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Recent Legal Theoretical Debates in Poland

In 2018, Poland celebrates 100 years of regaining independence. Two serene decades of freedom were interrupted by the outbreak of World War II. In 2019, it is thirty years since the end of the communist domination in our country. These anniversaries point out two opening moments for periods of free discussion in Poland about law. First, the revival of the Polish state was considered the victory of the idea of law.[1] Second, the work of Polish lawyers was acknowledged as a necessary premise for the real integration of territories divided as a result of the partitions of Poland in 1795.[2]

In 1918, the new republic had five different jurisdictions in private law. The French *Code civil* applied in the central voivodeships. The eastern voivodeships, which had been incorporated into the Russian Empire, used the *Svod zakonov* (Collection of Laws). In the western voivodeships, which had earlier been part of Prussia, the German Civil Code (BGB) was in place. The Austrian Civil Code (ABGB) applied in the south, but the legal situation of villages in Spisz and Orawa depended on Hungarian customary and statutory law. There was no doubt that unification not only of private law was necessary as quickly as practicable.

Statesmen of the early years of independence decided to work on the uniform Polish legal system thoroughly and without haste. They were concerned about the rich jurisprudential inheritance of the varying jurisdictions, and it was not determined which generation of Polish lawyers would actually be able to conduct codification works.[3] The immediate and spontaneous decision was taken that the new law should be modern but compatible with the national identity.[4] This general agreement did not mean unanimity, however, on whether and how social or technological changes should be expressed in the new law.[5]

There were several realms of successful legal unification during the first two decades of independent Poland, i.e. before 1939. The rest was completed hastily after the war ended. Several laws or drafts prepared within the framework of the Polish interwar legal debates were used then, as they offered significant features of innovation. To this day, some of them can be seen as touchstones in discussions on progress in law. They established the foundations of the modern jurisprudential framework of private law. The five different jurisdictions made it necessary to prepare and enforce two statutes on conflict of laws. There were two avant-garde regulations: one on international conflict of laws, one on domestic conflict of laws. They were completed in 1926, just after entry into force of regulations on bills of exchange and on protection of inventions, designs and trademarks, and at the same time as the Copyright Act. The 1933 Obligations Code and the 1934 Commercial Code were monumental achievements of Polish legislation and examples of modern, comprehensive and advanced unifications.

In the pre-war period, Poland was successful in preparing only a draft of the Property Law. It was considered a stage on the way toward systemic integration of the law on tangible property with intellectual and industrial property law. In Poland, foundations of progressive criminal law had been laid. The Soviet crimes of the 1930s in Ukraine led Rafał Lemkin to

1 R. Longchamps de Bérier, *W radosną chwilę*, „Przegląd Prawa i Administracji" 1918 no. 43, p. 1 of the Editorial inserted before p. 295.

2 S. Car, *Pilne zadania prawnictwa*, Warszawa 1918.

3 A. Parczewski, *Uwagi nad kodyfikacją prawa cywilnego w Polsce*, „Rocznik Prawniczy Wileński" 1925 no. 1, p. 50–52.

4 F.K. Fierich, *Rzut oka na najważniejsze zadania prac kodyfikacyjnych*, „Przegląd Prawa i Administracji" 1919 no. 44, p. 281–282.

5 S. Gołąb, *Przed projektem polskiego Kodeksu cywilnego*, „Czasopismo Prawnicze i Ekonomiczne" 1920 no. 1–4, p. 9–10.

work out the concept of genocide. When this advocate from Warsaw was in exile in the United States, his ideas inspired the worldwide introduction of notions of crimes based on hatred of racial, religious or cultural minorities.[6] But this is not the only example demonstrating that the achievements of Polish law and the research from the interwar period have been forgotten or neglected abroad. The unification achievements of the Obligations Code were not included in Ernst Rabel's work on the unification of contracts of sale.[7] It was not until the beginning of the 21st century that Filippo Ranieri described this code as "the first truly European civil codification."[8] The idea of systemic merger of rights *in rem* found an initial expression in a draft of 1937, but it had been presented by Fryderyk Zoll in the 1920s and 1930s.[9] His expectations that new generations of lawyers would make it binding law[10] are still little known and unfulfilled to this day. Yet, not only works on Polish legal history should fill this gap.[11] It is not just a matter of "justice" to recognize the high level and achievements of legal debate and academic work in the interwar period. It is not only to be aware of the richness of Polish legal culture. It is about the present Polish and European debate about the life of law and utility of legal experience. Therefore, contemporary legal theoretical analyses should keep referring to the achievements of those two decades.

There is one more remark to be made about what happened 100 years ago in the Polish legal system. The tradition based on Roman law was not recognized in Poland before its partition in 1795. Poland decided to consider the European legal tradition of private law as its own. After gaining independence in 1918, this happened not by a single act, but by the tacit acceptance of private law that remained in force after the partition. Changes of notions, values, institutions or regulations in Polish law were kept limited for the last 100 years as the stability of private law was guaranteed by the acceptance of the Roman legal tradition. The jurisprudential framework of Roman law in Polish legal thinking about private law was the choice of our independent state. This is why Roman law was and is taught at law faculties of today's Poland.

Forum Prawnicze – "Legal Forum", our bimonthly law journal, was founded in 2010. As an open law review, it tends to refer by definition to legal debates in Poland of the last 100 years. And it was created to broaden the opportunity to exchange results of legal and academic research and present varying views and opinions on what is important for the science of law *hic et nunc*. Our journal was established to support the development of modern jurisprudence which takes into account legal experience and the fundamental values of European legal culture and Polish society.[12] The discussions are of great interest and importance to us, but they are in Polish, and therefore not truly accessible to foreign readers. Summaries in English preceding each article could give only a slight insight into the subjects covered in each issue of the journal. But publishing everything in foreign languages would significantly limit the number of Polish readers. The *Forum* is for them, as law is always national or even local by its nature and regulative purpose. We would love to make it widely known as we appreciate very much the past achievements of Polish lawyers and find instructive the debates on contemporary legal issues in Poland. And we hope for foreign comments or even studies on them. We find them necessary to inspire and enrich Polish discussions and to deepen the worldwide knowledge of Polish legal culture. These are the reasons we decided to publish one of the six annual issues of *Forum Prawnicze* in English. We will do so each year starting from 2018.

Some of the articles in this volume of *Forum Prawnicze* were published in Polish during the previous year. We reproduce them here in English to present

6 R. Lemkin, *The Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, Washington, DC, 1944.

7 See E. Rabel, *Das Recht des Warenkaufs*, vol. 1, Berlin 1936.

8 F. Ranieri, *Europäisches Obligationen recht. Ein Handbuch mit Texten und Materialien*, Wien–New York 2009.

9 *Projekt prawa rzeczowego uchwalony w pierwszym czytaniu przez podkomisję prawa rzeczowego Komisji Kodyfikacyjnej*, Warszawa 1937.

10 F. Zoll, *Przedmiot praw rzeczowych*, „Kwartalnik Prawa Prywatnego", 1938 no. 3, pp. 239 ff.

11 W. Dajczak, *Derecho romano de obligaciones. Continuación y modificaciones en la tradición jurídica europea*, Santiago de Compostela 2018, pp. 25 ff.

12 "Od Redakcji" (Editorial), FP 2010 no. 1, p. 2.

current opinions on topics and methods of Polish legal life. Some articles are published in this volume for the first time. We want to encourage authors to consider publishing in English in our Polish legal journal of open access.

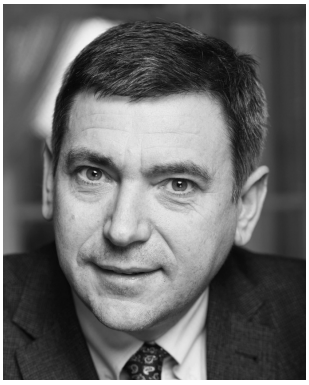
This issue no. 4 of *Forum Prawnicze* was designed for those who wonder what is new in Polish law and in Polish legal theoretical debates. We want to show that, but we rather hope to broaden research in Polish law and open our journal even further to free and diverse views and opinions.

Wojciech Dajczak
Franciszek Longchamps de Bérier

Wojciech Dajczak

If One Who Overcomes B Overcomes Those Who Were by B Overcome?

One of the Questions About Algorithmization of Law in Light of the European Legal Tradition



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Key words: algorithmization of the law; conflict of rights; European legal tradition, Gottfried W. Leibniz

1. Introduction

The question in the title can be written in the form of the following algorithm: A>B and B>C, hence A>C. Its content reflects the Latin maxim *'Si vinco vincentem te, vinco te ipsum'* (if I defeat the one who overcomes you, I overcome you too) introduced to the legal discussion in the Middle Ages. It was widely present in legal reasoning[1] until the 18th century. Gottfried W. Leibniz – one of the protagonists of drawing inspiration in law from mathematics[2] – made it an important element of his studies on the method of solving the so-called doubtful case (*casus perplexus*).[3] It is currently not present

1 See J. Knippius, *Disputatio inaugurales de Victo Vincente*, Halae Magdeburgicae 1704, p. 5. The 18th century title probably contains a typographic error. The wording should be: *de vincovincente*.

2 He did this in his doctoral thesis in law *De casibus perplexis*, which he defended in November 1666 at the University of Altdorf. It was a work ending his direct relationship with law and preceding mathematical discoveries. His interest in using mathematical inspirations in law indicates that after completing his philosophical studies in Leipzig he studied for a semester in Jena, probably because he wanted to participate to in the lectures of an inspiring mathematician – Erhard Weigel, and that shortly after graduating in law in spring 1666 he published the dissertation *Dissertatio de Arte Combinatoria*. See M. R. Antognazza, *Leibniz. An Intellectual Biography*, Cambridge 2009, p. 58–62.

3 G. W. von Leibniz, *De casibus perplexis in iure*, Altdorf 1666. I used Latin text of a bilingual edition: G. W. von Leibniz, *I casi perplessi in diritto (De casibus perplexis in iure)*, translated and compiled by C. M. de Iuliis, Milan 2014, p. 3–24.

in popular collections of Latin legal maxims.[4] In a contemporary research on the early-modern legal reasoning, it is an example reflecting the limitations of logical rigorism in view of the circumstances of a given case.[5] The discussed maxim can, therefore, be perceived as a test for potential algorithmization of legal argumentation in relation to the specific issue of conflict of rights. A limited yet clear reflection on this subject was an element of the argument referring to the schemes described as *topica* which supported the search for rational and fair solutions to specific legal issues. The loss of popularity of the said maxim in legal reasoning coincided with the breakthrough of legal hermeneutics, which took place during the 18th and 19th centuries.[6] Its distinct example is the systematic development of interpretation methods[7] by Friedrich Carl von Savigny, which is continued expressly, though non-unanimously in the interpretation of codified law.[8] Since the end of the 20th century, however, there have been visible signs of the process of decodification, i.e. loss of stability of codes and its position that is meant to ensure enforceability of law.[9] This is accompanied by an observation that digitization of law changes the way of legal thinking,[10] as well

The question in the title can be written in the form of the following algorithm: A>B and B>C, hence A>C.

The discussed maxim can, therefore, be perceived as a test for potential algorithmization of legal argumentation in relation to the specific issue of conflict of rights.

4 See A. Dębiński, K. Burczak, M. Jońca, Łacińskie *sentencje i powiedzenia prawnicze*, Warszawa 2013; D. Liebs, *Lateinische Rechtsregeln und Rechts sprich wörter*, München 2007; R. Domingo, B. Rodriguez-Antolin, J. Ortega, *Principios de derecho global. Aforismos jurídicos comentados*, Pamplona 2003.

5 P. Boucher, *Inductive Topics and Reorganization of Clasifications* (in:) *Approaches to Legal Rationality*, eds. M. Gabbay, P. Canivez, S. Rahman, A. Thiercelin, Dordrecht 2010, p. 67–69.

6 See J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999, p. 62; Chr. Baldus, *Gesetzgebung, Auslegung und Analogie: Römische Grundlagen und Bedeutung des 19. Jahrhunderts* (in:) *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis*, Hrsg. K. Riesenhuber, eds. 2, München 2010, p. 45.

7 F.K. Savigny, *System des heutigen roemischen Rechts*, vol. 1, Berlin 1840, p. 213–215.

8 Cf. L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 73.

9 See e.g. N. Irti, *L'età della decodificazione*, Varese 1979, p. 22 et al.; H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte. Rechtsentwicklungen im europäischen Kontext*, Heidelberg 2005, p. 262.

10 F. Longchamps de Bérier, *Myślenie dekodyfikacyjne a zjawisko dekodyfikacji* (in:) *Dekodyfikacja prawa prywatnego. Szkice do portretu*, eds. id., Warszawa 2017, p. 281.

as the thesis that in a discussion about the new idea of private law, legal tradition provides arguments in aid of an increase in its flexibility.[11]

Comparing those comments with the forecasts of an increase in the significance of IT tools, also to resolve legal issues,[12] prompts a question whether and how the experience behind the said maxim can enrich the discussion on algorithmization in dealing with cases of private law.

While defining the image of the early days of the maxim which already resembled an algorithm, one can imply that it was introduced as part of a set of arguments helping to solve issues of the open i.e. uncodified legal order.

2. *Origins of the maxim – from intuition to quasi-algorithm*

In the debate of Roman jurists, the *ratio decidendi* closest to the considered maxim can be found in an excerpt from the work of Cervidius Scaevola, one of the leading Roman jurists of the second half of the 2nd century AD. The text concerns adding the periods of possession the specific thing by different persons in the context of determination of legally relevant terms of possession. The jurist based admissibility of such addition in analyzed cases on equity (*sola aequitas*).[13] By such case he considered the situation of adding the time of possession of an item by the debtor in the interest of the creditor who received it in pledge not directly from the possessor but from the person who had the thing earlier in pledge. The general reference to equity (*aequitas*) is here reinforced by a logical grading of position. Since the second creditor is better (*potior*) than the first one, then they should much more (*multo magis*) exceed (*superaturus*) the possessor.[14] This passage, included in Justinian's 'Digesta', became the subject of a discussion among late medieval lawyers. Its picture – available to us through *ius commune* books – allows one to assume that Roman *ratio* was not so much a source but rather a confirmation of the *'si vinco vincentem te, vinco te ipsum'* rule. In legal discussion, this *ratio decidendi* can be found for the first time in the explanations to one of the emperor Justinian constitutions made by a glossator Azo of Bologna who lived at the turn of the 12th and 13th century. Justinian recognized there that the settlement of conflict of rights between creditors based on priority in time is modified in the interest of an effective subsequent wife's claim for restoration of the dowry.[15] In this context, glossator noticed that when we go beyond the time-order criterion,[16] the maxim *'si vinco vencentem te, vinco te ipsum'* does not apply.[17] In the closing part of the deliberations which develop the deviation from the

11 W. Dajczak, F. Longchamps de Bérier, *Prawo rzymskie w czasach dekodyfikacji*, „Forum Prawnicze" 2012, Volume 10, Issue nr. 2, p. 22.

12 R. Susskind, *Tomorrow's Lawyers. An Introduction to Your Future*, Oxford 2013, p. 47–49. 25

13 D. 44,3,14pr.

14 D. 44,3,14,3.

15 C. 8,17 (18), 12.

16 P. Azo, *Summa locuples iuris civilis thesaurus*, Venetiis 1584, item. 831 (VIII, *qui potiores*, 15): *Creditoris, qui prior est tempore, potestas quanta sit.*

17 Ibidem, item. 831 (VIII, *qui potiores*, 16): *Regulam, si vinco vincentem te, vinco te, non habere locum in quibusdam casibus.*

principle in light of the Roman sources, Porcius Azo explained that the maxim does not apply in absolute,[18] and indicated that summing the time of possession of the same thing by different persons is a probable case of its pertinence, which remained the subject of the Scaevola's text.[19]

While defining the image of the early days of the maxim which already resembled an algorithm, one can imply that it was introduced as part of a set of arguments helping to solve issues of the open i.e. uncodified legal order – as in the model well-known even from *Broccardio* by Azo of Bologna.[20] The starting point was to recognize its potentially broad application as well as notice limits of this application based on the confrontation with the Roman sources. So marked directions of deliberations on the maxim became a part of the discussion of *ius commune* lawyers until the 18th century. It was permanently connected with the Roman sources but ceased to be limited to them. A look at this legal experience from a current perspective can, therefore, be put in the question on setting the limits of an algorithmic solution to a legal problem in a complex social reality.

3. *Describing and justifying the limits of maxime's application in* ius commune

While referring at least terminologically to the scholastic probabilism,[21] Azo considered the maxim *probabilis* when its confirmation was found in the authority of Roman sources.[22] Acceptance of the maxime's argumentative value was expressed in *ius commune* – adequately to legal methods dominant at different times – as the commonly known sub-rule (*vulgaris sub regula*),[23] the common axiom of all scholars (*doctorum omnium axioma commune*),[24] the very well known (*celeberrima regula*)[25] or the compatible with natural reason (*conformis naturali rationi*).[26] Greater attention of the *ius commune* lawyers was drawn to the scope of maxim's application. Changes in legal methods meant that constant use of Roman sources was accompanied by the introduction of new elements of falsifying the universality of the principle and then determining the limits of its application. This legal experience can be synthetically presented by distinguishing two groups of arguments.

Acceptance of the maxime's argumentative value was expressed in *ius commune* – adequately to legal methods.

18 Ibidem, item. 834 (VIII, *qui potiores*, 16): *nec nam necessario concludit illud arg. ego vincum te et tu vincis illum, ergo debo vincere illum.*

19 Ibidem, item. 834 (VIII, *qui potiores*, 16): *Probabile tamen est ut de diversis temporalibus praescriptionibus et de accessionibus possessionum* (D.44,3).

20 In the 16th century work dedicated to legal argumentation (Cl. Prateo, *Regulae generales iuris*, Lugduni 1589, p. 162), the discussed maxim was indicated as a principle whose limitations are similar to the limitations of the argument '*ubi quod minimum est prohibetur, id quod maius est vetatur*' (where less is not allowed, the more so is more prohibited) and '*cum id quod maius est, conceditur, quod minus non vetatur*' (when more is allowed, it is prohibited less), indicated by Azon in the 46th column of Broccardia; P. Azo, *Broccardiasive generalia iuris*, Basileae 1567, pp. 420–422 (ref. XLVI).

21 See R. Schüssler, *Scholastic probability as rational assertability: the rise of theories of reasonable disagreement*, „Archiv für Geschichte der Philosophie" 2014, no. 96, p. 151–284.

22 P. Azo, *Summa*…, item 834 (VIII, *qui potiores*, 16).

23 Cl. Prateo, *Regulae*…, p. 162 (II, 718).

24 J. del Castillo Sotomayor, *Quotidianarum controversiarum iuris liber*, Lugduni 1658, p. 460 (lib. III, cap. 30).

25 G. W. von Leibniz, *De casibus*…, XXI.

26 J. Knippius, *Disputatio*…, p. 13.

3.1. Arguments excluding the use of maxim

The discussed maxim is found in Azo's deliberations on Justinian's constitution, whose main subject is to explain that a woman's claim for restoration of the dowry also takes precedence over 'those husband's creditors whose rights established earlier'.[27] The possibility to break the principle which favours those who establish their rights earlier (*qui prior est tempore*) was additionally confirmed in a glossa by an example from Justinian's Digesta,[28] where the third in time order creditor only for formal reasons won a dispute over the conflict of rights against the prior creditor.[29] Using yet another passage of Digesta,[30] Azo showed that limiting the use of the discussed maxim 'if I overcome the one who overcomes you, I overcome you too' (*si vinco vincentem te, vinco te ipsum*) may result not only from breaking the rule 'who better as to time, the better as to law *(prior tempore, potior iure*), but also a different precedence of inheritance in binding parallel regimes of succession based on the resolution of the senate (*SC Tertulianum*) and the praetor's edict.[31] The texts thus extracted from Justinian's compilation became the basis of falsifying the said maxim while citing the authority of Roman law. The texts quoted from Digesta helped the glossator show vividly that the falsification based on Roman sources does not lead to a new, clear ranking of three rights, but a difficult in grasping transitivity of order (*res in circulo*).[32] While describing this matter in reference to the algorithm provided in the introduction, one can explain the essence of the problem raised in the glossa with the following symbols:

A>B, B>C, C>A.

Detection of such nature of the problem was reflected in reaching for new arguments which convey imperfection of the quasi-algorithmic maxim in a clearer and more general way than ancient texts. Azo referred to a rule clarified in feudal reality, which says that as a vassal I do not have to serve the master whose vassal is my superior;[33] and he also mentioned a common-sense *dictum*: 'if I like you and you like them, it does not mean that I like them'.[34] Such falsification of the maxim's universality based on reference to colloquial ideas and common sense became popular in the 13th-century doctrine of glossators,[35] and was later

One can explain the essence of the problem raised in the glossa with the following symbols: A > B, B > C, C > A.

27 C. 8,17 (18),12. Azo included in the glossa also Justinian's constitution from the collection of Novels, which relates to the subject (Nov. 97,3).

28 D. 20,4,16 (Paul.).

29 P. Azo, *Summa…*, item 834 (VIII, *qui potiores*, 15).

30 D. 38,17,5 (Paul.). See. P. Voci, *Diritto ereditario Romano, Parte speciale*, vol. 2, Milano 1963, p. 28.

31 P. Azo, *Summa…*, item 834 (VIII, *qui potiores*, 16).

32 Ibidem. In the passage preserved as D. 20, 16,16, Paulus explained that judgment between the first and the third creditor had no effect on the second one. Paulus' text passed in D. 38,17,5 presents the issue of determining the order resulting from the fact that according to S.C. *Tertullianum*, the father of the child overcame their mother, but the mother took precedence over the agnate grandfather. However, according to the second class of the praetor's edict (*unde legitimi*), the agnate grandfather overcame the testator's mother.

33 P. Azo, *Summa…*, item 834 (VIII, *qui potiores*, 16): *si ego vasallumtuus sum et tibi debeo servire, tu autem vas alius est alterius non ideo teneo rilli servire.*

34 Ibidem, item 834 (VIII, *qui potiores*, 16): *si diligo te, tu diligis illum non ideo diligo illum.*

35 This is illustrated by Accursius' *Glossa ordinaria*, gl. ad D. 44,3,14,3 <*debeat*>. See. *Digestum Novum seu Pandectarum Iuris Civilis*, vol. 3, Lugduni 1627, item 848.

developed in *ius commune*. For example, Bartolus de Saxoferrato (1313/14–1357), an eminent commentator, tended to give clear and effective picture of exemptions from the maxim's universal application as analogous to reasoning according to which when one surpasses another(B) in calculations, it can not be inferred that they are better than those who defeated another(B) in a battle. He also used an example indicating that the defeated in a game by a particular person can in the same game defeat the one who defeated that person.[36] A popular work dedicated to legal argumentation of Nicolaus Everard, published for the first time in the early 16th century also referred to a game in explaining the maxim's limits. The jurist claimed that one would not accept as a hindrance to the maturity of payment to the winner of the game the fact that the promising of payment did not lose the game with another person.[37] By assessing this group of arguments, we can state, bearing the current perspective, that they did not yet give a clear foundation to ascertain when ensues the transition from the order consistent with the maxim and described by the following formula of transitive property of order:

A>B i B>C hence A>C,

to the situation described by the formula below:

A>B, B>C i C>A.

A more detailed reason for such a transition can be noted in the discussion specifying the criteria for the maxim's application.

3.2. Criteria specifying limits of the maxim's application

The practical sense of the discussion about the criteria defining the scope of maxim's application is confirmed by the fact that we can follow it from the first half of the 14th century when legal science based on Roman texts gained a more practical dimension. Oldrado da Ponte (died after 1337) explained in one of his opinions (*consilium*) that the maxim 'if I overcome the one who overcomes you, I overcome you too' applies when the causes (*causae*) or *rationes* of both victories are of the same kind. They then belong to the same order[38] and this, as a consequence, allows to determine the hierarchy of rights. Similarly, Bartolus de Saxoferrato pointed out in his comment that when in relations between three persons a different nature of benefit is at stake (*utilitas*, *commodus*), the discussed maxim that nominates the ranking does not apply.[39] The connection captured in this way between the use of a quasi-algorithmic maxim and some identity of the relation between three persons was later confirmed in

The practical sense of the discussion about the criteria defining the scope of maxim's application is confirmed by the fact that we can follow it from the first half of the 14th century when legal science based on Roman texts gained a more practical dimension.

36 Bartolus de Saxoferrato, *Commentaria. In secundam Digesti Veteris partem*, Venetiis 1593, p. 139 (*Qui potiores in pignoribus habeantur, l. Claudius*).

37 N. Everardi, *Loci argumentorum legales*, Lugduni 1579, p. 469.

38 Oldrado da Ponte, *Consilia seu responsa et quaestiones aureae*, Venetiis 1570, p. 84 (con. CXCVIII, 6).

39 Bartolus de Saxoferrato, *Commentaria*…, p. 139.

ius commune by both references to *causa*, *ratio*[40] or *utilitas* and new formulas requiring the same strength (*eadem vis*)[41] or dignity (*dignitas*), not greater, however, than dignity of the first winning person[42] or the same type of victory (*eodem genere vincendi*).[43] This legal intuition repeated for centuries was presented by Leibniz in the way closer to the approach of exact sciences. The scholar pointed out that the discussed maxim works consistently in reference to determined relations (*relations determinatae*), i.e. those in which the position can be quantified, which means, for example, that 'twice the double is not simply double but quadruple'.[44] On the other hand, undetermined relation (*relations indeterminatae*) that is inadequate to the axiomatic use of maxim were explained as random relation. Leibniz illustrated this with examples originating from *ius commune*[45] and also referred to a physical truth, according to which throwing one stone into another will not always cause that one to hit the next.[46] The progress in formalizing the scope of maxim's application can eventually be observed in the monograph devoted to this subject from the beginning of the 18th century. The notion known from an earlier period of *ius commune*, which consisted in combining this scope with the identity of genus (*genus*), order (*ordo*), measure (*media*), circumstances (*accidens*), degree (*gradus*), cause (*ratio*) or force (*virtus*) in the relation between three persons, was specified by Johannes Knippius as a limit (*limes*) determined by the existence of a uniform basis of their comparison (*fundamentum comparationis*).[47] As a result, going beyond the common point of reference (*tertium comparationis*) already required a way of settling the conflict of rights, which was independent from the maxim.[48]

The trend presented in the discussion of *ius commune* jurists, which goes towards explicitness in handling the discussed maxim, can be read as a confirmation of its usefulness and practical importance.

The trend presented in the discussion of *ius commune* jurists, which goes towards explicitness in handling the discussed maxim, can be read as a confirmation of its usefulness and practical importance. The 17th-century sources also allow one to note in this context some formal similarities to the argumentation typical for contemporaneous physics and mathematics. This inspires to pose the next two questions: what is the experience of discussing the method of resolving cases which were exempted from the use of maxim? Did extending theoretical reflection on the discussed paradigm contribute to the search for some regularity beyond the scope of its simple, algorithmic application in the context of the 17th and 18th-centuries' tendencies

40 N. Everardi, *Loci…*, p. 469; H. Donellus, *Opera omnia*, t. 9, *Commentari absolutissimi ad II, III, IV, VI et VIII libros Codicis Justinianei*, Lucae 1766, item 1125 (ad tit. XVIII, lib. VIII, *De his qui in pignorem*);

41 L. Pontano, *Consilia sive Responsa*, Venetiis 1569, p. 314 (cons. CCCCXXXVI).

42 Cl. Prateo, *Regulae…*, 163.

43 J. del Castillo Sotomayor, *Quotidianarum controversiarum…*, cap. XXX, 4.

44 G. W. von Leibniz, *De casibus…*, XXI: *…duplum dupli non est duplum simpli sed quadruplum*.

45 See ibidem: … a*micus amici meus amicius non statim est* (…) *neque libertus liberti mei meus libertus est*.

46 Ibidem.

47 J. Knippius, *Disputatio…*, p. 15.

48 Ibidem, p. 15: *Quoties enim extra tertium comparationis elabitur toties diversitas iuris adest, et regula nostra non procedit*.

to mathematisation of the legal method? Let's begin with the first one.

