to the rules of efficient operation. Other statements, in turn, refer to the evaluative plane, such as the sentence: “the draft provides for a system of sanctions helping the pursuit of a rational criminal policy which will be in line with contemporary tendencies”.[7] It is widely-known, however, that special sentencing principles and guidelines, and even penal sanctions themselves, contain axiological declarations. Moreover, sanctions implicitly indicate what weight is attached to a protected interest. The explanatory memorandum to the draft clearly states that the draft provisions on the term and degree of punishment “… differ radically from those in the 1969 Criminal Code, which were an expression of a different penal philosophy; one inconsistent with the spirit of a democratic state ruled by law”.[8] As can be seen, regardless of how “rationality” is understood, the draft applies this concept to different components of criminal policy, in other words to legislative decisions, and to decisions taken at various stages of criminal law enforcement. On this level of generality, the requirement that law be rational can hardly be treated in any other way than as a general guideline; it would be equally difficult to reconstruct its deeper meaning here.

In Polish criminal law scholarship, Lech Gardocki subjects the question of rationality to a broad analysis when focusing on the issue criminalisation. He believes that criminalisation is effected for rational reasons (“is rational”) when it expresses the legislator’s intention to bring about certain effects, which does not mean that such criminalisation can indeed bring about these intended effects, or that such effects

6 Draft criminal code, unpublished explanatory memorandum. Warszawa 1995, pp. 21–22. “This recognition is, however, limited by Constitutional principles and axiology expressed in principles and directives concerning the term and amount of punishment and other means”.

7 Ibidem, p. 36.

8 Draft criminal code with an explanatory memorandum, 1994, p. 35.

must meet with society's approval.[9] For instance, the purposes of rational criminalisation may include: protecting a legal interest, reinforcing moral attitudes, relieving social tensions, symbolically confirming certain values, disciplining society, and stressing the idea of social justice. Thus, for example, Gardocki expresses the view that witch trials were, according to the knowledge held at that time, an example of rational criminalisation.[10]

In contrast, according to Gardocki, irrational reasons for criminalisation include various emotional ones, in the invoking of which the legislator appeals to intuitions that a certain type of behaviour is reprehensible. Today, however, the real, emotional reasons for criminalisation are sometimes concealed under the guise of rational justifications. Gardocki claims that emotional criminalisation is based on punishing "because" (a crime has been committed) and not on punishing "in order to" (achieve a goal). As an example of emotional criminalisation (which can be fully approved), he includes the criminalisation of any sexual acts between adults and children.[11]

In this last assertion, Gardocki clearly refers to the juxtaposition of the criminal law based on retribution to that geared to prevention, in other words, the juxtaposition of the demands of justice with those of the effectiveness of punishment. The choice between these approaches and tasks is a fundamental moral choice present in the legal discipline in question, in both the legislative and judicial domains.[12] Additionally, it is worth mentioning in this regard that, according to today's understanding of this issue, punishing "because a crime has been committed" does not only involve emotions related to retribution. Punishment implementing the idea of justice has been used as a regulator of certain

9 L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990.

10 Ibidem, p. 53 ff. The subject of this work is, in the words of its author, a descriptive and not a normative study of criminalisation.

11 Ibidem, p. 83.

12 Cf. W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia*, Warszawa 1988, p. 267.

social and individual types of behaviour; hence, it has important goals to fulfil.[13] In practice, various compromises are obviously made between these two approaches.[14]

3. Among criminal law experts, it seems that the common-sense understanding of "rationality" is quite widespread: meaning the selection of appropriate means for achieving previously set goals, taking into account up-to-date scientific knowledge and commonly recognised values, including human rights.[15] If such an understanding were adopted, other meanings of "rationality" could be ignored and the discussion could be limited to the rationality of the goals and means. The point is, however, that the meanings of "rational" depend on the object being assessed, to which they refer, while such objects vary within law.

The definition of a criminal law system, Marian Cieślak writes, is a result of two factors. First, of rational thought that seeks to adjust optimally a given system to the current criminal policy so that criminal law becomes an efficient means for achieving the social ends that have been set for it. Second, it results from the "gravity of historical tradition and the inheritance of legal forms and patterns".[16] Unfortunately, there is no agreement in legal studies as to either the goals set or the proposed means, which is evident from the fact that jurists holding quite divergent views on the same issue claim that their individual proposals are the only rational ones. These complications arise because of the natural pluralism, so to speak, of goals in criminal law, which are observable in both general and individual perspectives. There are, however, also other reasons for these complications. A careful examination of the textbook definitions of punishment leads to the conclusion that the fundamental

13 Cf. U. Klug, *Skeptische Rechtsphilosophie und humanes Strafrecht, vol. II, Materiälle und formälle Strafrechtsproblemmme*, Berlin 1981; L. Lerneil, *Podstawy nauki polityki kryminalnej*, Warszawa 1967.

14 W. Sadurski, op.cit., p. 230 ff.

15 H.-D. Schwind, *"Rationale" Kriminalpolitik als Zukunftsaufgabe*, in: *Festschrift für Günter Blau zum 70. Geburtstag*, H.-D. ed. Schwind, Berlin, New York 1985; H. Zipf, *Kriminalpolitik*, Heidelberg 1980, p. 53.

16 M. Cieślak, *Polskie prawo karne, zarys systemowego ujęcia*, Warszawa 1994, p. 43.

question of whether a criminal law response constitutes a condemnation of an act or of the perpetrator is currently not clearly formulated, and this leads to a plethora of consequences.

In criminal law, as in other branches of law, there are normative, instrumental, axiological and social elements.[17] What makes this branch of law special, however, is its satisfaction of goals pertaining to justice, protection, guarantees and cooperation (consensual agreement in solving a conflict arising as a result of a crime). Taking into consideration all four different goals at the same time may lead to conflicts and in practice calls for making choices that may be assessed according to the criterion of rationality. Criminal policy, as Günther Kaiser writes, fits between criminological, criminal-law and political rationality.[18]

4. To answer now the question about the admissibility and adequacy of gauging law with the measure of rationality, it appears necessary to have a closer look at how this concept is understood in relation to law. There are two fundamental questions. The first concerns the object—what can be sensibly referred to as "rational" within the scope of law; while the second pertains to the subjectivisation of this concept.

As regards the latter issue, it is indisputable that the truth of a sentence or the rightness of a moral judgment does not depend on the person uttering it. However, in the case of the term "rational", the situation is quite different. The convictions that one has and the behaviour based on them are rational when there are "good reasons" for considering them true, morally right, etc. Yet, the truth and moral rightness, etc. of some convictions are not necessary conditions, and perhaps not sufficient conditions either, for considering them rational. A conviction may be rational even if it is false. This could be the case when an individual in a given situation has sufficient grounds for believing something is true and right. And vice versa, the rationality of a conviction may be

17 J. Wróblewski, *Teoria racjonalnego tworzenia prawa*, Ossolineum, 1985, p. 179.

18 G. Kaiser, *Perspektiven einer rationalen Kriminalpolitik*, "Kriminalistik" 1992, no. 12, p. 737.

questioned when, despite it being true, the individual has no grounds for accepting it.[19] It is obvious that this understanding of rationality comes down solely to the assessment of the decision-making process of the person making the decision and concentrates on its formal side.

It is also pointed out that there is a close connection between “rationality” and responsibility. Bernhard Peters observes that convictions, assertions or types of behaviour that can be described as rational are ones that a person can be responsible for, that can be somehow justified, or that lend themselves to being explained.[20] With regard to the object being assessed, Peters says that we tend to make statements about the rationality of behaviour or convictions when we adopt the role of observers, or when we look at our own activity with the benefit of hindsight. According to Peters, when we assume the role of “participants” we do not argue about “rationality”, but rather about the truth or rightness of convictions, assertions, etc.[21] However, it is difficult to agree with this assertion, because it is decision-makers that often try to make others consider their decisions rational.

Let us return to the first question—about the object, or what can be sensibly referred to as rational within law and a legal policy. Taking a broader view, it turns out that various scholarly disciplines have their specific research objectives, methods, criteria of judging effects and standards of criticism. Therefore, in a descriptive sense, there is talk of various “rationalities” or even various “logics of conduct”, including juridical and political rationality.[22] What appears particularly important but also highly problematic is relating rationality to moral norms and judgments.

19 B. Peters, *Rationalität, Recht und Geselschaft*, Frankfurt am Main 1991, p. 176; cf. Z. Ziembiński, *Metodologiczne zagadnienia.*…, op.cit., p. 116; L. Morawski, op.cit., p. 59.

20 B. Peters, op.cit., p. 172.

21 Ibidem, pp. 178, 217 ff.

22 Ibidem, p. 183.

In these considerations on the concept of rationality, our interest is primarily focused on decisions, in particular decisions relating to enacting and applying law. The rationality of such decisions is confirmed by two kinds of arguments: those expressing the decision-maker's knowledge and those expressing the preferences (values) they share.[23] The study of the questions of rational law-making has produced the concepts of internally and externally rational decisions.[24] Let us recall that internal rationality means a decision is supported by specific arguments and by the adopted rules of justified reasoning. The rationality of a decision thus understood is therefore its formal property, as it does not concern the content of arguments or the rules of reasoning. In turn, a decision is externally rational if, in addition, its premises are judged to be sound. Such a judgment involves a comparison of the decision-maker's knowledge and preferences with those held by the person judging the decision. When knowledge and preferences are found to be consistent with each other, also with respect to the ordering of values, a legislative decision is judged to be externally rational; if not, it is judged externally irrational. If the judging person cannot find any justification at all for a given decision and the legislator has not formulated one either, then, in the opinion of Jerzy Wróblewski, the decision is simply irrational.[25] This division of the rationality of legislative decisions seems to be an elaboration on the distinction between formal and substantive rationality attributed to Max Weber.[26] Looking at this from the perspective of criminal law, one can express the conviction that stopping at the internal rationality of the decision would be far from satisfactory.

5. Rationality in law has been much discussed in German scholarship, primarily due to the philosophical traditions and the need to

23 J. Wróblewski, *Rozumienie prawa i jego wykładnia*, Ossolineum 1990, p. 109.

24 Ibidem; J. Wróblewski, *Teoria*…, op.cit., p. 161 ff.

25 J. Wróblewski, op.cit., p. 164.

26 Cf. K. Eder, *Zur Rationalisierungsproblematik des modernen Rechts*, in: *Max Weber und die Rationalisierung sozialen* Handelns, eds. W. M. Sprondel, C. Seyfarth, Stuttgart 1881, pp. 157 ff; B. Peters, op.cit., pp. 114–118.

overcome the irrationality of law during the Nazi period. The German author Bernhard Peters, citing Jürgen Habermas, distinguishes three types of rationality: (1) cognitive-instrumental, (2) moral-practical, and (3) evaluative-expressive.[27]

The most important standard of the first type is truth. The second is related to adopting the point of view of rightness and the appropriate criterion of justification. The third has an entire gamut of standards, such as beauty, dignity, pleasure, etc. Furthermore, emphasis is rightly put on the difference in meaning between the “rationality” of human activities (for instance, decisions) and such concepts as the truth (of statements, for example), the moral rightness (of some norm or assessment) or appropriateness or validity (of some extra-moral values). All this supports the conclusion that “rationality” is by no means a hypernym for all these terms.[28] However, the key point is that the kind of division that Habermas and Peters adopt, which clearly refers to the old distinction between the rationality of aims and values (*Zweck*- and *Wertrationalität*), appears to be adequate to the study of legal phenomena, especially because the first two *types* of rationality are distinguished.

Doubts arise, however, with regard to Peter’s stance on the relationship between the three distinguished types (dimensions) of rationality. Specifically, he does not allow for the possibility of a conflict between empirical-cognitive rationality and normative (moral, evaluative) rationality. In his opinion, the attribution of empirical-cognitive rationality only entails that the decision was based on the best knowledge available. However, knowledge alone is not supposed to provide any recommendations as to the course of action to be taken; all it does is inform about possible courses of action and their expected consequences. Whereas the goals that Peters describes as moral may in fact be conflicting, for empirical reasons. All the three types (aspects) of rationality mentioned earlier are, according to Peters, independent conditions of the

27 B. Peters, op.cit., p. 186 ff.
28 Ibidem, p. 171.

"global rationality" of some type of behaviour, decision or norm. A lack of rationality in one of these dimensions cannot be made up for by its presence in another dimension. Hence if only one of them is judged to be "below the threshold of rationality", the entire behaviour or decision cannot be justified, and is thus entirely irrational.[29]

It appears that both of Peter's positions as set out above are incorrect. First, a possible conflict between cognitive-empirical rationality and normative rationality may arise because when we speak of rationality we have in mind the relationship between a decision made by taking advantage of knowledge and a decision made following some norms, and not the abstract relationship of objective knowledge alone to these norms. Second, it is for this reason that various kinds of rationality are distinguished: to be able to relativize the concept of rationality itself. Thus, the proposal to introduce yet another concept of global rationality may, perhaps, increase the regime of rationality, but at the same time increases the ambiguity of this concept. In such a general sense, a decision could possibly be judged optimal.

In analyses of the concept of rationality, reference is often made to the distinction between formal and substantive rationality mentioned earlier. Peters situates formal rationality "across" the three dimensions of rationality he distinguishes,[30] because he believes that formal criteria

29 Ibidem, pp. 193–197. The global rationality of some behaviour would be the greater, the higher are the values of individual dimensions of rationality. It follows that one should choose such manners of behaviour that bring about the optimum of rationality in all the three dimensions. Ibidem, p. 193. Cf. R. Dreier, *Irrationalismus in der Rechtswissenschaft*, "Rechtstheorie Beiheft. Juristische Logik, Rationalität und Irrationalität im Recht" 1985, vol. 8.

30 B. Peters, op.cit., p. 197 ff. Both the concepts of formal and substantive rationality, and the functions they have been given in jurisprudence have a rich history. They also played a practical role in countries whose legal systems witnessed a sharp turn from totalitarianism to democracy. The result of the evolution of views in post-war Germany is summed up by A. Kaufmann as follows: "Beklagenswerterweise hat aber auch hier wieder einmal unser Nationalcharakter bewirkt, dass die Dinge bis ins Extrem gesteigert wurden, nämlich bis zu einem völig inhaltsleeren Formalismus und Funktionalismus, dessen 'Reinheit' so steril geworden ist, dass sie nach nichts mehr schmeckt (Maihofer nennt diese Reinheit eine 'formalistische Amputation' des Rechts)" A. Kaufmann, Recht und Rationalität, Gedanken beim Wiederlesen der Schriften von Werner Maihofer". A. Kaufmann, E.-J. Mestmäcker,

play a specific role in justifying all three kinds of rationality: empirical, moral and evaluative.

In Polish legal theory, Lech Morawski views the concept of “rationality” from another perspective, by relating it to the main objectives of efforts to transform reality by means of law.[31] In his opinion, decisions involved in enacting or applying the law may concern either increasing the acceptability of the social order constituted by them or broadening communication—free from repression and founded on ethical norms—in social relations. To varying degrees, all these goals are actualised in the context of the fundamental functions of criminal law. Referring to these three ideas, Morawski distinguishes different corresponding models of reasoning: (1) epistemic-technological, (2) rhetorical-topical, and (3) communicative. The first can be reduced to the question of the goals set and the means approved. In the second, every argument is related to a specific audience, and the type of audience decides which arguments are to be considered relevant and which are not. The communication model, in turn, may be linked to criminal law primarily when its role is taken into account in the cooperation aiming to resolve a conflict between the perpetrator and the victim of a crime.

Morawski writes:

> Each of these models takes a different view of what rational law is and how social interactions ought to be rationalised by means of law. Consequently, each adopts a different conception of enacting and applying law, has a different understanding of what law interpretation is, and the problem of establishing the factual state of affairs […] each of these models draws on a different ideology of enacting and applying law.[32]

H.F. Zacker eds, *Rechtsstaat und Menschenwürde, Festschrift für Werner Maihofer zum 70. Geburtstag*, Frankfurt am Main 1988, p. 27.

