

Moving Towards More Reasonable Prescription in Private Law? Recent Developments in Switzerland (OR 2020) and Poland



Joanna Kruszyńska-Kola

PhD, postdoc at Adam Mickiewicz University in Poznań, her research interests are comparative private law (general part, law of obligations), Roman law and history of private law.

✉ joanna.kruszynska@amu.edu.pl

<https://orcid.org/0000-0001-8012-5417>

Key words: prescription, limitation of actions, preclusive time-limits, OR 2020, Polish Civil Code

<https://doi.org/10.32082/fp.v3i53.243>

1. Introduction

Prescription¹ or, more broadly, various instruments which allow for the passage of time to be taken into account in law, represents a permanent element in continental civil law regulations;² as perma-

nent as to be widely considered self-evident.³ Another frequently observed phenomenon relating to prescription is that it is thought of as an institution of a technical,

1 Hereinafter ‘prescription’ means extinctive or liberative prescription (civil law tradition).

2 Which besides prescription include chiefly usucapion and varied time-bars/preclusive time-limits. In Polish private law jurisprudence, a range of institutions relating to the recognition of the legality of a state of fact which exists and remains undisputed for a period of time are referred to using the notion of ‘dawność [expiration/forfeiture]’; see e.g. E. Till, *Polskie prawo zobowiązań. (Część ogólna). Projekt wstępny z motywami*, Lwów 1923, p. 175. Prescription is regulated in the civil codes of e.g. France (Art. 2219 ff.), Germany (§ 194 ff.), Italy (Art. 2934 ff.), Portugal (Art. 300 ff.), the Netherlands

(Art. 3:306 ff.), Czech Republic (§ 609 ff.), Poland (Art. 117 ff.). The functional equivalent to prescription (see footnote 1) is also to be found in common law (limitation of actions), though there are certain differences – see R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, Cambridge 2010, p. 69 ff.

3 In the codes relying on the pandect system, prescription is an obvious element in the general part; see J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung* (in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemeine Teil des Privatrechts. Historische Wurzeln – Leistungsfähigkeit im 21. Jahrhundert*, Berlin 2018, p. 79.

arithmetical nature.⁴ And yet, over the centuries and in diverse legal systems that technical and arithmetical mechanism gave rise to numerous controversies, quandaries and problems (which have been debated

which indeed establish new horizons of approaching prescription. One such recent proposal is the project of the new general part of the Swiss Code of Obligations (hereinafter OR 2020),⁷ published in 2013. A second



Neither is the discussed institution self-evident, nor is it technical or arithmetical.

with particular intensity in recent decades).⁵ This is the third distinctive trait of prescription. Doubts concerning the *ratio* (rationale) of the institution – which likewise prove universal historically and geographically – constitute the fourth characteristic. The said doubts are associated not so much with the substance of the motives but with the legitimacy of their being considered.⁶

Meanwhile, my historical-comparative studies on prescription demonstrate that neither is the discussed institution self-evident, nor is it technical or arithmetical. The traditional assertions with regard to the justification, the *ratio* of prescription are not all too accurate either, which in turn sheds some light on the adopted legislative solutions and the related issues.

Recent years have witnessed yet another wave of projects to modify prescription regulations, in the wake of the first, broadly known reforms of the German *Bürgerliches Gesetzbuch* (*Schuldrechtsreform* of 2001) and the French *Code civil* (reform of 2008),

proposal is the project of Book One (General Provisions) of the Polish Civil Code of 2015, drafted by the Civil Law Codification Committee (subsequent version of the project presented in 2008; hereinafter as KC 2015).⁸ Both projects are thus concurrent in time, and were developed in the same context, spanning the aforesaid earlier reforms as well as projects such as Principles of European Contract Law, UNIDROIT Principles and Draft Common Frame of Reference, the first of which has a particularly pronounced effect in the domain of prescription.⁹ One should also underline the associations between the Polish and the Swiss

4 See e.g. J.-S. Borghetti, *Prescription*, “Zeitschrift für Europäisches Privatrecht” 2016, no. 1, p. 168.

5 See e.g. A. Bénabent, *Le chaos du droit de la prescription extinctive* (in: *Mélanges dédiés à Louis Boyer*, Toulouse 1996, 123–133; J.-S. Borghetti, *Prescription...*, p. 170 (“It seems that a few decades ago the main thing that the various national legal systems had in common on the issue of prescription was the great disorder of existing rules and the criticism they attracted”).

6 See e.g. P.-A. Fenet, *Recueil complet des travaux préparatoires du code civil*, vol. 15, Paris 1836, p. 573, 575, 603, 604; S. Wójcik, *Zagadnienia etyczne przedawnienia roszczeń* (in: M. Sawczuk (ed.), *Z zagadnień cywilnego prawa materialnego i procesowego*, Lublin 1988, p. 141–160.

7 C. Huguenin, R. M. Hilty (eds.), *Schweizer Obligationenrecht 2020/Code des obligations suisse 2020. Entwurf für einen neuen allgemeinen Teil/Projet relatif à une nouvelle partie générale (deutsch/französisch)*, Zürich 2013. More on that project and its text: <<http://or2020.ch>>.

8 P. Machnikowski (ed.), *Kodeks cywilny. Księga pierwsza. Część ogólna. Projekt Komisji Kodyfikacyjnej Prawa Cywilnego przyjęty w 2015 r. z komentarzem członków Zespołu Problemowego KKPC*, Warszawa 2017. Thus far, neither the project in question nor any drafts of other parts of the new Polish Civil Code have entered the legislative stage. In 2018, certain provisions of the Civil Code pertaining to prescription were amended (Act of 13 April 2018 on the Amendment of the Civil Code and some other acts, *Journal of Laws* 2018 item 1104), and the adopted solutions draw in part on the KC 2015 project. These solutions will be taken into account in a further analysis here.

