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A DEVELOPED CONCEPTION OF THE SOURCES OF LAW: THE CONTEXT OF THE ROLE OF POLITICAL JUSTIFICATION, CUSTOM AND PRECEDENT¹

ROZWIŃNIĘTA KONCEPCJA ŹRÓDEŁ PRAWA: KONTEKST ROLI UZASADNIENIA POLITYCZNEGO, ZWYCZAJU I PRECEDENSU

The study analyses the ‘developed concept of sources of law’ created by Zygmunt Ziemiński in the second half of the 1960s, which was extremely important in Polish legal theory. Its main feature is a departure from the exclusivity of treating legal regulations as a source of law. While legislative competence plays a primary role in the conception, the inclusion of a norm in the system of law is also determined by other factors. The most characteristic in this context is the presence, in addition to the rules of exegesis (interpretative, inferential and conflict-solving), of three other factors discussed in this paper: political justification (legitimizing the legal system as a whole), customs (social norms introduced into the legal system by judicial decisions) and precedent (confirming an extra-legal norm or creating a legal norm after the acceptance of such an act by legal doctrine). This is why the concept not only breaks the positivist theoretical-legal paradigm, but also creates a realistic picture of the sources used in the decision-making processes of applying the law.

Keywords: sources of law; political justification; custom; precedent

W opracowaniu analizie poddano, niezwykle ważną w polskiej teorii prawa, rozwiniętą koncepcję źródeł prawa autorstwa Zygmunta Ziemińskiego. Jej cechą jest odejście od wyłączności traktowania przepisów prawnych jako źródła prawa. Wprawdzie kompetencje ustawodawcze odgrywają w niej podstawową rolę, ale o przynależności danej normy do systemu decydują także inne czynniki. Najbardziej charakterystyczne w tym kontekście jest włączenie, obok reguł egzegezy (interpretacyjnych, inferencyjnych i kolizyjnych), trzech innych omawianych w tym artykule czynników: uzasadnienia politycznego (legitymizującego system prawny jako całość), zwyczaju (norm społecznych wprowadzanych do systemu prawa przez decyzje sądowe) oraz precedensu (potwierdzającego normę pozaprawną lub tworzącego normę prawną po akceptacji

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takiego aktu przez doktrynę prawną). Koncepcja ta nie tylko przełamywała pozytywistyczny paradygmat teoretycznoprawny, ale tworzyła realny obraz źródeł wykorzystywanych w decyzyjnych procesach stosowania prawa.

Słowa kluczowe: źródła prawa; uzasadnienie polityczne; zwyczaj

I. INTRODUCTORY REMARKS

This study aims at analysing a conception advanced by Professor Zygmunt Ziemiński, which proved extremely significant in Polish legal theory, concerning the broadly understood sources of law. At the same time, it was so profoundly authorial that it hardly ever requires to be specified using the name of its originator. Regrettably, the scope of this study does not permit discussing all its components, which is why – in order to demonstrate the originality and potential of the conception – emphasis has been placed on the relatively ‘least obvious’ elements relative to the order of statutory law and the predominantly theoretical discourse (especially when the conception was taking its shape). Specifically, this applies to the law-making nature of political justification as well as custom and precedent, all of which feature in the conception. Their relationship with the other components is that, on the one hand, they complement the source which is essential to that order, namely legislative competence; on the other, they may constitute a viable component of reasoning that implements interpretive directives, rules of legal inference and conflict of law rules, all of which are collectively referred to in this conception as rules of exegesis.

