Przegląd Prawno-Ekonomiczny

REVIEW OF LAW, BUSINESS & ECONOMICS

styczeń–luty–marzec

Nr 34
(1/2016)

WYDAWCA
Katolicki Uniwersytet Lubelski Jana Pawła II | Wydział Zamiejscowy Prawa i Nauk o Społeczeństwie w Stalowej Woli

ADRES REDAKCJI
Redakcja „Przeglądu Prawno-Ekonomicznego" | 37-450 Stalowa Wola, ul. Ofiar Katynia 6a | e-mail: ppe@KUL.pl

DRUK I OPRAWA
VOLUMINA.PL DANIEL KRZANOWSKI | ul. Ks. Witolda 7-9, 71-063 Szczecin | tel. 91 812 09 08 | e-mail: druk@volumina.pl

ISSN 1898-2166 | Nakład 300 egz.

Spis treści

Artykuły

Recenzje

Materiały źródłowe

dr Barbara Lubas

Przedmowa

Szanowni Państwo,
To słowo wstępu pragnę zacząć od informacji, że ten numer, który trzymacie Państwo przed sobą jest szczególny i osobiście jestem z niego bardzo dumna. Ci z Państwa, którzy stanowicie nasze wierne grono czytelników wiecie doskonale, że od czasu do czasu takie specjalne numery naszego kwartalnika trafiają w Wasze ręce. Dlaczego ten jest szczególny? Bo udało się nam zdobyć piękny cykl tekstów znanych i cenionych naukowców światowej sławy, którzy piszą o nowoczesnym i filozoficznym podejściu do zarządzania, wyrażających ciekawe i godne uwagi poglądy, do tej pory myślę pominięte przez naszych rodzimych naukowców. Historia tych artykułów jest dosyć ciekawa, gdyż w 2012 roku trafiły one do publikacji w czasopiśmie w Kenii, jednak w międzyczasie czasopismo zawiesiło działalność. Dzięki uprzejmości Davida Lutza, który obecnie jest nowym członkiem naszej redakcji udało się złożyć nam wspólnie ten piękny cykl do publikacji w naszym czasopiśmie. Niestety, jeden z sześciu Autorów prof. Kozlowski zmarł w międzyczasie, tym bardziej jednak niech ten tekst opublikowany w naszym kwartalniku zostanie poświęcony jego pamięci.

Seria artykułów zaproponowanych w niniejszym numerze, w specjalnym układzie sześciu artykułów opartych zostało na filozoficznych tradycjach i globalnym zarządzaniu i przedstawia alternatywę dla teorii zarządzania obecnie przeważającą w popularnych szkołach biznesu na całym świecie. W dobie globalizacji, ludzkość potrzebuje teorii globalnego zarządzania zgodnego z ludzką naturą, aby ludzie jednocześnie mogli być gospodarczo wydajni ale pozostając przy tym prawymi ludźmi. Z opracowań zaproponowanych na łamach niniejszego numeru kwartalnika przez takich Autorów jak: Picken, Gichure, Koslowski, Mondejar, Keraf, Chando & Shimiyu możemy dowiadywać się o ludzkiej naturze w praktyce, przez badanie wspólnych elementów tradycyjnych kultur, które wytrzymały próbę czasu.

Warte polecenia w tym numerze jest szerokie spektrum pozostałych tematów z dziedziny prawa i ekonomii, do których przeczytania serdecznie Państwa zachęcam.

David Lutz

Editorial

The contributions to this special issue on philosophical traditions and global management present an alternative to the theories now prevalent in the world's leading business schools. Anglo-American management theories, which are dominant throughout the Anglophone world and increasingly popular elsewhere, are rooted in the individualistic social contract tradition of political and moral philosophy. The business firm is a collection of individuals. The purpose of business management is to maximize the wealth of the firm's owners. The most popular theory of business ethics, stakeholder theory, merely increases the number of individual parties to the social contract.

In the age of globalization, we need a philosophy of global management. Many authors have written about differences between Asian and African philosophy and management, on one hand, and modern Western philosophy and management, on the other hand. It might appear that there can be no hope of reaching a consensus. If, however, we compare Asian and African traditions with Western traditions, we find many points of agreement.

Despite the reality of cultural diversity, cultural traditions around the globe have much in common, because all members of the human race share a common nature. According to the social contract tradition, we are naturally individualistic and human organizations are artificial. According to traditional philosophy, we are naturally communal. According to social contractarianism, human society is characterized by conflicts of interest, conflicts between what is good for oneself and what is good for other individuals. According to traditional philosophy, we promote our own good by promoting the good of the communities to which we belong. The personal good and the common good are united. This is true for all persons in all traditional cultures. The insight that we are, by nature, social and political beings is not the monopoly of any particular continent.

Traditional moral philosophy—whether Asian, African or European—is virtue ethics. While the path to virtue is different for each person, the virtues are common to us all. No traditional culture values laziness, cowardice or foolishness. All traditional cultures value justice, generosity and wisdom. The tradition of Confucius and Mencius, African oral traditions, and the philosophia perennis of the West are all traditions of virtue ethics.

A philosophical theory of business management consistent with human nature must understand that it is natural for human persons to be economically productive within communities. The most important community in any society is the family. In traditional cultures on all continents, most work was performed within families. In the industrialised world of today, many people spend much of their lives working outside their families in commercial organisations. But we should understand business firms, not as collections of individuals, but as communities of persons. A philosophical theory of management consistent with human nature must understand that the purpose of management is to promote the common good, both the good of the business firm itself and the good of the larger communities to which it belongs.

In our age of globalisation, humankind needs a theory of global management consistent with human nature, so that people can simultaneously be economically productive and become virtuous. We can learn about human nature in practice by examining the common elements of traditional cultures that have stood the test of time. In order to go forward, we must recover lost wisdom. Consideration of the common elements in this diverse collection of articles can aid in the formulation of a theory of global management appropriate for all cultures. Although the contributions to this special issue are quite different from one another, their points of agreement are striking. If the issue challenges readers to think and write about a philosophical theory of global management consistent with our common human nature and all that is good in our traditional cultures, it will have served its purpose.

David Lutz (tłum. Barbara Lubas)

Artykuł wprowadzający (Słowem wstępu)

Seria artykułów zaproponowanych w niniejszym numerze, w specjalnym układzie sześciu artykułów opartych na filozoficznych tradycjach i globalnym zarządzaniu przedstawia alternatywę dla teorii zarządzania obecnie przeważającą w popularnych szkołach biznesu na całym świecie. Anglo - Amerykańskie teorie zarządzania, które są dominujące w anglojęzycznym świecie i coraz bardziej popularne gdzie indziej, są zakorzenione w oryginalnej tradycji w charakterze niejako umowy społecznej z politycznym światem i etyką zarządzania. Biznes, firma komercyjna kolekcjonuje niejako osoby. Celem kierowania firmą jest maksymalizacja zysku właścicieli firmy. Najbardziej popularna teoria etyki biznesu, teoria udziałowca, jedynie zwiększa liczbę indywidualnych treści zaproponowanych w umowie społecznej. Istotne jest to, że bez społeczeństwa żylibyśmy w stanie natury, gdzie każdy z nas miałby nieograniczoną wolność naturalną. W dobie globalizacji potrzebujemy filozofii globalnego zarządzania. Wielu autorów napisało na temat wiele ale nie brakuje różnic pomiędzy azjatycką i afrykańską filozofią zarządzania, z jednej strony, a współczesną Zachodnią filozofią w zarządzaniu, z drugiej strony. Może okazać się, że nie ma żadnej nadziei na osiąganie konsensusu. Jeśli, jednakże, porównujemy azjatyckie i afrykańskie tradycje z Zachodnimi tradycjami, znaleźć możemy wiele wspólnych nici porozumienia.

Pomimo rzeczywistości opartej na różnorodności kulturowej, te kulturowe tradycje skupione wokół globu mają dużo wspólnego ponieważ wszyscy członkowie rasy ludzkiej dzielą wspólnie dobra natury. Stosownie do tradycji wspólności społecznej, jesteśmy indywidualistami naturalnie, a wszelkie tworzone przez ludzi organizacje są sztuczne. Zgodnie z tradycyjną filozofią, jesteśmy z natury zgodni. Zgodnie ze społeczną teorią kontraktów, ludzkie społeczeństwo charakteryzuje się konfliktami interesów, jest sprzeczny pośrodku co jest dobry dla siebie i co jest dobry dla innych osób. Zgodnie z tradycyjną filozofią, promujemy nasz własny dobry przez promowanie dobry ze społeczności, do których należymy. Osobisty dobry i dobro publiczne są zjednoczone. To jest prawdziwe dla wszystkich osób we wszystkich tradycyjnych kulturach.

Spostrzeżenie, którym jesteśmy, z natury, społeczne i polityczne istoty nie jest monopolem jakiegokolwiek szczególnego kontynentu. Umowa społeczna to porozumienie człowieka z człowiekiem; porozumienie, którego skutkiem jest powstanie tego, co nazywamy społeczeństwem.

Czyż zaletą jest więc wyznawanie tradycyjnej filozofii etyki czy azjatyckiej, afrykańskiej albo europejskiej filozofii etyki? Podczas gdy droga do cnoty jest inna dla każdej osoby, cnoty są wspólne nam wszystkim. Żadna kultura rozpatrywana w aspekcie tradycji nie uznaje za wartości lenistwa, tchórzostwa albo głupoty. Wszystkie tradycyjne kultury promują sprawiedliwość wartości, hojność i mądrość. Tradycja Konfucjusza i Mencjusza, afrykańskie przekazy ustne, i Filozofia wieczysta (łac. philosophia perennis) z Zachodu oznaczają szczyt mądrości, do którego w mniejszym lub większym stopniu zmierzają wszystkie inne nurty filozoficzne.

Filozoficzna teoria kierowania firmą zgodna z ludzką naturą musi zakładać, że naturalne dla natury człowieka jest być gospodarczo wydajnym w społecznościach. Najważniejsza społeczność w jakimkolwiek społeczeństwie jest rodzina. W tradycyjnych kulturach na wszystkich kontynentach, najwięcej pracy zostało przeprowadzone w rodzinach. W uprzemysłowionym dzisiejszym świecie , wielu ludzi spędza dużo czasu funkcjonując poza rodzinami w swoich organizacjach. To natralne, jednak powinniśmy rozumieć biznesowe firmy, nie jako kolekcjonowania osób, ale jako społeczności osób. Filozoficzna teoria zarządzania zgodnego z ludzką naturą musi rozumieć, że cel zarządzania ma promować dobro publiczne, obydwa dobra wypływające z biznesowej części firmy ale i dobra z większych społeczności, do których firma należy.

W dobie globalizacji, ludzkość potrzebuje teorii globalnego zarządzania zgodnego z ludzką naturą, aby ludzie jednocześnie mogli być gospodarczo wydajni ale pozostając przy tym prawymi ludźmi. Możemy dowiadywać się o ludzkiej naturze w praktyce, przez badanie wspólnych elementów tradycyjnych kultur, które wytrzymały próbę czasu. Aby zmierzać do przodu musimy odzyskiwać wyzbytą się mądrość. Rozważanie wspólnych elementów w zaproponowanej serii odmiennych skądinąd artykułów może pomóc w sformułowaniu teorii globalnego zarządzania odpowiedniego dla wszystkich kultur. Pomimo że artykuły w tym numerze specjalnym różnią się całkiem od siebie, ich sens umowny jest mocno uderzający. Jeśli ta kwestia zmobilizuje czytelników do myślenia i skłoni do wnikliwej analizy o filozoficznej teorii globalnego zarządzania zgodnego z naszą wspólną ludzką naturą można uznać że ta kolekcja artykułów spełniła rolę w tym numerze kwartalnika.

Stuart D. B. Picken

A Critical Analysis of the Japanese Approach to Management Philosophy

Analiza krytyczna japońskiej drogi do filozofii zarządzania

Introductory Perspectives

Before it is possible to assess the potential merits or demerits of any system of ideas, it is necessary to grasp the essential differences between what is under investigation and that with which the observer is most familiar. It is, therefore, necessary to clarify the basic and defining characteristics of Japanese management in comparative perspective, before drawing any evaluative conclusions. Students of Japan's modernisation process since the Meiji period (1868–1912) have, in recent years, come around to accepting the fact that Japan's modernisation follows much less closely the kind of Western model that has been followed elsewhere, and that it was assumed Japan was also following.[1] This has been a reluctant admission on the part of several distinguished scholars, amongst them members of the modernisation school of the 1960s, who posited cultural convergence as the foundation of a new world order. The rise of militant Islam, as a reaction to alien cultural pressures in the Middle East, and the adamant refusal of some Asian nations to accede to Western demands in certain disputed trade matters[2] have further challenged this view.

Since the 1980s, when a Neanderthal style of economic theory overtook common sense and reality in the West, a new and matching Asian strain

[1] James C. Abegglen was one of the first to recognise the importance of Japan's pre-modern heritage for the process of modernisation. See his *The Strategy of Japanese Business* (Cambridge, Mass: Ballinger, 1984).

[2] Market protection, market opening, de-regulation, and the definition of free trade are issues that in this context are discussed in newspapers and magazines almost daily.

of criticism has been forthcoming in response, namely, that while 19th- and early 20th-century impositions of Western styles on other parts of the world were defended 'in the interests of the poor and benighted', late 20th-century Western inroads have been quite overtly exploitive.

The earlier enterprises were suitably coated with a veneer of sanctity in the form of schools and hospitals, as part of the missionary endeavour. They also left behind something tangible. As one critic I heard recently made the point, the crude goal that is now driving the forces of development on the part of Western nations is, quite simply, that of creating more and bigger markets.[3] The assumption remains that once 'developed' (or 'modernised', to use the sociological rather than the economic term), they will naturally acquire a taste for Western goods and services.

Persistent attempts to force the applications of this highly questionable, if not now discredited theory have resulted in the deterioration of specific areas of Japan-U.S. and China-U.S. relations. As the disputants become more entrenched – and, in this, Westerners are often astonishingly irrational and dogmatic – the gaps will widen. It is, therefore, imperative for Western-Asian co-operation, and indeed world stability, to understand that the differences are not the result of sheer defiance or deliberate awkwardness on the part of Asians, but are the by-product of different historical experiences and long-standing traditions.[4] Japanese management is one case in point. It is the contention of this paper that the Japanese approach to management has much to offer to the West, but even more to those emerging economies that have found adjusting to the so-called 'market economy' theory difficult and frustrating.[5]

---

[3] Prof. Emily S. Rosenberg gave a lecture at the International House of Japan, entitled 'Spreading "The American Dream" to Asia' (*IHJ Bulletin*, Vol. 15, No. 1, Winter 1995), pp. 1–6, which describes the subordination image of Asia learning from its master in the early part of the 20th century, a by-product of the 19th-century missionary surge. This stands in stark contrast to the image of President George Bush leading a delegation of businessmen to demand access to the Japanese market.

[4] See, for example, the work of Johannes Hirschmeier and Tsunehiko Yui in *The Development of Japanese Business, 1600–1973* (Cambridge, Massachusetts: Harvard University Press, 1975) or of M. Y. Yoshino in *Japan's Managerial System: Tradition and Innovation* (Boston: MIT Press, 1968). Both include well-researched historical materials.

[5] Three such voices in Asia, people with adequate Western background, have been consistently vocal in their criticisms of the ethnocentric assumptions made by the leaders of Western nations. These include, most notably, Ishihara Shintaro, *The Japan that Can Say No* (New York: Simon & Schuster, 1991); Lee Kwan Yew, *Forty Years of Political Discourses* (Li Guang Yao, *Sishi Nian Zheng Xuan*, Singapore: United Press, 1995), and Mahathir Mohamad & Shintaro Ishihara, *The Voice of Asia: Two Leaders Discuss the Coming*

Before discussing the distinctive features of Japanese management, two preliminary points should be made. The first is the simple one that, apart from 1945 to 1952, when Japan was under Allied Occupation, the nation was never colonised at any time in its history. The last major foreign cultural export to Japan came from T'ang Dynasty China (616 - c. 907). Consequently, assumptions about Western practices being employed in Japan or about English translations of Japanese terms meaning identically what they would mean in English are, at the very least, dangerous and, at worst, totally misleading. Hence, the frustration, disbelief and often anger that foreign corporate officers frequently feel when they try to take command of their Japanese subsidiaries, or when they begin to deal with totally Japanese corporations. The same applies to those who come to sell goods and services to Japanese corporations. They quickly become lost in a mystifying labyrinth of procedures, meetings, and often oblique or vague communications that force many to give up in despair.

This state of affairs, by implication, leads to the second point, namely, that because of Japan's long isolation and independent history, Japanese corporate culture evolved according to its own dynamics, based on the various traits of social values in force at different times.[6] The consequence is that Japan's development was affected tangentially, rather than substantially, by the West. To cite one example alone, the forerunner of the present-day Sakura Bank (the amalgamation of the former Mitsui and Asahi Banks) was the House of Mitsui, bankers to the Shoguns of the Edo period (1615–1868) for three hundred years, similar to the roots of

Century (Tokyo & New York: Kodansha International, 1995). Disillusionment with market-economy reforms and the resultant social upheaval in Eastern Europe, not to mention the rise of crime (in the former U.S.S.R, for example), corruption, and inequality in older economies such as that of the U.K. have prompted many to call into question the kind of free-market economic extremism advocated during the Thatcher-Reagan period. CIS President Gorbachev, at the time, made the comment that, while the collective economic system known as 'communism' had collapsed, 'socialism' would never vanish. The kind of economic injustice that the Thatcher-Reagan economic system has generated now seems to be contributing to the rebirth of socialism as a philosophy. In Poland, Communists were democratically elected back to power after the failed Walesa regime. The lesson here is surely that action and reaction may thus be equal and opposite in political economy as well as in physics.

[6] See Picken on 'multiplex system' in 'The Evolution of the Japanese Value System', *ICU Humanities* 17 (1983), pp. 145–70, and William LaFleur on 'bricolage culture' in *Liquid Life: Buddhism and Abortion in Japan* (Princeton: Princeton University Press, 1992).

some of the modern commercial banks of Europe. Promissory notes,[7] in addition to coinage, were in existence as early as they were in Europe, and it is out of that experience, rather than in imitation of Europe, that Japanese attitudes to banking and finance grew.

The argument may be carried one stage further. It could be maintained, plausibly, that herein lie the cultural dynamics that drove Japan to become technologically innovative, selectively modernising in order to benefit further from tradition. Consider two simple aspects of Japanese culture. Firstly, there is the fact that the traditional and continuing economic axis of Japan was, and is, the route from *Nihombashi*, in Tokyo, where Mitsukoshi Department Store stands (the oldest House of Mitsui dry goods store, depicted in *ukiyoe* paintings of the Edo period) to Osaka, city of the merchants. The road was known as the Tokkaido. Secondly, there is the fact that Japanese business relations have always preferred face-to-face encounter to demonstrate effort, sincerity, and a willingness to co-operate. These two facts, when combined, lie behind at least one impetus towards technological development. The 20th-century development of the *Shinkansen*, the super-express trains that now network[8] the nation, dates back before the Tokyo Olympic Games in 1962. The latest generation of cars is equipped with private conference rooms to enable groups to prepare for meetings and to de-brief on the way back. Here we see culture not only stimulating a development, but also helping to design its format. In short, while Japan may appear Western on the outside, the inner heart remains very distinctively Japanese and still demonstrates marked resistance to forced change, preferring to function on its own terms rather than being dictated to by the demands of the outside world.

With these points made, we may now proceed to examine the characteristic features of Japanese management, their merits and their difficulties, especially when interfacing with Western organisational concepts. From there, we will move on to examine the social background to the idea of management, to identify some of the features of the implicit Japanese understanding of capitalism, some of which are extremely relevant to the present, particularly to newly emerging nations and regions of Asia

[7] *Tegata*, as they were called, were important financial instruments of the Edo period. Similar also to Europe was the role of private banking families financing great feudal houses. In the United Kingdom, for example, Barings, the oldest, was the financier of the Napoleonic War in the early 19th century.

[8] This was neither borrowed nor copied from the West.

(and, in fact, Eastern Europe also) which are finding their experiments with market economics frustrating, if not painful, and which are evolving management styles of their own.

Characteristic Features of Japanese Management

In order to understand the defining features of Japanese management, it is perhaps helpful to see a basic outline of its hierarchical structure. It may be laid out in diagrammatic form as below. It should be noted that the English comes as an equivalent to the Japanese. A term such as *torishimariyaku*, director, is of considerable antiquity, as any cursory examination of 16th- and 17th-century Japanese house constitutions will demonstrate.[9] While other terms (such as *kaisha*) developed in the late 19th-century to identify joint-stock companies were indeed linguistic innovations, terminology for management was derived from older sources. More importantly, they came from a totally different history of social experience and a different understanding of social order than that in the West. Grasping the significance of this point is essential for anyone trying to understand not only the Japanese approach, but also other Asian-style approaches to social and business management.

Management Hierarchy

Japanese		**English Equivalent**
会長	*Kaicho*	Chairman
社長	*Shachoō*	President
副社長	*Fuku Shachoō*	Vice-President (only 1 or 2)
専務取締役	*Semmu Torishimariyaku*	Sr. Exec. Managing Director
常務取締役	*Jomu Torishimariyaku*	Executive Managing Director
取締役	*Torishimariyaku*	Director
次長	*Jichoō*	Assistant Director
部長	*Buchoō*	Divisional (General) Manager
部長代理	*Buchoō Dairi*	Deputy Divisional Manager

[9] See Oland Russell, *The House of Mitsui* (Westport: Greenwood Press, 1970), or *Mitsui: Three Centuries of Japanese Business* (Tokyo: Weatherhill, 1975), pp. 499ff.

課長	*Kachoō*	Section Chief
課長代理	*Kachoō Dairi*	Deputy Section Chief
係長	*Kakarichoō*	Chief Clerk
主任	*Shunin*	Supervisor
社員	*Shain*	Employee

The diagram above helps to highlight three features of the Japanese system that distinguish it from its Western counterpart. Firstly, it is directly hierarchical and vertical. There is no horizontal structure of Vice-Presidents, as there is, for example, in corporations in the United States. There is a personnel division or section, a finance section, and so forth, but all these fit within the overall hierarchy, just as the government ministries in Japan, although theoretically equal, stand in a hierarchy with the Ministry of Finance and the Ministry of Foreign Affairs at the apex.

Secondly, the line of demarcation, in terms of rights and responsibilities, between board and top management is not clearly defined. Decision-making functions are almost completely integrated. This also applies further down the hierarchy. Since all company staff, including management, are *shain*, company members, the line defined most clearly in the West, namely that between management and labour, is equally unclear. Decision-making, therefore, involves many people, which means that total support is a necessary condition for the successful implementation of any proposal or plan. Hence, Japanese companies, like sumo wrestlers, have, so to speak, a low centre of gravity, centred on the lower ranks, such as *kacho* and *kakricho*.

Finally, as a general rule, no one reaches the rank of *bucho* or above unless that person has entered as a *shin shain*, a new employee, fresh from college, at the lowest rank. While various corporate consolidations have created boards in which members of the former organisations join, generally speaking, outside members until recently have not been solicited and were not welcome[10] on boards that are, almost invariably, totally in-house.

A number of observations may be made regarding this system. First of all, it should be obvious that, for Japanese corporations, management evolved as a function of culture and, as such, is related to the social value-system. Secondly, since this assumption is obviously so alien to modern Western styles of management, it is hardly surprising that interfacing in

[10] See Yoshino, *Japan's Managerial System*.

international contexts with Western organisations can present serious difficulties that have the potential for conflict. Thirdly, however, while some aspects of Japanese management have created interest in the West, along with a range of opinions on the possible applicability of them in non-Japanese contexts, they are taking deep root in Asia, because many features have grown out of Asian soil. Japanese practices have become benchmarks for Asia and, in that regard, problems arising from major differences in perception between the West and Asia are liable to increase rather than decrease in the future to the degree that Japan's Asian presence and influence as a model is underestimated.

But, did Western ideas never take hold? The introduction of Western management theories parallels the introduction of everything Western at the end of the 19th century. After a period of early enthusiasm for what appeared a key ingredient of Western success, it became clear that they did not fit Japanese needs, and they were subsequently modified or abandoned.[11] A labour market did exist in the Western sense, of people who could be hired by larger organisations, much the way in which outsourcing in the late 20th century has become as common as regular employment. Many of these people belonged to *gumi*, or associations of tradespeople such as carpenters, whose roots go far back into history. The government became alarmed at the potential menace of these roving freelance workers, behaving like *ronin*, masterless samura of the Edo period, and began urging major corporations to integrate them into their labour forces. The 1910 labour laws were created to achieve this end and, while subsequent labour laws were enacted, that cornerstone principle has remained. Consequently, continuity has survived alongside change. This point leads directly into discussion of the consequences of the difference between the functional approach and the value-oriented approach to management.

[11] T. Boone Pickens found this to his cost when he failed to gain a seat on the Board of Koito, the Toyota supplier, even after purchasing 26% of the company's stock. The system has been criticised in the wake of numerous scandals, because it encourages 'cronyism'. The idea of an outsider being an objective eye has been proposed. It remains to be seen whether such a system can work effectively.

Continuity of Traditional Values in Japanese Management

The use of value concepts has proved most effective for motivation and communication, the life-blood of all Japanese enterprise. Both explicitly and implicitly, the reality and influence of traditional values underlie basic business practices and attitudes. To maintain the vitality and the relevance of corporate culture, equal emphasis is placed upon social profitability as upon corporate profits. The Japanese term *keizai*, which is the translation of the English term 'economics', has a much wider range of meaning, referring to the entire social, political and economic situation. In the early 1990s, the Japan Productivity Centre (JPC) changed its name from *Seisansei Honbu* (生産性本部) to *Shakai-Keizai Seisansei Honbu* (社会経済生産性本部), the Japan Productivity Centre for Socio-Economic Development.

One benchmark statement that reflects the great continuity between pre- and post- World War II traditions of management was enunciated by the *Keizai Doyukai* (The Japan Committee for Economic Development) in 1956. The organisation was founded by young post-war executives and remains a powerful force in business life, because most of these young men of 1956 became senior corporate leaders of the following generation:

> The function of management in a modern corporation goes far beyond that of a search for profit. From the moral as well as the practical point of view, it is vital that modern corporate managers strive to supply products of the highest quality at the lowest possible prices through the most effective utilization of product resources consistent with the welfare of the whole economy and the society at large. It is indeed the social responsibility of modern executives to serve as an effective instrument to develop a managerial system capable of accomplishing this mission.

The assumptions that underlie that philosophy are in principle the assumptions that underlie all aspects of Japanese corporate culture. They may be summarised as follows:

1. The corporation carries social responsibilities that are both legal and moral. The destinies of corporation and society are intertwined. (We shall return to this point in Section III.)
2. Without an overall context of values, actions become meaningless.

3. Workers are better motivated if they believe that what they are doing has significance beyond its immediate application.

Stress on sincerity and loyalty has had the effect of weakening any possible tendencies to cynicism in Japanese industry and commerce. This, in turn, has saved Japanese society and Japanese corporations from much of the self-destructive cynical atmosphere that has been so damaging to Western social and business life.

In contrast, the scientific management system treats the worker as an extension of the machine and this has resulted in the development of many negative attitudes and practices. The Japanese view the worker as a 'human resource', meaning someone who is a vital link in a process. The Japanese awareness of the importance of processes can be seen in the way in which, when a mistake is perceived, the process is refined, rather than the erring worker punished or dismissed.

Japanese social psychology (fed from the traditional value-system) is an effective support in this regard. Much is derived from key values found in the Japanese religious tradition:

1. There is the Shinto inclination to believe in the goodness of human nature. This seems to be a positive base for encouraging trust and sincerity.
2. There is the Buddhist concept of harmony, *chowa*, seen frequently on walls and other prominent places, which implies a concept of 'wholeness'. 'Grouphood' takes preference over 'selfhood' and co-operation is preferred to confrontation under any circumstances.
3. There is the Confucian ideal of all-round culturing in preference to the specialist technocrat, and the Confucian love of ordered hierarchy. Consequently, religious organisations frequently lie in the background of major corporations. Links with Shinto shrines (which most companies have) are not cosmetic. They are related to deeper social structures such as networks of personal relations between companies and government, local and national. Employee groups may be sent to these for various kinds of training programmes. This leads us into the issue of the links between corporation and society, the concept of the corporation in its role as a moral agent.

The Understanding of Social Responsibility in Japanese Management

The management of corporations may consequently be viewed as one aspect of the management of society. The corporation is a moral entity, sharing the wealth of society in return for loyalty and effort. This is the deeper implication of assumption 1. above, which underpins Japanese corporate culture.

As we have seen, in managerial authority and in working conditions, values find expression. Functional authority in management does exist, but it co-exists almost evenly with value-based authority, which was thought to have vanished with the advent of the Taylor System.

Japanese management is thus not paternalistic in the Western sense of being selectively beneficial in a capricious way. Japanese corporations in the second half of the 20th century developed an elaborate value-system based on the traditional concepts of *giri-nino* (義理人情), a syndrome of duty eliciting human feeling and human feeling eliciting duty, around the concept of *shushin koyo seido* (終身雇用制度), literally, life-employment-system, but better described as a stable employment system. It implies a structure entailing mutual obligations. While the prolonged recession since 1989 forced numerous companies to rethink this policy from a cost point of view, nevertheless, those who are considered suitable for the management track are treated as a separate category. These considerations have been combined in some companies with a merit system. However, there is still a great deal of suspicion as to what a merit system implies, especially if the confused criteria used in the United Kingdom and the United States are critically analysed, for example, in evaluation of police efficiency. What counts as higher merit, one hundred traffic violation convictions or two homicides? Merit can also be used as an excuse simply to freeze wages.

The Japanese employment system was not created out of nothing, nor was it simply the continuation of an older tradition. It was the imaginative adaptation of a traditional value, the *ie gensoku* (家原則) or house principle, through creating a modern industrial concept in a form that resembled a traditional institution, to meet the needs of the labour market in the early 20th century. Its principal characteristics included what have been called the *Kin-Tract* (*kinship* + *contract*) system, the seniority system, and the stable employment system. These were designed to inspire

in employees the idea that they had a share in the enterprise, a share that was meaningful, and that they truly belonged.

Critics have commented that this kind of thinking is outmoded and that, as always, 'Japan is changing.'[12] To these claims, I have three responses. Firstly, Japan has only 2,000 corporations that employee more than 1,000 people. 96.4% of all corporations are in the category of small-to-medium businesses, *chusho kigyo* (中小企業). These are either part of a larger grouping for business purposes or are subsidiaries, in which case they carry the values of the parent company. Secondly, these large companies are the model for those that aspire to greater things. 'House' continuity is the dream of most. Generations are frequently numbered quite assiduously. Thirdly, the house principle was well known in the West and, in a sense, marked the golden age of modern business development. The House of Morgan is a good reminder of that age, as is the Rockefeller tradition. Conversely, wry smiles greet the pretentious figures of Trump in the USA, Tapie in France, or Berlusconi in Italy as they try to imitate past greatness. Today's well-managed corporations in the West have much in common with Japanese ideals.

The nature of social responsibility as perceived by Japanese corporations may also be seen in the recent development of the expression 'ethical' with regard to funds or business behaviour. Again, the contrast is illuminating.[13] On the Western model, a corporation may be judged by some to be 'ethical' if it does not use animals for experiments, is environment-friendly, does not invest in arms, drugs or nuclear power, and avoids touching laundered money. In keeping with the spirit of the Ten Commandments, the term 'ethical' is used if the corporation in question 'does not' do certain things. Behaviour in any context can raise moral issues, and even raise the moral stakes, but such negatives hardly function as a guide for conduct.

In Japan, a corporation may be viewed as ethical, if it is seen to be behaving properly in certain areas of its activities. Firstly, there is the question of the commitment of corporations to the well-being of society,

[12] The 'Japan is changing' syndrome seems often to be based as much on wishful thinking as on fact. Arguments are usually based on the selective use of evidence to support signs of 'cultural convergence'. My paper referred to in footnote 12 discusses this point.

[13] See Picken on the concept of the Japanese model of the moral corporation in *Finance and Ethics Quarterly* (Edinburgh, 1995). One obvious area is in how shareholders behave. The Rover/Honda fiasco during the Major government in the UK demonstrated how far apart both corporate and government stances were.

on the grounds that social profitability is at least as important as corporate profit. This is seen most frequently in statements of corporate philosophies. Business in Japan is value-oriented in many respects, as we have seen, through paying attention to the importance of, and cultivating virtues such as sincerity, effort, service, gratitude and commitment. It is less concerned with normative judgements on conduct, but will face criticism if it produces bad social consequences through forced unemployment, for example, or being irresponsibly merged or acquired.

In the area of hiring practices and personnel management, human resource management, as Matsushita called it, the same criteria apply. The old fashioned precept of 'Do as I do, not, do as I say' is well known in Japan as the basis of managerial authority. Managers are not paid overtime, and are expected to lead by example. Example leads to trust and to a deeper moral awareness in the organisation, which in turn can flow into society.

To the Asian mind, the cultivation of morality is more important that enforced implementation of its negative aspects. Trust was once a valued commodity in Scottish society, for example, where a gentleman's word was indeed his bond, reflected in the point of law that verbal contracts in Scotland are still binding. The different senses of the term 'ethical' tell a great deal about the underlying approaches and assumptions about both society and corporation. Japanese corporations are often mocked as being like the Boy Scouts, or any quasi-religious character-building organisation that pays attention to the cultivation of virtue. The excessive emphasis upon defined roles, specified tasks, and pre-defined conditions, typical of Western corporations, has limited their ability to motivate people by any means other than cash incentives, on the one hand, or threats of dismissal, on the other. This is, in fact, demeaning and is merely an extension of the cynical maxim that 'every man has his price'. It is hardly surprising that loyalty is a scarce virtue. The power of example is vastly underrated. When Lone Ranger fan clubs were in vogue during the 1950s, a study of juvenile delinquency in the United States turned up the fact that these fan club members had a very low rate of delinquency compared to society at large. The Lone Ranger was, in terms of the popular movement of the day, Moral Rearmament, the model, who never killed, never stole, never lied, and who pursued truth and justice. The human response to goodness and sincerity should not be underestimated, nor should the power of example. Japanese corporate culture has not lost sight of this ideal.

The Distinctiveness of Japanese Capitalism

Having looked at aspects of corporate and social management relevant to this discussion, it is now time to examine the overall context within which these operate, namely, the capitalist economic system. Those most critical of Japan, or most cynical, normally argue from the implicit premise of a model of the global economy, in which, at present, Japan is a misfit that will, eventually, be brought into line. Models of the global economy are convincing in Western business schools but, alas, they sometimes do not work in the real world, particularly the Asian world. The same may be said of theories of management.

Dr. Eiskue Sakakibara, then a senior figure of the Japanese Ministry of Finance, published a famous book in 1986,[14] arguing that Japanese--style capitalism was not of the same genre as that in the West. Seeming over-employment, defence of the micro-level, and excessive regulation are some of the features criticised by Western economists and business people. These, however, do not arise as an attempt to block Western entries to the market, but from the kind of mixed-economy thinking that Japan favours and that grows from the structure of moral obligations that link corporation and society. Consider one or two of the assumptions that underlie Japan's brand of capitalism. Number one is that the corporation has an obligation to survive. Strategic mergers do take place, from time to time, but these are in the long-term interests of survival, and are frequently engineered by government agencies. Number two is that shareholders are expected to behave responsibly. Since the majority are corporate, they do. Economy and frugality are practiced, which is quite different from, for example, the British obsession with cheapness. Long-term strategies are devised for downsizing, but are conducted in an orderly manner. Government regulation has the role of ensuring fairness, protection for vulnerable but necessary sectors of the economy, and the maintenance of a system that, in the best utilitarian tradition, seeks to produce the greatest happiness for the greatest number. Various brands of Asian capitalism are being created, all with local flavour, and these will increase, with time, as economic growth and development proceeds.

[14] Sakakibara Eisuke, *Beyond Capitalism: The Japanese Model of Market Economics* (Lanham, Maryland: University Press of America for the Economic Strategy Institute, 1993).

Looking, by way of contrast, from the other end of the spectrum, consider China. In spite of the overt appearance of contrast between capitalism and communism, there is much overlap between the Japanese and Chinese approaches to social order and economic management. The common Confucian tradition makes this easier to understand. In the early days after the 1949 establishment of the People's Republic, Mao Zedong's eclectic philosophy concealed strong veins of classical Chinese humanism under an imported name, 'communism'.[15] But he was, in reality, leading a predominantly agricultural nation towards independence and self-confidence. Deng Xiaoping coined the expression 'Socialism with a Chinese face' to describe his regional flirtations with capitalism, which were permitted to flourish, provided social order and fairness remained. As soon as the economy appeared to overheat, or inequality became too apparent, the brakes were applied. Social profitability (meaning social stability) always takes precedence over individual profit. The same may be said of Jiang Zemin's regime. Lee Kwan Yew puts the point another way:

> I don't think that Japan, Taiwan, Korea or Singapore wish to view the United States of America or any European nations as a model. No society abandons its traditions in order to adopt a totally new social system. They will improve upon what they have by trial and error, and if it benefits both society and the economy, they may adopt it. I don't think that any Asian society wishes to copy the American system. Personally, having observed Americans, I am amazed that the country has survived 200 years. Only the Philippines has adopted the U.S. model, and that country is a bad model for Asia.[16]

Consider this in the light of developments in the United Kingdom since the years when Margaret Thatcher was in power. If, as the British Gas Corporation salaries issue suggested in 1994, the bad old days of crude capitalism were coming back, the case for re-nationalising vital state assets might again become self-justifying. The alternatives might be massive social discontent, increased street violence and social breakdown, followed by

---

[15] See Picken, 'Ideology, Social Goals and Historical Change: Aspects of the Thought of Mao Zedong in Comparative Perspective', *NUCB Journal of Language, Culture and Communication*, Vol. 3, No. 2, 2001, pp. 75–88.

[16] Lee Kwan Yew, *Forty Years of Political Discourses* (Li Guang Yao, *Sishi Nian Zheng Xuan,* Singapore: United Press, 1995), pp. 581–82.

revolution and bloodshed. Can it be described as moral, in any sense, that one executive can increase his salary by 400%, when it is already twenty-five times more than medium-paid workers, while at the same time dismissing 2,000 employees? The Asian sense of the corporation as a moral agent is very much needed as a counter to the kind of policies being practiced by the insensitive in high places. As Lee again puts it: 'For Asian countries, the issue is not to copy America, Britain or any European nation's constitution. For them, they simply wish to live in a secure, ordered society, and enjoy a growing standard of living.'[17]

But these prized values I have identified in Asia are not unknown in the West. They were enshrined in the common sense and ethics tradition in 18th-century Scottish Enlightenment thought. Benevolence and enlightened self-interest need not be in conflict,[18] if at the end of the day everyone feels some modicum of contentment. In this regard, it is not surprising that Prime Minister Tony Blair, when developing the ideas of New Labour in the United Kingdom, stated that he had found a modern son of that tradition, Professor John MacMurray and his philosophy of relations,[19] a rich source of ideas.

If the Asian world has a major lesson to teach, it is that corporate management cannot succeed effectively unless the management of society is considered at the same time. The Asian message would be that the gaps between rich and poor must be monitored because of their disruptive potential. It is perhaps not insignificant that international discussion of the United States response to the September 2001 terrorist attacks on New York has included extensive reference to the wealth/poverty gap, implicitly arguing that individuals' and nations' desires and ambitions should be moderated in the common interest, so that in the long term a safer society, and world, will result. What is the point in owning a $1,000,000 property, if the cost of insurance and security services is equal to as much as would buy another house?

---

[17] Lee, *Forty Years of Political Discourses*, p. 524.

[18] Francis Hutcheson (1694–1747) in his *Inquiry into the Original of our Ideas of Beauty and Virtue &c.* (London, 1725) introduces the concept of a Moral Sense, which comes close to the ideas discussed here.

[19] John MacMurray, *The Self as Agent* and *Persons in Relation* (Gifford Lectures delivered at the University of Glasgow, 1953–54, published by Faber, London, 1961).

Problems and Limitations of Japanese Management

No system is perfect and, therefore, we must look at some of the weaknesses and difficulties in the Japanese approach to management, to determine the limits of its applicability. The basic and underlying problem from which all specific issues arise becomes visible when Japanese management is forced to deal with non-Japanese contexts. That is when its highly Japanese character becomes most apparent, in its inability to adjust in interface contexts. One example, derived from my own study of management problems in a US-based Japanese manufacturer, illustrated the problems that arise from the Japanese preference for unwritten rules, and an almost studied inarticulateness in trying to explain them. This stands in sharp contrast to the Western preference for clarity and job specification. The informal type of Japanese communication that takes place over drinks in a bar, rather than in a meeting, makes matters very difficult for non-Japanese managers to deal with, leaving aside the language barrier.

Discrimination has also become a serious matter. US Congressional Committee hearings were conducted in 1991, in response to complaints from employees of Japanese enterprises.[20] The reverse side of the loyalty/commitment syndrome is often a certain disdain for 'hired' people. But this also exists in Japan itself, and among Japanese, with regular employees looking down on part-time workers, as little more than mercenaries. Japanese who worked for foreign firms in Japan were, in the past, similarly viewed as 'local coolies'. This is exacerbated in the United States by its complex racial composition, which can magnify a slight handed to one individual into a declaration of war on a class of persons, depending on how it is handled. These cases must be seen in the context of Japan's *uchi* (内, inside) and *soto* (外, outside), distinction. This applies domestically as much as internationally. The core, long-serving members of an organisation are always reluctant even to listen to new members, until they have a credible track record. It is part of the way organisations are energised and, whether good or bad, it is a reality. Moving to a new company is thus difficult, because it is not simply changing jobs, but moving to a new corporate culture, at a lower level, often waiting years, even to be recognised.

[20] Typical cases are documented in *Employment Discrimination by Japanese-Owned Companies in the United States* (Hearings before the Employment and Housing Subcommittee of the Committee on Government Operations, House of Representatives, One Hundred and Second Congress, First Session, July 23, August 8 & September 24, 1991).

It is a powerful incentive to remain where you are and suffer in silence. Another function of this is a lack of awareness of local situations and liking for central (head office) control. Because overseas postings draw people from the *uchi* to the *soto*, they are unpopular with the ambitious. Daiwa Securities in New York behaved, not as a United States corporation, which legally it was, but as a subsidiary of the parent company in Japan. The Japanese head office sees it the same way. Consequently, irregularities in accounting are frequent, staff transfers are considered 'internal', and from these attitudes and practices, many problems arise.

One final major consequence of the *uchi/soto* distinction is that external and internal relations fall under different moral categories. Amongst themselves and their group members, moral concerns are high. Towards those outside their circle, different rules may apply. This is part of the Confucian heritage which they adapted. However, *guanxi* in Chinese, namely relationships, of course start with family. Its Japanese semantic equivalent, *aidagara shugi*, 'human betweenness', starts, not with family, but with company. This is a huge point of difference. Both cultures use the same characters for human relations (人間関係), but a sea of meaning divides them, because of peculiar Japanese adaptations of Confucian relations that downgraded the family beneath feudal loyalties, now expressed towards corporations. A distressing by-product of this is that, in terms of points made by Nakane Chie,[21] Japan is comparatively poor on self-control, self-monitoring and crisis management. Braking mechanisms are weak. This can be seen in a number of areas of political and social life. It is also a feature of corporate life. Consider the inability of successive Japanese governments in the post-1991 period to deal either decisively or effectively with the crisis in national finance, the prolonged recession, and to encourage drastic reforms in the banking sector.

The tradition of the West, in matters of work ethics, has been dominated by the 'Protestant moral consciousness' as expounded by Immanuel Kant in his *Groundwork of the Metaphysics of Morals* and by Max Weber's *Protestant Work Ethic and the Spirit of Capitalism*. Consciously or not, their influence remains strong. But the distinctions found in Kant, between deontological and utilitarian values, and between the individual and the

[21] Prof. Nakane is best known for her work in defining the vertical structure of Japanese society. A similar point about a narrow social nexus limiting self-criticism is also made by the late Prof. Nakamura Hajime.

group, are drawn along different lines in Japan. Standard Western interpretations of moral issues are difficult to impose upon Japanese responses. In the complicated matter of corporate entertainment and gift-giving, many instances, seen in Western terms, are difficult to distinguish from simple bribes. The distinction does not seem to exist in Japan, unless the scale is of such magnitude, as it was in the case of the Recruit Shares scandal, that Prime Minister Nakasone was forced to step down.

One area where Japanese public opinion has challenged these practices is in the case of Tokyo bureaucrats being entertained regionally at local taxpayers' expense. Public accountability is now being demanded for the use of public money. The Foreign Ministry underwent such exposure in 2001. But this is a long way from changing long-established practices. While some change may be visible in certain areas of life, it will be a long time before the laws of cultural entropy bring about a serious restructuring of the Japanese system. Until then, it will, in the name of caring for the 'greatest happiness of the greatest number', continue to tolerate what is considered necessary in the interests of corporate survival and total social well-being. This is often difficult for Western values to understand, let alone accept. But it is to be found, not only in Japan, but also in other parts of Asia. While different regions of Asia have different local agendas, there is an emerging Asian awareness of the region in contrast to the West, and while some Asian nations would criticise Japanese practices, others would be prepared to pardon a great deal in the interests of a common Asian understanding and containment of Western influences on the region.

The Development of Asia and the Emergence of Asian Styles of Management

It is here that interest begins to emerge in what might be called an Asian evaluation of modernisation, one which has brought Asians into conflict with the West, and has seen the emergence of Western-style Asian diplomats and leaders, speaking firmly for the Asian cause. I have quoted Lee Kwan Yew already. Consider these words from Mahathir Mohamad, the long-serving Prime Minister of Malaysia:

> The West has a long history of aggressive wars fought in an ongoing campaign to Westernize the world: no Asian country has ever invaded

> another country to 'Easternize' it. The notion that a country must Westernize in order to modernize is ludicrous. Asian modernization occurred as an inevitable stage in our own history, not because we were Europeanized or Americanized. For Westerners to think that we cannot make progress unless we become like them is absurd.[22]

These points are reflected in recent discussions of management in Asia. I shall cite two as evidence, illustrating further that mere copying of the West never was basic to the agenda of these nations. The popular magazine *Asian Business* has for a long time devoted space to this issue of what is Asian Management:

> Managers in the 21st century will also understand the need to … find common threads and mutual ground that will support corporate goals across many cultures. In capitalist Japan and communist China, leaders have recognised this. The Japanese refer to *wakon yosai* – Japanese spirit and Western learning, Japan's success was based on a commitment to learn from outsiders. The Chinese have another dictum – Chinese learning as base, Western science and business methods as application. Both call for what each society would consider a 'best practice'; both result in modernisation.
>
> What is 'Asian best practice'? It is our sense of responsibility to our community, the positive side of the paternalism associated with Asian companies. If we can sustain this, our management styles will be based on respect for the communities in which we operate. All else will follow.
>
> Gordon Redding, professor of management studies at the University of Hong Kong School of Business, believes that all economic systems are embedded in a culture that is defined as a set of values. The cultures which cope best with modernisation are those that blend the rational values of modernisation with their own values to maintain co-operation within organisations.[23]

In another edition, Bernardo Villegas, Dean of the School of Economics at the University of Manila, makes a similar point: 'It is up to

---

[22] Mahathir Mohamad & Shintaro Ishihara, *The Voice of Asia: Two Leaders Discuss the Coming Century* (Tokyo & New York: Kodansha International, 1995), p. 77.

[23] *Asian Business*, Vol. 32, No. 1, January 1966, p. 38.

enlightened leaders to devise appropriate economic policies that make the culture's strengths productive.' He is critical of the 1960s Harvard theorists who wrote off South Korea, but praised Myanmar and the Philippines, and explains how they were totally wrong. He then takes up the issue of 'Confucian cultures' being responsible for growth, Japan and Singapore being cited, in contrast to the older view that it was Confucianism that was holding China in feudalism.

Dean Villegas may be a competent economist, but he does not define either 'culture' or 'Confucianism' clearly, or simply assumes that there are agreed meanings. In fact, while rejecting cultural theories, he actually admits they have credibility:

> A careful look at the historical evidence in Asia, therefore, leads to the conclusion that culture *per se* neither hinders nor helps economic development. That is not to say culture is irrelevant. But the success of some Confucian countries demonstrates only that particular cultures have particular strengths. Systems and policies which take these into account can accelerate economic development, even to 'miraculous' rates of growth.'[24]

Asian-style management is a fact, and a factor of growing significance, of which Japan is an exemplary model, displaying all the features identified.

Postscript on Emerging Trends

The age of the Pacific is upon the world and, with it, the rise of Asia's Little Dragons in the wake of Japan. Since the Great Dragon is now rubbing the sleep of centuries from its eyes, there is no doubt that a new world order is coming into being. Unlike that predicted by the modernisation theorists, it will not be simply a Western-style world. Western styles may be emulated, but they will be in an Asian way, and Japan's key role, as Asia's major investor, will guarantee this. Japanese influence in Asia is growing in parallel with the nation's rate of investment in the region. Four reasons can be adduced.

[24] *Asian Business*, Vol. 32, No 3, March 1996, p. 16.

The first is the presence of hands-on Japanese management and Japanese-style industrial relations in Japanese corporations' Asian-owned subsidiaries in Southeast Asian countries such as Singapore, Thailand and Malaysia. Secondly, Japanese products have become the benchmark of quality, because they have set international quality standards in manufacturing and services industries. Automobiles, hotels and airlines have all experienced the Japanese challenge. The growing universality of Japanese popular culture in Asia, in the third place, is having enormous influence on the tastes and values of Asia's young. Japanese music, pop icons and fashions are creating new youth markets in Asia, rivalling their Western counterparts. American pop culture exists world-wide, but can no longer assume world-wide dominance. Finally, the carefully considered merger and acquisition strategies being employed by Japanese corporations to avoid problems that arise from currency fluctuation,[25] amongst other reasons, are affording Japanese economic power greater weight, and managerial styles greater influence within the Asian region.

Amongst some of the implications for future Asian management styles are three important ones, in referring to which I will bring this essay to a conclusion: Firstly, emerging Asian management will contain valued-based awarenesses, in keeping with the long Confucian heritage of the region. Secondly, it will be local in style, meaning simply that business rituals will express local customs and local traditions, and a measure of Japanese influence added as a result of interaction. Thirdly, following from the comments of Lee and others, it will be viewed as one facet of overall social management. Whatever the limitations, there is no society in any part of the world that would not be the better for the practical application of some of these principles, or at least of the questions they raise. It is perhaps the only long-term solution to prevent the widening gaps between rich and poor nations, and between rich and poor within wealthy nations, from threatening social breakdown. Since one-third of the world's starving live in Asia, it is a version of the Asian call to business and academia to bring together, in meaningful discussion, the central themes of justice and economics. This might, with some justification, be called the moral dimension of Japanese management.

[25] Nippon 1996: Business Facts and figures (Tokyo: JETRO, 1996), p. 79.

References

Abegglen J. C., *The Strategy of Japanese Business* (Cambridge, Mass: Ballinger, 1984).

Hirschmeier J. & Yui T., *The Development of Japanese Business*, 1600–1973 (Cambridge, Massachusetts: Harvard University Press, 1975).

Hutcheson F., *Inquiry into the Original of our Ideas of Beauty and Virtue* (London: Printed by J. Darby, 1725).

Kwan L. Y. , *Forty Years of Political Discourses* (Li Guang Yao, Sishi Nian Zheng Xuan, Singapore: United Press, 1995), pp. 581–82.

MacMurray J., *The Self as Agent and Persons in Relation* (Gifford Lectures delivered at the University of Glasgow, 1953–54, published by Faber, London, 1961).

Mohamad M. & Shintaro I., *The Voice of Asia: Two Leaders Discuss the Coming Century* (Tokyo & New York: Kodansha International, 1995).

Picken S., *Ideology, Social Goals and Historical Change: Aspects of the Thought of Mao Zedong in Comparative Perspective*', NUCB Journal of Language, Culture and Communication, Vol. 3, No. 2, 2001, pp. 75–88.

Picken S., *Modernization, Japan, China and the West: Comparative Observations*, ICU Journal of Asian Cultural Studies, 1997.

Picken S., *The Japanese model of the moral corporation in Finance and Ethics Quarterly* (Edinburgh, 1995).

Roberts J. G., *Mitsui: Three Centuries of Japanese Business* (Tokyo: Weatherhill, 1975).

Russell O., *The House of Mitsui* (Westport: Greenwood Press, 1970).

Sakakibara E., *Beyond Capitalism: The Japanese Model of Market Economics* (Lanham, Maryland: University Press of America for the Economic Strategy Institute, 1993).

Yoshino M. Y., *Japan's Managerial System: Tradition and Innovation* (Boston: MIT Press, 1968).

Abstract

A principal purpose of the objective article is to clarify the basic and defining characteristics of Japanese management in comparative perspective. In order to understand the defining features of Japanese management, it is perhaps helpful to see a basic outline of its hierarchical structure. The second part of this paper is the understanding of Social Responsibility in Japanese Management. The management of corporations may consequently be viewed as one aspect of the management of society. Having looked at aspects of corporate and social

management relevant to this discussion, it is now time to examine the overall context within which these operate, namely, the capitalist economic system. Those most critical of Japan, or most cynical, normally argue from the implicit premise of a model of the global economy, in which, at present, Japan is a misfit that will, eventually, be brought into line. Models of the global economy are convincing in Western business schools but, alas, they sometimes do not work in the real world, particularly the Asian world. The same may be said of theories of management.
KEY WORDS: *Japanese Management, global economy, Asian Styles of Management, Social Responsibility in Japan, the capitalist economy system*

Abstrakt

Główny cel artykułu ma wyjaśnić podstawowy zakres określający cechy japońskiego zarządzania w porównawczej perspektywie. Aby rozumieć określające cechy japońskiego zarządzania będzie tu na pewno pomocne przytoczenie podstawowego zarysu jego struktury hierarchicznej. Druga część niniejszego opracowania jest tematyka świadomości społecznej odpowiedzialności w japońskim zarządzaniu. Zarządzanie korporacjami wskutek tego może być postrzegane jako jeden aspekt kierowania społeczeństwem. Ci najbardziej krytyczni wobec Japonii, albo najbardziej cyniczny, zwykle sprzeczają się i wychodzą z ukrytego założenia modelu globalnej gospodarki, w którym, obecnie, Japonia jest odmieńcem. Modele globalnej gospodarki przekonywają w Zachodnich szkołach biznesu ale, niestety, czasami nie sprawdzają się w świecie realnym, szczególnie azjatyckim świecie. To samo może być powiedziane o teoriach zarządzania.
SŁOWA KLUCZOWE: *Zarządzanie japońskie, globalna ekonomia, azjatycki styl zarządzania, odpowiedzialność społeczna w Japonii, kapitalistyczny system ekonomiczny*

Author

Stuart D. B. Picken, DPhil, was Professor of Philosophy,
International Christian University, Tokyo, Japan.

Christine Wanjiru Gichure

Towards a New African Worldview: Quandaries of Moral Business Management and Leadership in Modern Africa

W kierunku Nowego Afrykańskiego Światopoglądu: Dylematy moralne w kierowaniu firmą i przywództwie we Współczesnej Afryce

Introduction

There is sufficient evidence, based on studies made from a purely anthropological level—including language, culture and history—to believe that, to some extent, black Africa forms a unity and, for that reason, it is possible to speak safely about an African worldview, without falling into the error of hasty generalisation. In doing so, however, one should not overlook the fact that there exist many and sometimes major differences among the African people and their different cultures.[1] Scholars argue that, in traditional Africa, there was a worldview that informed the whole of its social, economic and governance issues and thereby curbed explicit malpractices in business activity. Some people nostalgically refer to it as being the only solution to contemporary Africa's morality crisis in business and leadership; they argue that, if Africa could develop its own management and leadership system based on this worldview or *Ubuntu*, it would

[1] Mzamo P. Mangaliso, 'Building Competitive Advantage from "Ubuntu": Management Lessons from South Africa', *Academy of Management Executive* 15(3) (2001), 23-32; Peter Kanyandago, 'From Abundance to Poverty: Reflections on Using African Values to Combat Fraud', *Business Ethics: A European Review* 9(4) (2000), 253; John M. Waliggo, 'Law and Public Morality in Africa: Legal, Philosophical and Cultural issues', Address to ALRAESA Annual Conference, Entebbe, Uganda, 4-8 September 2005.

realise an 'African Renaissance', a rebirth that would restore the aesthetics and identity of the African people in a modern setup.[2] Already, many of the traditional African moral values have been identified. However, their strengths and weaknesses as sources of morality in contemporary Africa have yet to be worked on. This chapter is a contribution towards that endeavour.

The theses of this essay are: first, that the cultivation of an authentic African worldview in the era of globalisation should start with the identification of what were genuine economic, social and moral goods in the African traditions from existing historical accounts. Secondly, that it is not sufficient merely to reminisce about a splendid past, a past which, after tasting modern lifestyles, nobody wants to go back to; rather there is need to return to that past with the view to reincarnate those values in a renewed African worldview. Thirdly, the realisation of a new African worldview requires the revision of and distinction between value and non-value in both traditional African worldview and in contemporary Western attitude to ethics. For purposes of this chapter, the people referred to mostly, though not exclusively, are the people of Central and Eastern Kenya.

For the framework of this study, I will use two Bugandan proverbs. The first one says: 'Wisdom is like fire; when it is extinguished in your home, you get it from the neighbour' (*amagezi muliro, bwe guzikira ewuwo ogunona ewa munno*). The other says: 'A stick in your neighbour's house can never kill a snake in your house' (*omuggo oguli ewa mulirwano, tegutta musota guli mu nju yo*[3]).

Morality and Public Law in the Traditional African Worldview of Selected Bantu-Speaking Communities of Kenya

'Morality' derives from the Latin word *mos*—whose other related parts are *mores* and *moralis*—itself a translation of the Greek term *ethike*, which means either custom or something pertaining to character, and

[2] Among others, Mangaliso, 'Building Competitive Advantage from "Ubuntu"'; Hellicy Ngambi, 'African Leadership: Lessons from the Chiefs', in *Conversations in Leadership: South African Perspectives*, ed. T. A. Meyer & I. Boninelli (Johannesburg: Knowledge Resources, 2004), 107-132.

[3] Waliggo, 'Law and Public Morality in Africa'.

its variation *ethos* (habit) or the kind of behaviour that is accepted to be right and fitting and thereby constitutes a people's heritage, way of life and values.[4]

Many African languages, especially those of the Bantu cluster, do not have single words that translate directly to 'ethics'. However, that is not to say that they do not have the concept of right and wrong or a distinction between good and evil actions. Words for these abound and they form an important part of the non-material cultures and values of these communities. They operated as the systemic grid that in traditional Africa ensured that social life and practices were conducted along socially acceptable patterns. From an early age the youths were given moral formation so that they could acquire the habits, attitudes, beliefs, skills and motives that would enable them to fit into the community as mature and responsible human beings. Each and every aspect of life had some significance, and it contributed to the moral formation of individuals. Breaking the moral code was sin, taboo or wrongdoing. An individual lived and acted as part of the community, and therefore had to know his role and duty in upholding the community's values.[5] Those duties were translated into actions which were well understood and respected as the bedrock of social interaction; interactions which necessarily included trade and commerce. It was, for example, understood that adherence to ethical behaviour in full view of the wider public would elicit respect and honour, whereas failure to follow the society's mores would not only render the individual and his whole family to contempt and ridicule, but also elicit some form of reprimand, punishment or sanction, depending on the magnitude of the offence.

Thus, for these and other similar communities, public morality was based on a strong sense of shame for an individual who behaved contrary to the common good of the community, where great importance was placed on what some people call 'African socialism', grounded on the principle: 'I am because we are.'[6] A sense of morality permeated every aspect of life; it was reflected in the unwritten laws and codes of behaviour

[4] Aristotle, *Nicomachean Ethics*, 2, 1, 1103a 17-18; Christine W. Gichure, *Basic Concepts in Ethics* (Nairobi: Focus Publications, 1997), 16-19.

[5] Charles Ambler, *Kenyan Communities: The Central Region in the Late Nineteenth Century* (New Haven: Yale University Press, 1988), 23-24; see also Stanley Kiama Gathigira, *Miikarire ya Agikuyu (*Karatina: Scholar's Publication, 1933).

[6] John S. Mbiti, *African Religion and Philosophy* (London: Heinemann, 1969), 224; also K. K. Prah, *Ethics and Accountability in African Public Service* (Nairobi: ICIPE Science Press, 1993), 58-72.

which, being so ingrained in the members of these societies, curbed selfishness and improper behaviour, including transactions in economic matters and business. Some wrongdoings or taboos were stressed more than others, but seldom would ignorance exempt one from the consequences of transgressing the moral code. According to J. S. Mbiti,[7] the most grievous violations of the moral code were murder, robbery and incest, the disrespect for elders or the refusal to take care of them, negligence of widows and carelessness or negligence to offer sacrifices and libations to God and to the ancestors during festivals. Disrespect for elders was seen to imply disrespect for the ancestors. Wrongdoing with regard to the relationships between the sexes, which often consisted of small and apparently unimportant details of behaviour, was also taken to be serious moral offences.[8]

Undeniably, viewed from today's perspective, it can be said that the African worldview had certain customs which would no longer be cherished as sound moral values. One has only to consult literature to realise that some actions, like those which were permitted to young circumcision initiates on the days preceding the ceremony proper, can no longer be accepted as proper moral behaviour.[9] Similarly, some of the taboos to which so much importance was attached in African social life would today not be accepted as moral values; others have simply been surpassed by scientific knowledge, modern medicine, and Christian and Islamic religious values. Among the Agĩkũyũ, for example, it was taboo—or sin—for women and girls to eat chicken and other meat delicacies; it was taboo to eat food from a broken pot; it was taboo to cross over the feet of a woman or to have an owl cry near your house, for that would bring a bad omen; it was taboo to mention that someone's child was beautiful, and so on. At another level, it was considered important to placate the wishes of the elders, and those of the living dead. These latter were believed to be of two categories: the good friendly ones, and the evil vicious ones, who, if angry, could return to take various types of revenge. Some of these things

[7] Mbiti, *African Religions and Philosophy*, 2nd Ed. (Oxford: Heinemann, 1990).

[8] Mbiti, *African Religions and Philosophy*, 166-167.

[9] See among others, Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gĩkũyũ* (London: Secker & Warburg 1938); Gathigira, *Miikarire ya Agĩkũyũ* (Karatina: Scholars' Publications, 1933), 41-45.

have found some explanation in the Christian faith, others in philosophy and science, while others fall under the category of mere 'superstitions'.[10]

Superstitions and taboos apart, in the pre-colonial history of Africa the greatest violation of ethics was, without any doubt, the treatment of some human beings as commercial commodities. It has been argued that slave trading was a common feature of African culture long before the 17th-century incursion of some European nations in Africa. Recent African studies have nevertheless put that belief into question, as lacking any substantive historical support.[11] They have also unearthed facts to support the theory that, historically, the kind of slavery in Africa that oral accounts speak of was thinly spread over wide expanses of space and time and was practiced mainly as a way of punishment for hard-core criminals, witches and prisoners of war. In times of great calamities such as famines, some people would willingly let themselves be taken to do slave work or exchange some member of their family in order to save the lives of the rest of the community.[12] The phenomenon of enslavement for the purpose of sale and importation of people as goods and in large quantities, which came about with the Islamic slaving of the East African coast and the European transatlantic slave trading that began in the 17th Century, were a radical departure from everything that had gone before in Africa. Most significant, however, is the fact that it is in this practice, which spanned three centuries as a form of external and international business, that the first traces of grand corruption started to infiltrate the continent. Avarice and greed—both of them age-old human defects—fanned by the enticement of incredibly efficient goods, hitherto unknown in Africa, in exchange for the betrayal, capture and sale of some other humans to be shipped—not killed—to some country as human labour did not seem to

[10] Fr. C. Cagnolo found that the evil spirits were at times much more feared than God because whereas God does good things, the 'Ngoma often became irritated for want of some attention due to them, and brought misfortune, accidents and even death to their victims. With these the Agĩkũyũ were careful' [(*The Agĩkũyũ: Their Customs, Traditions and Folklore* (Nyeri, Kenya: The Mission Printing School, 1933)] & Revised Version, ed. Hilary Wambũgũ, James Mwangi Ngararigа & Peter Mũriĩthi Kariũki (Nyeri: Wisdom Graphic publishers, 2006), 26; see also Samuel Kibicho, *God and Revelation in an African Context* (Nairobi: Acton Publishers, 2006), 56.

