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MIKOŁAJ HERMANN[a]

CONVENTIONAL ACTS AND THEIR NORMATIVE CONSEQUENCES: CONTROVERSIES OVER THE POZNAŃ CONCEPT OF CONVENTIONAL ACTS

CZYNNOŚCI KONWENCJONALNE I ICH KONSEKWENCJE NORMATYWNE: KONTROWERSJE WOKÓŁ POZNAŃSKIEJ KONCEPCJI CZYNNOŚCI KONWENCJONALNYCH

The concept of conventional acts is one of the foremost achievements of the Poznań School of Legal Theory. The aim of this paper is to resolve doubts concerning the relationships between constitutive rules and norms of conduct, whereby the norms bear on conventional acts in a twofold manner. On the one hand, they may regulate the performance of such acts and, on the other, attach normative consequences to a performed act, as a result of which the normative situation of certain entities changes. Focusing on the latter aspect, it was necessary to compile a catalogue of possible normative consequences and to decide whether such consequences are prerequisite if an act is to be qualified as conventional. The analysis warrants the conclusion that the existence of a conventional act does not depend on whether it entails normative consequences. The correlation between a conventional act and its normative consequences is not necessary, but merely functional, although its strength may vary. Also, it is likely that the confusion in this regard stems from the failure to distinguish between two types of effects which the acts in question produce, assuming that certain effects do in fact ensue. Specifically, one has to distinguish between an effect understood as the outcome of a conventional act and an effect understood as its normative consequence. It is presumed here that the effect of a conventional act is distinguished by a relevant constitutive rule, while any normative consequences following its performance should be approached only as a corollary of competence norms. Assuming that the relationship between constitutive rules and norms of conduct is functional enables the rules to be recognized as independent with respect to the norms. Furthermore, it also implies the need for two concepts of competence to be distinguished, namely conventional competence and normative competence.

Keywords: conventional act; constitutive rule; normative consequence of a conventional act; outcome of a conventional act; legal norm; competence norm; competence

Koncepcja czynności konwencjonalnych stanowi jedno z najważniejszych osiągnięć poznańskiej szkoły teorii prawa. Celem artykułu jest rozstrzygnięcie wątpliwości dotyczących związków, jakie

[a] Adam Mickiewicz University, Poznań, Poland /
Uniwersytet im. Adama Mickiewicza w Poznaniu, Polska
mhermann@amu.edu.pl, https://orcid.org/0000-0003-3035-9930

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występują pomiędzy regułami sensu i normami postępowania. Należy zauważyć, że normy na dwa różne sposoby odnoszą się do czynności konwencjonalnych. Z jednej strony mogą regulować dokonywanie takich czynności, z drugiej zaś – mogą z ich podjęciem łączyć pewne konsekwencje normatywne, polegające na zmianie sytuacji normatywnej określonych podmiotów. Koncentruję się na drugim wymienionym zagadnieniu, którego opracowanie wymagało przede wszystkim ustalenia katalogu możliwych konsekwencji normatywnych oraz rozstrzygnięcia, czy wywoływanie takich konsekwencji jest konieczne do przypisania czynności charakteru konwencjonalnego. Przeprowadzona analiza prowadzi do wniosku, że byt czynności konwencjonalnej nie zależy od tego, czy wywołuje ona konsekwencje normatywne. Tym samym związek pomiędzy czynnością konwencjonalną a jej konsekwencjami normatywnymi nie ma charakteru koniecznego, a wyłącznie funkcjonalny, chociaż różna może być jego siła. Sądzę przy tym, że jedną z przyczyn istniejących w tym względzie nieporozumień jest nieodróżnianie dwóch rodzajów skutków, jakie rozważane czynności powodują, przy założeniu, że jakieś skutki wywoływać muszą. Rozróżnić należy mianowicie skutek rozumiany jako wytwór czynności konwencjonalnej oraz skutek rozumiany jako jej konsekwencja normatywna. Przyjmuję, że wytworem czynności konwencjonalnej jest rezultat wyróżniony przez konstytuującą taką czynność regułę sensu, natomiast wszelkie konsekwencje normatywne wiążące się z jej dokonaniem traktować należy jedynie jako następstwo obowiązywania powiązanych funkcjonalnie z daną regułą sensu norm kompetencyjnych. Przyjęcie, że związek pomiędzy regułami sensu i normami postępowania ma charakter funkcjonalny, prowadzi do uznania samodzielności reguł sensu względem powiązanych z nimi norm, co w dotychczasowej literaturze budziło niekiedy wątpliwości. Oznacza również konieczność wyróżnienia dwóch pojęć kompetencji: kompetencji konwencjonalnej przyznanej przez regułę sensu oraz kompetencji normatywnej przyznanej przez normę kompetencyjną.

Słowa kluczowe: czynność konwencjonalna; reguła sensu; konsekwencja normatywna czynności konwencjonalnej; wytwór czynności konwencjonalnej; norma prawna; norma kompetencyjna; kompetencja

I. The concept of conventional acts – as well as the related concept of competence and competence norm[1] – represents one of the foremost achievements of the Poznań school of legal theory.[2] The ideas communicated in the 1972 paper 'Czynności konwencjonalne w prawie' [Conventional acts in law] by Leszek Nowak, Sławomira Wronkowska, Maciej Zieliński and Zygmunt Ziembiński, have evolved over the years.[3] They were supplemented and modified in various aspects by the authors themselves, primarily by Ziembiński, Zieliński[4] and Wronkowska,[5] though other scholars also contributed, including Tomasz Gizbert-Studnicki,[6] Andrzej Bator,[7] Wojciech Patryas,[8] Artur Kozak,[9] Marcin

[1] See esp. Ziembiński (1969): 23–41; (1991): 14–24; Zieliński (1997): 581–607.

[2] Czepita, Wronkowska, Zieliński (2013): 3–16.

