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V. ARTICLES

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PRIVATIZATION IN POLAND AS AN ETHICAL ISSUE**

The subject-matter of this paper are the ethical controversies surrounding the privatization of state-owned enterprises in Poland. The discussion concentrates on the ethical evaluation of lawful privatization, ignoring cases of unlawful appropriation of state property. The objective of the paper is to demonstrate the inadequacy of the laws regulating the process of privatization in Poland by means of a consequentialist and deontological evaluation of the privatization model.

1. THE ETHICAL PROBLEMS OF PRIVATIZATION

Privatization of state-owned enterprises has been taking place for many years in developed market economies, such as Britain, Germany and France. It has also been carried out, on a scale incomparably larger than in Western Europe, in the countries of Eastern and Central Europe, which have been undergoing a transformation of their economic systems.

In countries with well-developed market economies the reasons for privatization are economic in nature. Firstly, privatization is a source of funds for the state budget, as it takes the form of the transfer of property to private entities for consideration, principally through the sale of shares or assets. Secondly, privatization reduces state budget expenditure on subsidies to unprofitable state-owned enterprises, because it is done in such a way as to eliminate the causes of unprofitability, such as the lack of competition, inefficiency of the state in the supervision of its enterprises, and the employees' demand for higher wages. Thirdly, the elimination of the causes of unprofitability as a result of privatization and causing the already-privatized businesses to focus on profit making tends to result in the lowering of prices of goods manufactured by those enterprises. Yarrow and Vickers believe that this effect should be regarded as predominant when considering the economic consequences of privatization (Yarrow, Vickers 1985). The above result may be achieved if privatization is accompanied by the restructuring of the enterprise, and sometimes also of the entire sector of industry, in order to create conditions for potential or actual competition. Thus, from the economic perspective, priva-

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tization in countries with well-developed market economies consists in producing as many benefits as possible for all citizens or at least, if nothing more is practicable, in removing as many inconveniences resulting from the operation of state-owned enterprises as possible.

In addition to certain advantages, the privatization of state-owned enterprises also brings with it some negative consequences for employees and their families in the form of employment reductions. Such effects may be transitional or long-lasting in nature, depending on the country's general economic condition: its unemployment rate and ability to create new jobs. Since privatization in Western Europe is conducted on a case-by-case basis, it is possible to counteract the long-term effects of employment reductions and to compensate for the short-term results.

The above-mentioned results of the privatization of state-owned enterprises in countries with well-developed market economies indicate that decisions to privatize are based on consequentialist analysis. Although the analysis is mostly limited to the economic consequences of the process, it also takes into account its social effects. The analysis is used not only for deciding whether to privatize at all, but also to choose a privatization method that would improve the ratio of the positive results of privatization to negative ones. In this sense, the privatization of state-owned enterprises creates an ethical problem.

Tatarkiewicz (1989) writes that every state of affairs to which one can react in one way or another, or which can be maintained or changed, poses an ethical problem, which consists in choosing a course of action that will earn the relatively highest moral judgement. Thus, the proposition of Tatarkiewicz is not restricted to a consequentialist evaluation of a particular action and a choice based on the utility principle, but goes further by postulating the application of the moral evaluation of the action and the justice principle. Thus, with reference to privatization one should:

1. carry out as full as possible consequentialist analysis of particular privatization procedures,
2. assess the morality of the intentions of the means of implementing privatization and the results of privatization,
3. check whether the derealization principle was applied in the given project. The derealization principle prescribes that:
   a) suffered harm be made good and incurred losses be compensated,
   b) any merits be extolled.

Such analysis should precede the decision to privatize a given enterprise and accompany its implementation.

In comparison to privatization in Western Europe, privatization in Poland and other countries undergoing a systemic transformation is, because of its very wide scope, a social process creating further ethical problems. The

problems are connected with property rights and the justice of their allocation. Such issues concern not individual privatization projects but the selection of a privatization method in a given country. A full analysis of privatization conducted, for instance, in Poland would consequently consist of two elements. First, an evaluation of the rightness and morality of the privatization law and consideration of its relevance to rights and justice; second, an evaluation of the rightness and morality of particular privatization projects.

2. CONSEQUENTIALIST EVALUATION OF PRIVATIZATION IN POLAND

The Polish privatization law is based on the assumption that the privatization method to be applied depends on the type of enterprise to be privatized, its economic and financial standing, the environment in which it operates, etc. Thus, the law assumes that the object of privatization are concrete state-owned enterprises and that the privatization method to be used should be selected with a particular company in mind (Vademecum prywatyzacji 1991). Such an attitude is an imitation of the case-by-case approach adopted in Western Europe. When privatizing vast state property the choice of such a privatization model produces consequences, desirable or undesirable, which are spread over a relatively long period of time. The consequences result not only from the privatization of a given enterprise, but are also generated indirectly by the whole economy, which, as long as the privatization process continues, is dual in nature: the developing private sector operates side by side with the public sector, which is a potential or actual burden to the state budget. Additionally, the dual character of economy means that the economy is regulated by two mechanisms: a market and a political one. Economic activity along the borderline between the two mechanisms is especially susceptible to corruption.

