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Wojciech Dziedziak
Maria Curie-Sklodowska University
wojciech.dziedziak@poczta.umcs.lublin.pl

Axiological Basis for the Application of Law – a Perspective of the Equitable Law

Aksjologiczne podstawy stosowania prawa – perspektywa prawa słusznego

ABSTRACT

The axiological notions and assumptions are the necessary part of the analysis the application of law. Author of this article states the most basic axiological question, that is: how should a judicial decision be made? How should a court issue decisions, on what values should it be based, what is and what should be the aim of a decision? The research proposal to these questions is: equity, the equity of the decisions, equity *in concreto*. Characterizing the axiological bases of the application of law, one need to find a way which would take us to the best resolution. The court and the judge solve, after all, a certain case that exists in reality, and do not present alternative possibilities of choice. The court, while making a decision, makes a choice which should be driven by equity. After all, can we find any other values that would light our way? The judge should strive to find an equitable resolution, they should search for it and not reject it *a priori*. Justice should be treated as the pillar of equity, but equity is richer and greater.

Keywords: value, justice, equity, judicial decision, judicial decision making process

1. CATEGORY OF VALUE AS A RESEARCH NOTION

Axiology (from Greek: *aksía* – value; *áksios* – valuable) is the study of values, the theory of value, the philosophy of value.

The category of value found its place in philosophy relatively late. The word "value" (in German *Wert*) gained the status of a philosophical term in the 19th century, mainly thanks to Neo-Kantians.[1] The main originator was Immanuel Kant, who separated the „is" (*Sein*) from the "ought" (*Sollen*).[2]

[1] The theory of value as a new, separate branch of philosophy was suggested as late as at the turn of the 19th century by Brentanists and Neo-Kantians. Cf. A.B. Stępień, *Wstęp do filozofii*, Lublin 2007, p. 102.

[2] The forefather of this separation was David Hume.

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The first to introduce the category of value into philosophy was Rudolf Hermann Lotze (1817–1881)[3]. The research of value as something precious, worthy, due, obliging – gave rise to axiology (the theory of value). The term "axiology" was introduced by Paul Lapie (1902) and Eduard von Hartmann (1908).[4] The first study in the field of axiology is said to have been Christian von Ehrenfels's treatise *System der Werttheorie* from 1893.

Axiology-related issues have interested philosophers and other academics since ancient times, but for many centuries, before the terms "value" or "axiology" became popular, the notion of "good" was in use instead of the notion of "value". We can say that the notion of "value" is the contemporary counterpart of the term "good" (*bonum*).[5]

The term "value" had appeared earlier only in economics, in reference to economic phenomena: the value of something was its price. Such was the meaning of the word *aksía* (value) as used in ancient Greece. However, the word was also used to denote someone's majesty, which would place it closer to today's meaning of the word "dignity".[6]

Nowadays, the category of value is exceptionally widespread. The word is used in informal speech, journalism (although sometimes probably thoughtlessly), academic terminology (the notion of value appears in philosophy, ethics, economics, psychology, sociology, jurisprudence and other fields of study).[7] Among values, we can distinguish: moral, economic, aesthetic, political, world-view and praxeological values.[8]

The term "value" is connected to a whole family of notions that are sometimes close to one another, but sometimes completely different. Defining "value" is, therefore, extremely difficult. Usually, it is claimed that the notion of value is

[3] R.H. Lotze separated values from beings. Beings exist (*sind*) while values have a meaning (*gelten*). Cf. D. Oko, *Lotze Rudolf Hermann*, [in:] *Powszechna encyklopedia filozofii*, Vol. VI, Lublin 2005, p. 523.

[4] Cf. H. Kiereś, *Wartości teoria*, [in:] *Powszechna encyklopedia filozofii*, Vol. IX, Lublin 2008, p. 708.

[5] W. Tatarkiewicz writes: "[…] the term «good» (Latin: *bonum*) […] appeared often in ancient and medieval treatises and meant more or less the same as «value» as it is used by today's writers. In Anglo-Saxon countries «good» is used alongside and even more often than «value» to this day". Cf. W. Tatarkiewicz, *Pojęcie wartości, czyli co historyk filozofii ma do zakomunikowania historykowi sztuki*, [in:] *Pisma z etyki i teorii szczęścia*, Wrocław – Warsaw – Cracow 1992, p. 75. Cf. also: A.B. Stępień, *op. cit.*, pp. 102−103.

[6] Cf. M. Piechowiak, *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin 1999, p. 210.

[7] Cf. R. Ruyer, *Philosophie de la valeur*, Paris 1952, p. 6.

[8] This list is by no means exhaustive. There are many typologies of value. For example, Max Scheler distinguished four large classes of values: pleasure, life, holy and spirit. The values of the spirit include moral as well as cognitive and aesthetic values. Cf. W. Tatarkiewicz, *Historia filozofii*, Vol. III, Warsaw 1981, p. 221.

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something fundamental, indefinable.[9] We can, however, enumerate some basic meanings of value: 1) that what is judged positively by a human being (something precious), 2) that what is in accordance with nature, 3) that what ought to be, 4) that what is the object of desire, 5) that what demands coming into being, 6) that what is an aim of human aspirations, 7) that what fulfils certain needs, 8) that what demands fulfilment, 9) ideas, 10) absolute good, 11) that what obliges the receiver or appeals to them, 12) everything that is considered to be good.[10]

In principle, all axiologies (theories of value) admit that value is something advantageous (positive) and obliging (creating obligations).[11]

2. CREATIVE INFLUENCE OF VALUES CONNECTED WITH THE EQUITABLE LAW

After the above introductory remarks, let us get to the heart of the matter. The subject of the axiology of law is, above all, moral values. In principle, these values constitute the basis of law.[12] But law itself is also a value and an object of axiological analyses. The axiology of law, presenting law as a value, allows us to understand the essence of law, studies the values that underlie law and those expressed in law, analyses values in both the creation and the application of law.

When talking about axiological bases of the application of law, it is necessary to emphasize that such bases should be clear, certain, reliable and durable. Therefore, the question is to find fundamental bases (fundamental values) which would support the processes of the application of law. We should not seek a temporary, short-term, ephemeral axiology, one that would be in any way imposed by history. Axiological bases of the application of law cannot be relativistic and should not be relativised. When considering axiological bases of the application of law, we cannot think about instrumental values or, of course, formal values, i.e. the so-called inner values of the application of law[13]; we have to think about fundamental, universal values, which could constitute a reliable foundation for the decisions made in the application of law.

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[9] A.B. Stępień, *op. cit*., p. 103.

[10] Cf. *Ibidem*. Cf. also: A. Kojder, *Godność i siła prawa. Szkice socjologiczno-prawne*, Warsaw 1995, pp. 159−160.

