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SPRAWIEDLIWOŚĆ W ASPEKTCIE DYSKRECYJONALNEJ WŁADZY SĄDZIEGO

THE JUSTICE IN TERMS OF THE DISCRETIONARY POWER OF THE JUDGE

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Streszczenie

Niniejszy artykuł porusza problematykę sprawiedliwości w aspekcie dyskrecjonalnej władzy sędziego. Stanowi próbę odpowiedzi na pytanie jak definiowane było pojęcie sprawiedliwości na przestrzeni dziejów, a jak rozumiane jest współcześnie. Odnosi się w szczególności do roli sędziego w sprawowaniu wymiaru sprawiedliwości oraz podejmuje zagadnienia dotyczące sędziowskiego sumienia i sprawiedliwych wyroków sądowych.

Słowa kluczowe: sprawiedliwość; prawda; sumienie; wymiar sprawiedliwości; dyskrecjonalna władza sędziego

Abstract

This article deals with the issue of justice in terms of the discretionary power of the judge. It is an attempt to answer the question of how the concept of justice has been defined throughout history and how it is understood today. It relates in particular to the role of a judge in the administration of justice, and addresses the issues of judge's conscience and just court judgments.

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Key words: justice; truth; conscience; justice; the discretionary power of a judge

Introduction

Justice has been one of the most important ethical and legal concepts ever since the beginning of humanity. It has been the foundation of every state and every legislator, starting from the oldest times, when the essence of justice was seen through the perspective of the Babylonian set of uncompromising laws and rules – the Code of Hammurabi.

In every time period there was a court of law that tried to establish the truth as the grounds for delivering justice. The Austrian Emperor Franz I used to say that “Justice is fundamental to reign.”² The notion of justice gradually evolved over the ages. At some point it was no longer associated only with the Roman principles of law which recognised the absolute supremacy of legal norms and required their observance no matter the consequences (*dura lex, sed lex* – It is a tough law, but it is the law; *quod principi placuit, legis habet vigorem* – That which pleases the ruler has the force of law).

Justice in the legal aspect is defined through the inseparable connection between the guilt and punishment. The relation between those concepts gains significance whenever one of them is considered as superior to the other. Contemporary legal instruments definitely include traces of the maxim formulated by the Roman lawyer Publius Iuventius Celsus (son): *ius est ars boni et aequi* – Law is the art of the good and the equitable. It means that the application and interpretation of law should take into account such values as good (*bonum*) and equity (*aequium*) and it stresses that law and morality are inseparably tied together.

As the state systems developed, an institutionalised justice system became a necessity. The most important role was undoubtedly given to judges who must deliver judgments, so important to the society, not only based on the applicable law but also in accordance with their own conscience and sense of justice. The essence and significance of court

² *Iustitia regnorum fundamentum*, in: *Encyklopedia Gutenberga*, [online], <https://www.gutenberg.czyz.org/index.php?word=31493> (access: 08/04/2021).

judgments is conveyed in the words “I shall judge your justice”³ which used to be displayed in Polish court rooms in the past. The words served as a warning for judges and as a reminder that their obligation is to pass fair judgments because they will be judged too one day. This maxim has a long judicial tradition in Poland and a timeless meaning.⁴ It can be applied to all participants of a trial. The words are still valid, as evidenced by the fact that they are placed above the entrance to one of Poland’s largest court, i.e. the Białystok District Court.⁵ The importance of the role of a judge is also emphasised by external attributes. Since the Middle Ages, a sceptre, also called “wand of justice,”⁶ has been an object inseparably connected with function of a judge. The dignity of the function was also emphasised by the triptych-like arrangement of the courtroom, where the judge took the most prominent central place, with the prosecutor on their right and the defendant on their left.

1. Philosophical approach to justice

Just like any other term rooted in ethics, such as integrity, equity or responsibility, justice does not have a clearly defined meaning and its perception keeps changing.⁷ There is a certain relativism connected with the notion of justice as it is undoubtedly related to religion, morality or

³ *Iustitias vestras iudicabo*. The courtroom walls or the judge’s table in the I Republic of Poland featured the words from David’s psalm 74.3: *Iustitias vestras iudicabo*, to remind the judges about their duty to be fair while ruling in criminal and civil law cases, see: L. Czapiński, *Księga Przysłów, Sentencji i Wyrazów Łacińskich używanych przez pisarzy polskich*, Warsaw 1892, pp. 256-257.

