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THE INTENTIONALITY, INTERSUBJECTIVITY, AND CAUSABILITY OF CIVIL LAW TRANSACTIONS[1]

Abstract. The paper presents and discusses the principle of causability as expressed in many civil codes. This principle requires that the existence of any obligations of transfers of ownership the legal cause – usually associated with 3 types of dealings having been identified by Roman jurists and elaborated by postglosators and founders of the 17th-century natural law movement, namely: *causa solvendi*, *donandi, aquirendi*, or *causa cavendi* – creates a condition for validity of legal act. Referring to the philosophical background of the analytical philosophy of intention and intersubjectivity, authors advocate a modified theory of causability, according to which it is permissible for the parties to invoke abstract actions if this is not opposed by binding legal provisions.

Keywords: the principle of causality, legal acts, intentionality, brute facts, institutional facts, the philosophy of mind, intention

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[1] The paper is devoted to the memory of late Professor Tomasz Bekrycht. He devoted his doctoral dissertation to these issues, which was the first comprehensive study of Reinach's philosophy of law in Polish literature (cf. Bekrycht 2009). This work presented in a comprehensive and, at the same time, extremely insightful way, issues at the junction of phenomenology and linguistic philosophy. Aprioric foundations of civil law as perceived by Professor Bekrycht is a research project aimed at reconstructing the theory of speech acts and its application to the analysis of problems in the field of dogmatic analysis of civil law on the one hand and interpersonal communication on the other. In our attempt to build upon Professor Bekrycht's achievements and interpretations, in this paper we shell scrutinise the applicability of the theory of speech acts to the principle of consideration applied in civil law.

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INTENCJONALNOŚĆ I INTERSUBIEKTYWNOŚĆ A ZASADA KAUZALNOŚCI W POLSKIM PRAWIE CYWILNYM

Streszczenie. Artykuł przedstawia różne teorie dotyczące zasady kauzalności czynności prawnych przysparzających, obowiązującej w różnych kodyfikacjach prawa cywilnego. Zasada ta w ogólnym zarysie stanowi warunek ważności czynności prawnych przysparzających, wpływając na konstrukcję zobowiązań oraz przeniesienia własności. Wywodzące się jeszcze z prawa rzymskiego, a następnie rozwinięte przez postglosatorów oraz zwolenników szkoły prawa natury typy kauza, takie jak *causa solvendi*, *donandi, aquirendi* czy *causa cavendi* stały się zatem punktem odniesienia dla oceny ważności przysporzeń. Odnosząc się do intencjonalnego działania na płaszczyźnie intersubiektywnej w ujęciu filozofii analitycznej, autorzy opowiadają się za modyfikacją zasady kauzalności i dopuszczeniem możliwości kształtowania czynności oderwanych od przyczyny prawnej, o ile nie jest to sprzeczne z obowiązującymi przepisami.

Słowa kluczowe: zasada kauzalności, czynność prawna, intencjonalność, zdarzenia, fakty instytucjonalne, filozofia umysłu, intencja

1. INTRODUCTION

In this paper, we shell scrutinise the applicability of the theory of speech acts to the principle of consideration applied in civil law as the so-called 'general principle of the causability of any legal dispositions'. The core of the principle could be identified with the problem of enforceability of informal conventions and agreements in classical and postclassical Roman law. For lawyers, the 'spirit' of Roman law is very palpable in today's legal regulations. In the European culture, and particularly in its continental forms, certain terminological (and semantic) similarities relating to specific legal institutions can be discerned, and this is connected with the reception of the Roman law and its conceptual apparatus. This is a result of the return to the archetypes of civilisation, which is characteristic for the Roman culture and had previously been imposed by the Roman Empire, usually by force. The problem of causability in civil law transactions has endured as one of the most interesting and most controversial legal issues since the Roman times[2]. This issue continues to absorb the attention of contemporary civil law scholars (cf. Bahr 2000; Academy of European Private Lawyers 2001)[3]. Generally speaking, the question is whether such actions always have their *causae*.

In discussing this issue, however, we would also like to draw attention to the Greek roots of modern legal culture. Naturally, no one doubts that the Aegean

[2] The historical sources of considerations on causality can be found primarily in fragment D.2,13,6,3, in which Labeon lists three legal reasons for performing legal transactions: "Rationem autem esse Labeo ait ultro citro dandi accipiendi, credendi, obligandi solvendi sui causa negotiationem (…)." Cf. D'Ors (1976, 29–30), Albanese (1972, 205–206).

