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# Open Axiology in Judicial Interpretation of Law and Possible Misuse of Discretion

## *Otwarta aksjologia w sądowej wykładni prawa a możliwe nadużycia swobody decyzyjnej*

SUMMARY

The subject of the article is to determine the extent to which the judicial interpretation of the law is affected by the use of an open axiology argument in the course of adjudication. Assuming that the use of open criteria is based primarily on the application of the legislative construction of general reference clauses, it is important to link these references to a legislative policy in which they constitute a means of deliberately extending the scope of discretionary power, derived from natural (independent of the legislator) sources. The essential function of the references is the axiological opening of findings made in all essential phases of judicial interpretation – validation, reconstruction and construction, resulting, among other things, in a change in the relationship between the roles of particular interpretation rules. This may lead to various manifestations of abuse of the interpretative discretion of judges, which in turn necessitates the search for certain remedies, among which the formation of permanent lines of jurisdiction and precedential practice, as well as the transparency of the reasoning of judgements, seems to be of the utmost importance.

**Keywords:** open axiology; judicial interpretation of the law; general clauses; abuse of judicial discretion

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## INTRODUCTION

The paper[1] discusses the impact of the reference to the open axiology on the practical interpretation undertaken in the process of judicial implementation of law in the statutory legal order. The general reference clauses opening the legal system through such criteria like rules of rightness, good customs, good faith, rules of social coexistence, social interest, etc., are examples of such constructs. They do not indicate detailed values but enlarge judicial discretion in interpretation and application of law through opening the legal language and legal structure for extra-legal axiology. These effects depend on various factors like (among others) the type of legal order, of political system, of application of law or of branch of law but the implementation of the clauses always may bring misuse of discretion.

The article consists of three parts. The initial remarks on the origin and development of the general clauses show the universality of this construct and its place in legislative policy. They lead to the question of the main functions of the clauses in various phases of judicial interpretation, bringing finally an analysis of possible misuse of judicial discretion and some instruments that may keep functionality of the legal order in the situation of the presence of the clauses.

## OPEN AXIOLOGY IN THE LEGAL ORDER

### 1. A need for opening the law

The law, as the regulator of human behaviour, cannot be confined solely to the structure of legislated and formalized rules. Within the framework of the history of the legal order, two basic ways of opening the law to extra-legal factors can be distinguished. They do not give up intra-legal values, but express a tendency on the grounds of which an axiological opening of the legal system is necessary in order to achieve the state of adequacy of the law to changing relations, assessments and social norms and to fulfill the value of flexibility of application of law. What is important is that this is a property not only of the statutory law systems but also of the common law order.

The first of these consists in the formation of separate ways of legal decision making, mainly in resolving legal disputes, undertaken by separate institutions, functioning as if "alongside" the official judicial bodies. The best known and significant examples of such practices are the actions of the Roman praetor, who

[1] The paper has been prepared in the frames of the research grant, entitled "Axiological Judicial Discretion. Between Legislator's Intentions and Autonomy of Judiciary" (UMO-2016/21/B. HS5/00139), financed by Narodowe Centrum Nauki (National Science Center, Poland).

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made decisions based, generally speaking, on *ius aequitas*[2], or the actions of the English chancellery courts resolving disputes based on informal equity law[3]. In both cases[4], the aim was to make rigid rules (*ius civile* or common law precedents) more flexible on the basis of axiological criteria.

The second means of opening up is the practice, initiated on the basis of the great civil codifications of the 19th century, of including in legal texts special constructions called general clauses or general reference clauses. The clauses, appeared mostly in the statutory legal orders, might be understood as legislative construct opening (enlarging) the base for decisions of application of law through directing judicial and administrative axiological choices on undefined in this text, social (moral), political or economic values and norms (expressed by such criteria like good faith, good customs, rules of rightness, social interest, public interest, rules of social coexistence, etc.). In effect, they supplement the *stricti iuris* regulations with the open axiology in the process of implementation of law[5].

## 2. Clauses as an element of legislative policy

The general clauses became in the 20th century an element of legislative policy, playing the role of intentional instrument of the opening the legal order and enlargement of judicial and administrative discretion[6].

