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**GENERAL CLAUSES
IN THE PROCESS OF LAW APPLICATION.
CHOSEN ASPECTS**

Referral clauses in the Polish legal system have been frequently discussed. It is enough to mention the literary output of L. Leszczyński, the author of two monographs entitled *Tworzenie generalnych klauzul odsyłających*¹ and *Stosowanie generalnych klauzul odsyłających*² and many publications devoted to the topic. Due to this fact the considerations presented in this paper aim at neither verification nor duplication of the observations done by the above-mentioned author. Instead, the article aims at showing certain features of the general clause as a certain type of the referral clauses in the context of its role to express the axiology of the modern state under the rule of law. These considerations are going to be extended by a few recommendations with a special regard to general clauses which arguments should be taken into consideration by the adjudication organ in the process of law application.

H. L. A. Hart has noted that the language of law, being a natural language, is characterized by its lack of sharpness. He calls that feature “open texture”. Hart motivates that by the illustration that relative lack of knowledge of the facts as well as relative under-qualification of aims makes explicit qualification of legal consequences impossible. He also highlights that open texture and the use of general concepts enable a legislator and the organ of law application to adopt legal regulations to actual needs. Therefore, it clearly reveals that at the level of the language of law the appearance of under-defined concepts is not an extraordinary phenomenon. What is more, doubts at to the interpretation of the concept may appear not only on its

¹ L. Leszczyński, *Tworzenie generalnych klauzul odsyłających*, Lublin 2000.

² L. Leszczyński, *Stosowanie generalnych klauzul odsyłających*, Kraków 2001.

ground³ for, as M. Zirk-Sadowski has noted, “a new situation may potentially appear even for the well-defined concepts so that their application in that new situation should be decided upon”.⁴

On the ground of the issue of referral clauses the legislator’s usage of under-defined concepts may somehow take place in three dimensions: in the form of the reference to the customary norms, to the estimated valuation or to the systematic valuation (the so-called general clauses).⁵ The direction accepted for the article’s considerations excludes referral clauses to customary norms since the norms presented there fail to be axiologically justified.⁶ The subject under consideration will not include the so-called comparative terms (evaluation). Comparative terms (evaluation) are, for example, strong reasons, appropriate benefits or striking loss. Although their understanding depends on the valuation (estimation, to be more precise) and requires the application of a differential method which relies on the comparison of the factual state with the desired one. The evaluation arrived at in this manner deals with only the case under consideration in the way that it is impossible to talk about the existence of strong reasons as such, or appropriate benefits in general, *in abstracto*. What is more, the evaluation is not of the principle type restricted to approval or disapproval for some state of things,⁷ rather this is a statement as to reach some degree, weight or quantity through that state of things. In this manner judgments about the existence of “striking loss” on the side of the loser are based on or the existence of “complete and durable failure” between a married couple who are seeking a divorce. In this sense, the interpretation of the estimated phrase is not linked to evaluation but to estimation. In a different manner than in the case of general clauses, the legislator does not point to the rules and principles which should be applied to measure the level of “striking loss” or “strong reasons”.⁸ Many works show the differences between general clauses and estimation phrases. To differentiate between the concepts of general clauses and estimation phrases, S. Grzybowski points out technical and legislative background for the creation of the concept (in cases of the so-called estimation phrases) as

³ H. L. A. Hart, *Pojęcie prawa*, Warszawa 1998, p. 174.

⁴ M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, p. 195.

⁵ For more information see L. Leszczyński, *Stosowanie generalnych...*, p. 23 and following.

⁶ For more information see L. Leszczyński, *Stosowanie generalnych...*, p. 24.

⁷ M. Zieliński, Z. Ziemiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie*, Warszawa 1988, p. 43.

⁸ L. Leszczyński, *Pojęcie klauzuli generalnej*, Ann. UMCS 1991, nr XXXVIII, p. 162.

well as political and legislative motivation of the legislator addressing in the legal text the regulations appropriate in the general clauses.⁹

Bearing in mind the above-mentioned reasons, the subject under consideration should be limited to general clauses while discussing the axiology of the modern state under the rule of law. Before a detailed analysis of the concepts with a special regard to the construction of general clauses, in the introduction it is necessary to make a reservation as to the two ways in which the construction of general clauses is understood: one is a theoretical and legal way and another is a normative way. Considering these two ways of dealing with the definition of the institution under consideration, it will allow to introduce some order in the discussion how to define general clauses. If the restriction regarding the author's approach towards the construction is not made, the reader may be left with the impression that the discussion about general clauses is chaotic. In reality, this is not like this for any time a different author emphasizes a different feature of the general clause, it does not usually result from their discovery but this is a result of the direction given to the author's considerations, determining the necessity to emphasize this particular construction of the general clauses.

Many approaches and dimensions of the consideration of the definition of "general clauses" are revealed by the collective study of the theory of law. Some researchers define by this term any use of the expression generating a freedom of decision in a the text of the legal act. Others claim that any situation where legal regulations establish the necessity to give evaluation to fix the content of the concept should be treated as general clauses. Yet, other researchers define a general clause as the expression of language which refers to a certain system of evaluation which is beyond the scope of law.¹⁰ The position of Z. Ziemiński and the opposing positions of A. Stelmachowski and L. Leszczyński are the most representative positions among these concepts. Z. Ziemiński¹¹ is a supporter of defining a general clause in the functional dimension which has been the most broadly discussed definition of the term under consideration. In his opinion, a general clause, resulting from the text of the legal act, is any basis for the application of the decisive margin by the organ applying law.

