USING LEGISLATIVE HISTORY IN INTERPRETING POLISH LAW: EXAMPLE OF CHANGES IN UNDERSTANDING PRINCIPLES OF LAW DURING THE TRANSITION PERIOD

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Abstract: The article discusses changes in the fundamental legal principles which took place in Central and Easter European countries during the period of system transformation of the late 1980s and the early 1990s, presented from the perspective of Polish experience. It encompasses an analysis of the changes which were made in this period in the Constitution of the Polish People's Republic of 1952 and selected acts. The authors have studied legislative materials of the Sejm of the Republic of Poland of the 10th term (the so-called Contract Sejm elected in the aftermath of the Round Table Agreement, which paved the way to democratic changes in Poland) which amended the aforementioned acts. It is the authors' belief that the legislative materials are a valuable source of information on the legislative intent as they make it possible to identify the underlying objectives behind the changes made as well as the meaning the legislator intended to attribute to the new provisions. The research revealed that during the period of system transformation, new provisions were introduced to the Polish law which led to the establishment of new legal principles fundamental for the system (e.g. the democratic state under the rule of law principle); some provisions were amended and the terms used therein were reformulated so as to correspond to the goals of the state post-Communist transformation (e.g. the principle of the people's rule of law was transformed into the principle of the rule of law) while the other provisions, although left in their then-current wording, over the course of time, received a new meaning (e.g. the principle which requires that civil law relationships should take account of the rules of social coexistence). The authors believe the paper can be an interesting source of information for readers in the Czech Republic, which just like Poland, after the dissolution of the Eastern Bloc, was faced with challenges related to changing the jurisprudence in the aftermath of the system transformation.

Keywords: legal principles; legislative materials; system transformation; constitution; legal system

Klíčová slova: právní pincipy; legislativa; transformace systému; ústava; právní systém

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1. INTRODUCTION[1]

The underlying research idea behind this paper is to present three transversal issues which transcend beyond local discourse. The paper draws closer together a number of notions and functions related to the construction of legal principles and the

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issue of using legislative materials in the legal discourse. To illustrate their research, the authors have discussed changes in the fundamental legal principles which took place in countries of Central and Eastern Europea during the period of system transformation of the late 1980s and early 1990s, presenting the issue from the perspective of Poland's experiences.

Legal principles have been the subject matter of numerous publications all over the world.[2] The issue has also been a matter of interest and controversy in Polish literature, as evidenced by works published in both the 1960s and 1970s[3] and those from the period 2011–2014.[4] Paradoxically, although it is indeed difficult to find a monograph which does not use the term *legal principle*, there is no consensus as to the substance of this notion. The issue of understanding of legal principles has also been of interest to authors dealing with the theory of law in the Czech Republic.[5]

Particularly interesting is the issue of identification of legal principles and their content during the time of system transformation.[6] It is a period when the foundations of a legal system change, which means the system has to be based on new principles.[7] Both Poland and the Czech Republic, as well as other countries of the former Eastern Bloc were faced with this challenge after the events that commenced in 1989 in Central and Eastern Europe, leading to the collapse of the communist system in this part of the world. During the period of social and political transformation, Ronald Dworkin's observation that judges' task is to discover or reveal a system of rights and obligations that is best for the community[8] becomes extremely timely in Poland, A special challenge for judges was presented by cases, where legislation created before 1989 needed to be applied during the period of system transformation which, after all, consisted among others in changing the foundations of the system of law. It must be noted that although almost 30 years have passed since the fall of Communism, application of legislation

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[2] In Anglo-Saxon literature see e.g.: DWORKIN, R. *Taking Rights Seriously*. Duckworth, London, 1991; DWORKIN, R. *A Matter of Principle.* Cambridge, Massachusetts, and London, 1985; ÁVILA, H. *Theory of Legal Principles*. Dordrecht, 2007; In German literature: ALEXY, R. *Theorie der Grundrechte,* Baden-Baden, 1985; In Spanish literature works by ATIENZA, M. – MANERO, J. R. *A Theory of Legal Sentences*. Dordrecht – Boston, 1998; In Spanish language *Las piezas del derecho*. Ariel, 1996 (available at: http://www.fd.unl.pt).

[3] WRÓBLEWSKI, J. Prawo obowiązujące a „ogólne zasady prawa". *Zeszyty Naukowe Uniwersytetu Łódzkiego*. Lodz: Nauki Humanistyczno-Społeczne, 1965, seria I, z. 42, pp. 17–29; WRONKOWSKA, S. – ZIELIŃSKI, M. – ZIEMBIŃSKI, Z. *Zasady prawa. Zagadnienia podstawowe*. Warsaw, 1974.

[4] We mean the following works: MAROŃ, G. *Zasady prawa. Pojmowanie i typologie a rola w wykładni i orzecznictwie konstytucyjnym.* Poznań, 2011; KORDELA, M. *Zasady prawa. Studium teoretycznoprawne,* Poznań, 2012; TKACZ, S. *O zintegrowanej koncepcji zasad prawa w polskim prawoznawstwie (od dogmatyki do teorii)*. Toruń, 2014.

[5] Cf. e.g. HARVÁNEK, J. Právní principy. In: HARVÁNEK, J. et. al. *Právní teorie*. Plzeň, 2013, pp. 233–234.

[6] Cf. CZARNOTA, A. Transitional Justice, the post-communist post-police state and the losers and winners. An overview of the problem. *Silesian Journal of Legal Studies Contents*, 2009, vol. 1, pp. 11–20. See also CZARNOTA, A. Transitional Justice in Postcomunism. In: Clark, David S. (ed.). *Encyclopaedia of Law and Society*, 2007.

[7] The issue of the foundations of legal systems is frequently discussed from the perspective of Hans Kelsen's concept of the basic norm (Grundnorm). See, more broadly, H. Kelsen's Allgemeine Theorie der Norrmen, translated into Czech by Milan Kubín: KELSEN, H. *Všeobecná teorie norem.* Brno: Masarykova univerzita, 2000.