4. Searching for a settlement method when the maxim did not have any use

Uncertainty as to resolving the conflict of three rights, when the said maxim does not apply, is synthetically expressed by determining this state as transitive property of order (*res in circulo*)[49] and emphasizing its inevitability.[50] The practical dimension of this uncertainty is well illustrated by two texts from Justinian's Digesta indicated by Azo as falsification of the universality of the discussed maxim. The first is a passage from the third book of *Questiones* by Paulus who lived at the turn of the 2nd and 3rd century AD.[51] The jurist discussed the case of mortgages from three lenders referred to one specific land. One of the creditors is called Eutychian and the other Turbon. We do not know the third man's name. To simplify this description they are named A, B and C. The creditors' right of pledge was first established in favour of A, then in favour of B and C the latest. There was a trial between A and C about the order of payment of their dues from the land, which was won by C. The ruling was probably incorrect, because the jurist explains arising the claim preclusion (*res iudicata*) because the verdict has not been appealed. Paulus also explained that the state of *res iudicata* refers only to the relation between A and C. Consequently, B can in no way (*nullo modo*) rely on the issued ruling to justify the priority of their claim towards A. The resulting situation can thus be described by the following formula:

A>B>C>A.

The Roman jurist did not specify what should be the order of payment among those three creditors in this case. The second example comes from the work of Paulus[52] dedicated to a resolution of the Roman Senate called *Orfitianum*.[53] The problem considered in the text, however, concerns another resolution of Roman Senate called *Tertullianum*. It granted the mother the right to inherit after children. In this succession based on biological kinship (*cognatio*) she kept priority over those entitled to inheritance on the basis of a relation resulting from subordination to the legal head of Roman family (*agnatio*).[54] The complexity of the case discussed by Paulus arose from the fact that although in succession based on the Senate's resolution the testator's mother (herein after A) overcomes their agnate grandfather (B) and all the more the testator's father under his patronage (C),[55] the person called to succession was the testator's father (C) and not the mother (A), according to the praetor's edict. Based on the same edict, the grandfather's succession resulted from a legal relation, hence it overcame the son's entitlement (C).[56] This can be written by the formula below:

A>B>C i B>C>A.

In this case, the ancient jurist settled the doubtful issue. He found that application of the Senate's resolution is excluded (*desinit senatus consultum locus esse*), and confirmed the priority of the succession right of the grandfather (B). The settlement excluded the first order of succession and put forward the second, as the basic one, but constant precedence of the grandfather before the son in both of those orders was included (B> C).

The lack of solution in the first case and the arbitrary assignment of precedence in the second one confirm the difficulty in the matter of the transitive property of order of rights discussed by glossators. They prove

49 Cf. P. Azo, *Summa*…, item 834 (VIII, *qui potiores*, 16).

50 Bartolus de Saxoferrato, *Commentaria*…, p. 139: …*circuit indissolubilis*; Baldus de Ubaldis, *Commentaria in sextum Liberum Codicis*, Lugduni 1585, p. 202 (IX,4): …*quod non causa evitandi circuitus*; G. W. von Leibniz, *De casibus*…, XX: *in circulo autem principium et finis est*; J. Knippius, *Disputatio*…, p. 15: …*perpetuusque manet circulus*.

51 D. 20,4,16.

52 D. 38,17,5.

53 D. 38,17,9 (Gai.) The resolution established that when inheriting after the mother, children take precedence over the head of family whose power they are subject to. See also P. Voci, *Diritto*…, p. 18, ref. 3.

54 D. 38,17,2,17 (Ulp.).

55 See P. Voci, Diritto…, p. 28.

56 See ibidem.

that this difficulty could not be overcome with the argumentation scheme imported from Roman sources. This entails a question about the method of resolving the conflict of rights that cannot be arranged algorithmically by applying the discussed maxim. The sources allow following a more general reflection on this subject from the 16th century. Hugo Donellus, the modern forerunner of the idea of a systemic order of law, noted that when we state the impossibility of applying the '*si vinco vincentem te, vinco te ipsum*' maxim, we encounter an unclear case.[57] In connection with the first of Paulus' texts (D. 20, 4, 16), he defined the presented freedom of evaluation as universally accepted and consistent with obvious equity.[58] Jacques Cujas (Cuiacius), the representative of legal humanism contemporary to Donellus, drew attention to the aspect of fairness, while discussing doubts about the order of payment of privileged claims which exclude application of the discussed maxim.[59] He stated that the privileges granted by the ruler or statute should be interpreted in such a way as to not cause wrong to anyone (*nemini iniuriam inferant*) and choose what is fairer (*ut aequior humaniorque sit*).[60] Authors of the 17th and the beginning of the 18th century already repeat in their deliberations general comments on the difficulty in finding a right solution (*difficile est iustam rationem invenire*) when the mentioned maxim turns out to be inapplicable. The jurists close to the experience of a so-called Roman-Saxon law clarified, for instance, that in such situations solving the conflict of rights should be subject to the judge's merits on the basis of what is good and right (*ex aequo et bono*). They pointed out that the judge should take into account the position of parties and the type of creditors' rights[61] by applying what is good and right. Among the reflections on finding an accurate solution to the conflict of rights when the discussed maxim is inadequate, one can distinguish the deliberations of Gottfried W. Leibniz, included in his doctoral thesis in law, which he obtained as a twenty-year old man. The young doctor came out as outstanding in breaking the typical convention of a legal discourse and adopt-

Hugo Donellus, the modern forerunner of the idea of a systemic order of law, noted that when we state the impossibility of applying the '*si vinco vincentem te, vinco te ipsum*' maxim, we encounter an unclear case.

57 H. Donellus, *Commentari…*, item 1126 (ad tit. XVIII, lib. VIII, *Qui potiores*): *Res per se paulo obscurior exemplo plana fiet.*

58 Ibidem: *… ea sententia quam statuimus, aperte defendatur et verbis huius legis et sententia et manifesta aequitate et praeterea communi sententia recepta sit.*

59 The basis of the dispute were two of Justinian's constitutions indicated above. The issue was whether the payment of a wife's claim for restoration of the dowry, having priority over the secured earlier claims, (C. 8,17 (18), 12), takes also precedence over earlier privileged claims for the return of money lent for example for the construction of ships or homes (Nov. 97, 3).

60 J. Cujacius, *Opera*, vol. 10, *In Digesta seu Pandectas Justiniani Imperatoris Notae*, Neapoli 1722, item316 (lib. III, cap. XIV).

61 See: M. Berlich, *Conclusionum practicabilium. Pars prima*, Lipsiae/Jenae 1651, p. 477 (con. LXXII, 30): *…arbitrio iudicis decidendos reliqui debere, qui attentis circumstantiis facultatibus creditorum, eorum que qualitatibus et conditionibus ex aequo et bono arbitertur*; B. Carpzow, *Jurisprudentia forensis romano-saxonica secundum ordinem constitutionum Augustis Electoris Saxoniae*, Francofurti ad Moenum 1650, p. 307 (Const. XXVIII, def. CLXXV, 12) – repeats as correct (*bene docet*) the opinion of Berlich; J. Knippius, *Disputatio…*, p. 14: *Hinc ex aequo et bono pro ratione circumstantiarum materi am hanc esse iudicandam concludebant.*

ing a view closer to exact sciences.[62] He attempted to rationalize the conflict of three rights that could not be sorted by means of the discussed maxim. By approaching the three rights graphically as vertices of a triangle inscribed in a circle, he noticed that in the case of the circle, the beginning and end are conventional.[63] Hence – taking Leibniz's thought synthetically – the disorder in applying the rule, which results from heterogeneity of the relation between rights, can be perceived as either setting a different starting point by law (e.g. granting priority to a later claim for restoration of the dowry),[64] or recognizing that different priorities in particular relations lift one another which leads to adopting the equivalence of rights as a starting point in the search for a solution to their conflict.[65] Leibniz then analyzed fourteen cases of the conflict of three rights which can be pre-arranged according to a measurable criterion (e.g. time, degree of kinship) but elude application of the discussed maxim due to deviation from the homogeneity of relations. This analysis showed the use of both models of uncertainty resolution, as distinguished by him. While comparing the results of those deliberations, one can notice that Leibniz accepted the change in the order of priority when he recognized it a result of an unequivocal order. He accepted such explicitness of the order when it resulted from the statutory law (Saxon law),[66] a specific clause which accompanied granting a particular right[67] or judgment.[68] When Saxon law repealed privileges originating from ancient Roman law or a *ius commune*, Leibniz recognized, with the support of the statutory law, the order resulting from a measurable criterion (e.g. time).[69] In other cases, he remained reserved as to the change in the ranking of rights resulting from measurable criteria. Leibniz accepted controversies in *ius commune* related to the scope of preference as an argument in aid of determining the conflict according to a measurable criterion (e.g. time).[70] The critical assessment of Roman solutions, which granted exclusiveness to one of the successors, gave him a ground to recognize equivalence of conflicting rights based on pure and certain natural law (*ius merum*).[71] When the disassociated from a measurable criterion change of priority exempted the remaining rights entirely, the uncertainty ceased to exist. When such a result, however, was not accompanied by a specific privilege of the third right towards the first one (the situation

The jurists close to the experience of a so-called Roman-Saxon law clarified, for instance, that in such situations solving the conflict of rights should be subject to the judge's merits on the basis of what is good and right (*ex aequo et bono*).

62 Such inclination is indicated by the idea expressed at the beginning of the dissertation that the word *casus* reflects a certain similarity between the search for the size of a geometrical figure and the search for adequate remedy at law; see: G. W. von Leibniz, *De casibus*…, II.

63 Ibidem, XIX, XX: …*in circulo principium et finem autem est (…) tantum non natura*.

64 Ibidem, XXIII: …*ab alia parte hoc obiicitur*.

65 Ibidem, XXIII: …*quia nullus alterum vincit in effectu, mutua victoria propriae non victoria, sed paritas appellatur*.

66 Ibidem, XXX, XXXVII.

67 Ibidem, XXVI.

68 Ibidem, XXXII.

69 Ibidem, XXXVI, XXXVII, XXXVIII, XXXIX.

70 Ibidem, XXXIV, XXXV.

71 Ibidem, XXIX.

described by the formula A> B, B> C, and C>A), Leibniz tends to favour the solution that assigns priority to the second right (B) in accordance with a measurable criterion (time, generality) and determines subsequent positions adequately to the specific privilege.[72]

This picture allows one to notice the young thinker's few intuitions about the position of the discussed maxim in solving difficult cases of the conflict of rights. Firstly, a propensity to increase the importance of the discussed maxim by specifying and limiting reasons that cause disruption to the ranking of rights determined by means of a measurable criterion. Secondly, due to a specific characteristic of one of the conflicting rights, the change of priority was accompanied by the idea of limiting uncertainty, which was observed in preferring such a new order (of rights) that constitutes a compromise between a measurable criterion (e.g. time) and a special preference for some of those rights. When the starting point was the problem represented by the following formula:

A>B, B>C and C>A,

then the preferred solution in the absence of interaction between A and C led to determining the order below:

B>C>A.

Thirdly, in the absence of acceptance for the change of priority resulting from Roman law and impossibility to build a ranking with the use of a measurable criterion, Leibniz replaced the irregular and unclear order of rights in a transitive relation with the state of their equivalence. This can be expressed by the following formula:

A>B>C and B>C>A hence A=B=C.

Leibniz's reconstructed intuitions show clearly that he did not force a general theory which would lead

Leibniz's reconstructed intuitions show clearly that he did not force a general theory which would lead to replacing the uncertainty resulting from non-application of the discussed maxim with a new order arranging the conflict of rights. *Novum* of the young thinker consisted in seeking – for this part of legal argumentation – some regularity in an area where experienced *ius commune* jurists confined to assessing circumstances, based on equity.

72 Ibidem, XXVI: …*Igitur ponetur secundus loco Imo, tertius IIIdo, primus IIItio; ibidem, xxxii: Decidendum igitur mero iure Imo exo ponendum Secundum, IIdo Tertium, IIItio Primum*. In connection with the discussed Paulus text (D. 20,4,16), Leibniz allowed for the correction of this position and preservation of precedence based on a measurable criterion (time), when A acted in cooperation with C (*si prima esset in possessionione forte de consensu Tertii post rem iudiciatam, nunquid non optime dicetur integroiure contra Secundum uti posse, necquicquam obstante res iudicata*).

to replacing the uncertainty resulting from non-application of the discussed maxim with a new order arranging the conflict of rights. *Novum* of the young thinker consisted in seeking – for this part of legal argumentation – some regularity in an area where experienced *ius commune* jurists confined to assessing circumstances, based on equity. Boldness and innovative thinking of young Leibniz can be interpreted as a consequence of the view that there exist common features of a legal system based on natural reasonableness as well as geometric rationality and faith in the possibility of finding an accurate solution with the use of rules rationally considered as natural.[73] Such a mathematical approach to law showed that the argumentative potential of the discussed maxim is in fact broader. Leibniz drew attention to the possibilities of extending its application to some difficult cases of the conflict of rights. Moreover, he showed that a critical reflection on the reasons for breaking this maxim sets the starting point in search of a solution to such mentioned cases. His doctoral thesis, which presented those ideas, was in fact a juvenescent and limited-in-effect example of a formalized approach to law. The question then emerges whether – and if so then to what extent – the modernization of a legal method completed in the 17th and 18th centuries, with clear inspirations of contemporaneous mathematics, included reflections on the potential of the maxim?

5. Popularization of the maxim in the axiomatic legal reasoning in the 18th century

On the 20th September 1690 at Viadrina University in Frankfurt (Oder) the faculty of law chaired by Samuel Stryk adopted *disputatio inauguralis* by Johannes Knippius titled *De vinco vincentem*.[74] The work was assessed under the direction of Stryk, who – according to Franz Wiaecker[75] – charted a pathway of practical *usus modernus* jurisprudence at the beginning of the 18th century, and it remains a valuable source of reference to the question posed above. After presenting the concept and meaning of the principles in law, Knippius began his deliberations on the '*si vinco vincentem te, vinco et te ipsum*' maxim from emphasizing its axiomatic character. He described it as compatible with natural reason[76] and objectively valid, for it was true in accordance with nature.[77] Then the repeated thought about the limited scope of the maxim's use is combined in the thesis with a transition from axiomatic premises typical for the law of nature reasoning to relatively extensive analysis of the *usus modernus* practice-oriented cases. Knippius separately discussed legal transactions between the living (*De usu regulae in actibus inter vivos*)[78] and in the event of death (*de usu regulae in actibus ultimae voluntatis*).[79] The style of this discourse reflects – in my opinion – its two features. Firstly, within the reflection on the scope of practical application of the maxim appeared cases unseen in this context. The jurist, for instance, proved that the discussed maxim indicates the solution to the dispute between the seller and the acquirer of buyer's rights when the seller won the lawsuit against the buyer about an effective withdrawal from the contract.[80] Another example is Knippius' conclusions indicating usefulness of the maxim when interpreting testaments. He discussed as one of such situations the case of doubts, where the starting point was a disposition to appoint a substitute in the person of the deceased's wife for the son, should they died within 30 years. The wife's substitute, according to the testator, were supposed to be the poor. The doubt arose from the fact that although the son of the deceased died in the prescribed time, he left behind a son who, however, was not mentioned in the will. The

73 Ibidem, XI. It is worth reminding that it was the time when the vision of a young thinker came to life to build for the divine glory the unity of social reality divided in various ways, cf. M. R. Antognazza, *Leibniz*…, p. 66.

74 J. Knippius, *Disputatio*…, information on the title page.

75 F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, Göttingen 1967, p. 220.

76 J. Knippius, *Disputatio*…, p. 13: *…est admodum conformis naturali rationi*.

77 Ibidem, p. 13: *…istiusmodi regulae (…) qui ipsius naturae autor est, nec ab hominum opinione suspensa sunt, sed propria sua se veritate tuentur.*

78 Ibidem, p. 15–36.

79 Ibidem, p. 36–40.

80 Ibidem, p. 31: *si ego venditor vinco vincentem primum emptorem multo magis vinco te, qui ius ex cessione praetendis.*

jurist accepted the priority of the testator's grandson over the poor, and he based this choice on recognizing this especially close relation between the two;[81] he then reasoned that since the grandson excluded the widow, all the more he would do so with the poor.[82]

Decline of the idea of popularizing the use of maxim *de facto* as an algorithm that forms a basis or a link of legal argumentation in an open legal order can be associated with another and new in the 18th century direction of drawing legal inspirations from mathematics.

Another characteristic of Knippius' deliberations is combining the mechanism of applying the maxim with the achievements of the *ius commune* legal science. This consisted in disclosing the possibility of its broad application in cases where the relation of three entities is a consequence of a surrogation[83] or succession[84] of rights and duties.[85] Knippius' deliberations, therefore, allow for a conclusion that the potential of the discussed rule, inherent in its treatment as a wider-used quasi-algorithm that organizes and simplifies the legal argument, was noticed in the *usus modernus* experience at the turn of the 17th and 18th centuries. However, one will not – unlike in Leibniz's – find in his work any search for argumentative order for the cases in which the maxim did not apply. The similarities in the approaches of Leibniz and Knippius can be combined with the general idea of axiomatization of the legacy of legal argument based on topoi. The indicated difference between them shows that certain formalization of thought about the maxim, taken after the school of natural law in *usus modernus*, did not link with the question about the possibility of argumentative progress that could arise from the mathematical development of intuition, which can be observed in Leibniz's work. However, even the model of a broader approach to the rule presented in Knippius' work was not developed in the 18th-century *usus modernus*. In an extensive work of Christian Friedrich von Glück, which gathers and summarizes the achievement of *usus modernus*, the discussed maxim has only an auxiliary meaning in the explanations of the conflict of creditors' rights of pledge.[86] Such a picture of legal experience allows one to formulate two general remarks. Firstly, decline of the idea of popularizing the use of maxim *de facto* as an algorithm that forms a basis or a link of legal argumentation in an open legal order can be associated with another and new in the 18th century direction of drawing legal inspirations from mathematics. This new direction meant taking up the construction of a legal order in which solving

81 Ibidem, p. 37: *…nepos et filius habentur pro eadem personam.*

82 Ibidem, p. 37: *si neposiste ex ver osimili voluntate testatoris (…) excludituxorem magis dilectam, multo magis debet excluder emulto magis debet excludere peuperes minus dilectos.*

83 Ibidem, p. 37: *illam non procedere, quando vincens non surrogatur in locum victi.*

84 E.g. Ibidem p. 34: *…si vinco patrem etiam vinco filium in locum patris succedentem.*

85 The link between the scope of application of the discussed maxim and the effects of substitution and surrogacy was already noted earlier, cf. J. del Castillo Sotomayor, *Quotidianarum controversiarum…*, p. 461 (XXX, 5).

86 Ch. F. Glück, *Ausführliche Erläuterung der Pandekten nach Hellfeld ein Commentar*, vol. 19, part 2, Erlangen 1818, p. 282.

problems occurs by deduction from the rules constituting a closed system.[87] Secondly, juxtaposing the deliberations of Leibniz and Knippius suggests that significant progress in creating a model of a broader operation of the maxim in legal reasoning was and still is impossible without a deeper reflection on partly mathematical intuitions by Leibniz. I would consider the following as key ones among them: removing unnecessary restrictions on the use of maxim by the legislator in the course of law modernization and searching a new, argumentative order in areas where the quasi-algorithmic maxim cannot be applied to settle the conflict of rights.

6. Conclusion – remembering the maxim in the age of decodification

Limiting the use of maxim to the explanations of the conflict of creditors' rights, noticed in the work of Ch. Glück, is found in his contemporary theoretical discussion[88] as well as early remarks to the codification of civil procedure.[89] In this area, the references to the maxim gradually began to disappear. Seen from today's perspective, it can be regarded as a confirmation of a general view that Leibniz's attempt to mathematize the topoi applied in *ius commune* failed.[90] The '*si vinco vincentem te, vinco te ipsum*' maxim strengthens the clarity of such an opinion, both for its quasi-algorithmic form and the abovementioned argumentative experience that stands behind it. The view on Leibniz's failure at mathematizing topoi was voiced by Theodor Viehweg in the mid-20th century.[91] While he recognised a central role of the system's theory represented in private law by codification, he thought, however, that the topoi and figures of reasonings known from the pre-codification period did not lose their usefulness because of the multiplicity and variety of issues that legal practice faces.[92] The direction into which the law develops seems to confirm the importance of the pre-codification experience of legal reasoning. Since the end of the 20th century, the process of decodification has been widely recognized. Practice shows ever more clearly the illusive expectation underlying the 19th and 20th-century codifications, which believed that they would ensure finding the right answer easily, and a systemic structure and accompanying formalization of legal methods would give a stable foundation for predictability of solutions to particular cases. The important premises of decodification include the increasing number of specific statutory regulations which partly regulate the same issues as codes and the development of legal pluralism resulting from a significant increase in transnational lawmaking as well as the increase in the importance of the so-called *soft law*.

Typical consequences of those phenomena include greater difficulties in finding the proper text of law, greater ambiguity of the sense of provisions and the following increase in uncertainty of the *ad casum* legal assessment. Such image of the environment in which law is currently applied can only support the thought of the usefulness of topoi in legal argumentation.[93] The catalogues of Latin maxims considered useful in current legal argumentation may vary[94] owing to both different knowledge of topoi of the pre-codification period and beliefs about their current usefulness.

The conducted deliberations thus justify the question of whether the failure of Leibniz's idea of mathematization of topoi as well as practical, 19th-century identification of argumentative function of the maxims '*si vinco vincentem te, vinco te ipsum*' and '*prior tempore potior iure*' are sufficient evidence to currently ignore the experience that remains behind the former. In the system-developed private law orders, some of the problems related to the use of the discussed maxim seem

87 See e.g.: T. Viehweg, *Topik und Jurisprudenz*, München 1953, p. 54; D. von Stephanitz, *Exakte Wissenschaft und Recht. Der Einfluß von Naturwissenschaft und Mathematik auf Rechtsdenken und Rechtswissenschaft in zweien halb Jahrtausenden, Ein historischer Grundriß*, Berlin 1970, p. 94.

88 See Löhr, Über das Privilegium der zur Sicherheit der dos stattfindenden Pfandrechte, „Archiv für die civilistische Praxis" 1822, no. 5, p. 312.

89 See C. F. Mühlenbruch, *Entwurf des gemeinrechtlichen Civil prozesses*, vol. 2, Halle 1840, p. 229.

90 T. Viehweg, *Topik…*, p. 52.

91 Ibidem, p. 52 i 54.

92 Ibidem, p. 59.

93 W. Cyrul, *Topika i prawo (Krytyczna analiza topicznej wizji dyskursu prawnego)*, „Państwo i Prawo" 2004, vol. 59, no. 6, p. 54.

94 See J. Stelmach, *Kodeks argumentacyjny*, Kraków 2003, p. 86–87.

unlikely, such as the statutory inheritance patterns competing with one another within one legal system. However, the problem of the conflict of rights that result from various legal acts regulating analogous circumstances was one of the reasons for the maxim's reference in *ius commune*, and today it can be indicated as one of the manifestations of decodification. Refining the maxim and broadening the scope of its application over the issues regarding changes in law and transfer of rights relate to situations that are much more common today than in the world of the 17th-century Roman-Saxon jurists.

Remembering the said maxim directs attention today to the functionalities of digitization of legal texts and their inclusion in electronic databases.

The uniqueness of experience behind the *'si vinco vincentem te, vinco te ipsum'* maxim lies in the fact that it specifies the limits of an algorithmic solution to the conflict of rights, indicates the premises and directions to extend the scope of this solution in solving problems, and includes Leibniz's intuitions to search for a certain regularity of decisions beyond the limits of an algorithmic solution to the mentioned conflict of rights. Such characteristics of legal thinking in the pre-codification period resemble the search of exact sciences. Therefore, remembering the said maxim directs attention today to the functionalities of digitization of legal texts and their inclusion in electronic databases. The essence of innovation introduced by IT technology consists in the legal text being presented as a hyperlink, which in practice means a combination of a text written in a language compatible with a computer system. This allows one to present on the screen a consolidated version of a legal text based on the record in an electronic format.[95] Creating texts in this format enables them to be equipped with a system managing information and thus offers an expert system that aids in applying law.[96] Preparation of such aid in noticing possible consequences of the legal text displayed on the screen requires, however, the introduction of links in an electronic format. At this point then, it seems that the experience behind the discussed maxim can be one of the inspirations when designing the electronic format, as it shows that the legal discussion conducted in a pluralistic legal system recognized the utility of algorithmization to arrange limited cases of the conflict of at least three rights as well as those linking at least three persons (entities) as a result of surrogation, substitution or preliminary ruling. The discussed legal experience made it possible to introduce a functionality which combines within a single set the rights which have a common basis for comparison (e.g. claims against a particular debtor, right to succession after a specific person), and then supplement it with two standardized mechanisms of excluding the said set. Firstly, there are elements based on the legal provisions whose relation is not formally equivalent, which causes confusion of the order (A> B> C and B>C>A).[97] Secondly, there is a specific relation among some of the elements (A> B> C and C>A).[98] In both cases, this is combined with checking whether there is a relation of surrogation, substitution or preliminary ruling[99] between the excluded rights. The elements remaining in the set would be arranged systematically (in a way leading to confirming priority of payment or determining an order of payment) and adequately to the measurable criteria contained in the database, such as an absolute privilege, a relative privilege, a time sequence or

95 W. Cyrul, J. Duda, J. Opiła, T. Pełech-Pilichowski, *Informatyzacja tekstu prawnego*, Warszawa 2014, p. 34–35.

96 Ibidem, p. 72.

97 See above, p. 13.

98 See above, p. 13.

99 See above, p. 18.

a degree in a relation specified by law. Those elements would, therefore, be presented in an order based on the mechanism using the formula A>B and B>C, hence A>C, which corresponds to the discussed maxim. In essence, it would be a formal protection against an error in determining the consequences of a broadly understood conflict of rights – developing the medieval maxim. When, as a result of a verification of the set, it is impossible to put elements in order, then – reaching back to history – one can recommend those designing the electronic document to consider Leibniz's intuition from the perspective of the so-called multivalued logic, whose usefulness to rationalize legal argumentation has recently been the subject of discussion.[100] Exceeding this threshold of thinking, unknown to Leibniz, links with recognition that dichotomy of truth and non-truth, which is typical for logic, is complemented by categories – to put it simply – of "half-truth" (half true/false).[101] As a consequence, one could equip the expert system accompanying the digitized legal text with the function of replacing an unclear formula A>B>C and C>A with a list of three 'half-true' combinations in the order adequate to Leibniz's intuition, i.e. A = B = C or A>B >C and less likely C>B>A. Increase in the number of conflicting rights would expand the number of such 'true' variants, which would make IT support even more useful. It would be a tool designed to help the lawyer choose one of the arranged solutions – adequately to the sense of justice.[102]

The findings and the conclusions drawn on their basis lead to a general reflection. The focus on the '*si vino vincetem te, vinco te ipsum*' maxim has shown that although the possibilities for mathematizing legal reasoning are clearly limited, this maxim though is an example of evolution – from purely rightful intuition of Scaevola to some algorithmization of argumentation, whose peak was noted in Leibniz's doctoral thesis. In the age of digitization of legal texts, the current thought remains that the failure of Leibniz's formalization of topoi is a proof that systemic algorithmization of solving legal cases is impossible. On the other hand, the digitization of law encourages to seek inspiration, also in the *ius commune* jurists' argumentation, while creating algorithmic protection instruments against errors and significant uncertainties whose risk grows when one seeks a just solution to the problem in a dynamic as well as pluralist legal order both in regards to law and new, factual situations.