[3] Nowak et al. (1972): 73–99. See also Nowak (1968): 147–158.

[4] Ziembiński (1980): 134–136, 160–172, 222–225, 328–334, 353–354, 417–418; (1985): 32–47; Zieliński, Ziembiński (1988): 60–64; Ziembiński, Zieliński (1992): 46–57, 99–101; Zieliński (2012): 25–30. As regards earlier studies, see Ziembiński (1966): 76–79, 109–112, 143–145.

[5] Wronkowska, Zieliński (1993): 47–72; Wronkowska, Ziembiński (2001): 104–105, 117–118; Wronkowska (2005a): 12–13, 178–180.

[6] Gizbert-Studnicki (1975): 70–82.

[7] Bator (2000): 48–73.

[8] Patryas (2001): 130–146; (2005): 75–89.

[9] Kozak (2004): 151–168.

Matczak[10] and, notably, by Stanisław Czepita,[11] who attempted to enhance the Poznań solutions with elements derived from John R. Searle's[12] conception of constitutive rules. One would also deliberate on a particular type of conventional acts, namely legislative acts as well as the constitutional review of law.[13]

The above evolution notwithstanding, it may be asserted that the core of the conception of conventional acts has endured unchanged, as it invariably enables effective resolution of numerous major issues, both theoretical and practical. At the same time, it should be noted that certain issues are still in need of a conclusive solution, such as the semiotic characterization of constitutive rules, including their qualification as definitions or directives *sui generis*. The latter involves the question of the essence of a conventional act that manifests solely in its designation which is distinct from the designation of a natural act that constitutes its substrate, or in a being which is distinct from such natural act.[14] Drawing on Searle's constitutive rules, Gizbert-Studnicki observed that it would require one to ascertain whether the relationship between constitutive rules and conventional acts is a semantic or an ontological one (or more circumspectly – quasi-ontological).[15] Furthermore, certain issues require more precise terms; specifically, this applies to the defects in conventional acts and the consequences to which they give rise, such as nullity, annulment or ineffectiveness, primarily – albeit not exclusively – in the domain of public law.[16] The latter problem sparks considerable controversy within the specialized sciences concerned with the law in force.

Since it would be impossible to address all of the above issues in this paper, I will confine myself to one which continues to cause serious contention even in the milieu of the Poznań school. Broadly speaking, it concerns the relationship between constitutive rules and the conventional acts they construct, on the one hand, and norms of conduct on the other, particularly where legal constitutive rules and the legal conventional acts they construct correlate with legal norms. Such an inquiry necessitates recalling the essential findings with respect to conventional acts.

II. According to the widely accepted definition, a conventional act of an *n* degree is an initial act, that is, a natural act (previously usually referred to as a psychophysical act) or a conventional act of an n-1 degree, to which

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[10] Matczak (2004).

[11] Czepita (1996); (2006): 9–28; (2008): 109–116; (2016): 109–147; (2017): 85–102.

[12] Searle (1969).

[13] Wronkowska (1996): 73–86; Kanarek (2004); Wronkowska (2005b): 113–140; Hermann (2012); (2013): 249–277; Czepita (2014): 3–19; Zwierzykowski (2016).

[14] Definitional nature of the constitutive rules is asserted by Czepita (1996: 164–167; 2016: 131–135), Patryas (2001: 130–146), Zieliński (Ziembiński, Zieliński 1992: 99–101; Zieliński 2012: 26). Ziembiński's position on the issue is equivocal: Ziembiński (1969): 38; (1985): 40–41; Ziembiński, Zieliński (1992): 47; Wronkowska, Ziembiński (2001): 31.

[15] Gizbert-Studnicki (2001): 128. Por. Ziembiński, Zieliński (1992): 55–57.

[16] Siedlecki (1965); Wronkowska (2001): 207–218; Kamiński (2006); Gutowski (2017a), (2017b), (2019).

a new cultural meaning is assigned by a constitutive rule, one which has been explicitly established or developed by custom.[17] Constitutive rules indicate, as the minimum: (1) the authorized subject (authority), and (2) the substrate of the conventional act: the initial act; in addition, they may also require the initial act to be performed in a particular manner or in particular circumstances. If, in its nature, a conventional act is a linguistic one, a distinction must also be made between the conditions applicable to the content and form. Examples of extra-legal conventional acts include formulating an utterance, offering a greeting and making a move in a game, whereas the conclusion of a contract, delivering a judgment and the passing of a normative act are all instances of legal conventional acts.

It is not uncommon for conventional acts to be vertically interconnected, by virtue of which a conventional act of the first degree, which invariably arises on the substrate of a natural act, becomes the substrate of a conventional act of the second degree, and then a conventional act of the second degree provides the substrate for a conventional act of the third degree, and so on.[18] For example, if a person draws a certain arrangement of lines as a natural act, this may be considered – in view of the constitutive rules of the alphabet – to constitute the use of writing; the use of writing as a first-degree conventional act – in view of the linguistic constitutive rules – amounts to formulating an utterance; subsequently, formulating an utterance as a second-degree conventional act – in view of the legal constitutive rules – may declare intent, which now represents a third-degree conventional act.

From the standpoint of the contemporary distinction between two basic types of conventions: coordinative[19] and constitutive[20] ones, the Poznań conception of conventional acts undoubtedly tallies with the latter. However, it may be noted that in addition to conventional acts, the authors of 'Czynności konwencjonalne w prawie' [Conventional acts in law] also distinguished cultural acts which are not oriented towards interpretation and bear the hallmarks of acts regulated by the coordinative convention.[21]

III. Concerning the relation between constitutive rules and norms of conduct, it must be stressed that the former exclusively construct conventional acts by indicating the conditions under which they come into effect (conventionalization of the act). Conversely, norms of conduct can correlate with conventional acts in two ways, resulting in two distinct types of link between rules and norms. On the one hand, norms of conduct may regulate the performance of the conventional act itself, whereby any requirements on the performance

[17] Zieliński, Ziembiński (1988): 61; Ziembiński, Zieliński (1992): 46–47; Wronkowska, Zieliński (1993): 47–48; Wronkowska, Ziembiński (2001): 30; Wronkowska (2005a): 12–13.