Case-by-case privatization in Poland results in consequences the analysis and evaluation of which requires a comparison with, on the one hand, the model provided by privatization in Western Europe and, on the other hand, an alternative approach to privatization, based on the premise that the object of privatization is the bulk of state property rather than individual enterprises.

The principal characteristics of the privatization of a state-owned enterprise in Western Europe is the individualization of each case and the application of methods and procedures most likely to ensure the achievement of the objectives of the privatization. Such an approach is possible because of the relatively small scope of privatization, conducted within a complete market system and a mature institutional infrastructure. These factors allow for an unhurried analysis, preparation and implementation of restructuring plans, and create conditions for carrying out a reliable valuation of the privatized

enterprise and an equivalent transfer of property rights to private persons. The wide scope and maturity of market mechanisms, within which privatization takes place, leaves a mark on the applied methods and procedures. As a result, the market model of state-owned enterprise privatization is made up of the following assumptions:

1. The objectives of the privatization of a particular enterprise established by state institutions are internally consistent and compatible with the essence of privatization, i.e. with the acquisition of property rights by private persons.

2. The explicitly formulated bundle of privatization objectives is operationalized for the person or institution commissioned by the state to carry out the privatization. In terms of the agency theory the state can be said to be a principal commissioning an agent to implement privatization as a bundle of objectives.

3. The agent acts as a trustee of the principal's objectives, because achieving his own objectives is contingent on fulfilling the trusteeship.

4. The privatized enterprise is not a party, but the object of privatization. The human aspect of the enterprise, i.e. the human resources and the employees' idiosyncratic knowledge, is evaluated and taken into account in restructuring processes, according to its relative importance. The existence of labour markets, especially a managers' market, makes it possible to determine the alternative cost of labour resources in a given enterprise.

5. The valuation of an enterprise is carried out by independent experts, who have unrestricted access to information about the enterprise and full knowledge of the alternative cost of the physical resources of the enterprise.

6. The capital market is highly efficient and closed to insider trading, i.e. to persons with an interest in privatization who have access to essential non-public information about the enterprise.

7. The sale of the enterprise's assets is done by unlimited tender.

This list of assumptions could be enlarged, but it already shows the model characteristics of the privatization process of a state-owned enterprise in a market economy (our considerations ignore the problem of uncertainty). The process is based on contracts creating trust or agency relationships under conditions of full access to information, rational processing of data and their use exclusively in order to reach the privatization objectives. The existence of mature, clear and effective markets makes it possible to carry out objective valuation of the enterprise and, on its basis, to conclude contracts for the sale of state property and contracts with the employees. The contracts may be regarded, with a high degree of probability, as closed, and thus there will be no ex post transaction costs. Therefore transaction costs relate exclusively to privatization and include primarily the remuneration of the agent and expenditure on implementing action that he prescribes (Fig. 1).

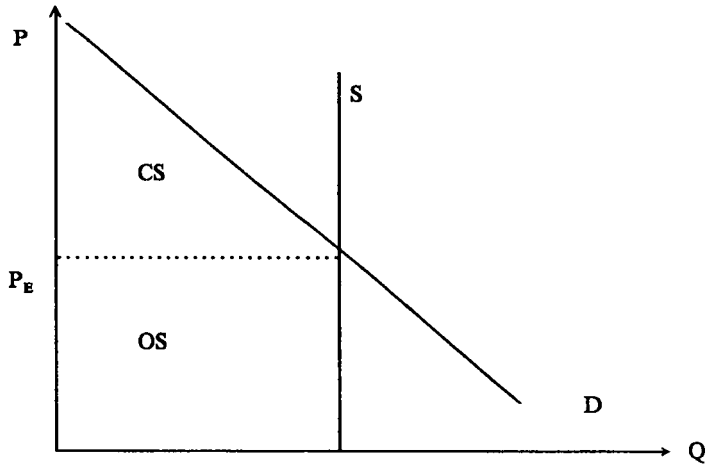

Fig. 1. Division of economic rent in the case of the sale of property rights to a constant quantity of factors of production (CS – purchaser's rent, OS – owner's (government's rent) in a perfectly competitive market without deduction of selling costs

Source: own research.

The model of state-owned enterprise privatization in a market economy shows that the behaviour of the participants in the process is regulated by morality, custom and law in a manner preventing the creation of ethically negative side-effects, effects resulting in additional transaction costs. This is the sense of, first of all, the assumptions regarding market clarity and efficiency as well as those concerning the elimination from the privatization process of situations personal objectives could prevail over privatization objectives. If a privatization has been carried out in accordance with the assumptions presented above it can be said that its participants were honest and trustworthy and acted in good faith. Such moral evaluation would warrant the conclusion that the transfer of ownership from the state to private persons was objectively equivalent and subjectively advantageous to each party.

