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edited by
Paweł Mazur
Tomasz Raburski

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CONSIDERING THE JURIDICAL AND EXTRA-JURIDICAL ASPECTS OF THE DOMESTIC VIOLENCE RELIEF SYSTEM IN POLAND

Abstract. The paper explores various problems within the two-track model of domestic violence prevention and relief system in Poland. The two tracks are oriented around social services and criminal courts, respectively. The common problem for both tracks is the shortage of personnel sufficiently trained to deal with the specifics of family abuse. Moreover, the discriminatory attitudes towards the victims are prevailing, while the gender aspect of the problem is poorly recognised in everyday institutional practice. Consequently, the cultural patterns that domestic violence stems from are rarely challenged, undercutting prospective long-term prevention strategies.

Keywords: domestic violence, maltreatment, gender, gender discrimination, violence prevention, revictimisation

PRAWNE I POZAPRAWNE ASPEKTY SYSTEMU PRZECIWDZIAŁANIA PRZEMOCY DOMOWEJ W POLSCE

Streszczenie. Artykuł podejmuje kwestie różnorodnych problemów w funkcjonowaniu systemu zapobiegania przemocy domowej w Polsce. Ów system skład się z dwóch ścieżek skupionych odpowiednio wokół pomocy społecznej i sądów karnych. Wspólnym problemem dla obu ścieżek jest brak personelu odpowiednio przygotowanego do specyfiki pracy z ofiarami i sprawcami przemocy w rodzinie. Ponadto dominują postawy dyskryminacyjne wobec ofiar, a aspekt genderowy problemu jest niedostatecznie uwzględniany w praktyce instytucjonalnej. W rezultacie wzorce kulturowe, z których wyrasta przemoc domowa, są rzadko kwestionowane, co osłabia potencjalne długofalowe strategie prewencyjne.

Słowa kluczowe: przemoc domowa, przestępstwo znęcania, płeć, dyskryminacja ze względu na pleć, zapobieganie przemocy, rewiktymizacja

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1. INTRODUCTION

The reasons for the persistence, scope, and severity of violence inside family and violence in intimate relationships are manifold. In this paper, I am going to explore different aspects of formal relief system, which aims to mitigate this problem.

The formal relief system constitutes more than just the conditions under which individual citizens may attempt to seek solutions for violence in their lives. It is also the locus where the patterns of the cultural interpretation of value – in this instance primarily the understanding of gender relations – are institutionalised (cf. Fraser, Honneth 2023). This is the context in which unfair patterns can be reinforced, but also one where they can be challenged. It is, therefore, unfortunate that globally:

> (…) most government agencies misunderstand the nature of domestic violence, with the result that domestic violence becomes repetitive, cyclical, and, due to the lack of appropriate punitive measures, endorsed. This approach of inertia and ignorance on the part of states becomes systemic and intimate violence, which we perceive as private, develops a very public dimension. (Meyersfeld 2016, 19)

How does this pessimistic assessment fit the situation in Poland? The laws existing in Poland are neither optimal nor model; they certainly invite criticism and require further amendment, hopefully in the near future, but they still can be deemed reasonably adequate in the historical moment that we find ourselves in.[1] However, there are other factors that hamper institutional response to violence.

Before I proceed, first, I clarify some key terms used in this paper. After some consideration, I decided to employ the term 'domestic violence' (DV) in order to keep it consistent with the recently updated Domestic Violence Prevention Act of 2005[2] (DV Act – t.j. Dz.U. z 2023 r., nr 180, poz. 1493, z późn. zm.) in Poland and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence of 2011 (Istanbul Convention – CETS 210; Dz.U. z 2015 r., poz. 961). The definition of DV includes, but is not limited to, various forms of intimate partner violence. Moreover, I will be using the term 'abuse' to denote the social phenomenon of reoccurring violence within a relationship, as well as the term 'maltreatment' to denote a crime that roughly corresponds to abuse of certain level of severity, characterised by excess, as defined in the Polish Penalty Code (PC – Dz.U. z 1997 r. , nr 89, poz. 555, Art 207).

Furthermore, I would like to underline that the terms 'gender-based violence', 'violence against women', and 'domestic violence' are overlapping, but not synonymous. Violence against women is a subcategory of gender-based violence,

[1] In this assessment, I include international acts that are in force in Poland.

[2] Until the 2023 update, the DV Act employed the term 'family violence' (Dz.U. z 2023 r., poz. 535).

whereas DV is a heavily gender-related phenomenon, women are hardly the only victims.[3] However, due to the gendered nature of the problem, it is impossible to tackle DV without tackling gender-based violence and discrimination.

The term 'victim,' mostly accepted in literature, is, however, not value-neutral. It is a stigmatised and oppressive identity, rejected by many people subjected to violence, who prefer to embrace a more empowering identity of a survivor.[4] The problem here is that the stigmatisation of victimhood is an inalienable aspect of impediments in systemic response towards violence (Sweet 2019, 212). Consequently, in some contexts, the term 'victim' is the only adequate one.

The paper takes broad-scope approach to the problem of formal institutional measures of DV prevention rather than focus on a particular element of the system. The analysis is based on the study of available literature. It presents an outside perspective on the law, namely from the standpoint of the study of gender relations and violence. The interest in the formal institutional response to DV, including the law and legal practice, is founded on the thesis that violence is conditioned on patterns of cultural value interpretation, which can either be reinforced or subverted through institutional practices. Therefore, effective countermeasure strategies to violence require a reflexive transformation of said practices, which entails, among other things, a comprehensive understanding of both DV itself and that of the systemic formal institutional response to DV. This prompts the questions about the ways in which the system works sufficiently and in which it falls short.

Within the paper, I will present in corresponding sections the following issues: the general shape of the DV prevention and relief system in Poland (section 2), the examination of prevailing barriers for accessing formal assistance (section 3), common prosecution and trial practices (section 4), a discussion about the aims of violence relief and prevention (section 5), and the conclusion (section 6).

[3] DV and intimate partner violence against men is not uncommon, and partner violence against men is not always predicated by gender-based prejudice (unlike violence against women); gender-based prejudice may play a part. It can be a result of the perpetrator's explicit prejudice against men, but also the perpetrator's perception that a male partner does masculinity in the "wrong way" – a deviation from the assumed norm. Furthermore, violence can be a form of social punishment for deviating from gender norms (cf. Bourdieu 1998/2002, 50), both against cis-heterosexual people and against queer people, i.e. both non-normative gender identity and expression as well as homosexuality can be considered deviation from gender norms. This aspect of the problem may feature in intergenerational DV, but, sadly, even queer intimate relationships are not free from it (Sanger, Lynch 2018).

[4] The question here is "empowering to whom?" The identity of a survivor is not value-neutral either and it comes with expectations (Sweet 2019). Moreover, not all who have been subjected to violence can be called survivors. Can someone who still lives in a violent relationship truly be called a survivor? Not to mention that people die as a result of violence, so the category of a survivor is not appropriate here (Meyersfeld 2016, 31). Many women self-identify neither as a survivor or nor as a victim despite detailed histories of violence suffered at the hands of their partners (Larance, Rousson 2016, 882).

2. THE DV RELIEF SYSTEM IN POLAND IN BROAD OVERVIEW

The Polish DV relief system can be characterised as a two-track model. On the one hand, there is a criminal-justice track with its main legal basis in the Penal Code of 1997 (PC), especially Article 207 that criminalises the offences of the maltreatment of family members or other dependant persons. The Majority of domestic-violence-related convictions fall under this Article (Grzyb 2020, 171). However, depending on the allegations, several other Articles of the PC can be employed to penalise domestic violence perpetrators, such as Art. 197 or Art. 191, which define, respectively, rape and punishable threats (Majerek, Lubińska-Bogacka 2023, 224). In practice, Art. 207 is the principal legal instrument for addressing DV in Poland, which does not entail that the crime typified by Art. 207 is synonymous with DV. In fact, the Polish PC does not include a definition of such crime as 'domestic violence'.[5] It is important to note that Art. 207 pertains to all relationships where one party depends on another and is not limited to the domestic context; it includes, for instance, crimes in the institutions where some type of essential care is provided to the recipients, such as hospitals and nursing homes. On the other hand, not all DV cases qualify for the crime of maltreatment.

The other track is the so-called Blue Card [Pol. *Niebieska Karta*] procedure with its legal foundation in the Act on Counteracting Domestic Violence of 29 July 2005 ("DV Act"). Additionally, a number of different legal acts and regulations beside the PC and the DV acts delimit formal institutional response to DV, including the Civil Code (1964 – t.j. Dz.U. z 2021 r., poz. 1805), the Family Code (1964 – t.j. Dz.U. z 2020 r. poz. 1359), and legislation regulating the work of state agencies, such as social services and the police, which come in frequent contact with families affected by violence.[6] The focus of the DV Act as well as the Blue Card procedure is violence prevention rather than penalisation. Consequently, the Blue Card Procedure provides possibility for a non-criminal investigation into relationships as well and assistance for families that are in an increased danger of the escalation of an internal conflict or crisis into violence.[7]

[5] The subject of if and how DV should be codified in penalty code warrants some discussion. Given that my understanding of DV is founded on a broad definition of violence (developed in Dutka 2023), I would make an argument that it is not feasible to define DV within an article of a penalty code in a way adequate to the theoretical understanding of violence as a social phenomenon. Legal definitions have different aims than theoretical studies, and while I believe legal acts can use same words as scholarship with different meanings, however employing same words, especially in the context of penalty code, may contribute to misunderstandings and have very negative consequences for public perceptions of the problems that both the law and scholarship try to address.

[6] The Social Services Act (*Ustawa o opiece społecznej* t.j. Dz.U. z 2023 r., poz. 901), the Police Act (*Ustawa o policji* – Dz.U. z 2021 r., poz. 1882).

[7] I should note that I find this formulation somewhat problematic; perhaps it would be more appropriate to say that latent forms of violence can turn into overt ones or that structural violence transforms into direct and interpersonal violence (cf. Galtung 1969).

This entire interconnected system is extensive. If the representatives of all those diverse branches – widely defined as social services, the police, the system of criminal and civil justice, education, and health care – are included and counted together, the number of people involved in the violence prevention system in Poland can be estimated at over a million people (Wrona 2016, 108).

Multiple state agencies and non-government organisations alike provide a range of various forms of assistance to individuals and families afflicted with DV, including assistance with legal matters, explaining the applicable legislation, writing or filling in legal documents, providing advice during litigation, etc., which can be obtained in Crisis Intervention Centres, [Pol. *ośrodki interwencji kryzysowej*] since 2004 and Municipal Information Consultation Centres [Pol. *gminne ośrodki informacyjno-konsultacyjne*] or Splacialised Family Violence Relief Centres [Pol. s*pecjalistyczne ośrodki wsparcia dla ofiar przemocy w rodzinie*] since 2005 (Majerek, Lubińska-Bogacka 2023). NGOs, such as the Women's Rights Centre [Pol. *Centrum Praw Kobiet*], can perform similar functions in legal consultation and other areas of violence relief, reducing the risk of revictimisation (Nowacka 2020, 83).

The DV Act guarantees that victims have access to free-of-charge medical, psychological, and legal consultations as well as career and family guidance, crisis intervention and assistance, protection from further harms, restraining orders, shelter in specialised facilities, documented medical examinations of DV-related injuries, and assistance in acquiring long-term housing (DV Act Art. 3; Bajor-Stachańczyk 2023, 123). Unfortunately, those law-mandated provisions are not realised sufficiently. In particular, the number of specialised shelters is woefully inadequate; on average 2–3 such shelters exist in each voivodeship (Ombudsman's Office 2020, IV C).

For the perpetrators, the DV Act introduces remedial-educational programmes (DV Act Art. 4; cf. Bajor-Stachańczyk 2023, 123). Such programmes implemented in Poland are based on the Daluth model (Uherek-Biernat, Zalewska-Łunkiewicz 2017, 44), which combines cognitive-behavioural treatment with feminist principles (Hamilton et al. 2013; cf. Pence, Paymar 1993). The fraction of perpetrators who attended remedial programmes is very small in comparison to the number of initiated Blue Card procedures (Uherek-Biernat, Zalewska-Łunkiewicz 2017, 44). The courts issue orders of compulsory participation in remedial programmes for perpetrators in only few percents of cases, while some districts [Pol. *powiaty*] do not run such programmes, do not prepare to develop them, and do not have personnel with relevant expertise (Jureczka 2022, 62). Courts' unwillingness to issue remedial education and local governments' failure to develop such programmes likely reinforce one another; from the perspective of local governments, there is "no point" to allocate resources to create remedial-educational programmes if the courts do not issue relevant orders, while the courts may be hesitant to issue orders when the options to fulfil them are so limited.

The Blue Card procedure reflects the postulates of integrated and comprehensive approach to violence. The procedure is run on the level of municipalities by an interdisciplinary team [Pol. *zespół interdyscyplinarny*] or a working group [Pol. *grupa robocza*] appointed by the interdisciplinary team (DV Act Art. 9a; 169; Bajor-Stachańczyk 2023, 124). Those bodies comprise representatives of social welfare, the police, municipality committees for solving alcohol problems, representatives of educational and health care institutions, and non-governmental organisations, but, depending on the case, working groups can also include prosecutors, probation and parole offices, and representatives of other relevant institutions (Majerek, Lubińska-Bogacka 2023, 229; Wrona 2016, 83).

There is a considerable gap in operation between the Blue Card system and the court justice system (Grzyb 2020, 165). It is, however, not the only relevant lacuna in the system – it is worth noting that DV cases may involve more than one court proceedings at the same time: on the one hand, civil proceeding over divorce/parental rights/division of estate, and on the other hand – proceedings in criminal court. The proceedings conducted by different courts and in accordance with different procedural rules cause considerable difficulties for the judges to holistically understand diverse aspects of a situation (Kalisz 2023, 91).

Needless to say, a successful solution in the Blue Card procedure requires tremendous efforts to coordinate between representative of institutions that on a daily basis operate on very different and not always compatible sets of procedures and practices, and who, therefore, are prepared to address different needs and expectations. Cooperation is not always smooth. The disparities between different institutions in the modes of responding to suspected DV were much more difficult to overcome than anticipated (Wrona 2016, 82).

Serval more obstacles with the smooth operating of Blue Card system are worth pointing out, including inflexible procedures, which place needlessly overblown bureaucratic requirements on the responders and help-seekers, as well as insufficiently defined legal status of interdisciplinary teams and working groups – which leaves those entities without means to act effectively or compel the suspected perpetrators to comply with the procedure. Moreover, there is the issue of funding, as it is unclear where the money for operating of working groups should come from (Wrona 2016, 110–112, cf. Ombudsman Office 2020, IIC art. 32).

Additionally, in recent times, changes in the ways in which social services centres operate have resulted in changes to arrangements of working groups and, in turn, impacted the quality of assistance for families afflicted with violence (Pułczyńska-Kurek 2023, 201). The staff shortages during the COVID-19 pandemic exacerbated problems in the institutional DV relief when at the time; the stress related to the pandemic and the necessity of social isolation caused the levels of violence to rise (Pułczyńska-Kurek 2023, 210–211). The regulations, introduced to mitigate the spread of the virus, did not recognise or address the needs of people subjected to domestic abuse (Skrabacz 2022, 25).

One of the pivotal aspects of providing help to the families afflicted with violence is separating the perpetrator from the victim (Wiktorska 2021, 80). The protective restraining orders prohibiting the perpetrator from contact with the victim are one of the more effective methods to prevent further DV victimisation that a court may employ (Helios, Jedlecka 2017, 10; Gierszewski 2019, 183; Melaniuk 2020). There are several venues in the Polish law that can be utilised to accomplish this goal, most of which lie in the discretion of prosecutors or the courts (Wiktorska 2021, 83). The protection orders in criminal proceeding can already be initiated at the pre-trial stage, at the prosecutor's discretion as an *ex officio* decision, or at the request of a police officer (Wolwiak 2023, 362).[8] However, courts underutilise the existing provisions (Jaworska-Wieloch, Sitarz 2019, 313–314; Wrona 2016, 80). That means not only the failure to protect the victim, but also decreasing the likelihood of completing the court cases (Fugate et al. 2005, 291). The quite robust measures for addressing DV provided by the law are not employed to sufficient extent, or, in fact, are barely employed at all (Halicka et al. 2018).

The analysis of violence prevention in Poland reveals that bridging the gap between the Blue Card system and the court justice system should be a priority, as the effective help for IPV depends on various parts of the violence relief system operating in a coordinated manner. Moreover, it stands to reason that cooperation between different branches of the system depends on how their representatives are educated and trained, including not only knowledge about the problem of violence, the relevant laws, and the make-up of the relief system, but also the fostering of the so-called soft competences and the shaping of non-discriminatory attitudes.

3. RECOGNISING BARRIERS

As many as ¾ of the people subjected to violence do not seek assistance from any institution, nor do they believe that such help could be effective (Majerek, Lubińska-Bogacka 2023, 224). There are several reasons for such situation. Undoubtedly, the internalised beliefs about violence, gender, and relationships play a part in discouraging potential help-seeker, as they do fear of the abuser or *for* the abuser; various problems in logistics of help-seeking, e.g. finding someone to take care for the children during a potential court hearing (Dobash, Dobash 1992; Goodman et al. 2009, 309–310); problems with 'material' infrastructure, e.g. the lack of options for commuting, digital divide, language barriers, including sign language, Internet resources unavailable in versions for the visually-impaired, or specialised

[8] Some changes with regard to this issue have recently been introduced into the law (for more, see Wolwiak 2023).

DV agencies housed in buildings inaccessible for the disabled (Ombudsman's Office 2020 IV, C; cf. DeKeseredy 2019, 318; Fugate et al. 2005, 299).

The psychological consequences[9] of the abuse and its impact on individual capacities to seek out assistance are not insignificant (Goodman et al 2009; Kalisz 2023, 97). Moreover, even under the best conditions, disclosing one's deeply personal and intimate issues to complete strangers is emotionally taxing. In theory, unfavourable reactions among help-seekers could be mitigated if they received appropriate support in the preparation for the meeting with the Blue Card working group or with the court. Unfortunately, there are not enough qualified professionals who could provide such service (Wrona 2016, 89). Another problem involves confidentiality concerns and pressure to keep quiet, especially in closely-knit communities, such as in rural areas and in the families of members of the police force (DeKeseredy 2019, 317–318; Johnson et al. 2005, 4; Huntley et al. 2019, 9; Zavala et al. 2015).

To a limited extent, the Polish law provides legal assistance free of charge to those who cannot afford it themselves. However, citizens are unaware of this form of support and, as a result, do not reach for it (Ombudsman's Office 2020, IV B).

Oftentimes DV victims are subjected to a long waiting period between the initial contact with the police and the hearing in court. Furthermore, court officials often fail to provide adequate information and guidance, while DV victims report little support from their attorneys (Gillis et al. 2016, 1159). On the other hand, the courts in criminal, civil or administrative proceedings often set deadlines on 7 or 14 days for receiving the consultations. Meanwhile, in many places in Poland, it is impossible to obtain a legal consultation in such a short time. For instance, in Warsaw, the waiting time is typically around one month, and there are times during the year when this time is extended to two months (Wrona 2016, 97).

A person seeking to escape DV must face the housing problem and the associated costs. In theory, there are several legal venues for securing the place of residence available for the victim, barring the access to the perpetrator. In practice, it is usually the victim who must seek a safe place to live elsewhere (Helios, Jedlecka 2017; Gierszewski 2019, 183), even if they are the sole owners or the co-owners of the property. This entails that the instruments meant to coerce the perpetrator to leave, thus securing a place of residence for the victim, are still not very effective (Wiktorska 2021, 80). However, even when the perpetrator is successfully barred from the property, the resulting situation may still leave the victim very vulnerable and without the means of economic support. Moreover, if the perpetrator was the sole legal owner of the property, it may be sold, potentially leaving the victim homeless (Jaworska-Wieloch, Sitarz 2019, 305; Wiktorska 2021, 84).

A group that may encounter specific barriers in accessing DV relief includes members of sexual and gender minorities. This subject has not been very well recognised in the Polish scholarship yet. However, considering the research

[9] Or even general health problems that come as a result of violence (Stark 2010, 203).

conducted in Europe and North America, it is not reasonable to expect that the lack of the legal recognition of same-gender unions or the unclear legal standing of such unions means that there are oversights in the law regarding the protection of queer people from DV (Calton et al. 2015, 591). Legal vulnerability is a considerable barrier to help-seeking among queer victims; in particular, insecure rights to custody or property may prevent them from seeking help (Hardesty et al. 2009, 40). Queer DV victims face particular problems securing the custody of their children, given that, historically, courts have marginalised parents in same-gender relationships with regard to child custody rights (Hardesty et al. 2009, 30; Scheer et al. 2020, 150).

Lastly, male victims of DV in heterosexual relationships are also the group of special concern when it comes to help-seeking. Specialised services for them are largely non-existent, while the general victim services may react with the lack of understanding of the problem (Hine et al. 2022). Additionally, abused men may encounter more ridicule in their communities and experience more shame than their female counterparts do (Helios, Jedlecka 2016, 72; Scarduzio et al. 2017, 2).

4. ADDRESSING VIOLENCE IN COURT PRACTICE

The maltreatment cases, which is the most common crime associated with DV that reaches the courtrooms in Poland, are among the most gruelling, lengthy court proceedings, as they frequently combine multiple legal aspects and even more extra-legal ones in addition to the fact that arriving at the material truth of the case is usually especially complicated in those types of cases (Kalisz 2023, 92). In the Polish court system, the main focus is on proving the guilt and sentencing the perpetrator, while the needs of the victims remain largely unrecognised and their well-being and safety not seen as relevant (Wrona 2016, 82). Unfortunately, in many ways, the mode of persecution and court proceedings protects the perpetrator (O'Neal et al. 2015, 1458; Helios, Jedlecka 2016, 125–126).

The district courts typically preside over cases of maltreatment. Grzegorz Wrona had extensively analysed a sample of sentences from those courts, concluding that the courts make the rule and present interpretations of the crime of maltreatment primarily based on the rulings of the Supreme court of Poland and, to some extent, based on commentaries to the PC (Wrona 2016, 213). Meanwhile, the courts do not reference the CEDAW, the Istanbul Convention, rulings of the European Court of Human Rights (ECtHR), or even the definition of violence from the DV Act (Wrona 2016, 211). Despite homogenous – or somewhat impoverished – sources of interpretation, Wrona notes that the final rulings are not very consistent (Wrona 2016, 214).

The crime of maltreatment is prosecuted out of office, although the criminal proceedings are very often discontinued when the victim refuses to testify, even

though they are legally entitled to do so when the accused is a family member (PC Art. 115 § 11). This practice goes against prosecutors' official responsibilities and the principle of humanitarian proceeding (Halicka et al. 2018; Wiktorska 2021, 83), even though there are other means for gathering evidence and other instruments to provide protection from further offences, legally securing victims' best interest (Wrona 2016, 230).

As the consequence of victims' shifting attitudes and priorities during the proceedings, prosecutors develop the image of a DV victim as uncooperative and untrustworthy, which, in turn, makes them unwilling to contribute appropriate information and satisfactory support (Gillis et el. 2006, 1153; Wrona 2016, 93). Those shifts come as a victim's response to realities of their situation – the reasons for withdrawal may include threats and pressures from the perpetrator or (temporal) improvement in the perpetrators' behaviour (the usual goal of those DV victims who enter the legal system), or even financial precarity. The attempt of withdrawal does not indicate that the prosecutors' involvement is no longer needed (Wrona 2016, 93). Prosecutors aware of victimisation mechanisms could hold additional interviews with the victims when such circumstances arise (Halicka et al. 2018, 225).

Many DV victims fail to get a fair and favourable outcome in court, because they do not fit the idea of what a battered woman should be like. Women subjected to DV are pressured into performing victimhood and survivorhood in a particular way that often ignores the socioeconomic realities of gender and interpersonal relationships as well as the victims' wishes. Those expectations are often contradictory. For instance, women who resolve to end violent relationships are more likely to receive legal assistance than their counterparts who appear unsure (cf. Fugate et al. 2005, 303).

At the same time, showing agency, initiative, or confidence, as well as signs of high socioeconomic standing in looks and behaviour can all be taken against the victim, but so can behaviours and attributes that judge, jury, or prosecutors see as unfeminine and/or unworthy of respect, e.g. forceful resistance to violence, substance abuse, or socioeconomic vulnerability (Wemrell et al. 2019, 10). Some courts rule that the victim's aggression eliminates the possibility of convicting the perpetrator for maltreatment without examining the reasons for such behaviour (Wrona 2016, 214).

On the other hand, women who do fit the victim stereotype are assigned unfavourable qualities such as stupidity or passivity, or are even perceived as deserving the abuse. As a result, they are often discouraged from further pursuing their cases (cf. Gillis et el. 2006, 1153). DV victims are put into the double bind – if they are passive, they do not need or deserve help, but if they are agentic, it is deemed as a proof against their claims (Wrona 2016).

Another factor is the image of the "ideal" DV perpetrator. Such an ideal perpetrator is usually seen as the Other, someone who deviates from the norm in terms of class, ethnicity, or mental health (Wemrell et al. 2019, 10), or especially,

as a substance abuser, which is a result of the legal tradition defining the crime od maltreatment as related to alcohol addiction (Wrona 2016). Moreover, the ideal perpetrator is also a man or at least masculine.[10]

Most maltreatment cases in Poland conclude with a settlement on various stages of the proceeding (Kalisz 2023, 89). More than 80% of the sentences in maltreatment cases were suspended. Especially the cases where the victim refuses to testify or when the perpetrator changes their behaviour and reconciles very often end with the acquittal or discontinuation of the proceeding, even if the court established that the crime took place (Wrona 2016, 93).

The court practice in Poland shows that the majority of criminal cases involving DV had been submitted for mediation (Sitarz et al. 2018, 359), with maltreatment cases being the most common context for mediations in criminal proceedings in Poland (Kalisz 2023, 89). Although meditation is presented as a kind of procedure that can empower the victim, there are concerns as to whether it is possible to mitigate unfair power imbalances created by abuse, which can negatively influence the outcome for the victim, even if the mediator is appropriately qualified (Johnson, Kelly 2008, 492). Consequently, battered women's advocates discourage mediation in DV-related cases, including custody and divorce civil proceedings, while the Istanbul Convention dictates that alternative dispute resolution processes cannot be mandatory in cases involving DV (2011, Art. 48). In this context, such a high percentage of mediation in DV cases in Poland appears odd.

The proceedings of divorce cases involving DV often reveal deep biases ingrained in the justice system. Legal professionals in such instances tend to blame women for destroying the marriage based on an implicit assumption that if a woman fails to meet her husband's expectations regarding housework or sexual activities, she is to be blamed for the marriage falling apart, even when her husband's expectations are unreasonable (Helios, Jedlecka 2016, 120).

Another problem is the custody over the children. Women are seen as nurturing and the natural providers of care for the children, so they are favoured in custody cases. However, granting the abusive former partner rights to visit their children can give them the opportunities to further exert abuse over the victim and her children (Gillis et el. 216, 1160–1161). On the other hand, based on the same stereotypes of maternal care, abusive women are also more likely to receive custody rights over their male partners. As a result of gender stereotypes prevalent in the justice system, abused men have difficulties in securing their children's custody or shared custody in court (Hine et al. 2022, NP5608).

[10] This goes both for cases involving queer relationships and heterosexual ones, where the woman is the perpetrator. If she appears and/or behaves in a way that is interpreted as masculine, she is more likely to be deemed guilty and the severity of her blame more likely to be deemed higher (Girshick 2002, 55).

The perception of gender and traditional family roles influences the outcomes of the legal process for queer women as well (Wasarhaley et al. 2017, 639). The heteronormative understanding of the dynamics within the family, including the dynamics of DV, contributes to the erasure of female victims of abuse perpetrated by women, while the testimonies of queer women appear unfamiliar and illegible to court personal (cf. Girshick 2002, 1505).

By neglecting to apply existing laws, downplaying violence, employing narrow definitions of the crime that is detached from the social reality of abuse, employing an interpretation which is insensitive to gender asymmetry, or suspending legal investigations or acquittals, the courts can, perhaps even unintentionally, redefine violence, making it appear less serious or as not violence at all (Wrona 2016, 12–28, 155; Wemrell et al. 2019, 11).

Court proceedings do not happen in vacuum. During the proceedings, the law is understood and interpreted by legal professionals through the prism of available cultural patterns. For instance, a stereotypical approach to a woman's role in the family informs the interpretation of formally-codified laws (Helios, Jedlecka 2017, 48). Those patterns affect not only the final verdict but court practices as a whole. The enduring tendencies have influence going far beyond the lives of those people who are directly involved in the individual cases. The court practices decide the dominant interpretation of the law, thus effectively shaping the law even in the legal systems where judges have no formal power to create the law.

However, the influence of courts as institutions does not end there. The courts can reinforce or subvert the hegemonic patterns of cultural value interpretation and communication. Therefore, it is important to consider that many of such patterns unfairly disfavour members of certain groups, such as women, children, the elderly, the disabled, and immigrants (cf. Fraser, Honneth 2003). As a result, courts can contribute to the maintenance of unfair social relations; in other words, courts as institutions are responsible for entrenching those patterns in society, but also have the power or transform those relations. That power lays not only in the final verdict or in the sentence, but also in the interaction between legal professionals and plaintiffs, defendants and witness, as well in the justifications for the decisions that the court presents.

Unless the court practices require appropriate countermeasures for unconscious prejudices, even the most progressive and well-thought-out laws will not be able to amend the ongoing cycle of discrimination (Young 1990, 151). In other words, the existence of adequate laws meant to help DV victims and prevent further victimisation is not a sufficient condition for effective violence prevention. Institutions of the justice system must, in practice, consciously address unconscious biases and gender stereotypes to avoid the reproduction of the same patterns they are meant to amend by implementing the existing laws. This makes the study of those mechanisms and the relation between the law and cultures and society embedded in and indispensable for the fair outcomes of court processes.

Unless such measures are taken, the very patterns that normalise and effectively sanction DV prevail and are reproduced through institutional practice. Therefore, the education of legal professionals who are to be employed in DV cases should include the study of those extra-legal factors.

5. DISCUSSION – WHAT IS THE LAW SUPPOSED TO PROTECT AND HOW TO ENSURE IT DOES?

The definition of domestic violence in the DV Act of 2005 is not the same as the crime of maltreatment defined by the PC Art. 207. I believe that this difference is fully justified by different aims of the DV Act and the PC. The DV Act provides legal basis for addressing a harmful social phenomenon, preventing or at least mitigating it, as well as providing relief to persons afflicted outside lengthy and burdensome litigations (Grzyb 2020, 165; Wrona 2016). Typically, DV victims do not wish to punish the perpetrator, but merely make them change their behaviour, while the fear of the perpetrator facing legal consequences can be deterrent in contacting potential assistance (Gillis et el. 2006, 1158).

It is unfortunate that the 2023 update of the DV Act that introduced previously absent condition of dependency into the definition of violence, aligning it more closely with the crime of maltreatment (PC Art. 207), thus reducing its scope, potentially hindering individuals and families in receiving assistance (cf. Wiktorska 2021, 85). Additionally, the change may exacerbate the already long-standing confusion in the Blue Card procedure, where courts' rulings against maltreatment are commonly treated as evidence of the absence of DV (Wrona 2016).

Both the DV Act and the PC Art. 207 adopt gender-neutral language.[11] However, DV is a gendered phenomenon, making gender a relevant aspect in designing strategies of DV prevention. Paradoxically, while the DV Act explicitly mandates raising awareness about DV (Art. 9 § 1), it does not recognise the gendered nature of the phenomenon. However, the acts of international law ratified in Poland underline the gendered nature of DV. Ideally, those acts, such as the Istanbul Convention or the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – Dz.U. z 1982 r., nr 10 poz. 71, 75–76) can be employed by relevant institutions, especially by the courts ruling on cases involving DV, although it is rarely the case (Wrona 2016, 211).

Furthermore, Art. 207 belongs to Chapter XXVI of the PC, titled "Crimes against family and guardianship," although the crime is defined in such a way

[11] This solution certainly had its advantages. On the one hand, gender neutrality is necessary from the standpoint of the equality in front of the law (Bajor-Stachańczyk 2023, 123). On the other hand, it is important to recognise that, *contra* the persisting stereotypes, people can be subjected to/perpetrate violence regardless of gender (Lelek-Kratiuk 2014, 85; Helios, Jedlecka 2016, 72; Scarduzio et al. 2017, 2).

that covers abuse between parties not remaining in familial relationships; the protection of family is the main interest here. Judging by the language employed in the original text of the DV Act from 2005 – the Act of Protection and Prevention of Violence within Family – it was also meant to protect family.

In this context, it is worth to remember the fact that the Constitution of the Republic of Poland of 1997 (Dz.U. z 1997 r., nr 78, poz. 483) guarantees special protections to family (Art. 18). Moreover, earlier drafts, more inclusive and egalitarian in this aspect, also emphasised the role that the state and/or the law in Poland should fulfil in family protection (Wyrzykowski 2012, 215–216).

The term 'domestic violence' is not necessarily broader than the term 'family violence' – those terms are overlapping. Substituting one term with the other by itself would not broaden the scope of cases to which the law applies. Broadening the scope would either require including both terms or defining one of them within the text of the law in such a way that encompasses the other, which is what the DV Act does. However, the original text of the law from 2005 had been equally inclusive by stressing that the Act should apply to people sharing domestic arrangement regardless of whether they have family ties (Art. 2). In short, the postulate for increased inclusiveness cannot be treated as a justification for the change.

This change can optimistically be interpreted as placing greater priority on the rights and well-being of individuals in accordance with international law. For instance, the Istanbul Convention also employs the term 'domestic violence'. Unfortunately, considering the political climate in which the DV Act had been updated, this interpretation is rather dubious. The Istanbul Convention in particular had become the subject of the so-called "culture war" (Gwiazda, Minkova 2024), while the ruling party at that time were aiming to exit the convention or at least minimise its influence in Poland.[12]

Both types of relationships – i.e. sharing a living space and sharing familial bonds – come with very particular vulnerabilities. Optimally, the state should respond with creating laws that account for those vulnerabilities in order to best protect citizens' rights, well-being, and interests. Recognising the particularities of contexts that individuals find themselves in and affording them special provisions on that basis is indispensable in protecting individual rights (Płatek 2013).

However, there is a difference between protecting just the individual rights in a certain type of arrangements, be it familial bonds or shared living space, and protecting family. The Polish Constitution, the PC, and the DV Act – at least in the original form – all recognise family protection as a distinct legal interest of the

[12] The political climate negatively affects the ability of the violence relief system in Poland to respond to citizens' needs. It may discourage legal professionals from employing an element from international law or sentences from international courts in DV-related proceedings. The negative effects are visible in other areas as well, such as governmental support for municipalities that failed to develop local strategies for DV prevention, failure to update the national strategy from the Prosecutor General, and the dwindling funding for NGOs (Ombudsman's Office 2020).

Polish state. For that reason, I believe that the change to term 'domestic violence' in the language of DV acts is missing the mark.

'Family protection' is an issue that more conservative voices often laid claim to, therefore constituting a subject that feminists tend to be wary of. There are good reasons for this concern: on the one hand, the voices that typically raise the subject of 'family protection' favour a certain inflexible and often oppressive model of family. On the other hand, the dominant understanding of 'family protection' is that it mainly entails maintaining the endurance of particular family over longer periods of time – ensuring that the family stays together – even to the detriment of the well-being of individual family members and the quality of relationships between them.

Despite that, I do not believe that family protection within the law is an issue that feminist should disavow. Family as an institution is fundamental in shaping gender relations and in shaping future generations' understanding of norms regulating living together. As DV stems from unfair gender relations, the concern for family integrity – beyond the rights and well-being of individual family members – is inalienable from long-term DV prevention strategies. However, the understanding of family integrity and protection has to be compatible with the individual rights framework (Płatek 2013). This entails, on the one hand, flexible understanding of what family is, for instance by recognising queer families and by re-examining the status of non-human family members.[13] On the other hand, the meaning of 'protection' in relation to family should be examined. All too often, the underlying idea is that the family staying together is either the same or at least necessary for preserving the integrity and stability of the family, which often goes hand in hand with the commitment to prioritise maintain social norms even above individual freedom and well-being (Płatek 2018; Helios, Jedlecka 2016, 125). However, if the threat to family integrity is abuse perpetrated by one or more family members, the longer time that the family stays together does not only mean prolonged suffering for the family members subjected to abuse, but also further destabilisation and violation of family integrity. Instead, the quality of family relationships should be protected. Family is wort protecting, because the family members support one another's well-being and growth. If familial relations do not fulfil this function, and especially when some family members exploit family bonds to harm others, the same protection is not warranted. The family-staying-together issue should not be prioritised by institutions providing DV relief. The law and the practice of legal professions should empower DV victims to cut ties with the perpetrators without directly or indirectly coercing them to do so.

[13] This is actually very pertaining from the perspective of violence prevention – the trouble with securing the safety of companion animals prevent many women from leaving their abusers. Companion animals are the source of important psychological support for people undergoing victimisation, but, unfortunately, can also be exploited by the perpetrator as a means to control or emotionally wound the victim (Flynn 2000). In this context, animal welfare is a separate issue and I will not explore it here.

6. CONCLUSIONS

The DV relief system in Poland works in a limited capacity. The legal foundations regulating the functioning of the system – although definitely in need of further adjustments to better suit the needs of individual and families afflicted with violence – are quite robust and reasonably adequate. However, the way the system operates in practice is far from smooth.

In part, it is simply because the existing services and infrastructure are overwhelmed by the extent of the problem. Especially acute is the shortage of qualified personnel across different branches of the system. As a result, the forms of assistance guaranteed by the law are unavailable to the citizens seeking them. It is impossible to overcome this problem without allocating financial resources to the system, i.e. clarifying the sources of funding in the legal documents.

However, not all issues within the system can be solved simply by securing the funding. Various branches of the system are poorly integrated together and, in particular, there is a chasm between the court system and services that provide various forms of social support to victims. Meanwhile, successful solution to violence depends on cooperation between different agencies.

Another problem lies in how legal professionals approach their jobs. When the focus is penalisation rather than aiding the victims, the cases with low or unclear chances of conviction are rejected or discontinued, while the courts underutilise the instruments of victim protection in their discretion. Additionally, there is little reason to invest time in cooperation with social services if victims' needs and well-being are deprioritised.

The pivotal aspect of DV prevention, namely anti-discrimination measures, is virtually neglected in the court practice. At the same time, the approach to family role is deeply embedded in gender bias. A more flexible way of thinking about family and its different possible forms and functions should be fostered among legal professionals. Moreover, family protection, understood as the protection of the quality of relationships, cannot be realised without the protection of individual rights and the well-being of individual family members. In order to promote the growth of nonviolent relationships, it is necessary to empower people to leave violent ones.

BIBLIOGRAPHY

Bajor-Stachańczyk, Małgorzata. 2023. "Równouprawnienie kobiet i mężczyzn w wybranych obszarach oraz w przepisach mających na celu przeciwdziałanie dyskryminacji ze względu na płeć w Polsce." *Zeszyty Prawnicze BAS* 77(1): 98–133. https://doi.org/10.31268/ZPBAS.2023.06

Bourdieu, Pierre. 2001. *Masculine Domination*. Translated by Richard Nice. Stanford: Stanford University Press.

Calton, Jenna M. Lauren Bennett Cattaneo. Kris T. Gebhard. 2016. "Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence." *Trauma, Violence, & Abuse* 17(5): 585–600. https://doi.org/10.1177/1524838015585318

DeKeseredy, Walter S. 2019. "Intimate Violence against Rural Women: The Current State of Sociological Knowledge." *International Journal of Rural Criminology* 4(2): 313–331. https://doi.org/10.18061/1811/87904

DeKeseredy, Walter S. 2021. *Woman Abuse in Rural Places*. London–New York: Routledge.

Dobash, R. Emerson. Russell P. Dobash. 2003. *Women, Violence and Social Change*. London: Routledge.

Dutka, Joanna M. 2023. *Education of moral competencies as a prospective method of violence prevention. A feminist perspective – through the lens of Nancy Fraser's model of justice.* Doctoral Dissertation, Adam Mickiewicz University in Poznań.

Flynn, Clifton P. 2000. "Woman's Best Friend: Pet Abuse and the Role of Companion Animals in the Lives of Battered Women." *Violence Against Women* 6(2): 162–177. https://doi.org/10.1177/10778010022181778

Fraser, Nancy. Axel Honneth. 2003. *Redistribution or Recognition? A Political-Philosophical Exchange*. Translated by Joel Golb, James Ingram, and Christine Wilke. London–New York: verso.

Fugate, Michelle. Leslie Landis. Kim Riordan. Sara Naureckas. Barbara Engel. 2005. "Barriers to Domestic Violence Help Seeking: Implications for Intervention." *Violence Against Women* 11(3): 290–310. https://doi.org/10.1177/1077801204271959

Galtung, Johan. 1969. "Violence, Peace, and Peace Research." *Journal of Peace Research* 6(3): 167–191. https://doi.org/10.1177/002234336900600301

Gierszewski, Janusz. 2019. "Policja w systemie zapobiegania przemocy w rodzinie." *Studia Politologiczne* 51: 174–197. https://doi.org/10.33896/SPolit.2019.51.10

Gillis, Joseph Roy. Shaindl Lin Diamond. Paul Jebely. Victoria Orekhovsky. Ellis M. Ostovich. Kristin MacIsaac. Sandra Sagrati. Deborah Mandell. 2006. "Systemic Obstacles to Battered Women's Participation in the Judicial System: When Will the Status Quo Change?" *Violence Against Women* 12(12): 1150–1168. https://doi.org/10.1177/1077801206293500

Girshick, Lori B. 2002. "No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence." *Violence Against Women* 8(12): 1500–1520. https://doi.org/10.1177/107780102237967

Girshick, Lori B. 2009. *Woman-to-Woman Sexual Violence: Does She Call It Rape?* Richmond: Northeastern University Press.

Goodman, Lisa A. Katya Fels Smyth. Angela M. Borges. Rachel Singer. 2009. "When Crises Collide: How Intimate Partner Violence and Poverty Intersect to Shape Women's Mental Health and Coping?" *Trauma, Violence, & Abuse* 10(4): 306–329. https://doi.org/10.1177/1524838009339754

Grzyb, Magdalena. 2020. "'We Condemn Abusing Violence against Women.' The Criminalization of Domestic Violence in Poland." *Archiwum Kryminologii* 1(42): 163–183. https://doi.org/10.7420/AK2020I

Gwiazda, Anna. Liana Minkova. 2024. "Gendered Advocacy Coalitions and the Istanbul Convention: A Comparative Analysis of Bulgaria and Poland." *International Feminist Journal of Politics* 26(1): 31–53. https://doi.org/10.1080/14616742.2023.2214566

Halicka, Małgorzata. Jerzy Halicki. Emilia Kramkowska. Krzysztof Czykier. Anna Szafranek. 2018. "Selected Measures of Protecting Female Victims of Intimate Partner Violence-Legal Aspects and Opinions of Practitioners." *Resocjalizacja Polska* 15: 213–232.

Hamilton, Leah. Johann A. Koehler. Friedrich A. Lösel. 2013. "Domestic Violence Perpetrator Programs in Europe. Part I: A Survey of Current Practice." *International Journal of*

Offender Therapy and Comparative Criminology 57(10): 1189–1205. https://doi.org/10.1177/0306624X12469506

Hardesty, Jennifer L. Ramona F. Oswald. Lyndal Khaw. Carol Fonseca. 2011a. "Lesbian/Bisexual Mothers and Intimate Partner Violence: Help Seeking in the Context of Social and Legal Vulnerability." *Violence Against Women* 17(1): 28–46. https://doi.org/10.1177/1077801209347636

Helios, Joanna. Wioletta Jedlecka. 2016. *Wpływ Feminizmu Na Sytuację Społeczno-Prawną Kobiet*. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Helios, Joanna. Wioletta Jedlecka. 2017. *Współczesne oblicza przemocy: zagadnienia wybrane*. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Hine, Benjamin. Elizabeth A. Bates. Sarah Wallace. 2022. "I Have Guys Call Me and Say 'I Can't Be the Victim of Domestic Abuse': Exploring the Experiences of Telephone Support Providers for Male Victims of Domestic Violence and Abuse." *Journal of Interpersonal Violence* 37(7–8): NP5594–5625. https://doi.org/10.1177/0886260520944551

Huntley, Alyson L. Lucy Potter. Emma Williamson. Alice Malpass. Eszter Szilassy. Gene Feder. 2019. "Help-Seeking by Male Victims of Domestic Violence and Abuse (DVA): A Systematic Review and Qualitative Evidence Synthesis." *BMJ Open* 9(6): 1–13. https://doi.org/10.1136/bmjopen-2018-021960

Jaworska-Wieloch, Anna. Olga Sitarz. 2019. "Funkcjonalność i adekwatność środka karnego i obowiązku probacyjnego nakazu opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym. Czy regulacje prawnokarne odpowiadają potrzebom osób pokrzywdzonych?" *Archiwum Kryminologii* 12(1): 297–323.

Johnson, Leanor Boulin. Michael Todd. Ganga Subramanian. 2005. "Violence in Police Families: Work-Family Spillover." *Journal of Family Violence* 20(1): 3–12. https://doi.org/10.1007/s10896-005-1504-4

Johnson, Michael P. Joan B. Kelly. 2008. "Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions." *Family Court Review* 46(3): 476–499.

Jureczka, Marlena. 2023. "Obraz przemocy w perspektywie osób skazanych za przestępstwo znęcania się w rodzinie." Doctoral Dissertation, University in Wrocław.

Kalisz, Anna. 2023. "Rola Uznania w Mediacji w Przypadku Hybrydowych Sporów Karno-Rodzinnych." *Probacja* 1: 85–113. https://doi.org/10.5604/01.3001.0016.2850

Larance, Lisa Young. Ashley Rousson. 2016. "Facilitating Change: A Process of Renewal for Women Who Have Used Force in Their Intimate Heterosexual Relationships." *Violence Against Women* 22(7): 876–891. https://doi.org/10.1177/1077801215610890

Lelek-Kratiuk, Marzena. 2014. "Przemoc domowa wobec kobiet – weryfikacja mitów i ustalanie prawdy." *Państwo i Społeczeństwo* 2: 79–99.

Leoniuk, Katarzyna. Halina Nowakowska. Krzysztof Sobczak. 2013. "Zadania pielęgniarki w systemie przeciwdziałania przemocy domowej." *Problemy Pielęgniarstwa* 21(3): 397–402.

Majerek, Bożena. Magdalena Lubińska-Bogacka. 2023. "Instytucjonalna pomoc i wsparcie interwencyjne osobom w kryzysie ze szczególnym uwzględnieniem ofiar przemocy." In *Interwencje kryzysowe – implikacje badawcze i praktyczne*. Edited by Katarzyna Wojtanowicz, Małgorzata Duda, Janka Bursová. 217–248. Kraków: scriptum.

Meyersfeld, Bonita. 2016. "A Theory of Domestic Violence in International Law." Doctoral Dissertation, Yale Law School.

Nowacka, Magdalena. 2020. "Uznanie przemocy wobec kobiet jako zagrożenia dla tradycyjnego podziału ról płciowych w Polsce." *Miscellanea Anthropologica et Sociologica* 21(2): 74–87.

O'Neal, Eryn Nicole. Katharine Tellis. Cassia Spohn. 2015. "Prosecuting Intimate Partner Sexual Assault: Legal and Extra-Legal Factors That Influence Charging Decisions." *Violence Against Women* 21(10): 1237–1258. https://doi.org/10.1177/1077801215591630

Paymar, Michael. Ellen Pence. 1993. *Education Groups for Men Who Batter: The Duluth Model*. New York: Springer Publishing Company.

Płatek, Monika. 2013. "Ochrona prawna przed przemocą wobec kobiet i przemocą domową." In *Przeciwdziałanie przemocy wobec kobiet, w tym kobiet starszych i kobiet z niepełnosprawnościami, analiza i zalecenia*. Edited by Stanisław Trociuk. 22–29. Warszawa: Biuro Rzecznika Praw Obywatelskich.

Płatek, Monika. 2018. "Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki." *Archiwum Kryminologii* 40: 263–325. https://doi.org/10.7420/AK2018F

Pułczyńska-Kurek, Urszula. 2023. "Interwencja kryzysowa w procedurze 'Niebieskie Karty', interdyscyplinarność działań – nowe wyzwania dla członków grup roboczych w czasie pandemii w kontekście podejmowanych działań na rzecz rodziny, w której występuje przemoc." In *Interwencja kryzysowa – implikacje badawcze i praktyczne*. Edited by Katarzyna Wojtanowicz, Małgorzata Duda, Janka Bursová. 199–215. Kraków: scriptum. https://doi.org/10.15633/9788374389969.10

Rzecznik Praw Obywatelskich. 2020. *Raport alternatywny Rzecznika Praw Obywatelskich do sprawozdania Rządu Rzeczypospolitej Polskiej z działań podjętych w celu wprowadzenia w życie Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej.* Warszawa: Biuro Rzecznika Praw Obywatelskich. https://bip.brpo.gov.pl/sites/default/files/raport_alternatywny_rpo_dla_grevio_czerwiec_2020.pdf

Sanger, Nadia. Ingrid Lynch. 2018. "'You Have to Bow Right Here': Heteronormative Scripts and Intimate Partner Violence in Women's Same-Sex Relationships." *Culture, Health & Sexuality* 20(2): 201–217. https://doi.org/10.1080/13691058.2017.1338755

Scarduzio, Jennifer A. Kellie E. Carlyle. Kate Lockwood Harris. Matthew W. Savage. 2017. "'Maybe She Was Provoked': Exploring Gender Stereotypes About Male and Female Perpetrators of Intimate Partner Violence." *Violence Against Women* 23(1): 89–113. https://doi.org/10.1177/1077801216636240

Scheer, Jillian R. Alexa Martin-Storey. Laura Baams. 2020. "Help-Seeking Barriers Among Sexual and Gender Minority Individuals Who Experience Intimate Partner Violence Victimization." In *Intimate Partner Violence and the LGBT+ Community*. Edited by Brenda Russell. 139–158. Cham: Springer International Publishing. https://doi.org/10.1007/978-3-030-44762-5_8

Sitarz, Olga. Dominika Bek. Anna Jaworska-Wieloch. 2018. "Mediation and Domestic Violence: Theoretical Reflection on the Polish Background." *International Journal of Criminal Justice Sciences* 13(2): 356–369. https://doi.org/110.5281/zenodo.2657631

Skrabacz, Aleksandra. 2021. "Wpływ pandemii koronawirusa na stan bezpieczeństwa społeczno-ekonomicznego Polaków." *Bezpieczeństwo. Teoria i Praktyka* 43(2): 17–33.

Stark, Evan. 2010. "Do Violent Acts Equal Abuse? Resolving the Gender Parity/Asymmetry Dilemma." *Sex Roles* 62: 201–211.

Sweet, Paige L. 2019. "The Paradox of Legibility: Domestic Violence and Institutional Survivorhood." *Social Problems* 66(3): 411–427. https://doi.org/10.1093/socpro/spy012

Uherek-Biernat, Celina. Karolina Zalewska-Łunkiewicz. 2017. "Motywacja osób stosujących przemoc w rodzinie do uczestnictwa w programie korekcyjno-edukacyjnym." In *Kryzysy osobiste i systemowe*. Edited by Katarzyna Popiołek, Augustyn Bańka, Karolina Zalewska-Łunkiewicz. 42–54. Poznań–Katowice: Stowarzyszenie Psychologia i Architektura, Uniwersytet SWPS.

Wasarhaley, Nesa E. Kellie R. Lynch. Jonathan M. Golding. Claire M. Renzetti. 2017. "The Impact of Gender Stereotypes on Legal Perceptions of Lesbian Intimate Partner Violence." *Journal of Interpersonal Violence* 32(5): 635–658. https://doi.org/10.1177/0886260515586370

Wemrell, Maria. Sara Stjernlöf. Justine Aenishänslin. Marisol Lila. Enrique Gracia. Anna-Karin Ivert. 2019. "Towards Understanding the Nordic Paradox: A Review of Qualitative Interview Studies on Intimate Partner Violence against Women (IPVAW) in Sweden." *Sociology Compass* 13(6): 1–23. https://doi.org/10.1111/soc4.12699

Wiktorska, Paulina. 2021. "Procedury prawne związane z możliwościami odseparowania sprawcy przemocy domowej od osoby doświadczającej przemocy." *Prawo w Działaniu* 45: 80–90.

Wolwiak, Ireneusz. 2023. "Zabezpieczenie rodziny przed przemocą w następstwie wydanego przez policję nakazu opuszczenia mieszkania bądź zbliżania się do niego." *Acta Universitatis Lodziensis. Folia Iuridica* (Numer specjalny): 359–370. https://doi.org/10.18778/0208-6069.S.2023.31

Wrona, Grzegorz. 2016. "Konflikt a przemoc. Zastosowanie art. 207 kk w przeciwdziałaniu przemocy w rodzinie." Doctoral Dissertation, University of Warsaw.

Wyrzykowski, Mirosław. 2012. "Publiczne a prywatne w wykładni konstytucyjnej na przykładzie art. 18 Konstytucji RP." In *Interes publiczny a interes prywatny w prawie*. Edited by Tomasz Giaro. 215–237. Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego.

Young, Iris Marion. 1990. *Justice and the Politics of Difference*. Princeton: Princeton University Press.

Zavala, Egbert. Lisa A. Melander. Don L. Kurtz. 2015. "The Importance of Social Learning and Critical Incident Stressors on Police Officers' Perpetration of Intimate Partner Violence." *Victims & Offenders* 10(1): 51–73. https://doi.org/10.1080/15564886.2014.890688

Legal Documents

International

Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW). (1979) (Dz.U. z 1982 r., nr 10 poz. 71, 75–76).

Istanbul Convention (2011), Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS 210). (Dz.U. z 2015 r., poz. 961).

National

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. z 1997 r., nr 78, poz. 483).

Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (t.j. Dz.U. z 2020 r., poz. 1359).

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (t.j. Dz.U. z 2021 r., poz. 1805).

Ustawa z dnia 6 kwietnia 1990 r. o Policji (t.j. Dz.U. z 2021 r., poz. 1882).

Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (Dz.U. z 1997 r., nr 89, poz. 555).

Ustawa z dnia 12 marca 2004 r. o pomocy społecznej (t.j. Dz.U. z 2023 r., poz. 901).

Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie (Dz.U. Nr 180, poz. 1493).

Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie (t.j. Dz.U. z 2023 r., nr 180, poz. 1493 z późn. zm.).

Ustawa z dnia 9 marca 2023 r. o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw (Dz.U. z 2023 r., poz. 535).

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LEGAL POSITIVISM, AI, AND THE MODERN LEGAL LANDSCAPE: CHALLENGES IN EDUCATION, RESEARCH, AND PRACTICE

Abstract. In a world that is constantly evolving and modernising, new technologies and automation mean rapid progress in many areas of society, including the law. This article aims to discuss whether artificial intelligence will have an impact on legal positivism by influencing the legal profession. This study will first discuss the foundations of legal positivism and the reasons for its crisis and criticism. It will then explore how AI is influencing legal education, research, and legal practice. Finally, it will conclude and indicate how AI is affecting the development of positivism or the stagnation of this legal theory.

Keywords: Artificial Intelligence, legal positivism, legal professions, legal education, Hans Kelsen, Herbert Lionel Adolphus Hart

POZYTYWIZM PRAWNICZY, SZTUCZNA INTELIGENCJA, I WSPÓŁCZESNE ŚRODOWISKO PRAWNE: WYZWANIA W EDUKACJI, BADANIACH I PRAKTYCE

Streszczenie. W świecie, który nieustannie się rozwija i modernizuje, nowe technologie i automatyzacja oznaczają szybki postęp w wielu dziedzinach życia społecznego, także i w prawie. Niniejszy artykuł ma na celu przedyskutowanie, czy sztuczna inteligencja będzie miała wpływ na pozytywizm prawniczy poprzez oddziaływanie na zawody prawnicze. W pierwszej kolejności omówione zostaną podstawy pozytywizmu prawniczego oraz przyczyny jego kryzysu i krytyki. Następnie zbadamy, w jaki sposób sztuczna inteligencja wpływa na edukację prawną, badania i praktykę prawniczą. Na koniec zostaną wyciągnięte wnioski i wskazane, w jaki sposób sztuczna inteligencja wpływa na rozwój pozytywizmu lub stagnację tej teorii prawa.

Słowa kluczowe: Sztuczna inteligencja, pozytywizm prawniczy, zawody prawnicze, edukacja prawnicza, Hans Kelsen, Herbert Lionel Adolphus Hart

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INTRODUCTION

Information technology is rapidly changing the world, and the vast amount of available information and its quick dissemination is accelerating our lives and shaping our history. While technology offers many opportunities, it also presents new challenges. Artificial Intelligence (AI) is a widely debated and researched topic in the scientific community. However, defining AI remains a challenge for many due to its complexity and multifaceted nature. Headlines in mass media often claim that artificial intelligence has enormous potential to double the annual growth rate of the economy, shorten the timeframe for economic growth, and improve labour productivity in most countries (see, e.g., Georgieva 2024). Some experts compare artificial intelligence with electrification, promising that it will revolutionise everything from industry to public services, including the administration of justice (Lynch 2017). The use of AI in medicine, transport, and cybersecurity has prompted discussions about its potential applications in the legal field: how can AI assist lawyers in their daily work; will AI replace lawyers and judges; or will it shift dispute resolution to online platforms? However, the legal community is also grappling with the compatibility of new technologies with established legal values and theories. Legal positivism is one of the most prominent legal theories, alongside natural law theory. It argues that the law is a human-made construct and that its legitimacy is determined by its source rather than its content.

The aim of this paper is to discuss whether artificial intelligence will have an impact on legal positivism by influencing the legal profession. This study will first present the foundations of legal positivism and the reasons for its crisis and criticism. It will then explore how AI is influencing legal education, research, and practice. Finally, it will conclude and indicate how AI is affecting the development of positivism or the stagnation of this legal theory.

The study applied linguistic, logical, and systematic methods of analysis. The linguistic method will be employed to conduct a detailed analysis of legal terminology and the linguistic dimensions associated with artificial intelligence and legal positivism. The logical method will provide a framework for structuring arguments and evidence, enabling a comprehensive exploration of the cause-and-effect relationships inherent in the interaction between AI and legal practice and theory. This will allow for a clearer understanding of the implications of AI on the legal landscape. Finally, the systematic method will be utilised to evaluate the foundational principles of legal positivism in the light of the challenges introduced by the modern legal landscape. This will aid the construction of a holistic perspective on the emerging trends and potential trajectories of legal development within the contemporary legal framework. By integrating linguistic, logical, and systematic methods, this study aims to contribute to the ongoing discourse on the

intersection of technology and the law, addressing the evolving nature of legal theory and practice in the age of artificial intelligence (see, e.g., Susskind 2019; Waisberg 2021).

The study drew on current research on artificial intelligence by authors such as R. Susskind, N. Waisberg, and A. Hudek, as well as on studies by various legal organisations, such as the International Bar Association.

1. LEGAL POSITIVISM AND CRITICISM

Legal positivism emerged in the 19th and 20th centuries as a critical response to natural law theories, which posited that laws are inherently linked to moral principles and universal truths. Thinkers such as Hans Kelsen and H.L.A. Hart sought to establish a clear distinction between the law as a social construct and morality, emphasising that the legitimacy of the law derives from its creation by recognised authorities rather than from its moral content (Kelsen 2002; Hart 1997). This shift was significant, as it allowed legal scholars and practitioners to approach the law as a system of rules grounded in human conventions, free from the subjective interpretations of morality that characterised natural law perspectives.

In contemporary legal discourse, legal positivism remains a foundational theory, but it also faces challenges that question its capacity to account for ethical considerations in an increasingly complex societal landscape. Critics argue that the rigid separation of the law and morality inherent in positivism may lead to legal systems that are ill-equipped to address pressing social issues, particularly in the light of evolving norms and values. As technology, especially artificial intelligence, changes the legal landscape, the relevance and resilience of legal positivism are called into question, prompting a re-examination of its principles and their application in the modern legal context. Taking into account the scope of this article, the analysis here draws attention to the famous positivists H. Kelsen's and H. L. A. Hart's ideas, but also includes the works of J. Bentham, J. Austin, J. Raz, and other positivists.

Hans Kelsen, a prominent figure in legal positivism, aims to establish a "pure theory of law" (which is the actual title of his 1934 book), which focuses exclusively on the description of the law, intentionally excluding elements of psychology, sociology, ethics, and politics (Kelsen 2002, 464). He argues that legal practice should rely on legal rather than moral arguments, thereby promoting an objective understanding of legal norms as constructs created by legislators. Kelsen emphasises the importance of distinguishing between the sources of legal norms and the moral imperatives associated with natural laws. For Kelsen, the task of legal science is not to construct a set of binding norms but to describe what the legislator has already artificially created. "A lawyer who scientifically

describes a legal norm does not identify himself with the legal authority that issued that norm. A Rule of law remains an objective description; it does not become a prescription," as the philosopher of law concludes (Arlauskas 2009, 252).

In contrast, the English philosopher of law H.L.A. Hart supports Kelsen's notion of law as an independent social phenomenon but seeks to reconcile it with moral considerations (Hart 1997, 177).[1] Hart introduces the concepts of primary and secondary norms, arguing that while primary norms reflect fundamental truths about the human society, they require transformation into enforceable laws through secondary norms. He recognises the creative nature of legal norms and the necessity for a legal system to address evolving societal needs (Arlauskas 2009, 254). Despite their contributions, both Kelsen and Hart as well as other positivists face criticisms regarding the adequacy of their theories in addressing the complexities of modern legal challenges, particularly the relationship between the law and morality.

This criticism calls into question the resilience of legal positivism to changes in society (e.g. Luban 2007, 15; Kaufman 2023, 31). The growing crisis of this theory is manifested in the fact that more and more lawyers are inclined to view the law not only as a factual system of norms but also in terms of its moral dimension.

The following criticisms of legal positivism can be identified:

1. Legal positivism distorts the picture of legal reality by separating the law from sociological, ethical, and political factors.

2. Legal positivism neglects certain aspects of contemporary reality, e.g. legal norms outside the jurisdiction of the state. This is not the case in the EU, the UN, or in the law developed by non-governmental organisations. It accuses positivism of singling out important elements that permeate legal standards from different areas of society.

3. For example, Hans J. Morgenthau's analysis concludes with a warning against the political consequences of legal positivism. He asserts that an uncritical adherence to positivist principles – seeking certitude through rational calculation – is politically disastrous (Chas 2023, 60). This critique resonates in the realm of international law, where positivism may misguide efforts to achieve peace by misunderstanding the true nature of international society.

The criticism of legal positivism has implications for its crisis. This crisis is also caused by lawyers' actions, such as courts creating laws or legal scholars criticising the theory's lack of consideration for moral and ethical issues.

Legal positivism, with its fundamental premise that laws are human-made constructs distinct from moral values, faces critical challenges as artificial intelligence becomes increasingly integrated into the legal field. The use of AI in legal practice raises important questions about the interpretation and application

[1] In this way, H.L.A. Hart attempts to free the theory of legal positivism from the criticism that it is indifferent to morality (Arlauskas 2009, 253).

of legal norms, potentially blurring the lines that positivism seeks to maintain between the law and morality.

The impact of AI on legal positivism has been researched by several contemporary researchers such as R. Susskind, M. Hildebrandt, H. Surden, and others. Based on their findings, it can be said that AI can have a significant impact on legal positivism, but it also raises critical questions. AI systems, which rely heavily on the automation of legal decisions and advanced data analysis, can strengthen legal positivism by reinforcing its emphasis on the separation of the law and morality, and the application of legal norms according to established rules. Since AI systems typically operate based on legal precedents and codified norms, they align with the positivist view of the law as a system of rules grounded in human conventions rather than subjective moral judgments (see more in: Hildebrandt 2020, 284).

However, the use of AI in the law also poses challenges to legal positivism. R. Susskind points out in his research that the automation of legal decisions by AI highlights potential weaknesses in the rigid formalism often associated with positivism, particularly when addressing complex moral issues that are not easily structured by algorithms. AI may thus expose the limitations of legal formalism, raising questions about the adaptability of legal systems when faced with ethical dilemmas. Furthermore, AI prompts discussions about the flexibility of legal interpretations and the importance of the human element in legal decision-making processes (Susskind 2010, 2017).

As a result, the development of AI technologies presents a dual impact on legal positivism: on the one hand, it may bolster positivism by reinforcing its focus on objective legal reasoning, while on the other, it challenges the boundaries of legal automation and the extent to which the law can remain isolated from broader moral considerations (see more in: R. Susskind, M. Hildebrandt, H. Surden). Consequently, the evolution of legal positivism must address these technological advancements, ensuring that legal systems adapt to new realities while remaining anchored in their foundational theories.

Further, this article analyses the relationship between legal positivism and new technological challenges, such as AI. First, it discusses the impact of artificial intelligence on legal studies and the work of legal practitioners and researchers. Second, conclusions will be drawn regarding how these new technologies are influencing the development of positivism or the stagnation of this legal theory.

2. ARTIFICIAL INTELLIGENCE IN THE LAW

Yuval Noah Harari – a renowned erudite, a visionary Israeli historian, the author of popular books on the history of humanity (*Sapiens*) and on the probable future of humanity (*Homo Deus*), as well as professor at the Hebrew University

of Jerusalem – points out that "Artificial Intelligence is set to decode and surpass human beings in areas that were hitherto considered purely in human domain" (Harari 2018, 37). AI is already proving to be highly adaptable and is helping us to tackle critical human challenges, from curing chronic diseases or reducing traffic fatalities to combating climate change or predicting cybersecurity threats. Is it possible that artificial intelligence systems can replace humans in the law?

The use of artificial intelligence in the law is far from new; it has been discussed since 1958 and the first working prototypes appeared in 1970. There have been specialised AI and law associations for more than 30 years as well as research and experimentation in this field for 60 years. Today, there are thousands of legal tech start-ups worldwide (Waisberg, Hudek 2021, 21).

The European Charter on the Ethics of Artificial Intelligence in Judicial Systems was adopted in Strasbourg on 3–4 December 2018. The charter highlights the importance of developing artificial intelligence in both the private and public sectors, including judicial systems, for all EU Member States. The Charter emphasises that AI can be utilised in various ways in legal activities related to judicial systems, such as searching for relevant case law, online dispute resolution, drafting pleadings, analysing cases (predicting outcomes), sorting contracts based on different criteria and identifying different or incompatible contract terms, keeping litigants informed about the progress of the case, and performing other functions during the judicial process (e.g. chatbots) (Babayan 2019). The AI Act, the first EU regulatory framework for artificial intelligence, will also be adopted in the near future and will also have an impact on the possibilities of using artificial intelligence in the law (European Parliament 2023).

Legal and philosophical scholars provide additional examples of AI applications in the law. Emotions can influence the decisions of judges, leading to incorrect rulings. In contrast, AI operates based on rationality and impartiality. One such example is the use of AI to prevent errors in the administration of justice. Proponents of AI in the law also believe that the use of algorithms will lead to fewer errors and reduce the cognitive load on judges (Teise.pro 2019). The use of new technologies, particularly AI, in the legal field is not a futuristic concept, but a current reality. AI is of great importance in all areas of the law, including practice, science, and research. However, it is important to note that AI is not a replacement for human intelligence but, rather, a tool created by humans to aid them in their legal affairs.

2.1. The impact of AI on legal education

One of the key ways in which AI is transforming the legal profession is through the automation of tasks that were once performed by junior lawyers and paralegals. In response to these changes, law schools must rethink their curriculums to ensure that graduates are prepared for the future of the legal

profession. This means not only teaching students about the latest AI technologies and their applications in the legal field, but also equipping them with the skills needed to work alongside these tools effectively. One way in which law schools can embrace AI in their curriculums is by incorporating courses on data analysis and programming. These skills are becoming increasingly important for lawyers, as AI-powered tools often require a basic understanding of coding and data manipulation to be used effectively. By teaching students how to work with large datasets and write simple algorithms, law schools can ensure that their graduates are better prepared for the challenges of the modern legal profession. Another approach is to incorporate AI into existing courses, such as contract law or legal research (Fornasier 2021, 19).

Moreover, law schools should also focus on developing students' soft skills, such as critical thinking, problem-solving, and communication. While AI has the potential to automate many tasks, it is unlikely to replace the need for human judgment and empathy in the legal profession. By fostering these skills, law schools can ensure that their graduates remain valuable assets in the workforce, even as AI continues to reshape the industry (Smith 2023, 339).

From my academic practice, I would just point out that law teachers need to encourage their students to read more legal doctrine and case law. If students use AI tools and only read the summaries of the doctrines that AI creates, it will not be effective learning. Summaries of legal documents or scholarly articles will not give the student comprehensive knowledge; they will only know the fact, but not the decisions that were made to recognise a certain fact. AI is an excellent learning tool when, after reading academic information, students want to know if they have understood the information correctly or if they have a good recall of the key points.

2.2. The impact of AI on legal research

Legal research is an indispensable skill for lawyers. Legal research, which refers to the process of identifying, analysing, and applying the law to solve a particular problem, is a core lawyering skill that significantly contributes to almost every aspect of legal practice. There is no particular field in the legal profession that does not involve the underway of legal research. Hence, legal research is determinant to almost all the activities of legal professionals (McConville, Chui 2007, 19). Although different professionals may undertake different types of research in scope, nature, and magnitude, researching the law is a common denominator to accomplish the tiniest of legal tasks. Therefore, it is not an exaggeration to conclude that the quality of legal services rendered by lawyers is directly dependent on the quality of the research undertaken to that effect (Biresaw 2022, 54).

AI provides celerity, simplicity, and effectiveness in solving a multitude of legal problems by researchers. AI can also perform automated tasks and adopt mass decisions efficiently. The use of AI is critical in legal research in terms of efficiency in searching, classifying, filtering, rating, and ranking issues, facts, ideas, laws, and so on. On the other hand, AI combined with computer systems is also capable of many other impressive feats that make the undertaking of legal research very easy, such as recognising and pointing out spelling errors and finding poor writing, and suggesting the rewriting of ill-constructed sentences (see: Cass 2001, 8).

AI is also a very useful tool for the law and the legal science in general. By applying knowledge to find a solution to legal problems, AI applications are assisting in legal reasoning. AI provides tools and techniques developed to solve specific problems in the law in general. The legal science recognises the usefulness of AI for legal reasoning and research. Legal reasoning is a general concept that refers to the process of forming and providing a justifiable answer to a particular legal question, e.g. by searching databases of legal texts and identifying which cases are relevant to the respective ongoing judicial proceedings. Moreover, AI tools significantly simplify legal research in the judiciary, as they can filter out irrelevant information. Besides, some AI expert systems can autonomously reason and provide specific answers to legal various problems (Krausova 2017, 55).

AI has also transformed another field important to human rights investigations, namely Forensic Anthropology. It has played a significant role in human rights abuse documentation since the 1980s, involving the examination of bones and other physical evidence to reconstruct the circumstances of death. In recent years, DNA sequencing has introduced a much greater degree of scientific accuracy and efficiency in forensic investigations (Biresaw 2022, 54).

Currently, AI tools can do almost all types of activities related to legal research, such as Legal Text Analyses, Legal Question and Answer (Advisory), Legal Outcome Prediction, Contract Review, Due Diligence, E-discovery (Technology Assisted Review), Document Drafting, Citation Tools, and so on.

Unfortunately, studies have shown that AI is limited in its ability to comprehend legal texts compared to human lawyers. While machine language can extract some meaning from legal texts, it is unable to provide explanations for its answers. Additionally, AI is typically unable to explain its responses to legal questions, and legal reasoning is limited (Searle 2002, 669). AI tools cannot consider how different circumstances would affect their answers, and most of them require human support (Ashley 2017, 22). Moreover, AI is also blamed for other disruptive features in the legal profession such as the problems of complexity, the worrisome increasing autonomy of AI systems over time, the problem of opacity in the decision-making of AI systems, and the technological vulnerability of AI systems as they are highly dependent on collected data, which may be insufficient, inaccurate, or biased (Biresaw 2022, 54). Furthermore, currently, the fact that

AI systems are highly exposed to cybersecurity attacks or breaches is a major challenge to the development of legal AI.

Only some decades ago legal research was an activity that could only be done by lawyers in a physical library. At present, many of the activities that constitute legal research are being done by AI tools with minimal human support, which resulted in monumental efficiency (in time, energy, and resources) in the underway of legal research and legal grunt work. At present, there are up to 5,000 legal tech start-ups throughout the world which are automating some type of legal work, which is a good reminder for tomorrow's lawyers that they will need to familiarise themselves with how to research the law using such AI tools in addition to possessing a working knowledge of the law (Biresaw 2022, 55). The same applies to law schools, which should consider incorporating courses on legal AI into their academic curricula.

2.3. The impact of AI on legal practitioners

AI has the potential to transform the legal industry, with a growing bevy of AI tools for lawyers already unlocking new efficiencies. Legal writing is a cornerstone of the practice of law. The question is how artificial intelligence can help legal writing and how AI is changing legal writing. It is a specialised skill that requires the expertise and critical thinking of legal professionals, but this does not mean that AI tools do not impact how lawyers get legal writing done. Just as word processors allowed legal professionals to write briefs more quickly than they could on typewriters in the past, generative AI tools can be used as supplemental tools to improve efficiencies in the realm of legal writing. When it comes to legal writing, tools such as ChatGPT can assist lawyers with tasks such as:

- **research**, such as conducting secondary research for cases or summarising complex legal cases in plain language for clients;
- **document-drafting and review** for legal documents such as contracts and briefs – with the input and review of lawyers;
- **proofreading** legal documents to help check for spelling and grammatical errors;
- **drafting** legal citations, though lawyers would still need to fact-check and format AI-generated draft citations, as ChatGPT lacks text formatting capabilities and can sometimes create inaccurate citations.

However, it is important to note that all of the above legal writing tasks require the input and review of legal professionals. AI should be considered a supplemental tool, and not as a main source for legal writing, as generative AI tools such ChatGPT have certain key limitations and risks, including:

- **a limited scope** – first, the developers of ChatGPT stated that ChatGPT is being trained on data until 2021. Later, OpenAI announced plans for future models that may contain more recent information; however, the exact timing of

these updates and the extent of current information remain unclear. Additionally, users who join ChatGPT for free may find that the availability of information sources is limited, which may affect the completeness of responses (Mok 2023);

• **the lack of reliability** – as some lawyers are learning it the hard way, there is no guarantee that the facts or cases that ChatGPT generates are real or accurate. It is up to the lawyers to verify the veracity and reliability of outputs that come from AI tools;

• **copyright infringement concerns** – when it comes to intellectual property and copyright, who owns contents generated by ChatGPT? Even though OpenAI has terms of use stating that it assigns the user "all its right, title and interest in and to Output," there are still many unresolved questions related to ChatGPT, intellectual property, and copyright. For example, if ChatGPT provides two users with identical output, who is the owner of that content? As these questions and answers evolve, lawyers must stay in the know if using AI tools;

• **ethical concerns** – from client confidentiality to the potential bias, there are many ethical considerations that arise for lawyers using AI tools, including in legal writing (Clio 2023).

With all that being said, AI can assist legal professionals in areas beyond legal writing. The following study will investigate the potential benefits of AI for law companies in various operations.

Despite the legal industry's long-standing hesitancy to adopt new technologies, AI is also beginning to make its mark on law companies. AI in law companies can deliver significant efficiency and cost-saving benefits for the companies' practice, helping automate routine tasks such as legal research and analysis, document management, and billing. The legal industry increasingly uses AI in many aspects of its work. AI in law companies may not be explicitly noticeable, but it helps lawyers and paralegals do their jobs better. Specifically, AI in law companies helps legal professionals transform their practice by putting clients first in an unprecedented way (Clio 2023). Below are just several of the ways lawyers can take advantage of AI in their companies (see more in: The Law Society of England and Wales 2018, 7–8):

• **electronic discovery** – the simplest and most common form of AI in law is e-discovery, i.e. the process of scanning electronic information to obtain non-privileged information relevant to a case or claim.[2] E-discovery aids the exchange of electronic information between parties during litigation and investigations, and is becoming commonplace for today's law companies;

[2] The Electronic Discovery Reference Model, or EDRM, is a common starting point for putting together an effective e-discovery workflow. The EDRM lays out the e-discovery legal process from identification and preservation through processing, review, and analysis to the final presentation of information.

• **AI-powered legal research software** allows legal professionals to quickly scan and search large databases, including regulations, statutes, case laws, and more;[3]

• **document management and automation** – while law companies continue to move away from paper documents, electronic document storage has similar challenges to hard copy document storage. Electronic records take less physical space, but sorting and finding documents is still challenging. Using tagging and profiling functionality, AI-driven document management softwares store and organise legal files, including contracts, case files, notes, and e-mails. This method of storing and organising digital files, along with full-text search, makes documents a lot easier to find. Document automation helps law companies create documents using intelligent templates; legal professionals can automatically fill form fields directly from case records into the templates, saving time and effort. Legal document automation provides a centralised and efficient process for producing letters, agreements, motions, pleading, bills, invoices, etc.;

• **due diligence** – conducting due diligence often requires legal professionals to review a large number of documents, such as contracts. As with other document-related challenges, AI can help legal professionals review documents more quickly;

• **litigation analysis** – determining the viability of litigation or quantifying the value of a lawsuit requires extensive analysis of precedent-setting cases. AI can quickly review those precedents and help lawyers draft more accurate and appropriate documents based on that data.[4]

It can be concluded that the use of AI in law companies enhances the abilities of legal professionals to perform their duties. AI helps to reduce the time spent on manual tasks, freeing up more time for relationship-building and client-focused activities. Automating routine manual tasks and brainstorming ideas with AI improves efficiency across the company. When lawyers become more efficient, they can devote more time to their clients and increase billable work. The main advantage of using AI in law companies is to provide lawyers and legal

[3] It should be noted that the majority of such Legal Research Tools are dedicated to the US law, e.g. Fastcase, Findlaw, Legal Information Institutes. However, also in Lithuania, to give one example, law companies are using Luminance, i.e. an artificial intelligence technology that uses machine learning to read and analyse contracts and other documents in a very human-like way, increasing the efficiency of processes such as due diligence. See more in: Kondratas (2018).

