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When Justice Merely Becomes Intuition. On the Threats Related to the Application of Article 58 § 2 of the Civil Code in Social Security Law

Abstract

The main aim of this paper is to consider the acceptability of application of Article 58 § 2 of the Polish Civil Code in the social security law in the regard to employment contract with pregnant women from the point of theory of justice. In the first part I recall in short basic typologies and definitions of justice. This leads to the observation, that although in philosophy there is no one understanding of justice, this notion has a long and established tradition. In following parts I analyze which concepts of justice are being realized by constitutional law, civil law and social security law. In the last part I demonstrate consequences of applying Article 58 § 2 of the Polish Civil Code in the social security law on the example of pregnant women being excluded from the social security system. This is followed by the final conclusion that although also for lawyers notion of justice has a long tradition, it is often imposed in spite of "locally" realized types of justice, which leads to unwelcome and unforeseeable consequences.

Keywords: Article 58 § 2 of Polish Civil Code, concept of justice, pregnant women, employment contract, solidarity, theory of justice, social security system, social justice principle

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Introduction

One of the current problems that pregnant women in the labour market have to face is that their employment is becoming a subject of inspection of disability pension authorities, which is often followed by their exclusion from the social security system.[2] Apart from the doubts of a constitutional nature arising in relation to this practice,[3] it is – as I intend to prove – also a problem from the point of view of the type of justice offered by the social security law. Although the problem needs to be explained in detail, it can already be said now that the main thesis, the rightness of which I would like to prove, claims that the questioning of women's insurance entitlement may be an expression of something I will refer to for the purpose of this article as an intuitive understanding of justice.

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2 This is substantiated by recent media reports, many with telling titles: P. Bednarz, *Kobiety w ciąży na celowniku ZUS?*, 6.05.2016, http://biznes.onet.pl/wiadomosci/kraj/zus-kontroluje-kobiety-w-ciazy/jk1z0e (access: 18.08.2017); M. Rozpędek, *ZUS nagminnie obniża wynagrodzenia kobiet w ciąży*, 9.05.2016, https://wiadomosci.wp.pl/zus-nagminnie-obniza-wynagrodzenia-kobiet-w-ciazy-ekspert-taka-praktyka-budzi-watpliwosci-6027385733403777a (access: 8.18.2017); *ZUS kontroluje kobiety w ciąży*, http://zus.pox.pl/zus/zus-kontroluje-kobiety-w-ciazy.htm, 27.01.2015 (access: 18.08.2017); E. Podleśna-Ślusarczyk, *ZUS poluje na ciężarne*, 16.09.2016, http://babyonline.pl/zus-poluje-na-ciezarne,aktualnosci-artykul,21047,r1p1.html (access: 18.08.2017); Z. Bartuś, *Kobiety w ciąży pod lupą ZUS*, "Dziennik Polski" 23.05.2016, www.dziennikpolski24.pl/aktualnosci/a/kobiety-w-ciazy-pod-lupa-zus,10023266/ (access: 18.08.2017); J. Frączyk, *ZUS walczy z ciężarnymi kobietami. Wojna o kilkadziesiąt milionów złotych*, WP, 13.09.2016, https://finanse.wp.pl/zus-walczy-z-ciezarnymi-kobietami-wojna-o-kilkadziesiat-milionow-zlotych-6111706701731457 (access: 18.08.2017); T. Molga, *ZUS wmawia prezesowi firmy, że nie potrzebował tej pracownicy. Tylko dlatego, że muszą wypłacić jej duży macierzyński*, 26.04.2017, http://natemat.pl/206763,zus-poluje-ma-bogate-matki-urodzisz-wezmiesz-zwolnienie-czy-macierzynski-i-od-razu-przychodza-do-firmy-po-pieniadze (access: 18.08.2017).

3 Despite the universal right to social security (Article 68 of the Constitution of the Republic of Poland), the ban on discrimination on the grounds of sex (Article 32), and the principle of equality between men and women in terms of the right to social security (Article 33, section 2), the protection and care of motherhood and parenthood (Article 18 of the Constitution of the Republic of Poland), special assistance of public authorities offered to single-parent families (Article 71, section 1 of the Constitution of the Republic of Poland) and pregnant women (Article 71, section 2 of the Constitution of the Republic of Poland) being granted, a pregnant woman – for reasons not found in the provisions of the applicable law – is deprived of the means to live with the moment she is unable to take up gainful employment on her own. All this in a democratic state that apparently implements the principles of social justice in practice (Article 2 of Constitution of the Republic of Poland).

What do I mean by an intuitive understanding of justice? To explain it, we should go back in time, a just under 20 years. It was then when Marek Safjan, the President of the Constitutional Tribunal of the time, wrote in the "Rzeczpospolita" daily that justice (especially that defined as "social") was often construed in an intuitive manner.[4] The expression passed unnoticed only to resurface 10 years later and be criticised by Tadeusz Kowalik, an economist, who considered it a manifestation of the neoliberal trait of the Polish elites.[5] Kowalik found it especially shocking that the claim was (reportedly) made by someone who acted back then as the President of the Constitutional Tribunal, a body appointed to interpret the Constitution of the Republic of Poland, "which provided a sufficient number of guarantees making up this justice!".[6]

It should be stressed that although the text by the President of the Constitutional Tribunal of the time features fragments proving the suspicion of his free-market sympathies to be true,[7] M. Safjan has nowhere claimed to believe that justice is only intuition. On the contrary, the author argued that lawyers view social justice as bearing a specific significance, which he supported by quoting the Constitutional Tribunal's decisions on the principle of social justice. But he contrasts legal knowledge with the opinions of "his friends", who understand social justice in different ways, depending – as one can guess – on one's political-economic views. Referring to Hart's division into the external and the internal point of view, it seems that M. Safjan wanted to show that even though social justice might be perceived as something intuitive (being a vague notion of an open meaning) from an external point of view, from an internal legal point of view it is rather a notion with specific content and an own theoretical background, from which concrete directives for action can result.