[11] John Reader, *Africa: A Biography of the Continent* (New York: Vintage Books, 1998), 291-96.

[12] In recent times, a good example was the Great Famine that devastated most of south-eastern Kenya in the 1890s. See Ambler, *Kenyan Communities*, 122-149.

disturb the consciences of a few powerful people. Avarice and greed have always been the tinder that lights and fans the fire of corruption.

Business and Economy in Traditional Africa

Although this topic has the tendency to spark off highly charged emotions, it would be hypocritical to ignore it as a historical fact related to the way in which leadership and the economy of Africa evolved just before the advent of colonial rule. As far as business and ethics are concerned, it can safely be said that, apart from the few people who got involved with the slave hunters, business malpractices and corruption in pre-colonial Africa were few and contained. They were contained because certain factors, such as the unpredictability of production and the continual need to barter for essential commodities, limited the chances of individuals or groups accumulating unshared wealth in a form and quantity that would enable them to control the lives of other people. In addition, there existed a collective authority made up of the age generations, genealogically defined, so that every twenty-five to thirty-year interval a new generation (made up of men of all ages) would be invested with the responsibility for the moral direction of the society, including the administration of the local sacred groves as well as the regulation of harmony within the society. Thus, the possibility of anyone achieving his overreaching ambition was remote.

Among agricultural communities, the household has always been the basic economic unit; production depended primarily—though not exclusively—on family labour. To meet the basic family needs, people looked largely to their own land and herds. Beyond this, every family counted on the extended family and the community to which they either rendered help or received it whenever they were in need. No family ever thought of itself as being entirely self-sufficient. Family-based trading parties handled most of the local exchange of basic commodities, and since little or no capital was required, participation was essentially unrestricted. This kind of exchange would happen among homesteads within a locality, involving a range of inexpensive domestic commodities, such as pottery, baskets, and ornaments, grain, vegetables and tubers, skins and ropes, among others.[13] Nonetheless, it had the capacity to reinforce both the integrity and

[13] Ambler, *Kenyan Communities*, 50.

interdependence of groups. Goods and services were paid for according to local custom and circulated within the system. So long as there was no external drain on the resources, the communal and political order of participating communities was secure. For items that were not available locally, it was necessary to make travel arrangements to get them, or for their delivery, through a relay network trade. If the journey was to be long, the traveller knew that he could always find shelter in a homestead along the route to his destination. It was an unspoken proviso that a traveller should never be turned out at night, as that was tantamount to leaving him at the mercy of wild beasts.

In East Africa, long-distance trade was a prerogative of the Akamba people. Among them there existed trader associations where groups of five, ten, twenty or more individuals combined and planned strategies, routes and destinations for trade expeditions. From the start, such enterprises were group projects and participants bound themselves together by oath. The parties travelled, camped and returned as a unit. But these trading associations were not partnerships; each member brought in his or her own stock of commodities and traded individually. Traders did not pool resources or divide profits; they simply agreed to travel together for security, convenience and companionship. These associations were generally dominated by men, even though, occasionally and by exception, there could be some women. This kind of long-distance trade did not penetrate community markets to any great extent, but occasionally the traders would hold their own series of ad hoc trade fairs and that would draw in large numbers of people to trade foodstuffs and livestock for goods brought in from the coast.[14]

Virtually every African society made a provision for its markets. Within the East African region, markets were most common in the densely-populated highland areas, where they occasionally attracted a substantive volume of trade. In sections of northern Gikuyuland such as Karatina, hundreds of people attended markets that were large enough to warrant the separation of traders according to the commodities they were selling. This ensured a well-organised market system. Domestically-produced goods such as food and utensils predominated in these markets, but items imported from beyond the immediate areas, including metal tools,

[14] Ambler, *Kenyan Communities*, 75 & 85; Godfrey Mũriũki, *A History of the Kikuyu: 1500-1900* (Nairobi: Oxford University Press, 1974), 107.

ornaments, cosmetics, tobacco and arrow poison, also circulated through small markets.[15] Ornaments were an important trade item and virtually everyone wore some kind of jewellery; some pieces or types were considered especially luxurious, while others were signs of position. Ownership of jewellery represented a minor form of savings, since ornaments were frequently employed in trade to compensate minor services such as assistance in river crossing. In the whole region, craftsmen used a combination of local and imported materials to produce a huge variety of ornamental items, including many sorts of beads, chains, earrings, necklaces, belts, and arm and leg bracelets. Many of them were made of iron.[16]

Wealth and Prosperity

In most parts of Africa, wealth and prosperity were considered in terms of one's family: wives, children and dependants; the amount of land and livestock, household goods and working tools; clothing, made from either animal skin (leather), sisal, or the bark of certain trees, depending on the communities' culture; ornaments and accessories, including headgear and personal insignia that indicated one's status such as spears, clubs, swords and drums. Consequently, wealth was necessarily of a kind and nature that could be seen by all, and these possessions, while belonging to an individual family and clan, were at the same time seen to be a good and source of pride for the whole community. The nature of the wealth itself did not provide many chances, if any, for the practice of what today we call corruption, because it was generated more or less as family business. The practice of gift-giving and gift-expectation before any transactions could be agreed upon, either in business, marriage or lawsuits, existed. Nonetheless, it has been difficult for business ethicists and historians to determine whether such gifts could be called bribes in the sense in which we use this term in modern times. The general opinion is that gifts formed part of social protocol.

Unfortunately, when trading with foreigners, it seems that it was not always clear how far the practice could go, perhaps because the gift items were so unusual and amazing. More often than not, these consisted of

[15] Ambler, *Kenyan Communities*, 85.
[16] Ambler, *Kenyan Communities*, 89.

fancy foreign ornaments such as glass, mirrors and chains; guns and gunpowder; and unusual brands of alcohol such as rum. Ignorance regarding cultural and technical advances outside Africa, coupled with human natural aspiration for grandeur, were certainly manipulated by slave hunters—European and Arab alike—to the extreme. The same mechanism would later be used, though with very scarce indigenous collaboration, to procure territory during the Scramble for Africa.

The Spirit of Sharing in the African Worldview

In the African worldview, it was presumed that the whole purpose of having resources was to satisfy human needs. Underlying this presumption was an unspoken proviso that resources existed for community use and were not to be accumulated for their own sake. It was for this reason that, among the Bantu agricultural communities of Kenya, for instance, ownership was vested more in the clan or Nyũmba (the extended family) than in an individual. So broadly could this ownership be interpreted that certain articles and objects, while remaining the property of a person, could easily be turned to communal use. According to Fr. C. Cagnolo, an Italian priest working among the Agĩkũyũ of the Mt. Kenya region:

> A Mũgĩkũyũ would not worry too much to provide many household requisites, especially if he was of scarce means, because he was well aware that in case of need he would easily be able to borrow a pestle, a hoe, a knife or any other necessary tool from his neighbor, who would never refuse it.[17]

This collective ownership, a sort of social responsibility, extended to land use and its cultivation in such a way that no hard-working person could ever suffer dire need, so long as others had land that could be put into use. The same spirit of sharing extended throughout the community during the seasons for cultivation and planting, as well as when somebody needed to put up a new house. Similarly, it was extended to preparations for marriage and other preparations for communal feasting.

[17] Cagnolo, *The Agĩkũyũ, their Customs, Traditions, and Folklore*, 29.

Customarily, it was the male children of the family who inherited property and it was expected that they would add to what they had received, either from virgin land or through conquest, from other non-agricultural ethnic communities.[18] Once a family came into possession of a certain piece of virgin land, under the principle of precedence, that land formed part of their patrimony in perpetuity. Thereafter, no individual could dispose of it authoritatively, and even if he were to sell it, such a sale was understood to be temporary with the implicit condition of recovering it for the clan.[19] Absolute ownership of land resided exclusively in the clan as a joint body, equivalent to what today we would call a limited company. Before the colonial period, it was always possible for migrants to settle down in territory that was largely uninhabited, but more often than not they were sure to encounter existing populations, albeit sparse, that had previously used it, and hence, lay claim to it. Oral sources in central Kenya, for instance, abound with references to indigenous non-Bantu-speaking hunters and gatherers—known as Okiek—whom farmers encountered as they spread from the north southwards. As the agriculturalists expanded, they also had to contend with groups of pastoralists who occupied the neighbouring grasslands. Sometimes, there would be a struggle for territory acquisition.[20]

Wealth and influence were inextricably intertwined in the agricultural African societies, and since land was generally available, prosperity and security depended on the ability of the people to work the land and tend their herds and flocks. Hence, the popular aphorism in central Kenya: *andũ nĩ indo*—'people are wealth or capital'. So long as there was labour, wealth would be self-perpetuating. Access to labour was what gave a man the resources to enhance his stature and develop a following. A man who had land and plenty of livestock was considered to be wealthy. With these, he was in a position to reward his labour by offering them the hospitality of beer parties and feasts, an essential part of building a position of leadership. In some communities, especially those of the highlands where there was more constant rainfall, the accumulation of wealth and the power that affluence brings with it were more pronounced. Nevertheless, it was still difficult for individuals, no matter how ambitious, to accumulate

[18] Cagnolo, *The Agĩkũyũ, their Customs, Traditions, and Folklore*, 29.

[19] Cagnolo, *The Agĩkũyũ, their Customs, Traditions, and Folklore*, 2.

[20] B. A. Ogot, ed., *Kenya before 1900* (Nairobi: East Africa Publishing House, 1976), 53-83; Ambler, *Kenyan Communities*, 12.

large amounts of wealth in the sense we understand wealth today, or for their dependants to be very poor, because strictly enforced social and ceremonial obligations saw to it that property was effectively redistributed following an established and rather uniform, inheritance procedure.

The rich were those people who could command the resources of labour necessary to open new fields for cultivation, watch over large herds, protect their settlements, and engage in trading, hunting and raids. Such men built up their bases of wealth by first expanding their families, generally through marrying more wives, who together with the children they bore formed the nucleus workforce. If necessary, they added to their labour capital through adoption of dependants. This sometimes was done through the development of patron-client relationships or through manipulation of social obligations. With these arrangements, it was difficult to find really destitute persons. Only people diametrically opposed to such arrangements could be said to have been really poor.[21]

As in all human communities the world over, there was no lack people who preferred not to work, but who nevertheless wanted other people to take care of them. Without necessarily condemning such people, many African oral traditions have proverbs by which they praise the industrious and advise idlers either to work or go elsewhere. For example, *Mwendi mbũri nĩ mũrĩmi*, which exhorts the lazy man to work if he want to have possessions, or *Utarĩ ndetagwo ndundu*, which literally means, 'One who owns nothing out of laziness should not be let into the communities' secrets.' Another warns those who would have what others have worked for without effort: *Wĩ mũnyota matahwo*.[22] In spite of these teachings directed to the lazy person, there is little evidence that beggars of the kind we find today in the streets ever existed in traditional Africa. Thus, in an indirect yet firm way, custom constituted checks and balances for industriousness and economic ethics. At the helm of the moral checks and balances of communal behaviour was the age-generation system.

A generation consisted of several age-sets and it was declared through a ceremony every 25 to 30 years. An age-generation would have its own distinctive character and name, often taken from an important current event.[23] So long as its tenure lasted, an age-generation was responsible for

[21] Ambler, *Kenyan Communities*, 25-26.

[22] Gerald J. Wanjohi, *The Wisdom and Philosophy of the Gikuyu Proverbs: Kihooto Worldview* (Nairobi: Paulines Publications, 1997), 157.

[23] Gathigira, *Miikarire ya Agikuyu*, 32.

public morality and social harmony. Thus, the age-group system established gerontology as the dominant form of political organisation. Respect for the elders and their way of doing things was the essence of the principle, and at times it automatically overruled the vertical authority of family lines.[24] An important aspect of the principle was the requirement that in case of a dispute, the community's ethic had precedence over individualistic interests.

Thus, through the age-grade and gerontology—the two most highly valued authorities—and the kind of economic system in use, there were hardly any major business ethics violations and there could not be any really major business ethics issues. When these did occur, as they inevitably must have occurred from time to time, especially with regard to social obligations attaching to herds and flocks, traditional organisational mechanisms took care to see that justice was properly administered.

Law and Public Morality

In traditional African societies, there was no clear-cut distinction between law and morality. Breaking the social mores, therefore, amounted to breaking the law and breaking the law was tantamount to isolating oneself from one's community.[25]

The administration of justice was a prerogative of the elders of the council, who were generally constituted from the age-generation in power and wielded the authority of the executive, judiciary and legislature all rolled into one. Among their most important functions was that of creating harmony in society by promoting the spirit of sharing of resources at the people's disposal.

Obedience to the elders was facilitated by the judicial system whereby, once a sentence was passed, the payment of the fine or punishment involved not just the offending individual but also his whole family. The enforcement of the sentences depended on people's reverence for the traditions. There were no prisons, nor prison warders, and yet the sentences were necessarily obeyed. Also, there was the obligation to the 'supernatural':

[24] Reader, *Africa*, 265.

[25] Philosophically these are two distinct but related fields in which morality and public order are generally taken to be the basis for law.

to disobey the elder would anger the living dead and that was believed to be tantamount to plunging one's people into calamities and dishonour.

When someone committed a crime, such as murder, it was the community of the offender rather than the individual that had to make recompense to the family or community of the victim. Exceptions to this rule were cases of witches and black magic, which were considered to be very evil because that was collusion with the evil spirits to do harm. Such people, like tumours in the body, were better extirpated from the community. In most cases, extirpation meant exile or being sold into slavery. Banishment or exclusion from one's community was the highest possible punishment that could be imposed on a person. In the worst of cases, such a person could be sold to a neighbouring community, where he would have to be born anew.[26]

Ordinarily, African justice only required that, in the case of other offences, the culprit should pay a fine commensurate to the offence. The fine or punishment would be thought out in a way and manner that could compensate the family of the injured or killed person for the loss or impairment of a contributor to the family's welfare. The fines were paid in livestock such as cattle, sheep or goats. Once a fine was determined, its payment remained the responsibility of every member of the offender's extended family. The general rule was to pay it in instalments[27] and so a payment could carry on for many years.

African communities, both pastoralists and agriculturalists, have always valued livestock. Consequently, any actions that could lead to its loss were to be avoided at all costs. As a result, when an offence was committed, the fines charged by the legal council—council of elders—took into account that livestock increases with time. Thus, when determining the fines to be paid, all possible increases of livestock over a period of time were taken into account. Decisions as to the kind of fine that should be charged, the amount, and how long it should normally take to pay the entire debt often required many sittings of the councils of elders, constituting their full-time employment. It necessitated long argumentations, which were a keenly savoured pleasure. Although these elders did not receive any honorarium, they had to be kept happy and satisfied with food and drink by the concerned parties. To clear a case, therefore, took

26 Gathigira, *Miikarire ya Agikuyu*, 19-20.
27 Gathigira, *Miikarire ya Agikuyu*, 4.

a long time, making it even more expensive for the parties involved. This was yet another reason to avoid crime and lawsuits.

Viewed from the perspective of the legal proceedings we use today, typical of Western justice, which requires the use of the police force, warrants of arrest, barristers, judges and prisons, etc., this system of dispensing justice may appear to have been simplistic, but it was cheaper, direct and practical. Certainly, it had its shortcoming and it is not difficult to imagine that it must have been abused from time to time. Nevertheless, it prompted people to act well. It enabled society to function and, in the long run, led people to observe at least the rudiments of ethics. Every person knew what was expected of him. The extended family knew that they should not collude with irresponsible persons, because in cases of behaviour contrary to custom, duty and obligation, they would probably have to contribute a goat or two and, in extreme cases, even a heifer. As a result, it was naturally in the interest of every adult to see that even his remotest cousin obeyed customary law and morals. Finally, there was also the question of the implications of disregarding the law, such as dispossession and the consequent downfall of the clan, family or community. Calamities could also be unleashed on the same from the 'supernatural' because of such downfall. It must be remembered that, in most of Africa, there has always been the belief that the universe is a composite of divine, spiritual, human, animate and inanimate elements, hierarchically perceived but directly related, which always interact with each other. While some of these elements are visible, others are invisible. The different elements were understood to correspond to their visible and invisible spheres of the universe; the visible world being composed of creation—including humanity, plants, animals and inanimate beings—and the invisible world being the sphere of God, the ancestors, and the spirits. At the top of the hierarchy of the universe is the Divine Force, God the creator and sustainer, the Holy. It was also believed that God does not only encourage commitment, but demands it. Hence, ethical commitment was ultimately anchored in the people's conception of God who is the Holy, and in their interpretation of what God demands of them in real life. People generally never questioned nor debated God's ultimate importance; it was taken for granted. Moreover, it is because of the place God occupies in the universal

order of things that human beings can even speak of their own existence, let alone their tradition.[28]

In this worldview, rituals were important, for it was through them that cultural-religious ceremonies to celebrate or commemorate events were performed. Rituals were symbolic,[29] performed to mark such important events as birth, the coming of age or initiation, marriage and death. Others were to acknowledge blessings, such as rain after a long drought, planting and harvesting, or the completion of a new home. It was through rituals that elders obtained powers, including the power to offer sacrifices to God—whose intervention was sought in the event of calamities such as famine, floods and epidemics. More often, though, the elders had to contend with trying to placate the living dead: the ancestors. Rituals, therefore, served to bring order, direction, and a sense of identity to the people. Nevertheless, that identity was always within small communities, and never amounted to something as large as a nation. The nation-state did not yet exist.

Social Transformation and Erosion of the Traditional System of Moral Values

We have already seen that religious beliefs were central to all aspects of the African way of life. They impacted on the way people lived their everyday lives, from what they ate or could not eat and, by extension, to the way they hunted, made tools and clothing, sat in council to hear lawsuits, planned and waged war, arranged themselves in families, married, divided and shared work, educated their children, treated illness, disposed of the dead, and related with God and the living dead. All of these practices, intermingled and intertwined, constituted their worldview, one that furnished them with certain mechanisms that helped them to understand the world in which they lived.

[28] Laurenti Magesa, *African Religion: The Moral Traditions of Abundant Life* (New York: Orbis, 1997), 39-40.

[29] For more information on Symbols see David N. Power, 'Symbols in Cultures and Identities', and George MacLean, 'The Symbols We Live By', presentations and discussions of the Council for Research in Values and Philosophy (Philosophical Seminar: Catholic University of America, September 2006).

The contact of traditional Africa with external cultures, through colonial rule, introduced into Africa a social, legal, economic and religious transformation. It brought a written legal system, introduced a monetary economic system and new languages that since then have facilitated inter--ethnic communication throughout the continent. However, for the new system to function, some old practices had to be abolished and in the process of doing so many practices that belonged to the African worldview became obsolete. With regard to Christianity, for example, it would take time before both the missionaries and the converted would reach a point of making a real distinction between what was good in African beliefs and practices and what was not, a distinction between, say, morals and taboo, superstition and true reverence of God as a totally powerful yet loving and merciful God.

Thus the process of 'civilisation' ultimately meant the disarming of traditional leadership patterns of the elders, which had hitherto served as a form of judiciary and priesthood. In its place there emerged a fragmented values system in which morality and religious practices belonged to one sphere, law and judicial matters to another, and economic and social affairs to a third. Theoretically, the new notion of community was now the nation-state, which ideally would bring together communities that had hitherto ruled themselves separately, either as pastoralists or agriculturalists, hunters or lake people, with their distinct cultures and customs. But in order to bring all these different communities under one rule, the new power needed collaboration. This was achieved through the creation of an artificial system of 'chiefs' and 'headmen' that would be the voice of the foreign rulers. Here, the basis for order and good behaviour would no longer be the traditional age-generation elders; in their place now sat imposed civil servants.

Public Morality and Justice in the New Values System

Thus, the root of the public morality crisis in Africa does not stem so much from the fact that Africa modernised, but rather from the fact that in abandoning the traditional setup and its governance system, including all its various beliefs, Africa did not fully accept the whole message of the new system with all its dimensions. As a result, once the ties that bound one to behave in certain 'correct' ways became inconsequential,

the socio-cultural and moral order also weakened. The new values system did not seem to bind as much as the old had. For example, in the new order an individual believed to have committed an offence must first be caught, taken to court, and charged. In the new system, the living dead are not feared, so in the process no one suffers, only the suspect. Again, some of the offences he may be suspected of having committed are difficult to prove; to be charged for theft, fraud or other forms of corruption, the evidence of the crime must be produced in court. Such evidence may sometimes be difficult to produce because money, unlike cattle or land, can be electronically transferred to banks anywhere in the world.

The process of transformation is further compounded by the fact of globalisation. From the West, the aspiring African has imbibed the individualistic principle of 'self-interest'. In an individualistic society, no one would be willing to contribute to a fine imposed upon, say, a brother's wife's step-son's cousin-in-law, even though it might cost us less to do so than to pay the proportion of our tax spent on getting him convicted and held for years in prison. Thus, the more the people become modernised, the more the principle of sharing, typical of the traditional African worldview, dwindles. On closer scrutiny, we see that what emerges is neither one thing nor the other, because whereas traditional African cultures valued the communal dimension of life and ethics, the modern African is more and more entrenched in individualism and selfishness which have infiltrated into Africa from Western education and from contemporary social and moral changes emerging from greater human mobility and urbanisation, job competition, economic management, and the on-going process of acculturation.[30] Everybody wants to enjoy the goods of modernisation.

Furthermore, due to either custom and/or insufficient lapse of time and experience of modern governance even after nearly half-a-century of independence, Africans in some countries continue to regard the state and its rules suspiciously, more as an intruder and enemy, rather than as the power that will steer the state to its common good. In such a situation, the assets of the state which, logically, originate from their own taxes, are perceived to be alienated public goods, which the craftier people feel entitled to grab with impunity. For them, the only evil is to be caught

[30] See A. T. Dalfovo, 'Applied Ethics and the Experiential Dimension in African Philosophy' in *African Heritage Series* (Washington: Council for Research in Values and Philosophy online publication, 2003), I.

doing so.[31] This approach to the state by its people has created a difficulty for post-independence African leadership, a difficulty of how to steer the continent to ethical economic growth, while balancing its various communities and fragmentations through a uniform set of ethical standards.

Africa has so far not devised a business model to suit its peculiar situation and there is little likelihood that such a model is forthcoming. It is more likely that business in Africa will continue to be conducted within a mixture of contradicting Western and African values. At the social and ethical levels, the African businessman continues to be torn between these two worldviews. He may, for instance, be doing business with a Westerner whose culture is rooted in the notion of ethics as 'self-interest' and who, nonetheless, is meticulous regarding issues which, to him, are of absolute importance. Such a person is shocked when his African counterpart asks for some token in order to set the negotiations rolling. To him, this is soliciting for a bribe and, rightly so, something unethical in business relations. Yet, for the African, this is, while perhaps not being something virtuous, nonetheless not the worst thing one can do. The really bad things are those that distort the natural human goods, such as the natural definition of marriage; the family, including its size and extent; the practice of *in vitro* generation of children—without a father or family; surrogate 'motherhood' as a business to beget children for others; an apparent culture of death contained in abortion and euthanasia; the practice of divorce and pornography in all its forms. By contrast, for the Westerner, if he is steeped in secular ethics, these matters belong to another sphere and should not enter into ethics; they belong to a personal worldview. The ethical and moral issues to worry about are how to safeguard peace, non-violence and justice; including transparency and honesty in business; care for the natural environment and its sustainability; respect for gender and affirmative action; and finally, utmost reverence for autonomous decision-making in everything, including the use of one's body. The results are two parallel manners of moral valuing, two standards of what are the essential human goods and important moral issues, both of which overlook the fact that neither the former nor the latter alone constitutes the whole truth about morality or ethics. Neither of these two approaches to ethics constitutes

[31] Not long ago a respected local daily in Kenya published a short story—a winning story—in which the hero manages to defraud another boy and in doing so 'prays hard' to succeed. The impostor takes the other boy's passport and $7,000 and flies away to start a new life in the United States of America!

genuine moral behaviour without the other and, therefore, neither of the two can call the other 'corrupt', because both, from the point of view of the total human good, are morally inadequate.

Thus, whereas to a Westerner soliciting a token in a business deal may appear to be bad, to an African it is not worse than those other things; it is just a different approach to partnership. Besides, there still remains in him the notion that visitors bring gifts, or that using public and even private money for oneself is not really something too bad, especially if it cannot be proved to have happened. Thus, having lost the traditional sense of reverence and fear, on one hand, and not having internalised normative Christian ethics, on the other hand, many individuals at the African frontline of business and leadership have no qualms about asking for favours proportionate to the amount of money the investor will gain. This is where the disillusion lies, in trying to graft an older way of thinking onto a system where it does not fit. The outcome is the phenomenon now commonly called 'corruption'.

Adopting the Traditional Values to a Modern Worldview

In 1991, a research project was carried out within various large corporations in the United States and Latin America, various countries of Europe, Japan, Southeast Asia and Canada with the aim of finding out why, throughout the previous decade, the business communities in these countries had become so interested in ethics.[32] Among the countries of the developed world, it was felt that ethics was essential, if their businesses were to function properly. In Britain, for example, among the managers the researcher interacted with, the researcher found a consensus that one of the concerns was the demise of traditional values and the need for formal rules. She also noted that, whereas it is common for people anywhere in the world to worry about the values of the younger generation, a feature that seemed to be particularly prevalent in the young people in Britain and the U.S was a lack of faith in the future. Unlike the post-war generation, the younger people did not believe that their standard of living would

[32] Joanne B. Ciulla, 'Why Is Business Talking about Ethics? Reflections on Foreign Conversations', *California Management Review Series* 34(1) (1991), 67-86.

be better than that of their parents; some actually feared that it would be worse. As a result of this fear, the up-coming generations of professionals and businessmen believed that it was imperative for them to get as much as they could before it all ran out. Noted also was that it is difficult for people anywhere to act on moral principles when they do not believe that some good will come of it, if not now, then sometime in the future. To a great extent, this is what has been happening in post-independence Africa, only in reverse. In comparison to the developed world, Africa has passed from the traditional worldview to modernity within a short period of time. Consequently, people who only three generations ago would have been considered wealthy today, given the demands of modern lifestyles and the cost of living, fall into the category of the poor. Their children do not want to be poor; hence the rush to get as much wealth as possible before it runs out.

Another interesting finding of the report mentioned earlier[33] is that, generally, one of the most obvious reasons why ethics was on the business agenda of the developed world was that few businesses today are insulated from forces in the global economy. The interdependence of business across national boundaries means that the modern corporation depends on and has obligations to strangers from all over the world and this is happening all the time. It is far more difficult to think about the moral obligations that we have to strangers than it is to think about our obligations to our own small community of clan, family, friends and, by extension, our countrymen. This is also the African experience. Yet, if we are to interact at the global level, relying entirely on traditional custom is no longer sufficient. One must be open to a much more rational and rather sophisticated way of thinking about morality, based more on rationality than on mere custom, to extend the 'inward bound' moral rules of small community life 'outwards' to the realm of non-intimate and distant relations. In agreement with the study referred to,[34] this realisation was one of the factors that led many business people and politicians to assert that their countries needed ethics, that they needed to return to traditional values, which usually means a return to honesty, integrity and promise-keeping.

[33] Ciulla, 'Why Is Business Talking about Ethics? Reflections on Foreign Conversations'.

[34] Ciulla, 'Why Is Business Talking about Ethics? Reflections on Foreign Conversations', 77.

It is in this sense that the wisdom of two Bugandan proverbs can enlighten us: *Amagezi muliro, bwe guzikira ewuwo ogunona ewa munno* ('Wisdom is like fire; when it is extinguished in your home, you get it from the neighbour') and *omuggo oguli ewa mulirwano, tegutta musota guli mu nju yo*[35] ('A stick in your neighbour's house can never kill a snake in your house'). Granted that not everything African is for that reason perfect, including African customs and traditions, neither should Africa swallow all lifestyles from the West; they do not suit the African worldview that still lurks in its veins.

Philosophers and economists alike have shown that there is a correlation between the way a society organises its property and the way it handles its social relations. They argue that to some extent, the socio-economic organisation has a powerful influence over the way people respond or perceive their moral obligations, especially to strangers.[36] They further argue that the experience of a life of excess poverty in the midst of plenty is likely to be used to justify actions that would otherwise be considered wrong. In a typical pre-colonial African setup, as exemplified in Bantu-speaking parts of Kenya, property and wealth, as we have seen, were considered to have meaning only insofar as it served the material good of the community. This traditional approach to wealth had a religious foundation. It was understood that the people and all material goods were gifts from God. This can be surmised from the names used to depict God. For some, God is the Great Ancestor, rendered variously as *Unkulukulu* for the Zulu, *Omukama* for the Baganda, *Nyane* for the Akan people, *Olodumane* for the Yoruba, and *Leve* for the Mande. God is the Primal Ancestor and Ultimate Source and Sanctioner of the tradition that sustains and nourishes the people.[37] For others, God is *Nyene* or the great owner of all things. He is, for example, *Mwene Nyaga* (Gĩkũyũ), that is to say, owner or possessor of brightness, of light and of warmth that makes things grow. He is *Mlungu* (Taita), *Mulungu* (Luhyia) and *Mũrungu* (Meru), all of which suggest 'other', the Great Other, mystery and power. God is *Gĩthuri*, the Great Elder, thus emphasising his Wisdom; God is *Ngai*, a name that derives from *Kũgaya*, meaning to distribute or share out something. *Ngai* is then the Great Divider and Distributor of

[35] Waliggo, 'Law and Public Morality in Africa'.

[36] Helen J. Alford & Michael J. Naughton, *Managing as if Faith Mattered* (Notre Dame: University of Notre Dame Press, 2001), 160ff.

[37] Magesa, *African Religion*, 40.

all things. Logically, He does so because He is the Creator, owner and ruler of all things, which he distributes as He wills.[38] The name *Ngai* and its variations are shared by the Akamba, Agikũyũ, Embu, Meru, and the Maa-speakers of Kenya. This notion that material possessions are a gift and that they should be shared, which is religious in its origin, is closely related to a similar teaching regarding the possession and use of material goods that stems from both rationality and Christian faith. It is called the 'universal destination of goods'.[39]

Universal Destination of Goods

From a religious point of view, Christianity holds that God created the world, and having done so, saw that it was very good. It was that very good world that God entrusted to humankind as a gift to rule and to make fruitful.[40] The basic rationale of the Christian teaching regarding the possession and use of the goods of the earth is thus based on this idea of 'gift'. The source of the natural resource is a gift; so too are the powers that human beings use to work on the land and its resources, such as the mind and hands. It is on this basis that Christian social teaching speaks of the 'universal destination of goods', by which is meant that their possession is for the sake of use. Hence, the gift of property, which with regard to business we can understand to be profits, needs to be made available to all human beings so that some should not suffer for want in the midst of plenty.[41]

Community of Life and of Work

When we look at it closely, we find that this African traditional worldview was not far from the Christian teaching and philosophy within which

[38] Magesa, *African Religion*, 40.

[39] Certainly, there has not been unanimity in this teaching, as can be deduced from Max Weber's *The Protestant Ethic and the Spirit of Capitalism*, but there does exist a Catholic work ethic. See Scott Hahn, *Ordinary Work, Extra Ordinary Grace* (New York: Doubleday 2006), 25-36.

[40] Genesis 1:9-31.

[41] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Nairobi: Paulines Publications, 2004), 329-40.

we find, alongside the notion of God's gift of creation and the right of all people to the common use of it, a command to work and subdue the earth.[42] The earth and its resources can only be subdued through the activity we call 'work'. Thus, Christian teaching and also social philosophy both explain that, although the goods of the earth should be open to all, this opening or destination of economic goods should, ideally, be preceded and guided by an underlying understanding that the cohesion and development of any community rests on an ethics of contribution and community of work.

To subdue the earth can be understood in several ways; for example, it is to make it yield its fruits, not only for oneself, but also for others through progressively more comprehensive spheres of community, that begin with one's immediate family and friends, and stretch outwards to other spheres: to one's co-workers, neighbours, fellow citizens, and ultimately for the general common good. This principle, properly understood and applied, implies the practice of social and economic responsibility. In business, this is just another name for 'business ethics'.

The biblical command to subdue the earth also means that humankind is specifically created to reflect God's image in and through work, and that work is good. Man, in working, reflects God's image as both giver and distributor. When he works well, he is closer to that image, doing good with his work. In this sense, we can understand work as a universal call, a call through which we define who we are. One is thus more human working than waiting to receive. Of this Scott Hahn, a biblical theologian, writes: 'Work itself, seems to have been God's original blessing: God made man to till the ground,[43] there was a job opening, a job description, and a job to do. God himself created the perfect candidate for the position.'[44] In work and through it, man exhibits the gifts received, in the form of talents and abilities, in a fully human manner. Work also implies acknowledgement of the presence of 'otherness', the realisation that, besides me, there are others like me to whom I can and should render some service, just as I, too, receive their work as service and as part of sharing.

It is clear then that there is a close relationship between Christian teaching and its values and the traditional African worldview regarding

[42] Genesis 1:28.
[43] Genesis 2:5.
[44] Hahn, *Ordinary Work, Extra Ordinary Grace*, 26.

the use of material resources. Wealth was known to be the result of a combination of resources and hard work. As Aristotle said, it is also partially a result of being blessed by God and not just something deserved.[45] To a certain extent, the rich man was both a lucky and powerful person. It was to manifest that recognition that when visitors went to visit such a person—to ask for some favour, for example—they took gifts with them. So long as someone was wealthy, his extended family and the whole immediate community knew that they would not go hungry. In Christian moral teaching, this idea is encompassed in the double precept of love: a love of God that is portrayed in the love of neighbor. Business ethics books prefer to refer to it as 'the principle of the golden rule'.

An important role of 'business ethics' in Africa today will need to be the correction of people's attitude towards work, any kind of work. This can only happen when people are helped to see the bigger picture, the picture of what can be accomplished if every person worked well in what they have to do, not only in purely economic considerations such as productivity, efficiency and competition, but also as a manner of contributing to the common good through the development of good work habits such as zeal to produce well-finished goods, honesty, the respect of property, and mutual respect of employers and employees, customers and clients, and other stakeholders.

This can only happen if Africa desists from falling into the individualism typical of the capitalist economic system, which, even though it can and does in fact cause admirable economic growth, nevertheless is anchored on a rather irrational pattern—a pattern that believes in widespread exploitation of man by man and of everyone by everyone, including oneself. Unfortunately, it is this pattern, a pattern so alien to the African roots, that has infiltrated African business and leadership today. Alien, too, is the socialist collectivism typical of Western socialist states whereby 'even though work is communalised, the primary objective underpinning the collectivisation is not any different from that of individualistic capitalism because it engenders the same kind of results'[46]: exploitation of man by the system. For that reason, as Pierpaolo Donati has aptly pointed out, 'If work is to be re-valued as a truly human activity it is necessary to create

[45] Aristotle, *Oeconomica*, 1256b26-27; 1256a11-13, 1256134 ff.

[46] Pierpaolo Donati, 'The Meaning of Work in Present Day Social Research', *Romana* 22 (January-June) (Rome: University of the Holy Cross Press, 1996), 122-134.

a work milieu that fosters rather than inhibits virtue.'[47] This is the ethical basis of any firm for a new African worldview, which we are yet to create and inject into modern business.

Reverence

A remarkable deterrent for unethical practices in traditional African life was reverence. Reverence is the appropriate respect for all things and for their intrinsic good; it is intimately bound up with truth. The misuse of reverence, its opposite, is superstition, which means giving to someone or to things more honour than is due them. Cicero, a Roman jurist and philosopher, taught that 'it is our duty to eradicate superstition; for superstition dogs our heels at every turn. When you regard an omen, go to an astrologer or fortune teller, or when some prodigy appears, superstition is at your side.'[48] The term 'reverence' encompasses several others that are inseparable: respect and honour. To respect means to give deference to the good person; to honour means to acclaim another for good done. Thus, rather than changing the role and importance of reverence in African traditional religions, Christian teaching shifted its focus by explaining that, among all the good things that exist—good because they all come from God—not all have equal worth and dignity. For that reason, not all should receive the same kind of awe and honour. This teaching pitted reverence against superstition. So does classical philosophy. Plato says, 'Worthy of honour is he who does no injustice, and worthy of more than twofold honour is he who not only does no injustice himself, but hinders others from doing any.'[49]

Towards a New African Worldview

Within the discussions of the way a society can go back to traditional moral values in modern business, it was noted that the model of morality found in most traditional societies (including those in Africa) rests on the assumption of a small-scale, homogeneous society where authority is passed down

[47] Donati, 'The Meaning of Work in Present Day Social Research'.
[48] Cicero, *On Divination*, Book 2. 72.
[49] Plato, *Laws*, 1. 5, 730b.

through many generations. In such a setup, rules are expected to be followed, but the numbers of people to whom the rules apply are limited, by family, class, gender, geography, ethnicity or political boundaries. In these tight societies, moral obligation is easy, because it is the authorities (elders in the case of Africa) who define the rules of social interaction; people know to whom they are tied and, consequently, to whom they have obligations. For that reason more than anything else, it is important to base ethics not so much on local custom as on rationality. There is an important difference between custom and morality. Custom means the way we do things. It arises from specific cultural and social conditions. Morality, on the other hand, is behaviour that follows a rationally-tenable reflection that points out certain moral goods that are always good to strive for.

The aim of ethics generally is to indicate rationally what those moral goods consist of. Necessarily, this kind of dialogue must start somewhere. Thus, for example, if one can show that a statement *Q* logically follows from another statement *P*, and then it can be agreed that *P* is true, one is in a position to persuade people that *Q* must also be true. In that case, our agreement on *P* is an adequate starting point. This is the pattern that we follow in philosophical ethics in order to agree on moral good. But, as we have mentioned earlier, there are many methods of doing so. It all depends on the grounds of the starting point. One such point grounds the reasoning on the First Principle of Morality, which says that 'good should be done and evil must be avoided'. This principle is derived from the Natural Law.

Natural Law and Moral Virtue

Natural law is so called to contrast with 'civic law' or 'human law'. The terms 'civic' and by extension 'civil' originate from the ancient-Greek notion of the city-state or *polis*, which in Latin is *civitas*. In ancient Greece, every *polis*, or city-state, enacted the laws it deemed necessary to take care of the welfare of its citizens. Those laws were therefore civic, meaning peculiar to a given city and enforceable within the walls of that city.[50] Such laws, therefore, lacked force elsewhere. After the era of the Greek city-states,

[50] For a more lengthy explanation of this topic see Alfonso Gomez-Lobo, *Morality and the Human Goods: An Introduction to Natural Law Ethics* (Washington: Georgetown University Press, 2002), 125-29. See also John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980).

this has continued to happen in such a way that all organised human communities up to the present time enact laws for the same purpose. All of these laws have their origin in human decisions; they are man-made. That is to say, they are 'posited' or put across by human beings to serve a purpose; hence their name: 'civic', 'civil', 'human' or 'positive' law. Civil laws are made to control human welfare in a state, a city, or a community. For example, in some countries such laws decree that motorists should drive on the left, while in others they decree that they should drive on the right side of the road. The decision to opt for either the right or left is reached through an agreement or convention by the legislators. Thereafter, it becomes a law to be observed by everyone within that state. It is a matter of indifference which side of the road the convention chooses. What does matter is the reason why it is necessary to have such a law. In this case, it is to avoid accidents, preserve lives, and facilitate smooth traffic flow, in order to maintain peace and harmony.

Hence, human laws are a necessary good. By contrast, there are many other basic goods for which no human convention is necessary. All people of the earth will automatically agree that human life is a good and that it should be preserved. They will agree that it is wrong to murder people, and a good thing to do everything possible to save lives. That consensus arises not from any convention but from a habit in man called 'practical reason'. Through practical reasoning, all human beings can distinguish some basic forms of behaviour that are right and others that are wrong. For example, everyone can know that it is wrong to murder, to rob, to deceive and so on, and they will do so for the same reasons no matter which country they come from. Similarly, everyone will agree that it is good to preserve life, help other people, tell the truth, be honest and, again, for the same or equivalent reasons. The knowledge that those are human goods, inherent in rational beings, is what we call 'natural law'. Aristotle points out that natural laws do not make a distinction of race, time or place; they are true for human beings everywhere and for everybody, 'just as fire burns both here and in Persia'.[51] Natural law is not posited or decided by people; it needs to be discovered in our own nature.

Some theorists claim that the major moral principles derived from the natural law tradition, often called the 'cardinal virtues', cannot be demonstrated to arise from a law in man. These are justice or rectitude in

[51] Aristotle, *Nicomachean Ethics*, 5.7.1134b26.

judging; prudence or insight in acting; courage, fortitude or firmness; and moderation, self-control or temperance. Effectively, some truths are indemonstrable, for the simple reason that they hinge on the first concepts by which we explain other truths, and because they are by their very essence self-evident. This is the case with the basic principle of practical reasonableness. However, regarding the movement from this general principle, *'good should be done and evil avoided'*, to the level of the cardinal virtues on which hinge all of the other virtues, such as honesty, truthfulness, accountability, respect, reverence and so forth, Aristotle was explicit that this kind of knowledge requires discussion with experienced and mature persons. This is so because age is a necessary though not sufficient condition for the required wisdom and maturity. The young can also acquire that maturity through learning.[52]

Distinction between Customs and Morality

Grounding morality on natural law allows one to be able to distinguish between the notions of *ethos* as custom and *ethike* as morality or ethics. Hence, before concluding we should look at the difference between the two. This difference is similar to that which occurs between actions that human beings just happen to perform and those that are, properly speaking, 'human actions'. Properly speaking, 'human actions' as such are 'moral acts'. A human act is one that is purposeful, which is to say that the action is rational, or that it displays *ratio*, a Latin term meaning 'rule' or 'measure'. For example, if someone were to say that X's nails are growing, it would carry a different meaning from saying that X is growing his nails. The difference between the two statements is that, in the first case, the statement does not indicate whether X wants his nails to grow. It simply states that the nails of X are following a biological course of growth, a law of nature, whereas in the second statement it clearly indicates that X is intentionally letting his nails grow. In the second statement, the pattern of growth of X's nails implies intention, a reason. In the first statement, it does not. This ability to put a rule or measure to our actions is what gives them the characteristic of being human acts or moral actions. It means that such actions are personalised or humanised, not only by the ends

[52] Aristotle, *Nicomachean Ethics*, I, 1094b28 a 12.

the agent chooses, but also by the rule or measure we follow in order to achieve the desired end. The root of those choices is what we call freedom, a quality which only human beings have, and which enables us to choose good or evil. Repeated human acts in which good is chosen rather than evil is what we call a morally or ethically good life.

Transformational Leadership

'A person becomes a person through the virtues of others.' This African proverb aptly recognises that virtues are forged in individuals—and thereby in the community—through a constant dynamic process. In practice, that is to say that for the development and teaching of moral values in modern Africa, we need African role models, that is, people who go beyond lamenting a golden African past that was destroyed by foreigners, and who instead are ready to reincarnate that past, as the elders of new Africa. We need leaders who 'walk the talk'. Among the words most commonly found in the literature on *Ubuntu* are two terms: 'tradition' and 'values'. The term 'tradition', from the Latin *tradere*, means handing over or transmitting something from generation to generation. The prerogative of an African elder and his age-generation was the transmission of moral values. Today's leaders of every cadre, irrespective of whether they are politicians, business executives, professionals in every field, teachers and parents, are the contemporary elders. They continue to have both the duty and the right to transmit moral values.

Values are transmitted. Habits, good and bad, the repetition of the virtues or vices that arise, are learnt by example. This is how we human beings learn. Lives well lived inspire others to live well and, likewise, bad examples such as acts of pilfering, fraud or solicitation of bribes, influence other people to do the same. Human beings everywhere pay special attention to those whom they regard as leaders.

Author

Christine Wanjiru Gichure, Ph.D., is Professor of Philosophy and Dean, School of Humanities & Social Sciences, Strathmore University, Nairobi, Kenya.

Peter Koslowski

Ethical Economy and Theological Interpretation of Totality in Thomas Aquinas' Summa Theologiae

A Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski a

It is in a 'Summa of Theology', in the second book of this work, dealing with moral theology or ethics, that we find Thomas Aquinas' approaches to a theory of economics. Therefore, we must conclude that Thomas's ideas about economics are, in the first place, closely bound up with ethics and, secondly, that they evolve from the standpoint of a theological view of the world and a personalist interpretation of reality. This is indeed the case: Thomas Aquinas' economic theory is ethical economy within a theological perspective. It is an ethical view of the economy founded on 'theological philosophy'. Economics, for Thomas, is based on a theological interpretation of total reality, on the conviction, therefore, that reality is Creation and that the existence of God is the source and the purpose of all reality, as it is the source and purpose of mankind.

The Structure of the Summa Theologiae

The *Summa* is divided accordingly. Its 'system' of theological philosophy begins with the question of God and Creation. Theology is essentially philosophy. Thomas's starting point in showing how we recognise reality is the recognition of God as the source and the cause of being and Creation. Thomas's teaching on God and Creation is set out in the first book of the *Summa Theologiae*, in the Prima Pars (I). This is followed by the first and second parts of the second book, the Prima Secundae (I-II) and the Secunda Secundae (II-II), which deal with the purpose and behaviour

of mankind, and thus with ethics and the theory of action. This second book is the most wide-ranging of the three that form the work, comprising around fifty percent of the text as a whole – an indication of the importance of ethics in Thomas's thinking. The second part of the second book, thus the second half of Thomas's ethics, the Secunda Secundae, offers a detailed description of human virtues.

Thomas's ethics is chiefly an ethics of virtue, virtue being that which endows a person, an action or a thing with goodness. There is an objective order of excellence for people and things; and virtue, or excellence, is the right relationship between the person or thing and that which they are, by nature, capable of being if they fully realise their destiny: 'According to the Philosopher [Aristotle] the virtue of a thing is that which makes its subject good, and its work good likewise. Consequently, wherever we find a good human act, it must correspond to some human virtue.'[1]

It is important not to ascribe an overly-interiorised, moral interpretation to the concept of virtue (*virtus*) in Thomas's writings. Virtue means fulfilling that which one can and should be by nature. Thomas's ethic describes the bases of the theory of human behaviour, including the theory of human passions. The virtues are developed in detail as ways of realising the form of being that the Creator intended for mankind. In the treatment of the virtues, human failures of being are included among the vices, bad habits and actions, or sins. Thomas divides his depiction of the virtues into the three theological virtues of faith (*fides*), hope (*spes*) and charity (*caritas*) and the four cardinal virtues of prudence (*prudentia/sapientia*), justice (*iustitia*), courage (*fortitudo*) and temperance (*temperantia*); the cardinal virtues are then further divided and expounded in various sections. The corresponding failings or vices are described after each virtue.

Thomas develops his economic ideas – his ethical economy[2] – in Questions 57 to 79, which discuss the virtue of justice. The economy is thus subsumed within the ethic and is the object of a lesson in the virtues of just behaviour and a just approach as part of the ethical discourse. The forms of economic exchange, buying, renting and borrowing, and the

[1] Thomas Aquinas, *Summa Theologiae*, II-II, q. 17, a.1, re.

[2] Cf. for the theory of ethical economy, Peter Koslowski, *Prinzipien der Ethischen Ökonomie: Grundlegung der Wirtschaftsethik* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1988; reprint 1994), & Koslowski, 'Ethical Economy as Synthesis of Economic and Ethical Theory', in *Ethics in Economics, Business, and Economic Policy*, ed. Koslowski (Berlin: Springer, 1992), pp. 15-56.

contracts that determine them and give them legal status are 'relevant to justice', being always subject to the requirement and criterion of justice. For Thomas, the economy is not an 'ethics-free zone', but a field of activity and inter-exchange that is determined absolutely by ethics. The virtue of justice is the virtue that governs dealings between people and makes these dealings good. Because the economy involves dealings and is a regulator of exchange between people, justice must be a necessary virtue within it: 'It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it denotes a kind of equality, as its very name implies.'[3]

Only through justice can the economy achieve its full productive capacity and be, in accordance with its nature, a good economy. Justice is the approach and the orientation for action which enables the economy not merely to 'function' but to fulfil completely its purpose and vocation. Economic behaviour and the economy, as one of the ways in which society is ordered, are determined in their entirety by ethics. Economic theory is ethical economy. For Thomas there can be no 'pure' theory of economics admitting only profit as a goal and examining the question of allocation without regard to the ethical issue. Rather, the economy is part and parcel of the universal teleological relation of human behaviour to the attainment of the greatest good, the state of supreme happiness. The virtue of justice, including ethics in the economy, is part of the correlation of virtues which ensures that human life succeeds and achieves its ultimate aim of eternal salvation. The economy as a means of ordering behaviour cannot be detached from this teleological correlation, because behaviour in the economy is every bit as 'relevant to salvation' as any other human behaviour.

Therefore, while the Prima Pars of the *Summa* describes how being originates from God, it is only logical that the Secunda Pars, the ethics, should describe mankind's ultimate purpose, supreme happiness, and the way towards that purpose and towards God; and that the economy, as a part of this way, is discussed in the Secunda Pars, within the ethics. In conclusion, the third book, the *Summa*'s Tertia Pars, deals with biblical theology in a more restricted sense, with the incarnation of Christ, redemption through Christ, and the continuing effect of the incarnation and redemption in the sacraments. Marie-Dominique Chenu summarises the structure of the *Summa* and the movement apparent in it as follows:

[3] Aquinas, *Summa Theologiae*, II-II, q. 57, a. 1, re.

'Prima Pars: the starting point, God as source; Secunda Pars: the return, God as destination; and because in reality, according to God's free and entirely voluntary decision (as revealed to us by the Scriptures), the return is accomplished through Christ, who is God made man, a Tertia Pars examines the Christian conditions of this return.'[4] According to John of Saint Thomas, the *Summa Theologiae* depicts God as causal agent, as determinant of purpose, and as purpose itself, and God as restoring redeemer. This departure from and return to God serves to describe the full cycle of things and to complete 'the golden circle of theology outlined in Saint Thomas's divinely inspired Summa'.[5]

Bringing together Faith and Knowledge

The particular character of the *Summa Theologiae* and what, for modern readers, makes it different is that it unites faith and knowledge, revelation and philosophy in a single system of knowledge. The *Summa Theologiae*'s system of knowledge and faith is not a system of philosophy in the modern sense, insofar as it does not seek to derive all knowledge from a principle or a method and to create a single deductive or derivative correlation. Rather, it is a sum of theological philosophy and philosophical theology, a compilation and a summary of theological and philosophical opinions on God, mankind, the world and their common history.

In contrast to the modern systems of philosophy since Scholasticism, which separate theology and philosophy, in Thomas's work philosophy and theology are brought together in a single system of propositions. Thomas's theological philosophy and philosophically-supported theology lays claim to earning its own validity from the force of its arguments. First of all, it is not 'church teaching', but rather the summation of theological and philosophical studies. We fail to recognise the *Summa*'s claim to philosophical

[4] Marie-Dominique Chenu, OP, *Das Werk des Hl. Thomas von Aquin* (Graz: Styria, 1960; 2nd Ed., 1982), p. 344.

[5] John of St. Thomas, *Cursus theologicus in Summa D. Thomae*, Introduction, part I (Paris, 1883), p. 191: 'Igitur Divus Thomas juxta hanc triplicem considerationem Dei causantis, scil. ut principium effectivum, ut beatitudo finalizans, ut salvator reparans, divisit totam doctrinam Summae theologiae, ut patet in initio secundae quaestionis hujus primae partis. Et sic a Deo in se et in essendo, per Deum efficientem et finalizantem et salvantem, regreditur ad Deum ut fruendum in se ultima gloria resurrectionis, *quod est plane aureum theologiae circulum complere, quem divina sancti Thomae Summa circumgyrat*.'

and academic validity if we see in it merely the teaching of the Church, as Gerhard Stavenhagen did when he wrote: 'In the same way, the Scholastics discuss economic issues only with regard to the demands of Christian ethics; their exclusive interest is the problem of the extent to which human economic activities are compatible with the teachings of the Church.'[6] Apart from anything else, this is an imprecise assessment of Thomas and of Scholasticism, because it was to a large extent the *Summa Theologiae* that first defined what church teaching was. What the *Summa* sets out to do is not to measure anything against the teaching of the Church, but to formulate the total contribution of ancient and medieval philosophy and theology to the perception of reality in Thomas Aquinas' time.

Thomas Aquinas is conscious in the work that those opinions which the *Summa* draws from biblical theology have their genesis in a different source of truth and a different set of reasons from the opinions of philosophy. Theology owes a substantial proportion of its opinions not to reason and experience but to revelation, and so, if the theological sum-total seeks to unite knowledge based on reason and knowledge based on faith, the tension between these will be apparent in the way in which the theological knowledge itself is systematised:

> That which has been pre-ordained is revealed in theology as faith presents it to human reason, in circumstances which, it is clear, are not only unconducive to conceptual organisation, but irrevocably opposed to adequate systematisation. God's word, the text of revelation and at the same time the inner word, possesses this unity only within God's own thought. In theology, the very system itself is a sign of the weakness of human reason, but also and equally a sign of its strength within faith. The compilation of the Summae in the thirteenth century is an ample illustration of this major problem of transposing a salvation history *(Heilsgeschichte)* into an organised scientific discipline.[7]

This is why, in the first questions of the *Summa*, Thomas characterises theology as a special kind of conclusive discipline. As a deductive science, it starts from revealed principles, postulated as ends in themselves, and by

[6] Gerhard Stavenhagen, *Geschichte der Wirtschaftstheorie*, 3rd Ed. (Göttingen: Vandenhoeck & Ruprecht, 1964), p. 15.

[7] Chenu, *Das Werk des Hl. Thomas von Aquin*, pp. 340ff. Cf. on scholasticism Rolf Schönberger, *Was ist Scholastik?* (Hildesheim: Bernward, 1991).

inference arrives at wider realisations in the same way that other scientific disciplines derive their particular propositions from accepting as valid the propositions of higher, i.e. more general or abstract, disciplines. In this way, theology regards the propositions of divine revelation as those of a superior, more elevated discipline. Thomas goes on to use the example of music, which accepts the premises of arithmetic and uses its propositions as a basis for teaching harmony.[8] Clearly, in regarding theology as a conclusive discipline based on revealed propositions, there remains the difficulty of how the validity of revealed principles is to be proven, for principles deriving from revelation are not obvious and many people do not accept them.

Reason and Revelation: The Philosophical and Theological Bases

It is for this reason that, in his more philosophical *Summa Contra Gentiles*, or *Summa of Christian Teaching*, Thomas advances additional, philosophical arguments for the credibility of principles deriving from revelation. Thomas begins by pointing out that, for the majority of people, who have no professional involvement with philosophy or theology, even those propositions that reason presents as truths can be no more than matters of belief: 'Since, therefore, there exists a two-fold truth concerning the divine being, one to which the inquiry of the reason can reach, the other which surpasses the whole ability of the human reason, it is fitting that both of these truths be proposed to man divinely for belief.'[9] The insights offered by both reason and revelation – for someone incapable of grasping them immediately – must simply be believed on the authority of either reason or revelation.

Thomas makes clear that revelation was not given to mankind in order to justify the authority of the Church, but that the authority of the Church is at the service of revelation which the individual freely accepts, at the service of the light that came into the world to illuminate everyone. Therefore, revelation is also indispensable because the process of knowing God through reason, the process undergone by any philosopher in his own

[8] Aquinas, *Summa Theologiae*, I, q. 1, a. 2.
[9] Thomas Aquinas, *Summa Contra Gentiles*, I, c. 4.

thinking, is so difficult that the majority of people would be in darkness as regards God if reason were the only means of knowing Him.

Thomas considered that the opposition between reason and revelation, between knowledge and faith – which is characteristic of the modern period – was a false opposition. The view that faith and knowledge, theological revelation and philosophical findings based on reason, are mutually contradictory fails to do justice to their true relationship, which is one of complementarity. Therefore, when Thomas writes that, just as the purpose of life surpasses worldly goods, so too knowledge of God surpasses reasoned knowledge, he is not implying that knowledge of God stands in opposition to reasoned knowledge, but rather that it indicates something surplus to reason, something that shoots beyond reason. Knowledge of God goes beyond reason in this way, not because it disregards it, but because it has a special, high regard for reason. Theology must go beyond the reasoned knowledge of science and philosophy, not only on account of the failings of reason, but also on account of the failings of human willpower and character. It is not primarily reason, but the human character that hinders mankind in using reason clearly and in knowing God. Revelation must surpass pure reason in order to break the arrogance of human beings who believe it necessary to follow only the knowledge that they themselves have generated and who, in this knowledge, are frequently mistaken. Presumption is the mother of error.[10]

That is why the part of theology – or rather of the theory of total reality – which consists of revelation serves to put human thought and human intellectual arrogance in their place. According to Thomas, philosophical theology teaches us that we cannot dismiss summarily everything that we fail to understand at once on first encounter. We often require a very long time to arrive at an important insight: 'Learning from experience takes a long time, and then it is often too late to derive the benefit of the lesson.'[11] The revelational side of theology gives us the possibility, in Thomas's view, of arriving at insights before we have fully worked through to them. The insights offered by revelational theology are not, however, *opposed to* reason, but rather may be achieved only with the aid of reason. They are *above* reason: 'We should not, therefore, immediately reject as false, following the opinion of the Manichaeans and many unbelievers,

[10] Aquinas, *Summa Contra Gentiles*, I, c. 4.
[11] Ernst Jünger, *Autor und Autorschaft* (Stuttgart: Klett-Cotta, 1984), p. 90.

everything that is said about God even though it cannot be investigated by reason.'[12] Thomas argues that there is no two-fold truth, but only a two--fold way of reaching the truth; there is the way of philosophy and the way of faith, and these ways to truth are two-fold only from our point of view, not from God's.[13]

In Thomas's *Summae* the validity of revelational arguments and that of reasoned arguments are not mutually exclusive, but rather complement one another. According to Thomas, both things, revelation *and* reason, lead us to three insights, and these are central not only to his theological philosophy but also to his economic theory – his 'ethical economy' – and without which his economic insights cannot be understood. These three fundamental axioms of Thomas's theory of totality are as follows:

> Firstly, God is being and the origin of being and, as being, he is within all things.[14]
>
> Secondly, goodness or God or being generates and communicates itself.[15]
>
> Thirdly, God is the ultimate purpose of Creation and thus the ultimate purpose of mankind. God is the final purpose of every human action, even of those actions taken in pursuit of economic purposes.[16]

These three principles determine to an equal degree the entire Thomistic interpretation of total reality, Thomas's general ontology, and his interpretation of economic reality, his economic ontology. In this way, they

---

[12] Aquinas, *Summa Contra Gentiles*, I, c. 3.

[13] Aquinas, *Summa Contra Gentiles*, I, c. 9.

[14] Aquinas, *Summa Theologiae*, I, q. 8, a. 1, re: 'God is in all things, not, indeed, as part of their essence, or as a quality, but in the manner that an efficient cause is present to that on which it acts.... Now since God's very essence is his existence, created existence is his proper effect. This effect God causes, not only when things first begin to be, but so long as they continue to be.... Existence is most intimate to each and deepest in all reality since it is the heart of all perfection. Hence, God is in all things, and intimately.'

[15] Aquinas, *Summa Contra Gentiles*, III, c. 24; *Summa Theologiae*, III, q. 1, a. 1, re.

[16] Aquinas, *Summa Theologiae*, I, q. 65, a. 2: 'Every creature exists for its own proper act and perfection, and the less noble for the nobler, as those creatures that are less noble than man exist for the sake of man, whilst each and every creature exists for the perfection of the entire universe. Furthermore, the entire universe with all its parts is ordained towards God as its end.'

operate as reality principles within both his general ethic and his economic ethic or ethical economy. We have already referred to the significance of the third principle for the process of 'bringing ethics' to economic behaviour and to the drawing up of contracts. The importance of the first and second principles in terms of economic ontology and economic ethics will become clear in what follows.

Justice as a Fundamental Principle of Economic Theory and Economic Ethics

Thomas defines justice as the virtue of man's dealings with others. If this is the definition of justice and if economic dealings are dealings with others, then the principle of justice also applies in the economy. The principle of justice states that everyone shall have their due: 'Justice is a habit whereby a man renders to each one his due by a constant and perpetual will.'[17]

Where this will is absent and each does not receive his due, injustice arises, unjust behaviour occurs, and wrong is done. Such wrong against individuals may take the form of according a person respect, in the sense of favouring that person over others; it may take the form of killing or beating, theft or robbery, partisan interpretation of the law, false charges, abuse, calumny, plotting, derision and cursing; and likewise it may take the form of deception in buying and selling and deception on the part of profiteers demanding interest.

In the questions about justice, Thomas deals systematically with the definition of doing right and with the forms taken by wrongdoing. His 'theory of the economy' is part of the discussion of just behaviour. Just behaviour in the economy is behaviour that avoids both deception *and* profiteering and that gives each party to a contract that which is his due. The prohibition of deception and profiteering determines Thomas's ethic of the economy. His theory of the economy serves, on the one hand, to define those situations in which deception is present, i.e. in which contract or price is unjust and, on the other hand, to justify his thesis that interest-taking is unjust because it represents profiteering.

[17] Aquinas, *Summa Theologiae*, II-II, q. 58, a. 1, re.

Justice in Contract and Price

Thomas argues that it is unjust to sell something for more than its value, because in this situation each party does not receive his due. For Thomas, the injustice of such behaviour is quite independent of whether the buyer wished such a contract or not. The principles of *caveat emptor*, 'buyer beware', and *volenti non fit injuria*, 'no wrong is done to one who consents', do not turn the objective facts of the matter – that it is unjust to sell something for more than its value – into permissible behaviour.[18] The basis for asserting that each party does not receive his due in a situation where one party sells at a price higher than the value of the article is the contention that, by their very nature, buying and selling require that both parties derive benefit from the deal. There should be benefit to both sides and an equivalence or balance of benefit should obtain.[19] For Thomas, it is not sufficient that the exchange be mutually advantageous; the advantage must also be equivalent. But if one party sells the article at a price above its value, this upsets the equivalence of benefit drawn by both sides from the exchange.

The difficulty of implementing the equivalence principle lies in the problem of how to determine the value of an article. Thomas is frequently accused of ontologising the value of economic goods, of setting up an 'ontological' value, independent of demand. The text does not support this interpretation. Thomas, in fact, specifies the socially-accepted price – i.e. in a market-orientated society, the market price – as the measure of the value of an article: 'Again, the quality of a thing that comes into human use is measured by the price given for it.'[20]

In this there can be no question of ontologising value. The market price, a function of subjective assessment of value, is the measure which must guide the particular price in any place at any point of time, because the value of the article, at the market price, may be realised again in other places, too. But if the individual price negotiated exceeds the intrinsic value, determined by the market price, then justice, which creates equilibrium,

[18] Cf. Aquinas, *Summa Theologiae*, II-II, q. 77, a. 2, re.

[19] Aquinas, *Summa Theologiae*, II-II, q. 77, a. 2, re; cf. Oswald von Nell-Breuning, 'Das Äquivalenzprinzip', *Jahrbücher für Nationalökonomie und Statistik* 133 (1930), pp. 33-47.

[20] Aquinas, *Summa Theologiae*, II-II, q. 77, a. 1, re.

is not being observed: 'To sell a thing for more than its worth, or to buy it for less than its worth is in itself unjust and unlawful.'[21]

However, human law intervenes in this situation only when the difference between price and actual value is great. On the issue of fair pricing, there emerges, in Thomas's view, a distinction between entitlement and morality, between positive law and divine law. Divine law leaves nothing unpunished that contravenes virtue. So, according to this law, it is considered forbidden not to observe a just equilibrium in buying and selling. Moreover, the exercise of virtue goes beyond the mere question of what is owed. For example, if one of the partners to an exchange derives particular benefit, i.e. a high consumer return, from an exchange at the market price, he may, according to Thomas, 'of his own accord, pay the seller something over and above: and this pertains to his honesty'.[22]

What Thomas is saying is very different from an uncritical ontologising of the economy or ignorance of market price mechanisms, and this difference is also apparent in his discussion of trading profit. Aristotle considered unnatural, unthrifty ('uneconomical') and 'chrematistic' any trade which, instead of exchanging goods for goods or goods for money, was conducted for the sake of making the profit that derived from the trade itself. In Aristotle's view, the first form of trade is natural, the second to be condemned because it is conducted purely for the sake of profit-seeking, which is open-ended, knowing no limits.[23]

On this point Thomas opposes Aristotle's static, ontologising view. Profit, including financial profit from trade, is not in itself something depraved or anti-virtuous. Rather, it may well be put to the service of an honourable goal. Profit is justified, even as pure profit from trade, if the trade serves the common good and the profit serves to maintain the trade. According to Thomas, it may even be permissible to strive for profit for oneself, if the profit is not the ultimate goal, but is pursued more or less 'on the back' of another necessary or honourable goal. Profit may be intended in its own right as a side-effect of pursuing an honourable goal. By the principle of double-effect, profit is considered as a side-effect of pursuing a purpose which serves the general good.

