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STRATEGIES AND TECHNIQUES USED IN THE PREPARATION OF JUDICIAL OPINIONS*

I. INTRODUCTION

An opinion of a judicial decision is a special kind of statement. It is an outcome of, on the one hand, the fulfilment of a procedural duty imposed on the court and, on the other, a need, stemming from social and cultural considerations, to give reasons for an imperative decision taken towards other persons or entities.[1] Therefore, the way it is prescribed to be drawn up by the court combines 'formal' characteristics and elements giving its author some leeway. The basic provisions on an opinion structure refer to the opinion of a judgment and are similar in all judicial proceedings. They give the principal components of an opinion with their general descriptions (as for instance in the Act on Administrative Court Procedure, Article 141 para. 4, pursuant to which an opinion should give 'a concise presentation of the case').[2] They are to be filled with specific content left to the discretion of an opinion draftsman. In this situation, admittedly, a certain practice has developed in the courts, but still some detailed aspects reflect the individual preferences of the draftsman. Due to the need to keep opinions flexible, in particular because there may always come up unforeseeable cases, and the complexity (many-sidedness) of opinion drafting,[3] it is not possible to prescribe—neither formally nor by agreeing on a single opinion drafting practice—the structure of an opinion in a fixed, final and only right manner that would be detached from individual preferences of expression.

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[1] For differences in giving opinions by courts between autocratic and democratic countries see: E. Łętowska et al., *Podstawy uzasadniania w prawie konstytucyjnym i międzynarodowym*, in: I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia decyzji stosowania prawa*, Warsaw, 2015: 15–16.

[2] The provisions regulating the structure of an opinion include the Act on Administrative Court Procedure [Prawo o postępowaniu przed sądami administracyjnymi], Article 141 para. 4, Code of Civil Procedure [Kodeks postępowania cywilnego], Article 328 para. 2 and Code of Criminal Procedure [Kodeks postępowania karnego], Article 424.

[3] For the complexity of judicial opinion drafting see I. Rzucidło, Wielowymiarowość uzasadnienia decyzji stosowania prawa, in: M. Żuralska (ed.), *Interdyscyplinarne ujęcie prawa. Materiały ogólnopolskiej konferencji naukowej „Prawo i…" Zasadność interdyscyplinarnego ujęcia prawa, Warszawa 2–3 grudnia 2011 r.*, Warsaw, 2013.

The leeway given to a judge as the author of an opinion is variously used by him/her, depending on individual preferences and competences in judicial opinion drafting. This can be seen in text editing (for instance use of numbering or headings)[4] or in particular wording, rhetorical devices and ways of reasoning. The last-mentioned item is in fact the question of using suitable strategies and techniques of argumentation, distinguished within the category of argumentation style, considered at the level of the general suitability of argumentation and not as a style following from the characteristics of a given legal system.[5] Since the question of argumentation style is unusually rich and merits attention going beyond the scope of a scholarly paper, this exposition shall focus on the strategies and techniques of drawing up judicial opinions. The conclusions formulated below are the effect of an extensive study of judicial decisions, above all judicial opinions, and publications on opinion drafting. The point of departure was, for the most part, the study of administrative court opinions, but its findings are nonetheless rather more universal and extend in principle to opinions drawn up by other courts. The findings are accompanied by the presentation of the most interesting and significant strategies, and techniques of argumentation observed, while admitting that there are more specific varieties to be found in particular types of proceedings.

Judicial opinions are believed in practice (the law is silent on this matter) to consist in principle of two structural elements: the so-called historical and legal parts. The former gives the description of the case history and—against this background—the findings of fact, while the latter contains legal deliberations (in a way, it reflects acts leading to the findings of law). Sometimes, a part devoted to the presentation and assessment of evidence is distinguished as a separate part of the opinion or an element of the historical or legal part. The strategies and techniques of drawing up an opinion are found to be used with respect to both principal opinion parts but the more natural space for the use of techniques is thought to be the legal part, because it gives more leeway as to its content than the historical part. The latter is largely defined by the statements of the parties and other persons or entities and the circumstances of the case, and the like.