[3] With regard to the latest publications devoted to this issue, see, among others: Bassani, Minke (1997); Vacca (1997); Scholl (1999); Hähnchen (2003); Inauen (2004); Ruland (2004); Ghestin (2006).

constitutes a kind of the 'golden branch' of civilisation; on the contrary, today, the Hellenic roots of our culture are once again being emphasised. There is even talk of the "Hellenisation of culture," which is understood in the scholarship as the acceptance of cultural values and models in a voluntary way in response to the strength of the inner qualities of the scientific, moral, or aesthetic ideas concerned (cf. Ziółkowski 2003, 219). Therefore, we would like to posit a certain general assumption, according to which legal discourse, and thus law, is treated as a variety of practical discourses regulated by ethical requirements; and thus to emphasise the communicative character of law, evoking the idea of Socratic dialogue between free and rational subjects. Already in the ancient times, attention was drawn to the defining features of a human being, referring to his/her role and social tasks. Aristotle defined the essence of a human being as *zoon politikon* (ζώόν πολιτικόν) and *zoon logon echon* (ζώόν λόγον έχον). These two aspects of humanity seem to intertwine and form a certain pattern of a human being that was already recognised in antiquity. It is not possible to talk about a human being, about his/her nature as well as rights and duties, without treating him/her as a rational, free, and social being.

In the authors' opinion, the validity of the thesis on the causality of civil law actions should be assessed in considerations that reach beyond strictly dogmatic conclusions. To be more precise, the issue should be addressed in the context of a discussion on the philosophical foundations of the theory of speech actions and an analysis of the concept of action, both of which tend to be situated within the branch of the philosophy of mind, inspired by research conducted in cognitive science. Our intention is to attempt a critical explanation of the nature of civil law transactions by referring to the latest research in the philosophy of language and mind, with particular focus on the notions of the intentionality and intersubjectivity of these phenomena. We will treat legal actions as a variety of human activities, with subjects retaining their autonomy. The subjects of legal action are not only autonomous, but also equipped with consciousness and free will, owing to which they can initiate their actions and, as a result, take free and rational decisions, also when participating in civil law relations.

2. THE GENERAL PRINCIPLE OF CAUSABILITY – THE VIEWS OF ADHERENTS AND OPPONENTS

On the basis of the French Civil Code, it may be stated that all legal transactions are examined in terms of their cause. Consequently, an obligation entered into without a cause or based on a false or fraudulent cause is null and void (Article 1131 of the French Civil Code), hence it is the *causa* that indicates why the parties entered into the obligation in the first place (Montanie 1992, 55; Pyziak-Szafnicka 1995, 45). The literature distinguishes between *cause du contrat* and *cause de*

l'obligation. The former indicates a legal cause in the subjective sense, i.e. it explains the motives for concluding a contract, while the latter constitutes the basis for the obligations of the parties in the objective sense, i.e. it resides in the nature of the contract. In contrast to legal orders based on the Roman law, the German law does not treat the concept of *causa* as an element that underpins the existence and correctness of a contract in terms of its legal effects. More specifically, the German Civil Law Book (BGB) does not contain the concept of an abusive *causa*, and the control of the purpose and content of the contract takes place by means of other mechanisms (the so-called *Inhaltskontrolle*[4]).

Historically, the concept of *causa* has been explained in civil law scholarship as the goal ("a part of the goal") pursued by the person undertaking legal action. In other words, such a goal is intended to justify the detriment caused to the assets of the person undertaking action to accrue benefit (Czachórski 1952, 35). A. Wolter asserts that "in the case of benefit, the motive plays an essential role, which is the idea of a so-called legal purpose or legal basis" (Wolter, Ignatowicz, Stefaniuk 2001, 270).

