Introduction

Wprowadzenie

Application of law constitutes a significant part of the area of study of contemporary legal theory within the culture of statutory legal order. In order to specify the research questions concerning application of law it is of fundamental importance to set apart the process of law making (including legislation) and the process of application of law. This separation is visible in particular in the legal orders of continental Europe, including the Polish legal order. In continental Europe, courts are radically separated from law making, and court decisions are individual i.e. they concern individual decision addressees in concrete cases decided upon by the justice system. Courts are not able to issue precedent rulings and are therefore not involved in law making. Consequently, a separate treatment of the processes of application of law is significant for the definition of research problems within legal theory. We can affirm that in the contemporary legal theory the research questions pertaining to application of law constitute the majority of research problems. These research questions are often very complex and have their own methodology (and a separate body of terminology), list of axiological problems, organisation and phases of law application processes. Compared against research in application of law, analysis of law making processes is clearly an underestimated area of study within the contemporary legal theory.

Contrary to European jurisprudence, Anglo-Saxon jurisprudence has so far treated application of law as an integral part of jurisprudence that includes the law making capacity of courts and other public authorities. The research problems in Anglo-Saxon jurisprudence are therefore not separated and do not constitute a self-standing theoretical reflection upon law. Rather, they are a traditional object of study associated with activities of courts as judiciary law upholders and public administration bodies as law enforcers. Consequently, it is not possible to directly transpose the heritage of continental jurisprudence to the Anglo-Saxon

legal theory, just as it is not possible to transpose the Anglo-Saxon legal theory to continental jurisprudence. This, however, does not exclude the possibility of a reflection and a dialogue between the two theoretical approaches. The dialogue has in fact been present for at least one century. A pre-condition for the dialogue is a mutual readiness to understand the differences between the two legal orders, particularly in the context of separation of law making and application of law. The assumption behind the dialogue is also knowledge of the fundamental differences between the two approaches to legal theory and openness to the knowledge and heritage of the other approach.

A legal-theoretical based on the Anglo-Saxon approach to legal order seems to be dominant now. This leads to an impression that the question of application of law is not of crucial importance for the contemporary jurisprudence and should remain within the Anglo-Saxon paradigm of the study of law. The impression is, however, contrary to the current state of affairs in legal theory research in continental Europe. The body of research is already extensive and diverse. Our aim is to present it to a larger group of readers interested in the achievements of the contemporary European legal theory. Research in application of law, including, in particular, interpretation of law, legal argumentation within the continental legal culture and organisation of law application processes by courts and public administration bodies has for a few decades been a major field of study for Polish researchers of theory and philosophy of law. Traditionally, the majority of Polish researchers in legal theory have been interested in the question of interpretation of law and legal argumentation. However, broader research approaches have cropped up, focusing on a multi-faceted perspective on processes of application of law as specific, multi-level and multi-layer decision making processes taking place within public authorities. The broader approach has adopted some assumptions of contemporary legal analysis such as the post-modern concept of law, Critical Legal Studies and economic analysis of law. A common feature across the researchers taking the broader approach is going beyond the static analysis of law that has so far prevailed and perceived law as a set of binding norms and legal institutions. In the broader approach, law is analysed through social subjects (individuals, organisations, groups and institutions that represent these groups) positioned in public authority structures (in states and groups of states such as the EU or the Council of Europe).

The approach has also been adopted by researchers from the Chair of Theory and Philosophy of Law at Marie Curie-Skłodowska University in Lublin. Our research in application of law approached from a decision making perspective was initiated in the 1980s by Professor Leszek Leszczyński. Over thirty years of study efforts have yielded an extensive and original output that has enabled us to position the theory of application of law as a separate sub-field of study within legal theory. Contrary to the traditional static analysis, the decision making approach

we have applied has enabled us to gain insight into the dynamics of the process of application of law, judicial interpretation, sources of judicial decision, precedent and its role in application of law, axiology of application of law, judicial review of administrative activity, justification of judicial and administrative decisions, etc. The scope of our research has not been limited to the classical questions of interpretation of law and legal argumentation/reasoning, as well as general clauses and procedures (civil, criminal, etc.) and their application. These research questions have been included in the decision making approach and linked to other questions that characterise application of law as an intertwined body of diverse decision making processes. Our research also deals with axiological foundations of the processes of application of law and the uniqueness of decision making phases in the judicial and administrative types of application of law in transnational public authorities, including the institutions of the EU and the Council of Europe. A supplementary thread in our research activities is investigation of the relationship between application of law and decision making through negotiation and mediation, a crucial element of the concept of law and public authority in deliberative democracy.

This book contains the results of work performed by researchers' team in theory and philosophy of law.

Application of law constitutes a significant research area in Polish jurisprudence. The first article of this volume is an overview of the basic notions and research approaches that the Polish legal literature has proposed over the last decades. The authors of the quoted notions, concepts of application of law and research approaches are Zygmunt Ziembiński, Kazimierz Opałek, Maciej Zieliński, Lech Morawski, and Leszek Leszczyński. The article contains a concise characteristic of the approaches and concepts, with particular emphasis on the theoretical assumptions of Leszek Leszczyński's concept and vision of the so-called operative interpretation of law. The assumptions are a point of departure for a presentation of results of research into decision-based processes of application of law.