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[4] The question of text organisation and editing goes beyond the scope of this paper and merits special attention.

[5] The category of argumentation style is not uniformly understood in all legal systems. A style characteristic of a given legal system is a separate conceptual category, to be found at another level than the other means of looking at this phenomenon. In this approach, it is the emanation of law enforcement assumptions and law observance itself, with three basic styles of drawing up opinions being distinguished: French, German and Anglo-American. Zob. E. Łętowska, Pozaprocesowe znaczenie uzasadnienia sądowego, *Państwo i Prawo* 52(5), 1997: 3–5.

II. ARGUMENTATION STRATEGIES

As mentioned above, the manner of opinion content presentation is decided by strategies adopted for this purpose by the draftsman. They decide how the narration pursued in the opinion is to be created and are conducive to the achievement of goals set by the draftsman. The goals, in turn, are defined by other factors, in particular by the intended readers of the opinion. An opinion seems in this context to be a game played with its readers. Strategies are used, as mentioned earlier, in drawing up both parts of an opinion, albeit differently. It is worth noticing that some strategies are mutually exclusive, while others may be used in parallel.[6]

1. Strategies for drafting the historical part of an opinion

The historical part of an opinion is drawn up (or at least it ought to be) with an eye primarily to its legal part.[7] Its individual elements are selected according to what the contents of the legal part are going to be. The historical part becomes thus a particular instrument of dialogue between the court and the addressees of its message, showing (inevident at first glance) a quite considerable rhetorical potential.

1.1. Detailed citing of elements

One of the strategies in this respect is a detailed citing of elements characteristic of the historical part: statements by parties, occurrences in the case, allegations raised on appeal, entire pleadings and other documents on record

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[6] A different opinion on strategies (in relation to a different legal system) is expressed by B.M. Atkins, Decision-making rules and judicial strategy on the United States courts of appeals, *The Western Political Quarterly* 25(4), 1972: 626f. Por. także M.A. Perino, Law, ideology, and strategy in judicial decison making: evidence from securities fraud actions, *Journal of Empirical Legal Studies* 2006, no. 3: 505f, in which the author listed various models of decision making and arguing: 'legal model'—decision and opinion based on law, 'attitudinal model'—on one's own preferences as to values and political views, and 'strategic model'—geared to the achievement of a goal. See also M. Bergara et al., Modeling Supreme Court strategic decision making: the congressional constraint, *Legislative Studies Quarterly* 28(2), 2003: 247ff.; P.T. Spiller et al., *Strategic judicial decision making*, NBER Working Paper No. 13321, <http://www.nber.org/papers/w13321> [accessed 3 March 2017]. For adjudication models similar to the presented argument strategies see P. Weiler, Two models of judicial decision-making, *Canadian Bar Review* 1968, no. 3: 408. See also interesting comments, although on another kind of decisions in O. Bachelet, *Le Conseil constitutionnel valide la motivation elliptique des verdicts d'assises*, Lettre „Actualités Droits-Libertés" du CREDOF, 4 April 2011. For another view of strategies see T.R. van Geel, *Understanding Supreme Court Opinions*, Harlow, 2007: 117f.

[7] Also in situations where the decision is only formal (as for instance with the withdrawal of a cassation complaint) and only procedural questions can be raised without citing allegations made by the party, because then they are irrelevant for the decision. Thus, the content of the historical part is selected with an eye to this decision. See the decisions of the Supreme Administrative Court of: 8 May 2013, II FSK 1840/11; 9 May 2013, II OSK 347/13; 9 May 2013, II GSK 376/12; 27 March 2013, II FSK 755/13; 21 May 2013, II OZ 384/13 (irrelevance of staying the execution of an appealed decision, owing to the prior rendition of a judgment in the case).

(making up the factual state and additional historical background of the case). Sometimes, even those elements of a historical part are cited in detail that are not closely related to the legal problem at hand or do not correspond to the antecedent of the legal norm applicable to the case.