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[2] See R. Taubenschlag, *Rzymskie prawo prywatne*, Warszawa 1969, pp. 28–40.

[3] H.E. Yntema, *Equity in Civil and Common Law*, "American Journal of Comparative Law" 1967, Vol. 16(1–2), DOI: https://doi.org/10.2307/838860, passim; J.E. Martin, H.G. Hanbury, *Modern Equity*, London 1993, passim.

[4] This also applies to other forms of such an opening, e.g. *iudicium aequitas* in early feudal Europe, consisting in the exercise of judicial powers by Franconian kings as the supreme guardian of justice (cf. K. Koranyi, *Powszechna historia państwa i prawa*, t. 4, Warszawa 1967, p. 108 ff.) or the contemporary practice of alternative dispute resolution and the various forms of mediation developed on its basis (see, e.g., A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, passim; *Mediation in the Polish Legal Order*, eds. A. Korybski, M. Myślińska, P. Kłos, „Studia Iuiridica Lublinensia" 2018, Vol. 27(3), passim).

[5] See J.W. Hedemann, *Die Flucht in die Generalkluaeln, Eine Gefahr für Recht und Staat*, Tübingen 1933, passim. For the concept of general reference clause see, e.g., L. Leszczyński, *Klauzule generalne w stosowaniu prawa*, Lublin 1986, p. 14 ff.

[6] The clauses went beyond civil law, appearing in public law and even in criminal law. What is more, they have also become a legislative measure in authoritarian legal orders, taking the form of e.g. healthy national feeling or revolutionary conscience and revolutionary legal consciousness (see D. Majer, *Grundlagen der nationalistichen Rechtssystems: Führerprinzip, Sonderrecht, Einheitspartei*, Stuttgart 1987, p. 144 ff.; S.M. Dżorbenadze, *O kształtowaniu się radzieckiego ustawodawstwa i radzieckiej nauki prawa*, „Państwo i Prawo" 1978, z. 12, pp. 23–28), bringing clear political axiology to the implementation of law (see also, in a softer form, regulations of Article 4 of the Polish Civil Code, where the principles and the purposes of the Polish People's Republic occurred to be the criteria for application and interpretation of all code rules, or Article 417 of the Polish Code of

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As a matter of fact, the presence of the clauses is convenient for the legislators since they can throw down at least a part of their responsibility for the content of law and the way it functions in society, placing the state organs (first of all judiciary) making individual decisions, based on the clauses, in the position of "joint law-maker" as far as the results of the particular judicial process are concerned. The legislator is, speaking generally, responsible for the idea of using the construct of general clause, for the naming the open criteria (though there are some traditions, tying some names with the legal branches or legal institutions) and for placement of the clauses in the system of legal regulations.

There are three main ways in which the clauses could be inserted into the legal text and its systematic divisions. The first one consists in placing the clause in the very detailed regulation of the legal institution, what ties the argumentation with this institution (for instance, institution of property) exclusively or mostly (if implementation of the clause *per analogiam* is acceptable). The second means placing the clause at the very beginning of the code (statute), making its implementation possible in the decision-making process of any or almost any rule of that statute[7], even if the clause does not appear in its detailed regulation. And the third situation connects these two, bringing both the reference in the general and introductory part of regulation and in the detailed regulations, what opens the joint implementations and possibility of collisions between the clauses using the same, similar or different names.

Therefore, the clauses are treated by legislators as rather point-marked constructs, opening the legal system in defined place and way. The legislator expected to be rational should predict the major effects of the implementation of general clauses, taking into account the properties of the legal branches, social and political system or the features of the legal practice, including the differences between the administrative and judicial application of law. He or she should be aware of the fact that they enlarge the scale of the discretion at the application of law, especially through introducing the evaluative reasoning to the decision-making process, the "measure" and control of which is rather difficult, if effective at all at the level of relations between legislature and judiciary. That is why the general clauses might be treated as a kind of "hidden structure" of the legal order, showing its true content in the judicial interpretation and implementation of law[8].

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Civil Procedure of 1964, where the violation of the interest of the Polish People's Republic was the criterion for the extraordinary revision of the court's sentence).