The digitization of law encourages to seek inspiration, also in the *ius commune* jurists' argumentation, while creating algorithmic protection instruments against errors and significant uncertainties.

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100 H. Prakken, *New Logics in the Functioning of Legal Orders* (in:) *Law and the New Logics*, eds. H. P. Glenn, L. D. Smith, Cambridge 2017, p. 3. This issue, or at least the scope of usefulness of multivalued logics in law remains controversial, cf. A. Halpin, *The Applications of Bivalent Logic, and the Misapplication of Multivalent Logic to Law* (in:) *Law and the New Logics*…, pp. 234–235.

101 G. Priest, *Where Laws Conflict. An Application of the Method of Chunk and Permeate* (in:) *Law and the New Logics*…, p. 177.

102 In this regard, I agree with the view that the reference to multivalued logic in legal argumentation should include a non-legal context in which we seek a solution to a legal problem; A. Halpin, *The Applications*…, p. 235.

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Walerian Pańko – on Ownership and Possession

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Introduction

Walerian Pańko, a student and the first promoted doctor of Professor Andrzej Stelmachowski,[1] was writing in his papers about ownership and possession the most and with brilliant insight. In the times when he was developing his original concepts, he distinguished himself with an unusual approach to law, noticing numerous conditions of executing the property right, and possession related to ownership, and even stating that "[l]egal and material and even constitutional guarantees of ownership may become paper declarations if they are not supported by the entire legal system, in the political and administrative practice of economic life".[2]

1. On ownership

Walerian Pańko developed an innovative concept of understanding the ownership as the presumption of general competence to use and dispose of real property.[3] He presented it more thoroughly in his paper entitled *O prawie własności i jego współczesnych funkcjach*[4] (Ownership and its Contemporary Functions), in which he analysed a dilemma regarding the reconciliation of the right of an owner's exclusivity with numerous limitations of that right and he stated *inter alia* that "the crux of the ownership is most simply – and most fully – expressed

1 Professor Andrzej Stelmachowski, when talking about Walerian Pańko (1941–1991), tended to use the evangelical phrase "my beloved student", which was mentioned on the 25th anniversary of the tragic death of Walerian Pańko, President of the Supreme Audit Office (NIK), by Roman Wyborski, *Państwo Pańki*, "Rzeczpospolita. Plus Minus", 8–9 October 2016, p. 28.

2 W. Pańko, *O prawie własności i jego współczesnych funkcjach*, Katowice 1984, p. 29.

3 See idem, *Własność gruntowa w planowej gospodarce przestrzennej. Studium prawne*, Katowice 1978.

4 Idem, *O prawie własności…*, reprint for the 25th death anniversary, Katowice 2016.

as the idea of presumed competence; a presumption attributable to the owner and referring to the entirety of behaviours towards a specific thing (good) (…). The idea of presuming general competence seems to be a compromise view on the following dilemma: either singular monopoly or »dividing« a competence structure of economic power between all entities participating in it".[5]

esnych funkcjach of 1984, is a still unappreciated, yet very significant step in that field which has not been made by anyone for a long time" (…). Objecting to the socialist or communist concept of socialisation, he believed that the owner is a person who is supported by the presumption of competence in managing and disposing of a specific good (…). Professor Pańko was of the opinion – which he could not write expressly,

Legal and material and even constitutional guarantees of ownership may become paper declarations if they are not supported by the entire legal system, in the political and administrative practice of economic life.

It is impossible not to underline that the above-mentioned monograph of Walerian Pańko *O prawie własności i jego współczesnych funkcjach*[6] (Ownership and its Contemporary Functions) is deeply embedded in the functional approach to law, which is a characteristic of the school of Professor Stelmachowski. It includes a concept constituting the source of deepened studies on the theory of ownership, which was most fully expressed in the quoted paper, being a significant contribution to the theory of ownership. As a participant and one of the co-authors of the Rzeszów-Ustrzyki Agreement (1981), Walerian Pańko was aware of inevitable future political changes. Therefore, he tried to adjust the theory of ownership to emerging new political conditions in that paper – which resulted *inter alia* from profound legal and comparative analyses conducted at the University of Florence.

In the memoir of Walerian Pańko, Professor Andrzej Stelmachowski wrote *inter alia*: "I attach the biggest importance to his theory of ownership. I believe that his concept on that matter, published in his paper entitled *O prawie własności i jego współcz-*

because those were the times of censorship, however, it is clear from his papers – that ownership, and not only the private one but also the ownership of certain groups such as local self-governments, co-operatives and associations, will be particularly significant in the new political system. According to him, there should be an extensively developed medium sphere of self-governmental ownership, group ownership of a different type, between the ownership of a single private owner and state ownership.[7]

The issue regarding the correlation between possession and ownership is an everlasting problem of legal relationships, especially those concerning agricultural land. It is enough to recall an accurate and brief aphorism used by Professor Stelmachowski at the beginning of the 2000s at a scientific conference dedicated to reprivatisation: "Ownership means accomplished facts plus sufficiently long lapse of time".[8]

5 Ibidem, p. 75–76.

6 Ibidem. The paper includes broad Polish and foreign literature (mainly Italian and French).

7 A. Stelmachowski, *Do Jego przemyśleń i prac będziemy często wracać*, "Samorząd Terytorialny" 1991, No. 11–12, dedicated to the memory of Professor Walerian Pańko, p. 5.

8 This statement is quoted in the memoir of Professor Stelmachowski by one of his students – Doctor Bolesław Banaszkiewicz, *Profesor Andrzej Stelmachowski (1925–2009)*, "Palestra" 2009, No. 7–8, p. 355, 356.

Pańko's reflections about the ownership of land are especially insightful. He reminded that Polish agriculture did not go through the capitalisation process, which makes farmers skilled entrepreneurs. The ownership was the symbol not only of property but also of the right to live and, in the times of captivity, it also constituted the guarantee of survival despite foreign pressures. "Therefore, the proverbial love of a Polish farmer to the land was probably of a special psychological value, however, the substratum of that love was prosaic in the overpopulated countryside where there were no special migration possibilities".[9] Walerian Pańko was presenting historical threads of development in the field of ownership in an exceptionally interesting way to get to presenting the state and directions of development of Polish legal science in that field (this was namely the state as of 1984 – the year of publishing the book). He contested that ownership is mainly a field of civil law studies. According to Pańko, there seem to be three trends in the broadly understood civil law studies, namely the ideological and political trend, the legal and dogmatic trend and the so-called "branch" trend. The latter, which also includes the ownership of agricultural land, goes beyond civil law studies and meets the administrativist field of studies on ownership.[10]

As already mentioned, Walerian Pańko comes from the school of Professor Stelmachowski. Therefore, it is appropriate to briefly refresh Professor Stelmachowski's concepts and thoughts regarding ownership and possession. Already almost 50 years ago, he stated that "it would be a mistake now to understand ownership only as a substantive right. Ownership is rather a set of rights and duties (…). Who knows, maybe the correlation of rights and duties, which is so typical of obligations, should also be considered in the field of rights in rem. Ownership is thus an effective right towards society but also a limited right because of the needs of society".[11]

The crux of the ownership is most simply – and most fully – expressed as the idea of presumed competence; a presumption attributable to the owner and referring to the entirety of behaviours towards a specific thing (good) (...). The idea of presuming general competence seems to be a compromise view on the following dilemma: either singular monopoly or »dividing« a competence structure of economic power between all entities participating in it.

9 W. Pańko, *O prawie własności*…, p. 25.

10 Other representatives of this trend were, apart from Walerian Pańko, Andrzej Stelmachowski and Małgorzata Korzycka. See W. Pańko, *O prawie własności*…, p. 27.

11 A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warsaw 1969, p. 227, 228; idem, *Zarys teorii prawa cywilnego*, Warsaw 1998, p. 206; idem (in:) *Prawo rzeczowe*, ed. T. Dybowski, "System Prawa Prywatnego", vol. 3, Warsaw 2003, Chapters II, III, IV, p. 63–468.

Referring to ownership as the broadest right to things, Professor Stelmachowski expressed an important view that the constitutional legislator noted the danger of such limitations which could distort the ownership. They cannot lead to a situation in which the owner's rights can be reduced to *nudum ius* (naked right) and therefore, he claims that "the most difficult problem is the problem of protecting agricultural ownership in terms of its attribute which we traditionally describe as the use of things (Article 140 of the Civil Code). The problem is about the conglomerate of legal norms which regulate other matters, however, they sometimes have an indirect influence on the right to use things".[12]

Agricultural ownership which is distinguished, according to Professor Stelmachowski, in terms of the subject matter of ownership is the set of rights and duties which determine the legal situation of an entity – the owner of a farm. According to Professor Stelmachowski, the fact that the mentioned duties refer not to specific individuals but rather to the state which represents the interests of society as a whole, constitutes a characteristic of agricultural ownership. In exchange for duly performance of agricultural ownership, the owner has the right to count on help (from the state) when executing his right of ownership.[13]

He referred the concept of agricultural ownership to a farm as peculiar property, because a farm is the subject matter thereof.[14] Therefore, it could be concluded that the above-mentioned concept of agricultural ownership refers to property in a broad sense which includes also duties and those duties may be included in the right of owners within the meaning of Article 140 of the Civil Code.[15] Such a conclusion can be found in the doctoral dissertation of Józef Nadler – one of Stelmachowski's students from his Wrocław period –*Pojęcie indywidualnego gospodarstwa rolnego w prawie rolnym* (Individual Farm Concept in Agricultural Law). We should bear in mind that such an approach broke with the fiction regarding the abstract competence of the owner who, pursuant to Article 140 of the Civil Code, may – excluding other persons and within the limits specified by the law and principles of social coexistence – use things in accordance with the social and economic purpose of his right – for the owner who exercises his right and such a behaviour is, by all means, common.

As written by Andrzej Stelmachowski, ownership provides the owner with a certain monopoly of control over the subject matter of ownership. Without that monopoly, it is not possible to conduct rational business activity or specify who is responsible for its outcome. Vesting the ownership in a person means the decentralisation of a significant scope of an economic decision.[16] Walerian Pańko develops the ideas of Professor Stelmachowski by stating that "certain powers must always be vested in the owner, there is a certain minimum without which a given person is no longer the owner".[17]

Walerian Pańko observed in his studies on ownership that the issue of ownership is the central element of each political doctrine, constituting a weapon of ideological fight.[18] According to Walerian Pańko, the ownership in the political sphere plays a significant role in the context of a battle that family farms in Western Europe fight with the power of commercial capital and the processing industry[19] and this shrewd statement is fully up-to-date nowadays. He also believed that the main factor of the differentiation of opinions regarding the essence and structure of the ownership is the ideological (political) differentiation of the concept of ownership.[20]

Representing the functional approach to law, Walerian Pańko questions the function of law, which is frequent also in Western European science, as the guarantor of freedom with an unclear content and he stresses the importance of ownership for the protection

12 A. Stelmachowski (in *Prawo rzeczowe*, ed. T. Dybowski…, Chapter II *Modele własności i ich uwarunkowania społeczno-ustrojowe*, in particular p. 192.

13 Ibidem, p. 189.

14 Ibidem, p. 187–193.

15 As J. Nadler, *Pojęcie indywidualnego gospodarstwa rolnego w prawie rolnym*, Wrocław 1976, p. 157.

16 See A. Stelmachowski, *Własność rolnicza*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1985, No. 4, p. 8.

17 As W. Pańko, *O prawie własności…*, p. 77.

18 Ibidem, p. 21.

19 Ibidem, p. 199.

20 Ibidem, p. 78.

of the independence of individuals in the economic, professional and even political sphere.[21] He develops this idea by writing that in the western doctrine, those are different trends of functionalism which have their 19th century philosophical origin in the views of Auguste Comte and the first full development in the doctrine of Léon Duguit. "Those trends, which underline social contents in the ownership, tried to eradicate the features of private egoism therein. Whereas legal and natural doctrine-related trends connect the ownership with the guarantees of freedom and democracy, using even the international legal level of protection of basic human rights. The Catholic Church doctrine – which tries to construct its own doctrine of ownership independent from the basic ideological dispute – had an undisputed influence on those two trends".[22]

Walerian Pańko put forward also the safety function (also called the "prudence" function). He was drawing attention to numerous limitations of the material function of ownership, especially in the case of succession and disposal, as well as to the role of "work". He assumes that work is "the most important source of ownership, it justifies ownership and ownership cannot turn against work".[23]

When mentioning the work factor, it is worth quoting – as a digression which, however, is strictly connected with Pańko's trend of legal thinking about ownership and possession – a view of another student of Professor Stelmachowski, namely Bolesław Banaszkiewicz,[24] who indicated the political equality of work in an individual farm with other forms of professional work in his doctoral dissertation entitled *Prawne aspekty pracy w indywidualnym gospodarstwie rolnym* (Legal Aspects of Work on an Individual Farm). He was stating that obviously the equality may not be treated in a mechanical way if the occupation of an individual farmer is characterised by the connection of the status of a person obtaining his or her means of support from work with the position of an owner and entrepreneur.[25] In the context of work performed on a farm by the possessor, Banaszkiewicz comes to an interesting conclusion, considering: a) the specificity of work of an independent possessor on their own account and b) boundaries of that work's durability. He notices a conflict of two values or a collision of two axiologically justified postulates: the postulate of guaranteeing the disposal of the products of work and its stability to a person who individually performs useful work and the second postulate – guaranteeing the exclusivity of exercising the subject matter of an owner's right to the owner. The legislator had to find a compromise between those two postulates.[26]

Coming back to the above-mentioned further functions of the ownership, Walerian Pańko was looking for the maintenance of social balance and peace as part of the organisational function of ownership in such a sense that ownership was a method of organising society, a method of regulating social relations expressing the interests of different entities.[27]

Disputing with Małgorzata Korzycka, a student of Professor Stelmachowski, who opted for the productive function of ownership in her doctoral dissertation regarding the protection of agricultural ownership, he indicated that we should not limit ourselves to that function in the legal constructions of agricultural ownership but we should rather look for the harmony of different functions of ownership: proprietary, productive, organisational, psychological and the harmony of different interests: social and individual.[28] What Pańko

21 Ibidem, p. 199.

22 Ibidem, p. 78.

23 Ibidem, p. 205.

24 Doctor Banaszkiewicz, a student of Professor Stelmachowski and an advisor of protesting farmers during the period of "Solidarność", developed together with Professor Stelmachowski and Professor Pańko the wording of the Rzeszów-Ustrzyki Agreement between the protesting farmers and the authorities of the People's Republic of Poland in 1981. The Agreement included the guarantee of the inviolability of peasant property together with the right to succession, levelling of rights of individual farmers with the state-owned and co-operative agriculture and the abolition of limitations regarding transactions in agricultural land, among other provisions.

25 B. Banaszkiewicz, *Prawne aspekty pracy w indywidualnym gospodarstwie rolnym*, Warsaw 1989, p. 38.

26 Ibidem, p. 46.

27 As W. Pańko, *O prawie własności…*, s. 206.

28 See W. Pańko, *Recenzja książki M. Korzyckiej „Ochrona własności rolniczej", Warszawa 1979*, "Państwo i Prawo" 1982, No. 3–4, p. 158.

had in mind was mostly the situation of owners who are actual producers and carry out production based on its all elements, namely: land and other means of production, capital, work of people and organisation thereof. Especially this last element had a significant importance, considering the fact that there existed the normative requirement of agricultural qualifications for the acquisition of the ownership of agricultural real property.

We should rather look for the harmony of different functions of ownership: proprietary, productive, organisational, psychological and the harmony of different interests: social and individual.

2. On possession

Both Andrzej Stelmachowski as well as Walerian Pańko commented on possession many times and in an original way. Stelmachowski is the author of a pioneer approach to possession which he perceived either as a substantive right or an expectancy right[29] and this was the thesis of his doctoral dissertation, which he defended at the University of Poznań in 1950. As we know, the views that possession is only a fact[30] prevail in civil law studies, however nowadays, there are many opinions in the doctrine that opt for treating possession as a specific right.[31] A view of Professor Stelmachowski which levels possession and ownership in the field of damages-related protection is also significant. He expresses his view in the following way: "If possession is supported by the presumption that the possessor is entitled to his right, the possessor should be then treated the same as the owner".[32] It is impossible not to refer to one of the biggest achievements of Stelmachowski's legal thought, connected with obligation relationships, and which were developed in Pańko's doctoral dissertation regarding leasing agricultural land. In the first issue of *Wstęp do teorii prawa cywilnego* (Introduction to the Theory of Civil Law) (1969), Professor Stelmachowski noted that a contract – which is the basis for "commercial and market relationships" – becomes also the basis for the so-called social agreement. He was writing about the necessity of supplementing the autonomy of entities with "the lack of direct pressure from the state", the characteristic which he considered omitted in many civil law papers.[33]

29 A. Stelmachowski, *Istota i funkcja posiadania*, Warsaw 1958, p. 41 and next.

30 See e.g. A. Kunicki (in:) *System prawa cywilnego*, ed. W. Czachórski, vol. 2, *Prawo własności i inne prawa rzeczowe*, ed. J. Ignatowicz, Wrocław–Warszawa–Kraków–Gdańsk 1977, p. 839 and next as well as rich literature mentioned therein.

31 See from the pre-war literature E. Waśkowski, *Przyszłość skarg posesoryjnych*, "Palestra" 1937, No. 1–2, "if possession enjoys the protection of the right by itself, regardless of the fact whether or not it is based on any other right, it is obviously the right by itself", p. 13. See also S. Wójcik, *Czy posiadanie jest dziedziczne?* (in:) *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, ed. W. Osuchowski, M. Sośniak, B. Walaszek, Kraków–Warszawa 1964, p. 529; idem, *Windykacyjna ochrona własności w polskim prawie cywilnym*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego", CXVIII, Kraków 1965, p. 13–14. Similarly M. Szaciński, *Dziedziczenie posiadania*, "Nowe Prawo" 1966, No. 7–8, p. 925.

32 A. Stelmachowski, *Istota i funkcje…*, p. 289; differently T. Dybowski, *Odszkodowanie za naruszenie posiadania*, "Nowe Prawo" 1973, No. 1, p. 3–19.

33 It has to be reminded that Stelmachowski derives the autonomy of entities from two basic values: 1) the dignity of a human being – as the only and unique being, 2) equality of all people which entails equality in mutual relations. In *Wstęp do teorii*

Tomasz Kozłowski, when characterising Stelmachowski's approach and concept regarding civil law a few years ago, wrote accurate and meaningful words: "In his »reflections on general properties« of civil law, Stelmachowski managed to show – unprecedently in the »communist block« – such a power of the independence of civil law existence even towards such a developed coercive apparatus and misappropriation of human creativity as was successfully built in the countries dependent on the Soviet Union. If civil law maintained its independence even in totalitarianism, this means that, *de facto*, there exists *Ius*, from which *Lex* is to originate[34]".

Walerian Pańko noticed a kind of "tension" accompanying the relation between possession and ownership due to numerous situations when the owner separates himself/herself from the subject matter of his/her ownership, especially when a farm is ran by a possessor without the title of ownership.

Walerian Pańko was developing many views of Professor Stelamachowski regarding possession in an unusual way and he was also creating his own original concepts. Pańko's doctoral dissertation concerned, as mentioned, the lease of agricultural land,[35] namely the right based on dependent possession. In that monograph, he discusses the problem of "proprietary" protection of the possessor in the context of a lease, stating openly that "the process of expansion of possessory protection is an outcome of the crisis of the ownership".[36] If there is no owner and the possessor fulfils the content of the right of agricultural ownership, he becomes the "carrier" of the social, national and economic value of that right. In the case of a lease and similar contractual relationships, there is, however, the problem of stability concerning the situation of a working farmer.[37] When writing about the lease of agricultural land, namely an agreement which is strongly present in legal and agricultural relationships, he postulated the creation of a system of template agricultural lease agreements – and we should keep in mind that it was 1975 – which would give such agreements a certain stability and appropriate shape. He was of the opinion that the lease relationship finds its protection rather outside the obligation sphere in the field of protection of possession (in fact – the exclusivity of using and benefiting from the leased land).[38] That view would require a contemporary analysis and, maybe, it is the key to shape such an agreement, especially in the field of actual mutuality (the problem of contractual dominance and the use of a poorer side of the market).

Walerian Pańko noticed a kind of "tension" accompanying the relation between possession and ownership due to numerous situations when the owner

prawa cywilnego, Stelmachowski very creatively developed the thread of synallagma, which comes from ancient times, constituting the expression of mutuality (issue 2 as amended, Warsaw 1984, p. 107 and next).

34 As T. Kozłowski, *Globalne prawo a partykularne państwo według Andrzeja Stelmachowskiego* (in:) *Prawo w dobie globalizacji*, ed. T. Giaro, Warsaw 2011, p. 22.

35 W. Pańko, *Dzierżawa gruntów rolnych*, Warsaw 1975.

36 Ibidem, p. 156.

37 Ibidem, p. 131.

38 Ibidem, p. 231.

separates himself/herself from the subject matter of his/her ownership, especially when a farm is ran by a possessor without the title of ownership. For instance, the owner may delegate, through a legal action, the right to collect profits – and thus the right to work on own account – to a dependent possessor, e.g. a lessee (Article 693 of the Civil Code) or a user (Article 252 of the Civil Code). In such a case, the boundaries of that right are determined by the content of the legal relationship between the owner and the dependent possessor, specified by an agreement and appropriate provisions of law. Then, we face the problem, whether and to what extent law should provide protection to the possessor. A thesis of Stelmachowski, who – based on the social and economic clause of the purpose of law – opted for dismissing a claim of a non-possessing owner against a possessor who was a producer, was broadly discussed.[39] We should keep in mind that in the 1950s, courts were refusing to consider debt collection complaints, granting protection to the possessor who was using agricultural real property based on an informal sales agreement (without a notarial deed).[40]

It is not a coincidence that a possessor-producer often paves a "priority" way for himself/herself in the case of protection where the owner does not exercise his/her right in accordance with its social and economic purpose. There are dysfunctions when it comes to the use of a debt collection or restitution claim, brought by an owner who is not connected with agriculture. We may mention here the institution of acquisitive prescription from the Civil Code and a construction similar to an acquisitive prescription (with significantly shortened periods of acquisitive prescription for possessors in good and bad faith), resulting from the Act of 26th October 1971 on Regulating the Ownership of Farms.[41] That Act had basically one-time usage,[42] however, of a significant importance due to the scale since it included more than 2.5 million farms.

When talking about exercising ownership and possession, it is impossible not to mention the problem regarding conflicts between industry and agriculture which were discussed in the legal literature in the period when Pańko started to write about spatial management. In the monograph *Własność gruntowa w planowej gospodarce przestrzennej*[43] (Land Ownership in Zoning Plans), Pańko stated that the actual solution of those problems lies in the mechanisms of the national economy management and spatial management, which should regularly correct the negative interactions of particular branches of the economy between each other.[44] He drew attention to the necessity of planning in advance, the allocation of agricultural land to non-agricultural purposes in order to obtain the possibility to change the direction of production or even prepare to resign from running a farm, which renders it possible to minimise losses from unnecessary outlays.[45] Andrzej Wróbel introduced this view of Pańko in his book entitled *Prawna ochrona gruntów rolnych w procesie inwestycyjnym* (Legal Protection of Agricultural Land in the Investment Process) and he was developing it in his further arguments, writing for instance that "determining the boundaries of agricultural land for agricultural usage in zoning plans favours stabilisation of farming on that land".[46]

Walerian Pańko noticed years ago the danger of capitalisation on the production process by writing:

39 A. Stelmachowski, *Klauzule generalne w kodeksie cywilnym (zasady współżycia społecznego, społeczno-gospodarcze przeznaczenie prawa)*, "Państwo i Prawo" 1965, No. 1, p. 18.

40 There is a rich literature on that matter, see for instance J. Nadler, *Z problematyki ochrony długoletnich posiadaczy gruntów*, "Nowe Prawo" 1968, No. 1.

41 Journal of Laws (Dz.U.) of 1971 r., No. 27, item 250.

42 The biggest group of purchasers of real property under law itself was constituted by autonomous possessors of real properties who possessed them continuously for 5 years in good faith and for 10 years in bad faith, counting from the date of the entrance into force of the Act, namely from 4th November 1971. See W. Pańko, *Uwłaszczenie posiadaczy zależnych według ustawy z dnia 26 października 1971 r.*, "Nowe Prawo" 1973, No. 12.

43 W. Pańko, *Własność gruntowa…*

44 See also W. Pańko, A. Stelmachowski, *Struktura prawno-organizacyjna a model zarządzania rejonem uprzemysłowionym*, "Zeszyty Badań Rejonów Uprzemysławianych" 1976, No. 62, and J. Nadler, W. Pańko, *Ekonomiczno-prawne aspekty funkcjonowania PFZ i problematyka wymiany gruntów w pow. lubińskim*, "Zeszyty Badań Rejonów Uprzemysławianych" 1968, No. 31.

45 As W. Pańko, *Własność gruntowa…*, p. 101.

46 See A. Wróbel, *Prawna ochrona gruntów rolnych w procesie inwestycyjnym*, Wrocław 1984, p. 127.

"Also capital, either in the form of bank or commercial capital, has separated itself from the ownership of means of production and work. This new act of progressing capitalisation found its vent in a mortgage, pledge or instalment sale. The essence of that phenomenon was a significant split-up of ownership in the economic sense and the legal title of ownership. The owner of land is in that case a capitalist-lender, the owner of real property encumbered with a mortgage and, finally, a lessee working on the land".[47] The most classic form which renders it possible to separate the elements of the production process from the right of ownership is a joint-stock company (spółka akcyjna), which nowadays is practically not used in the countryside. Also, companies played an important role in that field by moving ownership in the economic sense away from ownership in the legal sense.[48]

We can also mention that Pańko developed broad journalistic activity on the threshold of the 3rd Republic of Poland and in one of his articles, he accurately summarised with a journalist's temperament: "Let's just think. Could a right which obliged farmers to use artificial fertilisers, especially when they could not afford those fertilisers, enjoy any respect in the People's Republic of Poland? If only this was the sole example which satirised law and the state which enacted such law!"[49]

Conclusion

It is not easy to select from among numerous reflections of Walerian Pańko those which constituted the kind of conclusions of his so inspiring legal thoughts about ownership and possession, which are still valid. By making this difficult choice, let's recall that he was against the relativisation of the ownership. He wrote that "innovative changes in the code-based constructions of the ownership and multiplying general clauses will not replace a continuous process of improving legal norms in the spirit of morality and social feelings and needs (…), the metaphor which (…)

Innovative changes in the code-based constructions of the ownership and multiplying general clauses will not replace a continuous process of improving legal norms in the spirit of morality and social feelings and needs (...), the metaphor which (...) locates the contemporary world between the Scylla of conservative and Pharisaical legalism and the Charybdis of anti-legalism leading to narrow-mindedness and totalitarianism seems accurate.