9 See e.g. R. Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspectives*, Oxford 2010, p. 122 ff.; J.-J. Hyest, H. Portelli, R. Yung, *Rapport d’information n° 338 (2006–2007)*, p. 70–75 (<www.senat.fr>); P. Jourdain, *L’articulation des doubles délais extinctifs en droit français*

law of obligations, which affect the prescription regulation. The applicable Polish regulation relies to a considerable extent on the provision in the earlier Code of Obligations of 1933 (hereinafter KZ), which derived considerable inspiration from its Swiss predecessor; in fact, some of its solutions were adopted in the Polish counterpart.¹⁰

difficult. The numerous arguments that happen to be cited often provoke controversy and turn out to harbour internal contradictions as well. What usually characterizes reflection on the *ratio* of prescription (in Polish and French civil law for instance), is that particular motives are formulated primarily from a theoretical standpoint; their verification does not go



Only by answering the question ‘what is the *ratio* of prescription?’ can one devise pertinent and satisfactory solutions.

Therefore, the aim of this paper is to assess – from the standpoint of findings concerning the *ratio* of prescription – Swiss and Polish proposals of modification in the civil-law regulation of the institution.

2. The ratio of prescription in the historical-comparative perspective

At the outset, one should explain why *ratio* of prescription is adopted as a frame of reference in this case. It is rooted in the profound conviction that only by answering the question ‘what is the *ratio* of prescription?’ can one devise pertinent and satisfactory solutions, which do not result merely from repeated trial-and-error and will not prove to be a dead end in the long term. All problems and dilemmas associated with regulating prescription should be examined and resolved in the light of the answer to that most fundamental question.

This is by no means easy to achieve, since determining the *ratio* of prescription may be exceedingly

beyond the theoretical plane either. They are subsequently reiterated, sometimes discussed and criticized. Attempts at systematization are made as well, but their actual utility is limited.¹¹ Reflection conducted in this manner, used subsequently in argumentation relating to specific questions and problems, does little to change the state of affairs and fails to facilitate an understanding of the essence of the institution of prescription or promote satisfactory solutions.

2.1. The notion of the ‘ratio of prescription’ and method of analysis

In order to address the shortcomings of the discussion on the *ratio* of prescription, it is necessary to answer the question stated above through an analysis focusing mainly on the practical domain. For the purposes of this paper, *ratio* is presumed to mean a rationale (justification) objectivized on the basis of broader legal experience, which determines a rational framework for the regulation of the institution in positive law. Another question which thus arises is how to carry out the analysis of *ratio* in a practical rather than theoretical dimension.

(in:) P. Jourdain, P. Wéry (eds.), *La prescription extinctive. Études de droit comparé*, Bruxelles, Zürich 2010, p. 695.

¹⁰ See R. Longchamps de Berier, *Uzasadnienie projektu kodeksu zobowiązań: z uwzględnieniem ostatecznego tekstu kodeksu: art. 239–293.*, Warszawa 1936, 429 ff. For general information on Polish codification see W. Dajczak, A. J. Szwarz, P. Wiliński (eds.), *Handbook of Polish Law*, Warszawa–Bielsko-Biała 2011, p. 42 ff.

¹¹ See e.g. T. Pałdyna, *Przedawnienie w polskim prawie cywilnym*, Warszawa 2012, p. 38 ff.; J. Kuźmicka-Sulikowska, *Idea przedawnienia i jej realizacja w polskim kodeksie cywilnym*, Wrocław 2015.

The research method outlined below offers an answer; it was put forward and employed in the dissertation entitled *Ratio przedawnienia. Dylematy europejskiej tradycji prawnej w świetle historyczno-porównawczej analizy prawa francuskiego i polskiego*, 2018 (*The ratio of prescription. Dilemmas of European legal tradition in the light of a historical-comparative analysis of French and Polish law*, 2018), by this author.¹² In this paper, the method will be applied to assess the most recent trends in Switzerland and Poland. The following paragraphs offer indispensable help to the reader who has no command of Polish.

ing and connotations diverge. What is more, almost every author entertains a different conception and classifies detailed *rationes* differently.

Given that depending on the adopted premises the notions of ‘public interest’ and ‘private interest’ may overlap, the latter is construed in this paper as a benefit to the creditor or debtor solely as parties to a particular obligation, to the complainant or defendant solely as parties to a particular dispute, whereas ‘public interest’ is taken to mean benefit to the stability of legal transactions or benefit from the standpoint of the judiciary or efficiency of legislative policies.¹³



Question that arises is how to carry out the analysis of *ratio* in a practical rather than theoretical dimension.

The aim thus delineated is accomplished by juxtaposing the *ratio* presumed by a specific historical legislator, the *ratio* declared by the doctrine and the *ratio* actually implemented in practice (as a result of the process of the application of law). With respect to each element of the regulation, one should examine which *ratio* emerges from the statutes, which from the doctrinal interpretation and which from the judicial interpretation (case law).

Another indispensable component of the method is stating the criterion which informs the determination of the *ratio* of prescription. In those cases where the contentions of the legislator, representatives of juridical science and one’s own observation are/can be deemed precise, the *ratio* of prescription should be specifically stated (e.g. preventing evidentiary difficulties). Nonetheless, from the historical-comparative perspective, the basic (most important) axis of reflection on the *ratio* of prescription is the axis of public interest – private interest. These notions are extraordinarily difficult to define and demarcate. While in particular historical periods and legal areas the discussion about law is guided by those very terms, their understand-

Defined in this manner, the notions provide – for the purposes of this paper – a set of useful and deliberately employed mental shortcuts.

A fitting mode of analyzing the *ratio* of prescription is carrying out one’s inquiry based on the criterion of flexibility and diversity of solutions, two assets which highlight private interest within the axis of public – private interest.