⁴ J. Zajadło, *Teoria i filozofia prawa*, in: *Łacińska terminologia prawnicza*, ed. J. Zajadło, Warsaw 2013, p. 49.

⁵ A. Niczyporuk, *Łacińskie paremie na gmachach sądów w Białymstoku przejawem europejskiej tradycji prawnej*, “Zeszyty Naukowe Uniwersytetu Rzeszowskiego – Seria Prawnicza” 2019, No. 107, p. 251.

⁶ The judge’s sceptre, the wand of justice was not a metaphor but a symbol of an old legal custom where the judge in office held a sceptre, sometimes even made of precious metals. Hence the saying among lawyers: to appeal to the judge’s sceptre. For more see W. Maisel, *Archeologia prawna Polski*, Warsaw – Poznań 1982, pp. 236-237.

⁷ W. Lang, *Sprawiedliwość*, in: *Encyklopedia socjologii*, ed. H. Kubiak, G. Lissowski, W. Morawski, J. Szacki, Warsaw 2005, p. 289.

political views.⁸ It is one of the most important yet the most underspecified notions.⁹ There is truth in the opinion that it is much easier to list examples of injustice than to recognise what is just.¹⁰

The attempts to define the essence of justice over the ages must mention Plato's words from Book I of *The Republic (or On Justice)* that justice means "giving everyone what they deserve." As Józef Ratzinger¹¹ notes, the philosopher Plato concludes in his work that a just man proves to be perfect only once they do a just thing that appears unjust because only then do they show that they do not follow the opinion of others but serve justice for the sake of justice. This way, according to Plato, a man who is truly just in this world is forgotten and persecuted. Such a man is not afraid to say: "A just man will be scourged, tortured and blinded, and ultimately, having experienced all suffering, nailed to the cross." This text, written 400 years before Christ, will always leave a deep impression on a Christian. Truly Christian philosophical thinking suggested that the one only fully just in this world was the crucified Righteous One.

Aristotle presented a division into distributive and redistributive justice, which is used to this day. The former applies to proportionate distribution of public goods and burdens between members of a specific community (according to certain assumptions, e.g. proportionately to the work contributed), while the latter pertains to private relations – demanding an equal value of the exchanged goods, equivalent compensation for the harm done or appropriate punishment for the crime committed.¹²

The Greek philosopher of Stagira was aware that it was not entirely attainable to give a punishment equal to the crime. But he was right in claiming that it was possible to give a punishment proportionate to the crime.¹³ Recognition by the justice system of the above principle of proportional justice is indispensable in giving fair sentences.

⁸ M. Niebylski, *Dlaczego sprawiedliwość nie jest najważniejsza? Odpowiedź komunitariańska na wyzwania postnowoczesnego świata*, in: *Sprawiedliwość w kulturze europejskiej*, ed. W. Kaute, T. Słupik, A. Turoń, Katowice 2011, p. 197.

⁹ C.H. Perelman, *O sprawiedliwości*, Warsaw 1959, p. 110.

¹⁰ D. Juriś, *Sen o sprawiedliwości*, in: *Sprawiedliwość w kulturze...*, p. 232; D. Kala, *O poszukiwaniu istoty sprawiedliwości w sferze prawa*, "Kwartalnik Sądowy Apelacji Gdańskiej" 2015, No. 2, p. 11.

¹¹ J. Ratzinger, *Służyć Prawdzie. Myśli na każdy dzień*, Poznań Warsaw Lublin 1983, p. 54.

¹² W. Lang, *Sprawiedliwość...*, p. 290.

¹³ W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia*, Warsaw 1988, p. 71.

A model, quite universal pattern for construing justice has been developed by Roman jurisprudence.¹⁴ It created a division into *ius*, i.e. law in a general sense, both objective and subjective, and *lex* – law meaning the text of a legal act. The definition of law invented by Publius Iuventius Celsus (son) and disseminated by the prominent Roman jurist Ulpian clearly emphasises that law is rooted in values: *Ius est ars boni et aequi* (Law is the art of the good and the equitable).¹⁵

Additionally, considering that the word *ius* (law) is believed to derive from the word *iustitia* (justice), it is completely natural to treat these spheres as complementary, both in the past and in the modern era.¹⁶

Another commonly known and very often quoted definition of justice is one proposed by Ulpian, captured in the words *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*.¹⁷ It treats justice as a constant and unwavering desire to give everyone what they deserve.¹⁸ This definition emphasises the need to grant an individual the right it is entitled to. It is easy to notice how the definition is linked to the above-mentioned view presented by Plato. As regards the notion of justice, the views of Plato, Aristotle or Ulpian are also later quoted by the Augustine of Hippo and Thomas Aquinas.

