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The Barriers of Polish Legal Thinking in the Perspective of European Integration[**]

1. Introduction

The integration of Poland with the European structures is to result in the adaptation of our legal and economic system to European standards. The mere „harmonisation" of laws (legal provisions) is only a part of this adaptation, even in its legal aspect. Though it is the harmonisation of laws that attracts the utmost attention, what is really at stake is something else. It is namely the adaptation of a very Polish „legal sphere" (the legal life) to European standards. It is not only the written law that forms the legal sphere, also the way in which it is applied, the level of jurisprudence (case-law) and the foreseeability thereof are to be taken into consideration if we are to discuss Polish law as such. All these aspects of law are to be harmonised with their European counterparts, as they all taken together determine what physical or legal persons may expect in the Community. After the adaptation the same practical solutions of different problems are to be expected in Poland. Consequently, mere changes of legal norms are in no case sufficient in this country. Even if we hypothetically assume that the harmonisation of laws is really the cornerstone in the process of adaptation of the Polish law to European legal standards, the emergence of barriers to integration is inevitable.

The sources of these barriers are to be found in the very way of Polish legal thinking. What is more, these barriers are even more evident if the former (wider) definition of adaptation to European legal standards is adopted. What is really at stake is not the contents of Polish norms as such, the harmonisation thereof is not the objective itself, but only the means for attainment of the other

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[**] This is a broadened version of the article under the same tittle in: *„Państwo i Prawo",* no. 4-5 1996.

objectives. It is simply to bring about the uniform application of law by the executive and judiciary throughout the whole (future) Community. The legal aspect of integration is simply concerned with the integration with European legal culture. It is both the culture developed through several centuries and legal culture shaped within the system of the Communities. The culture as such is not subject to rapid changes and may not be enacted from day to day.

The Polish doctrine may boast of several theoretical works that keep at peace with the best European publications. The authors of these works may be claimed to lack neither knowledge nor open-mindedness. What really dominates are, however, to fit several outdated stereotypes of legal thinking. Regretfully, this is the case with the legislative works, the case-law of both the courts and the legislative works, the administrative organs and several press publications (more and more numerous, though not necessarily better). The above-mentioned stereotypes are not to be identified with individual mistakes as to interpretation or legal reasoning (though the latter are also to be found). The very general paradigms that are deeply rooted in our minds are really at stake. Despite their very general character, or perhaps because of it, they tend to let themselves known in uncountable, specific matters.

In this context one should point at three factors that determine our legal thinking or thinking about what law really is. The first is connected with the overestimation of the importance of mere text of legal instruments. I call it „textocentrism". The second factor is the overestimation of the importance of substantive law as opposed to procedural law. The third factor worth mentioning is the over-formalised concept of the legitimacy of law. All these factors should be discussed in detail.

2. „Textocentrism" of our legal thinking

This phenomenon is to be easily seen in practice. It is sufficient to have a brief look at several programmes for the improvement of law (not necessarily in the context of European integration), at different statements of law-makers and politicians and even at several public discussions on the subject. In all these pronouncements or discussions the problem of changes of law (its improvement, harmonisation, adaptation and so on) is very simple. It is namely a mere amendment of legal instruments - enacting new norms and deleting old ones. The law is understood simply as a product of the activities of law-makers, it is equalled to a mere text to be found in the Official Journal. Such an understanding of the very notion of law results in an improper approach to such processes as changes of law, its improvement and adaptation programmes. What is really the matter here is not even the fundamental differentiation between

objective law and subjective rights. To be succinct, legal texts form an important but not exclusive part of law (legal sphere, legal life) in its objective meaning.

The practical examples perfectly illustrate the very difference between binding legal texts and the law as it really stands. A few years ago the Polish statute on military service provided for the possibility of a so-called supplementary military service (that is, of working for public needs instead of serving in normal way, i.e. in military troops). Apparently, the Polish law at the time was very favourable to young persons who for various reasons did not particularly enjoy service in military troops. The lack of procedure to be followed in order to make use of the benefit of supplementary military service was the only problem. The lack of procedure made the very provision (though quite sympathetic) an inoperative one. Also the valuation of Polish law based exclusively on the very text of statute would be somehow of limited value. It does not mean however, that attempts for such an evaluation were not made. On the contrary, they were undertaken by some people who could attract attention to the humanitarian character of the Polish law. This humanitarian character remained, however, only on paper.

Since 1990 the Constitution has guaranteed that Poland is a democratic State of rule of law (*Rechtstaat*). The present author is the last person who would attempt to undervalue this innovation of crucial importance. She is, however, also the one who has claimed and still claims that the mere amendment of the Constitution has not as such turned Poland into a State of rule of law. This amendment only created the premises thereof and made it possible to fight for individual institutions typical of a state of law to be put into practice. What is more, I am not convinced by those who think that the presence of both the very constitutional provision dealing with the state of law and of all institutions thereof is sufficient to determine that Poland is a state of law at present. What is still to be determined is the way that these institutions function, and the constitutional provision as well.[1]

The enormous career of the term „legal standards" that is now seen is due to the very fact that this term refers not only to texts but also to the institutional and procedural aspects of law.