---

21 Aquinas, *Summa Theologiae*, II-II, q. 77, a. 1, re.
22 Aquinas, *Summa Theologiae*, II-II, q. 77, a. 1, re.
23 Aquinas, *Summa Theologiae*, II-II, q. 77, a. 4, re.

Thomas's position on this point lies between that of Aristotle – hostile to trade, asserting that direct intention to make a profit is unnatural and 'ignoble' – and the equally radical pro-trade position of Bernard Mandeville: that the first priority is to strive for profit and that the general good will then follow of itself, through the invisible hand of the market. By means of the invisible hand, Mandeville perceives even private vices transformed to public advantage. Thomas, on the other hand, is convinced that the general good is achieved only when commodities are sought for their own sake, but that profit is generated as a side-effect of striving for human well-being.

The Charging of Interest as Profiteering

Thomas considers that to charge interest for the provision of a loan constitutes unfair money-making; it is exploitation of the plight of others, which is unjust and ethically inadmissible, whatever the circumstances. To take interest for a loan constitutes profiteering and is therefore forbidden. He advances various arguments to justify this prohibition. The simplest and clearest of these is that with which he refutes the objection that, in the words of Deuteronomy 23: 19-20: 'Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury: Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury.' Thomas counters: 'By this we are given to understand that to take usury from any man is evil simply, because we ought to treat every man as our neighbour and brother, especially in the state of the Gospel, whereto all are called.'[24]

Such reasoning, that we must not take interest from anyone in need, is understandable in the case of consumer credit for someone who finds himself in a needy situation. According to the rules of care and love, the *ordo caritatis*, there are situations in which we have a duty to give assistance without being able to demand repayment of money lent. Someone who is not bound – for example, by family ties – to give assistance gets his full due when the sum that he lends is returned to him. According to Thomas, repayment without interest constitutes recompense for the person who

[24] Aquinas, *Summa Theologiae*, II-II, q. 78, a. 1, ad 2.

lends money without being bound to do so.[25] However, Thomas does not confine himself to prohibiting interest on consumer credit. By his reasoning, it is also unjust and forbidden to charge interest on an investment loan. To modern economic theorists, working in terms of capital accounting, opportunity costs, and time preference, the way in which Thomas justifies this prohibition appears strange and unfamiliar.

Thomas says, in essence, that the use of money cannot be lent or rented out; it is possible only to sell the money in its entirety. But because the person who takes out a loan cannot buy the money, the only option is to let him have it for a period of time under the obligation of repaying it in full at no charge or interest. According to Thomas, the taking of interest is unjust because it is based on the false idea that it is possible to let someone have a consumer good – money – for consumption and at the same time to demand a rent, in the form of interest, for that consumer good in the same way that rent is charged to those who enjoy the use of buildings, real estate or land. To let someone have a sum of money in a loan, as an item of property for a fixed period, while at the same time demanding an additional sum for its use – in the form of interest – is, according to Thomas, to sell the same thing twice. Thomas does not recognise money as a title to capital or assets, but only as a means of exchange, which is consumed when it is exchanged.[26] With this line of reasoning, Thomas is regarding money as a consumer good which is used by being consumed; the ownership of the good and the enjoyment of it are indivisible – in contrast to the case of land or property which can be leased or rented out – and therefore neither income nor rent may be raised from it. According to Thomas, the person who lends money at interest is selling the same thing twice: the money as a means of exchange for consumption and the use of the money in return for interest. Selling the same thing twice means, according to him, selling a false title to an asset, and this constitutes deception and injustice. On the other hand, in renting out a house it is possible to retain ownership and to sell the use of the property at a price – the rent.

Thomas's reasoning on this point is obscure because it is not clear what constitutes the sale price for the consumption of money. If money, like a consumer good – a loaf of bread, for example – is temporarily

[25] Aquinas, *Summa Theologiae*, II-II, q. 78, a.1, ad 5.

[26] Cf. Arthur Fridolin Utz, OP, *Thomas von Aquin: Recht und Gerechtigkeit: Theologische Summe, II-II, Questions 57-79* (Bonn: IfG Verlag, 1987), pp 424ff.

transferred to someone at no cost and is then returned undiminished, in its entirety or, depending on the good, in the same form and quantity – another loaf of bread of the same quality and size, for example – then no sale has taken place. Rather, property has been temporarily transferred at no cost. So the argument that ownership and use are indivisible in the lending of money seems to be a commentary, rather than a justification or explanation. In the case of money, a distinction *ought not* to be made between use and consumption and ownership and property. Money as a means of exchange, like all consumer goods – and it is a consumer good according to Thomas – may only be transferred, as property, for a period of time and at no cost; but the temporary use of money, wine or wheat is not to be paid for by a separate charge or interest in addition to the return of the thing temporarily and rightfully transferred.

Thomas does not justify the prohibition of interest-taking, as Aristotle does, on the grounds that it is unnatural for money to generate money by means of interest. Rather, he sees clearly that real interest is independent of the financial nature of the loan, for even in cases where there is real credit, for example when wine or bread is temporarily given to someone, it is possible to charge natural interest by demanding the return of more wine or bread than was given: 'In like manner he commits an injustice who lends wine or wheat, and asks for double payment, viz. one, the return of the thing in equal measure, the other, the price of the use, which is called usury.'[27]

Thomas, in contrast to many of those who oppose interest and finance, sees through the 'veil of money', and for this reason he also condemns as unjust not only interest on loans, but also indemnity and supplementary payments and interest in the form of compensation for loss of use.[28]

According to him, interest is also unjustifiable where it is intended to compensate for loss of use. A supplementary interest charge on top of a loan is justifiable only in cases where a debtor does not repay a loan within the time agreed. In such a case, a creditor may say that interest is applicable and demand 'interest for late payment' in the form of a supplementary charge.[29] A creditor thus has a right to claim reimbursement for lost profit – a right, therefore, to claim interest, only when the agreed

[27] Aquinas, *Summa Theologiae*, II-II, q. 78, a. 7, re.
[28] Aquinas, *Quaestiones quodlibetales*, n. 3, q. 7, a. 2, re.
[29] Aquinas, *Quaestiones disputatae de malo*, q. 13, a. 4, ad 14.

deadline for payment, the payment target date, is not observed. It becomes clear from this that Thomas was thoroughly familiar with the theory that understands interest to represent reimbursement for loss of profit, but that he rejected the idea that this theory offered any legal title or justification for interest. A lender may agree with a borrower to be compensated for a loan only in respect of actual disadvantage or loss which he suffers through making the loan. He may not, however, be compensated for loss of profit which is uncertain.[30]

> A lender may without sin enter an agreement with the borrower for compensation for the loss he incurs of something he ought to have, for this is not to sell the use of money but to avoid a loss. It may also happen that the borrower avoids a greater loss than the lender incurs, wherefore the borrower may repay the lender with what he has gained. But the lender cannot enter an agreement for compensation through the fact that he makes no profit out of his money: because he must not sell that which he has not yet and may be prevented in many ways from having.[31]

Thus Thomas rejects the idea of opportunity costs in lending. It is not permissible to express the costs of a loan in terms of the maximal value of alternative use of the money and then to charge these costs to the lender, because such opportunities are uncertain and they can always be advanced as an argument against granting interest-free credit. The opportunity-costs argument destroys any willingness to grant interest-free credit and thus any willingness to provide assistance. For Thomas, there are no opportunity costs in the *ordo caritatis*, the order of love.

---

[30] According to J. Sauter, 'Thomistische Gesellschaftstheorie', in *Handwörterbuch der Staatswissenschaft*, 4th Ed., ed. L. Elster, A. Weber, Fr. Wieser (Jena: G. Fischer, 1928), Vol. 8, p. 249, the charging of interest is allowed, according to Thomas, first, in the case of productive credit when a specific company contract is concluded (II-II, q. 78, a. 2, ad 5 & a. 1, ad 5); second, in the case of a deposit (a secondary use of the money), with a specific contract to rent (*de malo*, q. 13, a. 4, ad 15); and when a deadline for payment is not met (*damnum emergens*, *de malo*, q. 13, a. 4, ad 14). Sauter says that it is permissible, according to Thomas's system, to trade to deadlines, but that Thomas does not accept the right to interest based on the time differential, as though goods available immediately were worth more than those to come in the future, 'as erroneously suggested by Böhm-Bawerk (*Positive Theorie des Kapitals*, II, 1921, p. 318)'.

[31] Aquinas, *Summa Theologiae*, II-II, q. 78, a. 1, ad 1.

Of course, prohibiting interest raises the question of how to ensure, in an economy in which only interest-free lending is allowed, that those people not part of a family network with a duty of care can obtain interest-free credit; how will those whom no one is duty-bound to help enjoy the benefit of borrowing? What actually happened in such cases in the medieval economy was that the task of interest-free pawnbroking and credit provision fell to the monastic orders, especially the Franciscans, who assumed a role of providing social care. If we bear in mind that the present-day welfare state also provides 'loans' and social assistance free of interest, and indeed without imposing an obligation to repay, then Thomas's prohibition of interest is less strange than it may appear at first encounter.

According to Thomas, investment lending as a straightforward loan must be provided, in the same way as consumer lending, free of interest.[32] Interest is payable only in the form of a dividend on shares in investment which are also shares in a risk – in cases, therefore, where ownership of the money has not been transferred.[33]

If we look at Thomas's teaching on interest, it becomes clear that the essential basis for his prohibition of interest-taking on loans is the commandment to love and the duty to give assistance. Extending the prohibition beyond consumer or personal credit to cover investment seems to conflict with this, because in the case of investment credit there is no duty to provide assistance. For this reason, Thomistic scholars who came after Thomas developed a more comprehensive justification for forbidding interest. According to Giles of Lessines, interest is forbidden on moral grounds because it is a devious way of getting a price for a public asset which belongs to everyone, namely time.[34] Usurers want time to be seen as the consideration for which they obtain additional revenue in the form of interest. According to Giles, this intention is evidenced by the fact that they raise or lower the

[32] Cf. Sauter, 'Thomistische Gesellschaftstheorie', p. 248: 'The interest problem may be understood only through the universalist concept of "justice creating equilibrium", which was for Thomas a real, universal economic concept; and certainly not through the axiom commonplace in the schools that Thomas was familiar only with consumer credit and that it was on this form of credit that he had forbidden interest.'

[33] Aquinas, *Summa Theologiae*, II-II, q. 78, a. 2, ad 5.

[34] Giles of Lessines, *De usuris in communi* (1276/85), cap. 4, in Aquinas, *Opera Omnia*, ed. Fretté (Paris: L. Vivès, 1875), tom. 28, p. 581. For a long time this text was attributed to Thomas Aquinas, for example, by Eugen von Böhm-Bawerk, *Kapital und Kapitalzins*, Vol. I, *Geschichte und Kritik der Kapitalzinstheorien* (Innsbruck: Wagner, 1884), p. 18; and Joannes Nider, *Tractatus de contractibus mercatorum* (Paris, circa 1495), writes that time is an asset which may not be sold.

level of interest charged according to whether the period of time for which the loan is granted is extended or reduced. Time, however, is a public asset, belonging to no one in particular, but given by God to everyone equally. By demanding a price for time, as if it were a good that had been given up, the usurer is practising a deception on his neighbour, who is as much the owner of the time sold as is the usurer himself. He is also practising a deception on God, for whose freely-given gift he is demanding a price. In a nutshell, Giles operates a time-preference theory of interest; but time preference, in his view, is not to be a good for trade. Rather, it should be removed from the scope of contractual freedom, because it is by nature a public asset. The use of time, or time preference, must be without price.

Scholastic theory of the economy, with its prohibition of interest, has rejected the capital relation that characterises the modern economy. The idea that capital can generate added value in the alternative uses to which it is put – and that, therefore, every time capital is loaned it must earn at least a proportional reimbursement of lost profit – and the way in which this idea is acknowledged in society are determining factors for the modern capitalist economy. Within this structural factor of modern economies, termed by Karl Marx the 'capital relation' and by Max Weber 'capital accounting', lies a dialectic that must be acknowledged even by modern theorists who consider capital accounting to be economically sound.[35] The capital relation and the way of thinking based on opportunity costs lead to life being individualised and to people being isolated, a trend that has had to be countered in the modern period by state social policy. It must remain an open question whether the prohibition of interest was a means of hindering financial interest or delaying its emergence in historical terms. It is clear, however, that Thomas's economic theory involved clear insight into the central role played by the interest problem.

The reason Thomas rejects interest is not, as Anton Orel assumes,[36] in order to rule out income not derived from work. For Thomas does permit pension-type incomes and expressly differentiates between these and income from interest, which is not permitted.[37] Thomas rejects

[35] Cf. Koslowski, *Ethik des Kapitalismus*, with a commentary by James Buchanan (Tübingen: J.C.B. Mohr [Paul Siebeck], 1991).

[36] Anton Orel, *Oeconomia perennis: Die Wirtschaftslehre der Menschheitüberlieferung im Wandel der Zeiten und in ihrer unwandelbaren Bedeutung*, Vol. II (Mainz: Matthias Grünewald, 1930), p. 72.

[37] Utz, *Thomas von Aquin: Recht und Gerechtigkeit: Theologische Summe, II-II, Questions 57-79*, pp. 437ff., also takes this view.

interest because the system of charging interest, if strictly applied as opportunity-costs theory to all areas of social relations, would destroy the aspect of solidarity in economic life, in favour of a radical individualisation. This is also the reason the entire universalist, organically-orientated school of national economic studies after Otmar Spann followed Thomas's organically-orientated social theory and set up an opposition – perhaps too radical – between this and modern, individualist social theory.[38]

The Significance of Thomas Aquinas for Economic Theory Today

The present-day significance of Thomas Aquinas' economic thinking is to be found less in what it proposes in concrete terms than in what it tells us about economic methodology and ontology. Compared with modern theory of the economy, Thomas makes clear the limits of methodological individualism in the social and economic sciences and shows where the organic thinking of theology can serve as a corrective to modern individualism. The task that he set himself – to embed specifically economic issues within the discourse of ethics and thus to unite ethics and economic science in an theory of ethical economy – has been taken up again today[39] and is a fruitful one for the current fresh interest in issues involving ethics in the economy.

The Self-Generating Character of Goodness vs. Goodness as a Side-Effect

On one central point of ontology, however, Thomas radically calls into question modern theory of how the economy works. For Thomas, it is unthinkable that goodness should come into being *merely* as a side-effect of pursuing aims that are morally indifferent or even bad.

[38] Cf. Sauter (who belonged to the universalist school of sociology and political economy), 'Thomistische Gesellschaftstheorie', p. 249: 'By securing justice in the system of credit provision, Thomas was erecting a barrier against the individualistic financial economy, protecting the middle classes against exploitation, and laying the foundations for progress that would bear fruit.'

[39] Cf. Koslowski, *Prinzipien der Ethischen Ökonomie*, & *Gesellschaftliche Koordination: Eine ontologische und kulturwissenschaftliche Theorie der Marktwirtschaft* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1991).

The central tenet of market theory is that in conditions of full competition the market will not only ensure that those affected by it are included and become part of it and that negative side-effects are internalised, but will also produce efficiency as a positive side-effect (an externality) in a process aimed at something far removed from the general good. The actors in the economy pursue their own interest within the market; they seek to make their own profit and by means of the invisible hand of competition they are induced to produce efficiently and to sell at an equilibrium price.[40] A motive like maximising profit, which ranks fairly low or is neutral in terms of ethics, leads, via market forces, to something socially good, namely efficiency.

Mandeville turned this into an even more radical position. He focused on the capacity of the market to produce efficiency as an externality, a *side-effect*, in a process actually aimed at something quite different, and expressed it in the famous paradox 'private vices – public benefits'. Not only an ethically neutral motivation like striving for profit, but also immoral motives, vices, are transformed into positive side-effects, into something good, through the invisible hand of the market. Unethical behaviour is transformed, unbeknownst to those involved, into socially--beneficial behaviour.

Superficially, Mandeville's paradox may be placed among a series of other such paradoxes, such as Adam Smith's 'invisible hand' and Hegel's 'trick of reason in history', which realise the goals of human beings unbeknownst to themselves. His paradox, however, goes beyond these other authors, because it is explicit in regarding even unethical, not just ethically neutral, behaviour as conducive to the general good. Mandeville's principle resembles that of Mephistopheles in Goethe's *Faust*: '[I am] part of a power that would alone work evil but engenders good.'[41] Goodness is a side-effect of the action of someone who desires anything but goodness. It is not necessary to desire goodness, because it will come into being in any case as a side-effect of egotistical motivation.

In Mandeville's theory, ethics is eliminated from the market economy. It no longer has a part to play. Mandeville's theory is consistent: direct

[40] Cf. James M. Buchanan, 'Rent Seeking and Profit Seeking', in *Toward a Theory of the Rent-Seeking Society*, ed. J. M. Buchanan, R. D. Tollison & G. Tullock (College Station: Texas A&M University Press, 1980), pp. 3-15.

[41] Johann Wolfgang von Goethe, *Faust*, Part I, trans. Philip Wayne (Harmondsworth: Penguin Classics, 1949).

intention to achieve good is economically undesirable, because the pursuit of goodness also has bad side-effects in every case. On the other hand, the pursuit of what is bad also has *good* side-effects in every case. For this reason, there is no reason to commend a good action over a bad one. Every action has good side-effects for someone and bad side-effects for someone else. Mandeville cites the Great Fire of London as an example, in that it allowed fire fighters and reconstruction workers to earn a crust; whereas when the well-off classes economise on what they consume, it creates unemployment for the lower classes.[42] Mandeville's thesis is that it is no longer possible to have any firm ethos or consistent ethic in a market-orientated society. Good produces bad and bad produces good. This position is the opposite of that held by Thomas Aquinas.[43] For Thomas, goodness is by definition self-generating and self-propagating: 'The higher the manner in which a thing is good, the more and the further it diffuses its goodness.'[44]

Good brings about good and, for this reason, is worth striving for as an aim and an outcome of action. It is not created, as in Mandeville's theory, simply as an unintended side-effect of what we do. Such emphasis does Thomas place upon this principle of goodness transmitting itself, that he uses it as a basis for explaining the incarnation of God:

> It belongs to the essence of goodness to communicate itself to others.... Hence it belongs to the essence of the highest good to communicate

[42] Cf. Bernard de Mandeville, *The Fable of the Bees* (1705-29), Vol. I, ed. F. B. Kaye (Oxford: Oxford University Press, 1924), p. 367: 'It is in morality as it is in Nature, there is nothing so perfectly Good in Creatures that it cannot be hurtful to anyone of the society, nor anything so entirely Evil, but it may prove beneficial to some part or other of the Creation.' On Mandeville, see also Koslowski, *Gesellschaft und Staat: Ein unvermeidlicher Dualismus* (Stuttgart: Klett-Cotta, 1982), pp 174-85; & Alois Riklin, *Wissenschaft und Ethik* (St. Gallen: Hochschule St. Gallen für Wirtschafts- und Sozialwissenschaften, 1982).

[43] There is, however, a certain parallel between Thomas's thought and Mandeville's principle, in so much as Thomas allows the sins of another person to be put to use for good. It must be concluded from this that the economic order has to be so structured that it can derive benefit even from the less worthy efforts of mankind and can put these to use for the general good. This is one of the basic arguments in favour of the market economy and it is thoroughly compatible with the Thomistic ethic. It is not permissible, however, for the economic order to promote these 'vices' or portray them as morally indifferent. Cf. Aquinas, *Summa Theologiae*, II-II, q. 78, a. 4, re: 'It is by no means lawful to induce a man to sin, yet it is lawful to make use of another's sin for a good end, since even God uses all sin for some good, since he draws some good from every evil.'

[44] Aquinas, *Summa Contra Gentiles*, III, 24.

> itself in the highest manner to the creature, and this is brought about chiefly by His so joining created nature to Himself that one Person is made up of these three – the Word, a soul and flesh.... Hence it is manifest that it was fitting that God should become incarnate.[45]

No Division between 'Is' and 'Ought'

Because Thomas opts for an ontological stance and explains his ethic as an ethic of virtue deriving from the nature of mankind and of things, there is for him no division between stating what is and what ought to be. Interactions occur between statements of what is and what ought to be. Apprehending the laws of being and the factors that determine nature has an effect upon convictions about what is desirable and what ought to be. What Max Weber considered impossible – that an idea of values is formed through learning the consequences, in the domain of the mind, of behaviour consistent with a given idea of values – occurs, according to Thomas, through apprehending the laws of nature in the real world. It is impossible that convictions about values should change only via alterations within the realm of values, because the realm of values is geared towards the realm of being. Convictions about values have to be capable of being altered through what we learn about reality; otherwise we would arrive at a condition of complete solipsism, where the individual realm of values would be windowless and monadic.

An Ethic of Pricing: Justice in Prices and Exchange

Thomas's treatment of an ethic for the economy demonstrates – in contrast to the simple idea of pricing inherent in an equilibrium theory which deals in mechanical analogies – that particular prices and actual contracts remain relevant to ethics. Justice in exchange requires that each party receive his due, i.e. that there is an equivalence in the exchange. There are two elements to this rule. First, it involves requirements of *fair pricing*: that the market price should be adhered to in fixing the individual price and that there should also be parity between the price and what is

[45] Aquinas, *Summa Theologiae*, III, q. 1, a. 1, re.

purchased in the case of one-off goods for which no market price exists. On the other hand, the rule of justice in exchange involves the requirement of *material fairness* according to the material *nature of the item for exchange*. Material fairness requires that genuine and not sham goods are transferred in the exchange. These two elements of justice in exchange, fair pricing and material fairness, come together and are complementary in the requirement that the exchange be advantageous to both parties. The requirement of mutual advantage in the exchange serves to unite and to explain the aspects of fair pricing *and* material fairness within just exchange. If sham goods are exchanged or if one of the parties suffers a loss of assets through the exchange, then each is not receiving what is due to him according to fair pricing and material fairness in commerce, i.e. according to justice in exchange.

Thomas's teaching on what is a just price represents a position midway between that of complete freedom in price-fixing and rigid standardisation of the price applicable in an exchange. Today, we can observe tendencies to remove certain price-fixing processes from the arena of market pricing and to re-situate them within a framework of social solidarity; this is apparent in those articles of civil law which deal with profiteering, and particularly apparent in the lending rate and the process of fixing wage rates for labour. These developments demonstrate that price-fixing is not entirely independent of social conditions, standards and values, but must satisfy minimal conditions of justice.

The price set for time and borrowing, the bank lending rate, and the price set for labour, the wage rate, are the prices most sensitive to considerations of fair pricing. They are not, however, the only prices relevant to fair pricing, as can be seen from the disputes about corn and bread prices which play a significant role in economic history.

The historical conflict between the classical-liberal economic theory of positive price-determination and the ethical, moral-theological theory of fair pricing in the Scholastic tradition[46] since Thomas's time can be traced back to one-sided emphasis being placed upon either the process of price-fixing or upon its bases. The classical-liberal economic theory of price-fixing has stressed the process by which all prices are adjusted according to ratios of scarcity and demand and the way in which prices

[46] Cf. Oswald von Nell-Breuning, 'Fortschritt in der Lehre der Preisgerechtigkeit', in *Miscellanea Vermeersch*, Vol. I (Rome: Pontificia Università Gregoriana, 935), pp. 93ff.

are determined by types of market; moral-philosophical and moral-theological teaching, on the other hand, has stressed that the individual price of a particular good is linked to the socially-accepted price of that good, to the market price or to an officially estimated price, and that standards of justice must apply to the individual and the accepted price.

In the course of this conflict, those on the moral-theological side have often overlooked the significance of what price theory has to contribute to theory of the economy and society and have failed to see the importance for economic and social policy of observing price laws.[47] Meanwhile, national economics, in applying the theory of positive price determination to analysis of the way the price system works, has forgotten the internal ethical preconditions for the price system and the need for it to have legitimacy within a collective social order.[48] A synthesis of these

[47] This point is also made by Johannes Messner, *Das Naturrecht: Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik*, 7th Ed. (Berlin: Duncker & Humblot, 1984). An earlier edition is available in English translation: Messner, *Social Ethics: Natural Law in the Western World*, trans. J. J. Doherty (London: Herder, 1966). Messner notes (German edition, p. 1030, note 1) that present-day economic ethics permits connections to be made with a range of ideas fundamental to the natural-law-based economic ethics of medieval scholasticism and refers to the appreciation of such works by J. Schumpeter, W. Sombart and J. M. Keynes: 'For a picture of the natural law price ethics of medieval Scholasticism, the following are of value: Edmund Schreiber, *Die volkswirtschaftlichen Anschauungen der Scholastik seit Thomas v. Aquin*, 1913; Joseph Höffner, 'Der Wettbewerb in der Scholastik', in *Ordo*, 1953, pp. 181-202; Höffner declares, contrary to the opinion of Jakob Strieder, *Studien zur Geschichte der kapitalistischen Organisationsformen*, 2nd Ed., 1925, p. 58, that the Scholastic doctrine of price was not built upon a rigid principle of adequate sustenance. That this principle, however, played a vital role in the price policy of the guilds in the medieval town can hardly be disputed; the medieval scholastic price ethics remains attached to the wholly static thinking of the Scholastic ethics of the time, according to which the ordered acquisitiveness of man is confined to *exteriores divitias, prout sunt necessariae ad vitam eius secundam suam conditionem* (Aquinas, *Summa Theologiae*, II-II, q. 118, a. 1); only when capitalism began to evolve ... does more dynamic thinking emerge in Scholastic ethics also. The dynamic consequence of lowering of costs, which is integral to competition, remained unknown to it even then. The initial assumption was, as Höffner himself says, that prices, on the supposition of human needs, would be determined by costs and by the play of supply and demand. Hence, the price-raising and price-lowering effect of competition was recognized, whereas its cost-lowering function was not clearly perceived, although suspected; this undoubtedly is connected with the fact that the Scholastics critically examined first and foremost the price-formation in commerce, but paid little attention to the sphere of production (English Edition, p. 790, note 1).

[48] Cf. Messner, who offers a synthesis of the two schools of thought as well as basic principles of price ethics: 'The market ... is the organ in the socio-economic process serving to bring about the maximum of economic productivity; and the means by which this is achieved is the movement of prices toward the "natural price" level, which takes place when supply and demand develop in the proper way. *Supply and demand develop properly*

two approaches is, therefore, not merely possible but also necessary, and Thomas's *Summa Theologiae* – even today – has important suggestions to offer on how to achieve such a synthesis of a theory of ethical economy and of fair pricing.[49]

Author

Peter Koslowski, Dr. phil., was Professor of Philosophy at Witten/Herdecke University and the Free University of Amsterdam.

when neither side makes use of the ignorance or weakness of the other [emphasis added]. Distortions are caused by the withholding of supplies for the purpose of speculation; by underselling; by monopolistic price-fixing in association with production restrictions; by official fixing of maximum prices resulting in the exclusion of goods from the market; and quite generally by fluctuations in the value of money. If the market guarantees the orderly interaction of supply and demand, the result is a distribution of the social product through prices which allow the members of the social economy to receive back their raw material and labor costs in the prices of their products, in accordance with the productivity of the production factors they have used; with this, they also receive recompense for any entrepreneur service contributing toward increases in productivity, as well as for the "differential gains" made by firms as a result of advantages in the market' (*Social Ethics*, pp. 789-90).

[49] Cf. Messner: 'Because price formation is bound up with the social end of economy, *social justice* is the fundamental principle of price justice in the economy.... Hence, the following principle arises: Normally the first task of price justice is not the calculation of price quantities and the fixing of prices, but the establishment of the order of competition and the market, so that the factors of supply and demand become generally effective' (*Social Ethics*, p. 793).

Reuben Mondejar

Managerial Ethics: Why It Is Needed, Justified, and Cross-Culturally Valid

A Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski a

Awakening to the Contemporary Significance of Ethics

Every business text now used in a standard management principles courses includes a chapter on one of the latest fads to hit the business management scene: managerial ethics and its overflow into one's social responsibility. In places where free-wheeling capitalism flourishes, where the get-rich--quick attitude is at times given veneration status, the consequences of unethical behaviour, proven or perceived, have alerted certain quarters of society: law-enforcers, morality-watchers, and key figures in international business. The emergence of ethics as an area of concern has also brought about a flurry of course offerings in business management schools. Its incorporation into management training has been the subject of discussion for more than two decades now.

Of significance is an assumption often taken for granted: the fact that the concept of business management schools is a creation of the West, particularly North America. The orderly study of the various functions of business, neatly divided into what is now often taken as if this has been the state of affairs ever since man learned to manufacture, sell, and trade – functions such as marketing, finance, production, human resources management, and so on – is merely the offshoot of this oft-taken-for-granted assumption. Thus, when the emergence of concern over ethics took place, it was simply natural that the treatment of the subject would use the same infrastructure that has been put in place by the created concept

of business school training. In short, the vehicle through which ethics is to be discussed is, by itself, a creation of the West.

Ethical Science and Moral Uprightness

In order to study ethics, one is presumed to subscribe to a minimum of moral dispositions, a situation not so much required for the study of other sciences, particularly the exact sciences. A person who is not morally upright and studies physics, chemistry, botany, and similar 'hard' sciences would still come out with conclusions similar to those of another person, morally upright, conducting the same experiments. In other words, for the hard sciences, the moral disposition of the person does not, strictly speaking, affect the substance of the study in question. In ethics, it does. And in managerial ethics, even more so, because business management studies are among the softest of the 'soft' sciences, among which we include economics, sociology, psychology, anthropology, and other social sciences. In fact, business management draws from these other soft sciences for its justification. It is for this reason that the business manager, or student of business management, must be morally attuned to his raw material of study or activity, since his conclusions or results drawn from such study or work are the fruit of a correct appreciation of the raw material he engages in. Stated in another way, the requirement of adequacy of proportion between the learner and the object of the science he engages differs between the natural scientist and the business manager in action.

Ethics and Morality: Objective and Subjective

Ethics is the science that studies human acts as the proper good of the moral order. In other words, this discipline concerns itself with how man *ought* to live in order to attain his ultimate purpose. The word ethics comes from *ethos*, the Greek word for habit or custom. The Latin word for customs is *mores*, from which the English word 'moral' is derived. Thus, ethics and morals refer to the same root concept.

'Morality', on the other hand, is the term used to refer to the goodness or badness of human action, as determined by whether such action is in keeping with human nature. 'Morality', however, can only be used

when talking about free human acts; other human actions, the freedom of which has been impaired, even if only partially, cannot be subjected to an absolute morality rule. A free action means that the person who did it is the master of such action; he or she is responsible for it, conscious and willing in the performance of the action. Since business activity is replete with concomitant *responsibility* (supervisor-employee, owner-manager, seller-buyer), it is essential that those actions engaged in by the subjects concerned always call for some moral judgement as regards the intention of those actions.

Ethics is both objective and subjective. It is objective insofar as it has to be aligned with the nature and identity proper to a human being, which is the same for all races, creeds, and culture, i.e. their interpretation of man and his world may be different from one another, but they all belong to one biological species with a common human nature. Recognition of this objective foundation is paramount, for if one does not acknowledge this, then brute force takes over. In that case, whoever is more powerful will simply impose his own interests, opinions and standards, with scant regard for what ought to be due to others. People would then be regarded only to the extent that they can be exploited for one's own advantage or benefit. Ethics is subjective insofar as each person has the faculty of freedom, as well as individual conscience. (More will be said about this later.) Both elements, objective and subjective, must operate in unison, following a code that is one and the same for all humankind. Ethics, then, is the applied aspect of the theory supplied by the worldview, which in turn comes to the person in a myriad of ways.

Business Object, Agent and Beneficiary

Business activities are concerned with the production, distribution and exchange of material goods. Their object, therefore, is not directly the human person. These activities should be considered eminently human, however, on two counts. First, the agents involved in economic and business activities are men and women: all the sciences and techniques required for these activities are the object of human study and training. Second, the beneficiaries of economic and business endeavours are also human beings: it is for the service and benefit of humans that these sciences and techniques exist. Thus, it is indispensable for the business student or

business manager to have a correct understanding of the human person and the good proper to his own nature as a person. Otherwise, he would lack the correct perspective; his vision would be partial and, therefore, his ensuing assessments, evaluations and prognostications would necessarily be unscientific, unmethodical and, worse, his decisions could even be harmful to the men and women of society, the very reason served by managerial activity. In other words, one's proper understanding of a person not only could help to explain how one behaves in general, but of equal importance is that it can also point out how the person, i.e. the business manager, can help shape the destiny and well-being of his fellowmen. Without such understanding, one can neither direct one's own life confidently to its proper end nor help others do so (except by accident and with little hope of success). Thus, society can expect little from an individual in that predicament; society could only have much to fear from such a person, especially if he or she aspires to leadership, whether in business or any other field.

At this point, one may ask: why bother so much about ethics, let alone its consequences? The business manager sees first and foremost profit, economic opportunities, and the exercise of entrepreneurship. Why ask questions beyond that? Of course, if one is not interested in the starting point of why ethics is to be faced squarely, then one could also pretend to have no difficulty with the consequences of unethical actions. Such a person would see no justification for its study, see no problems, ask no questions. It is not to be denied that this type of person can be found today, particularly where there is enormous pressure to make money. Indeed, even to the detached scholar, to talk about ethics by first dealing with the person's nature may be incomprehensible. Yet, it does not require religious fanaticism for one to realise that, because of the social nature of the person, one's own workaday world is unavoidably enmeshed with other people's activities; his behaviour towards his fellow human beings is something that cannot be ignored. That is where ethics, and ethical behaviour if you will, becomes inevitable. Ethics is necessary, because by it we are able to position ourselves within the web of interrelationships among other parts of created reality.

To know something well, however, we must see it in context. No part of the universe is rightly known except in relation to the whole. If all reality is accepted as an expression of someone's creation, then reality and the interrelationships within it cannot be seen as a whole unless one

sees the Creator as its source and central point of focus and reference. Creator, creation, reality, and their vast and complex interconnections are all part of one story line. If this is not accepted, it renders a situation like a man knowing much about the human eye without ever having seen a human face. His knowledge is of items in a list, not of features in a face. The proportion and totality of things go unperceived by him. And because he does not know the context of things, he must exclude it from his vision and his judgement of action. And so he sees nothing rightly, because he sees nothing in context. This is where the justification of ethics lies. Business managers, like all the rest of their fellowmen, must go about their daily lives seeing the whole, if they are to manage their affairs well. Chester Barnard is credited with having been the first to point this out in his *Functions of the Executive*. He gave great stress to managing the whole, with the manager's primary role being to shape and guide those shared values in the organisation. The manager, according to Barnard, must 'possess the art of sensing the whole [and must strive to obtain] a formal and orderly conception of the whole'.[1] It is for this total perspective that Barnard's management framework has been regarded as 'a complete management theory'.[2]

Starting off with an Understanding of the Person

The business manager does not have to go far to realise that man is often in a seeming state of tension between apparent opposites. One experiences this frequently enough in the conduct of business operations. Indeed, one's life unfolds and advances by some kind of counter-pull between forces that seem to be the negation of each other. It is also clear that one's world of operations has certain laws; some not the making of men and governments, others man-made and legislated by parliaments and the like. Our freedom is made perfect by recognising and obeying these laws. Thus, we are free to live if we obey the laws that govern us, first of all in the physical world (i.e. we are free to erect buildings, sail the seas, fly in the air only if we observe the principles of physics, wave motion and gravity) and then

[1] Chester I. Barnard, *The Functions of the Executive* (Cambridge, Massachusetts: Harvard University Press, 1938; 30th Anniversary Ed., 1968), p. 239.

[2] Thomas J. Peters & Robert H. Waterman, Jr., *In Search of Excellence: Lessons from America's Best-Run Companies* (New York: Harper & Row, 1982), p. 101.

in the social world (e.g. laws of peace and order, taxation, etc.). Otherwise, we become fugitives from society or are locked up in some jail cell. These principles or laws are not mere accidents, nor are they incidental. All created things exist because someone made them exist, from nothing, to something, *ex nihilo*. Concomitantly, it follows that the setting up of a nature of anything comes with its corresponding laws, if that nature is to be preserved. Thus, the person's creator inscribes laws into the being of the creature to mark the reason for that creature's activity, just as any product manufacturer would inscribe instructions on how to make the product work if the consumer wants to use it properly. Thus, the instructions concerning how to use anything coincides with the laws, irrespective of whether they are legislated by society, that determine the purpose for that created something. Not far after the aforementioned realisation is the confrontation with a nearly mysterious phenomenon – that we live in two worlds – but not as beings who belong to one world and simply get tangled up in another. In other words, the human person is both physiological in structure as well as spiritual, as demonstrated by his intelligence, creativity, will, feelings, memory, imagination, wonderment and so forth. It is this person, astride both matter and non-matter, that operates in society, as engulfed in business operations or some other activity:

> Man is a microcosm or mini-universe astride spirit and matter. In him the quantitative degrees of the potentialities of matter dovetail, overlap and blend with the qualitative intensities of the actualities of the spirit, forever escaping total quantification. He is a single being, not two, but combining the corruptibility of matter with the deathlessness of the spirit, which carries his being beyond bodily disintegration. The being of man is astride time and eternity.... This being of man, both changeable and permanent, is reflected in the way he knows. His bodily senses grasp what is temporal and changeable while his spiritual intelligence grasps what is permanent in the being of things. This manner of acquiring knowledge also indicates the scale of values, or objects of moral action, that man must pursue. That is, material values (material sufficiency, health, fitness), which are necessary for his bodily being, must be acquired for the sake of spiritual values (wisdom, intellectual and artistic creativity, moral excellence or virtue). This is the total culture of man.[3]

[3] Joseph M. de Torre, *Christ and the Moral Life* (Manila: Sinag-tala Publishers, 1984).

Through the person's faculties of intellect and will, he enters into a conscious and determined relationship with all that exists; it is the person's power of intelligence that makes him capable of knowing and it is his faculty of the will that makes him desire and love what is presented to him as good by his intellect. In this sense, for an activity to be truly human, these two faculties must be in operation. And going beyond mere description, it must be said, too, that we do not really know what anything *is* (its nature) until we know what it *is for* (its purpose). Merely knowing what something is made of or who made such a thing does not necessarily lead to fruitful action. Comprehensive knowledge demands a knowledge of purpose. And, in the face of the proposition that nothing can be used aright until its purpose is known, the person who uses anything without such knowledge of its purpose is in a way acting blindly. He may mean well, but meaning well cannot substitute for doing well. As Peter Drucker would say, doing the right things (effectiveness) is not the same as doing things right (efficiency). Both should be done concomitantly.[4]

How to Know the Purpose

The easy, convenient way to know the purpose of something is to ask it from its manufacturer. And, naturally, the next-best method is to look into the essentials of the thing. Any other method will amount to a trial-and--error approach and will most likely lead to waste and error. In the way of knowing, this principle is primordial. If ethical behaviour or correct comportment of the person is a function of his or her reason of being, then there is no escape from the issue of getting to know the answer to the question of purpose.

We could consider principally two ways by which we can conceive anything to have come into existence: by intention or by accident. With regard to the person, evolved Western thought offers a firm answer: the person is a creation of the Supreme Being for a purpose and one must behave and live according to that purpose. In moments of imbalance or instability, the person must chart his course in life following the bright star of that ultimate purpose. Some might retort that the person's purpose

[4] Peter F. Drucker, *Management: Tasks, Responsibilities, Practices* (New York: Harper & Row, 1973; 1985), p. 45.

can be known sufficiently by simply studying human nature, identifying qualities and powers, and through that concluding that the person's development lies in putting such qualities and powers to their best use. There are two serious limitations to this approach. The first is that it is not easy to read human nature. People seem bent on a bewildering array of cross-purposes. They can do a wide variety of things. People can employ any number of powers and skills to accomplish assorted tasks. But for all that, because man is a part of the universe, there is no exemption from having to respect and recognise the rules and laws that govern all reality of which he is part. The person left to himself will accomplish no more than a partially successful job of discovering the laws of the material world, let alone the laws governing the non-material realm, which is not readily apparent and defies empirical investigation.

This consideration leads us to the second limitation, which is the danger of basing the nobility of the person on his or her finite existence only. A person belongs to both the natural and the supernatural orders, owing to the composite nature of matter and spirit jointly found in the person. An atheist may concede that man is a dignified creature, as he seems to stand at the summit of all life on earth. This would still be a grossly incomplete view, since it is posited that the person has a destiny beyond the ambit of his finite existence. The very dignity of his person is rooted in his participation in the infinite. Besieged then by these limitations, the person is led to search for guidelines for what is considered appropriate behaviour. It is more than obvious to any self-respecting person to admit that we all go about the business of daily living knowing only particular facts, and then only limited at that, and we do not usually combine them to explicitly form the aforementioned framework through which, as a matter of course, we ordinarily see things and events. It was the recognition of this problem that led Nobel laureate Herbert Simon to say that, precisely because the attempt to achieve sufficiently certain information is not often practical, people tend simply to *satisfice*, meaning that one's decision-making patterns tend to what is thought to be adequate, but not necessarily the best. As such, optimising behaviour becomes an exception, while satisficing not only becomes standard fare, but could even be the only realistic way to eventually reach one's supposed goals, or what may be referred to as

maximisation behaviour.[5] Transposed into the ethical sphere, it is here that people grapple for a measuring stick that finds its realisation in the formulation or acceptance of some form of worldview.

Worldviews, Codes of Conduct, and Practice

Construction of a Worldview: Believers and Non-Believers

One's disposition with regard to one's actions is to a great extent the result of one's acceptance of certain underlying assumptions as regards the human person, the purpose of our existence, our world, and the entire reality around us. Often, this worldview is supplied by a combination of any of the following: religion, philosophy, ideology, contemporary social practices, or the inherited tradition of the place having been developed across generations. Religion, in fact, has been taken as an all-encapsulating storehouse of all sorts of guidelines that would supposedly make the person fit for upright living. Recent data on the various religions professed worldwide indicate that half the world believes in the same God (one person in every six is a Muslim, one in three a Christian, and Jews account for 0.4%).

Even accepting the fact that a sizable number of Westerners, though drenched in several centuries of Christian heritage, do not practice religious observances or live according to the religion they identify with by convenient affinity, still, half of the world's six billion people (and their forefathers) theoretically claim to adhere to the Decalogue, the Ten Commandments. Even those outside the Judaic-Islamic-Christian league, provided they are not professed and convinced atheists, believe in some god or gods to whom they relate in one way or another in their lives. These religions have corresponding similar codes giving general directives for peace and harmony among all peoples, e.g. be good to one another, do good and avoid evil, and the like – even if not everyone believes in

[5] Herbert A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization* (New York: Macmillan, 1947; 1957; New York: Free Press, 1976; 1997). See also Simon, *Models of Man: Social and Rational* (New York: John Wiley & Sons, 1957); and James G. March & Simon, *Organizations* (New York: John Wiley & Sons, 1958; Cambridge, Massachusetts: Blackwell, 1993).

an afterlife. The point is that for most of the world's inhabitants there is a common denominator concerning what is generally considered proper conduct. Such commonality only reinforces the across-the-board validity of the Natural Law, that indestructible mother of all laws (theologians would confirm that the Ten Commandments, at times known as divine positive laws, are of course also within the natural law), which the early Christian convert and apostle to the Gentiles, Paul of Tarsus, referred to as that law which is unmistakably inscribed in the heart of every person by nature and necessity. In fact, because of this indelible mark of the natural law being inscribed in the person's nature, even those who believe in no deity, afterlife or transcendence of any kind would still experience an independent mysterious internal signpost, vague though it might be, in the form of *conscience*.

Ethics and the Eminence of Conscience

Conscience is the subjective practical judgement made by one's intelligence bearing on an individual human act in the light of some objective principles. It is the descent of the mind from the universal law, whether merely perceived or expressly understood and accepted, to particular circumstances:

Natural Law	Positive Law	Business Management and other Social Sciences
↓	↓	↓
Verdict of Conscience	Verdict of Judge	Manager
↓	↓	↓
Human Act	Legal Case	Business Transactions, Employees, Suppliers, Stockholders, Consumers and other Managerial Functions

In other words, there are three levels involved. The first and highest level has to be particularised through a conscientious judgement (e.g. a judge's verdict or manager's decision), which becomes the second level.

The third level is the base of particulars, which would be the beneficiary of the verdict or decision. The levels are necessary, because there is a jump from the abstract to the concrete; and thus an agent is needed to realise the descent. Hence, a judge who studies the proper application of the theory to practice is required to dispense the verdict; the manager is also in the same situation. Since management is both a science and an art,[6] the manager will similarly apply theory to practice, and it is in this process of application that he uses conscience in melding intellect with action. Conscience is a judgement of the intellect moved by the will: if it so happens that the will is malevolent, i.e. not upright or oriented towards a good that is sincere and true, then the conscience becomes corrupted. Here is how Christian thought regards the eminence of conscience in ethical behaviour:

> Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and to avoid evil, tells him inwardly at the right moment: do this, shun that. For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged. His conscience is man's most secret core, and his sanctuary. There he is alone with God whose voice echoes in his depths. By conscience, in a wonderful way, that law is made known which is fulfilled in the love of God and of one's neighbour. Through loyalty to conscience Christians are joined to other men in the search for truth and for the right solution to so many moral problems which arise both in the life of individuals and from social relationships.... Yet, it often happens that conscience goes astray through ignorance which it is unable to avoid, without thereby losing its dignity. This cannot be said of the man who takes little trouble to find out what is true and good, or when conscience is by degrees almost blinded through the habit of committing sin.[7]

The significance of religion to ethics rests on the idea that religion is a convenient cauldron upon which one's worldview is shaped. And while one's worldview may not guarantee ethical behaviour, it is dependent on it to a great extent, in fact, often inseparable. Hence, with human activity

---

[6] Peter F. Drucker, *The Frontiers of Management: Where Tomorrow's Decisions Are Being Shaped Today* (New York: Harper & Row, 1986), p. 227.

[7] Second Vatican Council, *Pastoral Constitution on the Church in the Modern World, Gaudium et Spes*, 7 December 1965, para. 16.

meant to be purposeful, it is to this *movement towards the purpose* that ethics is concretised. Such *purpose* is supposedly whatever is truly *good* for man's nature. The Western scholastics, Thomas Aquinas as its main exponent, add that it is the possession of such good that one is satisfied, brought to contentment, and led to perfection. As such, happiness is the possession of the good, and true happiness possession of true good.

From what has been presented thus far, it can be said that the person's nature is fourfold: *animal*, but *rational*, thoroughly *social*, and with some *non-material* elements (also called spiritual). Some of the proofs of his non-material aspects are his powers of abstraction, wonderment, curiosity, memory, imagination, reflection, among others – all of which have no physiological organs, strictly speaking. In fact, as pointed out earlier, the person's highest powers are both non-material: intelligence and the will. It is these unbounded dimensions of the person where one feels the need to exercise the highest forms of freedom, transcending the lower freedoms (e.g. of movement, locomotion), which man shares with non--rational animals.

What has been explained so far and the method of analysis given concerning the person may not be convincing everywhere. The instrumentality of analysis presumes a mind-set that is at home in breaking things apart, so as to be able to explain the whole by demonstrating its reconstruction, part by part. Indeed, it is an approach of reaching the general by building through the particulars. But what if one's mind-set is not of this assumption?

Of Orientals and Non-Westerners: Applicability of Western Analysis

Oriental Intuitive Wholeness vs. Western Syllogism and Logic

Peoples of the Orient – the so-called Orientals – do not necessarily have the same appreciation for the '*analysis*' of the person, as has been explained. Just as the Eastern world does not have the same appreciation for Aristotelian logic as does the Western world, syllogism is sorry rhetoric to the Oriental. It is not an uncommon remark in the West that the Oriental is somehow inscrutable. In general, perhaps because they have

not passed through gigantic mental upheavals (being 'reborn' with the Renaissance or 'discovering superiority in reason' with the Enlightenment – two major events from which Orientals have been spared!), Oriental mentality stresses totality. There is that tendency to appreciate the whole, avoiding a breaking-apart. From one point of view, it seems to come close to what Aquinas describes as the 'whole personality doing the thinking, the willing, the feeling'.[8] The entire psyche is at work, though the *localisation* of this 'total' attitude is not usually in the head, but in some focal point of the body, often implied to be the *heart* or *face*. The head is the symbol of Western mentality; the heart, face, or some other similar centre, the symbol of the Oriental. The Westerner regards thought as a separate function most representative of the rational animal. The Oriental does not so much *think* as he *ponders*; i.e., he fuses all his thinking, loving, feeling experiences into an inseparable unity. If for the Oriental, not the head, but the totality of experience constitutes what the West proudly calls 'reason', what then is the Oriental symbol for this centrality and fusion? Some Oriental scholars claim it is the heart: 'Different though the teachings of Shintoism, of the poetic art, and of Confucius may be, they all aim ultimately at the comprehension of a single heart.'[9] The Chinese word *sin*, though meaning 'heart', does not seem to mean exclusively the physical heart. If that were the case, we would not have the 'totality' that is so representative of Eastern thought. Rather, the heart means 'feeling', 'consciousness', or 'centre'. This most likely explains the tendency in Asiatic literature to speak of 'bowels', 'entrails'. Here again, this is not to be interpreted strictly as a definite physiological organ, but rather as a symbolic metaphor, as when one says, 'My heart bleeds for you.'

Thinking and feeling, which in the West exist as separate entities, operate as a single force for Orientals. In Chinese literature, one must first subdue the intellect and then proceed from conscious action to unconscious inaction. This flight to unconsciousness justifies why there is no need for such a compact and coherent system, as can be found in Aristotle, Augustine or Thomas Aquinas. There is no equivalent, for instance, of the concept of 'original sin' in man, which for Western thought explains one's tendency towards unethical behaviour. The Zen contemplations dispense

[8] Fulton J. Sheen, *Missions and the World Crisis* (London: Scepter, 1963), p. 39.

[9] Daisetz Teitaro Suzuki, *An Introduction to Zen Buddhism* (New York, Grove Press, 1964; New York: Grove Weidenfeld, 1991).

with dogmas, books and teachings, in order to reach the 'confluent experience of universal oneness'. For these people, universal truth is beyond all divisions and distinctions of what is pure or filthy.

Oriental Thought

For the Oriental, what is important is that vast undefined background of reality. Less important is the individual person being born into the world, who is considered just a small determination of that indeterminate mass. The individual comes into the world from this inchoate soul of the universe and then, when he dies, he returns to it. This universal, vague, indeterminable something is the essence of the Nirvana of Buddhism, as well as Taoism. As a result, the person has value only as forming part of the large vastness. The person must be content with his environment, the conditions in which he finds himself. And, because freedom is related to the determining principle of life, it follows that the world which emphasises the indeterminate is never concerned very much with the problem of freedom as such, nor the distinction of each personality, at least not as much as in the West.

The Oriental mind, stressing centrality more than rationality, may be illustrated as follows: If experiences multiply to a point where, like arrows, they seem to converge to one central point, then the conclusion is 'true'. At first, all these arrows may fly in different directions, as they do in the mind of an investor who cannot decide in which business venture he shall risk his money. When sufficiently numerous arrows seem to concentrate in a given place, however, the conclusion becomes true. Thus, the more arrows converging, the truer the conclusion. In a sense, the head does not take a leading role in drawing a conclusion. Rather, it is the total consciousness, in what could be called thinking, willing, feeling, living – all lumped together. Orientals are generally at home in vagueness, indirectness, seeming lack of focus. This is a mindset that often leaves the Westerner bewildered, a mental thought pattern that flows into international diplomacy, trade and investments, business and economics. This is perhaps because non-head factors are influencing the thinking. While the Westerner is going from idea to idea, from cause to effect, the Oriental is going from mood to mood. It is on this basis that one could posit that the Western mind, with its intellectual discipline cultivated in

the logical tradition of the Hellenic-Judaic-Christian civilisations, was able to leapfrog to produce a highly industrialised civilisation, leaving behind China and most of the Orient, beginning around the Middle Ages. It has only been in recent economic history that parts of the Orient (Japan and the Newly Industrialised Economies) have seen a surge in science and technology, and only perhaps after these economies have learned, having been apprentices for some time and have now developed the art of imitating the West (and even improving on the imitation!).

The Logic of the West

In the philosophy of the West, especially since the Enlightenment, the great stress has been on the individual's liberty. The laissez-faire of capitalism and liberalism highlights this freedom to its extreme. At the beginning of the twentieth century, 'self-determination' became a fashionable term. It was the beginning of decolonisation. Ravaged by two world wars, democracy became the battle cry as the century moved to its middle point. It was, of course, just a refinement of the earlier self-determination principle. The focus of the West, therefore, was on freedom, which little by little was equated with progress. It was carried further on and progress became venerated to almost religious status in the West, while in the Orient, Nirvana, or other forms of passive resignation, continued to be the order of the day.

The Western mind proceeds in reasoning from the major premise to the minor premise, and then finally to the conclusion. Rationality is strictly of the head; feeling, sentiment and desire must necessarily be excluded from rationality, if the conclusion is to be logically derived. It is, therefore, most heartening that from time to time sparks of wisdom appear to temper the veneration of rationality. In this regard, Herbert Simon's success in enshrining the idea of 'bounded rationality' is a reminder that the use of rationality is in fact imperfect, incomplete and truly constricted.[10] The Western mind traditionally seeks to be 'logical'; hence the ultimate in inconsistency is to be accused of 'contradicting oneself'. And, even with the onset of Machiavellian politics and the consequent repudiation of ethical norms in some aspects of Western living, the Western mind in general takes pride in consistency. 'To think' has become a common

[10] Simon, *Administrative Behavior*.

sign in today's industrial-technological civilisation. Western thinking is based on ideas, judgement and reasoning – all of which are products of the intellect. A judgement is made up of ideas, and syllogistic reasoning is made up of a series of judgements.

Ethics as Science, East and West

Arguably, during the past two millennia, the West has sped ahead in scientific culture and civilisation. In a way, science could be said to be the discovery by man of some of the secrets that the Creator locked in the universe when it was made. The Orient has produced little of what we now regard as modern technical science, at least, so far. Consequently, it lagged behind in getting itself attuned to the method of science, including the use of science in the field of ethics. The explanation could be that Orientals were not metaphysically prepared to do so, for the simple reason that they lacked the mental discipline which Christianity brought into the world, which was so essential for the precision that science demands. The possibility of science is more proximate, it seems, in a culture already accustomed to the principle of causality, and causality is one of the principles of reason. In other words, science became possible because nature and reality were assumed to be rational, consistent and universal in their operations. Mind, therefore, being logical, could unwrap the laws of nature and use them for the service of man. Thought was basically 'reasonable or logical', because behind the universe was the 'logos', which is the basic ground of all consistency, both in nature and in man. It is this relationship between man and those around him (i.e. nature and reality) that would provide a foundation for the justification of ethics. As already brought up earlier, however, the Oriental mind does not enshrine causality as much as Westerners do. The so-called 'science' of *I Ching* is not based on causality, but on relationships, or coexistence, or relative simultaneity, or the fact that certain experiences began to coalesce or 'jell'. A conclusion is not reached by the head, but is perceived by the whole psyche. Feelings affect the mind; resolutions affect sensations in a vast interplay of physical, conscious, unconscious, psychic, volitional elements. And all seem to concentrate in some mysterious centre, which is not necessarily the head. This is not the way of science as we know it, for science is after the certain and measurable.

This state of mental thought patterns, so different between Orientals and Westerners, presents some difficulties to the teaching of ethics. Unifying the two is not easy. The future of the world is no more to be achieved by making the Orient simply accept, lock, stock, and barrel, the ethical parameters of the West and drink from it indiscriminately. Neither would it be easy to think that more intricate global relationships in trade, business and economics would be free from a call by the West for all, Orientals and others, to abide by a common code of conduct considered upright, proper and ethical. It would be naive for the West merely to allow Orientals to be excused from certain ways of acting on the pretext of management decision-making being absorbed into some vague, unconscious Nirvana.

The teaching of management, to a significant extent, has taken the same mental method akin to the 'scientific' structure typical of the West. The division of business and management curriculum into the functions of marketing, finance, production, human resources development, etc., is just an attempt to make an analytical study of the various aspects of business and its management. For in that way, if by studying the process, the cause-and-effect relationship is revealed, then it is easier to find solutions to problems.

Nevertheless, putting aside for a moment the differences in thought patterns and worldview assumptions, both East and West recognise the evident reality of the interdependence among persons. And, because man is social, he evidently has to live with others. It is for his benefit to do so; his perfection, growth, development, and eventually overall individual good shall only be possible with the help of his fellow mortals. That limitation, as earlier stressed, is part of his very constitution. And just as there is an individual good proper to each person, there is also a common good proper to society, or said in another way, the good common to all the constituents of a society comprised by all the persons combined. The good of the individual person, in principle, should not be in opposition to the common good of society, since after all, the societal good is derived to a substantial degree from the congregated individual goods. It only follows, then, that the individual's ethical (i.e. good) behaviour is a necessary corollary of what is known as the common good.

The Common Good and its Operating Dynamics

The Common Good and its Sub-Principles: Solidarity and Subsidiarity

The common good is the unity of order among the constituent parts of society. In other words, the common good is that social order which enables each member of society to attain his or her fullest development economically, politically, culturally and spiritually. The state, as the legitimate temporal arbiter of power, may at times have to intervene and exercise regulatory or developmental functions, *but only* when the common good clearly demands such intervention, usually in such areas as the provision of basic social services. To achieve unity, there has to be some kind of coordination, subordination, hierarchy and cooperation within and among the members of society. Unity is also needed, because persons are free and their individual freedoms must be harmonised within society; otherwise there will be chaos, with each one going his or her own way in conflict with other members' freedoms. Abuses at both extremes must be guarded against. One extreme is individualism, which is the inordinate love of one's good to the exclusion of the general good. The other extreme is collectivism, which erases all private goods, obliterating the legitimate autonomy inherent in one's personhood. The common instrument to ensure the harmony and union of wills is accomplished through the passage of laws in society. For that reason, *law* is defined as the ordinance of reason for the sake of the common good, made by a legitimate authority who has responsibility for the care of the community, whereby persons are induced or restrained from acting through appropriate measures, rules and regulations. In action, the dynamics of the common good are operationalised in two sub-principles: solidarity and subsidiarity. Much of the West's aspirations were guided by these principles. When Pope John Paul II issued his social-doctrine encyclical *Centesimus Annus* in 1991, *The Times of London* reminded its readers in an editorial that the encyclical was in fact 'doing no more than reiterating the tenets on which (European) continental democracy is based',[11] for in solidarity the sense

[11] *The Times (London)*, 3 May 1991.

of collective good is emphasised, while in subsidiarity the devolution of powers and duties to the lowest possible level is recognised.

Indeed, *solidarity* inclines persons to fellowship and friendship among each other as inspired by their common identity of nature and origin. This principle, as a consequence, stresses duties, cooperation, collaboration, equality, overall material prosperity of society, and not the least, social responsibility. It is because of this principle that we can appeal to rich nations to give a helping hand to poor nations, to allow access for the economically disadvantaged ones to participate and have access to decisions in multilateral trade, Most Favoured Nation (MFN) status, the World Trade Organization (WTO), Asia-Pacific Economic Cooperation (APEC), and similar international arrangements. It is by solidarity that individuals, owing to their dignity, freedom, and social nature, are bound by reciprocal rights and duties to the society of persons, thereby establishing a bond of mutual obligations between the individual and society.

Subsidiarity, on the other hand, is that principle which says that what can be done by a smaller entity should not be usurped by a larger one. In other words, what private enterprise and initiative can perform or accomplish sufficiently and efficiently, larger entities must not arrogate to themselves. Applied to business, this principle means that governments should adopt a hands-off policy with respect to business operations that can be efficiently conducted by private individuals. As such, this concept stresses decentralisation, individuality, and the respect for personal talents and comparative advantages, the pursuance of profits without detriment to others, rights, private initiatives, family interests, privacy and individual freedoms. It is by this notion, too, that states are warned about the dangers of excessive planning leading to the curtailment of legitimate freedoms. States must take note of their directive function, since it is in the nature of the person to govern oneself within a larger juridical social order.

Balancing Personal Good and Common Good

Although, in principle, there should be no opposition between one's personal good and the general common good, in practice, one may find situations where there is indeed opposition. This is the case, because whatever is general, in this case, the common good, is made on the basis of aggregates, while exceptions abound in the particulars. More importantly,

there is individual freedom, which may not be employed according to the overall perspective in which it ought to be used, thereby serving only a particularised and limited good. This brings to the fore the issue of *freedom*, which, as Aristotle reminds us, is the person's power to exercise a choice between alternatives whereby one is brought to the ultimate objective identified by the intellect as good and consequently pursued by the will. From this it follows that freedom is not necessarily one's ability to do what one likes, since although what one likes may be the goal, doing what one likes may not necessarily be the road to the goal. In the bodily order, for example, eating what one likes may hinder one from doing what one in fact likes. Thus, it is only by acting as one *ought* that one attains true human freedom. Freedom, then, is not to be attained by merely doing what one likes, unless one also likes doing what one ought to do. But how are we going to be guided by what we ought to do?

Of Philosophers, Virtue and Vice

Philosophers have charted some guidelines arrived at after an analysis of man, his nature, and his world. Plato and Aristotle referred to them as simply the practice of cardinal virtues ('cardinal' taken from the Latin '*cardo*', meaning hinge; 'virtue' from the Latin '*vis*', strength) of prudence, justice, fortitude and temperance. At the time Plato and Aristotle engaged in mental gymnastics to formulate these guidelines, the Chinese were busy constructing the Great Wall (the original ones, not the rebuilt ones we see today) under the Qins. About sixteen centuries later, another philosopher in the West, the Italian Thomas Aquinas, would further elaborate on these four virtues and call them the chief moral virtues. To Aristotle and Aquinas, all good behaviour of man revolves around these four virtues (and for Aquinas, the supernatural virtues as well). Accordingly, ethical behaviour is guided by these and the other related virtues that turn around them. *Virtue* is the stable disposition expressed through habit, which empowers the person through his faculty of will, inclining himself towards the performance of good acts. Virtue, then, is a quality that perfects the person. The opposite is *vice*, which is precisely the absence of virtue in the person. Virtues are always directed towards action, to human operation and activity. They are acquired and developed through repeated operation, i.e. habit. The cardinal virtues are not inborn, but are found in the

state of potency in man and are natural virtues, not to be confused with supernatural virtues, such as faith, hope and charity, which, in the belief of those who adhere to the Decalogue, are inborn.

Cardinal/Moral Virtues and Ethical Behaviour

Prudence is that virtue which inclines persons to form the right judgements concerning proper actions to perform. It regulates the activity of the human will itself, so that it is in accordance with reason. It is in this sense that prudence is sometimes defined as 'right reason applied to action'.[12] Simply stated, it is a form of common sense raised to a very high level. *Justice* is the virtue that regulates human activity in relation to one's fellow human beings, whereby one is required to render to others their proper due. Strictly speaking, only persons can practice justice. Institutions and structures are only just in an analogous sense. *Fortitude* is the virtue that inclines people to pursue actions deemed proper, good and appropriate, even if their achievement may be difficult and disagreeable. Fortitude is the regulation of the person's irascible emotions and the virtue is concerned with attaining a good that is difficult to obtain. Finally, *temperance* is the virtue that inclines persons to govern and moderate their appetites, both mental and physiological. It concerns itself with the regulation of the concupiscible emotions and is directed to the good as something enjoyable.

And, just as there are cardinal virtues, which guide ethical behaviour, there are cardinal vices, which spell unethical behaviour. They are pride, greed, envy, anger, lust, gluttony and sloth.