[7] See, e.g., § 7 of the 1811 Austrian ABGB (referring to the natural legal principles – *naturliche Rechtsgrundsatzen*) or Article 4 of the 1907 Swiss ZGB (referring to the rightness – *Billigkeit*) creating, together with the customs, the criteria of deciding if there is a lack of code rules.

[8] J. Wróblewski, *Wartości a decyzja sądowa*, Wrocław 1973, p.188 ff.

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## OPEN AXIOLOGY IN THE JUDICIAL INTERPRETATION OF LAW

### 1. The process of interpretation

The operative interpretation of law in the course of the judicial process of the application of the law covers several essential phases in its model approach. The first of them is the validation phase (determining the set of sources from which the particular rules are reconstructed), the second – the phase of reconstruction of these rules, the third – the phase of combining these formulas into a basis of normative decision, and the fourth – the phase of reduction of this basis into a specific judicial decision. All of them differ in the type and subject matter of actions and interpretative reasoning, the role of particular interpretative rules or the results of these actions. Obviously, what is important in the context of this study, the participation of open axiological criteria is also different.

### 2. Opening the validation phase of judicial interpretation (implementation of the clause)

The statutory law order assumes a dominant position of legal regulations as a source of reconstruction of applied norms. However, it cannot exclude from such a role neither previous court decisions (precedents) nor open criteria, except that both these legal carriers of law play a complementary role to the legislation in building a set of these sources. This means, however, that in principle, the decision-making process in this order cannot be based exclusively (similarly to arguments from precedents) on the open criteria of general clauses.

However, non-legal criteria may sometimes determine the start of the decision-making process and judicial interpretation (its validation phase), as in the course of preliminary findings (peculiar interpretative intuitions, resulting from the first contact of the decision-maker with the materials of the case) it influences the conviction that the reported (in the complaint, statement of claim, indictment) case is worth legal protection in the form of a court trial.

The features of this type of legal order demand that the use of the general clauses in implementation of law may happen only if the clauses are expressed in the regulation being applied in the specific judicial process, what means – if their participation is predicted by legislator. Therefore, there is no possibility of creation of the separate clause by judiciary through naming and implementing of the extra-legal criteria that are unexpressed in the implemented legislative regulation.

As it was stated before, the clauses might be placed precisely in the concrete legal regulation or in the general (initial) part of the statute. Both ways create some scale of discretion, allowing for the use of clauses that are not connected with the specific legal institution. First, through careful using of the *per analogiam clau-*

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*sulae* reasoning, that means borrowing the clauses from similar regulation (e.g. regulations of lease and tenancy or regulations of real and personal easement). Second, through the connection of the specific institution, in which clause had not been expressed, with the general construct or general rule of implementation, in that the clause is present (e.g. according to Articles 1 and 4 of the Swiss ZGB, the use of the rules of rightness to the application of any rules of the Code, that are unclear as a base for decision)[9].

It means that possible choices of using the clause by judiciary are wider than its direct application connected with its presence in the particular applied prescription. They may bring to the process other extra-legal criteria, axiologically connected with the content of the applied clause, what results in a kind of axiological complex or "axiological involvement" of the interpretation, usually strengthening the role of these criteria in the whole judicial process.

### 3. Opening the reconstruction phase of judicial interpretation (setting the content of the criterion)

The language of the general clauses consists of combination of legal and axiological components, making the proportion in participation of linguistic and value--oriented methods of interpretation of the name of the clause the most important feature of legal reasoning connected with this part of the interpretative process. The strict semantic considerations that are taken usually at the discovering of the meaning of any legal term do not play decisive role when the meaning of the clause itself is the purpose of the reasoning. It is so, because the task of this phase of interpretation is not the reaching of pure linguistic sense of, for example, "good customs" or "rules of social coexistence", but to find the axiology that is to be brought to the judicial process by such clauses. That is why the axiologization of the semantics should be noticed as the crucial point of this reasoning.