⁹ S. Grzybowski, *System prawa cywilnego. Vol I Część ogólna*, ed. W. Czachórski, Wrocław, Warszawa, Kraków, Gdańsk, pp. 114–115.

¹⁰ For more information on the subject see L. Leszczyńskiego, *Pojęcie klauzuli...*, p. 158.

¹¹ Z. Ziemiński, *Stan dyskusji nad problematyką klauzul generalnych*, PiP 1989, nr 3, p. 17; Z. Ziemiński, *Etyczne problemy prawoznawstwa*, Ossolineum 1972, p. 160 and following.

This concept envelopes any situation where a legislator acknowledges referring to the aspects beyond the scope of law to be significant and necessary. At the same time, the concept of general clause includes expressions which refer to the system of rules beyond the scope of law and rely on the evaluation. It also includes the expressions which do not reveal such a direction but, because they reveal the features of an under-defined expression, they need to be referred to with the criteria beyond the scope of law to decide upon the content of the concept (such as, for example, “striking loss”, “strong reasons”). In this group the author places the so-called evaluation expressions (estimation). Bearing in mind the risk of general clause being washed away and their boundaries being erased when broadly defined, Z. Ziemiński sees a greater risk in the intuitive defining of the general clause as the expressions addressing to the evaluation characteristic for the classic approach to general clauses. The author points out a chaotic use of the concept “evaluation” highlighting that the apparently clear definition according to the classic approach becomes as imprecise as a functional capturing of the general clause by a free use of the concept “evaluation”. A. Stelmachowski captures clause in a significantly narrower way and marks that this is a “a regulation of the positive law which, aiming at giving elasticity to the law application, contains addressing to the system of norms beyond the limits of law”,¹² leaving out the scope of the term of the so-called estimation expressions. Therefore, a general clause is not only applying an under-defined concept but also referring to the collection of regulations beyond the scope of law acknowledged by the legislator to be right, which demand evaluation, the features which are not revealed by comparative (estimation) expressions.

Some chaos of defining appears from the state of the above-mentioned considerations. While discussing the definition of general clause and to make this part of the article precise, it is necessary to mention two dimensions of capturing the definition of general clause – theoretical and legal and normative – described earlier in this paper.

The first dimension, which could be called theoretical and legal, captures a general clause in a technical way, in other words, it points to its structural elements. In this sense a general clause is an editorial unit of a legal act or a legal regulation or its extract comprising the reference to the norms and values which are beyond the scope of the text and whose ba-

¹² A. Stelmachowski, *Znaczenie klauzuli generalnej zawartej w art. 386 k.c. w obrocie społecznym*, PUG 1968, nr 6, p. 185.

sic constructive element is expressed by the under-defined expression. This theoretical and legal way seems to be the way to capture the majority of definitions of general clause in which expressions are defined in the literature devoted to the issue of general clauses. Here it is necessary to make a reservation that making a division and choosing the two dimensions of understanding general clauses are not enough to illustrate and, above all, to solve the actual legal problems connected with the character of general clauses in the theory of law. Within the theoretical and legal formulation some questions remain troublesome. These are, among others, issues connected with the fact whether a legal regulation comprising a reference to the norms which are beyond the scope of the law (e.g. a general clause in its narrow formulation) should be called general clauses or whether the only imprecise expression in the text of the legal act with a reference to the norms beyond the scope of the law should be called general clauses (the so-called clause in a narrower formulation).¹³ To show this doubt in the framework of this paper in the description of the theoretical and legal formulation of general clauses a statement is used that a clause is “a legal regulation or its extract”. Z. Ziemiński argues that neither the first attempt nor the second one is correct. He explains it by the fact that the most precise point would be that a certain legal regulation reveals a general clause, the use of the expression (term) “social coexistence” or “social and economic purposes” alone does not make a general clause for the relations of the reference to these values are given only by the legal regulation within which they are expressed.¹⁴ In a similar way the incorrect defining of the conception of general clause shows that this is a legal regulation for not every legal regulation is a clause; only the use of the under-defined expression in the text of the legal act allows for defining a given technical unit as a general clause. In different publications there is a widely held view that a general clause is the very under-defined expression in the regulation, rather than the very regulation revealing the expression.¹⁵

Basing on the considerations regarding the axiology of the modern state under the rule of law adopted in this paper, the second dimension of the discussion about the the definition of the concept of general clause defined as normative will be more useful. In accordance with the normative for-

¹³ J. Czarzasty, *Przyczynek do problematyki klauzul generalnych*, PiP 1978, nr 5, p. 84.

¹⁴ Z. Ziemiński, *Stan dyskusji...*, PiP 1989, nr 3, p. 16.

