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# Normative aspects of Świdziński's theory – contextual art and a definition of art in legal science

## Introduction

The question of an art definition is as long as the history of art itself. Although many researchers have attempted to give a conclusive answer, none of the suggestions has ever earned a widespread recognition as an objective and exhausting answer[1]. Many artists, knowing how difficult it is to formulate a sharp, clear and universal art definition, undertook a game with viewers. They would enhance the chaos of definition. For example, Picasso would flirt with his viewers by claiming that he did not know what art was and even if he did, he would never have told anyone the answer[2]. This assertion, on the one hand, confirmed lack of language tools allowing to explain the essence of art activity, on the other, it suggested that there could be a solution to this dilemma; however, it remained hidden.

It is far easier to find in science literature definitions for particular art disciplines, currents or styles and trends than a general definition of art. As an example, I would like to bring here all different -isms, which

» 1 The problem of art definition has always been widely commented on by art theorists, critics and philosophers, see: A.C. Danto, The end of art. Contemporary Art and the Pale of History. PUP 1998; S. Davies, Definitions of Art, London 1991; N. Carrol (eds), Theories of Art Today, London 2000. The issues related to difficulties in forming art definition were reflected upon in legal sciences, see: M.M. Bieczyński, Der Kunstbegriff in der juristischen Literatur und Rechtsprechung des Bundesverfassungsgerichts, Opole 2012; K. Zalasińska, Prawna ochrona zabytkow nieruchomych w Polsce [Legal protection of immovable monuments in Poland], Warsaw 2010, p. 131 and following.

» 2 M. L. Anderson, The Quality Instinct: Seeing Art Through a Museum Director's Eye, Washington 2005, p. 2

define a particular method of reproduction characteristic for a historical period (i.e. Impressionism, Expressions, Fauvism, Les Nabis, Pointillism, etc.). After the war, researchers were trying to define the general changes, which took place in the art from the first signs of the avant-garde (i.e. Cubism, Futurism, Constructivism and Dada) to such formations as Conceptual art or Critical art. One way of dealing with the issue is to aggregate the above mentioned under one name: a contemporary art; modern art; or the latest art. However, I believe that none of the terms helps in defining with precision what is being described.

The definition dilemmas have not remained without consequences for the legal science. Lawyers, who tried to delve into the meaning of constitutional guarantee for freedom of art, or to define the limits of an object protection delineated by copyrights, have been searching for a verbal formula, which would serve as a reference point for the question of what art is. Finding an answer to that question is of utmost importance for both the act of drawing legal boundaries of art practice; and for the explanation of a practical dilemma: 'is every work of art a piece of work'[3].

Art is best explained through a set of concepts. The acts of replacing one art trend by the coming ones represent a form of a dialectic game in the history of art. What we are witnessing is a continuous self-confirmation of an art creation idea. It is best illustrated by the Dada slogan: 'Art is dead! Long live Tatlin's New Machine Art'[4], Tadeusz Kantor paraphrased it by saying: 'Abstraction is Dead! Long Live Abstraction!'[5].

Legal sciences, so far, have tried to investigate the phenomenon of art definition in the process of negation arising as a result of one art trend replacing the other. Meanwhile – it seems – that such an attempt may lead to explaining some issues connected with difficulties in qualifying the latest art as a work of art in legal terms. There is one concept of an art definition, which offers an interesting path to understand the essence of artwork. It is worth considering it from a perspective of legal sciences. I am speaking here about the 'theory of contextual art' developed by Jan Świdziński. The theory, as it was established by the author, has 12 theses and thus it resembles a legal act. This systematic way of explaining what art is allows us to consider Świdziński's approach as a variant of an artistic normatism.

» 3 This issue was investigated by The Highest Court in the following cases: HC verdict dated 31st March 1953, file no.: II C 834/52, HC verdict dated 27th March 1965 roku, file no.: I CR 39/65. In copyright literature, the issue is mentioned by E. Ferenc-Szydełko, Body art w świetle przepisów prawa autorskiego [Body art in copyrights law], PIPWI UJ 2007, p. 119-126. See also M. M. Bieczyński, Prawne granice wolności twórczości artystycznej w zakresie sztuk wizualnych [Legal boundries of art creation freedom in visual arts], Warszawa 2011, p. 102.