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4 See: M. Safjan, S*prawiedliwość społeczna – intuicja czy teoria?*, "Rzeczpospolita" 19.04.1999, http://archiwum.rp.pl/artykul/223522_Sprawiedliwosc_spoleczna_--_intuicja_czy_teoria.html (access: 4.02.2018).

5 A similar thesis is proposed by other authors as well. See: T. Kowalik, op. cit.; H. Kaczmarczyk, *Sprawiedliwość społeczna jako podstawa ładu społecznego*, "Studia i Materiały, Miscellanea Oeconomicae" 2016 20(2); R. Mańko, *Demons of the Past? Legal Survivals of the Socialist Legal Tradition In Contemporary Polish Private Law*, [in:] R. Mańko, C. Cercel, A. Sulikowski (eds.), *Law and Critique in Central Europe. Questioning the Past. Resisting the Present*, Oxford 2016.

6 See: T. Kowalik, *Sprawiedliwość społeczna a nowy ład społeczny, Trybunał Konstytucyjny, Podstawowe założenia Konstytucji Rzeczypospolitej Polskiej*, http://www.pte.pl/pliki/2/12/TryKonTK610_03.08.2010.pdf (access: 2.02.18), Warszawa 2010.

7 The author claims e.g. that "The concept of social justice in the Constitution of the Republic of Poland may not be equated with the vulgarised vision of egalitarianism and welfare state, where – as history shows – distribution of welfare would give way to distribution of shared poverty". See: M. Safjan, op. cit.

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To answer therefore the question asked above, to me, intuitive understanding of justice in the practical application of law means a law applying authority making its decisions based on some sense of (and even institutions designed to enforce) justice, but in isolation from the "spirit" of a given field of law and a locally enforced type of justice. It should be thus emphasised that my goal is not to make the discussion a part of the considerations on the role of intuition in legal practice, present in the Polish legal theory,[8] and the title "intuitive" understanding of justice is a certain metaphor. I am using this metaphor to show that the practice of law enforcing authorities analysed in this article, which may initially seem to be aiming at making the principle of justice become a reality, distorts this justice, in fact.

The purpose of this paper is then to prove that although M. Safjan's thesis may seem a reasonable claim in the normative sense (lawyers – on the grounds of a given field of law – should use an intersubjectively acceptable notion of justice), the case study in question shows that the claim is unfulfilled and that "legal minds" tend to treat justice in a quite atheoretical and intuitive manner at times. Before I do that, I would like to offer the reader a brief introduction to the best known concepts of justice. Then, I will try to give a concise explanation of the understanding of justice in constitutional, civil, and social insurance law. The final aim of this paper is to prove that particular fields of law are set to enforce different types of justice, which means that they construe justice in an autonomous way, and so an intuitive transposition of institutions – designed to enforce a given type of justice – to a field of law enforcing a different type of justice is not only questionable from a theoretical point of view. It may actually lead to negative social consequences, which I illustrate with the example of disability pension authorities' use of Article 58 § 2 of the Civil Code with the aim to exclude pregnant women from the social security system.

Justice as a subject of theoretical discussion[9]

Although justice is a notion of many meanings, the question about its nature has been open since the very beginnings of the discussion on the ideas of state, law, and society. Ancient philosophy used to regard justice as the main virtue of a man. Socrates claimed that knowing what it meant to be just was to be just. Following the philosophers of antiquity, John Rawls stated that "justice is the first virtue of social

[8] See: J. Stelmach, *Intuicja prawnicza*, [in:] K. Baran (ed.), *Dziedzictwo prawne XX wieku*, Kraków 2001; T. Pietrzykowski, *Intuicja prawnicza. W stronę zewnętrznej integracji teorii prawa*, Warszawa 2012.

[9] Those readers who are familiar with the elementary typologies and definitions of the notion of justice can skip this part of the article, included here for briefing and reference purposes.

institutions, as truth is of systems of thought".[10] The legal discourse held in the context of justice often quotes the words of Ulpian, who is attributed with a formula that "justice is the constant and unceasing wish of rendering to everyone his right", which is supplemented by a claim that "the precepts of right are these: to live honourably, not to harm any other person, to render to each his own". The biggest advantage of this formula of justice is its universality. Its biggest weakness, though, is its overly formalistic nature – its application requires an answer to the question of what one is entitled to and what should be rendered to them in a given situation, and so it is necessary to adopt some reconstruction criterion. And the decision on what criterion to opt for is a political decision *par excellence*.

The above leads us to a differentiation between formally construed justice and materially construed justice. The former will mean a principle according to which people belonging to the same category should be treated in the same way.[11] In this perspective, the criterion which determines the way in which these people are treated is insignificant, and justice becomes tantamount to equality. Materially construed justice, unlike formally construed justice, pays attention to the quality, the formula on the basis of which the distribution of goods is ordered. The adoption of particular formulas of material justice is motivated by a certain axiological choice, which others do not have to necessarily agree with.[12] For a lawyer, the formula of material justice "according to the law" seems to be particularly attractive. Although it somewhat limits justice to being law-abiding, it is still formulated from an external point of view and based on a non-controversial belief that the law should be adhered to, which makes it acceptable to virtually anyone.

The issue of material justice was raised by Aristotle, who offered a justice typology today serving as the starting point to all discussions on justice,[13] whose brief presentation is necessary especially from the point of view of the purposes of this paper. The philosopher spoke of universal justice, referring to a common good, and of particular types of justice, referring to individuals. He distinguished distributive justice and commutative (retributive) justice among these particular types of justice.

Distributive justice occurs when some goods, or burdens, are to be distributed among some individuals from a given group according to certain criteria. In practice,

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10 J. Rawls, *Teoria sprawiedliwości*, Warszawa 1994, p. 13.

11 Cf. Ch. Perelman, *O sprawiedliwości*, Warszawa 1959, p. 37.

12 J. Wratny, *Prawo do wynagrodzenia za pracę w świetle zasad sprawiedliwości i równości*, "Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, Sectio G" 2015, 62(2), p. 300.