The analysis of these aspects in the conception will rely on several works in which it appears in its entirety, dating from different periods of Ziemiński’s scholarly activity. This is because the conception evolved from the second half of the 1960s, beginning with the paper entitled *Kilka uwag metodologicznych o koncepcjach źródeł prawa* [Some methodological remarks on conceptions of the sources of law], which discussed its methodological foundations and outlined its components,² and then in the subsequent parts of the educational studies on legal theory: *Teoria państwa i prawa, Część druga: Zagadnienia teorii prawa* [Theory of State and Law, Part 2: Issues of Theory of law]³ and *Teoria prawa* [Theory of Law].⁴ The ‘original’ version of the conception saw its elaboration in Professor’s magnum opus, *Problemy podstawowe prawoznawstwa* [Fundamental Problems of Jurisprudence]⁵, only to appear yet again (already in a synthetic form) in the successive textbook editions of the Poznań

² Ziemiński (1967): 87–97.

³ Ziemiński (1969): 107–128.

⁴ Ziemiński (1972): 77 f.; (1977): 76 f.; (1978): 79 f. That last volume is identical with the earlier editions and the 1969 study but, being more readily available than the latter, it serves to locate and cite the author’s particular claims.

⁵ Ziemiński (1980): 252 f. (the seminal nature of that work is asserted by Wronkowska 2022: 52).

school of legal theory from the 1990s: *Zarys teorii państwa i prawa* [Introduction to the Theory of State and Law]⁶ and *Zarys teorii prawa* [Introduction to the Theory of Law].⁷

This study adopts the perspective of an external observer who neither directly witnessed the formation and evolution of the conception, nor has heard its assumptions and substance presented at departmental and faculty seminars and conferences. The absence of such experience means that certain conjectures will be made as to Ziemiński's intentions, relying on the links between the conception and other parts of his impressive body of work. Although these intuitions may be incorrect to some degree, the risk of analysing the conception and its selected components is still worth taking. At times, the analysis assumes a more critical bias, which nonetheless duly recognizes the conception's significance. Such an approach derives not only from extraordinary respect for Professor Zygmunt Ziemiński and his scholarly achievement, but also (let it not be regarded as audacity) from the somewhat similar viewpoint that the author of this study adopts with respect to the set of law-making facts in the decisional context of the application of law.

II. THE CONCEPTION: GENERAL REMARKS

1. Undoubtedly, the developed conception of the sources of law should be regarded as one of the foremost theoretical-legal paradigms advanced by Ziemiński and, simultaneously, as a conception distinguished by the impact it had on Polish legal theory and legal sciences in general. In keeping with a theoretical-legal counter-current that challenged the then dominant 'positivist-Marxist' approach, it altered the paradigm of the theoretical-legal analysis of law, with a novel description of 'the rules of the law-making game',⁸ to use the author's turn of phrase. It may have coincided to some extent with other novel insights into the legal order,⁹ yet it was distinct, being a 'comprehensive' conception.

Although the core of the conception with its six essential components remained invariable, it was a living idea as it evolved in the detail, which is also reflected in the changing nomenclature of the individual components. However, it is still a relevant framework, which even today numerous legal theorists consider to be a model for formulating (regardless of the modified language, different scopes of research and research methods) propositions that concern both the overall picture of law and its specific aspects.

⁶ Redelbach, Wronkowska, Ziemiński (1992): 179–185.

⁷ Wronkowska, Ziemiński (1997): 141–146.

⁸ Ziemiński (1974): 107.

⁹ Cf. e.g. Stelmachowski (1967) regarding potential judicial law-making, or Wróblewski (1967), (1969) with respect to precedent or the concept of the rule of decision. The impact of Ziemiński's conception within civil law as discussed by Stelmachowski (1990): 83 f.

2. The components of the conception, which in itself is situated within the order of statutory law,¹⁰ include (following a consistent order in all works): political justification, legislative competence, law-making custom and precedent, interpretive directives, rules of legal inference, and rules of conflict of laws.

Despite its 'second place' in this array of sources, legislative competence is an essential component of the conception. Indicating the grounds for the inclusion of legal provisions in the system of sources of law, it associates the basic form of legislation precisely with the normative acts which comprise them, in line with the characteristics of the order of statutory law.