The detailed proportions depend on some specific factors, among which the name of the clause referring to these extra-legal criteria plays decisive role. Such clauses like rules of rightness, social interests, good customs, rule of social coexistence, good of child, etc. bring definitely extra-legal axiology to the interpretation of the general clause. Other ones, referring to the rules of justice, public interest or good faith, are strongly connected with the legal axiology because either crite-

[9] Article 4 of the 1907 Swiss ZGB (referring to the rightness – *Billigkleit*) creates, together with the customs, the criteria of deciding if there is a lack of code rules, and should be read with Article 2, imposing the observance of the principles of good faith on the addressees of the code. Similar relation can be seen in the case of the role of clauses of Article 5 of the Polish Civil Code (rules of social coexistence, socio-economic destination of the law) regulating the criteria of the abuse of excercising own right.

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rion might be read in a legalistic way (justice, public) or it became (through the traditional developments) as a matter of fact more legal than axiological concept ("good faith" in continental private law). In both cases, the linguistic output of the finding of the criteria's meaning must be placed in the axiological frames, established in a result of balance between the legal and extra-legal axiology, giving however the priority to the axiology the clause brings over the linguistic meaning of the words of clause.

The choice of the type of values by the judiciary is the core of the judicial discretion. It operates in the frames of the moral, political and economic values. The indications given by the legislator through the name of the clause are very general and unsteady. They cannot exclude some aspects of political axiology from the content of for example "social interest" or "rules of social coexistence". And this is not the feature of the language of the clause that prejudges the result of choosing these values or the effect of weigh of their importance for establishing the content of criterion in the actual judicial process. There are rather the facts of the case, its subject and its connections with the social environment, that impact the result of the choice. Even if the interpretation ties the criterion with the moral axiology, still the choice between the conventional (social preferences) and naturalistic (theological) types of it or proportions between the whole-social (or group) and individual perspective of this axiology is undefined and depends mostly on the interpreter of the clause. Again, the name of the clause includes some indication but does not foreclose the result of the interpretative choice.

The interpretation of the general clause itself brings the question of the relation between the extra-legal axiology, which the clause is connected with and the legal axiology expressed and defined by the legal principles, formed in the regulations precisely as a principle or treated as the principle by the doctrine and the judicial practice on the base of importance and clear legislative preferences. It creates the sphere of "axiological edge", mixing both types of values and axiological argumentation. It does not impact the role of the linguistic interpretation of the clauses themselves but brings some elements of the juridical content to the clauses, at least in the form of the final point of its verification as a result of the role of the legal principles.

Establishing the content of the criterion leads to establishing the content of the whole rule expressed in the reference. The rules of syntax of the common (general) language, expressing the extra-legal axiology more adequately than the classical rules, reconstructed from the normative expressions of the legal provision, apply here. However, the form of such a rule must be "compatible" with the latter rules, since the connection (confrontation) of all reconstructed rules takes place at the next stage of judicial interpretation.

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## 4. Opening the construction phase of judicial interpretation (building the normative base of decision)

The general clauses referred to the extra-legal (extra-systemic) criteria, being implemented in the actual process of judicial decision-making (2.) and connected with the axiological content established through the interpretation of the clause itself (3.) impacts then the final part of the process of judicial interpretation, including the construction of the normative base for decision (judgement).

The criteria of open axiology and the extra-legal rules based on them are incorporated into the process of building the normative base of decision in addition to the standards reconstructed from legal regulations and other judicial decisions, influencing the content of this base to varying degrees. Assuming that this role is complementary does not exclude that in a specific process it is the extra-legal standard that decides on the content of the decision. The interpretative role of the open criteria is further strengthened if their content and use are established in the form of clearly formed case law lines.

Regardless of this basic relationship, the criteria of the clauses may be involved in determining the systemic relationship between different regulations and, as part of the conflict-of-law rules, may be involved in resolving conflicts between regular regulations (ordinary rules, reconstructed from the rules) and (less frequently, however) between the principles of law. In this context, they can act as a factor both in influencing the construction of a "compromise" content of the reconstructed norm, combining in different proportions the content components of both norms, and (which is less frequent[10]) in refusing to apply a rule that is inconsistent with the axiology represented by these criteria. The share of open criteria in all these situations is stronger if they are included in the clauses contained in the initial provisions of the given normative acts, particularly important for a given branch (e.g. codification) or (which additionally extends the field of such influence) of a constitutional regulation.