[4] It is interesting to mention that some companies in Germany are currently working on software that will automatically analyse judgments. The software is intended to make statements for the future based on judgments already made. How could a court decide? What could the reasoning be based on? Does judge 'A' possibly have special features in his/her decisions or does judge 'B' always decide in a particularly strict or lenient manner? It could also be used to examine when a decision is particularly often or particularly rarely overturned by a higher court. One of these tools, 'law stats', independently evaluates revisions using quantitative risk analysis. It is, therefore, less a legal service than machine learning from statistical data. However, it improves lawyers' work by setting them free from repetitive work. See more in: International Bar Association (2022, 77).

professionals with more time. AI-driven tools create time and labour efficiencies, allowing lawyers to spend more time directly with clients in order to foster meaningful relationships.

All of the above AI capabilities are also relevant to the work of the courts. However, I would like to discuss three more key areas where AI is poised to make a significant impact in courts, namely transcription, translation, and judicial guidance. I will dissect in this study how these technologies are being applied, their potential benefits, and the challenges:

1. AI can assist with transcription in courtrooms. Stenographers play a crucial role in creating an official record of all spoken words during hearings and trials, preserving important court records for posterity. AI transcription services can listen to spoken words and translate them into text in real-time, creating robust court transcripts. The potential for AI tools to take over this role is increasing with advances in technology. AI transcription can be used for recorded depositions and other types of audio and video evidence, making it easier to create searchable records regardless of the original format. The advantages are clear: AI transcription services can generate instant records of court activities and hearings, speeding up processes and reducing the cost of judicial services. The use of stenography can improve the accessibility of records, allowing a prompt review after a proceeding. However, concerns persist regarding the human aspect of stenography, which involves not only transcribing words but also understanding the context and nuance. Although AI has made significant progress in this area, questions about its accuracy remain. Addressing these challenges is crucial as we integrate AI into the courtroom (CEPEJ 2023).

2. AI can help with translation in courts. Language barriers can pose significant obstacles in court proceedings. Not knowing the language can make some people afraid to go to court. This is evidenced by a study by the Judicial Council of California, which analysed the use of translation services by individuals in court (see more in: Judicial Council of California 2020). This study reported the following:

> There were over one million interpretations a year for each of the four previous fiscal years. Criminal cases are the main driver of interpretation volume representing around 75% of the total recorded volume. Criminal case interpretations numbered approximately 3.3 million for the study's four-year period. This means that the use of interpreters in civil proceedings is small, implying that the state's highly diverse population may not be accessing courts for civil justice services as much as English-speaking populations.

This shows that unequal provision of translation services may violate a person's constitutional right to a court. Here is where AI can play a transformative role. Generative AI can intercept written formats and convert them into audio, helping those who are illiterate or who do not know a particular language used in court proceedings. As with transcription, accuracy is a concern. For example: can

these AI models interpret appropriately and translate both literal and idiomatic expressions? Are they able to convey emotionally-charged words used in testimonies? How does AI translation impact the perceived credibility of a witness?[5]

3. AI can help guide judges.[6] Modelling and supporting legal decision-making and predicting the outcome of legal cases have been central topics of AI and the law since its beginnings in the 1970s (Buchanan, Headrick 1970, 40). New technologies can help judges evaluate briefs or find legal reasoning about cases, conduct legal research, and aid in drafting rulings (Collenette, Atkinson, Bench-Capon 2023). They can sift through mountains of legal data and pinpoint relevant information, making the decision-making process more efficient. While these tools can speed up the decision-making process, they are not without flaws. Lithuanian legal scholar D. Murauskas identifies several stages of how AI can help a judge. 1) In the case of fact-finding, algorithms can help analyse large amounts of information in the evidentiary process.[7] 2) In the case of law discovery, algorithms can help to analyse a large number of sources of law and to select the applicable law. 3) In the final decision-making step, the potential of algorithms is limited and may involve the resolution of simple disputes or, based on an algorithm, the suggestion of certain historical data based on past case law (see more: Murauskas 2020, 54).

4. The court decision is made by the AI system. The use of AI systems to resolve legal disputes is one of the most interesting and questionable applications

[5] There are also considerations about vocal characteristics and their potential impact on perception. Research, such as a report by UNESCO on gendered AI, shows that gendered voice assistants receive disparate treatment (this report explains how gender imbalances in the digital sector can be 'hard-coded' into technology products), raising questions about how this could translate in a courtroom setting (see more in: UNESCO n.d.)

[6] Already, judges in India and Colombia are using ChatGPT to help justify their reasoning and answer legal questions, respectively (see more: Smith, Moloney, Asher-Schapiro 2023). The situation in Germany is different: according to the German constitution, a judge may not be replaced by AI. However, it is already less clear whether the judge should be allowed to use AI in his/her decision-making. The use of AI seems conceivable, especially in lower courts with less complex facts and legal issues. However, this is only a theoretical problem and only discussed in the literature, as there is still a lack of functional software (see more in: International Bar Association 2022).

[7] A number of court decisions in Australia have endorsed the use of AI in legal proceedings to assist with discovery processes and document review. An example includes a decision from the Supreme Court of Victoria in 2016, *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors*. The plaintiff identified at least 1.4 million documents that required review in order to determine discoverability. It was identified that a manual review process for these documents would take over 23,000 hours. The parties could not agree how to conduct discovery and the court was required to make an interlocutory decision. In his decision, Vickery J endorsed the use of 'technology-assisted review' (TAR) in managing discovery and identified that a manual review process risked undermining the overarching purposes of the Civil Procedure and was unlikely to be either cost-effective or proportionate. Subsequently, TAR was explicitly endorsed in the Victorian Supreme Court' practice notes for cases involving large volumes of documents (see more in: Supreme Court of Victoria, n.d., 6).

of AI in the law. The idea was not first conceived by the courts, but by private businesses (e.g. eBay, one of the largest online auction and e-commerce sites, resolves an average of 60 million consumer disputes a year through its online dispute resolution center) (Juškevičiūtė-Vilienė 2020, 124). Some scholars believe that such adjudication may even be more accurate than decisions made by a judge (Babayan 2019). Algorithms developed by artificial intelligence can help to evaluate a case and even calculate the probability of winning a case. The automation of judicial decision-making would significantly reduce the workload of judges and promote the economy and speed of court proceedings. Oxford Professor Richard Susskind says that online court as a service is the future that awaits all courts. "They will have to detach themselves from indoor courtrooms and boardrooms, and focus more on delivering the service online, in a virtual space" (Susskind 2017, 17).

In addition to the advantages (cost-effectiveness, the speed of proceedings, non-discrimination between the parties in the court process), there are several disadvantages of having AI systems to resolve disputes. For example, with online-only proceedings and electronic data sharing, there is the possibility that parties may not interpret written information from the judge or the other party in the same way, or may feel that they have not been listened to enough (Juškevičiūtė-Vilienė 2020, 125). Moreover, in many disputes, judges assess complex factual situations and nuanced legal frameworks. Judges deal with jurisprudential tensions, face value dialogues between the parties, see the context of the society and the social situation, and assess many other invisible factors. As Justice Barak has pointed out, one of the functions of a judge is to understand the purpose of the law in society and to help the law fulfil its purpose (Barak 2006, 292). Algorithmising specific, contextual indicators is, therefore, hardly possible today in the technical sense.

Studies, such as the one conducted by ProPublica (see more in: Angwin, Larson, Mattu, Kirchner 2016), show that these tools can contain systemic bias in their data, leading to skewed results. Transparency is another issue, as IT companies often do not disclose their algorithms, citing trade secrecy. These issues raise questions about the potential for undue influence on the judiciary and the preservation of its independence. Judges and lawyers need to advocate for full transparency on the AI tools used when issuing rulings or decisions and protect a court's discretionary authority to fight the machine recommendations.

CONCLUSION

The rapid growth of AI has brought to light several legal and ethical questions, sparking a heated debate on the subject of AI and legal positivism. Legal positivism is a philosophy of law that asserts that the law is a set of rules

and regulations created and enforced by the state. Therefore, the law is a product of human creation, and its validity depends on the processes of its creation and enforcement. On the other hand, AI is an autonomous and self-learning system that operates outside of human control. This often raises questions about the validity of the laws governing its actions. Critics of legal positivism argue that its limitations in dealing with AI arise from its inability to deal with non-human actors.

The study shows that the impact of AI on legal professions is immeasurable, affecting everyone from law students to judges. However, it is important to note that AI will not replace humans, and new technologies are guided by the existing positive law created by humans. Therefore, it is necessary to understand that legal positivism theories are particularly relevant at this time, as new technologies are guided by state laws and regulations. It is crucial that the new technologies do not replace or 'reinvent' this law. Lawyers must be critical when using new technologies and monitor whether the content of the law has changed. Additionally, it is important to note that AI lacks the capacity to understand and act on moral principles and values in the same way as humans. Therefore, decisions made by AI will align more with the positive law theory than the natural law theory.

BIBLIOGRAPHY

Angwin, Julia. Jeff Larson. Surya Mattu. Lauren Kirchner. 2016. "Machine Bias. There's software used across the country to predict future criminals. And it's biased against blacks." *ProPublica*, 23 May. https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

Arlauskas, Saulius. 2009. "Jurisprudencijos moksliškumo kriterijai šiuolaikinėje teisės filosofijoje." *Jurisprudencija* 4(118): 247–264.

Ashley, Kevin. 2017. *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age*. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781316761380

Babayan, Arpine. 2019. "Ar dirbtinis intelektas bando užimti teisėjo vietą?" *Teise.pro*, 19 January. http://www.teise.pro/index.php/2019/02/01/ar-dirbtinis-intelektas-bando-uzimti-teisejo-vieta/

Barak, Aharon. 2006. "Teisėjo vaidmuo demokratinėje valstybėje." *Konstitucinė jurisprudencija* 1: 291–306.

Biresaw, Samuel Maireg. 2022. "The Impacts of Artificial Intelligence on Research in the Legal Profession." *International Journal of Law and Society* 5(1): 53–65. https://doi.org/10.11648/j.ijls.20220501.17

Buchanan, Bruce. Headrick Thomas. 1970. „Some Speculation about Artificial Intelligence and Legal Reasoning". *Stanford Law Review*, 23(1): 40–62. https://doi.org/10.2307/1227753

Cass, R. Sunstein. 2001. "Of Artificial Intelligence and Legal Reasoning." *Uni. Chicago Public Law & Legal Theory Working Papers no. 18*: 1–10. https://doi.org/10.2139/ssrn.289789

Chas, Carmen. 2023. "Morgenthau's Critique of Legal Positivism: Politics, Justice, and Ethics in International Law." *Jus Cogens* 5: 59–84. https://doi.org/10.1007/s42439-023-00076-x

Clio. 2023. "What is AI and How Can Law Firms Use it?" https://www.clio.com/resources/ai-for-lawyers/lawyer-ai/

Collenette, Joe. Katie Atkinson. Trevor Bench-Capon. 2023. "Explainable AI tools for legal reasoning about cases: A study on the European Court of Human Rights." *Artificial Intelligence* 317: 103861. https://doi.org/10.1016/j.artint.2023.103861

Council of Europe European Commission for the efficiency of justice. 2023. "Possible use of AI to support the work of courts and legal professionals." https://www.coe.int/en/web/cepej/tools-for-courts-and-judicial-professionals-for-the-practical-implementation-of-ai

European Parlament. 2023. "AI rules: what the European Parliament wants." 20 June. https://www.europarl.europa.eu/news/en/headlines/society/20201015STO89417/ai-rules-what-the-european-parliament-wants

Fornasier, Mateus de Oliveira. 2021. "Legal education in the 21st century and the artificial intelligence." *Revista Opinião Jurídica* 19(31): 1–32. https://doi.org/10.12662/2447-6641oj.v19i31.p1-32.2021

Georgieva, Kristalina. 2024. "AI Will Transform the Global Economy. Let's Make Sure It Benefits Humanity." *IMF Blog,* 14 January. https://www.imf.org/en/Blogs/Articles/2024/01/14/ai-will-transform-the-global-economy-lets-make-sure-it-benefits-humanity

Harari, Yuval Noah. 2018. *21 pamoka XXI amžiui*. Vilnius: BALTO print.

Hart, Herbert Lionel Adolphus. 1997. *Teisės samprata*. Vilnius: Pradai.

Hildebrandt, Mireille. 2020. *Law for Computer Scientists and Other Folk*. Cambridge: Oxford University Press. https://doi.org/10.1093/oso/9780198860877.001.0001

International Bar Association. 2022. *Guidelines and Regulations to Provide Insights on Public Policies to Ensure Artificial Intelligence's Beneficial Use as a Professional Tool*. N.d.: Vasin Lee/Shutterstock.

Judicial Council of California. 2020. "Language Need and Interpreter Use Study." 20 March. 2020-Language-Need-and-Interpreter-Use-Study-Report-to-the-Legislature.pdf (ca.gov).

Juškevičiūtė-Vilienė, Agnė. 2020. "Elektroninis teisingumas ir konstitucinė asmens teisė į teismą." *Acta Universitatis Lodziensis. Folia Iuridica* 93: 117–136. https://doi.org/10.18778/0208-6069.93.08

Kaufman, Whitley R.P. 2023. *Beyond Legal Positivism The Moral Authority of Law.* Cham: Springer. https://doi.org/10.1007/978-3-031-43868-4

Kelsen, Hans. 2002. *Grynoji teisės teorija*. Vilnius: Eugrimas.

Kondratas, Justinas. 2018. "Dirbtinis intelektas teisininkų darbe." *Cobalt,* 12 October. https://www.cobalt.legal/lt/news-cases/dirbtinis-intelektas-teisininku-darbe/?gad_source=1&gclid=Cj0KCQiAm4WsBhCiARIsAEJIEzX2hVbiqOVQMWyWDS_rXaGvGBE0Fbo3CGbCnUG1r7HcSXPXLw8iHaEaAo9QEALw_wcB

Krausova, Alzbeta. 2017. "Intersections between Law and Artificial Intelligence." *International Journal of Computer* 27(1): 55–68.

Luban, David. 2007. *Legal Ethics and Human Dignity*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511487484

Lynch, Shana. 2017. "Andrew Ng: 'Why AI Is the New Electricity." *Stanford Business*, 11 March. https://www.gsb.stanford.edu/insights/andrew-ng-why-ai-new-electricity

McConville, Mike. Wing Hong (Eric) Chui. 2007. *Research Methods for Law*. Edinburgh: Edinburgh University Press.

Mok, Aaron. 2023. "ChatGPT is getting an upgrade that will make it more up to date." *Business Insider*, 6 November. https://www.businessinsider.com/open-ai-chatgpt-training-up-to-date-gpt4-turbo-2023-11

Murauskas, Donatas. 2020. "Dirbtinis intelektas priimant teismo sprendimą – algoritmų klasifikavimas remiantis teisinio kvalifikavimo stadijomis." *Teisė* 115: 55–69. https://doi.org/10.15388/Teise.2020.115.4

Searle, John. 2002. “Can Computers Think?” In *Philosophy of Mind: Classical and Contemporary Readings.* Edited by Chalmers David. 669–679. New York: Oxford University Press.

Smith, Adam. Anastasia Moloney. Avi Asher-Schapiro. 2023. “AI in the courtroom: Judges enlist ChatGPT help, critics cite risks.” *The Christian Science Monitor*, 30 May. https://www.csmonitor.com/USA/Justice/2023/0530/AI-in-the-courtroom-Judges-enlist-ChatGPT-help-critics-cite-risks

Smith, Steven. 2023. “The Fourth Industrial Revolution and Legal Education.” *Georgia State University Law Review* 39(2): 339–398.

Supreme Court of Victoria. n.d. *Technology in Civil Litigation. Practice Note SC Gen 5*. https://www.supremecourt.vic.gov.au/sites/default/files/2018-10/gen_5_use_of_technology_first_revision.pdf (accessed: 1.12.2023).

Surden, Harry. 2019. “Artificial Intelligence and Law: An Overview.” *Georgia State University Law Review* 35: 1306–1337.

Susskind, Richard. 2010. *The End Of Lawyers? Rethinking The Nature Of Legal Services*. Oxford: Oxford University Press.

Susskind, Richard. 2017. *Tomorrow’s Lawyers: An Introduction To Your Future*. Oxford.

Teise.pro. 2019. “Teisėjas ir dirbtinis intelektas: ar kūrinys gali būti pranašesnis už kūrėją? 12 December. http://www.teise.pro/index.php/2019/12/11/teisejas-ir-dirbtinis-intelektas-ar-kurinys-gali-buti-pranasesnis-uz-kureja/

UNESCO. n.d.. “Explore the Gendering of AI Voice Assistants.” https://en.unesco.org/EQUALS/voice-assistants (accessed: 1.12.2023).

Waisberg, Noah. Aleksander Hudek. 2021. *AI For Lawyers: How Artificial Intelligence is Adding Value, Amplifying Expertise, and Transforming Careers*. Hoboken: Wiley & Sons.

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UNINTENTIONALITY IN POLISH CRIMINAL LAW

Abstract. Unintentionality is still a relevant research problem in Polish criminal law. This article is a modest attempt to answer the key questions of unintentionality, i.e. how the volitional and cognitive element is shaped in each form of unintentionality; whether unconscious unintentionality has such elements at all, or whether it is a facade of the subjective side and leads, in fact, to objective responsibility; how to correctly draw the line between conscious and unconscious unintentionality, and what the boundary between unintentionality and intentionality in general looks like.

Keywords: unintentionality, conscious unintentionality, unconscious unintentionality, subjective side

NIEUMYŚLNOŚĆ NA GRUNCIE POLSKIEGO PRAWA KARNEGO

Streszczenie. Nieumyślność pozostaje wciąż aktualnym problemem badawczym na gruncie polskiego prawa karnego. Niniejszy artykuł stanowi skromną próbę udzielenia odpowiedzi na kluczowe dla nieumyślności pytania, tj. jak kształtuje się element wolicjonalny i poznawczy w każdej z form nieumyślności; czy nieświadoma nieumyślność w ogóle posiada takie elementy, czy też stanowi fasadę strony podmiotowej i prowadzi w istocie do odpowiedzialności obiektywnej; jak prawidłowo wyznaczyć granicę między nieumyślnością świadomą i nieświadomą, oraz jak wygląda granica między nieumyślnością, a umyślnością w ogóle.

Słowa kluczowe: nieumyślność, świadoma nieumyślność, nieświadoma nieumyślność, strona podmiotowa

1. INTRODUCTION

Unintentionality, as one of the two fundamental forms of the subjective side, is still a relevant research problem in the Polish science of criminal law. This relevance is connected not only with subsequent research and papers concerning the issue of unintentionality, but mainly with the lack of conclusive answers as to the essence of the types of unintentionality, i.e. conscious and unconscious unintentionality. This article will make another attempt to answer the question

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about what actually is covered by the labels of conscious unintentionality and unconscious unintentionality. The considerations in this article will centre around two key theses. The first one is that conscious unintentionality in Polish criminal law is more than an anticipation of the possibility of committing a criminal act combined with the lack of intent. The second one, on the other hand, concerns unconscious unintentionality and assumes that, although it is based on the lack of anticipation of the possibility of committing an act and the absence of a volitional attitude towards that act, it can be considered as a full-fledged form of the subjective side. With the theses indicated, there are, of course, a number of partial research problems, i.e. how the volitional and cognitive element is shaped in each form of unintentionality, whether unconscious unintentionality has such elements at all, or whether it actually leads to objective liability, how to draw the line between conscious and unconscious unintentionality, and what is the boundary between unintentionality and intentionality in general. The primary method used for the considerations presented in this article will be the dogmatic-legal method, and, additionally, the theoretical-legal and comparative-legal methods. The findings on the types of unintentionality in Polish criminal law have been, to some extent, juxtaposed with constructs known in common law – recklessness, negligence, or wilful blindness.

2. AN UNINTENTIONAL CRIMINAL ACT

According to the provisions of Article 9 § 2 of the Polish Criminal Code (CC), a criminal offence is committed unintentionally if the perpetrator, without intending to commit it, commits it due to non-compliance with carefulness required in given circumstances, although he/she has foreseen or might have foreseen the possibility of its commission. On the basis of the quoted provision, therefore, there is no doubt that the first condition for unintentionality is the lack of intention. Thus, based on the information on intent contained in Article 9 § 1 of the CC, it should be concluded that an offender who commits an act unintentionally does not want to commit it and does not agree to commit it. However, this lack of intention is not yet a complete description of the volitional element of unintentionality. This element has to be relativised to the cognitive element, which, firstly, is shaped differently in both forms of unintention – conscious and unconscious, and, secondly, in the case of conscious unintentionality, it seems to go beyond the constituent elements sentenced in the content of Article 9 § 2 of the CC.

3. THE COGNITIVE ELEMENT IN CONSCIOUS UNINTENTIONALITY

How does the cognitive element in conscious and unconscious unintentionality look like? With regard to conscious unintentionality, Article 9 § 2 of the CC requires that the perpetrator foresees the possibility of committing the act. However, an analogous requirement is also formulated for intentionality under Article 9 § 1 of the CC. Thus, an automatic conclusion arises that the cognitive element of conscious unintentionality is identical as in intentionality – the perpetrator foresees the possibility of committing a prohibited act. This automatic conclusion, however, upon further reflection, should give way to another finding. If the perpetrator committing his/her act unintentionally does not intend to commit the act, i.e. does not want to commit it and does not agree to commit it, a rather peculiar situation arises in which the perpetrator, not intending to commit the act, but at the same time being aware of the possibility of its commission, does not refrain from behaviour leading, as a consequence, to the realisation of the elements of the prohibited act (Kowalewska-Łukuć 2015, 116). It seems that the missing piece in the puzzle of the perpetrator's cognitive and volitional processes in this case is his/her assumption that he/she will be able to avoid committing the act. In short, this assumption seems to be the only rational explanation of why the perpetrator, being aware of the possibility of committing a prohibited act, but not intending to do so, finally commits it. I have argued in favour of this thesis *in extenso* in one of my earlier works (Kowalewska-Łukuć 2015, 117–118). It can only be mentioned here once again that it is also supported by the theory of cognitive dissonance (Kowalewska-Łukuć 2015, 117) and by the findings of the criminal interpretation developed by W. Patryas (Patryas 1988, 125).

Moreover, looking at the construction of conscious unintentionality outlined this way, it is possible to note its certain similarity to the construction of recklessness functioning in the common law system. In the USA, Section 2.02 of the Model Penal Code states that

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.

In British criminal law, on the other hand, R v. G and Another, a key judgment in understanding the essence of recklessness, pointed to the requirement of subjective awareness on the part of the offender of the risk and the unreasonableness of his/her action in the context of the circumstances known to him/her (Regina v. G and another 2003). Incidentally, it may be noted that there are doubts in common law about the subjective/objective nature of risk awareness, as well as the role of risk

awareness in general (Crosby 2008; Stark 2020; Greenberg 2024). Nevertheless, the essence of recklessness seems to coincide with the cognitive element of conscious unintentionality in Polish criminal law outlined above. Ignoring, or even negating, the perpetrator's recognised possibility of committing a criminal act becomes even clearer if one embeds it in the construct of so-called wilful blindness from common law. The essence of the construct of wilful blindness, regardless of its precision in individual rulings (Glichrist 2021, 417; Simons 2021, 656), assumes the existence of anticipation by the offender that a criminal act might be committed and the deliberate avoidance of full verification of that possibility (Simons 2021, 656).

It also appears that a significant part of the Polish criminal law doctrine, although without further justification, goes beyond the *expressis verbis* prediction of the possibility of committing a prohibited act indicated in Article 9 § 2 of the CC in defining the cognitive element of conscious unintentionality. As M. Budyn-Kulik points out, "Conscious unintentionality is supposed to consist in the fact that the perpetrator foresaw the possibility of committing a prohibited act. However, he or she did not intend to commit it and therefore presumed to avoid it" (Budyn-Kulik 2023). A. Zoll also consistently stands for the position that the perpetrator commits a criminal act in conscious unintentionality as a result of an assumption that it can be avoided, and this assumption is an element of the subjective side (Zoll, Art. 9 2004). At the same time, however, Zoll claims that there is no need to articulate this cognitive element of unintentionality in the regulation of Article 9 § 3 of the CC. The presumption of the perpetrator to avoid committing a criminal act as a constitutive element of conscious unintentionality is also mentioned by A. Grzeskowiak (2023) and J. Giezek (2012, 136).

Thus, since the cognitive element of conscious unintentionality does not consist in the perpetrator's anticipation of the possibility of committing a prohibited act, but also in the perpetrator's assumption that he/she will manage to avoid committing the act, it cannot be reasonably argued that this element is identical in the case of conscious unintentionality and in the case of eventual intent, or intentionality in general. Indeed, there is a major difference in this element, and this difference is precisely the assumption made by the consciously unintentional perpetrator that the commission of the act will nevertheless be avoided. Moreover, since this presumption is a real element of the subjective side of conscious unintentionality and the element which differentiates it from intentionality, it should appear in the Code regulation concerning an act committed consciously unintentionally, i.e. in Article 9 § 2 of the CC. Such a postulate was already formulated by T. Przeslawski (2008, 208), it was also put forward by me with the proposal for the new formulation of Article 9 § 2 of the CC (Kowalewska-Łukuć 2015, 145)[1], and by Ł. Pohl (2016,

[1] The reformulated version of Article 9 § 2 of the CC would take the following form: "A prohibited act is committed unintentionally if the perpetrator, without intending to commit the act, nevertheless commits it as a result of failing to take the precaution required under the given

430). In the light of the above signalled views of the doctrine as to the elements constituting the cognitive element of conscious unintentionality, it seems that these postulates have not lost their relevance.

4. THE VOLITIONAL ELEMENT OF CONSCIOUS UNINTENTIONALITY

Turning to the volitional element of conscious unintentionality, it must be stated that the volitional attitude of the perpetrator committing a prohibited act in conscious unintentionality must consist in the intention not to commit the act. As it literally appears from Article 9 § 2 of the CC, the perpetrator does not have an intention to commit a prohibited act, i.e. he/she does not want to commit it and does not agree to commit it. Furthermore, as it results from the considerations above, the perpetrator additionally supposes that the commission of the act can be avoided and it is this circumstance which allows him/her to undertake or continue his/her behaviour. If this is how the cognitive and motivational processes of the perpetrator are formed, then he/she must precisely want not to commit the criminal act (Pohl 2016, 430).

5. UNCONSCIOUS UNINTENTIONALITY

The difference between conscious unintentionality and the intention, or intentionality in general, is thus marked in both elements of the subjective side, i.e. both the volitional element and the cognitive element. However, the question of how the cognitive element and the volitional element are shaped in the second variety of unintentionality, i.e. in unconscious unintentionality, still requires consideration. As it follows from the provisions of Article 9 § 2 of the CC, a perpetrator who commits an act with unconscious unintentionally does not foresee the possibility of committing it at all. However, for the existence of an unconsciously unintentional act, it is necessary to state that such a possibility could have been foreseen by the perpetrator. The question of how to understand the possibility of such foreseeing remains the subject of a still current dispute in the Polish penal science, in which two fundamental positions as to the nature of this possibility have been outlined.

According to the first of these positions, the circumstance whether the perpetrator could have foreseen the possibility of committing a prohibited act should not only be considered objectively, but should also be based on the individual capacity of the perpetrator. As J. Lachowski, representing this position,

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circumstances, even though he/she foresaw the possibility of committing the act but presumed that he/she would avoid committing the act, or could have foreseen such a possibility."

points out, "(…) the criterion of a standard which is authoritative under the given circumstances should be the starting point for further considerations. The result of reasoning on the basis of such a criterion should be verified by an individualising criterion" (Lachowski, Art. 9, 2023). This criterion, then, should consist of the individual characteristics of the offender, which are not, however, linked to the genesis of his/her decision to engage in risky behaviour. That genesis is, in fact, already linked to guilt (Lachowski 2016, 411–414). Circumstances that constitute the individual capacity of a given perpetrator to foresee the possibility of committing a criminal act can, therefore, be decisive not only at the level of guilt, but also at the level of the subjective side, in the form of unconscious unintentionality. The circumstances which determined the existence or absence of such a capacity are a matter of the subjective side. On the other hand, the circumstances that relate to why the offender did not make use of such an existing capacity are a matter of fault (Lachowski 2016, 412). Moreover, as argued by J. Lachowski, reducing unconscious unintentionality to an objective foreseeability of committing a prohibited act means, *de facto*, a prohibited act without a subjective side, limited only to the fulfilment of elements of an object character. Unconscious unintentionality ceases to be a form of the subjective side; rather, it becomes, as objective foreseeability, an element of objective attribution (Lachowski 2016, 407–408).

A similar position is taken by K. Burdziak, who indicates that

> [o]n the other hand, in the case of the possibility of committing a criminal offence, one may theoretically expect the perpetrator to behave in accordance with the law, unless the genesis of his or her decision to commit a given act indicates that such an expectation would be unjustified and, consequently, that the decision to commit a given act was justified – then, e.g., Article 28 § 1 of the Criminal Code is applied and the perpetrator's guilt is also excluded (Burdziak 2021, 139).

Burdziak, therefore, like Lachowski, links the genesis of the perpetrator's decision on a given behaviour – which turned out to be a criminal act committed in unconscious unintentionality – with the layer of guilt. On the other hand, the other "individual characteristics of the perpetrator which are not directly related to the genesis of his/her decision" (Burdziak 2021, 139) determine the assessment of capacity to foresee referred to in Article 9 § 2 of the CC.

The second position, considering that the capacity of the perpetrator to foresee the possibility of committing the act should be assessed objectively, is consistently represented by A. Zoll. He indicates that it is necessary to separate the subjective features of a prohibited act from guilt (Zoll 2016). This position is also supported by other representatives of the Kraków school of criminal law, who point out that the question of whether or not the perpetrator could have foreseen the possibility of committing a criminal act is not a structural element of unintentionality (Małecki 2015, 15). Similar conclusions are reached by K. Lipinski, who indicates that

"foreseeability – like the violation of rules of conduct with a legal good – may be perceived as a precondition for norming, common to both intentional and unintentional types, and therefore cannot constitute an exclusive, constructive feature of unintentionality" (Lipiński 2020, 268).

Considering the possibility of foreseeing the commission of a criminal act – mentioned in Article 9 § 2 of the CC – as an objective category is intended, then, to make it possible to accurately distinguish the subjective elements related to the perpetrator and his/her act, which are related to the layer of guilt. This is related, *inter alia*, to the meaning of the construction of an error under Article 28 § 1 of the CC (Barczak-Oplustil 2016, 382). As M. Malecki points out, the question of the excusability of an error regarding a circumstance constituting the characteristic of a prohibited act is, *de facto*, a question of whether a specific perpetrator, with specific characteristics and under specific conditions, could have foreseen that he/she would be performing the objective characteristic of the prohibited act, *ergo* that he/she would commit the prohibited act (Małecki 2015, 47).

6. SUBJECTIVE OR OBJECTIVE FORESEEABILITY?

Referring to the two positions outlined above, inevitably somewhat briefly, and attempting to prove the accuracy of one of them, it has to be stated that J. Lachowski is right in stating that reducing unintentionality to the objective foreseeability of committing a prohibited act would have to mean the absence of any psychological processes in the perpetrator, and thus, *de facto*, the absence of the subjective side of his/her act (Lachowski 2016, 407). At the same time, however, the recognition that the perpetrator's capacity to foresee the possibility of committing a prohibited act should be viewed subjectively leads inevitably to the introduction on the subjective side elements characteristic for the layer of guilt. J. Lachowski argues that such a situation is not at all inevitable, as the individually (subjectively) understood capacity to foresee the commission of a prohibited act may be established on the basis of circumstances occurring on the part of a specific perpetrator, but not related to the genesis of his/her decision of will (Lachowski 2016, 414).

It seems, however, that the division of individual circumstances into those related and those not related to the offender's decision is a task from the category of extremely challenging ones. An exemplary division of circumstances into those deciding about the subjective side in the form of unconscious unintentionality and those deciding about guilt is illustrated by J. Lachowski, who uses the lack of adequate knowledge of the perpetrator, stating that

> [if] the perpetrator does not have such knowledge which would allow him/her to foresee certain consequences, it means that he/she could not foresee them. It must be stressed, however, that in a situation where the perpetrator did not have the knowledge that would have allowed him/

> her to foresee the prohibited act, it becomes necessary to consider whether he/she had the possibility of acquiring such knowledge. If such a possibility existed, it means that the offender was in a position to foresee the criminal act. The reasons for the failure to acquire knowledge which the offender could have acquired are a different matter. (Lachowski 2016, 412)

The approach behind this example should probably be understood in such a way that at the level of the subjective side one can establish certain facts: (1) the perpetrator did not foresee the possibility of committing the criminal act; (2) the reason for the lack of foresight was the lack of specific knowledge and (3) the perpetrator had the possibility of acquiring this knowledge. On the basis of these facts, the conclusion arises that the perpetrator could have foreseen the possibility of committing the prohibited act. Then, at the level of assessing the act of this offender in terms of guilt, the previously established facts are evaluated, taking into account the subjective circumstances related to the genesis of the offende's decision. This is the stage where a conclusion has to be made that the perpetrator's failure to take advantage of the opportunity to acquire knowledge was justified or not, based on a finding of what the reasons for not acquiring this knowledge were. However, it is not difficult to see that fact no. 2, which is significant for the establishment of the subjective side – and within it the subjectively understood capacity to foresee the possibility of committing a prohibited act – is, in fact, a finding concerning the genesis of the perpetrator's decision. If he/she did not foresee the possibility of committing a prohibited act and committed it as a result of his/her failure to take the precaution required under the circumstances, and at the root of his/her decision on the behaviour was the lack of specific knowledge (fact no. 2), it is this lack of knowledge that is the key factor in the decision of the perpetrator's will. Furthermore, fact no. 3, i.e. the finding that the perpetrator had the opportunity to acquire the knowledge in question, already contains an element of assessment which inevitably leads us to the layer of guilt – the issue of the allegation against the perpetrator and the existence or absence of an excuse for the perpetrator's behaviour (Kowalewska-Łukuć 2019, 216). Doubts about the example presented by J. Lachowski are also expressed by K. Lipiński, who, referring to the analysed example, points to what follows:

> However, the question arises: if we include among the criteria for attributing unconscious unintentionality the subjective possibility of acquiring adequate information to formulate a prediction about committing a crime, do we not contaminate this construction with circumstances belonging to the sphere of subjective justification for the failure to meet the criterion set by the personal standard, thus coming back to a certain genetic defect of individually (subjectively) understood foreseeability? (Lipiński 2020, 257)

It must, therefore, be concluded that the concept which assumes understanding the capacity to foresee the commission of a prohibited act subjectively – although it is very attractive, because it gives to unconscious unintentionality a real cognitive element, positively framed (only in a potential version) – is unacceptable because of the impossibility of reconciling it with the

essence and function of the layer of guilt. However, this argument, according to some, does not necessarily disqualify the concept of subjective unconscious unintentionality. As Ł. Pohl points out that the thesis on the single-function role of the elements constituting the elements of a prohibited act within the structure of an offence is counterfactual (Pohl 2016, 422). One must agree with Ł. Pohl that given circumstances related to the criminal act and its perpetrator are relevant at different layers of the structure of the offence. One example of this is the awareness of the perpetrator of the criminal act. A certain threshold of awareness is necessary in order to conclude that a certain behaviour of the perpetrator in question is an act at all. The perpetrator's consciousness is then treated in a kind of zero-one manner; what matters is whether the perpetrator was conscious (in the sense of being awake) or not at all. Once again, awareness is taken into account at the stage of establishing the elements of the subjective side. Then, the quantitative aspect of such awareness becomes relevant, i.e. whether the perpetrator foresaw the possibility of committing a criminal act. Finally, awareness is also relevant at the level of guilt, where its qualitative aspect, whether it was undisturbed – e.g. by insanity, error, or immaturity – is assessed. Awareness is, therefore, relevant at different levels of the structure of the offence, but each time a different aspect of that awareness is relevant, because a different element of the structure is also subject to assessment (Kowalewska-Łukuć 2019, 154–155). In the case of a criminal act committed with unconscious unintentionality, the subjective capacity of the perpetrator to foresee the possibility of committing the criminal act undoubtedly requires an assessment of the qualitative aspect of the perpetrator's awareness. This, in turn, remains the domain of guilt. On the other hand, the quantitative aspect of that awareness, which characterises the subjective side, seems to be contained in the lack of foreseeing by the perpetrator of the possibility of committing a prohibited act.

Thus, one has to agree with the supporters of an objective approach to the requirement contained in Article 9 § 2 of the CC, concerning the capacity of the perpetrator to foresee the possibility of committing a prohibited act. M. Małecki is right in indicating that

> (…) it is something different to characterise a «prohibited act» committed unintentionally or intentionally, and something different to characterise «unintentionality» and «intentionality». Article 9 § 2 of the Criminal Code, as the initial fragment of this provision expressly states, contains a characterisation of the «entire» prohibited act committed unintentionally, and not only of its fragment in the form of the subjective side (Małecki 2015, 15).

The elements constituting the subjective side in the form of unconscious unintentionality, as defined in Article 9 § 2 of the CC, include the lack of anticipation by the perpetrator of the possibility of committing a prohibited act (cognitive element) and the lack of intention to commit the act, or, in fact, the

lack of any volitional attitude (volitional element). The latter is obvious, as it is impossible to have any volitional attitude towards something completely absent from consciousness. The definition of unconscious unintentionality in Article 9 § 2 of the CC is, therefore, binegative. This does not mean, however, that criminal liability for a criminal act committed in unconscious unintentionality is, *de facto*, responsibility without a subjective side (Tarapata 2015, 85). The cognitive aspect of the subjective side, i.e. the fact that the perpetrator did not foresee the possibility of committing the offence, must be established. On the basis of this finding, the conclusion about the actual absence of the volitional aspect becomes legitimate (Kowalewska-Łukuć 2019, 217).

Therefore, unconscious unintentionality – while assuming that the perpetrator's ability to foresee the possibility of committing a criminal act is objective and not an element of the subjective side – has its structural elements related to the quantitative aspect of the perpetrator's consciousness. Thus, criminal liability for an act committed in unconscious unintentionality is not a liability without a subjective side, nor is it a liability with an objective character. Subjective factors related to the qualitative aspect of the perpetrator's consciousness are taken into account at the layer of guilt.

The perception of unconscious unintentionality as a form of the subjective side, rather than some form of objective liability, is also supported by its comparison with the well-known construction of strict liability in the common law system. In this construction, in both of its varieties (Morse 2004, 400), the cognitive-volitional relation of the perpetrator to the act is not relevant at all. However, referring in the context of unconscious unintentionality to the constructions known in the common law system, it is also necessary to honestly note that its closest formulation, i.e. negligence, is a certain exception to criminal responsibility rather than one of the forms of *mens rea*. At the same time, as in the Polish criminal law science with regard to unconscious unintentionality, negligence is accused of being objective in nature (Greenberg 2021, 490; Lachowski 2015, 98). However, the difference between Polish unconscious unintentionality and, for example, English negligence is that, as A. Greenberg points out, "English law does not actually require negligence to be inadvertent, i.e. that the defendant is unaware of the relevant risk. All negligence requires is that a defendant fails to meet an objective standard, namely that they fail to take precautions against risks that a reasonable person would have" (Greenberg 2021, 492). It can be argued, of course, that reducing unconscious unintentionality to a failure to foresee the possibility of committing a criminal act and, consequently, to the absence of any volitional attitude on the part of the perpetrator towards the act, is, in fact, also some element of criminal liability for carelessness. However, there is no doubt that the binegative view of unconscious unintentionality refers to certain mental processes of the perpetrator, such as his/her state of consciousness.

The binegative approach to unconscious unintentionality also does not entitle the claim that the unintentionality is nothing more than a lack of intent. Conscious unintentionality, as indicated above, in both its cognitive and volitional elements, is not a simple negation of intentionality (Kowalewska-Łukuć 2019, 218). It is also unjustified, if only because of the different formation of the cognitive and volitional elements, to diminish – as some authors do – the relevance of the difference between the two forms of unintentionality (Giezek, Lipiński 2021). Furthermore, it is rightly pointed out by J. Giezek in his other work that conscious and unconscious unintentionality are separated by a fundamental difference in the psychological layer:

> While the first one is based on the assumption that the causal regularity under consideration, which is only probabilistic in nature, will not actualise, we would say about the second one – considering its psychological basis from a purely cognitive perspective – that it is derived from the failure to perceive that the undertaken behaviour is careless (contrary to the applicable rules) or is due to the ignorance of the causal regularity linking this type of behaviour to its negative effect (Giezek 2012, 140).

The division into conscious and unconscious unintentionality may also have practical significance. J. Giezek and K. Lipinski point out that "(…) whether the perpetrator foresaw or merely could have foreseen the consequences of his reckless behaviour does not seem to constitute a relevant basis for differentiating his/her assessment" (Giezek, Lipiński 2021). However, it seems that the circumstance of whether the perpetrator foresaw the possibility of committing the act or did not foresee it, although he/she objectively could have foreseen it, is relevant for differentiating the assessment of his/her act (Greenberg 2024, 352, 362). Using the examples of perpetrators of traffic accidents, one of whom ignored road signs with the speed limit and information about road works, while the perpetrator did not notice these signs at all, it must be stated that, even intuitively, the behaviour of the first of them appears to be more reprehensible.[2] In turn, the degree of the social harmfulness of the act translates into the penalty, because, according to Article 53 § 1 of the CC, the court, in imposing the penalty, must take this degree into account.

[2] In Article 115 § 2 of the CC, among the criteria for assessing the degree of the social harmfulness of an act, there is admittedly no form of unintentionality. The legislator uses the form of intent as such a criterion. It appears, however, that the issue of conscious or unconscious unintentionality on the part of the perpetrator may be connected with the circumstances of committing the act referred to in Article 115 § 2 of the CC. This is because if one understands the circumstances of the commission of the act as its time, place, but also a certain situational context, which includes both subjective and objective circumstances, then the issue of the perpetrator's conscious or unconscious unintentionality also falls within this context.

7. CONCLUSION

Summarising the above considerations, it must be stated that unintentionality differs from intentionality not only in terms of the volitional element, but also in terms of the cognitive element. This difference, in turn, should be reflected in Article 9 § 2 of the CC. Moreover, there is also a difference between the two types of unintentional conduct on the grounds of the cognitive element, where the cognitive element of unconscious unintentionality consists in the offender's failure to foresee the possibility of committing a prohibited act. On the other hand, the capacity to foresee, referred to in Article 9 § 2 of the CC, on the part of the perpetrator, is objective in nature and does not constitute a structural element of unconscious unintentionality as such.

BIBLIOGRAPHY

Barczak-Oplustil, Agnieszka. 2016. *Zasada koincydencji winy i czynu w Kodeksie karnym.* Kraków: Krakowski Instytut Prawa Karnego.

Budyn-Kulik, Magdalena. 2023. "Art. 9." In *Kodeks karny. Komentarz aktualizowany*. Edited by Marek Mozgawa. Warszawa: Wolters Kluwer.

Burdziak, Konrad. 2021. *Osoba niepoczytalna a prawnokarna norma sankcjonowana. Rozważania na tle polskiego Kodeksu karnego.* Warszawa: Scholar.

Crosby, Cath. 2008. "Recklessness – the Continuing Search for a Definition." *Journal of Criminal Law* 72(4): 313–344. https://doi.org/10.1350/jcla.2008.72.4.313

Giezek, Jacek. 2012. "Przewidywanie czynu zabronionego oraz zamiar jego uniknięcia jako podmiotowe elementy świadomej nieumyślności." In *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa profesora Mariana Filara.* Tom I. Edited by Andrzej Adamski, Janusz Bojarski, Piotr Chrzczonowicz, Michał Leciak. 130–135. Toruń: Wydawnictwo Adam Marszałek.

Giezek, Jacek. Konrad Lipiński. 2021. "Art. 9." In *Kodeks karny. Część ogólna. Komentarz*. Edited by Jacek Giezek. 62–68. Warszawa: Wolters Kluwer.

Gilchrist, Gregory. 2021. "Willful Blindness as Mere Evidence." *Loyola of Los Angeles Law Review* 54(2): 405–454.

Greenberg, Alexander. 2021. "Why Criminal Responsibility for Negligence Cannot Be Indirect." *The Cambridge Law Journal* 80(3): 489–514. https://doi.org/10.1017/S0008197321000659

Greenberg, Alexander. 2024. "Awareness and the Recklessness/Negligence Distinction." *Criminal Law and Philosophy* 18: 351–367. https://doi.org/10.1007/s11572-023-09687-3

Grześkowiak, Alicja. 2023. "Art. 9." In *Kodeks karny. Komentarz*. Edited by Alicja Grześkowia, Krzysztof Wiak. Warszawa: C.H.Beck.

Kowalewska-Łukuć, Magdalena. 2015. *Zamiar ewentualny w świetle psychologii.* Poznań: Ars boni et aequi.

Kowalewska-Łukuć, Magdalena. 2019. *Wina w prawie karnym.* Warszawa: Wolters Kluwer.

Lachowski, Jerzy. 2015. "Negligence In Polish and English Criminal Law." *Comparative Law Review* 20: 87–102. https://doi.org/10.12775/CLR.2015.012

Lachowski, Jerzy. 2016. "Nieumyślność a brak zamiaru w prawie karnym – uwagi *de lege ferenda*." In *Obiektywne oraz subiektywne przypisanie odpowiedzialności karnej*. Edited by Jacek Giezek, Piotr Kardas. 399–417. Warszawa: Wolters Kluwer.

Lachowski, Jerzy. 2023. "Art. 9." In *Kodeks karny. Komentarz*. Edited by Violetta Konarska-Wrzosek. 79–89. Warszawa: Wolters Kluwer.

Lipiński, Konrad. 2020. *Wzorce osobowe w prawie karnym.* Warszawa: Wolters Kluwer.

Małecki, Mikołaj. 2015. "Usprawiedliwiony błąd co do okoliczności stanowiącej znamię czynu zabronionego w świetle nowelizacji art. 28 § 1 k.k." *e-Czasopismo Prawa Karnego i Nauk Penalnych* 3.

Morse, Stephen. 2004. "Reason, Results, and Criminal Responsibility." *Illinois Law Review* 2: 363–444.

Patryas, Wojciech. 1988. *Interpretacja karnistyczna.* Poznań: Wydawnictwo Naukowe.

Pohl, Łukasz. 2016. "Przyczynek do rozważań o strukturze nieumyślności i sposobie jej opisania w kodeksie karnym." In *Obiektywne oraz subiektywne przypisanie odpowiedzialności karnej*. Edited by Jacek Giezek, Piotr Kardas. 418–431. Warszawa: Wolters Kluwer.

Przesławski, Tomasz. 2008. *Psychika. Czyn. Wina. Wpływ czynnik psychicznego na zachowanie człowieka i jego winę jako podstawę odpowiedzialności karnej.* Warszawa: Wydawnictwa Uniwersytetu Warszawskiego.

Regina v. G and another. 2003. UKHL 50 (House of Lords, 16 October 2003).

Simons, Kenneth. 2021. "The Willful Blindness Doctrine: Justifiable in Principle, Problematic in Practice." *Arizona State Law Journal* 2: 655–679.

Stark, Findlay. 2020. "The Reasonableness in Recklessness." *Criminal Law and Philosophy* 14: 9–29. https://doi.org/10.1007/s11572-019-09501-z

Tarapata, Szymon. 2015. "Obiektywna czy subiektywna przewidywalność? Głos w sprawie sporu dotyczącego nieświadomej nieumyślności." *Czasopismo Prawa Karnego i Nauk Penalnych* 1: 51–100.

Zoll, Andrzej. 2004. "Art. 9." In *Kodeks karny. Komentarz.* T. I. Edited by Andrzej Zoll. Kraków: Zakamycze.

Zoll, Andrzej. 2016. "Art. 9." In *Kodeks karny. Część ogólna.* Tom I. Cześć I. *Komentarz do art. 1–52*. Edited by Włodzimierz Wróbel, Andrzej Zoll. 146–169. Warszawa: Wolters Kluwer.

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TRUST AND DISTRUST IN A DEMOCRATIC STATE OF LAW

Abstract. The issue of trust in law and trust of the governed in those who govern them has accompanied mankind since the early history. Trust is one of the most prominent values for maintaining cohesion of social groups and, more broadly, whole societies. People had to first have trust in themselves in order to trust the law and the state and, eventually, to have the state to trust them. The matter of trust in law remains highly up-to-date and should be considered in connection with the trust in the lawmakers, the legal acts created by them, but also trust in law exhibited by the relevant institutions and bodies. Trust is a temporal state; we can enjoy it either permanently or periodically, therefore, the institutions and principles laid down by the law are an indispensable aspect that guarantees permanence of trust. The key task of public administration, aimed at inspiring and intensifying trust, is to obtain and secure the common good in the state on the basis of, and within the limits of, the applicable legal regulations, which at the same time set out the methods and scope of social protection in the individual spheres of operation of the legislative, executive, and judicial authorities.

Keywords: trust, law, state, society, power

ZAUFANIE I NIEUFNOŚĆ W DEMOKRATYCZNYM PAŃSTWIE PRAWA

Streszczenie. Zagadnienie zaufania do prawa i rządzonych do rządzących towarzyszy ludzkości od zarania dziejów. Zaufanie jest jedną z najważniejszych wartości umożliwiających utrzymanie spójności grup społecznych, a w szerszym wymiarze – społeczeństw. Ludzie musieli zaufać najpierw sobie, by zaufać prawu i państwu, a na końcu, aby to ostatnie zaufało im. Kwestia zaufania do prawa pozostaje niezwykle aktualna i rozpatrywać ją należy na gruncie zaufania do ustawodawcy, tworzonych przez niego aktów prawnych, ale i zaufania do prawa stosowanego przez delegowane do tego instytucje, i organy. Zaufanie jest stanem temporalnym, możemy się nim cieszyć w sposób trwały albo okresowy, dlatego obecne w prawie instytucje i zasady są niezbędnym aspektem gwarantującym jego trwałość. Kluczowym zadaniem administracji publicznej, mającym

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na celu wzbudzanie oraz pogłębianie zaufania jest uzyskanie i zabezpieczanie dobra wspólnego w państwie na podstawie, i w granicach obowiązujących przepisów prawa, które jednocześnie wyznaczają metody i zakres ochrony społeczeństwa w poszczególnych sferach działania władzy ustawodawczej, wykonawczej, i sądowniczej.

Słowa kluczowe: zaufanie, prawo, państwo, społeczeństwo, władza

1. INTRODUCTION

Discussing the essence, value and nature of trust requires a multi-dimensional and multi-layered approach. To begin with, certain terminological and ontological assumptions must be made, as they will be crucial for the presentation of the core concepts and their endorsements in this article.

Trust is most commonly defined as an element of social capital or even the social capital itself, an organizational resource, the foundation of social interactions in an organization, a psychological condition reflecting positive expectations as to the motives of others and the outcome of the interaction, a willingness to accept the behaviour of the other party, a bet (Bugdol 2010, 12).

An explicit definition of the notion of trust is the prerequisite for embarking on fastidious analyses and deductions and for deriving valid conceptual conclusions therefrom. Nonetheless, any attempts at defining the scope of the term for research purposes should be based on the examination how it is used above all in general parlance. In everyday life, the matter of trust usually arises in connection with an attempt to resolve a dilemma concerning an individual behaviour of a partner during interaction under the circumstances of an insufficient familiarity with his or her intellectual, moral or religious qualities. Therefore, in terms of ethics it would be quite apt to make a hypothesis that "trust, appearing in anticipation of the future relationship, is a strong enough incentive to take action and, as a kind of hypothesis, lies at the verge between cognizance and non-cognizance of a person. Those who know everything need not rely on trust; those who know nothing can hardly, for obvious reasons, trust other(s)" (Simmel 1975, 396). By the same token, actually the opposite is true as regards trust in law and authority by citizens and certain social groups. At this point in time, this aspect is of utmost importance given the deep decline of trust by individuals, social groups and society as a whole in the legislative, judicial and executive powers as well as in the statutory law and actions taken in pursuance of legal regulations. The purpose of this article is therefore to discuss and systematise the key factors shaping the general level of social trust in the state, specifically including its governing bodies and the law they create, as well as the reasons for its rise, decline and vanishing, i.e., the transition from trust to distrust, and *vice versa*.

2. THE ESSENCE OF TRUST

Being an interpersonal phenomenon, trust is no less than dualistic in nature: it has a material plane with its content and value, and a procedural plane that involves aspects of a discourse as the basic form of intersubjective life and the assumptions of a just (re)distribution of goods. In this context, the formulation of the phenomenon varies from typical approaches where, firstly, trust is mainly a mental state (or a combination of mental states) and, secondly, trust is a three-part relation (X trusts Y in matters Z).

It should be made clear that the notion which is the opposite of trust is distrust, not a mere lack of trust. Distrust involves negative expectations as to the actions of others. Lack of trust, on the other hand, occurs in a neutral situation where neither distrust nor trust can be ascertained due to the absence of precise expectations or experiences. It is usually a temporal condition, at the initial phase of the relationship, although it does not always precede a relationship. It can be described as a suspension of the decision to either trust or distrust.

According to Russell Hardin, the term "trust" is loosely used in academic research and in the vernacular. This leads, in the eyes of the philosopher, to conceptual confusion: "Trust is therefore treated as an a-theoretical term. It is, for example, all of the things that survey respondents think it is" (Hardin 2006, 42). Therefore, since it is *all of the things*, it can also be none of them. In an attempt to nevertheless encapsulate the phenomenon of trust, Russell Hardin created the following definition: "The only thing that can meaningfully force me to trust someone is the evidence that they are likely to be trustworthy toward me in the relevant context, that they will have the right motivations" (Hardin 2006, 34). Trusting another person, according to Hardin, is to believe that "you have the right intentions toward us and that you are competent to do what we trust you to do" […] "Distrust must have a similar logic. If we distrust you, that is because we think that your interests oppose our own and that you will not take our interest into account in your actions" (Hardin 2006, 17) – and your behaviour is not ethical in my comprehension.

Under this approach, trust is a form of a "firm belief" based on experience and observations which "in most cases makes it possible to accurately predict that the trusted person will meet the expectations of the truster" (Graff 2003, 100).

A similar definition was coined by Piotr Sztompka, according to whom trust "is a kind of a «bet» about the future contingent actions of our partners" (Sztompka 2007, 69–70). Where the bet is settled in favour of the partner, that is to mean that the partner wins, it indicates trust, where the partner loses, a distrust (Sztompka 2007).

It follows that we believe the cognitive aspects of trust to be appropriate. This is because it opens up the room to search for trust-inducing factors in the form of

specific socio-economic and political conditions. These conditions are the sources of experiences and observations, which then constitute the grounds for attitudes and action strategies. The phenomenon of trust can also be recognised as gradable. This specific feature of trust has been highlighted by Georg Simmel: "Whatever quantities of knowing and not knowing must commingle, in order to make possible the detailed practical decision based upon confidence, will be determined by the historic epoch, the ranges of interests, and the individuals" (Simmel 1975, 396).

Roderick Kramer went a step further and drew attention to the possibility, or indeed the need, for a gradation of trust in connection with the resolution of interaction dilemmas: "After all, at the very heart of the dilemma is not simply whether to trust or distrust, but rather how much trust and distrust are appropriate in a given situation" (Kramer 2008, 250). Without a doubt, these insights of the author are pertinent and extremely valuable.

There are many other definitions of trust that could be quoted, created or modified across time. However, to put it straightforwardly, it is simply a waste of time since, as the sociologist Earl Babbie noted, the task of explaining terms such as trust in the social sciences seems to be an endless process.

It should be unequivocally acknowledged that the phenomenon of trust is a psychological experience available to every human being. Nonetheless, the question what trust in fact is in terms of ethics is not an easy one to answer, and it well resists being confined within a narrow definitional framework.

How closely should this ethical component be determined and to what extent does it preordain trust? In an act of trust, the truster transcends their self, reveals themselves and takes a risk, offers something that is precious to them. Does the truster count on something in return? Undoubtedly, the truster expects loyalty and hopes not to be cheated or betrayed. Nevertheless, it is amiss to equate these feelings to only a claim, an expectation of reciprocity that reduces trust to an exchange transaction, one of many of its kind. Trust is also, or perhaps above all, an expression of affirmative recognition, an acknowledgement of the other person's subjectivity and, as such, a manifestation of respect for them as a person, and the honouring of their humanity (Graff 2001, 309–316). Since this is the case, to fail to trust someone is to negate his or her qualities as a human being.

3. LEGITIMACY OF GOVERNMENTS AND RIGHTS OF THE GOVERNED IN A DEMOCRATIC STATE OF LAW

It needs to be highlighted that trust varies fundamentally in individual and social experiences. It therefore constitutes a permanent element of social reality in a democratic state ruled by law and, if this is the case, the concept of trust grows somewhat complicated. It should therefore be explicitly stated that it is not trust but the lack of trust that forms the basis for the democratic structure of the

checks of powers, rotation of functions and a collective corroboration during the electoral process.

Democracy requires justification of all rule which *per se* is seen as suspect (Holmes 1995, 18). It is only when it can be shown that the will of the people which has been expressed during the elections is the source of power and when the representatives elected by the majority act in the interests of citizens, then the government is considered legitimate.[1] What we have here is quite a complex mechanism of transition from the psychological sphere (trust) to the physical sphere (taking action and making a choice) in order to again develop trust that is, however, no longer derived from inclination towards candidates and their election programmes, but from satisfaction with a reliable and integral fulfilment of pre-election promises. At the same time, the representatives of the majority may fail to fulfil their mandate. Therefore, the democratic system allows for the institution of civil disobedience. „Both legislative and executive may be held to account by the community if they act in breach of trust" (Parry 1976, 131).

Distrust to those in power is wiped out by cyclic elections and expiring terms of office, which ensure that government representatives will be prepared to surrender their offices voluntarily, and surrender themselves (and their performance) to periodic evaluation. The assumption is that they will be unable to resist the temptation to keep their privileges, and that this inclination can only be defended against by an institutionalised rotation mechanism. "Rationally grounded trust in officials (…) requires that the officials be responsive to popular needs and desires. To have incentive to be responsive, they must be somehow accountable, most plausibly, perhaps, through competitive elections" (Hardin 2003, 204).

Law created by democratically elected political elites is also undoubtedly the object of trust, lack of trust or distrust on the part of the public. As a phenomenon, trust emerges and develops in various conditions, concerns separate manifestations of a collective and individual life, and does refer to various goods and values. It may be induced by deliberate actions of those who want to gain our trust, it may become a deliberate propaganda or ideological game, or it may be connected with the presence of certain family members, friends or public figures. Politicians resort to the institution of political marketing because the human brain mechanisms, discovered and widely discussed in science, allow them to predict and influence our emotions. A politician's image is primarily formed by his or her appearance, including the cut and colour of their clothes.[2] This perfectly illustrates how the

[1] As the classics of political philosophy put it, the government owes a fiduciary duty to the people and has a responsibility to fulfil this function.

[2] It has been demonstrated by the results of a study conducted by Wioletta Czerko at the end of 2003. The study was based on an experiment on a randomly selected group of people. The respondents were shown photographs of politicians dressed in white or green shirts; the respondents then evaluated the politician by expressing their general emotional attitude towards him and the emotions he evoked in them, such as trust, anxiety, or confidence. The analysed results indicated

country's political elite can influence the public using simple and cost-effective methods in order to win, maintain or regain trust.

It is therefore possible to gain public trust quite easily by reverting to various media ploys; nonetheless, maintaining a uniformly high level of trust over a certain period of time, such as for an entire term of office, is not that easy. We can enjoy trust either permanently or for a time. It depends not only on the attitude of the subject of public trust. Just because the public places its trust in a candidate at the time of election, it does not mean that it be maintained at an unchanged level permanently.

Attempts to describe the mechanisms for generating and deepening trust among the citizens of a particular community have been the subject of discourses since the distant past.

Deliberations on trust, lack of trust, distrust and the social role of each of the foregoing appeared very early, in ancient philosophical thought. The issue of trust was taken up for example by Aristotle, who in various writings considered it as a kind of belief (faith) and a specific form of social relationship. Furthermore, in Aristotle's reflections there are connections between the concept of trust and trustworthiness (Aristotle 1996, 306). The concept of trust has played a particularly important role in modern social and political philosophy. It was an integral part of numerous concepts of the social contract established in the 16th and 17th centuries. The fundamental status of trust in the functioning of social, political and economic structures was highlighted by one of the great thinkers of the era, Thomas Hobbes, who described the pre-state conditions and the functioning state.

According to Hobbes, in the state of nature, individuals pursued their individual interests and security at all costs (Hobbes 1651, 61). The state of nature is a state of perpetual danger, and all human relations in it were affected by distrust. The inconveniences of the state of nature prompted the need to establish centralised "artificial coercion" (Habermas 1983, 90). Thus, primitive men sacrificed their freedom derived from nature to ensure "the security of a man's person, in his life, and in the means of so preserving life as not to be weary of it" (Hobbes 1651, 66).[3]

In order to ensure inviolability for the individuals, the institutions of state and law have been established. These institutions are mutually complementary, as the existence of law is conditional upon the existence of the state, and the state

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that a candidate in a green shirt evoked less favourable emotional responses and was deemed less trustworthy than politicians in white shirts (Cwalina, Falkowski 2006, 201).

[3] See Giddens (1991, 126): "Much risk assessment proceeds on the level of practical consciousness and, as will be indicated below, the protective cocoon of basic trust blocks off most otherwise potentially disturbing happenings which impinge on the individual's life circumstances". It is possible for individuals to achieve a sense of security through a well-developed trust, despite their apprehension of the dangers present in everyday life. It thus follows that a sense of security cannot exist without trust."

manifests itself in the law. Trust is a deep sense of security, an endorsement of care, a declaration of love, friendship and faith. This is what has not been taken into account by Thomas Hobbes, therefore, one may conclude that the model of trust promoted by him is an extreme view in a materialist rather than social sense, which is more harmful than ignorance. Trust translates into a material good, but it itself is indeed an immaterial instrument, a pure form of mind, faith and spirit.

The need for trust to be built in the relationship between society and those in power was advocated by John Locke (Rau 1992, 59). The philosopher focused on both the relationship of public trust to the authorities as well as breach or lack thereof. John Locke enters into a polemic with his predecessor Thomas Hobbes (Szczepański 2021) and assumes that what preceded the existence of a state was a positive phase in human history. The nature of primitive man was connected with law, ascribed to him by virtue of his very being as well as being human. Man was born with the law, came to know the law through reason and knew that it applied equally to all; and this distinguished men from animals. The state did not emerge in response to the need to create and sanction the law to protect the interests of individuals. The law of nature existed before the state and manifested itself in the workings of ageless moral norms that protect the individual from evil (Chojnacka, Olszewski 2004, 111).

Law was a subjective mental experience, an immanent part of being, and everyone could interpret it differently, which gave rise to disorder and confusion. The state of nature was good, but it was also precarious, therefore people decided to create a state which has created law. It can therefore be concluded that the relationship between the ruling and the ruled must be based on trust.

Trust is one of the most important values for maintaining cohesion of social groups and, more broadly, societies. People had to first trust themselves in order to trust the state for the latter to ultimately trust them. Without trust, without the conviction that other person, other person's word, a diagnosis or a promise can be trusted, it is not possible to fully exist in a family, business or in a state (CBOS 2012).

4. RATIONAL TRUST

According to voluntarist theories, law emerges from the will of the lawmakers, therefore, whenever citizens trust the lawmakers, they will also trust the law they have made. "Whenever an addressees share the values of the lawmaker, they will be more likely to obey the law the lawmaker has created" (Kunysz 2014). Citizens are more likely to obey a law which they identify with. Law is the result of an organised and institutionalised action by certain actors known as the legislators, who aim to achieve certain objectives through law. Given that the lawmakers are supposed to arouse trust of citizens, they should be a rational legislator.

The concept of a rational legislator sets certain standards for state bodies or, more precisely, for those authorised to perform tasks on behalf of these bodies who thus exert real influence on the introduction of certain legislative acts in the process of law drafting and legislating. A rational legislator is a lawmaker who acts in a planned and deliberate manner. According to Zygmunt Ziembiński's definition, the assumption that a legislator is rational involves "an idealizing and no doubt counterfactual assumption that legal texts of a given system are the creation of a single, fully rational subject, which is unfailingly guided by a certain coherent knowledge and certain considerations, put to order according to preference" (Ziembiński 1980, 25). Legal norms should, given that they are identified with, be respected by all members of a given society. Notwithstanding the foregoing, a rational legislator should none the less have measures of potential coercion in place, should an individual object to the voluntary compliance with the disposition of a particular norm.

The legislator's actions should be well thought-out and orderly enough to avoid recurrent amendments or changes to a law. Such modifications could adversely affect the trust in the law, as they create a sense of instability and legal uncertainty. The negative phenomena associated with constant changes in law which erode citizens' trust can, however, be counterbalanced by legal principles. The first of these principles is the one expressed in the Latin maxim "*prioritas legis mitrior*", whereby, in the face of continuing legal changes, the law applicable to citizens will be the onewhich is more in their favour rather than the most recent law. This legal principle has undeniably a positive effect on citizens' trust in law, as it makes them believe that regardless of the changes made to the law, it will always protect their best interests.

Next is the principle of "*lex retro non agit*" which prohibits the enactment of laws and legal norms prescribing the application of newly-enacted legal norms to events which took place before their entry into force (Tuleja 2016). As Marek Zubik points out, "the prohibition enshrined in the principle of *lex retro non agit* in fact guarantees that subjects of the law may conduct their affairs being assured that by their actions they will not be exposed to negative legal consequences that they could not foresee" (Zubik 2016). Accordingly, the *lex retro non agit* principle is definitely intended to give citizens a sense of security and a feeling of trust in the law in force, in line with the principle of protecting citizens' trust in the state, and in the law laid down by it.

Exactly the same feeling, i.e., the feeling of trust, is to be evoked by the principle of "*pacta sunt servanda*" which dates back to Roman law, refers to good business practices, and is aimed at protecting acquired rights. According to this principle, a contract that has been duly made cannot be terminated by a decision of one party alone. What we are dealing with here are the basic assumptions of the protection of property. This builds a reality in which even the foreshadowing of a change in the law is not able to undermine the sense of security in a society.

Furthermore, certain circumstances regulated in codes of law that exclude guilt and legal liability are worth a note. An example of the circumstances referred to in the preceding sentence is the institution of an "error as to the unlawfulness of the act" regulated in Article 10 paragraph 3 of the Polish Fiscal Penal Code. According to a literal interpretation thereof, the statutory term "erroneous belief" refers to an error whereby a perpetrator is certain of the occurrence of a given **circumstance excluding unlawfulness**, and the certainty reflects the individual's trust in the law. The conduct of such an individual may be judged as naive or reckless, but isn't naivety basically an excessive trust? The lawmaker creates laws and regulations that positively contribute to citizens' sense of security and degree of trust.

More and more often the law safeguards and protects the interests of citizens as a priority to and over and above those of the state. Accordingly, the significance of the maxim *ignorantia iuri snocet* that young lawyers are taught at the beginning of their legal education is being gradually eroded.

What matters to a rational legislator are the consequences that citizens suffer and how individuals could be protected against them. This protection takes the form of civil rights granted to individuals, offering them the freedom to sue public institutions, appointment of an ombudsman, and, in some countries, even the admissibility of a direct "constitutional action" against the state. Citizens of European Union member states have the right to complain against their home state to a special court in Strasbourg, had their rights been violated by their state.

If law is an authority to citizens, it implies that they are convinced that those who created it are competent and have performed the task entrusted to them with full conscientiousness. Citizens should assume that the law operating in the actual social space is effective. The issue of the effectiveness of legal norms was addressed by Zygmunt Ziembiński, who distinguished between the formal and actual effectiveness. The former is the relative frequency of conduct compliant to the legal norm whenever it is applicable, and the latter is the degree to which the establishment of a given legal norm under the respective conditions has led to the intended outcome (Ziembiński 1980, 454). The public's belief that the law is effective is yet another pillar on which the trust in law rests. Individuals safeguarding their interests and seeking to protect or enforce their rights presuppose that the established legal norms will effectively guarantee the fulfilment of their expectations and requirements. The purpose of law is to regulate social relations in such a way so that citizens can pursue their individual interests without compromising the interests of others and of the state; the law must be effective. In order for the law to be applied, it must work, it must be observed and enforced. According to Jerzy Jakubowski, the effectiveness of a legal norm is tantamount to its observance by its addressees. If a certain legal norm is observed by its addressees, then such norm can be recognized as effective: in the case of primary norms, the addressees observe the norms, and in the case of secondary

norms, they apply them. Then again, those primary legal norms that, despite being in force, are not observed, and those secondary legal norms that are in force, but are not applied, are ineffective (Jakubowski 1965, 318, 320). A frequent recourse to decisions of common courts of law, in all the cases as needed, is a manifestation of individuals' trust in the law and in the administration of justice.

5. FAITHIN A FAIR AND IMPARTIAL JUDICIARY

Trust in law is generally also intensified by faith in the judiciary. Notwithstanding any connections with events taking place in the political arena, these deliberations should begin by reflecting on the constitutional principles of the courts system. Independence and impartiality of courts of law are the foundations for citizens' trust in the judiciary. The corelation between trust and the judicial system is of essence, as in order to avail themselves of legal remedies, citizens must first have trust in the fairness and effectiveness of law. The courts of law are for the people – without citizens and their cases brought before courts of law, the existence of the judiciary would be futile.

The judiciary should work in a predictable manner, without biases, and above alliin accordance with the letter of the law. The various measures put in place to protect the autonomy of courts of law (such as appointment for life or financial independence of judges) are intended to ensure that law is enforced without prejudice (Holmes 1995, 47). If we assume that we can trust the legislators and the normative acts created by them, the next step in the manifestation of citizens' sense of trust in law will be the equitable application of law by the judiciary. "Law may protect civil rights, freedom, and property even in the face of political opposition. Thereby, it may create confidence in the legal system and institutions protecting it can emerge, and it facilitates the expression of trust in other relationships" (Luhmann 1978, 194).

According to Article 178 paragraph 3 of the Polish Constitution, a judge may neither be a member of a political party or a trade union nor engage in public activities incompatible with the principles of judicial independence and impartiality (The Constitution 1997). The independent judiciary is the guarantor of fair judgments, free from undue influence. "Impartiality is, as emphasised in judicial jurisprudence, the condition for building social trust in the judiciary. The high profile of the judiciary largely depends on whether its decisions are perceived as impartial. The authority of judicial decisions is corelated with the authority of the law as such" (Jasiński 2009, 487).

Judges should not only remain independent and impartial, but also competent, in their work. When people entrust their cases to be resolved by judges, they do trust that the outcome will be fair, objective and rooted in the right legal norms. Each and every person appearing before a court has the right to expect that the

court will not be prejudiced against him or her and that its decision will be based solely on admissible and credible reasons (Jasiński 2009, 85).

When the judiciary is composed of trustworthy people, the society will also trust their decisions, which come to be a part of the legal order.

Judges are subordinate only to the Constitution and the statutory law. If we were to assume that citizens have trust in their lawmaker and the laws it has created, they will have confidence that judges, in keeping with the norms established by the lawmaker, will act as needed to protect their interests and issue fair judgments.

One should not, however, overlook the matter that has remained the focus of lively debates in legal scholars' writings since the 1930s, namely judicial discretion. It touches upon the interpretation of law, in particular the division between the "creative" and "derivative" interpretation of "judicial law". Bartosz Wojciechowski points out that "applying the law involves a particular kind of freedom concerning the choice of a legal provision, freedom of interpretation, freedom of evaluation of evidence or the choice of legal consequences" (Wojciechowski 2004, 16). In is noteworthy at this point that the discretionary power of the judge(s) is far from unlimited. Being subordinate to the Constitution and the statutory law is as such a serious limitation to the independence of the judicial power. Public authority bodies act on the basis of and within the limits of the law (Article 7 of the Constitution of the Republic of Poland). It should also be emphasised that their actions (decisions) must be derived from the *iuranovit curia* principle, i.e., the knowledge of the law (Gil 2012, 47).

Courts are free from the suspicion of bias or negligence thanks to the principle of two-instance procedure enshrined in Article 78 of the Constitution, further expanded in Article 176 thereof. The law guarantees to every citizen the right to have his or her case heard by a different judicial panel in a court of higher instance. This no doubt affords a sense of certainty, security, and, above all, assurance of a fair verdict. The principle of two-instance proceedings is the manifestation of the principle of the rule of law which is fundamental to the entire legal system as it constitutes the source of basic rights for a party to the proceedings. Non-appealability of a judgment before a higher instance court would restrict the interested parties' right to a fair trial, which is contrary to the principle of a democratic state of law and without a doubt reduces the degree of trust in the state.

6. SUMMARY

Mutual trust of individuals in each other and of all the citizens of a particular community in the public authorities and the law is fundamental to the proper functioning of an enormous system of interconnected authorities, i.e., the state.

Integrity, trustworthiness, sincerity and a certain degree of trust are essential for an effective public policy. The government and the local administration function within a system of communities organised into a state with its institutions, bodies and the applicable legal regime, including constitutional regulations. Given the importance of the Constitution, it has become a rule that the principal rules of the structure and the functioning of state administration, in particular a number of important component elements of the system and the workings of the administration itself, are set out in the Constitution.

The principle of a democratic state based on the rule of law enshrined in the Constitution also embraces the directive to protect and deepen citizens' trust in the state, its institutions, and its bodies. This directive presupposes, and even imposes, upon the administrative bodies the duty to be at least upright towards citizens: to observe the established rules of conduct, not to withdraw from the commitments made, and not to abuse their position of power or extended powers towards citizens.

Pondering upon the matter of trust in law, it must be unequivocally affirmed that the key task of state authorities is to fulfil the most important objective defined by law and based on the existing social values and the binding ethos. The objective is to attain and safeguard the common good in the state on the basis of, and within the limits of, the applicable laws that at the same time set out the methods and scope of social protection in the individual spheres of operation of the legislative, executive, and judicial authorities. The optics of the public attitudes towards various public administration institutions show that the image of a state is a complex issue moulded not only by a wide range of norms, expectations and individual experiences, but also by a diverse cultural, political, and socio-economic context.

It should be highlighted here that one of the best ways to improve the efficiency of the public sector, to reduce transaction costs and to provide a very strong impetus for those in power to carry out major reforms is to boost trust. Rebuilding eroded or lost trust usually requires more time, vaster resources and greater effort than the planned, continuous preventive measures to develop and maintain, for a long time and at an appropriate level, the reputation and mutual trust between the public administration and the society. It is therefore of the utmost importance that those in power focus precisely on the latter tasks with respect to the people they govern.

The government should persistently monitor, analyse and synthesise the conclusions derived directly from quantitative and qualitative research. Those analyses facilitate the development of nationwide strategies to improve and enhance the trust and credibility of the individual state authorities and to deliver public services in a more effective and efficient manner.

In summary, trust in state institutions and administrative bodies, in states as a whole, and in the law, has a direct bearing on the magnitude of innovative

activities, boosts the intensity of social mobilisation, fosters the development of communities, and is the driving force behind the human potential of the state. When a society develops in an atmosphere of mutual trust, not only does the level of prosperity increase, but the quality of life of its individual constituent units – its citizens – also rises. One could even conclude that their life is somewhat easier. Trust always brings commensurate positive values to the person bestowing it and to the one bestowed with it, and the same applies to citizen-state and society-state relations. When we trust someone, our actions are unpretentious and free from uncertainty. We do not have to control anyone or make sure that everything is as we wish it to be. We can then devote more time and energy to our family, work, intellectual development or charitable activities. A state that has trust in its society also does not need to control it, and can devote the expenditure otherwise spent on state control and direct coercion to pro-social activities and to helping those in need. Hence trust is a priceless value, and it is difficult to imagine any further development or right coexistence of societies and the states and laws they create without trust. It is therefore of the utmost importance to constantly monitor the level of public trust in the state and its particular bodies, and to create new solutions to build, maintain the permanently high level of and to regain lost confidence.

BIBLIOGRAPHY

Aristotle. 1996. *Dzieła wszystkie.* [Collection of All Works]. 306. Warszawa: Wydawnictwo Naukowe PWN.

Bugdol, Marek. 2010. "Zaufanie jako element system wartości organizacyjnych." [Trust as Part of an Organisational System of Values]. *Współczesne Zarządzanie* 2: 11–25.

Centre for Public Opinion Research (CBOS). 2012. *Zaufanie społeczne.* [Social Trust]. BS/33/2012. Warszawa, https://www.cbos.pl/SPISKOM.POL/2012/K_033_12.PDF

Chojnicka, Krystyna. Henryk Olszewski. 2004. "Liberalizm polityczny: Locke." [Political Liberalism: Locke]. In *Historia doktryn politycznych i prawnych. Podręcznik akademicki.* [History of Political and Legal Doctrines. Academic Handbook]. Edited by Danuta Wesołowska, Jacek Wiewiórka. 111. Poznań: Ars boni et aequi.

Giddens, Anthony. 1991. "*Modernity and Self-Identity*. *Self and Society in the Late Modern Age*." Stanford: Stanford University Press.