31 L. Morawski, op.cit.

32 Ibidem, p. 8.

A major claim made by Morawski is that a decision that is rational from the point of view of one model of reasoning does not have to be rational from the point of view of another model. As Morawski emphasizes, it is doubtful whether the idea of an effective order could replace the idea of a socially accepted order. These two kinds of rationality are simply different, and each may prove to be irrational from the point of view of the other, but this is no reason to eliminate one in favour of the other.[33]

6. According to Kunz, as a component of social practice, law is entangled in such diverse relationships that it cannot be defined strictly in accordance with the criterion of rationality.[34] For law is a relatively autonomous social medium, based on counterfactual normative assumptions ("dogmas") and subordinated to formalised procedural rules. Hence, an autonomy is manifested that prevents any direct shaping of social reality in accordance with the demands of effectiveness. In criminal law, in Kunz's opinion, we are faced with a flight from scientific-empirical analysis. This legal discipline uses many concepts that make empirical knowledge unnecessary and impossible to avail oneself of in the decision-making process. They include such evaluative terms as "social harm", "legal interest", "sufficient suspicion of commission of a prohibited act", etc.[35] The point is that, as Arthur Kaufmann stresses, the concepts of norm, duty and law are not free from references to values and, therefore, do not lend themselves to a strictly empirical approach.[36]

33 Ibidem, p. 62.

34 K.-L. Kunz, op.cit., p. 188.

35 Ibidem, pp. 189, 195. Another example of "resistance to experience" discussed by K.-L. Kunz is general positive crime prevention. In the conclusion of his critical remarks on the insusceptibility of criminal law to empirical verification, he asserts that administration of justice may be treated more as an institution for administering crime than combating it. Ibidem, pp. 192, 194.

36 A. Kaufmann, E.-J. Mestmäcker, H.F. Zacker eds, *Rechtsstaat und Menschenwürde, Festschrift für Werner Maihofer zum 70. Geburtstag*, Frankfurt am Main 1988, p. 27.

In the current criminal law scholarship, it is not uncommon for authors to draw attention the limitations that the law supposedly reveals with regard to the requirement of rationality, which is usually understood in an empirical sense. Criticism is sometimes levelled at criminal law itself for its failure to adapt to the modern canons of science. The discussions of such crucial problems as the concepts of acts and guilt, or the goals behind the severity of punishment, reveal the entire history of such disputes. On the other hand, the criterion of rationality is itself held to be inadequate for evaluating the law.[37] To bring some order to these discussions, it could prove helpful to refer to the paradigms of legal dogmatics currently in place and use the criterion of rationality in a properly relativised manner, so that the object under evaluation and further evaluative criteria adequate to it would remain clear. Furthermore, it is equally important to make certain ontological assumptions with respect to the values themselves.

Let us recall some fundamental issues: in the theory of law, attention is given to two models which serve as points of departure for the discussion on the nature of jurisprudence. One is designated as empirical, while the other as humanistic.[38] The subject-matter of the former is the description of reality. In turn, the subject-matter of jurisprudence as a humanistic discipline is the understanding of facts, consisting in ascribing a sense, meaning or value to the material substrate of the facts. This is done through statements that are not necessarily true or false sentences. If the statements of humanistic disciplines are not sentences, they are subject to justification in terms of the adopted epistemic and axiological premises.[39] In the study of law, both approaches—empirical and humanistic—maintain their relevance, but they are often wrongly

37 K.-L. Kunz, op.cit.; C. v Mettenheim, *Recht und Rationalität*, Tübingen 1984, p. 62 ff.; H. Schüler-Springorum, *Kriminalpolitik für Menschen*, Frankfurt /M. 1991, pp. 174 ff.

38 Cf. K. Opałek, J. Wróblewski, *Prawo, metodologia, filozofia teoria prawa*, Warszawa 1991, pp. 36 ff.

39 Ibidem, p. 37.

considered equivalent in practice. Furthermore, the methods they use are not properly distinguished.

7. Criminal policy, like many other social activities, requires effectiveness to be placed on an equal footing with rationality. Without going into the various meanings of the former, it is observed that "effectiveness is a condition of rationality". "Rational law-making is by assumption enacting effective law," Wróblewski writes, but adds: "Effectiveness is necessary, but does not suffice, since a rational lawmaker must also implement other values".[40] Moreover, in relation to the application of law, one can also speak of the rationality of goals, means and the results achieved. In order to avoid misunderstandings, it is necessary to specify exactly what effectiveness is at stake and in accordance with what dimension of rationality we formulate our assessments.

The effectiveness of law, meaning its ability to achieve set goals, is considered one of the principal reasons for criminalisation. Of course, before an act is criminalised, it is only possible to make predictions, while an empirical study of effectiveness can be carried out *ex post*.[41] The effectiveness of criminal law can be assessed in terms of its principal functions, which were mentioned earlier. Furthermore, the effects of criminalisation are sometimes discussed under the following three categories: protective, symbolic and educational.[42] They are variously ranked in importance, depending on the matter to which they refer, and are problematic when it comes to assessments according to the criterion of rationality. Gardocki draws attention to this issue.[43] For instance, with respect to the protective effect, he stresses that the notion of "legal interest" is prone to manipula-

40 J. Wróblewski, *Teoria…*, op.cit., p. 250; "Legal rules […] are also assessed not in terms of goals they promote, but various fundamental axiological values that a given system of law implements (e.g. justice…). Thus, effectiveness must not be made a fetish—effectiveness is neither the only one, nor, as one could presume, the highest assessment criterion of the law in force". Ibidem, p. 241. Cf. Z. Ziembiński, *Metodologiczne…*, op.cit., pp. 244 ff.

41 L. Gardocki, op.cit., pp. 149 ff; H. Zipf, op.cit., pp. 54 ff.

42 M. Delmas-Marty, *Analiza systemowa polityki kryminalnej*, "Państwo i Prawo" 1985, vol. 11.

43 Ibidem, p. 162 ff.

tion. It is facilitated by the difficulties with empirical verification caused by its very general or even ostensible formulation. In turn, “… owing to the ingenuity of interpreters, almost any provision may have an object of protection assigned to it, provided it is formulated sufficiently generally and obscurely”.[44] As regards the symbolic effect, this involves passing an emphatically negative judgement on an act through its criminalisation, in spite of the fact that it may prove ineffective as far as prosecution and punishment are concerned. In this case, the general-educational goal of law may be achieved, despite the commonly held opinion that the criminalisation of acts that cannot be prosecuted depreciates the value of law and results in demoralization. The stance adopted with regard to this effect of criminalisation seems to depend on the weight of the interest to be protected and the preferences of the legislator.

8. Certainly, the most interesting question—and at the same time the most difficult one—concerns the rationality of the values on which law rests, and which are also to be protected by law. Legal theorists emphasise that a major controversy of axiological studies is connected with the philosophical determination of an adopted methodology. The familiar issue here is the recognition or refusal to recognise the existence of objective values, and thus their cognisability. For this reason, Kazimierz Opałek and Wróblewski argue that we have to contend with various models of scientificality, and thus of rationality.[45] As Marek Piechowiak writes, to understand the foundations of law (not only its formal requirements, but also the basis of the content of just law), before we ask what is valuable we need to tackle the problem of what values are, and how they exist. The way in which the problems, foundations, content and goals of law are viewed depends on the answers to questions such as these.[46]

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44 Ibidem, p. 51.

45 K. Opałek, J. Wróblewski, op.cit., p. 44. Cf. S. Wronkowska, op.cit. V. also a statement by Ziembiński on the consequences of the position of emotivism: *O pojmowaniu pozytywizmu oraz prawa natury*, Poznań 1993, pp. 21 ff.

46 M. Piechowiak, *O wartościach i sprawiedliwości prawa* paper delivered at the conference *Justice, Ethics, Law—present-day dilemmas*, Katowice 1992.

Yet another issue is the possibility of considering the value of law as a social institution, either generically or specifically. On the one hand, as Ziembiński emphasises, the arguments that are considered the most convincing are tied up with seeking approval for the social system law is supposed to serve. On the other hand, these are discussions of the axiological justification of the particular institutions or norms of the legal system by appealing to the moral judgements of acts or the social results of acts indicated in these norms.[47]

This article is limited to the question of the results obtained by the application of the rationality criterion to the moral choices underpinning legal norms and others that are made in the course of applying the law. Here two directions of this reflection can be outlined, reflecting the formal and substantive understandings of rationality.

In the context of rational law-making, rationality is a formal value in the strict sense.[48] This entails, within the scope under discussion, the demand that the system of values on which the legislator relies when making decisions should be properly ordered. Moreover, the values must first be formulated precisely enough and working out the principles of their preferential character. In sum, the model of rational law-making developed by legal theory is said "…to be useful in every review of a specific ideology or a specific normative law-making model".[49] Rationality, as a formal value of law, is independent of the substantial goals it implements.

The formal values of law are instrumental in character: they are valuable on account of their usefulness in achieving specific substantive values. However, the rationality of law-making does not make law or its particular norms substantively rational. The question arises of whether, when addressing the axiological problems of the foundations of law, we can stop at appealing to the axiology of a democratic state ruled

47 Z. Ziembiński, *O stanowieniu i obowiązywaniu prawa zagadnienia podstawowe*, Warszawa 1995, p. 94.

48 J. Wróblewski, *Teoria.…*, p. 165.

49 Ibidem. Cf. S. Wronkowska, op.cit., p. 173. The author says that the values on which the lawmaker rests its decisions can be described as either substantial or formal.

by law, along with the indeterminate concept of rationality, as did the drafters of the criminal code in the successive explanatory memoranda in the early 1990s. It is worth noting that the formal understanding of rationality makes it possible to recognise the legal norms which realise the values adopted under the plebiscite procedure as rational. In this context, it will be worthwhile citing Ernst-Wolfgang Böckenförde”s opinion as a criticism of the conception of the axiological grounding of law. He argues that they invoke a changeable, temporary factor, an ethical consensus that in a pluralistic society undergoes frequent change and gives no guarantee of rightness. This conception abandons any verification of the consensus against external criteria and adopts it rather as an unquestioned benchmark. In this way, the axiological grounding of law surreptitiously succumbs to a new kind of positivism—a positivism of popular evaluations.[50] What is more, they can be very easily legitimated by referring to the criterion of rationality, which is after all understood subjectively. Hence, we are dealing with, in Böckenförde”s words, a sociological or socio-cultural justification of law, rather than a philosophical one. “Invoking values and the concept of value is thus not a sufficient response to the indefeasible question, arising out of the very essence of law, about its meta-positivist reason and foundation”.[51]

Considering the question of the axiological foundations of criminal law, gives rise to the thought not only of the rational creation of criminal law, but also of the creation of rational law, which in fact must be assessed according to different criteria, and which will not be touched upon here. The issue is a statutory law that is an “instrument of justice” and not its source, while the attained social (political) consensus is not the ultimate foundation of law. “There are rational grounds for question-

50 E.-W. Böckenförde, *Prawo i wartości, o krytyce idei aksjologicznego ugruntowania prawa*, “Znak” 1992, no. 11, p. 67.

51 Ibidem. In the conceptions of axiological grounding of law, in E-W. Böckenförde’s opinion, moral values lack any rational grounding also in this sense that their foundation is non-discursive: a discussion is an exchange of views on what is considered right and not on what the grounds for considering something right are.

ing the will of a majority. Allowing for such a possibility is necessary if one is serious about human rights".[52] From the perspective of conceiving values in the philosophy of action "… human rights […] are not a proclamation of one of many (broadly equivalent) systems of values, but they have their meta-positive justification, reaching all the way to who a human being is".[53] Ziembiński writes:

> Without adopting a specific ontology of the human being, without eschatological assumptions as to what the sense, purpose, tasks of h man life are, what its destiny is and other assumptions of this kind, many disputes about moral values may be actually irresolvable or, in the undisclosed absence of common assumptions, may lead to only apparent settlements.[54]

Let us add here that such settlements, in accordance with a commonly held understanding of rationality, may actually be considered rational.

9. Analysis of the concept of rationality makes one realise the extent to which this concept is misused in the colloquial understanding of enacted law and its application. The concept is in danger of taking on the role of a "code" or "cipher" which will ultimately shift its meaning to the opposite of rationality. We will be then dealing with a "modernist *façon de parler*" or a "modern-day rationality delusion".[55]

In the domain of criminal law, the understanding of "rationality", as many other issues, has been developed "on its own terms". Kaiser associates it with a planned, non-self-contradictory, "moderate" shaping of criminal-law social control. It takes into account the recognised principles of criminal-policy and, in addition, meets the conditions of trans-

52 M. Piechowiak, op. cit.

53 Ibidem.

54 Z. Ziembiński, *O stanowieniu.…*, p. 95. V. a critical statement by Ziembiński on the discussions held by criminal law theorists and views expressed in judicial decisions on this question: *Etyczne problemy prawoznawstwa*, Wrocław 1972, pp. 188–189.

55 H. Schiiler-Springorum, op. cit., p. 177. "Among even serious scholars, calling some behaviour rational in a given situation, is sometimes considered an expression that does not require any relativisation". Z. Ziembiński, *Metodologiczne.…*, op.cit., p. 118.

parency and verifiability, satisfies the duty to provide a justification, and can be corrected.[56] Heinz Zipf, in turn, counts "rationality" among the three principal requirements underpinning any criminal policy, alongside "practicality" and "effectiveness". By "rationality", he means a "judicious" implementation of a basic concept in the fight against crime, together with the "component elements" of such a concept. Zipf also recalls a well-known but ignored truth, namely that criminal-law dogmatics does not lend itself to being defined as an aim in itself, but rather all its pronouncements ought to be judged in the light of the overall conception of criminal policy.[57] However, as Kaiser emphasises, a "holistic" theory or conception of a rational criminal policy has yet to be developed, and the prospects for creating such a conception are viewed as bleak.[58] Stratenwerth comes across as downright pessimistic, since he writes that whenever a scientifically credible answer is sought in a matter of importance for criminal law, it transpires that most of the time such an answer still does not exist, and may never be provided with sufficient accuracy.[59] However, in a way, this is arguably a natural state of affairs. For instance, nobody can estimate the extent of actual damage caused by a single offence. In this situation, Stratenwerth maintains, all we can do is to "retreat in shame towards common sense, which, as a matter of fact, is hard to come by".[60] Indicating the limitations in the application of scientific arguments, Stratenwerth comes up with a highly pertinent reflection: We can certainly draw scientific conclusions as to what norms must be protected by criminal law in order to preserve a given social order, but science will be of no help to us in the attempt to answer the fundamental question of whether this order deserves to be supported in the first place.[61]

56 G. Kaiser, op.cit., p. 742.
57 H. Zipf, op.cit., pp. 53–54.
58 G. Kaiser, op.cit., p. 742.
59 G. Stratenwerth, *Leitprinzipien der Strafrechtsreform*, "Arbeitsgemeinschaft für Forschung des Landes Nordrein-Westfalen" 1970, vol. 162, p. 21. Cit. per L. Gardocki, op.cit., p. 101.
60 Ibidem.
61 Ibidem.

Literature

Böckenförde E.-W., *Prawo i wartości, o krytyce idei aksjologicznego ugruntowania prawa*, "Znak" 1992.

Cieślak M., *Polskie prawo karne, zarys systemowego ujęcia*, Warszawa 1994.

Delmas-Marty M., *Analiza systemowa polityki kryminalnej*, "Państwo i Prawo" 1985, vol. 11.

Eder K., *Zur Rationalisierungsproblematik des modernen Rechts*, in: *Max Weber und die Rationalisierung sozialen* Handelns, eds W. M. Sprondel, C. Seyfarth, Stuttgart 1881.

Gardocki L., *Zagadnienia teorii kryminalizacji*, Warszawa 1990.

Kaiser G., *Perspektiven einer rationalen Kriminalpolitik*, "Kriminalistik" 1992, no. 12.

Kaufmann A., Mestmäcker E.-J., Zacker H.F. eds, *Rechtsstaat und Menschenwürde, Festschrift für Werner Maihofer zum 70. Geburtstag*, Frankfurt am Main 1988.

Klug U., *Skeptische Rechtsphilosophie und humanes Strafrecht, vol. II, Materiälle und formälle Strafrechtsproblemmme*, Berlin 1981.

Kunz K.L., *Einige Gedanken über Rationalität und Effizienz des Rechts*, in: *Strafgerechtigkeit, Festschrift für Arthur Kaufmann zum 70. Geburtstag*, ed. F. Haft, Heidelberg 1993.

Lerneil L., *Podstawy nauki polityki kryminalnej*, Warszawa 1967.