13 Aristotle, *Etyka nikomachejska*, Warszawa 1956.

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the distribution of such goods (burdens), as shown by Ch. Perelman,[14] may take place based on different competitive formulas (the same to everyone, according to their deserts, according to their achievements, according to their needs, according to their status, according to the law).

The second type of particular justice spoken of by Aristotle is commutative justice (*iustita comunitativa*), which is secondary to distributive justice and aims, in essence, to equalise what was given and what should have been given. There are two variants of commutative justice: corrective justice and exchange justice. Corrective justice mainly serves a compensational purpose, where the idea is to requite the wrongs done by someone. Hence, as distributive justice is enforced by public law (tax law, social security law), the corrective law is handled by criminal law, but also by civil law in the context of liability in tort.[15] Exchange justice, in turn, being a second manifestation of commutative justice, focuses on the proportionality of compensation, which is important in freely concluded agreements. Hence exchange justice is equated with contractual justice. But it is again a kind of formula, the application of which may lead to various consequences, depending on the adopted philosophical-political perspective. One of the most extreme perspectives is the neoliberal perspective, according to which the free market is a condition sufficient for the existence of fairness of agreements. According to this view and the principle of *volenti fit non iniuria*, as long as the contracting parties are free and autonomous, there is no need for the state to interfere with contract law. On the opposite extreme there is the fair price doctrine and the attempt to subordinate contractual justice to distributive justice considerations. The former of them, originating from the Middle Ages, assumes there is something like a "fair price", understood as a price that takes the costs of production and labour into account, and anything beyond such costs is a mark-up that should be eliminated. In such a perspective, profit is understood as a way to cover the costs of labour. The latter, in turn, is based on a conviction that contractual law should serve to enforce distributive justice in the society.[16] Finally, there is one more approach, set to combine two values – justice and an individual's autonomy. It is the liberal approach, according to which a legal system should, where possible, vie for a fair balance between the parties involved, but not at the cost of the freedom of these parties.

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14 See: Ch. Perelman, op. cit.

15 See: e.g. K. Kurosz, *Sprawiedliwość prawnomaterialna a proceduralna – kilka uwag na temat napięć między różnymi postaciami sprawiedliwości w prawie cywilnym*, [in:] T. Giaro (ed.), *Między prawem cywilnym materialnym a procesowym*, Warszawa 2017, p. 113.

16 This reasoning would be embodied by forced housing management in the Polish People's Republic era, brought into effect on 21 December 1945 by a decree on public housing management and rental control (Journal of Laws of the Republic of Poland of 1946, no. 4, item 27).

Even though we cannot speak of a "single" justice in our philosophical reflection, it is a grounded concept, and one can see at this level alone that although justice is commonly understood in an intuitive manner, its meaning is grounded in theoretical reflection.

Justice in the constitutional law discourse

The comments made so far show that philosophers certainly do not treat justice as an unambiguous notion. Is it any different in the case of legal discourse? A claim that justice is an element of the axiological foundation of a democratic state of law, referred to in Article 2 of the Polish Constitution, emphasised in the preamble thereto through the words on equality in rights and obligations, and those on establishing the constitution as the basic law for the state, with these laws based, among others, on respect for justice, does not raise any major doubts among law researchers.[17]

It is reasonable to notice that justice does not take on a uniform meaning in legal discourse either. As shown by J. Jończyk, it is no coincidence that Article 2 of the Constitution of the Republic of Poland determines the "principles of social justice". As argued by this law researcher, Poland's Constitution emphasises "different principles of social justice, existing objectively as socially acceptable and applicable norms which are often, or even by default, non-coincident or even divergent".[18] The problem that arises here is whether we can equate the notion of justice with the notion of social justice. Although source literature offers views which are strictly against such a construction,[19] it appears that an analysis of the Constitutional Tribunal's decisions[20] makes it possible to say that the constitutional discourse itself equates social justice with distributive justice – if not with justice per se.[21] In such a point of view, the principle of social justice is a principle addressed at public autho-

17 K. Antonów, *Zasady równości i sprawiedliwości społecznej w prawie emerytalnym*, "Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, Sectio G" 2015, 62(2), p. 9.

18 J. Jończyk, *Prawo zabezpieczenia społecznego*, Warszawa 2006, p. 27.

19 It is important to add that Z. Ziembiński himself considers social justice an idea that is separate from justice per se. See: Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, p. 56. For the history of the former, see: A. Stoiński, *Zmiany sensu pojęcia sprawiedliwości społecznej w perspektywie celów państwa socjalnego*, "Świat Idei i Polityki", 2016, 15, p. 53 et seq.

20 S. Tkacz, *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2003.

21 The non-obviousness of such a construction was raised by M. Piechowiak, *Aksjologiczne podstawy polskiego prawa*, [w:] T. Guz, J. Głuchowski, M.R. Pałubska (eds.), *Synteza prawa polskiego od 1989 roku*, Warszawa 2013, pp. 39–70.

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rities, which are required to provide for a fair distribution of goods based on formulas such as "according to one's needs" or "according to one's deserts".[22]

The Constitutional Tribunal's reflection on justice dates back to the previous political system and the then-applicable Constitution of the Polish People's Republic, whose Article 5 read as follows: "the Polish People's Republic (...) shall implement the principles of social justice, eliminate the exploitation of man by man, and counteract any infringements of the principles of community life". The Constitutional Tribunal (CT), in its first historical judgment, dated 28 May 1986 (U 1/86), decided that the principle of social justice was, in essence, a directive of a programme nature, defining the activity of the Polish People's Republic and its authorities, which shall be understood in relation to a given case as a correction of the principle of equality to the benefit of citizens in the worst financial situation. In the next judgment, dated 9 March 1987 (U 7/87), the CT pointed to the historical and class determinants of understanding of the notion of justice. The CT, indicating the different ways of understanding the principles of social justice, concentrated itself on distributive justice and associated this notion with the principle of equal treatment, stressing that the purpose of a socialist system was not only to make formal justice (equal treatment of all people within a given class) but also material justice a reality, where the latter can be enforced based on various, often opposing, formulas (the same to everyone, according to one's achievements, according to one's needs).