Gil, Damian. 2012. "Wyłączenie sędziego związanego uprzednio wydanym orzeczeniem w procesie karnym." [Exclusion of a Judge Bound by a Previous Judgment in a Criminal Trial]. In *Dyskrecjonalna władza sędziego. Zagadnienia teorii i praktyki.* [Discretionary Power of Judges: Matters of Theory and Practice]. Edited by Marcin Dębiński, Robert Pelewicz, Tomasz Rakoczy. 45–54. Tarnobrzeg: Sąd Okręgowy w Tarnobrzegu.

Graff, Grzegorz. 2001. "Czy istnieje cnota zaufania?" [Is There a Virtue of Trust?]. *Przegląd Powszechny* 12: 309–316.

Graff, Grzegorz. 2003. "Etyczne aspekty zaufania." [Ethical Aspects of Trust]. *Prakseologia* 143: 99–107.

Habermas, Jürgen. 1983. "Klasyczna nauka o polityce a filozofia społeczna." [Classical Political Science and Social Philosophy]. In *Teoria i praktyka: Wybór pism* [Theory and Practice:

A Selection of Works]. Translated by Małgorzata Łukasiewicz. Selected by Zbigniew Krasnodębski. 90. Warszawa: Państwowe Wydawnictwo Naukowe.

Hardin, Russell. 2003. "Street-Level Epistemology and Democratic Participation." In *Debating Deliberative Democracy*. Edited by James S. Fishkin, Peter Laslett. 163–181. Oxford: Blackwell Publishing. https://doi.org/10.1002/9780470690734.ch8

Hardin, Russell. 2006. *Trust*. Cambridge: Polity Press.

Hobbes, Thomas. 1651. *Leviathan, Or, The Matter, Form, and Power of a Common-Wealth, Ecclesiastical and Civil*. Printed for Andrew Crooke: England.

Holmes, Stephen. 1995. *Passions and Constraint: On the Theory of Liberal Democracy*. Chicago: University of Chicago Press.

Jakubowski, Jerzy. 1965. "Pojęcia obowiązywania, realizacji i skuteczności normy prawnej oraz podstawy ich rozróżnienia." [The Concepts of Validity, Implementation and Effectiveness of a Legal Norm and the Grounds for their Distinction]. In *Studia z teorii prawa.* [Studies in Legal Theory]. 318, 320. Warszawa: Państwowe Wydawnictwo Naukowe.

Jasiński, Wojciech. 2009. *Bezstronność sądu i jej gwarancje w polskim procesie karnym*. [Impartiality of the Court and Its Guarantees in the Polish Criminal Process]. 85, 487. Warszawa: Wolters Kluwer.

Kramer, Roderick. 2008. "Paranoja zbiorowa: nieufność między grupami społecznymi." [Collective Paranoia: Distrust Between Social Groups]. In *Socjologia codzienności.* [Sociology of Everyday Life]. Edited by Piotr Sztompka, Małgorzata Bogunia-Borowska. 250. Kraków: Znak.

Kunysz, Justyna. 2014. "Skuteczność prawa (zagadnienia wybrane)." [Effectiveness of Law (Selected Issues)]. *Administracja: Teoria, Dydaktyka, Praktyka* 2(35): 67–93.

Luhmann, Niklas. 1978. "Soziologie der Moral." [Sociology of Morality]. In *Theorie, Technik und Moral*. Edited by Stephan Pfürtner. Frankfurt am Main: Suhrkamp.

Parry, Geraint. 1976. "Trust, Distrust and Consensus." *British Journal of Political Science* 6(2): 129–148. https://doi.org/10.1017/S0007123400000594

Piłat, Robert. 2022."O zaufaniu." [On Trust]. *Culture*, https://culture.pl/pl/artykul/o-zaufaniu.

Rau, Zdzisław. 1992. "Wstęp." In *Dwa traktaty o rządzie.* John Locke. [Introduction to Two Treatises of Government by John Locke]. 59. Warszawa: Państwowe Wydawnictwo Naukowe.

Simmel, Georg. 1975. "Socjologia." [Sociology]. 396. Warszawa: Państwowe Wydawnictwo Naukowe.

Szczepański, Jakub. 2021. "Pokój i wojna. O stanie natury według Johna Locke'a i Thomasa Hobbesa" [Peace and War. On the State of Nature According to John Locke and Thomas Hobbes]. *Studia Polityczne* 49(3): 65–80. https://doi.org/10.35757/STP.2021.49.3.03

Sztompka, Piotr. 2007. *Zaufanie: Fundament społeczeństwa*. [Trust: The Foundation of a Society]. Kraków: Znak.

Tuleja, Piotr. 2016. "Komentarz do art. 2" [Comments on Article 2]. In *Konstytucja Rzeczypospolitej Polskiej.* [The Constitution of the Republic of Poland]. *Komentarz do art. 1–86.* [Comments to Articles 1–86]. Edited by Marek Safjan, Leszek Bosek. Warszawa: Legalis/el.

Wojciechowski, Bartosz. 2004. *Dyskrecjonalność sędziowska: Studium teoretycznoprawne.* [Judicial Discretion: A Theoretical and Legal Study]. Toruń: Wydawnictwo UMK.

Ziembiński, Zygmunt. 1980. *Problemy podstawowe prawoznawstwa.* [Fundamental Problems of Jurisprudence]. Warszawa: Państwowe Wydawnictwo Naukowe.

Zubik, Marek. Wojciech Sokolewicz. 2016. "Komentarz do art. 2" [Comments on Article 2]. In *Konstytucja Rzeczypospolitej Polskiej.* [The Constitution of the Republic of Poland]. *Komentarz do art. 1–86.* [Comments to Articles 1–86]. Edited by Leszek Garlicki, Marek Zubik. Warszawa: LEX/el

Legislative acts

The Constitution of the Republic of Poland of 2 April 1997 (official journal "Dz.U." of 1997, 78, item 483).

The Act of 10 September 1999 – The Fiscal Penal Code (official journal "Dz.U." of 2024, item 628, 850).

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THE "DOCTRINE" OF LAW IN ISRAEL

Abstract. This article examines the doctrine of law in Israel, highlighting the integration of various legal influences, particularly the significant role of British legal traditions in shaping the legal framework. Despite the absence of a formal written constitution, Israel's Basic Laws serve as a constitutional foundation that guides governance and protects individual rights. The legal system reflects a unique blend of the Jewish law, the British common law, and modern statutory law, creating a dynamic and distinctive legal framework. The article provides a comparative analysis of Israel's legal system in relation to the British law and the Jewish law, emphasising the implications of not having a singular constitution and the importance of the Basic Laws in safeguarding rights. Overall, the article contributes valuable insights into the complexities of Israel's legal landscape, particularly the balance between secular and religious influences, making it relevant for scholars, practitioners, and those interested in the intersection of law and society.

Keywords: basic laws, British legal traditions, legal framework, Israeli constitutional system, legal doctrine

DOKTRYNA PRAWA W IZRAELU

Streszczenie. W artykule przeanalizowano doktrynę prawa w Izraelu, podkreślając integrację różnych wpływów prawnych, w szczególności znaczącą rolę tradycji prawnych brytyjskich w kształtowaniu ram prawnych. Pomimo braku formalnej, pisemnej konstytucji, podstawowe ustawy Izraela pełnią funkcję konstytucjonalną, która kieruje rządzeniem i chroni prawa jednostki. System prawny odzwierciedla unikalne połączenie prawa żydowskiego, brytyjskiego prawa zwyczajowego oraz nowoczesnego prawa ustawowego, tworząc dynamiczne i charakterystyczne ramy prawne. Artykuł dostarcza analizę porównawczą systemu prawnego Izraela w odniesieniu do prawa brytyjskiego i prawa żydowskiego, podkreślając konsekwencje braku jednolitej konstytucji oraz znaczenie podstawowych ustaw w ochronie praw. Ogólnie, artykuł wnosi cenne spostrzeżenia na temat złożoności krajobrazu prawnego Izraela, szczególnie równowagi między wpływami świeckimi a religijnymi, co sprawia, że jest ważny dla naukowców, praktyków oraz osób zainteresowanych skrzyżowaniem prawa i społeczeństwa.

Słowa kluczowe: Podstawowe ustawy, brytyjskie tradycje prawne, ramy prawne, izraelski system konstytucyjny, doktryna prawna

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The legal doctrine in Israel embodies a fusion of legal influences, with British legal traditions playing a substantial role in the evolution of the legal framework. Despite the absence of a formal, singular written constitution, the Basic Laws have emerged as a constitutional framework guiding governance and safeguarding individual rights. This progression underscores the adaptability of the legal system in meeting the societal needs of Israel while drawing upon the historical foundations of British legal principles.

A blend of legal traditions refers to the incorporation of diverse legal influences, principles, and practices from different sources into a unified legal system. In the context of Israel, the legal system reflects a fusion of various legal traditions, including the Jewish law, British common law, and modern statutory law. This blending of legal traditions is evident in the development of legal institutions, principles, and doctrines that draw from multiple sources to create a unique and dynamic legal framework.

On the one hand, the following article seeks to present this diverse influence on the formation of the legal system in Israel and. On the other hand, it attempts to characterise the distinctiveness and specificity of the doctrine of the law in Israel.

The article offers valuable insights into the coexistence and influence of different legal traditions, making it relevant for those studying comparative law and legal pluralism. It enhances the understanding of the Israeli society by illustrating how the legal system reflects the country's unique cultural and historical context, particularly the balance between secular and religious influences. Additionally, the discussion on the Basic Laws highlights their significance in current debates about governance and human rights in Israel. Finally, the article's findings may have broader implications for other jurisdictions facing similar challenges related to legal integration and the effects of colonial legacies on modern legal systems.

The article presents a comparative analysis of Israel's legal system, particularly in relation to British legal traditions and the Jewish law. The central argument of the article is that Israel's legal framework is a unique fusion of various legal influences, primarily British common law, the Jewish law, and modern statutory law. This blending creates a distinctive legal doctrine that reflects the societal needs and historical context of Israel.

The key hypotheses presented in the article, which will be explored, are as follows:

1. **Comparative Legal Systems** – the article contrasts Israel's legal system with the British law, highlighting how British legal traditions have significantly influenced the development of legal institutions and principles in Israel. It also touches upon the differences between the Israeli law and other legal systems.

2. **The Absence of a Formal Constitution** – the article discusses the implications of Israel not having a singular written constitution, instead relying on the Basic Laws that function as a constitutional framework. This aspect is

crucial for understanding how governance and individual rights are safeguarded in Israel.

3. **Adaptability and Evolution** – the article emphasises the adaptability of the Israeli legal system in addressing contemporary societal challenges while drawing from its historical legal foundations. This adaptability is essential for readers to understand the dynamic nature of law in Israel.

In summary, the article is a significant contribution to the understanding of Israel's legal landscape, offering a nuanced perspective that is beneficial to legal scholars, practitioners, and anyone interested in the intersection of law and society.

1. THE LEGAL SYSTEM IN ISRAEL – INTRODUCTION

The legal system in Israel draws extensively from the Western legal tradition, sharing the defining characteristic of the rule of law; namely, that all members of a society are considered equal before the law.

At the centre of the legal perception lies the individual – both their rights and duties. Israel, being a democratic sovereign state, with a mostly secular legal system (although one inspired by certain Jewish values) and a large religious population, albeit a minority, is faced with the challenge of balancing the need to enact laws which operate according to the needs of society at large while also acknowledging the Jewish ethos and character of the state.

Israel is a developed yet simultaneously evolving society. At the foundation of the legal culture lies the rational human being, as articulated by the Aristotelian philosophy, according to which this agent possesses the intellect necessary to make rational decisions and define goals. The law is a means that can assist rational agents to achieve such goals.

An illustrative example of the unique fusion of legal traditions in Israel is the active role of judges in shaping legal norms.

In Israel, judges are not only interpreters of the law but also creators of it, a practice influenced by the British common law tradition. This contrasts with many continental legal systems, where judges typically apply existing laws without significantly altering them (Mautner 2011, 267).

The Israeli Supreme Court exemplifies this judicial activism by expanding legal interpretations to protect individual rights and address social issues. Landmark rulings have tackled human rights, minority rights, and social justice, with the court often filling legislative gaps or challenging government actions (Hirschl 2004, 15–17).

This approach reflects a blend of legal influences: the common law tradition that allows judges to establish legal precedents and the Jewish legal tradition that prioritises justice and moral considerations. Consequently, the Israeli legal culture

demonstrates a dynamic interplay between these traditions, highlighting how diverse legal influences can coexist and shape the legal landscape (Rosen-Zvi 2004, 622).

As part of the Western legal tradition, the Israeli law has been significantly influenced by English common law, yet with time has adopted its own legal institutions, traditions, and principles. All the following derive from common law: the principles of trust, precedent, evidence, and legal prevention; and the adversarial system in criminal law, defined by two advocates representing their parties' position before an impartial person or group of people, typically a jury or judge who seeks to ascertain the truth based on the evidence presented before them and make a ruling accordingly. Moreover, Israel has adopted interpretative law (Barak 2005, 22), meaning the judicial process of determining the intended meaning of a written law or document, which thus empowers judges to make rulings accordingly. In this way, Israel has recognised the judge's status in the society as a figure authorised to interpret the law. Lastly, Israel has applied the principle of estoppel, according to which actors are prohibited from making statements that contradict what is implied by the previous actions or assertions made by the same individual (Barak 1992, 211).

The Israeli legal system's pyramidal structure (Cohen 1989, 287), influenced by common law, comprises three main courts: the Supreme Court, District Courts (organised by district), and Magistrates' Courts. The number of judges varies at each level, with 15 justices appointed to the Supreme Court by the President of Israel, following nomination by the Judicial Selection Committee and legislation by the Knesset. The system also includes national and regional labour courts. The israelisation of common law in Israel empowers judges not only to interpret and apply law but also to create it, diverging from the continental system's view of a judge's role. This approach, rooted in the British Mandate over Palestine, emphasises judges as active rule-makers, shaping the legal landscape in Israel (Barak 1992, 197–204; Shachar 1995, 217–219).

The 'israelisation of common law in Israel' is the process of adapting and integrating the British common law principles into the Israeli legal system, reflecting Israel's unique cultural, social, and historical context (Shetreet, Stark 2021, 362).

Judicial Activism – judges in Israel take an active role in interpreting and developing legal principles to tackle social issues and safeguard individual rights, which contrasts with the more conservative application of common law found in other jurisdictions (Bendor 2007, 1–30).

The Integration of the Jewish Law – the framework of common law in Israel incorporates the Jewish legal principles, recognising the Jewish identity of the state while also maintaining democratic values (Aharon 2018, 145–168).

Adaptation to the Local Context – common law doctrines are modified to align with Israel's unique cultural, social, and political contexts, resulting in the establishment of distinct legal norms and practices (Mautner 2017, 155–175).

Dynamic Legal Landscape – the legal system in Israel adapts and evolves in response to societal shifts and legal challenges, creating a vibrant and dynamic legal culture (Soffer 2021, 77–99).

2. THE APPLICATION OF THE ENGLISH LAW IN BRITISH COLONIES

The history of British Mandate law in the Land of Israel began with the British conquest of the Ottoman-controlled territory at the end of World War One. The British inherited the existing legal system that operated in the region at the time – the Ottoman law. For hundreds of years, the Ottoman law combined the Islamic *Sharia* law and original legislation enacted by the Ottoman sultans – the two existed side by side. However, during the course of the 19th century, the Ottoman law underwent a process of change. In the middle of that century, the Ottoman rulers concluded that the only way to preserve the diminishing power of their empire *vis-à-vis* the Western powers was to enact sweeping reform of the Ottoman regime; as part of those reforms, the sultans also changed the legal system applied throughout the empire. They adopted a list of codes based on the Western law (principally French) and repealed large swathes of the formerly applied laws – mainly the Islamic parts, which had been applied throughout the empire up until the mid-19th century (Ma'oz 1968, 189–199).

There were branches of law in which the sultans partially retained Islamic law precepts. The most important was civil law, which continued to be based on the Islamic religious law – *Sharia* – also after the reforms. However, even this field of law exhibited a certain Western influence, since the Ottoman regime gathered the civil rules of *Sharia* into a Western-style code – the *Mecelle*. The *Mecelle*'s written form was partially influenced by the structure of European civil codes, but the source of its norms was Islamic religious law. Other areas of pre-reform Ottoman law, for instance family law, remained almost unchanged. As a consequence of the reforms, a new legal system emerged, in which French, Islamic, and Ottoman norms are all intermingled. The impact exerted by the reforms on the daily life of the subjects at the periphery of the Ottoman Empire, such as Palestine, is unclear. It is possible that the impact was negligible. In the 19th century, a large proportion of the population living in Palestine did not use the Ottoman regime's legal systems, but regulated their affairs through non-governmental legal systems, such as the religious tribunals or the European Consular tribunals established under the Capitulation Treaties. In any event, when the British conquered the

Land of Israel, they encountered the Ottoman legal system, which had undergone a partial process of "westernisation."

What did the British do with this legal system they had encountered? Palestine was far from being the first place to be colonised by the British; it was, rather, one of the last places to join the British Empire, at a time when it was already in a process of decline. The British had, therefore, acquired experience of conquest and dealing with the local legal systems which had existed in the occupied colonies. They never formulated a uniform policy for dealing with the legal systems in the conquered lands, but one could say that there were certain elements that characterised the British legal policy throughout the empire.

The British policy at the end of the 19th century and the beginning of the 20th century aimed to preserve, as far as possible, the legal *status quo* in the colonies, in particular those colonies which had developed a local legal system preceding the British conquest.[1] The British authorities had no interest in antagonising the local population, which could potentially occur following the wholesale replacement of the existing legal system with a new one. However, one cannot say that the British entirely retained the legal systems which they encountered throughout their conquests. The longer a certain colony was subject to the British rule, the deeper the British law penetrated the occupied colony. This process of the penetration of the English law, referred to as "anglicisation", was at times the result of a concerted and planned effort on behalf of the British rulers of the colony, or that of the Colonial Office in London. The process, however, turned out to be the product of circumstance. Some local legal systems were more impervious to the penetration of the English law, and others less so.

In certain colonies, the English established a single governmental legal system, but in other parts (in particular throughout the African colonies), they created a "Dual Legal System." This system upheld an institutional distinction between the governmental legal system that applied the Western norms and the native legal system that applied local "customary" norms (or at least those perceived by the British as local customary norms). All these factors mattered for the process of differentiating legal systems within the various British colonies, as well as for the extent to which the English law penetrated the colonies. Some colonies, such as in the Caribbean Islands, had legal systems very similar to the legal system at the heart of the empire – England. In other colonies, such as those in Africa, the English law had very little impact, and certainly not in any practical way; the majority of disputes were adjudicated by means of custom-based courts, which received the blessing of the British rulers, or through the agency of extra-governmental native systems that had existed before the conquest (Elias 1962,

[1] For examples of different discussions of the British colonial legal policy in the various colonies of the Empire, see: Olawale (1962, 80–81); Morris (1972, 73); Zweigert, Kötz (1987, 233–245); Kirkby, Coleborne (2001).

80–81; Morris 1972, 73; Zweigert, Kötz 1987, 233–245; Kirkby, Coleborn 2001, 106–123).

The degree to which the English law was imported and thereafter imposed varied not only from one colony to the next, but also varied between the various branches of law within the law of any given colony. Two fundamental legal distinctions affected the extent to which the English law replaced local law: first, the distinction between substance and procedure; and second, the distinction between the private sphere and the public sphere.

I will first address the distinction between substance and procedure. The process of replacing the procedural aspect of the law (the laws of evidence, civil and criminal procedure) took place in place of replacing the substantive aspect of local law (such as property law, family law, or contract law). Replacing local laws of evidence and procedure with British laws of evidence and procedure was significant from the practical standpoint, since the governmental legal systems in the colonies were staffed by British judges and counsel, who were trained and specialised in the English procedure and English laws of evidence. Thus, one of the chief objectives standing behind the process of replacing the procedure was to exercise control over the law of a given colony, in particular over the application of law.

The other objective behind replacing the procedure was to increase the effectiveness of the colonial legal systems, at least as far as the British were concerned. Local legal systems, such as the Ottoman one, were often described by the British and other westerners as corrupt.[2] There were also British claims to the effect that their principal contribution to the law of the colonies was not in changing local substantive law, but mainly in the manner in which the local law was enforced. The British, according to the claim, gave the native population a legal system that enforced local norms; however, contrary to the local systems, it did so efficiently and in an incorrupt manner. Thus, in British texts, the claim is often found that the British "civilised" the local law throughout the colonies with ideas such as "the Rule of Law." For example,

> supremacy of law (…), which embodies three concepts: the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations. (Dicey 1915, 189)

[2] A similar (but not identical) example of that approach can be found in the manner in which Max Weber described the Islamic law as law that cannot ensure certainty. Max Weber's argument regarding the Islamic law, particularly in his comparative analysis of legal systems, primarily focuses on the intrinsic characteristics of the Islamic law that affect its ability to ensure legal certainty. Weber's analysis does not centre on corruption *per se* but, rather, on how the nature of the Islamic law influences its application and predictability (Rheinstein 1954, 213). For a critique of Weber's theory of the Islamic law, cf. Haim Gerber (1994).

The notion of the rule of law was also at the heart of this judicial system. This idea can be roughly defined as "[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes" (Oxford Reference 2023). This concept appeared in stark contrast to the native legal systems, where, it was claimed, judges would rule according to their discretion, which left the law susceptible to corruption and extortion, rather than operating according to hard and fast rules, where equality before the law was the chief principle.

It is difficult to ascertain to what extent the British description of local systems as corrupt was an accurate one, and how far it was a description that was intended to justify British colonialism. (For a general discussion of comparative imaging of the English law versus the local law, see: Chanock 1985, 5). It is even more difficult to ascertain whether the British did, in fact, succeed in creating more efficient legal systems in the colonies, as compared with the systems in place prior to colonialisation. In this regard, it is interesting to note a story that appeared in one of Norman Bentwich's books, suggesting that it was precisely the (alleged) lack of corruption in the British system that actually caused crime to rise. Bentwich, a Jewish British jurist who served as the Attorney General to the British Mandatory Palestine's government (Breitman, McDonald, Hochberg 2007, 144), relates that in the early days of the British Mandate, an Arab citizen of Haifa complained to him that because British judges could not be bribed, crime in the nation actually increased. The Arab's claim (as relayed by Bentwich) was that during the Ottoman times, "crime didn't pay", because criminals were forced to pay over all their criminal gains as bribes to the judges. Once the British conquered Palestine, the need for such bribes ended, and with it, crime began to pay off and, therefore, flourished (Bentwich 1961, 276).

The deterrent effect often depends on the cultural context and societal norms. Under the Ottoman rule, bribery may have created the perception of the law as flexible and negotiable, where criminals could calculate that the costs of illegal activities were offset by the ability to bribe judges. When the British removed this avenue, it may have led to a shift in how crime and its consequences were perceived. Yet, the removal of corruption might not have immediately built trust in the new legal system, particularly if the population remained sceptical of colonial rule (Miller 2022, 15).

Socioeconomic Factors – crime often stems from underlying issues such as poverty, the lack of opportunities, and social inequality. If the British legal system failed to address these root causes, simply removing bribery would not have been enough to deter crime. Without legitimate means to achieve their goals, some individuals may have turned to illegal activities (Barkey 2008, 67–83).

The Perception of Justice – the perception of justice and whether the legal system effectively handles crime can influence deterrence. If individuals believe they can evade punishment or feel the system is inefficient, they may be more inclined to engage in criminal behaviour.

Bentwich's account suggests that when bribery was removed, crime became more profitable, as the risks of being caught and punished were not perceived as significant. Importing the English law was also the consequence of a lack of familiarity with the local law. Thus, for instance, Anton Bertram, an English jurist who was the Attorney General of the Bahamas, a judge in Cyprus, and the Chief Justice of Ceylon, stated in 1930 – drawing on his personal experience – that the "most surprising characteristic of our legal system is the diversity of legal rules which our courts apply. Judges in the various supreme courts [of the colonies] are promoted from one legal system to another, and immediately, once they arrive in the new colony, are required to operate a legal system (…) which is entirely foreign to them (Bertram 1930, 152)."

Furthermore, it is worth noting that importing the English law into the colonies was not always an intentional process. When new legal questions arose in the legal system of a certain colony, the English lawyers and judges in the colony naturally turned to the English law to resolve the problem; in this manner, the English law was imported into the colony in an inadvertent manner (Fisch 1992, 39).

Regardless of whether the British colonial legal system was intentional or unintentional, or whether it was more efficient and less corrupt than the local pre-conquest legal system, there can be no doubt that the British caused a massive change of procedure and evidence laws in a significant part of the territories they conquered.

Changing the norms of the substantive local law was more difficult than changing the native procedure; however, here too the process of anglicisation was witnessed. Branches of law perceived as "private" (or "religious") – such as family law, inheritance law, and, to a certain extent, property law – did not undergo the process of anglicisation. Intermediate fields of law, such as contract and tort, were replaced by English rules, but this process took many years. Finally, the "public" spheres of law, criminal law, and commercial law, for the most part, did undergo the process of anglicisation (Zweigert, Kötz 1987, 235, 241–421; Liebesny 1975, 57; Friedman 1995, 253–254).

3. THE APPLICATION OF THE ENGLISH LAW IN MANDATORY PALESTINE

The distinction between procedure and substance, and that between the public and private spheres, also influenced the process of the anglicisation of the law in Mandatory Palestine. The Land of Israel, or pre-Mandate Palestine,

was conquered by the British in 1917–1918. According to the rules of international law, the occupying power is required to maintain the legal *status quo* in the occupied territory; and indeed, in the early years of the British rule over Palestine, the British did not impose a great deal of new legislation. However, in 1922, the League of Nations granted Great Britain a mandate over Palestine. Under the terms of the mandate, the British were required to ensure "political, administrative, and economic conditions which would ensure the establishment of a Jewish homeland [in Palestine]" (Malachi 1952, 43–53). That provision allowed the British to effect far-reaching legal changes in the laws of Palestine. This was, therefore, a crucial moment in laying the groundwork for the future establishment of a Jewish state in British Mandate Palestine, as it essentially granted legal recognition from the international community and ensured that the future legal system would be based in part on the British method.

The changes to Palestine's international status caused the British to re-organise the legal system, which was reflected in the "King's Order in Council – 1922", i.e. a constitutional document that defined the structure of the various authorities of the British Mandatory regime. The King's Order in Council foresaw the establishment of a legislative assembly that should (at least partially) represent the local populace – both Arab and Jewish. However, owing to disagreements between Arabs and Jews concerning the composition of the assembly, it was never ultimately established, and both the legislative branch and executive authority were vested in the British High Commissioner. This was illustrative of the great challenges posed by the two communities residing in the land and the impact on the establishment of a coherent legal system.

The King's Order in Council of 1922 also dealt with the establishment of governmental courts and empowered the religious courts of the various congregations to adjudicate on certain matters of family law and inheritance law. Section 46 of the King's Order in Council laid out the rules according to which the government courts would have to adjudicate. Section 46 prescribed that the government courts would apply the Ottoman and the British Mandatory legislation; however, in the event that the legislation would not provide grounds for answering the legal question facing them, the government courts would use the "principles of common law and equity" from the English law, as long as they are suitable to the conditions of the land and its inhabitants (Tadeski 1977, 132–188; Yadin 1962, 59–61; Zweigert, Kötz 1987, 221–222, 234, 237–238).

What is evident from all this is that the Order in Council envisaged two central mechanisms to import the English law. The first one was the importation by the agency of legislative pronouncements issued by the High Commissioner; the second one was importing the English law through case law, under the guidance of Section 46, in cases in which the Ottoman and Mandatory legislation did not apply.

Over the course of the three decades of the British Mandatory rule over Palestine, the Mandatory legislator replaced some of Ottoman laws with the

Mandatory Ordinances, which were based on the British or British-Colonial legislation. The replacement process reflected the distinctions between substantive law and procedure, and between the public and private domains, as mentioned above. The British began the process by replacing the procedural and commercial aspects of the Ottoman law, and later turned their attention to more "private" aspects of law. In the 1920s, the British replaced the Ottoman Commercial Code, the Ottoman Criminal Procedure Code, as well as certain Ottoman rules in the laws of evidence. Over those years, a more orderly system of land registration was also put in place, and planning and building laws were enacted, as well as other laws designed to regulate the use of land by the indigenous population (Stein 1984, 1361; Scott 1953, 85).

The legislative processes of the 1920s were presided over by Norman Bentwich. As a fervent Zionist and delegate at the annual Zionist Congress (Bentwich 1962, 21–23), Bentwich was eager to aid the Jewish settlement of the land, and it appears that for this reason he focused his efforts on generating modern legislation in the field of commercial law which (so he assumed) would assist Jewish immigration and settlement (Bentwich 1932, 91, 148–151; Ashbee 1923, 234, 269–270; Levine 1998, 36; Shahar 1982, 649, 675; Shahar 1984, 204, 207–208). Bentwich's interest in commercial law, and relative neglect of other legal branches, was also the result of his desire to consider the differing needs of the two national communities in the Land of Israel, namely the Arabs and the Jews. Bentwich wrote in his papers that "similar to a circus performer who simultaneously rides two horses, one is slow [meaning the Arabs] and the other fast [meaning the Jews]" (Bentwich 1932, 273). The solution he found to this problem was to limit legislation to certain legal branches while retaining the local law in others. "The principal impulse to legislate in Palestine – Bentwich wrote in 1932 – was the demand for modern laws on behalf of the progressive population immigrating to Palestine … from Europe [meaning the Jews]" (Bentwich 1932, 273, 277). The Arabs, on the other hand, he stated, would be "permitted" to retain the legal rules controlling "contracts and other simple transactions [of theirs]" (Owen 1994, 115). Bentwich's perception again highlighted the challenges of importing, establishing, and implementing a coherent legal system in a country with two conflicting communities.

It is interesting to note that the legislation of the 1920s mainly brought about a replacement of the French segments of the Ottoman law. The Ottoman Civil Code (the *Mecelle*) and the Ottoman land law, as Bentwich said, "are perceived as belonging to the Eastern and Islamic tradition", and for those reasons it was decided "to leave them generally in force" (Eisenman 1978, 126–131). However, he added, "the same cannot be said of commercial law. No sanctity of religion or tradition enshrined the Ottoman Commercial Code, which was originally based on the French law, and the provisions of that Code, imported into the empire in 1860, did not at all suit a country in which, under the auspices of British

administration, the project of the people with the most developed commercial instincts [that is to say the Jews] was under development" (Bentwich 1932, 274–275).

The conscious use of legislation as a means of encouraging the development of the land and promoting the Zionist enterprise seems to have disappeared in the 1930s. One reason was likely Bentwich's resignation in the early 1930s as a result of pressure from both the Arab residents and the Colonial Office. That, however, did not mean the end of the Mandatory legislative project. The British, during the 1930s, replaced the Ottoman Criminal Code and the Ottoman Civil Procedure with legislation based on the English law. Moreover, several other laws of a commercial nature were also enacted, such as the Mandatory Bankruptcy Ordinance. However, the legislative fervour did lessen in the 1930s. The majority of legislation in the late 1930s and early 1940s was introduced to "put out fires" – emergency legislation that responded to the 1936–1939 Great Arab Revolt as well as the operation of the Jewish Underground, or legislation in which the regime had a clear interest, such as the Mandatory Income Tax Ordinance of 1941, enacted to add sources of revenue for the operation of the Mandatory government. Only at the end of the 1940s, when the British rule was nearing its end, did a new wave of legislative initiatives begin, which mainly dealt with regulating branches of law which the British rulers had rather neglected until then, such as tort (Likhovski 1995, 291).

Legislation was one way in which the English law penetrated Mandatory Palestine. Another was anglicisation through case law. These measures were expressed in several ways. Some of the Mandatory Ordinances had interpretation clauses that referred the judiciary expressly to the English law to interpret them; some Mandatory Ordinances contained a provision that guided the judges not only to interpret the ordinance by means of the English law, but also to fill in any lacunae in the particular branch of law that was the subject of the ordinance, by reference to the English law. However, even where there was no such provision, the Mandatory judges naturally inclined towards the English law to interpret the ordinances (Friedmann 1975, 192). There are several reasons for this.

The deference to the English law was a result of problems that emerged in the provision of compensation in tort law. The judges recognised that there was a problem, namely that the Ottoman law does not provide compensation for bodily harm. This is illustrated by the PSAD Khoury CA 88/30 Municipality of Haifa v Khoury, 4 Rotenberg 1343 (1932). The case pertained to a pit that was dug by the Municipality of Haifa. The municipality did not cover the ditch or mark it with a warning sign. Mr. Khoury fell into the ditch and was injured. He sued the municipality for damages. The court ruled that the Ottoman law did not allow him to receive compensation for the bodily injuries caused to him due to the negligence of the municipality. The court refrained from making use of Section 46 of the King's Order in Council and deferring to the English law and deriving from it the authority to grant the compensation to the injured party.

At the end of the 1930s, and especially in the 1940s, this trend in rulings reversed. In the ruling on the case of CA 29/47 London Society for Promoting Christianity Among the Jews v. Orr, 14 PLR 218 (1947), which also dealt with a tort claim for negligence, the Supreme Court ruled that it was indeed possible to import English tort law into Israel by virtue of Section 46. This was also the case, for example, in the verdict in the Raphael case, CA 70/44 Raphael v. Rachamim, 11 PLR 367 (1944). In this ruling, it was a question of the pre-emptive right given by the Ottoman law to a partner to purchase his partner's assets. The court ruled that this right is an archaic right that does not fit the conditions of the country, and that the provisions of the Ottoman law must be interpreted taking into account the social changes that had taken place in the country during the mandate period. The willingness of Mandatory Courts to import the English law was combined with their willingness to reinterpret the provisions of the Ottoman law and create an independent law in the Land of Israel (Likhovski 1995, 291).

In addition, the English law entered Mandatory Palestine by virtue of the above-mentioned Section 46 of the King's Order in Council. This section instructed the Mandatory judges to turn to the English law when the Ottoman and/or Mandatory legislation did not apply. In the early years of the British Mandate, the courts did not make much use of that section; however, from the mid-1930s onwards, the Mandatory courts began to make significant use of it to import the rules of the English law, especially in civil law, but also in other branches, such as administrative law. This happened, because the Ottoman law deprived the residents of the possibility of receiving compensation for bodily harm and it was necessary to resort to importing the English law in order to allow the population to receive compensation for damages.

The outcome, therefore, was that the Mandatory judiciary, like the Mandatory legislature, actively worked to anglicise the legal system in Palestine; however, that activity did not bring about a complete replacement of the local law. For that reason, when the British left Palestine in 1948, they left behind them a mixed governmental legal system, i.e. one based partially on the English law and partially still Ottoman. As mentioned above, the process of replacing the Ottoman law with the English law was partly by design and partly the outcome of random events and special circumstances. In any event, it did not take place instantly, but spanned a period of more than 30 years.

4. POST-MANDATORY PALESTINE AND THE LEGACY OF MANDATORY LAW

What happened to the English / Ottoman legal system (which could be referred to as the "Mandatory System"), which the British bequeathed to the State of Israel after its foundation?

The Israeli law in its current form is evidently not the same as the Mandatory Law from 1948. Since 1948, and mainly since the 1960s, the Israeli law gradually disengaged from the Mandate's legacy, and mostly from the Ottoman part of it. However, this manifested as a part of a gradual transformation rather than an overnight revolution. To illustrate the gradual nature of this legal transition, Israel did not formulate a written legal constitution. Israel has a founding charter, its Declaration of Independence, which lays out the vision, character, ethos, and *raison d'être* of the nascent state, yet it does not suffice to constitute a written constitution. Suzie Navot described the Declaration of Independence as a "ceremonial document (…) [which] purported to present the credo of the new state while establishing legal facts to suit a state created *ex nihilo*" (Navot 2014, 5). Thus, it carries great weight, but falls short of being a constitution.

Moreover, in the subsequent years, Israel adopted a series of Basic Laws, which have a special status, but a legal constitution which would generate an entirely new legal system did not materialise.

The legal system since 1948 has borne witness to several changes and has been subject to the influence of numerous legal cultures. In the 1960s and 1970s, there was an attempt, which was only partially successful, to transform Israeli civil law in the spirit of the Continent. In the 1980s and 1990s, continental influences in the Israeli law became strongly supplemented by American legal influence, most particularly apparent in the Supreme Court's case. Indeed, since 1948, the Israeli legislature and courts have been striving, in some way or another, to create an original Israeli legal system, without foreign influence.

The quest for an original Israeli legal system since 1948 reflects a complex interplay of historical, cultural, and legal influences. When discussing what an "original Israeli legal system" might entail, it is important to consider several dimensions:

The Historical Context – after the establishment of the State of Israel in 1948, there was a strong desire to create a legal framework that reflected the unique identity of the new state. This involved navigating the legacies of Ottoman, British, and local legal traditions (Gavison 1997, 36).

The Jewish Law (Halacha) – one significant element of the Israeli legal identity is its connection to the Jewish law. While Halacha has influenced certain aspects of family law, property law, and personal status issues, it has not formed the sole basis of the legal system. The challenge has been in integrating these principles into a modern legal framework that accommodates a diverse society (Silberg 1965, 347).

The Israeli Context – the legal system has also evolved from the social, political, and economic realities of Israel. Issues such as the relationship between Jewish and Arab populations, security concerns, and democratic values have shaped legal developments. This context has led to a distinctive blend of laws and principles that address the needs of a multifaceted society (Rubinstein 2004, 14–15).

The Influence of Other Legal Cultures – the incorporation of continental and American legal principles highlights the pragmatic approach of Israeli lawmakers and judges. This blending aims to enhance the effectiveness of the legal system, ensure human rights, and promote justice while trying to retain a uniquely Israeli character (Dotan 2014, 21).

Judicial Activism – the Israeli Supreme Court has played a pivotal role in interpreting laws and rights, often infusing international legal norms into the domestic framework. This has further complicated the notion of an "original" system by incorporating external influences while striving for local relevance (Rosen-Zvi 2001, (53.

That being said, the legacy of the Mandate affected the shaping of many aspects of the Israeli law. The Israeli legal system inherited the principle of precedent from the Mandatory system as well as the idea that judges have an important and active role to play in shaping norms; the centrality of lawyers in conducting legal proceedings; the uniform structure of the court system; and many other characteristics. Even when a branch, or several branches, of the Israeli law underwent partial codification processes (for instance, civil law has been in the thrust of a decades-long process of codification on the basis of models imported from Europe), the Israeli legislature retained the English notion from the Mandatory era, namely that judges actively create norms. However, this assumption regarding the function of the judiciary is not accepted on the Continent. The connection between the Israeli law and the Mandatory law is present not only on the more abstract planes of the Israeli legal system, but also in the details.

Today, a truly unique Israeli legal system has materialised, which is difficult to categorise. It is a mixed jurisdiction – a system with its own style amidst Western legal traditions – based primarily on the common law.

The uniqueness of the Israeli legal system can be effectively argued by comparing it to other legal systems and highlighting specific distinguishing aspects:

The Influence of the Jewish Law – a defining characteristic of the Israeli law is the active integration of the Jewish law (Halacha) into legal reasoning and interpretation, particularly in family law and personal status issues. This contrasts with many legal systems that may only reference religious principles (Silberg 1965, 242).

The Basic Laws as Constitutional Framework – instead of a formal written constitution, Israel operates under a series of Basic Laws that serve a constitutional function, reflecting the values of a Jewish and democratic state. This framework is distinct from other democracies that rely on a single, codified constitution (Friedmann 2016, 67–88).

Judicial Activism and the Role of Courts – the Israeli judiciary, especially the Supreme Court, plays an active role in shaping public policy and interpreting

laws, often balancing individual rights against state interests. This level of judicial activism is more pronounced than in many other legal systems (Dotan 2014, 25).

Added to these layers of complexity is the fact that the State of Israel is not a simple democracy; it is both a democratic state and a Jewish one, and this is its uniqueness. Thus, alongside inheriting numerous legal traditions, which have subsequently evolved, Israel has attempted to synthesise Western legal principles with Jewish values and some elements of the Jewish law.

The influence of the Jewish law (Halacha) on the Israeli law, especially in family law and personal status matters, is a defining feature of the Israeli legal system. Halacha governs key areas such as marriage, divorce, and burial for Jewish citizens, with rabbinical courts holding exclusive authority over these matters. This integration contrasts with many secular legal systems that separate religion and law, and it creates complex legal and social implications, particularly for individuals who may not meet Halachic requirements or prefer civil solutions. While civil law in Israel remains largely secular, religious law's influence in personal status cases highlights the tension between Israel's dual identity as both a Jewish and democratic state (Menachem 1994, 287).

This balancing act has led to ongoing debates, as secular Israelis push for civil marriage and divorce options, while religious communities defend the role of Halacha as essential to Israel's Jewish character. Unlike many Western countries where religious law has limited legal standing, Halacha is actively integrated into the Israeli legal reasoning in these specific areas, leading to conflicts between religious obligations and civil liberties. The Israeli Supreme Court has occasionally intervened to limit religious rulings that infringe on individual rights, reflecting the broader challenge of reconciling religious traditions with modern democratic values (Halperin-Kaddari 2004, 17).

This presents several challenges, all of which have recurred throughout the history of the State.

5. CONCLUSION

The legal system in Mandatory Palestine was a mix of English and Ottoman laws. The British Mandate introduced the English law through legislation and case law, gradually replacing some Ottoman laws with Mandatory Ordinances based on the British or the British-Colonial legislation. Section 46 of the King's Order in Council instructed judges to turn to the English law when the Ottoman or the Mandatory legislation did not apply, leading to the importation of English legal principles, especially in civil and administrative law.

After the British left Palestine in 1948, they left behind a mixed legal system, based partially on the English law and partially on the Ottoman law. The Israeli law disengaged from the Mandate's legacy over time, transitioning away from

Ottoman influences and gradually transforming into a unique legal system. While influenced by various legal cultures, including continental and American legal systems, Israel has strived to create an original legal system.

The Israeli legal system inherited principles from the Mandatory era, such as the role of judges in shaping norms and the importance of precedent. Despite undergoing partial codification processes based on European models, the Israeli law retains elements from the Mandatory period, reflecting a mix of legal traditions and values, including the Jewish law. Israel's legal system is a mixed jurisdiction with its own style, blending Western legal principles with Jewish values, presenting unique challenges and complexities.

BIBLIOGRAPHY

Aharon, Gidon. 2018. "Jewish Law and the Israeli Legal System: Between Tradition and Modernity." *Journal of Legal Pluralism and Unofficial Law* 197–204.

Barak, Aharon. 2005. *Interpretation in Law:* Volume I. *The General Theory.* London: Weidenfeld & Nicolson. https://doi.org/10.1515/9781400841264

Barkey, Karen. 2008. *Empire of Difference: The Ottomans in Comparative Perspective.* Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511790645

Bendor, Ariel. 2007. "Judicial Activism and the Role of the Judiciary in Israel." *Israel Law Review* 40(1): 607–612.

Bentwich, Norman. 1932. *England in Palestine.* London: Allen & Unwin.

Bentwich, Norman. 1962. *My Seventy Seven Years.* London: Routledge & Kegan Paul.

Bertram, Anton. 1930. *The Colonial Service.* Cambridge: Cambridge University Press.

Breitman, Richard. Barbara McDonald Stewart. Severin Hochberg. Eds. 2007. *Advocate for the Doomed: The Diaries and Papers of James G. McDonald*. Bloomington: Indiana University Press.

Chanock, Martin. 1985. *Law, Custom and Social Order.* Cambridge: Cambridge University Press.

Dicey, Albert Venn. 1915. *Introduction to the Study of the Law of the Constitution.* London: Macmillan.

Dotan, Yoav. 2014. *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139856027

Eisenman, Robert H. 1978. *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a in the British Mandate and the Jewish State.* Leiden: Brill. https://doi.org/10.1163/9789004491427

Elias, Olawale. 1962. *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*. London: Stevens.

Elon, Menachem. 1994. *Jewish Law: History, Sources, Principles*. Philadelphia: Jewish Publication Society.

Fisch, Jorg. 1992. "Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion." In *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia.* Edited by Wolfgang J. Mommsen, Jaap de Moor. 1. Oxford, U.K.; New York: BERG.

Friedman, Lawrence M. 1995. “Law and Social Change: Culture, Nationalism and Identity.” In *Collected Courses of the Academy of European Law.* Edited by the Academy of European Law. N.d.: Kluwer Law International.

Friedmann, Daniel. 1975. “The Effect of Foreign Law on the Law of Israel.” *Israel Law Review* 10: 192–206. https://doi.org/10.1017/S0021223700005161

Friedmann, Daniel. 2016. *The Purse and the Sword: The Trials of Israel’s Legal Revolution*. New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190278502.001.0001

Gavison, Ruth. 1997. *The Quest for a Jewish Legal Identity: Foundations of Israeli Law*. Jerusalem: Hebrew University Press.

Gerber, Haim. 1994. *State, Society and Law in Islam: Ottoman Law in Comparative Perspective.* Albany: State University of New York Press.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge, MA: Harvard University Press.

Kahan, Y. 1989. *In Memory of Yitzhak Kahan, President of the Supreme Court*. Tel Aviv: Papyrus (1989): 9–10.

Liebesny, Herbert J. 1975. *The Law of the Near and Middle East: Readings, Cases and Materials.* Albany: State University of New York Press.

Likhovski, Assaf. 1995. “In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine.” *Israel Law Review* 24: 294–310. https://doi.org/10.1017/S0021223700014692

Ma’oz, Moshe. 1968. *Ottoman Reform in Syria and Palestine 1840–1861: The Impact of the Tanzimat on Politics and Society.* Oxford: Clarendon Press.

Malachi, E. 1952. *The History of the Legal System in the Land of Israel.* Tel Aviv–Yafo: n.d.

Mautner, Menachem. 2011. *Law and the Culture of Israel.* New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199600564.001.0001

Miller, Rory. 2010. *Britain, Palestine, and Empire: The Mandate Years.* Farnham: Ashgate Publishing.

Mommsen, Wolfgang J. Jaap de Moor. 1992. *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia.* Oxford, U.K.; New York: BERG.

Morris, Henry Francis. 1972. “English Law in East Africa: A Hardy Plant in an Alien Soil.” In *Indirect Rule and the Search for Justice: Essays in East African Legal History.* Edited by Henry Francis Morris, James S. Read. 73. Oxford: Clarendon Press.

Navot, Suzie. 2014. *Israel’s Constitutional History.* Oxford: Hart Publishing.

Owen, Roger. 1994. “Defining Tradition: Some Implications of the Use of Ottoman Law in Mandatory Palestine.” *Harvard Middle Eastern and Islamic Review* 1: 190–203. https://doi.org/10.1163/221129895X00182

Rosen-Zvi, Issachar. 2001. “Judicial Review of Politics: The Israeli Case.” *Israel Law Revie*w 760.

Rosen-Zvi, Issachar. 2004. *Taking Space Seriously: Law, Space, and Society in Contemporary Israel.* Farnham: Ashgate Publishing.

Rubinstein, Amnon. 2004. *Israel and the Middle Eastern Challenge: A Legal Perspective.* Jerusalem: The Israel Democracy Institute.

Rule of Law. Oxford Reference. 2023. https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100433129 (accessed: 22.01.2023).

Samuel, Horace B. 1920. “From the Palestinian Bench.” *The Nineteenth Century* 88: 498–500.

Shachar, Yoram. 1995. “History and Sources of Israeli Law.” In *Introduction to the Law of Israel.* Edited by Amos Shapira, Keren DeWitt-Arar. 1. N.d.: Kluwer Law International.

Silberg, Moshe. 1965. *Talmud and Law: The Influence of Jewish Law on Israeli Law*. Jerusalem: Magnes Press.

Stein, Kenneth W. 1984. *The Land Question in Palestine 1917–1939.* N.d.: University of North Carolina Press.

Tadeski, Gad. 1979. "The Problem of Lacunae and Clause 46 to the King's Council Rules." *Studies in Our Country's Law* 132: 160–161.

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

Zweigert, Konrad. Hein Kötz. 1987. *Introduction to Comparative Law.* Oxford: Oxford University Press.

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LEGAL TRANSPLANTS, LEGAL SURVIVALS, AND LEGAL REVIVALS: TOWARDS A RECONCEPTUALISATION OF THE CIRCULATION OF LEGAL FORMS IN TIME AND SPACE

Abstract. When Alan Watson introduced, back in the 1970s, the concept of a legal transplant, also known as a legal transfer, he revolutionised comparative law and comparative legal history by showing that most of legal development takes place through borrowing. However, his notion of a legal transplant conflates two quite different realities: on the one hand, the borrowing of legal forms from other, simultaneously existing legal systems (such as the transplant of the Swiss Civil Code to Atatürk's Turkey) and, on the other hand, the rediscovery of old legal forms and their "borrowing" from long defunct legal systems (such as the rediscovery of Justinian's *Corpus Iuris Civilis* by medieval lawyers in Western Europe, and the infusion of Roman ideas about contract law into existing customary rules). Although there are certain formal similarities between the two phenomena, this article will argue that they should not be conflated, especially given the sharp socio-legal difference between borrowing from a living legal system (with a functioning judiciary and legal academia) and the cultural appropriation of historical legal material for contemporary legal purposes. In this vein, the present paper – drawing on Theo Mayer-Maly's concept of "return of juridical figures" and Tomasz Giaro's concept of a legal "resurrection" or "borrowing from the past" – proposes to introduce a new notion of "legal revivals" and carefully delimits them from legal transplants, on the one hand, and legal survivals, on the other. One of the characteristic features of legal revivals is the use of the resources of legal history for the purposes of contemporary legal innovation.

Keywords: legal transplant, legal survival, legal revival, legal form, juridical anabiosis

PRZESZCZEPIANIE, TRWANIE I WSKRZESZANIE INSTYTUCJI PRAWNYCH: PRÓBA NOWEGO UJĘCIA OBIEGU FORM PRAWNYCH W CZASIE I PRZESTRZENI

Streszczenie. Kiedy Alan Watson wprowadził w latach 70. pojęcie przeszczepów prawnych (*legal transplants*), zwanych też transferami prawnymi (*legal transfers*), zrewolucjonizował komparatystykę prawniczą i porównawczą historię prawa, pokazując, że rozwój prawa odbywa

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się główne poprzez zapożyczenia. Jednak jego pojęcie przeszczepów prawnych łączy w sobie dwie zupełnie różne rzeczywistości: z jednej strony, zapożyczanie form prawnych z innych, jednocześnie istniejących systemów prawnych (takich jak przeszczepienie szwajcarskiego kodeksu cywilnego do Turcji Atatürka), a z drugiej strony, ponowne odkrywanie starych form prawnych i ich „zapożyczanie" z dawno nieistniejących systemów prawnych (takich jak ponowne odkrycie *Corpus Iuris Civilis* Justyniana przez średniowiecznych prawników w Europie Zachodniej oraz przenikanie rzymskich idei dotyczących prawa zobowiązań do istniejących systemów prawa zwyczajowego). Chociaż istnieją pewne formalne podobieństwa między tymi dwoma zjawiskami, niniejszy artykuł będzie argumentował, że nie należy ich łączyć, zwłaszcza biorąc pod uwagę wyrazistą społeczno-prawną różnicę pomiędzy zapożyczeniem z żywego systemu prawnego (z funkcjonującym sądownictwem i doktryną) a kulturowym przyswojeniem historycznego materiału prawnego w celu jego wykorzystania do współczesnych celów prawnych. W tym duchu niniejszy artykuł proponuje – w nawiązaniu do zaproponowanego przez T. Mayera-Malego pojęcia „powrotu figur prawnych" oraz przez T. Giaro pojęć „zmartwychwstania" lub „pożyczania z przeszłości" – wprowadzenie nowego pojęcia *legal revival* (tj. odradzania się czy też przywracania do życia dawnych instytucji prawnych), precyzyjnie oddzielając je od pojęć *legal transplant* (tj. przeszczepiania instytucji prawnych) i *legal survival* (tj. reliktowych instytucji prawnych). Tym, co charakteryzuje *legal revivals* to sięganie do zasobów historii prawa w celu opracowania nowatorskich rozwiązań prawnych we współczesności.

Słowa kluczowe: przeszczepy prawne, relikty prawne, wskrzeszanie instytucji prawnych, forma prawna, anabioza prawna

1. INTRODUCTION

From times immemorial, legal forms[1] have been borrowed from foreign jurisdictions (legal transplants)[2] and carried over – with modifications, especially through reinterpretation – from previous epochs (legal survivals). In Polish legal history, one is very familiar with the wholesale reception of French law in the Duchy of Warsaw, Austrian law in southern Polish lands, Prussian law in the West and Russian law in the east – all during the period of the partitions (1795–1918),

[1] In this paper, I understand "legal forms" as legal rules, legal norms, legal institutions (sets of norms), legal principles, or legal concepts perceived from a formal angle, i.e. in abstraction from their aimed or actual social function or purpose. The substratum of any legal form is a certain idea, which may be expressed in a concrete text (e.g. a fragment of the *Digest*, an article or set of articles of a civil code, a court judgment which contains an important precedent), but equally may be expressed in many texts (such as the actual meaning of a legal principle of concept). We should keep in mind that the Greek word for "form" is εἶδος which is etymologically cognate to the verb "to see" (ἰδεῖν) and the noun "idea" (ἰδέᾳ). Cf. Kraut 1992, 7; Zartaloudis 2019, xv. Cf. the notion of "legal doctrine" understood by Cotterrell (2018, 4) as "rules, principles, concepts, values" and placed at the core of his programme of a sociology of legal ideas as part of sociological jurisprudence.

[2] Defined by Watson (1993, 21) as "the moving of a rule or a system of law from one country to another, or from one people to another". I leave aside here the question whether the notion of a legal transplant/transfer can be effectively used both for the cross-border borrowing of individual legal institutions and entire codes or even entire legal systems. I would like to express my gratitude to Dr. Piotr Eckhardt for raising this methodological issue – one which certainly requires further reflection.

when an independent Polish state did not exist. There is also no shortage of global examples: for instance, the English common law was exported to British colonies and still exists there – as in the United States, Canada, or Australia. But also independent nations have voluntarily imported foreign law – amongst the most well-known cases are the transplantation of French civil law to Romania, Swiss civil law to Turkey, or German civil law to Japan.

Likewise, the phenomenon of *endurance* of legal forms over time has also been present since times immemorial. As Alan Watson put it: "A society makes law; the society changes, politically or economically, but the law remains the same or little changed" (Watson 2000, 1). Already in Roman law the institutions known from the *Lex XII Tabularum* survived until the end of the Empire. Legal survivals abound also in our modern legal systems. For instance, the English law of property with regard to immovables (land law) still resorts to purely feudal legal institutions, such as "freehold estate," which date back, as legal forms, to the Norman conquest of the 11th century. Over time, these institutions evolved and changed their social functions many times (Rahmatian 2022). The same can be said of the English doctrine of "consideration," which initially represented an element of actual synallagma or *quid pro quo* (Homes 1885, 171; Laske 2020, 85), but over time became a mere "badge of enforceability" (McKendrick 2019, 74) having nothing to do with the actual cause underlying a contractual obligation. In Polish law, we also find numerous examples of socialist legal survivals, such as the right of perpetual usufruct (Mańko 2017b), the legal regime of housing cooperatives (Eckhardt 2024, 283–336), the concept of the principles of social community life (Mańko 2012), and many others.

However, the existence of a given phenomenon is one thing, and its conceptualisation by legal science is another. While legal transplants and legal survivals have existed since Antiquity, the notion of a legal transplant was explicitly introduced only in 1974 by Alan Watson (Watson 1993[1974]), and the concept of a legal survival is to be credited to American judge Oliver Wendell Holmes (2009 [1881]) and to Austrian sociologist of law Karl Renner (1976 [1929]).[3] Although research into legal transplants – sometimes referred to as "legal transfers"[4] – has already become well established in comparative law (Trikoz, Gulyayeva 2003), the research on legal survivals is only developing, with a number of recent publications exploring their theory (Mańko 2015a; 2015b; 2016a; 2017a; 2023) and a slowly growing body of literature applying the theory and the ensuing methodology (Mańko 2016b; 2016c; 2017b; Kuźmicka-Sulikowska 2019; Stetsyk

[3] A very specific type of legal survivals, namely the change of function of archaic Roman formal acts was already noted in the 19th and early 20th century, and referred to as "apparent transactions" (Ger. *Scheingeschäfte*) or "reshaped juridical acts" (Ger. *nachgeformte Rechtsgeschäfte*). See Jhering 1858, 540–555; Rabel 1906/1907.

[4] The term "legal transfers" is used, *inter alia*, by legal historian Tomasz Giaro (2007; 2011a, 3–4; 2024).

2019; Ernst, Sadowski, Sadowski 2024; Preshova, Markovikj 2024).[5] Moreover, the importance of legal transplants and legal survivals for the legal identity of certain regions – notably, of Central (and Eastern) Europe – is being recognised (see e.g. Uzelac 2010; Mańko 2019, 69–73; Mańko 2020b, 34; Forić et al. 2024; Sulikowski, Mańko 2024, 258–259).

In 1971, in a short text published in the German *Juristenzeitung*, Austrian Romanist Theo Mayer-Maly drew attention to the phenomenon of the "return of legal figures" (Mayer-Maly 1971). In the context of a discussion on the reform of legal education, Mayer-Maly contrasted two metaphors used to account for legal change: evolution, on the one hand, and the permanence of return (*Permanenz der Wiederkehr*), on the other (Mayer-Maly 1971, 1). The Austrian Romanist focused on two examples, the *arbitrium boni viri* (the determination of performance by an independent third party) and *fiducia cum creditore contracta* (a transfer of ownership as security for a loan). On the bases of these case studies, Mayer-Maly noted that the return of legal figures is "not a regression (*Rückfall*) but a *Renaissance*" (Mayer-Maly 1971, 3). This is because a returning legal figure always contains new elements. On a more general note, the Salzburg professor of Roman Law noted that "[l]egal development occurs on a straight line much more rarely than evolution in nature. The return of structures is much more frequent than their final extinction" and that "[t]his tendency for the renaissance of the juridical has its grounds in the limitations of the juridical inventory. According to the hitherto experience (…) it is so small that a frequent return towards juridical figures developed long ago seems inevitable" (Mayer-Maly 1971, 3).

Mayer-Maly's idea of the "return of legal figures" was taken up again in 2007, when Tomasz Giaro's essay pointed out that such situations as the drawing up of the *Corpus Iuris Civilis* under Justinian – or later its reception in medieval Western Europe – can be described as instances of legal "borrowing from the past" or legal "resurrection" (Giaro 2007, 288). When Justinian ordered the *Digesta* to be compiled, it was a "transfer of law in fact no longer in force, originating from a no longer existing state," and the same was, of course, true with the reception of the *Corpus Iuris* in medieval Europe. However, despite the awareness of these phenomena and the proposal of an apt concept by Giaro,[6] it seems that sociologists of law, legal historians, and comparative lawyers have not yet taken

[5] Legal survivals have also been explicitly discussed during a recent focused research workshop held at the Riga Graduate School of Law (Mańko and Eckhardt, forthcoming) and had also been addressed during previous conferences organised under the auspices of the Central and Eastern European Network of Legal Scholars (CEENELS) (Zomerski 2016; 2017; Mańko 2020b, 33–34). Other CEENELS conferences were devoted to closely related questions of Central European legal identity (Szymaniec 2018) and Central European legal innovations (Szymaniec 2021).

[6] As a matter of fact, Giaro mentioned "resurrection" *en passant*, within a paper devoted to the concept of a legal transplant (transfer), and he did not argue for clearly delineating legal revivals from legal transplants.

up legal revivals seriously as an object of study, in contrast to the established scholarship on legal transplants and the emergent literature on legal survivals, referred to above. In this context, the present paper aims at drawing attention to the need of using a distinct concept to denote instances of legal borrowing from the past, and proposes a slightly less theologically-charged term – that of a "legal revival"[7] (by analogy to a legal *sur*vival)[8] or the "anabiosis"[9] of a legal form.

The paper will argue for a clear differentiation of legal revivals from legal transplants and a conceptual delineation from the bulk of legal survivals. I will argue that legal revivals can be treated, in some situations, as special cases of legal survivals (if the identity of the legal system and its corresponding legal culture are maintained), but more often legal revivals should be perceived as a distinct phenomenon, which testifies not so much to the capacity of the *endurance* of legal forms, but, rather, to their *universality and versatility* (Watson 1993, 96), which is – as it will be hypothesised – a consequence of their abstractness and generality (Mańko 2021, 40).

Being well aware of Alan Watson's warning that "[i]t is up to those (if any) who would wish to elaborate types of transplantation to show what new light the classification would cast on the data" (Watson 1993, 30), I hope that this paper will not only succeed in identifying the phenomenon of legal revivals, but also persuade the reader that this concept can bring new added value for the discussion of the circulation of legal forms in time and space, and become a path through which we can come to appreciate even more the intrinsic worth of juridical form based, as it is, on its formal values (Kozak 2010, 155). Indeed, the opting for one scientific concept over another one is also of significance. For instance, as Giaro points out, "in the study of circulation of legal models, if we banish the time-honoured concept of 'reception' replacing it with 'transfer' of legal rules or institutions, the reciprocity of influence and the active role of the taker will be stressed" (Giaro 2011a, 3–4). Likewise, speaking of "legal survivals" rather than "legal tradition" shifts the focus from the entirety of legal culture towards concrete legal institutions (Mańko 2015, 18). In this vein, the new concept of a "legal revival" can – as I will try to show – draw attention to different aspects of the same phenomenon than those which would normally be in focus. The present paper can also be seen as a response to Roger Cotterrell's call for developing a sociology of legal ideas, specifically focused on the sociology of what he calls "legal doctrine" (Cotterrell 2018, 4).

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[7] Etymologically, the English noun "revival" stems from the verb "to revive," which, in turn, is derived from the Latin verb *revivere* (Onions 1966, 764).

[8] The English noun "survival" stems from the verb "to survive," which also has a Latin etymology coming from *supervivere* (Onions 1966, 890).

[9] From the Greek ἀναβίωσις, etymologically derived from ἀνα- (equivalent of "re-") and βίος ("life").

Given that the present paper aims at proposing an entirely new theoretical concept on the basis of legal experience – and, therefore, inductively moves "form law to philosophy" (Zirk-Sadowski 2011, 19) – the main focus will be on examples of legal revivals (section 2), followed by an outline definition of the new concept (section 3) and a delineation from already existing concepts of legal transplants and legal survivals (section 4), followed, in turn, by an overview of possible research questions of a socio-legal and legal-historical nature (section 5). Considering that the concept of a legal revival is new, further research will still be necessary to explore its theoretical implications. Some of them will be addressed in a preliminary fashion in section 6. The examples provided in section 2 are taken from various jurisdictions and epochs rather than one legal system from a single period. This is a conscious choice, because the goal of the paper is to argue for a universally applicable and valid concept rather than one which would be limited to explaining only a single phenomenon in one legal culture.

In methodological terms, the paper spans between legal history, comparative law, the sociology of law, and legal theory. This interdisciplinary approach is dictated by the phenomenon of legal revivals itself. Just like the concepts of legal transplants and legal survivals also engage various legal disciplines, so too the phenomenon of legal revivals requires to move between various perspectives and adopt an eclectic approach. However, if one perspective were to be described as the leading one, it would be the historically-informed sociology of law in the classical sense: the goal of the paper is to *identify* a distinct phenomenon, *propose a new concept*, and *delineate* it *vis-à-vis* other existing concepts.

2. SOME EXAMPLES OF LEGAL REVIVALS

The most well-known and well-documented series of legal revivals arise from the so-called "reception" of Roman law in Western Europe from the 11th century onwards. It is important to stress that the source material for this process was a body of legal texts that came to be known in the West as the *Corpus Iuris Civilis*, a text that had been formally enacted by the Byzantine Emperor Justinian in the 6th century. However, it was not a compilation of Byzantine law of its period, but, rather, a reflection of earlier Roman law, chiefly of the period of the Principate (classical law), though with modifications (Watson 2000, 1–43). Thus, the intellectual influence of the *Corpus Iuris Civilis* in medieval Western Europe was neither a transplant of Byzantine law (which, by that time, had been codified in the *Basilicae*), but a rediscovery of a Byzantine collection of earlier Roman law – not a law that (simultaneously) *was* but a law that *had been* (cf. Giaro 2007, 288). For those reasons, it cannot – I argue – be described as a legal transplant: the donor system (Byzantine law) had changed in the meantime (between Justinian and the 11th century), and the original donor system (classical Roman law) had ceased

to exist centuries before. As Raoul Van Caenegem (1987, 126) put it, medieval Western Europe

> suddenly accepted the great law book of a society that had been gone for centuries as its ultimate authority and entirely reshaped its own law through scholastic glosses, disputations, and commentaries on this venerable relic of a defunct world.

The penetration of the *Corpus Iuris Civilis* differed from region to region. Thus, in some areas – such as southern France or Italy – it was officially accepted as the law of the land. The same occurred in Germany as of 1495 (Tigar 2000, 141; cf. Van Caenegem 1987, 44), i.e. much later. In other areas, such as notably northern France, where Frankish customary law remained officially in force, individual legal forms taken from the *Corpus Iuris* were nonetheless introduced, for instance in the process of restating the customary laws in written form (Tigar 2000, 138–141; cf. Van Caenegem 1987, 59) and their later official "homologation" (Van Caenegem 1987, 105–106). Michael E. Tigar points out that the main reason behind this revival of Roman law was the development of commerce and the need for effective solutions in the area of contract law (Tigar 2000, 76). In those areas where Roman law was not officially in force, such as northern France or England, its revival took place tacitly, without being cited or referenced (Tigar 2000, 142). An important inroad was – from the very outset – the practice of drafting commercial contracts (Tigar 2000, 72–75, 146–148). Another telling example of a legal revival is the reinstatement – following Greece's independence from the Ottoman Empire – of the *Hexabiblos* (itself based on the *Basilicae*), dating back from 1345, as the revived Greek civil law of the 19th century (Giaro 2007, 302).

However, the revival of legal forms is not restricted solely to the impact of the *Corpus Iuris Civilis* in medieval and early modern Europe. Examples of legal forms being effectively revived after decades of absence can also be adduced from today's legal culture. To refer to the Polish context, a characteristic example is the "extraordinary revision" [Pol. *rewizja nadzwyczajna*], i.e. a legal form of special appeal introduced into Polish law in 1949 (criminal procedure) and 1950 (civil procedure), transplanted most directly from Soviet law (Jodłowski 1951, 45–46). Yet, in 1996, as part of the post-communist legal reforms, the extraordinary revision was abolished, precisely on account of its Soviet pedigree (Mańko 2007, 96). However, 30 years after it had been abolished, the legislator decided to revive it under the similar sounding name of "extraordinary complaint" [Pol. *skarga nadzwyczajna*],[10] effectively copying the old legal form's most important features (Ereciński, Weitz 2019, 8–9; Zembrzuski 2019, 35–37; Stasiak 2020, 1).

The same can be said about the revival of separation (*separatio a mensa et thoro*), known e.g. in Austrian law and imperial Russian law, which had been in force in Poland until 1945, but was unknown to Polish family law as

[10] Articles 89–95 of the Supreme Court Act 2017 (Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym, *Dziennik Ustaw* 2018, item 5), in force as from 3 April 2018.

of its unification in 1945 (Lasok 1968, 100) and introduced to it only in 1999[11] (Fiedorczyk 2007, 61). It would be somewhat artificial to speak of a "survival" of the *legal form* of separation during the 50 years it did not exist in Polish law, nor to describe it as a transplant from abroad, given that the new rules were rather inspired by Professor Lutostański's pre-War draft)[12] (Fiedorczyk 2007, 59). Thus, one can certainly speak of the survival of the *idea* of the legal institution of separation (provided for, notably, in Professor Lutostański's draft), especially since conservative circles demanded its reintroduction, for instance on the occasion of the drafting of the Family Code of 1965 (Fiedorczyk 2014, 687).

There is also a host of examples of the revival of old legal forms within Polish public law, for instance the revival of the Supreme Administrative Court [Pol. *Naczelny Sąd Administracyjny*] in 1980 (modelled on the pre-War Supreme Administrative Court of Justice [Pol. *Naczelny Trybunał Administracyjny*]) (Banaszak, Wygoda 2014, 167), the revival of the institution of the President of the Republic in 1989 (following 48 years of a collective head of state – the Council of State [Pol. *Rada Państwa*]) (Kowalski 2008, 129), or the revival of the Senate also in 1989 (Leszczyńska-Wichmanowska 2021, 79–80).

Obviously, examples of legal revivals are not restricted to the Polish context. One can mention the revival of the Latvian pre-War constitution of 1922 (Pleps 2016; Pleps et al. 2022, 11–12; Cercel, Pleps 2024, 179–181) and its pre-War Civil Law of 1937 (Bolodis 2013) after it had regained independence from the Soviet Union. The revival of these legal acts, thrown into an entirely different social context after 50 to 60 years of not being applied,[13] created unprecedented challenges for the judiciary and doctrine.[14] In particular, the Latvian constitution of 1922 was considered by many as obsolete, and its restitution in 1990 was initially coupled with a suspension of most of its provisions; however, as of 1993, the entire constitution has been in force and applicable (Pleps 2016, 35–36). In Estonia, the pre-War constitution was partly restored (a legal *revival*) (Pleps 2016, 38), but, by contrast, the Soviet-era civil code was initially retained (a legal *survival*) (Kull

[11] Ustawa z dnia 21 maja 1999 r. o zmianie ustaw Kodeks rodzinny i opiekuńczy, Kodeks cywilny, Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz.U. 1999 nr 52 poz. 532).

[12] Projekt prawa małżeńskiego uchwalony przez Komisję Kodyfikacyjną w dniu 28 maja 1929, available at: https://www.bibliotekacyfrowa.pl/dlibra/publication/29355/edition/35389 (accessed: 25.07.2024). Cf. Dworas-Kulik 2020.

[13] The Constitution of 1922 was suspended already in 1934 due to a military coup and the ensuing period of authoritarian rule (Pleps 2016, 33; Pleps et al. 2022, 11; Cercel, Pleps 2024, 179).

[14] These issues were discussed in the papers presented at the International Workshop "Legal Survivals in Central and Eastern Europe: Socio-Legal Perspectives on Public and Private Law," Riga Graduate School of Law, 15–16 June 2024 (see Mańko and Eckhardt, forthcoming) – papers by Prof. Jānis Pleps ("Influence of the Socialist Legal Tradition on the Application of the Satversme") and Dr. Alexandrs Fillers ("A Relic of Days Gone By: The Latvian Civil Law in Contemporary Latvia").

1999, 158 n. 3). In Lithuania, the pre-War authoritarian constitution was reinstated in 1990 (Pleps 2016, 37–38), only to be replaced by a democratic one in 1992.[15]

Thus, although the anabiosis or revival of legal forms might seem *prima facie* something extremely rare and exceptional, the examples provided above clearly indicate that such processes have occurred both historically and in contemporary legal cultures.

3. JURIDICAL ANABIOSIS: TOWARDS A NEW CONCEPT OF A LEGAL REVIVAL

Assuming that there is a certain class of events pertaining to the circulation of legal forms in time and space which escapes the distinction into legal transplants and legal survivals, I propose to add a new category – that of a "legal revival" and the process of revival, i.e. "juridical anabiosis." I propose to define a "legal revival" as a: (1) legal form introduced into the reviving legal system; (2) which existed in a different legal system in force in the past, which is – as a rule – already defunct at the time of revival; (3) which was not taken over from an existing legal system, but, rather, (4) was revived from the past on the basis of knowledge about the defunct legal system (defunct donor system).

Ad 1. A legal revival is – just like a legal transplant or legal survival – a legal form which presents certain specific features. As mentioned earlier, the notion of "legal form" is used here in the sense of a legal norm, rule, institution, principle, or concept which is analysed from a *formal* angle, abstracting from its concrete social function or purpose. In this meaning, the legal system in force in any given time and place is made up of a certain number of *abstract legal forms* (such as the contract of sale, codified in Title XI of Book III of the Polish Civil Code,[16] or divorce, codified in Article 56 of the Family and Guardianship Code),[17] which – when referred to in legal practice – can give rise to *concrete legal forms* (such as a concrete contract of sale, which is considered to be a contract of sale under Title XI of Book III of the Civil Code, or a concrete divorce judgment rendered under Article 56 of the Family and Guardianship Code, etc.).[18] An abstract legal form is, therefore, a certain social relationship regulated *in the abstract* in legal norms in force. A concrete legal form is the "legal cloaking" of a concrete social relationship. Thus, the entire legal system reflects social reality in legal forms.

[15] Constitution of the Republic of Lithuania (approved by the citizens of the Republic of Lithuania in the Referendum on 25 October 1992). Available at: https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=TAIS.211295&category=TAD.

[16] Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Dz.U. 2024 poz. 1061).

[17] Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (Dz.U. 2023 poz. 2809).

[18] On the abstract vs. concrete legal form distinction, see e.g. Mańko 2023, [5]. (Given that the cited article is an "on-line first" version, not yet attributed to an issue of the journal, the pagination [in square brackets] refers to the on-line PDF.)

Ad 2 and 3. By contrast to legal transplants, which occur between simultaneously existing legal systems, a legal revival is a legal form which is – to say it metaphorically – *revived* from the past. However, by contrast to legal survivals, we are not speaking here about the continued existence of a legal form over centuries *within the same legal system*, but, rather, about the revival of a legal form from from a legal system which existed in the past, but which no longer exists at the time of the reintroduction. While the continued existence and progressive evolution of *emancipatio* within Roman law (Giaro 2011b, 45; Longchamps de Bérier 2011a, 214) – from its archaic to its post-classical period – can be said to be a legal survival, the revival of Roman law rules on contract law in medieval France or England cannot be described as such survivals. The key difference is the *identity of the legal system* – a legal survival is a phenomenon which is limited to the same legal system, as perceived by its participants and seen externally. Roman jurists of the Republic or Empire considered that they were operating the same legal system as in the past, and considered the Law of XII Tables as part of their legal system, not of a foreign and/or defunct one (Watson 1995, 124). By contrast, Philippe de Beaumanoir, borrowing from Roman law in his (creative) restatement of the customary law of Beauvais (Tigar 2000, 124, 138–141), does not treat the legal system of Beauvais as *identical* to Roman law or as being *in formal continuity* with it. To the contrary, given that the region of Beauvais is part of northern France, where the "reception" of Roman law was never officially decreed or recognised, the revival of Roman law takes place tacitly, as an intellectual inspiration, but not as an official reception (Tigar 2000, 138). By contrast, if today's English jurists are interpreting the institution of consideration, they operate on the assumption that today's English law has maintained identity with 19th- or 18th-century English law (that it is still *the same* legal system), even if – as to the substance – it has changed a great deal (see e.g. McKendrick 2019, 74–75). Thus, today's English jurists assume that there is an *identity and continuity of the form of English law* over the centuries, just like Roman jurists assumed the continuity of the legal system of the Kingdom of Rome, Roman Republic, and, later, Roman Empire, with the political transformation not affecting the continuity of the legal system as such.

Ad 4. Most typically, the material basis of a legal revival is not the continuity of legal culture – such as the knowledge and continuous transmission of legal texts – but, rather, the rediscovery of a past legal system through its study. Italian, French, and English lawyers of the Middle Ages borrowed a great deal of ideas from Roman Law, not because *the form of* Roman law (expressed in the text of the *Corpus Iuris Civilis*) continued to be in force, but, rather, because they rediscovered those texts. While the Byzantinians claimed continuity with the Roman Empire and, therefore, legal continuity with Justinian's codification of Roman law (viewed as a legal form), the Western kingdoms of the time had broken that kind of link, having replaced Roman law with customary laws, or never even had one (if we think of territories that never belonged to the ancient Roman Empire). More recent examples of legal revivals

– such as the aforementioned extraordinary revision or separation in Polish law – are, obviously, based on the transmitted knowledge of a not so distant past, although the restitution of those legal forms was certainly a question of reviving something from legal history (such as separation in a pre-War draft, or the Soviet-style institution of extraordinary revision as part of history of the law of People's Poland), in contrast to the resurrection of the legal form of a judicial assessor [Pol. *asesor sądowy*][19] in 2015,[20] following its earlier disappearance in 2009,[21] which occured within a relatively short timeframe. In fact, the history of the latter legal form can be treated as *one single legal survival*, beginning with its introduction in 1928 (Chmielarz-Grochal et al. 2022, 21–22), despite an interval between 2009 and 2015.[22]

4. LEGAL REVIVALS *VIS-À-VIS* LEGAL TRANSPLANTS AND LEGAL SURVIVALS

As I have already remarked in the previous section on the occasion of formulating the definition of legal revivals, they need to be conceptually contrasted to legal transplants, on the one hand, and to legal survivals, on the other. If a given legal form is effectively revived within the same legal system, and especially after a relatively short period of absence, it will be more appropriate to classify the phenomenon in question as a legal survival within the figure metaphorically known as the "resurrection" of a legal form (Mańko 2023, [14]–[15]), as is the case with judicial assessors.

These and other examples might suggest that the border between a resurrected legal survival, on the one hand, a legal revival, on the other, could be at times fuzzy. However, if we look carefully into the definition of a legal revival proposed above (in point 3), it will become clear that a legal survival originates, in principle, from a *defunct legal system*, such as that of ancient Roman law, or within an earlier legal system which has been separated from the current one by a revolution, or demise and recreation of statehood. There could be, of course, a certain degree of intellectual continuity between that defunct system and contemporary law, but such "continuity" should not be perceived as a formal continuity of statehood and legal system – even if, as part of the legitimising ideology, such a continuity

[19] A judicial assessor is a junior judge appointed for a definite period, who is to be evaluated before receiving a final appointment. Judicial assessors were provided for already in the Judiciary Act of 1928.