2.2. A universal ratio of prescription?

Whilst explaining how ‘*ratio* of prescription’ is construed here, it has been stated that, among other things, it is ‘objectivized on the basis of broader legal experience’. This leads to another question, namely the extent of legal experience that would serve to objectivize assertions regarding the *ratio* of prescription. After all, it would be warranted to stipulate that prescription may have different *rationes* depending on the legal system (or branch of law within that system) or the historical period one is considering.

12 The findings from studies on which that dissertation relies on will be presented in sections 2.3 and 3.

13 J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung* (in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemeine Teil...*, p. 89.

In the light of preliminary observations relating to *ratio* of prescription, the method described above was utilized in the aforesaid dissertation¹⁴ to study Roman, French and Polish law, in which the institution of prescription regulated in the general provision of the current Polish Civil Code of 1964 (Art. 117–125, hereinafter KC) served as a point of departure. The general regulation of prescription in the antecedent Code of Obligations of 1933 (Art. 273–287, hereinafter KZ) was also taken into account. *Pars pro toto*, I also analyzed certain particular periods of prescription in the domain of the law of obligations. Their selection was dictated by the exis-

Importantly enough, the analysis of both French and Polish case law relied on all rulings of the *Cour de cassation*/Supreme Court while *Code civil*/KZ and KC were/have been in force, sourcing the adjudications from the official bulletin under an entry relating to the discussed institution. Furthermore, the legislative experience was extensively consulted: preparatory works for new codes and major amendments, French reform drafts, e.g. *Avant-projet Catala*, as well as the reformed regulation in the *Bürgerliches Gesetzbuch* and the model laws: *Principles of European Contract Law*, *UNIDROIT Principles* and *Draft Common Frame of Reference*.



There is something permanent and common in prescription, that the notion of a universal core of the *ratio* is indeed viable.

tence of a corresponding comparative model in French law (thus affecting the persistence of such solutions) and the significance in legal transactions (e.g. time-limit for claims on account of the physical defects of a sold item). The period studied spanned a timeframe from the preparatory works on the KZ to July 2018.

With respect to French law, the area under analysis was defined analogously. It encompassed *prescription (extinctive)* regulated in Art. 2219–2281 *Code civil* and, after the reform of 2008, in Art. 2219–2254 *Code civil*. In its structure and essence, the institution corresponds with prescription of claims in Polish law. Historical inquiry began with pre-codification law, (essentially beginning in the seventeenth century),¹⁵ through the regulation in *Code civil* to the state as in June 2018.

The time-bars or preclusive time-limits mentioned at the outset (*délais de forclusion* etc.) were invoked in the analysis only when insights from their nature and *ratio (rationes)* proved useful for the determination of the *ratio* of prescription.

In Roman law, I studied the period from the fifth century BCE to the sixth century CE, In view of the history of taking the passage of time into account in law, it was necessary to consider all types of temporal limitations of *actiones* which inspired the general prescription of claims introduced by Theodosius II in the fifth century CE (C.Th. 4,14,1=C. 7,39,3), i.e. *usus auctoritas, usucapio, actiones temporales, longi temporis praescriptio*.

It is crucial that the inquiry in the areas thus delineated lead, by and large, to consistent conclusions regarding the *ratio* of prescription, demonstrating that prescription is rooted in certain elements of human nature which, in a manner evoking associations with

14 *Ratio przedawnienia. Dylematy europejskiej tradycji prawnej w świetle historyczno-porównawczej analizy prawa francuskiego i polskiego*, 2018 (*The ratio of prescription. Dilemmas of European legal tradition in the light of a historical-comparative analysis of French and Polish law*, 2018), by this author. A full analysis and its findings are to be found there.

15 As for pre-codification law, I paid particular attention to the treaties of such authors as Dunod, Domat, and Pothier.

On the one hand, their works recapitulated the previous achievement of the pre-codification law, and at the same time exerted the greatest influence on the substance of the prescription regulation contained in the original *Code civil*.

the natural elements, shape and determine specific legal solutions, thus verifying law-making intentions and designs. Even bearing in mind the potential differences across legal systems and historical periods, it may be argued that there is something permanent and common in prescription, that the notion of a universal core of the *ratio* is indeed viable.

2.3. Conclusions on the ratio of prescription

At this point, it would be perfectly natural to ponder the particular findings regarding *ratio* of prescription. One should set out with the observation that in ancient Rome, in France and in Poland (and, it is worth stressing, in other countries as well) one can speak of an unwritten obligation of diligence. The latter means an obligation to pursue one's affairs in an efficient, prompt and 'timely' manner, an obligation which – among other things – derives from a psychological foundation. In particular, it is the history of temporal limitations in Roman law – where, as already noted, general prescription of *actiones* appeared only in the fifth century CE – which demonstrated that it was something that could not have been ignored in practice. Thus, the

institution: prescription is an 'averaged' objection on the part of the legislator against a kind of abuse of rights, whereby abuse means infringement of the diligence requirement. One can observe that in similar circumstances (situations that are alike), it would be an abuse to seek to exercise a right after a specific amount of time – five years for instance – has passed. Prescription based on such an approximation does in fact facilitate the application of law.

Moreover, it is vital that the lapse of time introduces an additional dimension. Various temporal limitations provide a malleable tool with which legal relationships can be shaped and modelled. The *ratio* of such a temporal limitation becomes interwoven with the *rationes* of a given legal relationship (right/claim), underscores it and enables one to pursue it more effectively.