With reference to the above-quoted dictum of Ulpian, it is emphasised that judges must be expected to implement the notion of justice in the strict and not the merciful sense.¹⁹ Emphasising the distinction between both concepts, Kazimierz Ajdukiewicz states that “strict justice requires that no one be given either more or less than they deserve. Merciful justice requires only that no one be given less than they deserve but it allows to give good in excess [...]. We consider merciful justice as acceptable for

¹⁴ M. Krasuski, *O ewolucji pojęcia sprawiedliwości w Europie uwag kilka*, in: *Sprawiedliwość w kulturze...*, p. 20.

¹⁵ *Prawo jest sztuką stosowania tego co dobre i słuszne*, in: *Encyklopedia PWN*, [online] available on the Internet: <https://encyklopedia.pwn.pl/haslo/ius-est-ars-boni-et-aequi;3915731.html> (access: 02/04/2020).

¹⁶ For more see: J. Zajadło, *Terminologia łacińska w pracy współczesnego prawnika: retoryczny ozdobnik czy warsztatowa konieczność?*, in: *Kultura języka polskiego w praktyce prawniczej*, ed. D. Kala, E. Kubicka, Bydgoszcz 2014, p. 187.

¹⁷ *Digesta Iustiniana* 1, 1, 10; D. Kala, *O poszukiwaniu...*, p. 13.

¹⁸ B. Szlachta, *Idea “sprawiedliwości”. Wielość znaczeń*, in: *Sprawiedliwość w kulturze...*, pp. 13-14.

¹⁹ K. Ajdukiewicz, *O sprawiedliwości*, in: *Język i poznanie, T. I: Wybór pism z lat 1920-1939*, K. Ajdukiewicz, Warsaw 1985, p. 367.

one who does good or evil to another only on their own behalf. We demand strict justice against one who acts as a mandatory of another person on behalf of whom they do good or evil.”²⁰ So a just judge is one who gives the deserved good and the deserved evil to the defendant and does not give them any undeserved good or evil. Accordingly, a judge who fails to give the deserved good or the deserved evil or gives undeserved good or undeserved evil is an unjust judge.²¹

Similarly, in his attempts to capture the essence of justice, John Stuart Mill emphasised that it was just to respect and unjust to violate somebody’s rights guaranteed by the law. He stated that it was commonly considered as just when everyone received what they deserved (good or evil) and as unjust when they received something they did not deserve. He stressed that in common belief justice meant impartiality or favouritism in favour of one party and to the detriment of the other party in any cases where preferences should be of no significance. The obligation to act impartially also means the requirement to take under advisement only those criteria which should be considered in the specific situation and not to submit to any instigations encouraging one to act otherwise than as required based on the said criteria.²² The foregoing properly conveys the essence of formal justice, which is nowadays understood as equal treatment for all those who fall “under the same category.” This principle gains special significance in the context of the activity of public institutions, including but not limited to courts.²³

To sum up the deliberations on the essence of justice, one may ultimately conclude that it is captured in properly interpreted words by Ulpian – *honeste vivere, alterum non laedere, suum cuique tribuere*²⁴ (to live honourably, to harm no one, to give to each his own). This makes justice one of the most important virtues in every social order.²⁵

²⁰ *Ibidem*, p. 367.

²¹ *Ibidem*.

²² J.S. Mill, *Utylitaryzm. O wolności*, Warsaw 1959, pp. 75-79.

²³ D. Kala, *O poszukiwaniu...*, p. 16.

²⁴ *Digesta Iustiniani* 1, 1, 10, 1.

²⁵ H. Brighouse, *Sprawiedliwość*, Warsaw 2007, p. 7.