[20] By virtue of Act of 10 July 2015 (Dz.U. 2015 poz. 1224), which entered into force on 1 January 2016. Cf. Chmielarz-Grochal et al. 2022, 50–51.

[21] By virtue of Constitutional Court judgment of 24 October 2007, Case SK 7/06, which abrogated rules on assessors as from 5 May 2009.

[22] This legal form is an interesting survival of a pre-World War II institution which was creatively developed during the socialist period, when assessors were given the power to perform adjudicatory functions, just as judges (Chmielarz-Grochal et al. 2022, 27–28).

is claimed (e.g. that the "Holy Roman Empire of the German Nation" was a continuation of the Roman Empire, and the like). Thus, regardless of how the revival of Roman law was framed – as an allegedly legal continuity (e.g. in Italy or southern France), as a "reception" (as in Germany), or as a merely tacit, indirect source of inspiration (as in northern France or England) – from the sociological point of view, what happened was its *revival* in an entirely new historical and – in the case of most of Germany – geographical context. Therefore, in the case of legal revivals, if we speak of continuity with a defunct legal system, this should be understood not as formal (juridical) or sociological (genuinely legal-cultural) continuity, but as an instance of *intellectual continuity*, understood as taking up ideas, concepts, and trains of thought from the past – a rediscovery rather than a reception or endurance of past legal forms.

The story of Roman law in South Africa is a telling example of how legal revivals, legal transplants, and legal survivals are in practice intertwined, at the same time providing arguments in favour of explicitly acknowledging legal revivals as a distinct phenomenon. Thus, in the first step, Roman law was *revived* in the Netherlands as part of the *ius commune*, and later adapted and further developed by the School of Elegant Jurisprudence, giving rise to what has been since known as "Roman-Dutch law" (Van Caeneghem 1987, 70–71). This system of Roman-Dutch law was then *transplanted* to what was a Dutch colony, the Cape Country (Fagan 1996; Giaro 2007, 294),[23] and, later on, despite the takeover by the British and the ultimate independence and subsequent democratisation of the Republic of South Africa, Roman-Dutch law – including its deepest layer, the revived Roman *Corpus Iuris Civilis* – has *survived* (Mańko 2003; cf. Kleyn, Van Niekerk 2014) and is still applied by the courts (Mańko 2004a; cf. du Toit 2014). Even today, it can be said that: "In South Africa, Roman law institutions are still of vital importance" (Nicholson 2011, 107). However, the legal survivals of Roman law present in contemporary South African law are not a direct survival from the times of the Romans (because there was no legal continuity between Rome and Holland), but, rather, a survival of Roman-Dutch law, itself transplanted to South Africa by the Dutch, based on a legal revival in the times of replacement of customary law by revived Roman law in the Netherlands. The distinction becomes crucial because all three phenomena based on rather different processes in legal culture may be externally similar, but, are in fact quite different when perceived from a sociological angle. In particular, the sociological dynamics of legal transplants, survivals, and revivals is essentially different owing to the peculiar situation where the jurists of the defunct system are not available to be consulted on its functioning, where there is no case-law or modern textbooks available, and the only sources that one can rely upon are purely historical.

[23] Interestingly, the legal transplant of Roman-Dutch law to Cape Country led to an additional *legal revival* of Roman law of slavery, which was not in force in the Netherlands (Giaro 2007, 294). That part of Roman law applied until 1834, when the British abolished slavery in South Africa.

Finally, with regard to the relationship between the proposed concept of a legal revival and the concept of a legal survival, it should be noted that legal survivals are divided either (α) on account of their *structural place within the legal culture*, scil. into (1) normative, (2) methodological (metanormative)[24], and (3) institutional (organisational) (Mańko 2013a, 10–22; Mańko 2013b, 215–216; Forić et al. 2024, 257), or (β) on account of the *mechanism of their survival*, scil. into instances of (1) transsubstantiation (change of social function); (2) consubstantiation (the addition of new social function); (3) transfiguration (a change of legal form which preserves the essence of the old one); (4) palingenesia (judicial reproduction of an abrogated legislative form); (5) ideological repentance (cutting of ideological roots);[25] (6) resurrection; and (7) relics ("quiet" survivals which do not require any significant adaptation) (Mańko 2023, [8]–[15]). It seems that the first (α) typology is certainly applicable to legal revivals – within a given legal culture, it is possible not only to revive legal forms corresponding to substantive or procedural legal institutions, but also to copy historical examples of organising the judiciary or methods of legal reasoning. Paradoxically, metanormative (methodological) aspects of legal culture may be out of tune with the normative ones – for instance, whilst the substance of Roman private law was revived in medieval Europe, the methods of legal reasoning were henceforth based on the exegesis of Roman texts (methodological aspect) rather than on the methods of legal reasoning used by the ancient Roman jurists (cf. Van Caeneghem 1987, 55–56).

Concerning the second (β) typology, I have already mentioned that the figure of a legal revival comes at times close to the figure of a legal survival *per resurrectionem*, and indeed some cases can be described as being properly "liminal" (Mańko 2023, [15]). What could be explored, however, is the *vehicle* of juridical anabiosis and, notably, the respective role of the legislator (the political factor), the judiciary and legal academia in reviving a concrete legal form from a more or less distant past.

5. LEGAL REVIVALS: KEY RESEARCH QUESTIONS

The phenomenon of legal revivals, contemplated and conceptualised in this paper, lends itself to a number of promising socio-legal questions which can be asked with regard to both contemporary legal culture and the historical phenomena of legal revivals (socio-legal history). These questions are similar to those that are

[24] Even if normative legal survivals are scarce and are relatively easy to eradicate, the persistence of metanormative (methodological) survivals in the legal thinking and working methods of lawyers can be genuinely persistent (see e.g. Kühn 2004; Milej 2008; Uzelac 2010; Kühn 2011).

[25] Cf. Preshova and Markovikj 2024 (p. 130), who propose, in this context, a further distinction into legal survivals which are compatible and incompatible with the new axiology of the legal system after transformation.

being researched with regard to legal transplants and legal survivals, though given the specificity of legal revivals, they are distinct from them. Thus, first of all, there is the (1) *epistemological* question, namely how and where did the jurists operating the legal revival find out about the defunct legal system.

Secondly, there is the (2) *ideological and axiological* question, namely about how and why was the defunct system considered valuable and worthy of imitation. Was it because of the system's perceived superiority, or because its solutions were seen in other countries? Referring to the aforementioned example of the romanisation of Western European commercial law in the Middle Ages, Tigar (2000, 76–77) makes the claim that Western Europeans came into contact with living Roman law in the Byzantine Empire during the Crusades. Furthermore, both the Catholic Church and the French monarchy had a political interest in promoting Roman law and Roman law scholarship not so much on account of its contract law, but due to its utility for their own political goals (Tigar 2000, 116, 126).

Thirdly, one should enquire about the (3) *change of social function of the revived legal forms*. Were the legal institutions and individual rules used with the same purpose and for achieving the same results as in their original context of defunct ancient Roman law? Or were they taken "out of context" and used for entirely different purposes? This is the same question that can be asked with regard to legal transplants and legal survivals. To some extent, a change of social function is probably inevitable, given the changed circumstances, but research on concrete examples could reveal not only the extent of such change, but also the juridical mechanism of it. Most importantly, was change effected through a *reinterpretation* of the legal form, through its *application* in an entirely new context, or through the *modification* of the form itself? Questions concerning the changed social function and reinterpretation can and should be analysed also with an eye to the ideological and axiological context of the revived legal forms. Indeed, ideology can have a great impact upon the way that identically worded legal provisions are understood and applied (Collins 1982, 67; Kennedy 1997; 2008; Mańko 2016d; 2022).

Answering these and other research questions on legal revivals will also serve to highlight their distinctiveness from legal transplants and legal survivals. In broad terms, it could be said that a legal transplant arises whenever the law of a foreign country is considered superior and the benefits of its introduction considered to outweigh not only the social and economic costs but also the risk of an incoherence of the recipient system, which will need to integrate the incoming legal transplant. As Alan Watson (2003, 607) put it: "Borrowing is much easier than thinking. It saves time and effort. Not only that, it helps the new law to become acceptable because it has a recognized pedigree."

In the case of legal survivals, their continuity is based on a long-standing assumption formulated by Ulpian in the words: *In rebus novis constituendis evidens*

esse utilitas debet ut recedatur ab eo iure quod diu aequum visum est.[26] Here, the balancing of costs and advantages (*utilitas*) is done primarily in the domestic context on the assumption that old law should stay in place unless the advantages of reform clearly (*evidens esse*) outweigh the costs. Incidentally, the balancing can also include the option of a legal transplant which could replace the existing legal survival. However, if the balance is tilted in favour of keeping the old law, jurists – the judges and the jurisprudes – need to work out methods of adapting it through interpretation and careful application to the changed social reality. The balance will most probably remain clearly in favour of keeping the survival if such adaptation is minimal or not necessarily at all, *scil.* if the social conditions have not changed or have changed little.

In the case of a legal revival, the situation is quite different. What is compared on the one side of the scale is either a possible legal novelty (*ius novum*), or the keeping of existing law (legal survival), or a legal transplant from abroad, and – on the other side of the scale – of reviving a legal institution from the past. This entails a positive evaluation of the legal past, especially when compared with the present, and presupposes a specific situation of legal culture which, in the eyes of its contemporaries, is viewed as inferior to some past legal system. Legal revivals are, therefore, not very frequent.

In order to answer such questions, the researcher would have to trace all available sources for all three practices of legal culture (legislation, adjudication, scholarship) in search of hints of arguments and counter-arguments formulated by the relevant actors. The added value of such socio-legal research on the revival of past legal forms – conducted with questions of ideology and social function of legal institutions in mind – is a better understanding of the mechanisms of legal change and continuity, complementing the findings based on the paradigms of legal transfers and legal survivals.

6. THEORETICAL IMPLICATIONS: A PRELIMINARY SURVEY

Any novel concept in social sciences and the humanities has its theoretical and philosophical underpinnings and implications. The goal of the present paper was to introduce the new concept, provide examples of phenomena which correspond to it, and indicate the empirical research questions that the new concept entails. The exploration of the concept's theoretical and philosophical presuppositions and implications will undoubtedly require additional research. Therefore, in this section, I will only provide a preliminary survey of the possible lines of future inquiry along these lines.

[26] D. 1, 4, 2 (*Ulpianus libro quarto fideicommissorum*).

First of all, following Artur Kozak, one can claim that the phenomenon of legal revivals confirms the observation that the institution of law has the function of *cognitive unburdening (relieving)*, in the sense that a solution from the past can be applied to the present, without the need of inventing it again (cf. Kozak 2010, 173–174, see also Mańko 2020c, 352). Just like legal survivals continue to exist even despite adverse social conditions (revolutions, transformations, and other transitions), and just like legal transplants are popular because they offer ready-made solutions from abroad, so, too, legislators oftentimes prefer to reintroduce a legal form from the past rather than "invent the wheel" from scratch. This clearly has to do with the unburdening function of the law, whereby a legal form which had already existed in the past or abroad is preferred to creating an entirely new one.

Secondly, the phenomenon of legal revivals can be analysed theoretically from the point of view of law's *legitimacy and legitimation* (Berger, Luckmann 1991[1966], 110–146; Nonet, Selznick 2009[1978], 55–57) as well as the closely connected question of law's *authority* (Nonet, Selznick 2009[1978], 13–14). By referring to old legal forms, the legislator insists on the law's autonomy and its internal, institutional logic which – by reference to legal tradition – provide law with the necessary legitimacy and authority. Furthermore, a previously existing legal form which is brought back to life can also benefit from the value of legal experience, especially if it was applied over a longer timespan, managed to generate case-law and doctrinal literature, etc. Thus, for instance, the partial revival of the Commercial Code[27] after 1990 in Poland, following its abrogation in the socialist period (Frąckowiak 2015), could benefit from case-law and literature from the 1930s (Radwan, Redzik 2009, 6–7).

This brings us to the third theoretical question concerning legal revivals, namely the question of *knowledge transmission*. If we agree with H. Patrick Glenn that legal tradition is, ultimately, about the transmission of information (Glenn 2010, 13–16), using a legal form taken from the past and reviving it is a way of accessing information and knowledge from the past, making a short-cut to access it, in line with what was said above about the unburdening function of the law.

The fourth theoretical aspect of the phenomenon of legal revivals is the question of the *axiological foundations of the legal system* (cf. Pałecki 1997, 20–26). If a legal institution from the past is revived, it can probably be assumed that the legislator accepts the axiological entanglements of that institution, namely that he wishes to protect the same values as had originally been protected (cf. Longchamps de Bérier 2011b, 18). However, one should also keep in mind that the axiological preferences of the lawmakers may be different from those of the law's addressees (Pałecki 1997, 22).

[27] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks handlowy (Dz.U. nr 82 poz. 600).

The fifth theoretical question regarding legal revivals is the problem of their *binding force* (validity). Once again, it is an aspect which is common to legal transplants, survivals, and revivals. In all three cases, a given legal form is part of the legal system in question, because it is *in force* (valid) due to the will of the legislator (or other law-giver)[28], or – more interestingly – sometimes even despite his will (as in the case of jurisprudential palingenesia *contra* or *praeter legem* – see Mańko 2023, [11]–[12]). In the case of legal revivals, the moment of the legislator's will is crucial (cf. Giaro 2007, 295), but the actual functioning of the revival cannot be addressed abstracting from the context of the axiological foundations mentioned above. On top of formal validity, one cannot escape the question of factual (social) validity, the fact that a legal revival actually becomes part of the living law (cf. Giaro 2007, 281–282).

The sixth and final theoretical question that will need to be addressed as regards legal revivals is the problem of the *identity* of legal forms (legal institutions), a question discussed concerning both legal transplants (Legrand 1997; cf. Giaro 2007, 281) and legal survivals (Mańko 2023). Just like a legal transplant, moved from one jurisdiction to another, or a legal survival which continues to exist despite a revolution or transformation, a legal revival, too, can be analysed from the point of view of its identity and continuity despite the differences between the epoch when it had first existed and the period when it was revived. Obviously, the questions of the axiology of the legal system and the broader socio-economic, political, cultural, and ideological context will play their role, but, nonetheless, these should be analytically distinguished from the identity of the *legal form* as such (cf. Giaro 2007, 277). Questions of the identity of legal revivals could also benefit from insights of conceptual history, which emphasises the structures of repetition (Koselleck 2018[2006]). Identity and conceptual repetition are also closely connected to questions of *intentionality* – well illustrated by the Soviet marriage laws of 1917, which resembled the Roman *libera matrimonia* – but can we say that it was a revival of Roman law (cf. Giaro 2007, 281)? Or, rather, a mere coincidence? Is it important if the authors of the Bolshevik decree or those who enacted it knew that they are, in fact, returning to Roman law (e.g. Lenin surely knew it, as he received a proper legal education)?

The above are just some of the examples of the most pressing theoretical questions implied by the concept of legal revivals. As research on this socio-legal phenomenon, treated as a distinct area of inquiry, progresses, many more questions may come to the fore.

[28] Depending on the concept of the sources of law in a given legal system, this may include the judiciary, the doctrine, or the formation of a legally-binding custom. Thus, in terms of analytical legal theory, the question boils down to the "rule of recognition" in a given system (Hart 1994 [1961], 110–123) and how it enables a legal revival to be brought back to binding force.

7. CONCLUDING REMARKS

Abstraction is both the *causa causans* and the *raison d'être* of juridical form in general, and of individual legal forms – such as the contract of sale, of *locatio conductio* or the right of emphyteusis or perpetual usufruct. There can be no legal form without abstracting from the concreteness of the "real life" situations which give rise to the formal categories of the juridical. If law is to deliver on its promise of isonomy ("equal law for all"), it must operate with abstract and general categories. Law's abstract formality is essential to law's social legitimacy (Kozak 2010, 155). However, abstraction comes also with additional benefits, namely the possibility for legal forms to "travel" in time and space. Legal forms, once freed from their original socio-economic context in which they were first born, can be moved from place to place and survive over many centuries. Research into these specific features of juridical form is of primordial importance for understanding the fundamental dimension of law's ontology. What *is the law*, if it can be relatively easily "transplanted" from Rome to medieval France, from Germany to Japan, or from the United States to Poland? How can the law *be* if it is detached to such an extent from its underlying conditions? Is it pure form, or is its materiality also part of its essence? These and other fundamental ontological questions of the law can be answered not only through purely philosophical speculation, but also – concurrently – by resorting to an empirical examination of contemporary and past legal cultures. For this examination to yield useful results, it must proceed through the application of appropriate theoretical categories, allowing to arrange, understand, and interpret the empirical socio-legal material. The goal of this paper was to add a new scientific category – the *legal revival* – that would complement the existing conceptual framework and, in a sense, fill the gap existing between the well-known figure of the legal transplant and the recently conceptualised figure of the legal survival. The need for this kind of conceptualisation arises not only from the differences between legal revivals and legal transplants, but also from the historical importance of the revival of ancient Roman legal institutions in medieval Western Europe for the development of the European legal identity. Indeed, the revival of the institutions of ancient Roman law in Western Europe during the Middle Ages – which gave rise to the so-called *Ius Commune* – is considered by many scholars as one of the prime sources of (Western) European legal identity (Zimmermann 1996; 2001; 2004; Mańko 2002, 114–115; 2004b, 112; for a critique see e.g. Cercel 2010). The nature of the mechanism which led to such a development of such paramount importance certainly deserves attention.

In this way, the modalities of *the development of legal forms* can be neatly conceptualised, with a *summa divisio* into: (i) pure legal innovation – the creation of new legal forms from scratch; (ii) legal borrowing (the importation of legal forms) – the transplantation of legal forms from other jurisdictions, both

synchronically (legal transplants) and diachronically, through a rediscovery of legal forms from the past (legal revivals); and (iii) legal adaptation – understood as the fine-tuning of existing legal forms to suit new purposes and fulfil new functions (legal survivals). Drawing this kind of conceptual grid enables one to grasp the ways in which the law changes and adapts to new circumstances, at the same time making use of the existing forms – either borrowed abroad, rediscovered in the past, or adapted to new needs. Through legal revivals, the resources of legal history are put at the service of contemporary legal innovation.

Specifically, the new concept of a "legal revival," put forward in this paper, makes it possible to focus on the characteristic feature of "borrowing from the past" as opposed to transplanting functioning legal forms from any currently existing legal system. Despite the similarities between legal revivals, on the one hand, and legal survivals as well as legal transplants, on the other, the act of juridical anabiosis – the reviving of a legal form (sometimes originating in a long defunct legal system) – is accomplished through very different socio-legal practices, and it certainly merits to be studied in its own right rather than being conflated with other phenomena.

BIBLIOGRAPHY

Balodis, Kaspars. 2013. "The Latvian Law of Obligations: The Current Situation and Perspectives." *Juridica International* 20: 69–74.

Banaszak, Bogusław. Krzysztof Wygoda. 2014. "Funkcjonowanie sądownictwa administracyjnego w Polsce w zderzeniu z problemami współczesności – wybrane zagadnienia." *Studia Iuridca Lublinensia* 22: 165–178. https://doi.org/10.17951/sil.2014.22.0.165

Berger, Peter. Thomas Luckmann. 1991 [1966]. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. London: Penguin.

Cercel, Cosmin. 2010. "European Legal Integration as Phantasmagoria: On *Ius Commune* and Political Theology." *Journal of Contemporary European Studies* 18(2): 241–252. https://doi.org/10.1080/14782804.2010.486981.

Cercel, Cosmin. Jānis Pleps. 2024. "Eternity Clause as Agalma: Articulating Constitutional Identity in Romania and Latvia." In *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*. Edited by Cosmin Cercel, Alexandra Mercescu, Mirosław Michał Sadowski. 167–189. Abingdon–New York: Routledge. https://doi.org/10.4324/9781003346890-11

Chmielarz-Grochal, Anna. Ewa Wójcicka. Jakub Żurek. 2022. *Asesor sądowy w polskim wymiarze sprawiedliwości*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego. https://doi.org/10.18778/8331-043-5

Collins, Hugh. 1982. *Marxism and Law*. Oxford: Oxford University Press.

Dworas-Kulik, Judyta. 2020. "Dissolution and Separation of Marriage and Their Effects as Envisaged by Drafts of Marriage Law in Interwar Poland." *Roczniki Nauk Prawnych* 30(3): 31–43. https://doi.org/10.18290/rnp20303-2

Eckhardt, Piotr. 2024. *Socialism under Construction. Law and Ideology in Housing, Construction and Spatial Planning in Poland 1944–1989.* Warszawa: Scholar.

Ereciński Tadeusz. Karol Weitz. 2019. “Skarga nadzwyczajna w sprawach cywilnych.” *Przegląd Sądowy* 2: 7–19.

Ernst, Hano. Mirosław Michał Sadowski. Mirosław Sadowski. 2024. “An Ancestry of Bridges: The Persistence of Legal Transplants in Croatia and Poland.” In *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*. Edited by Cosmin Cercel, Alexandra Mercescu, Mirosław Michał Sadowski. 190–211. Abingdon–New York: Routledge. https://doi.org/10.4324/9781003346890-12

Fagan, Eduard. 1996. “Roman-Dutch Law in its South African Historical Context.” In *Southern Cross: Civil Law and Common Law in South Africa*. Edited by Reinhard Zimmermann, Daniel Visser. 32–64. Oxford: Oxford University Press.

Fiedorczyk, Piotr. 2007. “Family Law in 20th Century Poland: Between Soviet Patterns and European Legal Tradition.” In *Family Law: Balancing Interests and Pursuing Priorities*. Edited by Lynne D. Wardle, Camille S. Williams. 57–63. Buffalo–New York: William S. Hein.

Fiedorczyk, Piotr. 2014. *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945–1964)*. Białystok: Wydawnictwo Uniwersytetu w Białymstoku.

Forić, Samir. Marko Dokić. Danijela Vuković-Ćalasan. 2024. “Historical Trajectories and Shared Destiny as a Basis for Common Legal Identity: The Cases of Bosnia and Herzegovina.” In *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*. Edited by Cosmin Cercel, Alexandra Mercescu and Mirosław Michał Sadowski. 240–259. Abingdon–New York: Routledge. https://doi.org/10.4324/9781003346890-14

Frąckowiak, Józef. 2015. “Osiemdziesiąt lat polskiego prawa handlowego – wzloty, upadki oraz mozolna reaktywacja.” *Przegląd Prawa i Administracji* 101: 45–62.

Giaro, Tomasz. 2007. “Alt- und Neueuropa, Rezeptionen und Transfers.” In *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*. Edited by Tomasz Giaro. 273–317. Frankfurt am Main: Vittorio Klostermann.

Giaro, Tomasz. 2011a. “The Legal Tradition of Eastern Europe. Its Rise and Demise.” *Comparative Law Review* 2: 1–23.

Giaro, Tomasz. 2011b. “Historia i tradycja prawa rzymskiego.” In *Prawo rzymskie: u podstaw prawa prywatnego.* Wojciech Dajczak, Tomasz Giaro and Franciszek Longchamps de Bérier. 31–116. Warszawa: Wydawnictwo Naukowe PWN.

Giaro, Tomasz. 2024. “The Wave of Transfers: An East-European Chapter in the Civil Law Tradition.” *Comparative Law Review* 14(2): 33–58.

Glenn, H. Patrick. 2010. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford: Oxford University Press. https://doi.org/10.1093/he/9780199580804.001.0001

Hart, Herbert Lionel Adolphus. 1994 [1961]. *The Concept of Law*. Oxford: Clarendon Press.

Holmes, Oliver Wendell. 1885. “Early English Equity.” *Law Quarterly Review* 1(2): 162–174.

Holmes, Oliver Wendell. 2009 [1881]. *The Common Law*. Harvard: Harvard University Press.

Jhering, Rudolph. *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. Leipzig: Breitkopf und Härtel. Zweiter Theil. Zweite Abtheilung.

Jodłowski, Jerzy. 1951. *Nowe drogi polskiego procesu cywilnego. Założenia ideologiczne reformy postępowania cywilnego*. Warszawa: Wydawnictwo Ministerstwa Sprawiedliwości.

Kennedy, Duncan. 1997. *A Critique of Adjudication {fin de siècle}*. Cambridge, MA: Harvard University Press.

Kennedy, Duncan. 2008. *Legal Reasoning: Collected Essays*. Aurora: Davies Group.

Kleyn, Duard. Gardiol Van Niekerk. 2014. “Ulpian’s praecepta iuris and their role in South African law Part 2: Modern-day South African practice.” *Fundamina* 20(1): 446–455.

Koselleck, Reinhart. 2018 [2006]. “Structures of Repetition in Language and History.” In *Sediments of Time: On Possible Histories*. Translated and edited by Sean Franzel, Stefan-Ludwig Hoffmann. 158–174. Stanford: Stanford University Press.

Kowalski, Jerzy. 2008. "Instytucja prezydenta w Rzeczypospolitej Polskiej – tradycja i współczesność." *Humanum* 2: 123–137.

Kozak, Artur. 2010. *Myślenie analityczne w nauce prawa i praktyce prawniczej.* Edited by Maciej Pichlak. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Kraut, Richard. Ed. 1992. *The Cambridge Companion to Plato*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CCOL0521430186

Kull, Irene. 1996. "Legal Remedies Provided in the Estonian Draft Law of Obligations Act for Breach of Contractual Obligations." *Juridica International* 4: 147–159.

Kuźmicka-Sulikowska, Joanna. 2019. "The Politics of Limitation of Claims in Poland: Post-Communist Ideology, Neoliberalism and the Plight of Uninformed Debtors." *Acta Universitatis Lodziensis. Folia Iuridica* 89: 131–160. https://doi.org/10.18778/0208-6069.89.09

Kühn, Zdeněk. 2004. "Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement." *American Journal of Comparative Law* 52(3): 531–567. https://doi.org/10.2307/4144478

Kühn, Zdeněk. 2011. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Leiden–Boston: Martinus Nijhoff. https://doi.org/10.1163/9789047429005

Laske, Caroline. 2020. *Law, Language and Change. A Diachronic Semantic Analysis of Consideration in the Common Law*. Leiden–Boston: Brill-Martinus Nijhoff. https://doi.org/10.1163/9789004436169

Lasok, Dominik. 1968. *Polish Family Law*. Leyden: A.W. Sijthoff.

Legrand, Pierre. 1997. "The Impossibility of 'Legal Transplants.'" *Maastricht Journal of European and Comparative Law* 4: 111–124. https://doi.org/10.1177/1023263X9700400202

Leszczyńska-Wichmanowska, Krystyna. 2021. "Senat RP jako efekt kompromisu 'Okrągłego Stołu.'" *Polityka i Społeczeństwo* 19(4): 79–93. https://doi.org/10.15584/polispol.2021.4.6

Longchamps de Bérier, Franciszek. 2011a. "Rodzina." In *Prawo rzymskie: u podstaw prawa prywatnego*. Wojciech Dajczak, Tomasz Giaro, Franciszek Longchamps de Bérier. 199–240. Warszawa: Wydawnictwo Naukowe PWN.

Longchamps de Bérier, Franciszek. 2011b. "Roman Law and Legal Knowledge – Law Faculties versus Law Schools." In *Roman Law and Legal Knowledhe: Studies in Memory of Henryk Kupiszewski*. Edited by Tomasz Giaro. 13–20. Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji UW.

Lonchamps de Bérier, Franciszek. 2024. "Evolution of Roman Law." In *Research Handbook on Legal Evolution*. Edited by Wojciech Załuski, Sacha Bourgeois-Gironde, Adam Dyrda. 150–169. Cheltenham–Northampton: Edward Elgar. https://doi.org/10.4337/9781803921822.00021

Mańko, Rafał. 2002. "European Private Law – In Pursuit of Unity." *Warsaw University Law Review* 2(1): 110–131

Mańko, Rafał. 2003. "Prawo rzymskie jako źródło prawa w Afryce Południowej." *Zeszyty Prawnicze* 3(1): 139–162. https://doi.org/10.21697/zp.2003.3.1.05

Mańko, Rafał. 2004a. "Sądowe stosowanie Corpus Iuris Civilis w Afryce Południowej w świetle wybranego orzecznictwa." *Zeszyty Prawnicze* 4(3): 149–178. https://doi.org/10.21697/zp.2004.4.1.08

Mańko, Rafał. 2004b. *Prawo prywatne w Unii Europejskiej. Perspektywy na przyszłość*. Warszawa: Podyplomowe Studium Prawa Europejskiego UW. https://doi.org/10.5281/zenodo.13924121

Mańko, Rafał. 2007. "Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure." In *Private Law and the Many Cultures of Europe*. Edited by Thomas Wilhelmsson et al. 83–103. Alphen aan den Rijn: Kluwer Law International.

Mańko, Rafał. 2012. "Quality of Legislation Following a Transition from Really Existing Socialism to Capitalism: A Case Study of General Clauses in Polish Private Law." In *The Quality of*

Legal Acts and its Importance in Contemporary Legal Space. Edited by Jānis Rozenfelds et al. 540–561. Riga: University of Latvia Press.

Mańko, Rafał. 2013a. "Survival of the Socialist Legal Tradition? A Polish Perspective." *Comparative Law Review* 4(2): 1–28.

Mańko, Rafał. 2013b. "Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/*Sinthome*." *Pólemos: Journal of Law, Literature and Culture* 7(2): 207–233. https://doi.org/10.1515/pol-2013-0011

Mańko, Rafał. 2015a. "Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture." In *Tiesību efektivitāte postmodernā sabiedrībā*. Edited by Jānis Rozenfelds et al. 17–27. Rīga: LU Akadēmiskais apgāds.

Mańko, Rafał. 2015b. "Relikty w kulturze prawnej – uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym." *Przegląd Prawa i Administracji* 102: 201–224. https://repozytorium.uni.wroc.pl/publication/127538

Mańko, Rafał. 2015c. "The Cooperative Member's Proprietary Right to an Apartment: A Legal Survival of the Period of Actually Existing Socialism in Polish Private Law." *Zeszyty Prawnicze UKSW* 15(4): 131–160. https://doi.org/10.21697/zp.2015.15.4.08

Mańko, Rafał. 2016a. "Towards a Typology of Dimensions of the Continuity and Discontinuity of Law: The Perspective of Polish Private Law after the 1989 Transformation." *Wroclaw Review of Law, Administration & Economics* 6(2): 108–120. https://doi.org/10.1515/wrlae-2018-0007

Mańko, Rafał. 2016b. "'Demons of the Past'? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law." In *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. Edited by Rafał Mańko, Cosmin Sebastian Cercel, Adam Sulikowski. 66–89. Oxford: Counterpress.

Mańko, Rafał. 2016c. "Wybrane relikty prawne epoki realnego socjalizmu w polskim prawie cywilnym – analiza zmiany funkcji społecznej instytucji prawnych w następstwie transformacji ustrojowej." *Studia Iuridica* 66: 207–235.

Mańko, Rafał. 2016d. "Ideology and Legal Interpretation: Some Theoretical Considerations." In *Constitutional Values in Contemporary Legal Space*. Edited by Kalvis Torgāns et al. 117–126. Riga: University of Latvia Press.

Mańko, Rafał. 2017a. "Form and Substance of Legal Continuity." *Zeszyty Prawnicze UKSW* 17(2): 207–232. https://doi.org/10.21697/zp.2017.17.2.10

Mańko, Rafał. 2017b. "Prawo użytkowania wieczystego jako pozostałość po epoce realnego socjalizmu – ujęcie socjologicznoprawne." *Zeszyty Prawnicze UKSW* 17(1): 35–63. https://doi.org/10.21697/zp.2017.17.1.02

Mańko, Rafał. 2019. "Delimiting Central Europe as a Juridical Space: A Preliminary Exercise in Critical Legal Geography." *Acta Universitatis Lodziensis. Folia Iuridica* 89: 63–80. https://doi.org/10.18778/0208-6069.89.05

Mańko, Rafał. 2020a. "Legal Form, Ideology and the Political." In *Legal Scholarship and the Political: In Search of a New Paradigm*. Edited by Adam Sulikowski, Rafał Mańko, Jakub Łakomy. 17–40. Warszawa: C.H. Beck.

Mańko, Rafał. 2020b. "Being Central European, or some reflections on law, double peripherality and the political in times of transformation." In *Central and Eastern Europe as a Double Periphery?* Edited by Tomáš Gábriš, Ján Sombati. 17–44. Berlin: Peter Lang. https://doi.org/10.3726/b17760

Mańko, Rafał. 2020c. "Artur Kozak's Juriscentrist Concept of Law: a Central European Innovation in Legal Theory." *Review of Central and East European Law* 45(2–3): 334–375. https://doi.org/10.1163/15730352-bja04502003

Mańko, Rafał. 2021. “Legal Form, COVID and the Political: Notes Towards a Critique of the *Corpus Iuris Pandemici*.” *Acta Universitatis Lodziensis. Folia Iuridica* 96: 33–46. https://doi.org/10.18778/0208-6069.96.03

Mańko, Rafał. 2022. “Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication.” *Law and Critique* 33: 175–194. https://doi.org/10.1007/s10978-021-09288-w

Mańko, Rafał. 2023. “Legal Survivals and the Resilience of Juridical Form.” *Law and Critique* (online first: 6 October 2023). https://doi.org/10.1007/s10978-023-09357-2

Mańko, Rafał. Piotr Eckhardt. Forthcoming. “Conceptualising the Continuity of Legal Systems and Cultures. International Workshop ‘Legal Survivals in Central and Eastern Europe: Socio-Legal Perspectives on Public and Private Law,’ Riga Graduate School of Law, Riga, 15–16 June 2024.” *Acta Universitatis Lodziensis. Folia Iuridica* (in print).

Mańko, Rafał, Martin Škop. Marketa Štěpáníková. 2016. “Carving Out Central Europe As a Space of Legal Culture: A Way Out Of Peripherality?” *Wroclaw Review of Law, Administration and Economics* 6(2): 4–28. https://doi.org/10.1515/wrlae-2018-0002

Mayer-Maly, Theo. 1971. “Die Wiederkehr von Rechtsfiguren.” *Juristenzeitung* 1: 1–3.

McKendrick, Ewan. 2019. *Contract Law*. London: Red Globe Press. https://doi.org/10.1093/he/9780198808169.001.0001

Milej, Tomasz. 2008. “Europejska kultura prawna a kraje Europy Środkowej i Wschodniej.” *Przegląd Legislacyjny* 15(1): 60–74.

Nicholson, Caroline. 2011. “The Relevance of the Past in Preparing for the Future: A Case for Roman Law and Legal History.” *Fundamina* 17(2): 101–114.

Nonet, Philippe. Philip Selznick. 2009 [1978]. *Towards Responsive Law: Law & Society in Transition*. New Brunswick–London: Transaction Publishers.

Onions, Charles Talbut. 1966. *The Oxford Dictionary of English Etymology*. Oxford: Oxford University Press.

Pałecki, Krzysztof. 1997. “Zmiany w aksjologicznych podstawach prawa jako wskaźnik jego tranzycji.” In *Dynamika wartości w prawie*. Edited by Krzysztof Pałecki. 15–28. Kraków: Księgarnia Akademicka.

Pleps, Jānis. 2016. “The continuity of the constitutions: the examples of the Baltic states and Georgia.” *Wroclaw Review of Law, Administration and Economics* 6(2): 29–44. https://doi.org/10.1515/wrlae-2018-0003

Pleps, Jānis. Edgars Pastars. Ilze Plakane. 2022. *Constitutional Law*. Translated by Ingūna Beķere. Rīga: Latvijas Vēstnesis.

Preshova, Denis. Nenad Markovikj. 2024. “Old Patterns Die Hard – The Idiosyncrasies of the Yugoslav Socialist Legal Tradition and the Problem of Continuity in the Western Balkans.” In *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*. Edited by Cosmin Cercel, Alexandra Mercescu, Mirosław Michał Sadowski. 119–136. Abingdon–New York: Routledge. https://doi.org/10.4324/9781003346890-8

Rabel, Ernst. 1906/1907. “Nachgeformte Rechtsgeschäfte: Mit Beiträgen zu den Lehren von der Injurezession und vom Pfandrecht.” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 27: 290–335; 28: 311–379.

Radwan, Arkadiusz. Adam Redzik. 2009. “O dwóch dwudziestoleciach i trzech jubileuszach prawa handlowego w Polsce.” *Przegląd Prawa Handlowego* 9: 4–8.

Rahmatian, Andreas. 2022. “Der feudale Liberalismus des englischen Liegenschaftsrechts.” *Zeitschrift für Europäisches Privatrecht* 30(2): 273–300.

Renner, Karl. 1976 [1929]. *The Institutions of Private Law and Their Social Functions*. London–Boston: Routledge and Kegan Paul.

Stasiak, Jarosław. 2020. *Skarga nadzwyczajna w postępowaniu cywilnym*. Warszawa: C.H. Beck.

Stetsyk, Nazar. 2019. “Supervisory Review in Post-Soviet Legal Systems: Forward to the Rule of Law or Back to Soviet Survivals.” *Wrocławsko-Lwowskie Zeszyty Prawnicze* 10: 209–244.

Sulikowski, Adam. Rafał Mańko. 2024. “Conclusions: Post-communism, Neoliberalism, and Populism in the Semi-Periphery.” In *Law, Populism and the Political in Central and Eastern Europe*. Edited by Rafał Mańko, Adam Sulikowski, Przemysław Tacik, Cosmin Cercel. 248–259. Abingdon–New York: Routledge. https://doi.org/10.2139/ssrn.4828767

Szymaniec, Piotr. 2018. “Discussion about the Legal Identity of Central and Eastern Europe. 3rd Annual CEENELS Conference ‘Legal Identities and Legal Traditions in CEE.’” *Acta Universitatis Lodziensis. Folia Iuridica* 85: 139–153. https://doi.org/10.18778/0208-6069.85.11

Szymaniec, Piotr. 2021. “Search of Originality in Central and Eastern European Legal Culture Culture(s). 4th Annual CEENELS Conference: Legal Innovativeness in Central and Eastern Europe, Moscow, 14–15 June 2019.” *Acta Universitatis Lodziensis. Folia Iuridica* 96: 141–155. https://doi.org/10.18778/0208-6069.96.11

Tigar, Michael E. 2000. *Law and the Rise of Capitalism.* New York: Monthly Review Press.

Toit, Francois du. 2014. “Roman-Dutch Law in Modern South African Succession Law.” *Ars Aequi* 4: 278–285.

Trikoz, Elena N. Elena N. Gulyaeva. 2023. “The Communicative Function of Legal Transplants in Mixed Legal Systems.” *Kutafin Law Review*, 10(3): 515–543. https://doi.org/10.17803/2713-0533.2023.3.25

Uzelac, Alan. 2010. “Survival of the Third Legal Tradition?” *Supreme Court Law Review* 49: 377–396.

Van Caenegem, Raoul Charles. 1987. *Judges, Legislators and Professors: Chapters in European Legal History*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511599361

Watson, Alan. 1993 [1974]. *Legal Transplants: An Approach to Comparative Law*. Atlanta: Georgia University Press.

Watson, Alan. 1995. *The Spirit of Roman Law.* Athens–London: University of Georgia Press.

Watson, Alan. 2000. *Law Out of Context*. Athens–London: University of Georgia Press. https://doi.org/10.3366/elr.2000.4.2.147

Watson, Alan. 2001. *Society and Legal Change*. Philadelphia: Temple University Press.

Watson, Alan. 2003. “The Birth of *Legal Transplants*.” *Georgia Journal of International and Comparative Law* 41(3): 605–608.

Zartaloudis, Thanos. 2019. *The Birth of Nomos*. Edinburgh: Edinburgh University Press. https://doi.org/10.3366/edinburgh/9781474442008.001.0001

Zembrzuski, Tadeusz. 2019. “Extraordinary Complaint in Civil Proceedings Under the Polish Law.” *Access to Justice in Eastern Europe* 1(2): 31–44. https://doi.org/10.33327/AJEE-18-2.1-a000006

Zimmermann, Reinhard. 1996. “Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Science.” *Law Quarterly Review* 112: 576–605.

Zimmermann, Reinhard. 2001. *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198299134.001.0001

Zimmermann, Reinhard. 2004. “Roman Law and the Harmonisation of Private Law in Europe.” In *Towards a European Civil Code*. Edited by Arthur S. Hartkamp et al. 21–58. Deventer: Kluwer.

Zirk-Sadowski, Marek. 2011. *Wprowadzenie do filozofii prawa*. Warszawa: LEX.

Zomerski, Wojciech. 2016. “‘25 Years After the Transformation: Law and Legal Culture in Central and Eastern Europe Between Continuity and Discontinuity,’ Brno, Czech Republic, 16–17.04.2015.” *Archiwum Filozofii Prawa i Filozofii Społecznej* 1(12): 78–83.

Zomerski, Wojciech. 2017. "Conference Report: 2nd Annual Conference of the Central and Eastern European Network of Legal Scholars (CEENELS): 'An Uneasy Legacy: Remnants of Socialist Legal and Political Thinking in Central and Eastern Europe,' Jagiellonian University, Faculty of Law and Administration, 7–8 January 2017." *Wroclaw Review of Law, Administration and Economics* 7(2): 83–85. https://doi.org/10.1515/wrlae-2018-0019

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THE ROLE OF COURT EXPERTS IN PROTECTING THE INTEREST OF THE CHILD IN DOMESTIC CIVIL PROCEDURES

Abstract. In court procedures, the role of court experts and their opinions is important for the final decisions. It is generally accepted that the court appoints experts and makes decisions based on – among other things – specialised expertise and opinions of these experts. Court experts' knowledge differs from that of judges. It is worth analysing the intersections between these two types of knowledge. In this context, special attention is to be paid to the position and status of the child in court proceedings in family matters. The main purpose of this article is to examine the role of court experts in safeguarding children's best interests in civil procedures within the family matters context, which can help to improve the understanding of and trust in court experts' contribution from the institutional and societal perspective.

Keywords: the role of court experts, specialised knowledge of court experts, the status and rights of child in court proceedings, hearing, public trust

ROLA BIEGŁYCH SĄDOWYCH W OCHRONIE DOBRA DZIECKA W RODZIMYM POSTĘPOWANIU CYWILNYM

Streszczenie. W procedurach sądowych rola biegłych i ich opinie mają znaczenie dla ostatecznych rozstrzygnięć. Przyjęło się, że sąd wyznacza i powołuje biegłych, aby na podstawie m.in. ich specjalistycznej ekspertyzy i opinii podejmować decyzje. Wiedza biegłych różni się od wiedzy sędziów. Warto przeanalizować punkty przecinania się tych dwóch rodzajów wiedzy. W tym kontekście szczególnej uwagi godne jest miejsce i status dziecka w postępowaniach sądowych dotyczących spraw rodzinnych. Głównym celem niniejszego artykułu jest analiza roli biegłego sądowego w ochronie dobra dziecka i jego statusu prawnego w postępowaniu cywilnym w sprawach rodzinnych, co może wzmocnić zrozumienie działalności biegłych oraz pokładane w niej zaufanie z perspektywy zarówno instytucjonalnej, jak i społecznej.

Słowa kluczowe: rola biegłych sądowych, specjalistyczna wiedza biegłych sądowych, status dziecka w postępowaniu sądowym, zaufanie publiczne

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1. INTRODUCTION

This article employs the doctrinal approach, taking into account the interdisciplinary perspective of court experts' roles in protecting the best interest (e.g. Jędrejek 2018; Zajączkowska-Burtowy 2021; Pisarska 2024) and rights of the child in civil proceedings. The analysis integrates insights from both legal disciplines – particularly civil law – and social sciences, including psychology and pedagogy. The research method includes elements of the interpretation of the current regulations, a review of the debate on them in recent years, and, finally, an analysis of noticeable improvements in the participation of children in civil procedure as well as the identification of changes that are still required.

In court procedures, the role of court experts and their opinions are important for the final decisions. These considerations pertain to family cases involving juveniles, in which a common, dominant, and priority directive for experts and judges is to act in the best interest of the child. Experts are required to possess professional knowledge, skills, and competencies that enable them to initiate and maintain constructive contact with the juvenile in order to carry out the assessment ordered by the judge. When presented as evidence in the case, court experts' opinions often constitute a significant basis for the decisions made by the judge. However, before such a ruling is issued, the child may have contact with both the experts and the judge, as well as with the attorneys of the parties involved. It is important that these interactions occur in a manner that respects the child's rights, with the child's best interests guiding the course of the judicial proceedings.

The court expert and the judge are the most important individuals that a juvenile child of parents involved in judicial proceedings may encounter, whether the parents are in the process of divorce, after a divorce, or in another life situation requiring a judicial ruling (Stankowska 2012; Długoszewska 2012; Mróz-Szarmach 2020) on matters of custody over and care of the child, shared custody, foster care, or the child's contact with a parent. This article will consider the place and status of the child in judicial proceedings from a general, broad perspective, both legal – referencing current information and regulations included, among others, in Joanna Bodio's 2019 book titled *The Child as a Participant in Non-litigious Proceedings* – and psychological and social. It will also elaborate on the practice of court experts and their role. It is important to highlight that the concept of "the best interest of the child"[1] lacks a statutory definition. According to the Supreme Court Decision of 24 November 2016[2], it

[1] The phrasing "the best interest of the child" has been discussed by various authors, including Joanna Zajączkowska-Burtowy (2021, 141). A comprehensive review of the literature on this subject has also been conducted by Aleksandra Krzysiak (2023, 99–101).

[2] Supreme Court Decision of 24 November 2016, case II CA 1/16, published in OSNC 2017/7–8, item 90.

is interpreted as the child's entitlement to the protection of life and health, and encompasses all measures aimed at creating conditions for their peaceful and proper development, safeguarding their dignity, and ensuring their involvement in decisions that affect their situation in judicial proceedings. The determination of what constitutes a child's best interest is case-specific and must be evaluated in the light of the particular child's circumstances and perspective. In this context, the role of the court-appointed expert is crucial. The expert's role is to identify what the best interests of the specific child entail, propose concrete ways to secure the child's welfare moving forward, and ensure that the child's best interests are safeguarded throughout the judicial process (Andrzejewski 2017, 83 f.).

2. SPECIALISED KNOWLEDGE OF COURT EXPERTS

It is generally accepted that the court appoints experts, and that judicial decisions are made based on the specialised knowledge of court experts and the reliability of their expert opinions. The roles of court experts and judges are different, as are their duties and tasks. As a result of their work, a specific, professional system of knowledge is created, without which proper case assessment – in accordance with the law, professional ethics, and specialised scientific knowledge – would often not be possible. The role of experts is not to establish facts or assess the credibility and strength of evidence, as this is the role of the court. The primary task of an expert is to elucidate various circumstances and matters from the perspective of an expert, thus on the basis of specialised knowledge (Article 278 of the Code of Civil Procedure), skills, and experience.[3] Specialised knowledge consists of multiple layers of both descriptive and explanatory nature, enhanced by the expert's additional specialised training, enabling them to perform specific analyses, diagnoses, and opinions, as well as consultations and mediations (more on this topic in Stanik 2013, 401–408, 415, 417–423). The expert's specialised insights, both in terms of factual descriptions and their explanations –guided by the highest ethical standards in their profession – are intended to assist the court in resolving the substantive issues of the case under consideration (Stanik 2013, 430–446).

[3] In his book titled *Poznanie sądowe a poznanie naukowe*, Maciej Zieliński analyses the similarities and differences between scientific knowledge and judicial knowledge. He describes the role of the court expert, whose primary task is to provide the court with specialised knowledge – presented in a manner understandable to both the court and the parties, clarifying the facts or the dispute – necessary for establishing facts that fall outside the judge's expertise. However, it is ultimately the court that determines the usefulness and evidentiary value of this knowledge: "The final decision regarding the weight and significance of the expert's opinion always rests with the court, not the expert" (Zieliński 1979, 112).

The expert opinion is a particular type of evidence (Article 233 of the Code of Civil Procedure), which can and should be subject to critical assessment by the court according to the principles of logic and common knowledge, and based on criteria such as the level of the expert's knowledge, the scientific theory applied, the method of reasoning, and the decisiveness of the conclusions contained in the opinion. Furthermore, it is special personal evidence presented in the form of a written statement, which can be expanded and supplemented by oral expert testimony (more on this topic in Stanik 2013, 420–427). It is essential that the cooperation between the court and the expert should involve supplementing necessary data by the expert. The court has the obligation to assign specific tasks to the expert and cannot replace them, because it does not possess the specialised knowledge (e.g. Włodarczyk-Madejska 2017a) that the expert has, which is necessary for resolving the case. Therefore, the court expert bears a high level of responsibility for the integrity of their work, and adherence to ethical norms is of paramount importance, especially in cases involving children, whose rights should be respected and upheld in a particular manner. This is due to factors such as the child's procedural capacity, whether they are granted or not granted the status of a participant in non-litigious proceedings, as well as their intellectual maturity, emotional state, and knowledge.[4]

The literature repeatedly emphasises that court experts serve as a 'bridge' between the child and the court, helping judges understand the child's needs and what is in their best interest (e.g. Miller 2002; Op de Beeck et al. 2017). Particularly in cases involving child custody, expert opinions can be decisive for the final verdict. Both Polish and international literature on the role of court-appointed experts in protecting children's rights and welfare in civil proceedings offer a wealth of valuable insights on this topic.[5]

[4] Supreme Court Decision of 24 November 2016, II CA 1/16, OSNC 2017/7–8, item 90 (see, e.g., Jaśkiewicz 2013, 98–107).

[5] Domestic literature on this topic includes Flaga-Gieruszyńska (2020), Mróz-Szarmach (2020), Zajączkowska-Burtowy and Burtowy (2023, 564–607), Czerederecka (2016), Dzierżanowska and Studzińska (2015), Kalinowski (1994), Włodarczyk-Madejska (2017; 2018), Błaszczak and Markiewicz (2016). Related international literature on the role of court experts in protecting the rights and welfare of the child includes Saywitz, Goodman and Lyon (2002; 2017). The authors focus on the practice of interviewing children in both courtroom and non-courtroom contexts, offering significant insights into how expert assessments influence legal proceedings, particularly in child maltreatment cases (Saywitz, Goodman, Lyon 2017). Furthermore, they expand on how properly conducted interviews by court experts are crucial for ensuring both the accuracy of the child's testimony and their emotional protection during judicial processes. Their research is pivotal to understanding the role that court experts play in civil cases, especially in the context of child testimony; see also Brown, Craig, Crookes et al. (2015).

3. THE RIGHTS OF THE CHILD IN JUDICIAL PROCEEDINGS CONCERNING FAMILY MATTERS

The guarantees protecting children's rights in judicial proceedings are included in two important documents: in the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, (Journal of Laws of 1991, No. 120, item 526), as well as in the European Convention on the Exercise of Children's Rights of 25 January 1996 (Journal of Laws of 2000, No. 107, item 1128). The adoption of the Convention on the Rights of the Child by Poland, in accordance with Article 12, "guarantees the child capable of forming their own views the right to freely express them in all matters concerning the child, particularly by ensuring the opportunity to be heard in any judicial and administrative proceedings" (Journal of Laws of 1991, No. 120, item 526, as amended). The child's right to express their own views is considered as an essential aspect of their participation in social life, beneficial from the perspective of the child, the family, and society (Hodtkin, Newell 2006; also see: Committee on the Rights of the Child 2006). The European Convention on the Exercise of Children's Rights provides children with:

- the right to information about ongoing proceedings concerning them and the opportunity to express their opinion (Article 3 ECERC);
- the right to request the appointment of an independent representative of the child's interests (Article 4 ECERC);
- the right to demand the presence of selected persons in proceedings before the court and the right to be informed about the potential consequences of the child's position and the possible consequences of any decision (Article 5 ECERC).

The court should safeguard these rights, and this is currently the best possible way to ensure entitlements for the child as a participant in judicial proceedings.[6]

[6] The protection of children's rights is guaranteed by a number of legal instruments at both the national and international levels, extending beyond the Convention on the Rights of the Child and the Convention on the Exercise of Children's Rights. Below are some key legal documents that ensure the protection of children's rights:

1) the European Convention on Human Rights (ECHR) – 1950. Article 8. The right to respect for private and family life, which includes the protection of children's rights within family relations. Article 6. The right to a fair trial, encompassing judicial procedures concerning child custody and care;

2) the Charter of Fundamental Rights of the European Union – 2000. Article 24. Rights of the child, recognising the child as a rights-holder, including the right to express their views in matters that affect them and ensuring that the child's best interests are a primary consideration;

3) the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children – 1996. This convention facilitates international cooperation in matters concerning parental responsibility and child protection, including cases of child abduction and custody disputes;

The European legislation guarantees the child's influence on non-litigious proceedings through their hearing and presentation of opinions, which are taken into account when resolving the matter. The rights and obligations of the child in non-litigious proceedings include:

- the right to be heard;
- the child's right to personal participation in guardianship proceedings;
- the right to refuse to testify and to refrain from answering questions.

The obligations of the child as a witness include: the duty of the child to appear in court as a witness (art. 574 § 2 k.p.c) and the obligation to give testimony (art. 261 § 1 w zw. z art. 13 § 2 k.p.c.). A child acting as a witness enjoys the same rights and obligations as an adult (except for the duty to take an oath – art. 267 13 § 2 k.p.c.; more on this topic in Bodio 2019).

In litigious proceedings, the child is subject to hearing in non-property matters concerning them (these are matrimonial matters, which decide on parental authority, i.e. divorce, separation, annulment of marriage, child's descent, dissolution of adoption) (art. 576 § 2 k.p.c). In non-litigious proceedings, unlike litigious proceedings, the child's hearing occurs in family and guardianship

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4) the Hague Convention on the Civil Aspects of International Child Abduction – 1980. Its objective is to secure the prompt return of children wrongfully removed to or retained in another country, and to prevent situations that violate children's rights;

5) the International Labour Organisation (ILO), Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour – 1999. This convention targets the worst forms of child labour, such as forced labour, slavery, prostitution, and the recruitment of children for armed conflict;

6) the Act on the Ombudsman for Children (Poland) – 2000. This act outlines the competencies and responsibilities of the Ombudsman for Children, who works to protect the interests of children in Poland;

7) the Act on Counteracting Domestic Violence (Poland) – 2005. It contains provisions for protecting children from domestic violence and ensures legal measures to safeguard their safety and well-being;

8) the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) – 2011. Child protection is a key element of this convention, which also addresses the situation of children as witnesses to domestic violence;

9) the United Nations Security Council Resolution 1325 on Women, Peace, and Security – 2000. Although it focuses on the protection of women, it also includes the protection of children, particularly in the context of armed conflict and violence;

10) the Constitution of the Republic of Poland (1997). Article 72 establishes the principle of protecting children's rights, stating that everyone has the right to demand public authorities to protect the rights of the child. This provision serves as a foundation for broad protection of children's rights in the Republic of Poland.

Each of these legal instruments contributes to the protection of children's rights at various levels, both internationally and domestically. Through these regulations, the aim is to ensure the comprehensive protection of the best interests of the child and to guarantee their rights in various aspects of life.

cases concerning the person or property of the child (art. 261 § 1 w zw. z art. 13 § 2 k.p.c.; more on this topic in Bodio 2019).

The right to be heard, according to Walther J. Habscheid (the creator of this term), consists of three entitlements: the right to information, the right to take a position, and the right to consider factual allegations and legal claims. The court, by exercising this right, should be guided by the educational aim of instilling in the child primarily their co-responsibility for deciding on matters that concern them and making them aware that they are an active, not passive, subject – the central figure of the proceedings (Habscheid 1991, 263).

The implementation of the aforementioned rights is possible provided that the child is informed about the existence of these entitlements: information about rights related to the exercise of the right to be heard (Article 5 in conjunction with Article 13 § 2 of the Code of Civil Procedure), access to case files and the possibility of obtaining copies (Article 9 in conjunction with Article 13 § 2 of the Code of Civil Procedure), and ensuring the possibility of personal participation in individual activities during the proceedings (Article 149 and following in conjunction with Article 13 § 2 of the Code of Civil Procedure). Problems with implementing these rights most often arise when it comes to a child under the age of 13 (see Bodio 2019, 408).

In the Polish law, the child is obliged to personally participate in guardianship matters, unless the court exceptionally restricts or excludes their personal participation in the proceedings based on Article 573 § 2 of the Code of Civil Procedure, namely the child's right to be heard (Article 576 § 2 of the Code of Civil Procedure), the child's right to appeal decisions (Article 47 of the Family and Guardianship Code, Article 573 of the Code of Civil Procedure), or the child's right to appoint a legal representative in situations where the child cannot be represented by parents due to a conflict of interest (Article 99 of the Code of Civil Procedure in conjunction with Article 98 § 2 and 3 of the Code of Civil Procedure). Questions for the future include concerns about the direction of interpreting these rights and undertaking work to expand the procedural rights of children to other family matters, which have not yet found clear confirmation in legal acts or court practice.

4. THE STATUS OF THE CHILD IN JUDICIAL PROCEDURE CONCERNING FAMILY MATTERS

The role of an expert is different from that of the judge. The responsible role of court experts is to ensure the best conditions, which include providing information and ensuring good conditions for the child's participation in judicial proceedings when the child appears as an interested party or a participant in non-litigious proceedings. A question arises regarding the situations in which the right of the child to be heard is respected or overlooked in judicial proceedings.

The provisions of the European Convention on the Exercise of Children's Rights only outline general preferences regarding the child's right to express their views in judicial proceedings. According to Bodio, an analysis of norms arising from international law indicates that they do not provide sufficient grounds for formulating definitive principles determining the obligatory or discretionary nature of hearing the child in guardianship proceedings, nor do they establish standards for such hearings (Bodio 2019). As it turns out, according to Bodio, these norms do not require ensuring a direct hearing by the judge. They only define it as a strongly desirable element of the proceedings, fulfilling fundamental human rights and obliging the enactment of appropriate procedural safeguards (Bodio 2019). A child can be a participant in non-litigious proceedings because

> anyone who has legal capacity, any interested party, i.e., a person whose rights are affected by the outcome of the proceedings, can be one. The participant status is acquired by this person if they take part in it. This is possible at any stage of the case until the end of the proceedings in the second instance (Article 510 § 1 of the Code of Civil Procedure). If it turns out that the interested party is not a participant, the court summons them to participate in the case. By summoning to participate in the case, the summoned person becomes a participant (Article 510 § 2 of the Code of Civil Procedure) (Słyk 2014, 10).

Legal capacity is the ability to be a party and a participant in non-litigious proceedings (from birth). Until the age of 18, individuals do not have full legal capacity. A child can be a party in a civil case or a participant in non-litigious proceedings, in which case they act through a legal representative (parents, guardian, or curator), unless the legislator has granted them procedural capacity based on specific provisions (Bodio 2019, 15).

Joanna Bodio determined the current status of the child in judicial proceedings and the subjective qualifications of the child as a participant in non-litigious proceedings: judicial capacity, procedural capacity, postulatory capacity, procedural *locus standi*, and legal interest as conditions for the child to obtain the status of a participant in non-litigious proceedings (Bodio 2019). It is worth mentioning them briefly.

Procedural capacity in non-litigious proceedings concerning family matters applies to juveniles with limited legal capacity (aged 13 or older, unless completely incapacitated). Exceptionally, the guardianship court may limit or exclude the personal participation of a juvenile in proceedings if there are educational reasons for it (Article 573 of the Code of Civil Procedure). Every minor is a participant in proceedings before the guardianship court, and a child with limited legal capacity in matters concerning themselves may also personally perform procedural acts. According to the decision of the Supreme Court, "refusal to grant a child the rights of a participant in the proceedings does not constitute an obstacle to the court hearing the child (Article 574 of the Code of Civil Procedure), with the court should refrain from this right only in exceptional

cases if such a hearing is not meaningful" (Resolution of 26 January 1973; Case No. III CZP 101/71; OSNCP 1973 No. 7–8, item 118).

The legal capacity and procedural capacity of a child do not in themselves determine their participation in non-litigious proceedings. A child's acquisition of the status of a participant in non-litigious proceedings also requires having a legal interest (as understood in Article 510 of the Civil Procedure Code) and procedural legitimacy (becoming a participant). Evaluative criteria (the ability to perform procedural acts, nature of the case, psychological maturity, mental development, the age of the child) determine the child's autonomy but do not constitute a determinant of the legal interest justifying the child's participation in non-litigious proceedings (Bodio 2019, 460). It is, therefore, incorrect to link the status of a participant in non-litigious proceedings with evaluative criteria. It follows that a younger child who has not reached the age of 13 may also be a participant and should be guaranteed this participation, and thus to defend their rights just like an older child. Conclusions from the comparative analysis of selected European legal systems conducted by Joanna Bodio show that in all legal systems, obtaining the status of a party (participant) in proceedings is associated with the necessity of having legal and procedural capacity, although both capacities are not always distinguished in civil procedure codes (Bodio 2019, 112–113). In countries where capacity has been regulated, it usually refers to legal capacity (e.g. in Germany and Austria). In some European countries' law, a list of persons with legal capacity is provided (e.g. in Spain and Switzerland, even conceived children acquire it). Procedural capacity is gradable – depending on age – to full, limited, or lack thereof. Similarly to Poland, the limited procedural capacity of a minor does not involve limiting procedural acts but, rather, limiting the cases in which a child can perform all procedural acts.

Postulatory capacity is the ability to act independently in civil proceedings without a legal representative and the ability to personally act in civil proceedings; however, it requires having procedural capacity (Bodio 2019a, 35–49). In summary, the current rights of a child in court include: procedural capacity of a minor with limited legal capacity, the requirement to be heard, and the possibility to appeal court decisions.

In future and more detailed considerations, it will be worth contemplating how the status of a child in non-litigious proceedings should be defined, i.e.:

- whether based on the rights of other participants in the proceedings – equating the child's status with that of adult participants, or
- whether to attribute to them a special status, subject to broader protection (see Helios, Jedlecka 2019; 2017).

The current comparative analysis conducted by Joanna Bodio indicates that in most foreign legal systems, the status of a child in non-litigious proceedings has not been clearly distinguished from that of adult participants (Bodio 2019,

114). This is also the case in Poland, where the legal system lacks a clearly defined status for children in non-litigious proceedings, which, in turn, necessitates determining their participation based on general provisions (Article 510 of the Code of Civil Procedure). As Bodio states, these regulations guarantee the child's subjective treatment in non-litigious proceedings, but do not grant them the status of a participant in such proceedings. The author proposes "considering the introduction – following the German solution – of a catalog of participants in various types of non-litigious proceedings (especially those where the status of the child is most contentious, i.e., in guardianship proceedings)", because "in this way, the court and interested parties would gain legal certainty as to who should be a participant in the proceedings, removing the existing dissonance between statutory regulation, doctrinal views, and court practice" (Bodio 2019, 115). In this situation, the court expert would also have a more specified role and clearer tasks. Furthermore, criteria for the proper and conscientious conduct of court examinations, as determined by the status of the child in non-litigious proceedings, and criteria for the selection of research methods, would be more clearly defined. Additionally, the court could more precisely define the formulation of the evidentiary thesis and questions concerning minors to the expert (see Gurgul 2013).

5. THE HEARING OF A CHILD BY THE COURT

An important issue associated with the discussed topic concerns whether a child should be heard mandatorily or if it is relatively mandatory. In the legislation of European countries, the obligation to hear a child applies to children of various ages (see Cieśliński 2015; 2021). Generally, it is linked to the child obtaining limited legal capacity, typically after reaching the age of 12 or 13. In exceptional situations, considering the child's maturity, it is possible to hear them at an earlier age (in Germany, even as young as 2–3 years old). According to the current wording of Article 576 § 2 of the Polish Code of Civil Procedure, the court will hear the child in matters concerning their person or property if their mental development, health condition, and level of maturity allow it, taking into account their reasonable wishes as far as possible. The hearing takes place outside the courtroom. Therefore, the hearing of a child is conditioned by three prerequisites occurring together. The following factors must be taken into consideration: 1) the child's mental development, 2) the child's health condition, and 3) the child's level of maturity (cf. Czerederecka 2010; Stojanowska 2018). Analogous prerequisites arise from the applicable provision in litigious proceedings, Article 216^{1} of the Code of Civil Procedure. Considering the child's wishes in non-litigious proceedings is, in turn, conditioned by the existing possibilities and the reasonable nature of the child's wishes. "Since the hearing of a child is conditioned by the

aforementioned prerequisites, in the literature, it has been defined as 'relatively mandatory', dependent on the 'subjective values of the child'" (Gudowski 2012, 265; 2023). Marcin Cieśliński (2015; 2021) and Dominika Kuna (2024) also strongly advocate for the mandatory hearing of a child, provided that their mental development, health condition, and level of maturity allow it. The child's participation in non-litigious proceedings can be as a witness or with a hearing of the child. It is worth emphasising that merely hearing a child in proceedings by the court does not grant them the status of a participant in non-litigious proceedings (Bodio 2019, 462–463). The role of the court expert in the hearing of a child is of fundamental importance, primarily because their knowledge and specialised expertise can ensure that the child's voice and needs are properly understood, presented, and considered in judicial decisions. Moreover, the expert should have the capacity to safeguard the child's best interests, rights, and specific emotional needs throughout the proceedings.

In the context of the aforementioned Code of Civil Procedure and the strengthening of the procedural position of children, it is also worth addressing Article 216^2. This refers in particular to the legislation known as the "Kamilek bill," which reinforces the child's voice in civil procedure through, for example, introducing a child representative. Also, the Family and Guardianship Code, Article 99 § 1, brought changes here in 2023. Still, the recent amendments are insufficient. As Dominika Kuna points out,

> In answering the question: "How can the voice of the child be heard?" revision of the current provisions and regulations that do not raise interpretive doubts would be advisable. Interpretation of the law offers many practical solutions, but the pool of conceptions surrounding the right to be heard makes a single solution very difficult. The latter is primarily related to the nature of family matters and the very participation of children in court procedures. The low visibility of children in the social sphere, which has lasted for centuries, has also resulted in their rights requiring continuous evolution. (Kuna 2014, 89)

On the other hand, such shortcomings in domestic legal systems are addressed by the Expert Panel working at the Council of Europe on child-friendly justice standards and guidelines, based on an extensive consultation with almost 3,800 children throughout Europe. The European Committee on Legal Co-operation (CDCJ) recommends and supports their implementation in domestic legal systems. In general, child-friendly justice is justice that is:

- accessible;
- age appropriate;
- speedy;
- diligent;
- adapted to and focused on the needs of the child;
- respectful of the right to due process;
- respectful of the right to participate in and to understand the proceedings;

- respectful of the right to private and family life;
- respectful of the right to integrity and dignity

(Council of Europe 2024; see also the Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice 2011).

6. STRENGTHENING THE CHILD'S POSITION IN NON-LITIGIOUS PROCEEDINGS

How to ensure better implementation of children's rights in judicial proceedings? This is a matter for consideration in terms of strengthening the child's position in non-litigious proceedings. A comparison of legal systems by Bodio (2019) has shown that the most rights were granted to children in the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008, in the non-litigious laws of Serbia and Montenegro, as well as in the Lithuanian Code of Civil Procedure. Examples of good practices that are in line with the European Convention on the Exercise of Children's Rights (Articles 3, 4, and 5 of the ECECR) include:

- the institution of legal representation in the form of a legal guardian (legislation in Germany);
- the regulation of the legal capacity of children (Germany, Austria);
- a catalogue of participants in proceedings – providing legal certainty for the court and interested parties as well as determining who should be a participant in the proceedings (Germany).

In the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008, the procedural rights of children are equated with the rights of adult participants in proceedings. According to the German legislation, a minor child capable of legal action upon reaching the age of 14 has the opportunity to independently pursue their interests in proceedings before the family court and influence the proceedings. They are entitled to act on their own behalf in proceedings concerning guardianship, the place of residence, as well as in matters related to their education or medical treatment, and in proceedings regulating their contacts with other individuals (Bodio 2019, 78). The strengthening of the child's position in non-litigious proceedings in Germany has been achieved through the introduction of the institution of legal representation in the form of a legal guardian, who represents the child's interests in proceedings before the family court. Legal representation is associated with the child's participation as a party to the proceedings and is required when the child is to be separated from the person under whose care they remain. The legal representative also provides the child with information about the subject matter, the progress of the proceedings, and possible outcomes (Bodio 2019, 80–81). Such protection of the child as the weaker party – due to their lack of independence, less

life experience compared to adults, and less knowledge and skills – is in line with the European Convention on the Exercise of Children's Rights.

Another proposal involves introducing a catalogue of participants in various types of non-litigious proceedings, especially those where the status of the child is most contentious, such as guardianship proceedings. Such a solution, by introducing a catalogue of participants to remove disputes over the proceedings in which the child should have participant status, would provide legal certainty for the court and interested parties. This would eliminate dissonance between statutory regulation, doctrinal views, and court practice.

In the German law, under the FGG (the Act on Family Matters and Non-contentious Jurisdiction), children were initially included as "material participants". However, the FamFG (the Act on Family Proceedings and Non-Contentious Jurisdiction) designated them as formal participants who, like their parents, actively participate in all proceedings concerning them (Bodio 2019, 80–81). When the subject of the proceedings relates to a child's personal rights, children are equal participants in the proceedings alongside their parents, and they are granted procedural status. They can be heard by the court and also actively influence the outcome of the proceedings – either personally or through their legal representative.

7. EVIDENCE FROM THE OPINION OF A COURT EXPERT TEAM – THE ROLE OF FORENSIC EXPERTS

Evidence from the opinion of the expert court team has been regulated in Article 290[1] of the Polish Code of Civil Procedure, added by the Act of 5 August 2015 on expert court teams (Journal of Laws of 2015, item 1418).[7] The tasks of court experts include:

- preparing opinions in family and guardianship cases, as well as in juvenile matters, based on conducted psychological, pedagogical, or medical examinations;
- conducting mediations;
- conducting environmental interviews in juvenile cases;
- providing specialised counselling for minors, juveniles, and their families.

The knowledge and experience of a forensic expert determine the quality of their opinion. In the scope of the tasks mentioned above, the role of a forensic expert is that of a consultant and opinion giver, with the latter being most prominent in preparing opinions for the court. Both roles raise ethical dilemmas concerning the

[7] II CSKP 1199/22 – The best interest of the child, as the primary directive in decision-making in matters concerning the child and in resolving conflicts of interest between the child and other parties – Supreme Court Ruling.

information contained in forensic opinions, their use, and the welfare of the minor. In both criminal and civil cases (such as divorce, guardianship, or incapacitation cases), during interviews, the expert often learns about drastic behaviours of the subject towards others (family members, neighbours), facts about their sexual life, pre-existing illnesses, etc., which are sometimes embarrassing. Consequently, doubts arise about what information should be included in the opinion. It seems that two conjunctive criteria are essential here:

1) whether a specific piece of information would cause moral harm to the subject (infringing upon their welfare) or to the minor;

2) whether a specific piece of information is of significant relevance to procedural decisions.

Furthermore, frequent ethical dilemmas arise concerning the threat to the subjectivity of the child resulting from their participation in legal proceedings. It should be emphasised that the subjectivity of the child is less protected or weaker compared to the protection of the subjectivity of adult participants in legal proceedings due to specific factors that affect the child during childhood and adolescence.

The role of a court expert in fulfilling their advisory and consultative role should be determined by ethical standards and the skilful observance of these standards, depending on the situational context of the case under examination. The most important ethical and professional principles of forensic work include:

- the principle of respecting human dignity and protecting human welfare;
- the principle of observing professional secrecy and selectivity of information;
- the principle of adhering to the field of special knowledge;
- the principle of methodological and methodical integrity;
- the principle of communicative language;
- the principle of appropriate initiative (more in Stanik 2013).

Adherence to the aforementioned principles is often entangled in the individual cultural and social context of the case under examination. The actual implementation of these norms should ultimately indicate the level of trust in the authority of the expert, which translates into a broader context of public trust in the justice system.

8. LIMITED RIGHTS OF THE CHILD IN LEGAL PROCEDURES AND OTHER FACTORS NEGATIVELY AFFECTING SUPPORT OF THE CHILD'S SUBJECTIVITY AND WELFARE

Children have limited rights in legal proceedings and are more susceptible than adults to various risks stemming from factors such as their level of cognitive, intellectual, and emotional development, as well as experiences shaped by social relationships and micro- and macro-cultural influences. The most important psychological and sociocultural factors include:

- the level of cognitive, intellectual, and emotional development (individual developmental differences);
- the level of ethical development (competence in ethical decision-making and resolving ethical dilemmas);
- the level of knowledge and understanding of the specifics of the judicial process – knowledge and understanding concerning: informed consent to participate in the proceedings; the right to withdraw from participation in the examination; the right to privacy; as well as the right to participate in family court proceedings regarding custody and parental authority. Significant limitations in these areas are observed in the functioning of children compared to adults. As a result, children and adolescents often have little control over many key aspects of their participation in legal proceedings, which are guaranteed to adult participants.

This is also due to the various limitations that minors have, such as:

- limited life experiences – limited knowledge and understanding of the specifics of the problem subject to the judicial procedure (in family cases regarding parental authority, the custody over minors, and the regulation of contacts);
- limited social competencies – limited communication skills in expressing their own thoughts, feelings, needs, etc.;
- limitations resulting from environmental influences (influence of the family environment and significant individuals – authorities, school, peer group influence; social stigmatisation; commonly held stereotypes in the perception of, for example, children from single-parent families, families going through separation or divorce, and after a divorce). It sometimes happens that despite their resistance, minors still participate in legal proceedings and in examinations by court experts despite manifesting negative emotions, fear, and anxiety, if the consent has been given by parents/guardians or other adults (teachers, therapists) who are significant to the child, and who encourage them to participate – in such situations, it is difficult for the child to refuse (Stojanowska 1997; Stankowska 2012; Czerederecka 2020; Gruza 2021).

Furthermore, children as participants in judicial procedures have a dual status: on the one hand, child protection and acting in the child's best interests, and on the

other hand – children have limited rights. It is legal guardians who make decisions on behalf of children regarding their participation, and sometimes these decisions do not protect the minors' welfare, and the child is treated as an object in the battle between parents, i.e. the actual parties to the judicial proceedings (manipulating the child in divorce proceedings). In these situations, professional support for the child is highly recommended, i.e. external assistance from outside the family, in order for the minor to express their will to participate in judicial proceedings in the most autonomous way possible. It is a task for psychologists and educators, but also for professionals in the field of ethics, to strengthen decision-making processes in minors based on a deep understanding of their own thoughts and feelings as well as the development of ethical competencies in situations involving moral dilemmas. It follows from this that providing professional support to the child in judicial proceedings from various perspectives is essential: legal knowledge, psychological and pedagogical support, and ethical support. Nevertheless, the responsibility for providing this support lies with the judge and the court-appointed expert in judicial proceedings, as they are individuals in direct contact with the child, usually on an individual basis, thereby creating conditions for communication tailored to the child's age. It is important to emphasise the following common correlation: the younger the child is, the more abstract the judicial proceedings and examination are for them, not to mention the judgment and decision of the court. However, these factors directly affect the child's daily functioning, i.e. their thoughts and feelings as well as relationships with others (Słyk 2015; Błażek, Lewandowska-Walter 2017; Mercer 2018).

9. PUBLIC TRUST

In the discussed context, there arises the question of shaping public trust in the process of judicial cognition and the impact of practice on changes in legislation. In the light of the current regulations, the weaker procedural position of a child compared to an adult may stem from their age, lack of education, limited life experience, lack of legal knowledge, and familiarity with judicial practice. The existing provisions limit the child's ability to independently assert rights in non-litigious proceedings. Actions should be aimed at securing the child's procedural rights and ensuring proper legal protection, in line with the principle of equal treatment of participants in non-litigious proceedings.

Regarding regulations normalising the status of children in non-litigious proceedings, as Bodio (2019) observes, despite the existence of a general provision (Article 510 of the Code of Civil Procedure), case law often denies children the status of participants in non-litigious proceedings in many cases where the outcome concerns their legal sphere, such as cases concerning parental authority or contact with the child.

Current judicial regulations require supplementation that would explicitly grant children the status of participants in non-litigious proceedings, clearly indicating the child's status as an interested party or participant in the proceedings, as at present a child's participation as a witness or with their testimony does not confer upon them the status of a participant in non-litigious proceedings. The Code of Civil Procedure does not link the hearing of a child to a specific age limit but, rather, to their mental development, health status, and level of maturity. Therefore, ensuring the realisation of the child's right to be heard as a duty of the court is an expression of caring for their welfare (Czerederecka 2020; Gruza 2021; Skubik-Ślusarczyk 2018; Słyk 2015; 2013).

Expert opinion provides assistance for judicial decisions. The specialised trust between the court and experts extends to public trust as well. As mentioned earlier, the expert opinion can also benefit other specialists who care for the welfare of minors outside the court's work. The expert opinion should not only help in adversarial truth-finding but also in the efforts made by doctors, psychologists, educators, therapists, ethicists, and other specialists to seek practical solutions to minors' problems. The results of experts' work are, therefore, of particular importance and significance not only in the activities of the courts, but also in the broader social context, i.e. in the work of professionals whose tasks focus on safeguarding the rights and welfare of children and in maintaining the participants knowledge and self-awareness, which deepens and expands through explanations of the circumstances of their functioning. It is a process of collaboration among different individuals and specialists to seek the truth, solve problems, and then improve the quality of life; and that of building public trust based on the use of scientific knowledge, skills, and social competencies of court officials, including court experts (Lewicka 2021; Cudak 2023; Dzierżanowski 2010; Gluza, Kołakowska-Halbersztadt, Tański 2013).