[8] DWORKIN, R. *Law's Empire*. London, 1986, p. 255.

created during the period of Polish People's Republic (official name of the Republic of Poland during the years 1952–1982, further referred to as the PRL) continues to be a problem for Polish judicial practice to this day.

A third issue, an equally interesting one and arguably one of the most discussed ones in the world in recent years, is the use of legislative materials as a potential source of identifying the legislative intent. The discussion on ways of using legislative materials and the role they play or should play in the interpretation of the law is currently taking place in many countries all over Europe (Germany,[9] Sweden,[10] Great Britain,[11] France,[12] Spain[13]), but also outside the European culture: in the United Stated (which are not just the cradle of this discussion, but which in fact keep stirring it up, and keep it on a very high level[14]), Australia,[15] Canada,[16] New Zealand,[17] or in Asian countries.[18] The debate taking place involves not just interpreters but also the legislatures.[19] It is

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[9] I have discussed the discourse taking place in German speaking countries in the paper BIELSKA-BRODZIAK A. Cel interpretacji jako kryterium oceny przydatności materiałów legislacyjnych dla wykładni prawa na gruncie niemieckiej kultury prawnej. In: KŁODAWSKI, M. (ed.). *Szkice z teorii tworzenia prawa i techniki legislacyjnej*. Warsaw: Wydawnictwo sejmove, 2018.

[10] On the role of legislative materials in interpretation of the law, see VOGEL, H. H. Sources of Swedish Law. In: BOGDAN, M. (ed.). *Swedish Legal System*. Stockholm, 2010, pp. 30–34; PECZENIK, A. – BERGHOLZ, G. Statutory Interpretation in Sweden. In: MACCORMICK, D. N. – SUMMERS, R. S. *Interpreting Statutes: A Comparative Study*. Dartmouth, Worcester, 1991, pp. 311–357. In more general terms on the specific nature of the Swedish legal system, sources of the law and legislation, see CARLSON, L. *The Fundamentals of Swedish Law*. Lund, 2009, pp. 23–52.

[11] See e.g. POPKIN, W. D. *A Dictionary of Statutory Interpretation*. Durham, 2007, pp. 160–161; FLEISCHER, H. Comparative Approaches to the Use of Legislative History in Statutory Interpretation. *American Journal of Comparative Law*, 2012, vol. 60, s. 416–421; BEAULAC, S. Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight? *McGill Law Journal*, 1998, vol. 43, pp. 292–296.

[12] See e.g. a monograph by P. JOSSE, *Le role de la notion de travaux preparatoires dans la jurisprudence du conseil constitutionnel*. Paris, 1998; GERMAIN, C. M. Approaches to Statutory Interpretation and Legislative History in France. *Duke Journal of Comparative and International Law*, 2003, vol. 13, pp. 201–206.

[13] See e.g., SALVATOR, CODERCH P. Los materiales prelegislativos: entre el culto y la polémica. *Anuario de derecho civil*, 1983, vol. 4, pp. 1657–1684.

[14] Due to the multitude of materials available, we shall quote here just some of the more important works devoted to using legislative materials in the interpretation of law: the first one comes from the 1970s: FOLSOM, G. B. *Legislative History. Research for the Interpretation of Law*. Charlottesville, 1972; the second one is MAMMEN, Ch. E. *Using Legislative History in American Statutory Interpretation*. Hague–London–New York, 2002, See also BRUDNEY, J. J. Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court. *Washington University Law Review*, 2007, vol. 85, pp. 1–62. It is also worth drawing attention to the analyses of legislative materials usage in the American Supreme Court – see HENSCHEN, B. M. Judicial Use of Legislative History and Intent in Statutory Interpretation. *Legislative Studies Quarterly*, 1985, vol. 3, pp. 353–371.

[15] BEAULAC, S. Parliamentary Debates…, pp. 296–297.

[16] BEAULAC, S. Parliamentary Debates…, pp. 300–308; BEAULAC, S. Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates. *Saskatchewan Law Review*, 2000, vol. 63, p. 581–616; TREMBLAY, R. *L'essential de l'interpretation des lois.* Quebec, 2004.

[17] BEAULAC, S. Parliamentary Debates…, pp. 297–298.

[18] See EVANS, J. Controlling the Use of Parliamentary History. *New Zealand Universities Law Review*, 1998, vol. 18, p. 1, footnotes 1 and 2.

[19] See e.g. comprehensive and detailed empirical study conducted in the legislative circles, described in a two-part work by GLUCK, A. R. – BRESSMAN, L. S. Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons. Part I. *Stanford Law Review*, 2013, vol. 65, pp. 901–1025 and Statutory Interpretation … Part II, *Stanford Law Review*, 2014, vol. 66, pp. 725–801.

a trigger for discussions on the value of legislative materials for interpretation of the law. We believe that the period of transition, when many of the existing assumptions theses on legal principles become outdated, it is indeed difficult to find a better source of information on the legislative intent and goals than legislative materials. In the course of the analysis presented in this paper, we will try to present arguments to support our thesis that expanding the context that shapes the catalogue and content of the various principles through the use of legislative materials is not just desirable, but in fact necessary.

This paper is by no means a comprehensive study. Instead, it shall serve as a point of departure for broader reflection on the issues and problems presented in the course of the analysis. The text expresses the authors' conviction that the matters discussed here transcend beyond the borders of a single country and in the future ought to be studied by international teams of researchers. It would be especially useful if collaborative research into this matter was conducted by authors coming from countries which underwent system transformation connected with the collapse of the communist system.

2. LEGISLATIVE MATERIALS AS AN ACT'S LEGISLATIVE HISTORY AND WHERE A RECOURSE TO THIS HISTORY CAN LEAD TO?

Legislative materials usually appear in the context of interpretation of the law under the name *legislative history* and refer to a set of documents drawn up in the course of the legislative process of an act. While they contain information that is external in relation to the text of normative acts, they are – and this is a point that cannot be over-emphasised – materials that come from the legislator and reflect his will when adopting the act in question. Legislative history allows to obtain two types of important information: information on the meaning of the various terms used by the legislator, and information on the objectives the legislator wanted to attain by introducing a given regulation. We would like to stress at this point that whereas this may apply to any provision, we shall focus herein on the use of legislative history with respect to provisions expressing legal principles.