» 4 M. I. Gaughan, German Art 1907-1937. Modernism and Modernisation, Berno 2007, p. 148.

» 5 T. Kantor, Abstrakcja umarła, niech żyje abstrakcja, „Życie literackie", 1955, no 50, in-let „Plastyka", no 16, p.6.

Let me put forward here a research question, which logically flows from the above introduction: is it possible for Jan Świdziński's contextual art to be helpful in overcoming cognitive limits of legal sciences in recognising if, in a given case, we are dealing, indeed, with a work of art? A suggestion of such a possibility results from a selected by the author differentiation between various forms of art expression – traditional, conceptual and contextual art[6].

## Art normatism and legal normatism

While considering the problem of a legal definition of art, we may easily conclude that art has always been focal for various spheres of social life. They always thrived to determine the art contours through different expectations. In the beginning, art was treated in an instrumental way according to some outer criterion – religion, social or legal rules of appropriateness. After that, there was a rise of a new criterion, wrongly understood as an internal one – a criterion of aesthetic norms, which turned out to be rather biased. What is more, a clash of two diverse points of view became visible in law and aesthetics. One would see a work of art as a tool for some practical purpose; the other would claim that a work of art is an autonomous entity[7].

The utilitarian approach assumes that art does not represent a social good. Its value manifests itself in the context of fulfilled social functions. According to this point of view, the only art which is used to strengthen expected a code of behaviour deserves the protection of the law. As a representative example let me quote here the concept formulated by German legal science called Veredelungsthese – the thesis of sublimation. It presumed that art must possess essential features and specific elements, which would disclose its over and above the average character and would prove its indispensability for a society in a free, democratic state of law[8].

On the other hand, in an approach where art is seen as an autonomous entity, the value of art results from its independent social importance. The rejection of an instrumental concept of art, which serves the idea of art freedom, frees art from serving anything else except for itself. An autonomic perception of art enables us to consider it as a sphere of self-determination (German: Eigengesetzlichkeit)[9].

» 6 The text is a result of a research project finansed by the grants of National Science Centre in SONATA 2013 programme – id. no.: UMO-2012/05/D/HS2/03592 – entitled 'Philosophical basis of legal restrictions in visual arts' freedom'.

» 7 This issue was discussed more in a text by M. M. Bieczyński, Prawo i estetyka – zewnętrzna i wewnętrzna normatywność sztuki [Law and aesthetics – outer and inner normatism of art], Zeszyty Artystyczne no.: 26/2015, p. 7-30.

» 8 H. von Hartlieb, Die Freiheit der Kunst und das Sittengesetz, Munich 1969, p. 19.

» 9 Various aspects of this issue were discussed in detail in: U. Karstein, N. T. Zahner (red.),

Let us now put forward a question about Świdziński's theory. To be specific, how significant it is in terms of the opposition described above and the question of a legal definition of art. It seems to me that the most challenging is art that transcends limits of concepts and meanings; which cancels and questions social conventions. With that in view, law neither seems to be focused on so called conventional art, which touches traditional topics (a landscape; or a portray) nor, is it interested in abstract meanings, for example, geometric abstraction. Law is interested in art that enters into a relation with reality; or comments on particular events. I believe that Świdzinski speaks of that type of art. I wonder, therefore, if his contextual concept could be an answer to cognitive deficiencies in legal sciences with regard to post-war artistic practices.

## The normatism of Jan Świdzinski's contextual art concept

Jan Świdziński captured the concept of contextual art in twelve standardised theses[10]. He, therefore, proposed a rather formalised view of artistic activity, which may seem strange for an artist representing art communities. His idea brings to mind the 18th century's attempts to codify art, which were exemplified by academic artists. The difference between the two approaches is all about the fact that Świdziński did not aim to define 'the one and only art'. His idea was to suggest a typology of artistic phenomena.