Consumer protection should be invoked as another example. The Polish Civil Code makes it possible to protect the interest of consumers in a way analogous to that of the European Communities. There is only one problem - the scheme of consumer protection to be constructed on the basis of the Civil Code is mere theoretical character. It is still a scheme of not actual but only potential consumer protection. The practice is less advantageous to consumers as the

[1] See: T.Zieliński, *Poglądy Rzecznika Praw Obywatelskich (Opinions of the Ombudsman),* May-December 1993, p.13.

courts still lack adequate understanding of their interests. What is more, they lack hermeneutic skill in regards to the provisions that could as such be beneficial to consumers.[2]

Also, only amendments of legal texts are the subject of several reports sent by Poland to international organs and concerning the implementation of treaties concluded by our state.[3] Though the treaties in question concern changes of „law" as such, only legal provisions are recognised as part of this law, no mention may found about the practice, case-law of juridical or administrative organs. The significance of amendments of legal provisions is not to be undervalued but the situation in this respect is in no case to be appreciated as a perfect understanding of the very notion of law.

Fortunately, some optimistic remarks may be also made in this context. It happens sometimes that the law is much better than binding texts of legal provisions. The best example thereof is to be found in Polish constitutional law. Though Poland has not yet prepared a new constitution (as opposed to the other Central Europe states) it does not mean that a lack of a new text equals the lack of any changes. I have already presented the opinion according to which the new Polish constitution „grows up from the roots".[4] These roots (as opposed to the formal enactment of a new constitution) are to be found in the abundant and widely published jurisprudence of the Constitutional Court. The growing interest of medusa and the increasing understanding by the society are also most important factors in the process of the constitutionalisation of Polish life.[5] The conclusion is that the amendments of legal provisions are not necessarily a

[2] This relates especially to the clauses dealing with abuses of somebody's position. They are enumerated in the laws of the States of Members of the Communities. In Poland the judiciary has difficulties with the application of such clauses. This is especially the case with art.385a of the Civil Code which prohibits *„especially undue advantages"*. The judiciary cannot understand that it is this very provision which opens the way for European rules on consumer protection and that such an application itself would be the very transformation incumbent upon Poland according to art.68 of the „Association Agreement". The situation of the other provisions of the Civil Code is somehow similar. Even worse, we can see a complete lack of sensivity of the courts to the problems of consumers. The breaches of their rights are belived to be one of the univoidable costs of the economic transformation, as it was the case a few years earlier when their interests were not protected in order not to harm state enterprises. In fact, the clauses on abuse of rights or positions are perfectly adapted to protect consumers as it is done in the European Communities.

[3] It was the case of several reports concerning the implementation of human rights instruments and labour law conventions.

[4] E.Łętowska, *Po co ludziom konstytucja (Why Do People Need a Constitution)*, Warsaw 1995, p.190.

[5] See: the social tests conducted by the CBOS (Centre for the Examination of the Social Opinions) published in January 1994 (*The Constitution in the Eyes of the Society*), in May 1995 (*The Rule of Law, the State of Law*), in November 1995 (*Law, Individuals, Power, Expectations Concerning Law*).

prerequisite to the changes of legal standards, though they usually facilitate such changes.[6] In no case are, however, these amendments sufficient to bring about the desired changes of law.

There are several adverse consequences of our „textocentrism". It makes people used to disparities between legal provisions and real life. It does not stimulate, however, any attempts to examine the very reasons for these disparities. Only changes of legal instruments of state are believed to improve the law. At the same time the problems that are to be eliminated by such amendments of legal provisions are not attribute to the latter or can be only partly attributed to them. In such situations a new text is hardly any improvement. Secondly, several aspects of legal standards (especially case law) is only to a very limited extent in the centre of interest of the doctrine of law. University studies are still almost exclusively concentrated on the text of legal norms. We can also suspect that our law-makers and politicians believe in good faith that their „textocentrism" is not a vice but a real virtue and other aspects of law are outside the scope of their efforts with legal texts - as they stood in the past, stand now and are to stand in the future.

The negligent attitude towards the court jurisprudence is in no case a Polish *specialité de la maison.*[7] The most straight forward vision of the role of the courts amounts, however, to such a speciality. We cannot depart from the view that the courts are to automatically apply legal norms (written ones) to individual cases. I do not want to reopen the question of so-called „judicial law" (the very problem is in my opinion badly formulated).[8] I only would like to remind that the application of law in a concrete situation (the concretisation of a general norm in an individual case - *Rechtsfindung, Rechtsgewinnung*) depends upon several objective and subjective factors. They concern the judge himself (his knowledge, legal skills, values and degree of openness to the outside world, belief in his own position and tasks). The sum of these elements may result in such a situation in which the judge finds in a given legal text something that has not been expected by the law-maker himself or even by scholars strictly following the former case law.[9] It is only the result of such reasoning (or to be

[6] This should not be understood as an appreciation of situations in which there is no constitution in a state. I have never expressed such an opinion, though it has been attributed to me.