[18] Nowak et al. (1972): 84–86; Zieliński, Ziembiński (1988): 61; Ziembiński, Zieliński (1992): 46; Czepita (1996): 119–120; Wronkowska, Ziembiński (2001): 31; Czepita (2016): 118; Czepita (2017): 87–88.

[19] Lewis (1969). See also Dyrda (2013).

[20] Marmor (2009). See also Dyrda (2013).

[21] Nowak et al. (1972): 78–82.

of such an act that they may provide for on top of the constitutive rule do not affect its validity or invalidity;[22] on the other hand, norms of conduct may tie the performance of a conventional act with certain normative consequences. Thus, the conceptual apparatus advanced by Czepita respectively involves the formalization (normative regulation) of a conventional act by imposing an obligation, and the formalization (normative regulation) of a conventional act by determining the consequences.[23]

The first type of relationship does not seem to occasion any particular complications, therefore I believe it suffices to discuss it in general terms. Just as with natural acts, there is no doubt that norms of conduct can establish obligations pertaining to the performance of a conventional act. Two situations may be distinguished here, in which the performance of such acts:[24]

1) is not subject to obligation, which means that the norms do not establish either a prescription or a prohibition to perform a conventional act; in the case of law, this applies most often to private entities, since it is presumed with regard to authorities and related public entities that engaging in a conventional act to which they are authorized – even if it is not explicitly prescribed – usually constitutes an instrumental obligation that derives from general norms, including principles of law in the first place,[25]

2) is subject to obligation, with two possible variants, namely when:

(a) the norm prescribes a conventional act to be performed, whereby the obligation applies to all the authorized entities or only to certain categories of such entities, and arises regardless of the circumstances or exclusively in certain situations,

(b) the rule prohibits a conventional act from being performed by some of the authorized entities, in certain circumstances or in a manner other than stated in its content; importantly, it appears that in no situation would such a prohibition be a general one and pertain to all authorized entities, all circumstances or any possible manner, as this would undermine the validity of the very constitutive rule, unless such a rule and the norm prohibiting the performance of the conventional act it constructs belonged to different systems (e.g. a legal norm may prohibit an act of initiation of a new member practiced within a particular cult that involves bodily mutilation or animal torture).

Among the cases distinguished above, a partial prohibition on the exercise of the authority to perform a conventional act raises the most doubts. With respect to law, Ziembiński observes in his disquisition that if a specific provision prohibits the performance of an act constructed by legal constitutive rules in certain situations, then most often this provision should be interpreted to ex-

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[22] Czepita (2006): 16–18.

[23] Czepita (2006): 9–28; (2008): 109–116; (2014): 3–19; (2016): 136–145.

[24] Ziembiński (1966): 78–79, 110; (1969): 31–32; (1980): 161, 170–172; (1985): 43; Zieliński, Ziembiński (1988): 64; Ziembiński (1991): 20; Ziembiński, Zieliński (1992): 37–38; Wronkowska, Zieliński (1993): 56–59; Wronkowska, Ziembiński (2001): 105; Zieliński (2012): 28–30.

[25] Ziembiński (1969): 32; (1980): 171, 458; (1985): 44; Wronkowska, Zieliński (1993): 58–59; Zieliński (1997): 586–587; (2012): 28–30.

press a partial repeal (limitation) of the competence itself.[26] However, he cites examples where this is not the case, and a conventional act performed despite the prohibition remains valid, albeit illegal: the issuing of an unlawful order to a soldier (as long as it does not enjoin a criminal act),[27] the acknowledgement of the declarations of marriage by the wrong head registrar,[28] the parliament enacting legal norms which are contrary to the constitutional requirements.[29]

One should perhaps add that, in fact, a partial prohibition on the exercise of the authority to perform a conventional act which does not simultaneously repeal the relevant competence itself is by no means an exception to the rule. Such a possibility is quite frequently used by the lawmaker, usually for the sake of the security of legal transactions, for example issuing an uncovered cheque, concluding a civil-law agreement where exploitation is involved, performing a legal act without the consent of a corporate body required by the provisions of internal acts, or concluding a marriage despite the presence of legal obstacles.[30] The consequences of performing a conventional act contrary to a prohibition may vary.[31] They may be divided into those relating to the entity that performed the act (criminal, civil or disciplinary liability) and those relating to the act itself (empowering the authorities or entities concerned to annul it with *ex nunc* or *ex tunc* effect). It is also possible for the breach of the prohibition to incur no consequences, particularly if the norm proscribed the performance of a conventional act in a manner other than stated in its content, but the requirements it stipulated were merely order-oriented or ceremonial.

The second type of relations between the constitutive rules and norms of conduct is associated with the normative consequences of conventional acts that such norms determine. In order to discuss the issues involved in detail, it is first necessary to establish how such consequences should be construed.

IV. The normative consequences of conventional acts denote the effects that the performance of a specific conventional act bring about for the addressees of the norms of conduct (legal norms), which consist in a change in their normative (legal) situation.[32] In principle, the effects in question are determined by competence norms coupled with constitutive rules, which provide that the performance of a conventional act should be associated with such and not other consequences. In their works, the scholars of the Poznań school occasionally adopted distinct approaches to the matter, while their individual viewpoints also tended to shift over time. Hence, the issue cannot be discussed exhaustively and only the general conclusions need to be presented instead.

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[26] Ziembiński (1966): 110; (1969): 31–32; (1980): 171. See also Zieliński (1997): 587.

[27] Ziembiński (1966): 110; (1980): 171–172; Ziembiński, Zieliński (1992): 48.

[28] Ziembiński (1966): 111–112; (1985): 43–44; (1991): 23.