The first thesis[11] speaks about the fact that any search for the meaning of art is an attempt to objectivise it. The thesis connects the problem of art definition with a language problem[12]. Through asserting that the validity of a sentence is contextually conditioned, Świdziński refers to the logic and theory of sentence classification. According to the binary rule of logic, a sentence is either true or false. By noting this, we notice that – in opposition to other definitions of

Autonomie der Kunst? Zur Aktualitaet eines gesellschaftlichen Leitbildes, Wiesbaden 2017, all texts in the volume.

» 10 See. J. Świdziński, Sztuka jako sztuka kontekstualna [Art as contextual art], Warsaw 1977.

» 11 The 1st thesis of contextualism: There are no objects without a meaning as there are no meanings without objects. One and the same object may have different meanings in different codes, one and the same meaning may be ascribed to different objects. All this leads to two types of multi-meaning:
I. The multi-meaning of objects which have the same meaning.
II. The multi-meaning of meanings which have the same object.
In a particular context, only one meaning is accepted as the true one. The criterion of choice is the criterion of truth. [http://www.Świdziński.art.pl/12points.html]

» 12 The Linguistic character of Świdziński's contextualism was analysed, for exmaple, in a text by J. Jusiaka, Kontekstualna interpretacja dzieła muzycznego [Contextual interpretation of a music work], [in:] D. Leszczyński, M. Rosiak (eds.), Świadomość, świat, wartości. Prace ofiarowane Profesorowi Andrzejowi Półtawskiemu w 90. rocznicę urodzin, Wrocław 2013, p. 141.

art suggested by other representatives of art – Świdziński did not base his idea on an abstract concept of beauty, but he referred to an inference model found in legal sciences.

The second thesis[13] focuses on confirming the meanings in social context. The author draws attention to non-authoritarian definition formulation. In other words, we are talking here about the acts of definition making, which are not supported by the strength of the speaker's authority (i.e. a coercive force) and they do not require finding an objective point of reference for the quoted assertions. Without such reference, attempts to answer the question of what art is, leads to blurring the meaning of that concept in social context. As no-one can decree what art is, art may be anything. On the other hand, the reference to truth criterion conveyed by the first thesis rules that a human does not agree to call everything art. As a consequence, we witness the process of blurring the concept – both assumptions (about the multiplicity of art views and the one disagreeing to assume everything as art) begin to coexist. For that reason, there occur many conflicts and disputes about the basic notions within art communities and communities outside art. The opposing definitions of art seem to encompass the entirety of reality to think of. In the context of the first two theses proposed by Jan Świdziński, both the instrumental and autonomic theories described earlier on in this text, may lead to an unbound understanding of a work of art.

The third thesis[14] focused on two types of art, which are most often distinguished in European art tradition: traditional art (figurative) and conceptual art. The author noticed that each type linked with a different way of connecting objects to their meaning. By making this distinction, the theorist prepared the way to root his theory in historical context. Świdziński showed that a possibility of reality creation in an art process happens in a variety of ways – through the use of meanings or objects. The qualification of an art object depends secondarily on a creative strategy selected by an artist.

» 13 The 2nd thesis of contextualism: If different social groups ascribe different meanings to one and the same object and none of those groups commands sufficient authority to enforce its viewpoint on others, the problem arises of finding a suitable criterion of choice. This leads to the many definitions of art (everything may be art). Since civilisation is changing extremely fast today, there is little time for new meanings of objects to crystallise. In effect, the objects of art assume different meanings (everything may be accepted as an art).

» 14 The 3rd thesis of contextualism: In our practical activities, we create objects with a given meaning (concepts). This is how conventional art works. In our cognitive activities, we create meanings (concepts) possessing given objects. This is how conceptual art works. Both of these operations have a feedback relation. The reality which we shape depends on our concepts of reality, our concepts of reality depend on the reality which we create. Therefore the choice of criterion defines the reality which we shape.

The fourth thesis[15] of contextual art refers to meaning making in social reality. The author suggested that neither traditional nor conceptual art is adequate to describe the dynamism of meaning in everyday life. Everydayness does not allow for static concepts. Although certain groups of people while using language try to retain particular meaning connected to concepts (it allows them to hold on to developed divisions and force relations between groups), still, it is not possible to persist in it for longer periods of time[16].