Mettenheim C., *Recht und Rationalität*, Tübingen 1984.

Morawski L., *Argumentacje, racjonalność prawa i postępowanie dowodowe*, Toruń 1988.

Opałek K., Wróblewski J., *Prawo, metodologia, filozofia teoria prawa*, Warszawa 1991.

Peters B., *Rationalität, Recht und Geselschaft*, Frankfurt am Main 1991.

Sadurski W., *Teoria sprawiedliwości. Podstawowe zagadnienia*, Warszawa 1988.

Schüler-Springorum H., *Kriminalpolitik für Menschen*, Frankfurt am Main 1991.

Schwind H.-D., *“Rationale” Kriminalpolitik als Zukunftsaufgabe*, in: *Festschrift für Günter Blau zum 70. Geburtstag*, H.-D. ed. Schwind, Berlin–New York 1985.

Stratenwerth G., *Leitprinzipien der Strafrechtsreform*, “Arbeitsgemeinschaft für Forschung des Landes Nordrein-Westfalen” 1970, vol. 162.

Szaniawski K., *Racjonalność jako wartość*, “Studia Filozoficzne” 1983, no. 5–6.

Wronkowska S. in: A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa*, Warszawa 1993.

Wróblewski J., *Rozumienie prawa i jego wykładnia*, Ossolineum 1990.

Wróblewski J., *Teoria racjonalnego tworzenia prawa*, Ossolineum, 1985.

Ziembiński Z., *Etyczne problemy prawoznawstwa*, Wrocław 1972.

Ziembiński Z., *Metodologiczne zagadnienia prawoznawstwa*, Warszawa 1974.

Ziembiński Z., *O pojmowaniu pozytywizmu oraz prawa natury*, Poznań 1993.

Ziembiński Z., *O stanowieniu i obowiązywaniu prawa zagadnienia podstawowe*, Warszawa 1995.

Zipf H., *Kriminalpolitik*, Heidelberg 1980.

Jan Zdzitowiecki

A Few Remarks on the Theory of Finance[1]

The well-known Russian historian Yevgeny Tarle wrote in his *History of Europe 1871–1919*[2] that "in the first years after the war of 1914–1918 some financiers expressed the view that: "none of the rules of the so-called theory of finance had any scientific, i.e. compelling[3] significance, and could not have, because so-called "financial law" in its entirety was an attempt to construct an allegedly scientific theory from the long-standing customs of 19th-century financial life".

The mention of the "financial customs" of the 19th century seems to indicate that this historian had public finance in mind; and it is public finance that shall be discussed below. It is not known, in turn, if "some financiers" were practitioners or theoreticians in the area of finance.[4] Perhaps it would be going too far to believe that there is a big gap between practitioners and theoreticians in the way they understand finance; the former too often believe the latter to be doctrinaires, while the latter consider the former to be some kind of passive tools. Nevertheless, a difference between the views of theoreticians and practitioners is sometimes

1 Translated from J. Zdzitowiecki, *Parę uwag wokół teorii finansów*, "Ruch Prawniczy Ekonomiczny i Socjologiczny", 1972, 2, pp. 95–109 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 Y. Tarle, *Dzieje Europy 1871–1919*, Warszawa 1961.

3 Let's ignore the question if "scientific" indeed means the same as "compelling".

4 The quoted author did not give any name in this context. I shall follow his example in this article.

noticeable, with the impact of practitioners being easily noticeable in various publications as well. Views resembling those of Yevgeny Tarle quoted at the beginning have been expressed for a long time by authors more or less rightly considered to be – and considering themselves — theoreticians of financial matters.

When considering the early years of financial studies, a search for purely theoretical deliberations would prove to be in vain. In those times, journals were published for practical purposes and this continues to be the case, with success, ever since. There are plenty of authors who believe financial studies to be a kind of practical skill, an art close to a craft, denying its practitioners any ability to think in more general, not to say, abstract terms. The task of financial studies understood in this way is drawing up recipes or rules of conduct for the government and its financial agencies. A note of impatience and disdain for what can neither be immediately implemented nor revealed in practical life can be detected in this view. As if it were not familiar knowledge that research results can only seldom be immediately applied in practice. It was such direct ends that the authors of financial articles had in mind in the times of cameralism or of so-called political arithmetic. A certain dislike for theoretical inquiries may stem from too hastily drawing practical conclusions (sometimes ultimately proving to be highly impractical) from only sketchy scientific views (or theories). Not infrequently, they are rather more like preliminary outlines than completed wholes. Alternatively, hasty conclusions are drawn from insufficiently studied theoretical views, even though such views have fully elaborated.

All these diverse misunderstandings cause today's financial studies to be supposedly far from perfect, in the opinion of many contemporary authors from various countries. The studies allegedly lack any theoretical underpinnings and are a more or less chaotic collection of casual observations. This comes as no surprise, since the very concept of "finance", although commonly used both in academic discourse and colloquial speech, has allegedly not been defined accurately enough yet.

Theoretical questions arising from the study of the legal-financial situation, are supposedly tangled in a "maze of problems", which, in particular, financial-law studies have not been able to order and elucidate yet. When the state of financial science is painted with such colours—to which others will be added below—it will not be surprising to hear that this discipline lags behind many other fields of learning and attracts little interest.

Although in traditional financial studies, too, a great deal of space has been given to the technical aspect of financial phenomena, the modern-day professional literature devotes so much attention to these organisational and technical questions that the impression is sometimes created of the entire field of financial studies being largely concerned with the forms and methods of accumulating and using monetary resources. Alternatively, activity in the field of finance is held to be propelled by a single trend of social life. Meanwhile, life as we know it is rather complex and lends this complexity to finance.

Major advances in the technical and natural sciences, which it was possible to put into effect without much delay or hindrance, have pushed the humanities into the background. The latter's conclusions do not lend themselves to easy implementation or palpable verification. The successes of technical and natural sciences have thus influenced the social sciences, including financial studies. In this field, too, matters have begun to be counted first, before they are weighed, to the neglect of the old truth which had been expounded in writing in the latter half of the 18th century, that it is precisely in finance that two times two rarely makes four, but usually less or more. Thus, financial studies have also reflected this new positivism—we can use this term here—and bent their interest towards the search for a technical means of managing the monetary matters of the State. Incidentally, the considerable impact of finance practitioners is also evident in this area; those who confidently busy themselves today not only with current affairs but also long-term forecasts.

One more trait: perhaps not concerning studies as much as teaching (as a matter of fact, they are sometimes hard to separate: all that is known is that without the former, the latter should not be done). Teaching—at the tertiary level—too often tends to convey to students longer or shorter summaries of the legal norms in force (not only in the area of financial law, but also in the area of "finance"). This is done by explaining (which is actually necessary) commonly used concepts (not to say: names) and sometimes calling this part of the course the "theory of finance", or some such. Alternatively, being convinced that this is satisfactory, a historical approach to the subject is limited to the enumeration of successive occurrences. A reservation must be made in this context, namely that both the knowledge of the law and the sequence of occurring phenomena are necessary but insufficient. This way of teaching, meeting the above description more closely on one occasion and less so on another, seems, however, to be rather anachronistic today and appears to have been inherited perhaps from the 19th-century custom, or maybe an even older one. The capitalist State at that time (particularly earlier ones) made do with a relatively modest number of regulations concerning its finance. The reasons for this are well known and need not be mentioned here. To become familiar with all these regulations and learn them was perfectly possible, while today there are so many financial norms that the old teaching method has become glaringly absurd and would be best replaced with another. How to do this is another story. Suffice to say that the present teaching method seems to be influenced by the custom of primarily focusing on techniques and descriptions.

In many countries a lot of books are published, often very useful ones, but in most cases they are focused on teaching (textbooks) rather than research, or they are produced for propaganda purposes. Of course, even such publications may not be indifferent to the study of finance, but their main purpose obviously is not to make a contribution to knowledge. In all ages, financial matters were dealt with by historians, philosophers, jurists, economists, politicians and even theologians. Perhaps it

is for this reason that such studies, intended to be purely financial, often suffer from a confusion of subjects and the muddling of a strict theoretical analysis and synthesis with other approaches, either for pedagogical purposes (textbooks) or descriptive ones, or for making a dry presentation of the law in force.

Financial studies are based on and tap into, so to speak, many other branches of knowledge, which makes it quite difficult to stake out their proper purview. A well-known truth must be remembered in this context, namely that he who tries to embrace too much, does not hold firmly. If one wanted to consider financial matters in the broadest possible manner, one would run the risk of the treatise spilling in all possible and impossible directions. The certain outcome here would be a situation wherein readers would learn a lot of admittedly interesting details, but they would not learn the most important thing: what finance actually is and what financial studies treat of. Perhaps it is because our discipline sometimes tries to shoulder too much, while not always being able to bear the burden, that we can sometimes hear the opinion that actually there are not any financial studies, because those engaged in financial studies consider the discipline to deal with issues that have long been addressed by other branches of knowledge. Some kind of tolerance is still sometimes enjoyed by financial law, however.

After all, it is not necessary to conclude that financial studies do not exist, and that one can speak only of conditions conducive to the development of a financial theory. For this discipline and this theory do indeed exist, and have been around for some time. Admittedly, some publications circle around the keys issues, so to speak, being unable to get down to the heart of the matter, but cannot the same be said of all branches of knowledge?

Similarly to other branches of learning, financial studies or theory faces similar preliminary problems that must be prioritized. Namely, where to draw its boundaries, i.e. what its purview is, what its object should be and, finally, whose activity it is to take care of or what its

subject is. A certain difficulty lies in the fact that various disciplines can study the activity and character of the same subject; in other words, the criterion according to which branches of learning are distinguished is the point of view taken to observe a given subject –and not so much a criterion derived from the subject itself.

In every discipline, defining it means a certain restriction of its subject matter. In particular, in research it is absolutely necessary to draw some boundaries within which a certain body of inquiries is to stay. Of course, all restrictions entail some discretion, if only in order to facilitate research. Probably in no branch of learning can an absolutely precise definition be found, including the definition of its subject. Moreover, definitions may change due to a change in the point of view or the passing of time. If, therefore, this or that definition of financial studies appears to somebody to be too narrow, let them expand it, provided that the expansion is logically justified and the homogeneity of the studied subject is kept.

However, whatever boundaries are drawn for the subject of their studies by this or that researcher in the field of finance, common agreement or unanimity can hardly be expected in this respect. Any administrative order imposing some golden agreement, although this could have been attempted in the past, would bring one result, namely making research barren. Making financial studies as broad as possible, ignoring even the rather imprecise meaning of the adjective, would be viewed by some as doing the greatest service to this branch of knowledge, while others would consider this an inflation of the subject and a hindrance to its accurate treatment. Both would be right if they succeeded in their tasks, attaining lucidity and maintaining logic in their publications.

In financial studies this is not so easy, because the prevailing opinion is that this discipline is concerned with public finance in general and sometimes, albeit in a narrower scope but in greater detail, with the finance of the State. The State, in turn, is an organism embracing the many areas of life of a country, but in the first place it is a political organism.[5]

5 This is not the place to discuss what the term “political” means.

It conveys this important characteristic to the study of its finance, hence making the study political as well.

The heart of the political character of the State is its supreme authority and the fact that it has the attribute of power. The finances of the State, as the supreme authority, naturally fit into the concept of public finance, with the latter encompassing all the branches of finance whose subjects have—perhaps it might be said—admittedly a social character but they lack the attribute of supreme political authority. In turn, the question who, or what subject, can be attributed supreme political authority, although it can be subjected to scholarly deliberations, is settled by the country's political system, specifically, its constitution. Hence, in various countries the question may take a different form, which, however, should not hinder attempts to draw a general picture.

The right of the State (i.e. its bodies) to perform "acts of authority", its superiority in respect of various other subjects, seems to be a sufficiently clear criterion in a more or less general discussion of the question. Such a discussion is by no means easy: Mr Zagłoba noticed a long time ago that "not everybody can think in general terms".[6] Of course, the term "State finance" does not cover all the fields where financial activities are conducted. They transpire in various other fields as part of the activities of various organisations, associations, etc. The financial activity in other fields, i.e. apart from the State as an organisation of supreme authority, is sometimes studied as well. This, however, is already such a broad scope that it may be considered part of financial studies only if they are understood so broadly that they would be better called general or universal financial studies. It is doubtful, however, if such a broad and loose a treatment would ensure satisfactory coherence and clarity of argument. It might be better to draw clear lines indicating where to stop the study of each branch of this universality; thus, for instance, we would have state finance, finance of the national economy (enterprises), etc. Such distinc-

6 Had he known the author of this disquisition, he would have certainly confirmed in this conviction.

tions would not be, even in the slightest, a juxtaposition of one area of financial studies with another: on the contrary, they would supplement one another. Only when the boundaries between the domains of different sciences and different areas in the same universal financial studies are blurred, is one indeed faced with a "maze of problems" that are hard to get out of. The boundaries between the financial studies of the State and, for instance, the financial studies of the national economy (enterprises) are quite clear—they can be defined with satisfactory accuracy, provided that a clear criterion of division is chosen. The ability to define clearly the field of study is a necessary condition of clarity and—if this is the right word—the effectiveness of inquiries.

Naturally, any financial activity is influenced by various social factors and trends affecting a country at a given time. To be keenly aware of this and, more importantly, of the diverse consequences—not only financial ones—of some form of conduct for a seemingly isolated field of finance is a necessary condition for the successful use of a financial instrument. Again, it is a matter of noticing the limits of effectiveness of an intended endeavour. All this can be easily learned and sometimes even seen. Such an expansion of the purview of financial studies beyond strict boundaries may result in encroaching on the otherwise interesting fields of study and the experience of sociology or economic policy, but will also introduce into the purview such elements that are imperceptible to the financial studies of the State, which may obscure their picture. It would be better for the studies to stay within the boundaries drawn for financial activity by the constitution and other written and common law. Even if the consequences of law are not always predictable, at least motives behind legal norms and the mechanisms of their enactment would be known in advance. This seems to be an elementary requirement of the rule of law.

The question of the purview of financial studies is not exhausted upon realising what their subject is, upon finding whose finances are to be studied. No less important, the determination of what phenomena

ought to be considered financial shows what the proper object of financial studies is. On this matter, too, opinions vary: they are either expressed explicitly or can be gleaned indirectly from the professional literature. In any event, only after determining the object and subject of research is it possible to draw a general picture of the field, to build financial studies in the fuller sense of this concept and, ultimately, to develop a theory of finance. However, even an absolutely accurate determination of the subject and object of financial studies may prove insufficient for building complete financial studies or an all-round theory of finance when the subject and object are, for a change, too narrow in scope. In such a case, a certain fragment of the material can be presented, which could be otherwise beneficial and may later facilitate a comprehensive approach to the subject matter, but obviously falls short of it for the time being. In turn, a mechanical compilation of many such particular publications will not produce financial studies or a theory of finance.

A frequently encountered definition of the object of finance, and thus of its study, maintains that it is consists of financial activity (or that financial studies are concerned with such). Obviously, such a dry explanation did not explain anything (idem per idem) and an additional description was necessary as to what the "financial" attribute was (in this case, primarily of the State). Indeed, many authors writing on these matters came up with such explanations, quite rightly so, but almost all of them explained it in their own way. Hence, the selection of explanations is wide, e.g. a theory of exchange, theory of consumption, production, reproduction, etc. Without going into details, we can cite the view that the object of finance and its studies is the activity of the State aimed at accumulating funds to pursue its goals. This suffices for the time being, but this view clearly focuses attention on the outer shell of the financial activity, to the neglect of its economic aspects or other content. This over-generalised definition is usually supplemented by authors writing on financial matters with various additional explanations, which are sometimes quite significant, but which on other occa-

sions threaten to sidetrack the issue or, worse, lead it up a blind alley. To give an example: when too much stress is laid on the "movement of monetary resources" accompanying production or reproduction, it is easy to lapse into the ways of simple bookkeeping or accounting, which are useful technical skills. Although financial relations do indeed have a quantitative expression, seeking their sense only in the form in which they occur and observing only the vicissitudes and methods of monetary transactions would be to remove the content from finance and to break the ties between finance and a country's other spheres of life, such as the economy, and between finance and moral aspects, etc. The significance of latter aspects for social life should not be ignored.