[7] See: R.Herzog, *Staat und Recht im Wandel, Einreden zur Verfassung und ihre Wirklichkeit,* Goldbach 1993, p.150.

[8] As it makes the impression that the form of the activity of the judiciary and the legislature is the same. The former, however, do not create any texts of legal provisions, of course.

[9] More on this subject: E.Łętowska, *Czym naprawdę zajmują się sądy, czyli o prawdach banalnych, których nas uczono, ale o których zapomnieliśmy (What the courts do - considerations about the rudiments that we all had learnt but we forgot)*, *„Prawo i Życie"*, no.51-52 1995 and no.1 1996.

exact its multiplicity giving rise to the ability to future decisions)[10] that forms legal standards. Mere analysis of legal texts is of limited value in becoming knowledgeable about such standards. What is more, not only the court practice is at stake but also the administrative one, and we know about the latter even less than about the former.

The more general the text of legal instruments, the less is to be deduced from it itself, as the organs applying it are left with a wide scope of discretion. The administrative discretion is the best example. Here the question is not only how law is applied in practice but also where is it applied in one a way and where in another, as numerous municipalities have a say in this respect. Also, private law knows so-called general clauses.[11] Its text is not only of a very limited informative value. The same is to be said about instances in which courts interpret the provisions of agreements concluded by the parties within the reach of their freedom of contacts.

All three above-mentioned situations (administrative or court discretion, general clauses and freedom of contacts) have this in common - courts may not give judgements exclusively on the basis of legal provisions when dealing with such cases. Some extra-textual elements are necessary for those who would attempt to anticipate the decision of a court (other organ) in cases of disputes. The views, opinions and tendencies represented by persons who solve disputes (or make other decisions) are outside the scope of our knowledge. It is true also with respect to judges. Nobody collects information about the above-mentioned aspect of legal standards, there are no publications about them, no analyses are made. Not even minimal attempts are made by ministries to collect administrative case law. In regard to the jurisprudence of courts regarding general clauses, the situation is somehow paradoxical. The very separateness of case law on general clauses as opposed to other (more specific) legal provisions is hardly recognised. The differences are, however, not of minor importance. What is more, as the scope of application of civil (private law) norms *iuris cogentis* is narrowing, the importance of general clauses is to rise.[12] The general character of several provisions of the Civil Code will only strengthen this tendency. Case law is to play a particularly significant role in this respect. It remains only be mentioned that it is the latter (and the practice in general) which

[10] We can call this phenomenon „the law of the judges".

[11] B.Kordasiewicz was right when he deplored that the lack of sufficient motives of the court decisions and the lack of publication of the judgements of courts of the first instance, which made it impossible to follow the case law on art.23 of the Civil Code dealing with the rights of personality (the very article being an example of general clauses). See: B.Kordasiewicz, *Jednostka wobec środków masowego przekazu (Individuals Towards the Media)*, Warsaw 1991, p.186.

[12] See: C.Żuławska, *Zasady prawa gospodarczego prywatnego (The Principles of the Economic Private Law)*, Warsaw 1995, p.15.

determines the legal standards in this field much more than mere legal provisions to be found in the code.

„Textocentrism" is a false premise, and conclusions based on it are of no value. If it is to serve as the point of departure for evaluation of harmonisation (adaptation) of laws, the result of such an evaluation is not reliable. It is not sufficient to ask as to whether a given internal law instrument is not contrary to the letter of the European instruments (this question being the most typical in this field). The answer may be namely that though there is no conflict of the two texts, the mere enactment of the proposed internal law instrument will not, anyway, bring us nearer to the European standards. Such a situation may be possible due to several institutional or procedural loopholes. We can also imagine a situation in which the identity of the objectives is not reflected in the identity of the means for their realisation (consumer law being the best example, as the range of protection in Poland and in the Community are different).