S. Grzybowski adds that from the point of view of the normative notion of *causae*, only such objectives are important which fall within the motivational sphere directly related to the content of the legal transaction, and which are also typical and constitute objective motives in everyday legal transactions (Grzybowski 1974, 497 ff.).[5]

The scholarly literature distinguishes between three essential forms of the legal basis for accruing benefit:

– *causa solvendi*, the purpose of which is to release from the obligation incumbent on the person obtaining the benefit;

– *causa obligandi vel acquirendi*, which seeks the acquisition of a right or other economic advantage by obtaining the benefit;

– *causa donandi*, which applies in situations where a legal transaction is carried out with the sole aim of effecting a transfer to another person without any equivalent consideration (Wolter, Ignatowicz, Stefaniuk 2001, 271 ff.).

A distinction which is much disputed in the literature pertains to the taxonomy of the so-called establishing legal causes of action[6], in particular *causa cavendi*,

[4] This role is played in particular by § 134 of the BGB, which concerns the invalidity of a legal transaction contrary to a statutory provision; § 138, § 138 of the BGB, which concerns the invalidity of a legal transaction contrary to public policy and aimed at the exploitation of one of the parties; and § 242 of the BGB, which stipulates the duty to respect the principles of good faith in the performance of obligations, previously analysed under § 311 of the BGB (2002), i.e. former § 9 AGBG, which contains a clause to control general terms and conditions of contracts.

[5] Other authors also note that a *causa* is a stipulated element and, therefore, certain types of legal grounds should be closely related to a given type of legal transactions. See Łętowska (1970, 96 ff.); Wolter, Ignatowicz, Stefaniuk (2001, 270 ff.).

[6] This *causa* is typologised in Polish literature by, among others, Pyziak-Szafnicka (1995, 82–89); Radwański (2005, 230).

which is supposed to constitute a security cause. G. Tracz claims that "it is as if *causa cavendi* occupies a different plane of consideration than the traditional triad […] of *causae*. It expresses the economic purpose rather than the legal purpose of a legal action. In the concept of *causa cavendi* one can distinguish at least *causam solvendi* or *causam donandi*. But there is no such relationship between the three *causae*" (Tracz 1998, 151 ff.)[7].

Z. Radwański points out that the distinguished types of *causae* function both within the subjective and the objective theory of causality, because they instantiate different forms of legal justification of the benefit (Radwański 2004, 193). Obviously, when using the term *causa*, it is necessary to clearly specify whether we mean the *causa* of obligation (*causa obligationis*) or the *causa* of performance (*causa solutionis*) (Zaradkiewicz 1999, 259–261). The scholarly literature correctly observes that defining *causa* in the context of a valid legal transaction entails identifying it with the legal cause. On the other hand, if we treat *causa* as a cause of performance-regulation, it is rather a legal basis, and in terms of type it would correspond exclusively to *causa solvendi* (Zaradkiewicz 1999, 260; Gutowski 2006, 9). At this juncture, it is worth stating that on the grounds of the Polish Civil Code, the causative character of disposition contracts does not give rise to any doubts. Thus, on the grounds of Article 156 of the Polish Civil Code, the validity of a contract to transfer ownership through the performance of an obligation arising from a previously executed contract creating the obligation to transfer ownership, as well as from a legacy, unjust enrichment or another event, depends on the existence of that obligation.

The views emerging in the Polish civil law scholarship concerning the causality of legal transactions that accrue benefit[8] may be arranged in certain groups. The first one covers the position of those legal scholars who believe that the validity of a benefit depends on the correctness of its legal cause (Berier 1934; Czachórski 1952; Wolter 2001).The second group would include the views of civil law experts who hold that there is a lack of dependence between the correctness of the *causa* and the validity of the benefit, i.e. those whose position is that of abstractness (Drozd 1974; Kubas 1974; Zawada 1990; Tracz 1997). In turn, the

[7] This author claims that "the concept of *causae*, in other words the concept of a legal goal, cannot be equated with the concept of an economic goal. The *causa* is the legal purpose of the benefit, being typical and objective, which answers the question of why the entity performs a legal transaction. (…) The purpose of the contract, often also referred to as an economic goal, explains further, unusual and biased motives of the parties to the contract, in particular, it defines more precisely what economic result the parties want to achieve by concluding a specific contract."

