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LAWYER AS PEACEMAKER – APOLOGY, FORGIVENESS, RECONCILIATION IN DISPUTE RESOLUTION*

I. INTRODUCTION

The purpose of this article is to describe the specific professional or social role, defined by the term 'lawyer as peacemaker', that a lawyer may adopt when rendering assistance in the interest of a client as party to a legal dispute.[1] This still seems insufficiently appreciated by Polish academia, education, and also legal practice. In the meantime the constant search for, investigation of, and application of diverse conciliatory forms of resolving legal disputes (including those making use of such institutions as apology, forgiveness and reconciliation) leading to the genuine elimination not only of the adverse effects of conflicts but also their causes, should be acknowledged as by all means justified. This is because, apart from the cognitive aspect, it may bring diverse legal and extralegal benefits on individual, interpersonal, and social levels.[2] Nevertheless, lawyers continue much more often to be situated on the side of those occupations where confrontation, rivalry and battle is inherent rather than understanding, working together, agreement, or reconciliation between the parties to disputes.[3] This is happening despite the fact that the traditional court trial, particularly in situations where there are significant psychological, relational or social-living problems among the parties, does not give any certainty for a lasting elimination of the causes of their

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[1] The role of the lawyer as peacemaker achievable above all in the occupations of advocate, legal counsel, negotiator or mediator. It may to a certain extent also be realised by a judge, especially one in a novel kind of court known as a Problem-Solving Court. This is because the judge at such an interdisciplinary institution, by adopting a so-called holistic approach to justice (adapting appropriately the assumptions of procedural justice and Therapeutic Jurisprudence), can – alongside their traditional role – also function as a specific therapeutic agent, behaviour change agent, social worker, peacemaker or motivator – see Winick (2013): 211–212, 217–228, 231–232. For more on the topic of occupational roles and the broader category of social roles in the context of the profession of lawyer, see e.g. Kaczmarek (2014): passim; Łojko (2005): passim; Skąpska, Czapska, Kozłowska (1989). Cf. Bieliński (2013): 25 ff. Regarding the role of the lawyer as peacemaker – see e.g. Wright (2010). On the matter of the specific roles a so-called holistic lawyer may adopt, see Zienkiewicz (2018): 177–247.

[2] The concept of handling disputes (including their settlement or resolution) was defined and disseminated in Polish legal theory by A. Korybski – see Korybski (1993): 8, 193. On so-called holistic dispute resolution – see Zienkiewicz (2018): 248–275. Cf. Daicoff (2013): 131–180.

[3] Zienkiewicz (2018): 13.

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problems and disputes, for the establishing of peaceful interpersonal relations, or a positive personal transformation guaranteeing no relapse to the adverse attitudes and behaviours violating the law or other social norms.[4] On the other hand the phenomenon of law may be ascribed a dualistic nature at the very least, combining coercion and discourse, including that based on negotiations. This can adopt a confrontational formula but also an integrative one, aiming for resolution of the legal problem or dispute through agreement, giving a chance for improving the parties' communication and relations, as well as their constructive collaboration in the future.[5]

These deliberations focus on presenting how I understand the specific role of the lawyer as peacemaker and the goals of this role. This will be followed by a description of the fundamental issues concerning the institutions of apology, forgiveness and reconciliation between parties to a conflict, institutions that are particularly significant for the practice of resolving legal disputes that is based on so-called peace-making. The analysis will also identify selected regulations of Polish substantive civil and criminal law referring to apology, forgiveness or reconciliation. The presence of the said regulations in the Polish legal system – even if some lawyers are averse to the amicable handling of disputes – should encourage a closer familiarization of their essence (and that not only in a normative context) and their appropriate consideration in counselling practice, as well as the judicial resolving of disputes in the relevant factual and legal circumstances of a particular case.

II. THE LAWYER AS PEACEMAKER

A lawyer accepting the role of a peacemaker concentrates above all on effectively preventing the emergence, the re-emergence and the escalating of conflicts, as well as a real and lasting resolution of legal disputes and problems, on the basis of peacemaking,[6] which takes into account various aspects of a person's life, while also applying the achievements of the non-legal sciences (in particular psychology and sociology) as well as involving lawyers' collaboration with experts in other fields, as part of a Collaborative Team (for example therapists, doctors, mediators or social workers).[7] Peacemaking is based on a positive understanding of the term 'peace' (so-called positive peace), which in a conflict situation calls for it to be overcome via the appropriate collaboration between parties, aiming to reach an agreement which – whenever possible and depending on the requirements of

[4] Zienkiewicz (2018): 13. Similar emphasis is made by M. Araszkiewicz, K. Płeszka, A. Rękas – see Płeszka et al. (2017): 96; Rękas (2011): 18.