Justice as the Anchor Point of Managerial Ethics

Of the cardinal virtues, the one that hits managerial ethics at the heart is justice. While the other three virtues are also important for the manager, it is justice that calls for an immediate response, since it is the virtue that governs in a more direct way his relationships with other persons. In other

[12] Thomas Aquinas, *Summa Theologiae*, trans. Fathers of the English Dominican Province, IIa-IIae, 47, 2. Aquinas cites Aristotle, *Nicomachean Ethics*, trans. W. D. Ross, VI, 5: Prudence is 'a true and reasoned state of capacity to act with regard to the things that are good or bad for man'.

words, managerial ethics means that the manager, or anyone directly engaged in the various functions of business (finance, marketing, production, etc.) must always act justly, if he is to be ethical. In the first place, because as persons, by being just, they improve themselves in terms of quality, i.e., they become better persons *per se* (recall that virtue is a quality that perfects). Secondly, business management as an activity and all the functions related to it have a wider range of consequences for people than those related to the exact sciences. People in business are constantly performing activities that require sifting, interpreting and motivating others, leading to the production and exchange of goods and services, further touching upon the lives of a wider set of people: customers, buyers, sellers, distributors, employees, etc. Thus, the businessman's way to attain his personal good (self-improvement) is immediately linked to the general good of society, the common good. Besides, business also serves as the grand software for society to develop for itself the means needed for its citizens to obtain the indispensable requirements for modern living, by providing people with incomes that allow them to take care of themselves. Thomas Aquinas's categories of the different ways in which one could look at justice are helpful in the application of business ethics.

First is *commutative justice*, which is that practiced among equals, e.g. respecting the property or the good reputation of another person. Then there is *legal justice*, which refers to the practice of dutifully obeying the laws of the land, e.g. following mandated factory safety regulations, or paying taxes. The third is *distributive justice*, which is that exercised by a superior towards his subordinates, e.g. an employer paying just wages, or when government officials spread out the burden of taxation equitably among various segments of the population, or when a manager is faithful to observing the recognition of merit as a means of promotion among the subordinates and avoids promoting someone simply on the basis of compatibility of personalities, or worse, blood relations. Finally, there is *social justice*, which is the habit of orienting one's behaviour towards the common good, even in the absence of a law obliging the promotion of such good in a specific or particular way. This is so simply because of the spirit of solidarity, which binds the just person to society, e.g. the manager or entrepreneur who uses his surplus wealth to generate more employment or to promote public welfare institutions. It is unrealistic to expect, as some disciples of Adam Smith do, that a just and humane society can be built by simply encouraging every manager or entrepreneur to pursue profit

exclusively. Individuals must deliberately contribute to the attainment of the common good. A good society does not accidentally result from the selfish, greedy and unethical behaviour of its constituents.

Someone truly intent on living social justice can find application of the notion at practically all levels of the economy, domestic and international. At the macro level, one finds such areas as the third-world debt problem, unemployment, inflation, monetary crisis, harmful industrial and commercial monopolies, appropriate international trade and financial agreements, price balance in relations between rich and poor countries, reinvestment policies of multinational companies, regulation of interest rates, illicitness of transactions (which in currency exchange values harm weaker classes, regions, and nations), money laundering and so forth.

At the micro-, corporate-level, one finds such situations as threshold salary levels or the just retribution for work, appropriate work conditions, attention to special needs of women workers (e.g. onsite child care facilities if need be), employee pensions and retirement insurances, retraining of workers, the rights of employees to organise for legitimate causes, including to address grievances, the proper use of information obtained in confidence (accountants, auditors, consultants, etc.), integrity of financial information not to be used for unfair advantage (e.g. insider trading), manipulation of prices of stock and bonds for private gain, ecologically--related policies of the firm (e.g. treatment of wastes, toxic materials, environmental polluting substances), product safety, etc.

The aforementioned are sample areas where social justice could be lived in the realm of business. They all can be traced to how one lives social justice. These are also the areas where recent concerns over ethical behaviour have been raised. It should be stressed, too, that mere legislation of do's and don't's to cover what is appropriate behaviour is not only not foolproof; it is also not humanly possible, given what can be achieved by instruments of legislation and jurisprudence to identify all possible areas where transgressions of justice could be made. We have to remember that the beginnings of unethical behaviour are expressed in one's *rectitude of intention*, for which laws are of little practical guarantee. In short, evil indeed lurks in one's heart.

But, as explained earlier, the immediately preceding paragraphs can only serve as a guideline towards ethical behaviour. They do not yet explain why, despite these guidelines, there are continuing transgressions in ethics, which are at times committed so easily, if not blatantly.

The Tendency towards Unethical Behaviour

According to the classical Western (specifically Judaic-Christian) tradition, this tendency is explained by the person's 'wounded nature', more commonly known as 'original sin', inherited by all members of the human race as a result of the 'Fall' of the first parents, Adam and Eve, who sinned against God. As a result, from a state of harmony and innocence, all persons have been thrust into a state of constant conflict within themselves and, while remaining to be naturally inclined towards doing good, they must struggle at the same time against their inclination to evil, or the proneness to sin, disorder, error and unethical behaviour. The early Greek philosophers, Socrates, Plato and Aristotle in particular, who lived in an era without a hint of Christianity, already posited that this tendency, which they so well knew, can be minimised by training oneself in the cardinal virtues. Later, Christian thought adopted them and added that with the 'Redemption event' brought about by God's 'repurchase' of the fallen race of Adam and Eve, accomplished through the sacrifice made by Jesus Christ, those who accept that act of redemption by being baptised into Christ's people have the benefit of *Grace*, which helps them to counter, though still not without effort, the tendency, inclination, proneness or prelude to unethical behaviour. In this way, Christians believe that within the context of original sin/Redemption/Grace, they enjoy a supernatural (i.e. not man-made) energy vis-à-vis unethical behaviour, an unmerited divine gift, for which Christians would be held accountable at the end of their earthly life. Those who are not Christians must live with the same struggle in policing their behaviour, but must rely on their natural (i.e. not supernatural) power supplemented by whatever God, Creator of all that was, is, and will be, would grant in mercy and benevolence. This divine assistance to non-Christians is called *actual grace*, as distinguished from supernatural grace, which pertains to Christians.

This notion of the roots of unethical behaviour is unique. There is no similar explanation in other cultures that is as all-encompassing as the Western explanation. The power of this framework lies in its coherence, simplicity and comprehensiveness, most especially when it puts forth the proposition that one's realisation of the damaged or *impaired human condition*, which makes the person so easily vulnerable to unethical behaviour, is indispensable to one's ability to guard against falling into such behaviour. It is like saying that when we know our weaknesses, we are

better able to fortify our defences. Expressed in another way, the main enemy of ethical behaviour is not external to the person, but within him or her; other outside enemies only exacerbate the inclination towards unethical behaviour, but the crux begins with the person principally. Thus, an appreciation of this metaphysical foundation allows one to integrate into a single framework what otherwise would be fragmented bits and pieces of ethical justifications. It is in this sense that the appeal to ethical behaviour must be accompanied by a corresponding appeal to an appreciation of its supporting cast: the worldview, the person's nature, and the role played by men and women within that context.

A Pedagogy of Business and Managerial Ethics

At this juncture, several high-water marks can be stated. First, ethics, being a study of human acts in their application (not merely speculative), affects all that is touched upon by human operations, in the case of the interest of this essay, managerial actions. Second, the understanding of ethics, and its acceptance as something desirable, presupposes a worldview that spells out the links between the person and all reality around him or her. Third, ethics cuts across specific disciplines that study man. It requires a comprehensive perspective and knowledge of the interrelationships among the elements within that perspective. Fourth, because it cuts through multiple disciplines, it is abstract in a sense, yet remains practical, because its fulfilment is not in thought, but in specific human actions. Fifth, it is objective, just as it is subjective.

Also, there is the 'given' that the concept of business and management education carries with it a certain mentality of teaching it (with a certain dosage of case method) and structure of content, i.e. the division into the different functions of marketing, finance, production, HRM, control, MIS, and other business functions brought almost to a level of science.

The issue could well be raised that all of the above-mentioned high-water marks are very Western in character: rational, logical, analytical, scientific. These are points that were dealt with earlier, precisely pointing out that these are not the ways of the Oriental. Does this mean then that just because the emergence of ethics as a discipline of study, the ensuing method of explanation, and the worldview utilised to demonstrate it emerged in the West, ethics is a subject understandable only to the West?

Certainly not, for reasons already discussed, e.g. men's common nature and identity as a species, natural law, the metaphysical inquisitive bent of the human mind always in search of explanations until it is satisfactorily answered, etc. The instrument and vehicle of elucidation may be Western, but the final object or substance need not be exclusively Western. It is important to distinguish here substance from accident and form. Dwelling on the topic of East and West, it is worthwhile to repeat an excerpt from a *Wall Street Journal* editorial: 'To say that democracy is a Western product and therefore unsuited to the East is about as silly as saying that because the airplane was invented in America, Asians should stick with the Camel Express.'[13]

Surely, material and technological progress has made the world smaller, which makes necessary, too, a commonality in understanding of human affairs. This means that we require knowledge of the interrelationships among ourselves as one human family, as well as to aspire to deepen that knowledge. Ethics is one of these ways to put into effect the process of obtaining an intimate knowledge about this interrelationship.

It is important, also, to point out that one need not be Jewish or Christian to use the 'model' of explaining ethics and to be able to practice it. The gift of faith, Christians would maintain, is helpful, but not necessary. Utilising what has been discussed in the previous pages, a series of propositions proposed for use in the pedagogy of managerial ethics follows:

1. The beginning of ethical consideration should be an understanding, or interpretation if you will, of the person. This can be considered the first stage of this pedagogical ethics model. The most significant aspects in this regard are the following:
   - The person's composite nature of being material (physiological organs) and spiritual (powers of abstraction, imagination, reflection – especially the intellect and the will). Because of one's spiritual powers, the business manager can, so to speak, 'go against the grain', if he really wants to take ethics seriously.
   - The person's being in a state of potency, always capable of being further developed towards the inevitable aspects of life (e.g. growth towards maturity leading to self-improvement, perfection, maturity; also included here is Maslow's self-actualisation). This is crucial in the understanding that the transformation of the potentials into

[13] *The Wall Street Journal*, 4 June 1991.

realities, i.e., from potency to act, comprises the realm where ethical and moral behaviour matters. Every normal person possesses the cardinal virtues in a state of potency, and by making use of these virtues and developing them in oneself, can weave through life with ethical behaviour. The cardinal virtue of justice ranks highest and most immediate for the business manager.

- The acceptance of the natural law inherent in the person: *do good and avoid evil*. Recognising that good, as well as evil, is objective. Linked with this understanding are the roles played by conscience and individual freedom, which compose the subjective elements.

2. The process by which potencies are converted into real actions is the area of ethics and morals. This is the second stage of the model. Every action of the manager leads to something; it has an intention. The judgement of the goodness or the badness of those actions is morality. The description of those actions is their ethical-ness. Those series of actions inevitably lead the person towards some good. One's practice of virtue will lead one to the good; if one practices vice, instead, one will be hindered from reaching the good (i.e. good is one's self-improvement, self-actualisation, etc.). Just as there are pull and counter-pull elements in the first stage (e.g. physiological desires may not always coincide with spiritual ones), the same tug-of-war happens in the second stage between virtue and vice. The manager constantly faces the option of being virtuous or vicious.
3. The third stage is the attainment of the good, objectives or goals. As Herbert Simon highlights in his theory of bounded rationality/satisficing, this 'reaching the goal' is hardly perfect; at most it is only an adequate satisfaction level. At this point, one may be faced with a dilemma between the common good and individual private good. Then comes the time to live the two principles of solidarity and subsidiarity. It is not a question of one or the other. They must be lived simultaneously, just as in a weighing scale, balancing one with the other. Again, there is the pull and counter-pull, but if one is well grounded on solidarity and subsidiarity, the manager can be adequately guided as to how to strike the balance, surely not without effort at times, resulting in trampling upon one's own vested interests. This third stage completes the model depicted as follows:

First Stage	Second Stage	Third Stage
PERSON →	**POTENTIALS** transformed into **ACTS** →	**GOOD**
(Material/Non-material)		Common vs. Individual)
(Freedom & Conscience)	**MORALITY/ETHICS**	[Solidarity & Subsidiarity]
(Do good, avoid evil: Natural Law)		

As shown in the model, there are three distinct, but inseparable stages. Each succeeding stage builds upon the previous one. As one moves to the next stage, the comprehension of the inevitability of ethical behaviour becomes more apparent.

Conclusion

Three questions will serve to summarise and conclude this essay. First, is it possible to reconcile the divergent approaches of East and West towards the understanding of managerial ethics as part of decision-making activity? Second, if such a unified approach is possible, is it valid across cultural borders? And third, if at all valid, is it possible to teach it to students who may already have set thinking and values when they come to take up business management studies?

The answer to the first two questions is affirmative. To the first: yes, it is possible to reconcile the two approaches. While the analyses vary, the end-result should be the same. Even if rationality is the byword of the Western approach, its cause-and-effect method is just another way to understand the whole. Teachers of managerial ethics can constantly refer to the totality which cause-and-effect wants to get at. Orientals are more at home with the overall-total approach to understanding human activity and an appeal to this common objective can encourage openness to a rational approach. After all, the overall-total approach is just another way of looking at the common good, solidarity and subsidiarity. The teaching of management studies has, in fact, been taught with a rational approach and the incorporation of ethics into the various functions of management is a mere employment of the same approach. The three-stage pedagogical framework presented in the previous pages is sufficiently comprehensive to give due respect and consideration to whatever Oriental sensitivities

may come up. It is precisely the comprehensiveness of the framework that makes it marketable across cultures.

Certainly, such a reconciled approach would also incorporate the appeal to the common aspirations of men that are found in most cultures, such as harmony and peace in human interrelationships (i.e. the five cardinal relationships in Confucianism, for instance) and particularly what the Western sages of the Middle Ages called the metaphysical attributes of unity, truth, goodness, beauty – which have traces of existence in other cultures as well. Part of the task of teaching managerial ethics is to exhort that these attributes be given pre-eminence over pragmatism, crude convenience, unreflectiveness and mediocrity.

To the second question: yes, this approach to ethics, its substance and the method of imparting it, is teachable across cultures. But its teachableness demands that it be first recognised that ethics is the embodiment of values acquired by the person and is, therefore, to be seen as an attitude and disposition, a sort of state of mind that guides a person's every action, in business and everywhere else. Managerial ethics is an overflow of the ethical stock that is in the person, just as what some authors call the principle of moral projection.[14] While ethics as a course is teachable, it is not merely a course of study. It must be taught with the awareness that *attitude* (both of student and teacher), *substance*, and *method* of teaching – these three should go together, because any one that is missing will render the entire exercise less effective. Of particular importance is the initiative that the teacher must take in ferreting out the ethical aspect from each managerial function. Students should be helped, trained and sensitised to discover the ethical underpinnings at each turn in managerial decision-making. Needless to say, the maturity of the students is a plus factor, especially years of working experience contributed by different students coming from various fields.

Concerning the third question, admittedly, teaching ethics to adults is not the same as teaching it to more tender minds. Indeed, by the time students come to grips with the pedagogical ethics framework described in the previous pages, their value systems are already in place, their code of conduct already firmly established. At that juncture, adults are presumed to have already established their criteria of distinguishing between right and wrong and, as the argument goes, a course on ethics would really achieve

[14] Kenneth E. Goodpaster & John B. Matthews, 'Can a Corporation Have a Conscience?' *Harvard Business Review*, January-February 1982, pp. 132-41.

little, if anything at all. This pessimism is not justified. First, as stressed earlier, this way of imparting ethics has to be given as a total package: ethics is only the illumination through which the student sees the various managerial functions. Thus, one is really imparting the function rather than ethics itself. It has to be taught *as something incorporated into as well as something that consolidates*. As such, it invites a repositioning of values, even if these may have already taken root. The exchange of ideas in the course (that is why the method of teaching used is highly important) makes possible the resurrection of dilemmas they may have encountered which, although buried in time, as it were, remain open wounds, at times with raw nerves exposed. The 'Socratic' nature of business cases, with which there is supposed to be practically no right answer, as everything is left up to one's own judgement, invites self-reflection and inquiry into the role that ethics can play in managerial decision-making. This inquiry leads to the roots of right and wrong, of a stable standard upon which to base some principles. Additionally, people with some maturity, whether in age or corporate life, have that peculiar advantage of being especially equipped to cross-pollinate experience with an ethics consolidation course. It is on this window of ethical opportunity that this approach to imparting ethics expects to capitalise.

Also, an encounter with an ethics-illumined management course provides a chance for self-rectification. Even if one already has set ideas, there remains the possibility of that singular moment of questioning the solidity of the foundations of those ideas, and this spark of questioning can lead to the overhaul of one's ethical structure. After all, one who looks towards the long term understands the need for change and realignment according to new information or discovery. One's eventual survival in the marketplace depends upon timely correction. Such disposition, ever present in managerial functions, becomes even more important for ethics, since it colours all the different functions, giving them a perspective that is all encompassing.

Finally, since ethics is an applied discipline, it is closely tied up with a correct appreciation of the person, his or her relationship with other persons, as well as with the world community at large. As such, it is not a value-neutral, victim-free exercise.

Author

Reuben Mondejar, Ph.D., is Associate Professor, Department of Management, City University of Hong Kong.

Sonny Keraf

The Importance of Justice for Business Management: Adam Smith's Legacy for the Market Economy

A Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski a

It seems to be a truism that an ethical business is a good business. But the question remains: are there any conditions necessary for good and ethical business practice? And, if so, what are these conditions? This question is quite important and relevant, because managing a business ethically or morally can only take place within a certain kind of framework, one that supports such business management.

From a Smithian point of view, it can be argued that managing a good business presupposes a just legal-political framework. The point is that managing a business ethically or morally requires not only morals itself, but also just laws and a just administration of these laws that supports good management. Practices such as monopoly, collusion, nepotism and bribery ensure that it is hardly possible to expect people to conduct business ethically in such a situation. When there are no laws prohibiting such practices, or when laws prohibiting them are not taken seriously, good management is out of the question. When nearly everyone can conduct business by means of monopoly, manipulation and bribery without being prosecuted by the government, no one else will take seriously the requirement of doing business ethically.

This does not mean that just laws are all that is required to ensure good business management. That would be off target. Of course, we need morals; just laws are not sufficient. But, on the other hand, with regard to business management, ethics without just laws and a just administration of these laws would make no sense. Therefore, doing business ethically requires not only morals, but also a just legal-political framework. Or,

better, it requires an economic system that accommodates morals and a legal-political framework as well.

In the case of Adam Smith, this system is nothing other than the system of market economy, or what he calls a system of 'natural liberty and justice'.[1] Putting it briefly, justice is for him the most important and necessary virtue for economic and business activity. Hence, justice is important and necessary for ethical or moral business management.

This essay is an attempt to highlight Smith's theory of justice, especially the principle of no harm, and to show clearly that doing business ethically requires a just legal-political framework in the first place, without playing down the importance of morals. Morals are still at stake, because justice is, for Smith, not simply a legal rule, but also a moral rule, a natural moral virtue as well.

Though many people still wonder whether the system of market economy has a moral standing, or whether it is simply a system of moral anarchy,[2] Smith himself is quite certain that it is precisely in the system of market economy, that is, in the system of natural liberty and justice, that we can expect people to act ethically in their business activities. Hence, justice is for Smith the necessary prerequisite for good business management.

Adam Smith's Ontological Presuppositions

Smith's defence of the market system, including justice in the market system, can be understood well in terms of his ontological presuppositions. It is worth noticing that Smith's theory of justice, including his theory of the market economy and the function of the state therein, is influenced very much by the natural law tradition. Smith's whole position is that of a natural law author. He is influenced by the natural law thinkers – the Stoics, Hugo Grotius, Samuel Pufendorf, coming down through his 'never-to-be-forgotten' teacher, Francis Hutcheson – so much that his entire project is nothing other than an application of the natural law position to the economic field.

---

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (New York: The Modern Library, 1985), pp. 651, 141, 308, 497.

[2] See, for example, David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1992).

Sharing the natural law position, Smith has at least two main presuppositions. First, for him the modern social system is a system of the free-market economy, or what he calls the system of natural liberty and justice. His concept of the social system is in fact the very application of the natural law concept of the harmonious system of nature to the economy. The market system is then modelled upon that of the harmonious system of nature. This means that, just as in the case of nature, the natural harmony is maintained by the free functioning of every part of nature; thus in the market economy everyone is allowed to pursue his own interests as freely as possible and, as a consequence, a harmonious social order will come into being. However, as implied by the very terms 'natural liberty *and* justice' (emphasis added), this social harmony can only be maintained insofar as the natural liberty holds under the prevalence of the rules of justice. It is this combination of liberty and justice that will keep the social machine of the free-market economy running well.

Secondly, like the natural law authors, Smith assumes that the human person has two complementary natural tendencies, namely, the tendency to preserve one's own existence as a natural endowment and the tendency toward one's fellow-creatures. Man has a natural, moral obligation to preserve not only his own existence, but also that of his fellows and, in that sense, he is inclined to live together with his fellow-beings in society. The first tendency manifests itself primarily in the self-interest principle, which for both Smith and the other natural law authors is morally good. The second tendency manifests itself mainly in the Smithian natural principle of sympathy, which becomes not only the basis of moral life and moral judgment, but also a mechanism by means of which justice can be maintained.

This shows clearly that, unlike John Rawls and Robert Nozick, who hold that human persons are separate beings, Smith claims that we are individual co-existent beings. He puts it clearly that, 'Man ought to regard himself, not as something separated and detached, but as a citizen of the world, a member of the vast commonwealth of nature.'[3] This coexistence enables each individual person, on the one hand, to pursue his own interests and to preserve his own life as much as possible but, on the other hand, to respect, or even to support, the life of his fellow-creatures. For

[3] Adam Smith, *The Theory of Moral Sentiments,* ed. D. D. Raphael & A. L. Macfie (Indianapolis: Liberty Classics, 1982), III.3.11.

Smith, man is by nature an individual being. But, strangely enough, by nature he can only live as an individual human being insofar as he lives together with his fellowmen in society. Man is a *conatus essendi*. But he can be a *conatus essendi* only by living with others. So, man has a natural tendency toward the preservation of his fellows as well.

Having these two natural tendencies, man is allowed to pursue his own interests in his own way. However, it does not follow that he would do so at the expense of the interests or the rights of his fellows. He would not do that, simply because of the concern he has for his fellows, mainly through the natural principle of sympathy. Therefore, Smithian self-interest is not Hobbesian self-interest.

On the basis of these two ontological presuppositions, it can be argued that the traditional interpretation of Smith as an individualist is untenable. He is neither an individualist whose main concern is with individuals, nor a collectivist who is primarily concerned with society.[4] He is instead a Stoic 'liberal conservative', rather than an individual liberal thinker, as is traditionally taken for granted. He is a Stoic 'liberal conservative' who stresses extensive individual liberty under the prevalence of justice. Or, better, Smith is a Stoic 'liberal conservative' who views man as a natural entity in his totality, and thereby takes man to be an individual being who is quite concerned with his own interests, but is at the same time a social being with a commitment to the shared values of the entire human community. As a 'liberal conservative', he is not only concerned with individual liberty, but also stresses strongly the justice that would uphold the entire system and make the economy run well.

This explains somewhat why Smith so vigorously defends individual freedom in the marketplace, or simply the free-market mechanism, on the one hand, and on the other hand insists on the importance of the crucial and central role of the government in the market economy for the sake of the interests of all economic participants. It explains why Smith argues so much for the important duty of government 'of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it',[5] not only for the sake of individual rights, but

[4] See W. J. Samuels, 'The Political Economy of Adam Smith', *Ethics* 87 (1977), pp. 201-202; Robert Boyden Lamb, *Property, Market and the State in Adam Smith's System* (New York: Garland, 1987), p. 103.

[5] Smith, *Wealth of Nations*, p. 651.

also for the sake of the preservation of society. It explains why, for Smith, justice is so important for a good business.

The Principle of No Harm

Following the natural law tradition closely, Smith makes the claim that the core meaning of justice is commutative justice. To a certain extent, his commutative justice is Aristotelian. Like that of Aristotle, his commutative justice is concerned with rectifying the damage done in social transactions, as well as with economic exchange. For both philosophers, commutative justice holds on the ground of equality among human beings. In this sense, their theories of commutative justice have to do with the concept of reciprocity of values, both in rectifying damage done and in exchanging economic goods. Smith himself says that his commutative justice 'coincides with what Aristotle and the Schoolmen call commutative justice'.[6]

In a sense, however, Smithian commutative justice is much more extensive. First of all, Smith, more influenced by the Stoics, considers the main principle of commutative justice to be securing from injury or abstaining from doing any positive harm to others. It consists in the first place in not harming others. Therefore, the main principle of justice is to do no harm. Like Cicero, Smith claims that 'we are said to do justice to our neighbour when we abstain from doing him any positive harm, and do not directly hurt him, either in his person, or his estate, or in his reputation'.[7] In other words, 'Justice is violated whenever one is deprived of what he had a right to and could justly demand from others, or rather, when we do him any injury or hurt without a cause.'[8]

In this sense, Smithian commutative justice is concerned with rights, especially those that Grotius, Pufendorf and Hutcheson call perfect rights, that is, rights one has a title to demand and, if refused, to compel another to perform. Smith insists that 'the end proposed by justice is the maintaining men in what are called their perfect rights'.[9] It 'consists in abstaining from what is another's and in doing whatever we can with propriety be forced

[6] Smith, *Theory of Moral Sentiments*, VII.ii.1.10.

[7] Smith, *Theory of Moral Sentiments*, VII.ii.1.10.

[8] Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael & G. P. Stein (Oxford: Clarendon Press, 1978), A.i.10.

[9] Smith, *Lectures on Jurisprudence*, A.i.1.

to do'.[10] In a word, commutative justice prescribes perfect obligations of not violating the rights of others.

Secondly, it seems likely that Smithian commutative justice also includes what Aristotle calls 'legal justice', or treating everyone equally according to the rules of law. For Smith, everyone must receive equal regard, equal treatment, either as a person, as a member of a family, or as a member of the community. Everyone should receive equal respect, simply because he or she is a human creature like any other or a fellow citizen like others. Maintaining persons in their perfect rights cannot but come down to treating everyone equally before the law. The principle of commutative justice, therefore, has to do with the principle of impartiality in terms of the law.

For Smith, the no-harm principle is the very fundamental rule of the game that must be obeyed by everyone else. It is the minimal principle that not only preserves the rights of everyone else, but also preserves the very existence of society itself. Without this principle, society would degenerate into bloodshed. This would lead in turn to the extermination of not only human beings, but also the existence of the society. Without this principle, there could hardly be any human intercourse at all.

So important is the no-harm principle that, for Smith, it is the necessary condition for the existence of human beings and any society as well. It is the *sine qua non* of any society whatsoever.[11] In Smith's view: 'Justice ... is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric of human society ... must in a moment crumble into atoms.'[12]

Since this principle is so important, Smith even considers justice to be the necessary virtue. Smith recognises that human beings long not merely for the existence of human society, but also need a good society. That is the reason Smith provides room for moral principles such as benevolence and what might be called 'distributive justice'. For Smith, however, society and human beings could exist, even though in a poor condition. But, man and society 'cannot subsist among those who are at all times ready to hurt and injure one another'. For Smith: 'Beneficence ... is less essential to the existence of society than justice. Society must subsist, though not

[10] Smith, *Theory of Moral Sentiments*, VII.ii.1.10.

[11] See also T. D. Campbell, *Adam Smith's Science of Morals* (London: George Allen & Unwin, 1971), p.75.

[12] Smith, *Theory of Moral Sentiments*, II.ii.4.

in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.'[13]

In this regard, Smith even goes further to argue that justice is therefore an enforceable virtue. As a moral virtue, the implementation of this virtue is subject to the free will of the individual. It is a virtue implanted in the human mind since the beginning. As such, in social interaction, especially before any civil laws exist, 'everyone trusts to the natural feeling of justice he has in his own breast and expects to find in others'.[14] Thus, as a moral virtue, justice is maintained primarily through the mechanism of sympathy, which moves everyone else to condemn injustice and even to help the injured man to retaliate the injury done to him.

Nevertheless, because the violation of justice brings about evil, both material and existential, and threatens to undermine the existence of society, it must be somehow enforceable:

> As society cannot subsist unless the laws of justice are tolerably observed, as no social intercourse can take place among men who do not generally abstain from injuring one another; the consideration of this necessity, it has been thought, was the ground upon which we approved of the enforcement of the laws of justice by the punishment of those who violate them.[15]

This amounts to saying that, in addition to morals, there is a need for a legal framework that embodies the moral sense of justice into laws that guarantee the rights of individuals and the common good.

Applied to the realm of business management, the no-harm principle is then the foundation of and is necessary for doing business ethically. Justice thus holds as the necessary condition for ethical and long-lasting business interaction in the market economy:

> Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which

[13] Smith, *Theory of Moral Sentiments*, II.ii.3-4.
[14] Smith, *Lectures on Jurisprudence*, A.v.110.
[15] Smith, *Theory of Moral Sentiments*, II.ii.6.

> the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.[16]

It follows that in business management everyone is prohibited from committing any injury whatsoever to other persons. This is the fundamental principle that must be obeyed by everyone. Therefore, without general abstinence from doing harm to others, there can hardly be any good business management. This principle holds not only as a moral principle. Interestingly enough, this rule must also be established in civil laws maintained consistently and impartially for all business actors. This rule holds as the rule of the game for the sake of the economic progress of both the individual *homo oeconomicus* and the entire society.

A Just, Impartial Government

The above quotation also shows clearly that the no-harm principle itself presupposes a just administration of the principle. For the sake of justice, and hence for the sake of ethical business management, we need an impartial government, a government that would not irrationally take the side of any group of people. This is very crucial not only for Smith's own time, but also for our time, especially for a country like Indonesia. This is for the sake of guaranteeing the rights of all individuals in their business interactions. To Smith, for the sake of justice, and that means for the sake of doing business ethically, it is a prerequisite that government itself must be just. That is, government must really treat everyone impartially with regard to – in our case under question – business activities. If government is constantly manipulated by some group of people for their own sake at the expense of the rights and interests of many others, there will be no justice at all. Business activities will be chaotic and hence managing ethically will be a utopia.

This does not mean that a just, impartial government would take no side at all. On the contrary, government should defend and protect those

[16] Smith, *Wealth of Nations*, p. 862.

whose rights have been violated. So, in certain situations, government must prefer some groups of people to others. But, this is done under and according to the rule of the game: the rule of justice. This is done under and according to a definite objective moral criterion. And this is truly just and morally good.

We agree with Smith that in order to have a just government and, in turn, in order to have a conducive condition for ethical management, we need three important factors: separation and independence of power, absolute power of government within limits, and the right of resistance on the part of citizens. For Smith, these are three important elements inherent in a just legal-political framework that would preserve a good business under the prevalence of the no-harm principle.

Closely following John Locke and Montesquieu, Smith argues that there must be separation and independence of power, in particular, between judicial and executive power:

> When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called, politics.... But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. *In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power.*[17]

This separation and independence of power is of considerable importance, for if there is no separation and independence of power, there is a great danger that the power may be led to manipulation, nepotism, collusion, bribery, and other unjust and unethical business practices. No one would feel secure in managing his business in such a situation. If the just and legal procedures followed by any company might be cut down simply because of manipulation and abuse of power, unethical business management would be considered normal. Hence, each manager would not try to follow the rules of the game, but instead to buy the politics.

This leads to the idea that the 'absolute power' of government must be held within certain limits. We do agree that government should have absolute power – in the sense that government has the highest civil authority. This is of crucial important for the sake of social, economic and political stability. Having absolute power, government is able to function effectively

[17] Smith, *Wealth of Nations*, p. 68 (emphasis added).

in providing a legal and political framework impartially for every economic actor. Without the absolute power of government, there would scarcely be any political stability – which is also required by managers for their own business activities. All business managers need a stable and effective government for the sake of their own firms. They need a social--economic order managed by a just government that enables them to focus on conducting their own business. A weak government is as dangerous as a strong totalitarian government. However, this absolute power must be held within limits, within certain kinds of control; otherwise, sooner or later, it will give rise to political unrest. Therefore, government itself must be under the rule of justice as the rule of the game. In other words, the no-harm principle itself must also hold for government.

This means that government itself may be held under court if there are any abuses of power by government. In other words, citizens have the right to disobey or resist the government whenever it behaves unjustly. Smith claims that 'a right of resistance must undoubtedly be lawful, because no authority is altogether unlimited'.[18] Government is not an infallible institution that should be obeyed no matter what. Without this right of resistance on the part of the citizens, government could arbitrarily do whatever it wished, including providing a monopolistic position, privilege, protection, etc. to particular economic groups and, hence, would create an unjust and unethical situation for business management.

In this context, it can be understood why Smith is so critical of the system of mercantilism of his time. For Smith, mercantilism is an unjust system that gives rise to detrimental practices, such as monopoly, protection, manipulation and privilege. It is unjust and inefficient. It is unjust, because in its attempts to promote economic growth it gives privileges to certain groups of people, instead of economic freedom to all. Instead of providing an extensive opportunity for labourers to employ their labour in whatever manner they think proper, it limits their freedom by an economic policy of monopoly, protection and privilege. That is why, in Smith's view, the great defect of mercantilism is that it creates, encourages or supports opportunities for a few to aggrandise themselves at the expense

[18] Smith, *Lectures on Jurisprudence*, B.94.

of the great body of people.[19] In such a system, where justice is violated, managing ethically seems to be impossible.

Economic Freedom

One important element of the no-harm principle in the economic sphere is economic freedom. Freedom is, for Smith, one of the most essential and natural rights of human beings that must be preserved for its own sake. So, the no-harm principle also applies to the case of individual freedom. That is, no one is allowed to interfere with the free activity of anyone else. This makes the case for Smith to argue for the free-market economy. Smith, therefore, claims that

> to hinder [a poor man] from employing [the] strength and dexterity [of his hands] in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him.[20]

Likewise, 'To prohibit a great people ... from making all that they can of every part of their own produce, or from employing their stock and industry in the way that they judge most advantageous to themselves, is a manifest violation of the most sacred rights of mankind.'[21]

In this regard, Smith rejects state intervention into both individual life in general and economic and business activities specifically. State intervention with the economic activities of everyone else without a good reason – especially for the administration of justice – would be considered unjust, for it is a violation of the individual right to freedom. However, Smith's doctrine of non-intervention should not be read as a dogma. It is not a dogma, because he provides enough room for the important and crucial role of the state. In Smith's view, the state is in the market to maintain justice impartially and equally and, consequently, for all individuals.

---

[19] Leonard Billet, 'Justice, Liberty and Economy', in *Adam Smith and the Wealth of Nations: Bicentennial Essays 1776-1976*, ed. Fred R. Glahe (Boulder, Colorado: Associated University Press, 1978), hlm. 87.

[20] Smith, *Wealth of Nations*, p. 122.

[21] Smith, *Wealth of Nations*, p. 549.

That is why the role of the state is in fact not eliminated, but instead minimised. The state, for Smith, has only a minimal function. Yet, it is an effective function as well.[22] So, it is better to say that for Smith the state functions minimally, but effectively, for the sake of justice for all. This is in accordance with Smith's own statement that 'the first and chief design of all civil government, is to preserve justice amongst the members of the state and prevent all encroachments of the individuals in it, from others of the same society. That is, to maintain each individual in his perfect rights.'[23]

In this sense, Smithian justice applies to the market not so much as not harming others, but as a respect for the natural law, that is, a respect for free exchange as a natural coordinating mechanism. Smithian justice, consequently, means more than non-interference in the interests of others. Therefore, in the market economy, justice also prevails as a non-interference principle. It is also a principle of laissez-faire (although Smith does not use this term). However, this principle of laissez-faire is not an absolute one. It is not absolute, because it only holds under the prevalence of the no-harm principle. It means that the no-harm principle has priority over the non-intervention principle and, hence, justifies the intervention of the state for the sake of the no-harm principle.

In the market economy, it is highly valuable to let everyone manage his or her own business as freely as possible. However, this is not a principle of 'anything goes'. This principle of liberty or laissez-faire can only hold insofar as no one's rights are violated. Whenever anyone's rights or interests are transgressed, the principle of liberty or laissez-faire is thereby ruled out. Accordingly, if anybody's freedom is harmful for justice, if a free activity of business violates the rule of justice, then this freedom should be restrained. Therefore, though Smith defends individual (economic) freedom, there is no doubt that he indeed condemns exertions of economic freedom that endanger the rights of others and the security of society: 'Those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments.'[24] Therefore, government, in

[22] What we need is not a strong government that would not tolerate any alternative social and political power whatsoever – even those that want to promote and protect the rights of any group of people – except that of her own, rather, an effective government that would function powerfully without being able to be manipulated by any economic power for the sake of their own interests with the expense of the rights of many others.

[23] Smith, *Lectures on Jurisprudence*, A.i.1; i.9.

[24] Smith, *Wealth of Nations*, p. 308.

Smith's view, should have an active-effective role to ensure – through a just administration of laws and justice – that no one's rights are violated in the system of the free-market economy:

> In the race for wealth, and honours, and preferments, [one] may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors. But if he should justle, or throw down any of them, the indulgence of the spectators [the just government] is entirely at the end. It is a violation of fair play, which they cannot admit of.[25]

So, though economic freedom is highly respected, every individual must manage his business fairly, or without doing any harm unfairly to others.

No Harm versus Integrity

In his interesting book, *Competing with Integrity in International Business*, Richard T. De George, like Adam Smith, suggests rightly that the no-harm principle is a negative obligation, a negative virtue. In this sense, De George considers it to be too minimal and legalistic, and hence heteronomous.[26]

De George then argues for integrity as a universal principle for business in particular. What makes the integrity principle fascinating is that

> Acting with integrity is the same as acting ethically or morally. Yet, the word *integrity* does not have the same negative connotations that ethics does for many people; nor does it have the overtones of moralizing that the term *morality* often carries with it. Acting with integrity means both acting in accordance with one's highest self-accepted norms of behavior and imposing on oneself the norms demanded by ethics and morality. Since the word *integrity* implies self-imposed norms, a demand that companies act with integrity is more acceptable and less threatening to many multinationals than is a demand that they act ethically or morally – even though the two amount to the same demand.[27]

---

[25] Smith, *Theory of Moral Sentiments*, II.ii.2.1.

[26] Richard T. De George, *Competing with Integrity in International Business* (New York: Oxford University Press, 1993), pp. 184-85.

[27] De George, *Competing with Integrity*, pp. 5-6.

De George goes on to indicate that the principle of integrity is extremely relevant to the free competition that lies at the heart of multinationals' concerns.

We agree with De George that the no-harm principle indeed has a negative-legalistic character. We also agree with the concept of integrity suggested by De George. So far, so good. But, some objections may be put forward here. First of all, though it is true that the no-harm principle has a negative-legalistic overtone, it is not necessarily so. It is not necessarily a principle imposed from without. Someone might do no harm to others, not because of a legalistic motivation, but rather because of a pure moral motivation, that is, because he has a sense of justice, a sense of not harming others as he himself would not want anyone else do any harm to him. So, on the contrary, the principle of no harm might also be a self-imposed one. It might be 'in accordance with one's highest self-accepted norms'. As Smith himself suggests, it is a natural principle or virtue that holds since the beginning. So, even before there are any civil laws, this principle is already implanted in one's own heart. Therefore, abstaining from doing any harm to others might result not so much from being imposed from without, but from a moral sense, that is, from the moral sympathy that someone has with his fellows.

This principle is also acceptable and less threatening; for the implementation of this principle is also for the sake of companies' business and rights. Every manager knows well that if he violates the rights of others – of consumers, labourers, or stakeholders in general – he thereby creates a bad image for his company and, hence, no one will be ready to do business with him and his company. So, for the sake of his own business, he will impose himself to abstain from doing any harm to others. It is a self-imposed obligation, as in the case of acting with integrity.

Secondly, acting with integrity is indeed a positive attitude, and hence it is really praiseworthy. Yet, in a situation where no one takes integrity seriously, the principle of integrity makes no sense. In a situation where bribery, monopoly, collusion and similar unfair practices take place daily, the principle of integrity seems to have no place at all. Hence, no one would take integrity seriously. In situations where even the most honourable persons, both in the bureaucracy and in business, conduct business so unfairly that it appears they have no integrity at all, it is difficult to expect other business managers to act or compete with integrity. In a system where people act unethically without having any sense of guilt and remorse,

the doctrine of competing with integrity would sound quite bizarre. And we can do nothing for such a situation. So, it might amount to a helpless situation. (Is not integrity a self-imposed norm?) In such a situation, no one would rely upon the integrity of others. Integrity might be on the list of norms or values of doing good business. But it seems likely that it is not at the top of the list.[28]

It goes without saying that there might be the case in which no one cares about or takes seriously the no-harm principle in managing his or her business. But, with regard to the no-harm principle, we might be justified in compelling those who have harmed others to obey the principle by punishing them. So, though the no-harm principle is not sufficient, it might be very helpful in almost all situations, including business. For we could still expect government to take action against those who have harmed others. Certainly, as previously argued, this presupposes a just government at the same time. Without this, it would be helpless as well. Moreover, national and/or international boycotts against the products of any company that has done harm to its stakeholders is quite effective in creating a condition for doing business ethically – even though it may sound extremely legalistic. However legalistic it may be, it is better than the helpless situation with regard to acting with integrity.

Thirdly, in this connection, competing with integrity has the overtones of putting oneself in a weak position. Everyone involved simply assumes that others will act with integrity. But, in fact, no one is sure about that. Thus, integrity has the character of morality, without pretending to moralise. And if people act without integrity, nothing can be done about it. That is really a weak position. The situation is quite contrary with regard to competing under the prevalence of the no-harm principle. Competing under this principle is nothing other than competing fairly. And this is precisely the rule of the game that would give guarantee – however vague it might be – for everyone's rights in the highly competitive business environment. Everyone knows that there is at least a minimal moral-and-legal rule for good business management. They know that if anybody violates the rule, he could endanger his own business.

[28] It seems likely that De George's argument for integrity has too many American overtones. In America, North America especially, and some European countries – and Japan as well – it might be 'so well, so good' to compete with integrity. But, I am afraid it does not apply for other countries, such as Indonesia.

To summarise briefly, justice, especially the no-harm principle, is the most important and relevant virtue for business interaction. This is because this principle is not simply a moral rule, but also a legal rule as well, and vice versa. And, for business activities, such a rule is very appropriate. On the one hand, such a rule respects very much the freedom, both economic freedom and moral freedom, of every business manager. Businesspersons have extensive freedom to do as they wish. But, at the same time, this rule binds them to the values shared with other businesspersons and other human beings. It leads them to have commitments to respect the rights of everyone else, as well as the common good. And, quite interestingly, as a legal rule it gives a guarantee not only for the protection of individual rights, but also for the political and social stability of business activities.

Author

A. Sonny Keraf, Dr. phil, is Senior Lecturer, University of Indonesia, and Senior Lecturer, Atma Jaya Catholic University, Jakarta, Indonesia. He served as Indonesia's Environment Minister, 1999-2001, and as a Member of the Indonesian Parliament, 2004-2009.

Theophilus Chando & Paul M. Shimiyu

Culture, Management and Development in Africa: In Search of a Philosophical Paradigm

A Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski Tytył polski a

Introduction

That Africa is underdeveloped is an obvious fact. Just take a look at the many gloomy-looking faces of hungry women and children in any African country and you shall have supplied anyone doubting this assertion with a resounding example. Just mention one country at war with itself and you shall have rendered the sceptic speechless. A continent that cannot feed itself is surely underdeveloped as far as food sources are concerned. A continent that cannot be at peace with itself is certainly underdeveloped as far as peaceful coexistence is concerned. This is what Africa is. From such observations, it looks like F. G. W. Hegel was right in his assessment of Africa: 'Africa…is no historical part of the world; it has no movement or development to exhibit.'[1]

Of course, one must be fair to the German philosopher, too. For, indeed, Hegel does grant some species of historical movement to Africa; but he is careful to remind his reader that this Africa is not the proper Africa we know. It is the Asiatic Africa, the Africa where Egypt now stands. In truth, this Africa is Asia, for its spirit belongs to the Asiatic spirit.[2] To vilify Hegel

[1] F. Ochieng'-Odhiambo, *African Philosophy: An Introduction* (Nairobi: Consolata Institute of Philosophy Press, 1995), 1.

[2] Ibid.

for saying what, in his opinion, Africa represents seems to us to be guilty of intellectual blindness. The situation in Africa is not a Hegelian heritage. Hegel simply recorded it from the information afforded him by the generosity of 'well-meaning' cultural anthropologists and missionaries – the first of the God-sent-men from the West to come and save Africa from eternal damnation. These benevolent children of God came to develop Africa. Development, opinion prevails, is a rational process and can only be carried out within a rational milieu.

According to these God-sent-men, Africa is so alien to rational life that it 'cannot be expected to make any progress without a close and corrective tutelage. The category of primitiveness divests African thinking of any inner impulse to liberate itself from irrationality, myths, and obsolete habits. Only under the supervision and guidance of the West can it be dragged into some kind of rationality.'[3] A close look at the issue reveals that Africa's political leaders, who, instead of managing their own affairs, must run to the West in the face of any 'threat', supports this kind of mentality.

What is development, though? How does a society achieve development? Who are the agents of development, and what do they aim at achieving at the end of their activity, so that we give them a pat on the back and say: 'Well done. Now we are fine, thanks to your noble endeavour. We have got all that we have always longed for?' Such questions and probably many more in this line must be settled before we speak of development. Development is a multi-faceted concept, containing within it the spiritual, material and social connotations. Development means to unveil a potentiality into an actuality. It is to uncover what is necessary for human growth and sustenance. We would like to contrast development to 'envelopment'. Envelopment is, in our sense, a system by means of which the conditions by means of which people are able to unveil their potentialities are muzzled by giving them what has already been made, and forcing or persuading them to believe that it is that very product they want, and that their life would be much better with that product than without it, or than it would with an alternative. One is convinced that since the products have been made anyway, one does not need to produce an alternative to it, regardless of the circumstances in which one finds oneself. This is the phenomenon found in the consumerist spirit instilled in Africa from the West. Since

[3] Messay Kebede, 'Development and the African Philosophical Debate', in *The Journal of Sustainable Development in Africa*, Vol. 1, No. 2, 1999.

a refrigerator has been discovered in the West, Africa does not need to invent another preservation facility, appropriate to its climatic conditions. The refrigerator can serve the African purpose just as much as it serves the purposes of the West. This spirit 'envelops' people's potentialities for imagination, and no improvement can take place. To give people what is already made is not to develop them, however beneficial the said commodity is to the people. To import what makes life easy and bearable for people from elsewhere is not a bad idea, but it is not development.

Development, by its very nature, must begin from what is familiar to a people, from the ideas they subscribe to, the values they cherish and can easily identify with. Material development depends greatly on the spiritual pedestal of a society. Development is about the ideas people have about their environment. Africa seems to have insisted that development means modelling one's lifestyle according to the western paradigms. This Africa has not achieved and will not achieve. The western circumstances are not relevant to Africa's development; African development must take care of African environment and sensitivities. If we agree with Hegel that Africa has no development to exhibit, it is because Africa left her heritage and is trying to ride on the wings of western heritage as a means to development. Africa has all it takes to develop; the material heritage and the advantage of climate can very well sustain this. What is needed is a proper and sound conceptual framework upon which African development can be anchored.

Africa, above all, needs a relevant philosophy of management, since it already has the other factors that are necessary for development. She lacks pertinent managerial theories, which are suitable and self-sustaining. We contend that for such theories to be effective, they must be home grown, i.e. based on the indigenous cultural heritage. The present work is concerned to lay open, and to encourage thinkers and leaders to pursue African development accordingly.

This article is divided into four main sections. The first section is a philosophical reflection on the predominant human inclination of happiness. The second is a reflection on the aims of development. The third is a reflection on development according to the sub-Saharan cultural context. Section IV is an attempt to stipulate a philosophy of management for sub--Saharan Africa in the bid to satisfy the desire for happiness.

The Predominant Human Inclination

Means to an End

Development is a teleological concept. It points to a goal, consciously chosen, and striven for. Man is a being of choice, daily deciding to live in accordance with a purpose. Whatever man does, thinks and conjures is for a purpose, whether clearly stipulated or not. Whenever you meet a person working, for instance, in the fields, say, herding, riding, fighting and so forth, such a person has a reason for doing that. This does not exclude academic, intellectual and spiritual exercises that people undergo.

When one prepares a garden, it is because s/he, for instance, wants to plant some crop/s there. S/he plants something because s/he wants to, at the end of its maturity, acquire material or aesthetic satisfaction. One sows millet, plants coffee seedlings, because one would like, at the end of the day, to satisfy some material needs. One plants flowers because one wants to satisfy some aesthetic needs.

From the foregoing two paragraphs it comes out clearly that people, in their normal senses, do whatever they do for some end. Therefore, what they do is not done for its own sake. What people do is therefore the means to some end. People study in order to acquire academic degrees, which are supposed to enable them to acquire jobs, which, in turn, should enable them to earn a living.

In the preceding paragraph one can note that there can be a chain of ends. A certificate is an end in relation to studies. But a certificate is a means in relation to earning. Earning is also a means in relation to a good life. Of all the above stages in the process of studies, studying is the mere means; good life is, relatively, an ultimate end; the degree and earning are, relative in this case, proximate ends.

The Ultimate End of Human Desire

Man, as already stated above, is goal- or end-oriented in her/his activities. But does man ever come to some goal that is final in what s/he does? Let us re-examine the case of studying. As indicated, one studies to attain a degree; one attains a certificate in order to earn something that can

enable one to live well. But does one attain satisfaction with the so-called good life? It happens, according to common occurrence, that those who are supposed to have acquired a good life through their earnings, keep on working further for better things.

In line with studies, one with a BA or BSc degree strives to acquire an MA or MSc, in order to improve her/his opportunities. When one acquires the MA/MSc, one realises that it is not enough; therefore, one pursues the PhD. But even after the PhD one is supposed to keep studying, for instance, undergo what are known as post-doctoral studies, to further improve one's opportunities. This is still not sufficient, because one has to keep publishing, in order to remain relevant in her/his area of specialisation. This kind of process stops only with one's demise.

It is common knowledge that men live in the future through hope. Hope, we believe, is the driving force to some proximate goal, which, once attained, becomes a means to some other proximate goal, and this a means to another proximate goal, *ad infinitum*. Can this reality of things support the issue of an ultimate goal, which an individual, in every existential hoping, is directed to? When a person does a particular thing, s/he is hoping that this is a means to an ultimate goal, but s/he realises that it is not the case. Therefore, man keeps on shifting goals. If this is the case, then man, as Jean-Paul Sartre once put it, is a useless passion.[4] This implies that desire for an end is a sham, because one never attains it. It would also justify the view that enjoyment consists in the hoping or waiting. One enjoys insofar as one is hoping. Once one acquires what one hoped for, one immediately starts all over to hope for other things.

Happiness

Due to this kind of striving, which never comes to an end, many philosophers have come to the conclusion that that which man ultimately desires is none of the material things around him/her. All of the ends man desires to attain are merely proximate. But does this really mean that there is some ultimate end or goal?

In order to attempt an answer to the above question, we should find out what really underlies all man's desires. We contend that whatever man

[4] Cf. Jean-Paul Sartre, *Being and Nothingness*, 1943 'Doing and Having,' Sect. 3.

does, as man, is meant for some kind of fulfilment. This fulfilment occurs at every stage, be it in the means or ends that he desires to attain. The fulfilment in the means, i.e., in what one performs, e.g., studies, physical work, physical exercise, spiritual work, spiritual exercise, etc., is existential, i.e., *hic et nunc*. However, the fulfilment in the end is futuristic, i.e., never attained, because as soon as one reaches the so-called end, one begins, as already stated, all over again.

The fulfilment attained *hic et nunc* acts as motivation for further actions.[5] But this fulfilment is only a driving force; it is never complete. We contend, in line with this, that complete fulfilment would mark the end of one's pursuits. This is possible, perhaps, with death.

What we have so far referred to as fulfilment, *ut supra*, is normally regarded as happiness. Happiness is man's driving force in her/his human actions. Happiness is, we contend, man's ultimate goal in her/his pursuits, because s/he never at any moment, so long as s/he continues to work rationally, ceases to pursue it. This is the case, notwithstanding the variety of views.

What we have referred to as the ultimate end or happiness above can also be designated as 'the good'.[6] The good is the only end that man, *in quantum rational*, would seek for its own sake. This is because it is ultimate; the other ends that we have called proximate are only useful goods, i.e. means to this ultimate good. This is the good Plato referred to as the supreme, sovereign Good, or the *Summum Bonum*. This is the highest among Plato's transcendent ideas. For Aristotle, unlike for Plato, the good is identical with being, i.e. what *is*. Therefore, evil, as St. Augustine of Hippo also held, is privation of being. Scholastics made some distinction by referring to the good as the object of desire or appetite, and the true as the object of intellect.[7]

There are different opinions as to what might constitute what is the ultimate good of man. Hedonists hold that it is pleasure. For Stoics it consists in man's conformity with the universal law, which is of divine origin. This is modified by Kant, who regards it (the good) as having its source in the human intellect, which he expresses as 'duty for duty's sake'.[8]

---

[5] Cf. Aristotle, *Nicomachean Ethics*, 2.1, 1094a6-18.

[6] Cf. Ibid., 1.4, 1095a17-20.

[7] Cf. James Fox, 'Good', *The Catholic Encyclopedia*, Vol. 6 (New York: Robert Appleton, 1909).

[8] Ibid.

Christian philosophers distinguish different types of goods:

- corporeal good is whatever contributes to the perfection of the purely animal nature;
- spiritual good is that which perfects the spiritual faculty-knowledge, truth;
- useful good is that which is desired merely as a means to something else;
- the delectable or pleasurable good is any good regarded merely in the light of the pleasure it produces.[9]

In relation to all the above goods, the moral good is regarded as an end in itself. But the ultimate good, for Christian thinkers, inclusive of St. Augustine of Hippo and St. Thomas Aquinas, is God. Kant, too, would regard moral goodness as ultimate, i.e. good without qualification.[10]

In his *On the Improvement of the Understanding*, Baruch Spinoza writes about the ultimate good. He points out that men esteem as the ultimate good things like wealth, fame and sensual pleasure.[11] But he notes that sensual pleasure, once attained, is followed by melancholy. Pursuit of riches and fame, also when sought for their sake, are not fulfilling either. Spinoza argues that acquisition of things is indefinite in that one continues to pursue them on and on, the more one acquires them.[12]

Spinoza, therefore, disregarded riches, fame and pleasure as fixed goods to be sought after. Since these are perishable, they can, for him, never be the basis for happiness. They might rightfully, only, be used as means to the eternal and infinite, ultimate end of man's pursuit.[13] He contends that the end of man, the ultimate good, consists in the mind's union with the whole of nature.[14]

Spinoza argues, further, that whatever science or discipline there is, it is meant for the attainment of the good, happiness or human perfection. Above all, the understanding is the right path to this good. It is, therefore, obligatory to purify it for that purpose.[15] Through reflection, Spinoza reduces human modes of knowledge to four: 1) perception (knowledge) from hearsay; 2)

---

[9] Ibid.

[10] Cf. Josef Seifert, 'Moral Goodness alone Is "'Good without Qualifications"': A Phenomenological Interpretation and Critical Development of some Kantian and Platonic Ethical Insights into Moral Facts which Contribute to the Moral Education of Humanity', paper presented at the Twentieth World Congress of Philosophy, Boston, 10-15 August 1998.

[11] Cf. Baruch Spinoza, *On the Improvement of the Understanding*, trans. R. M. Elwes, paragraph 3.

[12] Spinoza, *On the Improvement of the Understanding*, para. 5.

[13] Spinoza, *On the Improvement of the Understanding*, paras. 9-11.

[14] Spinoza, *On the Improvement of the Understanding*, para. 13.

[15] Spinoza, *On the Improvement of the Understanding*, para. 18.

perception from mere experience; 3) perception of the essence of one thing inferred from another thing; and 4) perception when a thing is perceived solely through its essence, or through the knowledge of its proximate cause.[16]

Spinoza also enumerates four means of attaining the end: 1) to have an exact knowledge of our nature which we desire to perfect, and know as much as is needed of nature in general; 2) to collect in this way the differences, the agreements, and the oppositions of things; 3) to learn thus exactly how far they can or cannot be modified; and 4) to compare this result with the nature and power of man.[17] He contends that the adequate mode of knowledge for the attainment of man's ultimate end is the fourth one, which 'apprehends the adequate essence of a thing without danger or error'.[18]

From the above exposition of Spinoza, it is worth noting that, for him, the ultimate end of man's desire is not found in things like fame and bodily pleasures, because these are, for him, transient and temporary in comparison to the so-called fixed good. The fixed good, for him, is nature (substance, God). Man is supposed to reach this good through a mystical union with nature, or God. This is acquired by the purification of knowledge.

Spinoza's reflections are instructive in that he expresses the fact that man is end-oriented, i.e. teleological by nature, in whatever s/he does, be it in her/his daily chores of acquisition of wealth, character enhancement, or bodily, physical fulfilments. Spinoza brings out another fact, that man does this as a rational animal. This brings us to the discussion of the satisfaction of material needs, as necessary, though, not ultimate good for man.

The Aims of Development

The Teleological Character of Development

It is our stand here that development of whatever kind – be it biological, physical, material or intellectual – being end-oriented, i.e. teleological in character, must appeal to the values of a people. Economic, material development, which specifically has to do with the accumulation of

[16] Spinoza, *On the Improvement of the Understanding*, para. 19.
[17] Spinoza, *On the Improvement of the Understanding*, para. 25.
[18] Spinoza, *On the Improvement of the Understanding*, para. 29.

wealth, is teleologically meant to give satisfaction to man materially, and to contribute to his moral well-being, and this, ultimately, is meant to contribute to happiness. As David A. Crocker remarks, before undertaking any development activity, one should first consider: 'In what direction and by what means should a society "develop"? Who is morally responsible for the beneficial change?'[19] Any development agenda must try to answer these questions. Development, in this sense, is concomitant with freedom. It is 'a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialisation, or with technological advance, or with social modernisation.'[20] Freedom is happiness, and any other functionary of development is meant to serve this cause. Material opulence can only serve as a means to this end.

The human, ultimate good, which we have already identified above as happiness, is served by every means possible, the economic inclusive. It follows that lack of the means, in this case the economic, material means, does not auger well with man's possibility of the orientation to her/his ultimate end, happiness. It is well known that man needs both material and other satisfactions for her/his well-being and balanced living.

Lack of whatever kind, including that of material goods, is philosophically an evil. Evil, as St. Augustine rightly asserted, is privation, or lack. In the case of the lack of material goods, one is in a state of physical evil. The other types of evils Augustine stipulates are metaphysical evil and moral evil. While metaphysical evil concerns lack of that which does not appertain to the nature of a thing, moral evil has to do with man's choice not to love God, her/his Creator and Sustainer.

Physical evil also concerns man's bodily deformities, sickness, etc. This constitutes lack of what appertains to man as a physical, biological and psychological being. We contend that such lack, or evil, can be the ground of moral evil. One in such a need will necessarily seek to satisfy it. A hungry man or woman will seek food. A person without clothing will seek to acquire some clothes. A homeless person will seek shelter. And,

[19] David A. Crocker, 'Developmental Ethics', in *Routledge Encyclopedia of Philosophy*, Vol. 3 (London 1998): 39.

[20] Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000), 3.

above all, a person who suffers lack of money will strive to acquire money to satisfy such needs as are stated above.

Frustration of the striving will adversely affect the individual. One in such a need, if completely curtailed, may try to end their miserable life. One may also, having failed to use socially acceptable means, turn to morally wayward means to satisfy her/his material needs.

We would regard as morally wayward the practices of satisfying one's needs by means such as begging, prostitution, theft, robbery and murder, among others. It is true that each person should be responsible for his or her rational actions. But in some extreme cases, such as hunger, thirst, etc., one acting under such influences may not be completely in charge of oneself. If one is not completely responsible, then one cannot be said to have committed a morally wrong act.

In cases where this particular individual is not morally responsible, in the actions that hurt other people, there must be somebody else who is morally responsible for such acts, at least by extension. It is possible that one can be the cause of one's own desperation, but it is also possible that one's desperation be caused by others. For example, in the case of a destitute person, like a street urchin, stealing food or water, at least society must be held responsible. Society is responsible in that it has allowed unnecessary economic discrepancies among its populace. Through her leaders, society is supposed to see to it that there are equal opportunities for each according to their abilities. Through her education system, society is supposed to prepare each member, according to their capacity, to be able to, among other things, live as useful a member to her/himself and to society at large.

It is difficult to explain the phenomenon of extreme want in contrast to that of extreme affluence in some of our African countries. How does one explain the case where, in one and the same society, there is an individual who owns a fleet of cars, acres upon acres of land, an enormous number of flats, etc. alongside other individuals who have hardly anything to eat? Such extremes are as abhorrent as they are irrational, because one with such affluence does not really need it all. This is characteristic of African *petit* (petty) or *comprador bourgeois.*[21] The one without food needs more

[21] Cf. Abdul Rahman Mohamed Babu, *African Socialism or Socialist Africa?* (London: Zed Press, 1981). Cf. also Okwudiba Nnoli, *Introduction to Politics* (Enuga, Nigeria: Pan African Centre For Research on Peach and Conflict Resolution, 2003).

than just that; at least food, security, shelter, clothing and other basic economic securities are necessary.

It does not, after all, mean that an affluent person is necessarily happy. Happiness, as we have already demonstrated, is not attainable through any goods we acquire. Such goods, be they concrete or ideal, are only proximate ends. Happiness, as we have tried to explain earlier on, seems to be elusive, though it is man's ultimate end. It is never attainable and yet it is the real motivation of whatever man does.

Now, if a particular good does not constitute happiness, can a great number of them constitute it? We contend that for economic development to be a gateway to proximate happiness, it has to be oriented towards the achievement of personal and social integrity. This means that, despite the discrepancies that there may be, economically, one should strike a balance insofar as basic needs are concerned. We contend that a society whose basic needs, like shelter, clothing, food, health, etc., are satisfied,[22] is more oriented towards happiness, provided other needs, like the spiritual and aesthetic, are satisfied.

Economic development, as we have already argued above, is a goal--oriented enterprise. This goal-directedness is an expression of man's rationality. It is a rational process in that it is, besides, supposed to be planned and executed rationally, by rational men and women. As a rational process, it calls for responsibility on the part of its executers. Therefore, economic needs, insofar as they are man's needs, are rational in that they fall within the scheme of the fulfilment of man's needs.

The Concept Development

The question of 'development' seems a fairly complex one, not because of the linguistic significance the term evokes, but most importantly because of the socio-economic, political, and techno-scientific ramifications the term elicits in one's mind. This complexity makes defining 'development' a fairly fluid and elusive task. What one calls 'development' at one point may not be what others call 'development'.[23]

[22] We say that a person is satisfied when a person is contented and does not suffer want of any or at least the most essential goods, and has the amount of these goods required to fulfil the person's need for them.

[23] Walter Rodney, *How Europe Underdeveloped Africa* (Nairobi: East African Educational Publishers, 1972), 3; he exposes here the multi-faceted concept of development.

It may be admitted, though, that 'development' as a term is generally used to designate a progression in size, shape or function of any entity, be it material, social or mental. Development is an increment; it is a succession of stages in which each stage of the succession approaches what is regarded as an ideal. In this connection, development is understood as a function of a specific teleological direction[24] determined or discovered by the developing agent. Development calls for a sophistication of some sort. This is contrary to A. R. Mohamed Babu's materialist understanding of development. Being a sworn Marxist, he tends to reduce development to economic development.[25] Walter Rodney, while arguing that 'development' is complex, defines 'economic development' as follows: 'A society develops economically as its members increase jointly their capacity for dealing with the environment.'[26]

As a term denoting a concept, 'development' may be used either *descriptively* or *normatively*. The descriptive use of the term elicits a meaning of the process of economic growth, industrialisation and modernisation that results in a society achieving material opulence and stability. The normative use of the term elicits a meaning of societies whose established institutions realise or approximate worthwhile goals, which include overcoming economic and social deprivation, and the achievement of the moral and intellectual ultimacy of a society.

Development: Why and for Whom?