¹⁵ Z. Radwański, M. Zieliński [in:] *System Prawa Prywatnego. Prawo cywilne – część ogólna. Vol. 1*, Warszawa 2007, p. 332.

mulation, a general clause is a normative construction,¹⁶ the order of the legislator directed to the organ applying the law in the process of legal reconstruction of the legal norm including a general clause to refer to the criteria beyond the scope of the text or, in other words, unexpressed in the text of the legal act. The aim of that procedure is to establish the range of application or the scope of usage of the legal norm and its consequent application.¹⁷ Depending on the circumstances of a given case, there may appear a situation when the criterion beyond the cope of text may become the only source of the reconstruction of the decision which, in this case, has only its axiological basis. However, usually a decision is taken on the basis of legal criteria. During the reconstruction of the basis of the legal decision, the organ of law application, apart from the criteria beyond the scope of text, also considers textual criteria or, in other words, obligatory legal regulations.¹⁸ In this formulation a general clause enables the organ of law application to consider the criteria beyond the scope of the text in the process of taking a decision. This formulation of general clause results in pointing the addresses of the legal norms the necessity of taking into consideration those criteria while their performance for they will also be taken into consideration while taking a decision regarding the legal situation of the legal norms' addresses.

It is necessary to highlight here that law application with the use of general clause is not an extraordinary process which requires principles different from those which govern the processes of law application without the use of general clauses. The only characteristic feature is that the interpretation of general clause requires evaluation in the degree bigger than that employed to interpret other words revealed by legal regulations. Basically, these axiological complexities observed in the process of law application with the use of general clause constitute the biggest difficulty for both the law appliers and researchers of this phenomenon. For the sake of the considerations adopted in this paper, the issue of the creation of general clauses and their application mainly in the context of the article 2 of the Constitution of RP, as well as the subject of further reference and the way of deciding upon criteria seem to be the element of the discussion about general clauses which deserve a special consideration.

¹⁶ L. Leszczyński, *Stosowanie...*, p. 22.

¹⁷ See also Z. Radwański, M. Zieliński, *Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym*, „Przegląd Legislacyjny” 2001, nr 2, p. 11 and following.

¹⁸ For more information see L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001, p. 328 and following.

It is assumed that general clauses refer to moral, political and economic norms.¹⁹ It is necessary to add that these norms are obligatory in a given area, acknowledged and respected in the society which have an axiological basis. This observation is significant because it is possible to talk about general clause only when in the text of the legal act there is a reference “to” something or, in other words, to the collection principles and values and not in every case of the interpretation margin. In this sense, it is claimed that on the ground of general clauses one deals with a direction reference.²⁰ Basically, it has no significance whether the reference is directed to the system of norms (for example, moral norms) or to broadly understood values which have been not classified in any system so far. At this point one may ask whether “the exegesis of the legal texts of a general character is in any way the construction of the system”?²¹ Is it true that thanks to general clauses the legislator leaves the organs of law application with the possibility of giving an unlimited evaluation and the adjudgement basing on the criteria which are not expressed in the legal act, making it unexpected, optional and frequently non-verified?

In the first place it is necessary to refer to the issue whether the subject of the reference of the general clause are collections of norms beyond the system or only beyond the text. It is significant from the point of view of the above-mentioned freedom of the law application adjudging on the basis of the norm reconstructed with the use of legal regulations with general clauses. Many authors seem to neglect this problem. They employ interchangeable adjectives “extra-systematic” and “extra-textual”. Although others consequently point out that a clause is an extra-textual reference, they do not comment on the definition of the system and the definition of what is “systematic” or, in other words, what is an element of the system, and which is “extra-systematic” or, in other words, beyond the element of the system. Paying no attention to the debate between positivists and non-positivists and giving no support to any of the trends, it is necessary to state that, to be able to define whether the criteria of the reference are “extra-systematic”, first, it is necessary to identify the elements of that system. To decide whether something remains beyond the limits, it is necessary to mark the limits. Certainly, a Classic positivist will argue that the position of the limit

¹⁹ For more information see L. Leszczyński, *Tworzenie generalnych...*, p. 30 and following.

²⁰ A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe*, Warszawa 2006, p. 40.

²¹ R. Stefanicki, *Dobre obyczaje w prawie polskim*, PPH 2002, nr 5, p. 23.

is obvious and the elements of the system are only those norms which are comprised (expressed) in the official legal texts.²² However, it can easily be observed that the law structures have been eased which results in the observation of the evolution of legal systems from the closed systems (absolute systems) to the open and indefinite systems (*prima facie systems*).²³

A positivist ideal of law in this context seems to be deceptive. Taking a step further, since the legal system is open and indefinite, it means that the law does not make a system; it becomes a system with an active participation of lawyers. Therefore, a system is not given once for all, declared the absolute truth, but it constitutes the area of law created by the community of lawyers. An argument from the system in the law is, therefore, a tool on the basis of which one may formulate almost any commentator-friendly thesis²⁴. As it has been rightly noted by M. Błachut, J. Kaczor, P. Kaczmarek and A. Sulikowski, in this manner one may try to explain to the person eaten by a cannibal that the fact that he is being eaten in accordance with the art of cooking and with the use of cutlery makes his situation completely different.²⁵ Equipped with the awareness of the point that an argument of the system of law is deceptive, the statement that general clauses refer to certain “extra-textual” values or, in other words, not expressed in the legal act, has been consequently accepted within the framework of this paper.

Therefore, it proves that the observations of those who state that the law application organ with the use of general clauses exceed the law itself are incorrect and premature. On the contrary, if one assumes that the system of law is not something which is given one for all and does not have a closed structure, the statement that the values expressed with the help of general clauses are extra-systematic becomes unjustified. It allows to assume that the law application organ does not exceed the system structure and still is connected with its elements as in case when the law is applied with no general clauses. Being obliged to respect other elements of the law system, the organ of law application as well as the legislator are subjected in their sentences to the norms revealed by the Constitution. While considering general clauses, a basic regulation which should be referred to while

²² For more information see L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2003, p. 305 and following.