[11] Cf. H. Kiereś, *op. cit.*, p. 709.

[12] Moral values are considered to play a special role among values. They are the most general and the most significant category. The opinion that moral values are incommensurable in comparison with all other values has prevailed for a long time. Maria Ossowska, emphasising the above, writes: "moral values have a completely different scale than other values do". Cf. M. Ossowska, *Podstawy nauki o moralności*, Wrocław – Warsaw – Cracow 1994, p. 180.

[13] Generally, it is assumed that the inner values are: legality, certainty, uniformity and effectiveness of the application of law.

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Such bases are provided by the theory of equitable law. But what is equitable law? And what values is it based on? The answer is: truth, good, justice, human dignity. We can say that the common denominator of the values mentioned above is the dignity of every human being. Such an understanding of equity concerns the processes of both the creation of law and its application.

Truth, good, justice, human dignity – these axiological bases of the existence of law, i.e. values from which law and its creation stem, can and should be, in fact, also the values behind the application of law.

It is, therefore, necessary to explain the meaning of the given values. What is the sense of truth (Greek: *alétheia*, Latin: *veritas*, *verum*)? Here, the basic, classical understanding of truth is taken into consideration. Truth in cognitive sense (epistemological dimension of truth) is the adequacy of the intellectual perception and real things (*veritas est adaequatio intellectus et rei*). It is the adequacy between the content of our perception and its object.

When formulating (creating) norms, the truth about reality, including the truth about the existential dimension of a human being, should be the starting point for creating equitable law.

It is also necessary to emphasize that the Polish Constitutional Tribunal in its judgement of 12 September 2005 (SK 13/05, *Orzecznictwo Trybunalu Konstytucyjnego* (OTK) (Official Digest), 2005, Series A, No. 8, item 91) assumed that truth is a normative notion and stated: "The legislative body in the preamble to the Constitution considers truth to be a universal value which forms the basis of the political system of the Republic of Poland".[14] The notion of truth is used by the legislative body also in other normative acts, for example in the Polish Code of Civil Procedure (art. 3 – "truthfully", art. 252 – "untrue"), in the Polish Penal Code (art. 233 – "conceals the truth", "gives false testimony", art. 272 – "attestation of an untruth").

Since modern times, and especially nowadays, various concepts of truth have been formulated, but in jurisprudence such formulations do not seem to have any purpose (except for formal, "judicial" truth). In the application of law, it seems that every judge intuitively knows what truth is, in the sense of conformity with the facts.

The decision that establishes factual circumstances is the result of cognitive reasoning[15], which leads one to the recognition of the truth. What is meant here is a truthful description of the fragment of reality that constitutes factual circumstances.[16] Therefore, it is necessary to establish factual circumstances according

[14] It is necessary to emphasize that it is assumed in the introduction to the 1997 Constitution of the Republic of Poland that there exist universal values: truth, justice, good and beauty.

[15] Cf. M. Zieliński, *Poznanie sądowe a poznanie naukowe*, Poznań 1979, pp. 29–38.

[16] Cf. A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa*, Lublin 2010, pp. 153–155.

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to the reality. In the Polish law, the principle of material (objective, actual) truth dominates. It is expressed in art. 2 § 2 of the Polish Code of Criminal Procedure and art. 7 of the Polish Code of Administrative Procedure.

In the following part of this paper, the deliberations will consider mostly the judicial application of law. Therefore, it is necessary to emphasize now that the principle of objective truth expressed in art. 7 of the Polish Code of Administrative Procedure is the chief principle of administrative procedure, which deeply influences its whole shape. From this principle arises the public administration's obligation "to thoroughly inspect all factual circumstances linked to a given case, so as to create its actual image and obtain a basis for an accurate application of a regulation"[17].

As for learning the truth in civil procedure (art. 3 of the Polish Code of Civil Procedure), after the amendments to the code (especially the repeal of art. 3 § 2 of the Polish Code of Civil Procedure), there is a dispute among the procedural law scholars. The doctrine's opinions on the existence of the principle of objective truth vary.[18]

Without entering such disputes, we can ascertain that the requirement of truth in its classic, Aristotelian sense, in the application of, broadly speaking, private law, is not rigorous. However, it is necessary to emphasize that art. 3 of the Polish Code of Civil Procedure that is currently in force obliges the parties in the procedure to speak the truth.[19]

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[17] W. Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*, Warsaw 1962, p. 108.

[18] Krzysztof Knoppek claims that: "5 February 2005 is the last day of the era when the principle of objective truth, also known as material truth, was in force in the Polish civil procedure". K. Knoppek, *Zmierzch zasady prawdy obiektywnej w procesie cywilnym*, „Palestra" 2005, No. 1–2, p. 9. However, part of the doctrine defends the thesis on the existence of objective truth in Polish civil procedure. There are reasons for that, for example there are regulations that may oblige the court to find actual truth. Without taking up this question, we can agree with K. Knoppek's opinion: "It is necessary to emphasize that the two principles – material and formal truth – do not have to constitute opposing categories. One has to be conscious of the fact that the legislative body, relieving the court of the obligation to find the objective truth, at the same time gives the parties and, through them, the court as well, the possibility to find the objective truth. The legislative body even encourages the parties to endeavour to find the full, actual truth about a particular case, because the prize for such efforts would be winning the case. The parties' trial of facts, in turn, is functionally linked to the basic and now chief principle of civil procedure, i.e. the principle of adversarial process. It is the principle of adversarial process that should lead to a situation in which the formal truth corresponds to the objective truth, and the legislative body gives the parties the necessary tools. It is, therefore, worth emphasizing that the Polish Code of Civil Procedure after the 2004 amendments does not exclude the possibility of finding the objective truth. However, it is sought by the parties and not by the courts". *Ibidem*, pp. 13–14.

[19] Breach of this obligation can "activate" certain regulations that lead to sanctions, even if indirectly (for example, art. 255 of the Polish Code of Civil Procedure in connection with art. 252 and 253 of the Polish Code of Civil Procedure).

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Moving on to good (Greek: *agathón*, Latin: *bonum*), is it worth emphasizing that it is meant here in the moral sense. We can ask the question: why good? The answers are manifold.

A human is the only being (as remarked by Aristotle in *Nicomachean Ethics*, and later in *Politics*[20]) that is able to distinguish the good from the evil and thanks to this ability can choose the good.

Let us also quote the first sentence of *Nicomachean Ethics*: "Every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim".[21] It is important to note that the Latin excerpt from this sentence: *bonum est quod omnia appetunt* has become a commonly accepted axiom.

There is another fact that influences the choice of good: as was mentioned earlier, the general meaning of the word "value" was replaced with the word "good" throughout centuries.