„Textocentrism" results in efforts being concentrated on changes of legal texts, while simple educational activities, perhaps, would be sufficient for adaptation to the European standards. This sphere, however, is more than completely neglected. Nobody is ready to do anything in this field. The state authorities feel that the mere publication of statutes or regulations in the Official Journal is sufficient and they do nothing to secure the actual implementation of the norms enacted by them. The truth is, however, that well planned and organised activities of an informative and educational nature may play a very important role in the process of the approximation of Polish legal standards to the European ones. On the other hand, the principle of judicial independence (a principle which should, be respected of course) is sometimes used to justify the lack of any efforts aimed, for example, at enforcing a given set values or a given way of law interpretation. Such activities would, perhaps, result in greater sensitivity of judges for certain values to be protected by law already in force and in the increased readiness and courage to utilise the possibilities of such protection which may be found in the law.[13]

The obsolete character of our approach to the problem of law (i.e. as to mere legal texts) is particularly well seen if we consider the changes in law resulting from the process of integration. This is the best place to recollect another process in changing the legal system that we encountered a few years ago. The emphasis on the mere text of law resulted in the Gresham principle in the field of law - as bad law replaced good law. The statutes (acts of

[13] The example of the unwillingness to make use of such possibilities is the abstention of the Supreme Court (the Civil Chamber) from the evaluation of phenomena (i.e. the negatives ones) that would have to be evaluated in the case of individual disputes, when the practical differences of opinion as to the interpretation of law have not been reflected in court decisions. See: the argument of the present author with C.Żuławska in: *„Państwo i Prawo"* no.6 1994, no.7-8 1994, no. 9 1994.

Parliament) were replaced by several by-laws based on general authorisation clauses (or even instructions without any statutory bases). This was particularly the case with the law regulating the socialist economy and article XVI of the Statute and the Introduction of the Civil Code sanctioned practices of this kind. It was the wide acceptance of the principle of acts of Parliament and the deletion of the above-mentioned article that brought about the cancellation of the past situation in this respect. The principle of statute priority was consequently defended by the Constitutional Court. It remains only to hope that other courts and administrative organs will follow its line of case law.

Another visible phenomenon is that our constitutional system has now more dimensions than it had a few years ago. The constitution itself is more and more often directly applied, the drafts of the new constitution openly announce the direct applicability of the constitution by courts. In the future it will no longer be possible to rely on the mere text of legal provisions regulating a given detailed problem, while „forgetting" the constitution itself. The same is to be said about the constitutional regulation of the position of international law *vis-Ó-vis* domestic law and approval of the limitation of the powers of legislators as a consequence of the international obligations incurred by states. All these phenomena put „textocentrism" aside and make us revise our views about the legitimacy of law. What must be understood now is that the mere acceptance of the priority of statutes is no longer sufficient, as law is not the mere text of a given statute, it is a vertical system comprising the constitution and international law. Individual decisions are to be based on the law understood in such a way if the „textocentrism" is to belong to the past. The above-mentioned understanding is to be stimulated, as the spontaneous process of acceptance is to be awaited through a dozen or more years.

The conclusions of this part of the present article are modest but unequivocal. The message to our legislators is „No more dreams that European integration requires only the harmonisation of laws". Any legislative works dealing with integration have to concentrate on a comparison of legal standards and not of legal texts. Instead of the latter, the organs dealing with integration matters must know the Polish standards (to be established on the basis of court and administrative practice) and European ones. To get acquainted with the latter we should have access to the technical assistance of the Union provided for in article 70 of the „Association Agreement". On the other hand, the lack of any Polish practice in a given field, through it may seem to be a sign of the lack of conflict between the Polish and the European legal orders, is not really to be

welcomed.[14] Any legislative works undertaken without the mentioned documents are superficial and only strengthen the „textocentrism".

Another matter is the work to be done to increase the level of sensitivity of judiciary for European matters. The publications aimed at this ambitious task are, however, to avoid both a typically scholarly attitude and even the slightest suspicion of undue influence upon judiciary. The prerequisite, therefore, is that the authors of such publications throw away the textocentric approach themselves.

3. The overestimation of the role of substantive law as opposed to procedural law

If we have a look at the instruments of the European law, we will find out that much attention of the European legislator is devoted to the explanation of the aims, the spirit and the purpose of a given act.[15] The substantive content is very often not very rich - it contains simple orders or prohibitions. The other matters are left for domestic legislation of the Member State, or only the procedure to be followed by the Communities themselves is determined.[16]

One should not be under the impression that the European regulation is less intensive or less detailed than would be case if the legislator had regulated directly all aspects of a given problem by substantive law provisions. In some cases the mere orders or prohibitions are extremely detailed - the best example are norms regulating the quality of goods.

The domestic legislation problems perfectly illustrate the impossibility of anticipating all situations that may emerge through a given legal instrument. It is the case with both desired and undesired situations, which should be eliminated. The attempts of such an anticipation form, i.e. the history of socialist economic law (law regulating state owned enterprises). It seems that better results are to be expected when substantive norms exactly regulate prohibitions and orders (the border situations) and when a procedure is provided for the subsequent regulation of other matters. The results of the application of these procedures is not known beforehand, it is up to the participants in legal life to

[14] It is the case with consumer disputes, when the interested persons do not go to the court as they do not belive that they could win with powerful professionals.

[15] It should be seen in acts concerning human rights or consumer protection. This very characteristic lets us treat these acts as the sources of inspiration for lawyers from different European states.