Legislative materials can be used to both determine which part of an act should – in accordance with the legislator's will – be treated as a principle (establishing a catalogue of legal principles), and to determine the contents of legal principles.

Let us look at legislative materials (also referred to as preparatory works or *travaux preparatoires*) a little more closely. As mentioned before herein, the use of legislative materials for the purpose of interpretation of the law is called interpretation based on *legislative history*. The term originated in English-language literature, where it is used on a very wide scale.[20] Conventionally understood, legislative history is a set of materi-

[20] Legislative history is a highly popular term in Anglo-Saxon literature – cf. e.g. POPKIN, W. D. *A Dictionary of Statutory Interpretation*. Durham, 2007, pp. 160–183; also ESKRIDGE, W. N., JR. – FRICKEY, PH. P. – GARRETT, E. *Legislation and Statutory Interpretation*. New York, 2006, p. 303 (especially literature listed under footnote 17). This term is long preceded by the legal maxim "Ejus est interpretari legem, cujus est condere" dating back to Roman law.

als – drawn up in the form of documents – produced by the legislator (or commissioned by the legislator) in the course of drafting and passing of an act, with documents deriving from the parliamentary stage of the law-making process being the most important for the process of interpretation of the law. Legislative history is used in the process of interpretation of the law with the interpreter accessing draft acts, explanatory statements, parliamentary debate records, or other legislative documents in order to develop, accept or reject interpretative hypotheses. The underlying objective is to obtain information allowing to identify the historic intention of the legislator behind the introduction of a given law or act.[21]

As far as the role of legislative materials in the process of establishing the content of the law or application of the law is concerned, it should be noted that Poland has not introduced, either statutorily or through established interpretation directives, any rules for using them. Therefore, there are no directives requiring or prohibiting using them. As a general rule, the Polish legal tradition has allowed the use of any and all materials which may prove useful in the course of interpretation of the law, although it is obvious that some interpretation tools will be more culturally valued and recommended than others. The use of *travaux preparatoires* in the process of interpretation of the law has until recently only received marginal interest,[22] and yet their popularity in judicial decision making surprises by its scale. It is beyond any doubt that legislative materials are currently an important and increasingly used tool in the legal practice.[23] In the light of this fact, the authors of this paper have been faced with an exciting challenge of using legislative materials developed in the period of system transformation in order to establish a catalogue of legal principles that the Polish legislator decided to adopt after the collapse of the communist system. It must be clearly stated that the legal principles which will be discussed further in this paper are treated as foundations of the Polish legal system (foundations of the various branches of the law) to this day.

3. LEGAL PRINCIPLES – SPECIFICITY FROM THE PERSPECTIVE OF ISSUES RAISED IN THIS TEXT

Literature offers various differing characteristics of legal principles. As a preliminary point, we would like to emphasise that, given the specificity of the issues raised in this paper, we will focus on the traditional understanding of legal principles in the Polish legal culture. For the purpose of this paper, we will therefore skip those characteristics of legal principles which regard norms used to a larger or smaller extent

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[21] At this point it is worth mentioning a similar term *historical interpretation* – see more broadly TOBOR, Z. Wykładnia historyczna. In: *O prawie i jego dziejach księgi dwie: studia ofiarowane Profesorowi Adamowi Lityńskiemu w czterdziestolecie pracy naukowej i siedemdziesięciolecie urodzin*. Białystok, 2010, pp. 1177–1186; BIELSKA-BRODZIAK, A. – TOBOR, Z. Zmiana w przepisach jako argument w dyskursie interpretacyjnym. *Państwo i Prawo*, 2009, no. 9, pp. 18–32.

[22] First comprehensive study – see BIELSKA-BRODZIAK, A. *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa.* Warszawa: Wolters Kluwer, 2017.

[23] Ibidem.

in accordance with the maxim *more or less* as legal principles.[24] References to these concepts started in the Polish discourse on legal principles in the late 1980s. The first thorough analyses of these constructions were authored by professor of Jagiellonian University Tomasz Gizbert-Studnicki.[25] That said, we would like to stress, though, that we are aware that carrying a thorough and comprehensive analysis of legal principles is currently impossible without taking those characteristics into account. Doing so, however, would go beyond the assumed framework of this paper.

In the Polish tradition, successfully continued in the most recent monographs, the term *legal principle* is reserved for mandatory legal rules characterised by certain features which make it possible to distinguish them and set them against other norms within the system which are not considered to be legal principles. Legal principles are those norms which are of a fundamental (underlying for the system) character. They are distinguished by an exceptional axiological, functional and hierarchical significance.[26] The proposed criteria for selecting legal principles are diverse.[27] However, it is stressed that their character is different from that of other norms and that the role they play in the system is special.

The terminological diversity does not make it any easier to carry out an analysis of legal principles. The fact that there are multiple differing views on this matter results in considerable conceptual confusion as to how the term *legal principle* should be construed. Since the various authors adopt different theoretical assumptions, their views are on many occasions incomprehensible for legal practitioners. This applies in particular to judges, whose job is to adjudicate in individual cases, and not to go into the theoretical complexities of the various constructions of legal principles. In addition, the situation is not made any better by the fact that authors of theoretical works use different sets of tools, which results in differing catalogues of legal principles being established. This, in turn, leads to this complex matter being even more difficult to understand.

The Polish legal culture has a deeply ingrained image of legal principles as creations of the legislator. However, more recent publications tend to strongly accentuate the role of jurisprudence specialists in the discourse leading to determination whether a specific norm should be considered a legal principle. While the voice of the legislator, who creates provisions of the law, is important, and in many cases can determine whether a given rule will become a legal principle, it is never the only factor to determine whether a norm is "fundamental". Any expressions by the legislator are further "processed"

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[24] We mean the so-called "Dworkin's characteristics of legal principles". Cf. TKACZ, S. O zintegrowanej…, pp. 34–55.