While analysing the first four theses of contextual art, we may clearly see that the social practice of naming 'subjects of description' (man-made material objects, as well as situations generated by a man) as art represents a marker for conventions and cognitive schemata, which may be directly translated into authority[17]. We may deduce from that that consolidating the meaning through language is the basis for delineating social hierarchies. Świdziński sought to make us aware that there is a possibility of falsifying reality through artificial sustaining outdated meanings of concepts. He wrote: 'due to ambiguity within sign systems, there is a possibility of constructing ostensible meanings of reality, and as a result the act of producing an ostensible reality'. Świdziński clarified that both the concept of traditional art and conceptual art might find itself outdated with time. We may deduce that Świdziński may have confirmed, thus, that the most permanent feature of art history is the changeability of its research subject. However, we arrive here at a problem. The law operating on meanings constructed by language is not willing to modify set standards, and it tends to change very slowly. The dynamism of art and static nature of law result with the fact that both spheres stand in opposition to each other.

According to the fifth thesis[18], it is possible to learn the meanings of concepts in a context, which comprises of such parameters as subject,

» 15 The 4th thesis of contextualism: The changes which occur in that reality make the existing meanings no longer valid; social practice becomes the ultimate criterion. The fact that certain meanings lose their validity affects our life-styles, results in a loss of privileges that have been gained by one group in favour of another. There is, therefore, a constant trend towards upholding meanings which have lost their validity. Because of the diversified range of meanings in the definition systems, there is the possibility of construction apparent meanings of reality, and in consequence, of producing an apparent reality.

» 16 Cf.: K. Piotrowski, Czy człowiek istnieje tylko konceptualnie? Antropologiczny wątek w myśli Kosutha i Świdzińskiego, Dyskurs. [Does a man exist only conceptually? An anthropological thread in Kosuth & Świdziński's thinking. A discourse], Pismo Naukowo-Artystyczne ASP, Wrocław, no.: 16, vol. 16, 2013.

» 17 Cf.: J. Świdziński, Art, Society and Self-Consciousness, Calgary 1979, p. 123.

» 18 The 5th thesis of contextualism: The outdating of meanings is a constant process - proceeding all the faster, the quicker civilisation changes. Contextual art proposes a sign, the criterion of truth, which, defined by the pragmatic context, changes incessantly (a situation develops in which "p" begins to be "p" - begins not to be "p"). Object "O" assumes the meaning "m" in time "t", place "p", situation "s", in relation to person/persons "x" then and only then. A change of any of those elements outdates the previous meaning.

time, place, situation and a person. Świdziński writes: ‘ Object ‘o’ assumes meaning ‘m’ in time ‘t’, in place ‘p’, in a situation ‘s’, in relation to an individual/individuals ‘i’, then and only then.’ An alteration in any of the parameters outmodes the previous meanings. I believe that the fifth point agrees with the postulate of the avant-garde artists (Duchamp and Beuys) to equalise life and art. Świdziński stripped his theory of the historical features. He made it universal, while at the same time, he assumed that works of art, which fulfil the principles of his concept might be entwined in historical aspects. The correct reading of those works shall always happen in the primary context of their presentation. In other contexts, the works shall need to be updated to accommodate new meanings.

In the sixth thesis[19], Świdziński noted that there is art, which reveals the knowledge of its creators about inaccuracies in meanings created in social context. It is characterised by a continuous rejection of narrow cognitive codes-schemata. This art seems to be freed from a trap of static concepts. Świdziński in this way tell us that art, which he called contextual, allows to de-construct existing orders.

The seventh thesis[20] of contextual art pertains to the cultural formation, which may be defined as the third way. It challenges the short-comings of the two types of art: traditional and conceptual. ‘It rejects the established definitions of art’[21]. What is interesting – points 6 and 7 of his theory appear to assume a possibility of an escape from defining art while keeping valid the definition of art as an object in a singular context (see: point 5).

According to this view of art, it is impossible to define art in a general, objective and sharp way, but it is possible to delineate premises on the grounds of which we may assume the artistic character of author’s actions in a singular moment of its manifestation. The above conclusion appears to be surprisingly consistent with the theses of German Constitutional Tribunal. It asserted both the lack of art definition and the necessity of casuistic appraisal of an art premise of an author’s action in given circumstances while examining the case by the court.