The December amendment replaced the quoted Article 5 of PPR's Constitution in the wording of 1976 with section 1, Article 1 reading that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. Despite the above – and the radical political-social transformation at the root of the change, the CT pointed to a continuity in the understanding of the principle of social justice at the declarative level. In a ruling of 22 August 1990 (ref. no.: K 7/90), the CT argued that it had given attention to the issue of justice many times in its decisions "following the argumentation offered by science, according to which there are many possible meanings of the notion of justice, and speaking in favour of its distributive construction". The CT decided that its earlier rulings proved that it was "close to views pointing to relationships between equality in law and justice (Perelman, Tourtoulon), and treating the judgment on the equality in law as a consequence of justice".

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[22] The doctrine may sometimes offer a conviction that the principle imposes an obligation on the state to pursue an active economic and social policy to provide its citizens with means of subsistence. See: K. Strzyczkowski, *Zasada państwa sprawiedliwości społecznej jako zasada publicznego prawa gospodarczego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, 69(4), p. 22.

But the fact that can prove that despite the CT's declarations of continuity of unchanged understanding of the principles of social justice there was an evolution in the CT's views on the idea may be a juxtaposition of the already quoted the CT's judgment of 9 March 1987 (U 7/87), where the CT argued that the principle of social justice was to make the nationwide aspirations of the working class a reality with the judgment of 25 February 1997 (K 21/95), where the CT stressed that "there are no grounds for the Constitutional Tribunal (...) to give precedence to a 'social' point of view of the matter of implementing the principles of social justice, understood as a demand for a maximum satisfaction of the existing social needs through redistribution of the national income via the state budget, over other criteria of social justice, e.g. those that emphasise the significance of a 'healthy economy' for the development of a just and affluent society or call for rationalisation of budget expenditures in the interest of the present and the future taxpayers".

In the light of the above there should be thus no doubt that contrary to the CT's initial declarations of continuity of the adopted understanding of social justice, its decisions clearly move away from conceiving justice in socialist terms towards an expressly liberal interpretation of justice.[23] But regardless of the above, it appears that justice has a grounded meaning also in constitutional discourse, which is yet another indication of the fact that justice is a notion bearing a grounded meaning for a legal mind – at least at the conceptual level.

Justice in civil law

Taking the above into consideration, it seems that the discussion on justice in civil law remains as if isolated from the constitutional discourse. After all, the Constitutional Tribunal itself, reflecting on the notion of social justice, equates it with distributive justice, which is enforced mainly in the domain of public law. The CT thus understands the principle of social justice as one addressed to state authorities, meaning a public law principle, without – in general – an intention to interfere with the relationships between private law entities.

This does not mean, however, that a discussion on justice is absent from civil law. As noticed by K. Kurosz, justice enforced in civil law is mostly commutative justice (when we speak about the principle of equivalence and reciprocity, which is manifested in the form of the institution of exploitation, meaning the clause of

[23] So perhaps the CT's thesis on continuity was to disguise the "(neo)liberal" turn in its judgments after all. See: A. Sulikowski, *Government of Judges and Neoliberal Ideology: the Polish Case* [in:] R. Mańko, C. Cercel, A. Sulikowski (eds.), op. cit.

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rebus sic stantibus) or corrective justice (applicable in the context of liability in tort).[24] But he adds rightly that the principle of distributive justice is felt to some degree also in civil law, and it is a justice identified as social justice, which occurs e.g. in the case of liability in tort on equity principles.[25] Adopting an internal point of view after the cited author, we can acknowledge that "justice within the field of material civil law is a notion demanding that both the law and the axiology be taken into consideration (...), deciding together on the criteria of determining what everyone is entitled to".[26]

From the point of view of the topic of this paper, it seems right to cover the issue of exchange justice in civil law, known to lawyers as contractual justice, individually. One of the questions that needs to be answered by civil law is: What is a fair compensation for a rendered good? What conditions have to be met to make the exchange fair? To answer these questions, it seems reasonable to make a brief reference to civil law institutions that have been designed to enforce contractual justice. Reference literature usually speaks of the following set of civil law institutions in question:

1) institution of exploitation (Article 388 of the Civil Code),
2) unlawful clauses (Article 385^1 of the Civil Code),
3) provisions on the maximum level of interest (Article 359 § 2^{1-3} of the Civil Code),
4) the clause of *rebus sic stantibus (*Article 357^1 of the Civil Code*),*
5) limitation of liquidated damages (Article 384 § 2 of the Civil Code),
6) inconsistency of a legal act with the principles of community life (Article 58 § 2 of the Civil Code).[27]

It is necessary to notice that the reason behind "imposing" sanctions provided for by particular institutions, apart from the apparent exception of the last of them, is: a "serious" loss (in the case of the clause of *rebus sic stantibus*), an "excessive" amount of liquidated damages, or a "gross" disproportion the rendered and received services (exploitation). Even in the case of the last of the listed institutions, despite the said reason does not occur expressly, the doctrine argues that the absolute invalidity provided for in Article 58 § 2 of the Civil Code applies if (1) the autonomy of one party was limited, (2) the other party was aware of that autonomy, (3) and there is a gross disproportion between the value of the services rendered (grossly

24 Cf. K. Kurosz, op. cit., p. 113.

25 Ibidem. See also: W. Szewczak, *Sprawiedliwość dystrybutywna jako charakterystyka funkcji podziału dóbr*, [in:] W. Kaute, T. Słupik, A. Turoń (eds.), *Sprawiedliwość w kulturze europejskiej*, Katowice 2011.