[25] Cf. GIZBERT-STUDNICKI, T. Zasady i reguły prawne. *Państwo i Prawo*, 1988, no. 3, pp. 16–26; GIZBERT-STUDNICKI, T. Konflikt dóbr i kolizja norm. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1989, issue 51, pp. 1–15.

[26] LESZCZYŃSKI, L. – MAROŃ, G. Pojęcie i treść zasad prawa oraz generalnych klauzul odsyłających. Uwagi porównawcze. *Annales UMCS Lublin – Polonia*, section G, vol. LX, 1, Lublin, 2013, p. 81.

[27] In Polish literature, there are also other criteria being formulated which let us extract the rules of law. Among them are: the relation of a norm to other norms (a norm makes up a rationale for a whole group of norms) or the place of a norm in a construction of legal institution (a norm regulates substantial features of legal institution). Undoubtedly, in each case, it is imperative to evaluate the goals, tasks and functions of a norm (on the grounds of goals of the legal system or its parts). See: OPAŁEK, K. – WRÓBLEWSKI, J. *Zagadnienia teorii prawa*. Warszawa, 1969, pp. 92–93.

by representatives of jurisprudence and judicature[28]. An element that is necessary in determining whether a norm is a legal principle is therefore the so-called *opinio communis doctorum.*

If the assumption above is made, a question to be asked is where jurisprudence an obtain knowledge on the legislator's intention as to legal principles. The legislator's statements on legal principles can be divided into two categories:

a) statements presented in legal texts, among which the following can be identified:
   - statements presented in various sections of normative acts;
   - statements presented in a legal text outside the various sections of normative acts (chapter title);

b) statements presented outside normative texts (legislative materials).

In literature, establishing a catalogue of legal principles and picking out the fragments of texts which are related to legal principles is primarily connected with the first group of expressions mentioned above. It is acknowledged that in legal texts the legislator may "select", "introduce", "establish" or determine which norms constitute "legal principles". The legislative intent, expressed through the text of normative acts, is a powerful expression of his intention as to legal principles. Sometimes, however, this source is not sufficient as those sections of legal texts which are related to legal principles frequently contain indeterminate wording, characterised by a high degree of generality. In many cases, this makes it extremely difficult for representatives of jurisprudence and the Judiciary to construct on their basis legal principles. It must also be noted that legal principles usually express values upon which the system of law is based. System transformation entails a change of these values. Representatives of jurisprudence and judicature must decode these values from new legal texts. Furthermore, since the literal meaning of many provisions does not change or only changes marginally, they often have to somehow connect these values with the old legal texts. Given the significance of any expressions formulated in this matter, it is obvious that legal principles and contents related to them cannot be freely understood. This is of extreme importance during the transformation period. The problem is visible in the Polish discourse, also in the lively discussion that is currently taking place with respect to the foundations of the system of law. In the course of this discussion, different authors attribute contradictory meanings to the same sections of the constitution or even to the same legal principles.

In the light of the above, it is our belief that documents referred to in point b) above, i.e. documents drawn up in the course of the legislative process, can be a valuable source of information for defining a catalogue of legal principles and content relating to the various principles.[29] Referring to legislative history can prove helpful in identifying the Legislator's intent as to a particular provision being "fundamental" and the ways it should be used in practice. As a result, analyses of legislative materials can help to eliminate the discrepancies that have become visible in the discourse. To conclude, we

[28] This has been pointed out as early as the 1970s by Józef Nowacki. Cf. NOWACKI, J. „Materialna" jedność systemu prawa. *Zeszyty Naukowe Uniwersytetu Łódzkiego*. Łódź: Nauki Humanistyczno-Społeczne, 1976, I, issue 108, p. 96.

[29] A general conclusion can be formulated that, nowadays in Poland, in the process of the interpretation of law, the judges most frequently invoke legislative materials in the form of documents that justify the projects of normative acts.

would like to point out although that legislative materials have scarcely been used in the discussion on legal principles, it is our firm belief that they can be a useful tool in settling practical disputes on legal principles. This applies to using legislative materials to identify intentions of the creator of the constitution and the legislator both during the period of system transformation and in current times.

4. LEGISLATIVE MATERIALS AS A TOOL FOR UNDERSTANDING LEGAL PRINCIPLES

Let us identify two areas of analysis, which will help to systematize the issues we have been discussing herein. The first sphere is analysis of **reasons for using legislative history** (**what are we trying to find in legislative history?**), and the second one is analysis of **situations** wherein legislative history proves useful (**what problem are we trying to solve?**). Regardless of what problem the interpreter is working on, he or she may decide to use legislative history to find information either on the legislator's objective or on the meaning (of a particular word/phrase used in the wording of a provision of the law).[30]

In the first case, explanatory statements to bills will mostly be used, as this type of documents offers an explanation of the motives behind the legislator's law-making activity. It is worth noting that establishment of the objective is the prevailing reason for using legislative history in decision-making practice. Using legislative history in this way also appears to be in accordance with the legal intuition. Analysis of the comprehensive background for a bill and conditions of the debate that precedes its entry into force makes it possible to understand the context of the legislator's activity and the objectives of the actual legislator.[31] In the second case, identification of the meaning of a particular term or phrase calls for using different type of parliamentary documents. Here, the best way to obtain information on the particular meaning is through the observation of changes in a provision of the bill as a result of the changes adopted, and through an analysis of amendments rejected. This will involve both draft modifications implemented through amendments (elimination of certain wording, introduction of other modifications to the existing wording of the draft), as well as explanatory statements to the amendments. Moreover, information can be found in opinions on the draft, including the reaction of the Sejm bodies to these opinions (whether they have been taken into account or ignored). It is worth adding that when looking for information on the meaning of a particular word of expression used by the legislator, a single legislative

[30] Numerous publications in the English language highlight the two aforementioned reasons for using legislative materials. See e.g. "As we will also see, there are different ways of using legislative history – as indicia of semantic «usage» or to determine «purpose»" – NOURSE, V. F. Elementary Statutory Interpretation: Rethinking Legislative Intent and History. *Boston College Law Review*, 2014, vol. 55, p. 1644. On the other hand, L. D. Jellum writes about the use of legislative history to shed light on the detailed intention of the legislator as regards a specific problem and to identify the overall objective of a bill (law) – JELLUM, L. D. *Mastering Statutory Interpretation*. Durham, 2008, p. 169. Similar distinctions are available in the German literature – see ÜBELACKER, M. *Die genetische Auslegung in der jungeren Rechtsprechung des Bundesverfassungsgerichts*. Kiel, 1993, pp. 14–17

[31] BREYER, S. On the Uses …, s. 848.

material is seldomly used. Instead, interpreters usually carry out more comprehensive analyses of a wider range of documents. The opposite is true in case when the interpreter is looking for information on the legislator's objective behind the introduction of a particular Act of the Parliament. Then – as indicated above – usually just explanatory statements are used.