[8] By a legal transaction that accrues benefit, we understand a transaction which results in an increase in the property of another subject as a result of the acquisition of a property right, an increase in the value of an already existing right or a decrease in liabilities, or the prevention of a loss that would have occurred if the given transaction had not been performed. It is worth noting that the effect of the benefit resulting from the gain should be intended by the person performing the legal act (Tuhr 1918, 49 ff.).

third group includes those who acknowledge the existence of the so-called partial *causae* that occur at least in the case of disposition transactions (A. Szpunar). Finally, the fourth group consists of theoreticians who distinguish the so-called presumption of causality. This concept was formulated by M. Safjan, according to whom "accepting that the causality of a contract may be excluded by the will of the parties in favour of an abstract relation could be reduced to the thesis that in place of general causality a general presumption appears in favour of the causality of a contract. In other words, the abstract nature of the contract should be embraced by the will of the parties and should clearly appear from the content of the contract"[9].

3. THE PLACE OF PRACTICAL RATIONALITY AND INTENTIONALITY IN LEGAL ACTION

Human actions can be and often are considered in terms of their rationality. Thus, they are considered in the light of directly or indirectly posited goals, as it is held that a necessary (and sufficient) condition for establishing the rationality of certain actions is that only such actions are taken that aim to achieve a given goal. Naturally, through the prism of rationality, we can also assess the aim we posit, which must meet certain criteria for the action leading to its realisation to be considered rational. In the former case, we are dealing with the so-called formal (methodological, instrumental) rationality, while in the latter case, with substantive rationality (Kleszcz 1998, 42). In contemporary practical philosophy, the concept of principled rationality prevails, according to which rationality consists not only in choosing the most effective means leading to the realisation of an intended end, but also in a complex reflection on the aims of life in general, in rationalising the made value judgements, and in verbalising the conditions for realising these values (cf. Habermas 1987a; Alexy 1978, 223; Król 1992, 73, 77)[10].

Intentional action[11] is the purposeful – i.e. conscious and free (in the sense of freedom of choice) – triggering of a particular event with the intention of achieving a given result, which constitutes a value for the acting subject. Following J. G. Fichte, it is worth noting that human nature, in addition to the ability to reflect, comprises the ability to want, which the author vividly depicts as follows: "I find myself as myself only in wanting" (Fichte 1995, 18). The author of the *Grundlage des Naturrechts* points out that reflection on its own is not capable

[9] See Safjan (1998, 6); see also Zaradkiewicz (1999, 296).

[10] M. Król distinguishes rationality in an instrumental, essential, and justifiable sense. On legal rationality, see also Zirk-Sadowski (1984).

[11] Action understood in this way can be equated with the notion of 'action.' In the terminology of Z. Ziembiński, it will be a variant of an act understood as "proceeding considered in effect." See Ziembiński (1972, 29–40).

of acting (causation), but it produces a concept called will-order and only owing to this does it become the "supreme power of the concept," which determines the human will in terms of its purpose. The spontaneous power of the human will is thus called the "real capacity to act" (Fichte 2002, 29). The author understood will as the ability to exert influence on the physical world. Out of the living creatures known to us, only human beings possess the necessary features that allow them to have a purposeful (planned) influence on the external world. This manifests itself in the following: a rational will, the ability to learn, knowledge of causal relations, awareness of one's own needs, and the ability to hierarchise values, make decisions, and choose the means necessary for their realisation.

Similarly, A. Reinach points out that the social and legal sphere depends on "social acts", in which a very important role is played by intentional experiences, i.e. those in which we direct ourselves towards an object (Reinach 1989, 158 ff.)[12]. The author divides intentional experiences into active (where I am the acting subject, e.g. a state of indignation) and passive (in which case they can overwhelm me against my will, e.g. a feeling of sadness). Furthermore, active intentional experiences can be divided – using the criterion of the source of their causality – into those whose cause lies "in me" (*eigenkausale Akte*) and those whose cause lies in a "foreign subject" (*fremdkausale Akte*) (Burkhardt 1986, 24–31).

It becomes necessary to emphasise the intentional character that typifies all actions, because we can only recognise an event as an action if it is intentional. Generally speaking, an intentional action is one that is consciously performed as a result of a decision to act. Some authors believe that if an event cannot be described in terms of intention, then such an event cannot be regarded as an action (Davidson 1963, 685–700; 1991, 217; 1997, 96–102). Intention makes it possible to distinguish between actions which are expressions of our intentions and beliefs, i.e. those which we pursue and for which we are, therefore, responsible, and others, such as accidentally finding something on the street.