47 W. Pańko, *O prawie własności…*, p. 148.

48 Ibidem, p. 150.

49 As W. Pańko, *Wybór pory wyborów, Felietony z lat 1990–1991*, Warsaw 2001, p. 56.

locates the contemporary world between the Scylla of conservative and Pharisaical legalism and the Charybdis of anti-legalism leading to narrow-mindedness and totalitarianism seems accurate".[50] We also owe to Walerian Pańko the following thesis which is highly important for the values protected by law: "The power of the ownership lies in the sense of real stability, certainty and continuity of law (…), by protecting certainty as the basic value of the ownership, we do not protect an egoistic monopoly but rather the presumption of exclusivity which serves the owner".[51]

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50 W. Pańko, *O prawie własności…*, p. 210.

51 Ibidem, p. 212.

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Hate Speech Law in Australia

The Nature of Language and the Nature of the State

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I. Introduction

Restrictions on speech by controlling powers, whether sovereigns or governments, are not new. Earliest accounts show that rulers demanded certain affirmations from those they ruled and that what we might now term 'coerced speech' whether in the forms of oaths or restrictions on what we might now term 'free-speech,' accompanied the relations between ruler and subject from the beginning.[1] What is emerging most recently in many countries, however, is a new form of restriction – one

1 See, for example, the Assyrian oath of loyalty of 672 BCE, preserved on a tablet in the Museum of the Middle East in Berlin, which demanded absolute loyalty to the king and his designated successor. An obligation to report all forms of criticism of the king and crown price is expanded in Section 12 into the obligation immediately to lynch that traitor for acts aimed at "killing", "murdering" or "eliminating" the King.

> Should someone tell you of an uprising, rebellion with the aim of killing, murdering, eliminating Ashurbanipal, crown prince of the royal house, son of Esarhaddon, king of Assyria, your master, who in his favour has subjected you to the oath of loyalty, and you hear it from the mouth of any person, you should seize the instigators of rebellion and bring them to Ashurbanipal, crown prince of the royal house. If you are in a position to seize them, kill them, eliminate their names and their descendants from the land. If you are not in a position to seize them, to kill them, you should report it to Ashurbanipal, crown prince of the royal house; assist him in seizing, in killing the instigators of uprising, in eliminating their names and their descendants from the land.

Cited in C. Lombaard, I. T. Benson, E. Otto, *Faith, Society and the post-secular. Private and Public Religion in Law and Theology*- [Publication forthcoming], "HTS Teologiese Studies/Theological Studies" (special edition for EH Scheffler, 2019).

that is not merely disconnected from an articulation of a necessary moral good for the state, but that is focused on vague assertions such as offences against 'dignity' based upon attacks on 'feelings' or other matters not connected to actual threats to the physical or mental harm based upon strong empirical grounds. In these later sorts of examples, hatred may be likened to insults, ridicule or, as we see most recently, rejection of particular viewpoints as in the recent suggestion that criticism of immigration policies (much less immigrants themselves) can constitute 'hate'. Where restrictions on action, personal, communal or national are based upon language this language needs to be clear and not run rough-shod over principles, such as subsidiarity, that in their recognition and structure give recognition and importance to the familial, the local, the regional and on upwards to even the global. In all aspects however, subsidiarity dictates that a certain check and balance needs to exist to ensure that the larger entity (whether state or international) not usurp the proper function of the smaller. Diversity, which shelters difference and freedom, must not be ignored in well-intentioned moves to affirm the goods of what is shared or under the now popular (but largely undefined) framework of 'inclusion.' Terms of wide-meaning such as 'inclusion', 'equality' or 'hatred', where possible, need to be parsed carefully to ensure that their use comports with framework questions – in part legal and in part philosophical that respect important truths at the local level.

This article takes but one term that may be understood in a wide-variety of ways – the term 'hatred,' and examines it across a wide-spectrum of conduct. Court decisions and the analysis of experts suggest that the language that clusters around 'hatred' needs to be analysed carefully in part because the consequences of restrictions can be so severe. If hatred is taken at one end to include 'insults' or 'ridicule' then there is a very real risk that important other freedoms may be unduly restricted if such conduct is banned as an offence against 'hatred.' On the other hand, if 'hatred' means conduct that might include actual incitement to violence or physical harm, most people would view restrictions on this kind of conduct (intentional or not) as something that law should restrict.

When the kind of vague use of 'hatred' is at issue then we might want to ask what political or other differences, perhaps religious or moral, might underlie the use of 'hatred' in this context.

In both cases, however, truncating freedom of expression or even threatening the freedom of communities to manifest, teach or express their own beliefs is dangerous, as these freedoms are foundational to free and open societies. All that claims to be 'hatred' is not necessarily hatred, just as all that claims to be 'discrimination' is not necessarily 'unjust discrimination.' It is context that determines whether a distinction at law constitutes unjust discrimination: we do not let children drive cars or drink alcohol, yet this is clearly age discrimination to give one obvious example. Why terms such as 'discrimination', 'equality' or 'hatred' need to be understood in context requires us to look beyond simply the meaning of words themselves to ask about the context within which such words are used. Where some want the definition of 'hatred' to be vaguely defined and perhaps widely construed so as to restrict speech or what might be important matters central to the state questions should be asked as to why this approach is being taken. It is necessary to question why particular approaches to hate speech are being taken because how we understand this issue in a legal theory has real life consequences. Matters close

to the importance of a state, such as the make-up of its population, necessarily require discussion –current issues concerning immigration, use of 'hatred' in relation merely to arguments about the nature of immigration ought to concern us. When this kind of vague use of 'hatred' is at issue then we might want to ask what *political* or other differences, perhaps religious or moral, might underlie the use of 'hatred' in this context.

As debates on issues such as abortion, euthanasia or marriage have shown in recent decades, countries analyse and choose legal outcomes in relation to different cultural traditions and developments. The principles of international law contain many inter-related conceptions: 'self-determination' and 'sovereignty,' for example, are key dimensions of what constitute recognized states, the very basis of international legal relationships themselves.[2] Globalisation urges us to consider what is shared, but this ought not to confuse us as to the equally important principles that emerge from what is unique. Shared agreement on some things is not shared agreements on all and there is no principle of international law that can justly require sovereign states to adopt controversial matters about which reasonable nations might disagree as if they were *ius cogens* norms themselves.

Because all definitions are against meanings that change and develop over time, differing political philosophies may well be at issue when terms such as 'self-determination,''sovereignty,''diversity,''disagreement,''incitement' and related concepts are being discussed. Differing and changing understandings of key terms, including the role and importance of the State itself, require us to have a wide contextual vision in relation to how matters such as 'hate' are being used to frame contested political questions. What may be termed 'different moral viewpoints' and, perhaps, 'freedom of expression as the search for truth' invite us to think more broadly about the development of the legal tests and the case-law experiences of countries that have rejected overly vague uses and why others seem to prefer de-contextualized or more vague languages.

The difference between closed and open societies is important to a proper analysis of which approach to 'hate speech' is taken and how and where it is applied.[3]

Globalisation urges us to consider what is shared, but this ought not to confuse us as to the equally important principles that emerge from what is unique.

2 See, on sovereignty and the presumption in favour of self-determination, S. Hall, *Principles of International Law* (Australia: LexisNexis, 5th ed) 2016, p. 228 and following. Note, particularly, the 1960 UN General Assembly Resolution 1514 (XV) dealing with colonial territories but the principle of which would apply generally: "6. Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations" at p. 231.

3 See, J.-F. Revel, *The Totalitarian Temptation*, Harmonds worth: Penguin 1976) comparing totalitarian and free societies, Revel notes: "By contrast to totalitarian societies, free societies are not made up of a block whose parts are so rigidly soldered together that the slightest indiscretion on any point, by a single member of the group, is viewed as a rebellion aimed at the existence of the entire system" (211). Open societies understood within international law recognize not simply a "margin of appreciation" for local differences but essentially anticipate and celebrate differences as the essence of the co-relationship not an impediment to it. A movement of or within international law that fails to respect appropriate difference and diversity (perhaps even while employing seeming respect for such concepts) would be contrary to the very heart of what gives international law structure and credibility in the first place. If principles subordinate to general organizing concepts such as state sovereignty and the voluntary nature

In addition to this, the nature of language itself in relation to closed and open societies is also central. In his important essay from 1946 *Politics and the English Language* George Orwell, an astute commentator on the role language plays in relation to authoritarianism and definitions of the State, identified the role that 'meaningless words' play in relation to politics. He says that 'thought can corrupt language and language can, in turn, corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better'.[4] Simply because the language of respect or dignity is used in relation to a contested notion within international law is not enough. The language of respect and dignity must comport with the overall structure of international law, which is, based upon such principles as 'sovereignty' and 'subsidiarity' as discussed. A similar problem in relation to the use of human rights itself has been noted by Michael Ignatieff when he refers to the risk of human rights becoming an 'idolatry' beyond its proper role in politics.[5]

In the context of Australia, I will explore the Constitutional and legislative framework which govern Australia's approach to hate speech and interplay with international law. As Australia is part of the common law tradition, case law has developed the understanding of 'hatred.' The analysis of cases and current policy considerations demonstrate 'hate speech' is construed too broadly in Australia. The result of this is Australia being at risk of drifting ahead in the crisis facing Western Liberalism – without adequate tools to critique the moral content of one's speech. I shall now turn to examine more closely the political philosophy informing many Western countries, including Australia, which allows for a deeper analysis of 'hate speech.'

II. Political Philosophy

The idea of Liberalism has been the dominant political philosophy in Western countries since modernity though some suggest that consensus no longer obtains.[6] Although Liberalism is a broad term, and many countries have expressed this philosophy in different ways to suit the needs of the particular country, Western countries that can be described as 'Liberal' all share the fundamental principles that are found in the essence of Liberalism. The essence of Liberalism is quite simply this: the human person is considered first and foremost as an autonomous individual who is free to pursue his or her desires, so long as it does not restrict others from exercising their freedom, and does not cause harm. This *a priori* assumption in favour of freedom is described as the 'Fundamental Liberal Principle'.[7] The role of the State is thus to give 'pride of place to justice, fairness, and individual rights'.[8] The State achieves this by not promoting 'any particular ends, but enables its citizens to pursue their own ends, consistent with a similar liberty for all'.[9] The central idea of Liberalism is that the government should be 'neutral' on the question of the 'good life'.[10] Under the Liberalist framework, the government is regulated whether explicitly or implicitly, by a 'min-

of all but the most serious of dignity infringements (such as genocide – itself the subject of independent Conventions), are used to upset those larger structures one can imagine that the larger purposes of international law and the UN Charter itself will also be subverted possibly putting the credibility of the entire structure in doubt. This is hardly a wise manner in which to develop international legal principles.

4 G. Orwell, *The Collected Essays, Journalism and Letters, Vol VI, 1945–1950* edited by S. Orwell, I. Angus, London: Penguin, p. 156–170, 161–162.

5 M. Ignatieff (in:) A. Guttman (ed.), *Human Rights as Politics and Idolatry*, Princeton: Princeton University Press 2001, p. 53 ff and, in particular, 77–92 which discusses the danger of human rights "idolatry" being based upon a genuine "spiritual crisis" in the West.

6 See for recent sources on "the crisis of liberalism", I. T. Benson, *Civic Virtues and the Politics of Full Drift Ahead*, *The 2017 Acton Lecture*, Sydney: Centre for Independent Studies, Occasional Paper, p. 155 http://www.cis.org.au/publications/occasional-papers/acton-lecture-2017-civic-virtues-and-the-politics-of-full-drift-ahead/.

7 *Stanford Encyclopaedia of Philosophy, Liberalism* 'The Debate About Liberty' [1] (accessed in January 2018).

8 M. Sandel, *The Procedural Republic and the Unencumbered Self* (in:) S. M. Cahn (ed.), *Political Philosophy*, Oxford University Press 2015, p. 944.

9 Ibidem.

10 P. Horwitz, *The Agnostic Age*, Oxford University Press 2011, p. 10.

imal principle of liberty'.[11] The minimal principle of liberty is the idea that the 'government should not prohibit people from acting as they wish unless it has a positive reason to do so. The ordinary reason for prohibiting action is that the action is deemed harmful'.[12] The question of what legitimately counts as 'harm' is a controversial part of the theory of Liberalism, and it is necessary to consider 'harm' when analysing laws regarding restriction on freedom of expression. Discussed below the Australian legislative framework governing hate speech – section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA). In this section, it is necessary to analyse whether the definition of hate speech under s 18C is adequate to be considered 'harm' and thus whether the government has created legislation that is acceptable under this framework. This reasoning would also apply to considerations of what constitutes 'hatred.'

> But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation – those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity to exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.[15]

Due to Liberalism's commitment to the choices of citizens, freedom of expression is intrinsically connected to the premises of democracy. The means through which the government can attempt to maintain a neutral stance and allow for the choices of its citizens is to provide 'a process by which these groups can coexist without bloodshed. That process, in a word, is democracy'.[16] Many Western countries, particularly Australia, are described as multicultural pluralist societies. The consequence of this is the idea that we are unlikely to reach 'any real, uniform consensus on what constitutes the "substantive good"'.[17] The best option is thus to arrive at principles through a process that enables us to live together with these differences.[18] However, crucial to the process of democracy is that '[e]very side in the battle of all against all has an opportunity to convince others of the rightness of its positions'.[19] Kent Greenawalt highlights that the major political force of the twentieth century has been equality.[20] Al-

The autonomous individualism at the core of much of liberalism fails to give sufficient respect to associations.

The development of Liberalism in its early stages explicitly protected freedom of expression as it was viewed as fundamental to the autonomy of individuals that they have the freedom to discover what it true.[13] Individuals require the opportunity to hear and digest competing positions, and freedom of discussion is necessary to form independent judgment and decision.[14] This was captured by John Stuart Mill –

11 K. Greenawalt, *Speech, Crime, and the Uses of Language*, Oxford University Press 1992, p. 9.

12 Ibidem.

13 Ibidem, p. 10.

14 Ibidem, p. 26.

15 J.S. Mill, *On Liberty* (in:) S.M. Cahn (ed.), *Political Philosophy*, Oxford University Press 2015, p. 755.

16 P. Horwitz, *The Agnostic Age*, Oxford University Press 2011, p. 11.

17 Ibidem.

18 Ibidem.

19 Ibidem.

20 K. Greenawalt, *Fighting Words*, Princeton University Press 1995, p. 151.

though Greenawalt does not define 'equality', I take it to mean that there have been political movements to recognise people as 'equally human'. Paramount in this political movement of the twentieth century was

The 'crisis of liberalism' calls for a generation of forms of political philosophy that are in their nature more respectful of the importance of tradition and more respectful for the norm generative importance of religions to culture.

freedom of expression. However, the twentieth century also saw the dark side of freedom of expression in movements such as Nazi Germany. Thus these two extremes of freedom of speech create a fundamental issue within Liberal democracies –

> Extremely harsh personal insults and epithets directed against one's race, religion, ethnic origin, gender, or sexual orientation pose a serious problem for democratic theory and practice. Should such comments be forbidden because they lead to violence, because they hurt, or because they contribute to domination and hostility? Or should they be part of a person's freedom to speak his or her mind? Any liberal democracy faces this dilemma.[21]

Understanding the theoretical framework guiding Liberal democracies such as Australia is necessary to develop a comprehensive analysis of the current laws surrounding freedom of expression and hate speech. It also enables a greater insight as to why the current political framework we are situated within may be inadequate to solve the issues that have arisen. One critique that will be made throughout this chapter is that Liberalism requires the government to remain neutral, and thus individuals form the understanding that they *can* say anything they like. There is no external measurement outside of the individual to provide whether he or she *should* say something, such as an understanding of virtue. Rather, we find ourselves in a political climate where each individual has their own subjective 'values' that he or she has chosen for themselves, and we are left without adequate tools to critique the rightness or wrongness of an act. There is much to be concerned about within this conception. At the least is the problem that the idea of the State having a 'neutral' view (as opposed to acting impartially) tends to elide what is, in fact, moral evaluation and application. Second, the autonomous individualism at the core of much of liberalism fails to give sufficient respect to associations and this, in relation to that quintessential associational life, religion, means the importance of religious associations can easily be overlooked or given too little weight.

Recent commentators have recognized that the 'crisis of liberalism' calls for a generation of forms of political philosophy that are in their nature more respectful of the importance of tradition and more respectful for the norm generative importance of religions to culture. This has also been noted specifically in relation to immigration. In a recent article advocating the development of 'conservative democracy' (as opposed to 'liberal democracy') Yoram Hazony has written with respect to immigration, the nature of the empire and the role of international bodies the differences of approach between 'liberal' and 'conservative' as follows:

21 Ibidem, p. 47.

Immigration: Liberals believe that, since liberal principles are accessible to all, there is nothing to be feared in large-scale immigration from countries with national and religious traditions very different from our own. Conservatives see successful large-scale immigration as possible only where the immigrants are strongly motivated to integrate, and assisted in assimilating the national traditions of their new home country. In the absence of these conditions, the result will be chronic intercultural tension and violence.

Liberal Empire: Because liberalism is thought to be a dictate of universal reason, liberals tend to believe that any country not already governed as a liberal democracy should be pressed, and at times even coerced, to adopt this form of government. Conservatives, on the other hand, recognize that different societies are held together and kept at peace in different ways, and that the universal application of liberal doctrines often brings collapse and chaos, doing more harm than good.

International Bodies: Similarly, liberals believe that since liberal principles are universal, there is little harm done in reassigning the powers of government to international bodies. Conservatives, on the other hand, believe that such international organizations possess no sound governing traditions and no loyalty to particular national populations that might restrain their spurious theorizing about universal rights. They therefore see such bodies as inevitably tending toward arbitrariness and autocracy.[22]

Hazony's points, while interesting, fail to engage the deeper arguments about the shared nature of natural law, for example, in which the Greek idea of ordered *cosmos* with shared meaning undergirds not only the Greco-Roman-Judeo-Christian conceptions but also the core moral codes of religions and ethical systems discussed by many authors who have essayed the field.[23] What Hazony accomplishes, however, is an argument that contemporary liberal theories are not the necessary or even sufficient basis of the most robust and solid grounding for human society and political order. The day of liberalism's domination of theory in relation to domestic or international law are now, it would seem, if not entirely past, at least in a phase of necessary re-evaluation. Nonetheless, countries such as Australia are operating upon the principles that form the essence of Liberalism. It is

Contemporary liberal theories are not the necessary or even sufficient basis of the most robust and solid grounding for human society and political order. The day of liberalism's domination of theory in relation to domestic or international law are now, it would seem, if not entirely past, at least in a phase of necessary re-evaluation.

22 Y. Hazony, *Conservative Democracy*, *First Things*. https://www.firstthings.com/article/2019/01/conservative-democracy(accessed in January 2019)

23 On "cosmos" and its relation to "Natural Law", see G. Grant, *Philosophy in the Mass Age*, Toronto: Copp Clark 1959, 1966, pp. ii–ix and 28–41; and generally on the sharing of moral notions between traditions, C. S. Lewis, *The Abolition of Man*, New York: Macmillan 1943.

therefore necessary to analyse existing hate speech laws within the strengths and weaknesses of the Liberal democratic framework.

III. Constitutional Framework

The phenomenon of hate speech laws in Australia, as we have seen in other jurisdictions such as Canada (discussed in a companion piece published elsewhere), is a controversial policy area that has recently emerged, challenging pre-existing presumptions of freedom of expression.[24] Most countries functioning under a liberal-democratic system have explicit statutory or constitutional protections for the right to freedom of speech and expression.[25] Australia is unusual in this respect as free speech is not a right that is explicitly guaranteed within statute, the Australian Constitution, or a Bill of Rights. The framers of the Australian Constitution did not include a Bill of Rights, leaving Australia with the 'barest of protections of rights'.[26] The right to free speech has been described as 'delicate' or a 'precarious freedom' due to its existence relying upon the common law tradition.[27] Due to free speech being reliant upon the common law, it raises the question whether there is adequate protection of speech from government restriction.[28] The common law is easily modified by a statute and thus fails to provide a sufficient safeguard against any legislative incursions on free speech.[29] On the other hand, many critics of a Bill of Rights, point to the tendency of such frameworks to transfer unduly determinative power to the judiciary. Often cited in this debate are decisions of the Supreme Courts of the United States and Canada which have, in recent years, gone well beyond the strict texts of their Constitutions or Bills of Rights to find rights to such things as 'same-sex marriage' and 'physician-assisted suicide' none of which were in the minds of the original framers of the Constitutions in either country.[30] Putting aside debates as to whether Australia ought to introduce a Bill of Rights or not, it is important to note that despite not having a constitutionally entrenched protection such as a right to free speech, it appears thus far that Australia acts consistently with the Liberal principle that the government restriction on speech is warranted only when it there is a positive need to do so.

Discussed below in more depth is the doctrine of an implied freedom within the Constitution regarding political communication. It is important to note at this point that the implied freedom of political communication is limited in its application and scope. The implied freedom arises from the liberal-democratic tenet of representative and responsible government established by the Constitution and operates as a 'freedom from' government restraint, rather than a right

24 K. Gelber *Hate Speech and the Australian Legal and Political Landscape*(in:) *Hate Speech and Freedom of Speech in Australia*, Federation Press 2007, p. 2.

25 Ibidem.

26 P. Babie, *Australia*(in:) J. Dingemans, et al (eds.), *The Protections for Religious Rights,* Oxford University Press 2013, p. 142.

27 K. Gelber, above n 25, p. 3.

28 L. McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, "Sydney Institute of Criminology Monograph Series No 16", 2002, p. 5.

29 P. Babie, above n 27, p. 150 [4.30].

30 See, for example, the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. (2015) finding a "right" to "same-sex marriage" or the earlier decision in *Roe v. Wade*, 410 U.S. 113 (1973), finding the "right to abortion". In Canada, the Supreme Court of Canada found a right to "physician-assisted suicide" over the wishes of many groups including the Canadian Medical Association (which was opposed) in *Carter v Canada (AG)*, 2015 SCC 5. Earlier, this approach to judicial power was visible in the Court's decision that read-in to the anti-discrimination or "equality" provision (Section 15) the term "sexual orientation" as a protected ground despite that term being expressly omitted by the Parliamentary Committee that formed the *Canadian Charter of Rights and Freedoms* (1982) in the first place. See: *Egan v. Canada* (1995) 124 D.L.R. (4th) 609. Academic supporters of this kind of activist court and strenuous detractors continue to fight academic battles but the fact remains: under the guise of interpretation, apex courts in both the United States and Canada have taken control of policy formation. It is for this reason primarily that Australians are wary of calls for an "entrenched Bill of Rights" for Australia. See, for example, J. Allan, *Democracy in Decline*, Connor Court 2016 and P. Babie, N. Rochow, *Feels like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, "3 BYU Law Review" 2010, p. 830.

conferred on individuals.[31] This implied freedom is limited to political communication. Within the Australian legal climate, hate speech laws have been enacted by the legislature without being challenged on the grounds of constitutional or statutory impairment on free speech.[32] There has, however, been considerable academic and popular back-lash to the restrictions in Section 18C (see below). In 2018, the Government of Former Prime Minister Malcolm Turnbull expressed a wish to narrow the over-broad 'hate-speech' provisions to require 'harassment' rather than it being merely a focus on 'hurt feelings' but that government failed to have a sufficient majority to bring about the reforms. The current Australian law contains provisions struck down by the Canadian Supreme Court in the *Whatcott* decision, commented upon in brief below and in greater depth in the companion piece.

Within the Australian legal climate, hate speech laws have been enacted by the legislature without being challenged on the grounds of constitutional or statutory impairment on free speech.

The development of hate speech laws in Australia is partly a result of entering into international treaties. Although, as stated above, Australia does not have a Bill of Rights, Australia is signatory to the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR) and its *Optional Protocol*. The result of these treaties is Australia accepting the procedures which allow UN human rights bodies to provide redress to individuals who claim violations of their rights under the agreements.[33] In response to the international law, Australia has established the Australian Human Rights Commission (AHRC) through the *Human Rights Equal Opportunity Commission Act 1986* (Cth).[34] The AHRC has a number of functions concerning human rights such as 'research and education, examining existing and proposed legislation for consistency with such rights, reporting to Parliament on the need for laws or other actions to implement international obligations, and examining Acts or practices of Commonwealth authorities for consistency with protected rights'.[35] In 2011, the Commonwealth Parliament enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) which requires a Statement of Compatibility to be supplied with all new Bills introduced, showing compatibility with the human rights treaties Australia is party to.[36] The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) also establishes a Parliamentary Joint Committee on Human Rights. The Commonwealth Parliament has also enacted the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth). It is the combination of all these Acts and the Committees established that are the primary legislative protections for human rights in Australia.[37]

In order for a Commonwealth law to be constitutionally valid in Australia, the law must be supported

31 K. Gelber, above n 25, p. 3.

32 Ibidem, p. 4.

33 P. Babie, above n 27, p. 144 [4.13].

34 Originally named the Human Rights and Equal Opportunity Commission. This was renamed the Australian Human Rights Commission under the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) Sch 3, s 1.

35 Babie, above n 27, 144–145 [4.14]; *Human Rights Commission Act 1986* (Cth) s 11(e).

36 Babie, above n 27, 145 [4.15].

37 Ibidem, p. 144 [4.13].

by a constitutional 'head' of power. This is derived from section 51 of the Constitution. The relation between international law and the Australian domestic legal system is characterised as dualistic – domestic law and international law are separate legal systems and for an International Treaty to have domestic effect, it must be brought into domestic legislation or domesticated. Thus for the Commonwealth to ratify an international law, it must fall within section 51 of the Constitution. The head of power within the Constitution that allows the Commonwealth to validly domesticate international law is the external affairs power. Section 51 (xxix)

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … external affairs.

It is under the external affairs power that the Commonwealth government can incorporate the terms of a treaty into domestic law, introduce legislation dealing with Australia's relations with other countries,[38] and matters that are geographically situated outside of Australia.[39] On the Commonwealth level, it is theRDA which concerns hate speech. The RDA is supported by the external affairs power as Australia is party to the CERD, and thereby gives effect to the treaty. However, in order for the Commonwealth government to successfully rely upon the external affairs power, a number of requirements must be satisfied. Firstly, the treaty must be *bona fide.* Secondly, the subject matter of the treaty is a matter of international concern or character. Finally, the legislation meets the specificity and conformity requirements.[40] The implementation of the CERD through the external affairs power was the basis on which the constitutional validity of the RDA was defended when challenged in *Koowarta v Bjelke-Petersen*.[41] However, this case was prior to the introduction of s 18C which is the provision for hate speech law into the RDA. Thus, concerns have been raised by academics in Australia whether the section concerning hate speech in the RDA satisfy these requirements under the external affairs power to be constitutionally valid.[42] Section 18C has not been challenged in the High Court for a decision to be made: it is worth considering these arguments about the respective legislation.[43]

A. Constitutional Constraints

The scope of vilification laws in Australia is limited by the Australian Constitution, particularly the implied freedom of political communication. The High Court has found that there are certain freedoms or constraints on government power that can be implied from the text and structure of the Constitution. One of these is the implied freedom of political communication. This freedom prevents both Commonwealth and State Parliaments from passing laws that would 'inappropriately restrict communication on political issues'.[44]

The implied freedom of political communication requires the application of the *Lange* test in which the modified in *Coleman v Power*,[45] and *McCloy v New South Wales*.[46] It is a two-part test to be used to determine if legislation breaches the implied freedom:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?[47]
2. If yes to question 1, are the purposes of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
3. If yes to question 2, is the law reasonably appropriate and adapted to advance that legitimate

38 *R v Sharkey* (1949) 79 CLR 121.