Even in a mature market economy the case-by-case privatization model is slightly idealistic. In reality, as a result of numerous circumstances:

1) agency contracts are imperfect,
2) markets are not entirely clear or efficient,
3) the behaviour of privatization participants may be opportunistic.

It is worth noting, however, that case-by-case privatization offers an opportunity to monitor its progress by a democratic state's institutions and independent media, and consequently to correct its course. Negative side-effects may then be regarded as incidental.

Comparisons between Polish privatization and privatization in market economies is risky, no matter what methods are applied. Undoubtedly,

a comparison of actual phenomena present in the Polish privatization process with the idealized case-by-case privatization model is illegitimate. In particular, it would be pointless to attempt to uncover incidental cases of criminal conduct, although it is worth noting that such cases do not contribute to society's favourable attitude to privatization and thus should exclusively constitute side-effects of a clearly *preater intentionem* nature.

Thus, the consequentialist evaluation requires that a model of Polish privatization should be constructed on the basis of its legal framework, assuming that the legislator acted in good faith and, consequently, did not intend to create a legal basis that would give rise to negative moral phenomena.

The statutory model of Polish privatization is based on the case-by-case approach in the case of both the capital method and the liquidation method. Privatization through the NFIs (National Investment Funds) also favours the case-by-case method. Each privatized enterprise is subject to a complex procedure and requires the consent of the owner, represented by various governmental agencies and authorities. The scope of privatization in Poland is enormous when compared to privatization in Western Europe. In order that individualization of privatization be comparable in qualitative terms, an adequately large number of agents commissioned to conduct the privatization of individual enterprises would have to be appointed. However, the legislator did not provide for such a solution. The role of the agents is played partly by the so-called founding authorities, which, from the point of view of the agency theory, should rather assume the role of the principal, and the Ministry of Ownership Transformations, which has the characteristics of an agency in terms of the scope of tasks it fulfils, but the forms of its operations are bureaucratic.

Privatization objectives are thus not internalized in an agency contract. Let us assume, however, that despite this fact public officials act in good faith and in conformity with the law. The performance of the duties of agents faces a barrier which is absent from the market model of privatization, because enterprises in Poland are a party to the process, and a very active one, without whose consent privatization is impossible. Consequently, each privatization case constitutes a clash of interests, which is not incidental. Each privatization is surrounded by a market of interests, governed by principles established by the legislator by granting the enterprise, or rather its employees, the power of consent to privatization, the right to acquire property interests in the enterprise on preferential terms and the right to distribute the preferences among eligible persons.

The market of interests created by each privatization case is characterized by a double information asymmetry. On the one hand, there is an asymmetry of interests between the government agency and the enterprise, on the other,

an asymmetry inside the enterprise between its management and the other employees. Note that the asymmetry in the market of privatization interests is, in a sense, brought about by the legislator and exacerbated by a lack of objective conditions for the valuation of the physical and human resources in privatized enterprises. The inability to determine the alternative costs of assets, especially those of human resources and the employees' idiosyncratic knowledge, encourages the appropriation of the privatization rent by those who have access to important non-public information and who can use it to their advantage (rent seeking). The appropriation of the rent because of nonaccidental information asymmetry is an ethically negative phenomenon. In this sense, the privatization of state-owned enterprises in Poland can be compared to the used car market, which is a typical example of a market with information asymmetry. The parties in such markets do not trust each other and, as a result, their actions are opportunistic (Fig. 2).

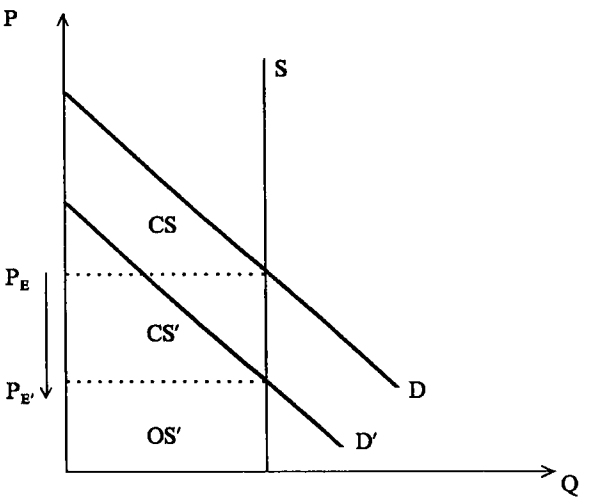

Fig. 2. Division of economic rent in the case of the sale of property rights to a constant quantity of factors of production in a market with an information asymmetry (CS' – additional rent of the purchaser who has an information advantage)

Source: own research.