[29] Ziembiński, Zieliński (1992): 37–38.

[30] Hermann (2013): 253–255, 260, 262; Wronkowska, Hermann (2015): 202–203.

[31] Nowak et al. (1972): 90–91; Wronkowska (2005a): 179–180; Hermann (2013): 251–266, 272–273; Zieliński (2012): 29–30; Wronkowska, Hermann (2015): 202–203.

[32] Ziembiński (1966): 77–78.

One readily notices that in some of the discussed works the normative consequences of conventional acts were construed in a relatively narrow sense. Ziembiński would sometimes note that in the case of the norm governing norm-giving competence (including legislative competence), the performance of a norm-giving act imposes an obligation on the entities that are subject to such competence: a prescription to comply with the norms thus established. As for the norm which grants the competence to actualize the obligation, the performance of a conventional act results in the actualization of the obligation in the form of a prescription to respond appropriately to the given act.[33]

Encompassing only the consequences provided for by competence norms, which combine the performance of a conventional act with an obligation in the form of a prescription to take a certain action, such a narrow view of normative consequences has become the object of critique. Leaving the norm of legislative competence aside, Patryas distinguished four possibilities for the competence norm to tie the performance of a conventional act with the following consequences: (1) there arises an obligation which consists in the prescription to undertake a certain act (e.g. a decision to have a building demolished); (2) there arises an obligation which consists in a prohibition against undertaking a certain act (e.g. a decision to have construction work discontinued); (3) an exemption from the obligation that consists in undertaking the prescribed act (e.g. remission of a tax debt); (4) an exemption from the obligation that consists in refraining from a prohibited act (e.g. a building permit).[34]

In addition to the four types of normative consequences suggested by Patryas, Czepita also mentioned a case in which the performance of a certain conventional act prompts the performance of another conventional act, which only in conjunction leads to a change in the normative situation of a specific entity.[35] As an example, one could cite granting civil power of attorney, as it is only in combination with the performance of the appropriate conventional act by the attorney that it will produce certain consequences for the principal.

The broadest catalogue of consequences resulting from conventional acts was advanced by Matczak, although it should be noted that the latter employs the concept of competence rule, which he nevertheless equates with the constitutive rule.[36] Among such consequences, Matczak distinguished the following: establishment, amendment and derogation of a norm of conduct or a competence rule (in the case of competence rules that grant norm-giving competence), actualization of an obligation (in the case of competence rules that grant the competence to actualize an obligation), and meeting the condition for the application of another competence rule, which determines the validity of a conventional act performed on its grounds (in the case of competence rules that grant auxiliary competence).[37] Examples of the latter include

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[33] Ziembiński (1985): 40; (1991): 16–17; Ziembiński, Zieliński (1992): 50. Similarly Wronkowska, Zieliński (1993): 54–55.

[34] Patryas (2005): 87–89.

[35] Czepita (2016): 123–125, 127–128.

[36] Matczak (2004): 126–140.

[37] Matczak (2004): 140–146.

notification or consultation in administrative proceedings as a condition for issuing a decision.

Still, it is worth noting that if the works of the Poznań legal theorists are analysed in more detail, it becomes apparent that the critical assessment of the approach to the normative consequences of conventional acts is unfounded, as they were indeed understood more broadly in numerous publications. It would be fair to admit, however, that the matter has not been comprehensively discussed in one dedicated study; instead, different types of normative consequences happen to be stated in different sections throughout one particular work. As regards the norms governing norm-giving competence, they include the establishment of new obligations (e.g. the enactment of a norm) or the cessation of previous obligations (e.g. the repeal of a norm), and – as with other competence norms – the actualization of such obligations (e.g. the creditor selecting one of the alternative prestations) or their de-actualization (e.g. licence to sell alcohol, exemption from military service).[38] The obligations in question may consist in an prescription to take an action or prohibition against taking an action.

One also recognizes a situation in which the performance of a conventional act leads only to a partial actualization of obligation, which may only become actual when another conventional act is performed or another circumstance occurs (e.g. the obligation to report at the relevant military unit sees preliminary actualization when a mobilization posting is determined and final actualization when mobilization is declared, while the obligation to accommodate flood victims is subject to a preliminary actualization when a housing decision has been issued in view of an anticipated natural disaster, and final actualization when such a disaster occurs).[39]

To complement the catalogue of potential normative consequences, it is thus possible – by way of analogy – to speak of a situation in which the performance of a conventional act leads only to a partial de-actualization of an obligation, which will expire only when another conventional act is performed or another circumstance occurs (e.g. the obligation to perform an agreement is subject to preliminary de-actualization if, following default, the creditor determines an additional deadline for the debtor to perform the prestations, and to final de-actualization when, upon the ineffective expiry of such deadline, they terminate the agreement). With partial actualization and de-actualization of an obligation taken into account, one can readily admit the case discussed by Czepita and Matczak, where the performance of a certain conventional act does not directly result in any consequences but enables a subsequent conventional act to be performed; it is only through the combined performance of both that a change in the normative situation of a specific entity ensues.

A certain reservation should be made at this point. Zieliński noted that when the performance of a conventional act which is prohibited by law to some degree (e.g. the issuance of a cheque in a situation where it is not covered by

[38] Ziembiński (1966): 77–78, 109–111; (1969): 29–30, 33–37; (1980): 163–165, 170–171, 328–334.
[39] Ziembiński (1980): 330–332.

the funds in a bank account) actualizes the obligation to initiate proceedings aimed at imposing a sanction, the person who violates the norm prohibiting the performance of that act cannot be granted the competence to actualize the obligations of the competent state authorities.[40] Such a legal effect, resulting from the unlawful performance of a conventional act, should not therefore be treated as a normative consequence of the act but as a normative consequence of the breach of law. Thus, it is not a competence norm but merely an intervening norm: an intermediary norm between the sanctioned norm and the sanctioning norm.