Moreover, we shall recall the well-known maxim by P.J. Celsus, mentioned by D. Ulpian at the beginning of Justinian's *Digest*: "[…] ut eleganter Celsus definit, ius est ars boni et aequi" – as Celsus elegantly puts it, law is art of applying what is good and just.[22] This formulation emphasizes not only that there exists a "moral element" in law, but also that law and morality stay in a close relationship, in a universal synthesis.[23] It is a general directive showing that good (*bonum*) and equity (*aequum*) are the fundamental values of law. In this paper, we assume a larger understanding of equity; however, by no means does it diminish the significance of good.

Good in the moral meaning is human good and common good.

We have to stress that the principle of common good is the fundamental, constitutional, system-founding principle expressed in art. 1 of the Constitution of the Republic of Poland currently in force.[24] Therefore, good is a legal term that has

[20] In *Politics*, Aristotle writes: "And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like". Aristotle, *Politics*, trans. B. Jowett, Kitchener 1999, pp. 5–6.

[21] Aristotle, *Nicomachean ethics*, trans. W.D. Ross, Book I, Kitchener 1999, p. 1.

[22] Ulpian, *Digesta*, 1, 1, 1. pr.

[23] M. Kuryłowicz, while analysing ethical aspects of law in Roman jurists' maxims, emphasizes the unity of ethics and law that is characteristic of Romans. Cf. M. Kuryłowicz, *Etyka i prawo w sentencjach rzymskich jurystów*, [in:] *W kręgu problematyki władzy, państwa i prawa. Księga jubileuszowa w 70-lecie urodzin Profesora Henryka Groszyka*, Lublin 1996, pp. 127–128. Cf. also: M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne. Zarys wykładu*, Warsaw 2008, p. 21.

[24] The principle of common good mentioned in the first article of the Constitution of the Republic of Poland expresses the idea that the state should serve the citizens, and not the other way around. Common good is not opposed to individual good. The basic determinant of common good is human good. Cf. W. Dziedziak, *Słuszność w prawie i prawa człowieka*, [in:] *Praktyka ochrony prawa człowieka*, ed. K. Machowicz, Vol. I, Lublin 2012, pp. 32–34. Cf. on the topic of understanding

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its roots in philosophy. It appears also in many other regulations in the following example constructions: "good of the children", "good of the family", "for the good of the citizens", "good faith", "good practice", "personal goods", "property goods".

As for justice (Greek: *dikaiosyne*, Latin: *iustitia*), we assume its classical meaning: "giving to each his own" (*suum cuique tribuere*).[25] The concise definition formulated by Ulpian is commonly known: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi".[26]

It is obvious that guaranteeing everyone what is due to them is a need and a necessity in social life. Justice is the foundation of social order. Law has to implement justice. Law has to be just. And what is truly just always corresponds to what is morally good.[27]

The legislative bodies have to properly establish the principles of proportionate, regular distribution of goods and the participation in the common good of the society.

The idea (postulate) of justice is present in probably every legal system. However, it can be mistakenly understood, subjectivized, and thus, unfortunately, deformed, turned into an ornament or limited only to its formal aspect. Such justice becomes only a pretence.

Distributional justice (*iustitia distributiva*) concerning the distribution of goods and social burdens may be violated. And this can significantly hinder the administration of justice in the application of law.

As for judicial application of law, the axiological basis of such procedure might seem to be already settled in the Constitution. Usually, the main orientation is towards justice. According to the Polish Constitution (art. 175, section 1), justice is implemented by courts.[28] The constitutional right to a fair trial is expressed in art. 45 section 1 of the Polish Constitution ("Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court").[29] Also the basic acts of the international law stipulate the right to a fair hearing: art. 10 of the Universal Declaration of Human Rights stipulates that everyone has the right to "a fair and public hearing by an

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common good: M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*, Warsaw 2012.

[25] The saying: "justice is giving to each his own" was known to Plato and Aristotle.

[26] Ulpian, *Digesta*, 1, 1, 10 pr.

[27] Cf. J. Karp, *Sprawiedliwość społeczna. Szkice ze współczesnej teorii konstytucjonalizmu i praktyki polskiego prawa ustrojowego*, Cracow 2004, p. 137.

[28] The implementation of justice is reserved to courts only. Cf. also art. 177 of the Constitution of the Republic of Poland.

[29] On the right to a trial, cf. e.g. E. Łętowska, *Prawo do sądu – różnice perspektywy*, [in:] *Aurea praxis aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, eds. J. Gudowski, K. Weitz, Vol. II, Warsaw 2011, pp. 2857–2885.

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independent and impartial tribunal"; art. 14 section 1 of the International Covenant on Civil and Political Rights stipulates that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal"; also art. 6 section 1 of the European Convention on Human Rights exposes everyone's right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal", which is described as the right to a just (reliable, equitable, fair)[30] court trial.[31]

But according to what justice? It seems that the belief that "judicial application of law means that judges administer justice according to the law in force, and for this reason they also abide by law"[32] is deeply rooted.

Zygmunt Ziembiński writes: "The official system of justice is implemented according to what everyone deserves by law. Therefore, the content of law determines whether a decision is just or not. It means, therefore, that it functions like a blanket form […]".[33] It is often thus presupposed that just examination proceedings remain in accordance with the provisions of material and procedural law. It is, therefore, assumed that what is in accordance with law (i.e. the will of the legislative body expressed in legal regulations) is just – this is called legalist (formalist) justice. Justice understood in such a way can lead to negating or annihilating its own essence. It does not guarantee its implementation according to the *suum cuique tribuere* principle (to each his own).

It is worth emphasizing that the Polish Constitutional Tribunal in its judgement of 6 July 1999 (P2/99, OTK (Official Digest), 1999, No. 5, item 103), referring to the constitutional principle of justice, says that justice which "resides in eliminating lawlessness to be free of subjective interests and subjective form, as well as of accidental force, so that it could be a punishment and not a vengeance. Thus expressed, justice is stronger than law".

Let us take into consideration that there are judgements of the Polish Constitutional Tribunal in which it deems certain challenged provisions illegal, but allows for their assessment from the point of view of justice and then deems them unjust.[34] In the relationship "legality" – "justice"[35], we can find certain judgements

[30] In literature, various terms are used.

[31] Cf. art. 47 of the Charter of Fundamental Rights of the European Union.

[32] R.A. Tokarczyk, *Sprawiedliwość jako naczelna wartość prawa*, „Państwo i Prawo" 1997, item 6, p. 12.

[33] Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, p. 126. The author notes the blank-form nature of the "to each his own according to law" formula: "it allows the judge to wash their hands of the substantive content of the decisions, moving the responsibility onto the legislative body". *Ibidem*.