²³ For more information see L. Morawski, *Główne problemy...*, p. 197 and following.

²⁴ The statement is cited after M. Błachut, J. Kaczor, P. Kaczmarek, A. Sulikowski, *Systemowość...*, p. 106, while the interpretation of the statement of J. Boyle is included in J. Boyle, *The politics of reason, Critical Legal Theory and local social thought*, University of Pennsylvania Law Review (1985), www.law.duke.edu/boylesite/politics.htm.

²⁵ *Ibid.*, p. 107.

creating and applying the law with the use of general clauses is the art. 2 of the Constitution which states that the Republic of Poland is a democratic state under the rule of law which practises the principles of social justice. It is controversial whether the above-mentioned art. 2 of the Constitution expresses the principle of a state under the rule of law or it is a general clause of the democratic state or perhaps, as S. Wronkowska argues, it is a reference of a different type.²⁶ Without going into details, the author supports the terminology used by the Constitutional Court. It is observed that the Constitutional Court is abandoning a directive formulation of the principle of the state under the rule of law and seems to be linked to the construction of general clauses.²⁷ The acceptance that the art. 2 of the Constitution reveals a general clause of the democratic state under the rule of law poses an actual question: in which way is a general clause of the democratic state under the rule of law, being general, to serve “to direct the interpretation and application of detailed regulations”,²⁸ including regulations with general clauses, since the very art. 2 is such a clause?

Apparently, in this situation one has to deal with the so-called vicious circle or, in other words, return to the zero point. This statement cannot be agreed with. A clause of the democratic state under the rule of law is a clause of the second degree, the so-called meta-clause, also called a “characteristic general clause” by some researchers.²⁹ This extraordinary character is made by a specific range and types of reference, adjudging practice of the Constitutional Court as well as the location of the art. 2 in the system of the Constitution. The qualification of the clause of the democratic state under the rule of law as a general clause does not mean that its understanding can be optional. The direction of such an interpretation is marked by the collection of the Constitution regulations, the output of the European democratic constitutionalism, as well as the so-called “hard basis” of the concept of the state under the rule of law which emerged as a result of balancing of the two values: individual and autonomic dignity and the social agreement constituting the relations between the individuals characterized in that manner

²⁶ S. Wronkowska, *Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej)*, [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warszawa 2006, p. 104.

²⁷ For more information see E. Morawska, *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*, Toruń 2003, *passim*.

²⁸ Cytat za E. Morawska, *Klauzula...*, p. 341.

²⁹ M. Kordela, *Zasady państwa prawnego w wystąpieniach Rzecznika Praw Obywatelskich*, [in:] *Polskie dyskusje o państwie prawa*, ed. S. Wronkowska, Warszawa 1995, p. 118.

and public authority.³⁰ The above mentioned elements constitute the content minimum of the concept of the state under the rule of law. Discussed in this way, the clause of the democratic state under the rule of law can be acknowledged to be an open construction but not indefinite on for its is necessary to consider that, although generality allows for the obtaining of its new meaning, the substance attributed to it is connected with other constitutional principles which give it a substance or concretize it. For this reason in the opinion of the Constitutional Court a clause of the democratic state under the rule of law should be reached on the scale of only those regulations and values which are not reflected in more detailed regulations of the Constitution; in case of lack of such a regulation, the clause under consideration should be the point of reference while the constitutionality control.³¹

Apart from a description function, the art. 2 of the Constitution also creates a certain model which is the basis of educating derivative principles. Hitherto the following principles have resulted from the jurisdiction of the Constitutional Court: a principle of protection of confidence in the state and its law, *lex retro non agit* principle, the obligation to preserve appropriate *vacatio legis*, the obligation to respect the so-called interests in the progress, a ban on the introduction of changes into the tax law before a fiscal year finishes, a principle of the protection of the rights rightly obtained, and the order of definiteness of legal regulations.³² Bearing in mind the fact that the art. 2 of the Constitution presents a directive addressed to the legislation organ but also a directive addressed to the law application organ, the principle of protection of confidence in the state and its law as well as the order of definiteness of legal regulations deserve a special attention while discussing the issue of general clauses. The order of definiteness of legal regulations results from the principles of the certainty of law and protection of the citizens' confidence in the state. It is a directive ordering the legislation organs to edit legal regulations in such a manner so that they are correct, clear and precise. Because they refer to the extra-textual values, general clauses are often deprived of the latter feature which is precision. The Constitutional Court has had a great impact on solving this matter and

³⁰ W. Sokolewicz, *Komentarz do art. 2*, [in:] *Konstytucja RP. Komentarz*, Vol. V, Warszawa 2007, p. 9.

³¹ The decision of the Constitutional Court of June 2, 1999, K 34/98, OTK ZU nr 5(27)/1999, p. 482; E. Morawska, *Klauzula...*, p. 341 and following.