Legislative materials can prove useful in two situations connected with the specific nature of legal principles. To be more precise, they are helpful both for i) identifying a catalogue of principles (justifying that a given regulation is a principle), and ii) for assigning normative content to legal principles. In order to demonstrate the way the legislator speaks about legal principles in legislative materials – as already indicated – we have analysed legislative materials created in Poland during the period of system transformation after the year 1989.

5. SYSTEM TRANSFORMATION IN POLAND

Changes made in Poland after 1989 sought to introduce democratic standards and build a new legal order. At its core was the replacement of legal principles characteristic of Poland's totalitarian system of the PRL era (1952–1989) with new principles, intended to create a new liberal-democratic legal system. In literature, this period is usually referred to as the transition period.[32]

The solutions adopted in the post-1989 Poland can be referred to as a continuation and at the same time gradual evolution of the legal system developed during the years 1952–1989. Accordingly, legislation created during the PRL period did not automatically cease to have binding force after the changes of 1989. By all means, the foundations of the legal system in Poland did change radically, however it was done on a step-by-step basis.

What may be of interest for the reader unfamiliar with the Polish reality is that the Constitution of the Polish People's Republic of 1952, in its version dated 7 April 1989 (as amended), in the part concerning legal principles remained in force until the entry into force of the Constitution of 2 April 1997 (the so-called Small Constitution of 17 October 1992 regulated only a part of the matters that are traditionally governed by the constitution, maintaining in force a number of provisions that were only amended in 1989). The solutions introduced in 1989 were included in the text of the Constitution of the Republic of Poland of 2 April 1997 which is currently in force. Hence, the changes made in 1989 are of utmost importance for the Polish legal system. As for the selected codes to be analysed further herein, it should be noted that the Code of Administrative Proceedings of 1960 and the Civil Code of 1964 have remained in force to this day. The only comprehensive codification of a branch of law that was successfully introduced in post-1989 Poland was the codification of (material and procedural) penal law in 1997.

[32] Cf. CZARNOTA, A. Transitional Justice …, pp. 11–20.

6. ANALYSIS OF LEGISLATIVE MATERIALS

Before we move on to the analyses, we would like to once again stress that as a result of the development of IT databases Polish legislative materials are currently readily available.[33] The most popular base of legislative materials – the Internet website of the Sejm of the Republic of Poland (www.sejm.gov.pl) – contains all information on the legislative works of the Sejm (Sejm papers, stenographic records of parliamentary sessions, expert opinions, etc.). In the late 1980s and early 1990s, although considerable attention was given to preserving legislative materials, it was not possible to make them easily available to citizens. The materials were paper copies, stored in archives. Despite the promotion of the idea of widespread access to legislative history, the full digitization of legislative documents of old drafts and travaux préparatoires is yet to be attained. In view of the above, even today access to legislative materials from that period is limited and often requires time-consuming researching. What follows is that an analysis thereof can result in a number of interesting conclusions of a general character.

Hence, in the subsequent part of this paper we shall carry out an analysis of legislative materials elaborated by the Sejm of Republic of Poland of the 10th term (1989–1991) which resulted in the enactment of:

1. Act of 29 December 1989 amending the Constitution of the Polish People's Republic (JL of 1989, no. 75, item 444);
2. Act of 24 May 1990 amending the Code of Administrative Proceedings (JL of 1990, no. 34, item 201);
3. Act of 28 July 1990 amending the Civil Code (JL of 1990, no. 55, item 321).[34]

By way of explanation, the Sejm of the Republic of Poland of the 10th term was elected in June 1989 in the partially free election in the aftermath of the so-called Round Table Agreement (negotiations between the communist authorities of the Polish People's Republic and the democratic opposition, held between February and April 1989). The agreement guaranteed the majority of the seats in the Sejm to political factions functioning during the PRL period – especially the communist party (Polish United Workers' Party). In the Senate – the restored second chamber of the Parliament elected in an entirely free election – the Solidarity Citizens' Committee had a landslide victory, winning 99 of 100 seats. As a result, members of Parliament of differing political backgrounds had different visions as to the directions and desired outcomes of the changes that were to be made. The post-communists were in favour of making minimal changes, and the changes they proposed were supposed to be indicative of them cutting ties with the past.[35] On the other hand, the faction that descended from the democratic opposition

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[33] More broadly, see BIELSKA-BRODZIAK, A. *Śladami prawodawcy faktycznego* …, chapter 6.

[34] We explicitly signalize that, for the purpose of our research, we chosen aforementioned acts based on their fundamental role in the Polish legal system both during the period of political transformation and today. Legal structures introduced by the analyzed draft constitutional amendment were retained?! also by the currently binding Constitution of 2 April 1997. Both the Civil Code and the Administrative Code enacted in the period of the People's Republic of Poland are still in force (in amended versions).

[35] Cf. e.g. Sejm paper no. 27. Bill deleting from the Constitution of the Polish People's Republic, chapter 1, article 3, point 1, i.e. the following provision: "PZPR [Polish United Workers' Party] is the leading political force of Polish society in the building of socialism".

which take over power after the election intended to radically shake up the system in Poland.