[34] Judgement of the Constitutional Tribunal of 9.01.1996 (K 18/95, OTK (Official Digest) 1996, No. 1, item 1).

[35] Cf. also: S. Tkacz, *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2003, pp. 69–84.

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of the Polish Constitutional Tribunal where it deems an illegally made provision just: it deems the provision illegal, but considers its justice and deems it just in the categories of material justice, finally judging it unconstitutional.[36] Of course, there are many judgements in which provisions that fulfil the Constitutional Tribunal's criteria of legality are deemed unjust and, as a result, unconstitutional. The Tribunal grants priority to material justice – whether it is distributive or rectificatory – over legality. This alone indicates that justice is not identical with legality.

Legalist (formal, legal) justice, in the sense of conformity with law, means that every law founds and measures justice. Therefore, law is a measure of justice, no matter what kind of law it is. We must reject such a legalist understanding of justice, linked to the positivist paradigm and based on the assumption that what is just is also consistent with the will of the legislative body expressed in the provisions of statutory law.

When considering equity and talking about axiological bases of the application of law, we surely cannot thoughtlessly trust and rely on legalist justice, because it may lead and has often led to betrayal, degradation and annihilation of the essence of justice. We cannot implement legalist justice based on the letter of every act, every *lex*.

In connection to the problem that we are deliberating on, we have to consider what Aristotle understood as justice in a broader, more general sense.[37] In *Nicomachean Ethics*, he wrote: "The just, then, is the lawful and the fair, the unjust the unlawful and the unfair"[38]. It is a fact that the Stagirite wrote: "[…] evidently all lawful acts are in a sense just acts; for the acts laid down by the legislative art are lawful, and each of these, we say, is just". But later on, we can read: "[…] in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society. […] This form of justice, then, is complete virtue, but not absolutely, but in relation to our neighbour. And therefore justice is often thought to be the greatest of virtues, and «neither evening nor morning star» is so wonderful; and proverbially «in justice is every virtue comprehended»".[39]

In *Politics*, he claims: "[…] this is the political science of which the good is justice, in other words, the common interest"[40].

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[36] Judgement of the Constitutional Tribunal of 28.05.1986 (U 1/86, OTK (Official Digest) 1986, item 2). Judgement of the Constitutional Tribunal of 12.04.1994 (U 6/93, OTK (Official Digest) 1994, item 8).

[37] Aristotle analysed justice also in more narrow, more detailed sense, distinguishing "distributive justice (*iustitia distributiva*) and rectificatory justice (*iustitia commutativa*)". Cf. Aristotle, *Nicomachean ethics*, p. 72.

[38] *Ibidem*, p. 73.

[39] *Ibidem*.

[40] Aristotle, *Politics*, p. 68.

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Aristotle, writing "all lawful acts are in a sense just acts", assumed that it is not law itself that is just. We can, therefore, say, that he meant not just any law, but the law that is shaped for "another's good"[41] and for common good.

We have to emphasize, moreover, that the classic formula proclaims that we should "give to everyone his own according to law (*ius*)"[42]. The terms *ius* and *lex* were two different notions for the Romans – the difference between the acts of law and law was obvious.[43] When explaining the meaning of the word *ius*, Ulpian derives the notion of law from justice. *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. – Est autem a iustitia appellatum* ("When a man means to give his attention to law (*ius*), he ought first to know whence the term *ius* is derived"). And it is derived from justice (*iustitia*).[44] He also gives the following principles of law *(praecepta iuris): honeste vivere* (live uprightly), *alterum non laedere* (injure no man), *suum cuique tribuere* (give every man his due).[45]

We also have to emphasize that art. 2 of the Polish Constitution imposes on the organs of the state an obligation of implementing the principles of social justice. This obligation concerns not only lawmaking, but all organs, courts included. We are not talking about legalist justice, which assumes that what is in accordance with law is just. The obligation of implementing the principles of social justice has to be considered in connection with the universal value – justice as expressed at the beginning of the Preamble to the Polish Constitution.

Now let us move on to human dignity (Latin: *dignitas hominis*). We are considering here the inherent, inalienable, indestructible dignity – personal dignity.

Human dignity today is a category not only in philosophy or ethics, but also in law.[46] The principle of protecting the inherent human dignity appears in international and national regulations.

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[41] Aristotle claims: "justice, alone of the virtues, is thought to he «another's good»". *Idem*, *Nicomachean ethics*, p. 73.

[42] Sometimes this expression is translated as "to give each what he justly deserves". Cf. M. Kuryłowicz, *Etyka i prawo…*, pp. 127–128. The well-known definition mentioned above can also be translated as follows: justice is the constant and invariable will of awarding everyone the right (*ius*) that he deserves.

[43] Cf. W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warsaw 2009, p. 44.

[44] Ulpian, *Digesta*, 1, 1, 1 pr.

[45] Cf. Ulpian, *Digesta*, 1, 1, 10, 1. On the validity of these principles of law. Cf. M. Jońca, *Prawo rzymskie. Marginalia*, Lublin 2012, pp. 17–18.

[46] In the most general sense, we can distinguish four concepts of human dignity: theological, philosophical, legal and psycho-sociological. J. Messner enumerates four aspects of human dignity: theological, metaphysical, ethical and ontological. Cf. J. Messner, *Was ist Menschenwürde?*, „Internationale katholische Zeitschrift" 6 (1977), No. 3, p. 239.

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Dignity is the foundation of human rights, the basis and the source of all human rights and their protection.[47] In the Polish Constitution, the principle of human dignity is expressed in art. 30, which states: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities". The Preamble also summons those who implement the Constitution "to do so paying respect to the inherent dignity of the person".[48]

The principle of inherent dignity stresses the super-positive, and thus superior to the Constitution, principle of human dignity.[49] Dignity is fundamental and independent from positive legal regulations, independent from the will of the legislative body. It is not awarded and cannot be taken away through any human action or influence of public authorities.

Art. 30 of the Polish Constitution refers to the solutions adopted in the Universal Declaration of Human Rights.[50] The principle of dignity is expressed by numerous regulations[51], among them art. 1 of the Charter of Fundamental Rights of the European Union, which says: "Human dignity is inviolable. It must be respected and protected".[52] In the Preamble to the Charter, we can read: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity […]". The term appears also in the constitutions of certain states.[53]

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[47] Cf. W. Dziedziak, *op. cit*., pp. 29–32.

[48] Cf. Preamble to the Polish Constitution.

[49] This provision constitutes a natural legal justification for rights and freedoms included in the Constitution.