The *ratio* of prescription is therefore a complex question, even doubly so. In general, many *rationes* substantiate prescription as a legal institution. Additionally, with virtually every claim (complaint) which is subject to prescription, and most certainly with each so-called specific period, the set of the *rationes*



Prescription is an 'averaged' objection on the part of the legislator against a kind of abuse of rights, whereby abuse means infringement of the diligence requirement.

psychologically relevant factor of long-term inaction should also be legally valid. If one fails to notice that, the solutions dictated by law seem unnatural, unanticipated, unfair and provoke resistance. A readily available proof for the existence of such an obligation and a token of a dependency between human psyche and law is seen in the emotions and defences triggered by a demand formulated after a considerable lapse of time, which 'seemed' a thing of the past.

This observation entails a fundamental and universal conclusion regarding the *ratio* of the discussed

behind it differs to a degree. Nonetheless, the conducted studies cogently show that the fundamental *ratio* of prescription is to regulate the relationships of the parties (in view of the obligation of diligence),¹⁶ whereas other *rationes* (such as e.g. certainty or sta-

¹⁶ First and foremost, this means parties to an obligation but, for the sake of accuracy, one should speak of parties to a dispute (since prescription is also an instrument facilitating the termination of groundless litigations where there is no material-legal relationship between the parties).

bility, which are usually cited as the essential values to justify prescription) are never reified in their entirety.

3. *The practical dimension of deliberations on the ratio of prescription*

The above conclusions concerning the *ratio* of prescription do have a practical dimension, as they translate into specific indications, establishing points of reference for the prescription regulation at various

The conclusions presented here are at odds with the reiterated declarations and assumptions relating to the supremacy of the public interest. They demonstrate that there is a need to revise the widespread and persistent demands deriving from that value, which call for a straightforward, lucid, rigorous regulation that ensures certainty, promptness, and security.¹⁹ Prescription is not a technical, arithmetical institution. Encountered throughout the European legal tradition,



The fundamental *ratio* of prescription is to regulate the relationships of the parties (in view of the obligation of diligence).

stages: its enactment, interpretation, application and scholarly-oriented reflection. A practical instance of the application of the above contentions may be seen in the conclusion (also supported by historical evidence)¹⁷ that it is correct to treat the so-called general period as a subsidiary one; in such an arrangement, the so-called specific provisions do not constitute exceptions and the often invoked requisite of their narrow interpretation can thus be dismissed.¹⁸

the dilemmas relating to prescription coincide with the chief axes of the debate on private law: flexibility – certainty, equity – justice, private interest – public interest, autonomy of will – protection of particular categories of subjects. Here, *ratio* of prescription is distinctly biased in favour of the need for flexibility, equity, private interest and autonomy of will.

The need for solutions characterized by a relatively high degree of flexibility is rooted in the very essence of prescription which, as already noted, is the expression of an objection against a kind of abuse of rights. It is therefore associated with the assessment of human behaviour, a procedure which requires a wealth of life's situations to be taken into consideration.

As for specific recommendations for formulating the prescription regulation, one cannot fail to notice that the above proposition concerning the principal

17 Introduction of the general prescription of *actiones* in Roman law impoverished the 'picture' of Roman law in that respect. It is only natural that a general regulation focuses the attention, but it also creates the illusion of attainable simplicity. The content of the *Codex Iustinianus*, read without due regard for the gradual development of Roman law, distorts the apprehension of the significance of the general prescription of *actiones*. In fact, it merely completed the systemic framework, but did not constitute its foundation (for more on that issue see J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung* (in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemeine Teil...*, p. 91).

18 I pass over the issue of reservations that could be raised regarding the said order of narrow interpretation. See J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung*

(in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemeine Teil...*, p. 91.

19 For the practitioners, the conclusions from these studies may encourage a more flexible approach and greater attention paid to the assessment of the conduct of parties whilst taking the entirety of case-related circumstances into account. This may diminish certainty, but a thorough historical analysis of prescription positively shows that its anticipation is in this case an illusory one, whereas a revision of that expectation results in increased equity.

ratio of prescription dovetails with the presence of temporal limitations whose regimes vary; in general, the broadest possible scope of allowing for the factor of long-term inaction; case-dependent consideration of the object of temporal limitations (catalogue of claims/complaints) and reasons for an interruption of the period of prescription; model of taking prescription into account by way of defence (with the possibility of waiving defence); relatively extensive so-called specific regulation (numerous specific provisions pertaining to the length and the run of the period of prescription); presence of elements within the regulation which are strongly linked to the behaviour of the parties (especially generally construed suspension

a maximally simple, unambiguous and easily applied regulation whose shape depends almost exclusively on the will of the legislator. Prescription (at least in part) puts the presumptions associated with e.g. the idea of codification and the positivist vision of law to the test.

This conclusion should draw attention to the experience of Roman law in which – given its relatively advanced development – the degree of accepted flexibility (and resulting uncertainty) was higher than in contemporary systems of enacted law (Polish for example). In the light of my inquiry into the experience of Roman and French law, the evolution of rules in the course of the application of law proves to have considerable significance. Also, concerns about the



It is correct to treat the so-called general period as a subsidiary one.

of the run of the period, reasons for interruption in the form of acknowledgment of debt) and relatively far-reaching flexibility of such elements; existence of the so-called equitable safety valve, which makes it possible for the entirety of circumstances of the case to be taken into consideration (regardless of the form of such a mechanism); allowing for subjective factors when determining the starting point of the prescription period; existence (within certain bounds) of the possibility of contractual modification of the prescription regulation; general nature of provisions (i.e. use of indeterminate phrases and general clauses).

The above recommendations do not mean that one ultimately surrenders when faced with the numerous theoretical and practical issues that prescription engenders. They should not be interpreted as consent to chaos, groundless distinctions or flexibility which paralyzes the participants of legal transactions. It is both possible and desirable to remedy the shortcomings owing to defective legislation or objective difficulties that formulation of the prescription regulation presents. However, approaching the discussed institution realistically, one should accept a certain (fairly substantial) degree of uncertainty and the limitations in pursuing

potential outcomes of the judicial interpretation of law are often expressed in the doctrine, which sees it as an intervention of case law into the statutory domain. Nevertheless, the example of the French reform of 2008 demonstrates that it is possible for a majority of adopted solutions to stem from case law.²⁰

4. Prescription in the drafts of OR 2020 and KC 2015 and following amendment of the Polish KC of 2018 in the light of conclusions concerning the ratio of prescription

The above practical recommendations, which constitute the yield of studies on the *ratio* of prescription, enable an evaluation of the regulation pertaining to the institution or its proposed changes.