The questions of why and for whom should any development activity be undertaken are questions seldom asked. The question development theorists and practitioners ask is, rather, how, i.e. by what means, do we achieve any development target? The assumption here is that human beings have homogeneous needs and, thus, homogenous ways of satisfying them. This further implies that there is a similar understanding of what development means to every person; and that the meaning is that development is the

[24] Robert Bernasconi, 'Can Development Theory Break with Its Past? Endogenous Development in Africa and the Old Imperialism', in *African Philosophy*, Vol. II, No.1, 1998, 26.

[25] Babu, *African Socialism or Socialist Africa?* 19. He argues that development started when man first freed himself from the 'fetters of nature by discovering that mechanical motion could be transformed into heat'.

[26] Rodney, *How Europe Underdeveloped Africa*, 4.

sophistication of a society in terms of technological innovations, economic growth, efficiency, increased production and consumption. This is the understanding dominating development practice and studies, and is institutionalised by even the powerful global bodies such as the World Bank and the IMF, and a host of the world's powerful NGOs.

That understanding of development is incorrect. Development is an all--encompassing phenomenon, and there must then be an all-encompassing approach to the practice of development. Development is poly-faceted in the sense that it covers the society integrally, in its economic, political, intellectual, socio-cultural and religious aspects. Therefore, there cannot be only one meaning of development and so, also, only one way how to develop. Each facet of development has its own definite goals, methods and tools. To identify development with only one facet of it is to utterly miss the point. Development is not economic growth, or industrialisation, which at best are means to development. It is not the mere transfer of economic, political and technological processes from one place to another. Development, we submit, is ultimately about people. It is about their 'values, ideas, and beliefs; their identity and feelings, how they view the world and their place in it, and what is meaningful to them'.[27] It is the ability for self-evaluation, the ability to develop, orient and re-orient a people's own values, in order to achieve comfort in all aspects their of life. Development is about people having the ability to make their own independent decisions; it is about whether they understand what they do and why they do it, and whether they participate fully in the life of the society. Development, we contend, is rooted in a people's system of beliefs:

> Development must acknowledge the role of social values and prevailing mores, which … influence the freedoms people enjoy and have reason to treasure. Shared norms can influence social features such as gender equity, the nature of child care, family size and fertility patterns, the treatment of the environment.... Prevailing values and social mores also affect the presence or absence of corruption, and the role of trust in economic or social or political relationships.[28]

[27] Vincent Tucker, ed., 'Cultural Perspective on Development', in *Cultural Perspectives on Development* (London: Frank Cass, 1997), 4.

[28] Sen, *Development as Freedom*, 9.

There should be a radical deconstruction of the inherited official myths about development. The myth about development that identifies development with economic opulence alone is incorrect. It is important to understand that a society is, above all, constructed by its ideas about itself, that is, its social imagery, and not material goods alone. Ideas are the substructure of the physical aspect of the society. We agree, in this case, with Tucker:

> Ideas, meanings, images, consciousness and imagination are not purely internal psychological processes but are primarily public and visible. The visible world is shaped by ideas and imagination. They have a material dimension. Thinking takes place not just 'inside people's heads' but on blackboards, computer monitors, in conversations, in dances, festivals, religious rituals and in all forms of social action and social conflict.[29]

From the foregoing argument it is obvious that for development to be relevant to a people, it must start from what is familiar to them, from the ideas they cherish and the material artefacts they understand and can easily identify with. In other words, it has to be an endogenous development, generated from within the people themselves. That is when one can speak of 'sustainable development', 'because it arises from an understanding of the local conditions that foreign agencies will never attain and … because it allows the local population to retain their autonomy'.[30] The case advanced here, then, is against the western criterion of development, on the very grounds that it is culturally specific and seeks to superimpose one culture on other existing cultures. It imposes an authoritarian egalitarianism, in which physical needs are satisfied at the expense of political, social and intellectual liberties. It advocates, in our view, an un-aimed opulence.

We argue that in order for Africa to acquire the economic development after which she is chasing, she must execute it rationally, and within her own context. This is because Africa, like other continents, is unique. It is unique physically, and culturally.

---

[29] Tucker, 'Cultural Perspective on Development', 10.

[30] Bernasconi, 'Can Development Theory Break with Its Past?' 23.

Development in the African Cultural Heritage Context

Material Heritage

Development, by its very meaning and nature, cannot be imported. It has to be a progression of what already exists, sampling and annexing according to a more appropriate mode. Africa, like any other continent, has a material heritage at her disposal to annex. It is a serious mistake of presumption to imagine that Africans know nothing about annexing their environment for better use, or that their methods, which, by and large, have been tried and tested, are not appropriate for their purposes. And it will not be anything new for Africans to do it again this time round. Rodney provides a detailed history of African material exploitation preceding European colonialism and imperialism, especially in the agricultural sector.[31] Kwame Nkrumah gives a concrete example of pre-European Congo's exploitation of her natural resources, such as copper.[32]

Africans have inherited their environment, including the way to manage it, for their benefit. The African continent is made up of deserts, rain forests, grasslands, mountains, hills, valleys and plateaus. As is obvious, Africans must just use these heritages to make their lives better every day. To dispute the beauty of the African environment would be to entertain ignorance of a fairly serious kind. But even if the African environment were not as beautiful, Africans would not borrow an environment from anywhere else. Africa has just to sustain this very environment, which luckily does not require much in terms of conservation work. Besides, Africa has vast freshwater resources, such as lakes, rivers and swamps. It is notable that some African governments are aware of the need to preserve water catchment areas.[33]

Africa is endowed with a variety of climatic zones. Most of the equatorial zone is rainy and warm. Most of the tropical zone, though not so

[31] Rodney, *How Europe Underdeveloped Africa*, 40.

[32] Kwame Nkrumah, *Challenge of the Congo: A Case of Foreign Pressures in an Independent State* (London: PANAF, 1967), 3.

[33] Those being evicted from forest areas consider the Kenya government notorious. We argue that if this is being done for the sake of the better common good, it should be supported, so long as the victims are assisted to go elsewhere.

wet, has sufficient periodical rains, if not for farming, at least for ranching. Deserts are dry, on the whole, but have, below them, water reservoirs.

The African continent is invested with an enormous variety of flora and fauna. In addition, Africa has large resources of mineral and precious stones. There are minerals such as copper, zinc, gold, diamond, and so forth.

Economic development, as stated above, is teleological and, therefore, rational. It is an activity of man as man, and it is meant to fulfil the desires of man as man. However, man is not a mere concept. Man is always concrete. For anything, say, x to be man, that x must also be concrete, in an environment g. The man x, has, therefore a social environment $g1$, a cultural environment $g2$, and a physical environment $g3$.

Man has managed to live on, at least for some millennia, because man has managed to adapt to her/his physical and natural environment. The African lives on because s/he has managed to adapt to her/his natural environment, at least to some extent.

Economic activities are ways of adapting to and exploiting the physical environment. Economic activities, which are the means of acquiring tools for the satisfaction of man's needs in order to succeed, must necessarily use the resources available. Africa, like other continents, has, as we have already indicated above, a vast spectrum of resources: water reservoirs, minerals, flora and fauna, among others.

Such resources are transformed into economic goods in the process of man's wish to satisfy his needs. Man will, for instance, transform a tree into timber, because he needs to construct a shelter, make furniture, carve a statue or acquire fuel for cooking or warming himself. Man may also transform copper alloy into an economic good for the purpose of tools for war or for work.

From the above, we conclude that man transforms natural resources into economic goods because of the fulfilment of material needs. But there are also other needs, which man has to fulfil, social, aesthetical, religious and so forth. All these needs are related in some way or other. Below we give illustration of these needs.

When a man tills land, for instance, to plant millet, he is doing it, first, to fulfil a material, economic need of eating. This same millet can be used as a means of socialising when it is consumed in the form of alcohol by a group of elders. The same millet can also be used in a religious rite in the form of a libation.

Man also uses wood to fulfil different needs. Wood can be used for the construction of shelter, or furniture, which are fulfilments of material needs. It can also be used for shaping statues, which can be for aesthetic or religious needs. This can apply also to mineral resources like diamonds, copper, gold and the like.

The purpose of articulating the preceding facts is to encourage contextualisation of economic development in Africa. We contend that Africans, in order to regain their lost glory, must reconsider what their material, religious, aesthetic and other needs are within their own milieu. Improving the food situation in Africa does not mean importing food from without Africa, but making the food already in Africa serve the Africa interest 'better'. Before one embarks on genetically modifying one's food, for instance, it is imperative for one to ask about the necessity of this. Could it be that the available traditional, non-genetically modified food is insufficient, or harmful? Why an activity is done is of paramount importance to the doing of the thing, much more than the how of doing it. It is the why which spells the context of the action, and determines whether an activity is to be engaged in absolutely. To a great extent, it also determines who carries out the activity, how the activity is carried out, and when an activity is carried out. Why destroying a particular plant or animal is prohibited among members of an ethnic community in Kenya, for example, may not be the same reason for not destroying the same in Cuba. There may be a value in this plant, discovered by members of this Kenyan community, that has not been discovered by Cubans. That Cubans have not discovered this value and, therefore, destroy this plant or animal, should not lead members of this Kenyan community to think that this plant or animal may not have the value for them, too, and may therefore be destroyed anyway. The contexts around which this plant or animal exists in the two places are different. One context allows for the discovery of a value in the plant or animal in question, while the other does not. To destroy the plant or animal, based on the Cuban context, would be to destroy a value.

It is our argument, therefore, that it is counterproductive for Africans to try to fulfil needs out of context. It should be clear that a European's needs are dictated by various factors, some of which are completely foreign to Africa. It is necessary to know that the type of needs one entertains are influenced by, among other things, the physical environment, natural resources, religious beliefs, and social and political aspirations. According to circumstances, different peoples in different parts of the earth have

developed various techniques of annexing the environment for man's benefit. Africans developed their own, according to their circumstances, and it is our strong assertion here that these should not be considered as 'backward'. It is dangerous to think this way, for this is the exact way a heritage is lost and generations get bewildered at the face of a possible extinction. Traditional techniques of environmental planning, conservation and management are indispensable. J. O. Kakonge offers an impressive explanation of how this can be done in his article 'Traditional African Values and their Use in Implementing Agenda 21'. Any local community knows how to prepare its gardens in such a manner that the soil fertility is not exhausted; any community knows how to take care of its animals, which treatment to give sick animals, and what to do if an increased production is desired. To assume that this is not appropriate is absurd, for it hinges on the assumption that the inhabitants of that place just sprang up a few days before the coming of the claimant, and have never had the experience of living in that environment.

The argument being advanced here does not mean to refute any attempts at seeking something new to improve what already exists. Great ideas cut across human cultures and environments. It is necessary to borrow helpful ideas, but such must be made to serve the context of the borrower. One must not borrow an idea, plus the alien context within which this idea was developed.

Cultural Heritage

Culture is a reasoned pattern of a people's behaviour, use of artefacts, and interpretation of reality by a people and the meaning of life, and the position of a people within the life patterns. It is culture which makes *Homo sapiens* really human, and separates us from the rest of the mundane creation.

We contend that what really makes the peoples of the world different are their respective cultural heritages. Culture is the result of man's reaction to her/his milieu. It is the end-result of the process of survival. Culture constitutes many things: religion, politics, social norms, language, artefacts, dress, philosophy and so forth. Africans, like other peoples of the earth, have their cultural heritage, which is supposed to be her mode of survival.

More often than not, value is culturally conditioned. It is our cultures that furnish us with the means of attaching values to whatever event or substance we are confronted with. It is the case that things do have intrinsic values, i.e. value residing in the thing qua thing. However, in most cases, the cultural value of a thing makes a greater difference in terms of the use of the thing than the intrinsic value. Value of this kind 'is socially constructed, i.e. formed only by the instinctive and/or deliberate thoughts and actions of human beings'.[34] There are certain cultural values that a people develop and become their means of judging specific circumstances. They attach these values to different heritages, which we refer to here as cultural goods. 'Goods', in this connection, does not refer only to tangible material things; we also use the term to refer to ideas, or ideological orientations to which people attach importance. Looked at from this broad spectrum, Africa counts herself either a beneficiary or a victim of multiple cultural heritages, depending on the point of view one adopts on this issue.

Apart from her own spectrum of cultures, other cultural types have also invaded Africa: the Euro-Christian and Arab-Islamic cultures. Africa is culturally a mixture of all the three types. This is the reason why African intellectuals, examples of whom include, Kwame Nkrumah and Ali A. Mazrui, talk of a triple heritage.[35]

Some people might retort that sub-Saharan Africa is culturally diverse. A number of African thinkers contend that despite the differences among the Africans, there are some common traits. Rodney points out that Africa south of the Sahara had cultural resemblances manifest in, for instance, music and dance.[36] One of the most common traits referred to by scholars is communalism. Kwame Gyekye strongly agrees with those who uphold this view, which is also expressed by John S. Mbiti: 'I am, because we are; and since we are, therefore I am.'[37]

Another common element among Africans is that of the image of man, expressed by Noah Komla Dzobo. By making reference to many proverbs from a number of African peoples, he comes to the conclusion that in Africa

[34] David Throsby, 'Determining the Value of Cultural Goods: How much (or how little) does Contingent Valuation tell us?' http://culturalpolicy.uchicago.edu/papers/2002-contingent-valuation/Throsby.html, accessed 2.1.14.

[35] Ali A. Mazrui, *The Africans: A Triple Heritage* (London: BBC Publications, 1986).

[36] Rodney, *How Europe Underdeveloped Africa*, 34.

[37] Kwame Gyekye, 'Person and Community in Akan Thought', in *Person and Community: Ghanaian Philosophical Studies, I*, ed. Kwasi Wiredu & Kwame Gyekye (Washington: Council for Research in Values and Philosophy, 1992).

the image of man, like that of reality, is expressed in the concept of unity in duality. In the last paragraph of the synthesis of his views he writes, 'The opposite in any duality and their relationships are therefore modelled on the paradigm of the female and the male relationship paradigm, i.e. on the principle of creativity, complementarity, tension, balance and otherness.'[38]

Africa is a notoriously religious continent, and always has been. Religion is an extremely important element of African heritage. It is not right to say, as do Stephen Ellis and Gerrie ter Haar, that 'in Africa … most people engage in some form of religious practice from time to time, and many profess membership of some formal religious organization, traditional, Muslim, Christian or otherwise'.[39] This is to misunderstand entirely, or to misrepresent deliberately the African religious heritage. The African religious world is not something to be hoped for, but is ever present and is realised and related to in a practical way. Immortality is not of souls, which either will enjoy the paradisiacal blessings or shall perish in hell, but in the minds of the living. The idea of the transcendent is too far-fetched and unreal in the African scheme of religious considerations. One becomes immortal through her/his deeds, by means of which her/his life touches the rest of the members of the community s/he interacts with. Benevolent members of the society are immortalised by means of naming them, while malefactors are forgotten, as nobody is named after them. Thus, their memory dies from the minds of the people. In this sense, according to Mbiti, both the living and the dead in an African cultural setup constitute one community. Kwasi Wiredu expresses the same idea in another way by emphasising that African talk about life after death is this-worldly.[40]

Men and women live, die and survive within their own environment. If, in certain African communities, a dead person has to be buried in his ancestral land, whether this means spending lots of money to transport the body from a distance up to the ancestral place, this is the explanation. There is great religious attachment to one's fatherland, for it is believed that the dead person will still want to communicate to the living from time to time. The soil in which this person is buried, therefore, is sacred

[38] Noah Komla Dzobo, 'The Image of Man in Africa', in *Person and Community: Ghanaian Philosophical Studies, I*, ed. Kwasi Wiredu & Kwame Gyekye (Washington: Council for Research in Values and Philosophy, 1992).

[39] Stephen Ellis & Gerrie ter Haar, 'Religion and Development in Africa.' December 2004.

[40] Kwasi Wiredu, Chapter VII 'Death and the Afterlife in African Culture' http://www.crp.or/book/Series02/II-1/chapterVI.htm, accessed March 13, 2004.

and must be treated with utmost respect. The dead who have power over us stay there and anything that may defile the soil may offend them and invite their wrath upon the whole community.

African religion is a very important tool for development. Religion is a potent tool for shaping people's ideas about development. Christianity, it is widely acknowledged, played a significant role in the development of capitalism in the history of Europe. It influenced a great deal of people's thinking on the legitimacy of wealth and on the moral value of saving or investing.[41]

The African understanding of the importance of the soil just alluded to presently is a safeguard against reckless use of land, which results in its depletion. Typically, an African would not mine a piece of land until it was completely unusable. This would be to offend against the ancestors, who might visit their wrath on the whole community. If such a thing is done, and a landslide buries a person or persons, the interpretation would be that the underworld would be unhappy. Also, African religion is the custodian of the image of man, and man's position, against the rest of creation. Within the African religious model, anything that diminishes human well-being is evil. Development must be human-centred for all purposes.

African religion would not allow that a society should count riches in terms of Gross Domestic Product, while members of the same society do not have food, shelter, clothing or any other good needed for people to live well. It would not allow for a Christian pretence in which we are informed to be our brothers' keepers, while at the same time violently robbing the same brother we should keep. To partner with Christianity in terms of development appears to us to be a very inappropriate and delicate issue to engage in. Christianity seems to us to know the rhetoric of keeping one's brother, but not the practice of it.

Communalism as a Tool

We argue that for the sake of economic development Africans should seek for what is common among them. There is a good sign in the attempt to create an African super-state in the African Union.

[41] S. Ellis, and Gerrie ter Haar, 'Religion and Development in Africa', presentation prepared for the Commission for Africa, London, 9 December 2004.

Africans should use the concept of communalism. If they are truly communitarian, as is claimed, then it should be a driving force to foster development. It is well known that, despite cases of individualism, many Africans have a greater tendency to assist others in need. This applies, at least, to members of one's clan, family or community. This happens in many cases of school fees for siblings, nephews, cousins and village mates. Assistance is also given to old, helpless parents, cousins and other relatives. In fact, this kind of assistance is demanded of one. One does not do it as a form of charity but out of obligation. One makes gifts to people of her/his neighbourhood due to some cultural obligation. Members of the neighbourhood always expect something from a member who is slightly wealthier.

Communalism is also expressed in mutual assistance during farm preparations, planting, weeding and harvest. Traditionally, until recently (still in practice among some ethnic groups) men and women in one locality would work on each other's farm in turns, which is an outstanding expression of communalism. This is what, we believe, Julius K. Nyerere wanted to emphasise with his *Ujamaa* in Tanzania. Babu considers Nyerere's *Ujamaa* to be outdated. He is outrightly against looking to the past for solutions to today's problems. Being a Marxist, he analyses economic dynamics from the primeval ages of mankind to today. Communalism (i.e. common ownership of property) preceded the slave-based economy; feudalism was followed by capitalism and then socialism. For him, these are manifestations of the material-centred man.[42] He is critical of all forms of African indigenous solutions to our developmental problems. He would not stand Nkrumah's socialism, Kaunda's Zambian Humanism, or even Léopold Sédar Senghor's *Négritude*. He thinks the only proper and correct model for Africa's development is Scientific Socialism.[43]

Babu knows well that both capitalism and socialism are products of a similar cultural milieu, Europe. Capitalism is imbued with individualism, which is the result of humanism, whose emphasis is on the rights of the individual. Socialism is a reaction to extreme individualism and the promotion of social rights. Therefore, socialism is continuous with capitalism. Just as he is against the capitalist model for Africa, he likewise rejects socialism for Africa. Africa must also, in order to develop, not

[42] Babu, *African Socialism or Socialist Africa,* 54-58.
[43] Cf. esp. Ibid., 68-71.

transplant whole systems from abroad. Her model must be indigenous and continuous, which is the sure way of sustainability. This can explain not only Europe's sustainable economies, but also those of Japan and China.[44]

Contrary to Babu's belief, a people is a people because of its history.[45] History is supposed to act as a point of reference for any people, whether African or Asian. We are not naively excavating the past for its own sake. It is true that not all traditional African cultural practices are relevant today. But this does not mean that because some are anachronistic, we should reject all of them. Therefore, we isolate the idea of communalism and contextualise it in today's prevailing circumstances.

It is well known that many Africans used to tend to common ownership, at least of land and/or animals. Today, in many traditional setups, that spirit is manifest in the way land is taken. Land is still communal, at least on the clan level. No one disposes of any piece of land without involving one's neighbours. Likewise, domestic animals are still, to a certain extent, taken as communal in that one cannot as a matter of fact slaughter even a goat and not share with immediate community members. Likewise, ownership is communal. But it is communal only socially. We say 'socially' because young members of the community are supposed to accord older ones filial respect.

Communalism is also expressed through borrowing and loaning things. People easily borrow food, utensils and other items. They easily lend one another clothes, shoes, watches and the like. Refusal to do so is regarded as a sign of being anti-social.

While it is true that such practices are not as popular as before, it is wrong to conclude that they are outdated. These practices may have little significance among Europeans and some Euro-Christianized Africans (petty-bourgeoisie of different calibres) but they are still upheld. This does not mean that all Euro-Christianized Africans shun these practices. But it is useless, in many cases, to shun these practices, because so long as one wants to belong to a community, it is obligatory for one to uphold them. This is because sharing of wealth in Africa is not voluntary.

We argue that economic growth in Africa cannot be attained without the consideration of communalism. In fact, communalism is not negative,

---

[44] Cf. Stuart D. B. Picken, 'A Critical Analysis of the Japanese Approach to Management Philosophy', in this special issue.

[45] Babu, *African Socialism or Socialist Africa,* 54ff.

but positive, because it is needed for economic development. It is a misnomer, for instance, to conclude that a state with a hundred billionaires and 28 million paupers is an economically stable condition. The billionaires in such a scenario should provide opportunities in the form of investment and welfare.

Self-Esteem as a Tool

Another factor that is worth considering is the image of man in Africa. We believe that what drives man, among other things, is the idea of what s/he is. One who regards oneself as useless can never strive to improve her/his lot. One of the factors contributing to Africa's underdevelopment is lack of self-esteem. Self-esteem is a function of cultural consciousness. It hinges on the value a person attaches to the cultural heritage one has, e.g. language.[46] This makes it possible for one to notice the worth of one's culture, to be proud of it, and to want to identify with it and subsequently to use it for a better life. We argue that a person with proper self-esteem will use all means available to make sure that s/he sustains it. One way of sustaining one's self-esteem is through economic development.

Africa's lack of self-esteem is manifest in the hunkering for 'aid'. Every organisation, be it an NGO, a Church or even an African state, is in search of aid, and from overseas, in order to realise their projects. It seems that an African thinks that in order to succeed, s/he must turn to donors for funding.

Africa does not need any helping hand from anyone in order to develop. The so-called helping hand is a fleecing hand, raping Africa. Obtaining wealth from Africa and then lending part of that wealth back to Africa is the height of paradox.[47] The aid and loans given to Africa are African wealth, taken from her, and given back to her to generate profit for the West. Africa must seek one important kind of aid from the West, i.e. that the West may do Africa the favour of leaving Africa alone to chart her own destiny, based on her circumstances. Only when the West leaves

[46] Cf. Kwesi Kwaa Prah, *African Languages for the Education of Africans* (Bonn: Education, Science and Documentation Centre, 1995), 77.

[47] Babu, *African Socialism or Socialist Africa?* 40.

Africa alone will Africa be free, which is a prerequisite for any form of development.

The so-called 'aid' money loaned to Africa by western bodies such as the IMF and World Bank is a means to enslave Africa, and to perpetuate material and ideological poverty in Africa.[48] The two bodies were created to uplift post-war Europe economically. The former European imperialists' economies had been so ravaged by World War II that they could not politically and militarily sustain their colonies. The so-called Marshall Plan and Truman Doctrine, planned and executed by the USA, then the only economically stable country, were used to benefit these former imperial centres. From Babu's presentation of this scenario we note two objectives for uplifting of the weak imperial centres. It was, first, to preserve and promote capitalism both at home and abroad (in order to use it for the continued captivation of the rest of the world), which was in danger of extinction. Secondly, once the Western European powers persisted economically well, they would easily counter the emergent communism, which was posed a great challenge to the waning capitalist world.[49]

The Role of Culture

Africans can use their enormous resources at hand to improve their lot. They can use freshwater resources for irrigation in order to improve their food reservoirs. They can use their mineral resources in various ways and forms to improve their material well-being. Plant life can be a source of herbs for medicine, wood for export, and a source of beauty for tourism. Animal life can also be turned into an economic good, for instance, for food (for both the local and foreign markets). As a source of beauty, it can also serve as a tourist attraction.

But to make economic goods out of African flora and fauna, there must be arrangements in place to preserve and guard them jealously. We argue that African cultures have the mechanisms for fulfilling such a need. We argue that, for instance, African peoples who take a certain mountain as special, say, the Kikuyu and Kamba, in the case of Mount Kenya, and the

[48] Babu, *African Socialism or Socialist Africa?* Babu is very articulate on this issue. Cf. Chapter 3: 'Blind Acceptance of Neo-Colonialism'.

[49] Babu, *African Socialism or Socialist Africa?* 32ff.

ba'Masaba of Eastern Uganda who respect Mount Masaba, cannot destroy these mountains' flora and fauna. And people who have certain animals as their totems cannot kill them. Many a sub-Saharan African still exhibits this sense of respect towards some objects in the physical environment, including animals and plants. This is an expression of a religious attitude retained from time immemorial.

The above reflection on culture is an example to show that if Africans retained some of their positive indigenous cultural traits, they would have fewer problems in preserving and utilising nature for their economic well--being. This does not, of course, mean that all acquired Euro-Christian and Arab-Islamic traits are negative. There are some positive elements in these cultures. However, in order for these foreign traits to benefit Africa, they must be made consistent with the corpus of African cultures. It should be up to Africans themselves to distinguish relevant from irrelevant foreign traits and to adapt the former appropriately. Any trait, be it religious, economic, etc., imposed from without is blatant colonialism.

Africans can also utilise other parts of their cultural heritage to improve their lot. Cultural goods can turn into economic goods at the prompting of a people. A language, as a language, has no economic value. It is a cultural heritage. People rarely stop to reflect about how to use their language. They know it is a tool for communication. Every language is just that, a tool for communication. But this tool for communication may turn out to be a tool for economic gain. David Throsby supplies us with a splendid example: 'Consider the value of the French language as symbolic of the cultural inheritance. [It] cannot be plausibly represented in monetary terms, no matter how … [it] might be assessed.'[50] But the French have turned their language into an economic good, and teach it to others for a fee. All languages of Europe and some parts of the Middle and the Far East have been turned into economic goods.

Cultural goods are many and varied. Africa has had and still has many of them. Some of these have been either stolen or vandalised by God's children from the West. What the Europeans could carry away was carried away and turned into economic goods. It is our submission that if they can serve economic purposes in Europe, they can do the same in Africa, too. If one disputes the above assertions as wild accusations, then one needs to be advised to visit the Egyptian Museum (*Museo Egizio*) in

[50] Throsby, 'Determining the Value of Cultural Goods'.

Turin, Italy, where one will pay a fee to enter. Many people travel to London to see, among other things, the Egyptian obelisk. The same was true for the Ethiopian one in Rome, Italy, which by now, fortunately, has been returned to Ethiopia. This shows that museums, if well taken care of, can be economic goods. However, one has to generate interest in the potential viewers. If the articles, for instance, reflect Africa's glorious past, they may generate interest more easily than if they exhibited past weaknesses.

We contend that Africans can learn more from such articles than merely admiring them. Therefore, apart from generating the aesthetic sense in the viewers, they can also be objects of research. Research on the Kamba and Wamakonde sculptures can refine them. Study of the Masai mode of dress can bring innovation in the African way of dressing, relevant and adapted to African climatic conditions. Study of indigenous forms of architecture can serve experts in improving our building industry in adapting buildings to the African terrain.

This should also include the study of African bodily decorations, necklaces, bangles and bracelets, among others. One should try to find out what is behind these pieces of art. They should not remain merely aesthetic goods, but should be transformed into economic goods by patents.

We must admit, though, that there are people who imagine that the invocation of African cultural heritage as a pivot upon which development may hinge smacks of lack of economic realism. African culture, it may be argued, is anti-modern. A culture that failed to prevent the colonisation of Africa cannot be depended upon to bring about development of any kind. It is this same culture, being looked at for a model of development, that failed to and actually promoted and participated in selling its sons and daughters. Romanticising African culture does not do the trick. This seems a fairly sound argument, based upon facts of experience. But one must not be deceived that the African culture is a superior culture, much more superior to the Western culture, that it does not allow for knavery, and treats everybody as well-meaning – a factor that was abused by the Western invaders: 'The West revealed itself to Africa in the striking figure of unmatchable material superiority intent on subduing a traditional spirituality.'[51]

[51] Kebede, 'Development and the African Philosophical Debate'.

Philosophy of Management for Sub-Saharan Africa

Background

In the preceding section we have concluded that the most viable model of development for sub-Saharan Africa is *communalism*. To be consistent, the suitable philosophy of development for the same sub-Saharan Africa should be commensurate with communalism. Communalism was the way of life of cohesive social groups, operating as, for instance, agriculturalists, pastoralists, hunters, etc. In agrarian communities, both male and female adults tilled the land. In pastoralist communities, the young male adults (in groups) went far and wide to acquire more livestock, while the female adults worked close to the homesteads.

Today, African populations have increased, which has led to diversification in employment. It would therefore be naïve to resuscitate *in toto* communalism, which was the archaic way of family or clan. We are interested in the underlying spirit of communalism other than its details. We therefore intend to construct a theory of management based on the underlying spirit of communalism, which extends beyond the family and clan to cover an administrative area like a district, region or even a state. In this case, we adapt communalism to a new reality of Africa. Since we have already exhibited communalism in terms of ownership, we will now discuss another area where it manifests itself. What we intend to explain in these paragraphs is a person's sense of belonging.

To start with we would like to present and analyse the pillars of communalism. Mbiti's adage, 'I am because we are,' when taken seriously, means that in sub-Saharan Africa the community/society comes before the individual. Community/society is the cornerstone of the African lifestyle. It follows that communal/social rights override those of an individual. Whatever the individual does affects the community/society in one way or other. Bad deeds by an individual are supposed to affect the community adversely, whereas good deeds are supposed to contribute to that community's well-being. An entire family or even clan can be regarded as bad or good, sane or insane, because of one of their ancestors. Others always look down upon a murderer's children, his grandchildren, and his entire lineage as descendants of a murderer.

The centrality of community/society is also expressed in one's sense of belonging to a family, clan or even ethnic group. It is rare African who does not talk of her/his folks with pride. We contend that this sense of belonging should be harnessed to yield positive and not negative results, as more often than not seems to be the case. African states deliberately teaching the young our languages, constitutions and laws can extend this sense of belonging to one's society, nation, country, continent and, by extension, the whole human race. We now turn to the proper subject of this section on the basis of what we have explained in the preceding paragraphs.

The Question of Management and Development in Sub-Saharan Africa

Management, one would loosely say, is the process of working with people as individuals and groups to achieve organisational goals.[52] Management is a process that involves 'planning, organising, motivating and controlling'[53] at different levels, to achieve set goals and objectives. Such is the understanding of management of an American, a Briton, a Frenchman, a German, or any other Western manager or scholar of management. Africans also write about management in the same way.[54] After all, isn't managerial practice about the same thing: planning, organising, motivating, and controlling, and the central issue is to do all this through people? Why must management systems and practices in Europe and America not be the same as those in Africa? It does not seem to make much sense to talk of management from an African context. After all, nowhere on earth do we find, at least for what we know now, a managerial system that can be termed purely African, the same way we speak of a European, American, or Asian (say, Japanese) model, for example.

If today you engage a professional manager in Africa in a discussion of management, it will be little wonder that this person will sound like a Briton or an American, or someone from some Western country. This

[52] Paul Hersey & Kenneth H. Blanchard, *Management of Organisational Behaviour: Utilising Human Resources* (Englewood Cliffs, New Jersey: Prentice-Hall, 1972), 2.

[53] Ibid., 4.

[54] Pick any book on management by an African scholar of management and you will not be amazed at what is being said here. Joshua Abong'o Okumbe's *Human Resources Management: An Educational Perspective,* is one such example. The authorities he cites are Michael Armstrong, D. Guest, among others. He has no African reserve to draw from.

is not accidental. The managers themselves know no other language to speak but the Western language. The African manager will, with great ease, recite for you Abraham Maslow's hierarchy of needs. He will tell you, for example, that a person must meet his physiological needs (food, clothing and shelter). A man also has safety needs; he needs to belong to a group and in this group he needs to be recognised. He also needs to fulfil his cherished ambitions. Managerial courses in African universities draw from the works of Max Weber, Elton Mayo, Henri Fayol, the theories of Douglas McGregor, among other notable pioneers of managerial science in the West. These, too, are the Africans' management pioneers. The management styles cited by these professionals are developed from Western cultural perspectives and needs. Should one challenge the African management experts to talk about some categories of management such as employee motivation, reward and compensation, crisis management at the place of work, e.g. conflict resolution, employment criteria, dismissal of employees, or some other such category of management, the manager will point to one or another model of Western management.

Culture, Management and Development

Africa, it seems, is the only society in the whole world lacking in a structured managerial system. It must borrow, as it has borrowed religion, language, clothes, and even manners of dying and burial, from the West. But what could be the explanation of this? We believe that it has to do with culture in one way or another. Every development, as has been pointed out, is a function of culture. We argue, too, that the ideas that a particular society entertains as constitutive of development will inform the manner in which they approach the activities resulting in this development. Their management systems will follow what they regard as important, and this is granted us by our culture; for it is our culture which constructs and bequeaths to us our values and value systems. Values are social phenomena, which develop from the dynamism of the life of a people. They respond to specific cultural needs. The Western managerial model grew out of specific cultural needs. It arose from an assessment of the people's conditions and environment. Westerners understood the dynamics of their societies, and why managerial systems had to be ordered in the way they were. They understood why there must be a central person at the top

called a managing director or chief executive officer. The Japanese have a managerial system that grew out of their culture and has developed over the years. It has relevance to Japanese society and can work best only within the Japanese context. Of course, there are certain principles of management that cut across societies, but there are certain peculiar circumstances that apply to the Japanese society alone. In the same way, there are also managerial principles from Western managerial systems that cut across societies, and these can be applied in Africa, too. But it is also the case that there are certain circumstances that are peculiar to Africa and can only apply to African societies. Any managerial theory and practice, in order to succeed in its objective of development, must take this fact into account.

Management from the African Cultural Base

There is a belief that before the coming of the European colonialist into Africa, Africa had no viable institutions of its own, let alone managerial systems. This is believed, shamefully,[55] even by many African leaders themselves. This is a big mistake, which has greatly harmed African attempts to develop. The idea that Africans did not have viable institutions, including managerial systems, revolves around the confusion between the existence of an institution and the form of it. European colonialists brought to Africa different forms of already existing institutions, not new institutions as such. Africans had fairly well developed managerial systems traditionally, and in order that Africa may succeed in its role of management for development, it has to make copious use of this traditional heritage. In order that sound managerial models may be successfully constructed for Africa, the cultural dispensation of the African environment must be looked at closely. Traditional African management systems were not monolithic like the models developed in the West and East. They were more broad-based, such that everyone took part in almost everything. This does not mean that there were no clear-cut areas of responsibility and definitions of roles, such that everybody did every other thing at the same time without following any order. There certainly were lines of authority, as we witness in modern-day management units modelled on Western and Eastern patterns.

[55] G. B. N. Ayittey, *Africa in Chaos* (New York: St. Martin's Griffin, 1999), 87.

Perhaps the most rudimentary model of management may be found at the level of the African clan. The clan is the widest, immediate, structured administrative unit. The clan elder is the central authority within the society, and every decision to be made has to involve him, at least as the voice of the group making the decision. He encapsulates the voices of those who speak in favour of the decision made. The clan elder stands, more or less, in the position of the managing director of a modern-day business company. He represents the people and acts on their behalf.

The clan elder, though, does not wield absolute authority and, unlike the modern-day managing director, has no authority to hire or fire anyone. He does not work independently. He is surrounded by a team of elders, what G. B. N. Ayittey calls 'the inner or privy council, which advised the chief'.[56] These elders act more or less like the advisory board or board of directors of modern-day business corporations. These people must consult each other on any matter, and must come to an agreement before a decision leading to an action is made. The hierarchical organisation of the modern-day Western model of management did not exist in the African system. The African system is more broad-based than monolithic. A typical African managerial structure would take the form of chief executive, management board (consisting of the chief executive and the board of directors), management council (consisting of the management board and employees at managerial levels in the entire organisation), and corporate assembly (consisting of the management board, management council, and all the other employees of the organisation). In case of a weighty issue, such as introducing a change in the organisation or meting out disciplinary action on a person or group of persons, the discussion had to take everyone on board. Here, not even the board of directors could deliberate and make a decision; it was obviously beyond their insight. It required the insight of the whole clan, at least those of a mature age. In the case of meting out a disciplinary action, the person(s) involved were key. The person(s) had to be present as their case was discussed. Their case was set before them and discussed in their presence, with everyone contributing their opinion. The weight and implications of the case were laid before the person(s) and the culprit(s) was finally asked to give her/his opinion. In most cases, the victim was asked to make a judgment on her/himself.

[56] Ayittey, *Africa in Chaos*, 86.

This was the best way to make sure that no rancour was remaining after the whole ordeal.

This system is long and tiresome. It may even be cumbersome, if everyone has to talk about an issue. There is a likelihood of wasted time in a simple matter. Besides, one might argue, it is not necessary that the opinions of even those who have no idea on an issue be sought. Trained experts are better placed to make quick and more accurate deliberations and decisions on technical matters instead of bothering the untrained majority. To this extent, one may say that the Western system is more effective and has an advantage over the African one. The African system may make processes stall simply because some people's opinions have not been sought. An African model of development would not do in the contemporary race of cut-throat economic competition. Africa had rather adopt a foreign model that has proved itself to be successful elsewhere.

One must, however, look at the issue of the ineffectiveness or otherwise of the African traditional system more closely before passing judgement on it. That it takes time for a project to be undertaken is not sufficient reason to reject the system. This, on the contrary, should be the reason to embrace the system. A well thought out project has a better likelihood of succeeding than a hurried one. It appears that the NGO world has realised this and is moving towards an all-inclusive system. African managers have not realised this as yet. This explains, in our opinion, the frequent industrial actions in most African companies and government-run commercial institutions. The African managerial system is broad-based and any lineal system which favours executive orders from one authority, which is not always questioned, incites the protest of the recipients of the order. Such a system never works and is attended to by much sabotage from the workforce. Managers following this system hardly excel in their managerial work. This is a system coming from a cultural heritage.

Traditional Africa did not have the concept of employees in the modern Western fashion. People worked on what they owned, not the property of an owner of factors of production, a capitalist. All that was worked for belonged to all. The issue of salaries paid at the end of the month, taking into account that the owner must maintain his profit margin, are very recent and unfamiliar phenomena. Any behaviour tailored towards this is seen as anti-social. The African is less concerned about the salary margin than about how he relates to what he has mixed his labour with, and how this affects his general welfare as a member of the larger society. This is

why the conditions of work, both out of and around the workplace, are of paramount importance. An African would like to identify with the organisation for which s/he is working. It is her/his property, which s/he owns jointly with the rank and file of the organisation.

Conclusion

This article has been concerned to build a case for the contextualisation of development and stipulating a philosophy of management that are relevant and practical for Africa. We have, in the process, endeavoured to expose the nature and purpose of development. We have at the same time devised a philosophy of management without which this development cannot take off. We believe that development, given its nature, is an inevitable phenomenon.

What development means, though, depends in fact entirely on a people's imagery about themselves and the ideas they have about the direction they want to take in their process of development. It is the case, though, that development must be integral and must encompass all aspects of a person's life. To identify development with only one aspect of human life, say, the economic aspect, is to utterly miss the point. Development, more importantly, is a teleological process, which aims at achieving happiness for the individual and the society. Development, then, must focus on the understanding of happiness for a people.

For this to be achieved, the means used to undertake any development process must consider the sensitivities and familiar grounds of the people concerned. Development must not be a super-imposition, but a natural process, starting from what is familiar and sensible to the people. Development must take root within the cultural dispensation of a people, and must use the local environmental data.

What this suggests for Africa is that there must be a radical reconsideration of our ideas of development. Africa must deconstruct its myths about development, and re-invent and produce what it can easily identify. Our call here is that Africa should stop thinking of development in terms of transfer of material and cultural sophistication from the West, particularly a transfer that does not adequately take the African context into consideration. Africa must start a process self-invention and re-discovery, and use its natural endowments for both material and intellectual emancipation.

What we are proposing here may call for radical reactions to the already existing structures of development. It may be seen as a call to rebellion and defiance against the Western model of development, until it is made to conform to the African context. It is a call to Africa to re-evaluate its economic structures, its social and political institutions, and the cultural and intellectual heritage to which it subscribes.

Africa is endowed with all the resources needed to make development possible and relevant to Africans. It is only a case of utilising them properly, and Africa shall be happy. The West has developed out of Africa. Africa has enough resources to maintain the whole world. There is, therefore, no reason why Africa should be behind the world, when it can be on top. It is time for the intellectuals and opinion- and policy-shapers of Africa to re-evaluate and reconstruct the African institutions that are responsible for development and to contextualise them in a manner that will afford Africa holistic growth.

Authors

Theophilus Chando, Ph.D., is Lecturer in Philosophy, Department of Human & Social Development, Technical University of Kenya, Nairobi, Kenya.
Paul M. Shimiyu, Ph.D., is Senior Lecturer in the Department of Philosophy, School of Humanities & Performing Arts, College of Humanities & Social Sciences, Makerere University, Kampala, Uganda.

Barbara Lubas

Rola kapitału ludzkiego w zabezpieczenia procesów biznesowych przedsiębiorstw

Role of the human capital in security policies of business processes in the enterprises

Wprowadzenie

Wzrost zaawansowania środków bezpieczeństwa, głównie w obszarze systemów zabezpieczeń technicznych, wiąże się z jednej strony ze wzrostem wartości chronionych zasobów, zaś z drugiej strony jest wynikiem uaktywnienia się środowisk przestępczych i doskonalenia przez nie technik stosowanych w celu dokonywania czynów zabronionych. Przedsiębiorstwa niejako zmuszone są do stosowania w systemach bezpieczeństwa bardziej zaawansowanych rozwiązań organizacyjno-technicznych, jednak związane jest to jednocześnie z większymi nakładami ponoszonymi przez organizacje. Zwiększenie wydatków na inwestycje w bezpieczeństwo, jako jeden z elementów determinujących konkurencyjność firm, wiąże się z potrzebą ich kontroli oraz optymalizacji.

Stanowi to niewątpliwie sygnał do wysunięcia tezy, że sprawne zarządzanie przedsiębiorstwami staje się niezbędnym elementem bytu organizacji biznesowych, a kwestie bezpieczeństwa, w związku z ich coraz większym znaczeniem i coraz większym stopniem skomplikowania, wymagają tworzenia specjalistycznych struktur zarządzających.

Co ciekawe, według badań ACFE (Association of Certified Fraud Examiners) za działalność korupcyjną w największym stopniu odpowiedzialni są menedżerowie średniego i wyższego szczebla, dobrze wykształceni, w wieku 35-55 lat, głównie mężczyźni. Średnie straty ponoszone w wyniku

korupcji i defraudacji ze strony menedżerów są dwukrotnie wyższe niż te będące następstwem działania pracowników, a w przypadku menedżerów najwyższego szczebla aż dwunastokrotnie wyższe! Średnia wartość strat rośnie także wraz z wiekiem i stażem pracy pracowników.Czyli należy zatrudniać na stanowiskach menedżerskich (a szczególnie wyższych menedzerskich) młode, samotne panienki bez specjalnego doświadcczenia. Nie będą potrafiły kraść. Jak widać zastępowanie moralności przepisami przynosi fatalne skutki niekończącego się rozrostu biurokracji i powiększających się strat: skoro jestem niezadowolony z pracy (dochodów? szefa?) to mam prawo ukraść, ot takie lewe ale życiowe.

Celem artykułu jest zaprezentowanie sytuacji polskich przedsiębiorstw, szczególnie tych z sektora MSP w aspekcie ochrony bezpieczeństwa danych, ukazanie wagi tego kryterium na system zarządzania organizacji biznesowych i podejścia przedsiębiorców do podejmowania działań w tym zakresie oraz próba stworzenia jakościowego modelu zabezpieczenia procesów biznesowych w oparciu o procedury polityki bezpieczeństwa informacji firmy i przy jednoczesnym zachowaniu reguły ciągłości działania w obszarze funkcji biznesowych.

Polityka bezpieczeństwa informacji

Posiadanie informacji i systemu informacji strategicznej jest niezwykle ważne i potrzebne dla każdego przedsiębiorstwa bowiem taka wiedza, przy odpowiedniej kulturze organizacyjnej pozwala na efektywne zarządzanie przedsiębiorstwem. W minionym czasie zarządzanie informacją było ukierunkowane na wspomaganie procesów zarządzania operacyjnego w celu obniżenia kosztów i zwiększenia wydajności pracy, dopiero pod koniec ubiegłego stulecia zarządzanie informacją uznano za jeden z głównych czynników tworzenia i wdrażania strategii przedsiębiorstwa. Dziś dobre zarządzanie biznesem to zarządzanie jego przyszłością, to zarządzanie informacją[1].

Polityka bezpieczeństwa informacji (ang. ***information security policy***) – jest zbiorem spójnych, precyzyjnych reguł i procedur, według których dana organizacja buduje, zarządza oraz udostępnia zasoby i systemy

[1] P. Kotler, *Marketing. Analiza, planowanie, wdrażanie i kontrola*, wyd. VI, Gebethner i Ska, Warszawa 1994, s. 38.

informacyjne i informatyczne. Określa ona, które zasoby i w jaki sposób mają być chronione.

Polityka ta powinna obejmować wskazanie możliwych rodzajów naruszenia bezpieczeństwa (jak np. utrata danych, nieautoryzowany dostęp), scenariusze postępowania w takich sytuacjach i działania, które pozwolą uniknąć powtórzenia się danego incydentu. Polityka bezpieczeństwa definiuje ponadto poprawne i niepoprawne korzystanie z zasobów (np. kont użytkowników, danych, oprogramowania).

Przechowywanie informacji to funkcja występująca w systemie i polegająca na zapisaniu informacji strategicznych na trwałych nośnikach w postaci i formie umożliwiającej ich łatwe wykorzystanie. Jest to możliwe dzięki operacji katalogowania i tworzenia baz danych.

Strategiczne znaczenie technologii informacyjnej jest związane z koncepcją informacji jako zasobu strategicznego. To właśnie informacja jest podstawą do tworzenia strategii i potencjalnym źródłem budowanej przewagi konkurencyjnej[2]. Chcąc osiągnąć przyjęte cele, trzeba stworzyć zasoby informacyjne. Przedsiębiorstwo potrzebuje zatem strategii informacyjnej definiującej potrzeby informacyjne oraz sposoby ich zaspokajania, a celem tej strategii jest ustalenie, jakiego rodzaju informacje należy zbierać, gromadzić i przechowywać, komu w e-przedsiębiorstwie oraz poza nim je udostępniać. Należy też dążyć do zbudowania systemu zapewniającego celowe i skuteczne tworzenie oraz wykorzystywanie informacji.

Warto przytoczyć w tym miejscu elementy wchodzące w skład całego procesu zarządzania informacjami w przedsiębiorstwie, na które każde przedsiębiorstwo ponosi odpowiednie koszty i podejmuje odpowiednie działania:

- planowanie, opracowywanie i wdrażanie strategii informacyjnej e-przedsiębiorstwa podporządkowanej jego polityce informacyjnej;
- sterowanie przepływami informacji w sieci komunikacyjnej e-przedsiębiorstwa;
- planowanie środków inwestycyjnych na rozwój systemów informacyjnych;
- zapewnienie efektywnej eksploatacji systemów informatycznych wspierających podejmowanie decyzji;

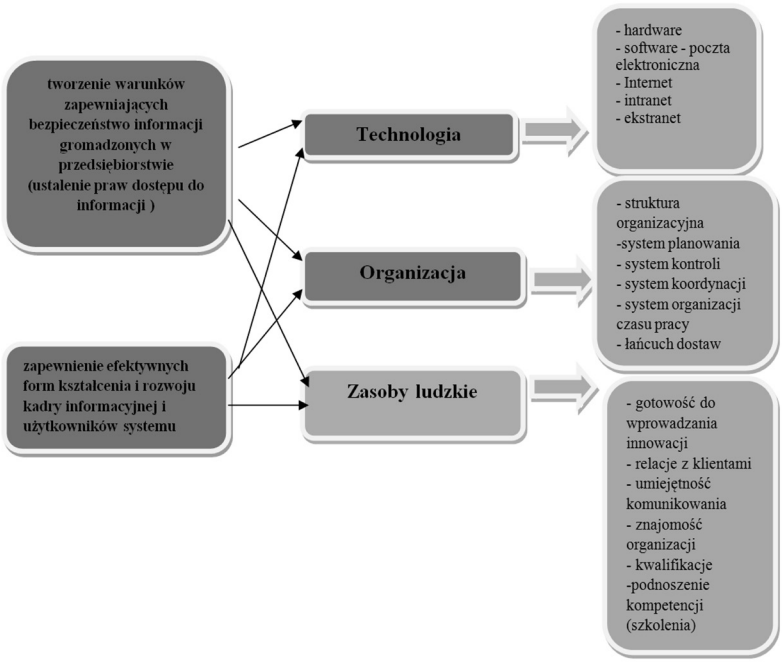
[2] M.E. Porter, *Strategia konkurencji*, PWE, Warszawa 1992, s. 34.

- wprowadzenie nowych systemów, na przykład systemów zarządzania relacjami z klientami (CRM);
- zarządzanie jakością informacji, czyli dbałość o to, by informacja wykorzystywana przez kierownictwo miała jak najwięcej atrybutów dobrej jakościowo informacji;
- tworzenie warunków zapewniających bezpieczeństwo informacji gromadzonych w przedsiębiorstwie (ustalenie praw dostępu do informacji);
- zapewnienie efektywnych form kształcenia i rozwoju kadry informacyjnej i użytkowników systemu;
- integracja systemów informacyjnych wykorzystywanych na różnych szczeblach zarządzania i w różnych podsystemach funkcjonalnych;
- projektowanie działań innowacyjnych i adaptacyjnych;
- wdrażanie inicjatyw, których celem jest zapewnienie lojalności klientów[3].

Rozpatrując istotę skutecznego działania w obszarze ochrony informacji i tworzenia odpowiednich zabezpieczeń warto wyjść od systemu zapewniającego celowe i skuteczne tworzenie oraz wykorzystywanie informacji w przedsiębiorstwie. Należy również w równej mierze podejść do wagi znaczenia wszystkich elementów ochrony i zabezpieczeń na trzech płaszczyznach działania: technologii, organizacji pracy oraz zasobów ludzkich. Mając na uwadze poniższy schemat działania (Rysunek 1) firmy powinny zarządzać informacją nie tylko w aspekcie technologicznym jak to najczęściej bywa, a i tak jak doświadczenie pokazuje odbywa się to w sposób niewystarczający, ale musi być widoczny efekt synergii czyli przenikania się wszystkich trzech zaprezentowanych aspektów efektywnego zarządzania informacją.

[3] J. Frąś, *Zarządzanie informacją elementem budowy przewagi konkurencyjnej e-przedsiębiorstwa*, Studia i prace wydziału nauk ekonomicznych i zarządzania, nr 21, s. 34.

Rysunek 1. Miejsce zasobów ludzkich w systemie zarządzania bezpieczeństwem informacji



Źródło: Opracowanie własne

Dotychczasowe doświadczenia wyraźnie wskazują, że bardzo często najsłabszym ogniwem w zabezpieczaniu danych są ludzie (zasoby ludzkie) – pracownicy danej organizacji. Dlatego wiele koncernów przywiązuje dużą wagę do szkolenia swoich zespołów. Niestety ponad jedna trzecia małych firm tego nie robi. W firmach brakuje często wyznaczonej osoby, która byłaby odpowiedzialna za zarządzanie bezpieczeństwem danych. Szefowie małych firm nie dysponują też jasno sprecyzowanymi regulacjami opisującymi m.in. konsekwencje wyciągane wobec osób, które naruszą zasady bezpieczeństwa informacji. Właściwymi zapisami w regulaminach może się pochwalić niespełna 20 proc. mniejszych przedsiębiorstw. Małe firmy nie są też w stanie w skuteczny sposób obserwować swojego łańcucha dostaw i nie przeprowadzają analizy ryzyka. Problem pojawia się nawet przy aktualizacji programów antywirusowych, których przestarzałe wersje nie są żadną przeszkodą dla cyberprzestępców.

Ludzie - największe zagrożenie dla firm

Największym wyzwaniem dla firm w obszarze zabezpieczenia procesów biznesowych jest rozpoznanie zagrożeń. Największym źródłem zagrożeń dla firm są ludzie, a po nich dane, informacje i wiedza (jako podmiot i przedmiot procesów biznesowych), a ponadto firmy współpracujące. Poszczególne źródła ryzyka wzajemnie się zazębiają, gdyż często zagrożenia pojawiają się w obszarze powiązań pracowników firmy z podmiotami i ludźmi z zewnątrz.

Zwykle przypadki wycieków są traktowane jak problem technologiczny. Tymczasem choć technologia jest jednym z głównych elementów prowadzących do usprawnienia przepływu informacji i bezpieczeństwa informatycznego, to równie bacznej uwagi wymagają ludzie, organizacja, kultura i procesy.

Zagrożenia związane z bezpieczeństwem informacji podzielić można na wewnętrzne oraz zewnętrzne wobec organizacji. Z jednej strony do ujawnienia, czy też wycieku informacji może nastąpić na skutek działań, bądź zaniechań samej organizacji. Brak jakichkolwiek zasad związanych z bezpieczeństwem funkcjonujących w danej organizacji informacji, zaniedbania w tym zakresie, czy w końcu zwykła głupota, mogą spowodować zaistnienie incydentu. Z drugiej strony incydent związany z bezpieczeństwem informacji może nastąpić na skutek działań podmiotów zewnętrznych wobec organizacji. Mówi się, że szpieg to drugi najstarszy zawód świata. Dziś z notorycznym zjawiskiem szpiegostwa gospodarczego mamy do czynienia szczególnie tam, gdzie pojawia się konkurencja. Przypadki nieuczciwych praktyk, mających na celu zdobycie informacji będących w posiadaniu konkurenta, można zaobserwować praktycznie w każdej branży i niezależnie od wielkości przedsiębiorstwa. Ze szpiegostwem gospodarczym mamy do czynienia, gdy metody zdobywania informacji na temat konkurentów nie są zgodne z prawem, a ich źródła nie są dostępne. Celem są informacje chronione prawnie lub fizycznie. Do ich zdobycia wykorzystuje się wszystkie możliwe środkii metody, przede wszystkim niejawne, nielegalne, często noszące znamiona przestępstwa, np.: podsłuch telefoniczny, włamanie (tradycyjne i cyberwłamania), podkupienie pracownika itp[4].

[4] Raport „*Efektywne zarządzanie bezpieczeństwem informacji*", SZiP, kod dostępu: https://www.us.edu.pl/sites/all/files/www/wiadomosci/pliki/RAPORT2013.pdf (z dnia 16.01.2016)

Tabela 1. Powody wycieku danych z polskich firm

Powody wycieku danych z firmy	Jak dochodzi do zdarzenia
Gapiostwo	Dochodzi do przypadkowego udostępniania danych, np. poprzez zgubienie laptopa, tabletu, telefonu komórkowego.
Słaba znajomość polityki bezpieczeństwa w firmie (brak edukacji)	Np. zapisanie danych na prywatnych kluczach USB
Lekceważenie, pośpiech mimo świadomości istnienia zagrożenia	Np. zmiana hasła firmowego na łatwiejsze do zapamiętania, np. „Karol1"
Zbytnie zaufanie do klientów zewnętrznych	Np. przekazywanie dostępu do plików firmowych
Zbytnia pewność siebie	Obchodzenie procesów bezpieczeństwa aby szybciej osiągnąć cel, np. pomijanie szyfrowania danych.

Źródło: Opracowanie własne na podstawie danych z raportu „Ryzyko w sieci", badania przeprowadzonego przez firmę Symantec (http://www.komputerswiat.pl/nowosci/bezpieczenstwo/2010/51/polscy-pracownicy wynosza-poufne-dane.aspx z dnia 15.03.2016)

- Wewnętrzny atak sieci przez pracownika firmy - system powinien być skonfigurowany tak, aby każdy użytkownik miał własne konto i uprawnienia adekwatne do zajmowanej funkcji. Wszelkie poczynania użytkowników powinny być raportowane administratorowi systemu. Tu też może okazać się skuteczne uprzedzenie o odpowiedzialność dyscyplinarnej i karnej poczynionej szkody. Dostęp do sieci musi być ograniczony do minimum.
- Nieumyślne (niekonieczne) zniszczenie przez pracownika - każdy pracownik powinien być odpowiednio przeszkolony w zakresie BHP oraz obsługi komputera. Nie powinni mieć dostępu do urządzeń współtworzących sieć pracownicy, dla których ten kontakt jest zbyteczny. Skuteczne może okazać się uprzedzenie o odpowiedzialności dyscyplinarnej i karnej za ewentualnie poczynione szkody. Bez względu na charakter i rodzaj działalności firmy, nie należy szczędzić pieniędzy na ochronę sieci komputerowych i zawartych w nich danych. Bezwzględnie należy regularnie dokonywać kopii zapasowych danych (kopie muszą być bardzo aktualne przy dużym przepływie danych) i deponować w bezpiecznych miejscach. Kopii powinno być kilka. Nie powinny być przechowywane na terenie zakładu a w rożnych, nie związanych ze sobą miejscach, takich jak skrytki w różnych bankach. Takie zabezpieczenie daje niemal stuprocentową gwarancję, że gdy wszystkie inne zapory zawiodą i sieć przestanie istnieć, firma odzyska stabilność dzięki którejś z kopii zapasowych.

Dzisiejszy obraz zagrożeń powoduje konieczność zaostrzenia polityk bezpieczeństwa, a co za tym idzie wyposażenia firmy w szerszy wachlarz narzędzi. Martwi szczególnie pomijanie rozwiązań chroniących przed wyciekiem danych.

Łańcuch jest tylko tak silny jak jego najsłabsze ogniwo. Jest to również prawda w odniesieniu do systemu ochrony informacji. Najpowszechniejszym na świecie standardem do określania obecnego i wymaganego poziomu bezpieczeństwa informacji, jest standard ISO-17799 (pierwotnie był to brytyjski standard BS -7799), który określa wszystkie istotne aspekty związane z ochroną informacji i systemów komputerowych. Standard ten podzielony jest na dziesięć różnych obszarów tematycznych, z których jednym z nich jest bezpieczeństwo związane z personelem.

- polityka bezpieczeństwa,
- organizacja bezpieczeństwa,
- zasady klasyfikacji zasobów informacyjnych,
- bezpieczeństwo związane z personelem,
- bezpieczeństwo fizyczne i anomalie przyrodnicze,
- zarządzanie oraz obsługa systemów komputerowych i sieci,
- zarządzanie dostępem do systemów i informacji,
- rozwijanie i serwisowanie systemów komputerowych,
- planowanie działań pozwalających zachować ciągłość pracy
- systemów komputerowych,
- zgodność z zobowiązaniami prawnymi i ustawowymi.

Materiał empiryczny z przeprowadzonych badań na temat świadomości zagrożeń wynikających ze znajomości i świadomości stosowania systemów ochrony danych w małych i średnich firmach województwa podkarpackiego

Edukacja użytkowników w kontekście prawidłowego wykorzystania istniejących technologii podnoszących bezpieczeństwo procesów biznesowych

Firmy muszą na bieżąco analizować zarówno wewnętrzny, jak i zewnętrzny przepływ danych. Poza tym niezbędne jest ustalenie odpowiednich

procedur i zasad postępowania oraz regularne szkolenie pracowników. Konieczne jest wdrożenie odpowiednich środków ochrony, ale także wypracowanie takiej kultury biznesu, która pozwoli na przeciwdziałanie potencjalnym atakom. Duże znacznie ma również wymiana doświadczeń związanych z cyberprzestępczością w ramach organizacji branżowych. Wielu pracowników firm i instytucji wciąż nie jest świadomych, że skasowanie pliku nie jest równoznaczne z usunięciem z dysku. System operacyjny likwiduje jedynie informację o lokalizacji, natomiast fizycznie plik dalej istnieje.

Co ciekawe, według badań ACFE (Association of Certified Fraud Examiners) za działalność korupcyjną w największym stopniu odpowiedzialni są menedżerowie średniego i wyższego szczebla, dobrze wykształceni, w wieku 35-55 lat, głównie mężczyźni. Średnie straty ponoszone w wyniku korupcji i defraudacji ze strony menedżerów są dwukrotnie wyższe niż te będące następstwem działania pracowników, a w przypadku menedżerów najwyższego szczebla aż dwunastokrotnie wyższe! Średnia wartość strat rośnie także wraz z wiekiem i stażem pracy pracowników.

Z badań Global Data Leakage Report 2013 wynika, że wśród źródeł utraty danych tylko 1,1% stanowią odpowiadający za bezpieczeństwo informacji administratorzy IT, natomiast, aż 49,5% to szeregowi pracownicy. Według ekspertów HSM Polska to nieprzestrzeganie podstawowych norm bezpieczeństwa, brak wiedzy oraz niedbalstwo jest przyczyną tego niepokojącego zjawiska.

W okresie październik - grudzień 2015 roku przeprowadzono badania ankietowe wśród kierownictwa sektora IT i sektora bankowego wybranych podmiotów województwa podkarpackiego. W badaniu wzięło udział łącznie 100 osób z 23 firm łącznie. Badaniem objęto 9 banków oraz 14 firm z sektora IT. W 5 firmach odpowiedzi udzieliło po jednej osobie ze szczebla kierowniczego, a w pozostałych było to więcej niż jedna osoba pełniąca funkcje kierownika niższego bądź wyższego szczebla. Na potrzeby niniejszego artykułu sformułowano następujace hipotezy badawcze, któ®e poddano weryfikacji:

1. Istnieje zależność pomiędzy hierarchią kierowników i ich podziale na niższego i wyższego szczebla, a częstotliwością organizowania spotkań z zespołem pracowników,
2. Istnieje zależność pomiędzy pełnioną funkcją a najważniejszym według respondenta sposobem postępowania przyjmowanego

w sytuacji, kiedy pracownicy nie wypełniają nałożonych na nich obowiązków,

3. Istnieje zależność pomiędzy pełnioną funkcją a częstotliwością nakłaniania do samokontroli własnego postępowania, stawiania sobie wymagań – podejmowania sytuacji lub zadań, które sprzyjają kształtowaniu zachowań pozytywnych.

W pracy zastosowano weryfikację poprzez testy niezależności chi-kwadrat[5].

Wyniki badań

Osoby pełniące funkcje kierownicze mają za zadanie budowanie wśród pracowników świadomości zagrożeń Jak często te spotkania zespołów są inicjowane pokazuje tabela 1. Najwięcej, bo 38% kierowników zwołuje zebrania ze swoimi podopiecznymi jeden raz w miesiącu. Nieco mniej, bo 35% dwa, trzy razy w roku. Nieco mniej niż 1/5 badanych osób (18% ogółu badanych) organizuje takie spotkania jeden raz w roku, a 9% zdecydowanie rzadziej niż raz w roku.

Tabela 1. Częstotliwość organizowania spotkań zespołów, zebrań

Częstotliwość stałych zebrań i spotkań doszkalających	%
jeden raz w miesiącu	18,0
dwa trzy razy w roku	35,0
jeden raz w roku	38,0
rzadziej niż raz w roku	9,0
Ogółem	100,0

Źródło: Opracowanie własne

[5] Przyjęto poziom istotności testów α=0,05, czyli prawdopodobieństwo popełnienia błędu polegającego na ewentualnym odrzuceniu prawdziwej hipotezy zerowej wynosi maksymalnie 5%. Zastosowano się do tzw. „twardych" założeń testu niezależności chi-kwadrat, czyli że w żadnej komórce nie może być liczebności oczekiwanych mniejszych niż 5. Ewentualnie do stosowanego przez statystyków mniej ostrego założenia: komórek o liczebnościach oczekiwanych mniejszych niż 5 może być co najwyżej 20%, ale żadna nie może wynosić mniej niż 1.