[5] Regarding the dualistic nature of law, with a description of the social functions fulfilled by the law, on the governance, distribution and settlement and management of disputes – see Korybski (1993): 48–49. On integrative discourse – see Zienkiewicz (2014): 189–198.

[6] For more, see Noll (2019). Cf. Wright (2010); Carter (2010).

[7] More on the topic of a lawyer working with a Collaborative Team in various types of case and branches of law – see e.g. Gutterman (2004): 97–244, 435–443.

a particular case – may precede their mutual understanding, apology, forgiveness and reconciliation. In contrast to peace in the positive sense is so-called negative peace, where the conclusion is only a neutralization of the negative communication between the parties to the dispute (despite their attitude remaining hostile) and their cessation of acts of violence or other adverse behaviour. However, this is usually achieved on the basis of coercion, mutual dependence, restrictions, supervision or the overbearing intervention of third parties authorized to impose sanctions.[8] The essence of peace in the positive sense, on the other hand, is bringing about the elimination of the causes of a conflict, rebuilding amicable relations and the foundations for future collaboration between the parties to the dispute, as well as their lasting positive behavioural and personal (including moral) transformation. Positive peace is achieved mainly through the application of diverse forms of the amicable settling of disputes, based on the paradigm of a win-win solution, taking appropriate account of the interests of the social context and the heteronomous or autonomous sources and formulae of justice. The lawyer as peacemaker therefore significantly more often undertakes the counselling or representing of a client via mediation, integrative negotiations or collaborative law, shunning the antagonizing role of legal representative in court proceedings.[9] This is because the approach in question treats a court trial as a last resort, since a court ruling – though resolving a dispute in realizing the norms of substantive and procedural law – frequently does not actually bring about a real or a lasting solution to the conflict between the parties, and even leads to its further escalation.[10]

Restoring positive peace between conflicted parties is frequently a very difficult task, one demanding a broader look at the phenomenon of conflict and the goals of resolving legal disputes in a personal, interpersonal and social sense. The lawyer as peacemaker forms their approach to the law, to their own tasks and competences, on the fundamental assumption that 'law in action' in particular has the potential for a positive individual and interpersonal change in the situation and the parties themselves, while also offering the kinds of resolution to legal disputes that also provide the parties with opportunities for a more satisfying and harmonious functioning as an individual and in society (among other things for dealing with the diverse causes of a behavioural, psychological or social nature, causing the said parties' problems with the law or with members of the communities in which they normally live).[11] A consequence of such a view is that, in their legal practice, the lawyer as peacemaker not only takes into account the needs and interests of their clients or parties to disputes of a legal-economic nature (so-called legal needs), but also their needs in a broader, humanistic sense (so-

[8] Cf. Noll (2019). The accepted assumption of the expedience of introducing peace in interpersonal relationships is in keeping with Christian morality – see e.g. the Sermon on the Mount given by Jesus, when he gave eight interrelated beatitudes, including to peacemakers. See The Gospel According to Matthew (Mt 5, 1–12) [in:] *The Bible, New Testament, New International Version* (1983). For a broader treatment, see Augustyn (2001); Martini (2008).

[9] A broader look at collaborative law – see e.g. Tesler (2008).

[10] Cf. Noll (2019).

[11] Cf. Daicoff (2011): 36.

called human needs). This contributes to them seeking the optimum solutions to a particular legal problem or case, taking account also of its non-legal aspects of a psychological, emotional, communicational, relational or ethical nature (in order, among other things, to determine their impact on a person's psychophysical condition). Alongside the traditional functions of law, such an approach to its practice also discerns its therapeutic / anti-therapeutic and transformative potential for having an impact on the behavioural, mental and social spheres of people's lives.[12] This is because during the resolving of legal problems, and especially while managing and settling disputes, aspects of significance might not only be those regulated by the traditional legal-economic context (based on an approach of rivalry, determining the degree of blame of the parties, or which of them is right), but also by personal categories such as understanding, apology, forgiveness, reconciliation, the healing of relations and attitudes, and building up personal, interpersonal and social harmony. The accepted understanding of the role of the lawyer as peacemaker therefore stands in opposition to treating coercion as the sole desirable or always dominant feature of the legal order; it constitutes an alternative to the exclusively trial-oriented, rivalry-based practising of the legal profession. The lawyer as peacemaker adopts a holistic attitude in their professional practice, diagnosing and resolving a dispute while taking into account its legal aspects as well as the relevant aspects outside of the strictly legal sphere (a model of which could assume the form of so-called proper or transformative holism), treating the dispute as but an element of the entirety of the life situation of the client / the parties to the dispute.[13]