The assessment of both projects with respect to findings relating to the *ratio* of prescription should begin with a general remark on their essence, which in turn may affect how the shape of the analysed institution is envisaged.

²⁰ Ph. Casson, *Le nouveau régime de la prescription* (in: Ph. Casson, Ph. Pierre (eds.), *La réforme de la prescription en matière civile: le chaos enfin régulé?*, Paris 2010, p. 50.

4.1. General regulation

Both drafts represent proposals of changes in the so-called general parts of the respective codes,²¹ while the provisions they contain are to be treated as general. Also, it is necessary to draw attention to one of the most emblematic provisions in that respect, namely those which stipulate the length of the period/s. Both projects (Art. 149 OR 2020, Art. 150 KC 2015) provide so-called general periods, whose application is to be as rare as possible. It is underlined in the supplementary material attached to the drafts that the so-called specific periods are to be created only sparingly (Art. 150 OR 2020, Art. 153 KC 2015), while at the same time one should strive for far-reaching uniformity of the period system, which

– the fundamental *ratio* of prescription – involves the necessity to consider the ‘realities’ of particular legal relationships, allow for the peculiar circumstances in which the parties function and the power configuration established by law and extra-legal factors. Using all too general solutions which have not been tailored to settle specific disputes leads to unsatisfactory outcomes and attempts to create or exploit special solutions for the sake of case-specific adjustments. The proposal to reduce the number of periods as far as possible is appealing from a general, theoretical standpoint. On a microscale, assuming the viewpoint of the court which adjudicates in a specific dispute reveals significant risks and shows that radical proposals in that respect are



Far-reaching generalization is rarely desirable.

should rely chiefly on the so-called general period.²² Such an aspiration is not in the least surprising. The trend has been clearly tangible in the European discussion on prescription so far, and in the proposals/reforms which that discussion engendered,²³ since it represents the answer to one of the most acute maladies of the discussed institution: the unfounded distinctions and the grossly inflated and complex system of periods.²⁴

However, bearing in mind the results of presented studies, such an approach to periods of prescription should be treated with some skepticism. First, given the *ratio*, far-reaching generalization is not desirable.²⁵ Regulating relationships between the parties

not practically feasible. This was noted in the course of preparations for the French reform of prescription of 2008, which resulted in a critical re-evaluation of the demand to achieve maximum uniformity; consequently, the reform went no further than reducing – realistically – the number of special periods.²⁶ In the partial amendment of the general prescription regulation in 2018, the Polish legislator also decided to shorten one of the three so-called general periods from ten to six years (see art. 118 KC in the current wording).²⁷ In line with the findings on the *ratio* of

jährung (in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemeine Teil...*, p. 92–93.

21 Code of Obligations in Switzerland and the Civil Code in Poland.

22 See <or2020.ch/Or2020/DocView/e13d268d-280b-43b3-ad-ba-9b5ef7e27d9e?edocTitleGuid=941db112-182a-4a35-bf19-69b45d2549dd#edoctitle_941db112-182a-4a35-bf19-69b45d2549dd>; P. Machnikowski (ed.), *Kodeks cywilny...*, p. 224.

23 See R. Zimmermann, *Comparative Foundations...*, p. 85, 89 ff.

24 See P. Machnikowski, *O potrzebie zmiany przepisów normujących przedawnienie roszczeń*, “Państwo i Prawo” 2018, no. 6, p. 109 ff.

25 See J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Ver-*

26 See e.g. F. Jacob, *L'unification des délais*, “Petites affiches” 2 avril 2009, no. 66, points 14–16, 20; F. Terré, *Observations* (in:) Ph. Casson, Ph. Pierre (eds.), *La réforme de la prescription en matière civile: le chaos enfin réglé?*, Paris 2010, p. 110; A. Guégan, *La nouvelle durée de la prescription: unité ou pluralité?* (in:) Ph. Casson, Ph. Pierre (eds.), *La réforme...*, p. 19, 24. See also J.-S. Borghetti, *Prescription...*, p. 179.

27 Art. 118 KC: Unless a specific provision provides otherwise, the period of prescription is six years, while for claims for periodical performances and claims arising in connection with the conduct of business activity – three years. However, the end of the period of prescription falls on the last day of

prescription, relations between periods as well as the role of the so-called general period can be defined by presuming the latter to be a subsidiary period (which it indeed is). Special periods – as an instrument better suited to shaping the balance between parties and

to preclusive time-limits (Art. 162 OR 2020 and Art. 161–164 KC 2015 which concerns the notion of a preclusive time-limit, as well as withholding of its termination and suspension of its run). An important value is the flexibility of regulation of temporal limitations,



An important value is the flexibility of regulation of temporal limitations, so that they correspond with the nature of specific legal relationships and claims as well as possible.

supporting the realisation of the *ratio* of specific legal relationships (institutions) – should take precedence in our deliberations on prescription. As the example of general prescription of *actiones* in Roman law eloquently shows, a general period is the capping stone of the system in that it creates temporal boundaries where no other regulation applies – in the name of general recognition of the significance of the passage of time in law. As already observed, this is not tantamount to asserting that the system of periods should persist in the considerably unsatisfactory state encountered in numerous civil-law regulations (Polish included). The above remarks serve merely to draw attention to the objective obstacles to uniformity and the possible, cautious reduction of the number of periods.