Information asymmetry means that purchasers manifest demand at the level D', whereas in fact their demand amounts to D'. In a market with asymmetry the price of a constant quantity of factors of production will equal $P_{P'}$. The government's rent will be reduced to OS', as compared with OS, which could be achieved at the perfectly-competitive-market price P_E. The difference $OS - OS' = CS'$ constitutes an additional rent gained by the purchaser. The government's rent is apportioned among the beneficiaries of the state budget.

A smaller government's rent means a smaller rent for the state budget beneficiaries.

Opportunistic behaviour should be regarded as a characteristic feature of privatization in Poland. In the capital method of privatization, such behaviour may extend to the sale of property interests by employees on the capital market. The market, due to its shallowness and low efficiency, tends to promote the appropriation of the privatization rent by some purchasers or transferors who are insiders. It should also be noted here that the participation of insiders in the exchange of ownership titles is permitted by the Polish legislator.

The presented functioning of the privatization interests market in an enterprise also influences the activities of officials acting as agents. Due to information asymmetry they can be accused of corruption or they can indeed be corrupted. Thus, irrespective of the intentions of the participants in privatization processes, Polish privatization cannot be said to contain trust-building elements. This statement also refers to those privatization procedures whose legality does not raise any doubts, because it is the privatization law itself that creates legal opportunities for activities as a result of which privatization is not equivalent in the sense of the appropriation of rent due to financial, information or political privileges.

In the consequentialist evaluation it has to be established which effect is or may be predominant. There exists a belief that the predominant effect of privatization is the replacement of inefficient state ownership with a system based on private ownership, an indispensable condition for transformation. Then, other privatization effects, disadvantageous or having a negative moral value, are considered unavoidable side-effects or *praeter intentionem* effects (Jasiński 1994). The argument has two weak points. Firstly, it is known that although, in general, private ownership constitutes a condition for achieving advantageous economic results, not every form of private ownership and not every ownership structure is favourable to the same degree. For a long time the issue has been considered in economic literature in connection with the dispersion of ownership among passive owners, on behalf of whom ownership functions are exercised by managers. In market economies diverse forms of monitoring managers and activating owners have been developed, such as the threat of a company buyout, depositary rights of banks, and investment trusts (Berle, Means 1932; Blattner 1977; Curven 1976; Stiglitz 1993). Research into such forms shows that they do not constitute a foolproof guarantee against managers pursuing their own interests. With reference to Polish privatization, which encourages managers to actively pursue their own objectives, it has to be additionally pointed out that the market mechanisms of monitoring managers are not functioning due to the shallowness and immaturity of the financial

markets, and nothing indicates that they could develop, because of the dual nature of the economy. Secondly, the view that the creation of a private ownership system is the principal effect of privatization implies that a fast rate of the process should be considered beneficial. This is the opinion shared by many Polish economists (J. Szomburg, J. Lewandowski, T. Gruszecki, R. Frydman, A. Rapaczyński), as well American ones (M. Friedman, J. E. Stiglitz, E. S. Phelps). Although fast privatization does not avoid the problem of management power, it creates an opportunity for activating dispersed owners' interests.

If, then, the dismantling of the inefficient state ownership system and the creation of an efficiency-oriented private ownership system is accepted as the dominant privatization effect, the case-by-case privatization model does not guarantee that the effect will actually occur, especially as Poland does not have appropriate safeguards against renationalization. At the same time the country is experiencing negative side-effects, which could be avoided by choosing a fast privatization model.

Fast privatization produces effects different from those brought about by case-by-case privatization; the effects are diverse and their intensity varies depending on the adopted method of fast privatization. First of all, *ex ante* transaction costs are significantly lower, whereas *ex post* transaction costs resulting from the necessity to monitor managers are comparable for both fast and gradual privatization. Secondly, the possibility of the appropriation of rent by concealing information and by hidden action of managers, which create an atmosphere of suspicion around privatization, is reduced. Society is not divided in the process of privatization into an active part, who have opportunities for rent seeking, and a passive one, but fast privatization may result in the passivity of all its participants. In the case of the transfer of ownership interests in state property to citizens this may become the predominant effect, adversely affecting the goal of creating an efficiency-oriented ownership system. That would bring about the necessity to search for a method of fast privatization whose predominant effect might be favourably evaluated and which would outweigh disadvantageous side-effects.

In conclusion, it must be stressed that a consequentialist review of privatization in Poland does not warrant an unequivocal judgement on its supposed rightness or wrongness until it can be contrasted with a better option. Now, after several years, economists are attempting to formulate alternative proposals for fast privatization combined with the active participation of dispersed owners achieved by means of pension funds (Stiglitz 1993). The formulation of such a proposal requires, however, that the ethical analysis of privatization should be extended to include the issues of rights and justice.