[16] Such a procedural approach is to be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (art.8-11) determining the legitimate derogations from the freedoms provided for therein. They contain the main test of the legitimacy of such derogations.

determine the rules. To this end one should forget about the omnipotent position of the legislator.

The very phenomenon of the increasing importance of the participants in legal life (other than the legislator itself, of course) is only „a return to the roots" of civil law (or generally law and economy). In the western world it is a normal situation flowing from the very principle of the freedom of contracts.[17] Paradoxically, substantive civil law has a very well developed procedural aspect. In the law of contracts it is even the main subject matter, as it shows how contracts are made and how they should be implemented. It is this procedural aspect of substantive civil law which gives rise to its self-serving character and peculiar democracy of private law.[18] It is namely the parties to a given legal relationship who determine the content of this relationship (the respective rights and obligations). It directly affects the legitimacy and the level of the social acceptance of the results achieved by the parties. Prohibitions and mandatory requirements are introduced by norms of *iuris cogentis*. What should be awaited in the field of economy is not the narrowing of the sphere regulated by such norms but the changes of the subject matter of such norms. The latter is required for the harmonisation with the European standards.[19]

As opposed to the private law, the growing importance of the procedural aspect of the public law is in no case any „return to the roots", it is a complete and unprecedented *signum temporis*.

The acceptance of the open society[20] implies a lack of stiffly regulated solutions, strictly determined beforehand by the legislator. The law is to provide only the general framework - comprising the procedures and the afore-mentioned boundaries of the freedom of the individual participants in legal life. As contemporary democracy does not equal a simple rule of the majority, a conflict of different interests is inevitable. One should not deplore it, what is really necessary is a pragmatic way of solving these conflicts. Only then will the state function normally. Such a way is to be found in negotiations, tenders or, generally speaking procedures. They are absolutely necessary, as democracy itself is a mere procedural device - it is namely a method of the functioning of the society. Otherwise the interests of the minorities would not be able to be articulated. Of course, it happens (unfortunately far too often) that persons holding very high offices (reserved, it may be thought, for the intellectual and

[17] C.Żuławska, *Zasady prawa ... (The principles ...)*, op.cit., p. 39, p. 48.

[18] More on this subject: E.Łętowska, *Podstawy prawa cywilnego (The foundation of civil law)*, Warsaw 1993, p. 28.

[19] In the case of consumer law one should expect the widening scope of orders and prohibitions as compared with the present state of legislation.

[20] K.R.Popper, *Społeczeństwo otwarte i jego wrogowie (The Open Society and Its Enemies)*, Warsaw 1993, vol.I, p. 42.

emotional elite) express opinions according to which „democracy means rule of the majority pursing its own objectives and protecting its own interests". There is no sense, then, to consider the very style of law-making, the answer is very simple - especially in the Marxist (pre-„social-democratic") version of the legal philosophy according to which „law is an expression of will of the dominating social class". Then law is simply a tool of legitimate oppression.

Fortunately, there are grounds to claim that the contemporary Polish law undergoes the process which gives procedural law more important position.

To begin with the process of law-making - this practice shows that the formal adoption of legal provisions is often preceded by negotiations.[21] Some forms are determined by positive law (sometimes the constitution itself). It is the case of referenda or consultations. In other cases the consultations are of purely political nature but are supported by tradition. They are conducted *praeter legem*. What is more - in cases of emergency, also, negotiations led *contra legem* are necessary and win general social acceptance. The best example of this is the Polish Round Table from 1989.

The sphere in which negotiations are resorted to is wider still. Consultations have been the traditional method of solving worker-employers disputes (particularly concerning the localisation of hospitals, investments or other establishments) and disputes between the central and local authorities. Some elements of negotiator solutions in the criminal proceedings are a complete novelty. They require, however, some limitations of the principle of legalism.[22]

The draft of the new constitution (especially in the section dealing with relations between the State and its citizens) plays particular attention to procedural aspects. The procedure envisaged in the draft provides the citizens with an influence if not a co-decision in matters concerning citizens - as the society or as individuals.[23]

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[21] See: S.Wronkowska, *Zarys koncepcji państwa prawnego w polskiej literaturze politycznej i prawnej (The concepts of the state of law in the Polish legal and politicl literature)* in: *Polskie dyskusje o państwie prawa (The Polish Discussions on the State of Law)*, ed. S.Wronkowska, Warsaw 1995, p.70.

[22] In this context we should remind ourselves of the famous case of the treasury from Środa Śląska. A few years ago a treasure consisting of valuable metals and coins was discovered there. Persons who got ahold of parts were promised by the Minister of Culture that they would not be prosecuted if they returned the treasure to the State. The prosecutors however initiated criminal proceedings against concerned persons. The arguments of the Ombudsman that the negotiatory way of solving this case should be respected did not win the understanding of the prosecutors invoking the principle of legalism as the basic rule of criminal proceedings.