2. Justice and the sources of law

Even according to Cicero “when the legislators, contrary to their promises and assurances, establish orders for the people which are unjust and destructive, they are implementing rules which do not deserve to be called laws.”²⁶ The significance of the above words is aptly captured in the maxim *lex iniustissima non est lex* (An unjust law is no law at all).²⁷ As Gustav Radbruch claims, if the legislator acts on purpose to violate the principles of justice, we cannot content ourselves with recognising the primacy of justice but instead must not treat a thus created legal measure as a law.²⁸

Natural law concepts were readdressed after the tragic events of World War II. The idea that there is a certain fundamental catalogue of rights and freedoms which stems from the primary value that is human dignity and which every human being should enjoy was revisited.²⁹ Justice is built on the foundation of respect for human dignity and the resulting rights.³⁰ The rooting of justice in human dignity is reflected in the preamble to the Universal Declaration of Human Rights adopted on 10 December 1948 by the General Assembly of the United Nations. It states that “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice [...]” The same expression was used in the preamble to the International Covenant on Civil and Political Rights of 1966.

Marcin Gacek notes that the notion of social justice was often used instrumentally by totalitarian systems, which rejected legalism and the inseparable ties between law and important values which should be incorporated in law. The functioning of totalitarian systems which isolate the law “from common sense and any axiological bonds” clearly shows

²⁶ M.T. Cicero, *O państwie. O prawach*, Warsaw 2010, p. 187.

²⁷ See K. Burczak, A. Dębiński, M. Jońca, *Łacińskie sentencje i powiedzenia prawnicze*, Warsaw 2007, p. 94.

²⁸ See J. Zajadło, *Formuła Radbrucha*, in: *Leksykon współczesnej teorii i filozofii prawa*, ed. J. Zajadło Warsaw 2007, pp. 94-96.

²⁹ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2015, p. 90.

³⁰ M. Piechowiak, *Pojęcie praw człowieka*, in: *Podstawowe prawa jednostki i ich sądowa ochrona*, ed. L. Wiśniewski, Warsaw 1997, p. 21. For more on the universal understanding of human dignity and on the understanding adopted in the current Polish Constitution see J. Zajadło, *Godność i prawa człowieka (ideowe i normatywne źródła przepisu art. 30 Konstytucji)*, “Gdańskie Studia Prawnicze” 1998, Vol. III, p. 53 et seq.

the difference between codified law and the sense of justice as construed by the Greeks and the Romans.³¹

In his *Teoria sprawiedliwości* John Rawls notes that the term ‘justice’ can be associated with vulnerability³² and he states: “Justice is the first virtue of social institutions, as truth is of systems of thought. [...] Being first virtues of human activities, truth and justice are uncompromising.”³³

The need to search for the truth is linked to Article 45(1) of the Constitution whereby everyone has the “right to have their case fairly and openly examined by a competent, independent and impartial court without undue delay.” It must be remembered that the Constitution guarantees that cases must be heard but not the content of the ruling. However, the hearing must be regulated in a way maximising the probability of obtaining a ruling consistent with the law.³⁴ The Constitutional Court has stressed that parties to litigation have a right to appropriate ruling consistent with the standards of substantive law.³⁵

In view of the foregoing, we can identify two states which should be achieved in litigation: substantive justice and procedural justice.³⁶ According to Stanisław Waltoś, achieving a state of substantive justice means equitable application of a norm of substantive law, while a state of procedural justice is achieved where “the person against or for whom the trial is held becomes convinced that the trial authorities have done everything in their power to enforce the law and acted towards such a person lawfully, diligently and in good faith.”³⁷

³¹ M. Gacek, *Sprawiedliwość w myśli Raymonda Arona – spór wartości i pragmatyki społeczno-politycznej*, in: *Sprawiedliwość w kulturze...*, p. 178.

³² J. Rawls, *Teoria sprawiedliwości*, Warsaw 1994, pp. 12-13; see M. Dyszy-Graniszevska, *Podstawowe założenia teorii sprawiedliwości Johna Rawlsa*, in: *Sprawiedliwość w kulturze...*, p. 187; M. Niebylski, *Dlaczego sprawiedliwość...*, p. 200; J. Skorupka, *O sprawiedliwości procesu karnego*, Warsaw 2013, p. 74.

³³ J. Rawls, *Teoria...*, pp. 12-13.

³⁴ See statement of grounds to the judgment of the Constitutional Court of 13/05/2002, SK 32/01, OTK ZU 2002/A, No. 3, item 31.

³⁵ Judgment of the Constitutional Court of 18/02/2009, Kp 3/08, OTK ZU 2009/A, No. 2, item 9.

³⁶ See S. Zabłocki, *Sprawiedliwość proceduralna a współczesne trendy zwalczania przestępczości (na przykładzie zmian w polskiej procedurze karnej)*, in: *Law and dignity. Księga pamiątkowa w 70 rocznicę urodzin Profesora W. Łączkowskiego*, ed. S. Fundowicz, F. Rymarz, A. Gomułowicz, Lublin 2003, p. 239.