3. PROPERTY RIGHTS AND JUSTICE OF PRIVATIZATION

For hundreds of years property rights have been the subject-matter of various concepts and controversies, which nowadays have a different resonance. The notion of property rights is used to mean the substantiation or justification of premises that are regarded as the sources or titles of the ownership of goods. Original and derivative property rights can be distinguished. Original property rights are derived from taking possession of a *res nullius* (a thing belonging to no one) and using it; the justification for acquiring a lawful title to the property is constituted then, firstly, by the absence of a user and, secondly, by the labour of the person using the property. In today's world there is no longer property belonging to no one, although there exists abandoned property, a lawful title to which may be acquired through prolonged use. Labour, however, is now dependent labour, remunerated on the basis of a contract of employment, which does not justify the acquisition of property rights by the workers (Sutor 1994). It has to be stressed that if labour is regarded as creating a property right to a *res nullius*, then this constitutes a descriptive approach, representing the existing practice, which has a long history. If, however, one begins to morally evaluate the factors of production, as Marx did, then labour is claimed to create rights to property which is already in somebody's possession. Such a position constitutes a shift from a descriptive to an evaluative approach (Sen 1984), which apply to disparate types of property.

Derivative property rights are obtained as a result of the acquisition or transfer of title. This is a view that has been justified for nearly three hundred years (Locke 1992). Today (Nozick 1974) this approach states that any distribution of goods that takes place as a result of acquisition or transfer is just, unless goods change hands as a result of the use of force, fraud, deception etc. The acquisition of property rights takes place through unrestricted transactions, whereas transfer, according to Nozick, consists in donation or inheritance.

Nozick's concept of property rights is not consequentialist in nature, as people's state of possession is justified by historical events and not by consequences. In this sense, the concept is akin to Pareto's optimum concept: any distribution of goods is justified if it does not violate the existing rights of the participants in economic exchange. A similar position is represented by F. A. von Hayek (von Hayek 1976), who claims that if injustice is not blatant and fresh, remedying it is unfeasible. With regard to this concept one can voice objections of the same nature as against the consequentialist concept. Just as it is impossible to predict all the possible results of a particular act, it is also impossible to establish retrospectively that the assumption of property rights

has taken place exclusively through acquisition or transfer without the use of force, deception, theft etc. Consequently, when Nozick maintains that the acquisition and transfer of property are just, he takes into account so-called procedural justice manifesting itself in the conformity of a particular action with the rules provided for this action. Rawls (1994) talks about three types of procedural justice: pure, perfect and imperfect. Pure justice is concerned exclusively with rules, regardless of the results of compliance with them. Such justice can be exemplified by the procedures of any games. Thus, according to Nozick's conception, the assumption of property rights is a game. On the other hand, perfect and imperfect procedural justice is judged on the basis of the result achieved by applying procedures.

The application of Nozick's concept to evaluate the privatization of state-owned enterprises in Poland produces astonishing results. The privatization law receives a different classification than privatization practice. If we agree that the Polish privatization law specifies the rules of acquisition and transfer, where preferential terms of the purchase of shares and donation of participation certificates constitute transfer in the form of donation, then the law establishes rules satisfying the requirements of procedural justice. Privatization practice proves, however, that the rules of the privatization law are inadequate for the assumption of property rights to meet Pareto's criterion, and thus the procedural justice of privatization is imperfect. Thus, according to Rawls's concept, achieving a just result is uncertain, where a just result is understood to be a result compatible with the legislator's intent.

The association of property rights with justice makes sense, because both property rights and justice justify or explain the distribution of scarce goods among different individuals. However, associating property rights exclusively with procedural justice is tautological, because:

1) rules or procedures are identical with rights; they have an institutional character and cannot be graded,

2) rules, just like rights, form a basis for the evaluation of justice; it is the justice of rule application.

Justice in rule application is of a formal nature and means that if a certain criterion regarding the distribution of scarce goods has been accepted, it should be applied consistently. M. Ossowska (1985), after J. Chwistek, calls this type of justice the principle of consistency. The situation begs a question whether consistency has a moral value. The answer to the question is not simple as it requires the evaluation of the justice of the rules themselves in terms of the actual results of the application of the given rules, criteria, rights, etc. Nozick and von Hayek evade the issue of substantive justice with reference to economic phenomena, maintaining that market distribution is shaped by impersonal factors and that it is the effect of a complex interplay of ability and

accident (von Hayek 1966). Thus, they regard the market as a game, the result of which is determined exclusively by observing rules. Von Hayek, after Aristotle, talks about distributive justice and commutative justice, and only the latter applies to market economy, in which exchange follows certain established rules (von Hayek 1976). It can thus be concluded that the reasons for the imperfection of the procedural justice of privatization are either inconsistencies in the privatization law or inconsistencies in its implementation.