The multi-aspectual goals and forms of resolving legal disputes adopted by peacemaking correspond with an alternative and holistic approach to the judicial dispensing of justice, a perfect exemplification of which comprises the so-called Problem-Solving Courts (especially those based on the assumptions of the Therapeutic Jurisprudence orientation).[14] These Problem-Solving Courts constitute specialized and interdisciplinary institutions focusing on a specific category of legally relevant issues, also linked for example to drug addiction, homelessness, unemployment, domestic violence, or the mental disorders or illness of a party (or the parties) to a trial. On the one hand the broader approach to the administering of justice taken by Problem-Solving Courts tackles such traditional matters as determining and punishing persons guilty of crimes, or obligating them to make amends for the wronged party, while on the other hand assistance is offered in diagnosing the main causes behind the problems or the disputes

[12] Regarding the therapeutic and transformative dimension (function) of law – see Zienkiewicz (2018): 121–135.

[13] More on the topic of the three main types of holistic attitude in legal practice (elementary, proper, and transformative holism), holistic diagnosis and the managing and resolving of disputes – see Zienkiewicz (2018): 139–176, 177–205, 248–275.

[14] For a broader look at the subject of Problem-Solving Courts, see e.g. Berman, Feinblatt (2002); Winick, Wexler (2003); Wiener, Brank (2013). In regard to the connections between Problem-Solving Courts and Therapeutic Jurisprudence, see e.g. Winnick (2003): 1055–1090. On the holistic approach to the system of justice – see Zienkiewicz (2018): 309–402.

between the parties (including running afoul of the law), regarding their mental, familial, occupational or some other personal or social sphere of their lives. In addition measures are taken to support the elimination of the parties' psychosocial problems, utilizing interdisciplinary court programs offering, among other things, assistance in education, treatment, therapy or occupational activation. These are usually implemented with the involvement of a team of various specialists operating under the supervision of a judge with a so-called multi-disciplinary team, the composition of which may include, for example, a psychologist, psychiatrist, educational counsellor, social worker, mediator, policeperson, employer, family therapist, and even persons close to a party to the trial.[15] Programs put into effect by Problem-Solving Courts involve both the concept of a person's positive transformation and also a more holistic version of judicial practice.[16]

The proposed approach to the tasks of the lawyer as peacemaker is a response to the lawyer having lost their role, in the process of the court's evolution, as the creator and guardian of the good, of righteousness and social peace, as noticed by Andrzej Korybski, but is also a response to the loss of the function of the contemporary court (a function still obvious a few centuries ago) boiling down to upholding social order and peace (the idea of the 'court of social peace').[17]

III. APOLOGY, FORGIVENESS AND RECONCILIATION IN MANAGING AND SETTLING DISPUTES

In the managing of legal disputes based on peacemaking, the institutions of apology, forgiveness and reconciliation of the parties are treated as particularly important when the case is of a civil, economic, familial or criminal nature.[18] This is because the bringing about by the lawyer as peacemaker – in the event of such a need and realistic possibilities existing – of an apology, forgiveness and reconciliation between the parties constitutes a solid foundation for the effective, multi-aspectual managing of the dispute, providing a chance for the lasting elimination of the causes behind it and an improvement in the relations and cooperation between the parties, resulting in their peaceful coexistence – in their positive peace. A prospective reconciliation may simultaneously make it easier for the wronged party to come to terms with the damage to property or injury sustained, and reduce their fear of its repetition in the future. It may in addition bring satisfaction from the admission to error by the apologizing perpetrator, from their expression of remorse, and their commitment to cease their adverse behaviour. As for the person responsible for the wrong done to the other party, it may enable an understanding of the sources and consequences of their own behaviour, the responsibility they bear and the scale of the suffering they have

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[15] Daicoff (2011): 241; King, Freiberg, Batagol, Hymas (2009): 82.
[16] King, Freiberg, Batagol, Hymas (2009): 82–83.
[17] Korybski (1993): 60–61, 184, 188–189, 192, 193.
[18] Likewise Daicoff (2011): 150.