When intentional determinants are taken into consideration, this allows those who are taking action to make a choice between different intended actions and the wilfully embraced consequences of such actions (Searle 1998, 106). At this point, it is worth noting that the actions of different actors undertaken in the same external situations may be different and yet rational. The external situations in which choices are made may be basically indistinguishable, and the made consideration of the individual choice of action – even taking into account certain general principles of action – may be evaluated differently with respect to the individual actor and specific factors, which are sometimes ancillary (Żegleń 2003, 203). For example, my original intention was to buy shares in a listed company to increase my funds,

[12] Reinach also distinguishes the so-called unintentional experience, i.e. one in which there is no such direction.

but I ended up putting my assets in a long-term deposit, despite the fact that I find the latter financially less attractive. The change in my decision was prompted by my conviction that there was a danger of a bear market in the second way of investing. My beliefs are part of a broader network of beliefs, which in this case concerns knowledge about the stock market and an appreciation of the dangers involved. Hence, the relation between beliefs and the decision (taken propositionally) is treated as a logical rather than a physical causal relation (Żegleń 2003, 202). In its simplest form, it can be presented as an asymmetrical relation: it is better to take (or not to take) a given action than not to take (or take it), and the positive or negative decision in favour of one of the alternatives will be dictated by our beliefs and preferences. In other words, this relationship allows me to decide what is better for me in a given situation, to find a reason allowing me to make one choice and not another. Similarly, when there are competing alternatives for action (the multiplicity of means for achieving a given goal), the decision-maker orders the alternatives on the scale of preferences (the scale of alternatives for choosing an action) according to a specific criterion necessary to make a rational choice of one of them.

While there can be multiple intentions for a given action, due to the fact that intention is based on best judgment, there can never be mutually exclusive intentions (Davidson 1985, 199–200; Nowakowski 2004, 165–168), at most just good or bad intentions. If intentions could come into conflict with one another, this would mean that one of them would necessarily be an intention to do something that is impossible, thus there can be no such conflict. I want to be entitled to a full agricultural pension even though I have not reached the required age, but at the same time I do not want to stop farming. I know that I cannot obtain full pension rights by continuing to farm, so I cannot have the intention to keep on farming and to receive a pension at the same time. I have to make a choice between these mutually exclusive goods, so in order to arrive at any intention, I have to resolve the conflict by weighing up the reasons. The truth or falsity of a person's beliefs, and thus intentions, can be brought to light in a frank conversation, assuming that we can put aside distractions such as not knowing one's reasons, memory deficiencies, laziness, self-deception (Nowakowski 2004, 167–168).

It is possible to act in an entirely free and intentional way – as S. Judycki points out – when certain necessary conditions are fulfilled (Judycki 2006, 86–90). We are conscious and self-aware beings. In general, this refers to our ability to make our own conscious experiences the object of our own higher-order observations, as well as to the cognitive ability to distinguish ourselves and our own body from all other objects. Furthermore, the consciousness of the person to whom we wish to attribute an action must maintain their identity over time. The subject must also have the capacity to respond to values, which does not mean this is a question of accepting a particular hierarchy of values while having free will and being able to initiate action in a way that does not violate their identity. Such a person must therefore be autonomous in relation to the physical world, and

particularly in relation to the content of their own acts of consciousness and their own actions. The behaviour of a particular person is rational when it has a cause, but this can only provide an explanation for their behaviour if the relationship between the cause and the behaviour is both logical and causal (Searle 1998, 106)[13].

It therefore falls to a free-willed, autonomous, and conscious person to decide to act in this or that way. With regard to legal transactions, we would say that such a subject must have legal capacity and autonomy of will, and that the proper form of their performance will be consensual agreement between mutual interests. In the science of civil law, the autonomy of the will of the parties is understood as a legal situation wherein, by virtue of the established law and within the limits set by this law, the subject may shape their private-legal relations on their own, in particular through legal transactions (Niedośpiał 1984, 64). Hence, subjects of law may shape binding legal relations by means of legal transactions within the limits of the law in force. Subjects acting in the sphere of legal relations, i.e. those external to their internal mental decisions, must take into account not only their intentions, understood as internal decisions, but also the legal norms restricting them. In modern, liberal civil law relations (but not only), dialogue and consensus are the essential means of reconciling the interests of the parties. In turn, within the framework of their autonomy, the parties are free not only to perform or not to perform a given legal act, or to choose a party, but also to shape the content of the legal transaction. The *causa* of a legal transaction that accrues benefit is, in our opinion, the kind of intention that underlies every such act. It is more than an aim or a motive and, as such, it is an element of every action, because, in general, when we make any choice among many possibilities (e.g. whether to buy a Toyota or a Honda car, a minivan or an off-road vehicle, in a showroom or at an exchange, etc.), we must refer to the intention we have. Intentionality is characterised by reference, content, and by being about something; representation is a property that belongs to language and to mental processes.