[50] The Declaration was adopted by 48 votes in favour, but it is symptomatic that ex-Communist states, including Poland, abstained from voting. The mere title of the document – Declaration – suggests that the rights expressed therein exist in reality and the content is of a declaratory and not constitutive nature. The Declaration does not stipulate human rights, it only confirms, declares them. However, the legal binding force of the Declaration is an object of disputes. Usually it is assumed that it is not binding, but there are different opinions. Cf. on the topic: K. Motyka, *Prawa człowieka. Wprowadzenie. Wybór źródeł*, Lublin 2001, pp. 34–35.

[51] For example, the International Covenants on Human Rights of 16 December 1966 assume that human rights result from inherent human dignity. Cf. The Introduction to the International Covenant on Economic, Social and Cultural Rights and the Introduction to International Covenant on Civil and Political Rights.

[52] According to the explanatory report to the Charter (cf. Explanatory Report to the Charter, Charte 4473/00 of 11 October 2000) art. 1 derives fundamental rights from personal dignity and constitutes it as a real source of these rights. Moreover, according to the Report, none of the rights inscribed in the Charter can be used to assault personal dignity. This dignity has to be respected, even if the given right is subject to limitations. The principle of respect for dignity is the foundation of a catalogue of fundamental rights (chapter 1 of the Charter is entitled "Dignity").

[53] E.g. art. 1 of the 1949 German Constitution, art. 1 of the 1976 Portuguese Constitution, art. 10 of the 1978 Spanish Constitution.

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Personal dignity is the foundation for recognizing every human being, every person as an end in itself, and never as a means. This is linked to the interdiction of instrumental treatment.[54]

From dignity result inalienable norms that cannot be modified by any regime or legislation.

The Polish Constitutional Tribunal has repeatedly referred to the principle of human dignity, stressing, among others, that it is: "[…] a transcendental value which is primeval to other human rights and freedoms (for which it is a source), inherent and inalienable […]"[55], that it constitutes "the foundation for the whole state's legal order"[56], and that it is absolutely forbidden to breach it.[57] It emphasized also that "it is the only right with which it is impossible to use the principle of proportionality".[58] In the explanation of the judgement of 15 October 2002 (SK 6/02, OTK (Official Digest) 2002, series A, No. 5, item 65) the Constitutional Tribunal stated that "human dignity can be treated as a spontaneous constitutional model, also in the case of a constitutional infringement". It also stressed that: "Human dignity mentioned in art. 30 of the Constitution serves several functions in the constitutional order: a link between the Constitution (an act of positive law) and the natural law order; a determiner for the interpretation and application of the Constitution; an indicator of the system and the range of particular rights and freedoms […]".

In the conclusion, we have to affirm that dignity is an objective category. It is an absolute, permanent and indestructible value, which should be regarded as the "right to rights".

3. ROLE OF EQUITY IN THE PROCESSES OF APPLICATION OF LAW

We need to emphasize that if the process of arriving at a legal resolution, or of implementing law, does not take good, justice and human dignity into account, it simply says "no" to humans. In other words, such a structure or a machine is not concerned with humans or with common good.

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[54] The thoughts of human dignity were excellently put by I. Kant in his famous imperative: "Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction". I. Kant, *Grounding for the metaphysics of morals*, trans. J.W. Ellington, Indianapolis [1785] (1993), p. 30.

[55] Judgement of the Constitutional Tribunal of 5.03 2003 (K 7/01, OTK (Official Digest) 2003, series A, No. 3, item 19).

[56] Judgement of the Constitutional Tribunal of 4.03 2001 (K 11/00, OTK (Official Digest) 2001, No. 3, item 54).

[57] *Ibidem*.

[58] Judgement of the Constitutional Tribunal of 5.03 2003 (K 7/01, OTK (Official Digest) 2003, series A, No. 3, item 19).

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Using the meaning of the word "equity" considered in this paper, we can say that every decision in the application of law should be equitable. The person who applies law should bear equity in mind. The idea of equitable resolution or decision, notably in the judicial application of law, should be inscribed in the very ethos of the judge's function. After all, courts are the bodies that implement justice. A just judge has to pass equitable judgements.

In the application of law, the role of equity is linked to the requirement of passing an appropriate, suitable, individual judgement. The equity of the decision has to be specific – it can be an "improvement of law" in the sense of its practical materialization. After all, we are not talking about an unjust judgement that conforms to the letter of law. A judgement, if necessary, can also be a tool which allows us to repair or improve law, as well as oppose or disobey legal acts.

Specific equity in the application of law leads to individualized, detailed justice and can complement material justice. Equity always strives to achieve full justice in the act of application of law. It is, therefore, the fullest, the most prominent form of justice. Equity allows us to choose the formula of justice that would allow us to "give to each his due". We can, therefore, say that equity "disambiguates" material, individualized justice and leads to a resolution that gives to each his "equitable" due.

Equity *in concreto* is the "just thing itself", the judgement which is just here and now, one which is the best or at least better than all the other ones.

It seems that in every situation there is a possibility to make an equitable decision, one that is based on real, actual facts, takes into consideration human and common good, justice and dignity of its addressees. When the basis of the judgement is the fully established objective truth in its classic sense, at which the court aims, the equitable decision will be the only appropriate one – simply the best one. And if the basis of the judgement is the so-called judicial truth (if it does not harm the parties in the trial and if the parties agree with it), an equitable decision will be better than other ones with such arrangements made. However, it will not be the only equitable decision, unless the judicial (formal) truth corresponds to objective (actual) truth, which cannot be excluded.

Equity, as it has been mentioned earlier, in the acts of the application of law can be a remedy to wrong, dishonourable, unfair content of law, a means to prevent the need to recall the saying *summum ius summa iniuria*. This is when the need arises to refer to higher values, to equity.[59] We have to agree with Zygmunt

[59] In the case of *Gesetzliches Unrecht*, the judge or the official is obliged to choose, according to the postulates of equity, such a norm of judgement that a just and rational legislative body, guided by good and respect for human dignity, would legislate for the particular category of factual states to which the given *casus* belongs. Therefore, when the letter of law is appallingly unjust, undignified, is a form of lawlessness, the one to apply it has to, in a way, replace the legislative body so as not to enter into a conflict with the obvious content of moral norms and with his own conscience.