³² E. Morawska, *Klauzula...*, passim.

possible doubts³³ indicating that **the order of sufficient definiteness of law does not mean that the legislator should indicate the designation of the notions each time they are used**. The Constitutional Court has frequently showed that the legislator's use of under-defined expressions or evaluation does not violate the principle of editing the text of the legal act inasmuch as:³⁴

- there exist objective criteria to qualify the circumstances which are referred to the expression;
- organs of law application as well as the addressee of legal norms who are under the application of a given norm may foresee the direction of the decision in the case; in this sense, they have a possibility to qualify one's behavior as being (or not being) in accordance with the subject of reference expressed by the general clause;³⁵
- the use of the under-defined expressions in the process of law application cannot lead towards giving a law-creative role to the courts.

The statement of non-constitutionality of the regulation revealing a general clause may take place only when the expression is to be interpreted in the way which is not in compliance with the Constitution or when a shaped line of jurisdiction gives a clause a non-constitutional meaning.³⁶

A second significant principle taken from the art. 2 of the Constitution is the principle of protection of confidence in the state. This principle results in the directive aimed at the legislative organs and organs of law application which regulates the creation and application of law "so that it does not become a characteristic trap for a citizen and so that a citizen may arrange his affairs in confidence that he will not face legal consequences which he was unable to predict at the moment of taking his decision and actions".³⁷ Additionally, the Constitutional Court has highlighted that the principle of protection of confidence in the state and its law remains current also in the process of law application for the content of the law is established by citizens

³³ The decision of the Constitutional Court of October 9, 2007, sign. SK 70/06, OTK ZU nr 9/A/2007, point 103; The decision of the Constitutional Court of July 8, 2008, sign. P 36/07, OTK-A 2008/6/103, Journal of Laws of RP 2008/123/804.

³⁴ The decision of the Constitutional Court of November 22, 2005., sign. SK 8/05, OTK-A 2005/10/117.

³⁵ The decision of the Constitutional Court of October 17, 2000, sign. SK 5/99, OTK 2000/7/254.

³⁶ The decision of the Constitutional Court of July 8, 2008, sign. P 36/07, OTK-A 2008/6/103, Journal of Laws RP 2008/123/804.

³⁷ Cyt. za E. Morawską, *Klauzula...*, s. 347.

mainly due to the practice of law application.³⁸ Referring the content of the above-mentioned principle to the problems of law application with the use of general clauses, it is necessary to take notice that the very application of them by the law application organ does not mean that a citizen cannot foresee legal effects of his enterprise because of the use of the under-defined expression in the legal act. On the ground of the private law, where general clauses are frequently found, a successful performance of legal acts should be accompanied by an appropriate doze of legal awareness reduced to the knowledge of legal regulations among which those revealing general clauses remain. This knowledge is logically primary over the performance itself.³⁹ Therefore, inasmuch as a citizen is equipped with a minimum of knowledge of the regulations of how to perform legally, he can and should foresee the consequences of his performance (on condition that the legislator has not abused the limits of decent legislation).

From the points mentioned above it appears that a clause of the democratic state under the rule of law may be understood also as a directive addressed to the organs of legislation and law application which orders to legislate and apply law with the respect of the content of the clause. Because of the incorporated values as well as the possession of the attribute of meta-clause, it constitutes a “safety valve” marking the boundary of the interpretation of general clauses.

The above-mentioned observations allow for making two points regarding the situation of the organ of law application with the use of general clauses. The argument of the system has appeared to be deceptive. Consequently, it has been adopted that on the ground of the institution of general clauses one should not talk about extra-systematic reference. Only extra-textual reference should be discussed. The law application organ does not take decisions on the basis of any extra-systematic rules. The second argument influencing the situation of the law application organ with the use of general clauses results from the clause of the democratic state under the rule of law revealed by the art. 2 of the Constitution which comprises the order to consider the essence and axiology of the legal state in the process of law application.⁴⁰ The content of the clause also closes the possibilities of the interpretation by the jurisdiction organ so that no application of the

³⁸ The decision of the Constitutional Court of December 21, 1999, sign. K 22/99, OTK ZU nr 7(29)/1999, p. 905.

³⁹ A. Bator, *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, Warszawa 2006, p. 282.

⁴⁰ The decision of the Constitutional Court of November 25, 1997, sign. K. 26/97, OTK ZU nr 5–6 (14–15)/1997, p. 445.

referral criterion which is not in compliance with the axiology of the state under the rule of law is possible.

Further considerations will be taken to arrive at the answers what gives the limits to the jurisdiction organ judging on the basis of legal regulations revealing general clauses and also what practical aspects of inducing the evaluation as based on the extra-textual reference are.

The first limit seems to be the jurisdiction of the Highest Court and lower courts. Although nowadays such jurisdiction does not have a binding power and precedents are not the source of law in Poland, from 1949 to 1989 the commentary done by the Highest Court had a binding power which was called the guidelines of the Highest Court in the range of the legal instructions and application of law (before 1986 it was the guidelines of the administration of justice and judiciary practice). The guidelines of the Highest Court were to standardize the jurisdiction of all courts in their interpretation and application of law. Because all courts were tied by those guidelines, they were obliged to judge in accordance with the direction and interpretation offered by them. Nowadays the Highest Court does not have the competence to offer binding guidelines. Nevertheless, it would be fiction to state that apart from the lack of the *stare deisis* rule, the jurisdiction of courts, especially the Highest Court, does not affect the process of law application. On the contrary, appeals to other courts' decisions are common in the Polish process of law application even though it is done in a "soft" way or, in other words, the decision is not directly based on the past jurisdiction of another court but on the general line of jurisdiction.⁴¹ In this way the law application organ does not base its decision on the jurisdiction in another case but on the legal norm reconstructed from the legal regulations whose understanding and guidelines have been established on the basis of the argumentation comprised by the shaped jurisdiction line. It leads towards the conclusion that on the ground of the Polish jurisdiction the so-called non-law-creative precedents oblige.⁴² Therefore, the jurisdiction of other courts, especially the Highest Court, significantly influences the establishment of the content of the criteria of the reference by the law application organs.