39 *Polyukhovic v Commonwealth* (1991) 172 CLR 501.

40 J. Forrester, L. Finlay, A. Zimmermann, *No Offence Intended: Why 18C Is Wrong*, Connor Court Publishing 2016, p. 25.

41 (1982) 153 CLR 168.

42 J. Forrester, L. Finlay, A. Zimmermann, above n 41.

43 Ibidem, p. 24.

44 C. M. Evans, *Legal Protection of Religious Freedom in Australia*, Federation Press 2012, p. 181.

45 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

46 (2015) 325 ALR 15.

47 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

object? If not, then the measure will exceed the implied limitation on legislative power.

Kent Greenawalt highlights that the origins of freedom of speech was due to the need for a social protection against governmental tyranny and corruption.[48] Under the framework of Liberalism, the government should not interfere with communication that has no potential for harm, and the government cannot 'suppress political ideas that pose challenges to it, because one aspect of a legitimate government is that criticism of those presently in power may be entertained'.[49] Free speech is foundationally significant for political life and 'government suppression of political messages is particularly dangerous because it can subvert the review of ordinary political processes which might serve as a check on other unwarranted suppression'.[50] On a principled basis, and in line with the Introduction to this article, there is no reason these principles would not apply in relation to matters of international as well as domestic concern. However, this implied protection for freedom of expression, in Australian law is limited to political communication. The significance of this implied freedom is founded upon the Liberal democratic commitment to citizens making free and informed choices.[51] Subsequently, it is necessary to analyse the key legislation in place governing hate speech in Australia, and its relation to the Constitution and international law.

IV. Legislative Framework

A. Section 18 C

The Commonwealth legislation concerning hate speech is found in the RDA. Section 18C stipulates:

> Offensive behaviour because of race, colour or national or ethnic origin
>
> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
>
> (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
>
> (a) causes words, sounds, images or writing to be communicated to the public; or
>
> (b) is done in a public place; or
>
> (c) is done in the sight or hearing of people who are in a public place.
>
> (3) In this section:
>
> *"public place"* includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.
>
> S18D Exemptions
>
> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing:
>
> (i) a fair and accurate report of any event or matter of public interest; or
>
> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In the arguments provided by Forrester, Finlay and Zimmerman, it is analysed whether s 18C conforms to the requirements to be a valid law under the external affairs power. Under the second criteria, it is required that the subject matter of the treaty be of 'sufficient international significance to make it a legitimate subject for international cooperation and agreement' for a domestic law to be valid under the external affairs

48 Ibidem, p. 124.

49 K. Greenawalt, *Speech, Crime, and the Uses of Language*, Oxford University Press 1992, p. 11.

50 Ibidem, p. 28.

51 S. Walker, *Lange v ABC: the High Court rethinks the "constitutionalisation" of defamation law*1998, 5(1),"Murdoch University Electronic Journal of Law" 1 [17].

power.[52] The development of common law has seen this criteria become 'the existence of international character or international concern is established by entry by Australia into the Convention or treaty'.[53] Therefore, Australia entering a treaty meets the requirements for this second limb of the external affairs power – 'the very fact that Australia has ratified the Convention will be sufficient to satisfy any requirement of "international character"'.[54]

The question whether the legislation meets the specificity and conformity requirements of a treaty requires the treaty itself be interpreted. On this issue, Brennan CJ stated:

> In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather … it is necessary to adopt a holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it related, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relation to the same subject may warrant consideration in arriving at the true interpretation of its text.[55]

Upon analysis of the treaty to understand its specificity requirements, the case of *Victoria v Commonwealth*,[56] held that

> When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an idea. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.[57]

Therefore, a treaty cannot be 'primarily aspirational' because if it is, it fails to impose reasonable specific legal obligations on Australia.[58] The consequence of failing to impose specific obligations is it does not provide a constitutionally sound basis for domestic legislation under the external affairs power.[59] *Pape v Federal Commissioner of Taxation*,[60] highlights that the treaty must avoid excessive generality. Article 4(a) of the CERD adds specific action for States to implement:

> [States] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.[61]

Therefore, the constitutional validity of s 18C under the external affairs power depends upon conformity to the treaty which is being domesticated. Through legislation, the Commonwealth Parliament can choose how the obligations of the treaty will be given effect, however, the means that are chosen must be considered reasonably capable of being adapted to achieving the goal of the treaty.[62]

52 *R v Burges; Ex parte Henry* (1936) 55 CLR 608, 658 (Starke J.).

53 *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J.).

54 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 28.

55 *A v Minister for Immigration and Ethnic Affairs* 1997) 190 CLR 225, 231 (Brennan C. J.).

56 (1996) 187 CLR 416.

57 Ibidem, p. 486 (Brennan C. J., Toohey, Gaudron, McHugh and Gummow J. J.).

58 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 28.

59 Ibidem.

60 (2009) CLR 1, 162 (Heydon J.).

61 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, art 4(a).

62 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 35; *Victoria v Commonwealth*(1996) 187 CLR 416, 487 (Brennan C. J., Toohey, Gaudron, McHugh and Gummow J. J.) ('*Industrial Relation Act Case*').

However, it has been suggested by Forrester, Finlay and Zimmerman that Article 4 directs State Parties to do a 'Herculean task'.[63] It is described as Herculean because it is not impossible, but it is extremely difficult. The task is to enact laws prohibiting expression based on the emotion of hatred, which carries the risk of 'one person's harmless opinion [being] another person's hate speech'.[64] Although laws are concerned with subjective intention of individuals such as *mens rea*, these laws are concerned with 'states of mind [that] pertain to *knowing* or *volition* and not *feeling*'.[65] Laws rarely prohibit conduct embodying or creating emotions, and the question needs to be asked whether the law 'should impose liability on expression that *creates* an emotional response in *other* people'.[66] The difficulty found in s 18C is the criteria of 'offence, insult and humiliation' which constitute hate speech. Offence, insult and humiliation describe emotions; however, they are '*substantially different* from hatred. They are substantially different in degree if not in kind'.[67] The problem facing Australia is that s 18C does not require actual offence, insult or humiliation to be caused, but simply that the speech is 'reasonably likely' to offend, insult or humiliate.[68] If s 18C is contrasted with Article 4 of CERD, then we see that s 18C is cast significantly broader than what it required under the treaty. Article 4 requires people to 'avoid conduct that manifests or creates hate towards people of a certain race, colour or ethnicity. By contrast, under s 18C, people need to avoid conduct that creates offence, insult or humiliation in certain groups or sub-groups'.[69] As will be seen from Canada in the *Whatcott* decision,[70] this broad language would not have survived in Canada.

63 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 39.

64 Ibidem, p. 41.

65 Ibidem, p. 39.

66 Ibidem.

67 Ibidem, p. 45.

68 Ibidem, p. 49; *Racial Discrimination Act 1975* (Cth) s 18C(1)(a).

69 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 49.

70 *Saskatchewan (Human Rights Commission) v Whatcott* (2013) SCC 11. The Canadian Court found that the provision at issue was only partly valid. It struck the phrase 'ridicules, belittles, or otherwise affronts the dignity of' from the *Human Right Code* as setting the bar too low on hate speech, and not being rationally connected to the goal of addressing systemic discrimination. This language is similar to some that continues to exist in Australia.

B. Case Law Interpretation of section 18 C

Case law differs concerning how broadly 'offence', 'insult', 'humiliation', and 'intimidation' are interpreted. A number of Australian cases have interpreted these terms narrowly, requiring that the act that offends, insults, humiliates or intimidates evidence hatred to breach s 18C.[71] If s 18C requires that the relevant act evidence 'racial hatred', such as incitement to violence, then s 18C's conformity to Article 4 would be much easier to establish.[72] In *Creek v Cairns Post Pty Ltd*, Keifel J stated that 'to "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights'.[73] However, more authoritative cases have not limited s 18C to acts evidencing hatred and have taken a much broader interpretation. In *Jones v Scully*,[74] Hely J stated 'in the absence of any statutory definition of the words, it is appropriate that the words be given their ordinary English meanings.[75] The leading case considering s 18C in the Federal Court is *Jones v Toben*.[76] In this case, Toben posted material on the internet that denied the Holocaust and vilified Jewish people. He suggested that the gas chambers at Auschwitz were unlikely and that some Jewish people, for improper purposes including financial gain, had exaggerated the number of Jews killed during World War II.[77] The complaint made to the Human Rights and Equal Opportunity Commission had found the material to be in breach of the RDA. The complainant then applied to the Federal Court to enforce the determination.[78] In the

71 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 17; *Bryant v Queensland Newspapers Pty Ltd* [2007] HREOCA 23.

72 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 17.

73 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCA 352, 356 [16] (Kiefel J.).

74 *Jones v Scully* [2002] FCA 1080.

75 Ibidem; (2002) 120 FCR 243, 269 [102] (Hely J.).

76 [2002] FCA 1150.

77 *Racial Vilification Law in Australia*, Race Discrimination Unit, HREOC, https://www.humanrights.gov.au/publications/racial-vilification-law-australia(accessed in October 2002)

78 Ibidem.

case, Carr J endorsed a broader view of interpreting 'offend, insult, humiliate or intimidate':

> In my view, the Convention can be seen to be directed not only at acts of racial discrimination and hatred, but also to deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination.
> In my opinion it is clearly consistent with the provisions of the Convention and the [ICCPR] that a State Party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or notational or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination.[79]

The court adopted the approach in *Jones v Scully*[80] and proceeded to interpret the words 'offend, insult, humiliate or intimidate' in accord with their ordinary meaning:

> **Offend**
> "to irritate in mind or feelings; cause resentful displeasure in" (Macquarie)
> "to hurt or wound the feelings or susceptibilities of; to be displeasing to or disagreeable to; to vex, annoy, displease, anger; now esp. To excite a feeling of personal annoyance, resentment, or disgust in (any one). (Now the chief sense)." (Oxford)
>
> **Insult**
> "to treat insolently or with contemptuous rudeness, affront." (Macquarie)
> "to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage." (Oxford)
>
> **Humiliate**
> "to lower the pride or self-respect of; cause a painful loss of dignity to; mortify." (Macquarie)
> "to lower or depress the dignity or self-respect of; to subject to humiliation; to mortify." (Oxford)
>
> **Intimidate**
> "to make timid, or inspire with fear; overawe; cow." (Macquarie)
> "to render timid, inspire with fear; to overawe, cow; in modern use esp. to force or deter from some action by threats or violence." (Oxford)[81]

Given these interpretations, s 18C is not confined to profound or serious instances of offence, insult or humiliation. No further qualification is given to 'offensive behaviour' other than it is based on racial hatred – 'it appears that relatively minor offensive acts are covered if they are based on racial hatred'.[82] Furthermore, s 18C requires no intent to promote hatred. The standard of proof is on the balance of probabilities that an act be reasonably likely to offend, insult or humiliate a group because of their race, colour or national or ethnic origin. Indeed, Australian courts have 'rejected the requirement to prove that acts breaching s 18C must be based on radical hatred'.[83] Forrester, Finlay and Zimmerman argue that issues arise from this approach:

> Acts that humiliate appear to be more serious than acts that offend or insult … humiliation may involve mortification, a painful loss of dignity, or a lowering of self-respect or pride. Conceptually, humiliation may involve serious harm to a person who is subjected to acts that degrade or dehumanise them. However, humiliation may fall well short of degradation or dehumanisation. In government or political matters, people commonly "stake their pride" in an idea, issue, cause, or position in which they believe. They may not like having their beliefs challenged, let alone mocked or shown to be problematic or false. Further, if the challenge succeeds in demonstrating as belief risible or wrong, then the person holding the belief may well feel humiliated.[84]

79 *Toben v Jones* [2003] FCAFC 137; (2003) 129 FCR 505, 524–525 [19]–[20] (Carr J); J. Forrester, L. Finlay, A. Zimmermann, *No Offence Intended: Why 18C Is Wrong*, Connor Court Publishing 2016, p. 18.

80 *Jones v Scully* [2002] FCA 1080.

81 *Jones v Toben* [2002] FCA 1150, 90, consulting the Macquarie Dictionary 2nd ed and The Oxford English Dictionary 2nd ed.

82 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 20.

83 Ibidem, p. 82; *Tobin*

84 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 20.

Jones v Toben[85] adopted the approach in *Hagan v* Trustees of the Toowoomba Sports Ground Trust,[86] in which Drummond J stated:

> It is apparent from the wording of s18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?

The Bill requires an objective test to be applied by the Commission so that community standards to behaviour rather than the subjective views of the complainant are taken into account.[87]

Following Drummond J's reasoning, Forrester, Finlay and Zimmerman argue that s 18C fails the requirement of being considered appropriate or adapted to the purpose of Article 4 of the CERD.

The relevant purposes of Article 4 are to prohibit speech *based on* racial hatred, and speech that amounts to *incitement* to racial hatred. Further, Article 4 requires due regard to the guarantee of freedom of expression in Article 5. This freedom entails a very broad range of expression, including expression that offends, insults or even humiliates. Section 18C does not require acts that offend, insult or humiliate to be based on racial hatred or to amount to incitement to racial hatred. Rather, the minimum threshold s 18C sets are acts that are reasonably likely to offend.[88]

Despite s 18C not being considered yet by the High Court, the terminology 'offend, insult or humiliate' is cause for grave concern. Firstly, because it is based upon feelings produced in another and not an objective test, and secondly, there is no defining limit as to what counts as offensive, insulting or humiliating.

Due to s 18C overreaching the purposes of the Article 4 CERD, Forrester, Finlay and Zimmerman thus argue that s 18C would fail at being constitutionally valid under the external affairs power.[89] Although the High Court of Australia has not considered the constitutional validity of s 18C, the Federal Court in *Jones v Toben* considered the question of s 18C's constitutional validity under the external affairs power. In this case, the Court held that the external affairs power through the CERD supports s 18C.[90] Despite s

85 [2002] FCA 1150.

86 [2000] FCA 1615.

87 *Hagan v* Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615, [15].

88 J. Forrester, L. Finlay, A. Zimmermann, above n 41, p. 89.

89 Ibidem, p. 241.

90 Ibidem, p. 24.

18C not being considered yet by the High Court, the terminology 'offend, insult or humiliate' is cause for grave concern. Firstly, because it is based upon feelings produced in another and not an objective test, and secondly, there is no defining limit as to what counts as offensive, insulting or humiliating. Subsequently, Australia finds itself in a paradoxical situation. On the one hand, the role of the government is to accommodate for the multicultural pluralist society by maintaining 'neutrality'. On the other hand, the government is to restrict the freedom of citizens if it is to prevent harm.

members of religious institutions. Outside that field religious persons are left without protection, unless it is to be found in state law. However, in the *Anti-Discrimination Act 1977* (NSW), for example, there is no protection for religious activity as such. There are protections for the incitement of hatred on the ground of race in s 20C(1). "Race" is defined as including "colour, nationality, descent and ethnic, ethno-religious or national origin". This leaves out religious origin other than "ethno-religious" origin.[91]

To attempt to strip out all contrary claims to truth from civil discourse would be to undercut the nature of the freedoms themselves if these freedoms are understood properly.

Within the legal framework of s 18C 'offence, insult or humiliate,' the government must intervene at the individual level for *any* emotional harm that could be construed under these categories. Thus the stance of neutrality begins to erode as conflicting goods cannot be fully accommodated.

Furthermore, religious freedom has become an issue within Australia, particularly after the plebiscite for legalising same-sex marriage. However, at the Commonwealth level, there are as yet no laws against hate speech towards religion. As retired High Court judge Dyson Heydon highlighted

> in the highly controversial s 18C, para (1)(b), selects as a requirement for unlawfulness the doing of an act "because of the race, colour or national or ethnic origin of [a] person or of some or all of … people in [a] group" – but not religion. If s 18C is to stay, why is religion not given the protection it affords? … It is true that s 351 of the *Fair Work Act 2009* (Cth) prohibits employers from taking adverse action against an employee on religious grounds, subject to exceptions for certain actions taken against staff

Whether Australian courts will narrow the overbroad language or whether a political remedy is needed remains to be seen: the difference between the two countries in this respect is marked. The Canadian Supreme Court struck the phrase 'ridicules, belittles, or otherwise affronts the dignity of' from the *Human Right Code* as setting the bar too low on hate speech, and not being rationally connected to the goal of addressing systemic discrimination.[92] One wonders how different from 'ridicules, belittles, or otherwise affronts the dignity of' is from the Australian language of: 'offend, insult, humiliate or intimidate.' If weight is put on intimidation in relation to threats of, say, 'violence' or 'incitement' then hatred is connected to genuine fear rather than the lower barrier (seen now so commonly on many university campuses) of 'hurt feelings.'

91 D. Heydon, *The inaugural PM Glynn Lecture' PM Glynn Institute – Australian Catholic University* https://www.pmglynn.acu.edu.au/news/the-inaugural-pm-glynn-lecture-by-the-honourable-dyson-heydon-ac-qc (accessed on 17 October 2017).

92 P. Babie, above n 27, p. 172.

The difficulty with religious matters is that adherents wish to espouse the truth as they see it and understand that religion is about the nature of what is true. The right to religious liberty in International Law (Article 18 of the ICCPR) includes after all not just the right to hold a religious belief but the right to teach, manifest and disseminate such a belief. To attempt to strip out all contrary claims to truth from civil discourse would be to undercut the nature of the freedoms themselves if these freedoms are understood properly. From Victoria, the principle case, *Catch the Fire Ministries Inc&Ors v Islamic Council of Victoria Inc*.[93] showed that under the Victorian legislation as it stood then, one could incite religious hatred without even the intention to do so and without any proof that hatred, contempt, revulsion and ridicule directly ensued. This case demonstrated that the Victorian legislation had backfired. The intent of religious vilification legislation is to promote social cohesion and tolerance yet, as one commentator remarked: 'nor do I think the object of religious harmony will be promoted by organising witnesses to go along to meetings of other religions to collect evidence for the purpose of later litigation'.[94] Catch the Fire Ministries showed that to seek to constrain someone from declaring that his own religion was correct, and another religion incorrect, constitutes the impairment of a speaker's freedom of religion.[95] According to Article 18 of the *Universal Declaration of Human Rights* (UDHR) everyone has a right to the 'freedom to change his religion or belief'. Importantly, this should logically involve the freedom to hear the arguments about why one should or should not change one's religion.[96] Just as the United Kingdom was mindful of this case when drafting their *Racial and Religious Hatred Act* 2006 (UK),[97] so the drafting of a Federal Act which seeks to address the various ways of discriminating against people on the basis of religion need to avoid the Victorian model.[98]

V. States and territories

The states and territories provide somewhat wider legislation protection against discrimination then found in Commonwealth legislation. For example, human rights legislation in the ACT and Victoria – the *Human Rights Act 2004* (ACT) ('ACT HRA') and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter') – expands the power of administrative bodies in those jurisdictions to monitor human rights violations.[99] The ACT HRA protects a range of freedoms and individual rights such as, the right to freedom of thought, conscience, religion, and belief,[100] and the right to freedom of expression, the right to take part in public life.[101] The ACT HRA does contain two significant limitations. Firstly, only individuals have human rights.[102] Secondly, none of the rights are absolute – 'Human rights may be subject to reasonable limits set by Territory laws that be demonstrably justified in a free and democratic society'.[103] This limitation language is consistent with many limiting provisions such as, for example, Section 1 of the *Canadian Charter of Rights and Freedoms* (*Constitution Act*, 1982).

In New South Wales, criminal offences for serious vilification have been relocated to the *Crimes Act 1900* (NSW), as a result of legislation that came into force on 13 August 2018. The *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018*(NSW) created a single new offence within the *Crimes Act 1900* of publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity, intersex status and HIV/AIDS status.[104] Within this new offence, it is irrelevant whether the

93 [2006] VSCA 284.

94 Peter Costello, MP, Address to National Day of Thanksgiving Commemoration, *Scots Church Melbourne* (29 May 2004).

95 P. Parkinson, *Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different,* "Australian Law Journal", 2007, vol. 81, p. 954.

96 N. Foster (in:) P. Babie, N. Rochow, *Freedom of Religion under Bill of Rights*, University of Adelaide Press 2010, p. xi–11, 69.

97 Ibidem, p. 66.

98 I acknowledge here a helpful paper produced by John Brazier, a law student at the University of Notre Dame School of Law (November 2018).

99 P. Babie, above n 27, p. 145 [4.16].

100 *Human Rights Act 2004* (ACT) s 14.

101 Ibidem, s 16.

102 Ibidem, s 6.

103 Ibidem, s 6.

104 *Crimes Act 1900* (NSW) s 93Z.

offender's assumptions or beliefs about the race, religion, sexual orientation, gender identity, intersex status and HIV/AIDS status were correct. A person may still be found guilty if they intentionally or recklessly threaten or incite violence. There is no need to prove actual incitement to violence, just that the public act was capable of inciting violence.[105]

Only Queensland, Tasmania and Victoria have enacted statutes that explicitly prohibit religious vilification.[106] In other jurisdictions, overlapping definitions of religion and race/ethnicity occur where the definition of 'racial' in racial vilification laws can extend to groups that share a common religious tradition as part of their ethnicity (such as Sikhs and Jews). Thus, racial vilification laws give some protection to some groups that might also be considered to be religious. However, this protection is not comprehensive and is not a protection from religious hate speech as such.[107]

In Victoria, the *Racial and Religious Tolerance Act 2001* (Vic) states:

> A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt form or revulsion or severe ridicule of, that other person or class of persons.[108]

Professor Carolyn Evans has noted the complicated relationship that laws which prohibit religious vilification or religious hate speech have with religious freedom. At its worst speech demonising and dehumanising groups has been a preparation for serious crimes including genocide against others. On the other hand, laws against religious vilification, particularly if drawn too widely, can chill certain kinds of religious expression and unduly limit what might be valid religious criticisms.[109] In addition, religious and moral viewpoints might well provide important background to opinions on politics, trade, immigration, medical issues and a host of areas that may be considered controversial exciting emotions and 'feelings' that could lead to feelings of concern, unrest and discontent – but such expressions are part and parcel of living in an open society where discussion and disagreement generate both heat and light sometimes in equal measure.

Laws against religious vilification, particularly if drawn too widely, can chill certain kinds of religious expression and unduly limit what might be valid religious criticisms.

What is at issue is the weighing two competing rights found in international law under the ICCPR:

Article 19 –

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

105 Anti-Discrimination Board of NSW, 'Changes to Vilification Laws' http://www.antidiscrimination.justice.nsw.gov.au/Pages/news%20articles/changes-to-serious-vilification-laws.aspx.

106 C. M. Evans, above n 45, p. 172.

107 Ibidem.

108 *Racial and Religious Tolerance Act 2001* (Vic) s 8.

109 C. M. Evans, above n 45, p. 171.

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

And
Article 20(2) –

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

What Articles 19 and 20 do, therefore, is uphold the rights of expression but only to the limit where there is damage to the 'rights or reputations' of others, necessary protections for public order and for the incitement to discrimination, hostility or violence. What constitutes 'discrimination' and reputational interests must be serious if the important freedoms guaranteed by Article 19 are not to be watered down unduly by the internal restrictions.

VI. Cases and complaints

The number of cases that have been heard concerning vilification is limited. Nonetheless, the cases are significant to turn to as they outline developments in the common law. In the *Catch the Fire Ministries Case,*[110] a complaint was lodged by the Islamic Council of Victoria (ICV) under Victorian law against the Catch Fire Ministries Inc, an evangelical Christian church. The church had conducted a seminar, published a newsletter, and published an article on the church's webpage stating that the Koran promotes violence and that Islam denies women equal value.[111] The ICV claimed this attacked the Islamic faith and breached s 8 of *Racial and Religious Tolerance Act 2001* (Vic). Catch the Fire claimed that its statements were accurate, that its actions were reasonable and undertaken in good faith, and that the seminar and publications were 'for a genuine religious purpose and in the public interest'.[112] When this complaint was heard at the Victorian Civil and Administrative Tribunal, Higgins J upheld the complaint as 'the cumulative effect of the statements and publications … were likely to incite others to religious hatred, contempt and ridicule'.[113] This was successfully appealed by Catch the Fire but was settled outside of court, 'leaving the key question of whether the conduct amounted to vilification unresolved'.[114] However, in the Court of Appeal's decision to allow the appeal, the judges found that 'incitement includes both words and actions that actually incite others, and also those that are calculated to encourage incitement but do not have that effect in practice. This makes it easier to bring a case as it is not necessary to show actual incitement of those listening'.[115] However, the Act does not 'prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons'.[116] The Court thus distinguished that which incites from that which is merely offensive.

The Court also considered what was required to fall within the exception for a 'genuine religious purpose.' The requirement that conduct be in good faith is a subjective test, so that the person making the statement had to be acting in good faith. Nettle JA stated:

> [members of society] acknowledge that there will be differences in views about other peoples' religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though some and perhaps to most in society such criticisms may appear ill-informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or mis-

110 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510;(2006) 15 VR 207 ('*Catch the Fire Ministries Case*').

111 C. M. Evans, above n 45, p. 176.

112 Ibidem, p. 177.

113 Ibidem, p. 177.

114 Ibidem, p. 177.

115 Ibidem, p. 178; *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2006) 15 VR 207, 254.

116 *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2006) 15 VR 207, 212 (Nettle J. A.)

conceived or ignorant or so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.[117]

Nettle JA also found that the conduct need not be motivated by an intention to incite hatred, contempt and so forth on the basis of religion. He considered that it is enough that the 'conduct incite hatred or other relevant emotion towards a person or group of persons which is based on their religious beliefs'.[118] This raises interesting questions as to how we are to measure the relevant emotion towards a person or group. For example, if atheists say that religions are irrational, that carries with it 'implications about the intellectual qualities of those who believe in them'.[119] It would therefore seem that all vilification laws should be restricted to incitement of violence which would fall under criminal law, or a measurable objective test for damage such as Post Traumatic Stress Disorder (PTSD), falling under civil law.[120]

In *Kanapathy v In De Braekt,*[121] the defendant did not want to undergo a security check and called the complainant a 'Singaporean prick'. It was found that the words were reasonably likely to offend, insult, humiliate or intimidate.[122] From the meaning of the words, and the manner and context of its use, the abuse was more than 'mere slights'.[123] Furthermore, whether the act was done for two or more reasons 'where one of the reasons is the national origin of a person, whether or not it is the dominant reason or a substantial reason for the doing of the act, nevertheless means that for the purposes of s. 18C of the RDA, the act is taken to be done because of the person's national origin'.[124] The Court held that a civil wrong had been established under s 18C of the RDA.

In *Campbell v Kirstenfeldt,*[125] Ms Campbell lodged a complaint about the conduct of her former neighbour, Mr Kirstenfeldt. The conduct was continuous name calling such as 'nigger', 'coon', 'black mole'. It was decided that the act was done 'clearly because of her race or colour because of the use of the word "black"'.[126] Mr Kirstenfeldt was found to be in breach of s 18C and was ordered to apologise and pay and pay $7 500 in damages.