This overloading of a historical part is to defend the court against the charge of a wrong determination of facts in the case and, consequently, the reversal of the decision or its negative assessment outside the court-hierarchy review system. From the point of view of the reviewing court, however, such an opinion may give rise to serious doubts whether the trial court has understood the core of the problem on which the case rested. The overloading, however, may be understandable if one considers the fact that the chief task of a trial court is to determine the facts in the case.[8]

The second reason why this strategy is used is to give the impression that since all this information has been included in the historical part of an opinion, it has been carefully determined, assessed and considered by the court while making a determination. This is conducive to the phenomenon that can be called 'legitimating by appearances', that is, manipulating the contents of an opinion so that its reader gets an impression of an exhaustive and detailed reflection. So understood, this strategy is characteristic not only of ordinary trial courts, but also other courts whose decisions are subject to review: within or without the court-hierarchy system or by parties to proceedings or other persons/entities in an informal manner.

A special variety of this strategy involves citing the allegations raised on appeal, often without condensing or paraphrasing (*in extenso*,[9] or sometimes even *in crudo*).[10] The purpose of such a measure is to show a party that its doubts have been given careful consideration and thoroughly examined (especially when the court is bound by the limits of the appeal). Moreover, it is also meant to demonstrate that the court has understood allegations raised by a party. Paradoxically, sometimes it may give the impression of superficiality. It is crucial, however, how the allegations are referred to in the legal part of the opinion: it is the manner of this reference that ultimately determines the argumentative value of the court's reasoning.

The bloating of a historical part may suggest that the court's input into its drawing up has been rather small, limited to copying the contents of the case file, in particular the pleadings. When the historical part is hypertrophied, the

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[8] F. Błahuta, Uzasadnianie orzeczenia pierwszej instancji w sprawie cywilnej, *Biuletyn Ministerstwa Sprawiedliwości* 1955, no. 4; idem, Uzasadnienie orzeczenia pierwszej instancji w sprawie cywilnej (wskazówki praktyczne), *Biuletyn Ministerstwa Sprawiedliwości* 1955, no. 4.

[9] Slightly re-worded allegations are not rare. Cf. SAC judgments: of 22 March 2013, II OSK 2259/11; of 18 September 2012, II OSK 1393/12; and 7 March 2013, I GSK 1258/11.

[10] Quoting practically unprocessed allegations can be observed by analysing the writing style and manner of referring to legislation and parties to proceedings (for example use of lowercase and uppercase letters throughout the findings of fact). M. Domagalski, Kopiuj/wklej w wyroku, *Rzeczpospolita* 20 December 2011.

legal part cannot often match it in terms of volume, which results in a slightly grotesque effect.[11]

1.2. Condensing

Another strategy employed in drawing up the historical part involves condensing its individual elements. This may take the form of either selecting the most important information from the entire case file (for instance, citing selected pleadings and passing over those that are irrelevant to the determination of the case) or writing a précis of all the facts and occurrences in the case. It is used especially when the drafted opinion refers to a decision by an appellate court that is already unlikely to be subject to review. Hence, there is no fear that the omission of an element of factual issues, relevant to the determination, will meet with censure.

Giving the details of the factual basis of the case and the course of proceedings so far is not necessary in this case also because the parties thereto, to whom an opinion is addressed most of the time, either know these details well or are only mildly interested in them insofar as they are necessary to grasp the legal part.

This strategy is used especially in drafting the judicial opinions of appellate court decisions also because at this stage of case cognisance, the legal problem to be determined is clearly discernible. Trial courts, for pragmatic reasons, often give their opinions on all aspects of the case. Sometimes only on a successive cognisance level, in particular after considering allegations raised on appeal, which frequently give direction to the determination of the case, can the crux of the matter be seen. Then, the historical part may focus on these elements that correspond with a specific determination, omitting or briefly going over the others. This is particularly well seen in administrative court opinions, especially those of the SAC, which is bound by the limits of the allegations raised in the cassation complaint. Then, the court considers above all these allegations in the legal part and, consequently, the factual basis given in the historical part of the opinion, correlated with the legal deliberations of the court, concentrates on the same.