10. CONCLUDING REMARKS

To sum up the analyses and explorations provided above, the role of court experts (including psychologists, psychiatrists, and educators) is crucial in safeguarding the rights and welfare of children in family law proceedings. This is particularly significant when parental resources for fulfilling their roles are severely diminished, such as during protracted divorce proceedings. In such situations, the professional assistance of court-appointed experts, i.e. individuals outside the familial system, often serves as essential support in defending the child's best interests. The manner in which the court expert conducts assessments involving a child plays a significant role in protecting the child's rights. These evaluations must be carried out to the highest substantive standards and in accordance with the most rigorous ethical and methodological guidelines, which

is essential for maintaining public trust in the justice system. When the expert testimony is conducted reliably, not only does the child receive support, but the entire judicial process also becomes more transparent and credible in the eyes of society, fostering public confidence in the domestic and international institutions responsible for safeguarding the child's rights. There remain a number of points to be examined and revised, for example relating to differences in child's cognitive competence and autonomy, which may privilege older children attending the hearing. Therefore, the right to be heard is not everything and should be complemented by the right to be assisted (e.g. Daly 2017), thus entailing the need for further legal institutions, standards, and practices; but these points deserve distinct considerations.

BIBLIOGRAPHY

Andrzejewski, Marek. 2017. "O roli nauk pomocniczych prawoznawstwa w orzekaniu w sprawach rodzinnych". In *Wokół problematyki małżeństwa w aspekcie materialnym i procesowym.* Edited by Jakub M. Łukasiewicz, Aneta M. Arkuszewska, Anna Kościółek. 80–97. Toruń: Adam Marszałek Publishers.

Błaszczak, Łukasz. Krystian Markiewicz. Eds. 2016. *Rola biegłego w postępowaniach sądowych*. Wrocław: Presscom Publishers.

Błażek, Magdalena. Aleksandra Lewandowska-Walter. 2017. *Rozwód jako proces. Perspektywa dorosłych i dzieci*. Warszawa: Difin.

Bodio, Joanna. 2019. *Status dziecka jako uczestnika postępowania nieprocesowego*. Warszawa: Wolters Kluwer.

Bodio, Joanna. 2019a. "Zdolność procesowa a zdolność postulacyjna. Glosa do uchwały SN z dnia 26 lutego 2015 r., III CZP 102/14". *Orzecznictwo Sądów Polskich* 11: 35–49.

Brown, Sarah. Leam Craig. Rebecca Crookes. Amy Summerfield. Natalie E. Corbett. Joanne Lackenby. Erica Bowen. 2015. *The Use of Experts in Family Law. Understanding the Processes for Commissioning Experts and the Contribution They Make to the Family Court.* London: Ministry of Justice.

Cieśliński, Marcin. 2021. "Sądowe wysłuchanie dziecka a stanowisko jego rodziców". *Przegląd Sądowy* 1: 45–58.

Cieśliński, Marcin. 2015. "Praktyka sądowa wysłuchiwania małoletnich w postępowaniach cywilnych w kontekście idei przyjaznego wysłuchiwania dziecka (komunikat o wynikach badania)". *Prawo w Działaniu. Sprawy Cywilne* 24: 221–236.

Committee on the Rights of the Child. 2006. *Days of General Discussion of the Committee on the Rights of the Child. Forty-third Session 11–29 September 2006*. https://cypcs.org.uk/wpcypcs/wp-content/uploads/2021/02/Day-of-General-Discussion-Report-2006.pdf

Cudak, Henryk. 2003. *Funkcjonowanie dzieci z rodzin rozwiedzionych*. Toruń: Adam Marszałek Publishers.

Czerederecka, Alicja. 2010. "Psychologiczne kryteria wysłuchania dziecka w sprawach rodzinnych i opiekuńczych". *Rodzina i Prawo* 14/15: 22–43.

Czerederecka, Alicja. 2016. *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych.* Kraków: Wydawnictwo Instytutu Ekspertyz Sądowych.

Czerederecka, Alicja. Ed. 2020. *Wyzwania psychologa jako biegłego w relacji z wymiarem sprawiedliwości*. Kraków: Instytut Ekspertyz Sądowych.

Daly, Aoife. 2018. *Children, Autonomy and the Courts. Beyond the Right to be Heard.* Leiden–Boston: Brill. https://doi.org/10.1163/9789004355828

Długoszewska, Iwona. 2012. *Przesłanki oraz skutki ograniczenia i pozbawiania władzy rodzicielskiej*. Warszawa: LexisNexis.

Dzierżanowski, Jerzy. 2010. "Psychospołeczna sytuacja dziecka w małżeństwach rozwodzących się". In *Rodzina w nurcie współczesnych przemian.* Edited by Dariusz Krok, Paweł Landwójtowicz. 255–278. Opole: Uniwersytet Opolski.

Flaga-Gieruszyńska, Kinga. Ed. 2020. *Biegły w postępowaniu cywilnym i karnym. Komentarz praktyczny z orzecznictwem. Wzory pism procesowych i orzeczeń.* Warszawa: C.H.Beck.

Gluza, Paulina. Zofia Kołakowska-Halbersztadt. Maciej Tański. 2013. *Dziecko w rozstaniu rodziców.* Warszawa: Wolters Kluwer.

Gruza, Ewa. 2021. *Psychologia sądowa dla prawników*. Warszawa: Wolters Kluwer.

Gudowski, Jacek. 2012. In *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze.* T. 2. 256. Edited by Tadeusz Ereciński. Warszawa: LexisNexis.

Gudowski, Jacek. 2023. *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze (art. 1–124).* T. 1. Edited by Tadeusz Ereciński. Warszawa: Wolters Kluwer.

Gurgul, Józef. 2013. "O swobodnej ocenie opinii biegłego". *Prokuratura i Prawo* 10: 34–56.

Habscheid, Walther J. 1991. "Verfahren in Zivilsachen und aktuelle Fragen zum rechtlichen Gehör". In *Z zagadnień prawa cywilnego. Księga pamiątkowa ku czci Profesora A. Stelmachowskiego*. Edited by Jan Gajewski. 263. Białystok: Wydział Prawa Filii Uniwersytetu Warszawskiego.

Helios, Joanna. Wioletta Jedlecka. 2017. "Diagnoza i ochrona dziecka z traumą rozwojową w polskim systemie oświatowym". *Issues in Early Education* 38(3): 73–81. https://doi.org/10.26881/pwe.2017.38.06

Helios, Joanna. Wioletta Jedlecka. 2019. *Diagnoza i ochrona dziecka z traumą rozwojową w polskim systemie prawa.* Warszawa: Difin.

Hodtkin, R. P. Newell. 2006. *Implementation Handbook for the Convention on the Rights of the Child.* Geneva: UNICEF.

Jaśkiewicz, Jacek. 2013. *Poznanie faktów w postępowaniu cywilnym.* Warszawa: Wolters Kluwer.

Jędrejek, Grzegorz. 2018. "Zasada ochrony dobra dziecka a postępowanie cywilne". In *Honeste Procedere. Księga jubileuszowa dedykowana Profesorowi Kazimierzowi Lubińskiemu.* Edited by Agnieszka Laskowska-Hulisz, Joanna May, Marek Mrówczyński. 225–235. Warszawa: Wolters Kluwer.

Krzysiak, Aleksandra. 2023. "Ochrona dobra dziecka w postępowaniu cywilnym – uprawnienia i obowiązki dotyczące małoletniego w postępowaniu nieprocesowym". *Ars Iuridica* 23(2): 97–110. https://doi.org/10.17951/szn.2023.23.2.97-110

Kuna, Dominika. 2024. "Znaczenie głosu dziecka w procedurze cywilnej – nowe standardy wysłuchania małoletniego w świetle ochrony interesu dziecka". *Dziecko Krzywdzone. Teoria, Badania, Praktyka* 23(3): 83–100.

Lewicka, Monika. 2021. "Dziecko w sytuacji rozwodu rodziców. Implikacje pedagogiczne". *Teologia i Moralność* 1(29): 93–108. https://doi.org/10.14746/TIM.2021.29.1.6

Mercer, Jean. 2018. *Child Development: Concepts & Theories*. Los Angeles: Sage Publications.

Miller, Glenn H. 2002. "The Psychological Best Interest of the Child Is Not the Legal Best Interest". *Journal of the American Academy of Psychiatry and the Law* 30: 196–200.

Mróz-Szarmach, Dominika. 2020. "Ochrona praw dziecka w postępowaniu cywilnym (zagadnienia wybrane)". In *Instrumenty ochrony praw rodziny i ochrony praw dziecka*. Edited by Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak. Gdańsk–Sopot: Wydawnictwo Uniwersytetu Gdańskiego.

Op de Beeck, Hanne. Katrien Herbots. Sara Lembrechts. Nele Willems. Kathy Vlieghe. 2017. "Najlepiej pojęty interes dziecka – między teorią a praktyką". *Dziecko Krzywdzone. Teoria, Badania, Praktyka* 16(2): 127–222. https://doi.org/10.5007/1677-2954.2017v16n1p127

Pisarska, Agnieszka. 2023. "Pojęcie 'dobra dziecka'. Przegląd wybranych koncepcji". *Annales Universitatis Mariae Curie-Skłodowska. Sectio J. Paedagogia-Psychologia* 36(4): 183–202. https://doi.org/10.17951/j.2023.36.4.183-202

Saywitz, Karen J. Gail S. Goodman. Thomas D. Lyon. 2002. "Interviewing Children in and out of Court: Current Research and Practice Implications". In *The APSAC Handbook on Child Maltreatment*. Edited by John B. Myers. 349–377. Thousand Oaks, CA: Sage.

Saywitz, Karen J. Thomas D. Lyon. Gail S. Goodman. 2017. "When Interviewing Children: A Review and Update". In *The APSAC Handbook on Child Maltreatment.* Edited by J. Bart Klika, Jon R. Conte. Thousand Oaks, CA: Sage.

Skubik-Ślusarczyk, Sylwia. 2018. "Wymiar sprawiedliwości przyjazny dziecku – perspektywa prawno-psychologiczna". *Nowa Kodyfikacja Prawa Karnego* 3897: 133–157. https://doi.org/10.19195/2084-5065.50.9

Słyk, Jerzy. 2013. "Rozstrzyganie o istotnych sprawach dziecka w przypadku braku porozumienia rodziców (art. 97 § 2 k.r.o.)". *Prawo w Działaniu* 14: 77–120.

Słyk, Jerzy. 2015. "Aspekty prawne wysłuchania dziecka w postępowaniu cywilnym". *Dziecko Krzywdzone. Teoria, Badania, Praktyka* 14(4): 9–31.

Stanik, Jan M. 2013. *Psychologia sądowa*. Warszawa: Wydawnictwo Naukowe PWN.

Stankowska, Magdalena. 2012. "Długoterminowe konsekwencje rozwodu. Problemy dorosłych dzieci z rodzin rozwiedzionych". In *Wielość spojrzeń na małżeństwo i rodzinę*. Edted by Anna Kwak, Mariola Bieńko. 175–185. Warszawa: Wydawnictwo UW.

Stojanowska, Wanda. 1997. "Dziecko w postępowaniu sądowym". *Jurysta* 5: 50–61.

Stojanowska, Wanda. 1998. "Status dziecka w zakresie jego uczestnictwa w postępowaniu sądowym". In *Pedagogika wobec kryzysów życiowych.* Edited by Jerzy Stochmiałek. 105–107. Warszawa–Radom: Instytut Ekspertyz Sądowych.

Stojanowska, Wanda. Mirosław Kosek. 2018. "Dobro dziecka a kolejne nowelizacje Kodeksu rodzinnego i opiekuńczego". *Ius Matrimoniale* 29(4): 41–56. https://doi.org/10.21697/im.2018.29.4.03

Włodarczyk-Madejska, Justyna. 2017. *Efektywność opiniodawczych zespołów sądowych specjalistów*. Warszawa: Instytut Wymiaru Sprawiedliwości.

Włodarczyk-Madejska, Justyna. 2017a. "Opinia biegłego w sprawach cywilnych w świetle badania aktowego". *Prawo w Działaniu. Sprawy Cywilne* 31: 155–176.

Włodarczyk-Madejska, Justyna. 2018. "Efektywność opiniodawczych zespołów sądowych specjalistów". *Prawo w Działaniu* 33: 172–210.

Zajączkowska-Burtowy, Joanna. 2021. "Dobro dziecka jako wartość podlegająca szczególnej ochronie w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów z dzieckiem". In *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*. Edited by Joanna Mucha. 141–175. Warszawa: Wolters Kluwer.

Zajączkowska-Burtowy, Joanna. Michał Burtowy. 2023. "Postępowanie sądowe i mediacja w międzynarodowych sprawach rodzicielskich". In *Międzynarodowe prawo rodzinne*. Edited by Piotr Mostowik. 564–607. Warszawa: Wolters Kluwer.

Zieliński, Maciej. 1979. *Poznanie sądowe a poznanie naukowe*. Poznań: Wydawnictwo Naukowe UAM.

Legal Acts

Charter of Fundamental Rights of the European Union (2000). Article 24.

Convention on the Rights of the Child adopted by the United Nations General Assembly on November 20, 1989 (Journal of Laws of 1991, No. 120, item 526, as amended).

Council of Europe 2024. "Child-friendly justice". https://www.coe.int/en/web/children/child-friendly-justice#{%2212440309%22:[0]} (accessed: 26.10.2024).

European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on January 25, 1996 (Journal of Laws of 2000, No. 107, item 1128).

European Convention on Human Rights (ECHR). The ECHR, adopted in Rome on November 4, 1950, Article 8. Article 6.

Code of Civil Procedure (Journal of Laws, item 1062).

Constitution of the Republic of Poland (1997).

The Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice 2011.

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996).

Hague Convention on the Civil Aspects of International Child Abduction (1980).

Regulation of the Minister of Justice of October 24, 2005, on court experts (Journal of Laws of 2005, No. 15, item 133, as amended).

International Labour Organization (ILO) Convention No. 182 on the Worst Forms of Child Labour (1999).

Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (2011).

Polish Act on the Commissioner for Children's Rights (2000).

Polish Act on Counteracting Domestic Violence (2005).

UN Resolution 1325 on Women, Peace, and Security (2000).

II CSKP 1199/22, II CSKP 1199/22 – The best interests of the child, as the primary directive in decision-making in matters concerning the child and in resolving conflicts of interest between the child and other parties – Supreme Court Ruling.

Supreme Court Decision of November 24, 2016, case II CA 1/16, published in OSNC 2017/7–8, item 90.

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RESEARCH FREEDOM AND ACCESS TO KNOWLEDGE IN ARCHAEOLOGICAL RESEARCH ON HUMAN REMAINS: LEGAL AND EXTRA-LEGAL PERSPECTIVES

Abstract. Present-day bioarchaeology of human remains has a complex, normative foundations, and this results in a nearly paradigmatic shift in research conducted in that discipline of science. This article first introduces the manifold non-scientific significance of human remains and mortuary sites and the essentials of bioarchaeological research as well. It subsequently examines the concept of research freedom in the context of international and domestic regulations. Each state regulates bioarchaeological research distinctly. The article outlines a diplomatic pathway for undertaking research abroad. We then examine (de)colonial, indigenous, religious, and political contexts in which extra-legal regulations on the study of human remains also gain validity. This leads to a normative pluralism, the sources and justification of which we analyse and examplify. Such a pluralism unveils the deficits of positive legal regulation in the various contexts of discussed research. Our article is to support researchers in dealing with normative challenges – legal and extra-legal – when it comes to undertaking research on human remains.

Keywords: Research freedom, research on human remains, bioarchaeology, legal, extra-legal, and multinormative regulations, (de)colonial, indigenous, religious, and political contexts

WOLNOŚĆ BADAŃ I DOSTĘP DO WIEDZY W BADANIACH ARCHEOLOGICZNYCH SZCZĄTKÓW LUDZKICH: PERSPEKTYWA PRAWNA I POZAPRAWNA

Streszczenie. Dzisiejsza bioarcheologia szczątków ludzkich ma złożone umocowanie normatywne, które pociąga za sobą zgoła paradygmatyczne zmiany w badaniach prowadzonych w tej dyscyplinie nauki. Niniejszy artykuł w pierwszej kolejności przybliża wielorakie pozanaukowe znaczenie szczątków ludzkich i miejsc pochówki i istotę badań bioarcheologicznych. Następnie

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analizuje pojęcie wolności badań w kontekście międzynarodowych i rodzimych regulacji. Każde państwo odrębnie reguluje badania bioarcheologiczne. W artykule nakreślamy dyplomatyczną ścieżkę umożliwiającą podjęcie badań za granicą. Następnie badamy konteksty (de)kolonialne, rdzenne, religijne i polityczne, w których ważność zyskały także pozaprawne regulacje dotyczące badania ludzkich szczątków. Prowadzi to do pluralizmu normatywnego, którego źródła i zasadność analizujemy i egzemplifikujemy. Pluralizm taki odsłania deficyty pozytywnych regulacji prawnych w najróżniejszych kontekstach badań nad ludzkimi szczątkami. Nasz artykuł ma wesprzeć naukowców w radzeniu sobie z wyzwaniami normatywnymi – prawnymi i pozaprawnymi – gdy przychodzi im podjąć badania na ludzkich szczątkach.

Słowa kluczowe: wolność badań naukowych, badania na ludzkich szczątkach, bioarcheologia, regulacje prawne, pozaprawne i multinormatywne, konteksty (de)kolonialne, rdzenne, religijne i polityczne

1. INTRODUCTION

Human remains are not just 'dead matter' or scientific or museum objects. Nor are they merely things to be taken out of their native context, made the property of the academy or part of the world's cultural heritage. Thus, bioarchaeology (concerned with human remains) is undergoing a paradigmatic shift. The recent changes in the normative status of human remains discussed hereafter reflect this shift. This paper identified the normative foundations – as well as the limitations – of research freedom in the archaeological investigation of human remains. We applied (a) scientific enquiry; (b) doctrinal (collecting legally relevant facts) and non-doctrinal research methods (in terms of socio-legal studies, legal pluralism, et cetera.); and (c) descriptive-analytical methods.

We began by outlining the manifold significance of mortuary sites and general international regulations in this area in concert with a discussion of *research freedom*. We then examined the legal and ethical codifications applicable to bioarchaeological research in Poland. Subsequently, we explored the contexts that push bioarchaeological researchers to confront new colonial, indigenous, religious, and political normative challenges. Succinctly, our study shows that research on archaeological human remains is governed by multiple regulations of a legal and extra-legal (i.e., not sanctioned by law) nature. We posit that growing awareness of such regulations should go hand in hand with the pending process of decolonisation of (bio)archaeological sites and artefacts (also happening within science and research institutions).

2. MORTUARY SITES AND THEIF MANIFOLD SIGNIFICANCE

As[1] for the term *human remains*, it "is to be understood as intact skeletons, parts of skeletons, and other human biological material kept in museums and collections, or discovered as a result of archaeological and other investigations" (Denham et al. 2022, 7). Research on human remains can be undertaken on "prehistoric, medieval, (…) early modern sites [and] modern cemeteries and tombs, including those from war" (Florek 2020, 373). In the Middle-European territory burial cemeteries called kurgans (Wiercińska 1970; Dzierlińska 2019), Jewish cemeteries, Muslim cemeteries, anonymous common graves, military graves, skeletal graves, catacombs, and further deposits of human remains (Sołtysiak, Koliński 2011) can be identified. In foreign locations, people encounter burial shafts, sarcophagi, unburied coffins with mummies (Riggs 2017), urns at pre-Columbian mortuary sites (Kieffer 2018), cannibalistic sites (Marsh, Bello 2023; Ullrich 2005), and open graves.

Archaeological research at sites with human remains may be non-invasive (Karski et al. 2017) or invasive. Non-invasive research "preserves the historical and cultural heritage" (Misiuk et al. 2019, 2) without damaging its substance or structure. Invasive research, in contrast, affects, transforms, or even destroys both substance and structure. *An immovable* archaeological site is an integral, unique whole whose damage would be irreversible. "In the case of an immovable archaeological landmark site, we deal not only with a collection of movable artifacts or distinct structures and layers but above all with their composition. It is formed as a result of a continuum of activities and processes, whereby all traces of events that have no direct tangible representation are of equal importance (…). The significance of an archaeological immovable landmark is largely determined by the originality of the composition of stratigraphic units and finds located in situ, in their original context of usage and deposition, including every slightest disturbance. An archaeological heritage must be treated as a whole and not as a collection of independent components that can be arbitrarily removed from it" (Misiuk et al. 2019, 2).

In many cultures, human remains are regarded as an integral and even immovable whole (e.g., Orthodox Judaism refuses exhumation or displacement of bones) or as integral parts of a whole. In these cultures, it is believed that displacement can result in disintegration, decontextualization, and oblivion of the dead. Burke referred to the special memory bond between the living and the dead as *pietas* (Scruton 2013). Margalit addresses the closeness of these relationships.

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"We want to have the kind of intense relations that will deserve to go on after our death. We want to be remembered by those who survive us" (Margalit 2004, 93).

Other scholars argue that "revelations by archaeologists of the details of past lives are a stronger counter to oblivion than the preservation of dead bodies intact in their graves" (Scarre 2003, 247). Nonetheless, the integrity of mortuary sites can also be critical to original communities, cultural heritage, and science. In contrast, "movable finds (…) can be deposited in various units of historical preservation, resulting in the dispersion of compact collections" (Misiuk et al. 2019, 5). The history of archaeology has witnessed the disintegration of finds and the dispersion of remains of countless individuals in museums, research institutes, and private collections.

Present-day research ethics already recognize that "all human remains, irrespective of age, are unique and have intrinsic value. Research activities that entail the destruction of human remains should only be carried out if it can be justified, based on a thorough assessment. In addition, some human remains are unique as research material due to their lack of contextual parallel" (Denham et al. 2022, 9). Scholars themselves realize that in the study of human remains, exhumation meets excavation and "heritage meets bioethics" (Blake 2021). For example, Chinchorro mummies from Atacama Desert were also cult objects.

Spiritual aspects and the fragility of this type of human remains to research interventions and unstable storage conditions would argue for field- and non-invasive research procedures. For example, unwrapping the mummy from the bandages would be highly invasive (Hudetz 2023; Moissidou et al. 2015) compared to computed tomography (CT), muon imaging, microarchaeological techniques (Panzer et al. 2019; Borselli et al. 2023; Warsaw Mummies Project 2016; Weiner 2012), and digital-archaeological techniques (Ulguim 2017; Jurda et al. 2019).

For example, the microsampling from human remains for DNA analysis may raise objections from local communities and authorities. On the other hand, limited "access to the distinctive aspects of the biology of present and past man, revealing a history of migrations and mixtures between populations (…) and confirming the role of the human body as a 'biological archive', unique and unrepeatable, of humanity and history" (Licata et al. 2020, 1; see Reich 2018) can be challenging for rapidly progressing paleo- and archaeogenetics. Furthermore, amid epidemics still uncontrolled by medicine, studies on human remains have recently gained in priority and urgency (Swali et al. 2023; van der Kuyl 2022; Loudine 2021; Fuchs et al. 2019; Gallagher, Dueppen 2018; Fornaciari 2018).

This discussion justifies the importance of providing researchers with an orientation regarding the scientific versus extra-scientific value of archaeological human remains (e.g., Lozina et al. 2021; Pearce 2019). Such orientation would be the *sine qua non* for salvaging both values; yet sometimes a limitation of scientific freedom and ambitions is essential. Limitations can be defined by legal and extra-legal normative sources (Nillson Stutz 2023), and ethical guidelines (Denham

et al. 2022; Tienda et al. 2019). An exhaustive presentation of them across national contexts would exceed the scope of this article, which is focused on Poland (for a comprehensive presentation see O'Donnabhain, Lozada 2014).

After defining research freedom, we outline the normative and procedural situation of a domestic bioarchaeologist, including a path towards research in international contexts. We then discuss emerging normative challenges that transform bioarchaeology around the world and can be sooner or later encountered by domestic researchers.

3. RESEARCH FREEDOM AND ITS LIMITATIONS

International codifications promote freedom of research. Specifically, Article 19(2) of the *International Covenant on Civil and Political Rights* protects "the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one's] choice". As for the European Union (EU) context, in 2020, the EU's Research Ministers and the European Commissioner for Innovation, Research, Culture, Education, and Youth enacted the Bonn Declaration on Freedom of Scientific Research 2020. Therein research freedom is "a universal right and public good" and a "core principle of the European Union and as such anchored in the Charter of Fundamental Rights of the EU" (2012) as well.

Further, Article 13 of the Economic and Social Council UN/Committee on Economic, Social and Cultural Rights (2020) states that "members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. (…) This freedom includes, at the least, the following dimensions: protection of researchers from undue influence on their independent judgment; the possibility for researchers to set up autonomous research institutions and to define the aims and objectives of the research and the methods to be adopted; the freedom of researchers to freely and openly question the ethical value of certain projects and the right to withdraw from those projects if their conscience so dictates; the freedom of researchers to cooperate with other researchers, both nationally and internationally; and the sharing of scientific data and analysis with policymakers, and with the public wherever possible. Nevertheless, freedom of scientific research is not absolute; some limitations are possible".

The normative foundations of scientific research outlined above are general and abstract in nature. They must be precised in domestic legislations and administrative procedures, research ethics, the procedures of bioethics boards issuing approvals, and at the level of societal and cultural consensus. Thus, research freedom is subject to complex regulations. The UNESCO Recommendation

Concerning the Status of Higher-Education Teaching Personnel (1997) states that "research and scholarship should be conducted in full accordance with ethical and professional standards and should, where appropriate, respond to contemporary problems facing society as well as preserve the historical and cultural heritage of the world" (para. 33). Hellenic Society for Law and Archaeology (2023), Cultural Heritage in EU Policies (2018), The European Convention on the Protection of the Archaeological Heritage (1992) and Code of Ethics of World Archaeological Congress (1990) define an axio-normative framework for archaeological research mainly for the European context.

4. LEGISLATIONS ON RESEARCH ON HUMAN REMAINS IN POLAND

This section dealing with legal regulations for conducting (bio)archaeological research on human remains in Poland commences by emphasizing the importance of research freedom and access to scientific knowledge. It is guaranteed by the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, item 78.483). Article 73 states that "Everyone shall be guaranteed freedom of artistic creation, scientific research and the publication of its results, freedom of education and freedom to benefit from cultural goods". This freedom is mainly expressed in the free selection of the research subject, research methods and how results and findings are presented (this includes not presenting the results) (Sobczak 2008, 110). Research arising from research freedom benefits all people irrespective of citizenship, political, and cultural background (Sobczak 2008, 96). Indeed, "A fundamental trait of human beings is an insatiable curiosity accompanied by an irrepressible ambition. It pushes researchers to take on ever new challenges, against all the odds, in spite of restrictions and risks" (Sobczak 2007, 70).

However, researchers cannot exercise their freedom in an unlimited manner. Nor is scientific truth, the establishment of which this freedom is intended to serve, an absolute value for the attainment of which it would be acceptable to sacrifice every other value. An orientation towards truth as an exclusive and unique value would indicate a deficiency of social and democratic competencies in a researcher (Cern, Nowak 2008, 336). The Polish legislator demonstrated these competencies by granting scientific truth the status of a value that must coexist with other values; hence, it does not have absolute priority. Article 31 of the Constitution provides the normative basis for the restriction of scientific freedom. It states that limitations on the exercise of constitutional freedoms and rights may be enacted only by laws and only if they are necessary in a democratic state: for its security or public order; for the protection of the environment, public health, and morals; and for the freedoms and rights of others.

Limitations, however, should not affect the essence of freedoms and rights. At this point, the following question arises: Which of the aforementioned premises

justifies the restriction of the freedom of archaeological research on human remains? We posit that it should be the premise concerning public morality. What denotes the concept of public morality? Kalisz indicated it is a general clause to protect values that are "public, i.e., so established and accepted by the majority of society that they can be considered characteristic" (Kalisz 2013, 197–210). On the other hand, Pietrzykowski argues that public morality is not a positive one because it tends to be internally inconsistent, often based on stereotypes, culturally conditioned intuitions, or the casual effects of socialization. Nor is it an individual morality but a body of ethical consequences derived from fundamental moral values and principles widely recognized by society. Moreover, the public morality concept presupposes a link between fundamental moral values and principles on the one hand and the axiological foundations of the legal order on the other (Pietrzykowski 2019, 16–17).

It may therefore be assumed that the respectful treatment of human remains – as physical traces of past human life – and the prohibition of treating them in merely material and instrumental terms are ethical consequences of the fundamental moral values and principles recognized in society. These values can include reverence and loyalty to the dead on the part of the living due to a sense of intergenerational bonding. Consideration of these values renders the vision of science as value-free inexact. In this vision, dating back to a bygone age, science rejects moral discussions as empirically meaningless (Rollin 2006, 20). As an aside, it would be naive to think that scientists are only motivated by the pursuit of truth. "[T]here is probably just us much lying, cheating, stealing, falsification, obstruction and downright fraud among scientist as there would be in society in general or in any large subgroup of society" (Rollin 2006, 249).

Present-day society, increasingly self-aware of its history and cultural complexity, is also developing sensitivity of and comprehension for the variety of traditions cherished by cultural, ethnic, and indigenous minorities. These traditions may require that ancestral remains be treated with particular piety. For example, exhumation may be prohibited. In turn, the values and moral principles that give rise to public morality should also be internalized by researchers based on shared citizenship or community affiliation. Respect for both universal and minority values when using research freedom has a strong justification in the Constitution. In turn, the legislators' task is to determine the normative at the level of statutory laws and administrative regulations that will restrict research freedom, considered here in the context of bioarchaeology. As for the legal situation of those who study human remains, they must reckon with various limitations that make scientific knowledge difficult and, in certain circumstances, even impossible to attain. These limitations are outlined below.

Małek-Orłowska and Jach (2022) rightly point out that Polish legislation governs biomedical research but provides little guidance to investigators from remaining disciplines. In the case of bioarchaeological and related research, there

is no single legal act to provide comprehensive guidance on the research of human remains. In fact, the norms authorizing such research must be reconstructed on the basis of a variety of legal statutes and regulations: (1) Act on cemeteries and burial of the dead of 31 January 1959 (Journal of Laws 2023, item 887); (2) Act on the preservation and custody of monuments of 23 July 2003 (Journal of Laws 2022, item 840); (3) Regulation of the Minister of Culture and National Heritage of 2 August 2018 on conducting conservation works, restoration works and conservation research on a monument entered in the register of monuments, as well as archaeological research and search for monuments (Journal of Laws 2021.21; Journal of Laws 2018, item 1609); (4) Act of 18 December 1998 on the Institute of National Remembrance (Journal of Laws 2023.102) and (5) Regulation of the Minister of Health of 7 December 2001 on the treating of human cadavers and remains (Journal of Laws 2021.1910).

In the Republic of Poland territory, human remains are usually buried in graves concentrated in three types of cemeteries: communal, confessional, and military (e.g., Malarewicz 2008). The status of these sites is not explicit. They are both immovable and movable archaeological monuments, and parts or complexes thereof. They are man-made artefacts and evidence of a bygone age "the preservation of which is in the public interest on account of their historical, artistic or scientific value" (see Article 3, item 1 of the Act of 23 July 2003 on the preservation and custody of historical monuments; Florek 2019, 15–16).

According to Article 36, item 1, § 4 and § 5 of the same Act, launching archaeological research at such sites adds a new quality – that of excavation (Trzciński 2007). Permission of the relevant voivodship monuments' conservator must be obtained to conduct research and research documentation. Adhering to requirements specified in the Regulation of the Minister of Culture and National Heritage of 2 August 2018 on the conduct of conservation works, et cetera, researchers submit a properly justified application to initiate an administrative procedure. Among other things, their application must include (1) their identification data including the name and address of the institute to which they are affiliated; (2) the location of the planned archaeological research – including geodetic or geographical coordinates with an accuracy of one 0,001th of a second; (3) a systematic plan for the execution of archaeological research; (4) a museum's (or another organizational unit's) declaration to host the exhumed remains and (5) a description of how the site will be cleaned up after the research is completed.

The conservator of monuments issues decisions based on administrative discretion under Article 36 item 1, § 1 of the Act on the preservation and custody of historical monuments of 23 July 2003. This means that the legal provisions of the Act do not determine when permission should be issued and when it should not. This happens at the discretion of the administrative authority (i.e., conservator of monuments) (Ginter, Michalak 2016). Such discretion does not exempt conservators from examining all legal and factual circumstances in the case under consideration.

They must also ex officio consider the legitimate societal and citizens' interests and further administrative procedures (Leszczyński et al. 2012, 468). Conservators' decisions do not contain any formal requirements for human remains that are categorized as archaeological monuments (i.e., standard documentation of excavations is to be produced and a storage place for the remains is to be provided once excavations have been completed). Instead, there are 'soft' recommendations in the form of codes of good practice including Misiuk et al.'s (2019) compendium, which was developed on behalf of the General Conservator of Monuments.

During the dig, archaeologists are bound by the provisions of the Act on cemeteries and burial of the dead regarding exhumation and transportation of remains of 31 January 1959 (Journal of Laws 2023, item 887). According to Article 19 of this Act, regulations on exhumation and transportation of remains do not apply to excavation work outside cemeteries covered by this legal act. Basically, archaeologists are obliged to both obtain the permission of the relevant conservator of monuments and consider the provisions of the Act on cemeteries and burial of the dead (Florek 2020, 372). The latter does not apply to accidental discoveries made in sites where tombs have not previously been identified. Bioarchaeological research in those instances can then be undertaken without restriction.

A major practical issue in bioarchaeology is the treatment of human remains. What is their legal status? Certainly, human remains in a material sense cannot be traded legally (Lichwa, Stec 2023). Nor should they be treated as possession of the National Treasury simply because they have been excavated from an immovable monument such as a cemetery (Florek 2019, 18). The Regulation of the Minister of Health of 7 December 2001 on the treatment of human cadavers and remains provides reliable guidance for bioarchaeologists. This regulation applies to dealing with (1) ashes (cremated remains); (2) remains of bodies excavated from graves or in other condition and (3) body parts detached from the whole, similarly as to dealing with the cadavers (with the reservation of §§ 2–6). Skeletal remains, fragments of bodies, and burnt bones (ashes) from open graves should be treated as human remains and reburied (Florek 2020, 373).

It is questionable, however, that an act with the rank of a regulation – thus hierarchically lower than a legal statute – prescribes the treatment of human remains as with bodies. We reason that such a norm should be encoded in the provisions of the aforementioned 1959 Law on cemeteries and burial of the dead. The duty of humans towards human remains is analogous to that towards bodies and involves reburial. Prehistoric, medieval, or even early-modern funeral site remains were once considered archaeological specimens and stored in museums, laboratories, and such. These practices, however, seem to exceed research freedom. Instead, the legal act prescribing burial applies to any human remains regardless of whether they were found at a confessional cemetery, in a war grave, or in a historical mortuary site. The regulation under discussion does not indicate a time limitation on the reburial (Florek 2020, 373).

Further, there is no plausible rationale why human remains dating back 50 years should be given a respectful burial and those dating back 500 years should not. Although it is indisputable that human remains are a material trace of an individual human's existence, this does not entitle the remains to be reduced to scientific resources, an item held in storage, and a property of a research institute or museum. Furthermore, although archaeological human remains (Márquez-Grant, Fibiger 2011) can be a precious – even irreplaceable – source of data and scientific knowledge, and hence be treated in a specific way, this is not a reason to instrumentalize and objectify them.

Is it thus reasonable to consider criminal liability for committing the offense under Article 262 § 1 of the Penal Code when institutions store human remains instead of reburying them? An offense is committed only by one who insults a human body, ashes, or the funeral place. Let us note that the normative scope of this legislative provision also covers human remains, which is confirmed by its linguistic interpretation (Hanc, Sitarz et al. 2017, 66). Human remains integrally belong to a body as confirmed by the legislator in the aforementioned regulation. Moreover, in line with the a fortiori rule, if the Criminal Code prohibits insulting human ashes, it prohibits insulting human remains even more (Barcik, Pilarz 2016, 91–92; see also Sierpowska 2020). Thus, theoretically, human remains from archaeological research can be the subject of an executive action.

Further, can the storage and preservation of remains, despite the burial regulation, be regarded as tantamount to insulting human remains or ashes (Florek 2020, 374)? We tend to accept that the use of human remains for investigative purposes does not actually mean an offense (Hanc, Sitarz 2017, 78). Hanc and Sitarz rightly noted that in Article 262 § 1 of the Criminal Code, the legislator did not prohibit all disrespectful and unethical behaviors toward human remains. Only those expressing contempt are to be criminalized (Hanc, Sitarz 2017, 64). The offense does not occur when treating remains as valuable research material and a source of knowledge, not of contempt. Nonetheless, failing reburial seems to transgress the corresponding law of burial. At the same time, legislation in most countries does not regard osteological remains from archaeological research as cadaveric. However, as we shall illustrate below, this may change across colonial, indigenous, and confessional contexts, where the law will be shaped in a pluralistic way.

It is worth noting the global ethical standards that museums (often collaborating with research institutes) must follow on the acquisition and preservation of human remains: "Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known" (ICOM 2019/2020, 10).

A serious legal problem addresses the repatriation of human remains (Lichwa, Stec 2023, 104–111) as a legacy of colonialism or imperialism practicing plundering politics towards the conquered peoples and their overall heritage. Repatriation refers to returning human remains to their country or community origin. Once taken (i.e., looted), the remains are commonly used as museum exhibits (Lichwa, Stec 2023), didactic preparations (Mazurkiewicz, Szymaniec 2019, 183), and curiosities in traveling circuses or human zoos. Sarah Baartman (1789–1815) was forced into slavery and made into a living curiosity. Posthumously, her skeletal remains and a body cast continued to be publicly displayed (Lichwa, Stec 2023), and her repatriation and burial in Hankey only occurred in 2002. In turn, 'trophies' in the form of prepared human heads from South America or New Zealand ended up in museum and private collections (e.g., Arkady Fiedler Museum in Puszczykowo; see Kobyliński 2018; Bugaj 2018). Considering such practices, Helena Eilstein's suggestion of research self-restraint sounds pertinent: "We are not obliged to occupy our minds with all the questions to which we can provide reliable accounts. We have the right to consciously decline the opportunity to acquire some knowledge, as long as our refusal to acquire it does not harm or expose other people to harm" (Eilstein 2005, 155).

In the international domain, on the other hand, bioarchaeologists are confronted with "a lack of internationally applicable framework regarding human skeletal remains" (Lozina et al. 2021, 162). "Because of different legislative, different religious distribution of the populations, and different historical (usually unresolved) issues, every country has different views on how, when, how long, in which manner, by whom, etc., human remains should be handled" (ibidem; also, Márquez-Grant, Fibiger 2011). Accordingly, the road to research abroad is diplomatic in nature.

To elaborate, the principal investigator must usually apply to the destination country's proper consular department for assistance in getting approval (concession) to conduct bioarchaeological (and related) research on that country's territory. The consular office then facilitates arrangements between the researcher and government agencies in the destination country (e.g., the Ministry of Culture). A multilevel, bilateral, properly documented agreement is produced and must be signed by the researcher (faculty dean or rector, respectively). If the project is international and grant-funded, the granting agency would expect to get insight into the agreement in which the destination country's authorities have set out the project's legal and procedural framework, research concessions, and so on.

5. STATEMENT FOR RESEARCH ON HUMAN REMAINS ACCORDING TO THE POLISH NATIONAL SCIENCE CENTRE

A bioarchaeological (e.g., anthropological, and medical) project planning research on human remains requires a legal-bioethical statement. In 2023, the Polish National Science Centre (NSC) released guidance on such a statement as an integral part of a grant application in which national and international bioarchaeological (and related) research on human material is intended. For instance, bioarcheologists are to address the following items:

- description of the type of local resources that will be used in the research;
- approval of the relevant bioethics board (its institutional affiliation and location), in particular for genetic research on human material;
- in case of research on genetic material, observance of the Nagoya Protocol to the Convention on Biological Diversity;
- an agreement to confirm scientific collaboration with the institution(s) abroad;
- permissions or approvals from relevant state authorities for the use of local cultural or natural resources (e.g., archaeological, and historical);
- description of the type of material imported;
- description of the type of material exported;
- an agreement authorizing the transfer of biological material and personal data between institutions (e.g., Material Transfer Agreement or Data Transfer Agreement) or other documents proving the establishment of scientific collaboration;
- authorisation for export of resources to countries located outside the EU;
- authorisation for importing materials (e.g., human remains, and artefacts) into Poland, which specifies the materials referred to, and the name of the approving institution; and
- permission to export materials from Polish institutions (National Science Centre 2023, 15).

We conclude from the above that the legal-bioethical statement of this leading national grant agency is focused on the relocation of human remains and biological materials; proceduralistic in nature (e.g., requiring several approvals, and concessions) (see Jaskólska 2020); and poor in normative guidance. The application form (and practice) suggest that applicants must correctly refer to any legal and ethical regulations. Application reviewers must assess the applicant's orientation in this respect. Additionally, the NCN does not address the essential legal and extra-legal, international, and intercultural contexts, a concern that we address in subsequent sections. The following sections focus on four contexts that present normative challenges that bioarchaeological researchers may have to confront: colonial, indigenous, religious, and political.

6. COLONIAL CONTEXT

Several states owe a considerable part of their scientific resources to their colonial relationship to other states, peoples, and communities or even to entire continents (Winkelmann et al. 2021; Museum of British Colonialism 2020; Trigger 1984). As an example, the African continent was *terra nullius* (i.e., not owned by anyone) for centuries. "From the 18th century on is there, thanks to the Enlightenment, a 'science' of difference: anthropology. It 'invents' an idea of Africa. Colonialism will elaborate upon the idea" (Mudimbe 1994, 30; also, Mudimbe 1988; a parallel work on the Americas is Dussel 1995). Consequently, colonizers transformed Africa into "a magnificent natural laboratory" (Tilley 2011, 2). It was not until circa 1930 that people began to consider Africa in terms of justice and "the development of Science in Africa, of Africa by Science" (Tilley 2011, 2).

Classical archaeology has mostly (1) emerged from the colonial discourse on discoveries, artefacts, and data colonized (i.e., displaced from their original contexts) and "ideas and institutions surrounding them" (Schnapp 2002, 134) and (2) has blended in the "external" contexts (Moro-Abadía 2006; Gosden 2004). Such practices have led to epistemic violence and the exclusion of indigenous populations from any benefits of (bio)archaeological research.

Furthermore, fossils and osteological remains discovered in Africa contributed to the myth of human origins long before Darwin and Huxley. Depending on who and where early fossils were unearthed, humankind's 'origin' or the evolutionary 'missing link' shifted from continent to continent, frequently in line with colonial hierarchies granting supremacy to Asia over Africa, Eurasia over Asia, and so on (Athreya et al. 2019). Anthropological expeditions also penetrated the African continent in search of evidence of races (e.g., Czekanowski 1917–1927; Czerska 2017). However, "in the past decade, new discoveries in anthropology have completely reshaped our ancestral evolutionary tree and scientific understandings of the origin of our species" (Joannes-Boyau et al. 2020).

States and communities may raise claims for the return of archaeological finds, including human remains, as well as reparations for damages and harms suffered. Unfortunately, the addressees of such claims (i.e., governments) are not obliged to consider them under existing international legislations as the latter does not apply retroactively. Recently, scholars have been attempting to determine which direction the development of suitable legislation should take (Labadie 2021). This determination would enable both the study of human remains and their treatment in line with indigenous, spiritual, and further grassroots requirements. "The excavation, retrieval, and celebration of the historical individual, the effort of bringing her within accessibility" (Spivak 1999, 199; see Ferris 2009; Ferris 2003) would meet here repatriation and reburial. Such legislative advances would

further transform bioarchaeology into colonial-sensitive research and relieve it of its predominantly commercial focus (Everill 2007).

Such a transformation based on the self-regulatory processes is already happening in Australia and Germany. In Australia, it was common practice for academics and museum professionals to collect Aboriginal human remains. The osteological remains of 4,600 individuals rest in cardboard boxes in the South Australian Museum. "They included skeletons stolen in their hundreds from ancient burial grounds. Others were collected upon request by frontier workers and police who either came across the dead or killed the living so as to make them collectable. It's no coincidence some of the skulls in the collection bear bullet holes" (Delay 2020). According to D. Rathman, chair of the museum's Advisory Board, "the injustice of what happened – the injustice that this collection of old people tells the story of – is profoundly disturbing" (Daley 2020).

At the core of postcolonial justice implemented in the science sector (Eckstein et al. 2017), there can be no shortage of sensitivity and activism on the part of researchers themselves. Such activism in bioarchaeology and anthropology, dealing with human remains deposited in museums, universities, and hospitals, can recently be observed in Germany. "Formal and informal colonial structures favored collecting and acquisition practices for collections and museums in the Global North and their networks, actors, and activities" (Winkelmann et al. 2022, 17). German collectors, collections, researchers, and research institutions benefited from the colonial structures of both German and non-German colonial powers (ibidem). Researchers are reckoning with their country's colonial past and infamous century of racial anthropology. In line with the International Council of Museums' (ICOM) (2022) policies, researchers have resolved that research on human remains acquired in the colonial era will not be continued. Instead, it will be replaced by multidisciplinary provenance research (*Provenienzforschung*) including the revision of collections and archives, the restoration of subjectivity to human remains, and, as far as possible, their repatriation. That said, the law still allows German institutes and museums to conceal information even about those individuals whose remains are being searched by descendants (e.g., Mboro, Kopp 2018).

7. INDIGENOUS CONTEXT

The concept of 'indigenous' is a variable construct with context-dependent, local sense. It is generic – a broad bucket within which there are thousands of nations, communities, cultures, and so on. United Nations has adopted an official definition of Indigenous opting instead to use the following criteria of indigeneity:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member,
- Historical continuity with pre-colonial and/or pre-settler societies,

- Strong link to territories and surrounding natural resources,
- Distinct social, economic or political systems,
- Distinct language, culture and beliefs,
- Form non-dominant groups of society,
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities" (Indigenous and Tribal Peoples Convention 1989, No. 169, fact sheet).

For a long time, the world was fascinated by the lives and afterlives of indigenous peoples. "Once disparaged as primitives on the lowest rung of the evolutionary ladder, these neo-'noble savages' have been a rich source of creative inspiration. (…) emulated, commodified, and otherwise appropriated, their distinctive cultures have greatly enriched dominant societies in any number of senses, not just economically" (Nicholas, Wylie 2012, 197). Fortunately, the states that were shaped as a result of colonization have reached a turning point in terms of the just treatment of indigenous minorities, including in the science sector.

This is significant because, currently, the United States (574 recognized Indian Tribes – Indigenous Americans) and Canada (630 First Nations communities – 50 nations) have advanced regulations on the treatment of indigenous heritage. Circa 300 First Nations were registered in Brazil, 68 in Mexico, 55 in Peru, and 10 in Chile. Officially, 705 ethnic-indigenous groups live in India, 40 in the Russian Federation, and 56 in China. There are a total of about 5,000 indigenous groups in the world (Amnesty International 2023).

The UN Declaration on the Rights of Indigenous Peoples (2007) prompted the transformation of research on human remains in indigenous contexts. According to Article 31, "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as (…) genetic resources, seeds, medicines, knowledge of the properties of flora and fauna" (see also Skille 2022). When the self-determination, vital interests, and traditions of indigenous peoples and their claims (arising from damages and harms inflicted by colonialism – and often in various forms continuing until today) are recognized by official legislation (e.g., federal and state level), they have a legal status. As long as the law does not recognize them, they retain extra-legal status. The UN Declaration promotes "partnership between indigenous peoples and States" in this respect, too.

Extra-legal reasons can be identified when an indigenous group refuses archaeological access to the remains of their ancestors while state or federal legislation does not constrain such access. In Canada, for example, the "Indigenous law and Aboriginal law are very different. Indigenous laws are the legal traditions of the respective Indigenous Peoples that continue to exist independently of Western legal systems. Aboriginal law is the constitutional protection of the rights of Indigenous Peoples under the Canadian Constitution, made by the courts and legislatures, that governs Aboriginal-Crown relationships" (Thompson Rivers

University 2023). The law of a particular indigenous group consists of a set of rules, habits, and cases, not only rooted in their traditional knowledge. "Indigenous societies have at least five sources of law: sacred, deliberative, custom, positive, and natural (…).

- Sacred law: creation stories and treaty relationships.
- Natural law: relationship with the natural world.
- Deliberative law: talking circles, feasts, council meetings, and debates.
- Positivistic law: proclamations, rules, regulations, codes, teachings, and Wampum readings
- Customary law: marriages, family relationships, and recent land claim agreements" (Thompson Rivers University 2023).

Likewise, notions of Indigenous law are variable by context because each Nation fits or not very differently within or apart from contemporary State conceptions of law in place. For example, in Canada, this plays out in law by the heritage of past State legal precedence in much of the eastern two-thirds of Canada. Colonial Sovereigns negotiated treaties and land surrenders in the past with Indigenous Nation Sovereigns, which today have tangible implications in the intersection of Indigenous and Settler Society rights and interests under Canada's Constitution (so First Nations spend a lot of time and effort researching the validity of past treaties and whether the State adhered to their Fiduciary obligations under them). When the colonizers arrived, each Indigenous nation had its distinctive land rights. Much of Canada's British Columbia and the north were occupied without legal framework of treaty, creating a different principle in law. Basically, without treaty, these lands are still First Nations Sovereign territory thus requiring the State to negotiate and share a level of decision making that is harder to legally impose in the east. Canadian courts continue to recognize them as part of the Canadian legal system; 'the rule of law' therefore embraces both Canadian and Indigenous laws (Gunn, McIver 2020).

Such a multi-juridical situation (Tamanaha 2021; Schiff Berman 2020; Dupret 2007; Teubner 1996; Vanderlinden 1989) does not always imply harmonious relations between the heterogeneous laws, however. Moreover, there is even less prospect of putting them all into one coherent, federal-level statute. The chair of the Indigenous Law Research Unit at the University of Victoria (Canada) claims law to finally be "[a]t its most basic level (…) collaborative problem solving and decision-making through public institutions with legal processes of reason and deliberation" (Napoleon 2016; see also Napoleon 2012). Practicing law in such a way clearly challenges the Enlightenment postulate of positive law's secularization, the state's authority as a sole legislative power, the centric view, and the Separation Thesis (Hariri et al. 2022; Zamboni 2021).

States increasingly recognize and protect Indigenous citizens' rights and liberties. For instance, "as post-colonial sensibilities slowly permeate North American society, descendant communities have challenged the basis for both

archeologists to assert an exclusive stewardship of the archeological record, and the state's authority to endow this exclusivity to archeologists" (Ferris 2003, 154). The denial of access to ancestral remains by descendants is not only justified by respect and cult. Sometimes the living owe the dead or communicate with the 'living death' (Baloyi, Makobe-Rabothata 2014). Indigenous peoples are also critically interested in ensuring that their historical and biocultural heritage (1) retains its distinctive meaning; (2) receives adequate representation in science and (3) does not become the victim of political, economic, or cultural appropriation (Nicholas, Wylie 2013).

The dignity, autonomy, and re-empowerment of indigenous groups is manifested in their control over their own heritage. "Central to this conception of appropriation is the insight that it involves intentional decontextualization" (Nicholas, Wylie 2013, 195–221; see Henderson 2009) and privileged access to archaeological resources. The equivalent of appropriation, however, will not be property, possession, or ownership in the colloquial sense.

> While the term 'ownership' is used here, I don't mean simple property possession, although that is how archaeological ownership tends to be defined in statute and in discussions about repatriation. Rather, the term is intended to convey privileged access to archaeological remains, privileged ability to interpret the record and write the stories of the past from those remains, and privileged right to speak on behalf of the record (Ferris 2003, 155–156).

Accordingly, research ethics has adopted the following principle: research on indigenous ancestor remains and any artifacts identified in mortuary contexts is conducted with the explicit consent of the descendant community. Consent is also necessary for reproducing, exhibiting and publishing archaeological finds from indigenous contexts. As Ferris and Welch assume, this is an integral aspect of archaeology as an "activist practice [and] a broad social engagement in and with contemporary societies over the material past", which "tends to be on behalf of causes and communities and typically adopts multi-vocality in the form of community, collaborative, engaged, activist, public or indigenous archaeologies as the means of defining and undertaking archaeological research, and more critically, of sharing or re-centering authority beyond archaeology" (2015, 72).

To continue, "much of it is overtly revisionist to more conventional academic practices that situate archaeology as an internal, authorized investigation of intellectual curiosity driven by a 'science-like' prerogative, and whose accountability is limited only to academic peers and institutions. Revisionist practice seeks to be inclusive, redresses colonial legacies embedded in archaeological conventions, and is quick to acknowledge the broader implications of practice in contemporary society, and the overtly political nature of making meaning from the past in the present" (Ferris, Welch 2015, 72).

On a different continent (Australia), the Uluru massif and the surrounding Kata Tjuta National Park have been home to the Anangu tribe since times

immemorial. The massif is also the residence of ancestral spirits and means 'everything' to its inhabitants. The Anangu are the traditional owner of Uluru territory, which, since 2017, has been granted autonomy under Australian federal law (the Uluru Statement from the Heart) (Lino 2017). By way of background, before the Australian Government allowed the Aboriginal communities to have a voice in public deliberation on recognition of their rights, there was overly liberal research into the remains of their ancestors (Thomas 2014).

To elaborate, in 1948, the Arnhem Land Expedition conducted – and filmed – such research in the Northern Territory of Australia. Decades later, local people were invited to a slideshow.

> The pillaging of a mortuary site and the decision to film it are sufficient to unsettle many viewers. For Aboriginal people with whom I have watched the footage, the close physical handling – the intimate contact of the living flesh of the intruder with the remains of the interred – is particularly unnatural and disturbing. (…) A person's spirit remains indelibly associated with the bones of the deceased. Living people have responsibilities towards the spirit, as much as they do to each other (Thomas 2014, 130).

In such cases, scientific interests clearly collide with indigenous values. Given that tourists have returned the rust-colored stones that they took from Uluru (claiming they have brought misfortune upon them), the return of indigenous remains seems just a matter of time (Australian Government, Director of National Parks 2023).

Another example of legislation meeting the autonomy of indigenous people may be the North Sentinel Island in the Andaman/Nicobar archipelago.[2] The Sentinelese (approx. 100 individuals) have inhabited the island for 30,000 years with no contacts with outsiders; they still violently resist such contacts (Safi 2022). In 2019, the Government of India placed Sentinel Island under strict legal protection:

> The entire North Sentinel Island along with 5 km coastal sea from high water mark is notified as tribal reserve. The Sentinelese are still in isolation practicing primordial hunting and gathering way of life. The Government respects their way of life style, therefore, has adopted an 'eyes-on and hands-off" practice to protect and safeguard the Sentinelese tribe. A protocol of circumnavigation of the North Sentinel Island has been notified. The ships and aircrafts of Coast Guard and boats of Marine Police make sorties around North Sentinel to keep surveillance.

DNA testing of Sentinelese ancestors would arguably be a breakthrough for science. It goes without saying that relations between state laws and the rights of Indian Indigenous inhabitants are complicated (Bhagabati 2023).[3]

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[2] Between 1850 and 1857, the Nicobar archipelago was a penal colony owned by the British Empire.

[3] "India has long been the world's primary source of bones used in medical study (…) In 1985 (…) the Indian government outlawed the export of human remains, and the global supply of skeletons collapsed" (Carney 2008; compare Locata et al. 2020). At the same time, "there is no specific

These are just a few examples illustrating the kind of research procedures with human remains in indigenous contexts that are no longer on today's agenda. For bioarchaeology, this would mean a transformation of their research practice towards a *sustainable* archaeology (Ferris, Welch 2014), an *indigenous* archaeology (Zimmerman 2010), a *sacred* archaeology (Ferris 2003, 167), and an *aboriginal* archaeology. These distinctions go hand in hand with the multi-jurisprudence phenomenon explained above.

Regarding the East European context, indigenous (and ethnic) groups have often undergone displacement due to wars, forced migrations, and demographic policies (Kołodziejczak, Huigen 2023). Displacement is a standard tool in the hands of colonial and imperial powers against indigenous populations. Among other practical consequences for bioarchaeological research, this practice implies that attribution of ancestors' remains to descendants in a straight line – or even to the population living in a particular territory today – would be difficult, if possible, at all. This, in turn, makes obtaining the consent of descendants for relevant research on human remains impossible. Displacement may involve taking entire mortuary sites from the indigenous population along with all the territory they originally inhabited and relocating the population (e.g., to a reservation). In such cases, rights or policies reclaimed by indigenous peoples would legitimize the repatriation of their ancestral remains to the reservation territory – and not necessarily eliminate the research opportunity.

For instance, in 1996, at Kennwick (Washington), the Army Corps of Engineers unearthed a skull (8,340 – 9,200 y. old). Claims to the remains were submitted by five Native American tribes. A research team eventually petitioned the court for authorization to examine the find. In 2015, DNA testing, in collaboration with the Confederated Tribes of the Colville Reservation, unequivocally confirmed the find's affiliation with the Native peoples. The US Congress recommended placing the skull in the Washington State Department of Archaeology and Historic Preservation. A repatriation and reburial of 'The Ancient One' followed in 2017.

> But the extensive notoriety afforded to this case, and others like it, negatively impacted both academic and public impressions of repatriation – the return of ancestral remains and other cultural patrimony to descendant groups from institutions like museums and universities. Such controversial cases often overshadow more collaborative repatriation work and promote the idea that repatriation is always incompatible with scientific research (…) For example, the 2020 book *Repatriation and Erasing the Past* argues that repatriation has harmed science and threatens to end certain types of archaeological research. It garnered significant backlash online, including a petition for the book's retraction (Nichols et al. 2021; see Weiss, Springer 2020).

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law in India for protecting the rights of the dead" (New Delhi 2021; https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf)

For bioarchaeologists from abroad, the legal and extra-legal standards implemented in a country for the inclusive and just treatment of indigenous peoples and their heritage are binding as an integral part of global research ethics. How these standards are to be respected needs a pre-agreement with the legitimate owners of the heritage. If the standards derive from common law precedents and case law, they apply with no less normative force than the letter of statutory law.

8. RELIGIOUS CONTEXT ON THE JEWISH DOCTRINE CASE

Religious or ritual contexts do not necessarily overlap with indigeneity (Sossis 2007) and territorial rootedness of believers. They may have behind them the history of deterritorialization due to pogroms, genocide, or migrations. In the tradition of Judaism, for example, respect for human remains is a consequence of the recognition of the special value of everyone who once possessed a body. This belief is reflected in the following commentary by the seasoned Halacha expert Rabbi Joseph B. Soloveitchik:

> The failure and absurdity of life are highlighted by the human corpse: the curse and affliction that bear down on the self-aware being appear in all their dread upon the landscape, over which hovers the fear of death, which mocks at all. Here, human dignity poses and aggressive and powerful demand. Be benevolent to the dead; protect his dignity, which is also your dignity. Demonstrate the humanity maintains itself even in the face of death, even when confronted with destruction and nothingness. To be benevolent to the dead – that is true *gemilut chasadim*. (Soloveitchik 2017, 177)

The Jewish cemetery is referred to as *beit olamim* (house of eternity) or *beit chayim* (house of life) and in Yiddish as *gute ort* (good place) (Gordon 2009, 106).

In Judaism, two principles are fundamental: the inviolability of the grave and the inviolability of Jewish cemeteries. Also, it is forbidden to interfere with the structure of the land. Human remains must rest in peace, intact (Bednarek 2020, 162). There is a strong emphasis on fulfilling obligations towards the dead. Deeds associated with the burial of the dead are referred to as *Chesed shel emet* (truekindness), for the dead cannot repay kindness. Respect is also expected towards the deceased (*Kvot ha-meit*) (Telushkin 2009, 95).

Both the norms of Halacha and the religious law Shulchan Arukh contain an important injunction in relation to human remains: "One should not remove a corpse and bones from a dignified grave to [another] dignified grave, nor from an undignified grave to [another] undignified grave, nor from an undignified one to a dignified one, and needless to say [that it is forbidden] from a dignified one to an undignified one. And [to remove a corpse] into his own, even from a dignified [grave] to an undignified one, is permissible, for it is pleasant for a man that he rests beside his ancestors" (Yoreh De'ah / Karo 1563, 363; Denburg 1955).

Consequently, archaeological research in Jewish cemeteries is subject to several restrictions. Noteworthy here is managing archaeological research on Jewish remains in the light of Polish diaspora policies. To date, 1167 graveyards under its custody have been catalogued on Poland's territory.[4] Some are among the oldest or largest worldwide. For example, the Warsaw Bródno cemetery, founded by Szmul and Judyta Zbytkower, contains an estimated 250,000 graves. Archaeological, ethnographic, and conservation research is being carried out there (including but not limited to identification of the deceased and returning tombstones to their original locations). For such research, authorizations are required from (1) the rabbinate; (2) the authorities of the local Jewish community, which usually owns the graveyard and its land; (3) the Rabbinical Commission for Cemeteries (in cooperation with the cemetery management); (4) the voivodeship heritage conservator and (5) the Foundation for the Preservation of Jewish Heritage (or other foundations taking custody of the cemetery – if they hold or administer the cemetery).

The Halakhic law prevents the excavation and keeping of human remains outside an original grave, moving them in the ground, sectioning or drilling them, and taking samples (Guidelines of the Rabbinical Commission for Cemeteries). "Neither archaeological excavation nor any paleoanthropological research are [sic] allowed to be undertaken" (Colomer 2014, 169). This doctrine allows examination in the field limited to visual inspection and identification, followed by placement of accidentally discovered remains on burial grounds.

Halakhic law and the traditional doctrine of Judaism are clear examples of extra-legal rulings restricting research on human remains. They have primacy over both legal acts and international standards of research ethics. In Israel, the legal system reflects the religious, ethnic, and cultural diversity of the population and has a multi-juridical character. The archaeological legislation is sound and consists of (1) The Antiquities Law (1978) and (2) The Israel Antiquities Authority (1989).

Remains unearthed at archeological excavations, at the request and under confirmation of a rabbi, are to be placed at the disposal of the Ministry of Religious Affairs (Reich et al. 2023, 365–366). In turn, exhumations carried out at universities have evoked constraints and demonstrations of ultra-Orthodox believers (Nagar 2021; Siegel-Itzkovich 2001). Doctrinal restrictions do not apply to studying human remains from foreign cultural contexts discovered in this unparalleled historical region (Nagar, Sonntag 2008), except the Islamic. "Political sensitivities about human remains mean that for most early Islamic burials discovered in Israel, paleo-anthropological studies have been limited to recording

[4] The oldest are Lublin (founded in 1541) and Cracow (1551); the largest are Wola (founded in 1806) and Bródno (1780), which are located in Warsaw. For comparison, 7 Muslim cemeteries are preserved (Sulkiewicz, Pawlic-Miśkiewicz 2021), and a few of different ethnics, e.g., Lemko, https://tmzl.labowa.edu.pl/galeria/cmentarze-lemkowskie/

the position of bodies and the presence or absence of bones" (Srigyan et al. 2022, Suppl., 5–6).

The situation may look different when research on human remains of Jewish origin is conducted in extraterritorial and unexpected. For example,

> in 2004, construction workers digging in advance of the Chapelfield shopping center development in Norwich, UK, uncovered a medieval well containing the remains of at least 17 people (…). Scientists from the Natural History Museum, University College London, Mainz and Cambridge Universities, and the Francis Crick Institute, conducted analysis on the remains of six of these individuals, uncovering new genetic, medical, and historic information. The whole genome analyses reveal the individuals appear to be a group of Ashkenazi Jews who fell victim to antisemitic violence during the 12th century (Bonner 2022; also, Brace et al. 2022).[5]

As for analogies made between Jewish communities' struggle for recognition of their funeral hereditary and indigenous communities' vindications,

> following American indigenous communities' vindications, the archaeology of the dead has similarly become the perfect battlefield for Ultraorthodox Jewish minority groups. It advances their interests in reinforcing their present political voice (…) and reassuring their religious capital worldwide. However, beyond a first appearance of being a similar topic of 'indigenous ethics', the two cases show little resemblance (Colomer 2014, 169).

9. NEAR AND MIDDLE EASTERN POLITICO-NORMATIVE COMPLEXITY

On a final note, in the Near and Middle East (without going into the semantic scope of the term) (Brooks, Young 2016), where abundant residues of ancient and later civilizations' remnants attract archaeologists, colonialism was a multifaceted phenomenon, not reducible to the European background, as it also included, for example, Ottoman colonialism (Türesay 2013). Colonial rules have finally created nation-states with little concern for the indigenous, ethnic, religious, and cultural identities of the local populations. They developed "a centralized administration, a legal system, a flag, and internationally recognized boundaries" (Owen 2004, 9; also, Tibi 1990) with which different bottom-up sources of law (especially Islamic) contemporarily intersect or interfere.

The Kurds, for example, were denied statehood (Eliassi 2016). In this extensive and greatly populated region, legal pluralism (Oberauer et al. 2019; Shahar 2008; Sullivan 2005) shows more tensions than the better-harmonised systems in Canada and the US as discussed. Colonization in many of the states that were created and even populated by settlers from Europe (with the exception of the Near and Middle East from which they withdrew) usually left behind one source of law and either

[5] Depending on what genetic research is carried out, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity of 2014 applies (e.g., Davis, Borisenko 2017).

a (1) codified civil law or (2) common-law system, which long dominated (e.g., local case law, the judiciary, and traditional laws). The increasing importance and voicing of grassroots sources of law in the public sphere thus reflects citizens' emancipation as autonomous lawgivers and rightsholders (Rivlin 2012).

From country to country, bioarchaeologists may encounter variable legal and extra-legal rules not limited to the most representative Islamic (*hadith*) (Márquez-Grant, Fibiger 2011) and the most restrictive regional system adopted in Israel (see Section 7). These rules are combined with highly bureaucratic regulations on the preservation of archaeological heritage. To illustrate, excavating pre-Islamic funerary sites would raise relatively little objections in Islamic communities. As for the remains of those buried in the Islamic faith, depending on the denomination of Islam, there may be more or less objections.

To continue, in the grave, (1) a Muslim's body is laid directly on the ground so that the face looks (or the feet are directed) toward Mecca. (2) In some communities, touching human remains is not accepted. (3) Orthodox believers may associate cemetery surveys and grave markers used in mortuary archaeology with blasphemy, for the doctrine holds that all Muslims are equal in death. Therefore, graves cannot display economic distinctions (Bullion et al. 2022, 632). "The rarity of archaeologically investigated Muslim burials is largely the result of religious sensitivities and traditional beliefs about the necessity for having a complete body with which to enter the afterlife" (Srigyan et al. 2022, Suppl., 3–4). Consulting with local archaeological circles that are familiar with what is acceptable for the local community is thus recommended when planning an excavation.

The export of archaeological human remains is virtually restricted to zero in Egypt and Turkey. Favorable conditions (including the exportation of complete skeletons excavated from archaeological sites) prevailed in Sudan before the outbreak of the civil war. Certain countries require returning unused samples and materials. It is not uncommon for properly documented researchers to be denied access to archaeological sites with human remains by an authority in a foreign country (as well as its population) on political or ideological grounds (Diaz-Andreu 2015, 4820; Curta 2014; Jones 1997; Cox, Ephross 1998).

Ethnic hostilities are another example. Over several decades, in archaeology, 'natural' or 'innate' ethnicity (ethnogenesis) has been replaced by concepts such as culture and community (Diaz-Andreu 2015, 4820; Curta 2014; Jones 1997; Cox, Ephross 1998). Nonetheless, inter-ethnic tensions may be challenging for archaeologists in restive regions. In one example, a research team planned a DNA study of the remains of representatives of an ethnic group that had populated a particular territory for millennia. Today, their original homeland is under the jurisdiction of a state that fails to recognize that particular ethnic group and pursues a policy of erasure of material evidence and remembrance of it (Bloxham 2003). Such situations may occur in territories where genocide, ethnic cleansing, expulsions, apartheid, et cetera, have been conducted.

It is easy to understand this situation using the example of research planned at archaeological sites with the remains of the Armenian individuals in eastern Turkey. In such a case, a politically or ideologically motivated refusal will limit not only the scientific role of the archaeologist but also their importance as a "bearing witness" (Bloxham 2003, 141–191; Staniewska, Domańska 2023; Smith 2023). In other cases, researchers may face refusals, restrictions, and censorship, which are part of an infamous tradition when "a state-sponsored historical narrative had stigmatized certain communities, encouraging archaeologists to avoid any evidence of their material remains" (Smith 2023, S57).

On the other hand, politically independent archeology strives to return communities "from historical erasure as well" (Smith 2023, S86; compare Letsch, Connolly 2013). Also, residents of a particular land may question access to and excavation involving the remains of unaccepted groups that are unfamiliar to them due to ethnic, religious, cultural, and other reasons. A related and multifaceted issue that requires distinct consideration is 'political exhumations' (an exquisite compendium on this topic is offered in Staniewska and Domańska 2023).

Disputes also concern the return of archaeological monuments and treasures to states established in the territories of origin of the disputable artefacts.[6] For instance, the Turkish Government, which plans to open the National Museum of Civilisations in Ankara to celebrate the 100th anniversary of the state, claims the return of archaeological treasures from museums in London, Berlin, New York, or Vienna. Sanctions against archaeological teams working become tools in the dispute (e.g., working in the Ephesus or Konya regions). Archaeologists working in demanding contexts may face restrictions depending on the political wind and the quality of diplomatic interstate relationships. Claims arising in Cairo concern mummies (Ronald 2023) followed by controversies. Further, museum objects from indigenous or colonial contexts are currently regarded as 'accidental refugees' and 'repatriates' (Appadurai 2017; Hick 2021; Colwell 2014) that deserve 'postcolonial curation' (Gaupp et al. 2020). The concept of such objects evolves both ontologically and normatively. Another global concern to note is the online trade of remains (Huffer et al. 2019).

[6] One of the items in dispute is the Pergamon Altar (located in the Pergamon Museum in Berlin), saved from destruction by Carl Humann in 1860: "The truth is that Humann had watched in horror as reliefs were being loaded into lime kilns (…) on the basis of contracts made according to the law governing antiques at the time, it was arranged for the reliefs to be brought to Berlin and so it was saved" (Letsch, Connolly 2013).

10. CONCLUSIONS AND PROSPECTS

Given the historical background of the colonial legacies, which gave rise to most of the barriers that bioarchaeologists encounter (outlined above), the "European nations who benefited from colonialism usually used International Law as a functional instrument for their expansionist interests. Specifically, the notion of *terra nullius* served to justify their occupation, expropriation, and looting of Indigenous peoples' lands around the world" (Labadie 2021, 137).

After World War 2 and decolonization, international legislation became non-retroactive, and their legal force suffered from limitations. Nonetheless,

> the UN *Declaration on the Rights of Indigenous Peoples*, although not a binding instrument, calls on States to provide reparation – which may include restitution, with regard to cultural artifacts of which they have been deprived. However, despite this normative arsenal regarding the prohibition of looting and the obligation to return cultural artifacts, the existing instruments often prove inadequate to resolve the demands relating to the Colonial Era (Labadie 2021, 136).

Closely related to reparations is the repatriation of human remains (Lichwa, Stec 2023). This, in turn, is a demanding aspect of reparative (restorative) justice, which refers to the broad spectrum of bioarchaeological practices that we approached in various contexts in this article. One of the difficulties in this regard is that during the annexation of archaeological resources, colonial legislation may have prevailed in a given territory, but there may have been no provision for the excavation and export of archaeological finds. In turn, there may have been very different ethnic, cultural, political, and legal contexts in a given territory prior to the setting up of a colonial order than there are at the present time. It may then be impossible to demonstrate that a tort (or organized crime) has occurred and that it requires litigation and an act of restorative justice (Blake 2015; Cornu, Renold 2010).

For researchers involved in the science sector of the democratic rule of law, where science is a public good, the changes taking place recently in international law of recognition "based on rights" become relevant. "These are the rights of minorities and of native peoples" (Tourme-Jouannet 2013, 677). The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) suggests the course to be followed in stabilizing the relationship between legal and extra-legal policies especially regarding research on specific archeological resources, including human remains.

To elaborate,

> externally, the principle of diversity means equal treatment for each state's cultures and the right for each of them to be respected in what makes it specific. States also have the right (…) freely to establish and preserve their own cultural policies. That is, a state legally has the ability, within the limits of respect for fundamental human rights, to limit its citizens' access to foreign cultures in order to protect their own culture. But internally states also have legal

obligations to protect and to promote diversity within their territory, and so to respect substate or indigenous cultures and promote individual freedom of creation and expression (Tourme-Jouannet 2013, 675).

The same obligations apply to the EU member states, which, since 1995, have implemented the following principle: "Pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity" (Council of Europe, Framework Convention for the Protection of National Minorities 1995, Preamble).

To conclude, we first described the extra-scientific significance of mortuary signs and analysed the limitations on *research freedom* in the archaeology concerned with human remains. The rationale and type of these limitations are often co-determined by manifold, extra-scientific, axiologies and norms. Positive legislation does not always reflect them. In certain contexts (decolonial, indigenous, religious, political) regulations take on a multijuridical and intersectional character. These normative transformations result in a paradigmatic shift in bioarchaeology itself as a scientific discipline, related research, and practices. This new development may challenge researchers insisting on access to the precious, but not unconditionally available, data and knowledge, the source of which can be human remains.

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BIBLIOGRAPHY

Amnesty International 2023. *Indigenous Peoples*. https://www.amnesty.org/en/what-we-do/indigenous-peoples/

Appadurai, Arjun. 2017. "Museum Objects as Accidental Refugees." *Historische Anthropologie* 25(3): 401–408. https://doi.org/10.7788/ha-2017-0306

Appadurai, Arjun. 2021. "The Museum, the Colony, and the Planet: Territories of the Imperial Imagination." *Public Culture* 33(1): 115–128. https://doi.org/10.1215/08992363-8742232

Athreya, Sheela. Rebecca Rogers Ackermann. 2019. "Colonialism and Narratives of Human Origins in Asia and Africa." In M. Porr, J. Matthews (Eds). *Interrogating Human Origins: Decolonisation and the Deep Past*. Abingdon: Routledge. https://doi.org/10.4324/9780203731659-4

Australian Government. Director of National Parks 2023. "Fact Sheet." https://sacredland.org/wp-content/uploads/2017/10/Media-Fact-Sheet-Sorry-Rocks-2.pdf?fbclid=IwAR3sDtJ9-bnV4vxVi4KU-Nrwd0wZKh9ZMUPJatS_0PfJsAk4Ogm8TA600c5E

Baloyi, Lesiba. Molebogeng Makobe-Rabothata. 2014. "The African Conception of Death: A Cultural Implication." In *Toward Sustainable Development through Nurturing Diversity. Proceedings from the 21st International Congress of the International Association for Cross-Cultural Psychology.* Edited by Leon T.B. Jackson et al. 232–243. Stellenbosch: Grand Valley State University. https://doi.org/10.4087/FRDW2511

Barcik, Jacek. Łukasz Pilarz. 2016. "Wykorzystanie zwłok i szczątków ludzkich przez studentów do celów dydaktycznych a przestępstwo znieważenia zwłok z art. 262 § 1 k.k.". *Czasopismo Prawa Karnego i Nauk Penalnych* 4(20): 87–105.

Bednarek, Małgorzata 2020. *Sytuacja prawna cmentarzy żydowskich w Polsce.* Kraków–Budapesz–Syrakuzy. Kraków: Austeria.

Bhagabati, Dikshit Sarma. 2023. "How to Be Indigenous in India?" *Law and Critique* 35: 92–123. https://doi.org/10.1007/s10978-023-09343-8

Blake, Janet 2015. *International Cultural Heritage Law*, *Cultural Heritage Law and Policy*. Oxford Oxford: Academic. https://doi.org/10.1093/acprof:oso/9780198723516.001.0001

Blake, Janet. 2021. "Where Heritage Meets Bioethics: Indigenous Human Remains and Genetic Prospecting." *Iranian Journal of Biomedical Law and Ethics* 2(1): 36–46.

Bloxham, Donald. 2003. "The Armenian Genocide of 1915–1916: Cumulative Radicalization and the Development of a Destruction Policy." *Past and Present* 181: 141–191. https://doi.org/10.1093/past/181.1.141

Bonn Delaration on Freedom of Scientific Research. 2020. https://www.bmbf.de/files/10_2_2_Bonn_Declaration_en_final.pdf

Bonner, Laure. 2022. "DNA from human remains found in medieval well shines new light on Jewish history." *University of Cambridge*, *Department of Archeology*, 30 August. https://www.arch.cam.ac.uk/news/dna-human-remains-found-medieval-well-shines-new-light-jewish-history?fbclid=IwAR3AXvqm2CdW-cu02zaOPPJIA_8dpujhHnLiY-LRBMoX3x7gqeYY5jBkAgQ

Borselli, Diletta. Tomasso Beni. Lorenzo Bonechi et al. 2023. "Muographic study of the Palazzone necropolis (Perugia, Italy)." Paper presented at International Workshop on Muography, Naples, 19–22 June 2023.

Brace, Selina. Yoan Diekmann. Thomas Booth et al. 2022. "Genomes from a Medieval Mass Burial Show Ashkenazi-associated Hereditary Diseases Pre-date the 12th Century." *Current Biology* 32: 4350–4359. https://doi.org/10.1016/j.cub.2022.08.036

Brooks, Alasdair. Ruth Young. 2016. "Historical Archaeology and Heritage in the Middle East: A Preliminary Overview." *Historical Archaeology* 50(4): 22–35. https://doi.org/10.1007/BF03379198

Bugaj, Michał. 2018. "Magazyny archeologiczne w Polsce – kwestia przechowywania zabytków archeologicznych, czyli rzecz o stajniach Augiasza i kilka przykładów dobrych praktyk". In *Znaleziska archeologiczne: problemy konserwacji, inwentaryzacji i przechowywania.* Edited by Katarzyna Zdeb. 103–114. Warszawa–Zielona Góra–Głogów–Legionowo: Muzeum Historyczne w Legionowie.