Świdziński seems to perceive his concept of an art creation as a ‘definition without a definition’. He assumes however that art is a universal formula, and its particular manifestations cannot be preserved in time and may not be understood in some other place than the place of their original presentation. Every new reading of the same artwork shall be dif-

» 19 The 6th thesis of contextualism: The operation of contextual art is, therefore, a steady rejection of canons used to arrest the outdating of meanings.

» 20 The 7th thesis of contextualism: Contextual art opposes the stabilisation of the objects of art since the lasting nature of an object extends into its meaning. Contextual art opposes the stabilisation of meanings since the lasting nature of meanings leads to the production of outdated objects. It, therefore, rejects the definitions of art.

» 21 J. Świdziński, 12 tez sztuki kontekstualnej, op. cit.

ferent. In this sense, Świdziński's definition is a definition, which assumes relative meanings of artwork regarding its presentation context. The author, however, highlights in one of his other points that the acts of making contextually relative meanings does not mean that they are relative.

The eighth thesis[22] expands the question of opposition amongst three cultural formations. The first type of art is the one using artwork as a medium for meaning, and the second is connected to a self-referential attempt in self-definition[23]. Conceptual art should be seen as a reacting art, where acting, in reality, seems to characterise it. An art domain, which responses the best to the idea of Świdziński's contextual art is performance art.

The 9th[24], 10th[25], 11th[26] and 12th[27] thesis complement the characteristic of contextual art. The author particularised the necessity of reading the meaning of art in relative terms – it means that the sense of work of art must always be read in a pragmatic context. The issue of relation, which lies in the focus of contextual art, does not exclude the fact that all art could be seen as contextual provided that it deals with a specific reality. Therefore, Critical Art, which researches particular conditions, in which it would be presented, potentially could fit the definition of contextual art.

In the 10th thesis, Jan Świdziński asserts that 'the expressions of contextual art are not expressions which would be acceptable for a group since the reality construed by the artist is something different than that which is received (it changes all the time)'[28]. The author speaks here about a potential argument between an artist and viewers. The conflict may happen both on the level of content and manner of utterance. We notice here the conflict-ridden nature of creative activity, which results from calling into question the meanings assigned to concepts in the social life practice.

» 22 The 8th thesis of contextualism: In the relation linking meaning and the object to which U is applied, in the case of conventional art both components remain stable ("art" implies these and not any other objects). Since Duchamp's time, the second of these components has been set into motion (every object may mean an art). In contextual art, both components change (also each object may have the meaning of an "art" and not be an art). The aim of art is the relativization of the entire area of meanings and of objects.

» 23 Ł. Guzek, Co stanowi kontekst sztuki? [What is the context of art], Obieg.pl, 12.06.2010, source: http://archiwum-obieg.u-jazdowski.pl/teksty/17671, accessed on: 11.12.2016, at 1pm.

» 24 9th thesis of contextualism: Art as contextual art is concerned with the relation itself (the readiness to the up the meaning with the object in a defined pragmatic context).

» 25 The 10th thesis of contextualism: The expressions of contextual art are not expressions which would be acceptable to a group since the reality construed by the artist is something different than that which is received (it changes all the time).

» 26 11th thesis of contextualism: Art as contextual art has no connection with science. Science has to define (immobilize) an object by giving its meaning. It is beyond the sphere of formal logic. The world in which it exists is not an area of formalized axioms, but rules which become constantly outdated and which attempts to preserve the changing reality.

» 27 The 12th thesis of contextualism: Art as contextual art is opposed to multi-meaning and also to relativism. One and only one expression is true in the given pragmatic context. Such expression is expressed with an assertion.

» 28 J. Świdziński, 12 tez sztuki kontekstualnej, op. cit.

Through the act of putting into opposition the contextual art and ambiguity/relativism. The author does not exclude a potential of recognising the context as the only way to guarantee the meaning of an art event or the possibility of its new reading in a new context. Świdziński maintains, however, that both meanings shall differ. This evaluation of work of art content, where the most important element is the reconstruction of the prime context of an utterance brings to mind the process of establishing the actual state of the case in court proceedings. In order to apply correctly the law norm, I am talking here about the act of subsuming through drawing the specific facts, and we need to perform a detailed reconstruction of all circumstances of the case.