V. Assuming a broad understanding of the possible normative consequences, one should ask at this point whether their occurrence is necessary, in conceptual terms, to qualify a particular act as conventional. A positive determination in this respect would mean that the acts which have not been tied to such consequences cannot be regarded as conventional. However, it seems that the authors of 'Czynności konwencjonalne w prawie' [Conventional acts in law] adopted the negative position, both at the time of writing as well as later.[41] This is supported by three arguments.

Firstly, it should be noted that the requirement for normative consequences to arise was never integrated into the definition of a conventional act. Instead, meeting that requirement was only relevant when such acts were to be attributed adequate appropriate social and, in particular, legal significance.[42]

Secondly, although practice has virtually always tended to highlight examples where conventional acts, in particular those constructed by law, are linked to certain normative consequences (e.g. the issuing of a normative act, the conclusion of a marriage, indictment, the issuing of an order, the conclusion of a civil-law agreement), it remained indisputable that conventional acts also included linguistic acts – whether performed orally or in writing – some of which certainly cannot be attributed such consequences.[43] For instance, formulating a descriptive or evaluative utterance in the course of an ordinary social conversation does not entail any normative consequences, even though it is an act regulated by, for example, moral norms, which prohibit deliberate transmission of false information or insincere communication of one's evaluative experience.

Thirdly and finally, the relationship between conventional acts and normative consequences is considerably weakened since partial actualization and de-actualization of obligations have been identified among the latter. It may be noted that failure to perform the subsequent conventional act which is required for complete actualization or de-actualization of an obligation to occur or when another requisite circumstance is absent, the initial conventional act will not ultimately result in a change of the normative situation of any entity.

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[40] Zieliński (2012): 27, 33–34. See also Zieliński (1997): 584.

[41] Czepita (1996): 149–150; (2017): 91.

[42] Nowak et al. (1972): 73.

[43] Nowak et al. (1972): 73, 75, 83–84; Zieliński, Ziembiński (1988): 61; Wronkowska, Ziembiński (2001): 30; Czepita (2006): 20.

Importantly, Czepita was the only scholar to adopt a markedly different approach to the necessary correlation between conventional acts and their normative consequences.[44] The author argued that an act that did not produce any effects in the normative situation of certain entities was devoid of the conventional nature. Ultimately, however, he rescinded that view in his last work on the issue, though he continued to assert that there exist such conventional acts for which it is conceptually necessary to entail certain normative consequences (e.g. making a promise or granting forgiveness).[45] He referred to those as conventional normative acts which, in particular, included conventional acts within private law and public law.[46] In such a paradigm, conventional acts other than normative acts would be created only by constitutive rules, whereas conventional normative acts would be co-created by constitutive rules and corresponding competence norms. I believe that one cannot concur with the above view, if only due to the fact that the definition of the conventional act should be uniform for all types of such acts. Consequently, the additional requirement according to which some of them would have to produce normative consequences in order to be attributed a conventional nature is impossible to accept.

Seeking to resolve this issue, I am in favour of the notion that the existence of a conventional act does not depend on whether it gives rise to normative consequences. In other words, the relationship between a conventional act and its normative consequences is not a conceptual prerequisite, but a purely functional element. Also, one of the reasons behind the misunderstandings in this respect is the failure to distinguish between the two types of effect that the acts in question produce, with the otherwise correct assumption that they must produce some effect. Specifically, a distinction must be made between the effect understood as the outcome of a conventional act and the effect understood as its normative consequence.[47] This distinction requires some further elucidation.

Just as all natural acts see their outcomes in the real world, conventional acts – as a superstructure based on the latter – will invariably produce theirs as well, but these emerge in a reality created by a given convention (e.g. linguistic, moral, religious, legal). The outcomes in question essentially involve the occurrence or cessation of conventional entities, objects or states of affairs. For example, the outcomes of the conventional acts of concluding a contract, entering into marriage or lawmaking are, respectively, a contract, matrimony and a legal norm, whereas the acts of terminating a contract, divorce and derogation of law result in the absence of contract, marriage and legal norm. Significantly enough, the outcome of a conventional act is in each case characterized by being distinct from the outcome of the natural act which provides its substrate. While a linguistic conventional act performed in speech results

[44] Czepita (1996): 147–149, 151, 157; (2016): 127–136.
[45] Czepita (2017): 92–99.
[46] Czepita (2017): 99–101.
[47] Hermann (2013): 267–268.

in a certain utterance, the outcome of the underlying natural act is a sound wave. It may be worthwhile to add that the mechanism is identical for the outcome of a higher-level conventional act and the outcome of its substrate, that is, a lower-level conventional act. While the outcome of the act of promising is the promise, the utterance is the outcome of the underlying linguistic conventional act.

I assume that a conventional act produces an outcome distinguished by the constitutive rule which creates the act, whereas any normative consequences of its performance are to be treated only as the corollary of the norms of conduct that are functionally connected with the given constitutive rule, notably legal norms, which represent competence norms. For example, the outcome of the conventional act of expropriation of real estate is expropriation: the transfer of ownership to a public entity, whereas imposing an obligation on the previous owner to transfer the real estate to the public entity is a normative consequence dictated by the legal norm which links such and not other consequences with expropriation.

It should be noted that in this approach each conventional act has its outcome; simultaneously, it is not that each conventional act must entail specific normative consequences, as this only depends on whether a corresponding norm is in force alongside the constitutive rule. The nature of the relationship between conventional acts and their normative consequences or, in other words, between constitutive rules and competence norms is, once again, merely functional, while its strength may vary. Let us illustrate this with a few examples.