6.1 AMENDMENT OF THE CONSTITUTION OF THE POLISH PEOPLE'S REPUBLIC OF 29 DECEMBER 1989

The following section of this paper is intended to outline some of the most important problems faced by deputies of the Polish Sejm of the 10th term taking up legislative work. Interestingly, they were convinced that amendments to the Constitution would have an interim character. They expected that a thorough transformation of Poland's political system would be effected by the new constitution, which they thought would be passed relatively soon. One of the authors writes explicitly that "(…) the scope of changes must be limited to the most essential modifications. Only such content which is devoid of reality and which in fact hinders the wielding of state power should be subject to modification".[36]

Irrespective of the narrowly defined plans, changes proposed by the Legislation Committee of the Sejm, originally focusing on the deletion of article 3 (the provision that stipulated the leading role of the Polish United Workers' Party) from the Constitution of the Polish People's Republic, proved to be far more reaching.[37] The Legislative Committee of the Sejm[38] notably proposed that the name of the country be changed and that a new title be adopted for the basic law, which was to be called the Constitution of the Republic of Poland. It was also deemed necessary to delete the preamble, whose "both wording and content completely do not correspond with the current reality".[39,40] The Legislation Committee was of the view that it was necessary to delete chapters 1 and 2 of the basic law, devoted to the political structure and social and economic structure, and replace them with seven new articles. In place of chapter 1, the Committee proposed adopting a general principle defining the character of the state as a "democratic state ruled by law and implementing the principles of social justice". This was to replace the socialist state formula. On the other hand, the principle of the rule of law was kept (during the PRL period, the principle was understood in an ideological way, equal to people's rule of law or socialist rule of law). Furthermore, the principle of self-government was highlighted.[41] So as not to "increase the fictitiousness of the cur-

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[36] CHRUŚCIAK, R. Zakres konstytucjonalizacji zasad i instytucji ustrojowych w pracach parlamentarnych w latach 1989–1996. In: SARNECKI, P. (ed.). *Konstytucjonalizacja zasad i instytucji ustrojowych.* Warsaw, 1997, p. 173.

[37] Sejm Paper no. 160. Draft bill on the amendment of the Constitution of the Polish People's Republic.

[38] Legislative Committee –the permanent committee of the Sejm of the Republic of Poland. The range of tasks of the committee includes maintenance of the legal consistency, cooperation in organizing of the legislative process and ensuring of its accuracy, examination of draft law of particular legal importance or of significant degree of legislative complexity.

[39] Report from the 17th sitting of the Sejm of the Polish People's Republic of 27, 28, and 29 December 1989. The deputy speeches quoted below have been sourced from the stenograhic record from this sitting. Speech by deputy-rapporteur Hanna Suchocka. During the years 1992–1993 Hanna Suchocka was the Prime Minister of Poland (President of the Council of Ministers).

[40] The first sentence of the preamble was worded as follows: "The Polish People's Republic is a republic of the working people."

[41] Ibidem.

rent Constitution and in order to remedy the lack of conformity in the system of law"[42] it was also proposed that chapter II be abrogated and that as few as two provisions be adopted in its place which would guarantee the freedom to undertake economic activity (regardless of the type of ownership) and ensure protection of ownership, without differentiating the protection depending on the form of ownership.[43] In the discussion that accompanied the first reading of the drafts in the Sejm, the deputies as a general rule expressed approval of the proposed changes. The proposed content of article 2, under which the supreme power shall be vested in the nation (the so-called principle of the sovereignty of the nation), or of article 6, which guaranteed the freedom of economic activity (the so-called principle of the freedom of economic activity) did not stir any broader discussion. That said, a problem of a more general character arose. Voices were raised that replacing two most important chapters of the constitution with seven articles was in fact risky. As one of the members of the Legislation Committee pointed out: "these provisions have been drafted within several hours at the session of the Committee, whose members, myself included, are not fully competent".[44] Even the proponents of the changes stressed that a significant number of provisions laid down in the Constitution of the Polish People's Republic will be manifestly contrary to the new regulations set forth in articles 1 to 7.[45] Another point raised was the issue of the enigmatic character of some of the changes proposed.[46]

Disputes as to the content of provisions related to legal principles concerned primarily the phrase "state under the rule of law". During the sitting of the Sejm, the following wording was proposed: "The Republic of Poland is a democratic state of free citizens."[47] Eventually, however, the provision on "democratic state ruled by law" was adopted, which – as one of the authors pointed out – was "determined by arguments that it is a term which appeals to rich theoretical considerations and will allow the Constitutional Tribunal to create new constitutional law constructions".[48] This opinion of the authors of the novelization was further corroborated by judgments of the Polish Constitutional Tribunal. The principle of the democratic state ruled by law became, under the case-law of the constitutional court, a source for many other legal principles (e.g. *lex retro non agit,* principle of the protection of acquired rights, principle of the specificity of legal provisions) which were not explicitly expressed in the text of the Constitution.[49]

Discussion was also stirred by the provision on the protection of ownership (article 7 of the draft). While there was consensus as to the need to put an end to the primacy of

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42 Ibidem.
43 Ibidem.
44 Speech by deputy L. Paprzycki.
45 Ibidem.
46 Speech by deputy A. Bratkowski.
47 Speech by deputy T. Bień.
48 Cf. CIEMNIEWSKI, J. Nowela konstytucyjna z 29 grudnia 1989 r. *Przegląd Sejmowy.* Wydawnictwo Sejmove, Warsaw, 2009, no. 3, p. 30.
49 In this respect, we have to mention a very abundant case-law of the Polish Constitutional Tribunal concerning the "państwo prawa" (Rechtsstaat, rule of law) doctrine and the corresponding principles. The Constitutional Tribunal, while justifying its position, invokes both the legislator's intent and the doctrinal opinions. For a more detailed explanation, see e.g. TKACZ, S. *O zintegrowanej* …, chapter 3; TKACZ, S. *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*. Katowice, 2003, chapter 5.

social ownership, which was characteristic of the PRL period, doubts were expressed whether all forms of ownership should be treated in the same way, or whether special emphasis should be placed on the inviolability of personal property.[50] "The principle of full protection of personal property" was so far strongly emphasised in the decisions of the Constitutional Tribunal and so it was believed this construction ought to be included in the text of the basic law.[51]