Intention is regarded as a necessary component of the mind that allows us to distinguish those actions that are the result of our agency (which are free, and for which we are responsible) from other forms of behaviour that may be accidental, e.g. a knee reflex, a fall down the stairs. Intention is manifested in interactions with other participants in the communication process and in social relations, for example while shaping the content of a legal transaction. Consequently, the existence of conscious human intentionality would argue *prima facie* in favour of the generality of the principle of the causality of civil law acts, since only transaction performed with a certain intention is a genuine transaction. We thus refer to the French tradition of *cause du contrat*, or a subjective legal cause. It could be said in this context that a certain intentional state is a performative one if the transaction binding the parties is concluded (Searle 1998, 104 ff.).

[13] Searle observes that "Explanations of rational human behavior thus essentially employ the apparatus of intentional causation."

4. THE DISCURSIVE APPROACH TO LAW AND THE INTERSUBJECTIVITY OF CIVIL LAW TRANSACTIONS

The content of our convictions should be intersubjectively accessible and understandable, i.e. intersubjectively communicable and verifiable. This is of particular importance when entering into contracts, when taking actions within the framework of any legal discourse. We should be able to assume that the intentions of the subjects of a specific legal relationship are, in principle, convergent, or may become so. It is traditionally noticed that every argumentative (communicative) act assumes certain *a priori* conditions of validity (of a normative character), which J. Habermas refers to as validity "claims" (Habermas 1984b, 355)[14]. Moreover, the author of *Theorie des kommunikativen Handelns* holds that every participant in a speech act (speaker) speaks sincerely and communicates true sentences in such a way that the listener recognises their utterance as certain (correct), and that their utterance is correct, i.e. accepted by the audience in a given axiological system.

It is worth noting that in his later works, Habermas stresses the role of discourse theory in shaping democratic procedures, fundamental political rights, and the functions of particular apparatuses of public power (Habermas 1994, 217, 241 ff.; Alexy 1995, 165–174; cf. Morawski 2000, 30; Kozak 2002, 129). The practical discourse broadly outlined above, within which the justification of normative statements takes place, became the basis for the construction of the theory of legal discourse. The concept of legal discourse was most extensively discussed and developed by R. Alexy, who treated it as a special case of general and practical argumentation (Alexy 1978, 62 ff.)[15]. Justice cannot be done to the thought of this outstanding German philosopher in this short text[16]. However, here it is necessary to emphasise that the concept of legal discourse presupposes that it belongs to institutionalised discourses. Apart from referring to the assumptions of an ideal speech situation characteristic of practical discourse, legal discourse formulates pragmatic rules and forms of argumentation that are to serve the purpose of issuing a rational and correct decision on the basis of legal *topoi* and the law in force.

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[14] In everyday communication, validity claims are supposed to constitute an assumption of rational communication. Validity claims include: the intelligibility (*Verständlichkeit*), truth (*Wahrheit*), reliability (*Wahrhaftigkeit*), and correctness (*Richtigkeit*) of the means of communication. See also the discussion of Habermas' theory in Polish scholarship from this point of view (e.g.: Zirk-Sadowski 1986; Kaniowski, Szahaj 1987; Morawski 1990).

[15] The thesis that legal discourse is a special case of practical discourse is not universally accepted and has been widely criticised, for example by Neumann (1986, 86) and Hilgendorf (1991, 109).

[16] In the Polish philosophical and legal literature, we can find a number of works dealing with the theory of legal discourse, for example: Wróblewski (1976; 1988); Morawski (1988); Zirk-Sadowski (1998); Grabowski (1999); Wojciechowski (2001; 2004, passim).

In this article, our intention is only to draw on discourse theory to address the problem of the intersubjectivity of interpersonal relations in the context of the causality of civil law actions.