4.2. Diversity of regimes of temporal limitations

Another general element which deserves discussion in the context of the *ratio* of prescription is the diversity of anticipated legal mechanisms. As noted earlier, the findings relating to the *ratio* of prescription correspond with the occurrence of temporal limitations whose regimes vary. Approval must therefore be given to attention paid to preclusive time-limits and to striving to maintain diversity in that respect. Both drafts contain a proposal of a general regulation pertaining

so that they correspond with the nature of specific legal relationships and claims as well as possible. These preclusive time-limits are usually exceptional but – as historical-comparative studies show – invariably useful tools in the hands of the legislator.²⁸ Also, it is very felicitous that the extent of the planned solutions is limited to certain general, basic issues associated with preclusive time-limits (although the provision in Art. 162 (2) OR 2020 may give rise to doubts, as it provides for a general and broad scope of contractual modifications, which is subject solely to the vague criterion of purpose of a given time-limit). In the light of the results of my studies, the introduction of a general regulation governing preclusive time-limits is acceptable as long as it involves an examination of individual occurrences of such time-limits and a revision of their current regulation with respect to general provision. This, however, requires extensive effort (which was deliberately not undertaken in France during the 2008 reform) and numerous difficulties in decision-making. The very category of such preclusive time-limits, as well as pertinent rules arising from the statutory provisions or case law – in Polish civil law for instance – are exceedingly diversified due to the nature (purpose) of the discussed mechanism, whose aim is to contribute to the institution within which they occur.²⁹

a calendar year, unless the period of prescription does not exceed two years.

28 See J. Kruszyńska-Kola, *The ratio...*, p. 112 ff., 203–204, 387 ff.

29 See *ibidem*, p. 616.

4.3. *The effects and the manner of taking prescription into account in legal proceedings*

From the standpoint of *ratio*, the effect and the manner in which prescription is taken into account in a lawsuit are vital issues. OR 2020 provides for a classic solution, i.e. effect in the form of refusal of performance available to the debtor (Art. 148 (1) OR 2020) and prohibition of considering prescription *ex officio* (Art. 161 OR 2020). In contrast, in the Polish draft – given the mass nature of legal transactions, the risk of discrimination of its weaker participants and the efficient functioning of the judiciary – the proposed solutions are altogether different. According to the project (Art. 147 § 1 KC 2015), once the period of prescription has elapsed the claim cannot be pursued, therefore it

the general prescription regulation of 2018, the presented solution was adopted into KC, and applies to claims against consumers (Art. 117 § 2¹ and Art. 117¹ KC).³¹ The explanatory memorandum to the amending act invokes certain *rationes* justifying prescription in general, namely to protect the debtor (who in this case enjoys the privileged status of the consumer), to mobilize the creditor, and to ensure the conformity of the state of fact and the legal state.³²

If one were to assess the above proposals, it would have to be stated that – given the general nature of the regulation – the solution which corresponds best with the findings concerning general *rationes* of prescription is the classic model, which provides for the emergence of defence. Hence the proposal in OR 2020



The solution which corresponds best with the findings concerning general *rationes* of prescription is the classic model, which provides for the emergence of defence.

would be considered by the court *ex officio*. However, in exceptional cases (Art. 149 KC 2015) and after having weighed up the interests of both parties, the court would not have to consider the lapse of the period of prescription, if equity required it. In particular, the court should examine: 1) the length of the period of prescription; 2) the duration of time from the lapse of the period of prescription to the moment in which the claim was pursued; 3) the nature of circumstances which caused the entitled party not to pursue their claim, including the impact of the behaviour of the obligated party on the delayed pursuit of the claim by the entitled one. The proposal draws on the solutions in Polish civil law in the communist period (i.e. from the moment that KC of 1964 came into force until the amendment of 1990).³⁰ As part of the amendment of

deserves to be endorsed, whereas the solution in KC 2015 should be evaluated in less positive terms.

Still, the very same proposal (when the effect consists in the inability to effectively seek satisfaction of claim and *ex officio* consideration of prescription) cannot be thus assessed – by default, as it were – when it applies only claims to which one is entitled against consumers. As already noted, the prescriptions of particular claims as well as their groups are characterized by a

30 See *ibidem*, p. 461 ff.; P. Machnikowski (ed.), *Kodeks cywilny...*, p. 221.

31 The adopted solution is anything but surprising, since the demands for the effect of prescription to be stricter (especially in consumer transactions) were formulated not only in the Polish regulation (or the French one for that matter). This is an example of the possible modes of nuancing the effect of prescription. See J. Kruszyńska-Kola, *The ratio...*, p. 205.

32 See explanatory memorandum, p. 3–4: <<http://orka.sejm.gov.pl/Druki8ka.nsf/0/573F488F5A1D2DB9C1258220003DC-2CC/%24File/2216.pdf>>.

peculiar set of *rationes*. The adopted solution promotes the realisation of the chief motives in the discussed area to a greater extent than taking prescription into account by way of defence. What is more, it deserves attention in view of the possibility of waiving consideration of prescription *ex officio*, which ensures the necessary flexibility, especially as the reasons for

the notion of ‘force majeure’ cited in the rationale,³⁴ or the interpretations to date,³⁵ it is doubtful whether such narrowly delineated reasons can ensure satisfactory results when the law is applied. An inquiry into French and Polish law (in which the liberalism of the French model was consistently opposed since the drafting of the KZ as, against the will of the legislator,



Prescription (at least in part) puts the presumptions associated with e.g. the idea of codification and the positivist vision of law to the test.

that possibility have been determined on the basis of extensive case law concerning the possibility of disregarding the lapse of the period of prescription (former Art. 117 § 3 KC) or the pleading of defence of prescription (based on Art. 5 KC, which contains general prohibition of abuse of rights).