26 Ibidem.

27 M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego*, Warszawa 2014, p. 350 et seq.

unequal consideration).[28] So it can be acknowledged, following M. Wilejczyk, that "the main purpose of Article 58 § 2 of the Civil Code is to prevent the appearance of such legal relationships whose content could be against the fundamental moral standards adopted and applied in the Polish society".[29]

As for agreements violating the principle of contractual fairness, it can be argued, following M. Wilejczyk, that "agreements violating the principle of contractual fairness are one of the groups in violation of the principles of community life, most often analysed in reference literature", and "this is to mean such agreements where the distribution of the entirety of rights and obligations as well as opportunities and threats related to a given agreement is clearly uneven".[30] The basic criterion of contractual justice is therefore the equality of everything both contractual parties get within a concluded agreement, that is both the benefits they gain and the duties they accept.[31] There is a question, though, about the extent to which the services rendered by the parties to each other have to be inequivalent for the entire agreement to be considered invalid within the meaning of Article 58 § 2 of the Civil Code. M. Wilejczyk argues that one can follow Roman law to indicate the criterion of injury of over half of the value (*laesio enormis*), but instantly adds that "it is not enough either; after all, we won't consider an agreement on the basis of which a landlord rents a room to an acquaintance for half the price they could expect in market conditions, or an owner of a painting sells it to a friend for half the price of its potential market value against the principles of contractual justice and is thus invalid".[32]

As a result, the new sanctions provided for by the provisions intended to satisfy the demands of contractual justice are imposed only when the violation of justice is serious, gross. Thus, bearing in mind the models of the philosophical-political views on exchange justice, it can be claimed that the Polish civil law enforces a liberal model – the model offers instruments to claim a fair balance between parties, but this, in principle, does not come at the cost of autonomy of the subjects involved. It is yet more important for the purpose of this paper to highlight an observation that Article 58 § 2 of the Civil Code intends to enforce contractual (exchange) justice – a justice that is secondary to distributive justice. The fact should be taken into account in the context of the assessment of acceptability of the application of civil

28 Ibidem, p. 350.

29 Ibidem, p. 350, after: E. Gniewek, P. Machnikowski (eds.), *Kodeks Cywilny. Komentarz*, Warszawa 2017, p. 140.

30 Ibidem, pp. 360–361.

31 Ibidem, p. 361.

32 Ibidem.

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law institutions in public law, which is to enforce distributive justice, positioned, after all, "before" exchange justice.

Justice in social insurance law

While civil law is named a classic example of a field of law that deals mainly (but not only) with the issue of exchange justice, the opposite pole is taken by social insurance law, which is to enforce justice in the distributive sense. This is so because the main purpose of social insurance law is to transfer goods to those citizens who are unable to obtain such goods (essential to their existence) alone because of the materialisation of some social risk (old age, inability to work, illness, accident, maternity), and so, in other words, grant citizens in need relevant benefits[33] to provide them with the necessary means of subsistence. Social insurance, in turn, is considered the basic form of social security guaranteed under the Polish constitution – and the most important instrument of the state's social policy.[34]

The right to take advantage of social insurance benefits is objectivised, in the sense that it depends on the fulfilment of certain statutorily required conditions.[35] Such conditions include the need to pay the required contributions for a defined period of time (accident insurance, sickness insurance, maternity insurance, but also: disability insurance) or to collect a given amount of capital from contributions (pension insurance),[36] and – self-explanatorily – the occurrence of a given social risk.

The foundation, a kind of a main theme of the insurance method of implementation of the idea of social security, is the principle of social solidarity.[37] The solidarity principle plays an important part especially in the distribution of the burden of contribution and the right to benefits – the beneficiary is a person who has suffered because of a materialised social risk, and the burden of contributions is

33 Cf. CT judgement of 29 May 2001, K 15/01, OTK ZU 2001, no. 8, item 252.

34 See: L. Garlicki, *Komentarz do art. 67*, [in:] idem (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. III, Warszawa 2005, p. 3.

35 K. Jaworska, *Główne cechy ubezpieczeń społecznych*, [in:] M. Czuryk, K. Naumowicz (eds.), *Prawo ubezpieczeń społecznych. Wybrane problemy*, Olsztyn 2016, p. 39.

36 On why a pension insurance contribution shall not be considered as earned money saved for one's old age or as invested savings, subject to special protection as the right to remuneration, see: J. Jończyk, *Sposób i miara zabezpieczenia społecznego*, "Państwo i Prawo" 2011, 10, p. 12.

37 Cf. E. Lach, *O solidarności społecznej w "ubezpieczeniu zdrowotnym"*, https://prawo.amu.edu.pl/__data/assets/pdf_file/0011/176168/dr-hab.-Lach.pdf (access: 2.02.18), p. 1.

carried by the entire community of the insured.[38] It can be therefore said that while the amount of benefits in the case of social insurance depends on the amount of the contributions paid (proportionality principle), the Polish social insurance system is characterised by a lack of a simple relationship between the amount of the contributions paid and the amount of the benefits received,[39] and in the context of the sickness, accident, and maternity (but not pension) insurance, we can clearly speak of a lack of relationship between the amount of the contributions paid and the benefits due to an individual.[40]

In this sense, social security law is characterised by an autonomy with regard to civil law, based on the principle of equivalence. The autonomy of the social security law is substantiated by the argumentation provided by the Supreme Court in its resolution of 21 April 2010, II UZP 1/10. In the resolution, SC argued for autonomy of social insurance relations with respect to obligation relations since in the case of the latter, "we cannot (...) speak, like in the case of civil-law mutual obligations, of a strict correlation (synallagmaticity of the contribution and the benefit)". As argued by SC, the social insurance contribution is not a personal input to fund one's future benefits, but only and exclusively a personal insurance input, designed to form a general insurance fund that provides the right to benefits to those insured who suffer from materialisation of a given social risk, and "both elements of the insurance relationship (the insurance contribution and the insurance cover) are not equivalent (exchangeable) because the principle of equivalence of benefits is modified in this case by the principle of social solidarity". Paraphrasing E. Lach, one can say that the reciprocity of benefits – documented contributions of the insured and the system guarantee – in the form of the *synallagma* under Article 487 of the Civil Code, understood in a way that one benefit is to be a counterpart of another, is made invalid in social insurance law, and "this means that it is also impossible to analyse the potential equivalence of such benefits since there is no way to assess the corresponding value of different benefits in a situation where there is no relationship expressed by the *do ut des* legal maxim between them".[41]

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38 Cf. K. Prokop, *Ubezpieczenia społeczne a konstytucyjna idea sprawiedliwości społecznej*, [in:] M. Czuryk, K. Naumowicz (eds.), op. cit., p. 15.

