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Competence of a civil judge in the field of decision making - reification function

Do not specify to the point it's narrow.
Stanisław Jerzy Lec[1]

1. The Purpose of the Article

Analyzing the decision-making process of a judge leads to the conclusion that apart from three functions: judicial (that consists in decision making in the form of judgments and orders), mediatory (that consists in attempting that the parties or participants made a plea), and informative (that consists in presentation of premises that had been decisive in decision making process in reasons for judgements as well as, in the limited extent, in providing information on the content of laws), there is one more particular function of a civil judge - a r e i f i c a t i o n function[2]. The following article aims in answering four questions: the first one – what the reification function is; the second one – why this function belongs to the judge in the model of separation of powers; the third one – why performance of reification function by judges is controversial; and the fourth one – what is the relationship between the reification function and judge's competence to make decisions.

2. What Does the Reification Function Consist in?

When it is said that 'law is passed' and 'law is applied', it is not about the same as 'law.' In the first case, it is about the recording of an idea. In the second case, it is about the process of its embodiment. For this embodiment, I use the term *reification* and define the function of a judge as the one who, from the text, from the idea expressed therein it, creates a judgment, solution to a specific problem, with justification for the individual situation and specific persons.

A provision of law is static and law itself is dynamic. The provision is a text, while law is a process running from passing a provision to its transformation into a specific social situation. This transformation may be an act of obedience to a legal norm, a result of

[1] S. J. Lec: *Unkempt Thoughts*, 2007, p. 117.

[2] In the language of philosophy, a term reification is materialization, objectification, a treatment of something that is not a thing as a thing, the recording of human activity in the form of a thing made by a man. Cf. *Dictionary of foreign words,* Elżbieta Sobol, ed., Warszawa 1999, p. 950.

negotiations, or a judicial decision. This is the path from abstraction (an idea) to a thing (embodiment of an idea). Law is embodied in a judicial decision, law is a 'thing' produced in accordance with a specific recipe – a provision of law.

One could also use a concept of conceptualism and conceptualization[3] and define the process that a judge performs as de-conceptualization. Conceptualism (the one in philosophy, not in art) reflects the thesis that universals, general terms, are only in the mind, and conceptualization is the transformation of those into concepts and definitions. Applying the metaphor of conceptualism to law, I would say that law within the meaning of 'provisions' is conceptual, and law in the sense of 'judicial decisions' is the result of the process of de-conceptualization. Provisions are 'conceptual' and law is 'real'. This is what differs the judicial decision from the act.

Law, as a provision, constitutes an incomplete system in respect of logic[4]. It may raise some doubts in those for whom completeness is perceived as a feature of what is being referred to as a system. However, law is undoubtedly a system and, certainly, it cannot 'escape' from this categorization. At the same time, incompleteness of this system cannot be denied. This incompleteness has several sources.

Firstly, the language and its characteristic features. Secondly, the difference between an abstract and general norm and a specific and individual one. Thirdly, the static nature of the provisions compared to the dynamism of social and economic relations and culture; although in the latter case the dynamism is less developed.

The first source of incompleteness of a legal system I am mentioning is language. Sometimes, the source of the ambiguity of the provision is ineptitude of a legislator formulating the provision. However, even if creators of legal provisions were masters of language usage, they would not avoid ambiguity. It results from the fact that the ambiguity of words and expressions as well as contextualism are the hallmarks of language as such. This is accurately explained by Stanley Fish and Bartosz Brożek.

Stanley Fish indicates that the language has a specific form that depends on the context[5]. The concept of 'literal sense' in accordance with which the only (meaning) is the one established once and for all would be justified on condition that one meaning understandable in isolation from any situation, one meaning that would not be a product of any interpretation but existing independently would exist. Every literal meaning is presented as fulfilling such condition. Such condition, however, may seem fulfilled due to the fact that

[3] This depiction is a result of a discussion with prof. E. Łętowska in 2017 and it is caused by her suggestion to capture the process that I described in a simultaneous or alternative manner.

[4] K. Zwingmann: *Zur Soziologie des Richters in der Bundesrepublik Deutschland*, Berlin 1966, p. 67, [in:] K. Piasecki: *Judgments of courts of first instance, courts of appeal and the Supreme Court in civil, commercial and business cases*, Warszawa 2007, p. 43.

[5] S. Fish: *Interpretation, rhetoric, politics. Collected essays*, A. Szahaj, ed., Krakow 2002, p. 29.

certain act of interpretation already exists. And such an act of interpretation is so deeply related to the situation (…) that it does not seem to be the act at all. We are always in some situation. We are never totally free from situational contexts. For this reason, we always make an act of an interpretation[6].

Brożek emphasizes that language must be structurally stable. It means it cannot be too precise. In the precise language of mathematics, the smallest perturbation, such as closing a bracket in a different place than intended, results in significant consequences for the message and a result of communication. Therefore, structurally stable language is a language insensitive to these kinds of errors. It is a language in which the meaning must be a) undetermined, b) relatively stable. The term undetermined shall mean that the meaning of the expression cannot be determined without a reference to the context. It results from the fact that a specific expression is assigned not with one but with a bunch of meanings. In turn, the relative stability of a language consists in the fact that every competent language user assigns similar meaning to a given expression. In conclusion, the structural stability of a language and its resistance to perturbations, as a result of indeterminacy and relative stability, causes expressions to have bunches of meanings as long as they are outside the context[7].

Brożek quotes Waisman's thought experiment: imagine meeting someone who looks like a human, moves like a human, speaks like a human, but is only 2 centimeters high. One needs to decide whether to call the creature human or not. It makes a term 'human' ambiguous[8].

Therefore, pure legal positivism is not possible. Positivism assuming that the content of law is only known through the linguistic correctness of the text, which ensures its understanding in consistency with the intention of the legislator[9]. It is not caused by ideological reasons related to the sources of law, but for pragmatic reasons: the features of language. Linguistic correctness guaranteeing unambiguity does not exist.

The second source of incompleteness of a legal system is the difference between abstraction and concrete facts.

A provision is related to an abstract situation and a category of entities. Law, as a process reflected in the judicial decision, concerns a specific and individualized situation. Pursuant to § 5 of the Legislative Drafting Principles[10], the provisions of an act shall be

[6] Ibidem. p. 39
[7] B. Brożek: *Limits of interpretation*s, Krakow 2014, p. 44-45.
[8] Ibidem, p. 45.
[9] Cf. P. Skuczyński, M. Zirk-Sadowski: *Two dimensions of professional ethics of judges*, National Council of Judiciary, 2012, no. 1, p. 14 i 42.
[10] Appendix to Regulation of the Prime Minister of 20 June 2002 on „The principles of legislative techniques", Notice of the Prime Minister of 29 February 2016 on the publication of the consolidated text of Regulation of

regulated concisely and synthetically, with avoidance of excessive specificity, and, at the same time, in the manner in which typical situations occurring in the field of matters regulated by the act are described. It means that a provision shall contain terms describing each situation that meets certain criteria. The evaluation criteria must wait for the moment of concretization in the process of applying law.[11] The evaluation whether these criteria are met is an act of concretization. And such an evaluation constitutes a connector between an abstract and a specific norm. The necessity of making evaluation is a feature of court adjudication process. While judging, a judge *reifies* the idea (provision) into the concrete fact (judicial decision).

The third source of incompleteness of a legal system is the static nature of provisions towards the dynamism of social relations.