The remaining components of the conception possess varying ability to add to the system of formal sources. While it may be somewhat surprising that the rules of exegesis (interpretive directives, rules of conflict of law, and inference) are qualified as unequivocally law-making within the conception, no realistic account of the legal order can dismiss their contribution to the substance of the law in operation. However, the other two (or actually three) components contribute the most to the originality of the conception. This is because recognizing the presence of custom and precedent requires one to venture decisively beyond the convention of the positivist vision of law (especially considering Polish legal realities when the conception was created). As for political justification, it shifts the role of a component of the conception from the formula of determining legal substance to the category of political influence. This is to some degree unique, because absence of direct references to the arguments used in political sciences is characteristic of Ziemiński's entire body of scholarly work.

All these components of the system are asserted to determine the validity of a legal norm in the system of law.¹¹ However, the apparent point of reference for such a qualification is not only *thetic* quality (which is a 'natural' category solely in the case of legislative competence) but also efficacy, which is not measured in terms of a legal norm¹² but on the scale of the entire legal order. Although Ziemiński does not elaborate on this perspective immediately within the conception of the sources of law, it seems that the aspect of efficacy more cogently justifies the presence of each component – other than legislative competence; notably, it 'facilitates' understanding why political justification becomes a factor that influences the role and the effect of the individual components of the system. It thus becomes possible to accentuate the essence of the entire system of sources, as well as each of those sources separately. As a result, it seems, the paradigm may be construed as a conception of the sources of law in the decisional sense: a comprehensive set of vehicles of legal content, which provide the basis for decisions as part of the application of law

¹⁰ The author clearly states that the order of common law is a case apart (e.g. Ziemiński 1978: 85).

¹¹ Ziemiński (1978): 80; Kordela (2015: 232) defines the first three components as acts of valid introduction of norms into the legal system, while the latter three are conceived as rules which prescribed that norms with a particular substance be associated with given facts.

¹² Which, generally speaking, is a component of the axiological validity of a norm, Ziemiński (1980): 176–178; Wronkowska, Ziemiński (1997): 39–42.

and binding qualification of the validity of a norm – including the statement of its applicability. Thus, it constitutes a vital element in the validation stage in the operative interpretation of law which is involved the decision-making in the application of law.¹³

Hence, the following analysis will focus on two components of the conception, spanning three types of sources (political justification, custom, and precedent); these ‘soft’ components – as they may be described – contribute to the originality of the concept and simultaneously define the role of the remaining elements.

III. POLITICAL JUSTIFICATION

The term ‘political justification’ first appears in Ziemiński’s 1969 work,¹⁴ replacing the previous ‘axiomatic part’ in the concept of sources of law.¹⁵ Later on, it assumes the terminological form of ‘ideological assumptions’,¹⁶ only to ‘return’ to the original name in the aforementioned textbook editions.¹⁷ However, the evolution of the nomenclature did not involve any significant changes in the approach to that component or in its role in determining the validity of a legal norm. Still, the emphasis on the ideological character of that justification (premises) may suggest that it was found to be more axiologically permanent in the context of its influence on the framework of sources of law and, consequently, on the substance of law.

Given the author’s explicit declaration, it may be surmised that the inclusion of this factor in the conception resulted from the intention to depart from the normativist approach to the legal norm and the legal system. This is evinced, for example, in the proposition that it would be superfluous to look for this kind of justification ‘in some imaginary “fundamental norm” of competence which grants the competence to enact a constitution.’¹⁸

The essence of political justification means, in most general terms, the presence of a political axiology in the conception of the sources of law. Characteristically, its content is not directly associated with the will of the political decision-maker (Ziemiński does not use this term at any rate) but with a political doctrine.¹⁹ Even if that doctrine comprises an ‘official political programme’ (or ideological assumptions), this must imply a broader platform for

¹³ Within the conception, the distinction between the rules of validation and exegesis featured in its expanded version (Ziemiński 1980: 252) and in the textbook versions (Wronkowska, Ziemiński 1997: 142).

¹⁴ Ziemiński (1969): 110.

¹⁵ Ziemiński (1967): 90.