caused, while motivating a positive transformation and also helping ease their guilty conscience. This applies especially to the situation of evoking in the perpetrator so-called reintegrative shame (or guilt), classifying the deed committed against the wronged party as reprehensible, but without condemning this person as irreversibly bad, and capable of performing an act of apology or reconciliation. This may evoke in the perpetrator a powerful desire to make amends, as well as a lasting and positive behavioural and personal (including moral) transformation. This is in opposition to the radical lowering of the perpetrator's self-esteem, and the possible recurrence of their negative behaviour or social alienation that is characteristic of so-called unhealthy shame (or guilt).[19]

Bearing in mind the individual, interpersonal and social dimension of a case, and its complete time horizon (past, present and future), the lawyer assuming the role of peacemaker should consider the legitimacy, the conditions, and the potential for leading to a genuine act of apology by the party to the dispute who is predisposed to doing so (for example exclusively to blame for the damage caused). The following may be listed among the attributes of sincere and effective apology:

a) the person apologizing doing so ideally face-to-face with the person receiving the apology, using directly the words 'I'm sorry', accompanied by a guilty conscience felt by the apologizing party and their expression of regret and remorse;

b) an admission of guilt, an explanation of the causes behind their offence, and a request for forgiveness;

c) the person apologizing having the intention (a plan) of never again repeating the negative behaviour towards the addressee of their apology, and especially the behaviour for which they are apologizing;

d) expressing awareness of the scale of the damage caused by the negative behaviour of the apologizing party, and the impact this had on various aspects of the life of the addressee of the apology;

e) in a situation of adequacy – the additional acceptance of full liability for the damage caused, and an offer of compensation.[20]

It is not always easy to make an unambiguous appraisal of the legal character of the act of apology, and this should be performed *a casu ad casum*. That is because it may be based purely on a declaration of will, or could constitute a set of diverse legal actions or similar, for example when the perpetrator – as part of the apology – admits their guilt, voluntarily surrenders to criminal or civil liability, makes a commitment to or immediately makes specific amends, or ceases actions leading to violation of the personal rights of the wronged party.[21]

Forgiveness by the party to whom an apology is addressed usually only occurs when the apology is considered sincere and is accepted as a form of symbolic compensation (sometimes accompanied by the certainty of the perpetrator accepting a more quantifiable economic and legal liability). However, this does not

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[19] Scheff (1998): 104–106.

[20] Daicoff (2011): 149. For a broader look at the institution of apology, see e.g. Cohen (1999): 1009–1069; Lazare (2005); Daicoff (2013): 131–180.

[21] For more on the topic of actions similar to legal actions, see Mularski (2011).

rule out the possibility of the wronged party forgiving a perpetrator who has not performed any act of apology at all (for example motivated by the norms of Christian religious morality, mercy, or magnanimity). By forgiveness one could usually understand a voluntary[22] act of will by the wronged (injured) party, which does not have to but should be manifested externally in an arbitrary form (including *per facta concludentia*), discernible to others if it is intended to evoke specific legal or social consequences.[23] However, in order for forgiveness to be effective, the forgiving party is not required to be aware of the related legal consequences, or to have the intention to bring them about.[24] Its essence lies in the treating of the damage (injury) done as having not occurred, in the renunciation of the feeling of anger, injury, or desire for revenge against the perpetrator. And moreover it involves the wronged party opting not to return to the unpleasant incident or to derive consequences from it, including the normatively justified liability of the perpetrator of the negative behaviour (the rejection of sanctions in a legal or moral sense).[25]

An act of forgiveness does not constitute a typical declaration of will or a legal transaction. In legal literature it is sometimes defined as a decision, an act or as a manifestation of will similar to a declaration of will or legal transaction.[26] Some writers emphasize that it is above all a volitive moral deed.[27] Others – that it is a manifestation of feelings and not will, which is sometimes rightly supplemented with the statement that it is also frequently a manifestation of reason.[28]

Forgiveness should in principle be performed personally by the wronged party,[29] with so-called sufficient understanding of all significant circumstances in

[22] An act of forgiveness is in principle carried out voluntarily, within the freedom of the person forgiving. The Polish legal system does not contain norms commending that acts of forgiveness be carried out by persons with the status of aggrieved party in a crime or civil offence or wronged by a dishonest partner to a civil law agreement. However, they are encountered in the area of religious morality, for example in Christianity the command to forgive was expressed by Jesus in response to a disciple's question: 'Lord, how many times shall I forgive my brother or sister who sins against me?' The words given in reply by Jesus, 'I tell you, not seven times, but seventy-seven time', may be interpreted as a summons or a commandment: 'Thou shalt forgive'. See The Gospel According to Matthew (Mt 18, 21–22), cf. the commandment to love your neighbour (Mt 22, 34–40). However, despite the evangelical command thus worded, man – in his free will – ultimately decides whether to perform an act of forgiveness.