The fact that a provision is static, and law is dynamic results from the fact that law is a social occurrence: it happens along with other social occurrences. For the legislator, a general clause is a method of opening a provision to the dynamics of social life. A general clause is supposed to prevent legal norms from ageing.[12] It allows to continue the application of legal norms, despite the change in economic conditions, affecting the evaluation of legal relations.[13] The sense of 'opening' a legal system by general clauses lies in the fact that, upon the moment of their creation, future evaluation cannot be predicted[14].

In conclusion, a provision is a text, and law is a process. Due to ambiguity of language, the necessity of changing abstraction into concrete facts, and due to the dynamics of social life in confrontation with a static text, law does not stay as it was pronounced by the legislator. In this situation, there must be a force that will shape this process and keep it in line with the goals and objectives of the legislator. This is the power of the judiciary, personified by a judge performing the reification function. A judge, turning abstract into concrete, provision of law into law, performs the reification function.

3. **Why does the reification function is the function of judges?**

The previous deliberations show that the legislator introduces the static provisions, and law is a dynamic process. It is so because of the several reasons – due to providing various interpretations to the ambiguities resulting from the characteristics of a language and changes in the social context, due to the necessary dynamics accompanying the

the Prime Minister of 20 June 2002 on „The principles of legislative techniques", Journal of Laws from 2016, Item 283.

[11] Cf. I. C. Kamiński: *Rightness and law. Comparative legal analysis*, Krakow 2003, p. 37.

[12] E. Rott-Pietrzyk: *General clause of reasonableness in private law*, Warszawa 2007, p. 284.

[13] Ibidem. p. 285.

[14] Ibidem. p. 295.

transformation of an abstract norm into an individual one; and due to the necessity to create a norm despite the lack of unequivocal provision being its source.

In this situation there must be a force that will seize the dynamics, shape it and keep within the limits of the objectives and assumptions of the legislator. The force is judiciary, personified by a judge performing the reification function. A wise legislator needs to allow such a function of a judge within law. Otherwise, the regulations will need to be specific to such an extent that, by formulation of an unequivocal provision, not taking into consideration the variety of real social relations, the function of the legal act will be distorted and not reflecting the purpose of an act. Montesquieu illustrated this situation with a vivid example. His remarks on law, except for the outdated analogy to the 'mouth that pronounces the words of the law,'[15] have largely preserved their accuracy: when the law intends to introduce a fixed norm, one must avoid, if possible, to express it in a monetary form. There are thousands of causes that change the value of money; with the same name – a thing is no longer the same. The story of a crook in Rome is well known. He slapped faces of everyone he met and paid them twenty-five pennies, as specified in the Law of the Twelve Tables[16]. This is an example of an effect of adopting the provisions that are too unequivocal.

Since the provisions of law are equivocal in an assumed intentional manner (although this ambiguity is also introduced from time to time in a non-intentional manner) and this situation cannot be avoided in a rational manner, the shaping of a legal norm addressed to a specific addressee is left to the authorities enforcing the law[17]. The application of the provisions consists in their specification in relation to the situation. This is a role of a judge, as the essence of the judiciary is to form assessments and make decisions. The influence of a judge on the application of law is expressed the most strongly in the role played by the assessments he is making.[18] It is necessary to allow a judge to make the assessments, as there is nothing like the universality of assessments and their absolute objectivity is not possible.[19]

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[15] The effect of the spreading of Napoleonic ideas in Europe, was not only adopting the Napoleonic Code in the conquered countries (...), but also the adoption of the French model of judiciary, which made judges public officers with no right to review the law established by the sovereign legislature. In Europe, only the events of the Spring of Nations in 1848 brought the first draft of a special court examining the lawfulness of the constitution (Germany). In France, as a result of historical determinants in this area, such a court did not arise until the mid-20th century. The first country allowing judicial control of the law was Greece, where the Supreme Court had the competence to indicate formal defects in an act, and then, from 1897, it gained the real right to control in this area. However, the first constitutional court in Europe was established in Austria (1920) and just after in Czechoslovakia (1920) and then in Spain (1931). Cf. D. Skrzypiński, *Judicial power in the process of transformation of the Polish political system. Political studies*, op. cit. p. 27.

[16] Montesquieu: *On the spirit of rights*, Kraków 2003, p. 524.

[17] Cf. Judgement from November 20, 2002, K 41/02, OTK ZU No. 6/A/2002, item 83 and a judgement from November 27, 2007, SK 39/06, OTK ZU No. 10/A/2007, item 127.

[18] J. Wróblewski: *Judicial application of law*, Warszawa 1972, p. 382.

[19] Cf. E. Rott – Pietrzyk, op. cit. p. 291 and cited M. Safjan: *General clauses in civil law, contribution to the discussion, „Państwo i prawo", 1990, no. 11*, p. 56, 57; M. Pawełczyk *Remarks on „referencing" character of general clauses,* „Studia Iuridica Silesiana" *1984, no. 9,* p. 84, 88; J. Nowacki *On standards (abstract – general) and situational understanding of principles of social coexistence*, *„Z problematyki Prawa Pracy i Polityki Socjalnej,*

It is only possible to come close to the objective model.[20] The essence of the notion of power implies that it consists in the possibility of making different choices and settlements. When a decision-making person does not have a certain scope of decision-making freedom, or it is minimal (…), it is difficult (…) to legitimately claim that the decision-maker exercises power; at most they are the executors of decisions coming from a decision-maker with power.[21]

4. Why is the reification function controversial?

One of the controversies regarding the judiciary in the context of assessments made by a judge is the boundary between the creation of law and its application. The thesis is: the court is to apply the law, not to create it.

The second controversy concerns the assessment of how 'dangerous' the general clause is – in regard to the scope of the freedom of adjudication.

The third controversy concerns the fear of a judge to realize the reification function, and, in its consequence, a specific 'refusal to adjudicate', being manifested in behavior, the way of making decision, rather than in the open refusal.

Starting from the first controversy, it must be pointed out that, when it comes to the theory of applying law, two basic theories can be named: the theory of constrained decision, and the theory of discretionary decision. The model example of the first theory is the syllogistic concept of the application of law, through which the law enforcement process was given a fully logical character, and the judicial decision was to be an automatic consequence of the application of an act. However, to apply law one needs to assume that the legal system is closed, complete and consistent[22]. I have rejected this thesis, pointing out three reasons for incompleteness of legal system.

The theory of discretionary decision of applying law distinguishes "the law" from "a provision of law". The process of applying law is not of a logical character, it is creative. This category includes the school of free jurisprudence, American legal realism with intuitionism, legal hermeneutics, and the theory of legal argumentation. I have not characterized the trends in the theory of constrained decision because I rejected it as being contradictory to the results of analysis of the legal system as being incomplete. On the other hand, it is justified

Katowice 1980, no. 5, p. 11; L. Leszczyński *Attributes of applying general clauses in private law. Perspective of a change of a trend,* „Kwartalnik prawa prywatnego" 1995, issue 3, p. 295; and cf. M. Król, *Concept of complex cases and finality of a judgement,* [in:] Theory of law. Philosophy of law. Contemporary law and jurisprudence", Toruń 1998, p. 97-109.

[20] Ibidem.

[21] W. Sanetra: *Common courts and the Supreme Court as a judicial authority*, 'Court review', 2008, No. 6, p. 6.

