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The Tradition and Precedent-based Approach Responsible for the Specificity with which Some Universal Concepts of Private Law are Discussed in the English System

SUMMARY

The paper discusses the extent to which it is possible to find the right Polish equivalents of such English concepts as acquisitive prescription (in property law), entitlements of the dependents (in the law of inheritance) and commercial impracticability (in the area of obligations). Although the general idea of the discussed concepts may easily be grasped and smuggled into such Polish institutions as *zachowek*, *zasiedzenie* (*legitim*), and *rebus sic stantibus*, deeper insight into the description of these concepts in the two legal systems discloses many differences in detail.

Key words: civil law, legal history, Polish civil law, common law

Słowa kluczowe: prawo prywatne, historia prawa, polskie prawo cywilne, common law

It is well known that in the world there are no two legal systems that fully fit one another. On the other hand it is also fact that in almost any system of law we may expect to find, at least in the area of private law, certain universal concepts which, if not implemented, would render it difficult for society to function. Thus we can assume that in each system of law we shall come across a solution that will allow, for example, the possessor of a real property who has no legal title to it to arrive at the title of ownership subsequent to meeting certain criteria (continuous occupation, usage, etc.) over a prolonged or predetermined period of time. In the Polish system this device would be referred to by the phrase *zasiedzenie* while its English equivalent would be *acquisitive prescription*. When we go on to the law of succession we can expect that in

most systems of law the closest relatives of the deceased, if left unmentioned in testament, will nevertheless be entitled to receive a certain, even if limited, share in the testator's estate (unless of course the latter formally disinherited them). This is the concept which in the Polish system is referred to by the phrase *zachowek* while in the English system it sits under the title *entitlements of the dependents*.

Also in many modern systems we may expect that in the law of obligations a radical change of circumstances, if beyond contemplation of the parties at the time of concluding the contract, may provide grounds for modifying the contract or even dissolving it. In the Polish system the concept is referred to by the Latin *rebus sic stantibus*. In English law it finds reflection in such concepts as *commercial impracticability* which may result in *discharge of the contract by frustration*.

Probing more deeply into the aforementioned universal concepts as functioning in the English system, we will inevitably come across some specific phraseology that reflects the nature of English law, in particular, its unique and precedent-based approach toward addressing specific problems. In this short essay let us therefore focus our attention on the three previously outlined legal instruments and examine the kind of stock legal phrases that are resorted to whenever we describe them in both the Polish legal system and in its English counterpart.

The institution that is distinguished by a considerable similarity in both systems is the one that allows the possessor of a property (who has no legal title to it) to achieve ownership status after the lapse of a certain period of time. This institution, referred to as *zasiedzenie* in the Polish system, and as *acquisitive prescription* in the English one, applies both to movable and immovable property. for the purpose of discussion let us limit this to real property. In the detailed discussion of the functioning of the institution in question there are immediately detectable factors that betray differences in the approach adopted to it in the two systems. Such differences manifest themselves at phraseological level. The Polish system seems to lay emphasis on, one might say, the "positive" aspect of the possessor who, without title, occupies someone else's real property and hopes at some point in time to achieve the title of ownership to it. Therefore in the Polish Civil Code he is referred to as *samoistny posiadacz*, the right translation of the phrase could be *autonomous possessor*[1].

English law views such possessor from a more "negative" perspective and refers to him as an *adverse possessor*.[2] The translator of the last phrase into Polish would have to render it by the adjective *bezprawny* and not by *samo-*

1 Cf. *The Polish Civil Code*, Gen. ed. D. Kierzkowska, Tepis Publishing House, Warsaw 1997, p. 29.

2 Cf. D.M. Walker, *The Oxford Companion to Law*, Oxford 1980, p. 194.

istny (in this case *bezprawny posiadacz*) even though he were aware that the concept of the *adverse possessor* is quite close to that whom the Polish law calls an *autonomous one*.