Bullion, Elissa. Farhod Maksudov. Edward Henry et al. 2022. "Community Practice and Religion at an Early Islamic Cemetery in Highland Central Asia." *Antiquity* 96(387): 628–645. https://doi.org/10.15184/aqy.2021.106

Carney, Scott. 2007. "Inside India's Underground Trade in Human Remains." *Wired,* November 2007. https://www.wired.com/2007/11/ff-bones/

Code of Ethics. World Archaeological Congress. 1990. https://archaeologicalethics.org/code-of-ethics/world-archaeological-congress-code-of-ethics/

Colomer, Laia. 2014. "The Politics of Human Remains in Managing Archaeological Medieval Jewish Burial Grounds in Europe." *Nordisk Kulturpolitisk Tidskrift* 17(2): 168–186. https://doi.org/10.18261/ISSN2000-8325-2014-02-02

Colwell, Chip. 2014. "The Sacred and the Museum: Repatriation and the Trajectories of Inalienable Possessions." *Museum Worlds: Advances in Research* 2: 10–24. https://doi.org/10.3167/armw.2014.020102

Cornu, Marie. Marc-André Renold. 2010. "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution." *International Journal of Cultural Property* 17(1): 1–31.

Council of Europe. 1995. Framework Convention for the Protection of National Minorities.

Cox, Carole. Ephross Paul. 1998. *Ethnicity and Social Work Practice*. New York: Oxford Academic. https://doi.org/10.1093/acprof:oso/9780195099317.001.0001

Cultural Heritage in EU Policies. 2018. https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621876/EPRS_BRI(2018)621876_EN.pdf

Curta, Florin. 2014. "Ethnic Identity and Archaeology." In *Encyclopedia of Global Archaeology.* Edited by Claire Smith. 2507–2514. New York: Springer. https://doi.org/10.1007/978-1-4419-0465-2_1715

Czekanowski, Jan. 1917–1927. *Forschungen im Nil-Kongo Zwischengebiet*. Vols I/V. Leipzig: Klinkhardt & Biermann.

Czerska, Tatiana. 2017. "Jan Czekanowski: antropolog na czarnym lądzie." *Białostockie Studia Literaturoznawcze* 10: 245–257. https://doi.org/10.15290/bsl.2017.10.15

Daley, Paul. 2020. "The room of the dead: how a museum became a halfway house for bones and spirits." *The Guardian*, 4 July. https://amp.theguardian.com/australia-news/2020/jul/05/the-room-of-the-dead-how-a-museum-became-a-halfway-house-for-bones-and-spirits?fbclid=IwAR3iUMLDlWxV0Cu8KkYbA3CcBzrgwGPWkkNCTsFXcuVnU3aHTuTrtqAm5oc

Davis, Kate. Alex Borisenko. 2017. *Introduction to Access and Benefit-Sharing and the Nagoya Protocol: What DNA Barcoding Researchers Need to Know*. Sofia: Pensoft Publishers. https://doi.org/10.3897/ab.e22579

Denger, Chaim N. 1955. *Code of Hebrew Law – Shulhan 'Aruk – Hoshen Hamishpat. Treating of the Laws of Judges.* Montréal: The Jurisprudence Press.

Denham, Sean et al. 2022. *Guidelines of Ethical Research on Human Remains*. Oslo: National Research Ethics Committee. https://www.forskningsetikk.no/globalassets/dokumenter/4-publikasjoner-som-pdf/guidelines-for-ethical-research-on-human-remains-web.pdf

Diaz-Andreu, Margarita. 2015. "Ethnic Identity and Ethnicity in Archaeology." In *International Encyclopedia of the Social & Behavioral Sciences*. Edited by James Wright. Vol. 8. Amsterdam: Elsevier. https://doi.org/10.1016/B978-0-08-097086-8.13032-6

Dupret, Baudouin. 2007. "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification." *European Journal of Legal Studies* 1(1): 296–318.

Dussel, Enrique. 1995. *The Invention of the Americas: Eclipse of 'the Other' and the Myth of Modernity*. New York: Continuum.

Dzierlińska, Monika. 2019. "Anthropological Analysis of Human Remains from Inhumation Graves at the Cemetery of the Oksywie and Wielbark Culture at Drawsko Pomorskie." *Materiały Zachodniopomorskie. Nowa Seria* 15: 239–248.

Eckstein, Lars. Dirk Wiemann. Nicole Waller. Anke Bartels. 2017. *Postcolonial Justice. An Introduction.* Potsdam: University of Potsdam.

Economic and Social Council UN/Committee of Economic, Social and Cultural Rights. 2020. General comment No. 25 (2020) on science and economic, social and cultural rights (article

15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights).

Eilstein, Helena. 2005. "Uwagi o aksjologii scjentyzmu." In *Ideały nauki i konflikty wartość. Studia złożone w darze Profesorowi Stefanowi Amsterdamskiemu*. Edited by Ewa Chmielecka, Jerzy Jedlicki, Andrzej Rychard. Warszawa: IFiS PAN.

Eliassi, Barzoo 2016. "Statelessness in a World of Nation-States: The Cases of Kurdish Diasporas in Sweden and the UK." *Journal of Ethnic and Migration Studies* 42(9): 1403–1419. https://doi.org/10.1080/1369183X.2016.1162091

The European Convention on the Protection of the Archaeological Heritage. 1992 The European Convention on the Protection of the Archaeological Heritage (Valetta) with amendments, https://rm.coe.int/168007bd25

Everill, Paul. 2007. "British Commercial Archaeology: Antiquarians and Labourers, Developers and Diggers." In *Archaeology and Capitalism: From Ethics to Politics.* Edited by Yannis Hamilakis, P.G. Duke. 119–136. Walnut Creek: Left Coast Press.

Ferris, Neil. 2003. "Between Colonial and Indigenous Archaeologies: Legal and Extra-legal Ownership of the Archaeological Past in North America." *Canadian Journal of Archaeology* 27: 154–190.

Ferris, Neil. 2009. *The Archaeology of Native-lived Colonialism: Challenging History in the Great Lakes*. Tucson: Uniersity of Arizona Press. https://doi.org/10.2307/j.ctv1kz4gx4

Ferris, Neil. John R. Welch. 2014. "Beyond Archaeological Agendas: In the Service of a Sustainable Archaeology." In *Transforming Archaeology: Activist Practices and Prospects.* Sonya Atalay, Lee Rains Claus, Randall McGuire, John R. Welch. 215–238. Walnut Creek, CA: Left Coast Press.

Ferris, Neil. John R. Welch. 2015. "New Worlds: Ethics in Contemporary North American Archaeological Practice." In *Ethics and Archaeological Praxis*, *Ethical Archaeologies: The Politics of Social Justice 1.* Edited by Cristóbal Gnecco, Dorothy Lippert. 69–92. New York: Springer Science+Business Media. https://doi.org/10.1007/978-1-4939-1646-7_7

Florek, Marek. 2019. "Kilka uwag o ustawowych definicjach zabytku archeologicznego i badań archeologicznych oraz ich konsekwencjach." *Ochrona Zabytków* 2: 11–29.

Florek, Marek. 2020. "Ekshumacje czy badania archeologiczne?" *Raport* 15: 369–375.

Fornaciari, Gino. 2017. "New Methods for Investigating Past Epidemics (Archaeology, Paleopathology, ancient DNA)." In *Epidémies et sociétes, passé, présent et futur*. Edited by Bernardino Fantini. 37–50. Pisa: Edizioni ETS.

Framework Convention for the Protection of National Minorities. 1995. Framework Convention for the Protection of National Minorities. Council of Europe.

Fuchs, Katharina. Christoph Rinne. Clara Drummer et al. 2019. "Infectious Diseases and Neolithic Transformations: Evaluating Biological and Archaeological Proxies in the German Loess Zone between 5500 and 2500 BCE." *The Holocene* 29(10): 1545–1557. https://doi.org/10.1177/0959683619857230

Gallagher, Daphne. Stephen Dueppen. 2018. "Recognizing Plague Epidemics in the Archaeological Record of West Africa." *Afriques* 9. https://doi.org/10.4000/afriques.2198

Gaupp, Lisa. Anna Abramjan. Frida Mervecan Akinay et al. 2020. "Curatorial Practices of the 'Global': Toward a Decolonial Turn in Museums in Berlin and Hamburg?" *Journal of Cultural Management and Cultural Policy* 2: 107–138. https://doi.org/10.14361/zkmm-2020-0205

Ginter, Artur. Anna Michalak. 2016. *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz.* Warszawa: Wolters Kluwer.

Gordon, Ewa. Boaz Pash. 2009. *Modlitwy na cmentarzu i zwyczaje pogrzebowe*. Kraków–Budapeszt: Austeria.

Gosden, Chris. 2004. *Archaeology and Colonialism. Cultural Contact from 5000 BC to the Present.* Cambridge: Cambridge University Press.

Government of India. Ministry of Home Affairs. Press Information Bureau. 2019. 5 February, https://pib.gov.in/Pressreleaseshare.aspx?PRID=1562728

Gunn, Kate. Bruce McIvor 2020. *First Peoples Law*. https://www.firstpeopleslaw.com/public-education/blog/the-wetsuweten-aboriginal-title-and-the-rule-of-law-an-explainer

Hanc, Jakub. Olga Sitarz. 2017. "Przestępstwo znieważenia zwłok (aspekty dogmatyczne i praktyczne)". *Czasopismo Prawa Karnego i Nauk Penalnych* 2(21): 53–78.

Hariri, Achmad. Satria Unggul Wicaksana. Samsul Arifin. 2022. "A Critical Study of Legal Positivism as a Legal System in a Pluralist Country." 3rd International Conference on Law Reform, *INCLAR KnE Social Sciences*, 22–23 July 2022 (Virtual). https://doi.org/10.18502/kss.v7i15.12131

Hellenic Society for Law and Archaeology. 2023. https://www.law-archaeology.gr/index.php/en/moveable-monuments (accessed: 20.12.2023).

Henderson, James Youngblood. 2009. "The Appropriation of Human Remains: A First Nations Legal and Ethical Perspective." In *The Ethics of Cultural Appropriation.* Edited by James O. Young, Conrad G. Brunk. 55–71. Oxford, UK: Wiley-Blackwell. https://doi.org/10.1002/9781444311099.ch3

Hick, Dan. 2021. "Necrography: Death-Writing in the Colonial Museum." *British Art Studies* 19. https://doi.org/10.17658/issn.2058-5462/issue-19/conversation

Hudetz, Mary. 2023. "A Scientist Said Her Research Could Help with Repatriation. Instead, It Destroyed Native Remains." *Pro Publica,* July 20. https://www.propublica.org/article/delayed-repatriation-allows-destructive-research-native-american-remains

Huffer, Damien. Duncan Chappell. Nathan Charlton. Brian F. Spatola. 2019. "Bones of Contention: The Online Trade in Archaeological, Ethnographic, and Anatomical Human Remains on Social Media Platforms." In The *Palgrave Handbook on Art Crime*. Edited by Saskia Hufnagel, Duncan Chappell. 527–556. London, UK: Palgrave Macmillan.

Indigenous and Tribal Peoples Convention, No. 169. 1989. https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169; https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

International Council of Museums. 2019/2020. The ICOM Code of Ethics for Museums. https://icom.museum/wp-content/uploads/2018/07/poland.pdf

Israel Antiquities Authority. 2023. https://www.antiquities.org.il/article_eng.aspx?sec_id=45&subj_id=220&autotitle=true&Module_id=7

Jaskólska, Wioletta. 2020. *Jak przygotować wniosek o pozwolenie na badania archeologiczne*. Warszawa: Narodowy Instytut Dziedzictwa. https://samorzad.nid.pl/baza_wiedzy/jak-przygotowac-wniosek-o-pozwolenie-na-badania-archeologiczne/?fbclid=IwAR2WLddrekULSaM3LVhX4VZ4wz7JxIQilyuGstvFwDiVmPYza3HK--woVjQ

Joannes-Boyau, Renaud. Alessandro Pellizzon. John Page et al. 2020. "Owning Humankind: Fossils, Humans and Archaeological Remains." *Heliyon* 6(6): e04129. https://doi.org/10.1016/j.heliyon.2020.e04129

Jones, Siân. 1997. *The Archaeology of Ethnicity*. London: Routledge.

Jurda, Mikoláš. Petra Urbanová. Jiří Chmelík. 2019. "Digital Restoration of Fragmentary Human Skeletal Remains: Testing the Feasibility of Virtual Reality." *Journal of Forensic and Legal Medicine* 66: 50–57. https://doi.org/10.1016/j.jflm.2019.06.005

Kalisz, Anna. 2013. "Klauzula moralności (publicznej) w prawie polskim i europejskim jako przykład regulacyjnej, ochronnej oraz innowacyjnej funkcji prawa". *Principia* 57/58: 197–210.

Karo, Yosef. 1563. "Shulchan Arukh." https://www.sefaria.org

Karski, Kamil. Sebastian Różycki. Aleksander Schwarz. 2017. "Memories of Recent Past. Objectives and Results of Non-invasive Archaeological Research Project at KL Plaszów Memorial Site." *Analecta Archeologica Ressoviensia* 12: 221–246. https://doi.org/10.15584/anarres.2017.12.13

Kieffer, Nail. 2018. *The Structural Violence of Maya Sacrifice: A Case Study of Ritualized Human Sacrifice at Midnight Terror Cave, Belize*. Doctoral dissertation, University of New Mexico. https://core.ac.uk/download/pdf/160274558.pdf

Kobyliński, Zbigniew. 2018. "Przechowywanie znalezisk archeologicznych: kolekcje prywatne a zbiory publiczne w kręgu cywilizacji europejskiej". *Znaleziska archeologiczne: problemy konserwacji, inwentaryzacji i przechowywania. Archaeologica Hereditas* 14: 103–115.

Labadie, Camille. 2021. "Decolonizing Collections: A Legal Perspective on the Restitution of Cultural Artifacts." *ICOM – International Council of Museums* 49(2): 132–146. https://doi.org/10.4000/iss.3784

Leszczyński, Leszek. Marek Zirk-Sadowski. Bartosz Wojciechowski. 2012. "Wykładnia w prawie administracyjnym." In *System prawa administracyjnego*. Vol. 4. Edited by Roman Hauser, Zygmunt Konrad Niewiadomski, Andrzej Wróbel Warszawa: C.H.Beck.

Letsch, Constanze. Kate Connolly. 2023. "Turkey wages 'cultural war' in pursuit of its archaeological treasures." *The Guardian*, 21 January.

Licata, Marta. Alessandro Bonsignore. Rosa Boano et al. 2020. "Study, Conservation and Exhibition of Human Remains: The Need of a Bioethical Perspective." *Acta Biomedica* 91(4): e2020110.

Lichwa, Natalia. Piotr Stec. 2023. "Repatriacja zwłok i szczątków ludzkich jako problem prawa dziedzictwa kulturowego". *Palestra* 9: 104–111.

Lino, Dylan. 2017. "The Uluru Statement: Towards Federalism with First Nations." *Australian Public Law*, 13 June. https://auspublaw.org/blog/2017/06/towards-federalism-with-first-nations/

Loudine, Philip. 2021. "The Role of Archaeology in the Study of Plagues and Pandemics." *National Museum Publications*, 16 March. https://nationalmuseumpublications.co.za/the-role-of-archaeology-in-the-study-of-plagues-and-pandemics/?fbclid=IwAR0Z1MBhUIpHSxOIKwirhWfV7aJs4sR3iNCBfJ5uvaVEiJuklXdh3X8vQAc

Lozina, Ante. Ivana Kružić. Ana Banovac et al. 2021. "Utilizing Human Remains for Science: Ethical, Legal, and Scientific Issues in Croatia, United Kingdom and the United States." *Beijing Law Review* 12: 161–176. https://doi.org/10.4236/blr.2021.121009

Malarewicz, Agnieszka. 2008. "The Legal Character of 'Cemetery Property' in Polish Civil Law." In *Real Estate in Czech and Polish Law.* Edited by Grzegorz Liszewski et al. 120–124. Białystok: Temida 2.

Małek-Orłowska, Monika. Katarzyna Jach. 2022. "Aspekty normatywne i aktualna sytuacja Komisji Etyki Badań Naukowych z Udziałem Ludzi na polskich uczelniach technicznych". *Diametros* 74: 19–35. https://doi.org/10.33392/diam.1811

Margalit, Avishai. 2004. *The Ethics of Memory.* Cambridge, MA–London, UK: Harvard University Press.

Márquez-Grant, Nicholas. Linda Fibiger. Eds. 2011. *The Routledge Handbook of Archaeological Human Remains and Legislations: An International Guide to Laws and Practice in the Excavation and Treatment of Archaeological Human Remains.* London–New York: Routledge.

Marsh, William A. Silvia Bello. 2023. "Cannibalism and Burial in the Late Upper Palaeolithic: Combining Archaeological and Genetic Evidence." *Quaternary Science Reviews* 319: 108309. https://doi.org/10.1016/j.quascirev.2023.108309

Mazurkiewicz, Jacek. Piotr Szymaniec. 2019. "'Nie wszystek umrę, wiele ze mnie tu zostanie…'. Aspekty prawne szczątków ludzkich jako dóbr kultury i integralności zwłok w tradycji kulturowej." *Studia Prawnoustrojowe* 45: 179–197. https://doi.org/10.31648/sp.5202

Mboro, Mnyaka Sururu. Christian Kopp. 2018. "'Unter Kannibalen' – Afrikanische Initiativen zur Rückführung der Ahnen." In *Unmittelbarer Umgang mit menschlichen Überresten in Museen und Universitätssammlungen.* Edited by Sandra Mühlenberend, Jakob Fuchs, Vera Marušić. 35–46. Hochschule für Bildende Künste Dresden.

Misiuk, Zbigniew. Jakub Wrzosek. Agnieszka Oniszczuk et al. Eds. 2019. *Wytyczne do prowadzenia badań archeologicznych*. Cz. 2. *Badania inwazyjne lądowe*. Warszawa: Rada Ochrony Dziedzictwa Narodowego.

Moissidou, Despina. Jasmine Day et al. 2015. "Invasive versus Non Invasive Methods Applied to Mummy Research: Will This Controversy Ever Be Solved?" *BioMed Research International* 192829. https://doi.org/10.1155/2015/192829

Moro-Abadía, Oscar. 2006. "The History of Archaeology as a 'Colonial Discourse'." *Bulletin of the History of Archeology* 16(2): 4–17. https://doi.org/10.5334/bha.16202

Mudimbe, Valentin-Yves. 1994. *The Idea of Africa*. Oxford: James Currey Ltd.

Mudimbe, Valentin-Yves. 1988. *The Invention of Africa*. Bloomington: Indiana University Press.

Museum of British Colonialism. 2020. "The Colonial Origins of Medical Teaching's Skeletons", 19 November. https://museumofbritishcolonialism.org/2020-11-17-the-colonial-origins-of-medical-teaching-skeletons-w5bff/

Nagar, Yossi. 2021. "The Human Skeletal Remains." *'En Esur ('Ein Asawir) III*, *IAA Reports* 68: 267–271. https://doi.org/10.2307/j.ctv26fw7vj.15

Nagar, Yossi. Flavia Sonntag. 2008. "Byzantine Period Burials in the Negev: Anthropological Description and Summary." *Israel Exploration Journal* 58(1): 79–94.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. 2014. https://www.cbd.int/ABS

Napoleon, Valerie Ruth. 2012. "Thinking About Indigenous Legal Orders." In *Dialogues on Human Rights and Legal Pluralism*. Edited by Coleen Shepard. Dordrecht: Springer. https://doi.org/10.1007/978-94-007-4710-4_11

Napoleon, Valerie Ruth. 2016. "What is Indigenous Law? A Small Discussion." https://www.uvic.ca/law/assets/docs/ilru/What%20is%20Indigenous%20Law%20Oct%2028%202016.pdf

National Science Centre. 2023. "Wytyczne dla wnioskodawców do uzupełnienia formularza dotyczącego kwestii etycznych w projekcie badawczym." Resolution no. 1/33/2023. https://www.ncn.gov.pl/sites/default/files/pliki/regulaminy/2021_12_wytyczne_dla_wnioskodawcow_kwestie_etyczne.pdf

Nicholas, George. Alison Wylie. 2009. "'Do Not Do unto Others…': Cultural Misrecognition and the Harms of Appropriation in an Open-Source World." In *Appropriating the Past: Philosophical Perspectives on the Practice of Archaeology*. Edited by Geoffrey Scarre, Robert Coningham. 195–221. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139026932.013

Nichols, Katherine. Chelsea Meloche. Laure Spake. 2021. "Repatriation Has Transformed, Not Ended, Research." *OP-ED Material World*, 16 November. https://www.sapiens.org/archaeology/repatriation-effects/?fbclid=IwAR2hw6pGjx93i6FM3cGmaa_I6Xd2gTRWhUwbHC7qWV1Bsaz9njHyxSK7v7E

Nillson Stutz, Liv. 2023. "Between Objects of Science and Lived Lives. The Legal Liminality of Old Human Remains in Museums and Research." *International Journal of Heritage Studies* 29(10): 1061–1074. https://doi.org/10.1080/13527258.2023.2234350

Oberauer, Norbert. Yvonne Prief. Ulrike Qubaja. Eds. 2019. *Legal Pluralism in Muslim Contexts*. Leiden: Brill. https://doi.org/10.1163/9789004398269

O'Donnabhain, Barra. María Cecilia Lozada. Eds. 2014. *Archaeological Human Remains. Global Perspectives*. Cham: Springer.

Owen, Roger. 2004. *State, Power and Politics in the Making of the Modern Middle East*. London–New York: Routledge.

Panzer, Stephanie. Sieglinde Ketterl. Roxane Bicker et al. 2019. "How to CT Scan Human Mummies: Theoretical Considerations and Examples of Use." *International Journal of Paleopathology* 26: 122–134. https://doi.org/10.1016/j.ijpp.2019.06.005

Pearce, Joanna. 2019. "Digging un the Dead. An Archaeological Field School Experience Shines a Light on the Grave Concerns People Have about the Treatment of Human Remains." *Sapiens*, 1 November. https://www.sapiens.org/archaeology/mortuary-archaeology/?fbclid=IwAR3abYBtIj_ifCzO-uhK2s4YxVYYsTZaUyw694Y4KDzDVBvQjuutj2s5314

Pietrzykowski, Tomasz. 2019. "Moralność publiczna a konstytucyjne podstawy ochrony zwierząt". *Studia Prawnicze* 1: 16–17. https://doi.org/10.37232/sp.2019.1.1

Rabbinical Commission for Cemeteries. 2024. "Guidelines." https://sztetl.org.pl (accessed: 15.09.2024).

Reich, David. 2018. *Who We Are and How We Got Here: Ancient DNA and the New Science of the Human Past*. Milano: Cortina Editore.

Reich, Ronny. Yaakov Billig. Yossi Nagar. 2023. "An Early Islamic Cemetery at the Edge of the Temple Mount." In *The Southern Wall of the Temple Mount and Its Corners: Past, Present and Future.* Edited by Y. Baruch, R. Reich, M. Hagbi, J. Uziel. 344–377. University Park, PA: Eisenbrauns; Jerusalem: Ancient Jerusalem Publications & Israel Antiquities Authority Publications. https://doi.org/10.5325/jj.10518972.29

Riggs, Christina. 2017. "The Body in the Box: Archiving the Egyptian Mummy." *Archaeological Science* 17: 125–150. https://doi.org/10.1007/s10502-016-9266-8

Rivlin, Eliezer. 2012. "Israel as a Mixed Jurisdiction." *McGill Law Journal* 57(4): 781–790. https://doi.org/10.7202/1013031ar

Ronald, Issy. 2023. "Don't say 'mummy': Why museums are rebranding ancient Egyptian remains." CNN, 23 January 2023.

Safi, Michael. 2022. "American Killed by Isolated Tribe on North Sentinel Island in Andamans." *The Guardian*, 22 November.

Scarre, Geoffrey. 2003. "Archaeology and Respect for the Dead." *Journal of Applied Philosophy* 20(3): 237–249. https://doi.org/10.1046/j.0264-3758.2003.00250.x

Schiff Berman, Paul. Ed. 2020. *The Oxford Handbook of Global Legal Pluralism.* New York: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780197516744.001.0001

Schnapp, Alain. 2002. "Between Antiquarians and Archaeologists: Continuities and Ruptures." *Antiquity* 76(291): 134–140. https://doi.org/10.1017/S0003598X00089900

Scruton, Roger. 2013. *Green Philosophy*. London: Atlantic.

Seferian, Nareg. 2017. *The Clash of Turkish and Armenian Narratives: The Imperative for a Comprehensive and Nuanced Public Memory*. Istanbul: Istanbul Policy Center.

Shahar, Ido. 2008. "Legal Pluralism and the Study of Shari'a Courts." *Islamic Law and Society* 15(1): 121–141. https://doi.org/10.1163/156851908X287280

Siegel-Itzkovich, Judy. 2001. "Orthodox Jews Demand University Bury Its Bones." *BMJ* 322(7294): 1084. https://doi.org/10.1136/bmj.322.7294.1084

Sierpowska, Iwona. 2020. *Śmierć w ujęciu prawa administracyjnego.* Warszawa: Wolters Kluwer.

Skille, Eivind. 2022. "Doing Research into Indigenous Issues Being Non-Indigenous." *Qualitative Research* 22(6): 831–845. https://doi.org/10.1177/14687941211005947

Smith, Adam. 2023. "Unseeing the Past Archaeology and the Legacy of the Armenian Genocide." *Current Anthropology* 63: 56–89. https://doi.org/10.1086/722380

Sobczak, Jacek. 2007. "Wolność badań naukowych – standardy europejskie i rzeczywistość polska". *Nauka i Szkolnictwo Wyższe* 2(30): 53–74.

Sobczak, Jacek. 2008. "Wolność badań naukowych – złudzenia a rzeczywistość". In *Dylematy praw człowieka*. Edited by Teresa Gardocka, Jacek Sobczak. *Dylematy praw człowieka*. Toruń: Adam Marszałek.

Soloveitchik, Joseph. B. 2017. *Halakhic Morality. Essays on Ethics and Masorach*. Jerusalem: Maggid Books.

Sołtysiak, Arkadiusz. Rafał Koliński. 2011. "Preliminary Report on Human Remains from Tell Arbid, Sector P. Excavation Seasons 2008–2010." *Światowit* 9(50)A: 49–66.

Sossis, Richard. 2007. "Why Sacred Lands Are Not Indivisible: The Cognitive Foundations of Sacralising Land." *Journal of Terrorism Research* 2(1): 17–44. https://doi.org/10.15664/jtr.172

Spivak, Gayatri. 1999. *A Critique of Postcolonial Reason*. *Toward a History of the Vanishing Present.* Cambridge: Harvard University Press. https://doi.org/10.2307/j.ctvjsf541

Srigyan, Megha. Héctor Bolívar. Irene Ureña et al. 2022. "Bioarchaeological Evidence of One of the Earliest Islamic Burials in the Levant." *Communications Biology* 5: 554. https://doi.org/10.1038/s42003-022-03508-4

Staniewska, Alexandra. Ewa Domańska. Eds. 2023. *Ekshumacje polityczne: teoria i praktyka.* Gdańsk: słowo/obraz terytoria.

Sulkiewicz, Dagmara. Barbara Pawlic-Miśkiewicz. 2021. *Mizary. Tatarskie cmentarze w Polsce*. Białystok: Anex.

Sullivan, Winifried Fallers. 2005. "Normative Pluralism: Islam, Religion and Law in the Twenty-first Century." *Religion* 35(1): 31–40. https://doi.org/10.1016/j.religion.2005.02.002

Swali, Pooja. Rick Schulting. Alexandre Gilardet et al. 2023. "*Yersinia Pestis* Genomes Reveal Plague in Britain 4000 Years ago." *Nature Communications* 14: 2930. https://doi.org/10.1038/s41467-023-38393-w

Tamanaha, Brian. 2021. "Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences." *The Journal of Legal Pluralism and Unofficial Law* 53(2): 168–205. https://doi.org/10.1080/07329113.2021.1942606

Telushkin, Joseph. 2009. *A Code of Jewish Ethics.* Vol. 2. *Love Your Neighbor as Yourself*. New York: Bell Tower.

Teubner, Gunther. 1996. "Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus." *Rechtshistorisches Journal* 15: 253–255.

Thomas, Martin. 2014. "Turning Subjects into Objects and Objects into Subjects: Collecting Human Remains on the 1948 Arnhem Land Expedition." In *Circulating Cultures*. Edited by Amanda Harris. 129–166. Canberra: ANU Press. https://doi.org/10.22459/CC.12.2014.06

Thompson Rivers University. 2023. "Indigenous Laws." https://implementingtrc.pressbooks.tru.ca/chapter/natural-law/

Tibi, Bassam. 1990. "The Simultaneity of the Unsimultaneous: Old Tribes and Imposed Nation-States in the Modern Middle East." In *Tribes and State Nationalism in the Middle East.* Edited by Philip Shukry Khoury, Joseph Kostiner. 127–149. Berkeley: University of California Press.

Tienda Palop de, Lydia. Brais Currás. 2019. "The Dignity of the Dead: Ethical Reflections on the Archaeology of Human Remains." In *Ethical Approaches to Human Remains*. Edited by Kirsty Squires, David Errickson, Nicholas Márquez-Grant. Cham: Springer. https://doi.org/10.1007/978-3-030-32926-6_2

Tilley, Helen. 2011. *Africa as a Living Laboratory*. *Empire, Development, and the Problem of Scientific Knowledge, 1870–1950*. Chicago–London: University of Chicago Press. https://doi.org/10.7208/chicago/9780226803487.001.0001

Tourme-Jouannet, Emmanuelle. 2013. "The International Law of Recognition." *European Journal of International Law* 24(2): 667–690. https://doi.org/10.1093/ejil/cht021

Trigger, Bruce. 1984. "Alternative Archaeologies: Nationalist, Colonialist, Imperialist." *Man* 19(3): 355–370. https://doi.org/10.2307/2802176

Trzciński, Maciej. 2007. "Wokół definicji zabytku archeologicznego". *Ochrona Zabytków* 4: 111–117.

Türecay, Özgür. 2013. "The Ottoman Empire Seen through the Lens of Postcolonial Studies: A Recent Historiographical Turn." *Revue d'Histoire Moderne & Contemporaine* 60–2(2): 127–145. https://doi.org/10.3917/rhmc.602.0127

Ulguim, Priscilla. 2017. "Recording In Situ Human Remains in Three Dimensions: Applying Digital Image-Based Modeling." In *Human Remains: Another Dimension.* Edited by David Errickson, Tim Thompson. 71–92. London: Academic Press. https://doi.org/10.1016/B978-0-12-804602-9.00007-2

Ullrich, Herbert. 2005. "Cannibalistic Rites within Mortuary Practices from the Paleolithic to Middle Ages in Europe." *Anthropologie* 43(2–3): 249–261.

UNESCO. 1997. Recommendation Concerning the Status of Higher-Education Teaching Personnel. https://unesdoc.unesco.org/ark:/48223/pf0000113234.page=2

UNESCO. 2005. Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Van der Kuyl, Antoinette. 2022. "Historic and Prehistoric Epidemics: An Overview of Sources Available for the Study of Ancient Pathogene." *Epidemiologia* 3: 443–464. https://doi.org/10.3390/epidemiologia3040034

Vanderlinden, Jacques. 1989. "Return to Legal Pluralism: Twenty Years Later." *Journal of Legal Pluralism and Unofficial Law* 21: 149–157. https://doi.org/10.1080/07329113.1989.10756411

Warsaw Mummies Project. 2016. https://blog.warsawmummyproject.com/why-the-famous-mummy-is-not-pregnant

Weiner, Stephen. 2012. *Microarchaeology. Beyond the Visible Archaeological Record.* Cambridge: Cambridge University Press.

Weiss, Elisabeth. James Springer. 2020. *Repatriation and Erasing the Past*. Gainesville: University of Florida Press. https://doi.org/10.5744/florida/9781683401575.001.0001

Wiercińska, Alina 1970. "Badania antropologiczne ludzkich szczątków kostnych z cmentarzysk ciałopalnych w Korklinach, pow. Suwalski". *Rocznik Białostocki* 9: 177–196.

Winkelmann, Andreas. Holger Stoecker. Sarah Fründt et al. 2022. *Interdisziplinäre Provenienzforschung zu menschlichen Überresten aus kolonialen Kontexten. Eine methodische Arbeitshilfe des Deutschen Zentrums Kulturgutverluste, des Berliner Medizinhistorischen Museums der Charité und von ICOM Deutschland*. Heidelberg–Berlin: ICOM Deutschland.

Wytyczne Komisji Rabinicznej do Spraw Cmentarzy. N.d. https://sztetl.org.pl/en/wytyczne-komisji-rabinicznej-do-spraw-cmentarzy

Zamboni, Mauro. 2021. "'A Legal Pluralist World'… or the Black Hole for Modern Legal Positivism." *Archiv für Rechts- und Soziologie* 107(2): 185–204. https://doi.org/10.25162/arsp-2021-0010

Zimmerman, Larry. 2010. "The Premise and Promise of Indigenous Archaeology." *American Antiquity* 75: 228–238. https://doi.org/10.7183/0002-7316.75.2.228

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LEGAL CONSCIOUSNESS IN THE POLISH PEOPLE'S REPUBLIC: THE EPISTEMOLOGICAL ROOTS OF THE HIGH CONSENSUS CONCEPT

Abstract. The paper explores the case of legal consciousness research in Poland during the period from the 1960s to the 1990s, focusing on its epistemic foundations. Three distinct traditions – Western, Soviet, and Polish – are identified, each with varying levels of scholarly consensus and diverse sources of that consensus. The study offers a concise analysis of different conceptualisations of legal consciousness. The methodological framework of the sociology of law during this era is examined, drawing from Carl. E. Schorske's concept of "new rigorism". The research observes a certain feature of the Polish legal consciousness research – a prevalence of tripartite distinctions. The reasons behind this phenomenon are explored and interpreted as a consequence of deep epistemic assumptions rooted in positivism.

Keywords: legal consciousness, Polish sociology of law, Adam Podgórecki, Maria Borucka-Arctowa, legal epistemology

ŚWIADOMOŚĆ PRAWNA W PRL. EPISTEMOLOGICZNE PODSTAWY WYSOKIEGO KONSENSU POJĘCIOWEGO

Streszczenie. Artykuł bada konceptualizacje pojęcia świadomości prawnej w polskiej socjologii prawa w okresie od lat 60. do 90. XX w. i analizuje ich podstawy epistemiczne. Porównywane są trzy tradycje, wyraźnie odrębne w tym okresie: zachodnia, polska i radziecka, charakteryzujące się odmiennym poziomem konsensu i odmiennymi jego źródłami. Omawiane są różne konceptualizacje pojęcia w tych tradycjach. Koncepcje te umieszczane są w perspektywie "nowego rygoryzmu" (pojęcie Carla E. Schorskego), który był dominującą ramą metodologiczną, określającą kryteria naukowości w tym okresie. Analizując konceptualizacje świadomości prawnej w Polsce, artykuł zwraca uwagę na wszechobecność trójczłonowych kategoryzacji. Jako propozycja wyjaśnienia tego zjawiska, wskazuje się głębokie założenia epistemiczne pozytywizmu (w jego odmianach filozoficznej, socjologicznej i prawnej).

Słowa kluczowe: świadomość prawna, polska socjologia prawa, Adam Podgórecki, Maria Borucka-Arctowa, epistemologia prawna

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1. INTRODUCTION

Scholars use the concept of legal consciousness to describe how law, knowledge, society, and consciousness intersect. However, there is a notable lack of consensus among legal theorists and empirical sociologists regarding its conceptualisation and operationalisation. The academic literature on this topic in both English and German is highly fragmented due to diverse interpretations and methodologies. In contrast, in post-Second-World-War Poland, legal consciousness was a much clearer concept, with a wide consensus among the sociologists of law and legal scholars on its conceptualisation and empirical meaning. Adam Podgórecki, Maria Borucka-Arctowa, and many other scholars developed and refined this concept over many years, making it a hallmark of the Polish sociology of law. I claim that this high consensus lasted from the 1960s to the 1990s, spanning from the post-Stalinist era to the years after democratic transformation, when the barriers between the Eastern Bloc and Western academic circles were lifted, allowing for increased intellectual exchange.

In this paper, I suggest that this difference stems from two primary factors: the political context (constraints imposed by the socialist regime and ideology) and the dominant methodological perspective called "new rigorism". These factors contributed to an intellectual environment defined by a strong concept of "scientific knowledge." One of the most distinctive feature of this environment is the organisation of ideas into triangular structures or tripartite divisions. The concept of legal consciousness serves as one of the primary examples of this phenomenon.

2. LEGAL CONSCIOUSNESS IN WESTERN AND SOVIET JURISPRUDENCE

Legal consciousness is one of many vague sociological terms in American and European jurisprudence, and different authors define it in various ways based on their research goals (Czapska 2017; Keßler 1981).

The psychological aspects of law was a well-established field of study within the sociologically-inclined jurisprudence in Austria and Germany (Szilágyi 2023, 7). The early 20th-century school of *Freirechtslehre* (Kantorowicz, Ehrlich) distinguished two concepts: *Rechtsbewusstsein* (legal consciousness – a more intellectual concept associated with knowledge) and *Rechtsgefühl* (legal feeling, an intuitional concept rooted in intuition, experience, and shared national culture) (Turska 1961; Gryniuk 1979, 5–6; Turska 1965).

After the Second World War, the concept of *Rechtsgefühl* faced significant criticism for two primary reasons. First, it did not meet the new methodological standards that emerged after the war (a new rigorism). The concept of *Rechtsgefühl*,

rooted in the German tradition of the historical school of law, was vague, poorly-defined, and difficult to operationalise for empirical research, relying heavily on intuition. It also became a fundamental concept in Nazi legal discourse – a link between individual consciousness and the collective national soul – and, consequently, after the war it was discredited (Schröder 2014, 597–616).

In 1964, the concept of legal consciousness (*Rechtsbewusstsein*) underwent critical examination by Theodor Geiger, a leading figure in German and Danish sociology of law. Geiger reviewed various approaches to the concept and ultimately dismissed its relevance to empirical legal research. He argued that it is a theoretical and heterogeneous construct, because psychological phenomena are inherently unobservable. Therefore, in his view, legal consciousness must be translated into observable human actions to hold any empirical significance (Geiger 1987, 340–375).

In the following decades, several conceptualisations of legal consciousness were developed for empirical legal research. As in other countries, attitudinal research became quite popular, along with defining legal consciousness simply as opinions on the law (Heitzmann 2002, 84–85). However, also more original approaches emerged. Lutz H. Eckensberger, and Heiko Breit applied Lawrence Kohlberg's theory of moral development to identify the stages of legal understanding (Heitzmann 2002, 78–80). K. H. Reuband introduced orientation criteria of individuals in their contact with the law (Heitzmann 2002, 85–86). R. Lautmann focused on individuals' ability (or competence) to use the law as an instrument to achieve their goals (Heitzmann 2002, 87–88). Meanwhile, in the German Democratic Republic (DDR), the sociology of law adopted the Soviet concept of legal consciousness (Heitzmann 2002, 92–96). This diversity of approaches is also reflected in the German-language journal *Zeitschrift für Rechtssoziologie*, which regularly published reviews of recent literature on this topic (Keßler 1981).

In English-language sociological literature of the discussed period, the concept of legal consciousness remained underdeveloped until the 1990s, leading to a diverse range of approaches. In addition to legal consciousness, several related concepts were in use (e.g. "legal awareness", "knowledge of law", "legal literacy", "images of law"). Additionally, there was a considerable overlap and conflation between the concepts of legal consciousness and legal culture (in contrast, these concepts are more sharply differentiated in languages such as German and Polish). Despite the establishment in 1962 of a specialised panel (Knowledge and Opinion about Law – KOL) within the Research Committee on Sociology of Law (RCSL) of the International Sociological Association, this diversity has not diminished (Keßler 1981; Szilágyi 2023, 12).

Two common approaches included attitudinal empirical research, which focused on opinions and knowledge about the law (Ewick, Silbey 1992, 738–739; Keßler 1981), and the Marxist framework (more theoretical than empirical),

which connected legal consciousness to class consciousness and treated it as epiphenomenon (Ewick, Silbey 1992, 739–741). Beginning in the 1980s, critical legal scholars began to view legal consciousness as a form of legal culture, using it to analyse cultural patterns within societies (Kennedy 1980). Additionally, research on rights consciousness emerged, studying individuals' knowledge and ability to use their rights as instruments in political engagement and empowerment (Scheingold 2004[1]). During this time, the English-language discourse was enhanced by the contributions of scholars from Poland, Germany, or Russia, who introduced their own perspectives on legal consciousness (Kozhukhova, Zhiyenbayev, 2018; Podgórecki, Kaupen, van Houtte, Kutchinsky 1973). Adam Podgórecki emerged as one of the leading scholars in the field of KOL studies.

In consequence, the field of legal consciousness remained fragmented. The renewed interest in it arose in the late 1990s.[2] Patricia Ewick and Susan S. Silbey's influential conceptualisation of legal consciousness – as how individuals experience the law and construct the concept of legality in everyday life – opened new research possibilities for analyses on a micro-level, legal ethnography, and other forms of qualitative sociology of law (Ewick, Silbey 1998).

This fragmentation is reflected in the Oxford University Press' *Companion to Empirical Legal Research*, gathering the experiences of the field in all its variety. Legal consciousness (and related concepts) is mentioned numerous times in different contexts, but there is no separate chapter dedicated to it (Cane, Kritzer 2010, 7–8). Currently, legal consciousness research can be divided into three main currents: (1) conceptualising it as a part of the characteristics of social actors, and employed as an explanatory variable (in this tradition, one may put attitudinal research, by scholars such as Borucka-Arctowa and Podgórecki, along with the new theoretical framework developed by Grażyna Skąpska's team); (2) understanding legal consciousness as a form of hegemony, a perspective embraced by many critical legal scholars (e.g. Duncan Kennedy) as well as contemporary empirical researchers (Austin Sarat, Patricia Ewick, and Susan Silbey); and (3) linking it to the concept of legal mobilisation (e.g. rights consciousness research) (Chua, Engel 2019, 337–342). As can be observed, these three currents are a continuation of the diverse approaches that had emerged in the latter half of the 20th century (the period of primary focus in this text).

The contrast between this lack of unity in Western legal scholarship and the Soviet tradition is striking. Russian interest in legal consciousness can be traced back to pre-revolutionary times, to the circles of liberal and conservative jurists such as Nikolai Korkunov, Leon Petrażycki, or Ivan Ilyin (Walicki 1992). These

[1] First Edition: 1974.

[2] Chua and Engel (2019) published a graph illustrating the increasing interest in legal consciousness research. The chart shows a fast rise in the number of publications beginning in 2000, with figures in 2018 being several times higher. However, the methodology behind this graph, which relies on Google Books data, may be questionable, and the data is undoubtedly incomplete.

pioneering scholars sought to integrate jurisprudence with the social sciences, bringing legal theory closer to the social contexts of their times. The intellectually-vibrant environment of late Tsarist Russia produced several notable figures who explored the interconnections between law, society, and human consciousness. Following the revolution, these researchers emigrated and disseminated their ideas internationally: Leon Petrażycki to Poland, Georges Gurvitch to France, Nicholas Timasheff and Pitirim Sorokin to the United States, and Ivan Ilyin to Switzerland. In post-revolutionary Russia, a diverse range of new theories appeared (e.g. by Stuchka or Pashukanis), attempting to apply the Marxist concepts of class consciousness into the legal domain. This Leninist period of intellectual experiments was transient, giving way to the dominance of Stalinist orthodoxy. In jurisprudence, this ideological shift manifested as socialist normativism, a synthesis of legal positivism, and a rhetoric of state orthodox Marxism (Varga 2013). Jurisprudence during this time became markedly conservative in both form and method, despite maintaining ostensibly revolutionary goals in its rhetoric. Fundamentally, this legal framework functioned as a façade, concealing the underlying reality of the oppressive power of administration and providing a rhetorical justification for decisions of authoritarian administrative state. Legal consciousness was considered an aspect of class consciousness, reflecting the class situation of an individual. "Legal consciousness is a form of social consciousness comprising a system of views, beliefs, judgments, perceptions, moods, feelings of a given class or society, determined by their material life conditions, aimed at establishing a legal system that would correspond to the interests and goals of this class or society" (Łukaszewa 1977, 93–94).

Special attention was paid to the concept of socialist legal consciousness, a consciousness of the working class, which was considered as "a new and higher type of legal consciousness, and, at the same time, the last historical type of legal consciousness." (Łukaszewa 1977, 98). In the words of Mikhail Strogovich: "Socialist legal consciousness is a necessary condition for strict compliance and correct application of socialist laws. It guarantees a proper understanding of the laws and does not allow even the slightest infringement of the laws issued by the Soviet power. Therefore, the socialist legal consciousness of Soviet judges forms the basis of their inner conviction when deciding court cases" (Strogowicz 1959, 127).

Legal consciousness was a theoretical (not empirical) concept, a derivate of class consciousness. It was only secondarily concerned with the consciousness of individuals. As a highly normative idea, it involved judging whether the citizens possessed the "correct" socialist consciousness. Such legal consciousness was an important part of the official Marxist rhetoric of law and was not researched empirically.

The aftermath of World War Two saw the subjugation of the Central and Eastern European countries and the forceful imposition of Soviet theories. The

geopolitical shift resulted in the transformation of universities according to the Marxist model, ending academic freedom and imposing restrictions on research. Handbooks by Russian theorists (e.g. Vyshinsky and Strogovich) were translated into the languages of the Eastern Bloc countries and the Soviet concept of legal consciousness was widely adopted. However, after the death of Stalin, political control over academia in Poland became weaker, creating the possibility for much more independent social research.

As a result, three distinct intellectual traditions emerged in Europe:

– the Soviet tradition is characterised by high consensus rooted in political constraints and a dogmatic academic discourse;

– the Euro-American tradition exhibits low consensus, where legal consciousness is a vague and diversified concept;

– the Polish tradition demonstrates high consensus, influenced by minor political constraints and predominantly shaped by a methodological and philosophical framework. In contrast to the Soviet model, this approach is distinguished by its strong empirical basis.

The concept of "high consensus" is drawn from Thomas Kuhn's influential work on scientific revolutions (Kuhn 1962). In Kuhn's framework, when a discipline reaches the stage of "normal science," there is a strong, often implicit agreement among the practitioners on fundamental concepts, theories, methods, and standards for evaluating research. In high-consensus sciences, disagreements typically focus on technical details rather than challenge foundational principles. The results of the research projects are cumulative and viewed as contributions to a shared discussion rather than as divergent or unrelated to one another. I argue that during the period under discussion (1960s–1990s), the Polish sociology of law (especially in the legal consciousness research) functioned as a high-consensus field. This does not imply an absence of scholarly debates, but, rather, that these debates did not challenge core elements such as the methodological framework (quantitative surveys on large populations) or the attitudinal concept of legal consciousness.

3. POLISH THEORY OF LAW – THE INTELLECTUAL CONTEXT

The restoration of Polish independence in 1918 led to the polonisation of local universities and the establishment of new ones. Scholars from diverse backgrounds and experiences – previously engaged in Russian, German, or French academic circles – began publishing in Polish. This brought together different traditions of research on the psychological aspects of law. Scholars influenced by the school of *Freirechtslehre* (such as Antoni Peretiatkowicz and Bronisław Wróblewski) encountered Leon Petrażycki, whose ideas had developed within Russian liberal circles. Petrażycki knew well both German and Russian traditions, and established

his own school of thinking after returning to Poland. His psychological theory of law, grounded in the concept of legal consciousness, gained immense notoriety in interwar Poland. When the communist party took control after the war, these traditions were suppressed and the sociology and philosophy of law disappeared from university curriculums. Following Stalin's death, a new concept of legal consciousness emerged, though it only partially constituted a continuation of the pre-war traditions.

After 1956, many Polish scholars sought a way out of Marxist orthodoxy, and it is not surprising that they found a gateway in the prevailing paradigms of the social sciences in the West. Carl E. Schorske coined a term for the overall intellectual climate of the era from the late 1940s to the late 1960s, calling it a "new rigorism" (Schorske 1997). Schorske analysed four different fields: economics, political science, philosophy, and literary studies. In each of these fields, a similar overarching intellectual climate became predominant – shaping the mainstream discourse and replacing the old approaches – based on diverse historical, cultural, and philosophical attitudes. "The passage here is from range to rigor, from a loose engagement with a multifaceted reality historically perceived to the creation of sharp analytic tools that could promise certainty where description and speculative explanation had prevailed before" (Schorske 1997, 295). In economics, this trend was marked by the rise of econometrics, the application of statistical methods, and the development of economic modelling. In political science, it meant a behavioural revolution and the dominance of quantitative methodologies. In literary studies, this new rigor was brought by the New Criticism school. In philosophy, the trend was characterised by the logical positivism of the Vienna Circle and the preeminence of analytic philosophy. Some of these observations can be extended to other disciplines, such as sociology, psychology, architecture, and jurisprudence, as well as beyond the Anglo-American world.

This concept will help us to understand the development of Polish legal theory after the Stalinist period, as the majority of the works that were published at that time shared many features with the new rigorism. These were as follows:

– strong emphasis on logic;
– the idea of "scientific jurisprudence";
– focus on methodology;
– strict definitions of basic concepts;
– precision as the highest value;
– the integration of jurisprudence with other disciplines (the idea of the unity of sciences);
– neglect of or aversion to historical, ethical, and political contextualisation.

This served as the model of what "scientific" meant at the time and became the methodological standard of the era, favouring unity, objectivity, and methodological strictness. It aligned well with Marxist criticisms of pre-war theories (for their lack of rigor, vagueness of concepts, and anti-naturalism) and

resonated with its rhetoric emphasising scientific rigor. Consequently, it provided a convenient gateway for researchers to explore new horizons while merely paying lip service to official Marxism.

In the USA, the dominance of new rigorism waned in the 1970s, as its methodological weaknesses became evident and new approaches emerged (Schorske 1997, 305–309). In the field of the sociology of law, this period was characterised by the emergence of critical legal studies, introducing the novel conceptualisation of legal consciousness (Kennedy 1980). In Poland, the new rigorism came later (in the early 1960s) and it maintained its position as the predominant paradigm in jurisprudence or sociology until the end of the 20th century.

This is the context of the development of the Polish concept of legal consciousness. Two circles of researchers were formed, one in Warsaw (the Adam Podgórecki school) and one in Kraków (the Maria Borucka-Arctowa school). These scholars were familiar with both Western and Soviet sociological traditions, but initially they stayed within the general framework of Marxist sociological theory and its goals (the transformation of society, the problems of scientific management, the centrality of the working class). However, they began to use Western research methods and philosophies of science (e.g. quantitative neopositivism in sociology and analytic positivism in law)[3] (Afeltowicz, Pietrowicz 2012; Czapska 2017). This initial period was marked by several large-scale research projects, starting with the study on the legal consciousness of workers (1971–1973) (Borucka-Arctowa 1974), followed by research on youth, lay judges, and the general public (Czapska 2017; Kwaśniewski, Winczorek 2009; Podgórecki, Kaupen, van Houtte, Kutchinsky, 1973).

The transition was not immediate. Russian texts continued to be translated (Kudriawcew 1978, 185–191; Łukaszewa 1977) and the Soviet concept of legal consciousness remained present in academic discourse, although the number of

[3] This paper addresses three currents, each referred to as positivism within their respective disciplines. These currents, though loosely connected, share a common epistemic perspective. Philosophical positivism (or logical positivism, associated with the Vienna Circle) is a philosophical approach notable for its critique of metaphysics, with its aim being to develop a scientific philosophy and its project that of establishing a unified methodological framework for all sciences. Sociological positivism (or neopositivism), rooted in the philosophical tradition (notably through Otto Neurath), was primarily advanced by empirical sociologists and methodologists such as Paul Lazarsfeld, with a focus on developing quantitative research methods, particularly surveys. Legal positivism, an older and more diverse tradition, is often reduced to three key theses concerning the relationship between law and morality and the origins of legal norms. In this paper, I focus on the epistemological foundations of the legal positivist approach, particularly the relationship between the subject (interpreter) and the object (legal text), as well as issues of truth and knowledge in jurisprudence and the possibility of a "science of law." The form of legal positivism that became predominant in post-war Poland shared many of the assumptions found in other forms of positivism.

references to it decreased. The lack of its empirical relevancy played an important role here. In 1962, there was an ideological campaign against the so-called "survey-mania" [Pol. *ankietomania*], initiated by Adam Schaff and targeted at prominent sociologists Stefan Nowak and Stanisław Ossowski (Mokrzycki 1990, 21–30). Non-rigorist pre-war concepts (such as *Rechtsgefühl* or Petrażycki's ideas) experienced a revival, e.g. Adam Podgórecki used the *Rechtsgefühl* concept in his early empirical works (Podgórecki 1964, 37–52, 123–132). However, it was ultimately abandoned in favour of legal consciousness as a basis of empirical research, following comprehensive criticism by Anna Turska. Her main argument was that *Rechtsgefühl* was vague, subjective, unrigorous, and, consequently, unscientific (Turska 1961; 1965).

A distinctive feature of this Polish approach to legal consciousness was its focus on individuals; it ceased to be viewed as a collective phenomenon, as seen in Durkheimian or Marxist traditions. This individualistic perspective arose from methodological individualism that was a core component of the positivist paradigm in both sociology and jurisprudence (Cywiński 1996, 12).

There were two (similar and mutually-translatable) main conceptualisations of legal consciousness. One approach viewed it as an attitude comprising three components: cognitive, evaluative (affective), and behavioural. The other approach defined it as a collection of knowledge and opinions about the law, including the evaluation of current laws and suggestions for their reform. This conceptualisation of legal consciousness as individual attitude was one among many legal consciousness theories developed in the West. It was also present in some Eastern Bloc countries, such as Hungary (Gryniuk 1979, 8; Szilágyi 2023). However, it was in Poland that this theory achieved a high level of consensus and became the pillar of the sociology of law.

Adam Podgórecki, the leading sociologist in this field, not only was interested in understanding the workings of the law in society, but also sought to employ the law as a tool for social engineering. In his concept of "sociotechnique", the law is treated as the primary instrument of the state. This can be compared to the Western traditions of applied sociology (e.g. clinical sociology and public sociology) (Gryniuk 1979, 8), or Roscoe Pound's idea of social engineering, but it had roots also in Polish traditions (Petrażycki's idea of the politics of law), or the Soviet concept of the law as a mechanism for social transformation. Podgórecki's theory was developed in the 1960s and 1970s, and gained also international recognition (Pogórecki 1968; Pogórecki, Schulze 1968; Podgórecki 1974; Podgórecki, Alexander, Schields 1996; Podgórecki, Kaupen, van Houtte, Kutchinsky 1973; Dębska 2022, 126–129).

Podgórecki's work is notable for its extensive use of three-part distinctions. Not only was legal consciousness conceptualised as a tri-componential attitude;

the scholar also distinguished between three levels of the functioning of the law[4] (the socioeconomic relations, the subculture in which the law is supposed to work, and the type of individual personality), three types of sociotechnique, three levels of socio-technical operations, three types of evaluative attitudes, three types of attitudes towards legal institutions (Podgórecki 1964, 67), three types of legalism, three types of links between the postulation of a value and its realisation, and three types of behaviour according to legal or moral norms. It could be stated that categorising things into three groups is intuitive and does not require further explanation. However, I will argue that this practice reflects the underlying ontological framework of positivism.

The other leading figure in empirical research on legal consciousness was Maria Borucka-Arctowa. Borucka-Arctowa was instrumental in establishing the standard concept of legal consciousness for empirical legal research, and her approach became a model for others in the field (Czapska 2017). Starting with her 1974 book on the legal consciousness of workers (Borucka-Arctowa 1974)[5], she and her research group conducted extensive surveys across different social classes and groups, using a consistent methodological framework. For several decades, empirical studies of legal consciousness have been a hallmark of the Polish sociology of law. Borucka-Arctowa's theory reached its mature form in her 1981 book titled *Świadomość prawna a planowe zmiany społeczne* (1981) (*Legal Consciousness and Planned Social Changes*), where she connected legal consciousness with the instrumental use of the law for the centrally-planned transformation of society.

High consensus within the field does not imply the absence of discussions and controversies. Rather, it signifies that a shared general framework exists, concepts are closely interrelated, research results build cumulatively, and there is a collective sense that all research contributes to the same ongoing debate. The most important point of divergence was the structure of legal consciousness (three or four elements). In this discussion, the term "attitude" is used in two distinct ways. According to the most popular concept of attitude, it comprises three aspects (the ABC of attitudes): affective (the evaluation of the object of the attitude), cognitive (the knowledge that an individual has about the object of the attitude), and behavioural (the tendency to act) (Nowak 1973, 23).

The two elements, cognitive and affective, are represented as knowledge and opinions about the law. The third element, behavioural, poses challenges primarily because quantitative survey methodologies are insufficient for capturing behaviour.

[4] There is no established translation of Podgórecki's phrase "*hipoteza trójstopniowego działania prawa*". Podgórecki himself translated it as "three levels of functioning of law", "three step hypothesis on the functioning of the law", or "three modifiers of the operation of the law" (Podgórecki 1966). In secondary literature, one can also find the term "three-stage working of law." However, this issue is of lesser importance here.

[5] It was based on earlier theoretical work (Borucka-Arctowa 1967).

Instead, they rely on verbal indicators, such as declarations of intended actions or tendencies to act. Thus, the debate between proponents of three- and four-element models can be reduced to discussions on how to operationalise the "tendency to act." Gryniuk and Podgórecki (Gryniuk 1979, 10; Podgórecki, Kurczewski, Kwaśniewski, Łoś 1971) argued that the third element represents a "general attitude" towards the legal system as a whole. Borucka-Arctowa accepted this element, but additionally introduced a fourth element: postulates for changing the law (Borucka-Arctowa 1974, 5–6).

In mainstream empirical sociology and psychology, an attitude is understood as a compound feature, encompassing three aspects: affective, cognitive, and behavioural (ABC). Despite this, scholars discussing legal consciousness as an attitude, including those proposing that legal consciousness comprises four elements – namely knowledge, evaluations, postulates, and "an attitude towards the law" – were addressing the behavioural aspect of attitude (a tendency to act). The concept of an "attitude towards the law," introduced by Danish sociologist Bert Kutchinsky (a co-author of Adam Podgórecki's book titled *Knowledge and Opinions about Law* (Podgórecki, Kaupen, van Houtte, Kutchinsky 1973, 101–134), was a simpler variable compared to the ABC model, representing a general tendency towards the legal order as a whole. Nonetheless, these debates should not obscure the underlying shared foundations. Legal consciousness research remains predominantly an ABC attitudinal study, employing quantitative surveys conducted on large populations. All discussions were grounded in the same theoretical framework, which treats legal consciousness as a characteristic of social actors and as an explanatory variable (Chua, Engel 2019, 337–339).

While there are fewer tripartite structures in the works by Borucka-Arctowa, the ones that exist are essential and widely accepted within the discipline. Here we encounter a mature form of empirically-operationalised legal consciousness, characterised as an individual attitude, consisting of three components: cognitive (knowledge about the norms), evaluative (affective), and behavioural (the tendency to act). Additionally, there are three general types of motivations to act according to the law: conformist, legalistic, and opportunistic. The law functions through three stages: (1) information about the norm is transferred to the individual; (2) the norm is evaluated by the individual; and (3) the individual acts in relation to a norm (Borucka-Arctowa 1967).

Podgórecki and Borucka-Arctowa gathered a significant number of scholars and educated generations of sociologists of law. The high consensus within this discipline was achieved partly due to the close contact between its practitioners, but also largely because of the compelling authority of the adopted methodology and the appeal of the scientific rigor behind it (Dębska 2022). Among these researchers, several other tripartite distinctions were introduced.

Anna Turska delineated three distinct modes of analysing legal consciousness: firstly, through information processes (using the cybernetic method); secondly, by

examining attitudes towards law (using surveys and psychological methods); and thirdly, by studying the actions of individuals, which integrates both information and attitudes.

Grażyna Skąpska developed the earlier typology of three evaluative attitudes toward legal norms by differentiating between the acceptance of the norms themselves and the acceptance of the goals of these norms. This refinement led to the creation of a matrix, resulting in nine possible individual attitudes based on the combination of these two criteria (Skąpska 1981, 23).

In the following section, I will argue that the high-consensus concept of legal consciousness and the tendency towards tripartite distinctions among Polish scholars are rooted both in the political context and in the basic premises of neopositivist ontology and epistemology, both of which favour hierarchical and authoritarian structures (Raburski 2022). The prevailing methodological climate of new rigorism – manifested as logical positivism in philosophy, as neopositivism in sociology, and as analytic legal positivism in jurisprudence – further reinforced these tendencies.

Following the democratic transformation of Poland in 1989, unrestricted academic communication with the Western academic world was re-established. The timing of these events coincided with the decline of the new rigorism methodological perspective in the West. Polish legal theory began showing interest in non-positivist approaches in the late 1980s, but the dominance of sociological neopositivism remained unquestioned for much longer. It was not until the 21st century that this intellectual landscape began to shift. Notably, several publications explored the concept of legal consciousness in new ways, culminating in a significant sociological research project led by Grażyna Skąpska in 2020 (Skąpska, Radomska, Wróbel 2022). This research reconceptualised legal consciousness, incorporating previously neglected aspects such as competencies, the forms of activities performed with the law, and the personal significance of law. Through factor analysis, the project enabled a more nuanced understanding of the sociological and psychological dimensions of the law in society.

4. DUALIST AND TRIALIST THINKING

One might argue that there is nothing particularly unique about the aforementioned tripartite distinctions in Polish sociological theory. However, I will attempt to demonstrate (though the reader will ultimately judge the strength of this argument) that the prevalence of those distinctions stems from the underlying epistemic assumptions of positivism in all its three forms. It was the methodological framework of new rigorism that led theorists to organise their thinking in this manner. However, as evident in contemporary works, this tendency appears to have weakened with the decline of the new rigorism's concept of science. For instance,

Skąpska's recent work does not conform to this tripartite scheme, despite being a critical re-examination of Polish experiences with legal consciousness research (Skąpska, Radomska, Wróbel 2022).

Many legal theorists drew attention to the tendency to dualist thinking or to organise knowledge into dichotomies. The tripartite divisions or trichotomies were less commonly studied or even noticed (Gizbert-Studnicki, Dyrda, Grabowski 2017). The argument is as follows: new rigorism is linked to positivist epistemology, which, in the natural sciences, tends to promote dualist thinking. However, in the social sciences, strict dualism proves unworkable and instead evolves into trialism. Consequently, tripartite distinctions and triangular theoretical structures recur in various contexts.

The human inclination to interpret reality through binary oppositions is deeply rooted in the way the human mind works. As Levi-Strauss and other structuralists have shown, this tendency results in the creation of structurally-ordered institutions within society.[6]

When discussing modern societies, their institutions, and modes of thought, great importance is given to René Descartes and his mind-body dualism. This framework, built on the separation between the immaterial mind and the material body, has exerted a profound influence on the Western thought and society. Descartes distinguished two essences: *res extensa* and *res cogitans*. *Res extensa* [En. the material world] is characterised by determinism and is perceptible through the senses. In contrast, *res cogitans* is immaterial, constituting the realm of freedom and morality. Notably, these two substances require different approaches and methods for inquiry. The natural sciences were supposed to explore the realm of *res extensa*, i.e. a world of empirical, deterministic phenomena. Meanwhile, speculative philosophy delved into the field of *res cogitans*, where freedom and morality held sway.

This framework gave rise to numerous other dichotomies that populated the Western culture (the following table provides examples). Nevertheless, it is crucial to remember that the interpretation of such pairs is highly contextual and varies across different cultural domains (Zirk-Sadowski 2004). The relationships between these dichotomies are dynamic and subject to interpretation within specific cultural contexts. In certain discursive contexts, the concept of "reality" may be associated with either factual or normative aspects. Therefore, Cartesian thought should be understood as a tendency rather than a rigid and systematic ontological division.

[6] For other interpretations of tendency to dualisms in jurisprudence, see: Gizbert-Studnicki, Dyrda, Grabowski 2017; Zirk-Sadowski 2011; Raburski 2022.

Body	Mind
Res extensa	*Res cogitans*
Real	Ideal
Fact	Norm / Value
Is	Ought
Objective	Subjective
Passive	Active
Material	Ideal / Formal

New rigorism thrived on these dichotomies. It was coined in contrast to non-rigorous methodologies that tended towards holistic and nuanced approaches, avoiding clear-cut and sharp distinctions. This dualist framework was particularly well-suited for the natural sciences, characterised by the strong opposition between the perceiving subject and the perceivable object. For the social sciences, the humanities, and social practices, this model proved to be too restrictive, as the boundary between these opposing terms is often blurred.

Consequently, there was a need for a third, intermediate term, something that exists in-between, allowing for blending and mediation, a bridge between opposing ideas. Thus, a triadic structure emerges, with its own characteristic symmetry. In this framework, there are two opposite terms: the first – "hard", material, and often passive; and the second – "soft", ideal, elusive, and often active. The third, middle term, is a blend of these two extremes, mediating between them. On the following pages, I will use specific letters to denote the position of each concept within this triangular structure. "I" will represent the Ideal, "M" will stand for the Material, and "MI" will indicate the middle term. These assignments are not strict and fixed, but relative. The same term or idea may be marked as Ideal in one configuration and play the Material role in another. The tripartite division reappears in various contexts, demonstrating its generative force and usefulness for theorists.

M	MI	I
Intelligence (cognition)	Will	**Emotions**
Facts	Text	**Norms**
Practices	Institutions	**Values**
Individual	Interaction/Group/Role	**Society**

The middle term is a mix of the extremes, making it both impure and complex. This complexity allows mediation and flexibility in response to the varied theoretical needs of social sciences. In the field of jurisprudence, the law itself is seen as a middle term or, as Jürgen Habermas described it, something stretched between facts and norms (Habermas 1996).

As has been mentioned, there is a strong tendency in positivistic jurisprudence towards tripartite distinctions. New rigorism brings also a strong inclination to unify all forms of knowledge about the law. This unification is driven by the belief in a single standard of scientific knowledge and the idea that jurisprudence should adopt scientific methods. However, this is done not by adopting a single scientific method (legal naturalism), but, rather, by creating subfields, whereby each is governed by different standards and researched with differed methods. As a result, the law becomes a lens that captures a comprehensive picture of society, encompassing the complexities of culture and political systems. Central to this framework is the concept of legal consciousness, which addresses the relationship between the individual, the state, and the law.

Many aspects of legal theory in Poland, including legal consciousness, were influenced by this fundamental generative mental framework. Legal consciousness seems to be built on more basic distinctions: the main currents of legal theory, the planar theory of the law, and the concept of attitude. These three distinctions were based on the neopositivist framework. One of the elements in each of these distinctions is treated as central and the most rigorous, and, in consequence, the most important.

5. THE LAW AS A COMPLEX PHENOMENON

M	MI	**I**
Realism	**Positivism**	Natural law
The socio-psychological plane	**The logical-Linguistic Plane**	The axiological Plane

1. A common view in legal philosophy is that it is divided into three main traditions: natural law theory, legal positivism, and legal realism. This division is an extension of the dualism between morality/values (as seen in natural law) and the material world (real actions, social structures, and facts). Legal positivism serves as a middle ground, focusing on legal texts (material aspect) carrying normative meanings (ideal aspect). It is not surprising that this middle position is the most important and practical one, as it bridges the two opposites. However, from the point of view of the history of ideas, this tripartite division is overly simplistic, as it lumps together such diverse theories as Catholic Thomism, Kantianism, Rothbardian libertarianism, and social Darwinism (all of them under the "natural law" label).

This division is important because of its wide acceptance, and because it establishes a crucial link between the primary methodologies of jurisprudence and the ontology of law. By enabling swift generalisation and the dismissal of certain arguments without the need for in-depth and nuanced analysis, it fosters the dominance of legal positivism as the prevailing perspective within legal practice.

This division was of particular consequence in Poland: after the Second World War, the studies of the philosophy of law were suppressed and replaced by the Marxist discipline of the theory of law and state, as well as the history of legal and political doctrines, initially based on Marxist methodology. The tripartite division allowed for the treatment of one element (positivism) as the sole "scientific" form of legal thinking. Its two contenders were classified as different forms of idealism: natural law was viewed as a historical or religious form of idealism, whereas realism was considered a "false realism", a product of ideal tendencies within the contemporary imperialist bourgeois societies (Seidler 1957).

2. However, the suppressed aspects of law did not disappear. Socialist normativism was unable to fully account for the complexities of legal phenomena. As a consequence, the original "plane theory of law" emerged in Poland. This theory represented another tripartite division, developed on similar grounds as the previous classification.

The concept of the three planes of law was proposed by Grzegorz Leopold Seidler in 1967, and later refined into its canonical form by Kazimierz Opałek and Jerzy Wróblewski (Seidler 1967; Opałek 1962; Wróblewski 1961; Leszczyński 2014). These researchers distinguished three such planes: linguistic, axiological, and socio-psychological. The linguistic plane reflects the material aspect of legal texts and their normative meanings, aligning with legal positivism. The axiological plane reflects the moral and value-based aspects of law, corresponding to natural law. The socio-psychological plane deals with real actions, social structures, and facts. It was researched by legal realists, sociologists, and psychologists of law.

The concept of the three planes of law became widely used in Polish legal theory. Some researchers proposed other planes (political, historical, or cybernetic), but these did not gain acceptance, probably because they introduced too much complexity, and did not fit into the ordering principle.

This theoretical framework, while nominally critical to the one-sidedness of earlier conceptions of the law (e.g. legal positivism was focused solely on legal text, while legal realists relied on social actions), led to the fragmentation of the study of the law. The planes were treated independently, and distinct disciplines were assigned to them, employing separate methodologies. The linguistic plane was dominated by the positivistic, analytical approach, while the socio-psychological one was soon dominated by empirical sociologists, drawing more and more from the Western neopositivist methodology and paying only lip service to Petrażycki's theory (Cywiński 1996, 14). In comparison to these two, the axiological plane was studied only to a very limited extent and thus remained underdeveloped. The primary reason behind this underdevelopment of the axiological plane research was the discrepancy between the official socialist ethical system and the morality of the Polish society. Since the late 1950s, so-called "socialist morality" became less advertised, and the concept was becoming less prominent in literature. However, official institutions, including courts, continued to use it. Among scholars, there

was a growing understanding that the actual morality of individuals was different from the officially declared values, which were perceived as merely a facade. The recognition of these tensions could only be partially mentioned in publications. At the level of survey methodology, sociologists were able to ask respondents about their opinions or values, which were later compared to the official value system. However, there were limits to these inquiries. Consequently, reflection on the axiological aspects of law remained at a general and abstract level, and avoided addressing many problems. In consequence, the linguistic plane was paid the most attention by scholars, as traditional jurisprudence was also focused on this plane.

3. Let us now turn to the third tripartite distinction, namely the concept of attitude. Since attitudes are measured through survey research, which captures declarations rather than observed behaviours, this distinction introduces a different approach to separating the real from the ideal. In this context, "the real" is understood as something that can be evaluated objectively as true or false (truth in the classical, correspondent sense), whereas "the ideal" refers to something subjective, which cannot be judged by truth criteria but, rather, by sincerity.

The cognitive component of attitude	The behavioural component of attitude	**The affective/emotional component of attitude**

4. Attitude is a psychological concept that became one of the fundamental instruments of quantitative neopositivist sociology. The majority of sociological survey forms were designed to examine individual attitudes (Nowak 1973). According to the most popular concept of attitude, it comprises three aspects (the ABC of attitudes): affective (the evaluation of the object of the attitude), cognitive (the knowledge that an individual has about the object of the attitude), and behavioural (the tendency to act) (Nowak 1973, 23). In our framework, the intellectual component is categorised as M, representing objective knowledge that can be labelled as true or false, while the affective/evaluative component is categorised as I, representing subjective values. The behavioural component acts as a bridge, indicating that a person with the right knowledge and values is inclined towards some form of action.

According to Paul Lazarsfeld, who was the most influential scholar responsible for the wide application of this concept in sociology, attitudes function as hidden mechanisms, representing crucial variables that drive individuals to action. They are not directly observable but are inferred from responses to survey questions. The number of fundamental underlying attitudes is relatively small. Thus, positivist sociologists believed that this concept opened the door for constructing simple empirical models of complex social situations (Hindess 1977, 53).

6. LEGAL CONSCIOUSNESS AS A TRIPARTITE CONCEPT

The Polish concept of legal consciousness was built on these foundations, applying the tripartite concept of attitude to the legal field and integrating it with the tripartite theories of law and the planes of law. In the cultural milieu of new rigorism, this approach achieved a high level of consensus. Political constraints influenced the development of various aspects of legal consciousness, causing some to become more prominent, while others were subdued. To fully understand this, one must revisit the aforementioned tripartite concepts developed by Polish sociologists.

The concept of legal consciousness can be broken into three components: 1) cognitive, which pertains to information about the law (Gryniuk 1979, 16–33); 2) axiological, which involves the evaluation of the law (Gryniuk 1979, 62–137); and 3) behavioural, which reflects the tendency towards action in contact with the law (Gryniuk 1979, 138–146). Legal consciousness was a multidimensional concept, encompassing a variety of mental responses to the law. It was regarded as the primary independent variable used to explain the social workings of the law.

Two of these components were dominating in the empirical research: knowledge and evaluation. It is essential for individuals (citizens) to have the right knowledge of legal norms and to hold a positive attitude towards them. Because of the limitations of quantitative survey methodology, researchers had to ask about knowledge and evaluations. Given the complexity of legal systems and legal knowledge, questionnaire questions had to be quite general to remain workable. This led to the development of the idea of generalised attitudes, which were assumed to be underlying variables generating specific responses to the law, e.g. "The general evaluative attitude" (e.g. general legalistic or conformist attitude) was a derivate of specific evaluations of particular norms. A person had a general legalistic or conformist attitude towards the norms.

The behavioural aspect of legal consciousness was not well-defined, as quantitative survey methodologies struggled to capture real behaviour. Its instruments are designed to gather linguistic responses rather than observe actual actions[7], limiting them to asking about individuals' declarations or inclinations to act (Skąpska 1981, 34). As a result, these surveys can only ask about what individuals claim they would do. In many studies, the behavioural aspect of legal consciousness is understood as "having postulates for changing the law" (*de lege ferenda*).[8]

Despite the individualistic methodology behind legal consciousness, it was seen as a crucial element of the social engineering agenda of the government.

[7] This is a general problem of attitude research (Nowak 1973, 48–57).

[8] "By legal consciousness research we will understand here the research of all three elements of this concept, i.e. knowledge of the law, evaluations and attitudes towards existing legal norms and institutions, and possible postulates for changes in the law" (Borucka-Arctowa 1974, 5–6).

Most notably, the widely used model for the functioning of the law was as follows: the law is considered an act of communication formed by a centralised legislative organ, which conveys its will through legal texts. These texts are received by citizens, reacting according to their attitudes (legal consciousness). Ideally, citizens should first have a good (true) knowledge of the law (a cognitive component of the attitude). Then, they should possess positive emotional attitudes towards the law (an emotional aspect), which then motivates them to act accordingly (the behavioural component of legal consciousness) (Borucka-Arctowa 1967). To promote obedience to the law, the state should focus on the proper linguistic form of legal texts, which was the subject of sophisticated studies on the methodology of legislation. Additionally, the state should prioritise legal education to ensure that citizens have true knowledge of the law, and it should foster positive emotions towards the law, such as trust and legalistic attitudes. The expected behaviour should follow from these premises.

The concept of legal consciousness appears to represent the perspective of the state. An optimal level of legal consciousness is characterised by citizens possessing knowledge, positive attitudes, and a disposition to act in accordance with legal norms. When any of these components is lacking, the level of social consciousness is considered unsatisfactory and one can expect that the law will not work the way the law-giver had intended. This concept aligns well with the authoritarian model of the law (or state-society-law relations) (Nonet, Selznick 1978), where the law is an expression of power and will of the government. It was built on an earlier, cybernetic concept of the law, where the legal process is understood as the processing of information through channels. Initially, Soviet Marxism was opposed to cybernetics, dismissing it as a bourgeois discipline. However, the post-Stalinist doctrine eventually reconciled with it, recognising the potential of cybernetics for the "scientific management of society." Consequently, cybernetic works were translated and accepted behind the Iron Curtain, fitting well with the authoritarian model of the state and its administration. In this model, citizens were treated as passive receivers of signals, with the primary concern being how to transmit an unaltered signal from the centre of power to the individual and how to trigger desired behaviour (Studnicki 1965).

The strong consensus around legal consciousness in Poland began to fade in the late 1990s. This shift appears to confirm our thesis that the paradigm was established through two key factors: political constraints and new rigorism as a general methodological paradigm. The former factor disappeared after the democratic transformation and the latter is slowly eroding with the emergence of non-positivistic approaches in legal theory and qualitative methods in sociology (Raburski 2022, 44). Nowadays, we can observe a greater diversity in approaches to legal consciousness in Poland, but primarily at the theoretical level. In empirical studies, the old paradigm seems still strong (Cywiński 1996).

7. CONCLUSION

The paper examined the development of research on legal consciousness in Poland, focusing on the epistemic foundations of research conducted from the 1960s to the 1990s. It begins by noting that this field, often considered a special feature of the Polish sociology of law, differs significantly from the Western or Soviet sociological discourses. I argue that it is a consequence of two contextual pressures: constraints imposed by the political system and the prevailing concept of the scientific methodology of the time (new rigorism). Polish researchers integrated influences from German, Russian, and contemporary empirical traditions, creating a new distinctive form. The intellectual milieu of new rigorism endowed the concept of legal consciousness with unique features, one of which was the prevalence of tripartite distinctions. The second part of this article argued that these distinctions (and the way they shaped the concept of legal consciousness) were a byproduct of positivist epistemology. In the 1990s, the new rigorism concept of scientific methodology seemed to loose the grip and new, more diversified methodologies emerged. Consequently, the field of legal consciousness in Poland began to align more closely with Western research paradigms.