[23] Several drafts of the Constitution serving as the point of departure for the last project recognized this aspect of the matter to different degrees. Their common characterisic was that they

The development of self-governments necessitates the development of procedural norms. Two aspects of this must be considered. The first is connected with the necessity of providing self-governments (municipalities) with a sufficiently strong position *vis-ó-vis* the powerful central government. The local and the central organs are to determine their mutual relations, to which end they need adequate procedures.

The second aspect of the problem is not yet widely understood. As self-government is simply a form of deconcentration of administration, self-governmental organs dispose of the power and may influence in a binding way the position of individuals within their jurisdiction.[24] Appropriate procedures of decision-making and control over the self-government must be introduced, as the self-governmental organs are often ready to subordinate the common good to the good of a given group of people.

Of course, there is no reason to appreciate any new regulations only because they regulate procedure, not taking into regard the substantive content of instruments in question.[25] There is, however, no doubt that the increasing importance of procedural regulations is due not only to the increasing legitimacy of procedural legal instruments. The search for this legitimacy is another *signum temporis* to be found nowadays. The question of the legitimacy of law is the subject matter of the next remarks.

The practical conclusion finishing this sub-paragraph will also concern the legislators. While preparing drafts of legal instruments (particularly in the field of public and administrative law), law-makers should consider the very dilemma „substantive law or procedural law". The former means a definitive regulation of given matters, with a complete explanation of the state of affairs to be brought about by the proposed legal instrument. The procedural norms will let the participants in social life determine themselves respective norms in the future.

4. The crisis of the formal legitimacy of law

paid much more attention to the matter than the 1952 Constitution. See: E.Łętowska, *Po co ludziom ... (Why Do People Need ...)*, op.cit., p.202.

[24] It was to be seen in the judgement of the Constitutional Court which gave special importance to the moral dimension of the self-gouvernment of medicians, as if forgetting the gouvernmental (binding) powers. See: *The judgement of the Constitutional Court of October 7,1992,* U 1/92.

[25] Over-develloped procedures may be real obstacles to their smooth functioning as systems of dispute settlement. Their introduction may be a tool of political obstruction. The Ombudsman suggested that it was the case with the right to strike. The same (may be not intentionally) is to be said about the procedure of enactment of the constitution determined in the 1992 Statute.

The argument according to which a given judgement or decision is just only because it conforms to law is no longer accepted. The public has no more understanding to arguments referring to law as the main denominator of justice or injustice, of somebody's having rights or not. The demand for such a „bureaucratic legalism"[26] is not to be found now. What is awaited is not a formula about the legality of judgements, decisions and laws but a justification, stating clearly the material reasons behind such judgements, decisions or laws.

Several examples may be invoked in this context. Several judgements concerning the interrelationship between the freedom of information and the other values protected by law (the professional secrets of journalists, the right to publish news concerning criminal proceedings acquired through the private investigation of journalists, the protection of state secrets and the possibility of punishing journalists for breaches of the latter) have been issued. It is astounding that the courts and the society differ in their conclusions. The social disapproval has been caused for concern even to the judgements of the Supreme Court. The courts paid special attention to the law as it stood and interpreted it in line with the best principles of legal reasoning. The critics did not deny the latter, they only clamed the insufficient character of the mere wording of legal texts and the rules of their construction as the legitimacy of decisions. People awaited for the courts to consider the problems in light of human rights, especially the right to receive and give information.[27] The very examination of the legitimacy of eliminations of this right in the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms was expected, which enumerates the possible derogations from the rights named therein.[28] The critical remarks concerned the lack of valuation of the relation of Polish law to international law. It was no longer sufficient, in the opinion of the public, to assess the conformity of given acts or commissions with domestic law. It is also the latter that should be examined, as to whether or not it does conform to international standards. It must be stressed that these standards have not excluded unequivocally the solutions adopted by the domestic legal order. The critics understood this very well and did not attack the very content of the judgements - only the narrow point of reference to be found in their reasons

[26] Such a term was used for the first time in the 1989 Ombudsman Report. The author noticed that her attitude to the problem is not well understood by the authorities.

[27] See: Art.10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It should be recalled that the right to information is comprised not only of the freedom of expression. The beneficiaries of the right to information are not only individuals but the society as the whole and this right is an important guarantee of the democratic order.

[28] The test is threefold: it concerns the 1) legality of derogations from the rights recognised by the „Convention", 2) the connection thereof with legitimate purposes - named expressis verbis by the „Convention" itself, 3) and the necessity of such derogations in a democratic state.

(a fact that has not been always recognised by the judges concerned). The mere formalistic argumentation in a bureaucratic style was challenged despite the fact that the argumentation referring to international legal order could have led to the same substantive decisions.[29]

Here we must invoke three cases in which the courts threw away the routine argumentation and searched for new grounds of legitimacy. The first is connected with the Constitutional Court. A few years ago it decided that the separate opinions of its judges will be published. It increased the prestige of the Court and at the same time became a source of valuable information for the public. It acquainted people with the possible judgements - other than the one actually issued by the court - and the reasons why the latter was preferred. The publication of separate opinions was also the best proof of the independence of judges.