The first has often been cited in the deliberations of the Poznań school scholars, namely the greeting in the form of a nod or hat tipping.[48] In our culture, greeting is associated with a normative consequence which consists in the actualization of the obligation to reciprocate the greeting, although its reciprocation does not actualize any subsequent obligation. The gesture initiating a greeting would be considered a conventional act because it produces normative consequences, whereas the same gesture in response would not be conventional, since it does not involve any of the consequences discussed. However, both the primary and the secondary gesture are undoubtedly conventional acts. Moreover, the analysis presented here concerns a society characterized by at least some degree of egalitarianism. After all, it is possible to imagine a different course of the interaction in an extremely hierarchical society, were the obligation to greet is imposed exclusively on persons from the lower strata whenever they encounter individuals from the higher strata. In such a case, not even the gesture which initiates the greeting entails a normative consequence, since the greeted does not have to respond. Thus, the functional link between the conventional act of greeting and its normative consequences is not particularly strong – it even turns out to be incidental. In contrast, a promise represents a somewhat different situation. Within any

[48] Nowak et al. (1972): 73, 78–79, 83; Ziembiński, Zieliński (1992): 46–47; Czepita (1996): 151; (2016): 116; (2017): 86.

known cultural system, a promise is only practical insofar as it is linked to a normative consequence which consists in the actualization of an obligation to keep one's word to someone. This link is still purely functional (although it is undoubtedly very strong), as it is conceptually possible to separate the conventional act from the normative consequence it produces.

Given the primary function of law, which is to regulate human conduct by means of norms that prescribe or prohibit certain behaviour, it would appear reasonable – on the face of it – to assume that at least conventional acts constructed by the legal constitutive rules invariably entail certain normative consequences. However, this assumption proves erroneous, because although conventional acts without normative consequences are few in this case, examples can still be found.

The first type of legal conventional acts with which the legislator does not (or at least does not have to) associate any normative consequences is the award of orders and decorations. This is because no one's obligations are actualized or de-actualized (even partially) when they are awarded. The fact that the aforementioned acts do not have normative consequences of a legal nature by no means undermines their status as legal conventional acts, since they have been constructed by the constitutive rules expressed in law. It would also be difficult to assert that they lack legal significance. When an order or decoration is awarded, the lawmaker grants a state authority the competence to formally honour certain persons for conduct compliant with legal norms and, at the same time, for conduct which surpasses the achievements of other addressees of legal norms in terms of heroism, commitment or at least constancy.

In this context, however, it may be worthwhile to cite the view expressed by Czepita who, having admitted that law does not associate normative consequences with the award of an order or decoration, stated that such consequences are determined – as if in lieu of legal norms – by customary norms, which enjoin that special respect be shown to the persons honoured in this manner.[49] This notion raises some doubts. On the one hand, even if one were to accept that the attribution of normative consequences constitutes a condition for an act to be recognized as conventional, the decisive factor is whether these consequences were determined within the normative system that encompasses the constitutive rule which constructed the act. The legislator would thus have to state such consequences directly in legal regulations or at least provide the latter with a reference to norms of a different type; however, no such measure was used by the lawmaker. On the other hand, one should perhaps ask whether customary norms indeed establish the obligation to demonstrate particular respect towards the honoured person or whether such an obligation is rather informed by the merits or achievements in view of which the honoured person was distinguished, while the award of an order or decoration itself already represents the performance of this obligation.

[49] Czepita (1996): 147–148; (2016): 128–129.

The second type of legal conventional acts to which law does not attach any normative consequences is the adoption of certain acts by the Sejm. In its decision of 7 January 2016,[50] the Constitutional Tribunal stated:

> Acts of the Sejm are diverse; among them, one will distinguish law-making acts, which contain legal norms and thus possess the character of normative acts ... (e.g. the Statute of the Sejm, provided for in Article 112 of the Constitution), as well as other acts, which do not contain legal norms. The division of the latter acts should be made based on the criterion of whether they do or do not give rise to legal effects. The acts which give rise to legal effects – and are legally binding – would include, inter alia, acts concerning the election of the holders of particular state bodies; in turn, the acts which do not produce any legal effects – and possess no legally binding power as a result – would include the acts specified in Article 69 of the Act of the Sejm of the Republic of Poland of 30 July 1992 – Statute of the Sejm of the Republic of Poland ... that is resolutions, declarations, appeals and statements.

According to the above, resolutions call upon a specific state authority to undertake a one-off action indicated therein, declarations express a commitment to a specific course of action, appeals communicate the request for a specific conduct, undertaking an initiative or task, whereas statements convey a position on a specific issue. Even though such conventional acts do not entail normative consequences of a legal nature, they retain the status of legal conventional acts, since they are constructed by the constitutive rules derived from laws. Nor can they be denied legal significance, considering that by means of its acts the Sejm – as a representative body – may formally, albeit non-bindingly, call for a particular course of action, commit itself to such a course of action or take a position in various areas of social life.

Assuming that the relationship between constitutive rules and the conventional acts they construct, on the one hand, and norms of conduct and the resulting normative consequences, on the other, is purely functional as opposed to being conceptually necessary, offers a valid counterpoint to the occasional allegations against the Poznań conception, in which it was asserted that the constitutive rules are not independent with respect to the related competence norms,[51] an issue which apparently was not sufficiently clarified in certain approaches adopted by the scholars of the Poznań school.[52] The findings this study arrives at warrant ascribing an independent role to the constitutive rules.

For this reason, it seems justified to expand the conceptual apparatus pertaining to competence by distinguishing two relevant notions:

1) conventional competence, understood as the authorization granted by a constitutive rule to perform a conventional act, irrespective of the normative consequences it may potentially entail (the constitutive rule is addressed to an entity authorized to perform a conventional act);[53]

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[50] Ref. no. U 8/15, published in OTK-A 2016/1.

[51] Czepita (1996): 130–131; Matczak (2004): 125–127.

[52] Nowak et al. (1972): 91–95; Ziembiński (1969): 37–39; Zieliński, Ziembiński (1988): 63; Ziembiński, Zieliński (1992): 50–51, 99.