The Act amending the Constitution of the Polish People's Republic of 29 December 1989 took effect from the day of its publication. Literature emphasises that the authors of the act, who, when working on the act, believed the scope of the changes was minimal, underestimated the value of the work they authored.[52] The changes thus introduced, which put an end to the existence of a state shaped by Marxist-Leninist ideology, led to the rejection of legal principles that had their roots in socialism and to the replacement thereof with ideas of the state under the rule of law.[53]

6.2 AMENDMENT OF THE CODE OF ADMINISTRATIVE PROCEEDINGS OF 24 MAY 1990

As far as the public law is concerned, amendments made to the Act of 14 June 1960 Code of Administrative Proceedings should also be mentioned. Changes made to the content of the Code were in line with the new political system and thus replaced the socialist ideology that had permeated through this act. The changes proposed in 1990 were an "important step to reaching the standards of European law".[54]

The proposed amendment was necessary e.g. in view of the local government that was restored in Poland. Generally speaking, the issue that was most discussed in the course of legislative works was the introduction of the principle of administrative court review of administrative decisions in all cases.[55] Deputy-rapporteur in justification of the Committee's position explained that, among other things "by introducing this principle and specifying what the exceptions to this principle are, the Committee had in mind that provision of legal protection judicially is the best way to ensure respect for the rule of law. It is fully compliant with international standards (…)."[56]

As for severance of ties with the communist origin of the Code, the content of articles 6 and 7 was amended since – as indicated in the course of works of the Committee – they required reideologising.[57] Before the amendment, article 6 was worded as follows: "State administration authorities are divided on the basis of provisions of the law, guided by the interests of the working people and tasks of the socialist system." Therefore, it was proposed that the first part of the provision, ending with "provisions of

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[50] Speech by deputy A. Zieliński.
[51] Ibidem.
[52] CIEMNIEWSKI, J. Nowela …, p. 30.
[53] Ibidem.
[54] Stenographic record from the 30th sitting of the Sejm of the Republic of Poland od 17 and 18 May 1990. Select Committee report on the governmental draft of the bill amending the Code of Administrative Proceedings. Speech by deputy-rapporteur Janusz Szymański.
[55] Ibidem.
[56] Ibidem.
[57] Report from the 14th Select Comittee sitting on draft bills on local government of 8 May 1990.

the law” be kept and the rest deleted. On the other hand, with regard to article 7, whose first part was worded “In the course of their proceedings, state administration authorities uphold the people’s rule of law (…)”, acting on the assumption that “there is just one rule of law”, it was decided that the word “people’s” should be deleted.[58] Neither change stirred controversy in the course of the legislative process. Articles 6 and 7 of the Code of Administrative Proceedings, with their substance unchanged, have remained in force until this day. Interestingly, legal writers and the case-law have problems determining the content of principles that should be derived from these provisions. Hence, both articles are associated with the principle of the rule of law. Further still, it is claimed that after deleting those fragments of their wording that were rooted in the ideology of the previous political system, one of these provisions have become redundant.[59]

6.3 AMENDMENT OF THE CIVIL CODE OF 28 JULY 1990

The underlying objective behind the comprehensive amendment of the Civil Code was transformation of the economic system, from centrally planned economy to free market economy. The explanatory statement to the bill amending the Code indicated the key directions of the proposed changes. Among those were: implementation of the principle of equality of all subjects of civil law relationships before the law and shaping ownership in a way which suits the needs of a free market economy. The former was realised, among others, through the elimination of the then-division of subjects of civil law into the privileged socialised ones (socialised sector) and non-socialised ones (private sector). It was emphasised that, as a general rule, equality before the law is unquestionable in civil law. Consequently, the Legislative Committee of the Sejm proposed repealing those provisions which stipulated that the socialised sector shall have privileges.[60] Fundamental role was also to be played by the proposal to introduce a new Article 353,[1] from which the principle of the freedom of contract is derived.

Noteworthy is also another fragment of the minutes from the Committee of the Sejm sitting, convened to discuss e.g. the deletion of Article 4 of the Code, which stipulated that: “Provisions of civil law should be translated and applied in accordance with the rules of the system and objectives of the Polish People’s Republic.”[61] In the course of the proceedings it was argued that the provision in question imposed a certain way of interpreting the provisions of civil law. It was emphasised that it is a “relic favouring social interest (…), rules for the interpretation of the law ought to take into account

[58] Ibidem.

[59] More broadly, see DANECKA, D. – TKACZ, S. O zasadach prawa, praworządności oraz państwie prawnym w dogmatyce adminitracyjnoprawnej. In: ZACHARKO, L. – MATAN, A. – GREGORCZYK, D. (eds.). *Administracja publiczna – aktualne wyzwania*. Katowice: AM Poligrafia, 2015, pp. 55–77.

[60] Report from the 35th sitting of the Sejm of the Polish People’s Republic of 12 and 13 July 1990. Select Committee report on the governmental draft bill amending the Civil Code (Sejm Papers no. 288 and 425) and the Code of Civil Procedure (Sejm Papers no. 289 and 426). Speech by Committee deputy-rapporteur A. Zieliński.

[61] Minutes from the 7th Select Committee sitting, convened to discuss draft bills on systemic changes in the state’s economy of 29 June 1990.

various interests, not just public interest, interest of the state, but also interests of its citizens".[62]

The second interesting item on the Committee's agenda was the amendment of Article 5 of the Code, pursuant to which "One cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life (…)". In the course of the proceedings of the Committee an opinion was expressed that the previous system used the principles of community life to break the law and violate citizens' rights.[63] It was pointed out that, given the provisions used by legislatures of other states, making civil law more flexible through the use of the notion of the principles of community life is improper. Nevertheless, despite such an explicitly negative assessment, it was decided that the community life clause would temporarily be kept unchanged: "We are of the opinion that the current general clause must absolutely be changed, but in the next novelisation of the Civil Code. Moving from the principles of community life to new clauses requires long-term work. It is not a simple process."[64] Although 27 years have since passed, this principle, rooted in the Marxist doctrine, has remained in force in the Polish civil law to this day. It has turned out that this clause, so deeply ingrained in the Polish legal thought, is so capacious that it can be successfully used to adjudicate on civil law relationships even post-transformation. Naturally though, it has been supplemented with new content through the process of interpretation.