The accumulation of funds and their successive distribution, the collection of revenue and incurring expenses, i.e. the manipulation of funds and recording all these acts in accounts and reports, is rather organisational and technical work. These acts are performed, so to speak, before or after the production process and outside the process of distributing and producing goods, while in fact they are—or should be—a component of both these processes. Financial acts do not merely consist in mechanically moving sums of money from one account to another, but are an element helping in the generation and distribution of the national income. The task of financial studies is not merely to record the movement of goods appraised in money; it is also important to consider how and to what degree movements of sums of money contribute to the rise of the national income and its better distribution. Finance is thus one element of the national economy that should be harmonised with its other elements, both tangible and intangible.

However, even if an author writing on financial matters succeeded in unexpectedly clearly and accurately identifying the subject of financial activity and financial studies, if they were able to define the object of considerations equally well, they would face another considerable difficulty, namely how to present financial studies to the general public. It would not be a question of choosing one of those methods of de-

scribing subjects that can be learned from elementary logic textbooks. In principle, every branch of learning, including financial studies, should be characterised by a certain unity and coherence of issues it deals with.

Meanwhile, although its object appears to be quite simple from the point of view of everyday financial practice, from the scholarly angle it looks quite different, if only because matters are discussed critically in this case. The occurrences and processes that financial studies usually deal with are made up of not only financial elements—on the contrary, they sometimes result from manifold causes and their consequences are no less complex. Thus, they are not only strictly fiscal but also, and sometimes predominantly, non-fiscal: either economic, social or political, or even of a moral character. It is for this reason that the same question, which apparently concerns finance only, may be and sometime is studied by various scholarly disciplines, while financial studies only illuminate one of its aspects (if at all). Financial institutions or acts, i.e. concerning State finance, are endeavours of the State and thus are not only economic, but also (sometimes predominantly) political. An additional and serious difficulty lies in the fact that it is not always possible to "translate" financial occurrences into economic ones or others, and vice versa. This could be one of the sources of the well-known truth mentioned earlier—that in finance two times two almost never makes four… Hence, the quantitative examination of just the turnover of monetary resources will almost never fully explain financial matters. As a matter of fact, all this should be quite understandable: not all relations between people or other groups are purely economic or ones that can always be calculated in money. The multiplication table (sometimes, a division table and most often a subtraction table …) is not a key to omniscience.

Not only is the current financial reality multicoloured and changeable, but the characteristics of finance change with time as well. State finance is not a recent invention; sometimes the roots of some present-day financial institutions hark back to a distant past.

The form financial institutions take is peculiar to the age in which they function, while in the same age, various countries and their political systems give them their own specific appearance. General financial studies may, so to speak, appeal to financial archives and present matters as they developed from ancient to more recent times. Alternatively, an attempt may be made to present matters in a general way: how they looked in a single selected age. Changes in financial reality are usually paralleled by changes in their theoretical illumination in financial studies and in the theory of finance. Research of two kinds has been undertaken. One concentrates on all the financial matters of the State. This is the domain of general financial studies. The other enquires into individual fields of finance and is undertaken by detailed financial studies. The former attempts to build a theory of finance, while the latter provides material for the former to be successful.

Of these and other difficulties in the scholarly analysis of financial matters, various ways out were attempted, from too simplistic to overly complicated ones. Thus, one may encounter financial studies or a theory of finance that is a mere enumeration of the financial institutions in existence in a given country. No reference is made to the legislation that has provided for their formation and prescribes the mode of their operation. Textbook chapters devoted to them sometimes bear the titles "Financial Studies" or "Theory of Finance". In turn, a chapter with the same content but supplemented with references to relevant legislation is entitled "Financial Law". This approach to the subject matter differs from a scholarly one as much as a chronicle differs from history.

Such a "chronicle" is normally supplemented with a description of financial institutions and acts. A well-drafted description brings us closer to the knowledge of the subject-matter, and as such is a necessary and useful endeavour, but like a "pure" presentation of financial reality which uses statistical tables or other accounting graphics, it is merely a set of information on the finance of a given country, and cannot be described as financial studies. Even if such a description—even a cor-

rect one—were augmented by an assessment in the indicative mood of a "judgement", this would not lend any characteristics of science or theory to it.

It may certainly happen that a financial dissertation will be thoroughly scholarly and theoretical throughout, but ultimately it must be admitted that descriptive publications, too, sometimes have passages of such a character. The same is true for publications whose intended goal is a generalisation. This is a difficult task, as even a generalised description remains a description, with the danger of the generalisation becoming an overly superficial, conventional and hasty review.

The State is a political organism and passes this characteristic to the study of its finance, which means that the study is one of political studies. The characteristic is to be broadly understood and extended to social matters as well. However, it must be remembered that it is not the only characteristic that marks out the area of financial activity and that the size of the area is given from above, so to speak, by the political system of the State and goals it attempts to achieve.

It might be preaching to the converted if the reader is reminded that scholarly and political activities differ in character. This is not in the least about which of these activities deserve more attention or praise: the task of learning is to discover the truth, while politics attempts to achieve objectives that are considered necessary at a given time. The difference resembles that between learning and art. Both spheres, although preferably interlinked, obviously are not identical. Learning or a theoretical approach is about learning the truth, discovering the forces at play in a given field and the rules governing it, explaining phenomena and identifying their causes, and anticipating probable consequences. However, it is not the task of learning to give practical guidelines. In learning, knowledge is all-important, while in practice it is the will that prevails. Even the strongest will, if it ignores knowledge, is doomed to groping in the dark, while even the most profound knowledge without a sufficiently strong will to implement its findings will gather dust on library shelves.

To this day, too many people see financial studies only as an art, unable to use the scientific method of building general theoretical concepts, an art whose only task is to develop practical recipes for the everyday operations of financial offices. Such recipes have little or nothing to do with scholarship, although, on the other hand, one should not allow oneself to be influenced by the form in this case, which might resemble a "recipe", but actually have some scholarly content. To illustrate the point, Vilfredo F. Pareto once used the following example. Two propositions: the first being that to calculate the area of a rectangle it is necessary to multiply its base by its height, and the second being that it is necessary to love one's neighbour as yourself, differ fundamentally. In the former, it is possible to strike out the words "it is necessary" and simply say that the area of a rectangle equals its base multiplied by its height, whereas in the latter, the words "it is necessary" cannot be struck out and thus the second proposition is not scholarly.

In the field of finance, there are no perpetually perfect practical guidelines or recipes. Situations in which they may be helpful change, and each new situation may demand different practical solutions, without undermining the fundamental achievements of scholarly research. Besides, the concept of financial practice encompasses not only some norms and regulations, etc. but also action. Furthermore, in finance there are no universal practical solutions, ones that are unique and identical for all countries wherever on earth they are located. The results of more fundamental scholarly research just enjoy a slightly longer life and a more general significance.

Having said that, it is better to be wary of doctrinaire one-sidedness and mindful of the fact that in the field of finance, as a matter of fact similarly to many others, the achievements of theory and experiences of practice should be continually exchanged and it would be undesirable if any of these trends or both were hampered by a dull doctrine or a carefree daily routine.

In the development path of financial studies, presumably as in the paths of other branches of knowledge, many different obstacles accrue.

Certainly, a more comprehensive list of such obstacles could be drawn up than those mentioned above.

Of course, in order to be able to undertake the task of describing financial studies or advancing a theory of finance, it is helpful to be aware of not only what "finance" is and whose finance is to be studied, but also what approach to the subject should be called its studies or theory. However, it is only with difficulty, if at all, that a definition of any branch of learning could be found that would be unreservedly accurate. Apart from the fact that any definition assumes certain knowledge of the subject on the part of the person for whom it is expounded (i.e. in most cases, the reader of a given publication), a difficulty lies here also in the fact that the object of knowledge and investigated situations are rather complex, and the choice of this or that characteristic as crucial for the definition is not always objective. To compound matters even more, the defined object and situations change with time or under other circumstances, and sooner or later any definition simply ages and calls for a revamping.

A study or theory is in principle therefore a certain generalisation of experience, but obviously in the very process of generalising, the guiding mind of a researcher is necessary. An objective phenomenon in itself may not say or show anything to one person, but a lot to another. A description of phenomena or occurrences is not yet a study or a theory. Only when certain general rules or regularities are inferred from their course, i.e. when the phenomena or occurrences are subjected to mental processing, do they become a study or theory. The regularities discovered in this manner and the direction of their occurrence are related to many other processes, taking place in various fields, which are also an object of scholarly studies. However, the existence of a phenomenon itself may be borne out, whereas general regularities inferred from it may not be confirmed until some palpable results anticipated by it are obtained. The scholarly explanation alone of what the reality is, or what overall guiding regularities it is subject to, i.e. the knowledge

of the subject matter, is in itself already a process and a state attracting understandable scholarly interest. However, it is also good to know that the acquisition of knowledge may entail more or less multifarious consequences in life. An unbridgeable gap between theory and "life" seems not to be possible, despite the fact that a theoretician is not necessarily and not always the person who puts the achievement of their branch of learning into practice at the same time. That division of labour between knowledge, theory and practice is only natural, and apparently it is necessary. In reality, the knowledge of a theoretician is combined with the actions of a practitioner into a peculiar whole. Thus, financial studies and the theory of finance, leading to practical actions, do not cease to be a scholarly endeavour, while practice, owing to its use (hopefully!) of the results of studies in life does not become a scholarly endeavour.

The ties between financial studies and practice in this field do not, or at least should not, restrict the studies to only to the most minute description of the currently existing reality, the explanation of today's phenomena and the indication of their and only their immediate consequences. In fact, it is necessary for financial studies, making use of all options, to advance certain general principles that might initially seem quite detached from life today. These would be general guidelines for a relatively more distant future that might only find their way to practice tomorrow. These would be the general laws, indications or illuminations that are part and parcel of the theory of finance (sometimes called the pure theory of finance) and that must be formulated in reliance not only on very narrowly understood purely financial phenomena, but also on substantial evidence from other spheres of life and branches of learning. These general scholarly financial laws not only border on existing social regularities, but sometimes have the character of postulates for future implementation: they speak of not so much how things are as how they should be.

Admittedly, here and there, in various publications, a scornful attitude is taken to the idea of advancing general financial laws. It is be-

lieved to be futile tinkering with generalities. However, it does not appear that this view is right. Undeniably, coming to know the truth is far more difficult than speculation in detached theses. The legitimacy of financial studies may be judged not as much by respect for their general principles as by comparing them with the results of their application to real life situations. However, for the results to emerge, one has to wait. Meanwhile, although life is in no hurry, people usually are… . Hence, they usually lambast the uselessness of the abstract discipline. Although in real life, only concrete institutions or financial systems exist, and purely theoretic constructs only rarely leave the pages of learned books, the latter are not useless, because they may serve as a point of departure for some action, may be used to assess reality, or may be adopted as a goal to be achieved in life. Without such a sui generis signpost, reality may go astray. A pillar of fire moved before Moses as he led his people to the Promised Land; they never approached it close enough to hold it in their hands, but finally it led them along the right way to a land flowing with milk and honey. Both theoretical inquiries and practical activity must set such a point of departure and destination for themselves. In financial studies it is good to know not only how things stand, but also how they should stand and how they may stand, which is not by any means the least important.

The clue that leads to the doorstep of financial studies is the understanding of what finance really is; this matter was already briefly discussed above. Considerable difficulties would be encountered by anybody who would see “finance”, like ancient cameralism did, as a mere manipulation of funds, techniques of collecting revenue and incurring expenses, and entering these revenues and expenses in books of account, etc. The knowledge of these techniques is necessary in financial offices, but financial studies should reach deeper and further beyond the monetary sheen of financial phenomena.

The task of financial studies is first of all to become familiar with and explain reality; as a matter of fact, the same goal should be pur-

sued by all branches of learning—unlike another goal specific to financial studies, i.e. making research results change reality in this or that way if the changes are considered necessary. Some other branches of learning do not set the latter goal for themselves by: e.g. astronomy wishes to come to know the reality of the field it investigates but so far it has not intended to make modifications to the revolutions of heavenly spheres…. Whether the changes which are sometimes aimed at, owing to the achievements of financial studies, will finally prove useful is another story. Financial phenomena and actions have their material content, they refer to certain occurrences with which, on the one hand, they originate, and on the other, to which they introduce changes, whether intended or not. The most easily perceptible content of financial phenomena and activity involves economic matters and certainly it is for this reason that the economic theory of finance is the most frequent topic of financial dissertations. However, finance, even if it is believed to have only economic content, ipso facto, fits into the purview of social matters; since at the same time finance is a sphere of State activity, it must have a political trait as well (as a matter of fact it is proper to finance also owing to the fact that, as was already mentioned, finance fits into the social sphere).

Thus the establishment and management of financial institutions are not done casually and randomly but are regulated by legal norms. The set of such norms makes up financial law. All these directions of financial activity and issues may and should be judged not only by their particular advisability—and sometimes they are—but also from the moral perspective. Finance, its content and tasks are an object of illumination or elucidation according to the views of particular authors writing on these subjects. However, finance itself is a domain where many various forces interplay; likewise, financial studies and theory are a joint effort, taking advantage of the investigative results of many other branches of learning. It might have been this aspect that made some authors writing on finance believe that there was no such thing as financial studies, and that

it all amounted to a purely chaotic jumble of information which sometimes came to be mistakenly described as financial studies. Of course, if somebody wished to approach, for instance, financial law or financial policy as a set of separate pieces of information on this law or policy, they would be right to conclude that there was no general study of financial law or financial policy (i.e. one covering a broader section of life). An even broader opinion could be ventured that there is no theory (study) of financial law and even less of financial policy, because there is a single study or theory of finance (what its content would be depends on the convictions of its author or supporter)—one general branch of learning from which every branch of financial studies stems. Such a situation would be hardly imaginable if a theory of finance, theory financial law, etc. existed in parallel but remained separate . The name of financial studies or financial theory is deserved only by a branch of learning that is capable of explaining and formulating general laws in all the branches of finance. Financial studies or the theory of finance harmonises all such branches into a single homogenous system and does not scatter them around. The fact that harmonisation may take place on some relatively high level of scholarly abstraction does not contravene the rule at all.

The fact that financial studies in one period or another lean towards this or that aspect of research, such as a high theory, or at another time become mired in details of accounting should worry no one. Each period judges each branch of learning by its own standards but the whole will come together by itself some time anyway… Moreover, if this or that argument sometimes puts on the airs of theory, it will meet the same fate as in the fable by La Fontaine: *La chétive pécore s'enfla si bien qu'elle creva.*

Literature

Tarle Y., *Dzieje Europy 1871–1919*, Warszawa 1961.

Roch Knapowski

The Coming Together of Astronomy and Economics[1]

The coming together of astronomy and economics is an unusual and paradoxical event, no doubt, but nevertheless not entirely random. This can be seen in personal aspects, characterising the minds of individuals of many talents and broad interests, and certain forms of contact between these two fields of knowledge in terms of subject-matter. The latter are only sensed today and certainly have not been fathomed yet. Anyway, as regards individuals, there are many examples, and some are very fine indeed. Two such examples shall be discussed below, although there are more.

In 1526, Sigismund I the Old, King of Poland, resolved to embark on a massive reform of the currency system, which had been prepared since the beginning of his reign and was to encompass the entire realm. The reform, highly desirable for political reasons, was to put an end to the intolerable currency situation that had arisen with time in various lands subject to his rule. The situation was particularly grave in the lands of Prussia, where throughout the 15th century and later, until the first decades of the next century, the state of currency left much to be desired. It was bad during war, but in peace it time it was not much better either. There were widespread complaints about the high prices that were encountered in all areas of life. People complained not only about the high

1 Translated from: R. Knapowski, *Skojarzenie się astronomii z ekonomią*, in: *Opuscula Casimiro Tymieniecki septuagenario dedicata*, 1959, pp. 128–142 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

prices of gold and silver but also food, servants' and workers' wages, and everything that they needed and used. The reason behind all this was the cheapness of money, a fact of which people at large were not aware, or to be precise, the process of money becoming ever cheaper or being constantly debased or, to put it bluntly, falsified.