The use of this strategy by the courts placed higher in the judiciary hierarchy is by no means a rule. The historical parts of appellate court opinions tend to be more detailed when they are drawn up in relation to a decision having the nature of a 'precedent' or for some other reason attracting a broader discussion (e.g. of a resolution), regardless of the court that has originally rendered it. The opinions of supreme courts, in particular when they decide precedent cases, are usually addressed to a larger group of readers: the legal community and the public at large. This is a result of the high esteem the decisions of these courts enjoy, owing to their high position in the structure of the

[11] For more on the hypertrophy of the historical part of opinions see: M. Grochowski, Uzasadnienie orzeczenia sądu drugiej instancji i jego deficyty (studium przypadku), *Państwo i Prawo* 69(2), 2014.

judiciary. Whence comes the need of providing a broader factual background to the decision which, together with the legal part, gives the full picture of the ruling.

2. Strategies for drafting the legal part of an opinion

2.1. Discourse

With respect to the legal part of an opinion, there are two major strategies used for its drafting. The first, known as 'discursive', 'reactive' or referential consists in affirming (approving) or questioning assertions and arguments raised by the parties or other facts/statements on record by successively discussing them—treating each of them as a separate problem to be discussed. Hence, this strategy is strongly oriented towards commenting by formulating arguments. Obviously, it is most often found in those opinion portions that are addressed mainly to the parties to proceedings. For an opinion to be fully discursive, it is necessary to quote statements by the party (in particular allegations raised) in the historic part and discuss each in the legal deliberations.[12] In the extreme form, the opinion draftsman answers every quoted argument, even the most absurd or irrelevant, by giving a counter-argument of a strictly matter-of-fact character.[13] Thereby, the court shows above all that it treats seriously each case as well as its respect for the citizen—following from the position of the court in a democratic country.

The discursive strategy is also used when the court is aware that the party or its counsel will study the determination and may draw arguments from it to be used on appeal in an effort to verify it. A similar situation is encountered with a higher court reversing a defective decision, when its reasoning is subject to review. Aware that a decision (or rather: arguments cited in its support) may be subjected to review by another organ, the court will draw up its opinion so as to present and explain best the arguments that have underlain it.

2.2. Monologue

The second strategy may be called a 'monologue' one[14] for it takes the form of a written argument on a legal question that has been raised in the case (or a legal institution applicable to it) or a proposal how to resolve questions related to it. Crucially, however, in neither of the two forms is any reference made to assertions formulated by the parties. A judicial opinion drafted in this way

[12] See for instance the SAC judgment of 5 April 2013, I FSK 840/12; Warsaw CoA judgment of 18 January 2017, II AKa 466/16; Warsaw CoA judgment of 30 December 2016, II AKa 190/16; DC judgment of 30 June 2004, VIII K 495/03; Łódź CoA judgment of 9 April 2015, I ACa 1502/14.

[13] See SAC decision of 15 May 2013, II OZ 359/13.

[14] The monologue and discursive strategies should not be confused with discursive and magisterial (monologue) styles distinguished in L. Morawski, M. Zirk-Sadowski, Precedent in Poland, in: N. MacCormick, R. Summers (eds.), *Interpreting Precedents. A Comparative Study*, Dartmouth, 1997: 225–226.

is not a discourse with the assertions, allegations and arguments raised by the parties or the evidence accumulated in the case, but is rather a monologue presenting the one and only possible point of view, at least in the court's belief. It resembles sometimes the solution of a moot case where the court presents its view with a lesser or greater amount of references to the realities of a given case. This strategy is employed to the full where the draftsman is unable—due to the tortuousness or irrelevance of statements by persons/entities appearing in the case—to discuss every assertion or circumstance separately or where finding and citing counter-arguments seems too difficult (especially when one adjudicates relying to some extent on the inner sense of what is right in the legal culture based on the enforcement of written law). The result is an elaborate statement with the underscoring of constitutional, European or international aspects (with respect to both law and judicial decisions).