4.4. Suspension of the run of the prescription period

From the standpoint of the *ratio* of prescription, the reasons to suspend the run of the prescription period are another highly important element in the regulation of that institution. The most significant among those reasons is occurrence and potential formulation of reasons other than those pertaining to the characteristics of entitled subjects or particular relationships between parties to an obligation. The OR 2020 project provides for the reasons of the inability to pursue claims before a court or obstacles to the pursuit of claim in the shape of *force majeure* (Art. 153 (1) (8) and Art. 10 OR 2020). KC 2015 also contains a reason for the suspension of the run of prescription with respect to the claim which the entitled was unable to pursue or enforce due to *force majeure* (Art. 157 § 1 (5) KC 2015).³³ Considering sample explanations of

the former reinstated the principle of *Contra non valentem agere non currit praescriptio*) demonstrates a much greater need to accommodate an evaluation of the behaviour of the entitled (parties) and allow for considerations of equity (which is associated with the essence of prescription identified above). In the Polish regulation, the restrictive approach to *force majeure* as the reason for suspending the run of prescription affected, among other things, the assessment of the defence of prescription in the light of the prohibition of the abuse of rights (Art. 5 KC). In other words, the need to consider e.g. the inability of the entitled to undertake action more broadly than within a scope limited to *force majeure* events found an outlet through recourse to Art. 5 KC, which regulates an institution of exceptional nature.

4.5. Starting point of the prescription period

Regardless of how one may evaluate the details of solutions tendered in both analysed projects, the determination of the starting point of the general prescription period with respect to the subjective factor of the knowledge of the entitled (Art. 149 (1) OR

33 By and large, the provision in the project duplicates the solutions adopted in Art. 121 KC, which in turn corresponds in terms of substance with Art. 277 KZ.

34 See <http://or2020.ch/Or2020/DocView/036cee1b-3940-42ee-a031-c79a224a5f2b?edocTitleGuid=4d6509e6-5b33-496b-aeb5-5ce6229cd7fa#edoctitle_4d6509e6-5b33-496b-aeb5-5ce6229cd7fa>.

35 See J. Kruszyńska-Kola, *The ratio...*, p. 564 ff.

2020, Art. 150 KC 2015) deserves positive appraisal. To some degree, it mitigates the stringency of formulating the aforesaid reasons for the suspension of the run (allowing for the most fundamental cause – the lack of ability to act – to be taken into account). A

4.6. Contractual modifications

Similarly, bearing in mind the conclusions concerning the *ratio* of prescription, one should positively appraise the proposals providing for the possibility of modifying the statutory regulation by mutual agree-



An inquiry into French and Polish law demonstrates a much greater need to accommodate an evaluation of the behaviour of the entitled.

survey of the amendments of the prescription regulation in other legal systems as well as in the previously mentioned international projects may lead one to believe that this approach to the starting point of the prescription period has largely become a standard.³⁶ However, in spite of the proposal contained in KC 2015 and the critique of the pertinent regulation currently in force, which provides for objective determination of the starting point of the so-called general period of prescription (maturity date),³⁷ the Polish legislator failed to introduce such a change as part of the most recent amendment of 2018, even though the period has been reduced by nearly half. And yet, it is crucial to jointly consider at least the duration of the period and its starting point, because a detailed study of the discussed institution shows that it does resemble an array of communicating vessels.³⁸

ment, found in both projects (Art. 159 OR 2020 – only regarding the length of some of the periods, Art. 154 KC 2015 – only regarding the length and end of the run of the prescription period for claims arising from agreements between entrepreneurs as part of their business activity and extension of the period of prescription for claims to which consumers are entitled).

Concerning contractual modifications, valuable insights are gained from the experience of the French law, whose versatility in that respect (though not exclusively), is confirmed by legal-comparative studies. It is thus revealed that the history of the discussed issues is in fact a history of discovery of the essence of prescription. As time went by, one would become increasingly aware that there was no contradiction between the necessity for prescription to exist, the realness of its effect and the autonomy of will of the parties.³⁹

Furthermore, the Polish experience makes it possible to see that just as with other elements of the discussed institution, deliberation on the nature of the prescription regulation entails the need to focus one's attention on the specificity of particular legal relationships as well. In obligation-based relationships, whose association with prescription is quite special in itself, freedom of contract plays a material role (for instance, enabling change of the period of the maturity of claim to which the starting point of the period is linked). In addition, it turns out that allowing for contractual modification is in line with

36 See J.-S. Borghetti, *Prescription...*, p. 178. See also J. Kruszyńska-Kola, *Time, Emotions, Legal Certainty and Justice. New Period of Prescription of Delictual Claims for Damages in the Polish Civil Code*, in: Stefan Lorenzmeier, Dorota Miler (eds.), *The New Law. Suggestions for Reforms and Improvements of Existing Legal Norms and Principles*, Baden-Baden 2018, p. 47–59.

37 See P. Machnikowski (ed.), *Kodeks cywilny...*, p. 223 ff.; M. Zelek, *Determinanty początku biegu terminu przedawnienia roszczeń w ujęciu prawnoporównawczym*, “Studia Prawa Prywatnego” 2017, no. 1, p. 21–32.

38 See J. Kruszyńska-Kola, *The ratio...*, p. 96, 547, 585.

39 See *ibidem*, p. 376.

the evolutionary trends observed in other elements, such as the shortening of prescription periods (the shorter the period the lesser the concern that the

relationships of parties in view of the existing (albeit unwritten) obligation of diligence in exercising one's rights. Such an answer to the question about *ratio* is in



It is revealed that the history of the discussed issues is in fact a history of discovery of the essence of prescription.

effect of prescription will be deferred). It remains to be seen that although the previous prohibition of contractual modification of the prescription regulation was sustained in the amendment of 2018, the Polish legislator will decide on a change of position in that matter, as both comprehensive reflection on all elements of prescription and conclusions regarding its *ratio* speak in favour of such a move.