In the Prussian lands, also covering former Polish Pomerania, silver shillings or solidi had circulated in the times of the Teutonic Order since 1380, that is, two years before the death of Winrich von Kniprode, the most powerful of the Order's Grand Masters, as the basic unit of the local monetary system. Originally, 134 pieces were coined out of one Chełmno mark (*grzywna* weighing 191 g), the fineness of which was 131/3 łut of silver (831/3%). Since a computational mark was always held to have 60 shillings, one mark by weight yielded almost 2¼ computational marks. Later, in particular in the 15th century, the coin was subjected to continuous devaluation, losing both its weight (by over 20%) and fineness. As a result, when out of one mark over 700 shillings were finally coined, this meant that over 11 computational marks were obtained out of it. In the meantime, during the Thirteen-Years War with the Order, the Prussian cities of Gdańsk (Danzig), Toruń (Thorn) and Elbląg (Elbing), which surrendered to the Polish king, also coined shillings of no better weight or fineness. Towards the end of the 15th century, during the times of Grand Master Johann von Tiefen, then a Polish vassal, admittedly, the coining of completely discredited shillings stopped, but they stayed in circulation. In their place, the Teutonic Order's *grosz* began to be issued with the face value of three former shillings. It, too, slowly lost its value.

The table, drawing on the work by F.A. Vossberg *Geschichte der Preußischen* Münzen und Siegel von frühester Zeit zum Ende der Herrschaft des Deutschen Ordens,[2] rightly called the classic work of Teutonic numismatics, shows currency relations in the Prussian lands to 1519.

2 A. Vossberg, *Geschichte der Preußischen Münzen und Siegel von frühester Zeit zum Ende der Herrschaft des Deutschen Ordens*, Berlin 1843.

Grand Masters of Teutonic Order or their Deputies and the cities of Gdańsk, Elbląg and Toruń	Periods of striking coin	Name of coin	Average weight in Prussian norm pfennigs[3]	Average silver fineness in *lut* and grains[4]		Coins struck out of one Chełmno mark or ½ pound of pure silver			
						Number of pieces	Total value in computational marks, skojec or denars		
Winrich von Kniprode	1380–1382	shillings	0.116[7]	13	6[5]	134.4[5]	2	5	23[5]
			0.109	13	9½	142	2	8	24
Konrad von Rothenstein	1382–1390	shillings	0.113	13	3	145,8	2	10	9
Konrad von Jungingen	1393[6]–1407	shillings	0.113	11	14	156 1/6	2	10	14
Ulrich von Jungingen	1407–1410	shillings	0.114	11	6	161	2	16	12
			0.114	10	12	171¾	2	20	21
Heinrich von Plauen	1410–1411	shillings	—	7	9	260 1/5	4	8	2
	1411–1413	shillings	0.107	6	12	292 4/5	4	21	3
	1413	shillings	0.111	10	—	187.2	3	2	26
Herman Gans (deputy)	1413	shillings	0.111	7	12	245.6	4	2	7
Michael von Sternberg	1414	shillings	0.113	6	17	261.9	4	8	23
			0.108	6	3	312.9	5	5	5
	1414–1416	shillings	0.104	4	3½	479.5	8	—	—
	1416–1422	shillings	0.116	8	9	210.8	3	12	10
			0.105	8	12	231.3	3	20	15
			0.112	8	9	219 8/11	3	16	—

3 So-called *Richtpfennige*.

4 100% fineness = 16 *lut* of 18 grams each

5 1 computational mark = 24 *skojec* worth 30 denars each.

6 Konrad von Wallenrod, Grand Master between 1391 and 1393, probably did not strike any shillings because there were enough in circulation.

Paul von Russdorf		1422–1441	shillings	0.111	8	3⁷⁄₉	229	3	19	18
Konrad von Erlichshausen		1442–1449	shillings	0.112	8	2½	229.5	3	19	24
Ludwig von Erlichshausen		1450–1454	shillings	0.104	5	8½	367,5	6	3	—
		1454–1467	shillings	0.099	3	17	535½	8	22	6
Cities	Gdańsk	1457–1466	shillings	0.095	3	12	600	10	—	—
	Elbląg			0.097	3	12½	584	9	17	8
	Toruń			0.099	3	16	543	9	1	6
				0.096	3	2	705.5	11	16	6
Heinrich von Plauen (deputy)		1467–1469 1469–1470	shillings	0.093	3	16½	574	9	13	18
Heinrich von Richtenberg		1470–1477	shillings	0.097	3	14	570	9	12	—
Martin von Welzhausen		1477–1489	shillings	0.092	3	4	705	11	5	—
Johann von Tiefen		1489–1497	shillings	0.092	3	4	705	11	5	—
			grosze	0.109	8	6	230	11	10	—
Frederick of Saxony		1498–1510	shillings	0.100	8	3	256	12	16	—[8]
Albrecht of Branden-burg		1511–1514	shillings	0.100	8	—[5]	258	12	185	—[7]
		1515–1519		0.100	7¾	—[5]	266	13	65	—[7]

Faced with such a currency situation as the one that arose in 1519, Nicolaus Copernicus, at that time a canon and administrator of the Warmian Chapter, wrote the first of his two economic treatises, namely *Treatise on coins* (*Tractatus de monetis*) and *On the estimation of the coin* (*De estimatione monete*). Both are short (they consist of only three or six pages) but significant. The latter is an elaboration on the former. Both give a correct description of the minting methods used hitherto and suggest ways of ameliorating the situation. Copernicus reaches back to the times when a pound of pure silver represented eight computational

7 On the basis of documents, the other figures are based on coins.

8 Grosz = 1/20 of computational mark

marks (or four Chełmno marks), with the alloy containing silver and copper in equal shares[9], next he mentions shillings in which only one-fourth was silver and one pound was reckoned to represent 16 computational marks *erat in his quarta pars dumtaxat argenti et –arc. XVI libr. argenti continebant*, then he provides the alloy proportions and the value of shillings coined by Prussian cities *crevit pecunia multitudine autem– on bonitate, cepitque IIII partibus eris quinta argenti misceri, donec pro – arc. XX libra argenti purissimi emeretur* and finally he makes an emotional statement: *Decrescebat ergo in dies magis ac magis estimation pecunie – posterior et pejor semper priori inducta estimationem precedentis oppressit et exrusit, donec estimation solidorum et grossorum valor coequaretur; et marc. XXIIII leves pro libra cedant argenti; necdum cessatur usque in presens. – Quid restat, nisi ut proxime marc. XXVI libra argenti ematur. – Tantis ergo vitiis laborant prussiana moneta – soli aurifices ejus – erumnis fruuntur –; colligunt enim ex promiscua pecunia antiquam, – plus semper argenti cum moneta recipients ab imperito vulgo. Utinam reformentur hec, dum tempus, est, ante ruinam maiorem, ut saltam ad XX marc. libra argenti restitueretur*[10]. As the best principle of coining good money, Copernicus thus recommends that it should be coined at one place, not in the name of a single city but the entire country pursuant to an inviolable decree (*decreto inviolabili*) and that a pound of pure silver should not be reckoned to be an equivalent of more than 20 computational marks. Only after 25 or more years could the coin be renewed.

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9 *Invenio autem ea numismata, Quue nunc grossi vocantur, ali Quando solidos fuisse et marcas VIII Iibram I habuisse purissimi argenti* Copernicus refers to the computational mark with the word *marca*, while the ounce (Chełmno) mark is referred to as ½ pound or 2 given marks as a pound *ubicum, Que marca dicetur, numerum intellegi volo; pro pondere vero libram nominabo, Quemadmodum marce II constituuntip sam*. cf. in the treatise on coins: *octo marcae complectebantur libram unam argenti puri alias feinsilber, hoc est duas marcas unciales*.

10 This is the famous rule that Copernicus ascertained, stating that bad money drives out good, formerly and wrongly called Gresham's Law in recognition of Sir Thomas Gresham, a financial agent of Queen Elizabeth I.

In the autumn of the same year, that is 1519, a war with the Teutonic Order broke out, and Copernicus, who was personally involved in the defence of Olsztyn, stood alongside the Polish king. In order to cover the costs of the war, amounting in cash only to over 574,000 marks, the Grand Master, Albrecht of Brandenburg, ordered that all church silver and gold vessels be confiscated and turned into coins, thereby flooding the Prussian lands with *grosze* of the worst quality. Coined in 1521 to pay soldiers, eight-*grosz* coins contained only one łut of silver each, while, there were 528 *groszy* to a Chełmno mark (i.e. 4,224 *groszy* as units) of the total value of 2111/5 computational marks. After a truce of four years was agreed in Toruń on 7 April 1521, *grosze* of the former type of the fineness of 7¾ łut, weighing however slightly less (0.095 instead of 0.100; there were 270 pieces to a Chełmno mark of a total value of 13½ computational marks) continued to be coined so the currency chaos that had reigned for so long in the Prussian lands was by no means averted.

The session of the Sejm held in Grudziądz in March 1522, at which Copernicus read out his treatise at the request of officials and deputies in attendance, did not bring any positive results, however, because the Prussian cities refused to give up the right to mint their own coins they had been granted some time earlier. Only the peace treaty concluded in Kraków on 8 April 1525 and the homage paid by Albrecht, from then on the Duke of Prussia, to the Polish King gave hope for a successful and final regulation of the monetary system. Following these events, Copernicus resolved to elaborate on his second treatise on money and produced a treatise twice as long as the original one, entitled *On the minting of coin* (*Monete cudende ratio*), in which historical and theoretic inquiries were expanded upon and practical recommendations were consistently developed and adjusted to the conditions and possibilities created by the new state of affairs.

The new version of the treatise opened with an introduction to the discussion of general issues that included the two famous sentences enu-

merating four major causes that, as a rule, lead to the destruction of kingdoms: discord, mortality, barrenness of land and corruption of coin (*discordia, mortalitas, terre sterilitas et monete vilitas*). Unlike the first three causes, which are obvious, the fourth, comprehended only by finer minds, acts perniciously, and not at once, with a single strike, but slowly and secretly, so to speak, (*non uno impetu simul, sed paulatim occulta quadam ratione respublicas everlit*). In his historical investigations, Copernicus goes back to the times of Konrad von Jungingen, or the times before the Battle of Tannenberg (*ante bellum Tanebergense*), or even to the times of Winrich, when in this entire period shillings were minted out of an alloy containing three parts of pure silver and one-fourth part of copper, whereas in the times of Heinrich, after the defeat at Tannenberg, shillings contained only three-fifths parts of silver and later even less, since it was only one-fourth part. Copernicus stresses that the pernicious custom of adulterating money has not stopped up to the present day *consuetudo sive licencia adulterandi, expilandi et inficiendi monetam cessare non potuit, ec in hunc diem cessat*. 'In what state it is today, it is a shame and pity to speak' in quo *statu nunc sit, pudet ac dolet dicere*. The worth of money has fallen so badly that there are 30 marks to a pound of silver. If the situation is not remedied (*si non succuratur*), Prussia will be left with only copper coin and foreign trade will collapse in its entirety. Experience teaches us that those countries thrive that have good coin in circulation, while those with worse languish. Where there is good money, there is art, excellent crafts and an abundance of goods, but where debased coin is in use idleness, laziness and slothfulness abound, while the arts and spiritual culture fall into neglect and prosperity is lost *Constat preterea ipsa loca, que bona moneta utuntur, artibus et opificibus egregiis nec non et rerum affluencia pollere, ac contra, ubi vilis moneta in usu est, ignavia, desidia ac resupinato ocio tam bonarum atrium quam ingeniorum culturam negligere arque omnium eciam rerum abundantiam interire*. An experienced economist and an expert on human nature speaks to us in the following poignant sentences: *Nondum*

memoriam hominum excessit frumenta et annonam minori pecuniarum numero in Prussia empta fuisse, cum adhuc bona moneta uteretur, nunc autem ea vilescente omnium rerum, que ad victum et humanum usum pertinent, precium ascendere experimur. Ex quo perspicuum esse potest levem monetam desidiam magis altere, quam paupertati hominum subvenire.

Copernicus sees a way out of the grave situation, continuing to maintain his previous recommendations — relying strongly on the authority of the Polish King — that the coin in the entire territory of Prussia should be unified and fully adjusted to the Polish coin. For this purpose, he recommends that coins for all Prussia be minted in one common mint or, if this cannot be done, that at most two mints be established, one for Royal Prussia and another for Ducal Prussia. In the former case each coin is to bear the insignia of the Prussian lands on one side and those of the Duke of Prussia on the other. On both sides, the insignia are to be surmounted by a royal crown *Conduceret itaque, unam et commune esse in tota Prussia officianam monetariam, in qua omnis generis moneta ex uno latere nummismate sive insigniis terrarium prussie signatur ita, ut superne coronam supereminentem habeat, ut ex hoc regni superioritatem recognoscat, ex atlero vero latere ducis prussie insigne pre se ferat, corona regni similitar incumbente*.[11] In the latter case, coins for Royal Prussia would bear royal insignia on one side and those of the Prussian lands on the other, while coins minted for Ducal Prussia would bear royal insignia on one side and ducal insignia on the other. Copernicus stresses that by a royal decree both coins will have to circulate and be acceptable in the entire realm, and adds a meaningful and perspicacious remark: *Que res ad animorum concilationem et negociationum communionem non parum ponderis est habitura*. Of course, both coins will

11 There are no doubts whatsoever as to the authenticity of this sentence and part of the next which are struck out in a later ink in two surviving manuscripts and were omitted from many editions of Copernicus works. V. *Mikołaja Kopernika rozprawy o monecie i inne pisma ekonomiczne w opracowaniu Jana Dmochowskiego*, Warszawa 1923, pp. 12, 2; V. ibidem, pp. LXXIX–LXXX.

have to be of the same grain or alloy, of equal value and estimation and, being closely supervised by the state authorities (*vigili cura primatum reipublice*), will continuously have to meet the regulations that will be issued. Old coins must be withdrawn without fail so that they do not 'infect' new ones. In an added separate chapter on the ratio of silver to gold, a certain proposal, given by way of an example, merits attention. It suggests adopting the former ratio of these metals as a standard, i.e. 1 to 11, instead of the actual ratio of 1 to 12, and mint 20 marks out of 11/11 pounds of silver. Then, the Polish and Prussian *grosz* would equalise completely, and two Prussian marks would have the same value as the Hungarian gold ducat. In his conclusion, Copernicus succinctly reiterates in six points, with the precision that only a great mind is capable of, all his recommendations in the monetary sphere.

Copernicus no doubt aware that the stability of currency depended on sufficiently strong public finance. He did not discuss this question at great length, however, because he was interested in the monetary issues that had been topical for a long time. Nevertheless, he understood and fully appreciated the role of the state and its political stance in money matters. Therefore, he placed great emphasis on the authority of the Polish State and the resolutions adopted on the initiative of its authorities for the estimation of the coin. Putting full trust in the strength and resources of the kingdom, he was able to be convinced that the conditions he set to protect the stability of the value of money could be met. He knew that the principal condition for attaining this goal was a complete renunciation of any profit from minting money *Et quod principes utrinque nihil lucre ex monete cussione sentient*. Hence such a strong a recommendation: *ut involabiter et immutabiliter perpetuo observetur, quod XX marche dumtaxat et non amplius fiant ex libra una puri argenti, dempto eo quod pro expensis opificii deduci oportet* and, on the other hand, also a warning: *ut caveatur a nimia monete multitudi*. For both conditions can be met only if there is sound finance and a strong state. Sufficient and stable state revenue must be supported by specific curren-

cy, otherwise the value of the revenue will devalue. 'We shall give the King, Our Lord', Copernicus writes in a letter to Feliks Reich, a canon and custodian of the Warmian Chapter, warning against the postponement of the currency reform, 'a lot of money, i.e. chaff but where will the grain go?' (*dabimus Regi Domino Nostro grandem pecuniam, id est paleas, grana autem ubi manebunt?*).