¹⁶ Ziemiński (1980): 262.

¹⁷ Wronkowska, Ziemiński (1997): 142.

¹⁸ Ziemiński (1978): 81.

¹⁹ Ziemiński (1978): 81. Although the author does not specify how this concept is to be understood, one should nevertheless assume that the doctrine is formed based on the dominant scientific views, sovereign political concepts and political ideology.

formulating the political or ideological foundations of the legal system beyond just the 'sovereign' aspect, which might also be seen as an additional argument in favour of abandoning the positivist conception. This departure, it seems, would have been even more pronounced if the author had combined what was after all an axiological dimension of justifying the system of sources of law with social (moral) or cultural-legal axiology. This would have neutralized the impact of political axiology and enable the axiological foundations of the system in democratic legal orders to be defined more thoroughly.

The fact that this component was distinguished implies that political discourse was recognized to influence legal discourse, which is indicative of a realistic view of the essence of law, whereby one seeks to ensure 'realness of the norms that are laid down'.²⁰ Considering effective law-making and functioning of law, this requires an institutional and axiological link with the sphere of politics and power. Hence, this factor is formulated descriptively in the conception, as the latter does not construe political justification as a postulation of influence (let alone a postulation of broad influence). This tallied with the author's circumspection – to say the least – with regard to justifying the political system at the time and relying on the Marxist paradigm.²¹

Unlike the other components, political justification was distinguished using the category of influence rather than the category of direct determination of normative substance, which somewhat diminishes its role in the system of sources. However, the extent of that influence is not uniform. Oriented towards legislative competence in the original version of the conception,²² it was extended in the later iterations to encompass the other components of the system, primarily the rules of legal interpretation and the process of its application, especially where they involve decisional leeway.²³

At the same time, political justification is approached from the dimension of universal influence. The author did not make any conclusive assertions about the place and the contribution of this factor in the Polish legal system, but neither did he associate its presence with any particular type of political system. The relevance of such an assumption is reflected in the distinction between two modes of socio-political legitimization of the legal system and the influence on the shape of the system of the sources of law and their functioning, which rely on force on the one hand and trust on the other.²⁴ This duality must – and Ziemiński did not address this – translate into distinct roles and contents of political justification in autocratic and democratic political systems.

²⁰ Ziemiński (1978): 81.

²¹ Nonetheless, Ziemiński did resort (uniquely within this conception) to the category of 'ruling class' as he discussed the situation when law assumes the form of a statute (1980: 256) and, at one point, refer to the Marxist definition of law (Ziemiński 1978: 79).

²² Ziemiński (1978): 81.

²³ Ziemiński (1980): 156–157; Wronkowska, Ziemiński (1997): 143.

²⁴ Ziemiński (1980): 253, 256.

IV. CUSTOM AND PRECEDENT

1. General remarks

Despite significant differences, both custom and precedent are found together in each version of the analysed conception, operating in an important functional relationship. In contrast to political justification, they are not approached as a category of influence on the system of sources, but as a normative component which directly extends the scope of the system (or set) of the sources of law.²⁵ This is noticeable even though the author underlines the marginal practical significance of both components in the order of statutory law²⁶ which, incidentally, caused them to be neglected as a matter of inquiry in the (Polish) science of law.²⁷

The nomenclature relating to those sources also fluctuates in the successive versions of the conception. In the early versions they are referred to as 'law-making custom and precedent',²⁸ transitioning to 'unwritten sources of law'²⁹ in 1980, and subsequently become the 'law-making role of custom and precedent'³⁰ in the final textbook version.

Ziemiński ascribes law-making capacity to both sources, despite the fact that one of the categories of precedent was unequivocally determined to lack that property (at least in the Polish legal order). Also, he did not explain the meaning of the joint designation the 'unwritten sources of law' for both components, apparently tacitly assuming that this denotes 'extra-statutory' sources (a precedential decision is a 'written' source after all).