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Ziembiński, who writes: "[…] there are some limits to the unjustness of law that, when overstepped, prevent the decent judge from being guided by the formula «to everyone his own according to law». There is a limit beyond which there is only the *non possumus* declaration, regardless of whether it may lead the judge to disrupt his professional career or even face repressions".[60]

However, even when law (legal institutions and provisions) is equitable in its content, "equitable in itself", certain "tensions" can appear between the general nature of law and individual nature of the cases, because the norms are general and abstract in their nature. Here, the role of equity in its traditional sense is emphasized. In this paper we assume a fuller understanding of this concept. It is the question of the classical *epieikeia*, considered by Aristotle. For him, such a category was a necessary correction to statutory law and could also fill in the legal loopholes, taking into consideration the general nature of norms. In the fifth book of *Nicomachean Ethics*, he wrote: "The same thing, then, is just and equitable[61], and while both are good the equitable is superior. […] the equitable is just, but not the legally just but a correction of legal justice. […] When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known".[62] *Epieikeia* was the subject of Aristotle's deliberations also in *Rhetoric*: "Equity[63] bids us […] to think less about the laws than about the man who framed them, and less about what he said than about what he meant […]".[64] Aristotle indicates also the functions of equity in the interpretation of the law.

4. WAYS OF ACHIEVING THE EQUITABLE JUDICIAL DECISION

If the mere content of law and legal norms, fulfils the requirements of justness, it is certainly a perfect basis leading to the equitable decision, although it does not determine whether the decision will be equitable or not. Coming to an equitable decision can be hindered, generally, by two types of factors: the generality of legal norms and the human factor – the body that applies law.

An alternative for the official disobedience to an unjust law, which takes the form of acting so as to remove legal loopholes, is also a voluntary (sometimes even ostentatious) resignation from the position correlated with the application of law.

[60] Z. Ziembiński, *O pojmowaniu*…, p. 129.

[61] In some translations of Aristotle's works, the notion of righteousness is used rather than equity. However, in literature, the word *epieikeia* is very often translated and understood as equity.

[62] Aristotle, *Nicomachean ethics*, pp. 88−89.

[63] The use of the word "righteousness" in some of the translations does not change the fact that traditionally, *epieikeia* is translated as equity.

[64] Aristotle, *Rhetoric*, trans. W.R. Roberts, Book I, Hazleton 2010, p. 65.

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How to aim at an equitable decision? Let us deliberate on it on the basis of the decision model of the judicial application of law.

In logical order, the first decision in the model is the one that establishes factual circumstances.[65] The establishing of facts in accordance with the reality (the principle of objective truth) is the starting point of an equitable decision. The court is obliged to reach the truth. It has been emphasized many times by the Polish Supreme Court. Both in the criminal procedure and in the administrative procedure, the principle of material (objective, actual) truth is obligatory.[66] The judge and the court in legal (criminal) procedure have to search for the truth of the situation. They have to aim at gaining an appropriate knowledge of the reality that would give them the possibility to find an adequate resolution.

In criminal procedure, the principle of material truth is considered to be the paramount, key principle.[67] When passing a judgement, the judge adjudicates the truth and establishes its consequences. Basing on truth, they administer justice.

However, we know that the requirement of material truth in civil procedure is not absolute. Moreover, there might appear elements of "judicial cognition" that limit the epistemological dimension of truth.[68]

Moreover, we need to emphasize that at the stage of establishing the factual circumstances, an axiological modification guided by equity can take place. Let us call it a "spontaneous equitable correction".

The way of expressing facts in legal norm is also important. These facts can be given not only in a descriptive form, but also in a comparative or assessing form. The facts in the second group are the source of a margin of decision. This margin can be influenced by equity. In a way, the establishment of facts merges with their evaluation - there appear estimations, e.g. "material reasons", "irretrievable and complete breakdown of marriage", "reasonable cause", "special circumstances".[69] Some examples of fact names in which the assessing quality is emphasized are: "moral damage", "strong agitation justified by circumstances", "acting with […] in view". In such situations, it is possible to use the "spontaneous equitable correction". Estimations and evaluations can play the role of equity, because they are linked to "valuation", referring to axiology. Thus, for example, not any reason, but

[65] We have to agree with M. Zieliński, who writes: "The question of being obliged to learn the facts that constitute the so-called factual basis of the resolution in legal proceedings is so obvious that even without any direct provision, indicating such an obligation to the judge, it would not give rise to any doubts in the light of the doctrine and the practice". M. Zieliński, *op. cit.*, p. 35.

[66] Art. 2 § 2 of the Polish Code of Criminal Procedure, art. 7 of the Polish Code of Administrative Procedure.

[67] A. Sakowicz emphasizes that some treat it on par with other principles. Cf. K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, *Kodeks postępowania karnego. Komentarz*, Warsaw 2012, p. 17.

[68] Cf. A. Korybski, L. Leszczyński, A. Pieniążek, *op. cit.*, pp. 154−155. Cf. also: L. Leszczyński, *Stosowanie generalnych klauzul odsyłających*, Cracow 2001, pp. 152−153.

[69] Cf. L. Leszczyński, *Stosowanie generalnych…*, p. 154.

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a "material reason" is an element of the factual circumstances. Only the "irretrievable and complete breakdown of marriage", not just any breakdown, is an element of the factual circumstances established in the decision process.[70] The existence of the fact of "acting under strong agitation justified by circumstances" demands establishing the state of strong agitation and issuing a justifying judgement.

Let us now move on to the validation decision, which establishes the normative basis[71] for the decisions in the application of law. In the statutory legal system, in principle, the starting point for establishing the legal circumstances are provisions of material law.

First of all, the role of equity can be linked to the choice of a particular provision. Second of all, reaching equity can mean that we have to take into consideration the equitable reference clauses (equitable clauses and other equitable references). Such clauses refer to the principles of equity, the considerations of equity or directly to the equity itself.[72] The element of equity can appear in different configurations: "legitimate interest of the citizens"[73], "equitable damages".[74] However, even now there is a problem with understanding such clauses in a full and certain way. We can use other clauses as auxiliaries[75], e.g. good faith, good practice, principles of community coexistence (still as a substitution)[76], good of the humans, good of the children, good of the family. In other legal orders, some examples of auxiliary constructions could be clauses of natural legal principles[77], principles of natural law[78], principles of reasonableness and equity.[79]

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[70] Cf. *idem*, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Cracow 2001, p. 69.

[71] We assume, of course, that the competence and procedural bases (general and detailed norms) have been fulfilled by the entity that applies law.

[72] For example art. 4172 of the Polish Civil Code, art. 7612 of the Polish Civil Code, art. 7643 § 1 of the Polish Civil Code, art. 827 § 1 of the Polish Civil Code, art. 614 § 3 of the Polish Family and Guardianship Code, art. 1194 § 1 of the Polish Code of Civil Procedure.

[73] Art. 7 of the Polish Code of Administrative Procedure.

[74] Art. 21 section 2 of the Polish Constitution.

[75] We can assume that different clauses with various names can be the way to the specific equity if they refer to moral criteria.