The great monetary reform made at the behest of Sigismund I the Old was carried out, by and large, in accordance with the recommendations of Copernicus, who actively participated in convocations, discussions and negotiations in person or by mail for many years. The groundwork for the reform was laid in the Constitution for the Prussian lands of 17 July 1526 (Article 31) and the resolutions of convocations in Elbląg of 7 July 1527 and Malbork (Marienburg) of 8 May 1528. In respect of the Crown, the reform was effected by the mint ordinances of 15 October 1526 and 16 February 1528, accompanied by the royal decree of 15 February 1528 that re-introduced the gold coin to Poland. A decision was made and implemented to unify the monetary systems of the Prussian lands and the Crown to the largest possible extent. In particular, it was decided that once old coins had been withdrawn from Prussia, new ones would be minted, namely *grosze*, shillings and denars with Polish insignia and those of the Prussian lands, and they would be minted only in a newly-opened royal mint in Toruń (this provision could not be implemented in full, and the mints in Gdańsk, Elbląg and Königsberg (Królewiec) continued to operate, the former two with breaks, though). It was further decided that two Prussian marks would constitute one Hungarian florin (*ut-duae marcae florenum Hungaricalem constituant*) and the Prussian *grosz* would be equal to the Polish one (*ut grossus Pruthenicus Polonicum aequet*). As regards fineness, the *grosze* were to be struck precisely in accordance with the Crown standard, that is, out of an alloy containing 6 łut of silver and 10 *łut* of copper, or to put if differently, a half-pound Kraków mark would yield 96 *grosz*; moreover, one Hungarian florin, equal in value to the Polish

one, was to be an equivalent of 30 *grosz* (of 18 denars each). However, instead of the latter original ratio, Copernicus recommended the ratio of at least 40 *grosz* to one florin, since it better corresponded to the reality of that time.[12] The monetary system in Poland and in the Prussian lands stayed at this level (about 45 *grosz*), i.e. in a generally good state, for about fifty years . This is yet one more argument for calling those times the Golden Age – as they are commonly known.

The example of Copernicus being capable of applying his mind to various sciences and problems, apparently distant in terms of magnitude and weight, but in fact closely related, was not isolated. Four hundred years later, when the newly founded Republic of Poland witnessed an acute and prolonged currency crisis after the First World War, another kindred mind emerged, one no less inquisitive, and capable of pursuing broader interests.

The origins of the decline of the Polish currency after the First World War can be traced back to the economic and political legacy left to us by the three Partitioning Powers waging war, in particular the most powerful one—the German Empire. Upon the outbreak of war, Germany began to direct an ever-greater share of its available resources towards world-scale political goals. These policies increasingly affected its economy and society, also impacting the Polish state which was taking shape as an independent political entity in the last stage of the Great War. At the end of the occupation, the German mark and the Polish mark were worth more or less half of their face value. Becoming independent, not only formally, in the sphere of currency, but at least maintaining the purchasing power the currency had at the moment of regaining independence, not to speak of the currency returning to its pre-war purchasing power, were expected by the public opinion as an absolutely certain outcome of the new political situation. Things, however, played out differently. As soon as the Treaty of Versailles was signed on 28 June 1919,

12 V. A 1526 letter to Ludwik Decjusz, head of the Kraków mint, drafted by Copernicus or with his participation.

giving Poland international foundations for its independent existence, the Polish currency started to lose its value in world opinion. By the end of that year most of its value had been lost. The international community must have been well aware of the greatly insufficient cover for the issued notes and coins by the current state revenues. Meanwhile, general political and economic conditions did not offer any prospects for balancing the economy in the near future. The situation should have improved in the following year; at least this is what was expected. After the great military campaigns against Soviet Russia in which the fortunes of the adversaries swung like a pendulum, taking Polish armies to Kiev and the Soviet army to the outskirts of Warszawa, only for the frontline to settle somewhere in between, an armistice followed. The conclusion of a peace treaty with the neighbour to the east was expected to follow soon after. However, this time round too reality did not live up to expectations.

Leaving aside the protracted peace negotiations in Riga and the uncertain outcome of the Silesian plebiscite, the economic effects of the two wars began to be strongly felt only then, forcing the authorities, lacking any appropriate fiscal apparatus, to incur a growing debt to the issuing institution. The conviction, bordering on certainty, that the situation would continue for a long time, had a dispiriting effect on the rate of currency exchange. Figures for the early years of independence illustrate the state of affairs in the currency sphere at that time. The figures come from the work by Edward Taylor *Inflacja polska*[13], giving the most thorough picture of these phenomena and problems in terms of their historical course and the applicable theory.

13 E. Taylor, *Inflacja polska*, Poznań 1926, p. 22.

Date	Amount of Polish marks in circulation (million)	Treasury Debt in Polish marks (million)	Dollar rate index (1914 = 1)[14] on last week of each month
1918			
11.11	880.2	——	1.90
31.12	1,023.8	117.8	2.14
1919			
28.2	1,160.0	315	2.53
30.4	1,346.0	575	3.62
30.6	1,784.6	1,125	3.97
31.8	2,466.6	2,525	7.53
31.10	3,723.6	4,375	11.41
31.12	5,316.3	6,825	26.36
1920			
29.2	8,303.3	10,775	37.44
30.4	16,027.9	19,375	45.90
30.6	21,730.1	27,625	33.43
31.8	31,058.8	39,625	50.98
31.10	38,456.8	46,925	69.77
31.12	49,361.5	59,625	137.99
1921			
28.2	62,560.4	77,125	200.04

Under these conditions, accompanied of course by the soaring prices of all kinds of goods, Prof. Tadeusz Banachiewicz, Director of Kraków Astronomical Observatory, published in the two high-circulation dailies of the day, namely the *Głos Narodu* and *Kurier Warszawski*, his programme for improving the monetary situation dated 5 March 1921. The programme is brief and succinct, and sets out in a few sentences a number of ideas which must have sounded very fascinating at that

14 Parity: 1 U.S. dollar = 4.21 German marks.

15 The value of Partitioning-Power currencies in circulation at the same time was on 11.11.1918: 7,119.8, on 30.09.1919: 10,760.3 (maximum) and on 30.04.1920: 1,372.1 million Polish marks.

time. First, it makes strongly worded, correct and incontrovertible general comments followed by proposals organized into four points.

> Until state expenses are in equilibrium with revenues, it is not possible to maintain a constant value of banknotes. Meanwhile, a stable currency is one of the fundamental conditions of prosperity of the country, because the unsteadiness of the value of money undermines any credit, prevents rational calculation in industry and commerce and, finally, is a major cause of social unrest. It has already become a platitude that to cure a currency, serious reforms in the country's economy are necessary (raising taxes, increasing production, etc.); however, serious reforms need time, while a constant measure of value is needed now.
>
> We see the following way out of the present predicament:
>
> 1. The State allows businesses to conclude contracts in 'Polish zlotys' but payable (for the time being) in Polish marks. Actually, Polish zlotys are issued onto the market.
> 2. The State determines on a regular basis how many marks equal one Polish zloty; this is done by collecting statistics from various locations in Poland for market prices (in marks) of food, cereals, clothing, footwear, coal, iron and gold so that average prices in Polish zloty be constant.
> 3. The entire budget of the State, taxes and other fiscal fees, railway tariffs, etc. are calculated in Polish zlotys.
> 4. Subscriptions to a state loan in Polish zlotys are solicited, postal saving unions also accept deposits in Polish zlotys to be paid in and out in Polish marks according to a rate of exchange.

Supplementing the above proposals, to counteract a potentially sharp a fall in prices, Banachiewicz recommended that a farmland tax, railway and postal tariffs and public official salaries be raised from an inordinately low level. The improvement of currency could by no means substitute other reforms aimed at amending the financial situation. The

sole purpose of the endeavour would be to remove the worst symptoms of the financial ailment. This in turn would facilitate a change to normal economic relations.

Without going into a detailed assessment of the above proposals, this author wishes to observe that it was here that the idea of conducting economic settlements in a currency unit that does not actually exist surfaced for the first time in Polish or possibly even German articles on business matters. In Poland, in 1921, Feliks Młynarski[16] recommended that the wholesale price index be used as a benchmark for assessing and paying taxes and fees. Later on, the supporters of this kind of currency dualism grew in number, in spite of understandable fundamental objections among both academics and public officials. In Germany, where inflation had not advanced so far until then as it had in Poland (on 1 March 1921, one U.S. dollar was worth 61 German marks), Eugen Schmalenbach, professor at Cologne University, had been demanding since 1921 that balancing be done in gold marks. Two years later, the movement in support of calculating receivables in gold grew so strong that even a number of ministries petitioned the *Reichsbank* to adopt this solution.[17] For the time being, however, the idea put forward by Banachiewicz did not meet with much response from the establishment in Poland, because of the prevailing illusion that the unbridled rise of inflation could be stopped without much sacrifice in taxation.

The otherwise important political events that occurred in March 1921, such as the adoption of the Constitution, the conclusion of the Peace of Riga, and the holding of a plebiscite in Silesia, did not affect the state of the currency in any significant manner. Yet, in the middle of that year, the dependence of the Polish mark on the German mark was strongly underscored when the Government of the Reich set out to make the first reparation payments and began purchasing high-priced currencies wherever it could. At the end of September, the Polish mark,

16 F. Młynarski, *Reforma ustroju pieniężnego*, Warszawa 1921, p. 98.
17 H. Schacht, *Die Stabilisierung der Mark*, Berlin–Leipzig 1927, pp. 49–50.

however, sharply rebounded in Poland, owing to a one-off levy announced by the energetic minister of the treasury, Michalski, and soon collected. In June 1922, when the revenue from the levy ceased and a protracted dispute between the Chief of State and the Sejm began, inflation gained fresh impetus, which could hardly be stopped by a gold loan issued by the minster of the treasury, Jastrzębski. The dramatic events that took place at the end of the year did not help the situation either. A table showing the most important figures, again taken from the work by Edward Taylor[18], gives an idea of how the situation unfolded until early 1923.

Date	Amount of Polish marks in circulation (million)	Treasury Debt in Polish marks (million)	Dollar rate index (1914 = 1) on last week of each month
1921			
30.4	86,755.3	106,625	195.91
30.6	102,697.3	130,625	494.28
31.8	133,734.2	158,000	666.98
30.9	152,792.1	178,000	1,500.71
31.10	182,777.3	198,500	926.75
31.12	229,537.6	221,000	702,71
1922			
28.2	247,209.5	230,600	945.21
30.4	260,553.8	220,000	933.85
30.6	300,101.1	235,000	1,082.12
31.8	385,787.5	285,000	2,103.98
31.10	579,927.7	453,500	3,200.32
31.12	793,437.5	675,600	4,242.10
1923			
31.1	909,160	799,500	7,804

Almost two years after the first publication, on 11 February 1923, Banachiewicz repeated his proposals, this time in the *Astronomical Year-*

18 E. Taylor, *Inflacja polska*, Poznań 1926, p. 23.

book of the Kraków Observatory for 1923 and added a few comments. Having observed that the theoretic Polish zloty had been legally introduced (submitted to the Sejm by the minister of the treasury, Władysław Grabski, the programme of financial reform was based on the computational index zloty), he stressed that the implementation of the 'programme' had been only fragmentary so far, and as such could not bring forth expected results and emphasised that the programme could hardly be considered a remedy for the ailment of the treasury. Its purpose was to "alleviate the most unpleasant conditions resulting from the ailment: the impossibility of saving, the difficulty of cost calculating, high prices of many products and foreign currencies, etc."

With regard to current developments, Banachiewicz was very critical about the 8-percent gold loan because it unnecessarily pegged gold to Polish marks, which was a very appropriate thing to say and corresponded with the prevailing opinion at that time. He attached greater—in a way decisive—importance to deposits in zlotys in saving associations, though he believed gold to be an imperfect measure of value at that time. The reason behind this opinion was the fact that the price (purchasing power) of gold, like that of foreign currencies, was exorbitant in relation to the Polish mark, for quite understandable reasons in the time of inflation. Finally, Banachiewicz censured the government for giving industrialists a loan of several dozen billion marks out of the state levy that had been collected with a great effort. The charge was fully justified; in the situation that prevailed, the loan was tantamount to a donation.

In order to assess Banachiewicz's proposals fairly, it is necessary to account for the feeling that ran through society at that time. The falling value of the currency, a situation that had already lasted for years, and the extremely high prices of all goods had worn the people's patience thin. The Polish mark was becoming ignored and was no longer relied on. Hence, any other legal tender, no matter what legal or theoretic objections it raised, was accepted and used to an increasingly broader extent. Out of the four points of Banachiewicz's proposal, the third was

no doubt the furthest-reaching and the most radical in its application. It provided for the calculation of the whole state budget, taxes, fees, tariffs, etc. in Polish zlotys or changing the entire public economy to a new measure of value, which actually did not exist as money. The second point was rather of a technical nature, while the other two, important in legal and general economic terms, were as a matter of fact optional.

In public administration, the computational zloty was used in its many varieties (budget zloty, bond zloty, and finally, a zloty for credit indexation and a general indexation of public revenues). In turned out that although it did provide better information on the payment capacity of society than budgets expressed in marks that rapidly became obsolete, and guaranteed that revenues would be raised as planned, it could not protect fiscal money against devaluation before it was expended, when it was still in the state coffers. Therefore, when the Polish mark began its disastrous downward slide in the second half of 1923, to which the disappointment felt by society in the wake of a long and inopportune trip abroad by the minster of the treasury, Kucharski, had greatly contributed, the run to get rid of the legal tender at any price could not be restrained. It was not capable any longer of fulfilling its principal functions as a measure and representation of value, not to mention its function as a means of capitalisation. The use of the theoretic zloty brought about a favourable effect to some extent in 1923, in the final stage of inflation, by forcing policymakers to embark as soon as possible on a comprehensive fiscal and currency reform and make all calculations refer to a stable measure of value, and not a theoretical one this time round.

Analogous events in Germany provided additional guidance on how to proceed. There, too, since passive resistance was resorted to in the Ruhr Valley in the second half of 1923, inflation had reached the stage of currency disaster. At this stage, with the already widespread use of stable measures of value, sometimes very strange but also interesting from a theoretical point of view[19], the German mark was repudiated, making

19 H. Schacht, op. cit., p. 54 ff.

the stabilization of the currency and financial reform a matter of urgency. When on November 15th, thanks to credit in the newly-founded *Rentenbank* and the huge but final credits in the *Reichsbank*, the Reich's Treasury ceased to incur debt to the latter institution and when on November 20th, the exchange rate of the U.S. dollar reached 4,210,500,000,000 or 4.2 billion German marks and was stabilised at this level by the currency commissioner, Hjalmar Schacht, the German parliament granted far-reaching powers to the Reich's government to improve finances and stabilise the currency on December 8th. Interestingly enough, the President of the *Reichsbank*, von Havenstein, who denied that there had been any inflation to the very last moment, by claiming that the *Reichsbank* had never issued more money than 'was demanded', died of a heart failure on that very day.

In Poland, the German example convinced the previously reluctant Sejm, to give the cabinet of Władysław Grabski equally broad but precisely specified powers by the memorable Treasury Improvement and Currency Reform Act of 11 January 1924.[20] The Polish mark stabilised in the first half of January 1924 at a level of 9.5 (later 9.3) million marks to the dollar, while the State Treasury ceased to incur debt to the issuing institution only on February 1st. The budget was really balanced even later on, that is, only in March 1924. It follows that the currency was stabilised only thanks to the conviction that the budget could and would be stabilised.[21]

It would be fitting to devote a few words to the comparison of the theoretic assumptions adopted for the improvement of a currency by

20 W. Grabski, *Dwa lata pracy u podstaw państwowości naszej*, Warszawa 1927, p. 26 ff.

21 On 31 December 1923 there were 125 billion Polish marks in circulation, while on 31 March 1924, 596 billion; the State Treasury was indebted on these two days for 111.3 and 291.7 billion Polish marks, respectively. The dollar stood at 1.5 and 2.2 billion Polish marks, respectively. The exchange for zlotys took place after the founding of *Bank Polski*, as is well-known, at a rate of 1,800,000 Polish marks for 1 zloty. Interestingly, American 'greenbacks' dropped to 1/3 of its value in 1862–1864, French pay vouchers and territorial mandates in 1790–1796/97 to 1/100 or 1/4000, respectively, Roman antoninianuses in 215–270 A.D. dropped to 1/100 of their value, while drachmas in Roman Egypt up to 380 A.D., after over four centuries of constant devaluation, fell to 1/10,000,000 of their original value.