The point is that traditionally the English system, to an extent larger than the Polish one, lays emphasis on the illegal nature of what the *adverse possessor* is doing. Because indeed the latter either informally bought the property (and as a result no deed of the transaction had ever been produced and details of the informal buyer had not been entered into the land and mortgage register) or he seized the property and, exploiting the lack of timely reaction to this on the part of the actual owner, continues to occupy it. Howsoever, the English system emphasizes that the *adverse possessor* is a *trespasser* (*osoba, która narusza cudze prawo posiadania, w analizowanym przypadku – posiadania nieruchomości*).

Thus the trespasser is the one who commits a tort, an illegal act. That he one day may arrive at the position of ownership results from the fact that the tort of trespass to the property is no longer actionable after the lapse of a certain period of time. After this lapse of time, both in the Polish and in the English systems, the *autonomous possessor / adverse possessor*, is in a position to claim ownership. In both instances this is achieved by applying to the court for award of title to the property. If the application is successful and the award granted, an entry informing of his status as owner of the property is then made in the land and mortgage register. While the two systems are similar in this respect, the qualifying period in terms of lapsed time differs considerably.

Let us now go on to another institution that shows considerable similarity in the two systems but displays differences in the discourse referring to it. The problem pertains to the rights of the dependants of the deceased in the area of the law of succession. In England, since the Inheritance Act of 1975, certain dependents have been granted a right to maintenance from the estate of the deceased person. Those who can raise a claim on this basis are the deceased's spouse, his children (irrespective of whether they are natural, adopted or illegitimate) and in fact any person who was dependent – wholly or partially – upon the deceased at the date of his death.[3] Therefore the dependent who was left unmentioned in the testament may argue that the deceased did not secure sufficient provision to him. In the Polish Civil Code the institution that resembles the right of the dependents is called *zachowek*, its suitable English translation being *legitime*, *legitimate portion* etc.[4] Unlike in the Polish law where the *legitime* is strictly determined in its proportion[5], in the English system there

3 S. B. Marsh, J. Soulsby, *Outlines of English Law*, McGrew-Hill Book Company, London 1987, p. 299.

4 *The Polish Civil Code*, p. 179.

5 The Polish Civil Code provides that the closest relative, if left unmentioned in the testament, is entitled to claim one half of what would fall to them by way of statutory succession. In exceptional situations they may even claim two thirds. *The Polish Civil Code*, p. 179.

exists considerable discretion of the Court in specifying the amount of the share in the estate that may be awarded to the one who applies for it on the basis of the *right of the dependent*. While deciding on this question, the Court would doubtless consider "what would be sufficient to enable the dependent to live comfortably according to his or her station in life"[6]. Therefore, for instance if the behaviour of the deceased's wife was particularly intolerable, the deceased might be found to be right if he left her nothing in his last will.[7] As can be seen, the two discussed institutions, despite being similar in their general outline, differ in the detailed solutions of the concept that they adopt.

Another concept which in its general outline demonstrates a considerable similarity in both systems but in detailed discussion shows remarkable difference in the phraseology exploited for its description, is that of excuse for non-performance. The point is that there are certain situations which may excuse the party to the contract of non-performance of his/her contractual obligations. Sometimes the entire contract may be deemed terminated due to a radical change of circumstances unforeseeable by the parties at the time of concluding the contract or due to the subsequent impossibility of either or both not being able to perform their obligations, etc. In the Polish civil system the problem is regulated inter-alia in articles 357^1 and 358^1 of the Polish Civil Code[8] but also in this section of the Code that is concerned with performance and the effects of non-performance of obligations resulting from mutual contracts[9]. And indeed, what is regulated in art. 357^1 is the extraordinary change of circumstance which has not been contemplated by the parties at the time of their concluding the contract. If, as a result of this change, the performance faces excessive difficulty or threatens one of the parties with substantial loss the Court may modify the contract or even dissolve it[10]. What is also regulated is the situation when one of the mutual performances has become impossible for reasons for which the obligated party is responsible (art. 493)[11], and also the situation where one of the mutual performances have become impossible as a result of circumstances for which neither party is liable (art. 495)[12]. In the context of these articles there appears in the Polish system such phrases typical of the legalese as *the redressing of the damage* (*naprawienie szkody*), *renouncing the contract* (*wypowiedzenie kontraktu*), *unjustified enrichment* (*bezpodstawne wzbogacenie*) etc.

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6 Marsh and Soulsby, p. 299.