The use of this strategy may be motivated by the role and position of appellate courts; it is these courts that most often draft opinions in this way. They do not have to fear that their decision will be set aside, because some assertions have been left unanswered. Next to its obvious disadvantages, this strategy serves the purpose of demonstrating, at least it is intended that way, the strongest competence to make autonomous decisions on cases. Furthermore, it may help fulfil the role of these courts to formulate ideas of a more universal nature. Last but not least, the use of the monologue strategy may have purely pragmatic reasons; such an opinion is easier to draft.

III. ARGUMENTATION TECHNIQUES

Strategies give the arguments of opinions their overall structure. Within strategies, there are also certain techniques, emphasising particular aspects of the opinion in its both parts. They are more concrete measures that, however, do not alter the overall structure of argumentation set by strategies. Specific techniques may be employed to introduce arguments within these concrete strategies that do not totally exclude their use, which clearly reflects the pragmatics of adjudication. Unlike strategies, which in principle cannot be used at the same time in their respective opinion parts, techniques may be used in parallel in both the entire opinion and its individual parts.

The techniques listed below are only examples of many possible argumentation techniques; it is absolutely certain that not all have been identified yet as they make use of a myriad of detailed drafting tools such as the use of specific expressions or linguistic constructions.

The techniques discussed below have been chosen as the most interesting—almost all appear to be atypical. They may give an apparently rather negative picture of the court as an institution, seeking to shape its statement for other purposes than those commonly accepted and revealed in the opinion. The list, however, does not exhaust the entire gamut of techniques that courts use with-

in the limits of the discretion that is left to them to draw up their opinions. In each case, however, they are instruments to achieve a specific effect by opinion draftsmen.

1. Ornamentation

One of the major techniques is ornamentally citing the juristic literature and judicial decisions in the opinion allegedly in support of the court's own views on the case, but actually without any relation to the court's own reasoning.[15] It usually takes the form of either quoting suitable theses or passages or adducing them by giving a file number or bibliographical details.[16] This technique is meant to give the impression that the case involves a major legal problem, calling for a serious study, testifies to a significant amount of work done by the court and the draftsman him-/herself and is used when the determination itself does not find an entirely stable foundation in positive law (its foundation is different, for instance, equity reasons). The citing of statements by other persons or institutions then is not so important for the decision rendered, by strengthening the real motivation behind the determination by citing, for instance, constitutionally protected values, as it legitimates the reasoning of the opinion.[17]

2. 'Omission of the obvious'

One of the techniques, which is rather characteristic of only the monologue strategy, is the 'omission of the obvious'. It comes down to the citing of the principle *clara non sunt interpretanda*[18] (directly, as a paraphrase or by implication) as a means of avoiding the need to present one's own argumentation (on the rhetorical level in the opinion, however, not always as an element of the court's reasoning). Drawn up thus, the legal part is deprived of its very essence and can be called an 'opinion without an opinion'. From the argumenta-

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[15] Ch. A. Newland, Innovation in judicial technique: the Brandeis opinion, *Seminar Proceedings, Idaho State College* 9 February1960: 5.

[16] Quoting judicial decisions lends, in turn, prestige to quoted decisions—see F.B. Cross et al., Citations in the U.S. Supreme Court: an empirical study of their use and significance, *University of Illinois Law Review* 2010, no. 2(18): 489f.

[17] Por. szerzej: I. Rzucidło-Grochowska, Argumentacja konstytucyjna w uzasadnieniach orzeczeń sądów administracyjnych. Znaczenie i typologia, in: J. Sułkowski et al. (eds.), *Kontrola konstytucyjności prawa a stosowanie prawa w orzecznictwie NSA, SN i TK*, forthcoming. On the need to use rhetorical devices when strong legal arguments are lacking, see. R. Moss, Rhetorical stratagems in judicial opinions, *Scribes Journal of Legal Writing* 1991, no. 2: 104.