Tabela 2. Częstotliwość organizowania spotkań zespołów, zebrań ze względu na podział na kierowników wyższego szczebla i niższego szczebla

		Funkcja				Ogółem	
		Kierownicy wyższego szczebla		Kierownicy niższego szczebla			
		N	%	N	%	N	%
Częstotliwość organizowania spotkań zespołów, zebrań	jeden raz w miesiącu	6	24,0	3	12,0	9	18,0
	dwa trzy razy w roku	10	40,0	7	30,0	17	35,0
	jeden raz w roku	9	36,0	10	40,0	19	38,0
	rzadziej niż raz w roku	0	0,0	5	18,0	5	9,0
Ogółem		25	100,0	25	100,0	50	100,0

Chi-kwadrat=11,820; p=0,008
Źródło: Opracowanie własne

Funkcja różnicuje odpowiedzi na pytanie dotyczące częstotliwości organizowania spotkań zespołów przez kierowników niższego szczebla i kierownictwo wyższego szczebla

W celu weryfikacji hipotezy zastosowano test niezależności chi-kwadrat, o poniższych hipotezach testu:

H_0: nie istnieje zależność pomiędzy hierarchią kierowników i ich podziale na niższego i wyższego szczebla, a częstotliwością organizowania spotkań z zespołem pracowników

H_1: istnieje zależność pomiędzy hierarchią kierowników i ich podziale na niższego i wyższego szczebla, a częstotliwością organizowania spotkań z zespołem pracowników

Przy powyższym układzie tabeli krzyżowej założenia testu niezależności chi kwadrat nie są spełnione całkowicie, ale tylko dwie komórki mają liczebności oczekiwane niewiele niższe niż 5 co przy bardzo niskiej wartości istotności asymptotycznej dwustronnej wynoszącej 0,008 pozwala z pewną dozą błędu przyjąć wyniki testu za bardzo prawdopodobne.

Z uwagi na to, że istotność asymptotyczna dwustronna wynosi 0,008, a więc mniej niż poziom istotności testu α=0,05, a więc odrzucono H_0, a przyjęto H_1. Stwierdzono zatem, że istnieje zależność pomiędzy

hierarchią kierowników i ich podziale na niższego i wyższego szczebla, a częstotliwością organizowania spotkań z zespołem pracowników[6].

Tabela 3. Najważniejsze cele przyświecające pracy menedżerów

Pyt.1. Co według Pani/Pana jest najważniejszym celem systemu edukacji o bezpieczeństwie w firmie?	I wybór		II wybór		III wybór	
	N	%	N	%	N	%
całokształt działań odpowiadający za świadomość istnienia zagrożeń	42	42,0%	5	5,0%	12	12,0%
kontrola pracy pracowników w celu unikania popełnienia błędu niezamierzonego wycieku danych z firmy	9	9,0%	27	27,0%	6	6,0%
chęć podejmowania prób naprawy błędów zmierzających do eliminacji niewłaściwych czynności związanych z wyciekiem danych	32	32,0%	22	22,0%	17	17,0%
sprawiedliwa ocena pracy	0	0,0%	25	25,0%	17	17,0%
służenie radą przez przełożonego	17	17,0%	21	21,0%	39	39,0%
brak odpowiedzi					9	9,0%

Źródło: Opracowanie własne

Kierownictwu firmy zadano pytanie dotyczące najważniejszego celu jaki przyświeca ciągłemu doskonaleniu wiedzy na temat zagrożeń wycieku danych w badanym przedsiębiorstwie przez menadżerów tejże organizacji. Badane osoby mogły wybrać maksymalnie trzy z podanych gotowych odpowiedzi. W pierwszym wyborze wskazali w największym stopniu na całokształt działań odpowiadający za świadomość istnienia zagrożeń, Tak odpowiedziało 42% badanych osób. Kolejnym priorytetowym celem wskazanym przez respondentów była chęć podejmowania prób naprawy błędów zmierzających do eliminacji niewłaściwych czynności. 17% ogółu odpowiedzi uzyskała pomoc w rozwiązywaniu problemów i służenie radą, a tylko 9% kontrola pracy pracowników. Rozkład w II i III wyborze dokładnie obrazują wyniki przedstawione w tabeli 3.

Aby dokładniej przyjrzeć się zagadnieniu dokonano analizy wyników z podziałem na funkcje pełnione przez badane osoby. W tabeli 4 zaprezentowano rozkład wyników dotyczących wskazania priorytetowych celów jakie przyświecają ciągłemu doskonaleniu wiedzy na temat zagrożeń wycieku danych w badanym przedsiębiorstwie przez menadżerów tejże

[6] Przy założeniach bardzo bliskich spełnienia.

organizacji, w podziale na kierowników niższego szczebla i wyższego szczebla .

Tabela 4. Wskazania priorytetowych celów jakie przyświecają ciągłemu doskonaleniu systemu motywacyjnego w badanym przedsiębiorstwie przez menadżerów

Pyt.1. Co według Pani/Pana jest najważniejszym celem systemu edukacji o bezpieczeństwie w firmie?	Funkcja											
	Kierownicy wyższego szczebla						Kierownicy niższego szczebla					
	I wybór		II wybór		III wybór		I wybór		II wybór		III wybór	
	N	%	N	%	N	%	N	%	N	%	N	%
całokształt działań odpowiadający za świadomość istnienia zagrożeń	21	42,0%	2	4,0%	7	14,0%	21	42,0%	3	6,0%	5	10,0%
kontrola pracy pracowników w celu unikania popełnienia błędu niezamierzonego wycieku danych z firmy	3	6,0%	16	32,0%	4	8,0%	6	12,0%	11	22,0%	2	4,0%
chęć podejmowania prób naprawy błędów zmierzających do eliminacji niewłaściwych czynności związanych z wyciekiem danych	18	36,0%	8	16,0%	14	28,0%	14	28,0%	14	28,0%	3	6,0%
sprawiedliwa ocena pracy	0	,0%	10	20,0%	8	16,0%	0	,0%	15	30,0%	9	18,0%
służenie radą przez przełożonego	8	16,0%	14	28,0%	15	30,0%	9	18,0%	7	14,0%	24	48,0%
brak odpowiedzi	0	,0%	0	,0%	2	4,0%	0	,0%	0	,0%	7	14,0%

Źródło: Opracowanie własne

Stwierdzono, że pierwszym wyborze najwięcej bo po 21 osób z każdej funkcji opowiedziało się za odpowiedzią pierwszą, czyli całokształt działań odpowiadający za świadomość istnienia zagrożeń. Wynik jest równoznaczny z 42% odpowiedzi w każdej grupie zawodowej[7].

[7] Funkcja różnicuje odpowiedzi na pytanie nr 1 pierwszy wybór. W celu weryfikacji hipotezy zastosowano test niezależności chi-kwadrat, o poniższych hipotezach testu: H_0 : nie istnieje zależność pomiędzy pełnioną funkcją a I-ym wyborem najważniejszego celu realizowanego przez menedżera, H_1 : istnieje zależność pomiędzy pełnioną funkcją

W badaniach skupiono się również wokół problemu zdefiniowania najważniejszych aspektów w strategii realizacji bezpieczeństwa firmy. Dlatego postawiono pytanie dotyczące wskazania najbardziej adekwatnych opisów roli jaką stawia przed respondentami wykonywana przez nich praca.

Tabela 5. Najważniejsze aspekty powodzenia realizowanej strategii bezpieczeństwa procesów biznesowych w firmie

Pyt. 2. Jakie są najważniejsze aspekty powodzenia realizowanej strategii bezpieczeństwa procesów biznesowych w firmie?	I		II		III		IV		V		VI	
	N	%	N	%	N	%	N	%	N	%	N	%
wdrożenie odpowiedniej strategii zarządzania bezpieczeństwem ukierunkowanej na ludzi i ich świadome zrozumienie jej istoty	25	25,0	16	16,0	17	17,0	1	1,0	10	10,0	4	4,0
bezwarunkowa akceptacja zasad strategii	7	7,0	5	5,0	13	13,0	12	12,0	3	3,0	21	21,0
Rozpoznanie elementów socjotechniki stosowanej w celu dokonania zawłaszczenia danych	25	25,0	17	17,0	11	11,0	15	15,0	8	8,0	4	4,0
uwzględnianie, liczenie się ze zdaniem osób odpowiedzialnych za politykę bezpieczeństwa	8	8,0	8	8,0	5	5,0	16	16,0	15	15,0	5	5,0
współuczestniczenie pracowników w podejmowaniu decyzji	7	7,0	18	18,0	18	18,0	4	4,0	13	13,0	11	11,0
Zrozumienie funkcji biznesowych w firmie, określenie, które z nich są krytyczne do prowadzenia działalności oraz zidentyfikowanie wszystkich elementów składowych tychże procesów	28	28,0	34	34,0	23	23,0	6	6,0	2	2,0	3	3,0
brak odpowiedzi	0	0,0	2	2,0	13	13,0	46	46,0	49	49,0	52	52,0

Źródło: Oprcowanie własne

a I-ym wyborem najważniejszego celu realizowanego przez menedżera. Wyznaczoną istotność (wartość *p*) porównujemy z poziomem istotności α: jeżeli istotność (wartość p) ≤α – należy odrzucić H_o przyjmując H_1, jeżeli istotność (wartość p) >α – nie ma podstaw do odrzucenia H_o.

Najwięcej osób, bo 28 % wskazało w pierwszym wyborze na zrozumienie funkcji biznesowych w firmie, określenie, które z nich są krytyczne do prowadzenia działalności oraz zidentyfikowanie wszystkich elementów składowych tychże procesów. Po 25% uzyskały odpowiedzi – wdrożenie odpowiedniej strategii zarządzania bezpieczeństwem ukierunkowanej na ludzi i ich świadome zrozumienie jej istoty oraz rozpoznanie elementów socjotechniki stosowanej w celu dokonania zawłaszczenia danych. Każde kolejne wskazania obrazuje tabela 5.

Tabela 6. Najważniejszy sposób postępowania z osobami nie wypełniającymi nałożonych obowiązków

Pyt.3. Jaki najważniejszy sposób postępowania przyjmuje Pan/i w sytuacji, kiedy osoby podwładne nie wypełniają nałożonych na nie obowiązków przestrzegania warunków bezpieczeństwa firmy?	Funkcja					
	Kierownik I szczebla		Kierownik Niższego szczebla		Ogółem	
	N	%	N	%	N	%
wskazuję na negatywne konsekwencje wynikające z braku realizacji tych obowiązków, bezwzględnie nakazuję im realizację	12	24,0	9	18,0	21	21,0
przekonuję do realizacji wskazując na pozytywne aspekty z tym związane	21	42,0	26	52,0	47	47,0
w zamian za ich realizację obiecuję pomoc w innej ważnej dla tej osoby sprawie	4	8,0	0	,0	4	4,0
staram się ułatwić tym osobom realizację orzeczonych obowiązków przez konkretne działania	13	26,0	15	30,0	28	28,0
Ogółem	50	100,0	50	100,0	100	100,0

Chi kwadrat=5,103; p=0,164
Źródło: Opracowanie własne

Stwierdzono, że zarówno kierownicy niższego szczebla jak i ci wyższego szczebla za najlepsze metody radzenia sobie z nieposłusznymi podwładnymi uznali rozmowę i przekonywanie do realizacji danego zadania, danej rady przy wskazaniu na pozytywne aspekty z tym związane.

Kierownicy niższego szczebla wskazali tę odpowiedź w większości, ponieważ w 52% ogółu tej grupy zawodowej. 30% uzyskała odpowiedź: „staram się ułatwić tym osobom realizację orzeczonych obowiązków przez konkretne działania", a 18% wskazuje na negatywne konsekwencje

wynikające z braku realizacji obowiązków i bezwzględnie nakazuje im realizację. Kierownicy wyższego szczebla jako drugie z kolei wskazanie na metody pracy zaznaczyli odpowiedź ostatnią, czyli starają się ułatwiać realizację obowiązków przez konkretne działania, a tylko 4% zyskała opcja: „w zamian za realizację zadań obiecuję pomoc w innej ważnej sprawie dla tej osoby".

W celu weryfikacji hipotezy zastosowano test niezależności chi-kwadrat, o poniższych hipotezach testu:

H_o: nie istnieje zależność pomiędzy pełnioną funkcją a najważniejszym według respondenta sposobem postępowania przyjmowanego w sytuacji, kiedy pracownicy nie wypełniają nałożonych na nich obowiązków,

H_1: istnieje zależność pomiędzy pełnioną funkcją a najważniejszym według respondenta sposobem postępowania przyjmowanego w sytuacji, kiedy pracownicy nie wypełniają nałożonych na nich obowiązków.

Przy powyższym układzie tabeli krzyżowej założenia testu niezależności chi kwadrat nie są spełnione. W celu spełnienia założeń dokonano połączenia trzeci i czwarty wariant cechy – uzyskując poniższą tabelę.

Pracownicy są świadomi zagrożeń ale z lenistwa, zaniedbań, braku czasu, bo jest za dużo pracy itp. nie przestrzega reguł bezpieczeństwa i dlatego zapytano czy są wyciągane jakieś konsekwencje w stosunku do pracowników u których stwierdza się tego typu niesubordynację lub/i notuje się przypadki zaniedbań, co może wpływać na utratę zaufania do firmy.

Tabela 7. Sposoby postępowania menedżera w sytuacji nie dostosowania się do procedur zachowania bezpieczeństwa ochrony danych obowiązujących w firmie

Pyt.3. Jaki najważniejszy sposób postępowania przyjmuje Pan/i w sytuacji, kiedy pracownicy nie wykazują chęci do podejmowania obowiązków służbowych wynikających z zachowania szczególnych względów bezpieczeństwa ochrony danych w firmie ?

			Funkcja Kierownik niższego szczebla	Kierownik wyższego szczebla	Ogółem
Pyt.3. Jaki najważniejszy sposób postępowania przyjmuje Pan/i w sytuacji, kiedy pracownicy nie wykazują chęci do podejmowania obowiązków służbowych?	wskazuję na negatywne konsekwencje wynikające z braku realizacji tych obowiązków, bezwzględnie nakazuję im realizację	N	12	9	21
		%	24,0%	18,0%	21,0%
	przekonuję do realizacji wskazując na pozytywne aspekty z tym związane	N	21	26	47
		%	42,0%	52,0%	47,0%
	w zamian za realizację pomagam lub ułatwiam tym osobom realizację orzeczonych obowiązków przez konkretne działania	N	17	15	32
		%	34,0%	30,0%	32,0%
Ogółem		N	50	50	100
		%	100,0%	100,0%	100,0%

Chi kwadrat =1,086; p=0,581
Źródło: Opracowanie własne

Założenia testu dotyczące liczebności oczekiwanych zostały spełnione – nie ma komórek o liczebnościach oczekiwanych mniejszych niż 5. Z uwagi na to, że istotność asymptotyczna dwustronna wynosi 0,581, a więc więcej niż poziom istotności testu α=0,05, nie ma więc podstaw do odrzucenia H_0. Stwierdzono zatem, że nie istnieje zależność pomiędzy pełnioną funkcją, a sposobem postępowania przyjmowanego w sytuacji, kiedy pracownicy nie wypełniają nałożonych na nich obowiązków

Na podstawie danych z tabeli stwierdzono, że kierownicy bardzo często nakłaniają pracowników ale i siebie samych do samokontroli postępowania i stawiania sobie pewnych osobistych wymagań. Tak odpowiedziało 24-ech

kierowników niższego szczebla oraz 32 kierowników wyższego szczebla. 44% kierowników niższego szczebla oraz 28% kierowników wyższego szczebla robi to zawsze, co jest bardzo optymistycznym sygnałem uzyskanych badań. Czasami zaznaczyła bardzo mała ilość osób.

Tabela 8. Nakłanianie do samokontroli

Pyt. 4. Jak często stara się Pan/Pani nakłaniać siebie i innych do samokontroli postępowania, stawiania sobie wymagań itp.?	Funkcja				Ogółem	
	Kierownik niższego szczebla		Kierownik wyższego szczebla		N	%
	N	%	N	%		
zawsze	22	44,0	14	28,0	36	36,0
bardzo często	24	48,0	32	64,0	56	56,0
czasami	4	8,0	4	8,0	8	8,0
Ogółem	50	100,0	50	100,0	100	100,0

Chi-kwadrat=2,921;p=0,232
Źródło: Opracowanie własne

W celu weryfikacji hipotezy zastosowano test niezależności chi-kwadrat, o poniższych hipotezach testu:

H_0: nie istnieje zależność pomiędzy pełnioną funkcją a częstotliwością nakłaniania do samokontroli własnego postępowania, stawiania sobie wymagań – podejmowania sytuacji lub zadań, które sprzyjają kształtowaniu zachowań pozytywnych,

H_1: istnieje zależność pomiędzy pełnioną funkcją a częstotliwością nakłaniania do samokontroli własnego postępowania, stawiania sobie wymagań – podejmowania sytuacji lub zadań, które sprzyjają kształtowaniu zachowań pozytywnych.

Podsumowanie

Firmy muszą na bieżąco analizować zarówno wewnętrzny, jak i zewnętrzny przepływ danych. Poza tym niezbędne jest ustalenie odpowiednich procedur i zasad postępowania oraz regularne szkolenie pracowników. Konieczne jest wdrożenie odpowiednich środków ochrony, ale także wypracowanie takiej kultury biznesu, która pozwoli na przeciwdziałanie potencjalnym atakom.

Dotychczasowe doświadczenia wyraźnie wskazują, że bardzo często najsłabszym ogniwem w zabezpieczaniu danych są ludzie (zasoby ludzkie) – pracownicy danej organizacji. Artykuł pokazał, że osoby odpowiedzialne za politykę bezpieczeństwa w firmie w większości przywiązują dużą wagę do szkolenia swoich zespołów. Niestety ponad jedna trzecia małych firm tego nie robi. W firmach brakuje często wyznaczonej osoby, która byłaby odpowiedzialna za zarządzanie bezpieczeństwem danych. Kierownicy na niższych stanowiskach (niższego szczebla) i kierownicy wyższego szczebla często dysponują jasno sprecyzowanymi regulacjami opisującymi m.in. konsekwencje wyciągane wobec osób, które naruszą zasady bezpieczeństwa informacji. Badania nie wykazały **na zależność pomiędzy pełnioną funkcją, a sposobem postępowania przyjmowanego w sytuacji, kiedy pracownicy nie wypełniają nałożonych na nich obowiązków.** Stwierdzono, że zarówno kierownicy niższego szczebla jak i ci wyższego szczebla za najlepsze metody radzenia sobie z nieposłusznymi podwładnymi uznali rozmowę i przekonywanie do realizacji danego zadania, danej rady przy wskazaniu na pozytywne aspekty z tym związane.

Zwykle przypadki wycieków są traktowane jak problem technologiczny. Tymczasem choć technologia jest jednym z głównych elementów prowadzących do usprawnienia przepływu informacji i bezpieczeństwa informatycznego, to równie bacznej uwagi wymagają ludzie, organizacja, kultura i procesy. Przedsiębiorstwa nie mogą już zarządzać bezpieczeństwem działając ad-hoc. Dla zmniejszenia ryzyka zakłóceń w działalności, osiągnięcia celów zgodności z przepisami i właściwego reagowania na kompleksowe naruszenia bezpieczeństwa, organizacje muszą integrować struktury bezpieczeństwa. Powinny stale monitorować przyjęte standardy, zasady i mechanizmy kontroli, tak by spełniały one ustalone parametry i mieściły się w ramach apetytu na ryzyko. Tylko dzięki pełnemu wglądowi w infrastrukturę bezpieczeństwa, organizacje mogą szybko wypełniać ewentualne luki w zabezpieczeniach. Stosując sprawdzone technologie należy uświadamiać firmy aby wdrażały minimum standardowe procesy z zakresu ochrony. Wszechstronny obraz bezpieczeństwa, uzyskany dzięki takim działaniom, umożliwia realistyczną ocenę słabych stron i aktywną ochronę aktywów informacyjnych. Zarządzanie bezpieczeństwem w sposób całościowy ułatwia monitorowanie zgodności z ustalonymi standardami i zasadami, a także utrzymanie ryzyka związanego z zarządzaniem aktywami firmy.

Bibliografia

Frąś J., Zarządzanie informacją elementem budowy przewagi konkurencyjnej e-przedsiębiorstwa, Studia i prace wydziału nauk ekonomicznych i zarządzania, nr 21.

Kotler Ph., Marketing. Analiza, planowanie, wdrażanie i kontrola, wyd. VI, Gebethner i Ska, Warszawa 1994.

Porter M.E. , Strategia konkurencji, PWE, Warszawa 1992.

Raport „Efektywne zarządzanie bezpieczeństwem informacji", SZiP, kod dostępu: https://www.us.edu.pl/sites/all/files/www/wiadomosci/pliki/RAPORT2013.pdf (z dnia 16.01.2016)

Raport „Bezpieczeństwo informacji – bezpieczna przyszłość" powstał na bazie badania globalnego „The Global State of Information Security® 2014 (http://it.wnp.pl/rosnie-grozba-atakow-itc-na-firmy,213335_1_0_0.html)

Streszczenie

Artykuł ma na celu zaprezentowanie sytuacji polskich przedsiębiorstw w aspekcie ochrony bezpieczeństwa danych, ukazanie roli tego kryterium w systemie zarządzania organizacjami biznesowymi i podejścia przedsiębiorców do zachowania szczególnej staranności w aspekcie zabezpieczenia procesów biznesowych w oparciu o procedury polityki bezpieczeństwa informacji firm, przy jednoczesnym zachowaniu reguły ciągłości działania w obszarze funkcji biznesowych.

Przeprowadzone w artykule analizy bazują na dorobku literatury przedmiotu i aktualnych badaniach sektora IT z polskich i ze światowych baz danych oraz własnych badaniach przeprowadzonych w 23 małych i średnich przedsiębiorstwach województwa podkarpackiego.

SŁOWA KLUCZOWE: *procesy biznesowe, zabezpieczenie danych, bezpieczeństwo, zarządzanie, edukacja do bezpieczeństwa, kapitał ludzki*

Summary

The objective of this paper is to present the situation of Polish enterprises in the aspect of the data protection and data security system. The Author's aim was also presenting the role of this criterion in the management system within business organizations and attempts of entrepreneurs at keeping the special care in the aspect of protecting business processes in the support for procedures of the information security policy of companies, keeping the rule of the continuity of action in the area of business functions.

Analyses conducted in the article are based on achievements of the literature and current data of the IT sector from Polish and from world databases and own examinations conducted in 23 small and medium enterprises of the Podkarpackie province.

KEY WORDS: *business processes, protecting data, safety, management, education to the safety, human capital*

Authors

Barbara Lubas, PhD. ScD - Doctor of economic studies, coach and academic teacher at the John Paul II Catholic University of Lublin, dr habil. (ScD) in the field of Management on The International Personnel Academy in Kiev, professor of this University, Dean in Nadbużańska Szkoła Wyższa in Siemiatycze. Graduated Akademie Schönbrunn, Munich, Germany in Psychology of Management, communication and negotiations, motivation, personnel management, sales techniques, entrepreneurship (psychological and sociological aspect). Graduate of European Integration Academy of Technology & Management, managing European projects and modern technologies in business. Expert for economy of the state at the Republican Foundation. Member and Senior Expert of Business Club Association in Oedhaim Schloss, Germany, Main scientific interests: management, marketing, psychological and sociological aspects of business administration, quality management, competitiveness of business entities, management in public sector, e-mail: barbara_lubas@poczta.onet.pl

Piotr Sołtyk

The legal consequences of the cessation of internal audit in local government

Konsekwencje prawne zaniechania prowadzenia audytu wewnętrznego w samorządzie terytorialnym

The nature and objectives of the audit in local government units

Public finance sector audits interior has been introduced under the provisions of the Act of 27 July 2001. Amending the Law on public finance, the law on the organization and operation of the Council of Ministers and the scope of ministers, the Law on Government Administration and Law on Civil Service[1] . The definition of internal audit presented in this Act has focused his activity typically in the area of finance. Consequently, at the beginning of this it caused some difficulties of interpretation, unlike the internal audit mission from the classical internal controls. According to the wording of Art. Paragraph 35c. 1 of the Law internal audit was defined as all activities through which the head of the unit obtain an objective and independent assessment of the functioning of the unit in the field of financial management. This assessment was carried out in terms of criteria such as: legality, economy, purposefulness, honesty, and transparency and disclosure. In the literature, internal audit is defined as an independent, objective activities of an ensuring and advisory guide in order to bring added value to the organization and improve its operation[2]. They are also

[1] Acts. Laws No. 102, item. 1116, as amended.
[2] K. Czerwinski, internal audit, InfoAudit, Warsaw 2004, p. 9.

common statements according to which an audit is defined as a tool to evaluate management processes based on risk analysis[3]. In recent years the scope of internal audit conceptual underwent constant change, and it was due to changes in the Act of 27 August 2009. Public Finance (hereinafter: UFP)[4]. According to a recent change u.f.p. - Internal audit was focused on their tasks more toward preventive - (control ex - Anete) by identifying various types of risks that could disrupt the implementation of the goals and tasks of the unit. The current definition expressed in terms of Article. 272 u.f.p. highlights the internal audit function on operations to before on supporting the head of the unit in the management unit. In this perspective, internal audit has been treated by the legislature as a modern instrument for the current management support unit through a systematic assessment of management control. The tasks related to supporting the audit management process realized primarily through consulting activities. According to the new regulation of the Minister of Finance dated 4 September 2015. On internal audit and information about the work and results of the audit[5] - consulting activities are undertaken by the auditor to provide independent and objective assessment of management control.

Head of the unit who actually sees the need for an audit, and does not treat the instrument as a formal complete another obligation imposed by law - to reduce the risk of non-compliance should benefit from this preventive - consulting audit function. This will often prevent the development of various dysfunctions in the activities of the entity's financial management criminalize breaches of discipline reasons of public finances. In the light of Art.69 u.f.p. for ensuring operation of adequate and effective and efficient management control at the level of local government is the responsibility of the mayor, mayor, city president, chairman of the board of the local government unit. Mayor as head of public sector entities within the meaning of Art.53 u.f.p. You can not get rid of responsibility for the dysfunctional operation of management control. This thesis also confirms the judgment of the Administrative Court according to which "head of the unit is not getting rid of responsibility for management control by authorized employees of that entity to the activities in the field of management control. Head of the unit, even when effectively communicate specific

[3] K. Knedler, M. Stasik, Internal audit practice, Polish Academy of Accounting, Warsaw 2005, p. 29.

[4] Text.one. Acts.U. of 2013. Pos. 885 with amendments

[5] Acts.U. of 2015.Item. 1480.

powers and duties of its employees is not getting rid of the responsibility for the lack of management control. The opposite argument would be contrary to the law and would lead to the conclusion that the manager of the unit may so shape the regulations and authorization in a unit that for nothing will not be responsible "(judgment of the Regional Administrative Court in Warsaw dated 14.05.2012 r. VSA / Wa216 / 12 Lex No. 1,297,705).Bearing in mind the possibility of the occurrence of a serious risk of budgetary discipline in connection with the improper operation of the management control - the role of internal audit, and especially in the provision of advisory activities is of major importance. Nevertheless it should be noted that according to the guidelines of the International standards of professional practice of internal audit - prepared by The Institute of Internal Auditors[6] - the nature of consulting services must be defined in the internal audit charter, which stems from the professional standard guidelines indicating the number 1000.C1. This is to ensure full independence and objectivity of internal audit in the performance of consulting services and ensure the implementation of tasks.

New forms of organization for internal audit

Changing the rules u.f.p. of 27.08.2009. it introduced the possibility of conducting an internal audit by two forms. In light of these solutions, audits may be carried out in the unit employed by the auditor of the entity or by the service provider not employedin the unit. This form of internal audit legislator refers to as an external service provider. However, this organizational flexibility is clearly limited by regulations. As the wording of Art. 275 u.f.p. legislator used in this respect alternative separable "or" which means that these two forms of performing an audit can not be in the public finance sector unit used together[7]. If the first solution guaranteed by the legislature internal auditor is hired by an employer under the provisions of the Labour Code[8]. This means that the establishment is the

[6] Statement No. 2 of the Minister of Finance dated 17.06.2013 r. On internal audit standards for public sector entities, Dz. Office. Min. Fin. of 2013. item. 15.

[7] W. Stachurski, internal audit and coordination of internal audit in jsfp, (in :) E. Ruśkowski, J.M. Salachna (ed.) The new law on public finances, along with the Act introducing practical comment, Gdansk 2010, p. 870.

[8] Act of 26.06. 1974. Labour Code, text. one. OJ of 2014.item. 1502.

employment relationship, which the auditor, as an employee, is obliged to carry out tasks in ensuring commissioned by the employer[9]. Conducting an internal audit by an external legislator in local government units is possible but under the condition laid down in Art. 278 paragraph. 3 u.f.p. Such an audit form can be realized if the budget resolution included in the local government unit amount of income and revenue and the expenditure and expenditure is less than 100 000 thousand. zl. If the threshold is higher than that specified in Art. 278 paragraph. 3 u.f.p. the internal audit should be carried out by employing an auditor in the unit. Unfortunately, the legislator did not specify in regulations or internal auditor job after exceeding this amount in the budget should be in full time or maybe on his part - ie. ½ or ¾-time. External legislator can be[10]:

- A natural fulfillment of the criteria required to pursue the profession of internal auditor;
- A natural person running a business - meets requirements under the occupation internal auditor;
- Partnership, general partnership, professional partnership, limited partnership, limited joint - stock company or a legal person who employs to conduct an internal audit unit of persons who fulfill the conditions laid down by the legislature to practice internal auditor.

Conducting an internal audit with an external service provider is based on an agreement concluded in writing. The minimum period for which the agreement should be concluded agreement is one year. The content of the agreement should include provisions guaranteeing conduct the audit in accordance with the laws and guidelines of the professional standards of internal audit in the public sector. An important element of the agreement are provisions for the handling of documents that the internal auditor uses for the needs of the assurance. In order to avoid getting documents and information on electronic media to unauthorized persons should be defined mechanisms to protect these documents from unauthorized distribution. With the conclusion of the contract with an external service elements to ensure efficient and effective implementation of internal audit rests with the head of the unit. This is due to the fact that the head of local government units perform tasks related to internal audit.

[9] P. Sołtyk, an external service provider of internal audit in local government units, "Municipal Finance" No. 4/2014, pp. 46-47.

[10] Art. 279 paragraph. 1 u.f.p.

Internal audit in assessing management control system

In the literature, there are common views according to which the primary purpose is to support the internal audit unit manager in achieving the goals and objectives by evaluating the management control system[11]. Here one should add that the concept of management control was introduced into the public finance sector change the law UFP August 27, 2009. and by the legislature - is it generally measures taken to ensure that the objectives and tasks in a manner consistent with the law, effective, efficient and timely manner - (Art. 68 UFP). The task of the auditor is to evaluate the effect of management control as a result of which indicated there are gaps in control mechanisms to generate a serious risk of violating public finance discipline. A comprehensive list of acts constituting the violation of public finance discipline in connection with the improper operation of management control system is contained in Art. 18 c section. 1 of the Act of 19 December 2004. On liability for violation of public finance discipline[12]. In light of this provision, violation of public finance discipline is the failure or improper performance by the manager of the public finance sector obligations relating to the management control in the public sector entity if it had an impact in particular on[13]:

- Depletion of the proceeds payable to the local government unit;
- Committing expenditure resulting in exceeding the amount of expenses specified in the financial plan of the individual;
- Making a commitment without the authorization referred to the budget law, the resolution of the budget or financial plan or by exceeding the scope of this authorization or in violation of the provisions on contract obligations by the public finance sector;
- Failure to perform the liabilities, including the obligation to repay the duty, tax overpaid or wrongly paid contributions for social and health insurance;
- A public procurement contractor who was not elected in the manner specified in the regulations on public procurement;

[11] Bulletin No. 3 (4) 2012 Management control in local government units, Ministry of Finance, Warsaw 2012.

[12] Acts.U. of 2013.Item. 168.

[13] Art. 18c paragraph.1 of the Act of 19.12.2004 r.On liability for violation of public finance discipline.

- An act or omission resulting in the payment of public funds penalties, fines or charges constituting a financial penalty, to which the provisions on enforcement proceedings in administration. Effective internal audit activity should contribute to improve performance management processes in the unit. What's more audit work should contribute to the improvement of controls limiting the possibility of the emergence of risks breach of public finance discipline. Audit work should also contribute to the improvement of the management and risk control and governance[14].

No audit unit

According to the law obligation to conduct an internal audit refers to those local government units where in the budget resolution of the unit amount of income and revenues or the amount of expenditure and outgoings exceeded 40 000 thousand. zl. After crossing the threshold amount unit manager has a duty to implement the internal audit unit. Regulations Art. 274 paragraph. 4 u.f.p. they also create the opportunity to conduct an audit if the manager decides to do so. Failure by the manager of responsibilities in the implementation of the audit unit to the obligated reserved was responsible for violation of public finance discipline. The present sanction was expressed in the wording of Art. 18a of the Act of 19 December 2004. On liability for violation of public finance discipline. Head of the unit exposes the responsibility of the internal auditor as a result of unemployment or not consisting of contract with an external service provider.

Bibliografia

Biuletyn nr 3(4) 2012 *Kontrola zarządcza w jednostkach samorządu terytorialnego*, Warszawa 2012.

Czerwiński K., *Audyt wewnętrzny*, Warszawa 2004.

Gos W., *Regulacje w zakresie audytu wewnętrznego*, (w:) *Audyt wewnętrzny w jednostkach sektora finansów publicznych,* (red.) T. Kiziukiewicz, Warszawa, 2007

Knedler K., Stasiak., *Audyt wewnętrzny w praktyce*, Warszawa 2005.

[14] W. Gos regulations regarding internal audit, (in :) An internal audit in the public finance sector units, (ed.), T. Kiziukiewicz, Difin, *Warsaw, 2007, p. 42.*

Stachurski W., *Audyt wewnętrzny oraz koordynacja audytu wewnętrznego w jsfp,* (w:) E. Ruśkowski, J.M.Salachna (red.) *Nowa ustawa o finansach publicznych wraz z ustawą wprowadzającą komentarz praktyczny*, Gdańsk 2010.

Sołtyk P., *Usługodawca zewnętrzny audytu wewnętrznego w jednostkach samorządu terytorialnego*, „Finanse Komunalne" nr 4/2014.

Regulacje prawa:

Ustawa z 27.08.2009 r. o finansach publicznych, tekst. jedn. Dz. U. z 2013 r., poz. 885 z późn. zm.

Ustawa z 26.06. 1974 r. Kodeks Pracy, tekst. jedn. Dz. U. z 2014 r., poz. 1502.

Ustawa z 19.12.2004 r. o odpowiedzialności za naruszenie dyscypliny finansów publicznych, Dz. U. z 2013 r., poz. 168.

Ustawa z 27.07.2001 r. o zmianie ustawy o finansach publicznych, ustawy o organizacji i trybie pracy Rady Ministrów oraz o zakresie działania ministrów, ustawy o działach administracji rządowej oraz ustawy o służbie cywilnej, Dz. U. nr 102, poz. 1116 ze zm.

Rozporządzenie Ministra Finansów z 4.09.2015 r. w sprawie audytu wewnętrznego oraz informacji o pracy i wynikach tego audytu, Dz. U. z 2015r., poz. 1480.

Komunikat Nr 2 Ministra Finansów z 17.06.2013 r. w sprawie standardów audytu wewnętrznego dla jednostek sektora finansów publicznych, Dz. Urz. Min. Fin. z 2013 r., poz. 15.

Abstract

The author has attempted to present the essence and goals of modern internal audit in local government units. Currently, the essence of the audit focused on the a priori risk analysis contributing in this way to reduce dysfunction criminalizes violation of public finance discipline. The article raises also the problem of the effects of a failure to implement the audit unit or liable for the failure to conclude a contract with an external service provider. It was pointed out that such activities pose to the manager of the premise resulting in the violation of public finance discipline.

KEY WORDS: *Internal audit, management audit, risk, discipline public finances*

Streszczenie

Autor podjął próbę przybliżenia istoty i celów współczesnego audytu wewnętrznego w jednostkach samorządu lokalnego. Obecnie, istota audytu koncentrowała się na analizie ryzyka a priori przyczyniając się do redukcji zaburzeń czynności uznanych za niezgodne z prawem objawiającej się zaburzeniami dyscypliny finansów publicznych. Artykuł podnosi również problem niepowodzenia we wprowadzeniu w życie jednostki audytu oraz odpowiedzialności za niepowodzenie kończąc umowy z dostawcą usług z zewnątrz. Zauważono , że takie działalności stanowią dla kierownika skutki związane z zaburzeniami dyscypliny finansów publicznych.

SŁOWA KLUCZOWE: *Audyt wewnętrzny, rewizja ksiąg dotycząca zarządzania, ryzyko, dyscyplina finanse publiczne*

Autor

Dr Piotr Sołtyk - Katolicki Uniwersytet Lubelski Jana Paweł II Katedra Bankowości, Prawa Finansów Publicznych i Instytucji Finansowych

Marta Greszata-Telusiewicz

Uprawnienia wikariusza sądowego w processus brevior coram Episcopo według motu proprio Mitis Iudex Dominus Iesus

The entitlements of a judicial vicar in processus brevior coram Episcopo according to motu proprio Mitis Iudex Dominus Iesus

Wprowadzenie

Mitis Iudex Dominus Iesus, co można przetłumaczyć „Pan Jezus łagodnym sędzią" - to tytuł motu proprio opublikowanego przez papieża Franciszka, reformującego kanoniczny proces o nieważność małżeństwa Główną intencją zmian wprowadzonych w nim jest uproszczenie i przyśpieszenie działania sądów kościelnych. Dlatego została wprowadzona instytucja tzw. procesu skróconego lub biskupiego, trwającego zaledwie 30 dni i stosowanego, gdy sprawę wnoszą zgodnie obie strony. Może on być przeprowadzany w przypadkach, gdy sprawa nieważności małżeństwa jest ewidentna i nie wywołuje wątpliwości. W takich sytuacjach definitywną decyzję w formie wyroku może podejmować biskup diecezjalny. Jak sama nazwa sugeruje, głównym aktorem procesu skróconego jest biskup diecezjalny, jednakże – jak wynika z nowych przepisów procesowych - niemniejszą odpowiedzialność za jego przygotowanie ponosi wikariusz sądowy, któremu zostały powierzone szczególne prerogatywy w kanonicznym procesie o nieważność małżeństwa prowadzonym przed biskupem.

Wikariusz sądowy, czyli oficjał jest to sędzia ze zwyczajną władzą sądzenia w diecezji, wykonywaną w imieniu biskupa diecezjalnego. Każdy biskup ma obowiązek ustanowienia w diecezji oficjała ze zwyczajną władzą

sądzenia różnego od wikariusza generalnego[1], który stanowi jeden trybunał z biskupem, ale nie może on sądzić spraw, które biskup zarezerwował sobie samemu[2]. Może on otrzymać pomocników, których nazywa się pomocniczymi wikariuszami sądowymi, czyli wiceoficjałami[3]. Kwalifikacje na urząd wikariusza sądowego Prawodawca kościelny określił w sposób następujący: 1) musi on być kapłanem; 2) powinien cieszyć się nienaruszoną sławą; 3) być doktorem lub przynajmniej licencjatem prawa kanonicznego; 4) mieć ukończone 30 lat[4]. Z kolei zadania wikariusza sądowego oscylują wokół następujących zagadnień: 1) stanowi on jeden trybunał z biskupem i dlatego nie może sądzić spraw, które biskup sobie zastrzegł; 2) jego władza jest zwyczajna i jednocześnie zastępcza i dlatego nie można od jego decyzji apelować do biskupa; 3) swej władzy nie może delegować innym, chyba że chodzi o czynności przygotowawcze; 4) biskup może ograniczyć zakres jego kompetencji wyłączając pewne sprawy spod jego jurysdykcji; 5) swą władzę wykonuje jako trybunał jednego sędziego lub jako przewodniczący trybunału kolegialnego; 6) wykonuje czynności administracyjne, czyli czuwa nad pracą trybunału i sędziów, wyznacza sprawy, kara nadużycia oraz obowiązuje go tajemnica urzędowa[5].

W tym kontekście właśnie należy spojrzeć na uprawnienia wikariusz sądowego jako tego, który stanowi jeden trybunał z biskupem, ale nie może sądzić spraw, które zostały zarezerwowane biskupowi jako sędziemu, tak jak ma to miejsce w skróconym procesie małżeńskim przed biskupem. Zostają jednak na niego nałożone pewne dodatkowe obowiązki procesowe, które wynikają z obowiązujących kodeksowych przepisów procesowych, a tym samym pozostają w duchy zasady słuszności kanonicznej, która wynika z ducha Ewangelii.

---

[1] *Codex Iuris Canonici auctoritate Ioannis Paulii PP. II promulgatus* (25.01.1983), AAS 75 (1983) pars II, 1 – 317; tekst polski w: *Kodeks Prawa Kanonicznego*, przekład polski zatwierdzony przez Konferencję Episkopatu, Pallotinum, Poznań 1984 (dalej CIC), c. 1420 § 1.

[2] CIC, c. 1420 § 2.

[3] CIC, c. 1420 § 3.

[4] CIC, c. 1420 § 4.

[5] M. Greszata, *Kanoniczne procesy małżeńskie. Pomoc dla studentów*, Lublin 2007, s. 116 – 117.

Podstawowe zasady procesu biskupiego

Wszystkie procesy małżeńskie to procesy pisemne z natury rzeczy, wynika to z procesowych przepisów kodeksowych i nic w tym względzie nie zmieniło się w kontekście motu proprio *Mitis Iudex Dominus Iesus*. Wiadomo, że ustnym procesem spornym mogą być załatwiane wszystkie sprawy nie wykluczone przez prawo[6], a sprawy dotyczące orzeczenia nieważności małżeństwa nie mogą być rozpatrywane w drodze ustnego procesu spornego[7]. w tym kontekście bardzo zastanawia, dlaczego Papież Franciszek w swoim motu proprio do procesu biskupiego wprowadził niektóre rozwiązania – można by powiedzieć - zapożyczone z przepisów ustnego procesu spornego, o którym się mówi, że jest szybszy. Nie powinno to jednak dziwić dlatego, że podobna idea przyświeca procesowi biskupiemu, jak sama nazwa wskazuje - procesowi skróconemu.

Już w 1992 roku A. Dzięga pisał, próbując porównywać proces o nieważność małżeństwa z ustnym procesem spornym, że proces małżeński w obowiązującym prawie kanonicznym Kościoła Łacińskiego może być prowadzony z zachowaniem zasady bezpośredniości – jednej z naczelnych zasad procedury ustnej. Jeśli byłoby to możliwe, zdaniem A. Dzięgi, żeby wszyscy trzej sędziowie byli obecni podczas przesłuchań, dałoby to im szansę na całkowicie własne i bezpośrednie spojrzenie na sprawę[8]. W świetle motu proprio ta zasada, zasada bezpośredniości, wydaje się być naczelną w procesie biskupim, zwłaszcza że w tym przypadku zupełnie nie potrzebny jest udział kolegium w poszczególnych czynnościach procesowych, wystarczy instruktor i asesor a następnie sam biskup diecezjalny[9].

W innym miejscu A. Dzięga pisał wtedy, że w sprawach małżeńskich trochę więcej problemów przysporzyć może zachowanie zasady koncentracji. Jej istotą jest bowiem to, aby całe postępowanie procesowe zamknąć w czasie jednego lub kilku po sobie bezpośrednio następujących posiedzeń sądowych[10]. Nie można było wtedy nawet przypuszczać, że zasada koncentracji właśnie będzie najistotniejszą zasadą procesu biskupiego. W aktualnym procesie skróconym bowiem, zaraz po powołaniu instruk-

---

[6] CIC, c. 1656 § 1.

[7] Litterae Apostolicae Motu Proprio *Mitis Iudex Dominus Iesus* (08.09.2015) (dalej MP *Mitis iudex*), c. 1691 § 2; por. CIC c. 1690.

[8] A. Dzięga, *Kościelny proces ustny*, Lublin 1992, s. 208.

[9] MP *Mitis iudex*, c. 1685 i c. 1687 § 1. Por. CIC, c. 1661 § 1.

[10] A. Dzięga, *Kościelny proces ustny*, Lublin 1992, s. 209.

tora i asesora posiedzenie powinno się odbyć w ciągu trzydziestu dni[11], tenże instruktor powinien zebrać dowody podczas jednego posiedzenia i wyznaczyć termin piętnastu dni na przedstawienie uwag na korzyść węzła oraz wniosków obrończych stron[12].

W tamtym czasie A. Dzięga pisał także, że od strony teoretycznej najwięcej kłopotu sprawić może próba zorganizowania procesu małżeńskiego w zgodzie z obowiązującymi kanonami a jednocześnie według kolejnej zasady ustności procesowej, a mianowicie zasady żywego słowa. Proces małżeński pozostaje nadal, także w świetle motu proprio Papieża Franciszka, procesem pisemnym, to znaczy, że wszystkie akta i czynności podejmowane przez strony, ich przedstawicieli lub trybunał muszą być sporządzone na piśmie[13]. Ale, dzisiaj także ta kwestia nasuwa nowe spojrzenie na zasadę pisemności w procesie biskupim, zważywszy na fakt, że niektóre pisma muszą być sporządzone według zasad ustnego procesu spornego. Tak właśnie powinna być sporządzona skarga powodowa, która, oprócz przesłanek wymienionych w kanonie 1504, powinna: 1°przedstawić krótko, całościowo i jasno fakty, na których opiera się roszczenie; 2°wskazywać dowody, które mogłyby być natychmiast zebrane przez sędziego; 3°zawierać w załączniku dokumenty, na których opiera się roszczenie[14]. W procesie biskupim Prawodawca kościelny, niewątpliwie hołdując zasadzie pisemności, jednak więcej zaufania okazuje wobec pamięci prowadzących ów proces, gdyż ma on być krótki i w tym czasie ich pamięć powinna zgromadzić odpowiednie informacje do późniejszego wyciągnięcia właściwych wniosków.

Jeszcze inna procedura ustna zostaje przeszczepiona do procesu biskupiego w przepisie kanonu 1687 § 2, gdzie mowa jest o tym, że pełny tekst wyroku wraz z motywacją powinien zostać jak najszybciej notyfikowany stronom, taki sam zapis można odnaleźć w przepisie kanonu 1668 § 3, który należy do ustnego procesu spornego[15]. W obu tych przepisach chodzi oczywiście o skrócenie ostatniego etapu postępowania sądowego.

Na tle ogólnej zasady ekonomii procesowe, czyli koncentracji, która przyświeca procesowi ustnemu, a która poprzez instytucje z procesu ustnego zapożyczone do procesu biskupiego, szczególnej rangi nabierają

---

11 MP *Mitis iudex*, c. 1685. Por. CIC, c. 1661 § 1.
12 MP *Mitis iudex*, c. 1686. Por. CIC, c. 1663 § 1.
13 A. Dzięga, *Kościelny proces ustny*, Lublin 1992, s. 212.
14 MP *Mitis iudex*, c. 1684. Por. CIC, c. 1658 § 1 i 2.
15 MP *Mitis iudex*, c. 1687 § 2. Por. CIC, c. 1668 § 3.

uprawnienia oficjała i wiceoficjała. Jego precyzyjne decyzje na etapie wstępnym przedmiotowego postępowania mogą przyczynić się do rzeczywistego usprawnienia przebiegu procesu o nieważność małżeństwa.

Oficjał podstawowym decydentem

Z przepisów motu proprio *Mitis Iudex Dominus Iesus* bardzo wyraźnie wynika, że strony mogą jedynie prosić o proces biskupi, ale decyzję o jego prowadzeniu podejmuje oficjał i to tylko w takiej sytuacji, gdy są spełnione łącznie wszystkie warunki niezbędne do prowadzenia tego procesu, płynące z kanonu 1683: 1° roszczenie złożone przez obydwoje małżonków lub przez jednego z nich za zgodą drugiego; 2° zaistniałe okoliczności faktyczne i osobowe, poparte zeznaniami lub dokumentami, które nie wymagają przeprowadzenia dokładniejszego badania lub dochodzenia oraz w sposób oczywisty wskazują na nieważność[16]. Wracając jednak do wikariusza sądowego, to właśnie on - po wcześniejszej weryfikacji warunków niezbędnych do prowadzenia skróconego procesu biskupiego - w tym samym dekrecie, w którym określa formułę wątpliwości, powołuje instruktora i asesora oraz wzywa wszystkich, którzy powinni wziąć udział, na posiedzenie (sesję sądową), które winno odbyć się w ciągu trzydziestu dni[17].

Co więcej, jeżeli w sądzie zostaje przedłożona skarga powodowa w celu rozpoczęcia procesu zwykłego, a wikariusz sądowy uważałby, że może ona zostać rozpoznana w procesie skróconym, powinien wraz z notyfikacją skargi zgodnie z kanonem 1676 § 1 stronie pozwanej, która jej nie podpisała, równocześnie poprosić ją o poinformowanie sądu, czy zamierza przyłączyć się do złożonego wniosku i uczestniczyć w procesie[18]. Jak się wydaje, treść artykułu 15 zawartego w Zasadach Proceduralnych motu proprio *Mitis Iudex Dominus Iesus*, pozwala wikariuszowi sądowemu, oczywiście po wcześniejszym właściwym rozpoznaniu wymaganych prawem warunków, skłonić strony do prowadzenia procesu o nieważność małżeństwa w trybie skróconego procesu biskupiego. Jest to oczywiście możliwe po uzupełnieniu niezbędnych warunków.

---

16 MP *Mitis iudex*, c. 1683.
17 MP *Mitis iudex*, c. 1685.
18 MP *Mitis iudex*, art. 15.

Na wikariuszu sądowym spoczywa szczególna odpowiedzialność za decyzję i przygotowanie procesu biskupiego, chociaż jak wynika z przepisów on sam nie musi być instruktorem w sprawie[19]. Najistotniejszym skutkiem decyzji oficjała, po którym ma nastąpić szereg działań instruktora i innych uczestników postępowania, powinno być osiągnięcie pewności moralnej przez biskupa lub jej brak, co z kolei skutkuje skierowaniem sprawy do rozpatrzenia w trybie procesu zwyczajnego[20]. Tego typu rozwiązanie jest oczywiście konieczne ze względu na uprawnienia strony procesowej i tym samym zachowanie sprawiedliwości w Ludzie Bożym. Ale z drugiej strony nie jest ono pożądane z punktu widzenia zasady ekonomii procesowej, bo tym samym zamierzenia dotyczące usprawnienia i szybszego prowadzenia spraw małżeńskich zostają obrócone w niwecz.

Wikariusz sądowy, więc po weryfikacji warunków płynących z kanonu 1683 oraz po weryfikacji treści skargi powodowej, czy jest ona sporządzona zgodnie z przepisami prawa a jeszcze przed wyznaczeniem instruktora i asesora, powinien bacznie przyjrzeć się zebranym materiałom procesowym, czy na przyszłość rokują one osiągnięciem pewności moralnej przez biskupa diecezjalnego. Jeżeli jest to w jakikolwiek sposób wątpliwe, to należałoby zrezygnować z procesu biskupiego i wskazać małżonkom tryb procesu zwyczajnego, do którego w razie późniejszych wątpliwości i tak dojdzie, tylko że już po niepotrzebnie podejmowanych wcześniejszych czynnościach procesowych, które skądinąd z pewnością da się wykorzystać jako materiał dowodowy.

Zgodna prośba małżonków

Już z kanonu 1676 § 2 wynika, że małżonkowie mogą jedynie postulować i prosić o proces biskupi, jednakże z całą stanowczością trzeba stwierdzić, że to oficjał decyduje o tymże trybie postępowania. A może on zdecydować o trybie biskupim jedynie wtedy, gdy są spełnione wszystkie wymagane prawem warunki, podobnie jak w przypadku procesu dokumentalnego. Odmawiając stronie prawa do procesu biskupiego nie odmawia się jej prawa do procesu w ogóle, tylko odmawia się konkretnego trybu. Wprowadzenie takiej selekcji jest konieczne, ponieważ strona procesowa nie

[19] MP *Mitis iudex*, art. 16.
[20] MP *Mitis iudex*, c. 1687 § 1.

posiada fachowej wiedzy kanonistycznej na temat możliwości prowadzenia procesu, by móc decydować o takich kwestiach. Oczywiście należy założyć, że strona ma dostęp do różnych informacji i możliwość korzystania z fachowej porady, ale nie w każdym przypadku jest to możliwe, a prawo musi być równe wobec wszystkich.

Z przepisu kanonu 1683, 1° jasno wynika, że jednym z warunków wszczęcia skróconego procesu biskupiego jest złożenie *petitio* przez obydwoje małżonków lub przez jednego z nich za zgodą drugiego. Wydaje się, iż należy to rozumieć w ten sposób, że skargę powodową składa jeden małżonek, do czego przychyla się i co popiera drugi małżonek lub obydwoje małżonkowie, co też jest wyrazem obopólnej zgody na proces. Termin określający zgodność małżonków, należy rozumieć maksymalistycznie, to znaczy nie chodzi tylko o to, iż jeden małżonek chce nieważności małżeństwa a drugi na to się zgadza i dalsze prowadzenie sprawy pozostawia sądowi. Raczej chodzi o to, że obydwoje małżonkowie zgodnie chcą procesu, procesu biskupiego właśnie, ze wszystkimi jego konsekwencjami i pozostają w pełnej dyspozycji dla sądu w zakresie dochodzenia do prawdy obiektywnej. Drugorzędne jest jedynie to, czy skarga powodowa jest złożona jako łączna, czy też składa ją jeden małżonek, a drugi to pisemnie akceptuje.

Ponadto, zgodność małżonków powinna również dotyczyć tytułu nieważności małżeństwa. Nie chodzi o to, że obydwoje chcą nieważności małżeństwa, ale każde z nich trochę inaczej to widzi i proponuje inną podstawę nieważności. Chodzi o to, że obydwoje zgodnie chcą nieważności małżeństwa z tego samego tytułu. W przeciwnym razie nie może być mowy o zgodności, gdyż wywoła to dyskusję sporną, w konsekwencji której będzie koniecznie powoływanie coraz to nowych środków dowodowych, sprawa przestanie być ewidentna i tym samym ów proces straci znamiona procesu skróconego[21].

Z powyższych rozważań wynika, iż wiele problemów niesie za sobą określenie zgodności małżonków, jako niezbędnego elementu procesu biskupiego i jak wielka odpowiedzialność ciąży na wikariuszu sądowym, który ma tę kwestię weryfikować. Od właściwej decyzji wikariusza sądowego w tym zakresie zależy dalsze skuteczne prowadzenie procesu biskupiego.

[21] M. Greszata-Telusiewicz, *Processus brevior*, [w:] *Proces małżeński według motu proprio Mitis Iudex Dominus Iesus*, (Red.) J. Krajczyński, Płock 2015, s. 82 – 85.

Apelacja od wyroku biskupiego

Uwzględniając oczywiście wyjątkowość trybu biskupiego w procesie skróconym, można dojść do przekonania, że strony procesowe, które zgodnie decydują się na tryb biskupi, powinny tym samym zaniechać po jego zakończeniu apelacji, gdyż rozstrzygnięcie biskupa powinno być niejako tym ostatecznym. Oczywiście, zgodnie z przepisami procesowymi nie można stron pozbawić prawa do apelacji, to byłoby zaprzeczeniem naczelnej i niezbędnej w procesie zasady apelacyjności i stałoby w sprzeczności z zasadą *salus animarum*. Tym samym nie można by było już zachować sprawiedliwości w Ludzie Bożym.

Ale, jednocześnie, z drugiej strony patrząc, trzeba pamiętać o tym, że proces biskupi jest procesem nadzwyczajnym i, żeby go rozpocząć muszą być spełnione wyjątkowe, szczególne, zweryfikowane przez oficjała, okoliczności. Ponadto, procesu biskupiego w zaproponowanej przez Papieża Franciszka formie, nie da się porównać do żadnego innego. Wydaje się więc, że apelacja zostaje przez Prawodawcę w tym procesie utrzymana tylko ze względu na szacunek dla starej kodeksowej zasady procesowej, ale jednocześnie powinna ona być rzadkością zarezerwowaną być może tylko dla obrońcy węzła i to właśnie w tym duchu powinno się odczytywać przepis kanonu 1687 § 3 i 4[22].

Istotą prowadzenia tego procesu jest zaistnienie ewidentnych okoliczności skłaniających do orzeczenia nieważności małżeństwa, więc jeśli tak właśnie się stanie, to po co wnosić apelację. Zważywszy na to, że przecież wcześniej obydwoje małżonkowie zgodnie o to proszą, zatem jeśli wspólnie o to samo proszą a następnie otrzymują to, o co prosili, to apelacja jest bezpodstawna. Wydaje się, w świetle kanonu 1687 § 1, że jeśli zostaną spełnione wszystkie wymagane prawem warunki dla procesu biskupiego, biskup nie może wydać tzw. wyroku negatywnego, czyli takiego w którym nie stwierdza nieważności małżeństwa. Oczywiście tak się może zdarzyć i stąd prawo w takiej sytuacji umożliwia biskupowi przekazanie sprawy do rozpatrzenia w trybie zwyczajnym, gdzie prawo do apelacji jest zachowane. Dlaczego tak się może zdarzyć, dlatego, że wszyscy zajmujący się daną sprawą sądową, nawet biskup, są tylko ludźmi

[22] Por. P. Majer, *Komentarz do kanonu 1687*, [w:] *Praktyczny komentarz do Listu apostolskiego motu proprio Mitis Iudex Dominus Iesus papieża Franciszka*, (Red.) P. Skonieczny, Tarnów 2015, s. 184 – 192.

i może zaistnieć możliwość błędu i dlatego Prawodawca zabezpiecza się przed takimi ewentualnościami.

Brak pewności moralnej ze strony biskupa skutkuje przekazaniem sprawy do rozpatrzenia jej w procesie zwykłym. Należy to rozumieć jako działanie ciągle w ramach tej samej instancji i oznacza to wznowienie instrukcji na podstawie przepisu kanonu 1600 § 1, 3°, czyli wtedy, gdy jest prawdopodobne, iż bez dopuszczenia nowego dowodu zostanie wydany niesprawiedliwy wyrok i kanonu 1609 § 5 również dotyczącego uzupełnienia instrukcji sprawy[23]. Oczywiście do zadań biskupa należy również powołanie kolegium sędziowskiego lub sędziego jednoosobowego z dwoma asesorami[24]. Dla dobra prawdy obiektywnej i zasady ekonomii procesowej należałoby również rozważyć, by w takiej sytuacji w skład kolegium był powołany wcześniej wyznaczony instruktor do przeprowadzenia procesu biskupiego.

Należy się jeszcze zastanowić nad tym, czy w procesie biskupim na samym jego początku wręcz nie należałoby wymagać od małżonków deklaracji, że nie będą wnosić ewentualnej apelacji. Jeśli nie zdeklarują tego, to być może nie powinna ta sprawa być prowadzona w trybie skróconym. Brak takiej deklaracji ze strony małżonków zaprzecza trochę pewnym założeniom, które niesie za sobą proces biskupi. Mianowicie, zwracając się z prośbą o orzeczenie nieważności małżeństwa do biskupa małżonkowie chcą przede wszystkim rozwiązania pastoralnego swojej sytuacji kanonicznej, za którym idzie także sądowe rozstrzygnięcie sprawy. Jeśli zaś nie wykluczają w przyszłości apelacji, to prawdopodobnie chcą tylko rozstrzygnięcia formalno – prawnego, to trzeba im na to pozwolić poprzez proces zwyczajny.

Podobnie należy spojrzeć na prawo do apelacji obrońcy węzła w procesie skróconym. Oczywiście ma on je zagwarantowane poprzez utrzymanie w ogóle prawa do apelacji w tym procesie. Uwzględniając kanon 1676 § 1, w którym Prawodawca kościelny stanowi, iż po otrzymaniu skargi powodowej wikariusz sądowy powinien ją przyjąć i nakazać dekretem umieszczonym pod tą skargą, aby jej egzemplarz został doręczony obrońcy węzła[25]. Jest to przepis zawarty w normach o zwyczajnym procesie o nieważność małżeństwa, ale jak się wydaje, konieczny do zastosowania

[23] CIC, c. 1609 § 5.
[24] MP *Mitis iudex*, c. 1676 § 3.
[25] MP *Mitis iudex*, c. 1676 § 1.

także w procesie biskupim, gdyż już na etapie wstępnym przedmiotowego procesu potrzebne jest zajęcie stanowiska przez obrońcę węzła. Jego wypowiedź dotycząca ewentualnych możliwości apelowania powinna przechylić szalę dotyczącą wszczynania tego trybu procesu bądź jego zaniechania.

Tak zatem, to właśnie wikariusz sądowy jest odpowiedzialny nie tylko za weryfikację wszystkich warunków koniecznych do wszczęcia skróconego procesu biskupiego, ale również za przygotowanie stron do jego właściwego przeprowadzenia, zgodnie z zamysłem Prawodawcy. Poinformowanie stron procesowych o specyficznym charakterze i celu przedmiotowego procesu, wydaje się że właśnie ze strony wikariusza sądowego, może pomóc w skutecznym rozpoznaniu i rozstrzygnięciu dokonywanym przez biskupa diecezjalnego.

Wnioski

Podsumowując, na wikariusza sądowego w świetle nowego motu proprio *Mitis Iudex Dominus Iesus* zostały nałożone obowiązki, które wynikają z roli jego szczególnego urzędu. Uwzględniając jednak fakt, iż wikariusz sądowy ma wiele różnych zadań w diecezji, poza orzekaniem i przygotowywaniem procesów biskupich, może należałoby również umożliwić przesunięcie jego szczególnych uprawnień dotyczących procesu biskupiego na pomocniczego wikariusz sądowego, który jest przecież zastępcą i pomocnikiem wikariusz sądowego. Jako taki właśnie, który weryfikuje i przygotowuje całą dokumentację do procesu skróconego, mógłby być w konsekwencji wyznaczony również na instruktora podczas toczącego się procesu, gdyż jako najlepiej poinformowany mógłby z największym powodzeniem wykonywać zadanie instruktora. W przeszłości to właśnie pomocniczy wikariusze sądowi byli powoływani do turnusów sędziowskich jako ich przewodniczący, potem w praktyce sądowej odeszło się od tego, gdyż wystarczyło powołanie na przewodniczącego jednego z sędziów. Być może w nieco nowej rzeczywistości procesowej należałoby powrócić do szczególnej roli pomocniczego wikariusz sądowego jako pomocnika wikariusz sadowego i jednocześnie przewodniczącego – instruktora w skróconym procesie małżeńskim przed biskupem.

Bibliografia

Źródła prawa

Codex Iuris Canonici auctoritate Ioannis Paulii PP. II promulgatus (25.01.1983), AAS 75 (1983) pars II, 1 – 317; tekst polski w: *Kodeks Prawa Kanonicznego*, przekład polski zatwierdzony przez Konferencję Episkopatu, Pallotinum, Poznań 1984.

Litterae Apostolicae Motu Proprio *Mitis Iudex Dominus Iesus* (08.09.2015).

Literatura

Dzięga A., *Kościelny proces ustny*, Lublin 1992.

Greszata M., *Kanoniczne procesy małżeńskie. Pomoc dla studentów*, Lublin 2007.

Greszata-Telusiewicz M., *Processus brevior*, [w:] *Proces małżeński według motu proprio Mitis Iudex Dominus Iesus*, (Red.) J. Krajczyński, Płock 2015, s. 75 – 92.

Majer P., *Komentarz do kanonu 1687*, [w:] *Praktyczny komentarz do Listu apostolskiego motu proprio Mitis Iudex Dominus Iesus papieża Franciszka*, (Red.) P. Skonieczny, Tarnów 2015, s. 184 – 192.

Streszczenie

Mitis Iudex Dominus Iesus, co można przetłumaczyć „Pan Jezus łagodnym sędzią" - to tytuł motu proprio opublikowanego przez papieża Franciszka, reformującego kanoniczny proces o nieważność małżeństwa. Została w nim wprowadzona instytucja tzw. procesu skróconego lub biskupiego, który może być przeprowadzany w przypadkach, obydwoje małżonkowie zgodnie o niego proszą i gdy sprawa nieważności małżeństwa jest ewidentna i nie wywołuje wątpliwości. Jak sama nazwa wskazuje, rozpoznanie i rozstrzygnięcie leży w gestii biskupa diecezjalnego. W tym kontekście właśnie należy spojrzeć na uprawnienia wikariusz sądowego jako tego, który stanowi jeden trybunał z biskupem, ale nie może sądzić spraw, które zostały zarezerwowane biskupowi jako sędziemu, tak jak ma to miejsce w skróconym procesie małżeńskim przed biskupem. Zostają jednak na niego nałożone pewne dodatkowe obowiązki procesowe, które wynikają z obowiązujących kodeksowych przepisów procesowych, a tym samym pozostają w duchy zasady słuszności kanonicznej, która wynika z ducha Ewangelii.