The integration of custom and precedent into the system coincides with a definite appreciation of the role that legal doctrine plays in determining the rules by virtue of which both components are deemed admissible as sources of law (especially in the cases of decisional leeway). Indeed, Ziemiński finds that this doctrine possesses the 'agency' to grant a decision-making role to both sources, almost ignoring the autonomous role of case law in this respect. It would seem, however, that his notion of doctrine goes beyond the science of law, enabling tacit inclusion of the 'practical doctrine' (i.e. the views of the judiciary) within the scope of this notion. This would correspond to the analogous appreciation of the influence of political doctrine on the shape of political justification, as discussed earlier.

²⁵ See Ziemiński (1967: 92), where the author refers to those components as the 'empirical part' of the conception.

²⁶ Ziemiński (1978): 85.

²⁷ Ziemiński (1980): 261.

²⁸ Ziemiński (1978): 83.

²⁹ Ziemiński (1980): 156–157.

³⁰ Wronkowska, Ziemiński (1997): 143.

2. Custom

The role of custom as a component of the conception derives from the assumption that there exists a general norm that emerges in a social reality and, having been sanctioned by a relevant state authority, becomes the basis of legal substance, however difficult its formulation might prove.³¹ Custom as a source of law, being 'prior' to law, is 'incorporated' into the system by the decisions involved in the application of law (chiefly judicial ones, although the independent role of the judiciary in this respect is not in any way underscored by the author). This involves legal doctrine, which determines not so much the content of such norms as the general admissibility conditions for such a measure to be effected.³²

One may ask whether all extra-legal social norms – inclusive of the axiologically justified ones – are to some extent 'represented' in this conception by custom. After all, in that fragment of the conception Ziemiński does not draw directly on moral values which, given the separate role attributed to political axiology within political justification, diminishes the importance of autonomous social values in this conception. The question is warranted insofar as the absence of such a reference does not tally with the importance that Ziemiński attached to (mainly moral) axiology in the legal order.³³

Admittedly, the above observation applies to the early versions of the conception, as its extended variant already includes the category of the principles of social co-existence.³⁴ Yet, even the latter does not underscore their moral substance, which in such a framework usually co-occurs with the customary content. Irrespective of that 'deficiency', Ziemiński mitigated the significance of these principles, and highlighted their dependent role in determining rights and obligations.³⁵

Characteristically, despite formulating numerous theoretical-legal propositions on the grounds of civil law³⁶ as well as using direct references to customary norms in the Polish Civil Code, Ziemiński actually ignores their links with that branch of law whilst noting and stressing the role of custom in constitutional practice.³⁷

3. Precedent

Precedent is introduced into the system of the sources of law differently than custom. The manner of its inclusion depends on the law-making or non-law-making attribute of precedential decisions, a distinction that was consistently made following the earliest versions of the conception.

³¹ Ziemiński (1980): 264.

³² Ziemiński (1978): 84.

³³ Ziemiński (1990), (1992).

³⁴ Ziemiński (1980): 261, 266.

³⁵ Ziemiński (1980): 266.

³⁶ Ziemiński (1978): 27–28 (concerning competence norm) 156 (concerning the conception of subjective rights), 163 (concerning thethetic legal relationship).

³⁷ Ziemiński (1978): 85.

Here, the law-making nature of a precedent is associated with the absence or vagueness of normative grounds which would inform decision-making in the application of law. Still, the decision may be made, which subsequently causes the legal doctrine to grant it law-making capacity and validity,³⁸ as it were, having recognized that such a decision is based on some general norm. Non-law-making precedent, on the other hand, is a decision which reproduces a general norm as a specific corollary of the latter, having been determined by the sameness of the *ratio decidendi* in both models of conduct. The decision in question may sanction a customary norm, while its normative character is also corroborated by the doctrine.³⁹