Searching for inconsistencies in privatization leads to the issue of privileges. Pure procedural justice, according to Rawls, stems from the social approval of rules, consisting in the understanding that rules should be observed. In other words, rules which are just through their application must have a public character. It is important that rules or rights should afford equal treatment to all persons who are members of the groups defined within a given institution. Thus, in privatization law, property rights can consist in classifying those entitled according to certain criteria; the evaluation of justice does not depend on whether the classification can offer privileges, but whether they are applied consistently and impartially (Rawls 1994).

The direct effects of privatization consist of the acquisition by a person of a certain bundle of rights to the object of privatization and the assumption by the person of certain duties and responsibilities. If between the received rights and duties there exists a relationship of equivalence, this particular seizure of property rights can be said to satisfy the requirements of commutative justice and the privatization can be judged to be equivalent privatization. However, the privatization law also provides for non-equivalent privatization, in the form of reliefs or exemptions granted to entitled persons, relieving them from the obligation to make an equivalent payment for the acquired property rights. Such privatization does not meet the requirements of commutative justice (Fig. 3).

Demand D consists of the demand of non-preferential purchasers, who take advantage of the sale offer available in the free market (solid line), and the demand of preferential purchasers (dotted line). The supply of factors of production is constant and amounts to S. In the free market, however, supply is reduced by the portion offered to preferential purchasers and, as a result, equals S'. Consequently, the free market sets the price at $P_{P'}$, higher than P_E, which is the price to the privileged employees of the given enterprise. The distribution of benefits from the transaction is as follows: field 1 – employees' rent, field 2+3+4 – the government's rent, field 5 – the other purchasers' rent. If the apportioned property rights S−S' are transferred to the employees as a donation, their rent is represented by field 1+2 and the government's rent by field 3+4. Such a situation means lower profits for state budget beneficiaries. It remains to be decided whether the employees' rent is offset by the rents of those state budget beneficiaries who do not directly participate in the privatization.

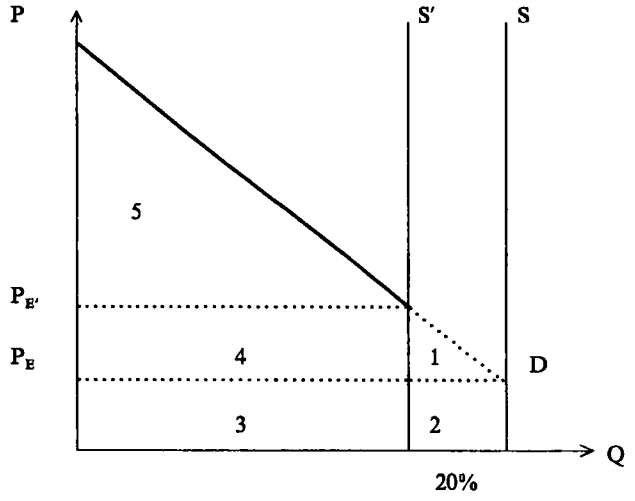

Fig. 3. Distribution of economic rent in the case of the sale of property rights to a constant quantity of factors of production with preferences for employees: (Field 1 – the employees' rent, field 2+3+4 – the government's rent, field 5 – rent of persons acquiring rights in the free market)
Source: own research.

From a formal justice perspective the problem of material privileges does not exist, since publicly legitimate claims are determined by rules, and the discharge of those claims results in a particular distribution pattern. With reference to privatization it has to be stressed, however, that rights to state property create a conflict; the law does not specify to which part of the property particular rights apply. Titles to property specified by the law: acquisition and transfer, are not supplemented with a specification of cases in which the government will be applying a specific title to pass its property rights to private persons. Consequently, the discussion of property rights should be included in the area of material justice, i.e. privatization effects should be judged from the point of view of commutative and distributive justice. The effects of the privatization of particular state-owned enterprises regarded in this manner can be divided into: direct – affecting the persons who obtain the property rights, and indirect – affecting persons not embraced by a given privatization project.

Can one accept, following Nozick, that the owner of a given thing can freely decide in what situation he will apply equivalent privatization and in what situation, non-equivalent privatization? In order to resolve this issue it has to be established:

1) what is the purpose of the differentiation by the privatization law between equivalent and non-equivalent privatization,

2) whether the purpose of the differentiation between equivalent and non-equivalent privatization is morally justified, and,

3) whether the differentiation has an essential and actual connection with the objective of the privatization law.

The purpose of the differentiation between equivalent and non-equivalent privatization is not specified in the privatization law. Thus, one can only put forward hypotheses. As far as the preferences for the employees of a privatized enterprise are concerned, they may be considered to constitute: a privilege, compensation for the arduousness of the privatization procedures, or payment for a consent to privatization. Non-equivalent privatization for persons not employed in a given enterprise may be regarded as compensation for the discrimination caused by the preferences granted to the employees of the enterprise or compensation for the negative indirect effects of privatization.