BIBLIOGRAPHY

Afeltowicz, Łukasz. Krzysztof Pietrowicz. 2012. "Socjotechnika Adama Podgóreckiego w perspektywie porównawczej." *Roczniki Historii Socjologii* 2: 39–71.

Borucka-Arctowa, Maria. 1967. *O społecznym działaniu prawa*. Warszawa: PWN.

Borucka-Arctowa, Maria. Ed. 1974. *Świadomość prawna robotników*. Wrocław: Zakład Narodowy im. Ossolińskich.

Borucka-Arctowa, Maria. 1981. *Świadomość prawna a planowe zmiany społeczne*. Wrocław: Zakład Narodowy im. Ossolińskich.

Cane, Peter. Herbert M. Kritzer. Eds. 2010. *The Oxford Handbook of Empirical Legal Research*. Oxford: Oxford University Press. https://doi.org/10.1093/oxfordhb/9780199542475.001.0001

Chua, Lynett J. David L. Engel. 2019. "Legal Consciousness Reconsidered." *Annual Review of Law and Social Science* 15: 335–353. https://doi.org/10.1146/annurev-lawsocsci-101518-042717

Cywiński, Zbigniew. 1996. "Kilka uwag o ujęciach świadomości prawnej." *Studia Iuridica* 31: 9–22.

Czapska, Janina. 2017. "Psychospołeczne wątki w pracach Marii Boruckiej-Arctowej. Świadomość prawna." In *Świadomościowy wymiar prawa.* Edited by Michał Dudek, Katarzyna Struzińska. 11–46. Kraków: Nomos.

Dębska, Hanna. 2022. "Herezja w prawoznawstwie. Trajektoria polskiej socjologii prawa w XX wieku." In *Polskie nauki społeczne w perspektywie relacji władzy i zależności międzynarodowych.* Edited by Tomasz Zarycki. 105–137. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.

Ewick, Patricia. Susan S. Silbey. 1992. "Conformity, Contestation, and Resistance: An Account of Legal Consciousness." *New England Law Review* 26(3): 731–749. https://doi.org/10.7208/chicago/9780226212708.001.0001

Ewick, Patricia. Susan S. Silbey. 1998. *The Common Place of Law: stories from everyday life*. Chicago: University of Chicago Press.

Geiger, Theodor. 1987. *Vorstudien zur Soziologie des Rechts*. Berlin: Duncker & Humblot. https://doi.org/10.3790/978-3-428-06308-6

Gizbert-Studnicki, Tomasz. Adam Dyrda. Andrzej Grabowski. 2017. *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa*. Warszawa: Wolters Kluwer.

Gryniuk, Anna. 1979. *Świadomość prawna studium teoretyczne*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika.

Habermas, Jurgen. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: Polity. https://doi.org/10.7551/mitpress/1564.001.0001

Heitzmann, Barbara. 2002. *Rechtsbewusstsein in der Demokratie*. Wiesbaden: Westdeutscher Verlag. https://doi.org/10.1007/978-3-322-87344-6

Hindess, Barry. 1977. *Philosophy and Methodology in the Social Sciences*. Hassocks: The Harvester Press Limited.

Kennedy, Duncan. 1980. "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940." *Research in Law and Sociology* 3: 3–24.

Keßler, Erich M. 1981. "Annotierte Bibliographie zu Knowledge and Opinion about Law KOL-Untersuchungen." *Zeitschrift für Rechtssoziologie* 2(2): 278–293. https://doi.org/10.1515/zfrs-1981-0207

Kozhukhova, Madina. Miras Zhiyenbayev. 2018. "Conceptualizing Legal Culture and Legal Awareness: Meaning And Structural Components." *SHS Web of Conferences* 55: 02009. https://doi.org/10.1051/shsconf/20185502009

Kudriawcew, Władimir N. 1978. *Przyczyny naruszeń prawa*. Warszawa: Wydawnictwo Prawnicze.

Kuhn, Thomas. 1962. *The Structure of Scientific Revolutions*, Chicago: University of Chicago Press.

Kwaśniewski, Jerzy. Jan Winczorek. Eds. 2009. *Idee naukowe Adama Podgóreckiego*, Warszawa: PTS – Wydawnictwo Uniwersytetu Warszawskiego.

Leszczyński, Leszek. 2014. "Profesora G.L. Seidlera koncepcja wielopłaszczyznowej analizy prawa." *Studia Iuridica Lublinensia* 61(1): 95–105. https://doi.org/10.17951/g.2014.61.1.95

Łukaszewa, J.A. 1977. *Socjalistyczna świadomość prawna i praworządność*. Warszawa: PWN.

Mokrzycki, Edmund. 1990. *Socjologia w filozoficznym kontekście*. Warszawa: IFiS PAN.

Nonet, Philippe. Philip Selznick. 1978. *Law and Society in Transition. Toward Responsive Law*. London: Octagon Books.

Nowak, Stefan. 1973. "Pojęcie postawy w teoriach i stosowanych badaniach społecznych." In *Teorie postaw.* Edited by Stefan Nowak. 17–88. Warszawa: PWN.

Opałek, Kazimierz. 1962. *Problemy metodologiczne nauki prawa*. Warszawa: PWN.

Podgórecki, Adam. 1964. *Zjawiska prawne w opinii publicznej*. Warszawa: Wydawnictwo Prawnicze.

Podgórecki, Adam. 1966. "Three Modifiers of the Operation of the Law." *Polish Sociological Bulletin* 1: 38–47.

Podgórecki, Adam. Ed. 1968. *Socjotechnika. Praktyczne zastosowania socjologii*. Warszawa: Książka i Wiedza.

Podgórecki, Adam. Ed. 1974. *Socjotechnika. Funkcjonalność i dysfunkcjonalność instytucji*. Warszawa: Książka i Wiedza.

Podgórecki, Adam. Rolf Schulze. 1968. "Sociotechnique." *Social Science Information*. 7(4): 135–152. https://doi.org/10.1177/053901846800700408

Podgórecki, Adam. Jon Alexander. Rob Shields. Eds. 1996. *Social engineering. The Technics of Change*. Ottawa: Carleton University Press. https://doi.org/10.1515/9780773596009

Podgórecki, Adam. Jacek Kurczewski. Jerzy Kwaśniewski. Maria Łoś. 1971. *Poglądy społeczeństwa polskiego na moralność i prawo*. Warszawa: Książka i Wiedza.

Podgórecki, Adam. Wolfgang Kaupen. J. Van Houtte. Bert Kutchinsky. Eds. 1973. *Knowledge and Opinion about Law*. Bristol: Martin Robertson.

Raburski, Tomasz. 2022. "Epistemologia stosowania prawa a zasada demokratycznego państwa prawnego." *Archiwum Filozofii Prawa i Filozofii Społecznej* 4: 39–51. https://doi.org/10.36280/AFPiFS.2022.4.39

Scheingold, Stuart A. 2004. *The Politics of Rights. Lawyers, Public Policy, and Political Change*. Ann Arbor: The University of Michigan Press. https://doi.org/10.3998/mpub.6766

Schorske, Carl E. 1997. "The New Rigorism in the Human Sciences, 1940–1960." *Daedalus* 1261: 309–330. https://doi.org/10.1515/9780691227832-015

Schröder, Jan. 2014. "Zur Rechtsquellenlehre des Nationalsozialismus im Kontext der neuzeitlichen Entwicklung." In *Recht im Wandel – Wandel des Rechts*. Edited by Ignacio Czeguhn. 597–616. Köln–Weimar–Wien: Böhlau Verlag GmbH & Cie. https://doi.org/10.7788/boehlau.9783412216818.597

Seidler, Grzegorz Leopold. 1957. *Doktryny prawne imperializmu*. Warszawa: PWN.

Skąpska, Grażyna. 1981. *Społeczne podłoże postaw wobec prawa*. Warszawa: Ossolineum – PAN.

Skąpska, Grażyna. Ewa Radomska. Marcin Wróbel. 2022. "Świadomość prawna społeczeństwa polskiego." *Państwo i Prawo* 12: 3–32.

Strogowicz, Michaił. 1959. *Prawda obiektywna i dowody sądowe w radzieckim procesie karnym*. Warszawa: Wydawnictwo Prawnicze.

Studnicki, Franciszek. 1965. *Przepływ wiadomości o normach prawa. Kraków*: Uniwersytet Jagielloński.

Szilágyi, István. 2023. "Social Legal Consciousness or Legal Culture?" *Public Governance, Administration and Finances Law Review* 7(2): 5–39. https://doi.org/10.53116/pgaflr.2022.2.1

Turska, Anna. 1961. "'Poczucie prawne' a świadomość prawna." *Państwo i Prawo* 2: 243–152.

Turska, Anna. 1965. "O niektórych teoriach społecznej znajomości prawa. In *Studia z teorii prawa.* Edited by Stanisław Ehrlich. 197–230. Warszawa: PWN.

Varga, Csaba. 2013. "Philosophy of Law in the Soviet Union and the People's Democracies." *Acta Juridica Hungarica* 543: 255–271. https://doi.org/10.1556/AJur.54.2013.3.4

Walicki, Andrzej. 1992. *Legal Philosophies of Russian Liberalism*. Notre Dame: University of Notre Dame Press.

Wróblewski, Jerzy. 1961. "Zagadnienia przedmiotu i metody teorii państwa i prawa." *Państwo i Prawo* 11: 751–755.

Zirk-Sadowski, Marek. 2001. "Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania." *Studia z Filozofii Prawa* 1: 83–95.

Zirk-Sadowski, Marek. 2004. "Legal Epistemology and Transformation of Legal Cultures." In *Epistemology and Methodology of Comparative Law.* Edited by Mark van Hoecke. 21–34. Oxford: Hart Publishing.

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THE THEORY OF EPISTEMIC (IN)JUSTICE IN THE PERSPECTIVE OF THE PERFORMANCE OF LAW: AN APPROACH BASED ON THE CONCEPT OF HERMENEUTIC THERAPY

Abstract. In this paper, the assumptions of Miranda Fricker's theory of epistemic (in)justice read in the context of the neo-Wittgensteinian philosophical trend, also called therapeutic or resolute approach, will be approximated. The theory in question concerns the issue of unequal participation of the experiences of specific marginalised individuals or their groups in the practices of legal meaning-making. The aim of the paper is to show the role of the said theory in legal theory. In the first step, I will discuss the main assumptions of the theory of epistemic (in)justice and its varieties from the perspective of the lawyer-layperson epistemic dependence. I will also present normative proposals for implementing the ideal of epistemic justice as well as a justification for abandoning such a research approach. In the second step, I will show an alternative to normative approaches in the form of a theoretical innovation consisting in supplementing the assumptions of the epistemic (in)justice theory with a therapeutic-resolute reading of the late Wittgenstein in the hermeneutic perspective. In the third step, I will demonstrate that the full application of the theoretical innovation presented in the previous steps within legal institutions requires taking into account the critical category of legal imagination related to "playing" or the performance of law (the game activity) in the sense of performance studies. The fourth step will be to identify sensitive legal institutions that can be improved by including the categories proposed by the theory in question while taking into account the concept of hermeneutic therapy derived from Type III deliberation. In order to illustrate the application possibilities of the theory of epistemic (in)justice in the area of law, I will use a case study. I will apply the following methods: analytical, thick description, and critical legal studies with elements of feminist research methodology.

Keywords: epistemic (in)justice, hermeneutic therapy, language games, performance of law, legal imagination, deliberation

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TEORIA (NIE)SPRAWIEDLIWOŚCI EPISTEMICZNEJ W PERSPEKTYWIE PERFORMOWANIA PRAWA: PODEJŚCIE OPARTE NA KONCEPCJI TERAPII HERMENEUTYCZNEJ

Streszczenie. W niniejszym artykule przybliżone zostaną założenia teorii (nie)sprawiedliwości epistemicznej Mirandy Fricker odczytywane w kontekście filozoficznego nurtu neowittgensteinowskiego, zwanego też podejściem terapeutycznym lub rozjaśniającym. Teoria będąca przedmiotem analizy dotyczy kwestii nierównomiernego udziału doświadczeń konkretnych marginalizowanych jednostek lub ich grup w praktykach tworzenia znaczenia prawnego. Celem artykułu jest ukazanie roli omawianej teorii w teorii prawa. W pierwszym kroku omówię główne założenia teorii (nie)sprawiedliwości epistemicznej i jej rodzaje w perspektywie problemu zależności epistemicznej prawnik-laik. Przedstawię też normatywne propozycje realizacji ideału sprawiedliwości epistemicznej oraz uzasadnienie rezygnacji z takiego podejścia badawczego. W drugim kroku ukażę alternatywę dla ujęć normatywnych w postaci innowacji teoretycznej polegającej na uzupełnieniu założeń teorii (nie)sprawiedliwości epistemicznej o terapeutyczno-rozjaśniające odczytanie myśli późnego Wittgensteina w perspektywie hermeneutycznej. W trzecim kroku wykażę, że pełna aplikacja przedstawionej w poprzednich etapach innowacji teoretycznej w obrębie instytucji prawnych wymaga uwzględnienia krytycznej kategorii wyobraźni prawniczej odnoszonej do „odgrywania" lub performowania prawa (aktywności growej) w rozumieniu performatyki. Czwarty krok będzie polegał na identyfikacji newralgicznych instytucji prawnych, które mogą być udoskonalane poprzez uwzględnienie kategorii proponowanych przez omawianą teorię z uwzględnieniem koncepcji hermeneutycznej terapii zaczerpniętej z teorii deliberacji typu III. W celu zobrazowania możliwości aplikacyjnych teorii (nie)sprawiedliwości epistemicznej w obszarze prawa posłużę się studium przypadku. Wykorzystam przy tym następujące metody: analityczną, opisu zagęszczonego, krytycznych nauk o prawie z elementami feministycznej metodologii badawczej.

Słowa kluczowe: (nie)sprawiedliwość epistemiczna, terapia hermeneutyczna, gry językowe, performowanie prawa, wyobraźnia prawnicza, deliberacja

1. INTRODUCTORY REMARKS

The paper presents a legal analysis of Miranda Fricker's theory of epistemic (in)justice in the context of the neo-Wittgensteinian philosophical trend, also known as therapeutic or resolute.[1] According to the theory in question, there exists a distinct kind of (in)justice inflicted on knowers (knowledge producers, testifiers) or due to their cognitive abilities (cf. Bublitz 2023, 1–28). One of the highlighted problems is epistemic dependence – an asymmetric distribution of dynamic hermeneutical resources (cf. Grygieńć 2021a, 11–28). Epistemic dependence is a relationship oriented towards achieving epistemic goals (e.g. justification) and at the same time a form of epistemic oppression, which, in turn,

[1] In the following paper, I do not elaborate on this thread and the significant subtle differences between the therapeutic and resolute approaches. A comprehensive and inspiring analysis in this regard has been presented by Wojciech Ufel (2023).

is a phenomenal form of epistemic injustice. It concerns exercise of a vulnerable knower's agency in meaning-making and knowledge production processes. The legal system is built on socio-epistemic structures that are rooted in and reinforce the existing inequities. At the systemic level, one such structure is epistemic injustice (Glaberson 2024, 456). The therapeutic approach demonstrates that this dependence is an element of language games, subject to contextual doubt and revision on a case-by-case basis.[2] It enables the identification of various forms of epistemic (in)justice, understood as real-world phenomena (lived experience) or practices reported in the literature.

Eliminating epistemic asymmetry on a universal scale seems impossible due to the so-called paradox of emancipation inherently embedded in power relations (both in a substantive sense, based on coercion – power-over or concentrated power and in a generative or communicative form, e.g. characterised by non-subjective, informal networks – power-with, power-to) (Hendriks 2008, 173–184). Additionally, the functioning of legal institutions is subject to specific legal-procedural rigour, where hierarchy (e.g. non-equivalence of parties in administrative legal relationships) and formality, distinct from formalism, are necessary attributes of the law. This paradox concerns the relationship between knowledge production and power dynamics that shape the discursive construction of what is "true" or "false" (Ferreira 2022, 314). The "paradox of emancipation" in legal terms involves the reproduction of the existing power dynamics that exclude socially-situated knowledges of marginalised groups (epistemic dependencies) through legal decisions, leading to the initial and systematic privileging of the lawyers' perspective in the process of creating normative meanings3 (cf. Carter, López 2024, 34).[3] In other words, in their effort to overcome instrumental rationalities or oppressive episteme, individuals (e.g. judges, practitioners, and academics) also partly stabilise them. Legal reasoning produces authoritative knowledge regarding human behaviour and social relations (Gutiérrez 2024, 209). Thus, in accordance with the normative approach, lawyers shall forgo the advantage of possessing superior knowledge, avoid professional jargon and mediate in normative universalisation of legal statements through translating legal requirements into the subjective language of everyday interactions for citizens. As a result, a theoretical shift occurs from deterrence to compliance (legitimate coercion). On the one hand, the higher the normative expectations or conditions imposed of lawyers and communication to break the cycle of relational and structural domination stemming from legally-constituted public power,[4] the more their fulfilment becomes

[2] The language game is a "specific system of concepts and rules in which the organisation of information about the world takes place" (Ziemińska 2013, 295).

[3] Thomas J. Spiegel describes this problem as "the epistemic injustice of epistemic injustice" (cf. Spiegel 2022, 75–90).

[4] According to Poul F. Kjaer "[s]tate law and public law are therefore not identical as public law goes beyond formal state institutions. A concept of 'legally constituted public power' provides a broader, yet more targeted and precise approach, deployable in a wide range of local, national and

unrealistic in empirical (factual, sociological) circumstances. On the other hand, the more the deliberative approach mitigates or relaxes the rigours or restrictions of these normative requirements (e.g. the strict consencus, the ideal speech situation), the more it diminishes in its critical impact, which, in turn, is associated with a return to more idealistic and rigorous assumptions of the theory. *Prima facie*, one could consider this paradox insurmountable due to empirically confirmed differences in power structures and in the linguistic, cognitive, and communicative resources of individual participants in legal discourse. In such an approach, law is anchored in violence, hence the epistemic relationship between experts and laypeople is always somewhat asymmetric, and its basis lies in (en)trust or reliance (cf. Grygieńć 2021b, 33). Trust and trust conflicts are partly born of ignorance. In contrast, from the perspectives of the theory of epistemic (in)justice and legal agency, laypeople (hermeneutically disadvantaged persons) play the role of experts possessing (experiential knowledge) necessary to make a fair decision. However, this knowledge is often systematically ignored or belittled and vulnerable knowers are denied opportunities to participate in sense-making and concept-mining activities.

The issue of uneven participation in legal culture is recognised within various "types" and "generations" of normative theories of deliberation, and in different "turns" in its scope.[5] Realistically utopian proposals in this regard are optative (grammatical statements used to express wishes, desires, or hopes) and based on "dogmas" (strong or hard normative assumptions) about communication, language, and meaning.[6] The utopian realism perspective they adopt does not provide adequate means to criticise epistemic asymmetry and fails to confront the presupposition of equality in the principle of social dialogue with forms of epistemic (in)justice in the field of law (cf. Levy 2018, 368).[7] A crucial element of

transnational settings, as well as in relation to formally public and to formally private institutions" (Kjaer 2022, 771).

[5] In global research, the genealogical analysis of the chronological development of deliberative democracy theory is conducted by combining two approaches to its description through two types and four generations. This is a systematics established and being developed in the science of 2009/2010, when „Bächtiger et al. systematised this debate by introducing the distinction between type I and type II deliberation" (Schmidt 2024, 6). As a supplement to this classification in the context of seeking a normative (desirable) ideal of democracy attention is also given to the occurring "turns": epistemic, institutional, practical, empirical, and systemic (Ufel 2023, 110). The theory of epistemic (in)justice constitutes a distinct and independent field of study from the normative epistemic turn in deliberation, promoted by scholars such as Cristina Lafont and Hélène Landemore.

[6] One of the thinkers who described his concepts as a "realistic utopia" was John Rawls. Rawlsian realistic utopianism is a combination of an axiological perspective with a realistic assessment of the social and political conditions that limit the feasibility of normative ideals (Klimowicz 2016, 36). I distinguish this perspective from utopian realism represented, *inter alia*, by Anthony Giddens. The reflexive law examined through the lens of Giddens' theory is not so much a socio-historical stage (trajectory) in the evolution of law as is a proposed state of affair (institutional ideal).

[7] One should bear in mind the risk of transforming deliberation into epistocracy. It is also pointed out that "procedural and substantive conditions of deliberation formulated in theoretical terms

this dialogue is shaping the set of norms that, from the perspective of a minority community, provide an impression of justice. In this paper, I look at this problem from the "epistemological angle" (cf. Gutiérrez 2024, 210). The original proposal for the study of social episteme (the system of meanings, including collective beliefs – propositional attitudes)[8] in the context of the relationship between law and its broader social background is Type III deliberation which proposes the hermeneutic (non-dogmatic) concept of deliberation based on a therapeutic (descriptive and critical) approach inspired by the method of language games (cf. Ufel 2023).[9] My research aligns with the broader current of studies on epistemic

may paradoxically lead, in practice, to exclusion, thus remaining inconsistent with the democratic ideal. […] Deliberative institutional solutions can be seen rather as an expression of a paternalistic attitude of elites, which, by controlling participation practices, exclude various social groups from effective political dialogue, depriving them of the opportunity to present new perspectives and ideas" (Tobiasz 2021, 31, 42).

[8] The system of beliefs does not have a closed character. The rules constituting it are indeterminate, open, variable, and non-binary. The "paradox of emancipation" in the realm of language games lies in the fact that in its efforts to break the dominant rules of individual interpretation, it also partially stabilises them. Testimonies serve as relays for beliefs. I would like to thank Wojciech Ufel for drawing attention to this issue and many other problems in the field of the philosophy of language games and its hermeneutic (interpretive) reading.

[9] Similarly to Robert Adlington and other scholars (such as André Bächtiger, Simon Niemeyer, Michael A. Neblo, Marco R. Steenbergen, Jürg Steiner, Axel Tschentscher, Stephen Elstub, Selen Ercan, Ricardo F. Mendonça, Jean-Paul Gagnon, Dannica Fleuß, Karoline Helbig, Gary S. Schaal, Kei Nishiyama, Susumu Shikano, Seraina Pedrini, Mirjam Ryser, Katharina Esau, Lena Wilims, Janine Baleis, Birte Keller, Juan E. Ugarriza, Natalia Trujillo-Orrego, Emma Turkenburg, Ine Goovaerts), I identify the Type I – classic, idealist or restrictive and Type II – more realistic and compromise-oriented, expansive or inclusive deliberation ("first", "second", "third", and "fourth generation" theory) (cf. Ufel 2023, 164). The primary interpretative trace of the main changes in the successive types of deliberative theory is, however, the concept of its four generations: the first – focused on normative aspects of the theory (Rawlsian and Habermasian versions); the second – developing the theory towards practical implementation; the third – concentrating on institutional solutions; and the fourth – associated with the systemic turn in deliberation theory (Ufel 2023, 110). Type III deliberation focuses on the reconstructions occurring within language games involved in the deliberative process (Ufel 2023, 317). It focuses on the analysis of the reconfiguration of language games, i.e. disciplining (rule following), transformation (the change of an "aspect-seeing"), and creation (perspicuous representation of meanings). Dominance, whether in terms of consolidating or gaining it, emerges as an inescapable element of policy (Ufel 2023, 320). Regarding the main element on which deliberation focuses, the hermeneutic model of deliberation shifts attention from the ideal deliberative process or its accompanying institutions or effects to the dynamics of the reconfiguration of language games (Ufel 2023, 25). By considering both the creative and transformative elements as well as those that discipline and limit free, rational discussion, the hermeneutic model of deliberation highlights the necessity of including all these elements as its indispensable components (Ufel 2023, 25). This approach abandons the substantive distinction between rational argumentation and emotional forms of speech or rhetorical statements (e.g. storytelling, metaphor). All forms of communication are treated as equally valid language games with a persuasive character. At the descriptive level, it is showing how language works in the specific context of deliberation, while at the normative level, it is saying how deliberation could work but

(in)justice in the context of the theory of deliberative democracy (cf. Schmidt 2024, 1–10).

The paper puts forward the following thesis: the application of the theory of epistemic (in)justice in legal sciences allows the delineation of the therapeutic dimension of legal language games, focusing on the participation of knowers or subjects of knowledge, including differently-situated individuals with vulnerable (prone to marginalisation) traits in the creation of normative meanings. Legal language games are language games that serve as coordinators of social institutions or synchronisers of structures organising social life.

In the first step, I will discuss the main assumptions of the theory of epistemic (in)justice and its forms, demonstrating that the normative approach in this area does not offer adequate means to examine the problem of creating language and concepts reflecting the experiences of individuals characterised to an equal extent by a given sensitive trait. In the second step, I will complement the theory in question with a therapeutic-resolute interpretation of the late Wittgenstein's thought.[10] In the third step, I will demonstrate that the full application of the proposed theoretical innovation requires a consideration of legal imagination as a tool for capturing the extremely delicate matter of "playing" law (the performance of law). The final step will involve the identification of crucial legal institutions that constitute the areas of the application of the theory in question as well as the development of a case study. In the first, second, and third steps, I will use the "from philosophy to law" approach, while in the fourth step, I will adopt the "from law to philosophy" perspective (cf. Zirk-Sadowski 2021). I will apply analytical and descriptive methods and critical legal studies with elements of feminist legal methodology.[11]

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is constantly aware of its own contingency (Ufel 2025, 288). However, normative premises regarding the acceptance or negation of specific means and forms of communication are replaced by a strategic selection of communication methods through the prism of the context and purpose of deliberation, e.g. the coordination of preferences in law-making processes (cf. Ufel 2023, 322). Consensus or justifying knowledge claims shall be regarded as another language game or rule, lacking transcendental principles that validate it against other games and that would appeal to its (radical) democratic nature or apolitical stance (Ufel 2023, 323). It is important to examine the direct epistemic effects of deliberations concerning the way knowledge is produced and the understanding of the problem under deliberation, whether in the context of material (regarding the allocation of resources) or normative decisions (disputes about values) (Ufel 2023, 322).

[10] Philosophical (hermeneutic) therapy is a form of language critique. The object of criticism is the metaphysical (metagame) conception of the relationship between language and the world of communicative practices. Therapeutic philosophy serves to clarify the forms of speech and the functions that speech fulfils in various contexts, as well as the ways in which it contributes to social integration (cf. Crary 2000, 1–18). "Philosophy is a battle against the bewitchment of our intelligence by means of language" (Wittgenstein 2000a, 72). Wittgensteinian therapy applied to the existing theoretical conceptions can identify their dogmatic elements.

[11] The hallmarks of feminist legal methods are empirical holism, situatedness, and sensitivity to non-arbitrary and inclusive ways of knowing (establishing truth and creating knowledge). The

2. THE CONCEPT OF EPISTEMIC (IN)JUSTICE – BASIC ASSUMPTIONS AND VARIETIES

Miranda Fricker distinguishes between two species of epistemic injustice: testimonial injustice and hermeneutical injustice. The author points out that

> [t]estimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word; hermeneutical injustice occurs at a prior stage, when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences. An example of the first might be that the police do not believe you because you are black; an example of the second might be that you suffer sexual harassment in a culture that still lacks that critical concept. We might say that testimonial injustice is caused by prejudice in the economy of credibility; and that hermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources (Fricker 2007, 1).

Epistemic (in)justice is subtly embedded in many other types of (in)justice (e.g. distributive, restorative) and (un)equal treatment. Epistemic justice is a *condicio sine qua non* for non-domination as non-neutrality. Epistemic injustice results from language resource variability. The theory of epistemic (in)justice concerns knowledge claims of disadvantaged groups inhabiting peripheral, degraded, underrepresented areas (e.g. uneducated slum dwellers, migrants, refugees, stateless people), minorities (e.g. LGBTQIA+ persons seeking asylum), and the weaker (e.g. defendants in SLAPP lawsuits). The "weakness" of an individual's position may result from subjective and social biases, perceived through the prism of entrenched negative stereotypes (e.g. related to gender) (Safjan, Mikłaszewicz 2011, 33). Yet, assigning certain groups the status of the weaker (e.g. children in care) can be stigmatising for them. The theory of hermeneutical injustice has a structural and relational dimension, because it refers to cognitive gaps or blind spots in the systemic knowledge, remnants of the historical, conceptual, or intersectional exclusion of certain groups from knowledge production processes, and lacunae in the legal conceptual framework, resulting in the lack of legal definitions of certain concepts (e.g. stateless person). On the one hand, some individuals (e.g. asylum-seekers) lack the conceptual apparatus and interpretive tools needed to make sense of their experiences, ultimately limiting their ability to articulate those experiences (cf. Ferreira 2022, 303–326). On the other hand, testimonial injustice concerns the credibility of the

latter is an embodied – i.e. inseparable from socioeconomic and cultural positioning – point of view and a significant trait of the knower. This is a naturalistic approach, because normative claims are questioned by explaining causation through examples of lived experiences, without negating the essence of epistemic normativity or normative inquiry (cf. Sveinsdóttir 2016, 49–60). The "situatedness" gives rise to knowledge originating in circumstances led by particular experiences (Gutiérrez 2024, 209). However, I do not subscribe to the dogma that the law always constitutes a sexist instrument of subordination from women towards men.

speakers and their argumentation, deposition, or explanations about their lived experience (experiential expertise). According to M. Fricker, the reference point for evaluating the strength of evidence (e.g. testimony based on memories revealed through trauma-focused psychotherapy (cf. Bublitz 2023, 1–28) or evidentiary conclusions is their evaluation through the prism of the standards of the ethics of knowing and legal interpretation.

Kristie Dotson and Gaile Pohlhaus Jr. also distinguish contributory injustice.[12] It is an intermediate form between testimonial injustice and hermeneutical injustice, and results from intentional hermeneutical ignorance that immunises the hearer from the discomfort of doubts (cf. Corso 2023, 103). This type of injustice occurs when oppressed epistemic communities can create alternative hermeneutic resources, but these resources are rejected or discredited by the dominant group (Pohlhaus Jr. 2012, 715–735). Those historically excluded from knowledge production or the realm of social understanding (e.g. indigenous people living in Canadian territories with direct experiences of the impact of specific investments on the environment) as well as disadvantaged or weaker groups (e.g. mentally ill patients, women-"home managers", incarcerated people) possess different levels of oppositional consciousness, which is why they cannot contribute equally to the collective understanding of their rights (e.g. home-working women's right to privacy, the right of indigenous peoples to consultation and ownership).[13] Experiential knowledge produced by them cannot become reflexive and reciprocally influence the law. Testimonies shaped by meanings (ways of using words) adopted in a particular group do not contribute to the linguistic representation of the world – a collectively shared pool of epistemic means (linguistic structures, expressions, conceptual metaphors). Due to wilful ignorance on the part of hearers, this representation does not reflect the epistemic reality experienced by all knowers whose knowledge it concerns. The theory of contributory injustice examines the intentions behind hearers' opinions and is the criterion for evaluating the quality of listening, cross-examination, and constitutional hearing. The scope of this paper does not allow for a detailed analysis of this issue.

[12] According to K. Dotson, contributory injustice occurs when "an epistemic agent's willful hermeneutical ignorance in maintaining and utilizing structurally prejudiced hermeneutical resources thwarts a knower's ability to contribute to shared epistemic resources within a given epistemic community by compromising her epistemic agency" (Dotson 2012, 32).

[13] The issue of epistemic injustice in the context of indigenous peoples' rights is described, *inter alia*, by Erin Shields, Dina Lupin Townsend, and Rebecca Tsosie.

3. JUSTIFICATION FOR NOT USING THE NORMATIVE (DOGMATIC) APPROACH, OR ABOUT THE WEAKNESSES OF THE DELIBERATIVE APPROACH TO THE FRICKERIAN THEORY OF EPISTEMIC (IN)JUSTICE

In literature, the category of the deliberative approach is often encountered in the context of political practice or dispute resolution, but it very rarely appears in the context of knowledge-sharing processes. The theory of epistemic (in)justice provides fertile ground for normative analyses embedded, explicitly or implicitly, in idealistic or realistic currents of the deliberative theory. It is emphasised that the active facilitation of just (equal), mutual linguistic exchange, the process of perspective-taking (actively imagining others' experiences), the social inclusion of speakers, and the exercise of empathetic skills and "testimonial sensibility" by hearers are all essential (cf. Muradova 2021, 644–664; Sorial 2022, 215–231). According to the doctrine of political liberalism, equality is an implication of dignity, and the principle of formal equality before the law guarantees equal opportunities (equity). It is thus necessary to expand the procedural framework of legal and judicial deliberation with new normative standards to ensure substantive equality of speakers. These standards can be interpreted from the perspective of normative ethical theories: deontologism (e.g. John Rawls's account), non-utilitarian (objective) consequentialism (e.g. Amartya Sen's account), or aretology (e.g. Martha Nussbaum's account). The first theory emphasises the need for hearers to fulfil specific hermeneutical duties and obligations, the second one lacks an enumerative catalogue or set of abilities in this regard, while the third one underscores the necessity of creating an objective list of epistemic virtues enabling benevolent co-understanding (cf. Sorial 2022, 221).

M. Fricker and other researchers (e.g. José Medina, Elizabeth Anderson) adopt the aretaic position, expressing it in the development of "corrective" (prejudice-neutralising) individual epistemic virtues (such as impartiality, open-mindedness, epistemic vigilance, intellectual sobriety, epistemic resistance, and reciprocity), institutional virtues, and protective epistemic character traits in contrast to vices (such as intellectual recklessness, naïve cynicism, epistemic laziness, carelessness, hubris, cultural blindness, and linguistic subterfuge).[14] Epistemic virtues are individual cognitive and valuable dispositions or remedies that serve to reduce hearers' identity biases woven into the fabric of our lived experience. These prejudices contribute to the stereotyping of various aspects of a person's social

[14] A similar epistemic competence approach is developed by Anne Ruth Mackor in legal ethics. It should be noted that objective epistemic virtues can sometimes be used to manipulate language (conceptual) resources (interpretative tools) shared in the legal imagination through legal interpretation (e.g. the so-called *Etikettenschwindel* – labelling someone or something with an untrue name, seeming legal institutions dressed in the robes of the law or a legal sham based on a shift of the meaning of certain terms in relation to their original meaning). Meanwhile, epistemic vices to a certain limited (narrow) extent can contribute to triggering progressive structural and systemic changes in discourses (language games). This phenomenon is called bias paradox.

identity and can affect the attribution of competence and sincerity, which are essential components of epistemic credibility (cf. Fricker 2007, 32). Epistemic virtues are not absolute and unconditional. They are contingent, progressive, and relative in character.

Imposing additional normative expectations on privileged hearers or speakers participating in deliberation can generate reverse epistemic injustice. The proponents of the deliberative approach to knowledge exchange and production processes based on mutual understanding (e.g. Susan Dieleman, Catriona Mackenzie, Lala Muradova, Sarah Sorial) and the aretaic interpretation of the theory of epistemic (in)justice (M. Fricker) valorise the role of substantive equality (as understood, *inter alia*, by Sandra Fredman). Yet, they do not conduct a comprehensive analysis of the objectivity of knowledge in the context of the actual differentiation of the status and real position of knowers in the social or personal system. These factors translate into the issue of representing the experiences of knowers in the grammar of legal language (the ways of using linguistic expressions which are constitutive of practice, meaning, and concepts).[15] Judges, as individuals distinguished by legal knowledge, members of a ruling elite, have authority over the interpretation of speakers' narratives and the integration of normative meanings in culture, which places them in a more favourable position than laypersons. Expert individuals "fare better in a discussion defined by themselves, can convince others of imposed standards, solidifying and reproducing the existing system. (…) In reality, we have deliberation controlled by the dominant group or groups based on standards presented as universal and serving everyone equally" (Tobiasz 2016, 112).

The normative (idealistic) approach to the theory of epistemic (in)justice is not entirely adequate, because it relies on the narrow conception of the objectivity of knowledge (cf. Crary 2018, 48–49, 51, 56). Referring to Ludwig Wittgenstein's terminology, it can be said that, in this approach, hinge propositions,[16] which serve

[15] Grammar is restored behaviour; it pertains to therapy, the cultural genealogy/sources of language games, while hinges rather relate to "resoluting", empirical, physical, biological, ethnological, or geographical causality. Grammar and hinges occur in the practice of language functioning. They can be used as specific functional equivalents of transcendental conditions of possibility. Cf. the next footnote.

[16] Hinge propositions are beliefs-certainties devoid of logical value that we recognise while playing the language game. They operate at the pre-reflective level, are not subject to justification, and are usually exempt from all doubt. Hinge propositions result from our cognitive engagement with reality and they are dispositions to rationally envisage reality that people bring to deliberation, epistemically prior to empirical knowledge (García-Valdecasas 2023, 36, 44). Hinges are distinguished as *de jure* (presuppositions, local) and *de facto* (universal, local) (Boncompagni 2021, 14–15). The concept of hinges is expressed most fully in L. Wittgenstein's work, *On Certainty* (Wittgenstein 2014). Similarly to Alice Crary and Brian Rogers, I assume that in this philosophical work, Wittgenstein continues to develop the therapeutic method. Unlike A. Crary and Penelope Maddy, I consider that linguistic therapy can be reconciled with the concept of hinge propositions.

as a substitute for objective knowledge and a point of reference for empirical sentences, stem not so much from sensitive observation and lived experiences as from the realistic utopia of aseptic reason. This occurs at the expense of accepting an inadequate assumption about the existence of strong normative spheres and the metaphysical grounding of epistemic virtues and skills in the anthropological paradigm of *homo narrans* as one of the arbitrary approaches to human nature.

Narrative is a language game of an ambivalent or ambiguous nature, because it can be both good and bad in the normative sense and in relation to deliberative ideals (cf. Boswell 2022, 333–344; Ufel 2023, 241).[17] It can structure testimonies and collective social understanding as well as it emphasises alternative interpretations of truth, a historicising pattern of knowledge ("plot-characters-moral"), and the expressive aspect of giving meaning to the nuances and complexities of the issue (cf. Skuczyński 2020, 2–6, 10; Muradova 2021, 660). Legal narrative has both inner and public dimensions. It can create the possibility to make hermeneutical resources intelligible or visible in a single moment of testimonial exchange (cf. Ralph 2024, 1345, 1351; Medina 2011, 16).

However, narrative statements are not brute facts. They are extra-rational means of argumentation. A narrative remains a persuasive tool susceptible to an excess of credibility, mythololegisation (e.g. the standard victim-blaming narrative of rape constructed by rape myths as highlighted by Emily Tilton, "greedy" consumer claims, "fake" and "bogus" asylum claims based on sexual orientation and gender identity (SOGI) as underlined by Nuno Ferreira), systemic biases that justify discrimination, false representations of testimonies ("toxic narratives" or dogmatic ones which turn out to be roots of a gross distortion of reality as underlined by John Boswell, Marco Armiero, and Iwona Jakubowska-Branicka), and epistemic exploitation (cf. Fricker 2007, 132).[18] The latter occurs when

This position is consistent with the findings of J. Medina on Wittgensteinian social naturalism. In the light of non-reductive naturalism, the acceptance of hinges according to the so-called third Wittgenstein is not equivalent to blindly trusting them; regardless of their actual certain contexts, some of them (especially local *de facto* hinges, e.g. prejudices, notoriety) may be revised (cf. García-Valdecasas 2023, 35). Epistemic normativity is a perspective on the relationship between hinges and empirical sentences through the lens of a form of life (culture) or a specific position on the structure of justifying beliefs (the legitimisation of knowledge as justified true belief).

[17] In older works, the view that narrative is one of the fundamental components of postmodern language appears. Currently, this position is considered outdated.

[18] Epistemic exploitation means "unrecognised, uncompensated, emotionally taxing, coerced epistemic labor" (Berenstain 2016, 587). According to S. Lisa Washington, the American family regulation (policing) system pathologises women, especially those who are poor and of colour, when they anticipate and share knowledge that contradicts the "carceral" official narrative of domestic violence based on, e.g., a standard template of community interview. The unwritten expectation is that survivor will portray herself as a needy mother in order to get a favourable result at the hearing (Carter, López 2024, 32). Survivors "are encouraged by advocates to construct their testimony in ways that fit the prevailing narrative of what a domestic violence victim looks like" (Carter, López 2024, 32). The discrepancy between the survivor's narrative (mothering knowledge)

a person's experiences are betrayed through the telling (reporting) of a story by someone who does not share the lived experience (e.g. when a prosecutor publicly defends the "law and order" position on behalf of a person experiencing domestic violence, regardless of whether the person supports this position; or when a lawyer defends their client in a way that does not reflect the accused person's experience adequately) (Washington 2022, 1111; Picinali 2024, 24). The experience gained through the constitutional crisis confirms that various forms of epistemic injustice and exclusion patterns can be subtly embedded and interlocked in narratives which may virulently fill hermeneutical gaps in accessing epistemic justice. As Lala Muradova points out, "[p]otential biases in the stored knowledge may lead people to make erroneous inferences about another person's feelings and thoughts" (Muradova 2021, 648).

Narratives of lawyers representing the stronger party to the contract (e.g. corporate client) may be structurally prejudiced, deprive those in a weaker (*de facto* unequal) procedural position of a sense of epistemic credibility and agency, and may also serve to prompt judges with biased interpretations (fables) of the law. In this context, the narrative contributes to systemic epistemic injustice. This issue in private law is discussed, *inter alia*, by Lyn K. L. Tjon Soei Len.

Narrative knowledges function based on rhetoric, appealing to opinions that may be based on a desire for dominance (cf. Sullivan 2017, 295). "Filtering" the content of narratives according to the pattern of virtuous hearing has little cognitive value in reformulating linguistic structures that perpetuate an epistemic dependence. Therefore, I propose the therapeutic approach to the theory of epistemic (in)justice. This approach is based on concepts of language games and wider objectivity (A. Crary). The consequence of this theoretical choice is the acceptance of non-essentialist methodological standards of an embodied conception of knower (e.g. Shaun Gallagher's approach), situated knowledges (e.g. Donna Haraway's approach), and standpoint empiricism (e.g. Nancy Hartsock's approach). In this approach, schematas or frameworks for generating knowledge, reason (justification rationality, reflective reasoning), and imagination are local and contingent in character and result from the historical interplay of various language games, while epistemic tools (dogmatic ones) and theories are

and the narrative based on institutional prejudices of lawyers, judges, or social assistance (e.g. parental alienation syndrome recently recognised by Italian courts as scientifically unreliable) is described as a lack of the victim's "insight" into the concept of violence (cf. Corso 2023, 110). Attempts to recontextualise the notion of domestic violence taking into account the parents' knowledge about child safety lead to the reorientation of state intervention towards family separation and questioning women's parental rights or the school-to-prison pipeline (cf. Washington 2022, 1141, 1160). According to Stephanie Glaberson, the systematic conflation of poverty as neglect is itself a form of institutional gaslighting (Glaberson 2024, 427). Terrell Carter and Rachel López argue that due to the narrative shift related to formation of "the battered woman syndrome", "courts tend to discredit the testimony of those victims who fight back, considering them unworthy of protection" (Carter, López 2024, 33).

burdened with inherent limitations (e.g. ideological saturation), which can only be overcome contextually (cf. Sorial 2022, 228). A person does not enter into language relationships as a rational, autonomously judging individual (such as in realistically utopian models of deliberation), but, under the influence of various language games, something is formed that we are inclined to call our own rational judgement (Ufel 2023, 311). The concept of epistemic injustice "is ultimately more a matter of the facts than the law" (Rogacka-Rzewnicka 2023, 1130). The main practical implication of the approach to the theory of epistemic (in)justice that I propose is the enhancement of criteria for legislative and judicial empirical analysis of hermeneutical resources or epistemic advantages of vulnerable knowers by the incorporation of some elements of hermeneutic therapy into legal evidential (factual) reasoning.

4. CREATING KNOWLEDGE THROUGH LANGUAGE GAMES – THE THERAPEUTIC-RESOLUTE APPROACH IN LAW

The theory of epistemic (in)justice in the normative perspective refers to the idea of the regulatory dogmatism of reason. Public reason is neutral towards situated knowledges (ethically-loaded perspectives), which results in their non-consideration in the practice of interpreting programmatic norms (policies).[19] Emotions and other normatively-loaded concepts are treated as a non-conceptual "given."[20] Conflicts of rules are resolved at the abstract level, detached from the actual situation of sensitive groups or the variable linguistic knowledge base. In the therapeutic approach, a broad and situated approach to social episteme objectivity is essential. Our view of the world is always a "view from somewhere" (Ufel 2023, 275). Language is rooted in lived experiences, enabling the creation of concepts and the transmission of information. Affect and emotions allow the conceptualisation of the relationship between the world and the properties and conditions of knowers. They reveal authentic forms of suffering (epistemic harms), thereby providing us with a more objective understanding of the world (cf. Crary 2002, 97–118; Fricker 2007, 162). Emotions are enfleshed interactions with the social environment, a factor that stimulates critical cognitive processes due to behavioural reactions suggested to rational consciousness by the imagination (the act of creating an alternative version of the world). Testimony is a non-purely rational form of discourse, a source of first-hand knowledge, a sentence construction based on images (world-pictures), and as such belongs to the class

[19] An example of such a norm is Article 70 section 1, first sentence of the Act of April 2, 1997 – Constitution of the Republic of Poland [Pol. Konstytucja Rzeczypospolitej Polskiej] (Journal of Laws, 1997, No. 78, item 483 as amended), hereinafter referred to as: "the Constitution of the Republic of Poland".

[20] I borrowed the adjective from A. Crary.

of local *de jure* hinges (Boncompagni 2020, 14). It allows the naming of what has no developed terminological vocabulary and the explaining of new knowledge. Reading the works of L. Wittgenstein suggests that imaginative experience (imagining something, creating imaginative schemes), implicit or tacit knowledge (know-how), communication, and professional skills of hearers are all local *de facto* hinges of every knowledge acquisition game.

As Wittgenstein points out, "[t]here is not a philosophical method, though there are indeed methods, like different therapies" (Wittgenstein 2000a, 78). The therapeutic interpretation of the theory of epistemic (in)justice involves applying the conceptual categories used in it to critique legal language games seen as practices of creating social episteme.[21] This is a significant and plausible alternative to the normative approach, which assumes that public reason constitutes an ideal standard of deductive reasoning ("from general to particular"), creating meanings autonomously, independent of the discriminative power of hidden or concealed motivations, the context of language use, and the actual circumstances of a specific case. Public reason uses idealised figures – general-abstract principles of justice – and it abstracts from neglected ways of knowing such as embodied cognitive mechanisms (imagination, intuition, language reasoning) distinguished in cognitive legal humanities (cf. Brożek 2018, 17). Such an approach easily leads to the trivialisation of knowledge or moralising and does not provide a experiential insight into the lived experiences involved in the mechanisms of the game, which operate according to rules – a set of grammatical and hinge propositions (the ways of seeing the world). Among these rules are forms of epistemic abuse (e.g. presumptions dictated by cultural or psychological biases rooted in social awareness, false or coerced confessions). On the one hand, they constitute dysfunctional (biased) epistemic resources of legal language games that distort our linguistic image of the world. This allows us to reconsider the essence of judicial truth and the principle of material (objective) truth. On the other hand, language games can be used to analyse the issue of giving normative meaning to empirical sentences describing socially-significant but unnamed experiences of a particular person.

[21] Phenomenal forms and family resemblance concepts of epistemic injustice manifest harms and patterns of practices and abuses (local *de facto* hinges), such as: epistemic positioning (bounding, domaining, non-attribution), epistemic appropriation (in IP law this is called pitching or idea theft), racial profiling, harbouring prejudices, biases, testimonial/legal quieting (by expectation, by doctrine), silencing, insincerity, suppressing, popular opinion, "tunnel vision" thinking, epistemic oppression and violence, objectification, epistemic redlining, epistemic exploitation, epistemic alienation, epistemicide, wilful hermeneutical ignorance, informed ignorance, testimonial/legal smothering (by doctrine, by expectation), othering, mansplaining, misgendering, epistemic bubble, epistemic corruption, denialism, systemic disbelief, lookism (halo effect), cat-calling, street-harassment, intellectual arrogance, obfuscation, disenfranchised grief, epistemic internal exclusion.

The theory of epistemic (in)justice relates to the study of the standard of fact-finding practices with legal significance. It is essential to "point out various forms of epistemic injustice (unfair argumentative advantage) resulting from legal or practical «privileging» of certain types of evidence (including statistical and probabilistic evidence), adopted rules of burden of proof distribution, presumptions, etc." (Dyrda 2021, 31). Legislative and judicial decisions shall unveil and examine nuanced justice implications of the subject of the case. In this context, the hermeneutical therapy focuses not only on identifying the communicative pitfalls or pathologies to which the law is exposed, but also on mechanisms for changing the "aspects of seeing" in the context of detecting misjudgments of the credibility of a testimony as well as the causes of the miscarriage of justice. The change is fluid. It concerns the implicit understanding of certain issues and opinions on public matters, the recognition of and support for specific problems, solutions, programmes, as well as a more personal shift in perceiving one's own identity or individual and group interests (cf. Ufel 2023, 319). Yet, "there may only be discursively constructed «truth» and «fakeness» rather than objective ones" (Ferreira 2022, 326).

5. LEGAL IMAGINATION AS AN OPERATIVE CATEGORY OF THE EPISTEMIC (IN)JUSTICE THEORY, OR ABOUT THE PERFORMANCE OF LAW

An essential aspect of the epistemic (in)justice theory is the practice of dialogue between hearers and speakers. The legal professional plays an actively accompanying role in relation to the knower (cf. Walker 2020, 25). Dialogue is based on an active process of transitioning from one's own position to the perspective of someone else – the ability to see oneself through the eyes of others, referred to in psychology as decentration (cf. Koczanowicz 2020, 46). The latter is linked to resilience.[22] Deliberative contexts in the hermeneutic approach are polyphonic. Words are powerful instruments for understanding the world. Hermeneutically marginalised individuals can enrich the "public lexicon" (language games) with new meanings of words that are essential for understanding the standards of a particular social normativity (e.g. the rules of an oppressed group concerning their relationship to specific cultural heritage). Words are dialogic and performative in character, because they emphasise the multitude of interpretative positions, which create a context of communication

[22] Resilience is an ability to flexibly and agilely respond to unforeseen circumstances and adapt to constantly changing conditions (e.g. digital reality and its non-linear narratives). One should bear in mind that resilience can turn into epistemic injustice when the frame narrative surrounding epistemic injustice expects a marginalised knower and a social worker to have internal motivation to cope with prejudices without emphasising the crucial role of systemic change in addressing this kind of injustice. This problem is investigated by Renada M. Goldberg.

(cf. Medina 2017, 209, 218; Ufel 2023). The court reconstructs the factual state of the case based on testimonies led by particular experiences or the language of the oppressed. It is possible to expand a limited (partial) perspective of understanding lived experiences for accurate truth-seeking and comprehensive evaluation of evidence.

Decentration (distinguished from decentralisation) may be perceived as an aspect of legal imagination in the perspective of creating a potential path for change in institutions. Imaginative thinking interacts with conceptual thinking and encompasses multiple dimensions (cognitive, perceptual, affective). Imagination is a mental tool subject to the control of will, allowing the development of alternative associative patterns provided by metaphors and other hermeneutical resources or mechanisms of debating law that underpin cognition. Its function involves envisioning (encoding meaning), awareness, and the juxtaposition of epistemic (cognitive, noetic) experiences or emotions (feelings) in specific circumstances, including oppressive social contexts (e.g. racism, sexism, classism)[23] (cf. Sousa 2007, 139–161).[24] Affective factors in communicative practices may distort facts related to a person's social identity (Burlando-Salazar 2023, 1254). Facts may also be overshadowed by improper assessments of a witness' credibility. Imagination is resolute in character because, it helps reveal tensions in this area.[25] It allows the reconfiguration of legal language games by changing the boundaries of figurative language to include new concepts which describe forms of epistemic (in)justice that are not entrenched in language (cf. Páez, Matida 2023, 13).

The category of legal imagination has been applied since the 1970s within the law and literature movement and is the subject of analyses in the jurisprudence of embodied mind. The latter has been developed, among other influences, under the thought of Maurice Merleau-Ponty (the so-called philosophy of attention). Concrete concepts of legal imagination are presented in areas such as legal theory (Amalia Amaya, Maksymilian Del Mar), constitutional law (Michael W. Dowdle, Zoran Oklopcic, Alexander Somek), international law (Martti Koskenniemi, Gerry

[23] One should bear in mind, that academic philosophy is still largely dominated by non-disadvantaged persons with middle- and upper-class backgrounds, and classism is an issue which can be overlooked by the proponents of epistemic (in)justice possibly due to their own social standpoint (Spiegel 2022, 76).

[24] In cognitive sciences, epistemic emotions include phenomena such as the tip-of-the-tongue phenomenon, melancholy, accuracy, curiosity, wonder, surprise, doubt, disorientation, (un)certainty. The social dimension of these emotions is expressed in the sense that they constitute a set of meaning rules guiding epistemic actions understood as acts of the deliberative exploration of the social environment to extract or discover important information.

[25] The resolute approach (represented, e.g., by Cora Diamond and James F. Conant) refers to proposition 6.54 of the *Tractatus* (Wittgenstein 2000b, 83) and the following statements: "[t]he limits of my language mean the limits of my world"; "[w]hereof one cannot speak, thereof one must be silent" (Wittgenstein 2000b, 64, 83). Imagination is a cognitive disposition that makes it possible to challenge the assumption that language is the central point of every game activity.

Simpson), IT law, and legal tech (Leila Brännström, Markus Gunneflo, Gregor Noll, Amin Parsa).[26]

A common point in various theoretical approaches to legal imagination is the close connection between the state of potentiality (unexpected interpretative possibility) and empiricism. Counterfactual thinking is the beginning of innovative actions. Imagination is an element of the mind that supports legal reasoning, responsible for mental simulations, "playing" images, and embodied experiences (e.g. the tone and rhythm of speech, body language) (cf. Brożek 2018, 77–128). This aspect of "playing" is called theatrical and brings legal language games closer to performing arts. The performative power of language lies in creating a reality that had not existed before. Each legal performance is unique and unrepeatable. Artistry (the performance of law) is a kind of therapy that aids the balance between the freedom of interpretation (expression) and its cognitive or affective limitations in the context of breaking the linguistic boundary of legal interpretation. Legal practice is based on reflex and thoughtfulness, while the distinguishing features of artistic craftsmanship, artistic work methodology, and theatrical operatic methods are situational improvisation, cognitive empathy for alternative "aspects of seeing" the world, and embodied mindfulness (cf. Leiboff 2015, 86).[27] Senses are socially-constituted through action and if it meets with social appreciation, a performative identity and legitimacy is created (Skuczyński 2016, 161). In this context, the

[26] The law, which evolved in the analogue era, struggles to keep up with the development of new technologies and forms of knowledge accumulation in this field. Legal imagination helps analyse knowledge-building practices (e.g. automated data processing, profiling aimed at constructing virtual legal actors' or Internet users' identities, computer-based implicit-association test (IAT)), involving entities other than humans (e.g. artificial intelligence). The result of these practices can be informational injustice or algorithmic discrimination associated, among other things, with epistemic biases (e.g. racial ones) embedded in the source codes of software that processes biometric data (cf. Hoven 2021, 1–12). Scholars such as Jasmine B. Gonzales Rose, Stephanie K. Glaberson, Nicola Lacey, Anne E. Ralph, and Jennifer Lackey draw attention to the aspect of racial biases in evidence law, rules, and doctrines (e.g. the doctrine of qualified immunity). The aforementioned issues shall be continuously monitored by the President of the Office for Personal Data Protection [Pol. Prezes Urzędu Ochrony Danych Osobowych], taking into account the analytical categories of the theory of epistemic injustice in relation to the "unique institutional knowledge" of this public body, on which all its employees rely on and which guarantees the possession of specialised expertise.

[27] For example, an element of a judge's embodied mindfulness is highlighted in the film *Courted* [Fr. *L'hermine*], directed by Christian Vincent, premiered on 6th September, 2015. The performative method makes it possible to question the "hegemonic" dimension of discourses, including legal sciences and legal ethics discourses, which adopt limited "tunnel vision" of "truth". Various aspects of the performativity of law, judicial decision-making, constitution-making processes, and role-playing game are drawn, *inter alia*, by Filippo Annunziata, Jack M. Balkin, Giorgio Fabio Colombo, Jeanne Gaakeer, Randy Gordon, Ewa Łętowska, Sean Mulcahy, Austin Sarat, Paweł Skuczyński, Julie Stone Peters, Nicole Rogers, and Martha Merrill Umphrey (cf. Annunziata, Colombo 2018; Gaakeer 2024, 340–354; Gordon 2023; Levinson, Balkin 1991, 1597–1658; Łętowska 2005, 3–7; Mulcahy 2022, 165–182; Peters 2022; Rogers 2008, 429–443; Sarat, Douglas, Umphrey 2018; Skuczyński 2016, 159–162).

perspicuous representation of meanings is crucial. One can view the courtroom as a real-world interpersonal deliberative setting and the lawyer as an imaginator who recentres the marginalised (sidelined) perspective by resolutely re-picturing the social imaginary of vulnerable traits (cf. Muradova 2021, 652). The social imaginary is a symbolic "repository of images and scripts that become collectively shared", which "provides the representational background against which people tend to share their thoughts and listen each other in a culture" (Medina 2011, 16, 33). The theory of epistemic (in)justice helps better understand the needs and expectations of members of oppressed groups, the third party, or non-academic co-researchers, who may provide informations and crucial evidence for particular cases or issues. Their testimonies may "co-judge" the decision and inform legal terms (cf. Gaakeer 2024, 348). Imagination implies the studiousness of audience's experience, human problems, and affairs. Drawing inspiration from Alain Badiou's thought, it can be said that every case or testimony is an "event."

A legal professional can reduce forms of epistemic injustice (e.g. in the context of procedural power imbalance based on informational advantage of the stronger party to the contract) by "healing" reasoning patterns. Imagination is stimulated by epistemic anxiety. The latter is an emotion that responds to epistemic risk – the risk of over-interpretation, belief in cognitive error (e.g. the false consensus effect), and misunderstanding or drawing conclusions about a knower, e.g. a mythomaniac,[28] a person with multiple personality disorder, a survivor-perpetrator of aggressive suicide, a murderer, and a victim of a domineering partner who endured prolonged domestic violence (cf. Fricker 2013, 1329–1330).[29] Imagination allows the introduction of a dose of humanistic spontaneity into law. The work of imagination is an element of multi-voiced therapeutic

[28] In this case, the reduction of the credibility of the testimony is justified (cf. Bublitz 2023, 5).

[29] The criteria of epistemic (in)injustice are of significant importance in criminal cases concerning homicides committed in the heat of passion, known as crimes of passion or provocation (the defence of provocation). They can serve to raise the standard (average level of real legal protection) established in the context of Article 148 § 4 of the Act of June 6, 1997 – Criminal Code [Pol. Kodeks karny] (Journal of Laws, 2024, item 17). When analysing the concept of domestic violence, including coercive control or reasons why a person experiencing domestic violence under art. 2 section 1 point 2 letter a, e or g of the Act of July 29, 2005 on Counteracting Domestic Violence [Pol. Ustawa o przeciwdziałaniu przemocy domowej] (Journal of Laws, 2024, item 424) did not leave her or his cohabiting partner (abuser), also in the Living Apart Together relationship model, and committed counter-violence (or exceeding the limits of self-defence), it is necessary to take into account a whole range of factual and contextual factors (e.g. (in)appropriate collective understanding of the victim/perpetrator's experiences, role or perspective reversal). In such cases, the key question is: who or what is considered a casualty in the first place? (cf. Gutiérrez 2024, 216). See the case of Sally Challen described by Emilie van den Hoven (2021, 5–7, 9, 11). Illustrative examples regarding the relationship between judicial truth and prejudices that may dominate the interpretation of law in this type of cases is provided by legal cinematography (e.g. the film directed by Justine Triet entitled *Anatomy of a Fall* [Fr. *Anatomie d'une chute*], premiered on 21st May, 2023, at the 76th International Cannes Film Festival (France)).

mediation (experience-based therapy) – a legal-practice methodology focused on situationally-adequate solutions. Its essence lies in reducing epistemic pressure through a dialogic analysis of linguistic misunderstandings or dogmatic nonsenses at the level of open conceptual structures and deep grammar (the description of ways in which words are used in different contexts). Social reality is in flux and too variable to present universal normative patterns in this area. Diagnosing the causes of perplexities or linguistic dilemmas in legal language games requires the use of abduction, techniques of "design jusitce",[30] question, iterative and lateral thinking inducing situational changes in the "aspect of seeing" a legal issue.

In the light of the concept of performative law, imagination supports trans-conceptual communication[31] in accordance with the conception of wide objectivity of knowledge, which assumes that the world is accessible to the mind in a way mediated by concepts. This approach can help us „move beyond the potentially stereotypical thinking about the modes of communication employed by marginalised groups" (Schmidt 2024, 6). Human experiences are situated in a specific language game, influencing which features of the world and meanings of words they consider essential. The therapeutic and resolute use of legal imagination supports the transformation of "aspects of seeing" (conceptual change) through hearing, questioning, sober reassessment, and replacing previous interpretations with new ones. The central problem of any legal language game is the performance of law. Language may be a source of epistemic injustice. Legal imagination transcends the boundaries of knowledge and it may be bound by dogma and jeopardise epistemic justice through forms of language, so it is necessary to use this epistemic tool carefully and through the prism of hermeneutic therapy.

6. EPISTEMIC (IN)JUSTICE – APPLICATIVE LEGAL INSTITUTIONS

6.1. Hermeneutic (in)justice and testimonial (in)justice in the legal cognitive process – crucial areas and empirical examples

The theory of epistemic (in)justice can be applied as a legal tool in legal practice. By applying the therapeutic approach, I will present crucial legal institutions – hermeneutic "hotspots" – within which both forms of the theory in question find application.

[30] According to Sasha Constanza-Chock, it is an approach to legal design that is led by marginalised communities and that aims explicitly to challenge, rather than reproduce, structural inequalities in order to ensure societal "feedback" in the way that community members are actually included in meaningful ways (Constanza-Chock 2020; Glaberson 2024, 454–455).

[31] In line with K. Dotson, I adopt the stance that trans-conceptual communication is an ability to engage in linguistic interactions across social boundaries and to pay attention to nonstandard uses of language that arise in practice.

The theory of hermeneutic (in)justice pertains to the failure to name and consider a specific individualised experience socially relevant, thus applying and perpetuating detrimental conceptual categories in language. Consequently, pursuing or questioning something that cannot be named is not possible. The case of Carmita Wood, who contributed to the formulation of the concept of sexual harassment and its inclusion in legal language in the 1980s, demonstrates that epistemic material possessed by a marginalised rights holder can play a pioneering role in creating meanings (cf. Fricker 2007, 149–162).[32] Hermeneutic deliberation transforms constitutional case-law games that pave interpretative paths in law and can be enriched by the assumptions of the theory in question.

The theory of epistemic (in)justice has practical implications for exercising the power of constitutional review. The reference point for analyses in this area is the principle of equality. It concretises epistemic justice concerning the examination of the identity of similar subjects and ensures advocacy organisations representing marginalised and minoritised groups the ability to supplement hermeneutical resources that contribute to the collective understanding of the experiences of these groups. Polish constitutional case-law is not consistent in the practice of interpreting the principle of the equality in law. The cause of this methodological inconsistency is the Constitutional Court's [Pol. Trybunał Konstytucyjny] reliance on various theoretical concepts and the application of different conceptual frameworks that refer to interpretative standards shaped against the background of pre-constitutional, Strasbourg, or Luxembourg case-law (Ziółkowski 2015, 100). Furthermore, the assumption is made about the non-autonomous constitutional nature of the right to equal treatment (Ziółkowski 2015, 104). The constitutional principle of equality is a second-order right (meta-right). It is a construction principle referring to the application of other constitutional norms and takes the form of an interpretive rule (Ziółkowski 2015, 103). According to established case-law, when assessing whether a violation of the principle of equality expressed in Article 32 of Constitution of the Republic of Poland has occurred, the Constitutional Court applies the equality test (cf. judgment of the Constitutional Court of March 18, 2014 (SK 53/12, OTK-A 2014/3, item 32)). This test consists of three elements: 1) assessing the similarity of the subjects compared (the obligation to treat similar subjects equally, the prohibition of treating similar subjects differently); 2) identifying the criterion of differentiation; 3) assessing the constitutional permissibility of differentiation according to the requirements of relevance, proportionality, and axiological adequacy (Ziółkowski 2015, 105).

From the perspective of both constitutional beneficiaries of rights and the methodology of the constitutional court, it is justified to expand the equality test to criteria related to the equal treatment of similar subjects from the perspective

[32] Another example in this regard is the case of Virginia Prince, who in 1969 introduced the adjective "transgender" into public discourse.

of epistemically-sensitive characteristics. Firstly, when assessing the similarity of subjects based on a common relevant feature, the category of difference as an epistemic counterpoint must be taken into account. The relevant feature is a property of epistemically similar subjects. A sensitive feature is its synonym, which emphasises what is different, separate, and individual in the structure (profile) of a marginalised subject of constitutional rights and freedoms (e.g. a non-citizen, disenfranchised individual). Differences may be analysed through the prism of voices briefs or legislative testimonies, current social knowledge resulting from the exchange of epistemic experiences, and the mutual overlap of their interactions (cf. Ralph 2024, 1374). Secondly, when examining the criterion of differentiation, the social experiences of individuals with intersectional identities should be taken into account. Thirdly, when evaluating the proportionality of differentiation within economic, social, and cultural rights related to knowledge (e.g. the right to be believed or to found to be persuasive, sexual education, information, legal counselling), it is necessary to analyse whether the consequence of introducing a specific barrier to access to knowledge will not limit the personal rights (e.g. reproductive or sexual rights) of weaker individuals. This limitation may exacerbate bias and prevent the articulation and naming of experiences and their inclusion in a collective interpretation base. Social data in this area may not reach constitutional hearers. A quantitative analysis of the vocabulary used in justifications of the Constitutional Court's judgments (previous judgmental practice) does not provide a complete picture of hermeneutic (in)justice: and may co-generate epistemic paradoxes of self-reference (e.g. the knower paradox). The weakness of such an approach in the light of the results of empirical legal research is highlighted by Tomasz Stawecki and Jan Winczorek (cf. Stawecki, Winczorek 2015, 528). It is prudent to pay attention to the following issues: forms of representing the knowledge of communities susceptible to marginalisation in protective regulations regarding weaker people and advocacy activities and epistemic rights, the essence of which are the knowledge claims of similar entities to obtain the level of credibility or veracity they deserve and not distorted by prejudice. The source of prejudice and other "grammatical" epistemic errors may be the application of a cognitive and interpretive scheme inconsistent with the gradable standard of epistemic rationality, i.a. inappropriate use of language in a given context. This standard is based on very weak deontic power.

In turn, the theory of testimonial (in)justice finds application in interpersonal deliberation between professional and non-professional actors and actresses in the legal order (e.g. during public hearing in law-making process, the implementation of the right to be heard). Testimonial injustice may be intentional or unintentional (negligent). Assuming that procedural law serves as an epistemic tool for realising the principle of equal treatment, testimonial justice is an aspect of procedural justice (cf. Bublitz 2023, 1–28). Law is a "narrative" system that policies what testimonies can be developed (cf. Ralph 2024, 1336, 1340). In outsider

jurisprudence, it is noticed that the "legibility of legal claims" of minorities requires simplifying their complex knowledge and translating it into arguments and claims that are recognised in legal language.[33] They are faced with the need to categorise their ineffable notions and experiences according to the logic imposed by legal terminology and legislative practice of using linguistic expressions (terms) in their ordinary and generally accepted meaning. This is an expression of "social suffering" generated by legal institutions.

An example of a factor triggering this type of suffering had previously been mentioned in epistemic exploitation,[34] which is a form of structural inequality. This phenomenon relates to the epistemic division of labour and may manifest particularly in the context of legal cases involving human rights issues, including the right to respect with regard to private and family life (Article 8 of the European Convention on Human Rights) in the context of the adoption procedure (cf. ECtHR 60083/19; Corso 2023, 109) and sexual violence (cf. Picinali 2024, 217), the right to fair trial (Article 6 of the European Convention on Human Rights) in the context of wrongful convictions and the violation of the presumption of innocence (cf. Bublitz 2023, 21), the prohibition of direct or indirect discrimination (based on gender identity, race, ethnic origin, nationality, religion, belief, worldview, disability, age, sexual orientation, or any other legally protected characteristic),[35] strategic climate

[33] This is particularly evident in proceedings regarding the determination (correction) of registered gender (cf. Jain, Rhoten 2020, 31). Transgender litigants „must narrow their lived experiences to become *citizens*" (Jain, Rhoten 2020, 7). The architecture of the courtroom and the provisions of the Polish law (e.g. the requirement for the plaintiff to sue their parents) do not create a friendly atmosphere for the parties. Similar conclusions are drawn by, *inter alia*, B. Lee Aultman regarding the judicial system in the United States in the context of legal proceedings related to workplace discrimination against transgender individuals.

[34] Epistemic exploitation refers to a situation in which the law imposes unequal cognitive burdens on marginalised speakers. Hearers, in a way, compel speakers to counteract the formulation of prejudiced judgements by undertaking additional work ("mental load"), providing explanations and knowledge about the nature of oppression faced by marginalised individuals (cf. Berenstain 2016, 569–590). Gaslighting is an example of epistemic exploitation. It constitutes a form of violence based on psychological manipulation (e.g. undermining competence, questioning credibility). This phenomenon can be encountered in areas such as workplace relationships, family and care law, and criminal law (cf. Romańczuk-Grącka 2021, 411–423). Another vivid example is when courts, when deciding on the divorce of a marriage with minor children, establish the residence of the minor with his or her mother. It is presumed that the mother possesses better parenting (caregiving, upbringing) skills and a stronger emotional bond with the child than the father. Therefore, the burden is assumed to be on the father to demonstrate higher abilities in this regard.

[35] This issue is regulated, among others, by: Article 32 and Article 33 of the Constitution of the Republic of Poland, Article 113, Chapter IIa of Section I, and Article 94^3 § 2 of the Act of June 26, 1974 – Labour Code [Pol. Kodeks pracy] (Journal of Laws, 2023, item 1465), Article 23a of the Act of August 27, 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities [Pol. Ustawa o rehabilitacji zawodowej i społecznej oraz o zatrudnianiu osób niepełnosprawnych] (Journal of Laws, 2024, item 17), Article 61 § 1 point 5 and Article 65 § 2 of the Act of November 17, 1964 – Code of Civil Procedure [Pol. Kodeks postępowania cywilnego] (Journal

litigation (cf. Gutiérrez 2024, 208–226),[36] international humanitarian law,[37] as well as tort law (e.g. civil cases concerning non-pecuniary damages) and criminal law (such as legal responsibility of minors, sexual assault trials,[38] property crimes, stalking, hate speech – defamation or insult of another person, including through mass media, based on national, ethnic, racial, religious affiliation, or lack thereof).

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of Laws, 2024, item 1568), and the Act of December 2, 2010 on the Implementation of Certain EU Regulations on Equal Treatment [Pol. Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania] (Journal of Laws, 2024, item 1175). Incidentally, the theory of epistemic (in)justice should become an integral tool in the work of the Commissioner for Human Rights [Pol. Rzecznik Praw Obywatelskich], Joint Commission of the Government and National and Ethnic Minorities [Pol. Komisja Wspólna Rządu i Mniejszości Narodowych i Etnicznych], and other equality bodies or grass-root organisations in the context of strengthening the effectiveness of the equality law.

[36] Natalia Urzola Gutiérrez argues that knowledge production regarding climate action measures or solutions in Latin America (LATAM) seriously lacks meaningful participation of non-binary persons and children. LATAM has no truly gender-conscious approach to climate litigation besides relying on material impacts that the oppressed groups suffer and treating them as knowledge users or concentrating on the procedural positions they formulate (Gutiérrez 2024, 212, 217). This is confirmed by the empirical analysis of the following cases: *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (6 February 2020), (ser. C) No. 400, Inter American Court of Human Rights, *Future Generations v. Ministry of the Environment and Others* (2018), STC4360–2018, Supreme Court of Colombia, and *Citizens v. Authorities for Environmental Damage to Mangroves* (2018), AR307/2016 Supreme Court of Justice of the Nation, Mexico (cf. Gutiérrez 2024, 210–226).

[37] The theory of epistemic (in)justice can be useful tool in the practice of international courts such as the European Court of Human Rights and International Criminal Court (ICC). For example, the trial of Dominic Ongwen at the ICC in 2021 raises the following question: was he a perpetrator only or merely a victim? (Gaakeer 2024, 352–354). On 15th December, 2022, D. Ongwen, one of the leaders of the Lord's Resistance Army (LRA), a rebellion led by Joseph Kony in northern Uganda from 1986 to 2007, was convicted by the ICC to 25 years in prison for war crimes (e.g. murder, torture, enslavement, forced marriage). He faced 70 charges and was convicted on 61 counts. At the age of 10, D. Ongwen had been abducted and conscripted into the LRA, later becoming one of its ruthless leaders. Ongwen's knowledge has been shaped by the criminal system, so he had an overdeveloped sense of "justice". His traumatic background spared him from a life sentence. The theory of epistemic (in)justice can play a crucial role in assessing the circumstances of offenders or victims who belong to marginalised communities. This is a significant social benefit associated with the proposed "therapy" of law. Hermeneutic therapy sensitises us to the problem of issuing (overly) definitive judgements about the actions of controversial knowers, which, however, is not equivalent to justifying these actions.

[38] For example, in the 1989 Central Park Jogger/Five Case, law enforcement officers' identity prejudices tied to racist stereotypes about men of colour (Black, Brown/Latino) suspected of raping a white woman led to their testimonies being considered untrustworthy and to unjust conviction for a crime that these men did not commit. Cf. also the 1991 case of Anita Hill (Black attorney and legal scholar) and Clarence Thomas (Black Supreme Court nominee, Hill's previous boss) concerning workplace sexual harassment (cf. Crary 2018, 51). Hill's testimony revealed the need for deeper systemic changes in thinking about gender violence, due process, and fair procedures through the prism of (in)justice related to knowledge.

According to the Supreme Court (Pol. Sąd Najwyższy), every judge has his or her own individual set of criteria that they use to assess the credibility of testimony. It cannot be ruled out that the knowledge of the criteria used in practice is tacit and that while specific indications serve as the basis for judgments, they are not necessarily conscious. It is suggested that judges are likely not fully aware of the factors that significantly influence their assessment of the evidentiary value of testimony. The court bases this assessment, *inter alia*, on the direct impression made by the witness, his or her behaviour, and the manner of giving testimony. The judicial discretion in the evaluation of evidence cannot amount to arbitrariness in rejecting or deeming evidence credible. The court should demonstrate that the decision is based on rational grounds and that this assessment aligns with the directives contained in Article 7 of the Code of Criminal Procedure,[39] meaning it was made with the consideration of the principles of sound reasoning, as well as the indications of knowledge and life experience (cf. decision of the Supreme Court (Sąd Najwyższy) of October 20, 2021 (II KK 467/21, publ. https://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20KK%20467–21.pdf). The trial is an epistemic enterprise (Picinali 2024, 229). An important criterion for the legitimacy of the judicial decisions is the fair distribution of credibility in compliance with the principle of the benefit of the doubt and proper identification of the disconnect between public experience and legal knowledge (cf. Ralph 2024, 1371–1372; Ferreira 2022, 323).

In my opinion, rational grounds of judicial decision are rooted in a wider conception of objectivity of knowledge, which means that they must encompass some subject-dependent qualities of the world elicited by knowers that possess them. Law is a concrete, personalised system of rules where experiences of vulnerable knowers are salient and really matter. Courts should exercise particular vigilance and critical awareness of phenomenal forms of epistemic injustice and caution in evaluating vulnerable witness testimony. Judges should bring their own mind to the law, apply the analytical tool of hermeneutic therapy, performatively enact it into practice in cases where the lack of credibility may be linked to some form of discrimination and therefore to the stereotypes held by the hearer regarding gender, ethnicity, race, etc., and in this context, define the limits of judicial discretion in evaluating evidence as understood under, e.g., Article 233 of the Code of Civil Procedure (cf. Corso 2023, 108). It can also help support the verification of motivated reasoning (hinges) underlying the hearer's attitude towards the knower in the context of the problem of the fallibility of eyewitness identification.

Representatives of ethnic minorities (e.g. Romani people) are often characterised by low legal awareness and do not use legal language in a manner

[39] The Act of June 6, 1997 – Code of Criminal Procedure [Pol. Kodeks postępowania karnego] (Journal of Laws, 2024, item 37).

satisfactory to the court (cf. judgment of the Regional Court in Nowy Sącz [Pol. Sąd Okręgowy w Nowym Sączu] of May 14, 2019 (III Ca 450/18, publ. https://orzeczenia.nowysacz.so.gov.pl/)).[40] For the majority and local authorities, they are "others" who do not participate in local life because of cultural beliefs and credibility deficits due to their level of language and discursive competencies (inequality in deliberative capacities) (cf. Sorial 2022, 218–219). The theory of epistemic injustice can serve as a tool or axe for evaluating the standards of implementing the prohibition of discrimination based on membership in a minority group, as referred to in Article 6 of the Act of January 6, 2005 on National and Ethnic Minorities and on the Regional Language [Pol. Ustawa o mniejszościach narodowych i etnicznych oraz o języku regionalnym] (Journal of Laws of 2017, item 823). It emphasises that the hermeneutically-disadvantaged persons often see and hear what the dominant groups cannot (cf. Glaberson 2024, 454).