[18] Farther: T. Grzybowski, Spory wokół reguły *clara non sunt interpretanda*, *Państwo i Prawo* 67(9), 2012; Z. Tobor, *W poszukiwaniu intencji prawodawcy*, Warsaw, 2013: 24f.; M. Zirk-Sadowski, Trzy ujęcia zasady *clara non sunt interpretanda* jako zakazu inicjowania interpretacji, in: *System prawa administracyjnego*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, vol. 4: *Wykładnia w prawie administracyjnym*, ed. L. Leszczyński, B. Wojciechowski, M. Zirk-Sadowski, Warsaw, 2012: 156–159.

tive perspective, finding clear a given regulation forestalls any further discussion, allowing the court to refrain from arguing something that is supposedly obvious.[19] It is used in most cases, however, only with an ostensible conviction about the clarity of a regulation, with the real purpose being to mask the true intention—to avoid arguing a difficult or complex question.[20] The use of this element of the clarification conception of legal interpretation may take the form of 'direct obviousness', already mentioned above, and 'implied obviousness'. The implied use of this element of the clarification conception involves leaving out specific content from the opinion (reasoning and arguments in its favour) when the opinion draftsman considers it obvious (or wishes that it were so considered) and implicitly communicates this by omitting it from his/her line of argument.[21]

Another problem with this technique is the avoidance of subsumption. This is a clear deficiency of the legal part of many opinions. In most cases, it is not intentional but rather a result of disregarding the need to give expression to an apparently obvious question in the opinion. Another cause of the deficiency may be the unawareness on the part of the draftsman that this element of law enforcement, sometimes taking place almost automatically, should be included in the opinion.

3. Excessive expatiation

Yet another technique to legitimate an argument, applicable to the legal part of opinions rendered by courts of any kind and rank may be called 'excessive expatiation'. This involves citing a large number of views from the juristic literature and judicial decisions as in the ornamentation technique but unlike it, the citations show a connection to the court's actual reasoning in the case (for instance, they have become an interpretation argument in the decision-making process). This technique is employed to show that the problem posed by the case has been carefully analysed from many angles and thus legitimate its determination. The heavy reliance on the juristic literature and judicial

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[19] A court using this measure contradicts itself by claiming that legal provisions are clear and should not be interpreted, because such a claim in itself is tantamount to an interpretation. For it is not possible to attribute an objective property, such as clarity, to anything in a subjective manner.

[20] This is particularly well seen in the case of decisions rendered *in camera* in matters—in principle—of minor importance addressed most of the time to a very limited number of addressees—mostly parties to proceedings. Such opinions on many occasions lack the reflection of the subsumption phase, which means that the message comes down to only authoritative assertions. A similar situation is encountered when general clauses are filled with content. The use—directly or implicitly—of the criterion of clarity and obviousness of legislation as a flight from giving the motives of one's decision considerably detracts from the prestige of the court in the eyes of the addressees of the opinion.

[21] P.M. Wald, The rhetoric of results and the results of rhetoric: judicial writings, *The University of Chicago Law Review* 62(4), 1995: 1373.

decisions is a sign of searching for external references (authorities) to make the decision more readily acceptable.[22]

The above technique has both clear advantages and shortcomings. A problem with its use and perception as inappropriate in some situations lies in the fact that excessive citing of jurists' views and judicial decisions not only shows the amount of work done on the case, but mainly shows off erudition in extreme cases. As a result, the legal part of the opinion unnecessarily grows out of proportion.

Similarly, long-winded stories about the essence and origins of, and problems with using, a specific legal institution (admittedly applicable to the case) despite the fact that these issues are not controversial in judicial decisions and jurisprudence, is sometimes simply redundant for the case determination even if the court's reasoning has relied on it to a degree. The use of this technique may distract attention from the main problem to be decided in the case, wrongly place emphasis in the opinion (for instance marginalise subsumption) and, consequently, make the opinion less readable.