Nicolaus Copernicus and Tadeusz Banachiewicz. Of course, their proposals must be judged in terms of their times, environments and circumstances. However, there are some general aspects that recommend themselves for a joint judgement and enable a comparison. Copernicus's proposal is based on the bad money rule he discovered. In hyperinflation, it might seem that the rule is reversed, that good money drives out bad. As Jan Dmochowski has already rightly observed, this view bears only 'superficial appearances of rightness'. Strong currencies were not in permanent and regular circulation but were assiduously picked out and treasured. However, another objection comes to mind: whereas Copernicus is adamant that bad money must be completely withdrawn from circulation if new good coinage is introduced, Banachiewicz clearly tolerates the currency being in circulation whose rate falls, in spite of the fact that a new one of a stable value has been introduced. However, in this case, too, the antinomy is only apparent. Banachiewicz does not suggest that a new currency should be put into circulation but only that value should be given in a purely theoretic currency, while payment functions are still to be left to the currency in circulation. The potential of this ideal currency, its attractiveness, is so strong in the transition period that it brings about the disappearance of the materially existing but bad money and forces the authorities to conduct a comprehensive reform. It involves, in agreement with the ideas of Copernicus, the withdrawal of a devaluated currency and replacing it with a new one of full value. There are also differences in the size, form and duration of respective inflations. These differences derive also from a different degree of credit development and credit technique. In more recent times, the expunction of indebtedness was thus an important driving force behind and a result of the devaluation of a currency.

More examples of astronomy and economics coming together could be given. To name but a few: Sir Isaac Newton who for many years headed the Royal Mint in London and while holding this office, collected valuable experience on fluctuations in the value of precious met-

als; Geminiano Montanari, professor of mathematics and astronomy at Bologna and Padua Universities, the author of the 1683 work *La zecca in consulta di Stato*;[22] and Alfonso X, King of Castile and Leon, and Germany, who was famous for his Alfonsine Tables (as a student Copernicus always kept them handy), but he was also able to collect taxes with great energy and skill, and derived income from minting money. Finally, he lost all three of his crowns and fled to the Moors. Last but not least, Julius Caesar, who knew the practical side of all fiscal matters very well, introduced gold currency to Rome, wrote a treatise on stars characterised by great accuracy, and he is still remembered by all as the reformer of the calendar.

Are there any deeper subject-matter associations between astronomy and economics? Who can tell with any certainty today? Of course, the alternations of night and day and the changes of seasons are astronomical phenomena, and as such they affect the course of human work and the productivity of earth, and thus the entire economy. But this is not the point. Rather, it would be interesting to know if also other changes and fluctuations spread over a long time, which are so important and characteristic of the general course of economic life, have any connection with the phenomena observed in astronomy. We know of the view held by W. Stanley Jevons, generally rejected by economics, about a causal relationship between the frequency of sunspots and economic crises. In more recent times, Henry Moore attracted attention with his claim that the planet Venus, at 8-year intervals, through terrestrial magnetism, affected the weather and crops. The claim was not definitely opposed by Ernst Wagemann, president of the German *Institut für Wirtschaftsforschung*.[23] Generally speaking, in the most recent times, many economists, notably American and Swiss, study the Moon and the Sun intensively to draw conclusions about the presumed effects on the economy of the various periodic phenomena and the impact of these heavenly bodies

22 G. Montanari, *La zecca in consulta di Stato*, Milan 1683.

23 E. Wagemann, *Wirtschaftspolitische Strategie*, Hamburg 1937, pp. 46–47.

on the Earth. The last word on this interesting and perhaps deceptive subject has yet to be said. However, a detailed discussion of specific theories falls outside the scope of this article.

Literature

Grabski W., *Dwa lata pracy u podstaw państwowości naszej*, Warszawa 1927.

Mikołaja Kopernika rozprawy o monecie i inne pisma ekonomiczne w opracowaniu Jana Dmochowskiego, Warszawa 1923.

Młynarski F., *Reforma ustroju pieniężnego*, Warszawa 1921.

Montanari G., *La zecca in consulta di Stato*, Milan 1683.

Schacht H., *Die Stabilisierung der Mark*, Berlin–Leipzig 1927.

Taylor E., *Inflacja polska*, Poznań 1926.

Wagemann E., *Wirtschaftspolitische Strategie*, Hamburg 1937.

Edward Taylor

Theory versus History of Social Economy[1]

Basically, any subject of human empirical cognition admits of a twofold approach: first, from the point of view of relationships between the components of reality in a given moment, or every moment, regardless of time and, second, from the point of view of the sequence and causality of the components of reality in time. This is why the same subject can be the focus of theoretical and nomothetical sciences, as well as idiographic, genetic and historical ones, depending on the terminology adopted. This duality of approach concerns the entire gamut of human cognition, despite appearances to the contrary. However, it has one aspect in the natural sciences and a different one in the moral sciences, as they were once called, which are now more often known as the humanities, of which a considerable portion could be classified as social sciences. The subject matter of physics, chemistry and biology is quite explicit, while the history of the development of the form of this same subject matter is the focus of geology, palaeontology and other similar sciences. However, the difference and variety of the scope and aspect of the studied phenomena are so considerable in this case that differentiating between these sciences does not pose any problems.

1 Translated from E. Taylor, *Teoria a historia gospodarstwa społecznego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1962, 2, pp. 121–130 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

It is a different story with the humanities, even more so with the social sciences, which are the primary concern here. Their subject matter as a rule admits of the dual approach mentioned earlier. Philology, grammar and stylistics have linguistics as their counterpart, which studies the history of language. Next to law studies, there is the history of law. It would seem that political and social histories have no theoretical counterparts. Meanwhile, sociology may be playing this role quite well, though it has perhaps not gone far enough in this direction yet. However, it has for a long time already been the case that economic history has accompanied the development of economics or political economy, whatever it is called, when understood as a theoretical science.

As far as economics is concerned, a certain confusion of ideas has been developing for a long time in this respect; deplorable misunderstandings and misconceptions have taken place, laden with far-reaching theoretical and practical consequences. This confusion of ideas takes two principal forms, concerning two issues that slightly differ from each other but are nonetheless closely tied and intertwined. These are, on the one hand, the distinction between the subjects of economics and economic history, and on the other, the viewing of economic development in terms of certain regularities.

Undeniably, the subject matter of the research of both economics and economic history is phenomena of exactly the same kind and scope. These are economic phenomena, that is, ones concerning social income, specifically the production, exchange and distribution of goods and services which making up social income. The only cause of contention in this regard is the scope of services included in it. *Prima facie*, unless one ponders the matter seriously, the simplest and – at the same time, to put it bluntly – the crudest way of drawing the distinction springs to mind. This involves distinguishing the areas of research pursued in the two fields in question by applying the criterion of a point in time to their common researchable phenomena. Thus, what has passed is assigned to economic history, while what is now and continues to be, belongs to the theory of economics.

The distinction is indeed a mechanical one, but it is very convenient and expedient as a convention. It was commonly used in our country when Polish economic history was emerging and taking its first independent steps. Among our scholars in this field, a versatile, ingenious and subtle polymath, Franciszek Bujak, did not overly stress this approach but another profound and conscientious mind, Jan Rutkowski, was quite fond of it. After the First World War, he held that economic phenomena from before the war belonged to economic history, while after the Second World War, he assigned the phenomena that occurred prior to the war to this history. Naturally, he was not absolutely strict about the distinction, allowing for exceptions and making the distinction dependent on a number of conditions.

However, I have the impression that the successors of these great masters and many other Polish economic historians have changed this distinction—rather conventional in nature—into a dogma. They tend to think that if economists make past facts the subject of their study, they thereby encroach on their turf—like a poacher who does not belong there. They believe that if research is concerned with 19th-century facts, or even, say, the interwar period in Poland, ipso facto it belongs to economic history and thus it must be studied, necessarily and exclusively, by an economic historian and only the latter may supervise a doctoral dissertation in this field.

It seems that this stance is absolutely wrong and smacks of a division of labour between craftsmen or qualified workers implemented through agreements and work rules, and regulations or administrative provisions concerning particular occupations. Can research work be subject to such simplified and conventional divisions?

What does the work of economists and economic historians consist in? Economic theorists study economic phenomena in terms of such characteristics that are common to them and are prone to generalisations. For this purpose, they disregard the accidental or individual characteristics of particular phenomena and isolate them from the impact of

their various configurations. They look for that which is more or less common, study various forms of relationships between phenomena and the conditions under which they occur, and try to establish the degree and kind of their universality, depending on various conditions. Meanwhile, the field of interest of economic historians covers something completely different. Their research focuses above all on establishing facts, wherever they are not absolutely certain, followed by finding any causality between them in the unique form of their unique sequence. In this way, they obtain a presentation and investigation of a sequence of facts over time in their entire diversity and completeness.

Obviously, these two types of research are interdependent and overlap. An economic historian in presenting and explaining a sequence of facts must make use of the concepts and causalities or interdependences developed by an economic theorist and, on the other hand, an economist must use the facts and interdependences established by an economic historian. On many an occasion, in certain areas, one type of work can be hardly distinguished from the other. In particular where the establishment of facts does not pose any difficulty, as for instance, where new or recent times are involved, economists, to achieve their research goals, must establish facts and their unique course and sequence. However, in such a case they encroach on the field of historical studies and more or less competently take on the role of historians. Likewise, economic historians may sometimes be forced to create a new research tool for themselves in the form of a concept or a kind of interdependence if they are not satisfied by those provided by theory. However, such a tool, naturally, will be rather temporary, as it will be closely adjusted to the subject matter at hand and thus may not be general or universal enough.

However, despite these mutual encroachments on their respective research turf, it is clear that the difference between the fields of learning under discussion does not lie in the time in which the studied facts arose, or the subject of research, but rather in the research method and goal. One research method is used for theory, and another one for his-

tory. Theoretical study and historical study pursue different goals This is where the borderline between research by economic theorists and economic historians runs.

It is obvious that the generalisations arrived at by an economist stem not only from the present experiences but also past ones, from the accumulated knowledge and facts often supplied by economic historians. After all, for instance, although the beginnings of the quantity theory of money reach back to certain findings from the 16th and 17th centuries concerning contemporary events, its development is an outcome of long research into a more distant or more recent past. The research was verified by the study of the quite recent past, such as David Ricardo's work on inflation during the Napoleonic Wars and afterwards. After all, his *High Price of Bullion*[2] cannot possibly be classed as historical scholarship. Nobody will include Thomas Tooke's famous study of the long-term movement of prices and money supply entitled *History of Prices* in economic history either. The study was not only crucial for the theory of money and credit, but also of considerable significance for economic history. Neither will anybody include the great work *Purchasing Power of Money* by Irving Fisher[3] in economic history, despite the fact that it relies on a meticulous long-term analysis of prices and money supply. The same is true for a more recent work, namely the two-volume excellent work *Theory of Prices* by A.W. Marget[4], already published in part prior to WWII.

To pass to another area of research, the entire theory of business cycles, or boom-and-bust if you wish, was born and developed—beginning with Clémant Juglar to W.C. Mitchell and contemporary theorists—by tracing the fluctuations of production, price, money and credit curves for the whole period from the early 19th century. Does the fa-

2 D. Ricardo, *The High Price of Bullion: A Proof of the Depreciation of Bank Notes*, London 1810.

3 I. Fisher *Purchasing Power of Money. Its Determination and Relation to Credit, Interest and Crises*, New York 1920.

4 A.W. Marget, *The Theory of Prices*, New York 1938.

mous work *Business Cycles* by W.C. Mitchell[5] belong to economic history because it studies not only the present but above all the past? Don't theorists have a right to rely on historical induction carried out by others or themselves? Can't they verify their theoretical claims using data from the past?

This author believes that such a stance would be clearly absurd. What matters most is how, using what method, for what purpose and from what point of view a given group of facts is considered, regardless of whether they belong to the past or the present. Besides, how very artificial and frail this distinction is, between the present and the past. In spite of all upheavals, reality is continuous and the past imperceptibly turns into the present: our roots are always in the past, while the present gives sense to the past.

There is no doubt that economics may base its generalisations on the study of the systematised facts which pertain to the present. To this end, it uses the descriptive method as a tool. It resembles the historical method and its results form a branch of economics sometimes referred to as descriptive economics. However, it may also be well-supported by facts from the past, and the further back it reaches, the more it needs the material supplied and digested by economic history. Moreover, it must always be careful to be competent enough in cases where it establishes facts and connections between them by itself, out of necessity, because economic history has not processed a given portion of material yet.

Now, we arrive at the most significant aspect of the dispute. No economist in their right mind would take facts from distant past, to use them as grounds for theoretical generalisations, from somewhere else than the works of economic historians or historians as such. The matter becomes awkward only in relation to recent times, the memories of which persist in the current generation and supply material for study from one's own observations and experiences or easily accessible sources of information. In this time range, the historian and theorist meet. It even looks as

5 A.F. Burns, W.C. Mitchell, *Measuring Business Cycles*, New York 1946.

if they have competed with each other since they describe and present the same material. A historian does this to record the course of events, while a theorist has to reconstruct these events and their course when the historian has not processed them or has not accounted for this aspect of phenomena that the theorist is interested in. However, a different goal is pursued by a historian and a different one by a theorist. They use different methods. The fact that they both study the same scope of facts is not only recommended and desirable but also proper.

An example will elucidate the matter for us. A great deal of interest is aroused by economic phenomena related to covering the costs of the reconstruction of the country and government expenses largely through the issuance of paper money in Poland in the period of inflation in 1919–1927. An economic historian has a lot to work on to trace the course of economic phenomena, present attempts at a reform, their successes and failures, and policies pursued, etc. However, the same issues, after they are determined and causal connections between them are established, are of great significance for theorists. They may also determine these issues, if they have not been determined accurately enough yet, or guide them in the direction of questions they wish to investigate. One of such questions could be inflation, that is, the relationship between changes in the amount of money and the availability of credit, on the one hand, and the rates of exchange, prices, interest, entrepreneur's profit, wages, manufacturing and national income on the other. It is quite clear that historians will not do this work without appropriate education and talent. If they have them, some conclusions might be ventured, but then such historians would be acting as theorists. This kind of work calls for a theorist, but a theorist will welcome the work of a historian, supplying and interpreting facts concerning a given period. Theorists will gladly avail themselves of them but if they are not available, they must do the descriptive work on their own and tie it to theoretical investigations. The presentation and preliminary processing of material will not pose any major difficulties, owing to the availability and abundance of

sources. Thus, both a historian and a theorist may work in this area, but each pursuing a different goal and employing a different method.

Let us turn to another issue, very close to the previous one in both time and nature, namely, the course the Great Depression took in interwar Poland in 1929–1933 or even 1929–1937. What a rich and multifaceted area of research it is for a historian. However, yet more interesting, or even exciting questions arise here for an economic theorist. The analysis of the adopted economic policies – especially monetary, credit and fiscal policies – and their effectiveness, helps decide if the so-called classic policy of credit crunch and constant value of money is effective, and under what conditions, for overcoming a crisis. Alternatively, if the policy of liberal credit and directed money, aimed at full employment, is more or less effective, and if so under what conditions

An analogous problem springs to mind as a subject of investigation of paramount importance for a theorist in even more recent times, namely, the "economic miracle" in West Germany in the years following the Second World War. Do theorists have to refrain from theoretical investigations only because no historian has studied this problem? Even if a historian has studied it, in all likelihood their work will not supply a theorist with the specific information they are most interested in, because of the special question they are working on. A historian is not aware of the significance of certain pieces of information for the issue at stake. Is a theorist then to stop encroaching on the descriptive and historical study of the relevant material in such a situation? Such a stance would be narrow-minded and pedantic.

Let us stress yet once again: it is not the time range, but rather the goal and method of research that separate the research subjects of economics and economic history. It appears that the simplifications and ideas of economic historians which are inconsistent with this view, are, to some degree, a belated response to, and a relic of, a certain long-passed period in the development of economics. In it, the criticism of the principle of economy, being a foundation of generalisations in economic

theory, since it was conceived of as a motive of action, led the older German historical school to the assertion that economic laws were of a historical nature. Next, the conclusion was finally drawn that there were no theoretical economic laws whatsoever, economic theory could not exist and it should be replaced by economic history and the laws of development it formulated.