Discussing the arguments due to which the law application organs establish the meaning of the reference on the ground of the case under consideration, additionally, it is necessary to indicate the subject of regulation

⁴¹ L. Leszczyński, *Stosowanie generalnych...*, p. 202.

⁴² L. Leszczyński, *Zagadnienia teorii...*, p. 303.

to which that clause is devoted. A model example of the establishment of the content of the general clause in the process of law application is the argumentation given by the Constitutional Court in the decision of November 22, 2005⁴³ and presented in the part devoted to the evaluation of the agreement of conditioning of the way of removal of the co-ownership from the social and economic purpose of the thing (the art. 211 of the Civil Law) with the standards of the democratic state under the rule of law. The Court in its justification pointed to the subject of the clause reference and stated that a social and economic purpose of the thing as the limitation of the possibility to physically divide the thing is a very accurate criterion which does not allow for any interpretative margin for the members of jurisdiction. The reference of the clause of social and economic purpose to the thing results in the evaluation which is objective and easy to foresee. A lack of the perspective to cooperate to keep a part of the mutually possessed thing or a degree of conflict and a growing hostility between the two owners (as it was in the case commented by the Constitutional Court) can be measured objectively and results in the clause of “social and economic purpose” with its reference to the thing; it cannot be recognized to be abused in terms of interpretation. Such evaluation of the regulation cannot constitute the basis of formulating an objection to the legislator regarding the precision of editing the text of the legal act since a great deal of the correct understanding of the meaning of the clause depends on the part of the law application organ which is obliged to conduct a logical analysis to be able to justify the choice of the evaluation.

A life-long experience is a necessary tool which allows the law application organ to decide upon the content of the reference and on the basis of which the evaluation is given. While editing the text of the legal act with a general clause, the legislator in the intentional way places the burden of deciding upon the content of the notion *ad casu* on the law application organ⁴⁴ or, in other words, every single case should be treated separately. The fact that the application of general clauses should be reserved exclusively to independent courts is a kind of “guarantee of procedural justice and legal governing”.⁴⁵ From the points mentioned above, one can conclude that the

⁴³ The decision of the Constitutional Court of November 22, 2005, sign. SK 8/05, OTK-A 2005/10/117.

⁴⁴ The decision of the Constitutional Court of July 8, 2008, sign. P 36/07, OTK-A 2008/6/103, Journal of Laws RP 2008/123/804.

⁴⁵ The decision of the Constitutional Court of May 8, 2006, sign. P 18/05, OTK-A 2006/5/53.

legislator assumes that the people applying law have a necessary life experience, an appropriate level of knowledge and abilities to think logically. These expectations go together with the nature of the profession and are indispensable elements of the general education of the judges. Confidence in the reliability of these expectations constitutes the basis for constructing a range of institutions, especially of the formal law. Such assumptions are revealed by the freedom of evidence evaluation present in the process law. If the legislator had doubts about the above-mentioned predispositions of the people who make jurisdiction as well as about the reliability of the administrative control, it would be necessary to return to the binding evaluation of evidence as well as establish a net of legal definitions and re-edit the content of legal acts so that they were free from general clauses and under-defined expressions and so that every case could be directed to a legal norm. Even if that way was accepted, courts would frequently have to deal with cases which would be impossible to be qualified as a case regulated by the law and the law application organ would not be able to refuse giving a decision.

In such a situation the reference to some extralegal values would be necessary which would be reflected in legal principles or general clauses.

From the point of view of the law application process, it is also necessary to state in which way the evaluation of the agreement of a given case with the collection of the regulations to be referred to is done. Is it a kind of evaluation objectified by the society or perhaps the evaluation is established by the judge who is overburdened by his own vision as to what is moral, correct or not? In other words, will it be a subjective evaluation or an objective one, deprived of the circumstances of the given case? Due to the existence of individual views of the people who make the judiciary group, it is often highlighted that general clauses create the risk of erasing the boundary between objective and subjective evaluation and the result of the law application process in this situation may depend on the individual beliefs of the group. The author of this paper argues that these doubts are not well-grounded.

This is not about the ethos of ideal judges and idealizing the jurisdiction organ (although it is necessary to highlight that they are people who are free from the influence of external subjective beliefs and weaknesses). The point is to identify a specific of having the occupation of the judge which is based on objectivity. Secondly, it is necessary to observe that the administration control (and further extra means of prosecution) is to verify the evaluation of decisions. Thirdly, the way of evaluation circumstances of the case promotes the control of the decisions taken by the jurisdiction organs. Frequently many publications point out that the decision taken in the law

application process cannot exclusively be the result of individual views of the law application organ. On the other hand, their statement cannot be general enough to be only the proclamation and repetition of the general clause of the regulation. A complete objectivity of the evaluation contradicts the very essence of general clauses.⁴⁶ It should be “a characteristic resultant of the preferences of the model law-applying subject”.⁴⁷ Basing on the above-mentioned point, it is assumed that general clauses do not reveal full powers of confidentiality.⁴⁸