Świdziński argues that contextual art is an utterance with an assertion. Assertion characterises positive opinions, claimed with conviction about its true, assertive nature. Art with an assertion shall be art, which possesses a thesis commenting on the reality. It would represent an interference into the reality – the radical nature of this interference has not been defined in any particular way. A scandalising work may potentially be a contextual work of art as well.

## The concept of contextual art and legal art definition

Federal Constitutional Court in the course of legal cases dealing with art activity developed a descriptive definition of art captured in four theses. First of all the court asserted that art cannot be defined sharply[29]. Secondly, the court assumed that an essential feature of art activity is 'free, unbound creation in which the feelings, experiences and insights of the artist are presented for a direct view through the medium of a specific formal language'[30]. This defining element has been determined in literature as 'a material one'[31]. Thirdly, we notice a 'formal-typological point of view, according to which the artistic character of work is confirmed when all requirements of a genre are met in work for example when we deal with painting, or sculpture'[32]. Finally, the definition was complemented by a symbolic and theoretical element according to which the art utterance is distinguished with an openness for interpretation[33].

» 29 Cf.:. M. M. Bieczyński, Pojęcie sztuki w niemieckiej literaturze prawniczej i orzecznictwie Niemieckiego Sądu Konstytucyjnego / Der Kunstbegriff in der juristichen Literatur und Rechtsprechung des Bundesverfassungsgecrichts, Opole 2012, p. 60-64.

» 30 The case of Anachronistischer Zug, file no.: BVerfG 67, 213, 28.

» 31 U. Karpen, K. Hofer, Die Kunstfreiheit des Art. 5 III 1 GG in der Rechtsprechung seit 1985 – Teil I, Juristenzeitung no.: 19/1992, p. 952.

» 32 The case of Anachronistischer Zug, file no.: BVergG 67, 213, 36; H.-J. P. Groth: Bundesprüfstelle und Freiheit der Kunst, [w:] B. Dankert, L. Zechin (Hrsg.): Literatur vor dem Richter. Beiträge zur Literaturfreiheit und Zensur, Baden-Baden 1988, p. 185.

» 33 It means that as a result of the process of interpretation there could be generated new meanings [U. Karpen, K. Hofer, op.cit., p. 952], in which we are dealing with practically endless,

The above definition represents a court's model of thinking about artwork, and therefore it is a basic measure applied in weighing the goods. According to German researcher of law, J. Wurkner 'the general definition of art – a formula – does not have to provide us with solutions for precedents, the opposite – its task is to make it impossible for courts to issue exclusive decisions in concerns related to freedom!'[34].

The above concept of legal art definition in German law represents a reference point for European legal sciences as the most complex study of the topic. It is therefore understandable that we should inquire into the question of the compatibility between the Federal Constitutional Court's theory of art and Świdziński's 12 points of contextual art. If we were able to pinpoint similarities in both thinking models, which seem to share the reference point (normatism), we could discover that thanks to the application of the concept by Polish theorist in the field of legal sciences we could overcome contemporary cognitive shortcomings in the legal qualification of artwork.[35]

The first and second contextual art theses allow to 'throw bridges' between art sciences and legal sciences. The author highlights the pragmatic context of artwork meaning, and this seems to be significant for a variety of reasons from legal sciences point of view. Firstly, it roots the problem of art definition in the area of logic and linguistics. By doing so, it allows analysing the concept of art in wider social context. The author transcends the level of expectations (expectations of artists, or lawyers) and in proposing such approach give us tools to acquire a distance from the object of description. What we have here is an attempt to objectivise the description of art. The act of objectivisation is a necessary condition for a neutral law education in terms of expectations from art.