7 Ibidem.

8 *The Polish Civil Code*, p. 60.

9 Ibidem, p. 84–85.

10 Ibidem, p. 60.

11 Ibidem, p. 85.

12 Ibidem, p. 86.

Let us now drift toward the English law and observe the phraseology with which similar phenomena are discussed. The language of English law, apart from some phraseology also detectable on the Polish side, introduces phraseology the rendition of which into Polish requires a considerable effort on the part of the translator. His experience in English-language description of analogous solutions as found in the Polish Civil Code would only partly prove helpful to him. The reason for this is the precedent-based tradition of the English system that generates certain legal expressions which accumulate long-lasting experience in solving certain legal questions appearing in this field. Thus in the English system the problem of excuses for non-performance is vitally connected with what the lawyers of that system call *discharge of the contract by frustration*[13]. This phrase might be translated into Polish as *zwolnienie z kontraktowego obowiązku przez pozbawienie umowy jej skuteczności*. The respective situations illustrative of the discharge are precedent-based and are referred to by certain expressions worked out within judge-made law. Among them the one relatively easy to translate is *subsequent physical impossibility*. The translator might render this in Polish as *następcza fizyczna niemożność (świadczenia)*. Among the precedents that gave rise to the forming of the expression is the case: Robinson v. Davison (1871) where a pianist, engaged to give a concert on a specific date, fell ill and therefore could not appear and play. This frustrated the contract[14] *Subsequent illegality* would be another expression justifying discharge of the contract by frustration. The Polish rendition of the same expression might be translated as *następcza nielegalność kontraktu*. One of the precedents that at one time was formative of the expression was that of Avery v. Bowden (1855). The case referenced relates to two merchants one of whom was contractually obligated to load a cargo at Odessa. The outbreak of the Crimean War and a change in government law making it illegal to load cargo at an enemy port, frustrated the contract; it could not be concluded without breaking the law.[15]

Another expression exploited in the area of frustration of contract would be: *the basis of the contract removed*. Its best Polish rendition seems to be *następcze zniknięcie podstawy kontraktu* or *odpadnięcie podstawy kontraktu*. To illustrate the point the English textbooks usually invoke Chandler v. Webster (1904). In this case one of the parties hired an apartment in Pall Mall in London for one day only. The tenant did this in return for a large price that he agreed to pay to the landlord. The only cause of his concluding the contract was his intent to see the procession that was planned to pass by Pall Mall after king Edward VII's coronation ceremony. Since the king fell ill the procession was

13 Marsh and Soulsby, p. 206; cf. also T.M. Dworkin, A.J. Barnes, E.L. Richards, *Essentials of Business Law and the Regulatory Environment*. Richmond D. Irwin Inc. 1995, p. 218.

14 Marsh and Soulsby, p. 207.

15 Ibidem.

postponed. This frustrated the contract since the event for which the contract had been concluded did not take place.[16]

Finally let us focus on one more situation, relatively close to what is discussed in the previously analysed art. 357^1 of the Polish Civil Code but which is referred to by the English expression *frustration of the commercial purpose of the contract or commercial impracticability*[17]. Article 357^1 uses different formulas and therefore in its English translation none of these phrases would appear despite the fact that the problem described in this article resembles that adopted for commercial impracticability[18]. The two English phrases listed above might be translated into Polish as *unicestwienie ekonomicznego celu kontraktu* (*frustration of the commercial purpose of the contract*) and *gospodarcza niewykonalność* or: *nieopłacalność kontraktu* (*commercial impracticability*). Polish lawyers usually discuss the problem using the expression rebus sic stantibus which smuggles in the concept of radical change of circumstances unforeseeable by the parties at the moment of concluding the contract.

The examples discussed in this short essay show that the similarity of legal institutions dealt with in the Polish and English legal systems may prove helpful in the process of translation so long as we discuss such similarity in general terms. When, however, we try to get a deeper insight into the problem we come across a specificity of English solutions that reflects the niceties of English legalese.

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16 Ibidem.

17 Ibidem. Cf. also Dworkin et al. p. 219.

18 It is however worthwhile to note that the remedies provided in the Polish and the English legal systems vis-à-vis the discussed problem, differ.