Open criteria of particular importance for the whole branch or system of law (due to the above-mentioned location or frequency of referring) may influence the establishment of axiological relations between various non-legal values (political and moral, economic and political, social and individual, etc.). This applies both to collision and cooperation relations, the latter meaning a kind of "support for each other" of arguments of extra-legal axiology (which usually strengthens their influence on the result of interpretation). They may also constitute a component

[10] Until 1989, the grounds for refusal to apply a provision of civil law and labor law could be its inconsistency with the fundamental principles of the political system and objectives of the Polish People's Republic (Article 4 of the Civil Code and Article 8 of the Labor Code of 1975).

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(usually complementary) of axiological inference reasoning, especially *per analogiam iuris* and, to some extent, *a fortiori* or *a contrario* rules.

In the situation of collision between extra- and intra-legal values as well as between different types of extra-legal values (e.g. political and moral) or within a given type of these values (e.g. moral values in the social and individual dimension), the role of the collision-solving rules does not consist in using classical systemic legal reasoning (e.g. *lex specialis*, *lex superior* or *lex posterior*) but in "weighing" the values in a way, generally speaking, analogous to weighing the principles of law, using the formula "more or less" in this respect.

The share of open criteria is stronger in the construction of the substantive basis for judicial decisions, both in terms of qualification of facts[11] (outside the criminal law) and setting the consequences of this qualification, as well as general procedural standards. On the other hand, it is weaker in the case of specific (detailed) procedural grounds (unless there is an explicit reference in the regulations[12]) and, which is the strongest limitation, in the case of building competence-based bases of action.

Open criteria no longer play such a clear role in the final phase of operative interpretation. Indeed, the reduction of the content of this normative basis of decision to the content of the decision, especially in the sphere of qualification of facts, is a kind of logical outcome, in principle excluding reference to the open criteria. Only the part of the decision which consists in determining the legal consequences of this qualification may be based, among others, on open criteria[13].

## 5. Changing roles of interpretational rules

The reference to open axiology modifies the assumption that the reconstruction of the norm starts from the linguistic considerations, both semantic and syntactic ones. The point of the meaning of the legal names keeps its relative independence, but the reconstruction of the normative rule from the unit of the legal text, including general clause directly or connected with the unit expressing directly such clause, brings the axiology to the initial phase of the interpretation. It "works" there together with the linguistic (syntactic) interpretative methods and ties the content of the rule

[11] An important factor to be regarded here is the evaluative setting the facts of the case. It requires estimation of the scale of occurrence of the particular facts in order to qualify them as facts in a decided case (e.g. important reasons, due diligence, irretrievable breakdown of marriage, etc.).

[12] As, for example, in the case of the role of criterion of "social interest" as the grounds for the prosecutor's participation in civil proceedings under Article 7 of the Code of Civil Procedure (1964) or the grounds for discontinuance of proceedings pursuant to Article 105 of the Code of Administrative Procedure (1960).

[13] As it is the case, for example, when measuring the compensation under Article 417 of the Civil Code (principles of social coexistence) or the grounds for imposing a criminal penalty under Article 53 of the Penal Code (degree of social harmfulness of the act and social sense of justice).

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with the axiology, what usually in the effect leads to enlarging its scope. It changes the role of the extra-legal axiology from the rules that "only" verify the results of linguistic and systemic interpretation, correcting the content of the rule in the final phases of the interpretative process, to the set of deciding arguments, building the reconstructed rule together with these linguistic and systemic arguments.

The open criteria change the relation between the interpretation rules in the course of the construction of the normative base of decision. Still, the systemic rules are the most important here, but one may observe the strengthening of the role of the systemic axiology in relation to the role of the systemic structure. It allows for the broader and more decisive use, if there is any type of the legal gap in the regulation, of the argumentation *per analogiam iuris* as a kind of the edge-arguments, using both legal and extra-legal criteria. The latter relation seems to be crucial for that phase of judicial interpretation. The another effect of the presence of the open criteria is strengthening the teleological and functional argumentation[14]. All these arguments work jointly with the axiology both in the collision-solving procedures (usually correcting the linguistic scope of the legal rule) and in the inferential reasoning (*a fortiori*, *a contrario*, etc.).