[53] Ziembiński (1985): 44; Wronkowska, Ziembiński (2001): 36; Zieliński (2012): 27.

2) normative competence, understood as the authorization granted by a competence norm to cause – following the performance of a conventional act – certain normative consequences (the competence norm is addressed to an entity obligated to act as it prescribes, whereby it may happen that it is one and the same with the authorized entity).

Bearing in mind that a conventional act does not have to entail certain normative consequences, the fact that a given entity possesses normative competence simultaneously entitles it to conventional competence. However, this particular interdependence does not operate conversely.

References

Bator, A. (2000). Prawna czynność konwencjonalna jako działanie zinstrumentalizowane [Legal conventional act as an instrumentalized action]. In A. Kozak (ed.), Z zagadnień teorii i filozofii prawa. Instrumentalizacja prawa [Issues in the Theory and Philosophy of Law: Instrumentalization of Law] (pp. 48–73). Wrocław: Kolonia Limited.

Czepita, S. (1996). Reguły konstytutywne a zagadnienia prawoznawstwa [Constitutive Rules and Issues of Jurisprudence]. Szczecin: Uniwersytet Szczeciński.

Czepita, S. (2006). Formalizacja a konwencjonalizacja działań w prawie [Formalization and conventionalization of actions in law]. In S. Czepita (ed.), Konwencjonalne i formalne aspekty prawa [Conventional and Formal Aspects of Law] (pp. 9–28). Szczecin: Uniwersytet Szczeciński.

Czepita, S. (2008). Formalizacja i konwencjonalizacja w systemie prawnym [Formalization and conventionalization in the legal system]. In O. Bogucki, S. Czepita (eds.), System prawny a porządek prawny [Legal System and Legal Order] (pp. 109–116). Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego.

Czepita, S. (2014). Czynności konwencjonalne i formalne w prawie a proces prawotwórczy i rola Trybunału Konstytucyjnego [Polish legislative procedure and the role of the Polish Constitutional Tribunal from the perspective of the theory of conventional and formal acts in law]. Państwo i Prawo 69(12): 3–19.

Czepita, S. (2016). O koncepcji czynności konwencjonalnych w prawie [On the concept of conventional acts in law]. In M. Smolak (ed.), Wykładnia konstytucji. Aktualne problemy i tendencje [Interpreting the Constitution: Current Issues and Tendencies] (pp. 109–147). Warsaw: Wolters Kluwer.

Czepita, S. (2017). O pojęciu czynności konwencjonalnej i jej odmianach [On the concept of a conventional act and its types]. Ruch Prawniczy, Ekonomiczny i Socjologiczny 79(1): 85–102. https://doi.org/10.14746/rpeis.2017.79.1.7

Czepita, S., Wronkowska, S., Zieliński, M. (2013). Założenia szkoły poznańsko-szczecińskiej w teorii prawa [Foundations of the Poznań-Szczecin school in legal theory]. Państwo i Prawo 68(2): 3–16.

Dyrda, A. (2013). Konwencja u podstaw prawa. Kontrowersje pozytywizmu prawniczego [Convention at the Foundations of Law: The Controversies of Legal Positivism]. Warsaw: Wolters Kluwer Polska.

Gizbert-Studnicki, T. (1975). O nieważnych czynnościach prawnych w świetle koncepcji czynności konwencjonalnych [On invalid legal acts in the light of the concept of conventional acts]. Państwo i Prawo 30(4): 70–82.

Gizbert-Studnicki, T. (2001). Ujęcie instytucjonalne w teorii prawa [Institutional approach in legal theory]. In J. Stelmach (ed.), Studia z filozofii prawa [Studies in the Philosophy of Law] (pp. 123–134). Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Gutowski, M. (2017a). Bezskuteczność czynności prawnej [Ineffectiveness of a Legal Act]. Warsaw: C.H. Beck.

Gutowski, M. (2017b). Nieważność czynności prawnej [Invalidity of a Legal Act]. Warsaw: C.H. Beck.

Gutowski, M. (2019). Wzruszalność czynności prawnej [Revocability of a Legal Act]. Warsaw: C.H. Beck.

Hermann, M. (2012). Derogacja w analizach teoretycznoprawnych [Derogation in Legal Theory]. Poznań: Ars boni et aequi.

Hermann, M. (2013). Stwierdzenie niekonstytucyjności jako czynność konwencjonalna unieważnienia aktu normatywnego [Declaring unconstitutionality as a conventional act of invalidating a law]. In M. Bernatt, J. Królikowski, M. Ziółkowski (eds.), Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa [Implications of Constitutional Tribunal Judgment for the Application of the Law] (pp. 249–277). Warsaw: Wydawnictwa Trybunału Konstytucyjnego.

Kamiński, M. (2006). Nieważność decyzji administracyjnej. Studium teoretyczne [The Invalidity of an Administrative Decision: A Theoretical Study]. Kraków: Zakamycze.

Kanarek, B. (2004). Teoretyczne ujęcia derogacji [Theoretical Approaches to Derogation]. Szczecin: Uniwersytet Szczeciński.

Kozak, A. (2004). Reguły interpretacji kulturowej a reguły dokonywania czynności konwencjonalnych [The rules of cultural interpretation and the rules of performing conventional acts]. In W. Jedlecka (ed.), Z zagadnień teorii i filozofii prawa. Kompetencja ze stanowiska teorii i filozofii prawa [Issues in the Theory and Philosophy of Law: Competence from the Perspective of Legal Theory and Philosophy of Law] (pp. 151–168). Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Lewis, D. (1969). Convention: A Philosophical Study. Cambridge, Mass: Harvard University Press.

Marmor, A. (2009). Social Conventions: From Language to Law. Princeton and Oxford: Princeton University Press.

Matczak, M. (2004). Kompetencja organu administracji publicznej [Competence of the Public Administration Authority]. Kraków: Zakamycze.