SŁOWA KLUCZOWE: *proces kanoniczny, proces małżeński, proces biskupi, wikariusz sadowy, biskup diecezjalny*

Abstract

Mitis Iudex Dominus Iesus, which can be translated as "*The Lord Jesus, the Gentle Judge*", is the title of a *motu propio* published by Pope Francis. It amends the canonical marriage nullity proceedings and introduces the institution of the so-called Briefer Process or the Bishop's Process, which can be conducted in

cases when both parties unanimously consent to it and when the case for the nullity of the marriage has evident grounds and does not raise any doubts. As the name suggests, the hearing and decision on such cases lie with the diocesan bishop. In this context we shall consider the entitlements of a judicial vicar. He and a diocesan bishop constitute one tribunal, which is, however, not entitled to decide cases which are reserved for the bishop as a judge as in the case of the briefer matrimonial process before the bishop. However, certain additional procedural obligations are imposed on him which result from the valid Code's procedural rules, and at the same time are in keeping with the spirit of the principles of canonical equity which stem from the spirit of the Gospel.
KEY WORDS: *canonical process, marital process, episcopal process, orchard assistant curate, diocesan bishop*

Autor

Dr hab. Marta Greszata-Telusiewicz, prof. KUL – kierownik Katedry Kościelnego Prawa Procesowego na Wydziale Prawa, Prawa Kanonicznego i Administracji Katolickiego Uniwersytetu Lubelskiego Jana Pawła II, Prawo kanoniczne w zakresie kościelnego prawa procesowego Al. Racławickie 14, 20-950 Lublin C- 539 e-mail: marta.greszata@gmail.com

Karol Juszka

The effect of redress the damage on the effectiveness of the institution of conditional discontinuance of criminal proceedings

Wpływ zobowiązania do naprawienia szkody na efektywność instytucji warunkowego umorzenia postępowania karnego

INTRODUCTION

The conditional discontinuance of criminal proceedings is an original Polish legal institution, which is defined as the temporary postponement in issuing a decision on guilt and criminal responsibility of a perpetrator[1]. Essential changes in the legal provisions in enforcing binding laws include giving the courts exclusive competence to apply the conditional discontinuance of criminal proceedings[2] and setting the form of the sentence as

[1] W. Wróbel, A. Zoll, *Polish Penal Law. General part,* Cracow 2012, s. 477 [in Polish].

[2] A. Zoll (in:) A. Zoll (ed.)., *The Penal Code. General part: Comment to articles 1– 116*, Warsaw 2012, s. 914-915 [in Polish]; Z. Ćwiąkalski, *Selected issues of the conditional discontinuance of criminal proceedings*", a paper presented in the IXth Bielany Penal-law Colloquium "The measures associated with placing a perpetrator under probation", Warsaw, 16 May 2012, published on the website of Czasopismo Prawa Karnego i Nauk Penalnych http://www.czpk.pl/index.php/wideo/bielanskie-kolokwium-karnistyczne/ix-bielanskie-kolokwium-karnistyczne (as of 1 February 2016). [in Polish]; K. Juszka, *Judicial protection of human rights in the practice of applying the conditional discontinuance of criminal proceedings* (in:) R. Sztychmiler, J. Krzywkowska (ed.), *Problems with judical protection of human rights,* Olsztyn 2012, s. 273-278 [in Polish].

the only one provided for pronouncing this institution[3]. This sentence is not a convicting judgement[4].

Z. Gostyński represents a correct opinion that Art. 67§3 of the Polish Penal Code provides an autonomous basis for adjudicating the obligation to redress the damage[5].

M. Leonieni and W. Michalski define the effectiveness of conditional discontinuance of criminal proceedings as the correlation between the objectives (targets) of the provisions pertaining to the studied institution and their implementation i.e. results of their application in the practice of courts[6].

A. Zoll emphasises that adjudicating the obligation to redress the damage caused serves an educating, verifying[7] and compensatory role[8].

The obligation to redress damage, linked with the conditional discontinuance of criminal proceedings is always adjudicated *ex officio* although the injured party may also submit a relevant motion to this effect under the provision of Art. 9§2 Polish Code of Criminal Procedure[9].

In the author's own studies, all ways for completion of the probation period by the accused, hereby called procedural situations, were listed:

- Successful completion of the probation period, and of the period referred to in Art. 68§4 of the Polish Penal Code,
- Successful completion of the probation period, and of the period referred to in Art. 68§4 of the Polish Penal Code arrived at as a result

---

[3] A. Zoll, *Substantive law issues of the conditional discontinuance of criminal proceedings*, "Scientific issue of Jagiellonian University. Part of Law" 1973, nr 62, s. 10-26 [in Polish]; A. Zoll (in:) A. Zoll (ed.)., *The Penal Code..., s .916-917;* P. Hofmański (ed.)., *Polish code of criminal procedure. Coment do articles 297-467*, Warsaw 2011, s. 369 [in Polish].

[4] A. Zoll (in:) A. Zoll (ed.)., *The Penal Code...,* s. 917 [in Polish].

[5] Z. Gostyński, *The obligation to redress damage in new penal legislation,* Cracow 1999, s. 136 [in Polish].

[6] M. Leonieni, W. Michalski W., *Conditions for the effectiveness of the conditionaldiscontinuance of criminal proceedings in judicial practice,* Warsaw 1975, s. 44 [in Polish]

[7] A. Zoll, *Substantive law issues…, s. 111* [in Polish];

[8] A. Zoll (in:) A. Zoll (ed.)., *The Penal Code…,* s. 930[in Polish]

[9] M. Szczepaniec, J. Zygmunt, *The obligation to redress damage in the system of probation measures* (in:) Z. Ćwiąkalski, G. Artymiak (ed.), *Substantive-law and procedural aspects of redressing damage in the light of penal codifications of 1997, and proposed amendments,* Warsaw 2010, s. 149; M. Szewczyk, *Some remarks on the compensation as punitive measure in the draft of the Penal Code*, "Palestra" 1995, nr 1-2, s. 74; [in Polish]. A. Muszyńska, *Redressing damage caused by crime*, Warsaw 2010, s. 175 [in Polish].

of proceedings during which a decision about not resuming conditionally discontinued criminal proceedings was issued,
- Decision about resuming conditionally discontinued criminal proceedings,
- Decision about resuming the conditional discontinuance of criminal proceedings arrived at as a result of proceedings during which a decision about not resuming conditionally discontinued criminal proceedings was issued,
- Decision about the discontinuance of enforcement proceedings due to the lapse of the probation period provided for in Art. 68§4 of the Polish Penal Code,
- Decision about the discontinuance of enforcement proceedings due to the lapse of the probation period provided for in Art. 68§4 of the Polish Penal Code, arrived at as a result of proceedings during which a decision about not resuming conditionally discontinued criminal proceedings was issued,
- Decision about the discontinuance of enforcement proceedings due to the death of the accused,
- Decision about the discontinuance of enforcement proceedings due to the death of the accused, arrived at as a result of proceedings during which a decision about not resuming conditionally discontinued criminal proceedings was issued.

The objective of this paper is to present the redress the damage from both the viewpoint of the opinions in legal doctrine, and the correlations between its individual resolutions and their impact on the way of ending the probation period. The analysis of these correlations will be presented by showing factors resulting from the author's own research of 405 court cases, pertaining to the effectiveness of the conditional discontinuance of criminal proceedings. These were cases individually numbered in the archives of the District Court in Krakow and the regional courts situated within the area of its jurisdiction. The presented analysis also includes a presentation of postulates *de lege ferenda* concerning both legislative amendments to the statutory construction of the legal institution of conditional discontinuance of criminal proceedings, as well as the action which should be undertaken in the area of its practical application within the framework of binding regulations.

STATISTICAL ANALYSIS OF COURT CASES

The measure of the effectiveness of the institution of conditional discontinuance of criminal proceedings, which is used in the author's presented research, is the criterion or either successful or unsuccessful course or completion of the probation period[10] broadened by adding the analysis of procedural decisions and the circumstances of the decision-making process affecting the decisions during all stages of criminal proceedings.

In the author's own research of 405 cases, the courts, in judgements conditionally discontinuing criminal proceedings, imposed the obligation to redress the damage to 54 accused (13,5%).

The presentation of the correlations between particular solutions adopted in a judgement conditionally discontinuing criminal proceedings should start from the statistical analysis describing these correlations[11].

In statistical analysis, the following scale is usually adopted for correlation:

r=0	the variables are not correlated,
0<|r|<0,1	there is a meagre correlation
0,1< |r|<0,3	weak correlation
0,3< |r|<0,5	average correlation
0,5< |r|<0,7	high correlation
0,7< |r|<0,9	very high correlation
0,9< |r|	almost full correlation

The first statistical analysis was presented by the results of correlation between the amount of obligation to redress the injury adjudicated in the judgement conditionally discontinuing criminal proceedings, and the time limit for its payment in the same judgement (Table 1, Table 2, Fig. 1).

[10] W. Ciechanowicz, *Effectiveness of the conditional discontinuance of criminal proceedings in the practice of military prosecutors' offices,* "Wojskowy Przegląd Prawniczy" 1978, nr 2, s. 220-221 [in Polish]; M. Leonieni, W. Michalski, *Conditions for the effectiveness…, s. 6-7.* [in Polish].

[11] Statistical analysis was consulted with Dr. Adam Ćmiel Eng. from the Department of Applied Mathematics of Stanisław Staszic AGH University of Science and Technology in Krakow.

Table 1. The results of correlating for the Spearman R coefficient of rank of the amount of obligation to redress the injury adjudicated in the judgement conditionally discontinuing criminal proceedings, and the time limit for its payment in the same judgement.

Two variables	The Spearman R coefficient of rank The correlation coefficients found are statistically significant with z p<0,05			
	N important	R Spearmana	t(N-2)	P
The amount of obligation to redress the injury and the time limit for its payment	42	0,327	2,188	0,035

Source: Own processing

Table 2. The results of correlating the amount of obligation to redress the injury adjudicated in the judgement conditionally discontinuing criminal proceedings, and the time limit for its payment in the same judgement.

Correlations between variables The correlation coefficients found are statistically significant with z p<0,05	
Variables	The time limit for payment of redress the injury
The amount of obligation to redress the injury	N=42 r=0,55 p=0,00

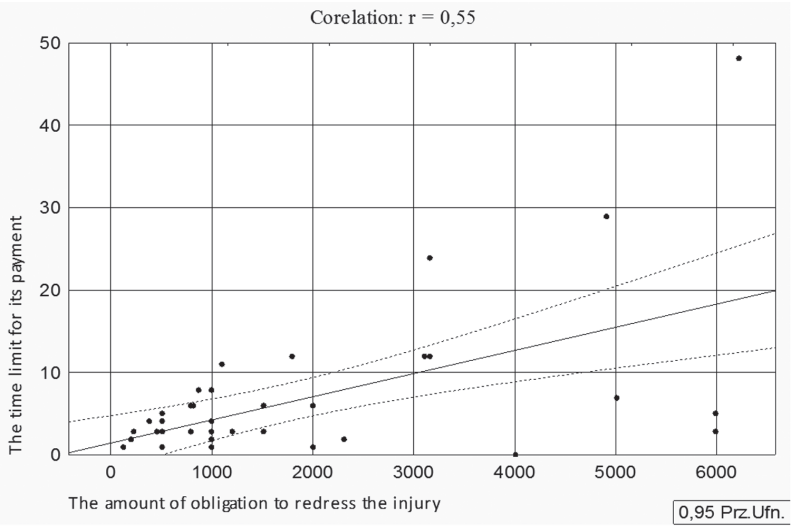
Source: Own processing

The graph (Figure 1) presents the scatter of data the amount of obligation to redress the injury adjudicated in the judgement conditionally discontinuing criminal proceedings, and the time limit for its payment in the same judgement with 0.95 confidence interval.

The results of the author's own studies of receipts indicated that in only 8 out of 54 cases did the accused pay consideration after the time limit resulting from the relevant judgement. The correct linking of the amount and time limit for payment of consideration redressing harm given in the judgement conditionally discontinuing criminal proceedings, underscores the individualisation of responsibility for someone's actions, entailing the redress of damage caused.

As a result of statistical analysis, the below-listed correlations between variables were found to be statistically insignificant.

Figure 1. The scatter of data the amount of obligation to redress the injury and the time limit for its payments



In the analysis, a positive correlation was found between the amount of obligation to redress the injury adjudicated in the judgement conditionally discontinuing criminal proceedings, and the time limit for its payment in the same judgement (R Spearmana =0,327, p=0,035, r Persona=0,549, p<0,001).

The first is the correlation between the number of persons supported by the perpetrator and the level of monthly income, and the time limit to meet the obligation to redress damage given in the judgement conditionally discontinuing criminal proceedings (Table 3)

The above conclusion is in line with a general premise relating the possibility to impose the obligation to redress damage, which involves finding that the injured party suffered real damage as a direct result of the crime in question[12] and that the damage includes both the loss of property and the loss of reasonably expected benefits[13].

[12] A. Marek, *The Penal Code. Comment*, Warsaw 2010, s. 222 [in Polish]; M. Szczepaniec, J. Zygmunt, *The obligation to redress damage…, s. 150; D.* Gorzkiewicz, *The conditional discontinuance of criminal proceedings in practice (notes de lege ferenda to Art. 66§3 PC*, "Wojskowy Przegląd Prawniczy" 2007, nr 4, s. 65; [in Polish]; M. Królikowski, K. Szczucki (ed.), *Penal Law. General part. Courts' decisions,* Warsaw 2011, s. 316-318 [in Polish].

[13] A. Zoll (in:) A. Zoll (ed.)., *The Penal Code…, s. 932* [in Polish]; Z. Ćwiąkalski, *Selected issues..., op. cit.;* A. Pilch, *The nature of the obligation to redress damage under the provisions of Art. 46 of the Polish Penal Code, and the issues of jurisprudential practice* (in:) Z. Ćwiąkalski, G. Artymiak (ed.), *Substantive-law and procedural aspects of redressing*

Table 3. The correlation between the number of persons supported by the perpetrator and the level of monthly income, and the time limit to meet the obligation to redress damage given in the judgement conditionally discontinuing criminal proceedings

Variables	The time limit to meet the obligation to redress damage
The number of persons supported by the perpetrator	r=0,13 N=42 p=0,41
The level of monthly income,	r=-0,22 N=31 p=0,24
Income per person	r=-0,23 N=31 p=0,23

Source: Own processing

In analysis of the above mutual relationship, no correlation was found between the above variables (e.g. Pearson correlation coefficient r=0.130 and it is insignificant, because p=0,412>0,05).

The above conclusion is in line with a general premise relating the possibility to impose the obligation to redress damage, which involves finding that the injured party suffered real damage as a direct result of the crime in question[14] and that the damage includes both the loss of property and the loss of reasonably expected benefits[15].

damage in the light of penal codifications of 1997, and proposed amendments, Warsaw 2010, s. 122 [in Polish]; J. Lachowski, T. Oczkowski, *The obligation to redress damage as a punitive measure,* "Prokuratura i Prawo", nr 9, s. 43 [in Polish].

[14] A. Marek, *The Penal Code. Comment*, Warsaw 2010, s. 222 [in Polish]; M. Szczepaniec, J. Zygmunt, *The obligation to redress damage…, s. 150; D.* Gorzkiewicz, *The conditional discontinuance of criminal proceedings in practice (notes de lege ferenda to Art. 66§3 PC*, "Wojskowy Przegląd Prawniczy" 2007, nr 4, s. 65; [in Polish]; M. Królikowski, K. Szczucki (ed.), *Penal Law. General part. Courts' decisions,* Warsaw 2011, s. 316-318 [in Polish].

[15] A. Zoll (in:) A. Zoll (ed.)., *The Penal Code…, s. 932* [in Polish]; Z. Ćwiąkalski, *Selected issues..., op. cit.;* A. Pilch, *The nature of the obligation to redress damage under the provisions of Art. 46 of the Polish Penal Code, and the issues of jurisprudential practice* (in:) Z. Ćwiąkalski, G. Artymiak (ed.), *Substantive-law and procedural aspects of redressing damage in the light of penal codifications of 1997, and proposed amendments,* Warsaw 2010, s. 122 [in Polish]; J. Lachowski, T. Oczkowski, *The obligation to redress damage as a punitive measure,* "Prokuratura i Prawo", nr 9, s. 43 [in Polish].

Another analysis involved the results of the correlation between the time limit to meet the obligation to redress the damage given in a judgement conditionally discontinuing criminal proceedings, and the procedural effectiveness presented in the introduction to this paper. (Table 4, Table 5, Fig. 2).

Table 4. The results of the correlation between the time limit to meet the obligation to redress the damage given in a judgement conditionally discontinuing criminal proceedings, and the procedural effectiveness

Procedural situation	The numer of cases	Total number	Percentage share	Total percentage share
A	28	28	66,67	66,67
B	8	36	19,05	85,71
C	3	39	7,14	92,86
D	1	40	2,38	95,24
E	1	41	2,38	97,62
F	1	42	2,38	100
Lacks	0	42	0,00	100

Source: Own processing

The first column presents the ways of completing the probation period indicated in this paper. The second column contains the numbers of cases in which the time limit to meet the obligation to redress damage was set in a judgement conditionally discontinuing criminal proceedings, in connection with the procedural situation. The third and fourth columns give the corresponding percentage values.

It is only three procedural situations which - a) Successful completion of the probation period, and of the period referred to in Art. 68§4 of the Polish Penal Code, b) Successful completion of the probation period, and of the period referred to in Art. 68§4 of the Polish Penal Code arrived at as a result of proceedings during which a decision about not resuming conditionally discontinued criminal proceedings was issued, c) Decision about resuming conditionally discontinued criminal proceedings - are well represented in the cases of the accused on whom the obligations to redress damage were imposed.

From the viewpoint of the studied effectiveness, the results obtained for this correlation lead to the conclusion about the pertinence of the statutory solution introducing the obligatory nature of imposing the obligation to

redress damage in applying the conditional discontinuance of criminal proceedings.

The results of one-dimensional significance tests for the time limit to provide redress for damage given in a judgement conditionally discontinuing criminal proceedings.(Table 5.)

Table 5. The results of one-dimensional significance tests for the time limit to provide redress for damage given in a judgement conditionally discontinuing criminal proceedings

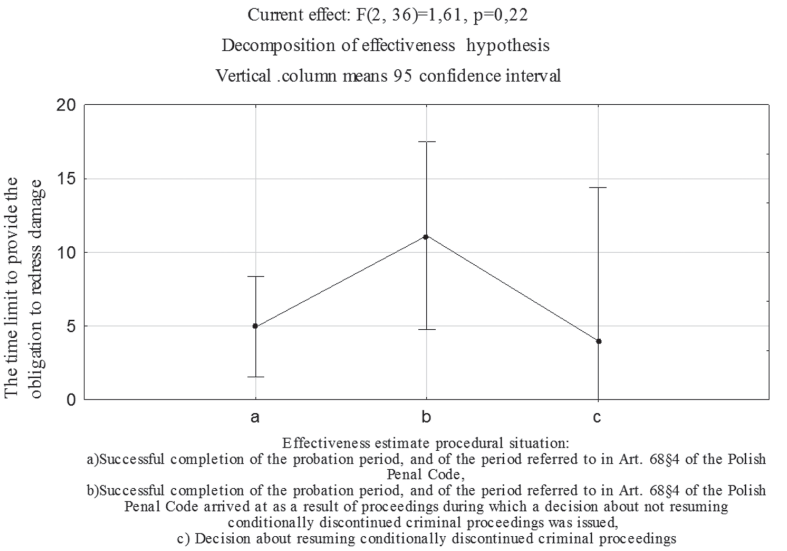
One-dimensional significance tests for the time limit to provide redress for damage given in a judgement conditionally discontinuing criminal proceedings Parametrisation with sigma limitation. Decomposition of effectiveness hypothesis

Result	SS	Degree of discre-ation	MS	F	P	Par-tial Eta--kwa-drat	Nie-cen-tral-ność	Obse-rve of validity (alfa= 0,05)
Intercept	814,3	1	814,27	10,32	0,003	0,223	10,32	0,88
Procedural situation	253,4	2	126,69	1,61	0,215	0,082	3,21	0,32
Error	2841,8	36	78,94	-	-	-	-	-

Source: Own processing

The next graph (Figure 2) illustrates the expected average boundary values for the time limit to provide and the effectiveness measured by the procedural situation. (1-way ANOVA) to redress damage given in the judgement conditionally discontinuing criminal proceedings, as a function of effectiveness measured by the procedural situation (a,b,c).

Figure 2. The expected average boundary values



In analysis of the above mutual relationship, no correlation was found between the above variables.

The next analysis concerns the results of correlation between the amount of obligation to redress for damage, given in the judgement conditionally discontinuing criminal proceedings, and the way of executing that obligation in the judgement in question. (Table 6, Figure 3)

Table 6. The results of U-Manna Whitneya test for the way of executing the amount of obligation to redress for damage and its level, given in the judgement conditionally discontinuing criminal proceedings.

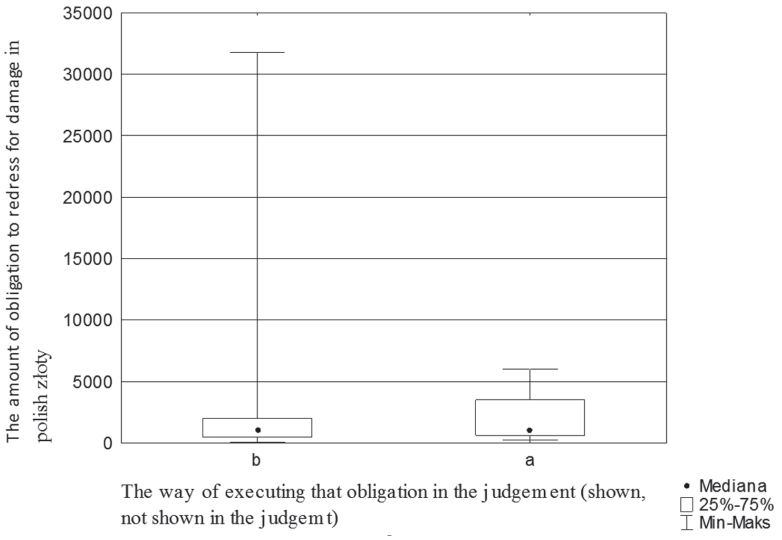
U-Manna Whitneya test – The way of executing the amount of obligation to redress for damage
The correlation coefficients found are statistically significant with z p<0,05

Variable	The level of monetary consideration
Suma rang b	1372,5
Suma rang a	112,5
U	97,5
Z	-0,066
P	0,947
Z popraw.	-0,066
P	0,947
N important b	50
N important a	4
dokł. p	0,937

Source: Own processing

The graph (Figure 3) presents the correlation between the amount of obligation to redress for damage, given in the judgement conditionally discontinuing criminal proceedings, and the way of executing that obligation in the judgement in question.

Figure 3. The correlation between the amount of obligation to redress for damage and the way of executing that obligation in the judgement in question



In analysis of the above mutual relationship, no correlation was found between the above variables. (p=0,947, test U Manna-Whitneya).

Analysis of the author's own studies indicates that the factor enhancing the effectiveness of the studied legal institution is the specific indication in the judgement conditionally discontinuing criminal proceedings of the manner in which the obligation to redress the damage has to be met. This condition was included in 5 out of 54 cases studied where such an obligation was imposed. In 4 out of these 5 cases, the total amount of obligations was divided into instalments, and both the amounts of instalments and the time limits for particular instalments were determined in detail in the judgement. The fact that such a form was applied in the judgements affected the timely performances by the 5 accused.

The next analysis covered the correlation between the manner of payment envisaged for the the obligation to redress the damage (in instalments, or as a total amount) given in a judgement conditionally discontinuing

criminal proceedings, and the time limit provided for the performance of this obligation in the judgement (Table 7, Fig. 4)

Taking into account the heterogeneity of variance and strong right--side asymmetry of data, the Kruskall-Wallis nonparametric ANOVA test was applied.

Table 7. Nonparametric ANOVA test of Kruskala-Wallisa rank correlation between the manner of payment envisaged for the the obligation to redress the damage (in instalments, or as a total amount) given in a judgement conditionally discontinuing criminal proceedings, and the time limit provided for the performance of this obligation in the judgement

ANOVA Kruskala-Wallisa rank
Kruskala-Wallisa test: H(2, N=41)=0,79; p=0,67

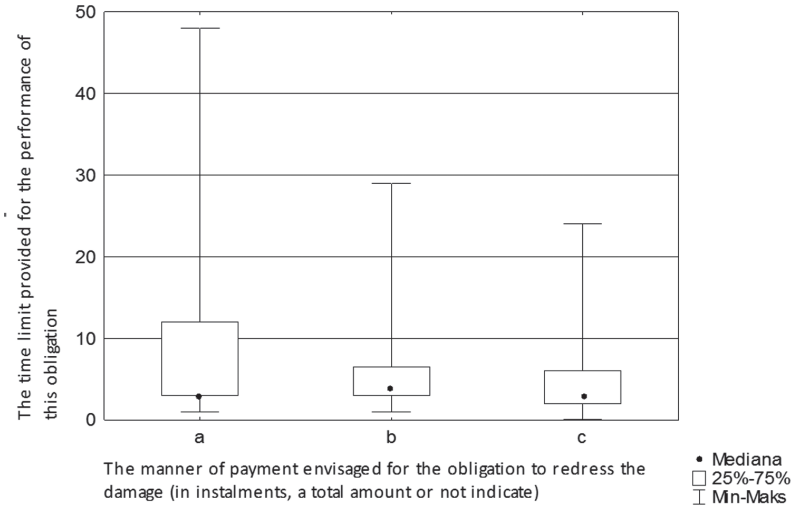
	Variable			
The amount of obligation to redress for damage	The manner of payment envisaged for the the obligation to redress the damage			
	Kod	N import ant	Total of ranks	Average of rank
A	1	5	115,5	23,10
B	2	20	442,0	22,10
C	3	16	303,5	18,97

Source: Own processing

The graph (Figure 4) presents the correlation between the manner of payment envisaged for the obligation to redress the damage (in instalments, or as a total amount) given in a judgement conditionally discontinuing criminal proceedings, and the time limit provided for the performance of this obligation in the judgement

The author's first proposal to the legal institution is amending the law (art. 336§3 Polish Code of Criminal Procedure) by giving prosecutors an additional possibility to extend the range of his/her contribution to the judgement conditionally discontinuing criminal proceedings by suggesting the manner and time limit to perform punitive obligations and measures, also for the purpose of synchronising this provision with binding Art. 68§2 of the Polish Penal Code.

Figure 3. The correlation between the manner of payment envisaged for the obligation to redress the damage and the time limit provided for the performance of this obligation



In analysis of the above mutual relationship, no correlation was found between the above variables (ANOVA p=0,67).

One of the author's own proposals concerning the application of conditional discontinuance of criminal proceedings with respect to the accused being supported by other persons results from a negative assessment of the practice used in 76 out of 91 examined cases. The modification of the above-referred practice consists particularly in the choice of restitution as the principle for performing the obligation to redress damage, and on refraining from the imposition of monetary consideration and court costs on the accused supported by other persons. Such practice will prevent doubts about personal compliance with the said decision in the judgement. The example of the aforementioned doubts was the content of the reasons for a decision on not reinstating the conditionally discontinued criminal proceedings after monetary consideration had been paid in by the mother of the accused.

The author's next proposal of changes in applying the legal institution examined in this paper is to determine, each time, the time limits and ways of meeting the obligations and performing punitive measures in judgements conditionally discontinuing criminal proceedings. Considering the method of payment, two practical factors should be mentioned: address of the beneficiary and his/her account number. The precise indication

of the manner of implementing the judgement by providing the above details enhances the possibility of its implementation within the probation period and limits attempts by the accused to delay the decision of properly implementing the decision on the obligation to redress damage imposed in the judgement conditionally discontinuing criminal proceedings.

It is disturbing to see the practice of courts which issue the decision to not reinstate conditionally discontinued criminal proceedings, or the decision to reinstate such proceedings within the period of probation when the accused evaded, in particular, the implementation of the obligation to redress damage, in these cases where the court did not determine the time limit for its implementation in judgements conditionally discontinuing criminal proceedings.

M. Leonieni rightly stated that the court should establish in its judgement not only the period of probation but also the time limit to fulfil the obligation. In M. Leonieni's opinion if the court has not set the time limit it is presumed to be equal with the period of probation, therefore a court implementing that judgement may not, by its own decision, and to the detriment of the accused, change the content of legally binding judgement and to set a shorter time limit[16]. The current lack of consequence on the part of Polish legislature should be pointed out: on the one hand, it differentiates between obligations and punitive measures in terms of material basis for applying the legal institution studied in this paper but (art. 67§3 Polish Penal Code and art. 68§2 Polish Penal Code), on the other hand, in procedural provision mentions only the obligations and forgets the punitive measures.

It should also be pointed out that the proceedings aimed at reinstating the conditionally discontinued criminal proceedings should be initiated immediately after the lapse of the time limit indicated in the judgement of conditionally discontinuing criminal proceedings, in particular, when it occurs due to lack of fulfilment of the obligations to redress damage, or to pay monetary consideration.

This group encompassed 48 out of 405 cases where the accused delayed both the monetary consideration and the payment to redress the damage, not suffering the consequences in the form of initiating the proceedings to reinstate the conditionally discontinued criminal proceedings. It is

[16] M. Leonieni, Reinstating the conditionally discontinued criminal proceedings by the court., Problemy Wymiaru Sprawiedliwości 1973, nr 2, s. 95 [in Polish].

likely that such practice results from preferring the late performance of the obligation set in the judgement conditionally discontinuing criminal proceedings by the accused, over the meticulous observation of time limits for this performance.

SUMMARY OF THE STATISTICAL ANALYSIS OF COURT CASES

In summary, it should be emphasised that the direct effect on the effectiveness of the conditional discontinuance of criminal proceedings, and in particular on its practical application is exerted by the form of the judgement conditionally discontinuing criminal proceedings. The proper analysis presented in this paper of the correlations between the decisions adopted in the judgement, and fulfilling the postulates *de lege ferenda* concerning with redress the damagewill contribute to the improvement and more effective use as well as to enhancing the importance of the institution of conditional discontinuance of criminal proceedings.

REFERENCES:

Bojarski T. (ed.), *Polish Penal Law. General part. Outline*, Warsaw 2008 [in Polish].

Ciechanowicz W., *Effectiveness of the conditional discontinuance of criminal proceedings in the practice of military prosecutors' offices.* "Wojskowy Przegląd Prawniczy" 1978, nr 2, s. 211-222 [in Polish];

Ćwiąkalski Z., *Selected issues of the conditional discontinuance of criminal proceedings*", a paper presented in the IXth Bielany Penal-law Colloquium "The measures associated with placing a perpetrator under probation", Warsaw, 16 May 2012, published on the website of Czasopismo Prawa Karnego i Nauk Penalnych http://www.czpk.pl/index.php/wideo/bielanskie-kolokwium-karnistyczne/ix-bielanskie-kolokwium-karnistyczne (as of 30 January 2016). [in Polish].

Gorzkiewicz D., *The conditional discontinuance of criminal proceedings in practice*

(notes de lege ferenda to Art. 66§3 PC), "Wojskowy Przegląd Prawniczy" 2007, nr 4, s. 59-67 [in Polish].

Gostyński Z., *The obligation to redress damage in new penal legislation,* Cracow 1999 [in Polish].

Hofmański P.(ed.), *Polish code of criminal procedure. Coment do articles 297-467*, Warsaw 2011. [in Polish].

Juszka K., *Judicial protection of human rights in the practice of applying the conditional discontinuance of criminal proceedings* (in:) R. Sztychmiler, J. Krzywkowska (ed.), *Problems with judical protection of human rights*, Olsztyn 2012, s. 273-278 [in Polish].

Królikowski M., Szczucki K. (ed.)., *Penal Law. General part. Courts' decisions,* Warsaw 2011. [in Polish].

Lachowski J., Oczkowski T., *The obligation to redress damage as a punitive measure,* "Prokuratura i Prawo" 2007, nr 9, s. 40-58 [in Polish].

Leonieni M., *Reinstating the conditionally discontinued criminal proceedings by the court*, "Problemy Wymiaru Sprawiedliwości" 1973, nr 2, s. 93-102 [in Polish].

Leonieni M., Michalski W. (1975). *Conditions for the effectiveness of the conditional discontinuance of criminal proceedings in judicial practice* Warsaw 1975 [in Polish].

Marek A., *The Penal Code. Comment*, Warsaw 2010 [in Polish].

Muszyńska A., *Redressing damage caused by crime*, Warsaw 2010 [in Polish].

Pilch A., *The nature of the obligation to redress damage under the provisions of Art. 46 of the Polish Penal Code, and the issues of jurisprudential practice* (in:) Z. Ćwiąkalski, G. Artymiak (ed.), *Substantive-law and procedural aspects of redressing damage in the light of penal codifications of 1997, and proposed amendments,* Warsaw 2010. [in Polish].

Szczepaniec M., Zygmunt J., *The obligation to redress damage in the system of probation measures* (in:) Z. Ćwiąkalski, G. Artymiak (ed.), Substantive-law and procedural aspects of redressing damage in the light of penal codifications of 1997, and proposed amendments, Warsaw 2010 [in Polish].

Szewczyk M., *Some remarks on the compensation as punitive measure in the draft of the Penal Code*, "Palestra" 1995, nr 1-2, s. 69-77 [in Polish].

Wróbel W. Zoll A., *Polish Penal Law. General part,* Cracow 2012 [in Polish].

Zoll A, *Substantive law issues of the conditional discontinuance of criminal Proceedings*, "Scientific issue of Jagiellonian University. Part of Law" 1973, nr 62 [in Polish].

Zoll A. (in:) A. Zoll (ed.), *The Penal Code. General part: Comment to articles 1–116*, Warsaw 2012 [in Polish].

Literatura:

Bojarski T. (red.*), Polskie prawo karne. Zarys części ogólnej*, Warszawa 2008 [in Polish].

Ciechanowicz W., *Efektywność warunkowego umorzenia postępowania karnego w praktyce prokuratury wojskowej, "Wojskowy* Przegląd Prawniczy" 1978, nr 2, s. 211-222 [in Polish];

Ćwiąkalski Z., *Wybrane zagadnienia warunkowego umorzenia postępowania,* referat wygłoszony podczas IX Bielańskiego Kolokwium Karnistycznego, „Środki związane z poddaniem sprawcy próbie", Warszawa, 16 maja 2012 r., umieszczony na stronie internetowej Czasopisma Prawa Karnego i Nauk Penalnych http://www.czpk.pl/index.php/wideo/bielanskie-kolokwium-karnistyczne/ix-bielanskie-kolokwium-karnistyczne (stan na 30 stycznia 2016). [in Polish].

Gorzkiewicz D., *Warunkowe umorzenie postępowania karnego w praktyce (uwagi de lege ferenda do art. 66§3 k.k.),*"Wojskowy Przegląd Prawniczy" 2007, nr 4, s. 59-67 [in Polish].

Gostyński Z., *Obowiązek naprawienia szkody w nowym ustawodawstwie karnym,* Kraków 1999 [in Polish].

Hofmański P. (red.), *Kodeks postępowania karnego. Komentarz do art. 297-467 k.p.k.*, Warszawa 2011. [in Polish].

Juszka K., *Sądowa ochrona praw człowieka w stosowaniu instytucji warunkowego umorzenia postępowania karnego* (w:) R. Sztychmiler, J. Krzywkowska (red.), *Problemy z sądową ochroną praw człowieka,* Olsztyn 2012, s. 273-278 [in Polish].

Królikowski M., Szczucki K. (*red.), Prawo karne – część ogólna. Orzecznictwo,* Warszawa 2011. [in Polish].

Lachowski J., Oczkowski T.*, Obowiązek naprawienia szkody jako środek karny,* "Prokuratura i Prawo" 2007, nr 9, s. 40-58 [in Polish].

Leonieni M., *Podjęcie postępowania umorzonego warunkowo przez sąd*, "Problemy Wymiaru Sprawiedliwości" 1973, nr 2, s. 93-102 [in Polish].

Leonieni M., Michalski W., Efektywność warunkowego umorzenia postępowania karnego w praktyce sądowej, Warszawa 1975 [in Polish].

Marek A.*, Kodeks karny. Komentarz,* Warszawa 2010 [in Polish].

Muszyńska A., *Naprawienie szkody wyrządzonej przestępstwem*, Warszawa 2010 [in Polish].

Pilch A., *Charakter obowiązku naprawienia szkody w trybie art. 46 k.k. a problemy praktyki orzeczniczej* (w:) Z. Ćwiąkalski, G. Artymiak (red.), *Karnomaterialne i procesowe aspekty naprawienia szkody w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, Warszawa 2010. [in Polish].

Szczepaniec M., Zygmunt J., *Obowiązek naprawienia szkody w systemie środków probacyjnych (w:)* Z. Ćwiąkalski, G. Artymiak, *Karnomaterialne i procesowe aspekty naprawienia szkody w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian,* Warszawa 2010 [in Polish].

Szewczyk M., *Kilka uwag dotyczących odszkodowania jako środka karnego w projekcie kodeksu karnego,* "Palestra" 1995, nr 1-2, s. 69-77 [in Polish].

Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna,* Cracow 2012 [in Polish].

Zoll A, *Materialnoprawna problematyka warunkowego umorzenia postępowania karnego*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze" 1973, nr 62 [in Polish].

Zoll A. (w:) A. Zoll (red.). 2012, *Kodeks karny. Część ogólna. Komentarz do art. 1– 116 k.k*, Warszawa 2012 [in Polish].

The translations of Polish titles are provided by the author of this study By "Polish Code of Criminal Procedure" I am referring to Statute of 6 June 1997 Code of Criminal Procedure (Journal of Laws of 1997, No. 89, item 555 with later amendments). By "Polish Penal Code" I am referring to Statute of 6 June 1997 Code of Penal Law (Journal of Laws of 1997, No. 88, item 553 with later amendments) Statistical analysis was consulted with Dr. Adam Ćmiel Eng. from the Department of Applied Mathematics of Stanisław Staszic AGH University of Science and Technology in Krakow

Summary

The objective of this paper is to present the redress the damage from both the viewpoint of the opinions in legal doctrine, and the correlations between its individual resolutions and their impact on the way of ending the probation period. The analysis of these correlations will be presented by showing factors resulting from the author's own research of 405 court cases, pertaining to the effectiveness of the conditional discontinuance of criminal proceedings. These were cases individually numbered in the archives of the District Court in Krakow and the regional courts situated within the area of its jurisdiction. The presented analysis also includes a presentation of postulates *de lege ferenda* concerning both legislative amendments to the statutory construction of the legal institution of conditional discontinuance of criminal proceedings, as well as the action which should be undertaken in the area of its practical application within the framework of binding regulations.

KEY WORDS: *institution conditional discontinuance of criminal proceedings, duty to redress the demage, effectiveness, research of court records, statistical analysis, Spearman corellaction coefficient, U-Manna Whitneya test and Kruskala-Wallisa test.*

Streszczenie

Celem artykułu jest przedstawienie teoretycznych i praktycznych aspektów oraz zależności statystycznych związanych z nakładaniem zobowiązania do naprawienia szkody w wyroku warunkowo umarzającym postępowanie karne. Niniejsza prezentacja zostanie oparta na analizie wyników badań własnych 405 spraw sądowych dotyczących efektywności warunkowego umorzenia postępowania karnego, opatrzonych sygnaturą akt Sądu Okręgowego w Krakowie oraz sądów rejonowych położonych na obszarze jego właściwości. Do analizy badań wykorzystano współczynnik korelacji porządku rang Spearmana model ANOVA (1-czynnikowa ANOVA), test U-Manna Whitneya, test Test Kruskala-Wallisa. Przedmiotowa analiza obejmuje także przedstawienie postulatów de lege ferenda dotyczących zarówno modyfikacji ustawowej konstrukcji badanej instytucji, jak również działań jakie należy podjąć w praktyce jego stosowania w ramach obowiązujących przepisów.

SŁOWA KLUCZOWE: *warunkowe umorzenie postępowania karnego, zobowiązanie do naprawienia szkody, efektywność, badania spraw sądowych, analiza statystyczna, współczynnik korelacji porządku rang Spearmana, test U-Manna Whitneya, test Test Kruskala-Wallisa.*

Autor

Dr Karol Juszka - Uniwersytet Jagielloński, Wydział Prawa i Administracji, Katedra Prawa Karnego, tel. +48 503 65 69 86, e-mail: karol_juszka@interia.pl

Grzegorz Wolak

On the Future of Contracts of Succession in the Polish Law of Succession

O przyszłości umów dziedziczenia w polskim prawie spadkowym

Introduction

De lege lata, the contract of succession in the Polish legal system is not tantamount to the title to succeed. Such titles are the last will and testament and the relevant law. This is expressly reaffirmed in Article 926 § 1 of the Civil Code ("CC") which reads that the title to succeed results from the law or from a will (testament). In connection with the work of the Codification Commission for Civil Law appointed by the Minister of Justice, one of its objectives being the drawing up of a new code, including its Book V covering the law of succession, it is worth having a closer look at the idea and purpose of introducing a contract of succession (as title to succession) into Polish law. This paper will address this question. The author will also review the approach of the doctrine of Polish civil law to the purpose and usefulness of such a contract.

First, the concept of contract of succession needs to be explained to enable any further consideration. This is more than desirable also with a view to dispelling confusion existing in the terminology regarding inheritance agreements.

The concept of contract of succession

The literature on the subject differentiates between the contract of succession *sensu largo* and the contract of succession *sensu stricto*. As for the

former of the two contracts, the doctrine lists various types of contracts that have a minor or major, direct or even indirect impact on inheritance (e.g. the contract of waiver of succession) without, however, conferring the title of succession. On the other hand, the contracts that involve the title of succession (i.e. which contain the appointment of heirs) are considered the contracts of succession *sensu stricto.*

The Polish doctrine is not always unambiguous in its terminology related to these legal events.

J. Gwiazdomorski[1] used to define the contracts of succession *sensu largo* as "agreements in which the parties decide, in one way or another, on the estate of a deceased person." One of the parties to such an agreement must be to the person whose estate is covered by the agreement, i.e. the future testator. At the same time, Gwiazdomorski proposed the following categorisation:

A) Positive contracts of succession *sensu largo.* Among them, he pointed to the so-called contracts on universal succession and contracts on singular succession. The former aimed at the appointment of an heir, their subject matter being the estate to be left by a living person. Therefore, they should be considered as a third title to succeed (the basis for inheritance), permitted in some jurisdictions alongside the law and a will.
B) Negative contracts of succession *sensu largo,* their subject matter being "the waiver by a person of a financial benefit that they would receive by way of inheritance of the estate of another person."

For J. Gwiazdomorski, positive contracts of succession regarding the universal inheritance were the contracts of succession *sensu stricto.* Thus, the contracts of succession *sensu stricto* are the agreements that confer the title to succession. In Polish law *de lege lata* there are two such titles: first, the will, a unilateral legal act of beneficial nature whose statement of will has no specific recipient; it is also revocable, personal, causal, formal, and *mortis causa,* aimed to dispose of the testator's assets, and second, the law (Article 926 CC).

A. Doliwa shares a similar stance in his current literature. This author sees the term "agreements concerning an estate" as equivalent to "contracts of succession." As he points out, there are two categories of agreements

[1] See J. Gwiazdomorski, in *Encyklopedja Podręczna Prawa Prywatnego*. Ed. Konic, H. Vol. I. Warszawa 1934, 541.

concerning an estate. First, a contract of succession, in the broad sense, is an act at law having a specific, yet different effect on inheritance (e.g. a contract of waiver of succession). Second, a contract of succession, in the narrow sense, is agreement constituting a title of inheritance (such a contract may also contain dispositions upon death, i.e. the appointment of an heir or devices and instructions from one or both parties).[2] A. Doliwa's position is, by my standards, somewhat inconsistent as he points out elsewhere that the contract of waiver of succession is not a contract of succession as it is not a title to succession.[3]

As regards the terminology, it is worth noting the opinion expressed by M. Niedośpiał and M. Pazdan.

M. Niedośpiał says that the contract of succession (*Erbvertrag*), in the technical and legal sense, is an act in which the testator names a designated person (counterparty, third party) an heir and the person agrees to it. In other words, it is a contract in which the testator appoints the counterparty or a third party as an heir. The contract of succession, in the broad sense, is an agreement in which the testator names an heir or establishes a devise or instruction. Accepting this broader meaning of the term is not justified according to M. Niedośpiał. However, this concept should be confined only to the agreement to appoint an heir, as follows from the wording itself anyway (as in § 1249 ABGB; in a broader sense – as pointed out above – in § 2278 BGB, Article 494-497 ZGB). In any case, we should always be aware of what approach to the term is adopted; the contract of succession, in the broad sense, cannot contain other dispositions than the appointment of an heir, devise or instruction (cf. § 2278 BGB), e.g. the appointment of an executor of the will or family dispositions. If they can be contained under a given legislation, they can be treated as unilateral dispositions of the last will (testamentary) and included only in the contract of succession.[4]

M. Pazdan argues that the term "contract of succession" is given by some a broad interpretation and is used interchangeably with "agreements concerning an estate." He claims that this is misleading. It is more correct

[2] See A. Doliwa, in *System prawa prywatnego*. Vol. 10. Law of Succession, Warszawa 2009, 914.

[3] See A. Doliwa, in "Umowa o zrzeczenie się dziedziczenia." *EP* (6-9) 2008, 15.

[4] See M. Niedośpiał, *Swoboda testowania*. Bielsko-Biała 2002, 21. This last reservation of this author referring to the conversion of the contract of succession into a will does not seem well-grounded.

to distinguish between these two terms and use "contract of succession" in the narrow sense to refer to an agreement comprising another legal act parallel to a will which may lead to the title to succession. So, the contract of succession is an agreement whose one or both parties make dispositions *mortis causa*. Such an interpretation of the contract of succession is one of the components of agreements concerning an estate.[5]

In my opinion, no distinction should be drawn between the contracts of succession *sensu largo* and *sensu stricto.* This can ensue in unnecessary legal oversimplifications and misunderstandings. Since the contract of waiver of succession is not the title to succession (its subject matter and purpose is not to establish an heir), it is not the contract of succession *(sensu largo)*. Still, it is and should be counted among the inheritance agreements concerning a living person or agreements concerning an estate. It would be ungrounded, in my opinion, to put an equal sign between the concepts: "contract of succession" and "agreement concerning an estate." I reckon that the logical relationship between these concepts is that any contract of succession is an agreement concerning an estate (inheritance) but not every agreement concerning an estate (inheritance) is a contract of succession. This is the case with the contract of waiver of succession.

As you can see, the terminology pertaining to the problems in question is anything but uniform, and, as rightly pointed out by M. Niedośpiał, it is important to be aware what kind of legal transaction is being handled. For no doctrinal term or phase determines what type of legal event (legal transaction) we are dealing with.

Contracts of succession in other legal systems

Unlike in Poland, some foreign legislations allow contracts of succession. This is the case in, for example:

- German law – § 1941, 2274-2300 of the Civil Code[6],
- Austrian law – § 602 ABGB: "Contracts of succession, for the entire estate or part thereof, may be concluded only between spouses. The relevant provisions are contained in the chapter on matrimonial

[5] See M.Pazdan, in *System prawa prywatnego*. Vol. 10. Law of Succession, Warszawa 2015, 1146.

[6] For more details, see A. Duda, "Umowa dziedziczenia w prawie niemieckim – pojęcie i moc wiążąca." *Rej.* (3-4) 2004, 116- 148.

contracts" (cf. 1249-1254 ABGB); § 603 ABGB: "To what extent a donation in prospect of death is considered a contract or a last will is determined in the chapter on donations,"

- Swiss law – Articles 512-515 of the Swiss Civil Code (GBS),
- Hungarian law – § 655-658 of the Hungarian Civil Code of 1959 and § 7.48 - 7.52 and § 7.54 of the new Civil Code effective from 15 March 2014.

The legal approaches pursued in the different legal systems differ slightly from one other. Some systems allow not only unilateral (including one party's dispositions only) and bilateral (including both parties' dispositions) contracts of succession but also multilateral ones (e.g. German law). Sometimes, there are limitations as to: the parties to such contracts (e.g. only spouses or engaged couples can be the parties provided that they enter into marriage), the type of permitted inheritance dispositions (sole appointment of an heir or any other disposition), and finally a group of beneficiaries of these dispositions (only the parties to the contract or also third parties).[7]

Contracts of succession, in jurisdictions where they are permitted, are acts at law in case of death (*mortis causa*). Yet, they are not the dispositions of the last will as they do not serve the disposal of assets in the event of death and cannot be cancelled by a unilateral legal action. Instead of revocability – which is one of the three (next to the unilateral nature and *mortis causa*[8]) inherent attributes of the will as a legal act – in the case of contracts of succession by the operation of law which permits the "cancellation" of their legal effects, there is the subsequent agreement between the parties aimed to nullify the effects of the previously concluded contract of succession.

Contracts of succession are not found in French, Italian, or Dutch law or in many other legal systems.

---

[7] See, e.g. M. Pazdan, "Umowy dziedziczenia w polskim prawie prywatnym międzynarodowym." *SIS* (5) 1979, idem "O umowach dziedziczenia zawieranych przed polskimi notariuszami." *Rej.* (4-5)1996, 6off, idem "Czynności notarialne w międzynarodowym prawie spadkowym." *Rej.* (4) 1998, 112-113, A. Duda, *Umowa dziedziczenia*…, op.cit., 116ff, Rott-Pietrzyk, E. "Umowa dziedziczenia – uwagi de lege lata i de lege ferenda." *Rej.* (2) 2006, 166ff.

[8] The occurrence of these three attributes is a prerequisite for regarding a will as an act at law; see e.g. E. Skowrońska-Bocian, *Prawo spadkowe*. Warszawa 2011, 72.

Justification of the prohibition of contracts of succession

Justification of the prohibition on entering into contracts of succession (contracts of succession *sensu stricto* – as some would like to stress) is fairly simple. The point is that they would constrain the contracting parties. After the conclusion of a contract of succession, unlike in the case of a will which the testator may at any time revoke without the need to justify their decision, the cancelling of the legal consequences of such a contract would only be possible by concluding another agreement nullifying the previously made contract of succession. For various reasons, to reach such a consensus by the parties could be impossible or very challenging. Consequently, any admission of the existence of contracts of succession would violate the principle that the testator is entitled to determine their last will as long as they die (*ambulatoria est voluntas testatoris usque ad mortem*).

The literature on the subject highlights, beginning with the regulation contained in Article 58 Code of Obligations, that the prohibition of concluding agreements concerning the estate of a living person is driven by the concern that they could lead to "attempts on the testator's life" by those who would be entitled to the estate as a result of such acts at law.[9] For this reason, M. Niedośpiał regards such acts as contrary to the principles of social coexistence as "exposing the testator's life to risk."[10] A. Kubas supported a view that the admission of agreements concerning the estate of a living person might also lead to the violation of the prohibition of custody substitution as referred to in Article 964 CC.[11]

Contracts of succession were already ruled out by the 1946 Decree on the Law of Succession. The so-called socio-political theses of the draft version of the decree published in 1946 read that: "The draft decree does not allow contracts of succession mainly due to the resulting constraint suffered by the parties in that they are unable to terminate the contract unilaterally or amend it, even though any changes taking place from the time of conclusion of the contract in the parties' life situations justify the need to modify or cancel the contract. The admission of contracts of succession would stand oppose to the fundamental assumptions of any

[9] See R. Longchamps de Bérier, *Zobowiązania*. Lwów 1939, 150; Namitkiewicz, J. *Kodeks zobowiązań. Komentarz dla praktyki*. Vol. I - General, Łódź 1949, 89.

[10] See M. Niedośpiał, "Darowizna na wypadek śmierci." *PiP* (11) 1987, 53.

[11] See A. Kubas, *Umowa na rzecz osoby trzeciej*. Warszawa-Kraków 1976, 84.

dispositions of the last will which always offers the possibility of a unilateral cancellation or modification of such dispositions."[12] Addressing the objection of arbitrariness, the same reasons can be assumed to have caused the authors of the Civil Code not to legitimize contracts of succession in the Polish legal system.

In this context, the current approach adopted by the Polish legislator appears as balanced and intermediate. For the Polish legislator only permits a contract of waiver of inheritance, at the same time disallowing agreements that would result in the appointment to inheritance. In my view, such a solution should be assessed positively.

The work of the Codification Commission for Civil Law

For more than ten years, our country has been witnessing a discussion on the future shape of civil law, including the provisions of the law of succession. With regard to the regulations on succession, the demand for a profound revision is indisputable. Some changes have already been implemented (e.g. on the order of intestate succession, bequest, liability for succession debt).

Part of the discourse addresses the question of whether to amend the 1964 Civil Code or draw up a new code. In addition, under the Regulation of the Council of Ministers dated 22 April 2002 on the appointment, organisation and operation of the Codification Commission for Civil Law,[13] the Minister of Justice established the said Commission. Pursuant to Article 8(1) of the Regulation, the Commission's responsibilities comprise the following: 1) formulation of the guidelines and general concept of modifications to civil law, family law and private commercial law, 2) formulation of the guidelines and development of draft provisions of fundamental importance for the system of civil law, family law and private commercial law, including tasks arising from the harmonisation of Polish law with European law.

The Commission had already prepared the drafts of earlier amendments to the Civil Code. The result of its work was, among others, the incorporation in the Civil Code of the institution of bequest (*legatum per*

[12] DPP (3-4) 1946, 69.

[13] Journal of Laws of 14 May 2002, No. 55, item 476 as amended.

vindicationem), as a devise of material consequences, and the amendment of the provisions on the heirs' liability for the debts under the succession which consisted in the introduction of the principle of responsibility for the so-called benefit of inventory (i.e. up to the value established in the inventory of the estate's assets), in place of the currently binding principle of unlimited liability. The solution provided for in the Civil Code regulations effective before 18 October 2015 did not protect the heirs properly against the unexpected liability for succession debts exceeding the value of inherited assets. Currently, the Commission is working on the new code. For now, they have drafted Book I (the general part). Other books are also being developed: Book II (property law), Book III (contract law), Book IV (family law) and Book V (law of succession).

The previous term of the Codification Commission for Civil Law closed on 10 February 2015. The Commission chairperson for the new term was appointed on 1 March 2015 and the members two weeks later. Pursuant to § 6 of the Regulation of the Council of Ministers dated 22 April 2002 on the appointment, organization and operation of the Codification Committee for Civil Law, Prof. Tadeusz Ereciński appointed two permanent teams: for substantive law and for the civil procedure. In addition, other teams are formed to perform specific tasks: either related to the drafting of the new code or preparing new legal content to be implemented in the current legislation.

The following teams have been established to handle tasks related to the designing of the new Civil Code: for agreements to the transfer of rights, for service agreements, for loan agreements, for security of accounts receivable, for insurance agreements, and for licence agreements. This group also covers teams responsible for the review of preliminary drafts of the new law, not yet approved by the Commission. These teams are the following: for agreements to use a thing or rights, for regulations on the conclusion of agreements, for regulations on the conduct of affairs of other individuals without commission, for unjust enrichment, and for regulations of illegal acts. Other soon-to-be appointed teams will address the issues of property law, family law, and the law of succession.

The Codification Commission for Civil Law in the term of 2011-2015 mainly focused on the draft of the new code. They reviewed the drafts of the general part of the law of obligations (general part of Book II) and property law (Book III), prepared by the Commission's task forces of the previous term. They closed the review of Book I – the general part – and included the reservations made to the draft version of this book published

in 2009. The new version of the book will be published on the Commission's website after the expiry of the current term. The work on the law of succession also reported some progress (Book V). Work was started on the specific part of the law of obligations. The responsible teams addressed the agreements transferring things and rights and agreements regulating the provision of services.[14]

That in the new code the matters concerning the law of succession will – as it is now – be included in a separate book should be seen as positive. It is of secondary importance that the number of the book will change from IV to V.[15] The law of succession is part of civil law and the legal standards applicable to succession are generally to be found in the civil codes of many states. It follows from the fact that the classic European codes that have influenced other national regulations invariably contained a book on the law of succession. This is true of, for example, the German Civil Code (*Bürgerliches Gesetzbuch*), Book V (law of succession), or the French Civil Code (*Code Civil* – Napoleon Code), Book III (the methods of acquiring property rights). Similarly in the Civil Code of Québec, Canada, the Civil Code of Louisiana, USA,[16] the Dutch Civil Code (*Burgerlijk Wetboek*), the Spanish Civil Code (*Código Civil*) or the Italian Civil Code (*Il Codice Civile*).[17] These codes are considered the most exemplary regulations of civil law. They were often treated as model for the civil legislation in states with less impressive legal traditions (e.g. Ukraine, Estonia, Hungary[18]). Today,

[14] See the information provided on the website of the Ministry of Justice: www.ms.gov.pl.

[15] The added number of the book of the Civil Code results from the inclusion (as Book IV) of the provisions previously contained in the Family and Guardianship Code.

[16] Louisiana is the only US state not influenced by common law. Positive law is the prevailing system. Civil law in this state is based on the code basically reflecting the French model. This is unique across the United States (see M. Załucki, *Wydziedziczenie w prawie polskim na tle porównawczym*. Warszawa 2010, 265 – 266).

[17] The codes are available on-line at the following addresses: http://gesetze-im-internet.de/; http://www.droit.org/;http://www.canlii.org/;http://legis.state.la.us/;http://wetboek-online.nl/http://www.ucm.es/; http://www.jus.unitn.it/.

[18] Cf. Gârdos, P. "Recodification of the Hungarian Civil Law." *European Review of Private Law* (5)2007, 707ff; Dovgert, A. "The New Civil Code of Ukraine 2003: Main Features, Role in the Market Economy and Current Difficulties in Implementation." In *Commercial Law Reform in Russia and Eurasia*. University of Illinois at Urbana-Champaign 2005, 2ff. (conference proceedings); idem, "Ukraińska kodyfikacja prawa prywatnego międzynarodowego." *Kwartalnik Prawa Prywatnego* (2) 2008, 349ff. (after M. Załucki, "Ku jednolitemu prawu spadkowemu w Europie. Zielona Księgi Komisji Wspólnot Europejskich o dziedziczeniu i testamentach." In *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*. Vol. VII. A.D. MMIX, 104).

all major codifications of civil law in the world, including the European codes, contain regulations concerning the law of succession.

The results of the work of the Codification Commission on Book V covering the succession *mortis causa* are still to be published. It should be noted, however, that in the discussion on the reform of civil law there is an express objective of regulating donation in case of death (*donatio mortis causa*). A need is highlighted for introducing far-reaching changes in the dispositions of the last will. The will is to remain the main form of such dispositions; at the same time, there is a plan to abandon some forms of will: allograph and specific. An open case is the question of admissibility of the conclusion of contracts of succession (also between the spouses). Joint wills are advocated along with the partition dispositions *mortis causa,* the so-called partition wills and custody substitution.

Therefore, the overall trend in the changes seems predictable at this point. The point is to contribute as much as possible – through the flexibility of regulations on the institution of law of succession and granting any potential testator the broadest possible freedom of disposing of (disposition) of their estate in the event of death – to the implementation of one of the functions of the law of succession, namely to encourage individuals to lead an active life and generate wealth.

Doctrine's approach to the need for the introduction of the institution of contract of succession into the Polish legal system

The literature on the subject reveals certain differences of opinion as to the need for the introduction of the institution of contract of succession into the Polish legal system.

More than twenty years ago, J. Pietrzykowski wrote that when amending the law of succession one should be "very careful as the existing regulations are rested on the well-established practice supported by the extensive case-law and legal literature..., and the stability of the legislation is specifically crucial in the area of transfer of property rights and obligations of the deceased to his or her heirs."[19] I think that J. Pietrzykowski's remark

[19] See J. Pietrzykowski, "Wybrane zagadnienia reformy prawa cywilnego." In *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci Profesora Tomasza*

should also be referred to the development of the new code. In any case, there is no point in making changes for the change's sake. Regrettably, the adoption of knee-jerk changes to the law is nothing new to the Polish legislator. The consequences (of course negative) of this state of affairs are self-evident. Those who face the operation of the law on the daily basis know it best.

Apparently, a supporter of the introduction into Polish civil law of the third, next to the will and the law, title to succession, i.e. a contract of succession, was K. Przybyłowski back in the 1920s; he would say that, "in modern legislations, one can observe a trend towards broader admission of contracts of succession."[20] He recognized the institution of the contract of waiver of succession as progressive and deserving attention.

S. Wójcik expressed a dissenting voice.[21] He stressed that "the state of affairs with regard to the titles to succession has so strongly established itself in the public awareness over the last sixty years that any change thereto is not only unnecessary for material reasons but would also be unjustified for psychological reasons. Consequently, the future should see no third title to succession introduced into our law in the form of a contract, even concluded between strictly designated persons."

Still, E. Rott-Pietrzyk ventured a moderate opinion.[22] In her judgement, it seems that if the legislator decided to have the institution of joint will introduced, and the notaries public were positive about the donation *mortis causa*, considered admissible by many representatives of the doctrine anyway, the institution of the contract of succession *sensu stricto* would be superfluous. And the legal instruments existing in our law would satisfy the interests of the parties to these contracts. In particular, it would allow testators – to a satisfactory degree – to have their will fulfilled and to have the influence on the future of their estate after their death. The implementation of the concept of contract of succession is not required to make our inheritance law more efficient and responsive to some existing needs (unlike in Germany where contracts of succession have a long

Dybowskiego. Studia Iuridica. Vol. XXI. Warszawa 1994, 249-250.

[20] See K. Przybyłowski, *Prawo spadkowe. Wedle stenogramu wykładów uniwersyteckich wydał J. Rodkowski*. Lwów 1929, 40.

[21] See S. Wójcik, "O niektórych uregulowaniach w prawie spadkowym. Uwagi *de lege ferenda*." In *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*. Eds. Ogiegło, L., Popiołek, W., Szpunar, M. Kraków 2005, 1489.

[22] See E. Rott-Pietrzyk, "Umowa dziedziczenia – uwagi *de lege lata* i *de lege ferenda*." *Rej.* (2) 2006, 178-179.

tradition (over a hundred years) and such a contract is widely used in civil law transactions). Moreover, as E. Rott-Pietrzyk underlined, of certain significance is the legal tradition of having two titles to succession (a will and the law), strongly established in the legal awareness of the public and lawyers (in particular the judicature and notaries) over more than sixty years, as pointed out by S. Wójcik, too.

The author also underlines that: 1) a new tradition replaced the former one because, before the Polish legislator decided the matter in the Decree on the Law of Succession of 1946 and later in the Civil Code of 1964, both the contracts of succession and joint wills had been allowed in part of the shared lands; 2) there has been no thorough study in Poland that would indicate that there is, in practice, a demand for new instruments of succession law concerning the legal transaction *mortis causa.* Finally, E. Rott-Pietrzyk says that if no sound and persuasive argument is put forward in favour of the introduction of the contract of succession into the Polish legal system, it would be advisable not to have it in place. For this could in fact be seen as an unwarranted experiment. The introduction of a new legal institution cannot be only justified by the desire to join the ranks of more progressive legislations. She concluded metaphorically, inspired by the work of J. Lorentowicz, that the law of succession should not be "a scene for the avant-garde theatre and far-reaching experiments."[23]

Like S. Wójcik and E. Rott-Pietrzyk, I also oppose the introduction of the contract of succession into the Polish law of succession. I fully subscribe to the reasoning of E. Rott-Pietrzyk. I am far from thinking that such a sentiment should be considered backward (or in any case the absence of progressiveness) on the side of the Polish legislator. I would like to reiterate the arguments based on:

- first – a long tradition in the Polish legal system of having only titles to succession (a will and the law); still, it must be admitted that the law prevails as the title to succession,
- second – the recognition as admissible by a larger part of the doctrine, and recently by the Supreme Court (see Resolution of the Supreme Court of 13 December 2013r., III CZP 79/13[24]), of contracts of donation *mortis causa,*

[23] Ibidem, 179.
[24] OSNC 12 (2014), item 98.