These effects deny the assumption of the direct understanding of the legal text, connected with the formula of *clara non sunt interpretanda*, in the situation of the interpretative use of open criterion. The concept of *clara*, even if accepted as the element of linguistic reasoning in the interpretation[15], cannot be considered as a part of the semantic or syntactic argumentation, in which the extra-legal axiology must be chosen, defined and connected with the arguments of *stricti-iuris* so that the judicial decision could be formed. This is formula of *omnia sunt interpretanda* that should be taken into account when determining both the prevalence and scope of the subject matter as well as the completeness of the catalogue of rules of judicial interpretation applied (in various roles) in a situation where open axiology is used.

## JUDICIAL DISCRETION, ITS POSSIBLE MISUSE AND SOME REMEDIES

The scale of judicial discretion created by the implementation of reference clauses is enlarged and the ways in which references to open axiology influence the process and results of interpretation depend on many factors. One should mention, among others, the kind of legal branch (public vs private law, specific practice of penal law), implementing organ (judiciary vs administration), instance of the court

[14] On the role of legal principles in the interpretation, see M. Van Hoecke, *Law as Communication*, Oxford 2002, p. 160 ff. On the various concepts of legal principles, see M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012, p. 21 ff.

[15] J. Wróblewski, *Rozumienie prawa i jego wykładnia*, Wrocław 1990, pp. 55–59, 63–69.

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(lowest vs higher and the supreme ones), type of political regime (democratic vs autocratic system) or of social situation (relative stability change vs deep social change). Some elements, however, are rather universal and worth to be shortly analyzed here from the point of possible misuse of the judicial discretion.

## 1. Factors of misuse of discretion

The possible misuse of discretion deals with all three aspects of the presence of the clause in the process of judicial implementation of law – the use of clause in the process, its interpretation as an expression of legal text and its impact on the course and results of the judicial interpretation.

(a) The use of the general clause in the judicial decision-making process in statutory legal orders might come to the point of abuse of this construct if the court creates the "new" clause which does not appear in the legal text. That would open the problem of legality of this process, since the names of the criteria applied in the judicial decision should be rather identical as the names expressed in the legal text. Even if the axiology brought by such "self-made" clause is not contrary to the axiology connected with the statutory clauses, it might switch the values or make the axiological complex definitely more unsteady. Besides, the abuse of discretion might be caused by transmitting the clause to the places of the legal system where the clauses do not appear. It deals both with the "borrowing" the clause from one part of the statute to another[16] as well as, what is more dangerous, from one legal branch to another. In the latter practice, especially if the transfer goes from private to the penal or public law, the types of axiology and specific values might be confused. Another aspect of abuse of discretion in the validation phase of interpretation would appear if the court bears the whole decisional process in the statutory law order exclusively on the criterion or criteria general reference clause (instead of merging that source with the legislative regulation).

(b) The scale of possible abuse of the discretion is much larger if one takes the interpretation of the general clause (setting the content of its criteria) into account. As was said before, the name of the clause, pointing out undefined criteria, ties the semantic interpretation with the axiology in establishing the meaning of the clause and that is accepted as a part of the normative base for actual judicial decision. The axiologization of the content of general clause may, however, cause the limitation

[16] Such condition should take into account of the presence of "meta-clauses" that might not only determine the content of other "ordinary" clauses but also be implemented in the particular part of the subsystem of regulation, in which the clauses are not formed. In the current Polish legal system it is actual in the case of meta-clauses contained in Articles 5, 58, 65 353 (1) or 354 of the Civil Code, in Article 7 of the Code of Administrative Procedure or (as a criterion important for the whole system of law and for the processes of its application) in Article 2 of the Constitution of the Republic of Poland (1997).

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of importance of the wording of the clause, reaching the point of "delinguization" of its interpretation. That could mean the establishing of the meaning of the clause according to the official political ideology, unconnected with or even contrary to the axiology of social morality (even if the criteria indicate that type axiology) or legal principles (that always should be taken into consideration in setting the content of open criteria). That is definitely dangerous in the autocratic political orders, where the reference to this ideology could cause the generalization of the content of the clause, pushing out the weighing the general social context (interests, aims, etc.) with the individual good or interests (rightness). The "politization" and, more generally, instrumentalization of the axiological content of the clause as an effect of such practice would be dangerous especially in the sphere of public (administrative) and penal law, but could be dysfunctional also in the branch of private (civil) law.