[23] Skowrońska-Bocian (2017a): thesis 5, Trzaskowski (2017): thesis 4, Księżak (2006): 57–58, 61.

[24] Skowrońska-Bocian (2017a): thesis 2.

[25] Por. Księżak (2006): 57–58; Witko (2012).

[26] Trzaskowski (2017): thesis 2. For a broader treatment, see Mularski (2011): 230–234; Wilejczyk (2013): 101–111.

[27] Ciszewski (2014): thesis 9; Trzaskowski (2017): thesis 3; por. Książek (2006): 58.

[28] Ciszewski (2014): thesis 9, cf. Książek (2006): 54. It cannot be ruled out that an act of forgiveness will be the consequence of consideration and mercantile calculation along the lines of loss-gain. However, no matter what the civil law status ascribed to it, it indisputably constitutes significant behaviour not only in a factual or legal sense, but also frequently in an ethical, communicative, relational, psychological, religious or philosophical sense.

[29] Some representatives of legal doctrine accept the possibility of the heir of a donor (on their own behalf) forgiving the donee their ungrateful behaviour, which would result in expiry of the right to cancel the donation – see Karaszewski (2014): thesis 2. The issue of forgiving on behalf of somebody else, especially the deceased victims of cruel crimes, is controversial – see Kołakowski (2007): 226–227; Saint-Cheron (2008): 184.

the case. The imprecise wording 'sufficient understanding', present in the provisions of Polish civil law, is described by legal doctrine as signifying that the wronged party realizes that the perpetrator committed a reprehensible deed, is capable of understanding and sensing the wrong done to them, and also wants to forget it, knowing the meaning of an act of forgiveness and the significant circumstances of the particular case.[30] A consequence of making the effectiveness of forgiveness dependant on sufficient understanding, and not on full capacity for legal transactions, is that in certain situations it may also be performed by a minor, by a totally or partially legally incapacitated person, or by a mentally disturbed or ill person.[31]

In order for it to be effective, an act of forgiveness should not be undertaken under the influence of a significant error or threat, or on the condition of or subject to a deadline.[32] It is, in principle, irrevocable.[33] It is not essential for forgiveness to be expressed in the presence of the person intended to be its beneficiary, or that it address this person directly.[34]

The final act of the triad under analysis, reconciliation, is never a certain or obvious consequence, even when the mutual acts of apology and forgiveness are achieved, although they frequently constitute essential stages leading to a reconciliation between the parties of a dispute.[35] It depends totally on there being convergent will shown by both parties, is determined by the entirety of the diverse aspects of the case, and the selected form and course of proceedings in regard to managing the dispute. An act of reconciliation requires the appropriate stimulation for the parties hitherto in dispute, combining the volitive aspects with its manifestation, meaning directed bilateral action or a complex of various actions of arbitrary form ultimately leading to achievement of a state of reconciliation. As with forgiveness, it may constitute a certain process drawn out over time, but it cannot be limited solely to internal will – and that only on the part of one party to the dispute. Because reconciliation is exceptionally helpful in rebuilding appropriate interpersonal relations and mutual trust, while also providing the parties with a realistic chance for positive and constructive collaboration and peaceful coexistence in the future, it should be given particular support by the lawyer as peacemaker. Especially in so-called personal disputes, between entities in long-term contact, but also where positive bonds or relations are particularly desirable (for example between family members, spouses, neighbours, entrepreneurs, or between employee and employer). This applies in particular to situations where the adverse consequences of disputes are also felt by the immediate or broader social environment of their parties.

[30] Skowrońska-Bocian (2017a): thesis 4; Trzaskowski (2017): thesis 3.
[31] Skowrońska-Bocian (2017a): thesis 4; Ciszewski (2014): thesis 4.
[32] Trzaskowski (2017): thesis 3, Ciszewski (2014): thesis 4, Skowrońska-Bocian (2017b): thesis 1.
[33] Księżak (2006): 64, Ciszewski (2014): thesis 6. Contrarily – Stecki (2011): 356.
[34] Karaszewski (2014): thesis 6.
[35] Cf. Wilejczyk (2018): 283.

Acts of apology, forgiveness or reconciliation may be accompanied by powerful and opposing emotions (positive and negative), but after the performance of such acts the parties are usually in a position to feel relief or to achieve inner and interpersonal peace (so-called horizontal harmony, and in the case of religious people also vertical harmony, with God).[36] This enables the significantly faster reworking of a negative attitude towards a matter or towards the opposing party in a dispute, and in effect makes it easier for parties and lawyers to proceed towards an amicable and lasting dispute resolution.