The intersubjectivity of our beliefs is linked to the communicative reciprocity of dialogue and mutual understanding. Thus, law also has to be understood as an element of linguistic and cultural communication, albeit formalised one. The thesis on the communicative nature of law has found full acceptance in the methodology of contemporary legal studies. Law is a cultural phenomenon and, therefore, also a result of communicative activity. Speech is the common means of communication of all people and, thus, a large part of human interaction takes place in it and with it. Reflections on this subject tend to be conducted with reference to Habermas' concept of communicative action.

It is worth noting, however, that communicative relations of reciprocity and the problem of intersubjectivity in legal relations were important elements of the Fichtean-Hegelian vision of philosophy of law, which focused on property and contract law. The concept of interpersonality (*Interpersonalitätslehre*) is regarded as one of the essential elements of the Fichtean social philosophy[17]. For Fichte, the basic assumption is that in the moral world, people live together within certain social relations. "Without it there exist only scattered natural people, savages, cannibals, who nevertheless have marriages, parents and children" (Fichte 1996, 331). This is why the following principle becomes so momentous from the point of view of just law: "The finite rational being cannot assume the existence of other finite rational beings outside it without positing itself as standing with those beings in a particular relation, called a relation of right (*Rechtsverhältnis*)" (Fichte 2000, 39). Interpersonal relationships based on the mutual recognition and appropriate treatment of rational and free subjects are thus subject to legal protection.

In Hegel's philosophy, a momentous role is played by the "ontologically" constitutive notion of intersubjectivity, which is fundamental to humanity (Siemek 1998)[18]. The communicative society, defined as the objective spirit emerging in civil society, provides the basis for primal intersubjectivity. In turn, for Hegel, intersubjectivity is intrinsically linked to the concept of "recognition," which plays an essential role in his philosophy of law. Hegel's views on this subject are expressed with particular clarity in the following passage: "Contract presupposes that the contracting parties *recognize* each other as persons and owners of property; and since it is a relationship of objective spirit, the moment of recognition is already contained and presupposed within it" (Hegel 1991, 103). The author of the *Phenomenology of Spirit* thus replaces the primary struggle

[17] Cf., *inter alia*, Hunters (1971); Girndt (1981); Düsings (1986); Siemek (1998).

[18] Hegel posits that human reality can arise and persist in existence only as a "recognised" reality. In other words, a human being is actually human for himself/herself and for others, provided that he/she is recognised by those others, that is, other members of society.

with an intersubjective logic and ethics of a common game (Siemek 1998, 101)[19]. Habermas condemns Hegel for summoning the "authoritarian embodiments of a subject-centered reason' against 'the unifying power of intersubjectivity" (Habermas 1987b, 30). Thus, for Habermas, it is the communicatively-achieved agreement between subjects that becomes the basis of modern society.

The concepts of mutual recognition and intersubjectivity are key elements of both Habermas' concept of communicative action and A. Honneth's concept of recognition. In these notions, as in Hegel's philosophy of law, the basic principle is the interaction of rational and free individuals who, through the process of intersubjective mutual recognition and understanding, can construct a social and legal reality.

The contemporary concept of recognition is linked to a critique of the subject presupposed by liberal conceptions of politics and society[20]. Thus, atomistic liberal conceptions are contrasted with the model of a discursive, cooperative society, in which the recognition of social relations and the law itself takes place through intersubjective communication, and which is based on a relationship of reciprocal dialogue and agreement. In this perspective, the human being is treated as a self-interpreting subject, whose fundamental duties include the exercise of choice and hierarchising values and behaviour. This is a subject equipped with identity and free will, while at the same time being confined by a set of discursive relations. Everyone is treated as a full participant in social interactions who, in the struggle for their recognition in every sphere, can formulate a variety of claims that must be considered and evaluated within the framework of intersubjective communication by others[21].

Habermas situates rationality in communicative action, highlighting the rational character of this action. The potential of rationality, which was once contained in religious depictions of the world, is now located in the intersubjective conditions of communication. It can be described as communicative reason. In order to achieve this goal, Habermas analyses the concept of social rationalisation, which finds expression in the 'growth of reason' in society. The author makes a distinction, which is crucial for his concept, between two types of rationality and two related varieties of the theory of action.