³⁷ S. Waltoś, *Proces karny*, Warsaw 2009, p. 24-25.

In his distinction between perfect and imperfect procedural justice, John Rawls emphasises that the former occurs whenever there is certainty that a specific procedure will in every case lead to the desired objective,³⁸ i.e. a judgment consistent with both the truth and the norms of substantive law. He also identifies a separate term of ‘pure procedural justice.’ The phenomenon arises if there is no independent criterion for appropriate outcome but there is a fair procedure which when applied properly leads to an appropriate (fair) outcome.³⁹

A vast majority of procedures used to make decisions in social matters reach the standard of imperfect justice at the most.⁴⁰ A court trial is a good example as it is characterised by an independent criterion for appropriateness of outcome but it lacks a procedure that would each time guarantee such an outcome.⁴¹ First and foremost, the findings made during a trial are based only on probability and not on certainty as to the outcome of the process of proving the case. Furthermore, rulings in trials are given by people – fallible beings, and the findings of fact underlying such rulings are made also based on witnesses. On top of that, the existence of evidence-related restrictions makes it harder to establish the truth. The above shows that compliance with procedural rules does not guarantee an outcome in the form of substantive justice.⁴² Aleksander Korowicki, the author of the first Polish-language criminal trial textbook, notes that trial law regulations are “the road of searching for justice.”⁴³ Remember the words by Socrates: “knowing what justice is means being just.”⁴⁴ The prominent lawyer Marian Cieślak emphasised that “eliminating the notion of justice from the discipline of law would deprive law of the most important meaning deeply rooted in social consciousness;” after all we require the law to be just and it would be hard to speak about a “justice

³⁸ J. Rawls, *Teoria...*, pp. 122-123; D. Lyons, *Etyka i rzędy prawa*, Warsaw 2000, s. 133; J. Skorupka, *Sprawiedliwość proceduralna jako cel procesu karnego*, in: *Rzetelny proces karny, Księga jubileuszowa Profesora Zofii Świdy*, ed. J. Skorupka, Warsaw 2009, p. 64.

³⁹ J. Rawls, *Teoria...*, pp. 122-123.

⁴⁰ Citation after D. Kała, *O poszukiwaniu...*, p. 25; D. Kała, K. Kwiecińska, *Wykorzystanie dowodów “pośrednio nielegalnych” w polskim procesie karnym a standardy rzetelnego procesu*, in: *Kryminalistyka dla prawa. Prawo dla kryminalistyki*, ed. V. Kwiatkowska-Wójcikiewicz, Toruń 2010, pp. 290-291.

⁴¹ J. Rawls, *Teoria...*, pp. 122-123.

⁴² D. Kała, *O poszukiwaniu...*, p. 26.

⁴³ R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna*, Kraków 2002, p. 22.

⁴⁴ M. Słonec, *Sprawiedliwość wobec prawa*, in: *Sprawiedliwość w kulturze...*, p. 310

system” while leaving out the term ‘justice’ without sounding grossly contradictory.⁴⁵ Ulpian also noted that “whoever wishes to pursue the legal profession should first be aware where law comes from. It comes from justice.”⁴⁶ While implementing the legalism directive rooted in Article 7 of the Constitution, judges are required to observe, with utmost diligence, the principles of procedural justice and to apply the principles of positive law so as not to lose what we call justice in the substantive sense.⁴⁷

The pursuit of a state of substantive justice is much more visible in criminal trial than in civil trial. The wording of Article 2(1)(1) of the Polish Criminal Procedure Code, substantially amended in 27 September 2013,⁴⁸ is of importance. Before the amendment, the meaning of the above article was that the objective of procedural regulations was to shape criminal trial in such a way as to detect the perpetrator, hold them accountable and prevent an innocent person from being punished. The regulation was definitely driven by justice. The following directives can be derived from the above articles: an innocent person should not be held accountable; a guilty person cannot be held accountable above what they deserve; a guilty person should not avoid accountability; a guilty person should not be held accountable below what they deserve.⁴⁹ After the amendment became effective, the meaning of the amended Article 2(1)(1) of the Polish Criminal Procedure Code was that the objective of a criminal trial was to make sure that a person whose guilt has not been proved is not held accountable. The amendment of the regulation considerably changed the sphere of justice and reduced the standards of substantive justice. In the attempts to make the trial completely contradictory and to give the judge a role of an entirely impartial arbiter, the legislator concurrently approved situations where a person who has committed a crime would not be held accountable or would suffer a punishment well below what they should receive under the norms of substantive law. This could happen especially

⁴⁵ M. Cieślak, *Polska procedura karna, Podstawowe założenia teoretyczne*, Warsaw 1984, p. 211.