[22] Cf. J. Stelmach [in:] R. Sarkowicz, J. Stelmach, *The Theory of Law,* Kraków 1996, p. 97-100.

to characterize shortly the theory of discretionary decision to present the range of decision freedom being discussed, because the differences in the recognition of this freedom themselves are the source of controversy and not the mere issue of adoption of the discretionary decision, being contrasted with the theory of constrained decision.

The school of discretionary jurisprudence represents the position that an act does not need to be neither independent nor the only source of judicial decision. A judge has freedom to the level close to the freedom of the legislator and, besides the codified law, there is also judicial law, up to the limits of adjudication *contra legem* – that is 'not only the act, but even against the act.'

American legal realism also acknowledged the existence of the judicial law that was different from the codified law. D. W. Holmes pointed out that law is 'anticipating what courts will in fact do,' and so there is law in books and law in use. J.C. Hutcheson reduces the application of law to waiting for an intuitive reaction: *hunch*. He allows the imagination to work and waits for the intuitive feeling that combines the matter and a decision. Hunch is a kind of imagination that good lawyers are characterized by[23].

In turn, legal hermeneutics indicates that law exists in an act of understanding. It is based on the confirmation of conformity, it emerges within the act of the update and realization, that is by transition from abstraction to a specific item.

The theory of legal argumentation in the perspective of the theory of discretionary decisions lies in the fact that judicial decision shall be based on logical assumptions (internal justification) and that these assumptions should be correct (external justification)[24].

It is difficult to apply anything from school of free jurisprudence to Polish legal system, apart from the generally applicable assumption of the theory of discretionary decision, namely, that an act is not the only source of jurisprudence. Even this assumption, though it seems to characterize the work of a judge well, is misleading. Even when a judge uses, for example, the rules of social coexistence, he does not go beyond an act. An act is open to social relations; therefore, a judge still acts within the framework of an act. It is important because, as defined in the Constitution, a judge is subject to the Constitution and acts. Going beyond these frameworks is no longer considered as the application of law. The *contra legem* interpretation allowed by the school of free jurisprudence is not supported by Polish law that shapes the process of application of law and the constitutional basis for functioning of the judiciary.

American legal realism is based on a different legal system. In Polish law, such an approach would be unjustified, especially as an assumption. On the other hand, outside the

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[23] J.C. Hutcheson: Judgement intuitive, Chicago, 1938, p. 21 [in:] J. Stelmach [in:] R. Sarkowicz, J. Stelmach, *The Theory of Law*, Kraków 1996, p. 97-100.

[24] Cf. J. Stelmach [in:] R. Sarkowicz, J. Stelmach, *The Theory of Law*, Kraków 1996, p. 100-103.

theory of law, in practice, case-law is a kind of source of law. However, it is not a source of law in a sense of an abstract norm, and not even a source of biding interpretation – with a few exceptions, but the source of argumentation. The thesis of a judgement is a poor material for a judge to use in a different lawsuit. A source that can be helpful at all stages, and mostly in the justification phase, is an argument presented in the justifications of the judgements. Because of pragmatic reasons one shall monitor the jurisprudence and anticipate what the result of lawsuits might be, but it is controversial to consider it as law in a sense an act is – abstract and general.

The theory of legal argumentation seems to best reflect the ideal process of the application of law. Since law is textual in its sources, and, therefore, linguistic, and, consequently, contextual – then the aspect that resolves the dilemmas is the argumentation for accepting one of the solutions. The argumentation comes into prominence and legitimizes (or not) the decision. It materializes in the justification, which is the key element of the application of law from the point of view of legitimization of judiciary.

The controversy about the boundary between the creation of law and its application is related to a question on what is considered as 'creation of law' and what is meant by 'application of law'. Dworkin points out that judges make judicial decisions on the basis of existing law – so they do not create it.[25] This thesis assumes that not applying the provision literally does not mean departing from an act. Dworkin does not deny that a judge 'looks for' the content of a provision, but he emphasizes that such a solution can be found in the sense that there is one correct solution (and not a few legitimate versions of it).

Even without determining which version of 'creativity' is permissible in making a judicial decision or whether the search made by a judge can be called creativity or it is simply the feature of application of law, it needs to be emphasized that the approach to law as if it were a physical object that could be objectively known is no longer popular. The concept of getting to know the law as an almost physical object, towards which a lawyer shall have an objective, purely cognitive attitude, is justified only on the basis of initial positivism. Nowadays, thanks to the influence of analytic philosophy, it has been contested, which resulted directly in a crisis of textualism in western legal culture. The essence of textualism consisted in the statement that all attempts to go beyond linguistic interpretation are considered as judicial legislation. This view is now being criticized by the doctrine called the judicial activism in the US[26].

At this point it is necessary to explain shortly what is meant by 'judicial activism' in its basic, most common formula. Judicial activism requires judges to apply law in a form of

[25] Cf. J. Woleński: Introduction to R. Dworkin, *Taking the law seriously,* PWN 1998, p. XII.

[26] Cf. M. Marczak: *Summa iniuria. On the mistake of formalism in the application of law*, Warszawa 2007, p. 53-82 [in:] P. Skuczyński, M. Zirk-Sadowski: *Two dimensions of professional ethics of the judges*, National Council of the Judiciary, 2012, No. 1, p. 13.

argumentative model – to use not only the text of an act, but also to take into account all phenomena accompanying the functioning of law, and, in justified cases, to look for the best solution even if it requires the modification of legal provisions. A judge shall consider the function of law and its purpose[27]. Law has many sources, and an act is only one of them, and the intention of the legislator might only be one of the points of reference[28]. Judicial activism is therefore based on legal knowledge, dependent on the ethical requirements of the legal discourse. It rejects the concept of law as objective and purely external to the object of cognition of the lawyer. Judicial activism gives a judge the opportunity to take ethical responsibility for the content of law and to look for its understanding in the context of cultural norms and values[29].

Since a judge shall translate an abstract and general provision to a specific and individual law, it is not possible to avoid creativity. It is not about creation of acts, but rather the creation of law. Creation of an act (provision) is something completely different than creating law (judgement). A judge creates law in the process of transforming the abstract into a concrete case. Doing this, that is performing the reification function, is, by design, creative – so creativity of a judge cannot be denied – the creativity in a field of law, which is, of course, not a source of new provisions or decisions against an act. One needs to distinguish creative role of a judge, which is characterized by its close (…) relation with an act as the basis for applying the law, from legislative role of jurisprudence, which is rejected in Polish law system[30].

As regards the boundary between the creation of law and its application, the following remarks shall be made. One shall take into account the nature of law and the difference between provisions, abstract and general, created by the legislator and law as a process leading to judicial decisions shaping a specific and individualized situation. An attempt to deprive a judge of instruments and power to any kind of creativity would mean that law could not be applied. This creativity does not mean that a judge has complete creative freedom. A judge differs from an artist in the limits – that a judge cannot go beyond. Creative supplementation of law being made [by its materialization – author's note] is undoubtedly reserved for a judge, who, however, is subject to law in exactly the same way as any other member of the legal community[31].

