

ZYGMUNT ZIEMBIŃSKI

## Lex and Ius in the Period of Transformation<sup>1</sup>

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.<sup>2</sup> We know of such expressions as: *lex duodecim 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<sup>3</sup>, 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

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1 Translated from: Z. Ziemiński, “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 categorical 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,<sup>4</sup> 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.

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<sup>4</sup> For a broader discussion v. Z. Ziemiński, *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.<sup>5</sup> 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.<sup>6</sup>

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<sup>7</sup> 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-

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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.<sup>8</sup>

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.

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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.<sup>9</sup> 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 law-makers than a large number of people who were to apply the law.<sup>10</sup>

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.<sup>11</sup> 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*).<sup>12</sup> Furthermore, it is not the task of human law to command the performance of any good deeds, nor to forbid all evil deeds.<sup>13</sup> Besides, St. Thomas allows reasonable dispensation from the observance

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9 Cf. *Obshchaya tieoria gosudarstva i prava*, v. II, *Obshchaya 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.<sup>14</sup> 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<sup>15</sup> 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”),<sup>16</sup> 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-

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

sic problems here in detail.<sup>17</sup> 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.<sup>18</sup> 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)<sup>19</sup> 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

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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 inutilli 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*,<sup>20</sup> 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.

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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).<sup>21</sup> 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.).<sup>22</sup>

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

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

22 For a broader discussion v. Z. Ziemiński, *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*,<sup>23</sup> 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.

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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<sup>24</sup> 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.

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<sup>24</sup> 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".

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