Świdziński's consideration over art leads him to assert that 'If different social groups ascribe different meanings to one and the same object and none of those groups commands sufficient authority to enforce its viewpoint on others, the problem arises in finding a suitable criterion of choice. This leads to the many definitions of art (everything may be art)'[36]. Similar views are expressed by judges reviewing cases concerning art. Let me recall here the verdict of District Court in Gdańsk in the famous case of Dorota Nieznalska, who was accused of offending religious feelings. The case concerned a public presentation of her installation work ssion]. At the closure of the trail, the court propounded

multi-layered information flow [H.-J. P. Groth, op.cit., p. 185].

» 34 J. Würkner: Wie frei ist die Kunst?, Neue Juristen Wochenzeitschrift no.: 6/1988, p. 317.

» 35 See.: a chapter entitled 'Pseudo-wyjścia z definicyjnych aporii' [Pseudo-exits from the definition of aporia] [in:] M. M. Bieczyński, Pojęcie sztuki w niemieckiej literaturze prawniczej i orzecznictwie Niemieckiego Sądu Konstytucyjnego / Der Kunstbegriff in der juristichen Literatur und Rechtsprechung des Bundesverfassungsgecrichts, Opole 2012, p. 28-40.

» 36 A fragment of the second point of contextual art according to Świdziński.

lack of clear reference points in recognising someone's actions as a work of art: 'The situation is relative. Since for some people the work of art is represented only by the Renaissance masters, for other people the same works are old-fashioned. Similarly, for some people 'Pasja' installation is good art, which moves sculpture forward, for other people it is nothing (sic!)'[37]. Fortunately, this line of thinking was found incorrect as the case developed, but it seems to reflect directly Świdziński's consideration.

The author of contextual art's concept is also aware of a potential social dispute (we may even say 'culture war'), which may come about as a result of an artwork presentation. In the 10th point of contextual art, we may read that: 'The expressions of contextual art are not expressions which would be acceptable to a group since the reality constructed by the artist is something different than that which is received (it changes all the time)[38].' This very statement reflects rather well the conflict-ridden nature of every art intervention.

An essential contribution of Świdziński to the theory of law appears to be his reference to the pragmatic context of an artwork presentation seen as the most significant interpretation premise. The assumption according to which an artwork as an object "O" assumes the meaning "m" in time "t", place "p", situation "s", in relation to person/persons "x" then and only then, where the change of any parameter cancels previous meanings[39]' seems to be the missing element in legal debates over the legality of an artwork. It seems that it is not a discussion about the definition (in other words a question of whether we are dealing with an artwork is a principle problem for courts), but the problem lies in a proper recreation of meaning (a social meaning) of work under scrutiny. Irrespectively of the fact that we assume an object, an action or a situation as an artistic one, the question about the motivation of a creator, his or her intention to break a legal norm remains open.

Amy Adler, an American lawyer, reviewed that issue in a different context[40]. According to Adler, the direction of changes in contemporary art which represents a departure from traditional forms of artistic expression (traditional art) and turning first towards language (conceptual art) and next, towards an active participation in social life (the critical art) created a situation in which no legal analysis of the degree of harm in art utterance may say nothing of the prime context it was formulated in. According to Adler, this problem becomes rather transparent in cases when

» 37 A verdict of District Court in Gdańsk dated 18th July 2003, full text can be accessed at: http://www.nieznalska.art.pl/rozprawa8.html

» 38 J. Świdziński, 12 tez sztuki kontekstualnej, op. cit.

» 39 J. Świdziński, 12 tez sztuki kontekstualnej, op. cit.

» 40 A. Adler, What's left?: Hate Speech, Pornography and the Problem for Artistic Expression, California Law Review 1996, vo. 84, No. 6, p. 1449.

politically engaged artists adopt the language of extreme social movements – for example, the hate speech, or pornography to complete a symbolic de-construction within its strategies of communication. Artists by using the creative strategy, which does not fit a traditional repertoire of artistic expression, put the legal world in a difficult situation. A lawyer, who is to examine the message objectively cannot say anything about the visual. For that reason, due to legal formalism, such work formulates two opposing postulates. On the one hand, it requires the state to intervene to fight the hate speech and pornography, on the other hand, because it uses the forms of representation associated with the above mentioned, it expects a wide margin of freedom to practice such criticism[41]. It leads to an estimative dilemma: how to prohibit pornography, while at the same time protect art, which is entwined in the context of fighting porn. How to prohibit the hate speech without punishing art, which uses it to criticise it.