The concept of Polish judicial activism shall be based on leaving the positivist vision of law as a text. Positivism assuming that law is being learnt through linguistic correctness of

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[27] P. Skuczyński, M. Zirk-Sadowski: *Two dimensions of the professional ethics of the judges*, National Council of the Judiciary, No. 1, p. 13.
[28] Ibidem, p. 13-14.
[29] Cf. R. Dworkin: *Law's Empire*, London 1986, p. 410–411 [in:] P. Skuczyński, M. Zirk-Sadowski: *Two dimensions of the professional ethics of the judges,* p. 14.
[30] K. Piasecki: *Organization of judicature in Poland.* Kraków 2005, p. 62.
[31] Hans Georg Gadamer: *The Truth and the Method*, Warszawa 2007, p. 450.

a text, which itself ensures its understanding in a manner coherent with the intention of the legislator, leads to instrumentalization of judgement[32].

It has been already proven that law is a social occurrence. The fact that legal positivism is impossible has also been already proven. This is because of the characteristics of language. Also due to the characteristics of language, one shall assume that law is of an argumentative nature.

It does not imply a conflict in the concept of separation of powers or a dilemma between a provision and justice. The legislator itself ensures the possibility to go beyond the text of an act and to refer to values and purposes. The legislator is aware that the abstract legal norm that is designed is of different nature than a specific legal norm resulting from the application of a provision. Therefore, it uses vague terms and general clauses that must formulate a general principle, and represent some regularity, being characteristic to the civil law system.[33] The legal order rarely provides direct and unequivocal answers to questions being resolved by a judge. It forces a judge to look for answers in the analysis of legal norms, and to use it to reconstruct the hierarchy of values recognized by the legislator – being important both from the perspective of the entire legal order and a case being adjudicated. It involves the legislative role of judges and courts in the state of law[34]. Therefore, a general clause or a vague term 'authorizes to make an assessment within individualized circumstances.'[35] The Constitutional Tribunal indicates that 'it is the authority applying law that is obliged to identify (...) the content (vague term), taking into account the basic principles of law, system-wide values and constitutionally protected standards'[36].

In this way, the legislator enables judges' activism and gives an impulse to it, avoiding the anticipated objection to the judges that they 'create law instead of applying it'. The legislator understands that, in the process of applying law, it just comes into existence, it is created by judges, being changed from a text into a social occurrence; being translated from an abstraction to concrete things.

[32] P. Skuczyński, M. Zirk-Sadowski: *Two dimension...,* p. 14.
[33] A. Stelmachowski: *Introduction...* op. cit. p. 414 [in:] Ireneusz C. Kamiński: *Rightness and law. Comparative legal analysis*, Kraków 2003, p. 32.
[34] A. Wasilewski: *Judicial power in the Constitution of the Republic of Poland*, 'The State and Law', 1998, No. 7, p. 8.
[35] I. C. Kamiński: *Rightness and law. Comparative legal analysis,* Kraków 2003, p. 32. The author notes that the same normative constructions are differently qualified in legal systems or legal literature of various countries. As an example, he gives public order and good faith, which in France are considered as vague concepts and in Germany as general clause. Also, the relations between clauses and concepts are differently defined, that is, clauses are sometimes included in concepts, sometimes the opposite or their relationship is otherwise determined.
[36] Judgement of the Constitutional Tribunal from January 15, 2019, K 45/07, point III.A.2.5.2.3.

In this context, the dilemma related to judicial activism does not exist. The legislator explicitly admits that law is the result of social communication that judges participate in[37].

Skeptics may say, 'well… but how to verify such a judgement?' There is a concern over the arbitrariness of assessments. The pragmatists will ask, 'well… but what should a judge do when there is no general clause in the provision?'

Answering the questions, it should be pointed out that a judge, 'knowing and expressing the dominant values in society, is to ensure that law follows the changing circumstances.'[38] This is the element of transformation of abstraction into a concrete object, that is, the implementation of a reification function. As I pointed out above, the legislator realizes that the abstract legal norm has a different character than a specific legal norm resulting from the application of the provision. Therefore, it introduces vague terms and general clauses.

The second controversy over the judiciary in the context of assessments made by a judge is the question of how 'dangerous' a general clause is in regard to the scope of the freedom of adjudication.

There is no legal definition of a 'general clause.' Only the Legislative Drafting Principles mention general clauses by the term, next to 'vague terms,' as instruments to ensure flexibility of the normative text, alongside another instrument in this category that is the determination of the minimum or maximum limits of discretion. It is defined in the doctrine that a general clause is an undefined legal term referring to the judgmental and generally oriented non-legal criteria, the specific content of which is determined in the law enforcement processes[39].

The function of general clause is to ensure the flexibility of provisions[40] and to prevent legal provisions from aging too quickly.[41] According to § 155 para. 1-3 of the Legislative

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[37] Cf. P. Skuczyński, M. Zirk-Sadowski: *Two dimensionp...,*. p. 14.

[38] Cf. T.T. Koncewicz: *Seeking a model of procedural fairness in Community law. Myth or reality?* op. cit., issue 30, p. 41.

[39] L. Leszczyński: *The concept of general clause*, Annales Universitatis Mariae Curie-Skłodowska 1991, vol. XXXVII, section G, [in:] Ireneusz C. Kamiński: *Rightness and law. Comparative legal analysis*, Kraków 2003, p. 33; J. Nowacki: *The problem of blanket rules containing general clauses* [in:] ed. G. Skąpska: *Law in a changing society,* Kraków 1992, p. 127; J. Czarzasty: *A contribution to the problem of general clauses*, 'The State and Law' 1978 No. 5 p. 83, 84; Z. Ziembiński: *The state of discussion on the issues of general clauses*, 'The State and Law' 1989, No. 3, p 16; L. Leszczyński: *General clauses in the application of law*, Lublin 1986, p. 20-21; R. Piszko: *Law and non-legal norm. Types of relationship,* Szczecin 2000, p. 133; cf. also Z. Radwański: *Civil law - general part*, Warszawa 2003, p. 51.

[40] Cf. Justification to judgement of the Constitutional Tribunal from October 17, 2006, P 38/05 OTK-A 2006, No. 9, item 123, where the Constitutional Tribunal pointed out that the system becomes more dynamic by the use of general clauses.

[41] E. Rott – Pietrzyk, op. cit. p. 284; The author illustrates it with references to W. Wolter: „general clauses are the functions of the time and place', and Descartes: „I should have thought that I had committed a serious sin against common sense if, because I approved of something at one time, I was obliged to regard it similarly at a

Drafting Principles, if there is a need to ensure the flexibility of the text of a normative act, one can use the vague terms, general clauses or set the intransgressible (minimum or maximum) limits of discretion. Constructing legal norm by means of vague concepts is sometimes 'the only reasonable solution'[42].

Difference in the doctrine on the clauses concern, among others, the question on whether general clauses refer to non-legal norms or values, or whether they do not contain any 'reference' to such assessments, but enforce the obligation to formulate assessments, as there are no assessments that could be referred to. It is a matter of distinction whether the obligation refers to some assessments or orders them to be formulated on the basis of certain norms.[43] It is sometimes pointed out that clauses do not refer to non-legal assessments, but they oblige to formulate an assessment: Sometimes (...) the problem of distinguishing if we deal with a term referring to objectified empirical criteria or to assessment may arise. It will be the case with the concept of interest. The reference is made to the assessment of social rules (e.g., rules of social coexistence or a custom of fair trade) or to the values (e.g. the best interest of a child)[44].

In my opinion, general clauses refer to non-legal criteria, obliging to make assessments. They do not refer to any rules or principles, but just to the criteria for making assessments: These principles (...) are treated as a factor that is a help or even a starting point for the institution applying law for the choice on the level of moral values when making assessments.[45] In a sense, the legislator indirectly obliges a judge to use norms and non-legal assessments when determining the meaning of a given term.