39 Cf. ibidem.

40 As J. Jończyk argues, social insurance law is characterised by an asymmetry between the contribution and the benefit received, which is to reflect the principle of solidarity in practice: all the insured contribute, and only the one who has suffered damage benefits. See: J. Jończyk, *Sposób i miara*..., p. 38.

41 See: E. Lach, op. cit., p. 3. On the issue – see also: T. Zieliński, *Ubezpieczenia społeczne pracowników. Zarys systemu prawnego – część ogólna*, Warszawa–Kraków 1994, p. 20; W. Szubert, *Ubezpieczenie społeczne. Zarys systemu*, Warszawa 1987, pp. 62–63.

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What is important from the point of view of this discussion is that the above is a consequence of different axiological assumptions at the root of civil law and social insurance law, and of their genesis as well.[42] While civil law is based on the principle of equivalence (the performance of one contractual party has to be equivalent to the performance of the other contractual party), social insurance, following the idea of solidarity, involves non-equivalence of the contribution made and the benefit received, provided in the event a certain social risk materialises (e.g. sickness or pregnancy). This means that if an individual has been socially insured for a sufficient period of time, regardless of the amount of the contributions paid so far, they are entitled to take advantage of the provided benefit in its full amount if a given social risk takes place.

It is important to stress at the same time that although social insurance law functions unquestionably based on the principle of distributive justice, the latter takes on different forms,[43] which leads to a situation that the principle of solidarity is manifested in some branches of social insurance law more than in others. The form of justice adopted in a given branch depends not only on the axiological choice made by the legislator[44] but also on the nature of a given social risk.[45] In order to check what form of justice has been adopted, it is good to examine the relationship between the contribution and the system of justice.[46] The differences can be seen between the sickness, accident, maternity, and disability insurance system on the one hand and the pension insurance system on the other. As argued by K. Ślebzak, in the event of a sickness, maternity, or inability to work, the principle of "according to one's needs" is only modified by the principle of "according to one's achievements" at the level of determining the amount of benefit (social insurance law treats "achievements" only as a precondition in the form of entitlement to social insurance benefits, the amount of the contribution affecting the amount of the benefit granted, but the amount of the benefit does not depend on the sum of the documented contributions), whereas in the case of pension-disability insurance, the primary

42 To put it in somewhat simpler terms, as much as the contemporary civil law may be associated with a free-market system, the social security law originates from Bismarck's welfare state concept, drawing from socialist doctrines and social teaching of the Catholic Church.

43 K. Ślebzak, *Aksjologiczne podstawy prawa ubezpieczeń społecznych ze szczególnym uwzględnieniem solidarności i sprawiedliwości – przyczynek do dyskusji*, XIX Zjazd Katedr i Zakładów Prawa Pracy i Ubezpieczeń Społecznych, Poznań 15–17 maja 2013 r., p. 15.

44 K. Antonów argues that the existence of a certain competition between the forms of justice is something natural, and the choice (advantage) of one of them depends on axiological, ideological, and moral choices of the legislator. Cf. K. Antonów, op. cit., p. 21.

45 K. Ślebzak, op. cit., p. 16.

46 K. Antonów, op. cit., p. 23.

form of justice is the "according to one's achievements" principle,[47] which makes the amount of benefit dependent on one's seniority and the sum of the contributions paid. As already mentioned, the choices made by the legislator are motivated to some extent by the nature of the social risks covered. Modifying the "according to one's achievements" rule in the context of accident, sickness, and maternity insurance by the "according to one's (justified) needs" rule is explained by the fact that a sickness or an accident (and pregnancy in a way) are unpredictable, random events that make one unable to work. As the doctrine explains, according to the principle of solidarity, benefits are paid only to those participants of the insurance system, who have been affected by some social risk, and others (who have not been affected by any such risk) have no right to either any benefits or a reimbursement of the contributions already paid.[48] The opposite is the pension insurance that offers old age cover, where the amount of benefit is directly related to the sum of the documented contributions, which is explained by the fact that the materialisation of this 'risk' is foreseeable.

In the context of the issue of rivalry of the forms of justice covered above, the doctrine finds that the principle of equivalence not being corrected by the principle of solidarity, or that the form of justice "according to one's achievements" not being modified by taking one's justified needs into consideration, may be interpreted as excessive individualisation of benefit, inconsistent with the universal constitutional right to social security.[49] This is followed up with a claim that the "according to one's achievements" and "according to one's needs" principles should complement each other to let an individual have a fair standard of living.[50]

And when justice becomes merely intuition...?

In the light of the above discussion, it can be firmly stated that lawyers view justice – at least at a declarative level – not as intuition but as a notion with a long tradition, ambiguous as it can get, but assigned a certain grounded meaning within certain fields of law. Still, practice proves that situations where justice is administered as if intuitively, against 'locally' enforced types of justice, are not rare. I believe that such a situation may occur when Article 58 § 2 of the Civil Code is applied before

47 K. Ślebzak, op. cit., p. 16.

48 Cf. K. Prokop, op. cit., p. 19.

49 K. Antonów, op. cit., p. 23.

50 Ibidem.

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the Social Insurance Institution to exclude an individual from the social insurance system, which may contradict the fundamental principles of social security law.

Three claims can be made against the practice of applying Article 58 § 2 of the Civil Code in social insurance law. First, it can be argued that in the face of no counterpart of Article 300 of the Labour Code in social insurance law, or no reference to the provisions of civil law expressed directly in a norm of social insurance law, the disability pension authorities are entitled to apply the institution of civil law, all the more that social security law comes from administrative law, not from civil law. Second, it can be added that since civil law and social security law serve different social functions and enforce different types of justice, we should not mix these two normative orders. Finally, it can be claimed that taking advantage of the institution of Article 58 § 2 of the Civil Code in social security law is undesirable not only from the theoretical but also from the praxeological and axiological perspectives. Utilising the institution of civil law intended to enforce exchange justice, meaning a justice that should be secondary – not primary – with regard to justice in the distributive sense in social security law may lead to unwanted social consequences, especially to a distortion of the fundamental principles of social security law.