The issue of privileges and their reverse, i.e. discrimination, is complex and controversial. Discrimination is the practice of treating differently people who are identical from the point of view of their essential features or treating people who are different in their essential features in the same way (Katzner 1975). Verification whether there is discrimination against certain individuals or groups and a simultaneous privilege granted to other individuals or groups requires establishing the essential features for a given type of differentiation of people laying claims to a certain quantity of goods. One important feature of market distribution in a market economy is the formal equality of opportunities, which guarantees the equivalence of exchange. Material differentiation of conditions for participation in distribution is not a privilege for some and discrimination against other market participants as long as, from a formal point of view, they are treated equally. However, this is the way in which an anonymous market mechanism can be evaluated and not legislation providing for non-equivalent privatization, which is additionally non-equivalent to a varying degree. Thus, no formal equality of opportunities is ensured with regard to participation in privatization. Here, discrimination and privileges mean that in a situation in which the formal equality of opportunities would be possible, it does not exist. In the case of privatization it has to be stressed, however, that the formal equality of opportunities does not constitute an entitlement to acquire property rights, since the scale of the process excludes full equivalence and equalization of formal opportunities. Thus, it can be presumed that the non-equivalence of privatization enables a reduction of the inequality of opportunities. Such a conclusion would be justified if the non-equivalence of privatization were universal and potential differentiations constituted a method of equalizing opportunities, as compensation for the present outcome of past discrimination. It would then be possible to claim that the derealization principle, the core of compensatory justice, has been applied. Compensatory justice means that a given distribution results in an equalization of costs and burdens borne by the participants in a given activity (Miller 1976).

Such justice has to be applied *ad personam*; thus, any group preferences contradict both the principle of the formal equality of opportunities and the derealization principle, or compensatory justice, because a group cannot be the subject of moral rights nor can it be responsible for past discrimination. Therefore ultimately, if we do not regard group preferences connected with non-equivalent privatization as an attempt at the equalization of opportunities, no moral justification for the form of their implementation can be found. The rules of privatization allow for the possibility that individual groups of entitled people compete among themselves in the political market for access to property rights to that part of state property which is intended for privatization in a given budget year. In consequence, the preferences are arbitrary and arouse suspicion that in fact their objective is to pay for the consent of the employees of a given enterprise to privatization. With reference to this hypothesis, the question of its moral justification would be based on a tacit assumption that privatization inflicts on some of its participants damage which cannot be fully compensated, because benefits are derived only by some. Thus, the essence of the hypothesis that non-equivalent privatization is payment for consent to privatization is the discrepancy between privatization procedures which grant all employees or citizens equal opportunities to decide about privatization and unequal opportunities to participate in it. On this interpretation it can be concluded that preferences have an essential and actual connection with the objective of the privatization law. However, a doubt remains whether the objective of preferences is morally justified if it is a result of a differentiation of opportunities, which is subjectively judged as unfair.

A subjective criterion for the evaluation of the justice of a differentiation was proposed by von Hayek (1960). He claimed that if a differentiation by a norm is supported by the majority of the distinguished group and by the majority of the remaining people, there exists an important premise for the presumption that it serves the purposes of all people, both in the distinguished group and outside it. This is the so-called double majority principle, which does not take into account substantive judgements, but it follows from our discussion so far that substantive judgements regarding distributive justice are extremely difficult to pass, since one can question or justify various titles to the acquisition of property rights.

The privatization law is constructed in such a way as to gain the support of the distinguished group, i.e. the employees of the privatized enterprise, without opposition from the other people, who are also promised non-equivalent privatization or an increase of benefits from the state budget. However, the actual implementation of the law has significantly deviated from the double majority principle, as a result of which people outside the distinguished group regard the differentiation as unfair. According to von Hayek, if a differentiation

is supported only by members of the distinguished group, one can talk about the existence of a privilege. In such a situation the non-equivalent method of the distribution of state property is incompatible with the objective of the distribution. The incompatibility is shown in the already discussed lack of confidence in privatization, discouragement, and employees' passive or active opposition, which leads to the escalation of their demands and the treating of privatization as a distribution of booty.

An example of the problem under consideration is provided by the privatization of Hutmen S.A. The company was to be included in the National Investment Funds (NFI) programme, which ensures the donation of 15% of the company's shares to its employees. For some unclear reasons (according to one version – on the employees' initiative, according to another – on the prime minister's initiative) the company was not included in the NFI programme and chose the individual privatization path. This, however, entails different preferences for the employees – significantly less favourable than those under the NFI scheme. The employees have given warnings of their intention to go on strike and blocked successive privatization initiatives, demanding a donation of 15% of the company's shares, to which they are not entitled under the privatization law (Bubnicki 1995). From the point of view of procedural justice the employees should be required to comply with the provisions of the privatization law. The employees, however, feel subjectively cheated as a result of the differentiation of access to non-equivalent privatization brought about by the privatization law. From the point of view of the privatization objective the differentiation is countereffective as it lengthens the privatization process and increases its costs. It is worth recalling here that von Hayek observed that only blatant and fresh injustices can be remedied.