Nowak, L. (1968). Performatywy a język prawny i etyczny [Performatives and language of law ethics]. Etyka 3: 147–158.

Nowak, L., Wronkowska, S., Zieliński, M., Ziembiński, Z. (1972). Czynności konwencjonalne w prawie [Conventional acts in law]. Studia Prawnicze 33: 73–99.

Patryas, W. (2001). Rozważania o normach prawnych [Reflections on Legal Norms]. Poznań: Holding Edukacyjny – Paweł Pietrzyk.

Patryas, W. (2005). Performatywy w prawie [Performatives in Law]. Poznań: Holding Edukacyjny – Paweł Pietrzyk, Wyższa Szkoła Zarządzania i Bankowości w Poznaniu.

Searle, J.R. (1969). Speech Acts: An Essay in the Philosophy of Language. Cambridge: Cambridge University Press.

Siedlecki, W. (1965). Nieważność procesu cywilnego [Invalidity of Civil Proceedings]. Warsaw: Wydawnictwo Prawnicze.

Wronkowska, S. (1996). Jednostka a władza prawodawcza. Przyczynek do dyskusji [The individual and the legislative power: a contribution to the debate]. In T. Jasudowicz, C. Mik (eds.), O prawach człowieka. W podwójną rocznicę Paktów. Księga pamiątkowa w hołdzie Profesor Annie Michalskiej [On Human Rights: On the Double Anniversary of the Pacts. A book dedicated to Professor Anna Michalska] (pp. 73–86). Toruń: Dom Organizatora TNOiK.

Wronkowska, S. (2001). O wadliwych aktach normatywnych w ujęciu wiedeńskiej szkoły teorii prawa [On defective laws as perceived by the Vienna School of Legal Theory]. In J. Stelmach (ed.), Studia z filozofii prawa [Studies in the Philosophy of Law] (pp. 207–218). Kraków: Uniwersytet Jagielloński.

Wronkowska, S. (2005a). Podstawowe pojęcia prawa i prawoznawstwa [Basic Notions of Law and Jurisprudence]. Poznań: Wydawnictwo Naukowe UAM.

Wronkowska, S. (2005b). O źródłach prawa i aktach normatywnych raz jeszcze [Once again on the laws and the sources of law]. In A. Nowicka (ed.), Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu [Private Law in a Time of Transition: A book dedicated to Professor Stanisław Sołtysiński] (pp. 113–140). Poznań.

Wronkowska, S., Hermann, M. (2015). Problematyka intertemporalna prawa konstytucyjnego. Zagadnienia podstawowe [Intertemporal aspects of constitutional law: basic issues]. In J. Mikołajewicz (ed.), Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza i funkcje [Intertemporal Issues in Law: Basic Problems. Intertemporal Solutions. Genesis and Functions] (pp. 195–240). Warsaw: C.H. Beck.

Wronkowska, S., Zieliński, M. (1993). Problemy i zasady redagowania tekstów prawnych [The Problems and Rules of Drafting Legal Texts]. Warsaw: Urząd Rady Ministrów.

Wronkowska, S., Ziembiński, Z. (2001). Zarys teorii prawa [Introduction to Legal Theory]. Poznań: Ars boni et aequi.

Zieliński, M. (1997). Dwa nurty pojmowania 'kompetencji' [Two concepts of 'competence']. In H. Olszewski, B. Popowska (eds.), Gospodarka, administracja, samorząd [Economy, Administration, Local Government] (pp. 581–607). Poznań: Wydawnictwo Printer

Zieliński, M. (2012). Wykładnia prawa. Zasady, reguły, wskazówki [Legal Interpretation: Principles, Rules, Guidelines]. Warsaw: Wolters Kluwer Polska.

Zieliński, M., Ziembiński, Z. (1988). Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie . Warszawa: PWN [fragments published in English as Justification of Judgments, Evaluations, and Norms in Legal Studies in M. Smolak, P. Kwiatkowski (eds.), Poznań School of Legal Theory (pp. 98–109). Leiden–Boston: Brill and Rodopi, 2020. https://doi.org/10.1163/9789004448445_9].

Ziembiński, Z. (1966). Logiczne podstawy prawoznawstwa [Logical Foundations of Jurisprudence]. Warsaw: Wydawnictwo Prawnicze.

Ziembiński, Z. (1969). Kompetencja i norma kompetencyjna. Ruch Prawniczy, Ekonomiczny i Socjologiczny 31(4): 23–41 [published in English as Competence and the competence norms. In M. Smolak, P. Kwiatkowski (eds.), Poznań School of Legal Theory (pp. 91–97). Leiden–Boston: Brill and Rodopi, 2020. https://doi.org/10.1163/9789004448445_7].

Ziembiński, Z. (1980). Problemy podstawowe prawoznawstwa [Fundamental Prolems of Jurisprudence]. Warsaw: Państwowe Wydawnictwo Naukowe.

Ziembiński, Z. (1985). O aparaturze pojęciowej dotyczącej sytuacji prawnych [On the terminology of legal situations]. Państwo i Prawo 40(3): 32–47.

Ziembiński, Z. (1991). O zawiłościach związanych z pojmowaniem kompetencji [On the intricacies of interpreting competence]. Państwo i Prawo 46(4): 14–24.

Ziembiński, Z., Zieliński, M. (1992). Dyrektywy i sposób ich wypowiadania [Directives and How They Are Expressed]. Warsaw: Polskie Towarzystwo Semiotyczne [fragments published in English as Norms of conduct, in M. Smolak, P. Kwiatkowski (eds.), Poznań School of Legal Theory, pp. 98–109. Leiden–Boston: Brill and Rodopi, 2020. https://doi.org/10.1163/9789004448445_8].

Zwierzykowski, P. (2016). Nowelizacja jako sposób zmiany prawa. Studium z teorii legislacji [Amendment as a Means of Changing the Law: A Study in Legislative Theory]. Poznań: Ars boni et aequi.