The first claim is addressed in the issued judicial decisions in a way that involves an argument that the subject of inspection from the point of view of civil law is not the insurance entitlement or the fact of being eligible for social insurance, but the employment contract only. In other words, the exclusion of an individual from the social insurance system is only an indirect effect of examining their employment contract pursuant to Article 300 of the Labour Code in relation to Article 58 § 2 of the Civil Code. In the already quoted Supreme Court's resolution of 21 April 2010 (II UZP 1/10), the Supreme Court, despite arguing for the autonomy of social insurance law from civil law, claimed that employment contracts in the scope in which they served as social insurance entitlement determined the amount of the contribution, leading in consequence to the entitlement to certain benefits, should be subject to evaluation from the point of view of Article 58 of the Civil Code because courts could not, and should not, be so "powerless" against the practice of taking advantage of the right to social insurance benefits. We can use the above argument as the basis to reconstruct the answer to the second claim. There is no time to feel sorry for roses when forests are ablaze. The purity of theoretical constructs may be an obstacle in preventing the phenomena of abuse of rights to social insurance benefits.

In this variant the last of the claims made remains unanswered. A claim that implies that applying the construct of civil law to social security law is undesirable from the axiological and praxeological points of view. I would like to show in the next part of the paper that the above claim is reflected in the reality, and is not only a merely theoretical problem.

A case study[51]

Like I signalled in the introduction, one of the ongoing problems pregnant women in the labour market have to deal with is the fact that their employment is a subject of great interest of disability pension authorities. These authorities, notified of employment of a pregnant woman, initiate an inspection pursuant to Article 83, section 1, item 1, Article 68, section 1, item 1, letter a) of the act on social insurance system, aiming to prove that the contract concluded with the pregnant woman was apparent (of ostensible nature) (Article 83 of the Civil Code), or that aimed at circumventing the act (Article 58 §1 of the Civil Code), or that it violates the principles of community life (Article 58 § 2 of the Civil Code).

The Social Insurance Institution has the power to acknowledge in each of the quoted cases that the insurance entitlement was invalid and exclude the person in question from the social security system on that basis – also with a retroactive effect. A controversial issue here is that the standard which the Social Insurance Institution applies to consider employment contracts invalid (on account of their ostensibility, intention to circumvent the act, or violation of the principles of community life) is ambiguous to say the least. In the light of the decisions issued by the Supreme Court and some courts of appeal, it seems that the only model to analyse if an employment relationship has actually been established (which naturally translates into a social insurance entitlement) should be Article 22, section 1 of the Labour Code, which states that by establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under their supervision, in a place and at the times specified by the employer; the employer, in turn, undertakes to employ the employee in return for remuneration. Finding that a given activity bears all the qualities listed in the quoted provision determines that an employment relationship has been established and that the employee is subject to social insurance. The Supreme Court argued in 2001 (judgement of 14 March 2001, case II UKN 258/00) that it was not possible to accept that a declaration of intent of concluding an employment agreement where the employee took up their employment and the employer received the required services was ostensible. In a recent judgement, the Supreme Court has argued that "if we acknowledge that an employee concluded an employment agreement and performed the duties under the agreement in question, and an employer received the services

[51] This is where I offer a brief overview of a problem I have written about in "Rzeczpospolita". See: W. Zomerski, *Umowa o pracę, ciąża i świadczenia z ubezpieczeń społecznych*, „Rzeczpospolita" 8.12.2017, www.rp.pl/Kadry/312089987-Umowa-o-prace-ciaza-i-swiadczenia-zubezpieczen-spolecznych.html (access: 24.04.2018).

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from such an employee, there are no grounds to consider such an agreement ostensible (Article 83 of the Civil Code), even if the agreement lasted a very short time, nor one intended to circumvent the act" (SC's judgement of 6 December 2016, case II UK 439/15).

The fact of being pregnant should be especially irrelevant to the decision on whether an employment relationship has been established because a refusal to offer employment on such grounds is considered discrimination on grounds of sex (District Court in Szczecin's judgement of 22 January 2014, case VI U 1279/13). The motivation of the employee should be irrelevant in this context as well – entering into an employment contract to obtain a maternity benefit is neither reprehensible nor against the law (see: SC's judgement of 9 August 2005, III UK 89/2005), and – as argued by SC in its judgement of 14 February 2006 (ref. no. III UK 15/2015) – it is even a reasonable behaviour, justified from a personal and social point of view. As I have argued in the quoted article:

> "Other judgements of the Supreme Court and common courts have argued that considering employment as apparent may not be affected by other circumstances unrelated directly to the fact of employment and performance of work, such as:
>
> - inequivalence of remuneration – CS' resolution of 27 April 2005, ref. no. III UZP 2/05;
> - short term of work under an employment contract before going on a leave – Court of Appeal in Gdańsk's judgement of 19 January 2017, III AUa 1499/16; CA in Warsaw's judgement of 17 June 2008, case III AUa 536/08; DC in Gliwice's judgement of 29 October 2014, case VIII U 1513/14; CA in Białystok's judgement of 8 October 2014, case III AUa 606/14;
> - creating a specific job position for the employed female employee – CA in Warsaw's judgement of 14 February 2006, case III AUa 577/05;
> - no employment of an employee to substitute the employee being on sick leave – DC in Konin's judgement of 29 December 2014, case III U 885/14;
> - no professional education to perform the required work – DC in Szczecin's judgement of 22 January 2014, case VI U 1279/13".[52]

[52] Ibidem.