4. LEVERAGED PRIVATIZATION

Equivalent privatization can be hindered by financial limitations on the part of the potential owners, usually the enterprise's managers, who could actively exercise their rights. There are many known forms of privatization which is leveraged with a view to overcoming the financial limitations on the part of the managers. Two such forms are analysed and ethically judged below: leveraged buyout (LBO) used in market economies and the leveraged acquisition of shares by employees, used in the Polish privatization.

LBO takes place when a corporation purchases shares representing equity and converts them into bonds representing debt. It means that the company's managers buy shares in the company they manage financing the purchase with bonds. The purpose of the operation is to solve the agency problem by making

managers interested in good financial results of the company, because when shares are converted into bonds the company has to pay interest on the bonds, even if it is in a bad financial situation, in which it would not have to pay dividends. The bonds of companies using the LBO technique, so-called junk bonds, are attractive to many investors, such as pension funds, savings associations and banks, although they constitute high-risk investments.

In the case of the privatization of a state-owned enterprise which is a corporation, some or all of its shares can be offered to its managers on credit secured by the company's assets; the loan is then repaid, together with accrued interest, out of the company's profits. Such a course of action can be evaluated from the point of view of its consequences. The positive effects include a probable increase in profits, caused by the managers' interest in obtaining property rights. Among the negative results are: the weakening of the company's investment power and the managers' conflict of interests. Generation of profits with a view to repaying interest and redeeming bonds usually requires an injection of capital to the company. Thus, managers may face the need for additional borrowing or share issue, which changes the conditions on the basis of which the LBO contract was concluded. In particular, the share price may fall, which is against the owners' interests. The managers seek to purchase the shares at the lowest possible price; at the same time, however, they are morally responsible to the shareholders and, for this reason, are obliged to offer the highest price. It is a typical conflict of interests, which is difficult to avoid, as the managers are insiders, they have access to information which is not available to people outside the company. That is why some specialists claim that LBO is not fair and should be illegal (De George 1995).

LBO in the form discussed above has not taken place in Poland, aside from the case of the privatization of Novita S.A., whose managers financed the purchase of company shares with a bank loan, without converting shares into bonds (Novita S.A. Miniprospect 1994). However, privatization leverage in a broad sense does occur where employees purchase shares both in the case of the sale of the enterprise and the lease of its assets. Leverage takes the form of the transfer of part of the company's profits generated during the privatization process in order to supplement the employees' means through the social fund, bonus fund, foundations etc. Such forms can be described as increasing remuneration for work by remuneration invested in the company's shares. They differ significantly from LBO or so-called investment remuneration used in the Eastern lands of Germany. The type of leverage used in Poland differs from LBO-type privatization in that the means for the purchase of shares are not a future profit anticipation, and thus one cannot justify using them by the creation of long-term motivation for employees. As a rule, non-management employees are interested in immediate income generated by the sale of their

property rights. It may, however, be advantageous to managers, who buy the employees' shares out of the company's profits and then cancel the shares. Thus the share capital is not reduced and the managers' equity stakes increase (Commercial Code, Art. 363). In this case, managers have to work out a long-term strategy, which constitutes a benefit of the Polish leverage system. A morally doubtful element of such an approach is the fact that managers take advantage of their position as insiders in two kinds of situation: firstly, when negotiating with a state owner the conditions of company buyout or lease, secondly, when purchasing shares from employees.

The Polish leverage also differs from the investment remuneration system used in the Eastern lands of Germany in that there are no clear rules regulating the conditions of share acquisition in the context of contracts of employment. Consequently, the above-presented moral doubts can be additionally supplemented with an accusation of procedural injustice.

5. CONCLUSIONS

The ethical objections to privatization discussed above could be regarded as excusable if privatization efficiently and quickly caused an increase in the efficiency of the Polish economy. One could also regard as acceptable the managers' desire to obtain rent as a way of compensating their idiosyncratic knowledge about the company, industry and market. More difficult to justify are the privileges, although here too one could find mitigating circumstances, as the free transfer of property rights reduces or eliminates transaction costs borne by enterprises in the various forms of financial support for the acquisition of property rights by employees and contributes to their acceptance of the privatization process. Thus it can be concluded that disadvantageous consequences and unfair privileges constitute a necessary cost of the efficiency-boosting privatization effects. Such a claim can be put forward if privatization progresses at the fastest possible pace and, consequently, the accompanying disadvantages are minimized. However, Polish privatization is slow and the group of state-owned enterprises that delay their privatization includes the key sectors of the economy, which either enjoy the position of market monopolists or operate thanks to the government's regulation. Postponing privatization is legal, but unjustified, because the lost opportunity costs, connected with the operation of privatized enterprises in a market environment, are steadily increasing.

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