(c) The similar types of effects could arise from the participation of general clauses in the process of construction of normative base of judicial decision. General clauses, applied in the process and already interpreted, change the proportions between linguistic and systemic on the one side and teleological and functional interpretative arguments on the other side. Misuse of the discretion appears if such change comes to the point of resignation from the first two arguments in interpretation of statutory regulations, bringing the latter ones instead and giving them decisive role in shaping the final phase of interpretative process. That would lead to the situation in which court bears the content of the normative base of final decision exclusively on the criterion or criteria general reference clause (instead of matching that content with the norms reconstructed from legislative regulation). It would also weaken the role of the constitutional principles and legal axiology in favor of the extra-legal axiology introduced to that process by clauses, what could move closer to the precedence of social rightness over the legal axiology in the application of law, opening in the autocratic orders the field for the priority of ideology.

The points of danger noticed above may multiply if all three types of misuse of discretion unify in one act of operational interpretation in judicial decision-making process. That would happen if the clause is created not by legislature but by the judiciary, is used as the exclusive source of the judicial decision, its content would be settled instrumentally, without real reference to the social axiology and legal principles and finally, the normative base of decision bears on the content of the clause without proper matching them with the criteria of legislative regulations or judicial precedents. That would bring the level of judicial activism to the unacceptable level, in that the attitude of judges (judiciary) to participate in forming applied legal rules[17], through various means of exercising judicial discretion, would reach the point of political instrumentalization and/or "privatization" of the applied open

[17] L. Morawski differentiates two types of judicial activism – policy-oriented and argumentative-oriented activisms (see L. Morawski, *Stressing – The Controversy between Judicial Pasivism*

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axiology. Even if such practice is only potential in the statutory legal order and rather impossible in the stable democratic and rule of law states, it may occur in particular acts of the application of law. If it deals with the public or penal law, the danger is even bigger, raising, as a matter of fact, the question of the legality of the process of implementation of law. That's what happens here because possibility of exercising and enlarging of the scale of discretion is even broader in the statutory legal orders, where such constructs like clauses appear much more frequently in all branches of law, allowing the courts to insert the axiology they regard as proper to the normative base of the judicial decision, derived (contrary to the common law) not from the concrete precedent but from the general regulations.

## 2. Some remedies

There are no certain and effective remedies, making the possibility of misuse of the discretion, resulting from the use of the general clauses in the judicial implementation of law unactual. Since there is no way to avoid the presence of the clauses in contemporary law, one should strengthen rather necessary measures of functionality of legal order, among which the various forms of self-restraint of judicial activism, transparent and argumentative justifications of decisions and firm judicial control mechanisms play the most crucial role. The scale of discretion created by the construct of general clauses leads to the assumption, that instead of illusion of avoiding the misuse of discretion, one should speak about some factors limiting the effects of such misuse, taking into account, that in final instance all depends on the particular court and particular judge, exercising this discretion.

There is no doubt that the features of the social and political order, treated as an environment of the legal system may work for strengthening the value of legality of implementation of law and the principle of rule of law. That makes the use and interpretation of the clauses as well as its impact on the judicial process on the one side connected with the legal axiology, pushing them into the frames drawn by legal principles and on the other side, connected with the meanings of the legal terminology expressed in the normative text, in which the clauses appear. Any failure of democratic or rule-of-law foundations accelerates the presence of negative effects of the discretion based on clauses, coming closer to the point, in that arbitrary and uncontrolled decisions are being taken.

There is, however, other factor, that should be regarded as the most important and effective measure in making the remedies real. It is the condition of the judiciary and judicial practice.

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*and Activism*, [in:] *Stressing Legal Decisions*, eds. T. Biernat, K. Pałecki, A. Peczenik, C. Wong, M. Zirk-Sadowski, Kraków 2004, pp. 47–60).

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The touchstone of maturity of judiciary in this respect deal not only with the way the judicial decision is taken but also with the way these decisions are justified as well as with the effective instruments of control undertaken by higher court instances.