In the second article Leszek Leszczyński links the types of application of law present in the legal theory with the relevant decision making model, constructed on the basis of two main types: the judicial and the administrative types. However, the model also takes into account the attributes of two subtypes: the mediation and managerial subtypes. The attributes that differentiate the types are associated with the subject, the mode of the process, the shape and contents of the decision, the types of control as well as decision making discretion. The decision making model that applies for all the types referred to above focuses on discerning the preparatory phase which includes fact finding and operative interpretation (in the broad validation-derivative approach) and phases of making the decision to apply law (with the decision divided into the decision that qualifies the factual state and the decision that defines the consequences of the qualification), along with its justifi-

cation that plays a highly significant communication and argumentation role. The holistic model of the process of application of law ought to also include the potential control phase and execution phase, both of which also, as a rule, constitute separate decision making processes. The basic detailed components of the model have been presented, applicable across all types of application of law: making the assumption on the existence of operative interpretation in each decision making process (i.e. negation of the clara non sunt interpretanda principle); differentiation of reasoning and activities that include validation and reconstruction findings as well as post-reconstruction reduction and presentation of reasoning and interpretative activities as arguments justifying the decision, leading to its rationalisation. The following are the main particular components of the decision making model (relative to the type of the decision making model): diversity of relations between particular sources of reconstruction of the norm (regulations, decisions, non-legal criteria) within validation findings; diversity of relations between particular principles of reconstruction of the normative basis of the decision (linguistic, systemic, purposeful, functional, axiological); diversity of types and sources leading to diversity of decision making discretion in application of law; presence of political goals and policies of application of law within the decision making processes of the administrative type, and diversity of justification styles, associated with the content of descriptive components and components that rationalise the contents of the decision and its process, and with the openness of the presented arguments.

In the third article Wojciech Dziedziak states the most basic axiological question, that is: how should a judicial decision be made? Of course, the most mature form of application of law is its judicial application. So, how should a court issue decisions, on what values should it be based (and how to fulfil them), what is and what should be the aim of a decision? The answer to these questions is: equity, the equity of the decisions, equity *in concreto*. Courts have a wide margin of freedom in the application of law. It should be used "with their eyes set upon equity", which is, let us recall, built on the following values: truth, good, justice, human dignity. In the judicial application of law, the final decision, touches, in fact, the principal, basic values and judgements (it touches truth, good, justice and human dignity) if we reduce the subsequent reasoning and explanations. Characterizing the axiological bases of the application of law, one need to find a way which would take us to the best resolution. The court and the judge solve, after all, a certain case that exists in reality, and do not present alternative possibilities of choice. The court, while making a decision, makes a choice which should be driven by equity. After all, can we find any other values that would light our way? The judge should strive to find an equitable resolution, they should search for it and not reject it *a priori*. Justice should be treated as the pillar of equity, but equity is richer and greater. Justice, when driven by truth, good and respect for dignity, does allow for giving to each "his own". If the decision in its nature is just, it is also equitable.

Therefore, equity protects the formula *suum cuique* from being deformed. It fulfils it and does not allow for its degeneration and perversion.

Bartosz Liżewski presents in the next article model-based features of the decision-making process of the application of law in the legal order of the Council of Europe. Neither the real assessment of the effectiveness of legal order nor the way in which Poland realises its obligations arising from the membership in the Council of Europe have been analysed, as such an analysis would require a separate and completely different examination. Referring the application of law in the legal order of the Council of Europe the guidelines for the decision-making process of the application of law applied in the legal area of the European Convention on Human Rights and the European Social Charter were presented. Problems of the characteristics of the decision-making process of the application of law in terms of human rights protection on European and supranational level were discussed, as well as the differences between such processes carried out on the basis of the ECHR and the ESC. The demonstration of these processes requires a presentation of the relevant background in the form of a general overview of the Council of Europe in terms of human rights protection in Europe (the first part of the article). In later parts of the article, the following issues were analysed and discussed in details: systemic consequences associated with becoming a party to the Convention and to the Charter, the character of the obligations arising from the membership, the decision-making process and the reasoning applied within the process.

The fifth article is devoted to the specificity of application of law in the administrative type of application of law. The subject is presented in the context of legal and extra-legal conditions of functioning of public administration that are linked to the necessity to implement public functions by administrative bodies. The conditions significantly influence making decisions to apply law and shaping certain, relatively stable, tendencies within the policy of application of law by public administration bodies. The article discusses the characteristic features of the administrative type of application of law, particularly when compared against court-based decision making. Consequently, the article emphasizes a separate nature of the process of application of law by administrative bodies that are predominantly associated with understanding administrative application of law as an element of management in the public domain. One of the differentiating features consists in supplementing the process with an additional phase that precedes the pre-decision phase. The differences are visible also in legal reasoning and arguments that justify the selection of legal basis of decisions and the substantial merit of administrative decisions. Special attention should also be paid to how administrative decisions are formulated through administrative acknowledgement that authorizes the administrative body to choose the decision (between at least two legally available decisions) that implements the state's policy of application of law to a larger extent.

The last article contains an attempt at showing a separate nature of the decision making process within mediation, compared against the decision making process of application of law – in the context of the criteria that differentiate the particular types of application of law. The comparison leads to the conclusion that the analysed decision making processes, apart from their common objective (levelling of social conflict) feature some common elements (the situation of dispute, process initiation) as well as different elements (the position of the decision making entity, rules and procedural principles, source of normative reconstruction of the basis for the decision) as well as the "permeating" elements (decision content formulation phase in criminal mediation and in cases involving minors, the control phase of the decision making process, the execution phase). The sources of the discrepancies appear to stem from the different modes of dispute settling, within which the decision making processes "function", i.e. adjudication (the judicial, administrative and managerial.

The role of our publication is to present the research results to a wider audience as well as contributing to the dialogue between the Anglo-Saxon and continental legal theories.

Andrzej Korybski
Bartosz Liżewski