Paradoxically, the use of this technique may be detrimental to the reception of an opinion by showing a huge effort put in the making of the decision and drafting the opinion which, however, on many an occasion, is disproportionate to the ultimate effect (for example determination of a typical problem in an incidental case).

However, in some situations, demonstrating that an identical position has many a time been taken on a point of law in both jurisprudence and judicial decisions may serve the purpose of confirming and strengthening the view of the court expressed in the opinion. Such situations include above all the determinations of a difficult case or one coming up before the courts for the first time. Then, the court may in part seek support (in respect of one of the threads of its reasoning) in an established view, and in part, in respect of which jurisprudence or courts have not had an opportunity to voice their opinion, rely on one's own means. Used in this combination, the technique in question facilitates the acceptance of the decision, which, admittedly, is not arrived at entirely autonomously, but is consistent, at least to some extent, with the views of jurisprudence and judicature accumulated hitherto.

Another advantage of this technique is the fact that an opinion drawn up making use of it may be treated as a sign of affording the case serious attention, even in a typical situation where it could be excusable to use other decisions as models.

It must be remembered, however, that between quoting the views of jurisprudence and the judicature for the purposes that no doubt serve the latter well and their unjustified excessive citing, that is harmful to the judicature, there lies a very fine line indeed.

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[22] In the case of references to judicial decisions, one can speak of the search for an external-internal authority—still a part of the judicature, but outside the specific process of law enforcement in a given case.

4. Pretermission

Another technique used in the historical part, but having a direct impact on the legal one, is pretermission. It may take many forms. The most popular one sees the opinion draftsman ignore certain elements of the historical part (especially assertions or allegation by the parties) so that he/she does not have to discuss them in the legal part. In addition, problem issues that are hard to discuss and yet have no bearing on the case can be pretermitted. These are frequently situations where a decision would take a concrete shape anyway, regardless of whether the court discussed a given issue or not (for example when an appeal would be quashed anyway as groundless and one of the appellant's arguments—although not decisive—would call for complex counter-arguments). Another example involves absurd assertions by a party, far from the merits of the case, as for instance insisting on letting the court know one's emotions and opinions (sense of being wronged, descriptions of personal relations with the other party to the proceedings, pleading for mercy, and the like). Discussing such assertions by the court, especially when done at length and unskilfully, could expose the opinion to ridicule.[23] Treating such assertions as legitimate only apparently would give the impression of treating the case seriously. It appears that, paradoxically, only in few cases do attempts to discuss unsubstantial assertions on their merits build a positive image of the administration of justice.[24]

5. Bias

Still another technique is one that has been referred to in the juristic literature as manipulating the facts (embellishing).[25] Actually, it is about exhibiting bias in opinions. This is done by stressing these elements that support the determination selected by the court and omitting those opposing it in the opinion, especially in its historical part. Opinions drawn up in evidence of a foregone conclusion stress only arguments in favour of the selected view, while covering or even concealing arguments to the contrary or ones that do not unequivocally speak in favour of a particular stance. Poignant illustrations include highlighting facts testifying to the defendant's guilt or the re-

[23] Concessions of the type: 'although the court understands the difficult situation the party is in, but …' seem acceptable.

[24] In a sense, as an example may serve a decision circulating in the judicial community, in the opinion of which the judge at length and in a scholarly manner demonstrated that the claimant had no personal copyright in the Scriptures (Bible).

[25] R. Moss, op. cit.: 106. For more on manipulation in judicial opinions see: K. Schmidt, Uzasadnienia sądowe jako impuls zwrotny dla teorii, in: M. Sadowski, P. Szymaniec (eds.), *Prace z historii oraz teorii prawa i administracji publicznej*, Acta Erasmiana IV, Wrocław, 2012: 11f.

sponsibility of the person causing damage, or using stylistically-marked epithets in order to convey an impression intended by the draftsman (for example defendant's brutality or absence of guilt). This is intended to build a conviction in the reader about the fairness of the decision rendered. Such a conviction, however, rests not so much on substantial arguments as on impressions, attitudes or emotions.