The second example was connected with the proclamation of a judgement in one of a few controversial cases with political background attracting the special attention of the public. As the court did not find the accused person guilty due to the lack of evidence and the public expressed it discontent, the judge tried to explain the motives of the judgement (in a kind of an ad hoc press conference). The judge managed to get, if not approval, than at least a better understanding on the part of the society.

The third example is connected with the famous judgement of the Supreme Court - the Chamber of Administrative, Labour and Social Security Matters - concerning the validity of the 1995 presidential elections in Poland. The open character of the court proceedings and the means of justifying the issued judgement (it was chosen by the court itself despite the possibility of limiting itself to the routine activities) brought about a particularly wide social approval of the proceedings themselves.[30]

These examples are, however, rather exceptional, as the attitude of the judiciary is usually a bit different. What is more - the three examples cited were widely criticised. According to some people, some lawyers, the judges attempted to become the stars (if not starlets) of the day, and according to the others the publication of separate opinions was an infringement on the secrecy of deliberations preceding the publication of judgements.

[29] We should refer here to a cautiously worded position of the Helsinki Committee issued in accordance with the sentencing of the editor of the Polish journal *„Nie"* for breach of state secret. It is namely a problem of whether it is necessary in the democratic state to keep the opportunistic rule according to which everybody (journalists as well) is obliged to not reveal state secrets, this obligation not beeing limited only to persons holding state posts.

[30] Newspaper *„Warsaw Voice"* accorded its special prize to the Court for demonstration of the priority of law over politics.

In effect, our courts often forget that the motives of the judgements are not written only for the court of second instance. That is why the reasons which are explained just after publication of the judgement are not understable for people without any legal education. What is to be found at the ground of such an attitude is the very bureaucratic formalism. According to it, everything is right if the judgement conforms to law and is issued in accordance with the conscience of the judge concerned, and additionally when this double conformity is reflected in the reasoning attached to the judgement when sent to the second instance. Then no additional justification (excuse) is necessary, as all requirements of the procedure are adhered to. Such opinions of the judiciary result in situations in which the society is deprived of a possibility to be convinced of the motives of the judges. The judiciary also deprives itself (somehow at its own initiative) of the possibility of winning wide social acceptance and actual reliance.

Interesting enough, it is the High Administrative Court that strongly opposes the bureaucratical motives of administrative decisions.[31] This is to be attributed to the kinds of organs which are controlled by this court. The High Administrative Court is never satisfied with the mere explanation that the administrative organ in question has had a right to issue a given decision. What is required is on explanation of the actual reasons underlying such a decision. It is the consequence of the differentiation of the legality and the motives of decisions. It is particularly the case with decisions issued within the range of administrative discretion. Though the organs themselves tend to believe that no justification is necessary in such cases, the opinion of the Administrative Court is just the opposite. The requirement of material justification in such matters is just intensified, as the lack of reasons for such decisions makes any attempts to control them immaterial.[32] The efforts of the High Administrative Court to eliminate the bureaucratic approach of administrative organs have lasted a few years and can be compared to the Sisyphean labours. An end to these efforts is in no case awaited, but the winning of some understanding, at least in the higher circles of administration.

Now let us turn to the legislative organs. Citizens have no special reasons to trust the law-makers now and the very fact of the passage of a new statute in the Parliament is a source of legal legitimacy for hardly anybody. History has shown that such law often lacks any support from the system of generally accepted values. Who is to guarantee that the law, as it stands now, will be better? Such doubts can be invoked more clearly with respect to the law inherited from the socialist system. The above-mentioned negotiatory aspect of

[31] See: e.g. the judgement of June 8, 1993, V SA 150/93

[32] See: the judgement of October 21, 1993, V SA 150/93.

law has important implications in the field of law legitimacy. Law that has been the subject of such consultations is to be understood and accepted more easily. The origin of law affects its legitimacy. The same is to be said about different forms of self-government.

It is a paradox that the very introduction of procedures and institutions controlling the legislator (the Constitutional Court, the Ombudsman) makes such control more and more necessary in the name of the material of law.

The problem which must be addressed in this context is connected with the promulgation of legal acts in the Official Journal. The formalistic approach to the problem is very irritating. Our relatively recent history accustomed us to antedated Official Journals and ones that could not be bought, due to the shortcomings of the distribution system in the socialist democratises. Of course, the principle *ignorantia iuris nocet* was less vulnerable to any shortcomings or defects. The other examples were connected with very short or even non existent *vacatio legis* (the result thereof being the same as of the lack of the promulgation) and the several yearlong delays of publication of the international agreements concluded by Poland, among them agreements containing self-executing norms and due to be applied directly.