As a result, the teaching of economics morphed into the teaching of economic history and the ways of developing social economy, while chairs of economics were taken over by economic historians. Thus, Gustav F. von Schmoller, the representative of an already not so radical younger realistic historical school, excited by a dispute with Carl Menger, said loudly that at German universities, at the chairs of social economy, there was no place for abstract theorists and that positions were only available for realistic historians[6] (*Untersuchungen über die Methode der Sozialwissenschaften*, 1883). The rule was also extended to the history of economic thought, although by its very nature it can only be practiced successfully by an expert theorist. However, since theory was to be replaced by history, in this field, too, a theorist was to be replaced by a historian. The outcomes of this attitude were deplorable, as were the ensuing appointments to professorships. Germany paid very dearly for them. Economics soon went into decline there, almost collapsed and stopped being respected abroad. Only slowly and gradually, against great obstacles, did it recover in the 20th century. As far as practice is concerned, the catastrophic inflation in Germany after the First World War resulted to a large extent from the so-called state theory developed by G.F. Knapp, which prevailed in Germany as regards money. It was a product of the anti-theoretical Historical School of economics.

The conclusions drawn by the Historical School, in particular the older one, from the proposition on the historic nature of economic laws were completely wrong. They followed from the ambiguity of the prop-

6 C. Menger, *Untersuchungen über die Methode der Sozialwissenschaften*, Leipzig 1883.

osition in question. The proposition itself, properly understood and interpreted, is absolutely right and real.

It is undeniably right to say that economic laws are historically determined. Depending on the generality and universality of their assumptions, they concern some shorter or longer development periods while those that use the most general assumptions are valid in respect of several development periods or even may concern any aspect of social economy in general, admitting of some general common assumptions. The younger historical school found, because of the evolution of its views, that there existed similar, so-called "periodic" economic laws. Marxism, too, after initial misunderstandings, believes now in a similar historic nature of economic laws. It admits not only single-period, but also multi-period or "common" economic laws, as they are called by Oskar Lange.[7] The latter extend to "all social formations whose economic base has … common characteristics", which often makes their operation very regular. These single- or multi-period laws are theoretic and nomothetic in character. They ought to be distinguished from another understanding of the historic nature of economic laws, namely, as laws of development or laws of economic development. At this juncture, we arrive at the second question, relating to the proper distinction between the scopes of research of economics and economic history.

In essence, development laws cannot substitute for theoretical economic laws, nor may they replace them. They concern different things. The questions they are expected to answer are simply different. Their goal is to provide causal explanations of how the quantities of the economic system changed over time, accounting for their interdependence and relationships. Since what is meant here is how past phenomena changed over time, a historical approach naturally comes to mind, *prima facie* so to speak. Thus, economic historians usually believe that it is their task to make such a synthesis and discover laws of development. Many such syntheses have been made, relying on the study of the most

7 O. Lange, *Ekonomia polityczna I*, Warszawa 1959, p. 65.

important characteristics of the past and their mutual ties, and projecting the experience gathered hitherto onto the future. Though frequently very interesting and suggestive, they are as a rule are one-sided, since they suffer from a fundamental, unavoidable and inevitable defect arising from the very heart of the matter, namely the incompleteness of induction and latitude in generalisations. As a result, they easily move onto the field of philosophy of history.

However, contrary to the practice and opinions of economic historians, it is also possible to approach economic development theoretically. Not everything that has happened and occurs in time must necessarily be approached from a historical point of view. As regards the generalisations of causalities and interdependences, rather than their individual occurrence, the field is wide open for theoretical studies. Economists of the past tried to consider economic development by building its model on the basis of certain assumptions and assertions regarding the changes of and relationships between particular economic factors. Such attempts sometimes also offer a vision of the end of development. Adam Smith revealed the principal reason of changes in an economic system, namely accumulation and investment, and also another collaborative one, namely technological progress related to the division of labour. With the classical economists, who introduced the third factor of population growth, in particular David Ricardo, a clear theory of development had emerged, which was later used by Karl Marx, who advanced a consistent, comprehensive and independent theory of development. Assuming the classical construction of a diverse, not necessarily explicit connection between the changes of economic factors, John Stuart Mill suggested the possible existence of a few variously combined models of economic development.

Ultimately, all these theories encompass more than just economic phenomena, the ties between them and interdependences. They go beyond these, advancing propositions on the changes of economic factors. In some, this is conscious and deliberate, as is the case with Marxism,

which wants to give—and gives—more than a mere theory of economic life. Where this is unconscious and unintentional, an unsatisfactory distinction between historical problems, possibly even philosophical and sociological ones, and theoretic-economic ones, is to blame.

At present, there is a tendency in economics to approach from a different angle the question of changes in the quantities of an economic system. This reflects the need to make a cognitive distinction between the changes of quantities, or economic system elements, following from their interaction in movement and the changes thereof following from changes in economic factors. In that case, the analysis of one's own changes of economic factors is not necessary anymore. Research in such a limited scope is referred to with the new name of theory of growth, to distinguish it from the broader concept of economic development. The latter also encompasses economic factors being practically and in principle independent variables of an economic system. If they are brought into the equation, it becomes complicated and less comprehensible.

This stance is right and justified. The theory of economics does not have to limit itself to statics only, to the study of how dependent variables, or system elements, adjust to the movement of external independent variables that upset the balance of the former. It may and should build economic dynamics and it is the theory of growth that attempts to make economic research more dynamic in response to widespread calls. It should provide a theory of the process of changes of interrelated quantities, or economic elements, as they interact as a result of and during movement. These elements include the quantities, their growths and losses, of capital, production, consumption, investment and accumulation. Furthermore, it must be able to explain not only the mechanism of movement, but also its forms, such as cyclicity, and find out whether their causes are endogenous or possibly exogenous.

The theory of growth understood in this way has two different trends, employing two different methods. One determines simply the direction

and ways social economy has hitherto changed in time, and various configurations of the underlying causes. Actually, this is still a historic approach that only slightly deepens the traditional theory of development. It does not provide any insight into the mechanism of changes. This is the character of the syntheses by some economists such as W.A, Lewis, W.W. Rostow and others. The other trend closely reflects the methodological assumptions of the theory of growth. It has already produced interesting results, in the work of Michał Kalecki, R.S. Harrod, E.D. Domar and others, showing that the influence of historicism has already been shaken off. Consequently, it provides a deeper independent insight into economic phenomena and after its results are combined with the results of other studies, it is capable of providing effective guidelines for managing and planning economic life.

As can be seen from the above brief review, the introduction of the conception of alleged development laws by historicism paradoxically led in fact to the opposite effect, i.e. to the rise of a nomothetic theory of growth. This was only possible thanks to the precise and proper separation of the subjects of research of economic theory and history. The misunderstanding as to the subject of research pursued by these two branches of learning and separating them using the criterion of the time at which the studied phenomena occurred and not that of the goal and method of study, has proven to be disastrous — always and everywhere. The research in these branches must be based on correct methodological assumptions. Then, they do not get in each other's way and harmoniously collaborate for the benefit of human knowledge.

Literature

Burns A.F., Mitchell W.C., *Measuring Business Cycles*, New York 1946.

Fisher I., *Purchasing Power of Money. Its Determination and Relation to Credit, Interest and Crises*, New York 1920.

Lange O., *Ekonomia polityczna I*, Warszawa 1959.

Marget A.W., *The Theory of Prices*, New York 1938.
Menger C., *Untersuchungen über die Methode der Sozialwissenschaften*, Leipzig 1883.
Ricardo D., *The High Price of Bullion: A Proof of the Depreciation of Bank Notes*, London 1810.

SUMMARY

The Statute and the Judge

The paper is an English translation of *Prąd nowy w prawoznawstwie. Ustawa a sędzia* by Antoni Peretiatkowicz, published originally in Polish in 1916. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: constitutional law, statute, judge.

Prof. Antoni Peretiatkowicz, 1884—1956, Former Professor of the Jagiellonian University, Jan Kazimierz University, Lwów and University of Poznań / Adam Mickiewicz University, Poznań.

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SUMMARY

On the Concept of an Organ of State

The paper is an English translation of *O pojęciu organu państwowego* by Karol Marian Pospieszalski, published originally in "Ruch Prawniczy Ekonomiczny i Socjologiczny" in 1972. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: constitutional law, theory of law, the concept of an organ of state.

Prof. Karol Marian Pospieszalski, 1909—2007, Former Professor of the Adam Mickiewicz University, Poznań and Institute of Western Affairs.

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SUMMARY

Preliminaries to the Study of Morality and Law

The paper is an English translation of *Rozważania wstępne do nauki o moralności i prawie* by Czesław Znamierowski published originally in Polish by PWN Publishing House in 1966. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: theory of law, universal benevolence, moral judgements.

Prof. Czesław Znamierowski, 1888—1967, Former Professor of the Adam Mickiewicz University, Poznań and Institute of Western Affairs.

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SUMMARY

Lex and ius in the Period of Transformation

The paper is an English translation of "*Lex*" a "*ius" w okresie przemian* by Zygmunt Ziembiński published originally in Polish in "Państwo i prawo" in 1991. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: theory of law, lex, ius.

Prof. Zygmunt Ziembiński, 1990—1996, Former Professor of the Adam Mickiewicz University, Poznań.

10.14746/ppuam.2019.10.04

SUMMARY

Critical Remarks on Roman Law in the Prussian Correction

The paper is an English translation of *O prawie rzymskim w korekturze pruskiej. Uwagi krytyczne* by Zygmunt Lisowski, published originally in Polish in "Czasopismo Prawno–Historyczne" in 1954. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: history of law, roman law, prussian correction.

Prof. Zygmunt Lisowski, 1880—1955, Former Professor of the University of Poznań / Adam Mickiewicz University, Poznań and Jagiellonian University.

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SUMMARY

Speculum Saxonum and Ius Municpale as Sources of Law in the Works of Tucholczyk

The paper is an English translation of *Speculum Saxonum i Ius municipale jako źródła prawa w dziełach Tucholczyka* by Władysław Bojarski, published originally in Polish in "Annales Universtitatis Nicoli Copernici. Prawo" in 1987. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: roman law, *Speculum Saxonum* and *Ius municipale*, *Joannes Cervus Tucholiensis*.

Prof. Władysław Bojarski, 1931—2000, Former Professor of the *Nicolaus* Copernicus *University in Toruń and* Adam Mickiewicz University, Poznań.

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SUMMARY

Precedents as a Source of Land Law in Poland's Past

The paper is an English translation of *Prejudykaty jako źródło prawa ziemskiego w dawnej Polsce* by Bogdan Lesiński published originally in "Czasopismo Prawno-Historyczne" from 1990. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: history of law, precedents, Polish land law.

Prof. Bogdan Lesiński, 1922—2001, Former Professor of the Adam Mickiewicz University, Poznań.

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SUMMARY

Economic Origins of the Partitions

The paper is an English translation of *Gospodarcze podłoże rozbiorów Polski* by Jan Rutkowski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1930. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: historical studies, external causes of the partitions of Poland, internal causes of the partitions of Poland.

Prof. Jan Rutkowski, 1886—1949, Former Professor of the University of Poznań / Adam Mickiewicz University, Poznań.

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SUMMARY

On the Codification of International Law

The paper is an English translation of *O kodyfikacji prawa międzynarodowego* by Bohdan Winiarski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1930. The text is published as a part of a jubilee edition of the Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: public international law, history of codification of public international law, political determinants of codification of public international law.

Prof. Bohdan Winiarski, 1884—1969, Former Professor of the Adam Mickiewicz University, Poznań.

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SUMMARY

The Potsdam Agreement as Reflected in Peace Treaties

The paper is an English translation of *Umowa poczdamska a traktaty pokoju* by Alfons Klafkowski, published originally in Polish in "Państwo i Prawo" in 1966. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary

of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: public international law, peace treaties, Potsdam Agreement.

Prof. Alfons Klafkowski, 1912—1992, Former Professor of the Adam Mickiewicz University, Poznań.

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SUMMARY

Responsibility for Currency in an Occupied Territory

The paper is an English translation of the chapter *Odpowiedzialność za pieniądz na terytorium okupowanym* from *Pieniądz na terytorium okupowanym. Studium prawnomiędzynarodowe ze szczególnym uwzględnieniem praktyki niemieckiej* by Krzysztof Skubiszewski published originally in Polish by Instytut Zachodni Publishing House in 1960. The text is published as a part of a jubilee edition of the Adam Mickiewicz University Law Review "100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: public international law, responsibility for currency in an occupied territory, world war II.

Prof. Krzysztof Skubiszewski, 1926—2010, Former Professor of the Adam Mickiewicz University, Poznań and *Institute of Law* Studies of the Polish Academy of Sciences.

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SUMMARY

The Autonomy of Treaty Terms

The paper is an English translation of *Autonomiczność pojęć traktatowych* by Anna Michalska published originally in Polish in "Toruński Rocznik Praw Człowieka i Pokoju" in 1993. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: public international law, the law of treaties, the autonomy of treaty terms.

Prof. Anna Michalska, 1940—2001, Former Professor of the Adam Mickiewicz University, Poznań.

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SUMMARY

On the Definitions of Administrative Law

The paper is an English translation of *Z zagadnień definicji prawa administracyjnego* by Marian Zimmermann published originally in Polish in "Acta Universitatis Wratislaviensis" in 1964. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: the concepts of administrative law, theory of law, legal institutions.

Prof. Marian Zimmermann, 1901—1967, Former Professor of the Adam Mickiewicz University, Poznań and Institute of Western Affairs.

DOI 10.14746/ppuam.2019.10.13

SUMMARY

The Evolution of General Administrative Proceedings

The paper is an English translation of *Rozwój ogólnego postępowania administracyjnego* by Zbigniew Janowicz published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1970. The text is published as a part of a jubiliee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: administrative proceedings, code of administrative arocedure, state administration.

Prof. Zbigniew Janowicz, 1921—2011, Former Professor of the Adam Mickiewicz University, Poznań.

DOI 10.14746/ppuam.2019.10.14

SUMMARY

Public Administration Activities in the Light of the Contemporary Conception of Public Business Law

The paper is an English translation of *Działania administracji publicznej w świetle współczesnej koncepcji publicznego prawa gospodarczego* by Teresa Rabska published originally in Polish in *Instrumenty i formy prawne działania administracji gospodarczej* by Adam Mickiewiczy University Press in 2009. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: the concept of public business law, public administration activities, goals of public–law regulation of the market economy system.

Prof. Teresa Rabska, 1926—2018, Former Professor of the Adam Mickiewicz University, Poznań.

DOI 10.14746/ppuam.2019.10.15

SUMMARY

Theory and Practice in Criminal Law

The paper is an English translation of *Teoria i praktyka w prawie karnym* by Józef Jan Bossowski published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1924. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: criminal law, theory of criminal law, judicial application of criminal law.

Prof. Józef Jan Bossowski, 1882—1957, Former Professor of the University of Poznań / Adam Mickiewicz University, Poznań and Institute of Western Affairs.

DOI 10.14746/ppuam.2019.10.16

SUMMARY

On "Rationality" in Criminal Law

The paper is an English translation of *Rozważania o "racjonalności" w dziedzinie prawa karnego* by Bogusław Janiszewski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1996. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Pro-

fessors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: criminal law, theory of law, the concept of rationality in legal studies.

Prof. Bogusław Janiszewski, 1949—2006, Former Professor of the Adam Mickiewicz University, Poznań and University of Szczecin .

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SUMMARY

A Few Remarks on the Theory of Finance

The paper is an English translation of *Parę uwag wokół teorii finansów* by Jan Zdzitowiecki published originally in Polish in "Ruch Prawniczy Ekonomiczny i Socjologiczny" in 1972. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: theory of finance, theory of law, financial law.

Prof. Jan Zdzitowiecki, 1898—1975, Former Professor of the Adam Mickiewicz University, Poznań.

DOI 10.14746/ppuam.2019.10.18

SUMMARY

The Coming Together of Astronomy and Economics

The paper is an English translation of *Skojarzenie się astronomii z ekonomią* by Roch Knapowski published originally in Polish in *Opuscula Casimiro Tymieniecki septuagenario dedicata* in 1964. The text is published as a part of a jubilee edition of the "Adam Mickiewicz Uni-

versity Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: astronomy, economics, monetary policy.

Prof. Roch Knapowski, 1892—1971, Former Professor of the Adam Mickiewicz University, Poznań.

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SUMMARY

Theory versus History of Social Economy

The paper is an English translation of *Teoria a historia gospodarstwa społecznego* by Edward Taylor published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1962. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Faculty of Law and Administration" devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: economics, theory of social economy, history of social economy.

Prof. Edward Taylor, 1884—1964, Former Professor of the Adam Mickiewicz University, Poznań and Poznań University of Economics.

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