The presence of argumentative and discursive justification of the judicial decisions[18] opens their reasons to the public, including not only the addressees of the decisions but also legal doctrine and the courts of higher instances, if the decision is reviewed. That creates kind of external public control of the use of discretion, making all cases of misuse or abuse of it visible and ready for evaluation. There are no direct effects of this control (except the appeal procedure undertaken by addressee of decision) but the unanimous reaction on the practice, going too far with the use, interpretation and the role of extra-legal criteria in deciding may play the role of competent argument against it. If such argumentation includes the axiological reasons based on strong observation or research of conventional social morality, the strength of it might be even bigger.

Appeal procedure ties the external control with the control of use and interpretational role of the general clauses exercised by the courts of higher instances. It deals on the one side with the review of particular decisions in result of appeals but also, what is more important for the image of the practice, with the enforcement of the lines of jurisdiction, in which the scale of the discretion derived from the clauses would be placed within the axiology of the rule-of-law state. The latter might be connected with the practice of solving the main problems by the enlarged composition of the bench at the highest level court (7 Judges or the Chamber) making the resolution binding all judges dealing with the interpretative problems (hard case) or with the precedential practice, making the courts deciding similar case following the solution already taken in other decision treated as a precedent[19].

Scale of uniformity of the judicial implementation of the clauses achieved through these ways of strengthening the certainty of the implementation of law and the law itself[20] does not, however, guarantee restrain from misuse of discretion in particular decisions. The concrete implementation of the clause, its interpretation

[18] Contrary to the referential and reportive style of giving the motives, see M. Zirk-Sadowski, *Wykładnia i rozumienie prawa w Polsce po akcesji do Unii Europejskiej*, [in:] *Polska kultura prawa a proces integracji europejskiej*, red. S. Wronkowska, Kraków 2005, pp. 94–97.

[19] On the role of that practice in Polish and, more generally, statutory law orders see, e.g., *Precedens w polskim systemie prawa*, red. A. Śledzińska-Simon, M. Wyrzykowski, Warszawa 2010, passim; *Precedens sądowy w polskim porządku prawnym*, red. L. Leszczyński, B. Liżewski, A. Szot, Warszawa 2018, passim; *The Potential of Precedent in the Statutory Legal Order*, eds. L. Leszczyński, B. Liżewski, A. Szot, Berlin 2019, passim.

[20] Being an element of the rule-of-law principle. See M. Kordela, *The Principle of Legal Certainty as a Fundamental Element of the Formal Concept of the Rule of Law*, "La Revue du Notariat" 2008, Vol. 110(2), DOI: https://doi.org/10.7202/1045553ar, p. 587 ff.

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and the role in decision-making will always depend on particular court or judge. The uniformity of judicial practice, however, could be the point to which the court should refer if the general clause becomes the element of the normative base of judicial decision.

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## STRESZCZENIE

Przedmiotem artykułu jest określenie zakresu wpływu, jaki na procesy sądowej wykładni prawa ma wykorzystanie w toku orzekania argumentu z otwartej aksjologii. Zakładając, iż sięganie po kryteria otwarte opiera się przede wszystkim na zastosowaniu legislacyjnej konstrukcji generalnych klauzul odsyłających, istotną kwestią jest powiązanie tych odesłań z polityką prawodawczą, w ramach której stanowią środek celowego rozszerzania zakresu swobody decyzyjnej, pochodzącej z natural-

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nych (niezależnych od prawodawcy) źródeł. Zasadniczą funkcją odesłań jest aksjologiczne otwieranie ustaleń dokonywanych we wszystkich zasadniczych fazach wykładni sądowej – walidacyjnej, rekonstrukcyjnej i konstrukcyjnej, mające skutek m.in. w zmianie relacji pomiędzy rolami poszczególnych reguł wykładni. Może to prowadzić do różnych przejawów nadużywania interpretacyjnej dyskrecjonalności sędziowskiej, co z kolei wymusza poszukiwanie pewnych środków zaradczych, spośród których kształtowanie się trwałych linii orzeczniczych i praktyki precedensowej oraz przejrzystość argumentacyjna uzasadnień orzeczeń wydają się mieć największe znaczenie.

**Słowa kluczowe:** otwarta aksjologia; sądowa wykładnia prawa; klauzule generalne; nadużycie swobody sędziowskiej

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