[76] This clause was meant to be a functional counterpart to equity in the Polish socialist system. It was introduced for ideological reasons, it was a tool of "ideologization of law". Of course, it concerned the socialist principles of morality. Its introduction was a reception of Soviet solutions. The postulate to return to the traditional clauses, rooted in the European culture, is fully justified.

[77] § 7 ABGB of 1811 (*natürliche Rechtsgrundsatzen*).

[78] Art. 16 of the Portuguese Civil Code of 1867 (*principles of natural law*).

[79] Art. 3:12 of the Dutch Civil Code of 1992 (*redeliikheid en billijkheid*).

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Also the principles of social justice clause refers to moral values.[80] This clause, along with the common good clause, is of special significance in the process of reaching equity.

While recapitulating these draft deliberations on reference clauses, and at the same time enlarging the perspective to include extrajudicial (administrative) application of law, we have to emphasize that in the application of law, when aiming an equitable decision, a special part should be played by the following reference meta-clauses: common good (art. 1 of the Polish Constitution), principles of social justice (art. 2 of the Polish Constitution), legitimate interest of the citizens (art. 7 of the Polish Code of Administrative Procedure).[81] These meta-clauses give an axiological dimension to every decision and nothing can prevent us from referring to them. The universality of their role in the decision processes requires wider axiological deliberations while taking individual decisions. These clauses can be an excellent way to achieve an equitable resolution.

Let us emphasize that reference clauses can play a deciding role in validation.

Thirdly, bases for decisions may be sought in the constitutional meta-principles of law – from the perspective of equity, the most important are the principle of common good (art. 1 of the Polish Constitution), the principle of social justice (art. 2 of the Polish Constitution) and the principle of the inherent and inalienable dignity of the person (art. 30 of the Polish Constitution). The aforementioned principles have to be treated as applying to the whole legal system.

Fourthly, aiming at an equitable decision can be linked to a direct application of international law, including the principles of the said law that are connected to moral criteria.[82]

Fifthly, in the argumentation for the creation of a normative basis, we can use "axiological creation" from legal principles, including the principles of the whole legal system (constitutional principles). The aforementioned principles expressed in art. 1, art. 2 and art. 30 of the Polish Constitution may be crucial. These principles constitute the core of meta-axiology of the Polish Constitution, and it is worth adding that this meta-axiology on this level is coherent.

Sixthly, other, earlier decisions in the application of law could be a complimentary element (the *per rationem decidendi* argument). The decisions concerned are those of both national and international courts.

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[80] Art. 2 of the Polish Constitution. It is necessary to emphasize that in jurisprudence it is claimed that: "The principles of social justice clause resembles slightly the principles of equity clause, typical of the private law". L. Leszczyński, *Tworzenie generalnych klauzul odsyłających*, Lublin 2000, p. 76.

[81] A similar role can be played, still as a substitute, by the principles of community coexistence clause (art. 5 of the Polish Civil Code).

[82] Cf. L. Leszczyński, *Stosownie generalnych…*, p. 134.

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As for the subsequent decision (the interpretation decision), the body that applies law at the stage of interpretation[83] has a smaller or larger, often hidden, degree of freedom.[84] It has a certain "axiological autonomy". The principles of exegesis include tools, instruments and ways of axiological correction of the letter of law. They are activated to prevent making unjust and thus inequitable decisions. Among such principles, the most important are the principles of purpose and function[85], the principles of system axiology[86], as well as the principles of open axiology.[87] Dynamic interpretation of law might be of great significance.

Practical interpretation forces the person applying law to enter into a relationship with reality, both in the social dimension (a specific given case, often a dispute, is adjudicated) and the legal dimension (interpretation of law not *in abstracto*, but for a practical use). These dimensions are linked to the axiological dimension, aiming at equity in its very bases.

The mere act of decoding the norms from legal provisions, or building a model of behaviour from various elements included in a legal text, is naturally linked to margins of decision.

It can happen that the factual situation leads to a modification of the interpretation in the sense of using a "different norm" than the one initially assumed.

In exceptional cases, the judge, using his margin of decision, can adjust the meaning of provisions through interpretation to such an extent that the facts will not be regulated by a given provision, but a different one. As a consequence, they can present a different legal classification of the factual circumstances.

It is necessary to emphasize that as early as at the stage of linguistic interpretation we can consider the axiology of the system (the principles of law) and, through it, slightly correct the meaning.[88]

The judges should have the ability to notice the values hidden behind the meaning of the letter of law. They can seek the sense of law, apart from the wording of provisions, or extract the content that has the characteristics of equity, if law contains them.

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[83] We assume that interpretation takes place every time, regardless of the interpreter's initial belief on the clarity of the object of interpretation. Cf. on the topic: A. Kalisz, L. Leszczyński, B. Liżewski, *Wykładnia prawa. Model ogólny a perspektywa Europejskiej Konwencji Praw Człowieka i prawa Unii Europejskiej*, Lublin 2011, pp. 25−26.

[84] Cf. Z. Ziembiński, *Wstęp do aksjologii dla prawników*, Warsaw 1990, p. 208.

[85] The principles of purpose and function, broadly speaking, refer to the purpose or the function of a regulation.

[86] The principles of system axiology refer to the axiology of the legal system. They concern the use of legal principles for interpretation, as well as the use of the axiological coherence of a legal system. Cf. L. Leszczyński, Zagadnienia teorii…, pp. 129−130.

[87] We consider here the criteria of open (extralegal) axiology which, if used, would mean the necessity to use equitable reference clauses.

[88] A. Kalisz, L. Leszczyński, B. Liżewski, *op. cit.*, p. 42.

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The role of equity is sometimes linked to using the remedial interpretation. Here, the "axiological remedial role" of interpretation is especially important. Interpretation should be conducted in such a way that it does not permit appalling injustice, and thus an inequitable decision. The court is expected to be just, and justice is a part of equity.

The Polish Supreme Court in the resolution of 22 March 2007 said: "Linguistic interpretation cannot […] lead to a resolution that in the light of commonly accepted values has to be deemed appallingly inequitable, unjust, irrational or destructive to the *rationem legis* of the interpreted provision".[89] In a similar situation, in the judgement of 8 July 2004, the Polish Supreme Court said: "[…] the directives of the purpose interpretation demand that in the process of establishing the meaning of a norm, its axiological context has to be taken into account. In the process of establishing the meaning of a norm, the commonly accepted principles of equity and justice have to be taken into consideration".[90]

Law has to be interpreted with the constitutional principles and meta-values in view. We can say that it is a pro-constitutional interpretation.[91] Meta-axiological foundations of law, meta-principles of law that constitute the general principles – these are the factors that draw the general shape of axiological choices. Pro-constitutional interpretation that refers to the meta-axiology of the Polish Constitution[92] is a straight way to an equitable decision.