At this point in the conception, one should note the significant role of the legal doctrine that supersedes case law, particularly where it bears on the normative nature and the role of precedent, since it is impossible for the latter not to be linked to judicial decisions. However, Ziemiński consistently avoids stressing the impact of case law where the role of this component is at stake, including the question of its direct law-making nature. Even if one accepts the aforementioned broader understanding of the legal doctrine, in which it transcends the scope of jurisprudence alone, it is precisely that component which offers room for case law to be 'appreciated'. For one reason or another, Ziemiński chose not to do so, as not only did he not link that component with the requirements concerning, for example, the independence of judges or the courts, but in fact he also failed to include these entities in the terminology of the conception altogether.⁴⁰

In this respect, the only exception is made (in a later version of the conception) to emphasize the role of guidelines for the justice system and judicial practice issued by the (Polish) Supreme Court.⁴¹ Although they were not attributed precedential quality, Ziemiński (aptly) noted their hybrid nature – combining elements of case law and judicial law-making – and highlighted their function in providing binding directives of the policy which informs the application of law.⁴²

V. SIGNIFICANCE OF THE CONCEPT

1. The developed conception of the sources of law is undoubtedly formulated in declared opposition to the normativist conception, which is most evident in the assertion of political justification at its core, in a sense replacing the Kelsenian basic norm.⁴³ It also appears that the conception should be seen

³⁸ Ziemiński (1978): 84.

³⁹ Ziemiński (1978): 83–84.

⁴⁰ Opting for the term 'jurists employed in the justice system' instead of 'judges'. Cf. Ziemiński (1980): 262.

⁴¹ Ziemiński (1980): 261.

⁴² Ziemiński (1980): 265.

⁴³ Ziemiński (1978): 81.

as contrary to the Marxist conception (despite the suggestion of such a connection in its original version and the use of the notion of the ruling class⁴⁴) as well as to legal positivism, which (in its classical version) would not admit the law-making capacity of factors other than acts of political power. On the other hand, the conception displays certain affinities – albeit not articulated by the author – with Herbert Hart’s theory, notably with the component which distinguishes secondary rules and, among them, the rules of recognition, whose essence lies in recognizing certain norms of conduct as legal norms,⁴⁵ thereby going beyond the statutory establishment of legal provisions. In particular, their role is not unlike those of custom and precedent, or the rules of exegesis employed in decisions on the application of law, even if Ziemiński’s conception does not ‘appreciate’ the role of the judiciary in their creation.

Combining theoretical and practical perspectives, the conception is not at all remote from the functionalist approaches (which its author does not verbalize either). Indeed, it tacitly points to a kind of *law in the action*. This seems to be a pertinent analogy, even if one assumes that Ziemiński held functionally oriented Scandinavian jurisprudence in higher esteem than American functionalism, as evinced by the references he makes in his works to various aspects of the conception advanced by Alf Ross.⁴⁶

The innovativeness of Ziemiński’s paradigm is not diminished by its association with other contemporary Polish conceptions which stressed the role of ‘extra-statutory’ sources of law. They either derived from civil law (as in Andrzej Stelmachowski’s conception of judicial law-making⁴⁷) or from legal theory (as in the concept of the rule of decision and typology of precedent expounded by Jerzy Wróblewski⁴⁸). Despite the fact that they went further (allowing the law-making of courts) or were more detailed (elaborating on the theoretical-legal essence of precedent) than the individual components of the system of sources in Ziemiński’s conception, they were not ‘comprehensive’ and would not qualify precisely as ‘developed’ with regard to the crucial (even ‘identifying’) fragment of the legal phenomenon that the system of the sources of law must always be.

2. Given the above links and affinities, it would fairly clearly follow that the set of the sources of law within Ziemiński’s conception is ‘de-positivized’ and that it dismisses the monopoly of legislation as the only form of law-making, especially in terms of its influence on the decision-making processes in the application of law. This highlights a peculiar *junctim* between the actions of the legislator and the actions of other actors, or between the norms established by statute and the extra-legal norms (custom, moral norms, as well as political norms), whose extra-legal nature may vary in any case. This would support the shift of the focal point in how law is construed, namely from the

⁴⁴ Cf. n. 21.