Attention should also be paid to the fact that the court’s declaration regarding the agreement of some behavior with the references revealed by the clause demands their experiencing and feeling of certain phenomena connected with the case under consideration.⁴⁹ Therefore, it is not possible to formulate a judgment abstractly or with no reference to the situation under evaluation for the declaration of the judgment relies on some previous experience, which is only possible *ad casu*. It is also necessary to highlight that the evaluation of the behavior presented by the legal norm’s addressee applies to every individual case and cannot lead towards the generalization of certain judgments. Every factual state exists and is created in different circumstances. Therefore, when discussing general clauses, one cannot in advance state that the principle of legal equality has been violated since this violation can only be stated when in the same conditions legal subjects cannot enjoy equal rights. The above-made reservation that general clauses concern every single case and are dependent on the existence of particular circumstances of the case⁵⁰ allows to claim that the application of the evaluation deduced on the basis of the general clause cannot lead towards the deprivation or concession of the entity law in a definite way. A refusal to admit the justness of the judgment which is formally correct but not fair is dictated exclusively by the circumstances of the case under consideration and in case of some changes may lead towards a different judgment. The application of the general clause in this case does not lead towards the deprivation of power of the existing regulation. It leads only to non-application in this case due to the circumstances which have implied the establishment

⁴⁶ M. Sajjan, *Klauzule generalne w prawie cywilnym. Przyczynek do dyskusji*, PiP 1990, nr 11, p. 54.

⁴⁷ L. Leszczyński, *Optymalizacyjny...*, p. 2.

⁴⁸ B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne*, Toruń 2004, p. 76.

⁴⁹ L. Leszczyński, *Pojęcie...*, p. 161.

⁵⁰ B. Wojciechowski, *Dyskrecjonalność sędziowska...*, p. 74.

of such a preference evaluation whose values are referred to by the general clause.⁵¹

There is no fear that the law application organs use general clauses to “get clear of” the necessity to give judgment in difficult cases and in this way to fix a desired content for this special case protecting themselves by the content of the general clause. One should notice that the application of general clauses does not relieve anybody from the obligation to employ legal thinking. What is more, it does not change the regularities governing this process. As L. Leszczyński has noticed, the application of general clause cannot lead to the resignation from the linguistic interpretation. The interpretation of the law conducted with the use of general clauses should take place simultaneously to the linguistic and extralinguistic arguments.⁵² First, such a process demands establishing the entity law that the side is entitled to. Then, there should be the establishment of the principle which has been violated by the application of this law and its naming. Next, there should be the establishment of the evaluation of the agreement of the behavior of the side with the principle applied. Finally, there should take place the declaration of the judgment (corrected or not) on the ground of the evaluation established.⁵³

It is necessary to highlight the deceptiveness of placing a bigger meaning on the verbal dimension of general clauses. One has to remember that the legislator editing the text of the legal act with a general clause has meant to refer to something that is not significant. Thus, how can anything be written down that remains unwritten? L. Leszczyński has successfully captured this aspect of the under-defined notion claiming that the search for the designations of the under-defined expressions by referring to facts or empiricism demands the reference to the reality, to the phenomena that are observed in the external world. On the other hand, the search for the designations of names that are under-defined expressions giving evaluation (general clauses are among this group) takes a different way. The establishment of such designations takes place by the so-called “acting” or, in other words, a previous experience of the phenomenon.

The above-made considerations result in the conclusion that conducting a thinking processes in an accurate way and its consequent justification

⁵¹ The decision of the Highest Court of June 20, 2008, sign. IV CNP 12/08, LEX nr 461749.

⁵² L. Leszczyński, *Optymalizacyjny...*, p. 8.

⁵³ The decision of the Highest Court of May 7, 2003, sign. IV CKN 120/01, LEX nr 141394; the decision of the Appeal Court in Katowice of March 4, 2003, sign. II AKa 33/03, 2003/10/29.

make a very significant element of the law application process. The law application process should base its judgment on the argumentation making reference to a particular rule or regulation on the basis of which the decision has been taken. What is more, the evaluation of the circumstances, which has been drawn due to the application of general clause so that the addressee of the legal norm could evaluate which values have been primary in the judgment and which ones the jurisdiction has emphasized, has to be made public. Such edition of the justification promotes the publicity of decisions and enables the addressees of the legal norms to foresee the decision – the feature which has been emphasized by the Constitutional Court while commenting on the accuracy of editing of the texts of the legal acts with the use of the under-defined expressions. Furthermore, it is essential to remember that the clause is not the aim in itself; it remains only the means allowing for the certainty of making use of the extra-textual virtues in relation to which the behavior of the legal norm addressees has to be judged. Therefore, there is a clear need to get rid of the conviction that the application of the general clause is the legislator's mistake, omission or weakness. This is an intentional action of the legislator who, being at the point of editing of the legal act text, should foresee the future consequences of its application on the ground of individual decisions. The motivation of such a practice may be different starting from the lack of possibility to foresee all possible cases, the will to generalize regulations and a consequent avoidance of its casuistic formulation and finishing with the intentional granting of complete freedom on the law application organs regarding the adaptation of a legal regulation to the changing reality. By the application of such a construction, the legislator clearly defines the scope in which the law application organ should use the clause. In this manner the art. 211 of the Civil Code,⁵⁴ which tackles the subject of “social and economic purpose of the thing”, deals with not every social and economic purpose of anything but only social and economic purpose of the thing which constitutes the subject in possession. Secondly, the legislator does not refer to any evaluation, to something which “is just in my opinion” but to the principles which are commonly established and accepted.