In *Clarke v Nationwide News,*[127] an Aboriginal woman, who was the mother of three young people killed in a car accident, complained about readers' comments about the incident posted on 'perthnow.com.au'. The Court considered whether the publication of the comments were objectively reasonably likely, in all the circumstances, to offend, insult or humiliate, and considered 'the comments from the perspective of the applicant herself, who says she was the target of the comments, or of a group or subgroup of which the applicant is a member [the Aboriginal community]'.[128] The comments stated that young Aboriginal children learn how to steal cars and start them without a key due to the families' criminal history – implying that because they were Aboriginal, their families had a criminal history.[129] It was held that the website that published the comments contravened s 18C. The company was ordered to remove the comments and pay $15,624 in compensation.

What these cases and academic commentary cited show is that there is a considerable 'live debate' about calls for protection against hatred alongside calls for narrowing the broad language of s 18C so that it is more in line with other countries such as Canada. What popular discussions about 'hot button issues' show is that where disagreement is likened to 'lack of respect' and lack of respect is ratcheted up to 'attacks on dignity' then claims of 'hatred' will not be far behind. Where disagreement with matters close to the heart of a polity such as issues relating to life and citizenship and related issues such as immigration (see the final section of this article dealing

117 Ibidem, p. 242 (Nettle JA).

118 Ibidem, p. 214 (Nettle JA).

119 C. M. Evans, above n 45, p. 176, 180.

120 I. T. Benson, *Action Lecture 2017: Civic Virtues and the Politics of "Full Drift Ahead*(in:) *The Centre For Independent Studies* (Occasional Paper 155) 2017, p. 10.

121 *(No. 4)* [2013] FCCA 1368.

122 *Kanapathy v In De Braekt (No. 4)* [2013] FCCA 1368, 37 (Lucev J.).

123 Ibidem, p. 38.

124 Ibidem, p. 40.

125 [2008] FMCA 1356.

126 Ibidem, p. 31.

127 *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307.

128 Ibidem, p. 187.

129 Ibidem, p. 208.

with the recent Global Compact on Migration), claims of lack of sensitivity or exclusion can all too readily be viewed as and argued for or against as hatred when they are, lacking incitement, nothing of the sort.

In heated cultural climates such as those of many Western countries, calls for widening laws in relation to hatred ought to be viewed with suspicion unless these are geared closely to actual incitement of violence. Terming religious views of heterosexual marriage or the nature of men and women as 'male' or 'female' and rejections of the ideology of transgenderism 'hatred' are signs of the times but the law and politics must act to ensure that the novel viewpoints of some do not become clubs with which to beat others. Genuine diversity and pluralism require disagreement and the goal of civil education and citizenship is to create cultures that respect other viewpoints (within reason) while not succumbing to the strident voices of the few. Protection of minorities is a noble goal but allowing new or minority opinions to trump traditions and majorities is neither implied by nor justified by any proper understanding of justice.

Law and politics must act to ensure that the novel viewpoints of some do not become clubs with which to beat others.

VII. Policy considerations

A. The Emerging Debate in Australia about a National Religious Discrimination Act

On 14 December 2018, the Expert Panel of the Ruddock Commission released their Report on the Religious Freedom Review in Australia following an inquiry into religious protections occasioned by, amongst other things, legalisation allowing same-sex marriage in Australia.[130] The Expert Panel stated that there is an inconsistency across Australia with regards to anti-vilification laws.[131] Each State and Territory, except for the Northern Territory, has either civil or criminal provisions prohibiting hate speech in relation to race. The Australian Capital Territory has the most extensive provisions regarding hate speech, covering disability, gender identity, HIV/AIDS status, intersex status, religious conviction, and sexuality in addition to race.[132] Contrasting current Australian anti-vilification law with international law, the Expert Panel stated:

> Article 20 of the ICCPR does not prohibit hate speech as such. Article 20 has a 'responsive character', being intended to 'combat the horrors of fascism, racism and National Socialism at their roots', by preventing the type of incitement and hatred that would lead to the systematic violation of the rights to life (article 6) and equality (article 7). It is directed at the shaping of public opinion rather than targeted acts of hatred …[133]
>
> Article 20 of the ICCPR is concerned only with vilification. It is important to distinguish between vilification and other restrictions on speech. Vilification is concerned with advocacy of hatred that incites discrimination, hostility or violence. It is intended to capture speech addressed to an individual or group in society inciting them to discrimination, hostility or violence towards another individual or group.[134]

130 The Expert Panel, *Religious Freedom Review*, Report (2018), https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf.

131 Ibidem, p. 84 [1.340].

132 Ibidem [1.340].

133 Ibidem, p. 84 [1.339].

134 Ibidem, p. 85 [1.344].

Recommendation 15 of the Commission stated that: The Commonwealth should amend the *Racial Discrimination Act* 1975, or enact a *Religious Discrimination Act,* to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

The suggestion that Australia finally enact a *Religious Discrimination Act*, in parallel with other aspects of Australia's obligations under the ICCPR, has been met with wide support from across Australian society. How and indeed, whether, the legislature will respond with adequate safeguards in the form, ideally, of a separate Act to protect religious believers and their communities (as well as those without religious views as the Ruddock Commission was keen to point out) remains to be seen.

Professor Neil Foster has commented that, with respect to religious vilification:

> …it is not the intention of the Government to include in such a Bill a provision regarding offensive, humiliating or insulting behaviour, such as that contained in Section 18C of the *Racial Discrimination Act* because, as the Expert Panel noted, the entrenchment of laws regarding blasphemy would be a retrograde step which the Government considers would place too great a burden on the freedom of expression in Australia. Relatedly, the Government will consult with the States and Territories on the terms of the potential reference to the Australian Law Reform Commission to give further consideration to how best to amend current Commonwealth anti-discrimination legislation to prohibit the commencement of any legal or administrative action pursuant to State-based anti-discrimination legislation analogous to Section 18 C of the Racial Discrimination Act, that seeks to claim offence, insult or humiliation because a person or body expresses a view of marriage as it was defined in the Marriage Act before being amended in 2017.[135]

135 Personal communication on file with the author (December, 2018).

Not only will the Government not introduce as 18C equivalent, it looks as if, says Professor Foster, the Government is serious about cutting back the reach of the State of Tasmania's *Anti-Discrimination Act 1998* (Tas) s 17 which has the broadest reach of all the anti-vilification laws in Australia, explicitly demonstrated in the context of the kind of challenge launched against the Roman Catholic Archbishop Porteous for issuing a Pastoral Letter supporting the traditional Roman Catholic position on marriage.[136] Though that case was eventually dropped it cast a considerable chill upon religious people in relation to the support of traditional marriage. Thus the report highlights somewhat the failure, or at least difficulty of Liberalism – i.e. the inability to remain neutral to competing interests in society. One person's expression of religion is another person's hate speech. Australia currently needs to address the concerns of religious freedom, particularly in relation to same-sex marriage, and yet also address current state legislation which makes religious positions that are against same-sex marriage to be considered hate speech.

B. Global Compact for Safe, Orderly and Regular Migration

As this article was in the final stages it became clear that an aspect of the UN's Global Compact for Safe, Orderly and Regular Migration (Draft July 11, 2018, signed by some countries, December, 2018)[137] would raise important questions about the scope of freedom of expression in relation to 'hate speech' on matters dealing with immigrants and immigration. Various countries (including Austria, Hungary, Australia and Poland) have refused to sign the Compact.

The particularly relevant provision in relation to speech and vilification is as follows:

136 'Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says' *ABC News* (online) 28 September 2015 < https://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

137 *Global Compact for Safe, Orderly and Regular Migration*, Final Draft) https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf (accessed on 11July 2018).

OBJECTIVE 17: Eliminate all forms of discrimination and promote evidence-based public discourse *to shape perceptions of migration* 33. We commit to eliminate all forms of discrimination, condemn and counter expressions, acts and manifestations of racism, racial discrimination, violence, xenophobia and related intolerance against all migrants in conformity with international human rights law. We further commit to promote an open and evidence-based public discourse on migration and migrants in partnership with all parts of society, that generates a more realistic, humane and constructive perception in this regard. We also commit to protect freedom of expression in accordance with international law, recognizing that an open and free debate contributes to a comprehensive understanding of all aspects of migration. To realize this commitment, we will draw from the following actions:

a) Enact, implement or maintain legislation that penalizes hate crimes and aggravated hate crimes targeting migrants, and train law enforcement and other public officials to identify, prevent and respond to such crimes and other acts of violence that target migrants, as well as to provide medical, legal and psychosocial assistance for victims

b) Empower migrants and communities to denounce any acts of incitement to violence directed towards migrants by informing them of available mechanisms for redress, and ensure that those who actively participate in the commission of a hate crime targeting migrants are held accountable, in accordance with national legislation, while upholding international human rights law, in particular the right to freedom of expression

c) Promote independent, objective and quality reporting of media outlets, including internet based information, including by sensitizing and educating media professionals on migration-related issues and terminology, investing in ethical reporting standards and advertising, and stopping allocation of public funding or material support to media outlets that systematically promote intolerance, xenophobia, racism and other forms of discrimination towards migrants, in full respect for the freedom of the media

d) Establish mechanisms to prevent, detect and respond to racial, ethnic and religious profiling of migrants by public authorities, as well as systematic instances of intolerance, xenophobia, racism and all other multiple and intersecting forms of discrimination in partnership with National Human Rights Institutions, including by tracking and publishing trends analyses, and ensuring access to effective complaint and redress mechanisms

e) Provide migrants, especially migrant women, with access to national and regional complaint and redress mechanisms with a view to promoting accountability and addressing governmental actions related to discriminatory acts and manifestations carried out against migrants and their families

f) Promote awareness-raising campaigns targeted at communities of origin, transit and destination in order to inform public perceptions regarding the positive contributions of safe, orderly and regular migration, based on evidence and facts, and to end racism, xenophobia and stigmatization against all migrants

g) Engage migrants, political, religious and community leaders, as well as educators and service providers to detect and prevent incidences of intolerance, racism, xenophobia, and other forms of discrimination against migrants and diasporas and support activities in local communities to promote mutual respect, including in the context of electoral campaigns

It is not possible to anticipate what the application of such terms as these will mean in relation to robust domestic conversations and policies relating to immigration. Opinions differ as to whether this Compact will lead to infringements of sovereignty or interference with domestic immigration rules and applications. At the very least the Compact calls on governments to change public perceptions in relation to immigration and to eliminate "all forms of discrimination" which, on its face, would certainly catch decisions on immigration status themselves. Depending what is meant by 'hate crimes' with respect to "perceptions" about immigration (the terminology is vague) it is not possible to anticipate exactly what these developments from the UN might mean.

Popular opinion and the expressed views of various politicians suggest that restrictions on speech under

the rubric of hate crimes could be extended to make criticisms of immigration itself 'hate speech'.[138] Other commentators deny this is or could be the impact.[139] What is certain is that there is a lack of clarity in the key terms ('hate crimes') and no saving language – i.e. 'nothing in this Compact refers to public criticism of immigration that falls short of incitement to violence.' Compact with its wide and essentially undefined use of 'hate-crimes' in relation to any 'discrimination' against immigrants. In common with many liberal regimes Australia has protected people against insult as well as ridicule – an approach tested and found wanting in Canada. As such, the Australian protections for speech (religious or other) do not restrict 'hate' to incitement to violence but risk, as the language in this area goes, casting a chill against expressions many would consider, while rude or inappropriate, should fall short of the standard of 'hatred' that could properly be suppressed by law.

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Given the concerns in the Article based upon case law and legal history, not to mention growing unrest generally about the role of religion in Western Cultures,[140] this sort of language expressly protecting the freedoms of religion and expression in relation to hate speech laws would seem to be both wise and overdue.

VIII. Conclusion

Australia, in common with other countries, has an active debate about how 'hate speech' should be defined and to what extent limits should be directed towards actual incitement to commit violence or physical or mental injury. The Australian concern about immigration has led to a refusal to endorse the Global

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138 See, for example: https://www.youtube.com/watch?v=0pn7X_Z1_tc

139 See, for example: The Freedom of Expression Organization, Article 19, https://www.article19.org/resources/global-compact-for-migration-positive-for-ensuring-free-expression-access-to-information-and-inclusive-public-debate/.

140 I. T. Benson, above n 7.

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Taxation of Retail Sales in Poland Vis-à-Vis EU Provisions on State Aid

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1. Introduction

Poland's special taxation of retailers became a normative reality with the coming into force, on 1 September 2016, of the Act of 6 July 2016 on Retail Sales Tax[1]. The *de facto* collection of the new tax, however – which, in the sponsors' intention was to bring approximately PLN 1.9 billion p.a. into the state budget[2] – ceased already on 18 October 2016 with a retroactive effect for revenues achieved since the coming of the Act into force[3]. The reason for desisting so quickly from the collection of the tax was the formal investigation procedure under Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) initiated by the Commission (EC) against Poland in connection with the suspicion that the new tax – or, more precisely, its progressive rate scale – constitutes state aid in the meaning of Article 107(1) TFEU. In the decision initiating the formal investigation procedure (hereinafter the 'EC Decision') the Commission ordered Poland to suspend the application of progressive rates[4].

The purpose of this article is to demonstrate that the EC's allegations imputing to the retail-sales tax the nature of state aid are entirely unfounded and violate

1 Dz.U.2016.1155.

2 See the explanatory memorandum to the draft bill of the Act on Retail Sales Tax, available at http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=615, pp. 9–10

3 See Regulation of the Minister of Development and Finance of 18 October 2016 in the matter of refraining from the collection of retail sales tax, Dz.U.2016.1723. The Regulation was enacted on the basis of Article 22(1)(1) of the Act of 29 October 1997 – Tax Code (restated text: Dz.U.2015.613, as amended). 15 November 2016 saw the passage of the Act Amending the Act on Retail Sales Tax (Dz.U.2016.2099), stipulating that the provisions of the Act on Retail Sales Tax shall apply to retail sales revenues achieved since 1 January 2018.

4 Commission (EU) Decision of 19 September 2016 – State Aid SA.44351(2016/C) (ex 2016/NN) – Poland – Polish tax on the retail sector (OJ EU C 406 of 4/11/2016, p. 4).

Poland's fiscal autonomy as a European Union (EU) Member State to shape the basic construction elements of taxes imposed. Irrespective of the final outcome of this particular case concerning the Polish tax in the proceedings pending before the EU institutions (*viz.* the Commission and then the EU courts)[5], it would be expedient to recommend that the Commission, in the future, refrain from such deep interference with the regulatory autonomy of the Member States to tax specific economic activities and in that way pursue legitimate fiscal and redistributive goals at the domestic level.

The European Commission should refrain from deep interference with regulatory autonomy of the Member States to tax specific economic activities and in that way pursue legitimate fiscal and redistributive goals at the domestic level.

2. Domestic taxation instruments formally differentiating the situation of the various taxpayer categories are not selective measures in the understanding of Article 107(1) TFEU.

The fact that the relevant national tax measure (instrument), including a tax imposed by a Member State, differentiates formally the situations of the various categories of taxpayers, so that it imposes different burdens on different categories of taxpayers, in particular different tax rates for different categories of taxpayers, does not necessarily make it a selective measure – and thus state aid – in the meaning of Article 107(1) TFEU[6].

If a domestic tax measure (including e.g. retail sales tax) is to be regarded as selective in the meaning of Article 107(1) TFEU (and, subject to meeting the remaining criteria, state aid in the meaning of Article 107(1) TFEU), it is first necessary to identify and consider the tax regime that is general or 'normal' in the Member State; this is the so-called reference system. It is precisely in reference to such a general or 'normal' tax regime (i.e. in relation to the reference system) that one must subsequently assess and determine the hypothetical selective nature of favours conferred by the tax measure under consideration, showing that the measure derogates from the general system by differentiating the situations of undertakings whose

5 Poland challenged the EC decision before the Court of First Instance – Case T-836/16, *Poland v. Commission*.

6 Here, it is necessary to recall that the selectiveness of a measure is one of the mandatory defining criteria that must be met if the measure is to be recognized as state aid in the meaning of Article 107(1) TFEU. The remaining criteria are as follows: 1) the measure must originate from the state or the state's resources; 2) it must result in aid that favours certain undertakings; 3) it must interfere or threaten to interfere with competition; 4) it must affect commerce between Member States. More broadly see e.g. R. Plender, *Definition of Aid* (in:) A. Biondi, P. Eeckhout, J. Flynn (eds.), *The Law of State Aid in the European Union*, Oxford 2004, pp. 3–40; L. Hancher, T. Ottervanger, P. J. Slot, *EU State Aids*, London 2012, pp. 49–120; M. Szydło, *Pojęcie pomocy państwa w prawie wspólnotowym*, 4 Studia Europejskie 2002, pp. 33–54; A. Nykiel, *Pojęcie pomocy państwa w świetle prawa Unii Europejskiej* (in:) C. Mik (ed.), *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku*, Toruń 2002, pp. 193–213; S. Dudzik, *Pomoc państwa dla przedsiębiorstw publicznych w prawie Wspólnoty Europejskiej. Między neutralnością a zaangażowaniem*, Cracow 2002, pp. 33–131.

factual situations, in the light of the objectives of the tax system of the relevant member state, are comparable[7]. 'The system of reference, therefore, is the benchmark against which the selectivity of a measure is assessed. The reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system is to apply, the rights and obligations of undertakings subject to it, and the technicalities of the functioning of the system. In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. For example, a reference system could be identified with regard to the corporate income tax system, the VAT system, or the general system of taxation of insurance'[8], or the Polish retail sales tax system that is the subject of this article.

'Once the reference system has been established,' (for example once the reference system for retail sales tax has been established), 'the next step of the analysis consists in examining whether a given measure differentiates between undertakings in derogation from that system. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in the light of the intrinsic objective of the system of reference. External policy objectives – such as regional, environmental or industrial policy objectives – cannot be relied upon by the Member State to justify the differentiated treatment of undertakings'[9]. Hence, when considering the selectivity of the relevant tax measure (including retail sales tax), it is necessary to establish whether the relevant tax exemptions or other derogations from the system of reference relevant to the tax measure (such as, for example, a progressive rate scale, if not regarded as an element of the system of reference itself) are liable to favouring certain undertakings or the production of certain goods compared to other undertakings in a similar factual and legal situations, provided that the similarity is to be assessed in the light of the objective pursued by the reference system, including the relevant tax regime[10]. 'If a measure,' (e.g. retail sales tax), 'favours certain undertakings or the production of certain goods which are in a comparable legal and factual situation, the measure is *prima facie* selective'[11].

Once the relevant tax measure (e.g. retail sales tax) is found to be selective *prima facie*, that is to derogate from the relevant reference system and favour certain undertakings that are in a comparable factual and legal situation to others, such a measure can still be qualified as not selective in the meaning of the Article 107(1) TFEU, if the derogations from the reference system (e.g. tax exemptions, progressive rates) are justified by the nature and general scheme of the tax system of which they are part or in which they belong[12]. A tax measure derogating from the general tax system (i.e. relevant reference system) may, therefore, be legitimate, if the Member State can show that the measure is a direct consequence of the principles underlying its tax system[13]. For this purpose a distinction must be drawn between the intrinsic objectives of the specific tax system and objectives extrinsic to it, on the

7 Judgments of the Court of Justice (CJEU): of 8 September 2011 in joined cases from C78/08 to 80/08 *Paint Graphosand others*, ECLI:EU:C:2011:550, paragraph 49; of 1 July 2006 in Case C88/03 *Portugal v. Commission*, ECLI:EU:C:2006:511, paragraph 56.

8 Commission (EU) Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, paragraphs 132–134 (OJ EU C 262/01 of 19/7/2016, p. 30), hereinafter the '2016 EC Notice'.

9 2016 EC Notice, paragraph 135.

10 CJEU judgment of 8 September 2011 in joined cases from C78/08 to 80/08 *Paint Graphos and others*, ECLI:EU:C:2011:550, paragraph 54.

11 2016 EC Notice, paragraph 137.

12 CJEU judgments: *Paint Graphos and others*, as cited above, ECLI:EU:C:2011:550, paragraph 64; of 8 November 2001 in Case C-143/99 *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, ECLI:EU:C:2001:598, paragraph 42; of the Court of 4 February 2016 in Case T287/11 *Heitkamp Bau Holding GmbH v. Commission*,ECLI:EU:T:2016:60, paragraph 158.

13 CJEU judgments: *Paint Graphos and others*, as cited above, ECLI:EU:C:2011:550, paragraph 65; *Portugal v. Commission*, as cited above, ECLI:EU:C:2006:511, paragraph 81; of 18 July 2013in Case C6/12 *P Oy*, ECLI:EU:C:2013:525, paragraph 22.

one hand, and mechanisms inherent to that system and necessary for the achievement of such objectives, on the other hand[14]. This is provided that for exemptions and other derogations from the reference system relevant to the relevant tax measure (e.g. progressive rates in retail sales tax), 'to be justified by the nature or general scheme of the system, it is also necessary to ensure that those measures are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures'[15].

Even a tax measure which is formally selective can be considered as not selective in the meaning of Article 107(1) TFEU if the Member Stare applying such measure can show that the measure is a direct consequence of the principles underlying its tax system.

As the EC notes (in summarizing the above-cited case laws): 'A measure which derogates from the reference system (*prima facie selectivity*) is non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system. In contrast, it is not possible to rely on external policy objectives which are not inherent to the system. The basis for a possible justification could, for instance, be the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation, or the objective of optimising the recovery of fiscal debts.' This is provided that: 'For derogations to be justified by the nature or general scheme of the system, it is also necessary to ensure that those measures are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures'[16].

3. Polish retail sales tax is not a selective measure in the meaning of Article 107(1) TFEU.

In the light of the above-presented criteria for establishing the selectivity of a tax measure, developed in the case laws of European courts and the Commission's decision-making practice, it can be clearly concluded that Polish retail sale tax is not a selective measure in the meaning of Article 107(1) TFEU, and consequently also not state aid in the meaning of that provision.

14 CJEU judgments: *Paint Graphos and others*, as cited above, ECLI:EU:C:2011:550, paragraph 69; *Portugal v. Commission*, as cited above, ECLI:EU:C:2006:511, paragraph 81; of 7 March 2012 in Case T210/02 RENV *British Aggregates Association v. Commission*, ECLI:EU:T:2012:110, paragraph 84; *Heitkamp Bau Holding GmbH v. Commission*, as cited above,ECLI:EU:T:2016:60, paragraph159.

15 CJEU judgments in *Paint Graphos and others*, as cited above, ECLI:EU:C:2011:550, paragraph 75; CJEU judgment in *Heitkamp Bau Holding GmbH v. Commission*, as cited above, ECLI:EU:T:2016:60, paragraph 160.

16 2016 EC Notice, paragraphs 138–140.

Polish retail sales tax regulated in the Act of 6 July 2016 on Retail Sales Tax is a revenue- (turnover-) based tax having as its object retail sales (Article 5 of the Act) and as its basis the surplus of retail sales revenues achieved in a given month over PLN 17 million (Article 6(1) of the Act). The tax rates are: 1) 0.8% of the basis – for the part in which the basis does not exceed PLN 170 million; 2) 1.4% of the basis above PLN 170 million – in the part the basis exceeds PLN 170 million (article 9 of the Act). The taxpayers are required to calculate the tax and pay it into the tax office's bank account for monthly taxable periods (Article 10(1) of the Act).

Numerous substantiated arguments support the proposition that the Polish retail sales tax is a not selective measure in the meaning of Article 107(1) TFEU.

Polish retail sales tax constituted in this way fails to meet the criteria to be regarded as a selective measure in the meaning of Article 107(1) TFEU. In particular, its alleged selectivity certainly cannot be inferred from the inclusion in its design of progressive rates at 0.8% and 1.4% of the taxable basis. (As a marginal note, the EC Decision wrongly assumes the alleged existence of a third tax rate at 0% – EC Decision, paragraph 8; this is a demonstration of the failure to understand the scheme of this Polish tax, since retail sales revenue up to the amount of PLN 17 million is not taxed at a 0% tax rate but is not included in the basis at all – see Article 6(1) of the Act on Retail Sales Tax.)

That Polish retail sales tax is not a selective measure in the meaning of Article 107(1) TFEU is demonstrated by circumstances and arguments that follow below.

Firstly, the scheme of Polish retail sales tax does not include any derogations from its relevant reference system that could hypothetically be regarded as selective. The reference system relevant to Polish retail sales tax is the whole of that tax, with its complete design, as applied to undertakings operating within the territory of Poland in the sector of retail sales of all sorts of goods, having as its inherent element progressive rates at 0.8% and 1.4% of the tax basis. Granted, the EC Decision regards the progressive rates (or progressive rate scale) defined in the Act on Retail Sales Tax as not constituting part of the reference system (EC Decision, paragraphs 22–29). However, that position is fraught with errors. Tax rates always constitute an inherent element of any tax (*viz.* they are an indispensable element of the facts relevant to tax law as defined in any tax statute), without which, in principle, no tax can exist. Interestingly, in its 2016 Notice, the EC itself admits that, for state measures being taxes, tax rates constitute an element of the reference system – in the EC's opinion the system of reference relevant to the relevant tax is based, among other things, on tax rates[17]. That last assertion is all the more relevant to Polish retail sales tax, which contains only two tax rates. Those tax rates are defined in a transparent and clear way, are relatively low and relatively flat (*viz.* the transition from one rate to the other is neither rapid nor radical, as the higher rate is in only a 1.75 proportion to the lower). Moreover, the higher rate applies only to the taxpayer's revenues in excess of the PLN 170 million threshold. This means the higher rate applies neither to all of the taxpayer's revenues, nor even to all of the taxpayer's revenues in excess of the basis threshold. (The Polish tax under discussion, therefore, shows a 'bracketed' progression, which is very advantageous to taxpayers.) It is also an important fact that both of the rates in Polish retail sales tax are of a fully

17 2016 EC Notice, paragraph 134.

objective and non-discriminatory nature, given that they are made relative to an objectively specified tax basis, which is monthly retail sales revenues in excess of PLN 17 million. The nature of this type of taxable basis and threshold is fully open, in the sense that no one is excluded *a priori*, or discriminated against, and both are accessible to anyone. This means that any taxpayer (being an undertaking engaging in retail commerce) may take advantage of the aforementioned tax basis threshold. It is because, firstly, anyone who fails to achieve such monthly revenues is not taxed at all, and, secondly, no taxpayer whose retail sales revenue exceeds the threshold is taxed on revenues below the threshold (and this is not subject to any discretionary or arbitrary decision-making on the part of any authority). Furthermore, the existence of two different tax rates in Polish retail sales tax, and the exclusion of revenues below the tax basis threshold, are justified by the objectives of this tax, namely the pursuit of budget revenue with the simultaneous desire to distribute the related tax burdens among the various taxpayer categories according to their ability to pay, so as to protect the tax basis and allocate the tax burdens fairly (which, in a way, in return contributes to the achievement of the fiscal objectives of this tax). The objectives of the Polish retail sales tax are not only fiscal (i.e. aimed at filling the budget) but also redistributive[18]. And these, precisely, are the objectives explaining the establishment of two different tax rates for retail sales tax, as well as a tax basis threshold. The progressive tax rates and the tax basis threshold are of utility both to the fiscal objective of Polish retail sales tax (because the budget income from this tax can only be realized in the assumed degree if the burdens are allocated in accordance with the principle of ability to pay and in that connection the weaker taxpayers are not burdened excessively or ruinously, while also the stronger taxpayers are afforded the benefit of the basis threshold) but also its redistributive purpose (i.e. fair distribution of tax burdens according to ability to pay). Hence, the European Commission is wrong in asserting that Polish retail sales tax containing a progressive rate scale: 'is, therefore, selective in a manner that cannot be justified by the objective of the tax being to secure budget revenue for the state,' and, in consequence: 'the appropriate reference system in the case at hand is the taxation of monthly proceeds from retail sales without the progressive rate scale being part of the system,' (EC Decision, paragraph 29). Contrary to the Commission's assertion, it is precisely thanks to the progressive rates, and also thanks to having a tax basis threshold, that the objectives of Polish retail sales tax can be achieved, including the achievement of its fiscal objective (i.e. generation of budget revenue). It is because of the instrumental relationship between the structural elements of the tax and its objectives, among other reasons, that both of the progressive rates and the tax basis threshold constitute an inherent element of the reference system relevant to Polish retail sales tax.