⁴⁶ Cytat za D. Kala, *O poszukiwaniu...*, p. 27.

⁴⁷ *Ibidem*, p. 27.

⁴⁸ Polish Act Amending the Criminal Procedure Code and Some Other Acts of 27 September 2013 (Journal of Laws of 2013, item 1247).

⁴⁹ See M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warsaw 1984, p. 210.

when actions of the prosecutor in the trial did not eliminate the uncertainties regarding the central fact – Article 5(2) of the Polish Criminal Procedure Code, and at the same time the grounds laid down in Article 167(1) sentence 3 of the Polish Criminal Procedure Code did not arise, i.e. there were no justified and special circumstances which would give the court a right to admit and take evidence ex officio in special cases.⁵⁰ It must be added that the previous wording of Article 2(1)(1) of the Polish Criminal Procedure Code was restored on 15 April 2016. A possibility of taking evidence ex officio without limits was also provided after the previous wording of Article 167 of the Polish Criminal Procedure Code was restored.⁵¹

3. Discretionary power of the judge

Judges definitely play an important part in bringing substantive and procedural justice. The institution of a judge dates back to the early Piast dynasty period. Back then, just as it is now, the role of the judge was to guard internal social and legal order. The development of the function of the judge not only reflected the political system changes but also the organisational transformations of the justice system and the development of the legal culture. The judge profession in its current shape formed after the Enlightenment. The regaining of independence in 1918 led to redefinition of the judge profession – until that time it had been tied to the legislation of the invaders. The views regarding the function, position, significance and role of a judge in a modern state did not become properly crystallised until after 1989. The function of the judge is currently regulated by the Polish Constitution of 02 April 1997 (Journal of Laws No. 78, item 483 as amended) and the Polish Act on the System of Common Courts of 27 July 2001 (Journal of Laws of 2020 item 2072) and is not just an occupation to be practised but service to the country and the society – a kind of mission.⁵²

⁵⁰ D. Kala, *O poszukiwaniu...*, p. 21.

⁵¹ Polish Act Amending the Criminal Procedure Code and Some Other Acts of 11 March 2016 (Journal of Laws of 2016, item 437).

⁵² M. Oliwa, *Niezawisłość sędziowska z perspektywy wyzwań współczesnej cywilizacji (wybrane zagadnienia)*, “Studia z Zakresu Nauk Prawnoustrojowych Miscellanea”, Vol. III, Bydgoszcz 2013, p. 51.

The task of the court is to deliver justice in specific cases, which is the art of judging. The court is obligated to determine in its ruling both the type and the duration of the sentence in accordance with the discretionary principle. Representatives of German idealism Georg Hegel or Immanuel Kant⁵³ would state that the idea of justice is brought to life with the act of judicial ruling.

Crime as negation of the law and punishment as negation of that negation restores the rule of law. A crime entails the need to inflict punishment, which is a response to (retribution for) the perpetrator's act. This is the approach adopted by authors of absolute theories of punishment, also known as retributive theories or justice theories of punishment.⁵⁴ Giving a sentence based on strict justice does not guarantee a possibility of achieving any goals beneficial to the perpetrator and the society. Seneca was right in claiming that *nemo prudens punit, quia peccatum est, sed ne peccetur* (no reasonable man punishes because there has been a wrong doing, but in order that there should be no wrong-doing). The application of the above principle has preventive effects and it helps counteract future crimes. Additionally, it is also the degree of guilt that sets the upper limit of the punishment. A sentence is just one of the few, though incredibly important, human and not divine tool for restoring a sense of justice.⁵⁵ Considering the diversity of sentences, it must be stated that application of only absolute theories, which treat punishment as fair retribution, or only relative theories, which stress individual and general prevention, makes it impossible to define the content of sentences and the limits of punishing.