The guideline to answer a question whether it all is about making references or not is an indication that general clauses redirect a judge to make assessments. Either way, these assessments are determined by various factors of the socio-political, cultural context and the

later time, after it had possibly ceased to meet my approval, or after I had ceased to regard it in a favorable light'. R. Descartes, *Discourse on the Method*, Antique Publishing House, 2009, p. 21.

[42] Cf. The resolution of the Constitutional Tribunal from November 6, 1991, W 2/91 [in:] judgement of Constitutional Tribunal from January 15, 2009, K 45/07.

[43] Cf. The analysis conducted, among others, in P. Tkacz: *The clause of 'Justice'*..., op. cit., p. 12, et seq.; J. Wróblewski: *Rules of reference*, Acta Universitatis Lodziensis, Folia Iuridica 1964, No. 35, p. 15; A. Stelmachowski: *The introduction to the theory of civil law*, Warszawa 1984, p. 293; K. Wójcik: *General clauses as non-systemic reference,* Acta Universitatis Lodziensis, Folia Iuridica 1987, No. 32; Z. Radwański, M. Zieliński: *The system of private law,* Vol. I p. 333, L. Leszczyński: *The notion,* p. 163; L. Leszczyński: *Evaluative phrases in the draft of the Constitution of the Republic of Poland – regulation of norms of the system and civil rights*, Annales Universitatis Mariae Curie-Skłodowska, Lublin-Polonia, G. Vol. XLIV Lublin 1997, p. 58 et seq.; J. Czarzasty: Contribution, p. 86; J. Wróblewski: *Judicial use,* p. 224, M. Pawełczyk: *The remarks on „the referential",* p. 81 et seq.; J. Nowacki: *On Provisions including general clauses. Studies on the theory of law,* p. 134, 135; L. Leszczyński: *The use of general referral clauses*, Kraków 2001, p. 21; E. Rott – Pietrzyk, op. cit., p. 280.

[44] I. C. Kamiński: *Rightness and law... op. cit.* p. 33.

[45] J. Nowacki: *On Provisions including general clauses. Studies on the theory of law,* Kraków 2003, p.147 (this article had been originally published in: Law and politics, A. Bodnar (ed.), J. Wiatr, J. Wróblewski, Warszawa 1988), being referred to by E. Rott - Pietrzyk, op. cit. p. 282, 283.

personality of a judge.[46] Therefore, a judge should know and consider, in the exercise of the jurisdictional function, the current social, economic and political problems of the state.[47] At the same time, taking into account moral pluralism and the fact that a judge does not conduct research and does not have the results of research on the values accepted in society, they must refer to the image of these social values in their own eyes, and they are legitimized to do so by a provision, obliging them to decide with the use of common sense and life experience[48].

The reference to non-legal criteria in civil law has a particular justification: In the western legal tradition, the relationship between civil law and non-legal norms arises from several reasons. Firstly, the provisions of positive law are not exhaustive in their nature, because 'the civil matter is extensive and the ability to predict the law is limited.'[49] Modern civil law is an open system that regulates typical situations in a non-authoritative manner.[50] Secondly, private law is to enable people to cooperate, allow them to regulate their mutual relations by themselves, and not to prevent – as in criminal law – from unexpected interference of the state.[51] In the public debate on values, the commonly used strategy is to assume that when someone manages to prove that two values come into conflict with each other, in certain circumstances, but one of them predominates the other, the problem is settled. In reality, however, we rarely deal with this kind of situation[52].

Therefore, one shall not be concerned that general clause is 'empty' and a judge can fill it with any content. On the contrary, the intention of the legislator introducing general clauses is to develop relatively stable assessments of judges.[53] The question is how to achieve this, since the principles of social coexistence in their essence are not to be catalogued or formulated *in abstracto*.[54] It is not possible to create a catalog or any codification of the rules of social coexistence. It results from the very assumption that social norms are dynamic. The

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[46] J. Wróblewski: J*udicial application of law,* Warszawa 1972, p. 28.

[47] B. Bladowski: *Methodology of the civil judge's work*, p. 30. The author emphasizes that a judge is bound by: 1. Authentic interpretation included in an act; 2. Interpretation included in the judgement of the Constitutional Tribunal answering a question on the conformity of an act with the constitution (art. 193 of the Constitution of the Republic of Poland and art. 10 of the Constitutional Tribunal Act); 3. Interpretation contained in the motifs of the appeal decision referring the case for judicial review (Article 386 § 1 of the Code of Civil Procedure); 4. Interpretation contained in the resolution of the Supreme Court providing an answer to the legal issue in a specific case (art. 390 of the Code of Civil Procedure); 5. Interpretation contained in the resolution of the Supreme Court entered in the book of legal principles (Article 61 § 6 of the Act on the Supreme Court).

[48] Cf. E. Rott - Pietrzyk, op. cit., p. 289.

[49] C. Huberland: *Les mécanismes institutés pour cambler les lacun es de la loi*, [in:] C. Perelman (ed.) *Le problem des lacunes en droit*, Brussels 1968, p. 55 [in:] I. C. Kamiński, *Rightness…* op. cit., p. 25.

[50] A. Stelmachowski: *General Clauses in civil law (II)*, "The State and Law", 1966, No. 3, p. 473, et seq. [in:] I. C. Kamiński: *Rightness…, op. cit.* p. 25.

[51] Ibidem.

[52] H. Brighouse, *Justice,* Warszawa 2007, p. 13.

[53] I. C. Kamiński, *Rightness...*, op. cit., p. 32 and 35.

[54] Cf. resolution of the full panel of the Civil Chamber of the Supreme Court dated March 18, 1968, OSPiKA 1968 c. 151; resolution of a bench of seven Justices of Supreme Court dated January 30, 1976, OSNCP 1975, item 158.

Supreme Court reluctantly responded to legal questions addressed to it, in which the courts asked for clarification of the specific principle of social coexistence[55].

It follows that a general clause or an undetermined term entitles to make an assessment of an individualized circumstances. The Constitutional Tribunal drew attention to the fact that institutions applying law have the obligation to identify the content of a vague term, taking into account the basic principles of law, general values and standards constitutionally protected.[56] At the same time, the lack of an explicit factor determining the content of the principles of social coexistence does not equal the exemption from the necessity to make objective assessments to which the clause refers. The disposition to make an assessment (...) does not constitute an authorization to make an unrestricted selection of criteria and values, and, in particular, the choice of those that are accepted by the institution applying law, regardless of the criteria and values generally accepted[57].

The Constitutional Tribunal consistently pointed out that general clauses do not pose a threat to legal certainty and are necessary instruments to ensure the flexibility of legal system and the dynamics related to it[58].

What to do with the express fear of arbitrariness of assessments?[59] There are some mechanisms counteracting the effects to which the concern is related. An example of such mechanism is the case in which a tendency, that appeared in the jurisprudence, to state the conformity or incompatibility of the actions with the rules of social coexistence, without even indicating the principle in question, was criticized both by the doctrine[60] and jurisprudence[61]. Although it was agreed that there is no explicit factor determining the content of the principles of social coexistence, this circumstance cannot be understood as an exemption from the obligation to objectify the assessments to which the clause referred. To ensure the certainty and predictability of jurisprudence, courts should indicate any 'external, tangible and objective points of reference[62]. The basic catalog of values which, as should be assumed, is an expression of the views of Polish society is contained in the Constitution[63]. When the judges refer to the principle of social coexistence, they must specify the principle itself and how they have established the content of it. As a result of such practice, it becomes possible

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55 I. C. Kamiński, *op. cit.,* p. 70.