Nevertheless, a professional lawyer (even one functioning in the role of peacemaker), counselling or representing the client, should consider in every case – despite the advantages of the institutions of apology, forgiveness or reconciliation – whether it is worth inspiring the parties to the dispute, and how, to opt for taking this direction. The said lawyer should precisely weigh all the fors and againsts, and also determine the best possible allocation in time and space for their possible occurrence – since it may prove in practice that for some reason or other their client does not wish to receive an apology, or is not ready to deliver a sincere apology, or takes badly a refusal to accept an act of forgiveness. It may also happen that the apology given by the client results in a significant weakening of their negotiating position, or leads to the court assuming that they have acknowledged the claims or admitted to being guilty and surrendered to legal liability.[37]

A lawyer encouraging their client to cooperate within the peacemaking approach may encounter their fear that an apology, forgiveness or reconciliation would ruin the chance of the appropriate administering of justice, for example in the case of an unreliable business partner with whom a contract was concluded, or the perpetrator of a civil offence or crime, thereby resulting in the latter avoiding civil or criminal liability. Without going here into detailed analyses of the legal provisions and judicial practice relevant for specific factual states, then in general one should admit that the institutions in question may have some degree of an alleviating impact on court sentence or on the civil law obligations imposed via the judgments of civil courts or determined in settlements between the parties to the dispute. Nevertheless, in some cases they may remain totally immaterial in regard to the perpetrator's legal and economic liability, in particular when not revealed to third parties – including the judge or the mediator. The client's or party's sense of a deep disparity between the sense of justice or rightness and the consequences of the apology, forgiveness or reconciliation – which in certain cases may lead even to the perpetrator of the negative deeds avoiding any sanctions whatsoever, or the need to make right the damage done – may constitute a significant obstacle to their realisation during the handling of disputes. Overcoming this is an individual matter, and sometimes may prove inappropriate or impossible, especially when we are dealing with a significant scale of suffering on the part of the wronged party or their loved ones. Making the parties to the conflict aware of the fundamental sources of the analysed acts, which (especially for forgiveness and reconciliation)

[36] Daicoff (2011): 148.

[37] Cf. deliberations on the matter of a 'safe' apology – Cohen (1999): 1031–1042.

are love and mercy for one's fellow man – also holding a significant religious dimension for some people[38] – is also sometimes helpful in their achievement. When considering the specific relations between the indications of justice on the one hand, and love or mercy – constituting the basis for a sincere, frequently irrevocable and selfless act of apology, forgiveness or reconciliation between the conflicted parties – on the other, one should note that they do not always have to rule one another out, or stand in mutual opposition.[39] Justice should be discerned in acts of mercy, but these acts are not ruthlessly bound by its precepts, they are not exhausted within it, but by – as it were – surpassing the demands of justice, they constitute a gift for the other party of the dispute, and are sometimes even a manifestation of heroic virtue when taking into account the scale of the wrong suffered.[40]

IV. REGULATIONS OF POLISH CIVIL AND CRIMINAL LAW REFERRING TO APOLOGY, FORGIVENESS AND RECONCILIATION

Analysis of Polish substantive civil or criminal law leads to the conclusion that provisions referring directly to apology, forgiveness or reconciliation are few and far between. In regard to the act of apology, one should point to Article 72 § 1(2) of the Criminal Code, which stipulates that when suspending the execution of a penalty, a court may oblige the sentenced person to apologize to the wronged party.[41] As for civil law, an important provision is contained in Article 24 of the Civil Code, which states that a person whose personal interests are violated by another person's actions may demand that the person who violated them perform the actions necessary to redress the consequences, including the making of a declaration with the relevant content and in an appropriate form, which in practice is frequently a demand for a suitable declaration in the form of an apology.[42]

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[38] As rightly indicated by Ciszewski (2014: thesis 12) in regard to forgiveness, its essence is its humanitarian character and social-ethical value. Cf. Ochotny (2017): 87–101.

[39] After all one frequently sees both the sanctioning of the perpetrator's negative behaviour and an act of apology, forgiveness and reconciliation between parties to a conflict. It is sometimes the case that only their co-occurrence increases the chance of a positive behavioural and personal transformation in the perpetrator, including their moral improvement.