What was said above about progressive rate scales and the tax basis threshold in Polish retail sales tax (i.e. their objective and non-discriminatory nature, as well as instrumental utility in the pursuit of the objectives, including the fiscal objective, of the tax), ultimately permits the conclusion that both of the progressive rates and the tax basis threshold constitute elements of a consistent set of tax rules applicable, on the basis of objective criteria, to all undertakings (taxpayers) subjected to Polish retail sales tax, as defined according to the system's objective. In this sense both of the progressive rates and the basis threshold are an inherent element of the reference system relevant to Polish retail sales tax. From that reference system, in turn, which includes, among other things, both of the progressive rates and the tax basis (including the threshold), there are no further derogations in the Act on Retail Sales Tax; for example no such tax exemptions as might attest to the selectiveness of the tax in the meaning of Article 107(1) TFEU.

By contrast, the EC's position according to which the reference system relevant to Polish retail sales tax is that same tax divorced from its progressive rate scale (see EC Decision, paragraphs 22–29) is highly arbitrary and lacks support in any persuasive arguments, as well as based on an erroneous and impoverished way of identification of the objectives of Polish retail sales tax (*viz.* the EC fails at all to account for the redistributive objective of the tax and fails to perceive

18 Explanatory memorandum to the draft bill of Act on Retail Sales Tax, pp. 1 and 7.

the utility of progressive rates in the pursuit of the fiscal objective of the tax). Ultimately, it provides an example of excessive interference with Poland's fiscal autonomy as an EU Member State[19].

Secondly, should one reject the thesis defended in this article that both of the progressive rates in Polish retail sales tax constitute an inherent element of the reference system relevant to Polish retail sales tax, there would still be no basis to – as the EC Decision does – exclude both of the progressive tax rates from the tax's reference system. Instead, at least one of the rates should be regarded as a part of the relevant reference system; namely, the one that finds the most frequent practical application in taxing retail sales revenue. In the case law of the EU courts and the EC's decision-making practice, it has not infrequently been held that the reference system relevant to the relevant tax comprises at least one of the two or more progressive rates existing within the scheme of the relevant tax, namely the one that is of the most frequent practical application, and not the tax alone without any progressive rates[20]. By analogy, also in the EC Decision it ought to have been considered, or Poland ought to have been required to consider, which of the rates of Polish retail sales tax applies to the majority of undertakings (taxpayers) most frequently, permitting that rate to be regarded as the normal or reference rate. In omitting this, the EC made its task easier and enabled itself to draw the rash and unjustified conclusion that the reference system relevant to Polish retail sales tax was that tax alone with neither of the both progressive rates.

Thirdly, even if we should follow the Commission's reasoning expressed in its decision and assume that the reference system relevant to the Polish retail sales tax is that same tax without the progressive rates, the legal scheme of that tax still shows no derogations from that reference system favouring any specific undertakings whose factual and legal situation is similar to that of other undertakings in the light of that basic reference system. In particular, no such derogation violating the equality principle (and consequently selective in the meaning of Article 107(1) TFEU) can be found in the two progressive rates applicable as part of Polish retail sales tax. This is because the two progressive rates introduce differentiated tax burdens for two categories of undertakings (taxpayers) that, in the light of the fiscal and redistributive objectives of the retail sales tax (being the reference system in the discussed case), are in a different factual and legal situation. Namely, undertakings with monthly retail sales revenues within the PLN 17–170 million bracket are undertakings with much less economic force and ability to pay the tax in the relevant reference period than undertakings with monthly retail sales revenues in excess of PLN 170 million; this difference as to the economic potential of both of the groups of undertakings is clear and noticeable. Furthermore, different still is the factual and legal situation of those undertakings whose monthly retail sales revenues do not exceed PLN 17 million and which, in consequence of failing to reach the tax basis threshold, are not taxed at all; their economic power and ability to pay taxes are far less than those of both of the groups of undertakings mentioned before. Here, one must add that undertakings belonging to the first of the aforementioned groups, *viz.* those with the highest monthly retail sales revenue, are – thanks to their size – in a position to achieve so-called economies of scales, thereby reducing (rationalizing) their costs and further increasing their income, i.e. their net profits. (As to how large retailers achieve such economies of scale see the remarks that follow in the later on in this article). On the other hand, such options are not available to a similar extent to smaller undertakings, whose monthly retail sales revenues do not exceed the tax

19 Concerning the fiscal autonomy of EU Member States, see e.g. R. Barents, *The Single Market and National Tax Sovereignty* (in:) S. J. J. M. Jansen (ed.), *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future*, Alphen aan den Rijn 2011, pp. 51–71; F. Vanistendael, *The European Union* (in:) G. Bizioli, C. Sacchetto (eds.), *Tax Aspects of Fiscal Federalism: A Comparative Analysis*, Amsterdam 2011, pp. 581–648; M. Isenbaert, *EC Law and the Sovereignty of the Member States in Direct Taxation*, Amsterdam 2010, pp. 5–227.

20 Judgments of the Court: of 5 February 2015 in Case T473/12 *Aer Lingus Ltd v. Commission*, ECLI:EU:T:2015:78, paragraphs 47–64; of 5 February 2015 in Case T-500/12 *Ryanair Ltd v. Commission*, ECLI:EU:T:2015:73, paragraphs 69–90, as well as the EC decisions evaluated in those judgments.

basis threshold – PLN 17 million or PLN 170 million. This reinforces the conclusion that the factual situation of undertakings belonging to the various aforementioned groups is highly differentiated and not uniform and, as a result, the adoption of different retail sales tax rules (demonstrated in differentiated tax rates or total exclusion of some undertakings from taxation in consequence of the failure to exceed the tax basis threshold) does not violate the principle of equality before law but is an appropriate (fair) response the part of the Polish lawmaker to significant disparities in the economic standing and financial power of the various groups of undertakings.

The progressive rates and the tax basis threshold as (differentiating) derogations from the reference system are supported (justified) by the redistributive objective of Polish retail sales tax.

A different position is taken in the EC Decision, *viz.* that, in the light of the fiscal objective of Polish retail sales tax (i.e. to fill the state budget) all economic operators engaging in retail sales in Poland find themselves in a similar legal and factual situation irrespective of the type of activity and size of revenues, with the result being that the existence of a progressive rate scale in the tax at hand leads to differentiated treatment depending on the size of those retailers who, in the light of the tax's objective, are in a similar legal and factual situation. That, in turn, allowed the EC to conclude that the Polish retail sales tax was selective (EC Decision, paragraphs 30–33). In the light of the arguments raised above, that particular position taken by the EC is fraught with errors, and the errors result in particular from the Commission's failure to take into account the redistributive objective of the Polish retail sales tax, which consists in striving to allocate the tax burdens among the various taxpayer categories according to their ability to pay in order to protect the tax basis and distribute the tax burdens fairly according to the economic power of the various categories of undertakings, measured according to the size of their monthly retail sales revenues. This redistributive objective of the tax under discussion is, besides, tightly linked to its fiscal objective, because fair tax redistribution contributes to increased efficiency in securing budget revenues. In the light of the aforementioned redistributive objective of Polish retail sales tax (connected with its fiscal objective), it is not at all possible to claim that all undertakings engaging in retail sales in Poland, irrespective of the type of their activities and size of their monthly revenues, find themselves in the same legal and factual situation and in particular that they have the same level of taxpaying ability. The EC's failure to account for this redistributive objective of Polish retail-sales tax in assessing the nature of the derogations from the relevant reference system (i.e. derogations in the form of progressive rates and the exclusion of undertakings not exceeding the tax basis threshold from taxation) constitutes another manifestation of the excessive interference with Poland's fiscal autonomy as an EU Member State, visible in the EC Decision.

Fourthly, even should one accept that the reference system relevant to Polish retail sales tax is composed of that same tax alone divested from its progressive rates (as was done in the EC Decision, paragraphs 22–29), and, furthermore, should one accept that the tax under discussion, because of its legal scheme – *viz.* through progressive rates and exclusion from the taxation of undertakings not meeting in the relevant month the tax basis threshold – derogates the application of the rules of the reference system in a way that favours certain undertakings that in the light of

the reference system's basic objective are in a similar factual and legal situation (as is the interpretation in the EC Decision, paragraphs 30–33), honesty requires one to observe that the progressive rates and the tax basis threshold as (differentiating) derogations from the reference system are supported (justified) by the redistributive objective of Polish retail sales tax. This redistributive objective of Polish retail sales tax consists in striving to distribute the burdens generated by that tax among the various categories of undertakings (taxpayers) according to their ability to pay in order to protect the tax basis and allocate tax burdens fairly according to the economic power of the various categories of undertakings, measured by the size of their monthly revenues from retail sales. Attempting to shape any tax (including retail sales tax) in such a way as to distribute the burdens generated by that tax in keeping with the principle of the taxpayers' ability to pay belongs to the guiding principles of Poland's tax system and manifests itself especially in income and revenue taxation[21]. Polish retail sales tax is a revenue tax, and, in its case – similarly to income taxes – the Polish lawmaker strives to guarantee a relatively even distribution of tax burden among retailers, according to their individual ability to pay. It is beyond any doubt, after all, that retailers with monthly revenues on retail sales in excess of PLN 170 million have incomparably more economic and financial potential for paying retail sales tax than retailers achieving monthly retail sales revenues within the PLN 17–170 million bracket, who, in turn, are still economically capable of paying the discussed tax in a much greater degree than those retailers whose retail sales revenues do not exceed that basis threshold of PLN 17 million.

The conclusion concerning this sort of progressive differentiation of the ability to pay among the various aforementioned categories of undertakings finds additional support in the fact that the undertakings belonging to the first of the aforementioned groups – namely, those with the highest monthly retail sales revenues – are thanks to their size capable of realizing so-called economies of scale, thereby decreasing their costs and further increasing their income, i.e. net profits. Those largest retailers are capable of suitably optimizing their total costs (provided that this refers to actual economic optimization, not illicit cost manipulation for the purposes of tax fraud), they can reduce their unit costs, they can distribute their fixed costs among a greater number of transactions, and they can obtain higher discounts from their suppliers. The Commission itself, in its decisions made in anti-trust cases, has many a time held that large retailers also have correspondingly large potential for optimizing (rationalizing) their costs and realizing the economies of scale linked to the size of their commercial operations[22]. On the other hand, such options are not available to a similar extent to smaller undertakings, including especially those retailers trading in Poland whose monthly retail sales revenues do not exceed the basis threshold – PLN 17 million or PLN 170 million. Due to the different levels of economic power enjoyed by and different financial options available to the various aforementioned categories of undertakings, the Polish lawmaker decided to make applicable to them different rules of retail sales taxation (manifesting themselves in a progressive rate scale and the exclusion of undertakings not meeting the tax basis threshold in the relevant month from taxation), and even if we were indeed to regard such different taxation rules as *prima facie* selective (as the EC Decision, in paragraphs 30–33, asserts, and which is highly controversial and doubtful), such types of differences are justified by the redistributive objectives pursued by the Polish lawmaker in this case, namely striving for a repartition of the burdens generated by the tax among the various categories of undertakings (taxpayers) according to their ability to pay, so as to protect the tax basis and allocate tax burdens fairly

21 As Professor Ryszard Mastalski puts it: 'the implementation of taxation according to ability to pay should result in the tax burdens being distributed according to the individual ability to pay, on the basis of accounting for all personal and above all economic and financial elements;' this principle should: 'determine the personal and the material scope of taxation and its value,' – R. Mastalski, *Prawo podatkowe – część ogólna*, Warsaw 1998, pp. 4–5.

22 See e.g. EC Decision of 17 December 1975 in Case IV/26.699 *Chiquita* (OJ EEC L 95 of 9/4/1976, p. 1); EC Decision 2003/2/EC of 21 November 2001 in Case COMP/E-1/37.512 *Vitamins* (OJ EC 2003, L 6, p. 1), paragraph 713.

according to the economic power of the various categories of undertakings, measured by the size of their monthly revenues from retail sales.

In this context, it would be appropriate to recall that the redistributive objectives of the relevant tax are enumerated in the 2016 EC Notice on State Aid among those objectives or values that the Member States can rely on to support (justify) the *prima facie* selective nature of some of their tax solutions, including progressive rates in income taxation[23]. While the EC mentions the possibility of relying on redistributive objectives, including progressive rate scales, to justify selective solutions in income taxation, such an option must consequently exist in revenue taxation (such as Polish retail sales tax), which, from the perspective of its fiscal efficiency being dependent on the various taxpayers' ability to pay, is substantially identical (or at least comparable) to income tax. This is because also in revenue taxation, and certainly in the case of Polish retail sales tax, it is important to fiscal efficiency that the severity of taxation (dependent on the tax rates and tax basis threshold) be adapted to the various taxpayers' ability to pay and that the burdens generated by the tax be allocated in a relatively even way resulting in a fair redistribution of the burdens. (This fair redistribution of burdens has, on the one hand, an idealistic dimension to it and is a value unto itself, and on the other hand it is of instrumental utility to the fiscal objectives of the tax, enabling for the state – by preserving the taxable basis – a realistic achievement of the projected budget revenue from the relevant tax.) Polish lawmaker's pursuit of such a type of redistributive objective – a legitimate objective in all income and revenue taxation – is, in the light of Article 139 of the 2016 EC Notice, a value that adequately justifies the *prima facie* selective legal solutions used in the Polish Act on Retail Sales Tax (provided we deem such *prima facie* selective solutions to include progressive tax rates and exclusion of undertakings not meeting the tax basis threshold in the relevant month from taxation).

A different position was taken in the EC Decision, asserting that Poland cannot rely on a redistributive objective to justify progressive rates of retail sales tax, as there is no evidence showing that undertakings achieving higher retail sales revenue simultaneously achieve higher profits or have more solvency (EC Decision, paragraphs 34–39). This Commission's position manifestly ignores the economic reality and marks an absolutely dazzling attempt at persuasion – contrary to all laws of economy, confirmed by the EC itself in many of its own decisions in anti-trust cases concerning retail commerce – that extremely large undertakings engaging in retail commerce and achieving very high monthly revenues on that activity allegedly are unable to benefit from the economies of scale and have no ways of improving their fixed costs and reducing their overall costs. The EC's lack of assent, resulting from this position, to Poland's enjoyment of all of the desirable and beneficial consequences of the country's ability to shape its own tax system (as regards retail sales tax) in keeping with the principle of ability to pay and in line with redistributive purposes, constitutes a violation, by the EC, of the fiscal autonomy Poland is entitled to as an EU Member State.

Fifthly, even if we were to agree that a progressive rate scale in retail sales tax and exclusion of undertakings not meeting the tax basis threshold in the relevant month from taxation constitute *prima facie* selective solutions (as is held in the EC Decision, paragraphs 30–33), one must at the same time note that Poland can justify such types of selective solutions with the need to counteract financial fraud or tax evasion, and therefore the purposes the EC itself regards as capable of justifying *prima facie* selective means and making them non-selective in the meaning of Article 107(1) TFUE (2016 EC Notice, paragraph 139). Progressive rates calculated on the taxable basis manifesting itself in revenue on retail sales, such as those existing in Polish retail sales tax, make it possible to combat financial fraud or tax evasion for two principal reasons. Firstly, with the application of such rates it is very easy to calculate the tax due from each retailer, as it is then sufficient to multiply its monthly retail sales revenue by the tax rate, and at that point there is no need of subtracting costs from revenues, which is always a complicated operation paving way to various

23 2016 EC Notice, paragraph 139; identically, EC notes in paragraph 24 of its 1998 Notice on the application of State aid rules to measures relating to direct business taxation (OJ EU C 384 of 10/12/1998, pp. 3–9).

abuse. If the tax rate applies to revenue instead, undertakings can no longer engage in a variety of illicit tax optimizations showing artificial or exaggerated costs. Secondly, the application of a higher progressive tax rate on the retail sales revenues of undertakings having monthly retail sales revenues in excess of PLN 170 million affects large retailers with a lot of economic power, often having complicated capital ties to other undertakings. Precisely for such types of undertakings it is a relatively easy thing to do to artificially elevate their costs through correspondingly higher so-called transfer prices or some other internal transfers occurring within their capital groups, which, in turn, has the purpose of avoiding tax on income actually achieved. If, hypothetically, the retail sales achieved by such sorts of large retailers, usually operating within an extensive network of capital ties within capital groups, were to be taxed with a rate calculated on their income (and not revenue) – whether with a flat or a progressive rate applied on the income – then it would be very easy for them to artificially push down their income and therewith the tax due, by engaging in fraudulent or aggressive cost elevation. The use of progressive tax rates applied on revenue, as with Polish retail sales tax, in practice makes it impossible for them to accomplish such a type of manipulation geared toward evading the tax.

The EC Decision did not agree with this the justification of the structural elements of Polish retail sales tax under discussion here, noting that: 'the Polish authorities have not provided any detailed arguments on the alleged optimising strategies put in place by larger or multinational companies, nor the link between such alleged behaviour and the design of the tax,' (EC Decision, paragraph 38). The EC, however, ignores in this case the fact that while the CJEU, in its case decisions, allows Member States to apply specific tax rates differentiating taxpayers in some way and justified by the need to fight tax evasion and manipulative taxpayer behaviour aimed toward tax reduction or evasion, it does not at all require the Member States to submit any special proof or arguments attesting to the fact of or size of tax-optimization strategies used by undertakings. Instead, in such cases the Court satisfies itself with the Member State's stated rationale indicating simply the possibility or risk of tax manipulation on the part of undertakings, which, for the CJEU, constitutes sufficient justification for Member States' use of *prima facie* selective preventive measures[24]. Thus, the introduction of the aforementioned progressive rate scale for a certain category of taxpayers is not selective in the meaning of Article 107(1) CJEU, if it is intended to counteract certain manipulations engaged in by taxpayers to evade (higher) taxes, which interferes with normal competition in the market. The Court does not require evidence of the actual practice of such tax evasion but satisfies itself with the fact that some taxpayers could engage in such behaviour[25]. The above-cited EC Decision, paragraph 38 fails to take this fact into account.

It must also be remembered that the discussed (income-) tax-manipulation (-optimization) strategies employed by undertakings with capital ties, including especially undertakings belonging to international capital groups, are in no way merely 'alleged' (EC Decision, paragraph 38) but are an element of the economic reality of the European Union, of which the EC has very good knowledge and is fully aware. The fact that international capital groups, including those trading in the retail sector, have an inclination to circumvent tax law, and that they use aggressive tax strategies diminishing the tax due, is fully recognized by the EC in a variety of its own official documents in which the Commission itself suggests various preventive measures to counteract the practice[26]. In this

24 See e.g. CJEU judgment of 29 April 2004 in Case C-308/01 *GIL Insurance Ltd, UK Consumer Electronics Ltd, Consumer Electronics Insurance Co. Ltd, Direct Vision Rentals Ltd, Homecare Insurance Ltd, Pinnacle Insurance plc. v. Commissioners of Customs and Excise*, ECLI:EU:C:2004:252, paragraph 70–78.

25 *Ibidem*.

26 See e.g. Commission Proposal of 18 March 2015 for a Council Directive amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation, COM(2015) 135 final; Communication from the Commission to the European Parliament and the Council of 18 March 2015 on tax transparency to fight tax evasion and avoidance, COM(2015) 136 final; Communication from the Commission to the European Parliament and the Council of 28 January 2016 – Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU, COM(2016) 23 final; Communica-

sense, the *a priori* disqualification, in the EC Decision, paragraph 38, of the Polish side's argument justifying the use of revenue-based progressive tax rates with the need to fight financial abuse or tax fraud, notably with no detailed explanation given, manifests arbitrary neglect of facts known to the EC *ex officio*, is incompatible with the 2016 EC Notice, paragraph 139 and violates – once again in the EC Decision – the fiscal autonomy to which Poland is entitled as an EU Member State. Within the aforementioned fiscal autonomy one of the things Member States are allowed to do is to pursue a legitimate objective in the form of creating the right circumstances to guarantee honesty in the performance of tax obligations. The EC Decision prevents Poland from pursuing this objective.

Sixthly, assuming that progressive tax rates in retail sales tax and the exclusion of undertakings not meeting the tax basis threshold in the relevant month from taxation are *prima facie* selective solutions (as held in the EC Decision, paragraphs 30–33), such solutions can be justified by specific negative external effects caused by the taxable activities, *viz.* retail commerce. In its decision-making practice the EC holds that negative external effects can justify a Member State's use of a progressive rate scale in revenue- (turnover-) based tax if the tax is a response to or preventive measure against the aforementioned negative external effects and if the scope (size) of such negative external effects increases along with increase in revenue and size of the (taxable) operations[27]. For Polish retail-sales tax, the above conditions can be deemed met. The Polish side can, therefore, avail itself of the argument that the aforementioned tax rates applicable to retailers achieving higher revenue are justified by the much greater scale of potentially negative effects caused by their operations, namely the social effects (e.g. breaches of occupational safety and health or Sunday rest employees are entitled to), economic effects (e.g. violations of competition law) or ecological effects (e.g. greater waste production and energy consumption).

Seventhly, it must be recognized that both progressive rate scales and the tax basis threshold in Polish retail sales tax – approached in the EC Decision as differentiating derogations from the reference system relevant to that tax – are fully proportionate and first and foremost necessary from the perspective of the values invoked by the Polish side as justifying the *prima facie* selectivity of Polish retail sales tax, such as the redistributive objective of that tax entailing the need to adapt its value to the various undertakings' ability to pay, and the need to counteract financial abuse and tax fraud. The requirement of this sort of proportionality is a condition that must absolutely be met if the relevant *prima facie* selective domestic tax measure is ultimately to be deemed non-selective in the meaning of Article 107(1) TFEU[28].

A closer analysis of progressive tax rates and the tax basis threshold in Polish retail sales tax leads to the conclusion that both these elements are fully proportionate to the reasons (values) justifying the *prima facie* selectiveness of Polish retail sales tax. In this context it is especially worth noting that the proportionality of progressive tax rates in Polish retail sales tax is overwhelmingly demonstrated in how they are in effect very mild on and friendly to the taxed undertakings, imposing no excessive or overly drastic tax burdens. This qualification and evaluation of the progressive rate scale in Polish retail sales tax is determined by the following circumstances: 1) the rates are neither high nor extortionate, especially if compared to the rates in place in some other EU Member States; the progression is bracketed and not global, which means that the higher rate (1.4%) applies only to the part of taxpayer's revenue exceeding PLN 170 million, and therefore the higher rate applies neither to all of the relevant taxpayer's revenue, nor even to all of the taxpayer's revenue exceeding the tax basis threshold (this means that the relevant taxpayer's retail sales revenue

tion from the Commission to the European Parliament and the Council of 5 July 2016 on further measures to enhance transparency and the fight against tax evasion and avoidance, COM(2016) 451 final.

27 EC Decision of 12 March 2015 – State aid – SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ UE C 136 of 24/4/2015, p. 7), paragraph 37; EC Decision, paragraph 38.

28 CJEU judgment: *Paint Graphos and others*, as cited above, ECLI:EU:C:2011:550, paragraph 75; *Heitkamp Bau Holding GmbH v. Commission*, as cited above ECLI:EU:T:2016:60, paragraph 160; 2016 EC Notice, paragraph 140.

within the PLN 17–170 million bracket is taxed at 0.8%, even where the relevant taxpayer's revenue within the reference tax period exceed PLN 170 million); 3) the progressive rates in the tax under discussion are relatively flat (rather than steep), *viz.* the move from one rate to the next is neither rapid nor radical, as the higher rate remains in only a 1.75 proportion to the lower rate; 4) the retail sales tax is settled with the tax office in monthly periods, i.e. at relatively short intervals. Within such short settlement periods even a smaller retailer could occasionally exceed the PLN 170 million revenue threshold and to that extent be taxed at the higher rate, while a very large retailer could in one of the reference settlement periods fail to exceed the PLN 170 million revenue threshold, in which case it would not be taxed at the higher rate but only pay the lower rate or not pay the tax at all due to not having exceeded the tax basis threshold. In such a turn of events (and not, for example, quarterly or annual) settlement periods in Polish retail sales tax contribute in the long term to equalizing (levelling) the differences between larger and smaller retailers. This, in turn, shows not only the abundant mildness and proportionality of the progressive rate scale construction in Polish retail sales tax but is also a fact that contradicts the EC's unequivocal assertions that the progressive tax rates in this Polish tax very strongly differentiate among the various categories of taxpayers (*viz.* large versus small retailers) and that the rates are in consequence selective in the meaning of Article 107(1) TFEU (EC Decision, paragraphs 29, 32 and 37). Such a type of unequivocal assertions on the part of the EC are incorrect, among other reasons, due to how the Polish lawmaker opted for a shorter, monthly (rather than significantly longer) settlement period for retail sales tax; 5) each of the progressive rates in the Polish retail sales tax applies to a tax basis that encompasses the retail sales revenue of only one undertaking (one taxpayer), without adding thereto the revenues achieved by other undertakings, having capital or franchise ties to the taxpayer. This, again, is a fact that attests not only to the proportionality of the legal scheme of the progressive rate scale in this tax but also one that shows how no additional burden is imposed on large retailers – usually having high revenue levels and capital or franchise ties to other large retailers – but instead they obtain a sort of tax advantage. In a specific way, this mitigates or levels the retail tax burden imposed on large retailers and to some extent equalizes their situation relative to smaller retailers[29]. This fact contradicts the EC's claims of

The progressive tax rates and the tax basis threshold in Polish retail sales tax are fully proportionate to the values invoked by Poland to justify the *prima facie* selectiveness of Polish retail sales tax such as: the redistributive purpose of the tax connected with the need to adapt the amount thereof to the various undertakings' ability to pay and the need to counteract financial abuse or tax fraud.

29 Additionally, this solution differs from the one used, among others, in the provisions of the Hungarian law on tax on retail

the situation of the various categories of taxpayers (*viz*. large and small retailers) being strongly differentiated by the Polish retail sales tax (EC Decision, paragraphs 29, 32 and 37).

Ultimately, therefore, the conclusion should be that, contrary to the position taken in the EC Decision, the legal scheme of Polish retail sales tax is such that makes it (even considering its progressive rate scale and exclusion of revenue below the tax basis threshold) a non-selective measure in the meaning of Article 107(1) TFEU, and therefore not state aid in the meaning of that provision. Poland designed (constructed) its retail sales tax in this way and not any other to achieve a specific fiscal objective and simultaneously accomplish the redistribution of the revenue (and income) of undertakings (which, *nota bene*, indirectly contributes to the fiscal objectives of this Polish tax) and thus implement the legitimate objectives (principles) of the domestic tax system, which falls within the fiscal autonomy of EU Member States. Poland did this in a manner that is fully respectful of the principle of proportionality.

4. Summarizing remarks and recommendations as to the EC's future decision-making practice concerning the qualification of retail sales taxes or similar levies as selective measures in the meaning of Article 107(1) TFEU.