6. Review

Still another technique is used in drawing up the opinions of decisions rendered by appellate or administrative courts (that review decisions rendered by lower courts or executive agencies, and other entities). Its use entails designing the legal part in two different ways, depending on the preferences of the draftsman and circumstances accompanying the determination of the case. In the first, characteristic of the discursive strategy, the draftsman separately discusses each argument or assertion made in a pleading only to say next that their acceptance or rejection results in the court's making a specific determination. The discussion of arguments or assertions includes not only purely referential comments, but also may indicate—for the sake of contrasting—the correct reasoning in the case. In the second, seemingly similar to the monologue strategy but finding application mainly in its discursive counterpart, the draftsman, while assessing the legitimacy of an appeal or simply examining the assertions made by a party or discussing the case file, presents first the model determination of the case (possibly assessing from this point of view, as a consequence, the decision under review) and then confronts it with assertions made by the parties in pleadings, dealing with successive arguments offered there. In the latter case, it is clear that from a trial (but also theoretical) point of view, it would suffice to present an ideal model of the determination of the case, while discussing the assertions made by the parties is an added value of the opinion. This technique is meant to show an individual, not conventional approach to the case and opinion on it. Furthermore, responding to each assertion made by a party (in particular those going in an opposite direction to that of the decision) may give an impression that the determination is well thought out and that it could not possibly be different as the court is able to counter any argument.

This technique is sometimes used with precedential decisions or ones determining a complex legal issue. Then, a general background is outlined first, which is an introduction to the understanding and application of a given legal institution as defined by the judge, followed by a concretisation with some references to the allegations raised.

IV. CONCLUSION

The distinction and employment of strategies, and especially techniques of drafting judicial opinion reveal a rift between discovery and opinion.[26] The techniques, strategies and styles demonstrate that even if the opinion draftsman and the decision-maker are the same person, the mode of argumentation to reach a decision (at the level of reasoning) may differ from one employed when the decision has already been rendered. This is so because it is possible to use different argumentation while enforcing the law and next draw up a different written opinion, making use of specific strategies and techniques, irrespective of actual reasoning, to bring about a desired rhetorical (or communication) effect. The variety of strategies and techniques shows that it is possible to build various narratives concerning the same decision even when something is to remain concealed (then, appropriate measures are employed). In a typical situation in which the court wishes to reveal the actual motives behind the decision, it can do this in many ways, too, by taking advantage of diverse strategies and techniques. It is these that help deliver the message in a particular way.

An entirely separate category is made up of the opinions that do not fit into any of the above patterns. These are opinions void of any strategy in which the intention of their draftsmen is hard to fathom. Their potential readers are almost entirely ignored, while their drawing up is treated merely as paying lip service to requirements imposed by procedural law.

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STRATEGIES AND TECHNIQUES USED
IN THE PREPARATION OF JUDICIAL OPINIONS

Summary

The structure of a judicial opinion is determined by specific legal provisions regulating particular kinds of proceedings. These provisions are of a general character and specify only the basic elements of judicial opinions, whereas endowing them with legal content is a task undertaken by their authors. This is effected by using strategies and techniques employed in the drafting of judicial opinions, which are pursuant to the desired result and instruments of

[26] Opinion draftsmen do not always give true decision motives—R.A. Leflar, Honest judicial opinions, *Northwestern University Law Review* 74(5), 1979: 721ff.

law used for this purpose. Different strategies in the drafting of the 'historical' part of a judicial opinion (containing factual findings) and legal reasoning (that reflects the main judicial reasoning in the case) may be distinguished. The former category includes the strategies of detailed citing of elements of the historical part of a judicial opinion and to condense its respective elements. The latter includes the discursive and monologue strategies. Among the techniques used by drafters of judicial opinions in this context are ornamentation, omission of the obvious, excessive expatiation, pretermission, bias, or review.