56 The judgment of the Constitutional Tribunal 1501 2009 K 45/07 point III. A. 2.5.2.3.

57 E. Rott-Pietrzyk, op. cit., p. 288, 289.

58 W. Lang: *The Law*, Cf. E. Rott-Pietrzyk, op. cit., p. 289.

59 Cf. Resolution of the Constitutional Tribunal from November 6, 1992, W 2/91 OTK 1991, item 20; judgement of the Constitutional Tribunal from January 23, 3002, Ts 109/01 OTK-B 2002, No. 2, item 255; judgement of the Constitutional Tribunal dated October 17, 2000, SK 5/99 OTK 2000, No. 7, item 254; judgement of the Constitutional Tribunal dated October 26, 2005, SK 11/03, OTK-A 2005, No. 9, item 10.

60 Cf. E. Rott – Pietrzyk, op. cit., p. 288 and judgement of the Constitutional Tribunal dated May 8, 2006, P 18/05, OTK-A z 2006, No. 5, item 53.

61 I. C. Kamiński: *Rightness...*, op. cit., p. 71, footnote 182.

62 Ibidem, footnote 183.

63 Ibidem, footnote 184.

to use such a defined principle later and it allows its application in similar cases[64]. At the same time, the institution applying law does not use a ready system of norms and values accepted in society.[65] The pursuit of objectivization does not eliminate the subjective element in assessment, while, when making an assessment or a choice, axiological argumentation is crucial.[66] The filter of the decision of judges is mainly their own, usually unstructured, observation, life experience, as well as moral intuition,[67] and 'knowledge about the values or rules approved by the society or by a given social or professional group'[68]. Such description of the freedom of a judge is necessary, because there is a difference between interpretative and argumentative activism and the unlawful judicial legislation[69].

Here the strength and significance of the procedure is revealed: The proper application of a substantive norm is protected by all of the procedural norms, requiring the indication of the premise of applying a legal norm constructed by means of vague concept.[70] Procedural justice is to be a kind of protection against fears related to the instability of law[71] or to instable manner in which law is applied. Within this framework, the justification of the judgement is particularly important: it should be required that the courts, when justifying the judgement, explain the course of the interpretation process, presenting their own reasoning when filling *in concreto* the general clause[72]. The use of general clauses falls within the scope of instance supervision in the context of the style of justification of a decision, based on the use of clauses[73].

Finally, in the light of these conditions concerning the system of law that is its incompleteness and abstractive nature, the role of a judge is largely ethical, consisting in determining the type and manifestations of the judges' activism. One of the discussions on the ethics of judges concerns the degree of moral responsibility of judges and other lawyers for the active improvement of law through the process of its application[74]. An important,

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[64] Cf. Z. Radwański, M. Zieliński: *De lege ferenda remarks on general clauses in private law*, Warszawa 2001, p. 22; P. Machnikowski: *Freedom of contracts*, p. 307.

[65] I.C. Kaminski: *Rightness...*, op. cit., footnote 186 and p. 71; Cf. E. Rott – Pietrzyk: op.cit., p. 288, 289 „The order to make an assessment (...) does not constitute an authorization to freely choose criteria and values, and, in particular, to choose those which are accepted by a person applying law, regardless of the criteria and values generally accepted."

[66] Ibidem, p. 289.

[67] Cf. L. Leszczyński: *The functions of clauses,* p. 3 et seq.; *The use of general clauses*, p. 181; E. Rott - Pietrzyk, op. cit., p. 290 and referenced therein L.A. Dimatteo, *The counterpoise of contracts*, p. 293 et seq.

[68] L. Leszczyński: *The notion of a clause*, op. cit., p. 197.

[69] E. Rott – Pietrzyk, op. cit., p. 290, 291.

[70] E. Łętowska [in:] K. Sobczak: *Problems of the Polish judiciary according to Professor Ewa Łętowska,* National Council of the Judiciary 2012, No. 1, p. 34.

[71] Cf. Resolution of the Constitutional Tribunal dated November 6, 1991, W 2/91, Journal of Laws 1991, No. 112, item 490; also cited in the judgement of the Constitutional Tribunal dated January 15, 2009, K 45/07.

[72] M. Borucka-Arctowa: „Trust in law as a social value and the role of procedural justice,' [in:] *The theory of law. Philosophy of law. Contemporary law and jurisprudence*. Toruń 1998, p. 20.

[73] E. Rott – Pietrzyk, op. cit., footnote 142.

[74] See L. Leszczyński, op. cit., p. 303.

social factor is the fact that, in public opinion, the expectation is that, in the process of application of law, the judges should be more active in correcting the bad law[75]. It clashes with the model of education of a lawyer, based on legal positivism. Hence, there is a postulate to change the attitude of lawyers and a demand for responsibility for the content of law[76]. For the citizens, the important aspects are not only the honesty of judges and their behavior in the public sphere, but also the activity of judges towards the phenomenon of bad law. This problem can be called a dispute over the role of a judge in culture[77].

Correction of a legal norm made due to specific elements and circumstances of an individual case may manifest itself in justification by using principles of equity. Equity does not lead to the questioning of the provision 'in general' but only to limit the scope of its application.[78] Can a judge make a decision on the basis of the 'equity principle?' One can lead a dispute about two ways of opening law on the criterion of equity. The first model consists in 'saturation' of law with evaluative references, which became possible, among others, due to the construction of general clauses and other non-specific terms referring to non-legal assessments. In the second solution, apart from law as such, there is an additional legal system based on the sense of equity (equity in the Anglo-Saxon legal tradition, praetor's law in Roman law)[79].

The dilemma related to the scope of the judge's activity is even more acute as there are some alternative solutions that are 'more cautious': Judicial power (...) faces a dilemma whether to make an interpretation towards adapting bad law to the needs of reality, even at the price of using fairly dubious interpretative directives , i.e., to give the proper, acceptable sense to a badly-formulated legal norm, or whether to refrain from such measures and, by demonstrating the non-functional legal provisions (and sometimes its absurdity, irremovable contradiction with other legal norms), to force the legislative authority to intervene[80].

The answer seems to be provided also by the Constitution. According to the Constitution of the Republic of Poland, the judiciary is not only a separate power, (...) but it is also a power that is equal to the legislative and executive power. Therefore, it is permissible (...) that jurisprudence, especially in the Supreme Court jurisprudence, includes settlements

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[75] P. Skuczyński, M. Zirk-Sadowski: *Two dimensions of the professional ethics of the judges*, National Council of the Judiciary, 2012, No. 1, p. 12.

[76] On the other hand, activism may raise a negative reaction of public opinion and negatively affect the authority of the judiciary and its legitimacy. Cf. Dariusz, op. cit. p. 69.

[77] P. Skuczyński, M. Zirk – Sadowski: *Two dimensions…*, op. cit., p. 12.

[78] Ibidem.

[79] I. C. Kamiński: *Rightness and law. Comparative legal analysis,* op. cit., p. 34; Individual justice refers to the notion of rightness proposed by Aristotle, according to which the rightness allows the correction of the general provision of law if its application in an individual case would lead to injustice. The judge issuing the decision is also to realize individual rightness. Cf. I. C. Kamiński: *Rightness and law. Comparative legal analysis*, op. cit., p. 36.