7. LEGAL PRINCIPLES DURING THE TRANSFORMATION PERIOD IN THE LIGHT OF LEGISLATIVE MATERIALS – SEVERAL CONCLUDING REMARKS

1. The Polish legal culture has a deeply ingrained image of legal principles as creations of the legislator. However, more recent publications strongly highlight the role of jurisprudence (legal science) in the determination whether a specific paradigm should be recognised as a legal principle. While the voice of the legislator is important, and in many cases can determine whether a given rule will become a legal principle, it is never the only factor to determine whether a norm is "fundamental". Both the catalogue of legal principles and the content of legal principles are established through discourse. One element of this discourse is the legislator's voice in the form of "traces" left in various places. Another factor that is necessary in determining whether a norm is a legal principle is *opinio communis doctorum*.[65]

2. The legislator's intents are identified and developed by representatives of the jurisprudence and the Judiciary who participate in the discourse leading to the identi-

[62] Ibidem. As a sidenote, it is worth adding that an identically worded provision referring to labout law remained in force in Poland until 2 June 1996 (Article 7 of the Labour Code was deleted by act of 2 February 1996, JL of 1996, no. 24, item 110).

[63] Ibidem.

[64] Ibidem.

[65] We clearly emphasize that the term "opinio communis doctorum" is to be understood in a broad sense. It is evident that in a discourse of which the effect is creation of "the scholar's opinion", both the judges (who express their views in the reasoning of court rulings) and the representatives of doctrine must take part.

fying the legal principles and their scope. They can use both the legislator's statements present in the texts of normative acts and statements included in legislative materials. While the objective of the legislator, expressed through the text of normative acts is a very strong manifestation of legislative intent, sometimes this does not suffice. Those sections of legal texts from which legal principles are derived frequently include very general, indeterminate phrases. This is why an important trace of the legislative intent can be a declaration expressed in the text of legislative materials, from which it can be inferred that a legal principle can be derived from a specific provision. The problem of identification of legal principles and their content becomes more manifest during the period of system transformation, when the then-current axiological foundation becomes outdated. It then becomes necessary to determine new principles acting as the framework for the new (newly constructed) legal system. In such cases it is indeed difficult to find a better source of information on the objectives and intention of the legislator than legislative materials.

3. The solutions adopted in the post-1989 Poland can be referred to as a continuation and at the same time gradual evolution of the legal system developed during the years 1952–1989. Accordingly, legislation created during the PRL period did not automatically cease to have binding force after the changes of 1989. The catalogue of legal principles of the Polish legal system post-1989 was determined on a step-by-step basis. The following changes were made during the transition period:

– introduction of provisions from which new principles of the system of law were derived (e.g. the principle of the democratic state under the rule of law, principle of the sovereignty of the nation, principle of the freedom of economic activity, principle of the protection of ownership, principle of the freedom of contract);
– abrogation of provisions from which specific legal principles were derived (e.g. the principle of the leading role of the Polish United Workers' Party, principle of interpretation of provisions of civil law in accordance with the objectives of the Polish People's Republic);
– reformulation of some provisions in order to reject content that was rooted in the socialist ideology (e.g. the principle of the people's rule of law was transformed into the principle of the rule of law);
– leaving some provisions in their then-current wording while, over the course of time, attributing new meaning to the principles that were derived from them (e.g. the principle which requires that civil law relationships should take account of the rules of social coexistence).

4. Given the indeterminateness of the wording of principles, the interpreting community has two possible directions when it comes to looking for information on the content of a principle: take into consideration the intention of the real legislator, as expressed in legislative history, or complete the content of the principles without referring to parliamentary materials.[66] However – and it goes without saying – choosing from among

[66] More broadly on the Polish judicial decision-making practice, see BIELSKA-BRODZIAK, A. Historia legislacyjna w interpretacji. Kilka impresji na gruncie polskiej praktyki stosowania prawa. In: KŁODAWSKI, M. – WITORSKA, A. – M. LACHOWSKI, M. (eds.). *Legislacja czasu przemian, przemiany w legislacji. Księga jubileuszowa na XX-lecie Polskiego Towarzystwa Legislacji.* Warsaw, 2016.

comprehensively (and not selectively) analysed hypotheses is a measure of reliability and competence of an entity talking about legal principles. Until recently – given the insufficient availability of legislative history in the public space – the main way of dealing with legal principles was creating their content without referring to legislative history. The situation is currently changing, as the access to legislative history has significantly increased and is still improving.[67] Although, in the Polish tradition, the catalogue of legal principles and their content was not identified on the ground of legislative history, the currently available access opportunities offered by information technologies mean that expanding the context that shapes the catalogue and content of the various principles through the use of legislative materials is not just desirable, but in fact necessary. We believe this context is still underestimated and underused.

5. Authors of the amendments that were introduced to the Polish system during the period of system transformation were convinced that the changes made and solutions implemented would have an interim character. The need to pass a new Constitution and new codes in a relatively short time was strongly emphasised. The authors of the changes underestimated the value of their work, the fruit of which resulted in rejection of socialist ideas and the creation of foundations for a new liberal-democratic legal system in Poland. Legal principles developed during this period continue to be foundations of the Polish legal system to this day.

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[67] This tendency generally applies to all countries – more broadly, see BIELSKA-BRODZIAK, A. Materiały legislacyjne w dyskursie interpretacyjnym z perspektywy brytyjskiej, amerykańskiej, francuskiej, szwedzkiej i polskiej. In: NAWROT, O. – SYKUNA, S. – ZAJADŁO, J. (eds.). *Konwergencja czy dywergencja kultur i systemów prawnych?* Warsaw, 2012.