All of these phenomena strongly infringe upon the principle of the reliance of citizens towards the state (the consequence of article 1 of the Polish Constitution according to which Poland is a democratic state of law). There is no doubt that citizens should be defended before such infringements. There is also no doubt as to the insufficient legitimacy of law enacted in such a way - i.e. without a proper promulgation.

The rule *ignorantia iuris nocet* is an important instrument in the future. It is a consequence of the presumption that law is known by citizens, and is a tool of the reasonable share of the risk of someone's negligence. Only one reservation is to be made - this principle can function after the due promulgation of legal instruments concerned. Otherwise, the state cannot demand the knowledge of law. Ignorance is then justified, as it is really the state itself and not citizens which is negligent. It would be an anachronism to use the principle *ignorantia iuris nocet* to excuse any irregularities of promulgation attributable to the state. It would amount (and unfortunately it does in practice) to an incentive to further irregularities, as no sanction is provided for them.

The implementation of law will be the subject matter of this sub-section. To begin with, implementation is in no case a mere publication of legal texts in due time and fulfilment of strictly formal requirements of the accessibility of these texts to the public. Something more is necessary. Implementation is an action aimed at education and information (propagation). This action is to be planned, organised and realised by the state itself. In Poland no such action is, however, undertaken, nobody finds himself responsible for the implementation

of legal texts, and no tradition exists in this respect to be followed. And the very matter has a special dimension in Poland. It was only in 1995 that the Organisation for the Economic Co-operation and Development (OECD) - grouping the most highly developed states of the world - organised special tests. Citizens of the Netherlands, Canada, Germany, Poland, Switzerland, Sweden and the United States of America were tested as to their ability to search for and to understand information and work out mathematical calculations in their every-day life. The members of the tested group (counting 300 persons) were asked to read, i.e. simple normative texts. The level of their understanding was examined and the compatriots of the present author had to satisfy themselves with the last position with very bad results.[33] This fact (discussed by the press as well) may not remain without no influence upon the process of the implementation of law. As we criticise the way of the implementation and the mere formalistic approach to the promulgation of legal acts, taking into consideration the need for public access to law, more dramatic conclusions are to be drawn if we realise that the public may have special difficulties with understanding law. The question of the proper implementation of law must be stressed especially strongly. Any works connected with European integration will have to take into consideration the need to attain the level of the public understanding of law (also citizen-citizen relations) that is required by the premises of the integration process.

The opposition against the bureaucratic formalism and the search of a new (material) legitimacy of legal order is another *signum temporis*. No acceptance is to be found by simple legalistic, formal arguments. This is true with regard to the executive, but also with respect to the legislative and judiciary branches. Any forms of arbitrary rule are strongly opposed by the public. This should be attributed to the development of human rights - the post-war answer to the totalitarian systems. The arbitrary treatment of the citizens of a given state no longer is an internal affair of this state, it is a case of universal interest - at least to the point of the minimal requirements. As the state of law emerged as a result of the denial of absolutism on the level of the executive branch, the contemporary law of human rights is more ambitious. The mere priority of acts of the Parliament or the existence of administrative courts are no longer sufficient guarantees of the rights of individuals. They are to be defended not only from arbitrary treatment by the executive, but also the judiciary and the legislators themselves are to be controlled. In case of breaches of human rights by any of the branches of the state, individuals may themselves take protective

[33] The lowest level was occupied by 40% of Poles (20% of Americans, 10% of Swedish persons). 3/4 of the Polish respondents were on the lowest levels. The sociological tests show that the results in regard to the lecture and the level of understanding of the press are not better.

measures on the international level. The ambitions stirred by the development of human rights[34] and by some other developments bringing about limitations of the powers of the authorities (the European integration being one of them) have twofold consequences. One of them is a critical attitude towards authorities. The other is the crisis of legitimacy based on the mere legality of measures taken. Material justification is demanded nowadays.

Legality is a perquisite of the legitimacy of the activities undertaken by the authorities, but it is not sufficient. It seems that the authorities themselves have not fully understood this yet. That is why there is a substantial disagreement between the authorities - citizens. Contemporary democracy is of a representative character, which in the government is more and more evident. Rescue is to be found, if not in the revival of the political participation, than in information about the activities of the authorities. This is to be achieved through well written reports, good reasoning of the judgements, decisions or statutes adopted, generally speaking - through the transparency.[35] Similarly, if material justice (fairness of the authorities towards the society) is to be guaranteed, this may be a source of legitimacy of the rulers of the state.

The conclusion to be made is - more light, more reasonable transparency, more information and more search for social approval from the three branches of the government. It is the best indication of the detailed solutions before the complicated matters of European integration are worked out.

[34] Human rights are applied to legal persons as well.

[35] Interesting enough, the developement of independent audit finds justification in the same arguments referring to the legitimacy, see: M.Power, *The Audit Explosion*, London 1994.