[80] Ibidem, p. 21.

of a precedent nature, in fact, supplementing the system of legal norms in force[81]. The words of the oath concerning conscience point out a judge as the person on whom the ultimate burden of responsibility for the applied law falls. The last word belongs to a man, not a code; it is a man, not a code, who signs a decision[82].

5. What is the relation between reification function and a competency of a judge to make decisions?

The reification function takes place at three levels. Namely, at the level of fact finding, establishing the legal status and making subsumption. It involves all the four roles of a judge: the role of authority, the role of service, the role of justice, and the role of a professional. Its relationship with a competence to make decisions is based on and finds a common denominator in the concept of 'evaluation'. It means that the reification function consists in designing the premises of judge's decision. Therefore, judge's competence to make decisions consists in, among others, the reification of ideas into concrete situations. In other words, the relationship between this function (reification) and the mentioned competence (to make decisions) consists in the fact that the reification function results from the obligation to make decisions in the area of making a legal norm specific. This concretization requires not so much knowledge, but also something that can be referred to as "familiarity with the circumstances". Professional qualifications of a judge include also the knowledge of current, basic social, economic, and political problems, the development of social relations, customs, principles of social coexistence, the understanding of the concept of social interest, socio-economic interest, as premises for functional interpretation. In general – it shall include having life experience.[83] All these elements of judge's competency are also needed when the court intends to ask a question, for example, on the conformity of a normative act with the Constitution, ratified international agreements, or an act, if the resolution of a case pending in front of court depends on an answer to a legal question.[84] Before a judge poses a question, a judge shall form its own opinion on the subject of the inconsistency of a normative act with the Constitution,[85] because the institution of a legal question to the Constitutional Tribunal

[81] W. Sanetra: *Common courts and the Supreme Court as a judicial authority*, 'Court review', 2008, No. 6, p. 10.
[82] Ibidem, p. 7.
[83] M. Najda, T. Romer: *Ethics for judges. Reflections.*, Introduction. 'What is professional ethics?' Judgement from October 24, 2007. Cf. B. Bladowski, *Methodology of the civilian judge's work*, p. 40.
[84] Art. 193 of the Constitution of the Republic of Poland and art. 3 of the Act of Constitutional Tribunal. This provision regulates the matter of control of a concrete control (apart from a constitutional complaint and abstract control of constitutionality of legal provisions, regulated in Article 191 of the Constitution of the Republic of Poland).
[85] Judgement of Voivodship Administrative Court in Opole from November 4, 2010. I SA/Op 533/10, LEX No. 749795; Cf. Judgement of Voivodship Administrative Court in Olsztyn from February 19, 2009. I SA/Ol 10/09, LEX No. 489868 (The court cannot ask a legal question pursuant to Art. 193 of the Constitution of the Republic of Poland unless it itself has a legal view of the inconsistency of a normative act with the Constitution); the

is not intended to remove doubts about the legal status, but to remove from a legal system a provision that is inconsistent with the Constitution, a ratified international agreement, or an act. It means that the court is obliged to include in a question 'a charge' of inconsistency of a given normative act with the Constitution, ratified international agreements, or an act. (…) Otherwise, it should be assumed that, in a given case, a judge *de facto* avoids making an autonomous (independent) interpretation and application of law *ad casum*. It would also mean that the court would ask the Constitutional Tribunal a legal question not to present a motivated accusation of inconsistency of a normative act with the Constitution, but to obtain a correct interpretation of the indicated legal norms that constitute the legal basis for a court decision, which, of course, is not within the competence of the Constitutional Tribunal[86]. At the same time, it is impossible to accept that the court with doubts as to the conformity of the provision of an act with the Constitution would stop at the stage of finding doubts. Therefore, applying to the Constitutional Tribunal is an expression of the consistency of the court and, in this sense, it is an automatic obligation without the right to choose[87]. On the other hand, the principle of direct application of the Constitution[88] defines the obligation of the court to interpret provisions in the spirit of respect for these principles, and to seek a direct basis for decision in the provisions of the Constitution only if a regular act does not regulate a specific matter. The difference is that it is not prohibited to examine the conformity of an act with the Constitution, but the acceptance of the declared non-conformity to be substantive law for decision on unconstitutionality has been reserved exclusively for the Constitutional Tribunal, while limiting the agents entitled to take initiative in this area[89]. The common court is one of these agents, but it is obliged to submit a legal question in this regard.[90] More frequent use of the Constitution as a criterion for wise interpretation of common acts by judges could be one of the ways of limiting the negative impact of manipulation of law by politicians[91].

judgment of the Supreme Administrative Court in Warsaw from February 20, 2008, II FSK 1785/06, LEX 469215 (the Court cannot ask a legal question pursuant to Article 193 of the Constitution of the Republic of Poland unless it itself has a legal view of the inconsistency of a normative act with the Constitution).

[86] Judgement of Voivodship Administrative Court in Warsaw from November 9, 2005, III SA/Wa 2426/05, LEX No. 198985, and cf. justification to the judgment of the Voivodeship Administrative Court in Opole, from November 2010, I SA / Op 533/10, LEX No. 749795; judgment of the Voivodeship Administrative Court in Gdańsk from October 7, 2008, I SA / Gd 353/07, LEX No. 497398, (The court cannot ask a legal question pursuant to Art. 193 of the Constitution of the Republic of Poland unless it itself has a legal view of the inconsistency of a normative act with the Constitution); Judgment of the Voivodship Administrative Court in Warsaw of November 9, 2005, III SA / Wa 2426/05, LEX No. 198985 (The court cannot ask a legal question pursuant to Art. 193 of the Constitution of the Republic of Poland unless it itself has a legal view of the inconsistency of a normative act with the Constitution).

[87] Judgement of the Supreme Court from March 27, 2003, V CKN 1811/00, LEX No. 521816.

[88] Art. 8, para 2 of Constitution of the Republic of Poland.

[89] Art. 191 and art.193 of the Constitution of the Republic of Poland.

[90] Cf. Justification to the judgement of the Supreme Court from March 27, 2003, V CKN 1811/00, LEX No. 521816.

[91] Ewa Łętowska, *The Sculpting of the state of law 20 years later,* Introduction, p. 9.

I deliberately have chosen such a complex task of the judge – to illustrate the wide range of social competences a judge must have to perform a task and, at the same time, to emphasize that the tasks of a judge reach far beyond being just 'the lips of the act'.

On the other hand, it is noticeable that the courts present reluctance to adjudicate on the basis of general clauses, mainly by directing questions to the Constitutional Tribunal[92]. It is emphasized in Polish legal literature that taking into account constitutional values when interpreting provisions containing general clauses is a necessity, and that jurisprudence could play a significant role in transferring constitutional standards to the level of civil law[93]. This tendency to avoid the use of certain tools may indicate that courts do not perform the reification function, with a limitation to the adjudication function. The difference between these two functions seems to lie in the degree of judges' activism. Of course, the Constitution itself plays a role here, because the likelihood of activism increases with the inclusion in the constitution of a relatively rich catalogue of civil rights and constitutional (abstract) rules, in defense of which and with the interpretation of which courts may appear[94]. However, the Constitution itself, with its broad catalog of rights and freedoms, is not enough, because the need for judicial activism must arise not from the provision itself, but from the belief that it is part of the judge's function and the judge's skills to perform that function, referred hereto as reification function.