Principles and clauses can overlap, support and reinforce each other. This is linked to values, intra-legal axiology and external values. A reinforcement of the content of a decision concerning the application of law by the criteria of reference clauses, criteria of legal principles, and especially constitutional principles expressed in art. 1, art. 2 and art. 30 can take place.

We have to emphasize that the use of the equity criterion can change the model order in which the interpretation principles are used, thus moving the axiological arguments to the initial stage of the interpretation.

As for the subsumptive decision, it might seem that the role of equity is not of great importance. However, it is not always the case. At this stage, a comparison of the established factual circumstances with the reference clause criteria or the principles of law that constitute an element of the normative basis for the decision

[89] Polish Supreme Court resolution of 22.05.2007 (III CZP 8/2007).

[90] Polish Supreme Court judgement of 8.07.2004 (IV CK 520/03).

[91] Of course, only when the fundamental values on which equity is based are expressed in the Constitution.

[92] Meta-axiology of the Polish Constitution can be built on the universal values enumerated in the Introduction: truth, justice, good, beauty, as well as common good (art. 1 of the Polish Constitution), principles of social justice (art. 2 of the Polish Constitution) and the principle of dignity of the person (art. 30 of the Polish Constitution).

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can take place. It is possible to classify the factual circumstances basing only on equitable criteria.

The decision that establishes legal effects (the final decision) is the next stage in the process of the application of law. The influence of equity on this stage can be twofold. Firstly, it may be that the criteria of equity lead to non-application of the consequences that were predicted in the norms. Sanctions established in the norms have to yield to the important arguments of equity. Secondly, the criterion of equity can influence the choice of consequence type or the scope of legal effect if they are gradable. It concerns not only the sanctions as they appear in the criminal law, but also those in the civil law (e.g. the amount of compensation) or in the administrative law.[93]

While taking into consideration the criteria of equity (be it intra-legal, intra-systemic or external ones), it seems that sometimes what constitutes the basis of the application of legal sanctions are moral sanctions. They also correct legal sanctions.

Of course, the axiological (equitable) argumentation has to be strongly reflected in the justification of the decision. After all, the decision has to be "accepted" as equitable.

Thus, the general ways of reaching an equitable decision were presented.

5. CONCLUSION

In the conclusion, we may state that in the application of law, the most basic question is: how should a decision be made? Of course, the most mature form of application of law is its judicial application. So, how should a court issue decisions, on what values should it be based (and how to fulfil them), what is and what should be the aim of a decision?

The answer to these questions is: equity, the equity of the decisions, equity *in concreto*.

We have to state that the courts have a wide margin of freedom in the application of law. It should be used "with their eyes set upon equity", which is, let us recall, built on the following values: truth, good, justice, human dignity.

In the judicial application of law, the final decision, touches, in fact, the principal, basic values and judgements (it touches truth, good, justice and human dignity) if we reduce the subsequent reasoning and explanations. The legal effect established in the final decision always concerns a human, directly or indirectly.

Therefore, when talking about axiological bases of the application of law, we need to find a way which would take us to the best resolution. The court and the judge solve, after all, a certain case that exists in reality, and do not present alter-

[93] Cf. L. Leszczyński, *Stosowanie generalnych…*, s. 164.

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native possibilities of choice. The court, while making a decision, makes a choice which should be driven by equity. After all, can we find any other values that would light our way? The judge should strive to find an equitable resolution, they should search for it and not reject it *a priori*.

It is also necessary to refer to the assumptions that the judicial application of law is concerned with, above all, finding an equitable resolution. What is, therefore, the relationship between justice and equity? Justice, as it results from our deliberations, constitutes part of equity.

We can say that justice is the pillar of equity, but equity is richer and greater. Justice, when driven by truth, good and respect for dignity, does allow for giving to each "his own". If the decision in its nature is just, it is also equitable. Therefore, equity protects the formula *suum cuique* from being deformed. It fulfils it and does not allow for its degeneration and perversion.

And one more remark: equity does not postulate arbitrariness of judicial judgements and decisions, but rather opposes it.

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SUMMARY

This paper addresses the issue of axiological foundations of law enforcement in the short equity law. The law is surface mounted right on the values essential, primary, which are: truth, goodness and justice. Such an understanding of the validity refers to both the law-making process and its application. With regard to the application of the law in the study focuses mainly on his judicial type, in which the court deciding specific, real situation is to take the right decision.

STRESZCZENIE

W artykule zostało podjęte zagadnienie aksjologicznych podstaw stosowania prawa w perspektywie prawa słusznego. Podstawy takie powinny być jasne, pewne, solidne, trwałe i takie daje właśnie teoria prawa słusznego. W opracowaniu wyjaśniono rozumienie prawa słusznego i wartości je fundujących, a są nimi: prawda, dobro, sprawiedliwość, godność człowieka. Wartości te są aksjologicznymi podstawami bytu prawa, tj. wartościami leżącymi u źródeł procesów tworzenia prawa, ale w istocie są też (powinny być) zasadniczymi, podstawowymi wartościami stosowania prawa. W procesach stosowania prawa rola słuszności wiąże się z wymogiem wydania właściwego, godziwego orzeczenia. Sądy w stosowaniu prawa dysponują sporym zakresem/marginesem swobody. Jego wykorzystanie powinno dokonywać się ze „wzrokiem skierowanym na słuszność", bowiem ustalone w decyzji finalnej skutki prawne dotyczą zawsze człowieka (bezpośrednio czy pośrednio). Rola słuszności może wiązać się z „udoskonaleniem prawa" w sensie jego praktycznej konkretyzacji. Kategoria ta, gdy zachodzi taka konieczność, może być także narzędziem naprawiania, poprawiania prawa, pozwala sprzeciwić się, wyjść poza posłuszeństwo ustawom, słuszność bowiem nie dozwala na podjęcie decyzji niesprawiedliwej. Słuszność spełnia też funkcję korektury stanowionego prawa, niwelującej napięcia między ogólnym charakterem prawa a indywidualnym

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charakterem przypadków, mogącej też wypełniać luki w prawie. Słuszność w stosowaniu prawa jest zatem wartością korygującą – naprawiającą, udoskonalającą, uzupełniającą prawo i jednocześnie dopełniającą sprawiedliwość. W opracowaniu, w oparciu o model decyzyjny sądowego stosowania prawa, zostały ponadto przedstawione sposoby dochodzenia do decyzji słusznej. Sformułowano też pogląd o możliwości podjęcia jedynej słusznej decyzji. W konkluzji rozważań stwierdzono, iż wartości budujące słuszność, stanowiące zarazem aksjologiczne podstawy stosowania prawa, przeciwstawiają się arbitralności ocen i decyzji sędziowskich.

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