- third – the provisions of Articles 1048-1050 CC on the contract of waiver of succession treated by some part of the doctrine as a contract of succession *sensu largo,*
- four – the fact that in the legal systems which allow a joint will, its similarity to the contract of succession is sometimes so strong that it is often called a "weakened" version of the contract of succession (this is the case in German law with reference to a mutual will). At this point, I wish to underline that I would advocate the establishment of a matrimonial joint will in Polish law of succession. Thus, a joint will, had it become an institution of the Polish Civil Code, would, to some extent, fulfil the objectives of the contract of succession.
- five – admissibility in the case-law of the Supreme Court of the construct of conversion of an invalid – because of the existing dispositions of two testators – of allograph will (Article 951 CC) into two separate oral wills (see e.g. Resolution of Seven Judges of the Supreme Court of 22 March 1971, III CZP 91/70[25]),
- six – the absence of the need registered by both the legal theoreticians and practitioners (notaries) to introduce a third title to succession.

It should be noted that in the legal systems permitting the contract of succession it is the strongest foundation of appointment to succession (follows by the last will and the law). This means that if the testator has entered into a contract of succession, the subsequent dispositions in the will or other inheritance agreement are invalid in so far as they violate the counterparty's rights ensuing from the previously concluded inheritance agreement. Similarly, any testamentary dispositions prior to the contract of succession are nullified if they limit the right of the individual benefiting from the contract of succession. For example, such a solution is to be found in § 2289 of the German Civil Code; it is similar in the ABGB – despite the absence of an express provision, it results from the nature of this agreement.[26] These three titles to succession (contract, will, law) pertaining to other parts of the estate are not mutually exclusive and can operate in parallel (e.g. heir A receives 1/3 of the estate under the will, 1/3 of the estate under the contract of succession and 1/3 of the estate under

[25] OSNCP 10(1971), item 168.
[26] See, e.g. Niedośpiał, M. *Swoboda…,* op.cit., 23.

the law; the same can apply for several heirs: e.g. heir A receives 1/3 of the estate under the contract of succession, heir B receives 1/3 of the estate under the will, heir C receives 1/3 of the estate under the law).[27]

I am of the opinion that there is no convincing argument that support the introduction of the contract of succession into the Polish legal system as an inheritance agreement constituting the title to succession. I would advocate this view also if the contract were to be "reserved" only for the spouses. The arguments of the representatives of the legal literature endorsing the prohibition of inheritance agreements covering the estate of a living person, including the contracts of succession, are still valid.

Conclusion

De lege lata, in Polish civil law, the law and a will are the only titles to succession. a contract is not the title to succeed (as follows from the provisions of Article 926 § 1, Article 941 and Article 1047 of the Civil Code). Article 1047 of the Civil Code does not rule out the conclusion of such contracts that, although made between living persons (*inter vivos*), have an impact not only on the possible appointment to inheritance but also on the partition of an estate and the right to legitim. For example, as a result of a donation agreement concluded between the future testator and their sole heir at law which transfers the ownership of an asset being the future inheritance, the value of the estate to be inherited in the future may be close to zero. On account of various donations made by the testator and expenses incurred for the upbringing and education of the heir, there are relevant settlements occurring between the heir or donees and the person entitled to legitim (Article 993 et seq. of the Civil Code). Finally, the testator's donations and the costs of raising and educating the heir are of importance in the settlements between the heirs in connection with the partition of the estate (Article 1039 et seq. of the Civil Code).

In this article, I endeavoured to demonstrate the futility of introducing into the Polish legal system of the contract of succession *sensu stricto* as a title to succession. I am of the opinion that existing legal, i.e. the two titles to succession, under the law and a will, should remain in force. On the other hand, I would propose the introduction into the Polish matrimonial

[27] Ibidem.

law of succession of the institution of joint will. As for the passable changes to the law of succession, it would be advisable, in my view, to have in place a clearer regulation of donation in case of death (*donatio mortis causa*). I would also advocate the introduction of the so-called partition wills and abandon specific wills, however, maintaining an allographic testament as ordinary will (along with two other forms of ordinary will: holographic and notarized).

Bibliography

Doliwa A., Umowa o zrzeczenie się dziedziczenia, EP (6-9) 2008.

Doliwa A., in System prawa prywatnego. Vol. 10. Law of Succession, Warszawa 2009.

Dovgert A.. The New Civil Code of Ukraine 2003: Main Features, Role in the Market Economy and Current Difficulties in Implementation. In Commercial Law Reform in Russia and Eurasia. University of Illinois at Urbana-Champaign 2005, (conference proceedings).

Duda A., Umowa dziedziczenia w prawie niemieckim – pojęcie i moc wiążąca, Rej. (3-4) 2004.

Gârdos, P. "Recodification of the Hungarian Civil Law." European Review of Private Law (5) 2007.

Gwiazdomorski, J. in Encyklopedja Podręczna Prawa Prywatnego. Ed. Konic, H. Vol. I. Warszawa 1934.

Kubas A., Umowa na rzecz osoby trzeciej, Warszawa-Kraków 1976.

Longchamps de Bérier R., Zobowiązania, Lwów 1939.

Namitkiewicz, J. Kodeks zobowiązań. Komentarz dla praktyki. Vol. I - General, Łódź 1949.

Niedośpiał M., Darowizna na wypadek śmierci, PiP (11) 1987.

Niedośpiał M., Swoboda testowania, Bielsko-Biała 2002.

Pazdan M., Umowy dziedziczenia w polskim prawie prywatnym międzynarodowym, SIS (5) 1979.

Pazdan M., O umowach dziedziczenia zawieranych przed polskimi notariuszami Rej. (4-5) 1996.

Pazdan M., Czynności notarialne w międzynarodowym prawie spadkowym, Rej. (4) 1998.

Pazdan M., in System prawa prywatnego. Vol. 10. Law of Succession, Warszawa 2015.

Pietrzykowski J., Wybrane zagadnienia reformy prawa cywilnego. In Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci

Profesora Tomasza Dybowskiego. Studia Iuridica. Vol. XXI. Warszawa 1994.
Przybyłowski K., Prawo spadkowe. Wedle stenogramu wykładów uniwersyteckich wydał J. Rodkowski, Lwów 1929.
Rott-Pietrzyk E., Umowa dziedziczenia – uwagi de lege lata i de lege ferenda, Rej. (2) 2006.
Wójcik S., O niektórych uregulowaniach w prawie spadkowym. Uwagi de lege ferenda. In Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana. Eds. Ogiegło, L., Popiołek, W., Szpunar, M. Kraków 2005
Skowrońska – Bocian E., Prawo spadkowe, Warszawa 2011.
Załucki, M. Ku jednolitemu prawu spadkowemu w Europie. Zielona Księgi Komisji Wspólnot Europejskich o dziedziczeniu i testamentach. In Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego. Vol. VII. A.D. MMIX.
Załucki M., Wydziedziczenie w prawie polskim na tle porównawczym, Warszawa 2010.

Summary

The author discusses the future of contracts of succession in the Polish law of succession. *De lege lata*, in its Article 1047, the Civil Code prohibits the entering into contracts of succession with the exception of contract of waiver of succession. Considering the ongoing work of the Codification Committee for Civil Law aimed to draw up a new code, the purpose of introducing such contracts as a third – next to a will and the law – title to succeed seems worthy of consideration. The author expresses the view that with regard to the succession titles the existing solution contained in Article 926 § 1 of the Civil Code should be maintained. Consequently, he advocates against the introduction of contracts of succession into Polish law.

KEY WORDS: contract of succession, estate, contract, succession, title to succession

Streszczenie

W artykule autor omawia zagadnienie przyszłości umów dziedziczenia w polskim prawie spadkowym. *De lege lata* kodeks cywilny w art. 1047 kc zakazuje zawierania umów o spadek, z jednym wyjątkiem odnoszącym się do umowy zrzeczenia się dziedziczenia. Z uwagi na prace Komisji Kodyfikacyjnej Prawa Cywilnego mającej opracować nowy kodeks cywilny, uprawnionym wydaje się rozważenie celowości ich wprowadzenia do nowego kodeksu cywilnego jako trzeciego – obok testamentu i umowy – tytułu powołania do spadku. Autor jest

zdania, że w zakresie tytułów powołania do spadku zasadnym jest pozostawienie obecnego rozwiązania wyrażonego w art. 926 § 1 kc. Tym samym opowiada się przeciwko wprowadzaniu do polskiego prawa spadkowego umów dziedziczenia.
SŁOWA KLUCZOWE: *Umowa dziedziczenia, spadek, umowa, dziedziczenie, tytuł powołania do spadku.*

Autor

Grzegorz Wolak, LLD, Vice-President and Chairman of the 2nd Penal Department of the District Court in Stalowa Wola, assistant professor in the Department of Private Law, Faculty of Law and Social Sciences in the Stalowa Wola Campus of John Paul II Catholic University of Lublin

Eliza Kosiorek

Problem przydatności odpowiedzialności porządkowej we współczesnych stosunkach pracy

The Issue of the Usefulness of Disciplinary Liability in Today's Working Relations

Rys historyczny odpowiedzialności porządkowej - wprowadzenie

Stosowanie środków dyscyplinujących w stosunkach zatrudnienia ma odległe tradycje sięgające jeszcze początków XIX wieku, kiedy to utrzymanie dyscypliny pracy pozostawało w wyłącznej gestii pracodawcy. Ewolucja „władzy dyscyplinarnej"[1] pracodawcy wiązała się natomiast ze stopniowym jej ograniczaniem. Środkiem ograniczającym samowolę pracodawcy w kwestiach stosowania wobec pracowników środków dyscyplinujących była instytucja regulaminu pracy, a więc obligatoryjnego aktu wewnątrzzakładowego pochodzącego wprawdzie od pracodawcy, ale zarazem ograniczającym subiektywizm w rozstrzyganiu spraw indywidualnych. Dodatkowo, w toku rozwoju historycznego na treść regulaminu pracy miał wpływ czynnik pracowniczy.

[1] Określenie to występuje w ustawodawstwie francuskim, które przyznaje każdemu pracodawcy specyficzne uprawnienie określane mianem p*ouvoir disciplinaire.* Według G. Camerlyncka władza ta jest niezbędnym elementem uprawnień kierowniczych przysługującym osobie odpowiedzialnej za dobre funkcjonowanie przedsiębiorstwa. zob. J. Pélissier, A. Supiot, A. Jeammaud, Droit du trawail, Éditions Dalloz, Paryż 2002, s. 957. zob. także *G. Camerlynck, Conlusions de M. Le Professeur Camerlynck [w:] Actes du Cinquieme Congres International de Droit du Travail et de la Securite Sociale, tom II, Imprimerie Emmanuel Vitte, Lyon 1963*, s 995.

W toku rozwoju historycznego upoważniono sądy do kontrolowania tego, czy zarzucane pracownikowi czyny mają naturę uzasadniającą zastosowanie sankcji. Wyrazem ideologii praw człowieka, będącej efektem działalności organizacji międzynarodowych i europejskich było ustanowienie zakazu dyskryminacji pracowników m.in. w dziedzinie stosowania kar [2].

W Polsce obowiązek ustalania i stosowania regulaminów pracy wprowadzono rozporządzeniem Prezydenta Rzeczypospolitej z dnia 16 marca 1928 r. o umowie o pracę pracowników umysłowych oraz w wydanym w tej samej dacie rozporządzeniem o umowie o pracę robotników[3]. W przepisach tych rozporządzeń zawarto zasady stosowania kar porządkowych, które w przypadku robotników miały postać kar pieniężnych nakładanych w razie naruszenia ściśle określonego katalogu wykroczeń[4], zaś w stosunku do pracowników umysłowych zastrzeżone były jako kary umowne. W katalogu kar znalazła się również dopuszczalność rozwiązania umowy o pracę bez wypowiedzenia, które miało zastosowanie w stosunku do ogółu pracowników[5]. Poza tym regulaminy pracy wydawane na podstawie przytoczonych rozporządzeń mogły zawierać środki upominawcze.

Istotne zmiany dotyczące tej formy odpowiedzialności wprowadziła po wojnie ustawa z dnia 19 kwietnia 1950 r. o zabezpieczeniu socjalistycznej dyscypliny pracy[6]. Celem ustawy wydanej w czasach stalinowskich było

---

[2] Z. Góral, *Pracownicza odpowiedzialność porządkowa*, Acta Universitatis Lodziensis, Folia Iuridica nr 29, Łódź 1987, s.14.

[3] Dz. U. z 1928 r., Nr 35, poz. 323 oraz poz. 324. Przepisy art. 50 rozporządzenia o umowie o pracę robotników i art. 44 rozporządzenia o umowie o pracę pracowników umysłowych wskazywały na zakres treści regulaminu pracy. zob. także Z. Fenichel., *Prawo pracy Komentarz*, Kraków –Warszawa 1939, s.387-389.

[4] art. 43-45 rozporządzenia o umowie o pracę robotników wskazywały, że „ Kary pieniężne mogą być nakładane na robotników, jeżeli są przewidziane w regulaminie pracy i tylko za następujące przekroczenia: 1) za rozmyślnie złe lub niedbałe wykonanie robót oraz za rozmyślne psucie podczas niej materiałów narzędzi i maszyn; za nieprzybycie do pracy, 2) spóźnianie się do pracy lub samowolne jej opuszczenie w ciągu dnia roboczego lub bez uzasadnionej przyczyny, 3) za zakłócenie spokoju, 4) za znajdowanie się przy pracy w stanie nietrzeźwym, 5) za nieprzestrzeganie przepisów ostrożności przy obchodzeniu się z ogniem, światłem i t.p., zamieszczonych w regulaminie pracy. Kary pieniężne nie mogły być nakładane na robotnika po upływie trzech dni od ustalenia przekroczenia (…)". Por. Z. Fenichel., *Zarys polskiego prawa robotniczego*, Kraków 1930, s. 198 i n. Ustalenie w dekrecie ścisłego katalogu przekroczeń, za które dopuszczalne było ustanawianie kar pieniężnych. M. Święcicki uznawał za ważną zaletę rozporządzenia. Por. M. Święcicki „*Instytucje polskiego prawa pracy w latach 1918-1939*", Warszawa 1960, s.144.

[5] D. Klucz, *Kompetencje dyscyplinujące pracodawcy a ochrona jego interesów,* MoPr 2005, Nr 8, s.215-219.

[6] Dz. U. z 1950 r., Nr 20, poz.168.

zabezpieczenie w sposób rygorystyczny dyscypliny pracy. Ustawa przewidywała nawet kary sądowe za nieusprawiedliwione opuszczenie pracy lub niepunktualne jej rozpoczęcie. Ustawa uchyliła przepisy przewidujące karę pieniężną dla pracowników fizycznych, wprowadzając jednolitą odpowiedzialność dyscyplinarną i karną. Regulaminy pracy wydane na podstawie rozporządzeń z 1928 r. straciły wówczas znaczenie, jako podstawa normowania odpowiedzialności porządkowej pracowników. Po sześciu latach obowiązywania ustawa została uchylona, a regulaminom pracy przywrócono pierwotne znaczenie.

Charakterystycznym rysem prawa pracy w okresie totalitarnego socjalizmu były takie cechy jak paternalizm połączony z represyjnością prawa. Wyrazem tej ostatniej cechy było szerokie pojmowanie odpowiedzialności pracowniczej obejmujące utratę różnorakich korzyści w następstwie naruszenia obowiązków w szczególności o charakterze porządkowym (np. opuszczenie dnia bez usprawiedliwienia). Określano to jako zespół środków wpływających na stan tzw. dyscypliny formalnej w zakładzie pracy (możliwość utraty lub zmniejszania premii, potrącenia dodatków stażowych, niewypłacenia nagród jubileuszowych itp.) Przerost stosowania tego rodzaju środków w tamtej formacji ustrojowej, przybierał niekiedy postać „kaskady kar" spływającej na pracownika, co drastycznie naruszało zasadę *ne bis in idem*. Stan ten był powodem wprowadzenia do kodeksu pracy art. 113[1] głoszącego iż: „*Pracownik, wobec którego zastosowano karę przewidzianą w art. 108, nie może być pozbawiony dodatkowo tych uprawnień wynikających z przepisów prawa pracy, które są uzależnione od nienaruszenia obowiązków pracowniczych w zakresie uzasadniającym odpowiedzialność porządkową*"[7]. Przepis ten w nowych warunkach ustrojowych uległ dezaktualizacji i został uchylony w 2002 roku.

Model odpowiedzialności porządkowej obowiązujący w zasadzie do dzisiaj został ukształtowany w wyniku kodyfikacji prawa pracy, która weszła w życie 1 stycznia 1975 roku. W raz z wejściem w życie kodeksu pracy przestała obowiązywać reguła, zgodnie z którą zakład pracy mógł stosować kary porządkowe tylko w przypadku uwzględnienia ich w regulaminie pracy. Zasady stosowania tych kar zostały bowiem wyczerpująco unormowane w samym kodeksie. Tym samym odpowiedzialność porządkowa stała się instytucją ustawową. Nie oznacza to jednak całkowitego zerwania więzi między funkcjonowaniem odpowiedzialności porządkowej

[7] Dz. U., Nr 135, poz. 1146.

a treścią obowiązującego u pracodawcy regulaminu pracy. W kodeksie pracy ustalono obowiązujący do dzisiaj katalog kar porządkowych złożony z dwóch kar o charakterze moralnym: upomnienie i nagana oraz karę pieniężną stanowiącą dolegliwość o charakterze materialnym. Dodatkowo, według pierwotnego brzemienia kodeksu pracy, kierownik zakładu pracy mógł, gdy uznał to za stosowne, zaostrzyć karę nagany przez podanie jej do wiadomości załogi, co miało oddziaływać wychowawczo na postawę całej załogi. Określono również dokładnie obowiązki kierownika i jego kompetencje w zakresie egzekwowania obowiązków pracowniczych za pomocą środków o charakterze porządkowo-represyjnym[8].

Po roku 1989 nastąpiły znaczące przemiany stosunków pracy. W konsekwencji nieuchronna okazała się także potrzeba dostosowania instytucji odpowiedzialności porządkowej pracowników do nowych uwarunkowań społeczno-gospodarczych. Uczyniono to częściowo przy okazji gruntownej nowelizacji Kodeksu pracy w 1996 r.[9]. W wyniku tej nowelizacji ustanowiono zasadę sądowej kontroli kar porządkowych, czego kodeks pracy pierwotnie nie przewidywał, a co stanowiło realizację wysuwanych od wielu lat postulatów przedstawicieli nauki prawa pracy[10]. Dodatkowo należy podkreślić, że w wyniku nowelizacji kodeksu pracy z 1996 r. tzw. lutowej, instytucja odpowiedzialności porządkowej została rozciągnięta na wszystkie zakłady pracy, podczas gdy wcześniej dotyczyła wyłącznie tzw. uspołecznionych zakładów pracy. Po drugie, nakładanie kar porządkowych uznano wyraźnie za uprawnienie dyskrecjonalne pracodawcy; podczas gdy poprzednio niektóre sformułowania odnośnych przepisów działu IV Kodeksu pracy mogły sugerować, że stosowanie kar porządkowych jest w zasadzie obowiązkiem zakładu pracy, mieszczącym się w kategorii tzw. obowiązków zakładu pracy wobec państwa[11]. Kierownik zakładu pracy zarządzający nim jednoosobowo w imieniu państwa mógł bowiem

[8] Jednocześnie należy wspomnieć, że w pierwotnej wersji rozdział VI działu czwartego Kodeksu pracy zatytułowany był „Kary za naruszenie porządku i dyscypliny". D. Klucz, *Kompetencje dyscyplinujące pracodawcy a ochrona jego interesów* MoPr 2005, Nr 8, s. 2 zob. A. Mirończuk *Kodeks pracy Nowe prawo pracy poradnik dla rad zakładowych*, Warszawa 1975 s. 393

[9] Dz. U. z 1996 r., Nr 24, poz. 110 z późn. zm.

[10] Za możliwością podważania decyzji o zastosowaniu kary porządkowej na drodze sporu sądowego opowiadali się w szczególności M. Święcicki., *Odpowiedzialność pracownika a dopuszczalność drogi sądowej,* PiP 1962, nr 5-6, s.853 oraz J. Jończyk *Zagadnienia ochrony dóbr osobistych w prawie pracy*, PiP 1963, nr 5-6, s.819.

[11] J. Wratny (red.), *Kodeks pracy., Komentarz,* Warszawa 2013,s.277 i n. zob. też L. Florek (red.) *Kodeks pracy. Komentarz,* Warszawa 2011, s. 593 i n.

odstąpić tylko wyjątkowo od kary, w razie gdy uznał za wystarczające zastosowanie wobec pracownika środków oddziaływania wychowawczego. Można więc stwierdzić, że był on zobligowany w sposób określony przepisami ustawy do reagowania na wszelkie niewłaściwe zachowania pracowników, godzące w porządek i dyscyplinę pracy[12]. W zależności od okoliczności sprawy mógł on zastosować kary porządkowe lub inne środki dyscyplinujące[13]. Do roku 1996 „siłą bezwładu" odpowiedzialność porządkowa na płaszczyźnie regulacji prawnej pozostawała jakby wpisana w koncepcję ustroju socjalistycznego i „socjalistycznej praworządności", w ramach której akcentowano organizacyjną i wychowawczą rolę prawa pracy[14].Warto podkreślić, że przed nowelizacją kodeksu pracy z 1996 r. termin „odpowiedzialność porządkowa" był pojęciem nauki prawa pracy. Obecnie terminem tym zatytułowano Rozdział VI Działu czwartego kodeksu pracy.

Istotne zmiany w konstrukcji odpowiedzialności porządkowej zaproponowała Komisja Kodyfikacyjna prawa Pracy[15] przedstawiając w 2007 r. projekt nowego kodeksu pracy. W projekcie tym uporządkowano i skomprymowano rodzaje kar porządkowych. Zaproponowano usunięcie z ich katalogu kary pieniężnej uzasadniając to rzadkością jej stosowania, pozostawiając jedynie kary na czci. Zrezygnowano ponadto z konsultacji związkowej przy rozpatrywaniu przez pracodawcę wniesionego przez pracownika sprzeciwu.

---

[12] Kodeks pracy z dnia 24 czerwca 1974 r. Preambuła cyt.:" Kierownik socjalistycznego zakładu pracy odpowiada za prawidłowe wykonywanie zadań zakładu wynikających z planu społeczno-gospodarczego rozwoju kraju, racjonalne wykorzystanie wszystkich czynników produkcji, jak również stałą poprawę warunków pracy, a w szczególności warunków bezpieczeństwa i higieny pracy - oraz zgodnie z zasadą jednoosobowego kierownictwa reprezentuje zakład pracy i zarządza tym zakładem w imieniu państwa. Kierownik zakładu jest uprawniony do nawiązywania i rozwiązywania stosunku pracy. Kierownik zakładu współdziała z organizacją związkową i okazuje pomoc w spełnianiu jej statutowych zadań"(...).

[13] Z. Góral, *Pracownicza odpowiedzialność porządkowa*, Acta Universitatis Lodziensis, Folia Iuridica nr 29, Łódź 1987, s.65-66; Z. Góral, *Środki prawa stymulujące wykonywanie obowiązków pracowniczych*, Acta Universitatis Lodziensis. Folia Iuridica 1993, nr 58, s.15; podobnie W. Masewicz, *Środki dyscyplinujące pracownika*, Warszawa 1993, s.55.

[14] J. Pacho, *Obowiązek właściwego organizowania pracy i zapewnienia dyscypliny pracy*, PiZS 1978, nr11., s.3.

[15] *Kodeks pracy, zbiorowy kodeks pracy - projekty opracowane przez Komisję Kodyfikacyjną prawa pracy*, Katowice 2010, s.163-164.

Instytucja odpowiedzialności porządkowej współcześnie

We współczesnych stosunkach pracy instytucja odpowiedzialności porządkowej traci na znaczeniu. W wyniku transformacji ustrojowej w miejsce socjalistycznych zakładów pracy pojawili się „realni pracodawcy" w osobach prywatnych właścicieli środków produkcji. W nowym modelu stosunków pracy pracodawca nie pełni już przypisanej mu w dawnym ustroju roli kierownika zakładu pracy, lecz troszczy się o realizację własnych celów gospodarczych. Egzekwowanie pożądanej postawy pracownika w procesie pracy pozostaje zatem w ścisłym związku z indywidualnym interesem każdego pracodawcy. Pracodawca prywatny dysponuje przy tym innymi niż sankcje porządkowe środkami wymuszającymi na pracowniku przestrzeganie porządku w zakładzie pracy. W warunkach gospodarki rynkowej efektywnym środkiem pozostającym w gestii pracodawców są w szczególności instrumenty polityki kadrowej, w czym mieści się stosunkowo łatwa możliwość zwolnienia pracownika naruszającego swoje obowiązki. Środkiem takim jest przede wszystkim możliwość rozwiązania umowy z pracownikiem w trybie niezwłocznym lub za wypowiedzeniem, które, w orzecznictwie Sądu Najwyższego[16] zostało uznane za zwykły sposób rozwiązania umowy o pracę, a więc zwykły sposób prowadzenia przez pracodawcę polityki kadrowej. Łatwość rozwiązywania z pracownikiem umowy o pracę, która ma miejsce już obecnie, a w większym jeszcze stopniu stanowi postulat przyszłych zmian w kodeksie pracy[17], sprawia, że stosowanie środków odpowiedzialności porządkowej nie jest pracodawcy przydatne w takim stopniu, jak to miało miejsce dawniej. Jednym z uzasadnień zastosowania narzędzi odpowiedzialności porządkowej, na które wcześniej się powoływano, było gromadzenie przez pracodawcę argumentów uzasadniających zwolnienie niesumiennego pracownika, co obecnie, jak się wydaje, nie ma większego znaczenia. Należy się zgodzić ze stwierdzeniem, że perspektywa utraty pracy oraz trudność znalezienia nowego zatrudnienia stanowią na ogół dostateczną groźbą zmuszającą pracowników do przestrzegania obowiązków, w tym związanych z dyscypliną i porządkiem w pracy.

[16] **Wyrok SN z dnia 23.09.2004 r., I PK 487/03**
[17] *Kodeks pracy…*,op.cit., s.163 i nast.

Czynnikiem dyscyplinującym pracowników jest również stan braku równowagi na rynku pracy[18]. Trudno przy tym zaprzeczyć, że utrzymujące się ciągle jeszcze na wysokim poziomie bezrobocie, spowodowane różnymi przyczynami w tym postępem technologicznym i kryzysem ogólnoświatowym, oddziałuje na postawy pracowników, którzy z obawy o utratę pracy i niemożność znalezienia innego zatrudnienia, przykładają się do należytego wykonywanie obowiązków. Dodatkowo należy podkreślić fakt, że, w związku z nadejściem tzw. ery postindustrialnej, w coraz szerszym zakresie stosowane są nietypowe formy zatrudnienia (telepraca, zatrudnienie tymczasowe, zatrudnienie na czas określony itp.), w ramach których stabilizacja pracowników w zatrudnieniu jest jeszcze niższa, zaś stosowanie środków dyscyplinujących, z uwagi na charakter pracy, jest nader problematyczne. Nowe formy zatrudnienia ingerujące w tradycyjny stosunek pracy stwarzają pracodawcy możliwość elastycznego pod różnymi względami wykorzystania zasobów pracy w przedsiębiorstwie[19].

Instytucja odpowiedzialności porządkowej nie występuje w ramach cywilnoprawnych form zatrudnienia[20], gdy tymczasem wzrasta liczba osób świadczących pracę na podstawie tego rodzaju umów[21] (o dzieło, zlecenia – potocznie zwanych „śmieciówkami"). Zleceniodawcy, mimo braku możliwości stosowania odpowiedzialności porządkowej, są w stanie skutecznie dyscyplinować osoby wykonujące pracę na ich rzecz. Wśród instrumentów wpływających na zachowanie zarówno pracowników jak i osób świadczących pracę w ramach niepracowniczego zatrudnienia, można wymienić zwiększenia lub obniżenie wynagrodzenia, awans, przeniesienie na inne stanowisko, przyznanie określonych przywilejów lub ich pozbawienie[22].

---

[18] Liczba bezrobotnych zarejestrowanych w urzędach pracy w końcu grudnia 2014 r. stopa bezrobocia wyniosła 11,4% czyli 1825,2 tys. osób; w końcu grudnia 2015 r. stopa bezrobocia wyniosła 9,8% czyli 1563,3 tys. osób (dane pochodzą z GUS.).

[19] J. Wratny, prelegent, *Zjazdu Współczesne problemy prawa pracy i ubezpieczeń społecznych – sprawozdanie z XVIII Zjazdu Katedr/Zakładów Prawa Pracy i Ubezpieczeń Społecznych w dn. 26-28.05.2011 r.*

[20] W podmiotach kontrolowanych przez Państwową Inspekcję Pracy (PIP) na podstawie umów cywilnoprawnych (głównie umów zlecenia, umów o dzieło) pracowało w 2012 r. 458 tys. osób (tj. 12,6% ogółu osób kontrolowanych). Dla porównania w roku 2011 – 10,7%, natomiast 2010 roku – 10,9%. Umowy takie głównie występują w branży budowlanej, usługach ochroniarskich, branży handlowej.

[21] Według danych z ZUS w grudniu 2012 liczba osób wykonujących pracę na tej podstawie wyniosła prawie 816 tys.

[22] Wyrok SN z dnia 26.07.1978 r., IPR 64/79, OSNC 1980, nr 1-2, poz.17.

Wszystko to nie oznacza, że instytucja odpowiedzialności porządkowej uległa na dzień dzisiejszy całkowitej dezaktualizacji i przepisy regulujące tę odpowiedzialność należałoby niezwłocznie uchylić Za jej dalszym utrzymaniem w prawie pracy, przynajmniej w dłużej trwającym okresie przejściowym, przemawiają przypisywane jej tradycyjne walory prewencyjno-wychowawcze. Pracodawcy należy pozostawić szeroki wachlarz środków oddziaływania na załogę, w tym prawo do zauważania nagannego postępowania pracownika i reagowania na jego przewinienia. Ma to szczególne znaczenie w tradycyjnych formach pracy skooperowanej i podporządkowanej[23], które nadal dominują, zwłaszcza w sektorze własności państwowej i w komunalnych zakładach pracy. W tych sektorach instytucja odpowiedzialności porządkowej nadal znajduje istotne i praktyczne zastosowanie z uwagi na bardziej sformalizowany tryb działania tych zakładów.

Na stanowisku utrzymania tej instytucji stanęła też Komisja Kodyfikacyjna, która opracowała w 2007 roku projekt nowego kodeksu pracy[24]. Wysoka stopa bezrobocia, *nota bene* spadającego w ostatnim czasie, będąca sama przez się efektywnym środkiem determinującym przestrzeganie dyscypliny pracy, nie przekreśla racji bytu takiej instytucji prawa pracy, jaką jest odpowiedzialność porządkowa pracowników. Poza tym należy zauważyć, że bezrobocie występuje z różnym nasileniem w różnych sektorach lub dziedzinach gospodarki. Występują grupy osób bardziej lub mniej narażonych na jego skutki. Zróżnicowanie to jest również dostrzegalne na rynku pracy. Nie sposób poza tym przyjąć, aby zakres ochrony interesów pracodawcy uwarunkowany był jedynie stopą bezrobocia lub popytem na określoną kategorię pracowników (np. o specyficznych kwalifikacjach). Uzasadnione więc wydaje się poszukiwanie optymalnych rozwiązań w systemie prawa pracy. Jednym ze środków służących ochronie interesów pracodawcy powinna pozostać odpowiedzialność porządkowa pracowników jako instrument opcjonalny, do którego pracodawca będzie sięgał, jeżeli uzna to za właściwe zabezpieczenie swoich interesów.

---

[23] W. Patulski, *O pracowniczej odpowiedzialności porządkowej* (w:) A. Patulski, K. Walczak *(red.)*, *Jedność w różnorodności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana profesorowi Wojciechowi Muszalskiemu*, Warszawa 2009, s.140.

[24] *Kodeks pracy…*,op.cit., s.163 i n.

Podsumowanie

Należy podkreślić, że przydatność kar porządkowych jako instrumentu oddziaływania na postawy pracowników nie zależy wyłącznie od czynników obiektywnych związanych m.in z sytuacją na rynku pracy. Zależy również od organizacji pracy, od stylu kierownictwa załogą. Ich rola będzie mniejsza w ramach partycypacyjnego stylu zarzadzania, gdy pracownikom zapewnia się większą swobodę przy realizacji zadań. Będzie również mniejsza, gdy pracodawca położy większy nacisk na kierowanie załogą poprzez bodźce pozytywne. Wiele zależy wreszcie od osobowości konkretnego pracownika i jego nastawienia do pracy. W stosunku do pracowników, którym nie zależy na utrzymaniu się w danym miejscu pracy, z natury niezdyscyplinowanych, oddziaływanie przy pomocy środków dyscyplinujących nie wpłynie na poprawę ich postępowania[25].

Bibliografia

A. Mirończuk *Kodeks pracy Nowe prawo pracy poradnik dla rad zakładowych*, Warszawa 1975 s. 393

D. Klucz, *Kompetencje dyscyplinujące pracodawcy a ochrona jego interesów,* MoPr 2005 Nr 8

G. Camerlynck, Conlusions de M. Le Professeur Camerlynck [w:] Actes du Cinquieme Congres International de Droit du Travail et de la Securite Sociale, tom II, Imprimerie Emmanuel Vitte, Lyon 1963

J. Jończyk *Zagadnienia ochrony dóbr osobistych w prawie pracy*, PiP 1963, nr 5-6

J. Pacho, *Obowiązek właściwego organizowania pracy i zapewnienia dyscypliny pracy*, PiZS 1978, nr11

J. Pélissier, A. Supiot, A. Jeammaud, Droit du trawail, Éditions Dalloz, Paryż 2002

Kodeks pracy, zbiorowy kodeks pracy - projekty opracowane przez Komisję Kodyfikacyjną prawa pracy, Katowice 2010

Kodeks pracy. Komentarz, red. J. Wratny, Warszawa 2013

Kodeks pracy. Komentarz, red. L. Florek, Warszawa 2011

M. Święcicki „*Instytucje polskiego prawa pracy w latach 1918-1939*", Warszawa 1960

M. Święcicki., *Odpowiedzialność pracownika a dopuszczalność drogi sądowej,* PiP 1962, nr 5-6

Staszewska E., red. Góral Z., *Odpowiedzialność pracownicza,* Warszawa 2013

W. Masewicz, *Środki dyscyplinujące pracownika*, Warszawa 1993

[25] E. Staszewska, red. Góral Z., *Odpowiedzialność pracownicza,* Warszawa 2013,s.208.

W. Patulski, *O pracowniczej odpowiedzialności porządkowej* (w:) A. Patulski, K.Walczak (red.), *Jedność w różnorodności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana profesorowi Wojciechowi Muszalskiemu*, Warszawa 2009

Z. Fenichel., *Prawo pracy Komentarz*, Kraków –Warszawa 1939

Z. Fenichel., *Zarys polskiego prawa robotniczego*, Kraków 1930

Z. Góral, *Pracownicza odpowiedzialność porządkowa*, Acta Universitatis Lodziensis, Folia Iuridica nr 29, Łódź 1987

Z. Góral, *Środki prawa stymulujące wykonywanie obowiązków pracowniczych*, Acta Universitatis Lodziensis. Folia Iuridica 1993, nr 58

Akty Prawne

Ustawa z dnia 19 kwietnia 1950 r. o zabezpieczeniu socjalistycznej dyscypliny pracy (Dz. U. 1950 Nr 20 poz.168.).

Ustawa z dnia 10 września 1956 r. w sprawie uchylenia przepisów o zabezpieczeniu socjalistycznej dyscypliny pracy. (Dz.U. 1956 Nr 41, poz. 187).

Ustawa z dnia 2 lutego 1996 r. o zmianie ustawy - Kodeks pracy oraz o zmianie niektórych ustaw. (Dz.U. z 1996 r. Nr 24, poz. 110).

Rozporządzenie Prezydenta Rzeczypospolitej z dnia 16 marca 1928 r. o umowie o pracę pracowników umysłowych (Dz. U. 1928 Nr 35 poz. 323).

Rozporządzenie Prezydenta Rzeczypospolitej z dnia 16 marca 1928 r. o umowie o pracę robotników (Dz. U. 1928 Nr 35 poz. 324).

Orzecznictwo

Wyrok Sądu Najwyższego z dnia 23.9.2004 r., I PK 487/03.

Wyrok SN z dnia 26.07.1978 r., IPR 64/79, OSNC 1980, nr 1-2, poz.17.

Streszczenie

Celem artykułu jest przyjrzenie się pojęciu odpowiedzialności porządkowej pracowników zawartej w ustawie z dnia 26. 06. 1974 r. (Dz. U. z 1974, Nr 24, poz. 141, ze zm.) i jej zachodzącym zmianom na przełomie lat. Przepisy te umożliwiają realizację uprawnień pracodawcy stosowania tylko takich kar porządkowych, jakie przewiduje kodeks pracy w razie zaistnienia określonych kodeksem przesłanek. Na początku środkiem ograniczającym samowolę pracodawcy w kwestiach stosowania wobec pracowników środków dyscyplinujących była instytucja regulaminu pracy. W toku rozwoju historycznego upoważniono sądy do kontrolowania tego, czy zarzucane pracownikowi czyny mają naturę uzasadniającą zastosowanie sankcji. W konsekwencji model odpowiedzialności

porządkowej obowiązujący w zasadzie do dzisiaj został ukształtowany w wyniku kodyfikacji prawa pracy, która weszła w życie 1 stycznia 1975 roku. W obecnych stosunkach pracy pracodawca nie pełni już przypisanej mu jak w dawnym ustroju roli kierownika zakładu pracy, lecz troszczy się o realizację własnych celów gospodarczych. W dalszej części artykułu Autor przedstawia argumenty przemawiające za utrzymaniem odpowiedzialności porządkowej w prawie pracy (w dobie gospodarki rynkowej) przypisując jej tradycyjne walory prewencyjno-wychowawcze. Autor jest świadomy, że artykuł nie ujmuje wszystkich zagadnień w sposób wyczerpujący, niektóre zaś kwestie tylko sygnalizuje. Zamiarem autora, było zwrócenie uwagi na odpowiedzialność porządkową pracownika, a nie szczegółowe omówienie zagadnienia.
SŁOWA KLUCZOWE: *odpowiedzialność porządkowa, prawo pracy, pracownik, pracodawca*

Summary

The aim of this article is the look upon the concept of disciplinary liability as stated in the law from 26th June 1974 (Journal of Laws from1974, No 24, item 141, as amended) and its ongoing changes within the years. This law enables the realization of the employer's right to use only such disciplinary penalties as are expected in the Labour Law in the case of conditions which the Law describes. At the beginning a means which restricted the employer's license in the issues of using disciplinary measures towards employees was the institution of working regulations. Within historic development the courts became empowered to control whether the employee's actions were of the kind which justified the use of sanctions. As a consequence, the model of disciplinary liability, which has existed up to now, was shaped as a result of the codification of the Labour Law, which came into force on 1st January 1975. In current working relations, the employer does not longer perform the role of the manager of the workplace, as in the past system, but takes care of his/her own business aims. In the further part of the article the author presents arguments for keeping disciplinary liability in the Labour Law (in the era of market economy), attributing it preventive-educational benefits. The author is aware that the article does not contain all the issues in full, thus some issues are only signaled. The author's aim was to draw attention to the employee's disciplinary liability- not to provide a detailed description of the issue.
KEY WORDS: *ordinal responsibility, labour law, employee, employer*

Autor

Eliza Kosiorek, absolwentka studiów doktoranckich oraz Executive Doctoral Business Administration w INE PAN, doktorantka prof. dr hab. J. Wratnego; zainteresowania: podróże.

Beata Piasny

Zarządzanie respektujące wartości. Raport z badań

Recenzja książki A. Hermana, T. Oleksyna, I. Stańczyk (red.), Wydawnictwo Difin, Warszawa 2016, liczba stron 276.

W 2016 roku została wydana, przez Wydawnictwo Difin, książka pod redakcją Andrzeja Hermana, Tadeusza Oleksyna i Izabeli Stańczyk zatytułowana Zarządzanie respektujące wartości. Raport z badań. Redaktorzy publikacji, w szczególności dwóch pierwszych to osoby z dużym doświadczeniem i dorobkiem w zakresie poruszanej w pracy problematyki. Andrzej Herman jest profesorem, dyrektorem Instytutu Zarządzania Wartością (IZW) Kolegium Nauk o Przedsiębiorstwie w Szkole Głównej Handlowej w Warszawie, zaś Tadeusz Oleksyn jest profesorem, kierownikiem Zakładu Aksjologii i Pomiaru Wartości w IZW SGH. Izabela Stańczyk to doktor nauk ekonomicznych, adiunkt w Instytucie Ekonomii, Finansów i Zarządzania na Uniwersytecie Jagiellońskim.

Publikacja ta stanowi efekt kilkuletnich prac zespołu badaczy z uczelni warszawskich: Szkoły Głównej Handlowej, Wyższej Szkoły Finansów i Zarządzania oraz Szkoły Głównej Gospodarstwa Wiejskiego, a także Uniwersytetu Jagiellońskiego w Krakowie. Publikacja zawiera treści związane z tematem wartości i ich roli w zarządzaniu.

Monografia składa się z trzech rozdziałów, literatury, refleksji końcowych oraz spisu tabel, wykresów i rysunków. W rozdziale pierwszym przedstawione zostały informacje ogólne o badaniu ankietowym, tj. cele badawcze, tezy badawcze, respondenci, wspomaganie informatyczne badań. Następnie dokonano charakterystyki próby badawczej, przedstawiono postrzeganie różnych grup wartości w zarządzaniu, a mianowicie postrzeganie wartości ekonomicznych na tle innych grup wartości, postrzeganie wartości etycznych i kulturowych, postrzeganie wartości kompetencyjnych i rozwojowych oraz postrzeganie wartości społecznych

i obywatelskich. Dalej dokonano opisu wpływu wartości na zarządzanie w opiniach respondentów oraz zajęto się poszukiwaniem zależności tj. wartości w organizacji a forma prawno-organizacyjna, wartości w organizacji a wielkość podmiotu wg zatrudnienia, wartości w organizacji a sekcja gospodarki oraz wartości a funkcja respondenta w organizacji.

W kolejnym podrozdziale opisano wartości, których znaczenie najbardziej się zmieniło. Następnie zajęto się rangami wybranych wartości ekonomicznych, w szczególności rangą zysku w długich okresach czasu, rangą zysku krótkookresowego, postrzeganiem konkurencyjności przedsiębiorstwa, postrzeganiem innowacyjności, postrzeganiem efektywności. Następnie zajęto się godziwym wynagrodzeniem. Następny podrozdział poświęcono rangom wybranych wartości pozaekonomicznych i opisano w nim zrównoważony rozwój, społeczną odpowiedzialność przedsiębiorstwa, wartości związane z godnością, zaufanie, równoważenie pracy zawodowej i innych sfer życia, jakość jako wartość, sprawiedliwość jako wartość oraz uczciwość jako wartość. Dalej zajęto się wartościami wspólnymi dla ludzi w organizacji, a mianowicie wyodrębnieniem wartości wspólnych dla organizacji, używanymi nazwami wartości wspólnych dla ludzi z organizacji znajomością wartości wspólnych w organizacji, wartościami najczęściej przyjmowanymi jako wspólne, oceną praktycznej użyteczności wartości wspólnych. Respektowanie wartości w polityce personalnej organizacji to kolejny podrozdział omawianej publikacji. Skupiono się w nim na uwzględnianiu wartości przy rekrutacji i doborze, przy ocenach pracowników, przy decyzjach o awansach, przy wynagradzaniu, a także promowaniu wartości poprzez wyróżnienia niematerialne. Rozdział pierwszy zakończony jest konkluzjami i wnioskami z badań ankietowych. Znalazł się tu również wykaz literatury.

Rozdział drugi omawianej pozycji stanowi raport z badań obejmujący studia przypadków czterech firm: Capgemini, Qumak SA, Five o'clock i Delphi Poland SA. Autorzy dokonują charakterystyki każdej z organizacji, by w efekcie skupić się na wartościach w systemie zarządzania każdej z nich.

Rozdział trzeci nosi tytuł wybrane kwestie aksjologiczne i porusza zagadnienia tj., współczesna aksjologia ekonomiczna i jej związki z zarządzaniem wartością ekonomiczną, aksjologia ogólna i ekonomiczna, neoliberalizm a aksjologia ekonomiczna, wielość różnych praktyk aksjologicznych i ich ekonomia, kierunki uzupełniania niekompletności teorii zarządzania wartością ekonomiczną, słabe związki zarządzania wartością ekonomiczną z zarządzaniem ryzykiem i niepewnością, nikłe związki teorii zarządzania wartością ekonomiczną z zarządzaniem kulturą, rozbieżność teorii z realiami

współczesnych rynków kapitałowych, które w coraz większym stopniu nie tyle tworzą, ile przechwytują wartości ekonomiczne, niespójność zarządzania wiedzą i wartością ekonomiczną oraz atrofia ewidencji księgowej, niedostateczne uwzględnianie ekonomii behawioralnej oraz nowej ekonomii instytucjonalnej – także w kontekście zarządzania wartością, niedocenianie rozwoju sfery Webonomics oraz jej wpływu na wartość ekonomiczną, niedostateczne uwzględnianie potrzeb wszystkich interesariuszy organizacji i koncentrowanie się głównie na interesach właścicieli/akcjonariuszy, słabość ponadnarodowych regulacji rynkowych i nadzoru korporacyjnego, związki wartości ekonomicznych z konsumpcją i zagrożenia konsumpcjonizm, problem wartości pozornych i fetyszyzacji pieniądza oraz zarządzanie przez wartości drogą do rozwoju zrównoważonego. W podrozdziale drugim opisane zostały natura wartości oraz katalogi/listy wartości w ujęciu wybranych autorów.

Monografia zakończona jest bibliografią wskazującą na szerokie uwzględnienie dorobku innych autorów, tak krajowych jak i zagranicznych. Przede wszystkim jednak jest prezentacją własnych przemyśleń i wniosków autorów, co, bez wątpienia, podnosi wartość pracy.

Dzięki usystematyzowaniu wiedzy zastanej i przedstawieniu rezultatów dociekań badawczych treści zawarte w monografii mogą być przydatne w dalszych pogłębionych badaniach oraz w realnych procesach decyzyjnych składających się na praktykę zarządzania. Walory praktyczne pracy powiększa autorski, unikatowy katalog wartości w zarządzaniu, który może być wykorzystywany bądź adoptowany w praktyce wielu organizacji - zwłaszcza w polityce personalnej, rozwoju zawodowym, integrowaniu i motywowaniu oraz tworzeniu kodeksów dobrych praktyk. Wysoko należy również ocenić warsztat metodologiczny.

Praca napisana jest w sposób zwięzły i ciekawy, jasno i treściwie. Książka ta, bez wątpienia, stanowi interesujące i wartościowe źródło wiedzy dla badaczy, studentów studiów magisterskich i doktoranckich z zakresu ekonomii i zarządzania oraz praktyków zarządzania, w szczególności dla przedsiębiorców i menedżerów oraz specjalistów ze służb HR i PR. Prezentowana monografia stanowi przykład wartościowej i godnej polecenia pozycji wydawniczej, tak z uwagi na walory naukowe jak i praktyczne.

Autor

Dr Beata Piasny – adiunkt, Katolicki Uniwersytet Lubelski Jana Pawła II, Wydział Zamiejscowy Prawa i Nauk o Społeczeństwie w Stalowej Woli, Instytut Prawa i Ekonomii, e-mail – piasnybeata@gmail.com

Artur Lis

Przywilej w Cieni 1228

Tytuł angielski.

Dokument wydany przez księcia Władysława III Laskonogiego w Cieni koło Kalisza 5 maja 1228 roku ma ogromne znaczenie dla badań historycznoprawnych. Jest to jeden z najstarszych przywilejów nadanych przez księcia dla możnowładztwa ziemi krakowskiej. Na mocy umowy w Cieni, tron krakowski objął Władysław III Lasonogi. Historyk Benedykt Zientara omawiany przywilej określił jako pierwsze *pacta conventa* w Polsce[1]. Należy zaznaczyć, że podczas wiecu książę nadał dwa przywileje: osobno dla Kościoła[2] oraz dla rycerstwa małopolskiego[3]. W niniejszym szkicu zajmiemy się drugim z wymienionych dyplomów. Dotychczasowi badacze zajmowali się tymi źródłami przeważnie na marginesie innych dociekań np. immunitetu[4]. Na szczególną uwagę zasługuje wypowiedź wybitnego mediewisty Romana Grodeckiego: „Po raz pierwszy na naszych ziemiach społeczeństwo w swej walce emancypacyjnej z monarchią absolutną otrzymało tu dokumentową gwarancję swych praw, czyli określenie granic władzy monarchy. Zwracam uwagę, że klauzula ogólna: *ius suum cuilibet conservabo*, obejmuje całe społeczeństwo we wszystkich jego warstwach, podobnie jak ustępy o podatkach i o sądownictwie. Natomiast reszta gwarancji odnosi się do jedynej wówczas politycznie aktywnej warstwy

[1] B. Zientara, *Henryk Brodaty i jego czasy*, Warszawa 2006, s. 293 i n; zob. J. Bieniak, *Jak Wincenty rozumiał i przedstawiał ustrój państwa polskiego*, [w:] *Onus Athlanteum. Studia nad Kroniką biskupa Wincentego*, red. A. Dąbrówka, W. Wojtowicz, Warszawa 2009, s. 39-46.

[2] *Kodeks dyplomatyczny katedry krakowskiej***,** t. I, wyd. F. Piekosiński, Kraków 1874, nr 20 i tablica. Zob. K. Maleczyński, *Studya nad dyplomami i kancelaryą Odonica i Laskonogiego 1202-1239*, Lwów 1928, nr 11, s. 241.

[3] *Kodeks dyplomatyczny Wielkopolski (Codex diplomaticus Maioris Poloniae)*, t. I, Poznań 1877, nr 122, s. 110-111; K. Maleczyński, *Studya nad dyplomami…*, nr 12, s. 242.

[4] J. Matuszewski, *Immunitet ekonomiczny w dobrach kościoła w Polsce do roku 1381*, Poznań 1936, s. 183-189; Z. Kaczmarczyk, *Immunitet sądowy i jurysdykcja poimmunitetowa w dobrach kościoła w Polsce do końca XIV wieku*, Poznań 1936, s. 93.

rycerskiej w obu jej odłamach, *barones et alios nobiles*. Najważniejszą gwarancją dla tych baronów tj. dostojników duchownych i świeckich, jest zobowiązanie ograniczające pozytywnie władzę księcia, mianowicie że owe sprawiedliwe prawa, którymi książę będzie się kierował w rządach, będą zależały od ich rady, od *consilium* baronów, czyli innymi słowy, te tylko prawa będą miały moc obowiązującą które rada biskupa i dostojników świeckich uzna za *iura iusta* i *honesta*. Za czym nie oświadczy się *consilium baronuw,* tego książę nie będzie mógł wykonać. Doniosła jest też klauzula, zabezpieczająca temu zobowiązaniu, tj. o destytucji z urzędu tego urzędnika, który by się tą rada baronów nie chciał kierować"[5]. Konkludując, należy stwierdzić, iż doniosłość gwarancji cieńskich dla elity politycznej przejawiała się w tym, że Władysław zobowiązywał się do rządzenia „według rady biskupa i baronów", uzależniając własne decyzje od ich zgody. Uczestniczący w radzie książęcej (ewentualnie instytucji wiecu)[6] będą decydować które prawa będą słuszne, a książę będzie ich tylko wykonawcą[7]. Należy dodać, że zobowiązanie Laskonogiego odnosiło się nie tylko wobec stanu rycerskiego ale do wszystkich stanów: „zachowam wszystkich w ich prawach".

Treść przywileju w języku łacińskim:

Ego Wladizlaus dux Polonie, Bolezlaum filium fratris mei ducis Lestconis adopto in filium et in bonis meis omnibus mobilibus et inmobilibus totaliter mihi heredem substituo, secundum quod iuravimus ego et pater eius, videlicet quod si quis nostrum habens prolem decederet, superstes prolem illam in propriam adoptaret et sibi totaliter substitueret in heredem, si propriam non haberet. Similiter econverso, et hoc cuiuslibet iure in integrum conservato. Et hoc iuro, quod ei nullo tempore inmutabo. Terram vero que ad ipsum ex paterna successione devenit, in protectionem et tutelam suscipio, et contra omnem hominem toto posse meo defendam, tam per me quam per meos

[5] R. Grodecki, *Dzieje wewnętrzne Polski XIII wieku*, [w:] *Polska piastowska*, Warszawa 1969, s. 117-474, cyt., s. 141-142.

[6] O. Balzer, *Królestwo Polskie 1295-1370*, Kraków 2005, s. 66 i nn.

[7] Zob. T. Giergiel, *Colloquia rycerstwa sandomierskiego. Od wieców dzielnicowych do zjazdu ziem polskich w Chęcinach w 1331 roku*, [w:] *Lokalne społeczności a konstytucje i uchwały sejmowe. Z dziejów parlamentaryzmu między Wisłą a Pilicą*, red. J. Muszyńska, J. Pielas, Kielce-Warszawa 2008, s. 9-55; M. Światłowski, *Rozdrobnienie dzielnicowe w Polsce (XII-XIII w.)*, Kraków 2015, s. 293-294.

ut suos milites. Barones eius eciam et alios nobiles pure diligam et benigne confovebo, plebem et terram bona fide et pie, exclusis gravaminibus et exactionibus indebitis, regam (et) ius suum cuilibet conservabo. Iudicia iniusta penitus interdico. Iura iusta et honesta secundum episcopi et baronum consilium tenebo et faciam ea firmiter ab aliis teneri; quod siquis violaverit, punietur; et si reiteraverit, dignitate quam habet privabitur. Ecclesiam vero in omnibus finibus illis constitutam, in eo quicquid obtentum ex antiqua consuetudine, vel libertate concessa a fratre meo duce Lestcone premortuo, illibatam conservare volo; salvo eo, si quid inspirante Domino pro remedio anime mee ampliare mihi placuerit in augendo.

Datum ab Incarnacione Domini anno M.CC.XXVIII in colloquio in Cena. Presentibus Vincencio Gnezdnensi archiepiscopo, Ywone Cracoviensi et Paulo Poznaniensi episcopis, abbate Tinciensi Liffrido, Radolfo cantore Cracoviensi et Ade (sic) preposito sancti Floriani et Iohanne archidiacono Zudomiriensi, Pakoslao Zudomiriensi et Marco Cracoviensi palatinis, Mstivione castellano Vizliciensi et aliis multis.

Tłumaczenie tekstu:

Ja Władysław, książę Wielkopolski, przybieram za syna Bolesława, syna brata mego księcia Leszka, i ustanawiam go całkowitym spadkobiercą wszystkich moich ruchomości i nieruchomości zgodnie z przysięgą złożoną przeze mnie i przez ojca jego, mianowicie, że jeśli któryś z nas mający potomka umrze, pozostały przy życiu przybierze tego potomka za swego i uczyni go całkowitym swoim spadkobiercą, jeśli nie będzie miał własnego potomka. W podobny sposób odwrotnie, i to z zachowaniem nieuszczuplonych praw każdego. I przysięgam, że tego nigdy nie zmienię. Ziemię zaś, która przypadła mu w spadku po ojcu, biorę w obronę i opiekę i będę jej bronił przeciw każdemu człowiekowi ze wszystkich moich sił, zarówno osobiście, jak z pomocą moich i. jego rycerzy. Również baronów jego i innych wielmożów szczerze będę miłował i łaskawie popierał, ludem i ziemią w dobrej wierze i miłościwie rządzić będę, z wykluczeniem ciężarów i podatków nienależnych, i każdemu zachowam jego prawa. Stanowczo zabraniam niesprawiedliwych sądów. Zgodnie z radą biskupa i baronów przestrzegać będę sprawiedliwych i uczciwych praw i nakażę, aby inni ściśle ich przestrzegali. Jeżeli ktoś tego nie uszanuje, poniesie karę, a jeśli ponownie tak postąpi, pozbawiony zostanie urzędu, który piastuje. Kościół zaś ustalony

we wszystkich jego granicach, w tym, cokolwiek otrzymał na podstawie dawnego zwyczaju lub przywileju, nadanego mu przez brata mego, przedwcześnie zmarłego księcia Leszka, chcę zachować bez żadnego uszczerbku, z zastrzeżeniem prawa do powiększenia dóbr jego, jeśli za natchnieniem Pana spodobałoby mi się dla zbawienia mej duszy dodać mu coś więcej.

Dan w roku od Wcielenia Pańskiego 1228 na zebraniu w Cieni, w obecności Wincentego arcybiskupa gnieźnieńskiego, Iwona biskupa krakowskiego, Pawła biskupa poznańskiego, opata tynieckiego Lutfryda, Radulfa kantora krakowskiego, Adama proboszcza św. Floriana i Jana archidiakona sandomierskiego, wojewodów Pakosława sandomierskiego i Marka krakowskiego, Mściwoja kasztelana wiślickiego i wielu innych.

Lista świadków dokumentu

Wystawca: Władysław III Laskonogi, urodzony 1161/67, zmarł 3 listopada 1231 w Środzie Śląskiej. Syn Mieszka III Starego i Eudoksji Izjasławówny. Książę wielkopolski, panował w Krakowie w latach 1202-1206 oraz 1228-1231[8].

1. Wincenty z Niałka arcybiskup gnieźnieński (1220-1232)[9], pochodził z rodu Jeleńczyków, pełnił różne funkcje kościelne: kanonik kapituły katedralnej gnieźnieńskiej, kanonik kapituły katedralnej poznańskiej, prepozyt kapituły katedralnej gnieźnieńskiej[10].
2. Iwo Odrowąż biskup krakowski (1218-1229)[11], przed objęciem biskupstwa kanclerz księcia krakowskiego Leszka Białego[12].

---

[8] M. Przybył, *Władysław Laskonogi*, Poznań 2015, s. 188; S. Pelczar, *Władysław Odonic książe wielkopolski, wygnaniec i protektor kościoła (ok. 1193-1239)*, Kraków 2013, s. 236 i n.

[9] J. Maciejewski, *Episkopat polski doby dzielnicowej 1180-1320*, Kraków - Bydgoszcz 2003, s. 225.

[10] J. Umiński, *Arcybiskup Wincenty z Niałka, następca Henryka, zw. Kietliczem,* [w:] *Księga pamiątkowa ku czci Władysława Abrahama*, red. O. Balzer i in., t. II, Lwów 1931, s. 146-163; A. Polak, *Dyplomatyka Kościoła polskiego okresu sredniowiecza. Formularz dokumentów arcybiskupów gnieźnieńskich do 1381 roku*, Opole 2014, s. 367-369.

[11] J. Maciejewski, dz. cyt., s. 232 n.

[12] A. Lis, *Najstarsze dokumenty opatowskie*, „Rocznik Lubelskiego Towarzystwa Genealogicznego" t. IV, 2012, s. 142; R. Grodecki, *Iwo Odrowąż, biskup krakowski*, [w:] *Polski Słownik Biograficzny*, t. 10, Kraków 1962-1964, s. 187-192; K. Maleczyński, *Zarys dyplomatyki polskiej wieków średnich*, Wrocław 1951, s. 100 i n.

3. Paweł biskup poznański (1212-1242)[13], związany politycznie z dworem Henryka Brodatego[14].
4. Lutfryd opat tyniecki (1224-1244).
5. Radulf kantor krakowski[15]
6. Adam proboszcz św. Floriana[16]
7. Jan archidiakon sandomierski[17]
8. Pakosław Stary (ok. 1170-1245) syn Lasoty, herbu Awdaniec, wojewoda sandomierski (1223-1229)[18], następnie kasztelan wiślicki (1230-32), kasztelan krakowski (1234), kasztelan żarnowski (1237), wojewoda krakowski (1238), kasztelan wiślicki (1239-42) oraz kasztelan sandomierski (1243)[19].
9. Marek wojewoda krakowski (1228-1230)[20], z możnego rodu Gryfitów, zmarł ok. 1230/31[21].
10. Mściwoj kasztelan wiślicki (1228-1229, 1248-50), wcześniej kasztelan sandomierski (1222-27), następnie wojewoda łęczycki (1239-41, 1243-47) oraz wojewoda krakowski (1241-43)[22].

---

[13] J. Maciejewski, dz. cyt., s. 255 n.

[14] G. Labuda, *Paweł, biskup poznański*, [w:] *Polski Słownik Biograficzny*, t. 25, Kraków 1980, s. 363-365.

[15] Radulf - archidiakon sandomierski, kanonik krakowski, następnie w latach 1224-1237 kantor krakowski; za: J. Szymański, *Wczesnośredniowieczne kanonickie środowisko zawichojsko-sandomierskie*, [w:] *Opera minora selecta Josephi Szymański*, red. T. Giergiel, B. Trelińska, Warszawa 2009, s. 40. Zob. L. Poniewozik, *Prałaci i kanonicy sandomierscy w okresie średniowiecza*, Toruń 2004.

[16] Zob. J. Szymański, *Kanonikat świecki w Małopolsce. Od końca XI do połowy XIII wieku*, Lublin 1995, s. 98-99.

[17] „Występuje on w takim charakterze w latach 1214-1229" za: J. Szymański, *Wczesnośredniowieczne kanonickie środowisko...*, s. 40, przypis 49.

[18] *Urzędnicy małopolscy XII-XV wieku. Spisy*, red. A. Gąsiorowski, Wrocław 1990, nr 960, s. 219-220.

[19] J. Bieniak, *Pakosław Stary*, [w:] *Polski Słownik Biograficzny*, t. 25, s. Kraków 1980, s. 38-42; A. Lis, *Najstarsze dokumenty...*, s. 146.

[20] *Urzędnicy małopolscy XII-XV wieku. Spisy*, red. A. Gąsiorowski, Wrocław 1990, nr 435, s. 120-122; J. Wyrozumski, *Marek wojewoda krakowski*, [w:] *Polski Słownik Biograficzny*, t. 19, s. Kraków 1974, s. 619-620.

[21] Por. M. L. Wójcik, *Ród Gryfitów do końca XIII wieku. Pochodzenie – genealogia – rozsiedlenie,* Wrocław 1993, („Acta Universitatis Wratislaviensis" 1482, Historia 107), s. 117.

[22] *Urzędnicy małopolscy XII-XV wieku. Spisy*, red. A. Gąsiorowski, Wrocław 1990, s. 349; por. A. Teterycz-Puzio, *Na rozstajnych drogach. Mazowsze a Małopolska w latach 1138-1313*, Słupsk 2012.

Źródła

M. Wiszniewski, *Historya literatury polskiej*, t. II, Kraków 1840, nr I, s. 472.

Kodeks dyplomatyczny Wielkopolski (Codex diplomaticus Maioris Poloniae), t. I, Poznań 1877, nr 122, s. 110-111.

Kodeks dyplomatyczny katedry krakowskiej, t. I, wyd. F. Piekosiński, Kraków 1874, nr 19, s. 26-27.

Wybór źródeł do historji ustroju Polski, zeszyt I: *Epoka piastowska*, wyd. S. Kutrzeba, Kraków 1928, nr 12, s. 19-20.

R. Grodecki, *Podziały i zjednoczenie państwa polskiego: (1138-1320)*, [w:] *Teksty źródłowe do nauki historii w szkole średniej*, zeszyt 18, Kraków 1924, s. 14-15.

J. Sawicki, *Wybór tekstów źródłowych z historii państwa i prawa polskiego*, t. I, Warszawa 1952, s. 33.

Wybór źródeł do historii Polski średniowiecznej (do połowy XV wieku), t. I: *Społeczeństwo i państwo polskie do połowy XIII wieku*, oprac. G. Labuda, B. Miśkiewicz, Poznań 1966, s. 202-203.

Autor

Dr Artur Lis, adiunkt w Katedrze Historii Prawa Wydziału Zamiejscowego Prawa i Nauk o Społeczeństwie KUL w Stalowej Woli.