Taking the above into account, we can say that on the one hand, the Supreme Court constructs a general rule according to which Article 58 § 2 of the Civil Code not only can but also should be used to examine employment contracts as social insurance entitlements. On the other hand, it sets a range of limitations in the context of circumstances that can be considered when examining an established employment relationship. But law-enforcing authorities tend to follow CS' guidelines selectively. The practice of disability pension authorities shows that it is very common to question employment contracts concluded with pregnant women on account of the occurrence of the said circumstances, especially given the fact that these authorities consider these contracts uneconomic, making a *post factum* evaluation, not analysing them at the time they are concluded.

Applying models known in civil law, based on the equivalence principle, in social security law, based on the solidarity principle, leads to unpredictable consequences. The result is that the fact that an employee being pregnant not only becomes a reason to initiate an inspection, but in the end determines the outcome of the inspection. When pregnant women take advantage of sickness insurance benefits, the disability pension authorities do not question the occurrence of the social risk in the form of sickness, but argue, given the short term of employment before the materialisation of this risk, that the employment has been economically unprofitable since the very beginning and aimed at taking advantage of the social insurance system, which makes it invalid in the light of Article 58 § 2 of the Civil Code.

It shall be stressed here that the disability pension authorities quoting Article 58 § 2 of the Civil Code in the context of excluding pregnant women from the social insurance system is questionable not only for constitutional considerations[53] and is not line with the specificity of social security law based on the solidarity principle, but it is also questionable from the point of view of civil law. It is reasonable to recall here that according to the view accepted and adopted in the doctrine of civil law, application of Article 58 § 2 of the Civil Code is determined by three preconditions: (1) limitation of the autonomy of a party, (2) the other party's awareness of limitation of the said autonomy, (3) gross disproportion between the value of the services rendered by the parties).[54] If we were to uphold the view that

[53] See: footnote no. 3.

[54] It seems reasonable to add, by the way, that Article 58 § 2 of the Civil Code offers grounds to consider a relationship invalid not only in the event when justice is breached, but also when the content of a contract or the circumstances of its conclusion violate some significant ethical standards for other reasons. So maybe it is possible to defend the application of Article 58 § 2 of the Civil Code in social security law at a theoretical level. But this does not change the fact that even if we adopt such a perspective, the application of the provision in question in social security law is highly questionable from the point of view of the purpose that social security law is to serve.

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the basis to apply Article 58 § 2 of the Civil Code is Article 300 of the Labour Code, it appears that in the case in question, the preconditions to apply Article 58 § 2 of the Civil Code are not fulfilled. It is hard to imagine a situation where an employer offers inequivalent market remuneration because their autonomy is limited. Therefore, neither the first nor the second precondition is fulfilled in this situation. Even if the third precondition were fulfilled, it should be assessed at the time of conclusion of the contract in question, not *post factum* – when the social risk in the form of a sickness is materialised. The non-equivalence of a contract examined *post factum* may not – even from the perspective of civil law – serve as the grounds to question it. But if we were to apply Article 58 § 2 of the Civil Code accordingly and agree that the parties to the insurance relationship is a pension disability authority on the one hand and a contributor and an insured on the other, then even if the first two preconditions are fulfilled, the remarks regarding the third one remain valid. Moreover, it is impossible to justify such a solution on the basis of Article 300 of the Labour Code (which has no counterpart in social security law).

Conclusion

In the light of the discussion presented above we should acknowledge that M. Safjan was right only partially. Justice really bears certain defined meanings in particular branches of law. But that does not mean that law-enforcing authorities consider these defined meanings as sources for the directives for action – compatible with the said meanings. Applying Article 58 § 2 of the Civil Code in social security law is the best proof that law-enforcing authorities administer justice quite often intuitively, and therefore (following the meaning of the word as adopted at the beginning of the article) against the locally enforced types of justice. This, in turn, leads to undesirable and unpredictable social consequences.

Taking the above into account, I believe that the practice of intuitive administration of justice should not be made a theoretical standard. As I have been trying to prove, intuition-driven settlement of what is just on the basis of institutions foreign to social security law remains at variance with both the nature and the intended purpose of the institutions and the principles of social security law, especially with the principle of solidarity underlying this law. This is absolutely not about the theoretical purity of the applied constructs, but about something much more essential. Someone could say that intuition-driven attempts to settle what is just on the basis of civil law institutions is a certain remedy to the helplessness of disability pension authorities in the face of abuse of the social security system using medical certificates written out quite "liberally". As argued

by A. Kozak, when it comes to justice, lawyers have quite a modest challenge to deal with – to materialise achievable justice in specific interpersonal relationships.[55] Lawyers may not afford themselves to adopt an external perspective on justice, a Derridean horizon we are always after but never able to reach.[56] As I have been trying to show in this text, making achievable justice a reality may not be based on an intuitive and abstract sense of what is just. Rather, it should be done taking into consideration a given field of law, and especially the type of justice enforced locally. Otherwise we have situations where disability pension authorities, unable to prove that a medical certificate is fake, assume by default that every pregnant woman who has taken up a job in the period of pregnancy, and then got a medical leave, has done so to take advantage of undue social security benefits. A system of law that assumes in advance that its social actors are dishonest is not only unjust. It actually contributes to a continued low level of social trust[57] and a persistent dishonesty, and, in consequence, to a common sense of injustice. Such a system is just only apparently. After all, as Plato once noted, the highest reach of injustice is to be deemed just when you are not.[58]

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55 See: A. Kozak, *Granice prawniczej władzy dyskrecjonalnej*, Wrocław 2002, p. 170.

56 Such a perspective is to correspond to political practice, focusing on the notion of justice as an ever "unachieved" ideal of social life. A. Kozak claims that although the perspective in question is an attractive political alternative to the intellectually ossified modernity, it is useless in legal discourse, which "needs to be based exactly on ossification, on standardisation, without which it is impossible to make modest justice real 'here and now'". Ibidem, pp. 169–170.

57 On the extremely low level of social trust in Poland see e.g.: CBOS, Post-study release no. 18/2016: *Zaufanie społeczne*, https://www.cbos.pl/SPISKOM.POL/2016/K_018_16.PDF, Warszawa, February 2016.

58 Plato, *Państwo*, book II.

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