It is the role of the judge to decide whether a specific sentence is just a punishment or if it would be a retaliation. Judicial justice means being strict within the limits of the law. The task of the courts is to ensure the safety and freedom of the citizens by acting within the limits of the law, based clear and legible rules and on the intentions of the legislator but not

⁵³ I. Kant, *Krytyka praktycznego rozumu*, translated by J. Gałęcki, Warsaw 1984; In his words "(...) the starry heavens above me and the moral law within me" Immanuel Kant points to the existence of dual human nature. The first plane is that of man empirically exploring the universe around them. The other one is that of man aware of the existence of an internal moral right and the need to be guided by it in their choices.

⁵⁴ Ruling of the Supreme Court dated 13/01/2009, V KK 366/08, LEX no. 478166.

⁵⁵ See I. Zduński, *Wybrane aspekty sądowego wymiaru kary*, in: *Oblicza Temidy. Wybrane problemy prawa i procesu karnego*, ed. I. Zgoliński, Inowrocław 2012, p. 145.

relying on exclusively on them. The notion of justice when applied to a sentence is associated not only with the ethical aspects of punishment but is also directly connected with its effectiveness, which has major social implications. There is often a conflict between the perception of justice and the effectiveness of punishment. The role of the aggrieved party in the trial is directly connected with their demand that justice be served, while the aggrieved party themselves expects to be treated fairly.

The practical aspect of the addressed issues related to justice lies in the fact that social justice, which is undoubtedly attractive from the point of view of legal dogmas and which influences the judiciary and arises directly from the Constitution,⁵⁶ influences court rulings to such an extent that divergent rulings can be given in similar factual cases. This is because fair punishment is diverse and depends on a number of factors. The final sentence (though within the limits set by the law) for a specific perpetrator for a specific offence is up to the judge within their discretionary power. After all, this power means the right to make decisions in specific matters without legal constraints.⁵⁷ This definitely does not mean the right to give a ruling based on one's own preferences or inclinations but acting in accordance with the rules of equity, ethics and justice. The discretionary power gives a judge full freedom and flexibility in the application of the law. Such power also inseparably encompasses the notion of conscience. Although it is undoubtedly derived from Christianity, it is nowadays commonly perceived as a secular concept. Polish dictionary defines conscience as the ability to evaluate one's own conduct and the awareness of the moral responsibility for one's own doings.⁵⁸ Conscience is perceived here without any links to religious terms – as the ability to make specific judgments, called moral judgments. The obligation of a judge to act in accordance with the rules of justice, based on their own conscience, arises also directly from the oath taken by the judges at the moment of appointment. A judge vows to "(...) safeguard the law, perform the judge's duties with due diligence, deliver justice in accordance with the law, impartially, in line with their conscience, keep any legally protected

⁵⁶ In accordance with Article 2 of the Polish Constitution, "The Republic of Poland is a democratic state of law bringing to life the principles of social justice."

⁵⁷ *Władza dyskrejonalna*, in: *Słownik Języka Polskiego* [online], <https://sjp.pwn.pl/sjp/wladza-dyskrejonalna;2536845.html> (access: 02/04/2020).

⁵⁸ *Sumienie*, in: *Słownik Języka Polskiego* [online], <https://sjp.pwn.pl/sjp/sumienie;2525263.html> (access: 02/04/2020).

secrets and follow the principles of integrity and fairness in their conduct.”⁵⁹

Conclusion

The foregoing clearly shows that the human factor is indispensable for the justice system to actually work, i.e. for the application of the law in accordance with the rules of equity, ethics or morality. In the modern days, considering the scientific progress, there are more and more attempts at defining the notion of justice based on the application of artificial intelligence, which is a set of algorithms. However, a machine imitating human mind does not bring the concept of justice to life. Artificial intelligence uses mathematical ideas, it calculates the probability, and organises information rather than using it creatively. Digitalisation, artificial intelligence, even emphatic one, cannot guarantee treating an individual as a person. They pose a huge threat to people’s right to an honest and fair trial, and as a consequence to a good and equitable ruling in line with the principle ‘*Ius est ars boni et aequi*,’ consistent not only with the applicable laws but also with the rules of equity.

A judge can be compared to a musician who follows the notes written down in the score, except that the judge’s score consists of procedural regulations and the provisions of substantive law. It must be borne in mind that just as not every musician playing the notes is a virtuoso, literal application of the law is also not enough in legal issues because the human factor remains the most important element in analysing the facts and the legal status of a case.

⁵⁹ See Article 66 of the Polish Act on the System of Common Courts of 27 July 2001 (Journal of Laws of 2020, item 365, as amended).

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