[40] Ochotny (2017): 93, 97–99. At this point attention should be drawn to attempts made in philosophical and educational literature to tackle crucial issues regarding the tension between the unforgiveable and the radical forgiveness of everything, the demand for remorse and unconditional forgiveness, and social and individual reconciliation, also considered in the context of the mechanisms behind the transformation of a person's personality – see Maliszewski (2016): 11–24 and the literature referred to there.

[41] See the Act of 6 June 1997 – the Criminal Code, consolidated text; Journal of Laws of the Republic of Poland [JL RP] 2018, item 1600 as amended.

[42] See the Act of 24 April 1964 – Civil Code, consolidated text, JL RP 2019, item 1145.

The act of forgiveness is referred to in the provisions of civil law related to the normative regulation of the institution of donations, as well as the declaration of unworthiness and disinheritance in inheritance law. Pursuant to Art. 899 § 1 of the Civil Code, a donation cannot be revoked because of ingratitude if the donor has forgiven the donee.[43] In Art. 930 § 1 of the Civil Code, the legislator states that an heir cannot be declared unworthy if the bequeather forgave the former.[44] And in Art. 1010 § 1 of the Civil Code we read that the bequeather may not disinherit one entitled to a legal portion if the former forgave the latter.[45] Also deserving of note are records in doctrine and jurisprudence regarding the impact of forgiveness on determining guilt for the breakdown of marriage in divorce cases.[46]

The issue of reconciliation is tackled directly in the regulations of criminal law regarding the ruling of punitive damages and application of extraordinary mitigation of punishment. In Art. 47 § 4 of the Criminal Code, the legislator anticipated that in particularly justified circumstances, when punitive damages would be detrimental to the offender having the essentials for their and their family's livelihood, or where the wronged party has become reconciled with the perpetrator, the court may administer the said damages to a value lower than indicated in § 3. Article 60 § 2(1) of the Criminal Code anticipates, in turn, that the court may apply extraordinary mitigation of punishment in particularly justified cases, when even the lowest penalty anticipated for the crime would be incommensurately harsh, particularly if the wronged party has become reconciled with the perpetrator.[47]

When analysing the institutions of apology, forgiveness and reconciliation in criminal law, one cannot omit Article 53 of the Criminal Code, in which it is indicated that the court, when passing sentence, will take into account among other things the offender's behaviour since committing the offence, and especially their efforts towards redressing the damage or satisfying the public sense of justice in some other way, but also the conduct of the aggrieved party. In addition the court takes into account the positive outcomes of mediation conducted between the wronged party and the perpetrator, or a settlement reached between them in proceedings before a court or public prosecutor.[48] The act of apology as well as forgiveness and reconciliation may constitute a significant element of the conduct shown by the offender and the aggrieved party, especially as the result of mediational proceedings culminating in the concluding of a settlement.

At this point it is worth stressing that – bearing in mind the multi-aspectual goals of mediation in diverse civil or criminal disputes, which particularly within so-called transformative mediation do not focus solely on concluding an agreement taking into account the interests and needs of both parties, but above all an improvement in their communication, their relations, and a positive behavioural and personal transformation – then bringing about the fulfilment of an act of

[43] Ibidem. For a broader treatment, e.g. Krajewski (1997): 65–97.
[44] Krajewski (1997): 65–97
[45] Ibidem.
[46] See e.g. Domański (2017): 19–20, 49–50.
[47] Ibidem. For more – e.g. Misztal-Konecka (2013): 65–78.
[48] Ibidem.

apology, forgiveness or reconciliation may play a key role in achieving these goals and in cutting back or eliminating not only the negative consequences of disputes, but also their causes.[49]

Analysis of the provisions of Polish substantive civil and criminal law, referring directing to apology, forgiveness or reconciliation, allows one to assert that they apply to only a few institutions. Nevertheless, they may be made broad use of during diverse forms of handling legal disputes. In particular they deserve the interest of lawyers assuming the role of peacemaker, providing assistance for clients / parties to disputes in negotiation or mediation proceedings. Depending on the needs and capabilities of a particular case, they may also be taken into account appropriately in counselling practice as well as in the resolving of disputes through the courts and arbitration. At this point attention needs to be drawn to the latest amendment to the Code of Civil Procedure, introducing as of 7 November 2019 the institution of a preparatory sitting conducted by a judge, and with the participation of the parties to a civil trial or their representatives.[50] Pursuant to Article 205(5) § 1 and Article 205 (6) § 2 of the Code of Civil Procedure, a preparatory sitting serves to resolve a dispute without the need of conducting further sittings (and especially a court hearing), and during such a meeting the person chairing should encourage the parties towards reconciliation and aim for an amicable resolution to the dispute, in particular through mediation.[51] This trial-related institution could therefore contribute to an increase in the practice of peacemaking in the managing of legal disputes, not only on the part of lawyers with the role of representatives in the trial, but also on the part of judges.