Social actions differ from one another in the way they are coordinated – by the intertwining of egocentric calculations of utility (goal-directed action) or by reaching agreement in the sense of a cooperative process of interpretation (communicative action) (Habermas 1984a, 101). Habermas suggests that two levels of communicative action can be distinguished: a content-based one, where a certain state of affairs is communicated, and an intersubjective one, where the relationship between the discourse participants is established. Communicative action is contrasted with strategic interaction, in the sense that "*all* participants

[19] See also Siep (1974; 1979); Sae-Seong (2001).

[20] For more on the concept of recognition, see, among others, Honneth (1994; 2003).

[21] See Apel (1976, 102); Sierocka (2003, 122).

harmonise their individual plans of action with one another and thus pursue their illocutionary aims *without reservation*" (Habermas 1984a, 294). On each occasion, communicative action is interaction involving at least two subjects capable of speech and action who enter into interpersonal relations. In this case, the criterion of rationality is not primarily efficiency, but, rather, the voluntariness of the reasoned acceptance of the norms in force. From the point of view of justifying the thesis on the causality of civil law actions, the most important theoretical component seems to be Habermas' assumption that "the process of mutually convincing one another in which the actions of participants are coordinated on the basis of motivation by reasons" (Habermas 1984a, 392). In other words, reaching consensus means 'communication aimed at a legitimate agreement.'

The performance of any civil law transaction that accrues benefit is the result of a certain consensus between the parties. Commonly accepted and intersubjectively verifiable reasons constitute the foundation of every action. Otherwise, we would not be able to say that their consensus depends on shared beliefs. A certain speech act (even more so a legal transaction) is successful when both participants accept the offer contained therein (Habermas 1984a, 475).

This allows us to objectify the legal cause underlying the act, in the sense that we can assume that it is the consequence of an agreement based on an intersubjective recognition of shared convictions concerning its essential elements. This, in turn, makes it possible to achieve the desired illocutionary result, owing to the possibility of citing the reasons (derived from shared beliefs) that constitute the rational motivation for performing the act in question. In this sense, these intersubjectively communicable and verifiable reasons (beliefs, validity claims) constitute the *cause de l'obligation*.

5. CONCLUSION – THE PHILOSOPHICAL AND LEGAL JUSTIFICATION FOR THE PRESUMPTION OF THE CAUSABILITY IN CIVIL LAW TRANSACTIONS

Since we are free, autonomous subjects, even though there is an actual intention (treated as one of the propositional attitudes) underlying a given legal action, we may modify it, or even resign from it (which, in effect, will also constitute a certain intention), and make the performed action have a detached (abstract) character. A modified theory of causability could therefore be advocated, according to which it is permissible for the parties to invoke abstract actions if this is not opposed by binding legal provisions. We would then be dealing with a kind of the 'presumption of causality'[22], which could be rebutted by the parties themselves by means of

[22] In the civil law literature, the concept of "presumption of causality" was formulated by M. Safjan, who stated that "the recognition that the causality of a contract may be the will of the parties to be excluded in favour of an abstract relationship could boil down to the thesis that instead of general causality there is a general presumption in favor of the causality of the contract. In other

a discursively shaped action, if the relevant provisions allow for it (for example, the derogation from the causality of disposition transactions concerning real estate would be excluded). Such a distinction is not just empty sophistry devoid of practical value, as such a presumption may constitute a certain rule for the interpretation of declarations of will. Therefore, the parties' exclusion of the contract's causal character should take the form of an express waiver of objections *ad personam* (Zaradkiewicz 1999, 296). The abstract character of a legal transaction must thus result from an intersubjectively reached agreement, and it should also be possible to intersubjectively verify the correctness of such a regulation of a specific legal relationship by assessing the correctness of the legislative process, or the conclusion of an agreement between the parties to a specific legal relationship. Consequently, the party invoking the abstract nature of the legal act would bear the burden of proving the truth of such a claim. It should be stressed that the adoption of such a flexible theory of causability strengthens the requirements of the certainty of trade (especially in the sphere of economic relations) and constitutes an expression of respect for the autonomy of will of the parties within the framework of contract bonds.

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words, the abstract nature of the contract should be subject to the will of the parties and clearly result from the content of the contract" (Safjan 1998, 6).

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