Apparently, a negative attitude towards general clauses mainly results from the past experiences of the former system with a common distrust in the institutions leaving the law application organs with some decisive margin and institutions based on the under-defined expressions. General

⁵⁴ The Law dated 23 April, 1964 – Civil Code, Journal of Laws Nr 16, item 93, later changes introduced.

clauses frequently revealed a political dimension; in the democratic state their aim was to elasticize the process of law application and ensured the possibility of correcting of the decisions formally unjust; in the totalitarian system they were a tool used by the obedient judges to subordinate political opponents of the system and destroy the acts of insubordination. Organs of law application, faced with the expectations of the system, were acting with the awareness that they could be deprived of the status on the basis of their failure to guarantee a proper execution of the occupation. The sign of these anxieties is also revealed by the blame formulated from the point of view of social living including the one concentrating on the literal implication of the name of that clause. These doubts have not been shattered by even the Constitutional Court which has stated that although historically the name of the general clause of the principle of social living is modeled on the Soviet example, the way of dealing with the evaluation with the use of the clause has been changed due to the change of the epoch.⁵⁵ Therefore, the name of the clause alone should be used to deduce its pejorative meaning or its deceptive role in the process of law application.

The application of general clause always demands giving evaluation. Many a time there appears a direct statement that general clauses' designations are some grades. It is already at the point of the initiation of legislative process the legislator, by giving a reference to the extralegal criteria, conducts the evaluation of some extralegal rules acknowledging them to be significant inasmuch as to make the criteria of the evaluation of certain types of behavior of the legal norms' addressees. The motion deduced in this manner demands a former legislator's establishment as to which extra-legal criteria remain in agreement with the axiology of the system and are significant enough to become the measure to refer the types of behavior of the legal subjects to. In the next step the law application organ decides which rule should be established as relevant on the ground of the case under consideration and then decide whether the element to be verified with the evaluation remains in agreement with it. Therefore, the evaluation alone does not prejudge the law that the addressee of the legal norm is entitled to or the justness of its execution. It is a legal regulation which demands the acknowledgment of some circumstances of the factual state to be relevant if they are (or not) in agreement with the regulation expressed by the legislator in the reference to the evaluation.

⁵⁵ The decision of the Constitutional Court of October 17, 2000, sign. SK 5/99, OTK 2000/7/254.

It was already Portalis who wrote: “Even the most complete Code is never finished and the judge faces thousands unexpected situations for the laws, being once edited, remain as they are written but people are never stuck in one place; they constantly act”.⁵⁶ Therefore, the organ of law application faces a real challenge of having to deal with judging the case which has not been foreseen by the legislator. This can be exemplified by claims of the so-called *wrongful conception*⁵⁷ or claims which are the results of the agreements regarding substitute maternity with the so-called substitute mothers where in practice there is first the claim to judge the case frequently based on the regulations expressing the axiology of the modern legal system (including the regulations based on general clauses) and only after that the legislator starts successive regulations of such cases. It was in case of a growing number of substitute mothers whose task was to carry a baby of other people in their womb for nine months for a fixed payment. It resulted in the dispute which lady should be treated as the mother of the baby. It was only in the law of November 6, 2008 where the legislator stated that the woman who gives birth to the child is the mother of the child.⁵⁸

Consequently, the legislator is always a step behind the advancing dynamics of the development of legal relations which can suddenly become the subject to be judged by the law application organs. In such a situation as well as in case when a formally correct decision could lead to materially unjust result, general clauses entitling the law application organ to consider the indication of justice referred to by the regulation are helpful. Undoubtedly, one cannot fail to observe that general clauses, when compared with some other concepts, remain expressions which allow the law application to use a wide range of interpretation. In this manner, extra-textual arguments are included in the process of law application. Nevertheless, one can notice that such a clause is part of the legal system and should be used together with its other elements. Additionally, as T. Zieliński has highlighted, in the evaluation of the institution under consideration the conditions in which the law (including general clauses) is practised and who is responsible for that enterprise matter.⁵⁹ In the system of respecting the indications of general clauses of the democratic state there is a smaller risk of degeneration of the

⁵⁶ Quoted after K. Sójka-Zielińska, *Zasada słuszności a założenia kodyfikacyjne w XIX w.*, PiP 1974, nr 2, p. 34.

⁵⁷ The regulation of the Highest Court of October 27, 1983, sign. III CZP 35/83, OSNCP 1984, nr 6, item 86.

⁵⁸ The law of November 6, 2008 regarding the change of the law – Family and Custody Code and other laws, Journal of Laws Nr 220, item 1431.

⁵⁹ T. Zieliński, *Klauzule generalne w prawie pracy*, Warszawa 1988, p. 281.

institutions with some margin of interpretation than in the system which does not respect such principles. That is why general clauses are often called a bridge between the use of the static and dynamic law; they are also called a necessary evil.⁶⁰ Perhaps the indication that general clauses are lesser evil would be the most appropriate indication. Indeed, there is nothing worse than a judgment which, although in agreement with the positive regulations, is nevertheless unjust, according to the principle *summum ius summa iniuria*.

⁶⁰ Ibid., p. 289