5. Concluding remarks

The analysis of OR 2020, KC 2015, and the 2018 amendment of the Polish KC demonstrates that despite intense discussion on prescription and the profound reforms in a number of European legal systems, the proposals of changes (or actual changes) do not always correspond with the universal characteristics of a rational prescription regulation. This owes chiefly to the theoretical nature of reflection on the *ratio/rationes* of prescription and reiteration of traditional assertions/assumptions in that respect. It follows from historical-comparative research that such assertions, for the most part invoking the primacy of public interest, provide a basis for solutions which in various contexts (i.e. various legal systems and historical periods) prove inapplicable or ineffectual, engender problems and raise doubts.

On the other hand, the method outlined and employed in this paper offers answers to the question concerning the *ratio* of prescription from a practical standpoint and contribute new elements to the discussion in connection with the prospective changes in Switzerland and Poland. Also, it enables one to appreciate that the *ratio* of prescription is a complex matter; nevertheless, one predominantly seeks to regulate the

consonance with the varied aspects of the prescription regulation and its development trends seen in a historical-comparative perspective. Above all, however, it empowers creating solutions which are likely to be satisfactory in the long term.

Bibliography

- Borghetti J.-S., *Prescription*, "Zeitschrift für Europäisches Privatrecht" 2016, issue. 1, pp. 167–182.
- Casson Ph., *Le nouveau régime de la prescription* (in:) Ph. Casson, Ph. Pierre (eds.), *La réforme de la prescription en matière civile: le chaos enfin réglé?*, Paris 2010, pp. 25–50
- Dajczak W., Szwarc A. J., Wiliński P. (eds.), *Handbook of Polish Law*, Warszawa–Bielsko-Biala 2011.
- Fenet P.-A., *Recueil complet des travaux préparatoires du code civil*, vol. 15, Paris 1836
- Guégan A., *La nouvelle durée de la prescription: unité ou pluralité?* (in:) Ph. Casson, Ph. Pierre (eds.), *La réforme de la prescription en matière civile: le chaos enfin réglé?*, Paris 2010, pp. 11–24.
- Huguenin C., Hilty (ed.) R. M., *Schweizer Obligationenrecht 2020/Code des obligations suisse 2020. Entwurf für einen neuen allgemeinen Teil/Projet relatif à une nouvelle partie générale (deutsch/französisch)*, Zürich 2013.
- Hyst J.-J., Portelli H., Yung R., *Rapport d'information n° 338* (2006–2007), (<www.senat.fr>).
- Jacob F., *L'unification des délais*, "Petites affiches" 2 avril 2009, issue 66, p. 7.
- Jourdain P., *L'articulation des doubles délais extinctifs en droit français* (in:) P. Jourdain, P. Wéry (eds.), *La prescription extinctive. Études de droit comparé*, Bruxelles, Zürich 2010, pp. 687–702.
- Kruszyńska-Kola J., *Time, Emotions, Legal Certainty and Justice. New Period of Prescription of Delictual Claims for Damages*

- in the Polish Civil Code, in: Stefan Lorenzmeier, Dorota Miler (eds.), *The New Law. Suggestions for Reforms and Improvements of Existing Legal Norms and Principles*, Baden-Baden 2018, pp. 47–59.
- Kruszyńska-Kola J., *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung* (in:) Christian Baldus, Wojciech Dajczak (ed.), *Der Allgemeine Teil des Privatrechts. Historische Wurzeln – Leistungsfähigkeit im 21. Jahrhundert*, Berlin 2018, pp. 71–98.
- Kruszyńska-Kola J., *Ratio przedawnienia. Dylematy europejskiej tradycji prawnej w świetle historyczno-porównawczej analizy prawa francuskiego i polskiego*, 2018.
- Kruszyńska-Kola J., *The ratio of prescription. Dilemmas of European legal tradition in the light of historical-comparative analysis of French and Polish law*, 2018.
- Kuźmicka-Sulikowska J., *Idea przedawnienia i jej realizacja w polskim kodeksie cywilnym*, Wrocław 2015.
- Longchamps de Berier R., *Uzasadnienie projektu kodeksu zobowiązań: z uwzględnieniem ostatecznego tekstu kodeksu: art. 239–293*, Warszawa 1936.
- Machnikowski P. (ed.), *Kodeks cywilny. Księga pierwsza. Część ogólna. Projekt Komisji Kodyfikacyjnej Prawa Cywilnego przyjęty w 2015 r. z komentarzem członków Zespołu Problemowego KKPC*, Warszawa 2017.
- Machnikowski P., *O potrzebie zmiany przepisów normujących przedawnienie roszczeń*, “Państwo i Prawo” 2018, issue 6, pp. 107–120.
- Pałdyna T., *Przedawnienie w polskim prawie cywilnym*, Warszawa 2012.
- Terré F., *Observations* (in:) Ph. Casson, Ph. Pierre (eds.), *La réforme de la prescription en matière civile: le chaos enfin réglé?*, Paris 2010, pp. 107–111.
- Till E., *Polskie prawo zobowiązań. (Część ogólna). Projekt wstępny z motywami*, Lwów 1923.
- Wójcik S., *Zagadnienia etyczne przedawnienia roszczeń* (in:) M. Sawczuk (ed.), *Z zagadnień cywilnego prawa materialnego i procesowego*, Lublin 1988, pp. 141–160.
- Zelek M., *Determinanty początku biegu terminu przedawnienia roszczeń w ujęciu porównawczym*, “Studia Prawa Prywatnego” 2017, issue. 1, pp. 21–32.
- Zimmermann R., *Comparative Foundations of a European Law of Set-Off and Prescription*, Cambridge 2010.
- Zimmermann R., *The New German Law of Obligations. Historical and Comparative Perspectives*, Oxford 2010.