In the recognition of such cases, important considerations include the use of inclusive and plain language, juxtaposing legally-relevant facts with an individual threshold of sensitivity and the degree of experienced distress. From the perspective of the victim, providing evidence or giving testimony in cases related to anti-discrimination law, bullying, crimes against sexual freedom or morality, and crimes against family and care may be perceived as a form of epistemic exploitation, leading to secondary victimisation (the necessity to relive a specific trauma).[41] However, from the perspective of judges, it represents the

[40] The judgment of the first-instance court in the cited case reveals epistemic dependence related to structural inequality resulting from the communicative power imbalance in legal performance between the judge and the knowers. As a consequence, the minority group has been denied the opportunity to contribute to collective hermeneutical resources and has become subjected to a public discourse that was primarily formulated by the majority (cf. Sorial 2022, 220).

[41] Epistemic exploitation can also occur in cases related to labour law, family law, fiduciary and care law, as well as in administrative cases concerning the certification or refusal of the certification of citizenship and the transcription of foreign civil status acts (e.g. birth certificates of children whose parents are in same-sex relationships). For instance, in the resolution of the Supreme Administrative Court [Pol. Naczelny Sąd Administracyjny] of December 2, 2019 (II OPS 1/19, published by the Central Database of Administrative Court Judgments (CBOSA), https://orzeczenia.nsa.gov.pl/cbo/query), it was indicated that entering the names of same-sex parents in a child's birth certificate contradicts the principles of the Polish legal order. This resolution highlights the tendency of administrative courts to base legal (interpretative) assessments and credibility appraisals on strictly normative criteria (the principle of legality), detached from the examination of the factual and intellectual experiences of individuals and social groups being assessed. Establishing a clear meaning of a provision or constructing a legal norm in isolation from the factual context is a mode of thinking that finds reflection in public law in general. This specific judgment resolved the legal issue in an operative dimension but not in the sociocultural aspect. Essentially, it perpetuates a state of epistemic marginalisation of children of LGBTQIA+ parents. There is no doubt that "rainbow" families do not enjoy the special care and protection envisaged in Article 18 of the Constitution of the Republic of Poland. Nevertheless, this provision, as stated in connection with Articles 30, 33 section one, and 47 of the Constitution of the Republic of Poland, does not exclude statutory regulation of the status of partnership relationships forming these families (cf. ECtHR

implementation of specific principles, duties, and procedural actions.[42] In turn, legislators may consider applying the discussed theory when creating legal constructs (e.g. legal definitions) and legislative solutions in the aforementioned areas of law.[43]

The theory of testimonial (in)justice emphasises strengthening the role of situational and contextual factors in evidence assessment and examining the potential contribution to shared interpretive resources by persons with epistemically-sensitive characteristics. Their experiences can significantly influence the evidentiary standard.[44] For example, digital evidence provides a context for understanding why parties or participants in legal proceedings

11454/17). The administrative court, as a rule, does not make factual determinations but only assesses whether findings of the facts made by public administration authorities in a specific case are correct. Therefore, it often focuses on examining purely formal compliance with law and, in a way, avoids reflecting on the broader societal context (policies) of the decision being made.

[42] In the specified exemplary categories of cases, courts should consider *in situ* axiological arguments. Their content revolves around the significance shaped based on an individual's sense of identity, which is inseparably linked to their epistemic positioning determined by the societal and cultural context. The theory in question can serve as a means of interpreting the rights of marginalised individuals shaped by institutions not regulated by the Polish law (e.g. surrogacy agreements).

[43] For example, the applicative value of the theory of epistemic injustice can be used to rethink the shape of the institution of the family environmental interview, as referred to in Article 107 of the Act of March 12, 2004 item 1283 on Social Assistance [Pol. Ustawa o pomocy społecznej] (Journal of Laws of 2024, item 1283). Directionally, the interview questionnaire should include a section on the sociocultural aspects of the lives of disfavoured knowers (e.g. ethnic minorities) so that attention can be drawn to how the social problem is experienced by them. They can contribute information about their lived experience that should be relevant to policy decisions.

[44] For example, in the assessment of police interventions involving marginalised individuals, recordings from city cameras and personal police body cameras (attached to officers' uniforms) play a significant evidentiary role in wrongful death lawsuits. An example is the 2021 case of the assassination of George Floyd, previously punished Black American man, by Derek Chauvin, white police officer. On 25th May, 2020, G. Floyd allegedly used a fake $20 bill to pay for cigarettes (Gaakeer 2024, 348). D. Chauvin, a police officer summoned to the scene of the crime, cuffed G. Floyd and then pressed his neck with his knee for a few minutes, preventing G. Floyd from breathing, which eventually led to his death. On 25th June, 2021, a Minneapolis court announced that D. Chauvin had been sentenced to 270 months in prison. The case was heard by a racially- and gender-diverse jury and intensified discussion on the standards of adjudication in cases of Black people who had lost their lives or had suffered permanent damage to their health due to police violence (cf. Gaakeer 2024, 350; Ralph 2024, 1319). In such cases, it is essential to consider the following factors: structural racism, prejudice and bias, systemic inequity, social conditions relating to knower's race, class, or positionality – the roles individuals may play in relation to the system (cf. Glaberson 2024, 422, 425*;* Harding 2020, 1–12). It is indicated that an anti-discrimination approach to racialised testimonial injustice is too narrow and should therefore be replaced by a critical race theory (criticalist) anti-subordination perspective (Gonzales Rose 2024, 178–179). Our unconscious cognitive biases (e.g. heteronormative assumptions, the framing effect: hindsight bias effect) should not obscure a comprehensive evaluation of the evidence. The hermeneutic therapy helps us situationally identify this issue in judicial deliberation.

may perceive facts differently (Sullivan 2017, 296–297). It is crucial to enhance the awareness of professional and lay judges regarding the assumptions they bring to interpretation (Sullivan 2017, 295). Higher-instance courts, tasked with examining the fairness of proceedings, should verify the evidentiary reasoning of lower-instance courts, taking into account the experiences and variable knowledge of the sensitive social group to which the party or participant in the proceedings belongs (cf. Picinali 2024, 1–35).

The theory of epistemic (in)justice can be applied to reflect on the case of Ms. Joanna from Kraków (Poland), which is pending before the Regional Court in Kraków [Pol. Sąd Okręgowy w Krakowie] (VI Ko 55/24). Ms. Joanna is seeking 100,000 PLN in compensation for wrongful detention. On 28th April, 2023, Ms. Joanna contacted a doctor (psychiatrist) after her health had deteriorated following the ingestion of an abortion pill. During her visit to the hospital, it turned out that the doctor had informed the police about the incident, thereby violating medical confidentiality. During the examination of the woman, four police officers violated Ms. Joanna's personal dignity, forcing her to undress, perform squats, and cough. The police also confiscated her mobile phone and laptop. After the entire incident, the patient was escorted to another hospital, where another police patrol was waiting for her. The Polish law does not prohibit women from performing abortions on their own. Ms. Joanna was not suspected of committing a crime and there was not even a prospect of charging her. Therefore, the police had no legal basis for their intervention and repressive behaviour, which was confirmed by the District Court for Kraków-Krowodrza in Kraków [Pol. Sąd Rejonowy dla Krakowa-Krowodrzy w Krakowie] in the decision of June 12, 2023 (II Kp 589/23/K).[45] The woman perceives the personal search as humiliating. Through such action by the police officers, Ms. Joanna was, *de facto*, punished for an act that, in the light of Article 152 of the Penal Code, cannot be attributed to her. Ms. Joanna argues that she had terminated her pregnancy almost two weeks before the police intervention. She did not report any side effects from taking the medication, she was not in any suicidal crisis, and only needed medical assistance, not intervention from police services.

This example should be treated not only as a contribution to the discussion about excesses in police interventions or the disproportionate use of competence as understood in human rights case law. From the perspective of the epistemic (in)justice theory, the police, in their search for evidence which they unjustifiably consider justified, essentially portray the affected woman as if she were actively involved in criminal assistance with abortion. These actions are compounded by media narratives that delve into the woman's past and expose her intimate details. The hermeneutic therapy of law involves the reconfiguration of judicial deliberation in a particular case through a change in the "aspect of seeing" facts,

[45] The decision has been shared on social media by Ms. Joanna's attorney.

mitigating circumstances, or issues. In such cases, judges and attorneys should analyse whether they are dealing with various forms of epistemic injustice phenomenon, as described in footnote 21.

In the new model of judicial governance reform as understood by Pablo Castillo-Ortiz, proposed by judicial associations, it is necessary to include the institution of a sensitive observer, i.e. a member of a disadvantaged community (e.g. the person whose social and personal knowledge is concerned), who adopts the wider concept of objectivity and could assist the judge or the legislator in reconstructing the standards of marginalised social normativity (e.g. climate adaptation policies). In this regard, a critical and careful selection of the sample is essential. Under these conditions, the importance of properly recognising the conditions of deliberation (e.g. the acknowledgement of the value of situated-knowledge, the nature of its subject, the scope of decision, differentiated and heterogenous characteristics of the audience, fundamental features of the creation and functioning of language) increases (cf. Ufel 2023, 300; Gutiérrez 2024, 223).

6.2. Case study – the prohibition of the discrimination of employees (the principle of equal treatment)

In accordance with current judicial decisions, workplace discrimination constitutes any case of unequal treatment that is not objectively justified, regardless of criteria such as gender, age, disability, race, religion, nationality, political beliefs, union membership, ethnic origin, faith, sexual orientation, employment on a fixed-term or indefinite basis, in full or part-time (cf. resolution of the Supreme Court [Pol. Sąd Najwyższy] of August 24, 2023 (III PZP 1/23, publ. http://www.sn.pl/). The prohibition of discrimination also applies to non-employment forms of work (cf. judgment of the European Court of Justice of January 12, 2023, J.K. v. TP S.A. (C-356/21, ECLI:EU:C:2023:9)). The catalogue of discrimination criteria (non-epistemic reasons for the weakening of the persuasive power of testimony from a weaker party) is open (cf. judgment of the Regional Court in Lublin [Pol. Sąd Okręgowy w Lublinie] of June 20, 2018 (VIII Pa 86/18, publ. https://orzeczenia.lublin.so.gov.pl/)). These criteria help determine whether there are grounds for applying the theory of epistemic (in)justice. The latter allows for a deeper understanding of discrimination, wrongful undermining an employee's role as a knower, and mobbing behaviours.[46]

[46] For example, such behaviours can include actions based on subjective (arbitrary) judgements by a direct supervisor (e.g. a head of a division), involving the obligation of only one department employee to provide a detailed daily report regardless of the reporting obligation that this employee, like other employees, must complete in the electronic work reporting system introduced by the employer. Such behaviour may be analysed in terms of undermining credibility and cause the employee (knower) to feel alienated and even suffer from health problems.

In the collective interpretation base, there are concepts such as ableism, ageism, and misogyny, but no vocabulary has been developed to capture the problem of discrimination based on criteria beyond the above-mentioned relevant features. A hypothetical case is that of an employee in a specific department of an organisational unit of a public authority and treated less favourably than other employees due to affiliation with the scientific (academic) community – a significant feature in the form of an academic degree or title. Epistemic injustice can be discussed when the social context of the language game indicates that a given significant feature is a source of structural prejudice. In the projected case, epistemic injustice is a dimension of discrimination that may involve the continuous assignment of duties outside the division to which the employee has been assigned under the employment contract. As a result, there is a real deterioration in the conditions of employment for the weaker person, who effectively becomes an interdivisional employee. In the evaluation by the superior (e.g. possessing a Master's degree in the same field as the employee), the objective reason justifying the constant and different from other employees of the parent division allocation of tasks from another division is the provision of the employment contract allowing the assignment of other tasks entrusted by the superior within the scope of the occupied position. Such general clauses are included in the employment contract or a document describing the individual duties of the employee to flexibly implement the employment relationship in the case of exceptional circumstances (e.g. longer absence of another employee) and should not be treated instrumentally.

From the perspective of the theory of epistemic (in)justice, the employer's reliance on the argument that a different way of assigning tasks is justified due to the significant (socially-important) feature of the employee in the form of an academic degree or title raises doubts when the practice context adopted by the employer, and the testimonies of other employees show that this is not a *condicio sine qua non* for performing these other tasks. The employee's objection to reprehensible practices may face repeated accusations of excessive inquisitiveness and emotional hypersensitivity as well as encounter gaslighting and moral harassment or mental mistreatment (abuse). The boss oppresses the employee by diminishing his or her self-confidence. Gaslighting and moral harassment often lead to mobbing. It causes unique moral and epistemic harms, because in a situation where it is not recognised it can act as a betrayal, undermining the speaker/victim's "moral trust" in the person or institution (e.g. coordinators/representatives for equal treatment in central, provincial, or local offices) to which they turned with their account (cf. Glaberson 2024, 423).

Employment relationship is a legal language game that generates various interpretative misunderstandings, linguistic dilemmas, and forms of epistemic injustice. Interference with the agency of the knower (employee) by the stronger party (supervisor) to obtain epistemic benefits (results of conceptual work)

without regard to the pro-employee judicial decisions, *de jure* hinges (the mechanism of deriving freedoms and rights of the employee from the dignity, the proportionality principle) may constitute discrimination against the weaker in law, and, consequently, cause testimonial injustice. However, employer prejudices are not necessarily related to discrimination and may be considered a separate category for examining epistemic injustice in labour law. Analytical and comparative subsuming of employee experiences under general judicial standards or computational algorithms based on the averaging (standardisation) of features and estimating the credibility of argumentation is an unreliable approach in terms of identifying epistemic errors. The examination of the ways of practical reasoning adopted by the parties to the employment relationship should be based on models of operative interpretation that take into account the factual circumstances accompanying the initiation of cooperation between the parties and the execution of the employment contract.

The above-described case does not constitute the factual circumstances of a specific court case, although it is based on real and authentic lived experiences. However, in the following case, the knower is denied the conceptual vocabulary to understand his or her own experience and may be harmed in his or her capacity as knower. Many labour law cases are not brought to court, because the law does not include the category of epistemic (in)justice as a separate ground for the employer's legal liability. The "therapy" of law based on the hermeneutic model of deliberation serves to build bridges between law and imagination by revealing or dawning many new aspects for understanding phenomena such as workplace policies (e.g. Diversity, Equity, and Inclusion (DEI) programmes),[47] mobbing, gaslighting, and professional burnout. It can also support research on the discrimination of vulnerable and/or marginalised knowers (e.g. neurodivergent intersex employee), and can be used as a criterion to assess whether the report of a knower (e.g. a vulnerable witness) is credible or unreliable. The processes of perspective-taking and collective reasoning may be biased, e.g. when a particular community or social group normalises the situation of those persons who lack the epistemic resources to name their experiences, perspectives, and feelings in their own words and are denied the possibility to develop these resources in the specified factual situation (cf. Muradova 2021, 659).

The epistemic (in)justice theory inspired by hermeneutic therapy enables the development of effective methods of acquiring knowledge from highly sensitive knowers and it is capable of situationally overcoming less or more deep-seated biases, the hermeneutic impoverishment, and overlapping systems of oppression

[47] It may turn out that, in practice, the DEI narrative achieves the opposite of its intended effect and paradoxically excludes certain individuals (e.g. men, linguistic minorities) from deliberation. Tokenistic half-hearted inclusion of the marginalised person or community in agenda-setting (pre--decisional processes) and decision-making spaces (e.g. diversity washing) is a way of reproducing epistemic dependence (cf. Gutiérrez 2024, 219).

in such a way that they do not constitute a concealed criterion for assessing the credibility of a knowing subject. This is a significant benefit of applying the theory of epistemic (in)justice from the point of view of the judicial interpretation and application of law. It may be expected that the legislation and interpretative performance of labour courts will tend towards including epistemic (in)justice as an integral element of the pro-employee model of the protection of human rights. The latter are performative acts that may begin to construct a new arrangement of meanings in social normativity. Ensuring the sustainability of legal decisions in such a way that they constitute a source of the transformation of social normativity involves formulating arguments from the perspective of the lived experiences of vulnerable knowers (e.g. plaintiffs) affected by the decision. In this way, legal policy coherence is achieved.

7. CONCLUSIONS

An epistemic injustice occurs when a hearer does not believe the words or experience of a knower because of multiple biases. Credibility is a comparative and contrastive quality (Medina 2011, 20). It is distributed inappropriately among deliberators due to prejudices and gaps in hermeneutical resources. In collective reasoning, some forms of epistemic injustice may go unrecognised and be normalised, regarded as legitimised. Hermeneutic therapy shows that the ways of knowing related to "aspects of seeing" (the evaluation of legislative and evidentiary facts) are inevitably linked to the challenge of abandoning the universalising elements present in the standard account of M. Fricker's theory in favour of examining the reconfiguration or transformation of knower's position, contribution, status, or standing in meaning-making and knowledge acquisition communicative practices. The novelty or genuine solution to the research problem I bring to the theory of epistemic (in)justice is the reconfiguration of its specific dogmatic (normative) assumptions from the perspective of "therapeutic" and "performative" deliberation based on a wider conception of objectivity and the exploration of directions, areas, and potential ways of its application in law, with particular attention to the specifics of the Polish law.

The theory of epistemic (in)justice is crucial for law, as it addresses the examination of uneven access to hermeneutic resources, enabling the articulation of nominal and interpretative knowledge that does not fit into normative legal categories. It can serve as a heuristic device (tool), which enriches legal means by providing a broader view of interpretative, situational, and contextual factors influencing various ways of perceiving the equality, reception, assessment, or interpretation of the same fact or event. A shortcoming affecting the theory in question is its dogmatic framework assuming the existence of metalinguistic games (universal reference points validating other games), and cognitive-affective

sensibility is considered a subjective (private) epistemic virtue serving to neutralise hermeneutic resources (cf. Ufel 2023, 20, 24, 165, 268). Transitioning to a critical linguistic register, it can be said that institutions, through their apparent neutrality expressed in various legal language games (e.g. movement law, disaster law), paradoxically may generate and reinforce systemic hierarchies and inequalities (cf. Rosario-Lebrón 2023).[48] In other words, institutions and their entrenched linguistic practices are an ideological tool that serves to (self)justify their existence and thus legitimises the causes of institutional crises resulting from the omission of the element of epistemic injustice in the processes of participation in the reconfiguration of social normativites.

In the light of the performative conception of law, philosophical therapy focuses on reflexively removing language difficulties in hermeneutic deliberation. It assumes that since language is social, the imaginative sensitivity of its users is an objective, non-neutral (situated but not partisan), and embodied habit of thought. This means moving away from establishing semantic criteria for using rules (conventions) of language to searching for a successful interpretation of these rules in the light of cultural norms and values as well as specific temporally lived experiences.[49] This approach is based on a wide, weak (ensuring societal coherence), and qualified (considering marginalised knowledges) concept of objectivity (cf. Rodak 2011, 6, 10; Kjaer 2022, 777). In the light of the Latin maxim *ex facto ius oritur*, law (artifact) arises from a fact (knowing-in-practice) mediated by acts of legal imagination. The latter serves the functions of reproducing, projecting, and organising experiences or affective reactions related to the insufficient representation of devaluated knowledges in law by incorporating or combining meanings into new sense-making constellations (cf. Lobo 2022, 20). Imagination aids the analysis of the correlation between deficits and surpluses of the credibility of speakers associated with implicit biases of fact-finders. A nuanced view of epistemic dependence as an ambivalent phenomenon is possible. This dependence arises from the insufficient cognitive engagement of hearers (e.g. judges, jury, legislators) in the perspective of a disadvantaged person or community (e.g. a man experiencing domestic violence, a homeless person, a Black sexual worker, a martial rape victim, a male victim of rape, a female prisoner, a victim of violent crime inside prison, a genderqueer person, a member of the Rohingya ethnic group or the Windrush generation). The performative task of lawyers is to analyse the risk of epistemic harm at the individual and institutional levels, and raise awareness of tokenistic assumptions and generalisations that may cause

[48] The theory of epistemic (in)justice may constitute an important contribution to reflection on the paradoxical nature of rules, which may be developed in other work.

[49] The fundamental problem on which the therapeutic approach focuses is the dilemma between normativity, objectivity, and the "hingeness" of law as a performative (i.e. cultural and political) phenomenon.

or perpetuate the disadvantageous situation of knowers. The theory of epistemic (in)justice takes into consideration the fact-interpretation distinction to better understand "aspects of seeing" in the context of deliberative standards (e.g. democratic or experimental digital innovations such as legislative forums and mini-publics). Lawyers (e.g. during *voir dire*) and expert witnesses should reflect on the question of how some of the key narratives upon which legal standards of proof and their social understanding rest have been formed, unfolded, validated, or excluded, and consider their implicit acceptance of "taken-for-granted" kinds of rules of evidence (cf. Sullivan 2017, 301).

The goal of implementing the proposed concepts is to change the outcomes in specific cases. However, the issue of epistemic (in)justice should be approached holistically rather than casuistically and must be based not on wishful thinking, but on thick historicity and sociality (cf. Páez, Matida 2023, 32; Medina 2011, 17; Carter, López 2024, 54). On the systemic level, structures are needed that would allow the subaltern to speak for themselves and lawyers in power to listen to the knowledge of the hermeneutically-disadvantaged without objectification, representational bias, or tokenistic inclusions (cf. Glaberson 2024, 455–456; Gutiérrez 2024, 219); Carter, López 2024, 36). The specific reconfigurations of legal language games or social normativities occurring in the processes of knowledge production by critically analysing legal language can initiate certain processes of change in the perspectives ("aspects of seeing") of hermeneutically-privileged participants in deliberations (cf. Ufel 2023, 320). Despite the short-term legitimacy of current power and the *status quo*, in the longer term, these changes can lead to lasting shifts in attitudes or the functioning of the existing and future institutions (cf. Ufel 2023, 320).

Many legal issues – such as procedural law (especially evidentiary procedures), anti-discrimination law, family law, criminal justice, forensic science, penology and penitentiary law (cf. Hanan 2020, 1185–1244), refugee law (cf. Ferreira 2022, 303–326), legal ethics (cf. Buralndo-Salazar 2023, 1282–1283), or the computational turn in law (cf. Hoven 2021) – are not commonly associated with the theory in question. It is advisable to further familiarise concepts within its scope and incorporate them into inferences or practical reasoning and socio-legal participatory research as well as the legal education process[50] in a way that reflects balancing legal decisions and becomes part of reflexive legislative and judging arts.

[50] The need to apply the theory of epistemic (in)justice and more precisely curricular injustice in legal education in the context of decolonisation of knowledge is emphasised i.a. by Swethaa S. Ballakrishnen, Sofia Balzaretti, Stephanie Deig, and Sarah B. Lawsky.

BIBLIOGRAPHY

Annunziata, Filippo. Giorgio Fabio Colombo. Eds. 2018. *Law and Opera*. Berlin: Springer.

Berenstain, Nora. 2016. "Epistemic Exploitation." *Ergo: An Open Access Journal of Philosophy* 3(22): 569–590. https://doi.org/10.3998/ergo.12405314.0003.022

Boncompagni, Anna. 2020. "Prejudice in Testimonial Justification: A Hinge Account." *Episteme* 1: 1–18. https://doi.org/10.1017/epi.2021.40

Boswell, John. 2022. "Narrative Analysis." In *Research Methods in Deliberative Democracy*. Edited by Selen A. Ercan, Hans Asenbaum, Nicole Curato, Ricardo F. Mendonça. 333–344. Oxford: Oxford University Press. https://doi.org/10.1093/oso/9780192848925.003.0023

Brożek, Bartosz. 2018. *Umysł prawniczy.* [The Legal Mind]. Kraków: Copernicus Center Press.

Bublitz, Jan Christoph. 2023. "When is Disbelief Epistemic Injustice? Criminal Procedure, Recovered Memories, and Deformations of Epistemic Subjects." *Criminal Law and Philospohy* 2*:* 1–28. https://doi.org/10.1007/s11572-023-09695-3

Burlando-Salazar, Julian A. 2023. "Preventing the Epistemic Harm of Testimonial Injustice in Lay Witness Credibility Assessments." *Boston University Law Review* 103(4): 1245–1285. https://doi.org/10.1007/s11572-023-09695-3

Carter, Terrell. Rachel López. 2024. "If Lived Experience Could Speak: A Method for Repairing Epistemic Violence in Law & The Legal Academy". *Temple University Legal Studies Research Paper No. 2024-26*, https://ssrn.com/abstract=4741795 [access: 14.10.2024].

Constanza-Chock, Sasha. 2020. *Design Justice: Community-Led Practices to Build the Worlds We Need*. Cambridge, MA–London: The MIT Press.

Corso, Lucia. 2023. "Epistemic Injustice, Judiciary Reasoning and Stereotypes: From Narrow, to Broad, to Broader." *Milan Law Review* 4(2): 100–113. https://doi.org/10.54103/milanlawreview/22186

Crary, Alice. 2000. "Introduction." In *The New Wittgenstein*. Edited by Alice Crary, Rupert Read. 1–18. London–New York: Routledge.

Crary, Alice. 2002. "What Do Feminists Want in an Epistemology?" In *Feminist Interpretations of Ludwig Wittgenstein.* Edited by Naomi Scheman, Peg O'Connor. 97–118. Philadelphia: Penn State University Press.

Crary, Alice. 2018. "The Metodological is Political. What's the Matter with 'Analytic Feminism?'" *Radical Philosophy* 2(2): 47–60.

Dotson, Kristie. 2012. "A Cautionary Tale: On Limiting Epistemic Oppression." *Frontiers: A Journal of Women's Studies* 33(1): 24–47. https://doi.org/10.5250/fronjwomestud.33.1.0024

Dyrda, Adam. 2021. "Epistemologiczne problemy prawoznawstwa." [Epistemological Problems of Jurisprudence]. In *Teoria i filozofia prawa.* [Theory and Philosophy of Law]. Edited by Adam Dyrda. 29–32. Warszawa: Wolters Kluwer.

Ferreira, Nuno. 2022. "Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice." *International Journal of Refugee Law* 34: 303–326. https://doi.org/10.1093/ijrl/eeac041

Fricker, Miranda. 2007. *Epistemic Injustice: Power and The Ethics of Knowing.* Oxford: Oxford University Press.

Fricker, Miranda. 2013. „Epistemic Justice as a Condition of Political Freedom?" *Synthese* 190(7): 1317–1332.

Gaakeer, Jeanne. 2024. "Feel, Show, Tell: Affect and Legality in the Trial as Performance." *Law, Culture and the Humanities* 20(2): 340–354. https://doi.org/10.1177/17438721231177641

García-Valdecasas, Miguel. 2023. "Are Wittgenstein's Hinges Rational World-Pictures? The Groundlessness Theory Reconsidered." *Topoi* 42: 35–45. https://doi.org/10.1007/s11245-022-09830-0

Glaberson, Stephanie. 2024. "The Epistemic Injustice of Algorithmic Family Policing." *UC Irvine Law Review* 14(2): 404–456.

Gonzales, Rose. Jasmine B. 2024. "A Critical Perspective on Testimonial Injustice: Interrogating Witnesses' Credibility Excess in Criminal Trials. A Comment on Federico Picinali's 'Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial'." *Quaestio Facti. Revista Internacional Sobre Razonamiento Probatorio* 7: 173–185. https://doi.org/10.33115/udg_bib/qf.i7.23043

Gordon, Randy. 2023. *The Performance of Law: Everyday Lawyering at the Intersection of Advocacy and Imagination*. Abingdon–New York: Routledge.

Grygieńć, Janusz. 2021a. "Czy powinniśmy bać się zależności epistemicznej (i jak bardzo)?" [Should We Fear Epistemic Dependence (And How Much)?] *Filozofia i Nauka. Studia filozoficzne i interdyscyplinarne* 9(1): 11–28.

Grygieńć, Janusz. 2021b. "Od dyktatury ekspertów do demokracji nieliberalnej. Podejście systemowe do demokracji deliberacyjnej i jego braki." [From the Dictatorship of Experts to Illiberal Democracy: A Systemic Approach to Deliberative Democracy and Its Shortcomings]. *Civitas. Studia z Filozofii Polityki* 28(4): 15–40.

Gutiérrez, Natalia Urzola. 2024. "Gender in Climate Litigation in Latin America: Epistemic Justice Through a Feminist Lens." *Journal of Human Rights Practice* 16(1): 208–226. https://doi.org/10.1093/jhuman/huad030

Hanan, M. Eve. 2020. "Invisible Prisons." *UC Davis Law Review* 54(2): 1185–1244.

Harding, Brynne. 2020. "*R v Theriault:* A Case of Epistemic Injustice." *ABlawg.ca* 10: 1–12. https://ablawg.ca/wp-content/uploads/2020/10/Blog_BH_Theriault.pdf (accessed: 14.08.2024).

Hendriks, Carolyn M. 2008. "Deliberative Governance in the Context of Power." *Policy and Society* 28(3): 173–184.

Hoven, Emilie van den. 2021. "Hermeneutical Injustice and the Computational Turn in Law." *Journal of Cross-disciplinary Research in Computational Law* 1(1): 1–13.

Jain, Dipika. Kimberly M. Rhoten. 2020. "Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism." *Journal of Human Values* 26(1): 30–49. https://doi.org/10.1177/0971685819890186

Kjaer, Poul F. 2022. "What is Transformative Law?" *European Law Open* 1: 760–780. https://doi.org/10.1017/elo.2023.1

Klimowicz, Katarzyna. 2016. "Utopia w «realistycznej» teorii demokracji przedstawicielskiej i realizm w «utopijnych» teoriach demokracji deliberatywnej i partycypacyjnej." [Utopia in 'Realistic' Theory of Representative Democracy and Realism in 'Utopian' Theories of Deliberative and Participatory Democracy]. *Hybris. Internetowy Magazyn Filozoficzny* 33(2): 33–52.

Koczanowicz, Leszek. 2020. *Lęk i olśnienie. Eseje o kulturze niepokoju.* [Anxiety and Lucidity: Reflections on Culture in Times of Unrest]. Warszawa: Instytut Badań Literackich PAN.

Leiboff, Marett. 2015. "Towards a Jurisprudence of the Embodied Mind – Sarah Lund, Forbrydelsen and the Mindful Body." *Naveiñ Reet: Nordic Journal of Law and Social Research. Special Issue on Law and Art* 6: 77–92.

Levinson, Stanford. Jack M. Balkin. 1991. "Law, Music, and Other Performing Arts." *University of Pennsylvania Law Review* 139(6): 1597–1568.

Levy, Ron. 2018. "The 'Elite Problem' in Deliberative Constitutionalism." In *The Cambridge Handbook of Deliberative Constitutionalism*. Edited by Ron Levy, Hoi Kong, Graeme Orr, Jeff King. 351–369. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108289474.027

Lobo, Camila. 2022. "Speaking Silences: A Wittgensteinian Inquiry into Hermeneutical Injustice." *Nordic Wittgenstein Review* 12: 1–23. https://doi.org/10.15845/nwr.v11.3643

Łętowska, Ewa. 2005. "Communicare et humanum est – o komunikacyjnej misji prawników i muzyków." [Communicare et humanum est – on the Communicative Mission of Lawyers and Musicians]. *Monitor Prawniczy* 1: 3–7.

Medina, José. 2011. "The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary." *Social Epistemology: A Journal of Knowledge, Culture and Policy* 25(2): 15–35. https://doi.org/10.1080/02691728.2010.534568

Medina, José. 2012. "Hermeneutical Injustice and Polyphonic Contextualism: Social Silences and Shared Hermeneutical Responsibilities." *Social Epistemology: A Journal of Knowledge. Culture and Policy* 26(2): 201–220. https://doi.org/10.1080/02691728.2011.652214

Mulcahy, Sean. 2022. "Methodologies of Law and Performance." *Law and Humanities* 16(2): 165–182. https://doi.org/10.1080/17521483.2022.2123616

Muradova, Lala. 2021. "Seeing the Other Side? Perspective-Taking and Reflective Political Judgements in Interpersonal Deliberation." *Political Studies* 69(3): 644–664. https://doi.org/10.1177/0032321720916605

Páez, Andrés. Janaina Matida. 2023. "Editorial of Dossier 'Epistemic Injustice in Criminal Procedure'." *Revista Brasileira de Direito Processual Penal* 9(1): 11–38. https://doi.org/10.22197/rbdpp.v9i1.821

Peters, Julie Stone. 2022. *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe*. Oxford: Oxford University Press.

Picinali, Federico. 2024. "Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial." *Quaestio facti. Revista Internacional sobre Rezonamiento Probatio* 6: 1–35. https://doi.org/10.33115/udg_bib/qf.i6.22888

Pohlhaus Jr., Gaile. 2012. "Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance." *Hypatia: A Journal of Feminist Philosophy* 27(4): 715–735.

Ralph, Anne E. 2024. "Qualified Immunity, Legal Narrative, and the Denial of Knowledge." *Boston College Law Review* 65(4): 1317–1380.

Rodak, Lidia. 2011. "Objective Interpretation as Conforming Interpretation." *Oñati Socio-Legal Series* 1(9): 1–11.

Rogacka-Rzewnicka, Maria. 2023. "The Impact of the Concept of Continental (Romano-Germanic) Criminal Procedure on the Phenomenon of 'Epistemic Injustice'." *Revista Brasileira de Direito Processual Penal* 9(3): 1109–1135. https://doi.org/10.22197/rbdpp.v9i3.800

Rogers, Nicole. 2008. "The Play of Law: Comparing Performances in Law and Theatre." *Queensland University of Technology Law and Justice Journal* 8(2): 429–443.

Romańczuk-Grącka, Marta. 2021. "Gaslighting jako forma przemocy psychicznej." [Gaslighting as a Form of Psychological Violence]. *Studia Prawnoustrojowe* 52: 411–426. https://doi.org/10.31648/sp.6614

Rosario-Lebrón, Aníbal. 2023. "Law's Power in Naming & Silencing (reviewing Lisa Washington, Survived & Coerced: Epistemic Injustice in the Family Regulation System, 24 Colum. L. Rev. 1097 (2022))." *Family Law Jotwell: The Journal of Things We Like (Lots)* 11. https://family.jotwell.com/laws-power-in-naming-silencing/ (accessed: 6.08.2024).

Safjan, Marek. Przemysław Mikłaszewicz. 2011. "Granice uprzywilejowania wyrównawczego." [The Limits of Compensatory Preference]. *Przegląd Sejmowy* 107(6): 31–45.

Sarat, Austin. Lawrence Douglas. Martha Merrill Umphrey. 2018. *Law and Performance*. Amherst–Boston: University of Massachusetts Press.

Schmidt, Eva. 2024. "Epistemic Injustice in Deliberative Mini Publics". Journal of Deliberative Democracy 20(1): 1-10. https://doi.org/10.16997/jdd.1493

Skuczyński, Paweł. 2016. "The Attitudes of Lawyers Towards the Constitutional Crisis and the Independence of the Judiciary." In *The Limits of Judicial Independence?* Edited by Grzegorz Borkowski. 149–166. Warszawa–Toruń: Krajowa Rada Sądownictwa.

Skuczyński, Paweł. 2020. "Narrativity of Legal Language in the Law-Making Process." *Archiwum Filozofii Prawa i Filozofii Społecznej* 22(1): 1–17. https://doi.org//10.36280/AFPIFS.2020.1.66ENG

Sorial, Sarah. 2022. "Deliberation and the Problems of Exclusion and Uptake: The Virtues of Actively Facilitating Equitable Deliberation and Testimonial Sensibility." *Ethical Theory and Moral Practice* 25: 215–231. https://doi.org/10.1007/s10677-022-10273-0

Sousa, Ronald de. 2009. "Epistemic Feelings." *Mind and Matter* 7(2): 139–161.

Spiegel, Thomas J. 2022. "The Epistemic Injustice of Epistemic Injustice." *Social Epistemology Review and Reply Collective* 11(9): 75–90.

Stawecki, Tomasz. Jan Winczorek. 2015. "Posłowie." [Afterword]. In *Wykładnia konstytucji. Inspiracje, teorie, argumenty*. [Constitutional Interpretation: Inspirations, Theories, Arguments]. Edited by Tomasz Stawecki, Jan Winczorek. 517–528. Warszawa: Wolters Kluwer.

Sullivan, Michael. 2017. "Epistemic Injustice and the Law." In *The Routledge Handbook of Epistemic Injustice*. Edited by Ian James Kidd, José Medina, Gaile Pohlhaus Jr. 293–302. Abingdon–New York: Routledge. https://doi.org/10.4324/9781315212043.ch28

Sveinsdóttir, Ásta. 2016. "The Naturalism Question in Feminism." In *The Blackwell Companion to Naturalism*. Edited by Kelly James Clark. 49–60. Hoboken: Wiley-Blackwell. https://doi.org/10.1002/9781118657775.ch4

Tobiasz, Marcin. 2016. "Demokracja deliberatywna a władza. Iluzje współdecydowania." [Deliberative Democracy and Power. Illusions of Co-Decision]. *Studia Politologiczne* 41: 106–122.

Tobiasz, Marcin. 2021. "Deliberacja jako forma wykluczenia." [Deliberation as a Form of Exclusion]. *Myśl Polityczna* 2(8): 31–45.

Ufel, Wojciech. 2023. *Granice demokracji. Dylematy deliberacji w perspektywie filozofii gier językowych.* [The Limits of Democracy: Dilemmas of Deliberation from the Perspective of the Philosophy of Language Games]. Warszawa: Wydawnictwo Naukowe Scholar.

Ufel, Wojciech. 2025. "Language-Based Critique of Deliberation as a 'Picture' in the 'Album Theory' of Democracy." In *Wittgenstein and Democratic Politics. Language, Dialogue and Political Forms of Life*. Edited by Lotar Rasiński, Anat Bieletzki, Leszek Koczanowicz, Thomas Wallgreen. 274–294. New York–Abingdon: Routledge. https://doi.org/10.4324/9781003485254-17

Walker, Melanie. 2020. "Why Lawyers and Legal Educators Should Care About (Epistemic) Justice." *International Journal of Clinical Legal Education* 27(1): 5–46. https://doi.org/10.19164/ijcle.v27i1.915

Washington, S. Lisa. 2022. "Survived & Coerced: Epistemic Injustice in the Family Regulation System." *Columbia Law Review* 122(4): 1097–1664.

Wittgenstein, Ludwig. 2000a. *Dociekania filozoficzne.* [Philosophical Investigations]. Translated by Bogusław Wolniewicz. Warszawa: Wydawnictwo Naukowe PWN.

Wittgenstein, Ludwig. 2000b. *Tractatus logicus-philosophicus*. Translated by Bogusław Wolniewicz. Warszawa: Wydawnictwo Naukowe PWN.

Wittgenstein, Ludwig. 2014. *O pewności.* [On Certainty]. Translated by Bohdan Chwedeńczuk. Warszawa: Wydawnictwo Aletheia.

Ziemińska, Renata. 2013. *Historia sceptycyzmu. W poszukiwaniu spójności.* [The History of Skepticism: In Search of Consistency]. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika.

Ziółkowski, Michał. 2015. "Zasada równości w prawie." [Principle of Equality in the Law]. *Państwo i Prawo* 5: 94–111.
Zirk-Sadowski, Marek. 2021. *Wprowadzenie do filozofii prawa*. [Introduction to the Legal Philosophy]. Warszawa: Wolters Kluwer.

Legal acts

Convention of Human Rights and Fundamental Freedoms of November 4, 1950, Journal of Laws 1993, No. 61, item 284, https://www.echr.coe.int/documents/d/echr/convention_eng.
Constitution of the Republic of Poland of April 2, 1997, Journal of Laws, 1997, No. 78, item 483 as amended.
Act of November 17, 1964 – Code of Civil Procedure, Journal of Laws, 2024, item 1568.
Act of June 26, 1974 – Labour Code, Journal of Laws, 2023, item 1465.
Act of June 6, 1997 – Code of Criminal Procedure, Journal of Laws, 2024, item 37.
Act of June 6, 1997 – Criminal Code, Journal of Laws, 2024, item 17.
Act of August 27, 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, Journal of Laws, 2024, item 44.
Act of March 12, 2004 on Social Assistance, Journal of Laws, 2024, item 1283.
Act of January 6, 2005 on National and Ethnic Minorities and on the Regional Language, Journal of Laws, 2017, item 823.
Act of July 29, 2005 on Counteracting Domestic Violence, Journal of Laws, 2024, item 424.
Act of December 2, 2010 on the Implementation of Certain EU Regulations on Equal Treatment, Journal of Laws, 2024, item 1175.

Case law

Judgment of the European Court of Human Rights of January 20, 2022, D.M. and N. v. Italy, 60083/19, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001–215179%22]}
Judgment of the European Court of Human Rights of December 12, 2023, Przybyszewska and Others v. Poland, 11454/17, https://hudoc.echr.coe.int/?i=001–229391
Judgment of the European Court of Justice of January 12, 2023, J.K. v. TP S.A., C-356/21, ECLI:EU:C:2023:9.
Judgment of the Constitutional Court of March 18, 2014, SK 53/12, OTK-A 2014/3, item 32.
Resolution of the Supreme Administrative Court of December 2, 2019, I OPS 1/19, https://orzeczenia.nsa.gov.pl/doc/0CB4DBF3D4
Resolution of the Supreme Court of August 24, 2023, III PZP 1/23, http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20pzp%201-23.pdf
Judgment of the Regional Court in Lublin of June 20, 2018, VIII Pa 86/18, https://orzeczenia.lublin.so.gov.pl/
Judgment of the Regional Court in Nowy Sącz of May 14, 2019, III Ca 450/18, https://orzeczenia.nowysacz.so.gov.pl/
Decision of the Supreme Court of October 20, 2021, II KK 467/21, https://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20KK%20467-21.pdf
Decision of the District Court for Kraków-Krowodrza in Krakow of June 12, 2023, II Kp 589/23/K, unpublished.

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WYBRANE ASPEKTY TAJEMNICY PSYCHIATRYCZNEJ W ORZECZNICTWIE SĄDU NAJWYŻSZEGO

Streszczenie. Tajemnica psychiatryczna, której podstawę stanowi art. 50 ustawy z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego, ma na celu ochronę godności i prywatności pacjentów oraz ich rodzin. Nie posiada ona jednak charakteru absolutnego i w określonych sytuacjach może zostać ograniczona lub uchylona, czego przykłady można znaleźć w orzecznictwie. W związku z tym celem artykułu była analiza orzeczeń Sądu Najwyższego poświęconych problematyce zdrowia psychicznego oraz ochrony tajemnicy z nią związanej.

Artykuł ma charakter przeglądowy, zawiera analizę orzecznictwa Sądu Najwyższego dotyczącego problematyki tajemnicy psychiatrycznej.

Wyniki przeprowadzonych badań wskazują, że w orzecznictwie Sądu Najwyższego problematyka tajemnicy psychiatrycznej pojawia się w kontekście postępowań karnych, zwłaszcza w sprawach związanych z pracą biegłych sądowych. Sąd podkreśla, że tajemnica ta nie posiada charakteru absolutnego i może podlegać ograniczeniom w celu ochrony innych dóbr konstytucyjnych, jednak przy zachowaniu proporcji między celem ograniczenia a zakresem ujawnianych informacji. Wyroki Sądu podkreślają także autonomię biegłych z zakresu psychiatrii oraz konieczność zaufania do ich zawodowych kompetencji, zwracając uwagę na różne aspekty związane z oceną ich pracy.

Na podstawie przeprowadzonej analizy orzecznictwa Sądu Najwyższego można stwierdzić, że tajemnica psychiatryczna nie posiada charakteru absolutnego i w określonych sytuacjach może zostać ograniczana, zawsze jednak z poszanowaniem dóbr osobistych pacjenta. Orzecznictwo wskazuje ponadto na potrzebę równoważenia tej tajemnicy z innymi wartościami, jak dobro pacjenta czy społeczeństwa. Należy również zauważyć, że istniejące różnice w interpretacji przepisów dotyczących powoływania biegłych psychiatrów w procesie karnym mogą wpływać na praktykę sądową w tej dziedzinie.

Słowa kluczowe: ochrona zdrowia psychicznego, prawa pacjentów, Sąd Najwyższy, tajemnica psychiatryczna, tajemnica zawodowa

CHOSEN ASPECTS OF PSYCHIATRIC CONFIDENTIALITY IN THE JURISPRUDENCE OF THE SUPREME COURT

Abstract. Psychiatric secrecy, which is based on Article 50 of the Law of August 19, 1994 on Mental Health Protection, is intended to protect the dignity and privacy of patients and their families.

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However, it does not have an absolute character and can be limited or abrogated in certain situations, examples of which can be found in case law. Accordingly, the purpose of the article was to analyze the Supreme Court's rulings on mental health issues and the protection of secrecy related to it.

The article is an overview, analyzing the case law of the Supreme Court on the issue of psychiatric secrecy.

The results of the analysis show that in the jurisprudence of the Supreme Court, the issue of psychiatric secrecy appears in the context of criminal proceedings, especially in cases related to the work of expert witnesses. The Court emphasizes that this secrecy is not absolute and may be subject to restrictions to protect other constitutional goods, but in proportion between the purpose of the restriction and the scope of the information disclosed. The Court's rulings also emphasize the autonomy of psychiatric experts and the need to trust their professional competence, noting various aspects related to the evaluation of their work.

Based on the analysis of the Supreme Court's jurisprudence, it can be concluded that psychiatric confidentiality does not have an absolute character and can be limited in certain situations, but always with respect for the patient's personal rights. The case law further indicates the need to balance this secrecy with other values, such as the welfare of the patient or society. It should also be noted that existing differences in the interpretation of the rules on the appointment of psychiatric experts in the criminal process may affect judicial practice in this area.

Keywords: mental health care, patients' rights, Supreme Court, psychiatric confidentiality, professional secrecy

1. WPROWADZENIE

Tajemnica psychiatryczna, której podstawę stanowi art. 50 ustawy z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego, ma na celu ochronę godności i prywatności pacjentów oraz ich rodzin, a także zapewnienie zaufania do lekarzy i innych osób świadczących pomoc w zakresie zdrowia psychicznego. Odgrywa ona znaczenie nie tylko w sferze cywilnej, ale także karnej, mogąc stanowić podstawę odmowy składania zeznań lub udzielania informacji. Tajemnica ta nie posiada jednak charakteru absolutnego, dlatego w określonych sytuacjach może zostać ograniczona lub uchylona, a przykłady rozstrzygnięć dotyczących jej zakresu i granic można znaleźć w orzecznictwie Sądu Najwyższego. W związku z tym celem niniejszego artykułu była analiza orzeczeń Sądu Najwyższego, które poświęcono problematyce zdrowia psychicznego oraz ochrony tajemnicy z nią związanej.

2. DEFINICJA TAJEMNICY PSYCHIATRYCZNEJ

Realizacja praw pacjentów do zachowania w tajemnicy informacji udzielonych przez nich w związku z realizowanymi świadczeniami zdrowotnymi nastąpiła poprzez objęcie osób wykonujących regulowane zawody medyczne obowiązkiem zachowania tajemnicy zawodowej, rozumianej jako tajemnica uzyskana w związku z wykonywaniem zawodu (Jackowski 2011, 76). Tajemnica ta stanowi

jedną z podstawowych cech zawodów zaufania publicznego, w przypadku profesji związanych ze zdrowiem psychicznym pełniąc przede wszystkim funkcję ochronną i gwarancyjną. W wyroku z dnia 9 kwietnia 2013 r. Sąd Apelacyjny w Szczecinie wskazał, że „przepisy o prawie odmowy zeznań czy odpowiedzi na pytania stron mają chronić świadka, który w sytuacji dylematu etycznego stałby w trudnej moralnie sytuacji, czy zeznawać prawdę".

Tajemnica psychiatryczna, która odgrywa kluczowe znaczenie nie tylko dla prawidłowego funkcjonowania systemu ochrony zdrowia psychicznego, ale również wymiaru sprawiedliwości, została zagwarantowana przez art. 50 ustawy o ochronie zdrowia psychicznego oraz art. 40 ustawy z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty. Zgodnie z tym ostatnim, lekarz ma obowiązek zachowania w tajemnicy informacji związanych z pacjentem, a uzyskanych w związku z wykonywaniem zawodu, natomiast, w myśl art. 50 ustawy o ochronie zdrowia psychicznego, osoby wykonujące czynności z niej wynikające są obowiązane do zachowania w tajemnicy wszystkiego, o czym powezmą wiadomość w związku z ich realizacją.

W literaturze wskazuje się na brak ustawowej definicji tajemnicy psychiatrycznej, której charakter jest szczególny, zarówno jeśli chodzi o zakres podmiotowy i przedmiotowy, jak i moc wiążącą. Artykuł 50 ust. 1 ustawy o ochronie zdrowia psychicznego określa jedynie w sposób ogólny jej zakres, stanowiąc, że osoby wykonujące czynności na podstawie tej ustawy są obowiązane zachować w tajemnicy wszystko, o czym powezmą wiadomość w związku z ich realizacją. Z porównania treści tego artykułu z art. 40 ustawy o zawodach lekarza i lekarza dentysty wynika jednak, że zakres przedmiotowy tajemnicy psychiatrycznej jest znacznie szerszy od lekarskiej. Tajemnica psychiatryczna obejmuje bowiem wszelkie informacje, które pozyskały osoby wykonujące czynności na podstawie ustawy o ochronie zdrowia psychicznego, natomiast lekarska tylko te związane z pacjentem i uzyskane w związku z realizacją zawodu lekarza. Zastosowane w art. 50 ust. 1 sformułowanie określające zakres przedmiotowy tajemnicy psychiatrycznej prowadzi zatem do wniosku, że nie jest możliwe określenie w sposób wyczerpujący katalogu okoliczności i faktów w jego skład wchodzących (Eichstaedt 2022, 36–39).

Obowiązek zachowania tajemnicy psychiatrycznej dotyczy nie tylko pracowników medycznych, ale również administracyjnych i psychologów oraz przedstawicieli organów ścigania i wymiaru sprawiedliwości (Duda 2009, 240). Z kolei art. 52 ust. 1 wprowadza bezwzględny zakaz dowodowy przesłuchiwania osób zobowiązanych do jej zachowania jako świadków na okoliczności wypowiedzi osoby, wobec której podjęto czynności wynikające z ustawy o ochronie zdrowia psychicznego. Zakaz ten potwierdziło postanowienie Sądu Najwyższego z dnia 20 kwietnia 2005 r., w którym stwierdził on, że

przepis art. 52 ust. 1 ustawy z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego dotyczy każdej osoby, która wykonuje czynności określone w tej ustawie; ustanawia on bezwzględny zakaz dowodowy, będąc przepisem szczególnym w stosunku do unormowania art. 180 k.p.k., a wobec tego takiej osoby nie można przesłuchać co do okoliczności przewidzianych w art. 52 ust 1, nawet jeżeli wyrazi ona gotowość ujawnienia tego rodzaju tajemnicy.

Do kręgu jednostek objętych tajemnicą psychiatryczną należy tym samym zaliczyć wszystkie osoby zatrudnione w placówkach zdrowia psychicznego, jak również innych podmiotach prowadzących prace naukowo-badawcze lub uczestniczące w zajęciach dydaktycznych. Zdaniem B. Kmieciaka, krąg ten należy dodatkowo poszerzyć o jednostki zewnętrzne wykonujące na podstawie umów cywilnoprawnych czynności na rzecz placówki psychiatrycznej, ponieważ również ich pracownicy mogą wejść w posiadanie informacji objętych tajemnicą psychiatryczną (Kmieciak 2014, 53).

3. TAJEMNICA PSYCHIATRYCZNA W ORZECZNICTWIE SĄDU NAJWYŻSZEGO

W orzecznictwie Sądu Najwyższego problematyka tajemnicy psychiatrycznej pojawia się głównie w kontekście postępowania karnego, dotycząc przede wszystkim zagadnień związanych z pracą biegłych sądowych. W orzeczeniu z dnia 12 maja 2021 r. Sąd Najwyższy podkreślił, że tajemnica ta nie posiada absolutnego charakteru i może być ograniczona przez inne dobra konstytucyjne, jak prawo do obrony lub rzetelnego procesu, jednak takie ograniczenie musi być uzasadnione konkretnymi okolicznościami sprawy, ponadto nie może ono naruszać istoty prawa do prywatności i godności pacjenta. Należy w tym miejscu dodatkowo zauważyć, że zgodnie z wyrokiem Sądu Najwyższego z dnia 24 stycznia 2008 r., obowiązek zachowania tajemnicy psychiatrycznej odnosi się do wszystkich osób poddanych badaniom i leczeniu w trybie ustawy o ochronie zdrowia psychicznego, a nie tylko wobec tych, u których zostały stwierdzone zaburzenia.

W swoich orzeczeniach Sąd Najwyższy zwracał również uwagę na konieczność zachowania proporcji pomiędzy celem ograniczenia tajemnicy psychiatrycznej a zakresem ujawnianych informacji. Konstytucyjny aspekt zasady proporcjonalności był przedmiotem jego rozważań w kontekście orzekania środków zabezpieczających w postaci umieszczenia w zamkniętym zakładzie psychiatrycznym. W wyroku z dnia 5 lutego 2009 r. Sąd, mając na względzie właśnie zasadę proporcjonalności, wskazał, że przed podjęciem decyzji o zastosowaniu środka zabezpieczającego w postaci umieszczenia na zamkniętym oddziale psychiatrycznym należy rozważyć, jaką karę należałoby wymierzyć sprawcy zabronionego czynu przy uznaniu jego poczytalności. Zdaniem Sądu, jedynie w sytuacji całkowitego braku wątpliwości, że dla sprawcy właściwą karą byłoby bezwzględne pozbawienie wolności, można zdecydować o umieszczeniu takiej osoby w zamkniętym zakładzie psychiatrycznym. O trafności tego poglądu świadczą przesłanki

określone w ustawie o ochronie zdrowia psychicznego, która przewiduje przyjęcie osoby chorej psychicznie do szpitala psychiatrycznego bez jej zgody tylko wówczas, jeśli dotychczasowe jej zachowanie stwarza bezpośrednie zagrożenie dla własnego zdrowia lub życia bądź zdrowia innych osób (art. 23 ust. 1).

Z postanowienia Sądu Najwyższego z dnia 5 września 2008 r. wynika, że sformułowany w art. 52 ust. 1 ustawy o ochronie zdrowia psychicznego bezwzględny zakaz dowodowy jest w stosunku do ogólnych zasad postępowania karnego przepisem szczególnym, który nie może być uchylony ani modyfikowany. Zdaniem Sądu, dotyczy on każdej osoby wykonującej określone w ustawie czynności, której nie można przesłuchać odnośnie do ich okoliczności, nawet jeżeli wyrazi ona gotowość ujawnienia tego rodzaju tajemnicy zawodowej.

We wskazanej sprawie, w której wątpliwości dotyczyły psychologa prowadzącego terapię rodzinną obejmującą rodzinę oskarżonego i uzyskanych podczas niej informacji, Sąd Najwyższy podkreślił, że art. 52. ust. 1 ustawy o ochronie zdrowia psychicznego odnosi się do każdego niezależnie od zawodu czy pełnionej funkcji, kto wykonuje czynności określone w art. 2 tej ustawy, jednak dla ustalenia zakresu jego zastosowania nie jest wystarczające wykonywanie takich czynności, ponieważ dotyczy on tylko osób określonych w art. 50 ust. 1. W sprawie tej we wniosku Prokuratury Krajowej stwierdzono brak wskazania ustawy korporacyjnej ustanawiającej tajemnicę zawodową psychologa, co jednak zdaniem Sądu nie zwalniało go z obowiązku zachowania tajemnicy w przypadku wykonywania czynności wynikających z ustawy o ochronie zdrowia psychicznego. Sąd w swoim postanowieniu trafnie podkreślił, że źródłem takiego obowiązku są nie tylko przepisy tego aktu prawa, ale również normy wynikające z art. 30, 31, 47 i 51 Konstytucji oraz aktów prawa międzynarodowego, stanowiących pierwotne źródło obowiązku zachowania tajemnicy zawodowej.

Orzecznictwo wskazuje dwa główne kryteria, które należy uwzględnić przy ocenie zakresu i granicy tajemnicy psychiatrycznej, a mianowicie dobra pacjenta i społeczne (postanowienie Sądu Najwyższego z dnia 5 września 2008 r.). Pierwsze z nich oznacza, że tajemnica może być naruszona w przypadku konieczności zapewnienia odpowiedniej opieki medycznej lub ochrony życia czy zdrowia pacjenta (Jabłońska 2020, 289). Przykładem takiej sytuacji może być konieczność poinformowania rodziny o stanie zdrowia osoby chorej lub uzyskania zgody na jej leczenie od przedstawiciela ustawowego, jak również potrzeba udzielenia informacji innym lekarzom lub instytucjom medycznym, które biorą udział w leczeniu lub nadzorują jej stan (Gałęska-Śliwka, Śliwka 2013, 79–84). Dobro społeczne oznacza z kolei, że tajemnica psychiatryczna może być naruszona, jeśli jest to niezbędne dla zapobiegania lub wyjaśnienia przestępstwa, ochrony życia lub zdrowia innych osób lub realizacji ważnego interesu publicznego, czego przykładem może być konieczność poinformowania organów ścigania lub sądu o pacjencie stanowiącym zagrożenie dla innych ze względu na zaburzenia psychiczne (Dawidziuk, Nowakowska 2020, 86–87).

W orzecznictwie Sądu Najwyższego zagadnienia dotyczące dobra pacjenta były najczęściej poruszane w sprawach dotyczących umieszczenia osoby chorej psychicznie w szpitalu psychiatrycznym na podstawie art. 29 ust. 1 pkt. 1 i 2 ustawy o ochronie zdrowia psychicznego. W postanowieniu z dnia 5 września 2008 r. Sąd wskazał, że prawo nie wiąże obowiązku wszczęcia takiej sprawy poprzez złożenie oświadczenia woli przez osobę bezpośrednio zainteresowaną, dlatego prokurator może samodzielnie skutecznie złożyć wniosek o jej wszczęcie, za czym przemawia również interes publiczny. Sąd, kierując się dobrem jednostki chorej, zastrzegł jednak, że złożenie takiego wniosku przez prokuratora powinno nastąpić dopiero po stwierdzeniu, że nie ma innych osób uprawnionych do tego lub nie chcą one bądź nie mogą tego uczynić.

W postanowieniu z dnia 24 stycznia 2014 r. Sąd Najwyższy podkreślił, że orzeczenie o konieczności poddania uczestnika postępowania leczeniu psychiatrycznemu bez jego zgody wymaga ustalenia konkretnych okoliczności uzasadniających wniosek, że zaniechanie tego leczenia spowodowałoby znaczne pogorszenie stanu jego zdrowia psychicznego, a nie tylko samo pogorszenie lub brak poprawy. W podobny sposób Sąd Najwyższy odniósł się do tego zagadnienia w postanowieniu z dnia 10 stycznia 2017 r., podkreślając, że ocena prognozowanych zachowań osoby z zaburzeniami psychicznymi wymaga nie tylko uwzględnienia opinii biegłych, ale także dokonania analizy dotychczas popełnionych czynów, ich motywacji i związku ze stwierdzonymi zaburzeniami psychicznymi, wcześniejszego przebiegu życia sprawcy, jego aktualnej sytuacji oraz wyników postępowania terapeutycznego wraz z możliwościami jego podjęcia w warunkach wolnościowych.

Problematyka dóbr pacjenta w kontekście umieszczenia w placówce opiekuńczej została z kolei poruszona w postanowieniu z dnia 14 kwietnia 2011 r., dotyczącym przyjęcia do domu pomocy społecznej z powodu upośledzenia funkcji intelektualnych osoby bez jej zgody. W sprawie tej Sąd Najwyższy podkreślił ochronny charakter przepisów, stwierdzając, że sąd opiekuńczy rozpoznający wniosek o przyjęcie danej osoby do domu pomocy społecznej bez jej zgody na podstawie art. 39 w związku z art. 38 ustawy o ochronie zdrowia psychicznego powinien wykorzystać możliwość ustanowienia adwokata z urzędu w celu ochrony praw tej osoby. Zdaniem Sądu, stan zdrowia psychicznego ma istotne znaczenie dla oceny potrzeby przyjęcia do domu pomocy społecznej, jednak nie może o tym samodzielnie przesądzać, dlatego opinia biegłego lekarza psychiatry nie może stanowić wystarczającego źródła ustalenia materialnoprawnych przesłanek orzeczenia w sprawie umieszczenia chorego w domu pomocy społecznej bez jego zgody.

Zagadnie tajemnicy psychiatrycznej w kontekście dobra społecznego poruszono w postanowieniu Sądu Najwyższego z dnia 10 listopada 2015 r., dokonującym wykładni art. 94 § 1 Kodeksu karnego. Zdaniem Sądu, choroba psychiczna może stanowić w pewnych sytuacjach ryzyko dla życia i zdrowia chorego oraz jego otoczenia, jednak warunkiem jego przymusowego umieszczenia w szpitalu

psychiatrycznym tytułem środka zabezpieczającego powinno być przeprowadzenie rzetelnego postępowania karnego, ustalającego ponad wszelką wątpliwość prawne i medyczne aspekty jej orzeczenia. Sąd podkreślił, że zasada domniemania niewinności dotyczy również osób z zaburzeniami psychicznymi, dlatego nikt nie może zostać pozbawiony wolności w drodze środka zabezpieczającego bez uprzedniego ustalenia sprawstwa czynu oraz potwierdzenia obawy, że w związku z istniejącą chorobą może się go dopuścić ponownie.

W kontekście tym interesujące jest również postanowienie z dnia 13 stycznia 2016 r. dotyczące wniosku o umieszczenie chorego w ośrodku dla osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób na podstawie art. 14 ustawy z dnia 22 listopada 2013 r. o postępowaniu wobec takich osób (ustawa z dnia 22 listopada 2013 r. o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób), w którym Sąd Najwyższy podkreślił, że wykładnia przepisów nie może naruszać obowiązku respektowania godności ludzkiej i prawa do wolności. Podobnie Sąd wypowiedział się w postanowieniu z dnia 12 października 2018 r. dotyczącym ustalenia zasadności przyjęcia osoby do szpitala psychiatrycznego bez jej zgody, wskazując w nim na daleko idące ograniczenie dóbr osobistych i wynikającą z tego konieczność ochrony takiej jednostki.

Orzecznictwo Sądu Najwyższego wskazuje na konieczność poszanowania tajemnicy psychiatrycznej przez biegłych sądowych, podkreślając znaczenie tego aspektu dla oceny ich kwalifikacji zawodowych (wyrok Sądu Najwyższego z dnia 12 maja 1964 r.). Utrwalił się w nim także pogląd, że dopuszczenie dowodu z opinii biegłego z zakresu psychiatrii powinno następować w sytuacji, gdy sąd nie posiada specjalistycznej wiedzy na określony temat. Opinia taka stanowi dowód o szczególnym charakterze, a jej ocena może być dokonywana jedynie na płaszczyźnie logiczności i poprawności wnioskowania, natomiast nie można tego czynić z pozycji wartościowania panujących w danej dziedzinie wiedzy poglądów. Teza ta, wyrażona w wyroku z dnia 21 czerwca 1971 r., podkreśliła autonomię biegłych z zakresu psychiatrii i potrzebę zaufania do ich zawodowych kompetencji.

Zagadnienia związane z problematyką oceny wiarygodności i miarodajności opinii biegłych oraz możliwości ich wyłączenia poruszono w postanowieniu z dnia 29 stycznia 2014 r., w którym Sąd Najwyższy zauważył, że pochodzenie z tego samego województwa co badany i podleganie temu samemu wojewódzkiemu konsultantowi w dziedzinie psychiatrii nie może być uznane za powód do podważenia zaufania do biegłego psychiatry, ponieważ pomiędzy nim a konsultantem nie zachodzi zależność służbowa dająca podstawy do podważenia ich niezależności i przyjęcia, że nie są oni zdolni do sporządzenia niezależnej i bezstronnej opinii psychiatrycznej. W postanowieniu Sąd podkreślił również, że o wyborze metody badania powinien decydować autonomicznie biegły, a nie strony procesowe,

ponadto nie można od niego wymagać, aby zawsze przeprowadzał wszystkie znane psychiatrii badania dodatkowe.

Wyroki Sądu Najwyższego wskazywały na różne aspekty tajemnicy psychiatrycznej w kontekście oceny dowodów. W tym miejscu należy przytoczyć uchwałę z dnia 24 listopada 2010 r., której przedmiotem było zagadnienie badań psychiatrycznych przeprowadzanych w toku postępowania karnego. Sąd Najwyższy wskazał w niej, że „na postanowienia sądu, wydane w trybie art. 203 k.p.k., o nieuwzględnieniu wniosku o orzeczenie badań psychiatrycznych oskarżonego połączonych z obserwacją w zakładzie leczniczym, bądź o odmowie jej przedłużenia na dalszy oznaczony czas, nie przysługuje zażalenie". Zdaniem Sądu, tego rodzaju postanowienia powinny być zatem traktowane tak samo, jak inne decyzje o oddaleniu wniosków dowodowych, na które nie przysługuje zażalenie, dlatego skarżone mogą być jedynie przy okazji wnoszenia apelacji.

W kwestii powoływania biegłych w procesie karnym należy zwrócić uwagę na postanowienie Sądu Najwyższego z dnia 8 lutego 2012 r., dotyczące obowiązku powołania na mocy art. 202 § 3 Kodeksu postępowania karnego biegłego seksuologa do udziału w wydaniu opinii o stanie zdrowia psychicznego osoby oskarżonej w związku z zaburzeniami preferencji seksualnych. Zdaniem Sądu, obowiązek taki ciąży na sądzie lub prokuratorze tylko w przypadku złożenia stosownego wniosku o jego powołanie na podstawie art. 202 § 2 przez wcześniej wyznaczonego biegłego psychiatrę. Pogląd ten egzemplifikuje zasadę, że powołanie biegłego innej specjalności do udziału w sporządzeniu opinii o stanie zdrowia psychicznego oskarżonego może nastąpić tylko na wniosek biegłego psychiatry. Należy w tym miejscu jednak zwrócić uwagę na sprzeczności występujące w orzecznictwie dotyczącym problematyki powoływania biegłego lekarza seksuologa do udziału w wydawaniu opinii o stanie zdrowia psychicznego osoby oskarżonej w zakresie zaburzeń preferencji seksualnych, ponieważ w wyroku z dnia 13 marca 2013 r. Sąd Najwyższy stwierdził z kolei, że powołanie biegłego lekarza seksuologa do udziału w wydaniu takiej opinii nie wymaga wcześniejszego wniosku ze strony biegłych lekarzy psychiatrów.

Problemy interpretacyjne w tym zakresie Sąd Najwyższy rozstrzygnął w uchwale siedmiu sędziów z dnia 25 września 2013 r., w której stwierdził, że

> powołanie przez sąd, a w postępowaniu przygotowawczym przez prokuratora – na podstawie art. 202 § 3 k.p.k. – biegłego lekarza seksuologa do udziału w wydaniu opinii o stanie zdrowia psychicznego oskarżonego, w zakresie zaburzeń preferencji seksualnych, nie wymaga wniosku biegłych lekarzy psychiatrów, o którym mowa w art. 202 § 2 k.p.k.

Zdaniem Sądu, w związku z nową treścią przepisów o charakterze materialnoprawnym, które weszły w życie w 2010 r., organy procesowe są obecnie zobowiązane nie tylko do ustalenia stanu psychicznego sprawcy, ale także związku popełnionego przez niego czynu z zaburzeniami preferencji seksualnych, co niewątpliwie wymaga wiedzy z zakresu seksuologii. W opinii Sądu, podejście

takie nie jest sprzeczne z dominującą pozycją psychiatrów w opiniowaniu o stanie zdrowia psychicznego oskarżonego, ponieważ organ procesowy powinien dysponować możliwościami niezależnego sięgania po specjalistyczną wiedzę również z zakresu seksuologii, a więc podejmowania działania z urzędu bez oczekiwania na wniosek biegłych lekarzy psychiatrów.

W wyroku z dnia 27 maja 2010 r. Sąd Najwyższy wypowiedział się z kolei na temat przekazywania sądowi dokumentów mogących naruszać dobra osobiste innej osoby. W sprawie, w której gmina sporządziła i przedłożyła sądowi administracyjnemu opinię psychologiczną diagnozującą u powoda chorobę psychiczną, Sąd uznał, że działanie polegające na dostarczeniu na żądanie sądu opinii psychologicznej o treści naruszającej dobra osobiste innej osoby nie stanowi deliktu, ale wykonanie obowiązku wynikającego z przepisu prawa. Działaniem bezprawnym nie jest również przedłożenie sądowi przez stronę określonych dokumentów w celu przeprowadzenia dowodu na okoliczności mające istotne znaczenie dla rozstrzygnięcia sprawy, nawet jeśli narusza dobra osobiste innych, ponieważ takie postępowanie jest realizacją prawa do obrony, którego jednym z elementów jest możliwość składania wniosków dowodowych. Sąd Najwyższy podkreślił jednocześnie, że jedynie przedstawienie dokumentów dotyczących dowodów nieistotnych dla ustalenia okoliczności mających znaczenie dla rozstrzygnięcia sprawy, których treść dotyka dóbr osobistych innych, może być uznane za działanie bezprawne.

W orzecznictwie Sądu Najwyższego poruszona została również problematyka związana z art. 51 ustawy o ochronie zdrowia psychicznego, czyli nieutrwalania w dokumentacji dotyczącej badań lub przebiegu leczenia oświadczeń obejmujących przyznanie się do popełnienia czynu zabronionego pod groźbą kary. Zgodnie z art. 199 Kodeksu postępowania karnego, dowodu nie mogą stanowić oświadczenia oskarżonego dotyczące zarzucanego mu czynu złożone wobec biegłego lub udzielającego mu pomocy lekarza. W wyroku z dnia 24 stycznia 2008 r. Sąd Najwyższy dodatkowo podkreślił, że ten zakaz dowodowy odnosi się również do oświadczeń osoby, która w momencie ich składania nie miała jeszcze formalnie statusu oskarżonego.

W orzecznictwie można również znaleźć przykłady spraw, w których kwestia tajemnicy psychiatrycznej miała wpływ na przebieg i wynik postępowania karnego. W przytoczonym już wyroku z dnia 12 maja 2021 r. Sąd Najwyższy stwierdził, że oparta na opinii biegłego psychiatry możliwość wznowienia postępowania cywilnego jest uzasadniona, jeśli pozwany wykazał, że w dacie zawarcia umowy znajdował się w stanie wyłączającym możliwość świadomego powzięcia decyzji i wyrażenia woli. Opinia biegłego psychiatry w tym przypadku stanowiła nowy dowód, który powstał po uprawomocnieniu się wyroku i miał wpływ na rozstrzygnięcie sprawy.

4. PODSUMOWANIE

Tajemnica psychiatryczna ma ważne znaczenie nie tylko dla ochrony praw pacjentów, ale także prawidłowego funkcjonowania wymiaru sprawiedliwości. W procesie sądowym może ona mieć wpływ na ocenę zdolności do czynności prawnych oskarżonego lub pokrzywdzonego, możliwość dopuszczenia dowodu z opinii biegłego psychiatry, jak również warunki wykonania kary pozbawienia wolności lub środka karnego. Tajemnica psychiatryczna, pomimo swojego znaczenia, była jednak zagadnieniem stosunkowo rzadko poruszanym w orzecznictwie Sądu Najwyższego.

Zakres i granice tajemnicy psychiatrycznej nie zostały jednoznacznie określone przez prawo i tym samym mogą budzić wątpliwości interpretacyjne, dlatego orzeczenia Sądu Najwyższego pełnią ważną rolę w kształtowaniu standardów postępowania i ocenie odpowiedzialności za jej naruszenie. W jego orzecznictwie podkreśla się szczególnie, że każdy przypadek takiego naruszenia należy rozpatrywać indywidualnie, biorąc pod uwagę wszystkie okoliczności sprawy, a zwłaszcza cel, zakres i sposób udzielenia informacji oraz stopień naruszenia dóbr osobistych pacjenta. Wynika z niego również, że zachowanie tajemnicy psychiatrycznej jest jednym z podstawowych obowiązków osób wykonujących czynności wynikające z ustawy o ochronie zdrowia psychicznego i ma istotne znaczenie dla ochrony praw osób chorych psychicznie, dlatego jego uchylenie powinno być dopuszczalne tylko w ściśle określonych przypadkach.

BIBLIOGRAFIA

Dawidziuk, Ewa. Joanna Nowakowska. Red. 2020. *Izolacja sprawców przestępstw uznanych za niebezpiecznych dla społeczeństwa.* Warszawa: Biuro Rzecznika Praw Obywatelskich.

Duda, Juliusz. 2009. *Komentarz do ustawy o ochronie zdrowia psychicznego*. Warszawa: LexisNexis.

Eichstaedt, Krzysztof. 2022. „Tajemnica psychiatryczna, czyli jakie okoliczności i przez kogo muszą być zachowane w tajemnicy". *Psychiatria po Dyplomie* 6: 36–39.

Gałęska-Śliwka, Anita. Marcin Śliwka. 2013. „Zasady informowania pacjenta i innych podmiotów – analiza praktyczna". *Medycyna Paliatywna w Praktyce* 7(3–4): 79–84.

Jabłońska, Marta. 2020. „Tajemnica medyczna a prawo osoby bliskiej pacjenta do informacji medycznej – przyczynek do dyskusji". *Białostockie Studia Prawnicze* 25(2): 275–290. https://doi.org/10.15290/bsp.2020.25.02.15

Jackowski, Michał. 2011. *Ochrona danych medycznych*. Warszawa: Wolters Kluwer.

Kmieciak, Błażej. 2014. „Problem tajemnicy psychiatrycznej w kontekście dostępu prawników niemedycznych do informacji o pacjencie". *Psychiatria i Psychologia Kliniczna* 14(1): 50–54. https://doi.org/10.15557/PiPK.2014.0006

Orzecznictwo

Postanowienie Sądu Najwyższego z dnia 20 kwietnia 2005 r., sygn. akt I KZP 6/05, https://www.sn.pl/sites/orzecznictwo/Orzeczenia1/I%20KZP%206-05.pdf

Postanowienie Sądu Najwyższego z dnia 5 września 2008 r., sygn. akt III CSK 178/08, OSNC, 2009 nr 9, poz. 129
Postanowienie Sądu Najwyższego z dnia 14 kwietnia 2011 r., sygn. akt IV CSK 483/10, http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/IV%20CSK%20483-10-1.pdf
Postanowienie Sądu Najwyższego z dnia 8 lutego 2012 r., sygn. akt V KK 180/11, http://www.sn.pl/sites/orzecznictwo/Orzeczenia2a/V%20KK%20180-11.pdf
Postanowienie Sądu Najwyższego z dnia 24 stycznia 2014 r., sygn. akt V CSK 543/13, LEX nr 2542501.
Postanowienie Sądu Najwyższego z dnia 29 stycznia 2014 r., sygn. akt II KK 216/13, LEX nr 1436071.
Postanowienie Sądu Najwyższego z dnia 10 listopada 2015 r., sygn. akt IV KK 254/15, http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iv%20kk%20254-15.pdf
Postanowienie Sądu Najwyższego z dnia 13 stycznia 2016 r., sygn. akt V CSK 455/15, http://www.sn.pl/sites/orzecznictwo/orzeczenia3/v%20csk%20455-15-1.pdf
Postanowienie Sądu Najwyższego z dnia 10 stycznia 2017 r., sygn. akt V CSK 483/15, http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/v%20csk%20483-15-1.docx.html
Postanowienie Sądu Najwyższego z dnia 12 października 2018 r., sygn. akt V CSK 166/18, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20CSK%20166-18-1.pdf
Uchwała Sądu Najwyższego z dnia 24 listopada 2010 r., sygn. akt I KZP 22/10, OSNKW, 2010 nr 12, poz. 104.
Uchwała składu siedmiu sędziów Sądu Najwyższego z dnia 25 września 2013 r., sygn. akt I KZP 8/13, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20KZP%208-13.pdf
Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego (Dz.U. z 1994 r. Nr 111, poz. 535 ze zm.).
Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty (Dz.U. z 1997 r. Nr 28, poz. 152 ze zm.).
Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz.U. z 1997 r. Nr 88, poz. 553 ze zm.).
Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Dz.U. z 1997 r. Nr 89, poz. 555 ze zm.).
Ustawa z dnia 22 listopada 2013 r. o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób (Dz.U. z 2014 r. poz. 24 ze zm.).
Wyrok Sądu Apelacyjnego w Szczecinie z dnia 9 kwietnia 2013 r., sygn. akt II AKa 49/13, LEX nr 1312093.
Wyrok Sądu Najwyższego z dnia 12 maja 1964 r., sygn. akt III K 91/64, OSNKW, 1964 nr 9, poz. 138.
Wyrok Sądu Najwyższego z dnia 21 czerwca 1971 r., sygn. akt III KR 18/71, OSNPG, 1972 nr 2, poz. 33.
Wyrok Sądu Najwyższego z dnia 24 stycznia 2008 r., sygn. akt V KK 230/07, LEX nr 359261.
Wyrok Sądu Najwyższego z dnia 5 lutego 2009 r., sygn. akt II KK. 252/08, LEX nr 491593.
Wyrok Sądu Najwyższego z dnia 27 maja 2010 r., sygn. akt III CSK 257/09, LEX nr 852666.
Wyrok Sądu Najwyższego z dnia 13 marca 2013 r., sygn. akt V KK 230/12, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20KK%20230-12.pdf
Wyrok Sądu Najwyższego z dnia 12 maja 2021 r., sygn. akt II CSKP 55/21, http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20cskp%2055-21.docx.html

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