A judge has no right to say, 'I do not know.' The comfort of invoking ignorance is taken away from the judges in the name of the right to a trial and the right to adjudication. Whereas the issue raised in court proceedings might not be regulated in law or be regulated in a manner inadequate to the real issue. What should a judge do? M. Safjan indicates that there are three mindsets of judges. The first one is a judge-dogmatist, a positivist that claims that the reality needs to be reflected in provisions of law. The second one is a judge-functionalist and pragmatist who is open to analogy and looks for adjudication by referring to teleological interpretation of an act. The third one is a judge-moralist who, not finding the solutions in the provisions, would look for it outside the system [95]. I would venture to say that these three mindsets represent three different approaches of a judge to the reification function, being understood in a way I have presented here.

Assuming that the relation between reification function and the competence to make decision consists in the fact that the reification function results from the obligation to make decisions in the area of making a legal norm specific, one may pose a question whether a judge makes

[92] Rott p. 299, and a footnote 141.

[93] Cf. M. Safjan, *The Constitution or Civil*, p. 781, 782; cf. R. Trzaskowski, *The limits of freedom, p*. 394-396; M. Pyziak-Szafnicka *Subjective Right*, p. 110; P. Radwański, M. Zieliński, *De lege ferenda remarks*, p. 18; E. Łętowska, *Radiation of jurisprudence,* p. 353 et seq.; E. Rott, *Clause*..., p. 288.

[94] R. Hirszl, *Towards Juristocracy. The origins and consequences of the new constitutionalism*, Cambridge, Massachusetts-Lindon, 2007, p. 170-171 [in:] D. Skrzypiński: *Judicial power in the process of transformation of the Polish political system. Political studies*, Wroclaw 2009, p. 69.

[95] Cf. H. Izdebski, *Foundations of modern states*, Warszawa 2007, p. 205-206, [in:] D. Skrzypiński, op. cit. 59.

a choice between alternatives or finds the right solution that is the only correct one, initially hidden though. If a judge does not make a choice between alternatives, may one claim that a judge does make a decision? If a judge does make a choice between alternatives, may one assume that the law is permanent, if a judge decides on legal consequences of situations that had already occurred?

It is accurate to refer to the research of Kozielecki on the process happening prior to judge's decision making. Kozielecki discusses processes taking place prior to decision in closed situations (simple and complex) and open situations (simple and complex).
It should be first determined whether judges' decisions are made in closed or open situations; simple or complex. In closed situations, there is a finite number of alternatives – a finite number of alternatives. In open situations such a number should be established, and one should determine, how many alternatives are there to choose from.
It seems that judge's decisions are made to the same extent in open and closed situations. It can be explained in a way that the matter of whether the situation is open or closed, shall be conditioned upon the determination whether the limit to the number of alternatives is constituted by the factual or legal situation. If it comes to factual situation, a judge is in the open position, as a judge does not know which factual situation is going to be established within the proceedings. If it comes to legal situation, a judge is in the closed situation as there is a limited number of alternatives of legal solutions - possible to determine upfront - for the given factual situation established within the proceedings. In the light of the above, one may conclude that a judge is in the open situation until the moment when the factual situation is determined. And after the factual situation is determined, a judge is in the closed situation. Individualization of a legal norm is an act that belongs to the closing phase of proceedings and is of a cognitive and interpretational nature. It manifests itself in binding determination of effects that legal order associates with actions, representations and legal acts constituting specific factual situation[96].

One may infer that sometimes, a judge makes a choice between alternatives, and sometimes, a judge simply finds a solution that is the only correct – although hidden - result in a given situation.

As mentioned earlier, the evaluation is a common denominator for such function and for a competence to make decisions. The evaluation whether these criteria are met is an act of concretization. And such an evaluation constitutes a connector between an abstract and a specific norm.

[96] K. Piasecki: *Judgments of courts of first instance, courts of appeal and the Supreme Court in civil, commercial and business cases*, Warszawa 2007, p. 54.

The reification function is carried out in designing the premises of judge's decision. Judge's competence to make decisions consists in, among others, the reification of ideas into concrete situations. To reiterate, the relationship between this function (reification) and the mentioned competence (to make decisions) consists in the fact that the reification function results from the obligation to make decisions in the area of making a legal norm specific. I am not claiming that the decision-making process and competences within such extent are impossible without reification function. Such competence may be carried out in a judicial function itself. The difference between those two functions resides in judicial activism.
A judge that is making a decision is reflected in all three mindsets: a judge-dogmatist, a positivist that claims that the reality needs to be reflected in provisions of law; a judge-functionalist and pragmatist who is open to analogy and looks for adjudication by referring to teleological interpretation of an act, and last but not least, a judge-moralist who, not finding the solutions in the provisions, would look for it outside the system[97]. However, the reification function is reflected only in a second and a third mindset.
The essence of the power of the judiciary is forming evaluations and making decisions. But the range of premises that are chosen by a judge when forming adjudication differ. Not every model assumes judicial activism which is necessary to perform the reification function. A concern related to arbitrariness of assessments, present in relation to judicial activism, should be counteracted by a judge's competence to make a decision, particularly, by the justification of the judgement – which is a part of the proceedings.

6. Summary

I am assuming that there are four functions of a judge: judicial, reification, mediatory and informative. This article focuses on reification function as this is a function that is carried out in parallel with judicial function. Both those functions interweave in a decision-making process performed by a judge - the second function, however, is not always carried out. Both funtions differ in relation to the degree of judicial activism applied in the process of interpretation of law. While judicial function does not require the application of judicial activism, reification function obliges a judge to apply activism that may be a source of controversy related to the dilemma that consists in determination what degree of judicial activism and judge's creativity (or even law-making) should be applied.

This article contains the answer to four questions. Firstly, what does the reification function consist in. While answering that question, I focused on the matter of incompleteness of a legal system and the source of such incompleteness. I presume that such a source may be caused by the following factors: characteristic features of the language; the difference between an abstract and general norm and a specific and individual one, as well as the static

[97] H. Izdebski: *Foundations of modern states*, Warszawa 2007, p. 205-206; [in:] D. Skrzypiński, op. cit. 59.

nature of the provisions compared to the dynamism of social and economic relations and culture.

Then, I moved to the question why the reification is a function of judges. I have referred to the relation between static nature of a provision and dynamism that accompanies the process of turning an abstract into concrete norm pointing that in such conditions there must be a force that will shape this process and keep it in line with the goals and objectives of the legislator. And this force is personified by judiciary power.

Then, I focus on answering the question why performing reification function by judges raises so many concerns. I have indicated that they may be related to three controversies – first controversy would be related to the boundary between the creation of law and its application, second controversy would focus on the 'dangers' hidden under general clauses, and a third one would concern the fear of a judge to realize the reification function as well as other functions.

The last matter discussed in the article concerns the relation between reification function and a judge's competence to make decisions. In this part, I focused on the item that is a common denominator for both of them - making an evaluation taking into account that the decision-making process is entirely related to deciding and predecisional processes. And that the essence of reification function consists in a particular manner in which the evaluation is made – based on judicial activism and reaching to broad range of premises contributing to making a decision.

Keywords:

Competencies of a judge; decision of a judge; adjudication of a judge; function of a judge; judgement; function of a judge; reification function; judicial activism; general clauses; judicial decision;