V. CONCLUSION

Although the agency of lawyers cannot be overestimated, we still seem to be dealing with too low a level of making use of the potential in the legal professions in regard to the amicable managing and settling of disputes, and in building up peaceful social co-existence.[52] As such, the popularizing among lawyers of knowledge on the essence and strengths of the role described by the term 'lawyer as peacemaker' is justified, as is encouraging them appropriately to seriously consider running their own professional practice based on peacemaking (especially when resolving disputes through mediation or integrative negotiations, including that conducted within with what is known as collaborative law). Lawyers should not treat the institutions of apology, forgiveness and reconciliation unfavourably, as always displaying weakness, an inclination to fall into line, an irrational admission of guilt or acknowledging the

[49] A broader look at the topic of multi-aspect goals of mediation in a personal, interpersonal, social, psychological, communicative and negotiation-informational sense – see Zienkiewicz (2007): 96–123. Regarding the assumptions of transformative mediation – see e.g. Bush, Folger (2005).

[50] See the Act of 4 July 2019 – on amendment to the act on the Code of Civil Procedure and certain other acts: JoL 2019, item 1469.

[51] See the Act of 17 November 1964 – Code of Civil Procedure, consolidated text; JoL 2019, item 1460 as amended.

[52] Zienkiewicz (2018): 13.

rationale of the other party to the dispute. Neither do the said institutions deserve to be marginalized due to the shortage within a particular legal system of regulations in civil or criminal law referring directly to them. This is because the appropriate appreciation by lawyers of the institutions of apology, forgiveness and reconciliation is particularly significant in the everyday practice of managing and settling diverse legal disputes in civil, familial, neighbourly, economic or criminal matters, and in regard to labour law, since they grant parties a chance for mutual understanding and the elimination of not only the negative consequences of a conflict, but also the causes, as well as more satisfying and harmonious functioning as individuals and in society.[53] It is high time for them to be no longer treated as the domain of help rendered solely by psychologists, therapists or the clergy.

Lawyers who are guided in their professional practice by the desire to provide realistic and lasting help to the parties they represent cannot be ignorant in regard to the skilful application and utilization of the strengths of the institutions of apology, forgiveness and reconciliation when managing and settling disputes. Knowledge and skills in this area should already be honed during legal studies and apprenticeships. As was quite rightly pointed out by Warren E. Burger (former Chief Justice of the Supreme Court of the United States), lawyers – in the broad understanding of this profession – should be legal architects, engineers, and builders, and occasionally inventors, focused on helping to achieve accord and stability in social relations for the good of democracy, which functions at its best when based on compromise. Lawyers should be promotors of social progress, constructors of foundations enabling not only the appropriate resolution of problems and disputes, but also the transformation and evolution of the law, fulfilling the role of entities helping in building harmony and social peace, and in healing interpersonal relations rather than initiating or escalating conflicts.[54]

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[53] Cf. Daicoff (2013): 131–180. See also the deliberations regarding the functioning of a lawyer in an ethical context, within the holistic approach to practising law (including when performing the role of peacemaker), based on the specific approach of 'think like a professional', stepping beyond the traditional paradigm of 'think like a lawyer' – Zienkiewicz (2018): 194–203. Cf. Perry (2008): 159–165; Schiltz (1999): 871–951.

[54] Burger (1980): 378; Zienkiewicz (2018): 412–413.

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LAWYER AS PEACEMAKER – APOLOGY, FORGIVENESS, RECONCILIATION IN DISPUTE RESOLUTION

Summary

The constant search, research and application of various, amicable forms of dispute resolution, including those using institutions such as apology, forgiveness and reconciliation, should be considered as justified, as it can bring benefits in the individual, interpersonal and social spheres. The aim of the article is to present the specific professional or social role that lawyers can perform, especially during dispute resolution, known as *lawyer as peacemaker*. This paper describes the understanding of the lawyer's specific role as a peacemaker, based on the author's concept of a holistic approach to law and legal practice. The paper analyses the essence of the institution of apology, forgiveness and reconciliation, which are particularly significant for the practice of alternative dispute resolution, based on peacemaking. Finally, selected Polish civil and criminal law regulations referring to apology, forgiveness or reconciliation are identified.

Keywords: lawyer; peacemaker; apology; forgiveness; reconciliation; Alternative Dispute Resolution; holistic approach to law and legal practice