The fact that the author recognises the lack of objective instruments in differentiating between opposing visual messages formulated within one phraseology, based on formal and non-substantial premises – crossing out a swastika is using it – must lead to putting forward a question about a possibility and principality of introducing an unconditional exception from a general censorship (punishment) of hate speech for art[42]. Adler is not able to point us towards any solution for this situation.

Perhaps, a suggestion of help may be found in the contextual art theory by Świdziński. The theorist seems to suggest that it is not the formally conceptualised visuality or artwork content that should determine the degree of social harm, but the meaning to be read from a pragmatic context; from an assertion contained in the artwork at the time of its public premiere. Świdziński accentuated establishing the meaning of the artwork within the context of its first presentation.

While reviewing ECHR's verdicts in cases related to the freedom of expression in the arts, we may notice attempts in differentiating the meaning of a creative action according to a context. This approach, however, does not seem to be anchored in domestic legal orders. European Tribunal used the context-conditioned differentiation method in judging the art utterances[43] in such cases as Akdas against Turkey[44] or Vereinigung Bildender Kunstler against Austria[45]. In the first case, the Tribunal

» 41 *Ibid*em

» 42 *Ibid*em, s. 1548.

» 43 Verdict ETPC dated 26th May 2011 r., complaint no.: C-485/07.

» 44 Verdict ETPC dated 25th January 2007, complaint 68354/01.

» 45 See.: amongst others M.A.Nowicki, Wokół Konwencji Europejskiej: Komentarz do Europejskiej Konwencji Praw Człowieka [Around the European Convention: Commentary on the European Convention on Human Rights], Warsaw 2013, p. 655; I. Kamiński, Swoboda autora wypowiedzi będącej satyrą lub karykaturą – glosa do wyroku ETPCz z 25.01.2007 r. w sprawie

allowed distributing in Turkey an indecent novel by Apollinaire assuming it to be part of European literary heritage. In the second case, the court acquitted of all charges an author of an artwork which infringed personal rights of a politician. The Tribunal asserted that the artwork was an answer to the earlier public criticism uttered by the politician about the painter. The court ruled that although the artwork trespassed offensive limits, the language of the work should be measured according to the circumstances motivating the artists (the perpetrator).

## The summary

The analysis shows us that the theory of contextual art is not a ready-made recipe for the cognitive shortcomings of legal sciences in estimating an artistic quality of artwork. The theses of the contextual theory provide us with a new way of understanding an artwork in legal sciences. Świdziński's theory is based on criteria of logical thinking rooted in language, and thus it is a much more operative tool for lawyers to define art than any other earlier theories of normative aesthetics. In other words, Świdziński in 12 points seems to fill in a cognitive gap in artistic normatism. This seems to be located between aesthetic orders and legal orders. Świdziński, in my opinion, transcends an opposition of either instrumental or autonomic definitions of art. The author, through his analysis, highlights where we could encounter difficulties with objectivisation of an art action in the process of legal and aesthetic appraisal. Independently from accepted research criteria, the artwork possesses a potential possibility of escape from commonly fossilised meanings.

An assumption of conceptual theory in which a natural human inclination is to assume only one version as true does not exclude a situation in which achieving this is not possible. In this sense, an artwork becomes a hypothesis which could be verified in all contexts, but it is confirmed only in the prime context of its presentation. If then Świdziński can provide lawyers searching for a definition of art any tool to objectivise it, then we may claim that in case of a questioning the nature of the artwork, first, we must, in detail, establish the prime context of that work. That is where this work has been constituted in. The above assumption enables us to differentiate an artwork estimation process from factual criterion. We are dealing here also with a possibility of neutralisation of content illegality by denoting the contextual content of work. ●

[Freedom of the author of satirical speech or caricature - a response to the verdict of the ECHR dated 25.01.2007 in case of Vereinigung Bildender Künstler against Austria] Vereinigung Bildender Künstler przeciwko Austrii (complaint 68354/01), Europejski Przegląd Sądowy 2008, no.: 2(29), p. 47.