⁴⁵ Hart (1961): 92–100.

⁴⁶ Ziemiński (1978): 53–54; (1980): e.g. 126, 135, 152, 258, 264, 289, 535.

⁴⁷ Stelmachowski (1967).

⁴⁸ Wróblewski (1969).

system of law to the legal order (even though Ziemiński did not use the latter term), since the legal order prioritizes the real role of sources in recognizing given norms as legal norms, which in itself goes beyond the outcomes of actions undertaken as part of legislative competence. Also, the conception would thereby gain an additional practical value, as it thoroughly and realistically represents decision-making in the application of law, even if there is a certain deficit as the conception fails to take into account extra-legal norms other than customs, and does not associate the essence and role of precedent with the case law of the courts.

However, Ziemiński strives to ensure that the conception does not 'promote' such a 'slackened' perception of law which would lead to a 'disruption of the doctrine of the sources of law', thus adversely affecting the juridical precision of both the structure of the legal system and the recognition of particular facts as law-making facts or particular norms as valid legal norms.⁴⁹ Likewise, this does not mean that the conception fails to acknowledge the role of legislation, which, after all, determines the substance of law, especially in a statutory law culture. This is tangibly reflected in the term 'legislative competence' (i.e. 'law-giving' as opposed to 'statute-giving'), although at times the contribution of other components of the conception to the 'game of law' mentioned at the outset may undermine that 'terminological emphasis'.

Considering the features involved in the process of the application of law (judicial law in particular) as well as the operative legal interpretation, the conception may be claimed to have accurately rendered the participation of individual 'vehicles of law' in constructing the normative foundation for the decisions regarding application of law (which would coincide to some extent with the notions espoused by the author of this study). Hence, the formula 'developed conception of sources of law' could be supplemented with 'in the decisional approach', denoting a set of components that are taken into account when making such a decision and that realistically influence its content.

3. It is quite characteristic that all components of the conception (except for competence) are linked with the role of doctrine (mainly legal, but also political), which in the case of legal doctrine seems to be understood broadly enough not to be limited to the science of law or even less theory, but encompasses 'practical doctrine' as well.

If accurately surmised, such a subjective extension would explain why Ziemiński was reluctant to note the independent role of case law (despite the custom being introduced into the legal order by virtue of judicial decisions and despite the role of law-making precedent, in which the judiciary is unavoidably involved), with respect to which Ziemiński does not assert any axiological or pragmatic demands. Even more, he did not actually use the terms such as 'judge' and 'court', replacing them with 'jurists employed in the justice system';⁵⁰ not only does this sound rather imprecise, but it also seems

⁴⁹ Ziemiński (1980): 267.

⁵⁰ Ziemiński (1980): 262.

to be formulated with a certain degree of depreciation towards the judiciary as an entity that contributes to the legal order.

Despite these limitations, Ziemiński's conception offers scope to reflect on the essence and extent of judicial discretion. It does not, however, suggest a state that corresponds conceptually to today's notion of judicial activism, and certainly does not reach the point where one could consider the issue of judicial law-making in the Polish legal order. On the other hand, it constitutes a prototype for the theoretical-legal conceptions put forward today (and endorsed by the author of this study), which assert that the concept of law (legal order) in the culture of statutory law includes 'extra-statutory' vehicles of law – used particularly in the processes of the judicial application of law – such as extra-legal criteria, non-formalized principles of law, and previous judicial decisions, which may be attributed the functional status of precedent.⁵¹

In this context, the developed concept of sources of law, in which Polish legal realities are referenced by the author only occasionally, appears overall to be a universal conception, one which tallies (allowing for terminological differences and the shift of emphasis as to the roles of its individual components) with the characteristics of various legal cultures. Although Ziemiński' did not explicitly declare such an intention, this apparent correspondence does not seem exaggerated.

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⁵¹ Leszczyński, Liżewski, Szot (2018); Leszczyński (2021).

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