In its decision-making practice to date the EC has generally refrained from challenging tax progression in income and revenue taxation as allegedly violating Article 107(1) TFEU. It only started doing so with regard to Poland and a while earlier Hungary in the matter of an analogous retail sales tax and in the matter of some other similar Hungarian public levies regarded by the EC as selective measures in the meaning of Article 107(1) TFEU[30] (provided that the facts and laws in the Hungarian cases differ on several important points from the Polish retail sales tax). The EC's new tendency, manifesting itself in the Hungarian cases and the Polish case, to dispute tax progression as fundamentally incompatible with Article 107(1) TFEU, provokes great astonishment and deserves far-reaching criticism. The European Commission must respect the fiscal autonomy of Member States, and, in consequence, it cannot regard all tax progression in a domestic tax as a selective measure in the meaning of Article 107(1) TFEU. The Commission should, therefore, show appropriate forbearance to Member States in assessing whether their tax progression: 1) should be qualified (counted) as an element of the reference system relevant to the tax; 2) derogates from the principle of taxpayer equality; 3) is justified and proportionate. By contrast, in this sort of new decision-making practice, the EC – in all those cases in which it considers the aforementioned three issues relating to tax progression –not only fails to show any forbearance or responsiveness to Poland and Hungary, but it *a priori* assumes the most unfavourable position vis-à-vis these Member States. That, in turn, *de facto* violates the fiscal autonomy of these two states and prohibits them from conducting their own economic and fiscal policies, motivated, after all, not by an intention to discriminate against or favour any of the taxed undertakings or groups thereof but by an intention to pursue justified fiscal and redistributive objectives and objectives relating to the prevention of dishonest taxpayer behaviour. For challenging by the EC of the permissibility of the Member States' pursuit of the aforementioned objectives undermines the confidence in the EC as a guardian of common values within the EU and weakens the legitimacy the institution needs to fight the real undesirable trends in enterprise taxation.

turnover in stores – see the contents of the relevant Hungarian solutions cited in the CJEU judgment of 5 February 2014 in Case C385/12, *Hervis Sport- és Divatkereskedelmi Kft. v. Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága*, ECLI:EU:C:2014:47, paragraphs 3–11.

30 Commission Decision (EU) 2016/1848 of 4 July 2016 on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee (OJ EC C 277 of 21/8/2015, p. 12); Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, as cited above; Commission Decision (EU) 2016/1846 of 4 July 2016 on the measure SA.41187 (2015/C) (ex 2015/NN) implemented by Hungary on the health contribution of tobacco industry businesses (OJ EU C 277 of 21/8/2015, p. 24).

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Legal Influence on the Service Continuity Provisions of Modern Power Systems

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I. Introduction

The dynamic changes in technology confront legal scholars with new phenomena, and new technological solutions which pose new issues to be resolved or regulated. However, a nexus of legal and technical experience is necessary to look for optimal answers to these challenges.[1] One of the major changes happens now in the power system. Paper deals with the phenomenon of decentralization of power system through sharing the control of energy production, and energy transfer. On the one hand the state shares it with lower level administration, ie. with local authorities, or communities. On the other hand it has started to share it with individuals-prosumers, or with group of individuals by allowing subsidiary small-scale production, and transfer of energy which can eventually in near fu-

1 That is why Stanford Law School has started joint-degree program: JD/MS degree in Law and Electrical Engineering.

ture be transformed into a blockchain of smart homes. The paper gives an overview on a legal and technical framework in the light of discussion about pros and cons of centralized, and decentralized power systems critical infrastructure and the challenge of digitalization of power system as such.

The paper gives an overview on a legal and technical framework in the light of discussion about pros and cons of centralized, and decentralized power systems critical infrastructure and the challenge of digitalization of power system as such.

The ongoing debate over energy autarky envisages it as a way to enhance sustainable development through transformation of energy system.[2] The concept of energy autarky is based on decentralization of energy system, and splitting it into local energy resources. Usually it has much in common with renewable energy resources. However, it does not have to be limited only to this dimension. One can learn much more from flourishing phenomena of blockchain processes.

The idea of energy autarky is to be achieved through the cooperation of numerous small energy units. Applying blockchain processes to a power system is not a mere idea. Just recently Korean Electric Power Corporation has announced the program to develop a blockchain-based microgrid. The program is called „KEPCO Open MG Project" within which will be applied the „Future Micro Grid".[3] Even before blockchain phenomenon erupted, the idea of decentralization of power system has been on the agenda, for example in the United Kingdom. It was the way to democratization of power system. Nowadays decentralization of power system is still one of the future challenges,

The idea of energy autarky is to be achieved through the cooperation of numerous small energy units. Applying blockchain processes to a power system is not a mere idea.

2 M. Muller, A. Stampfli, U. Dold, T. Hummer, *Energy autarky: A conceptual framework for sustainable regional development*, "Energy Policy" 2011, vol. 39, p. 5800–5810; C. Brosig, E. Waffenschmidt, *Energy Autarky of Households by Sufficiency Measures*, "Energy Policy" 2016, vol. 99, p. 194–203.

3 Korea Electric Power Corp developing blockchainmicrogrid: https://www.offgridenergyindependence.com/articles/15889/korea-electric-power-corp-developing-blockchain-microgrid (last access 03.12.2018).

just like decarbonization, deregulation and digitalization of power system.[4] Applying new phenomena of blockchain process to power system, deals both with its decentralization, and digitalization. Both are bottom-up processes which enables energy consumers to take part not only in monitoring their power usage, and storage, but also in offering their power producing capacities into the market which means a broad deregulation of the energy market.[5]

From legal point of view the question is how far regulation can go in to control the distributed power system, and how much it has to protect privacy, and freedom of energy consumers and prosumers. Without doubt much depends on effective cooperation at the local level, and on trust, which is one of the key factors of blockchain processes.[8] Broad range of above-mentioned issues will be taken on the example of security of power system infrastructure, and challenges that it can face. Today the power system infrastructure seems to be well defined, and regulated. Figure 1 represents energy system with the energy as the end-product, and the most important object of the power system security measures. All elements like resources necessary to set the system into motion, wanted side-effects: by-products and unwanted side-effects: pollution – are important for the security, and that is why they have not only technical definition but also legal definitions and legal sanctions that regulate lawful way of conducting power system.[9]

Without doubt much depends on effective cooperation at the local level, and on trust, which is one of the key factors of blockchain processes.

Autarky of energy system is usually seen as a political dream to be more independent, and less vulnerable to political impact of energy producers, and suppliers.[6] However, as debate on energy autarky goes, it becomes clear that one of the way to be more safe in terms of energy supply, is to cooperate with many energy producers, and providers, and not to limit the energy chain to one, or to main supplier.[7] It is true in regard to the inner structure of power system of a country as well.

However, there are some obstacles which can have negative impact on the security of power system. Technical experts claim that decentralization and digitalization of power system can cause limited visibility of power system, limited control over private distributed energy units, limited predictability of demand and supply of energy, and limited coordination of numerous individuals and private energy units: mainly smart homes.

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However, in near future every home can become an element of critical power infrastructure. Our paper will briefly examine main aspects of the issue of decentralization of power system and provide conclusions in the interdisciplinary perspective.

4 *Stable grid operations in a future of distributed electric power. White Paper*, International Electrotechnical Commission, Geneva 2018, p. 3.

5 Ibidem, p. 28.

6 *The Geopolitics of Power Grids. Political and Security Aspects of Baltic Electricity Synchronization*, E. Tuohy, T. Jermalavičius, A. Bulakh, H. Bahşi; A. Petkus, N. Theisen, Y. Tsarik, J. Vainio, International Centre for Defence and Security, Tallinn 2018.

7 Energy 2020, *A strategy for competitive, sustainable and secure energy*, p. 8, https://ec.europa.eu/energy/ sites/ener/files/documents/2011_energy2020_en_0.pdf (last access 3.12.2018).

8 K. Werbach, *The Blockchain and the New Architecture of Trust*, Massachusetts 2018, p. 1–2.

9 J. Timmerman, C. Deckmyn, L. Vandevelde, G. Eetvelde, *Towards Low Carbon Business Park Energy Systems: Classification of Techno-Economic Energy Models*, Towards low carbon business park energy systems: Classification of techno-economic energy models, Energy, Volume 75, 2014, p. 68–80.

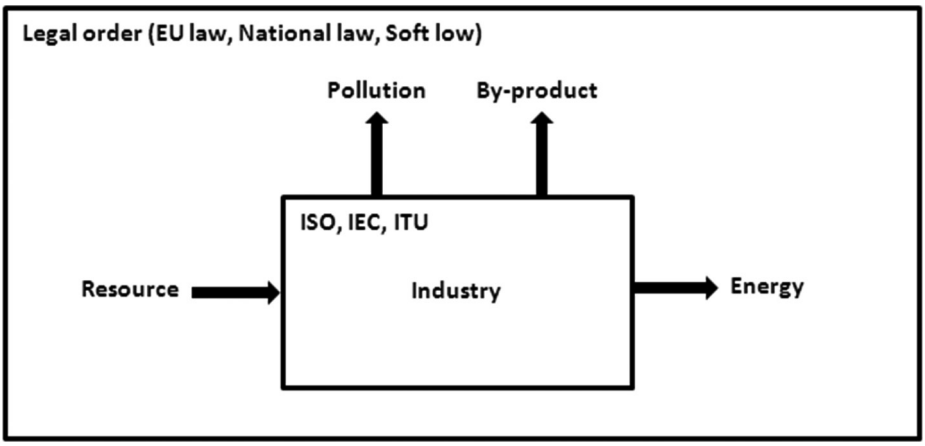


Fig. 1. Simplified representation of energy systems.

II. On the border between technical standards and legislative acts

Power systems are the part of compound and complex critical infrastructure.[10] That is why they are more vulnerable to situations of endangerment. Protection of power system deals with the situation when infrastructure layer is exposed to various kinds of endangers. In Figure 2 regular operations as well as situation of endangerment are shown.

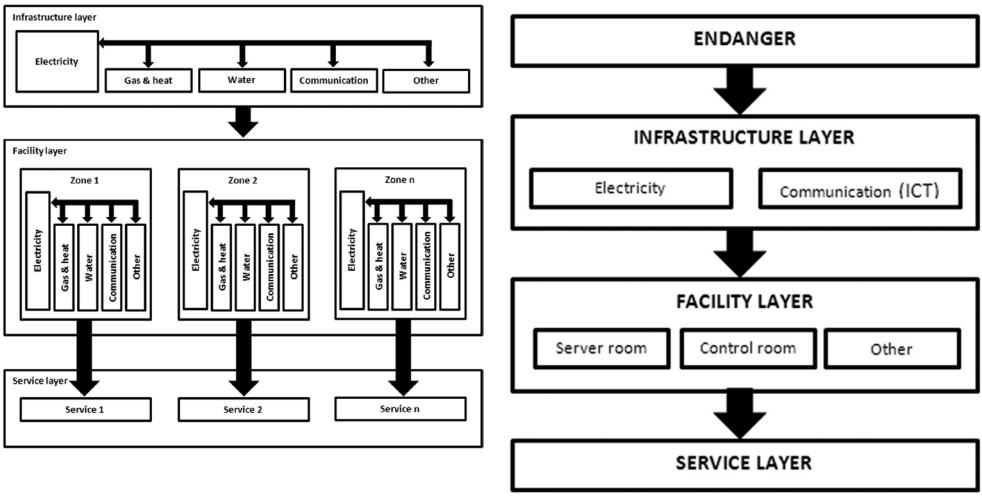
Among types of risks that should be taken into consideration are those resulting from the forces of nature, from the end of life cycle of equipment – its durability, from accidents and unforeseen cases – on safety and logistical levels, and as well from social changes both political and legal – new geopolitical situations or new legal standards.[11] An overview of typical risks to power systems is illustrated in Figure 3.

Protection of power systems and the provision of their service continuity are key issues when making decisions in situations of endangerment of critical infrastructure. Moreover, these issues are not only limited to the technical rules. On the one hand we do have technical standards that guide experts and engineers, like ISO, IEC and ITU standards. On the other hand we cannot forget about legal aspect of the whole issue. Thus, holistic approach to protection of power systems shall include the analysis of legal rules and their application on both European, and national levels, as well as should take into consideration soft law which dominates on international level.[12] Legal norms can promote and make technical standards applicable in more cases. Moreover, what both tech-

10 M. Dunn, Understanding Critical Information Infrastructures: An Elusive Quest", in: Myriam Dunn and Victor Mauer (eds.); The International CIIP Handbook 2006: Analyzing Issues, Challenges, and Prospects (Vol. II) (Zürich, Forschungsstelle für Sicherheitspolitik, 2006), pp. 27–53.

11 Y. Shiwen, H. Hui, W. Chengzhi, G. Hao, F. Hao, *Review on Risk Assessment of Power System*, "Procedia Computer Science" 2017, vol. 109, p. 1200–1205; H. Patrik, C. J. Wallnerström, J. Rosenlind, J. Setréus, N. Schönborg, Poster CIRED2010 RCAM Risk JS 1Juni2010ver4 (2013); W. Fu, *Risk assessment and optimization for electric power systems*, https://lib.dr.iastate.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=13683&context=rtd (last access 3.12.2018); E. Filiol, C. Gallais, *Critical Infrastructure: Where we stand today?* (in:) S. Liles (ed.), *Proceedings of the 9th International Conference on Cyber Warfare and Security*, West Lafayette 2014, p. 47–57.

12 A. Farid, B. Jiang, A. Muzhikyan, K. Youcef-Toumic, *The need for holistic enterprise control assessment methods for the future electricity grid*, "Renewable and Sustainable Energy Reviews" 2016, vol. 56, p. 669–685; C. Saldarriaga, R. Hincapie, H. Salazar, *A Holistic Approach for Planning Natural Gas and Electricity Distribution Networks*, "IEEE Transactions on Power Systems" 2013, vol. 28, p. 4052–4063.



Regular operation Situation of endangerment

Fig. 2. Overview on critical infrastructure operations

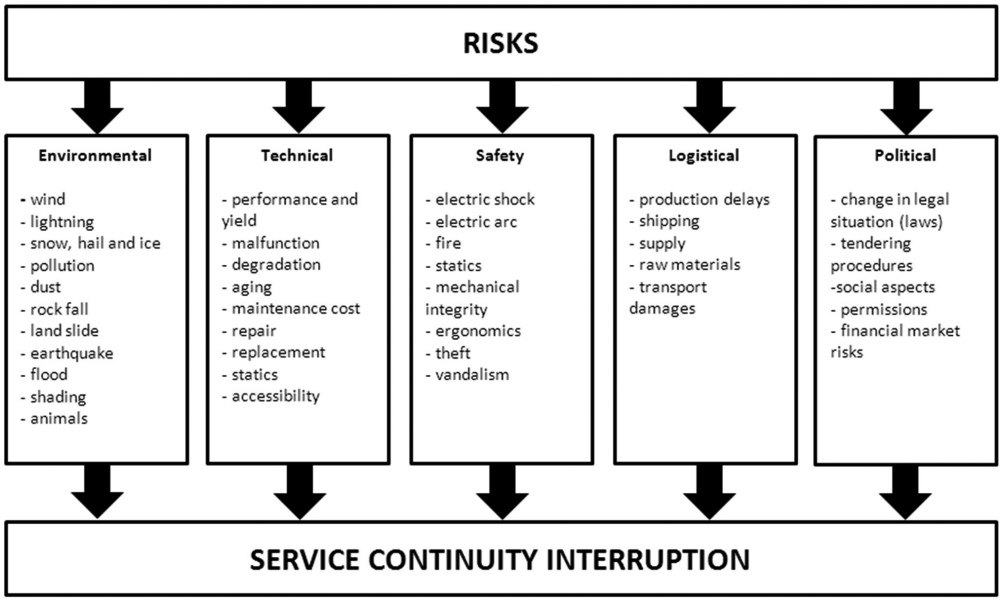


Fig. 3. Selected risks of power systems.

nical standards and legal rules have in common is a normative character which binds anyone who wants to follow successfully the prescriptions. It is important to highlight that in principal technical standards are not mandatory, but they can be followed deliberately. It is so according to both Polish Normalization Committee standpoint,[13] and to art. 5 subsec. 5 of Statute on Normalization of 2002.[14] Legislator can make a technical norm applicable mandatory only by regulating it in other statute, however it must be clearly stated that it overrides a common principle that technical norms are only soft norms, and not peremptory norms. The way in which legislator decides to promote a technical norm is crucial. It can refer to a specific norm using the code number or it refers generally prescribing to comply with Polish Norms or European Norms. However, when legislator refers to a specific norm it can either pick a norm using only its name or code number regardless of date when it was defined, or it can refer to a version of the norm from a specific date. Like, in the Energy Effectiveness Act of 2016 the legislator in art. 36 exempts from the obligation to conduct energy audit every 4 years if a company is applying the Polish Norm regarding system of energy management, requirements, and recommendations. The legislator has referred to the norm only by indicating its name, even though it has also its own number PN-EN ISO 50001. This way of reference is much more flexible, since it means that applicable is the most recent version of technical norm. However, in the Energy Law Act of 1997 the Polish legislator has not even referred to specific technical norms invoking numerous times only a duty to follow customer service quality standards, and fuel, gas and energy quality standards.[15] The latter way of referring to technical norms by picking up the norm from specific date makes the reference in legal act very stable, and clear, however, when technical norm is updated, also the reference in statute has to be updated which means that statute has to be amended, otherwise it does not represent the state-of-the-art. It is quite clear that both general references, and direct references to technical norms without picking up the norm from specific date, seem to be the most optimal way of coordinating technical norms in legal acts. However, it is not the only way both legal and technical norms can influence each other. The legislator shall not be limited only to following, and copying into the statutes or other legal acts what technical committees have agreed to. Sometimes, legislator fails even to complete rather this simple task which levels down the power system protection.[16] Even more important is to create a regulatory context which encourages the following of standards, and policies developed at an international level. One of the examples is promoting

Moreover, what both technical standards and legal rules have in common is a normative character which binds anyone who wants to follow successfully the prescriptions.

13 Stanowisko Rady Normalizacyjnej PKN w kwestii dobrowolności stosowania Norm z 28 października 2010 r. por. https://wiedza.pkn.pl/web/wiedza-normalizacyjna/stanowisko-pkn-w-sprawie-dobrowolnosci-pn (last access 1.12.2018)

14 Article 5 (4) Act of 12 September 2002 on standardization (Journal of Laws 2002 No. 169 item 1385): The application of Polish Standards is voluntary.

15 Energy Law Act of 1997, eg. art. 3.16b; art. 7.7.

16 E. Siwy, *Dostosowanie przepisów polskich w zakresie jakości energii elektrycznej do wymogów Unii Europejskiej*, „Śląskie Wiadomości Elektryczne" 2003, no. 1, p. 31–32.

decentralization of energy production, and transmission which is referred to as distributed generation. In recently discussed draft of „Polish Energy Policy of Poland until 2040" there is a proposal of development of distributed energy, energy clusters, and energy cooperatives. Moreover, in the recently amended Act on Renewable Energy Resources (OZE) in 2016 and in 2018 there has been added a new provision which defines energy cooperatives, and set technical rules which liberates them from some formal duties, like seeking approval of tariffs, of development policy, etc. (art. 2.33a; art. 38b OZE).[17] In order to constitute a closed distribution system, and to have more flexible mode of operation, an energy cooperative has to distribute energy only to its members, the number of which cannot amount to 1000, and members have to be bound by „comprehensive agreement", and the distribution system cannot be connected with neighboring countries. Although energy cooperatives could have been established on the general principles of conducting a cooperative, there is only one successful example of it – „Nasza Energia" created in 2014 close to the city of Zamość.[18] Now, legislator decided to introduce a specific regulation in the Act focused on renewable energy. Perhaps, it will encourage citizens to establish such cooperation particularly in rural areas. For sure, it is one of the elements of stable, legislative measures which are crucial for developing local energy market as it has been studied in recent comparative research.[19] More developed decentralized energy generation has been already conducted via energy clusters which are still growing in Poland. These are the first steps to effective decentralization of energy sector. The second goal of the Draft of Polish energy policy is to enhance the importance of individuals in terms of consumer and prosumers. That is why, the Ministry of Energy plans to develop smart grid, and to encourage to invest in smart homes.[20] Till 2026 ca. 80% of family units should have smart meters, and future legislative effort should be directed towards energy consumers. They will be engaged in generation, selling or DSR services not only as prosumers – which are already covered by energy policy, but also as local energy communities, like inhabitants of block of flats, etc.[21] This direction has been recently confirmed, and

The legislator shall not be limited only to following, and copying into the statutes or other legal acts what technical committees have agreed to. Even more important is to create a regulatory context which encourages following standards, and policies developed at an international level.

17 *Ustawa o odnawialnych źródłach energii* Dz.U. z 2015, poz. 478 z późn. zm.

18 M. Błażejowska, W. Gostomczyk, *Warunki tworzenia i stan rozwoju spółdzielni i klastrów energetycznych w Polsce na tle doświadczeń niemieckich*, „Problemy Rolnictwa Światowego" 2018, t. 18, nr 33, z. 2, p. 26.

19 M. Błażejowska, W. Gostomczyk, *Warunki tworzenia…*, p. 31; S. Saintier, *Community Energy Companies in the UK: A Potential Model for Sustainable Development in "Local" Energy?* „Sustainability" 2017, nr 9, 1325.

20 *Polityka Energetyczna Polski do 2040 roku*, Ministerstwo Energii, wersja 23.11.2018, Warszawa 2018, p. 19.

21 *Polityka Energetyczna…*, p. 27.

one can expect that the OZE Act will be amended in order to extend the group of prosumers by adding to it small and large enterprises, as well as units of local government.[22] From the point of view of legislator it will be a challenge to a centralized sector of energy. Acceptance of players on lower level of power system, like enterprises, cooperatives, local authorities has to be followed by more flexible way of managing power system, and its units.[23] Only this can make decentralization of power system effective, and economically viable. When deregulation grows, more important will be the turn to technical standards, and soft law recommendations which should be widely promoted, and controlled.

When one considers legal dimension of power system protection one of the most important issues is the structure of property rights. On the one hand, it influences the development of distributed generation. Recent researches point out that the development of energy cooperatives depends on the attitude towards private and communal property.[24] On the other hand, it becomes decisive in terms of power system infrastructure who owns the power systems infrastructure – and further who holds the information about technical characteristics, about endangers and risks experienced on the spot, who is financing and deciding about the protection technologies. From the legal perspective we can form power system as public property governed by the state or by the state-owned enterprise; secondly as private property that usually is given a state permit to create and conduct power systems; thirdly as public-private property where we have representatives both of the state and private companies. Usually that structure results from the decisions made in the very early stage of creating power system unit. Thus, there are public and private investors: one side gives money, the other technology, one invests to gain high return, the other takes risks and receives necessary funds to start the project. Property structure becomes crucial in the situation of endangerment – then a question arises – how does the ownership of a power system infrastructure influence the decisions – whose interest prevails, the private individual or the common good? How to compel private owners to comply with technical standards? These questions could be answered by International Electrotechnical Commission white papers, and guidelines.[25] In the time of blockchain process the property structure can extend enormously. It is no more the state which will be responsible for creating power system infrastructure from the very early stages. It will rather control who can add its own unit (e.g. home) to the critical infrastructure network. The most important challenge for power system as such, and for power system infrastructure deals with providing service continuity while there is limited visibility of grids, installations in smart homes, limited control over the application of the state-of-the-art technologies, and security measures, limited predictability of demands of energy supply due to increasing number of IoT, and devices that need electrical energy. The last issue posed by IEC deals with higher interconnectedness of energy infrastructure, and resulting limited coordination of the energy market. Legislator should answer how to assure a proper flow of energy, to distribute in a proper manner stored energy to locations where there is lack of it, and enhance energy market regulations which can reduce negative effects of delays, and errors of prosumers.[26] Interconnection between property types of infrastructure is shown in Figure 4. It is evident that the legal attention shall take a holistic approach with different restrictions in light of property types of power systems.

Power system infrastructure depends much on the electricity network. The infrastructure of network impacts the operation of network which is the key factor to help the supply meet the demand. That is why the topic of provision of power system infrastruc-

22 http://seo.org.pl/powiekszenie-katalogu-prosumentow/ (last access 22.02.2019).

23 W. Skomudek, M. Swora, *Wpływ inteligentnych sieci na system regulacji podsektora elektroenergetycznego*, „Pomiary Automatyka Robotyka" 2012, nr 9, p. 64.

24 M. Błażejowska, W. Gostomczyk, *Warunki tworzenia…*, p. 26.

25 Various analysis, and reports are available at https://www.iec.ch (last access 3.12.2018).

26 M. Niemimaa, J. Järveläinen, *IT Service Continuity: Achieving Embeddedness through Planning* (in:) J. Guerrero, *Proceedings of the 8th International Conference on Availability, Reliability and Security (ARES)*, Washington 2013, p. 333–340.

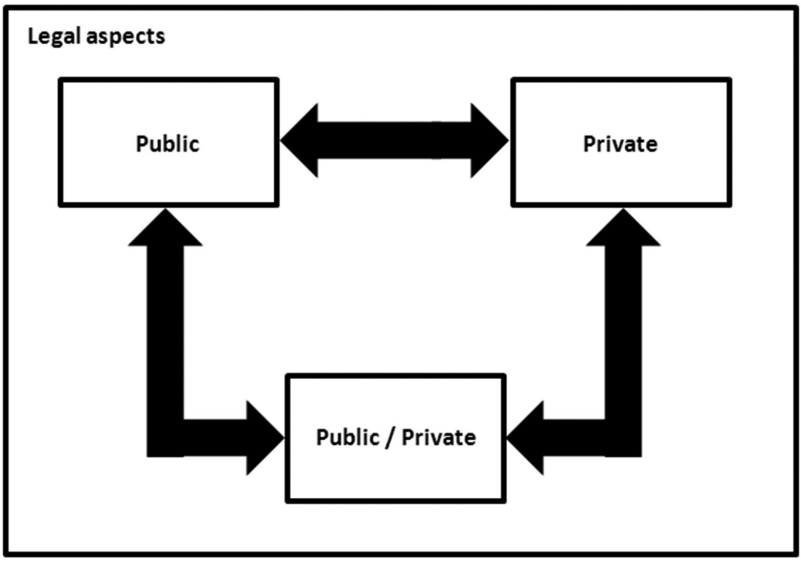


Fig. 4. Legal framework of power systems

ture should be taken into consideration by the Polish legislator and Polish government. Thus, it should be considered how to enhance the effectiveness of electricity network, how to shape the electricity network, how to take care about its infrastructure.

III. Power systems structure – centralized v. polycentric

The service maintenance needs to be allowed to consider the power system at the infrastructural level as a kind of good that is endangered – a victim – that is exposed to harm and damage that comes from the outside. Both the centralized and the polycentric power systems could be endangered. Schematic representation of the infrastructure that can be endangered by an external source of damage is shown in Figure 5.

In principal, power systems can be formed in two different ways which influence its durability and perseverance to the endangers. Traditional structure of electricity sector is based on high centralization and strict connection between the elements of the infrastructure. Smart structure of power system on the other hand is polycentric and decentralized. There are several centers of the power structure, so we create a highly interconnected system, which transform the way electricity is produced, transmitted, and supplied.

One should notice that this twofold character: centralized or decentralized must be reflected in legal regulations – how to deal with various entities responsible for different elements of a complex power system.[27] Traditionally, electricity is generated in large power plants, transferred through transmission and

27 H. Daquan, Z. Liu, X. Zhao, *Monocentric or Polycentric? The Urban Spatial Structure of Employment in Beijing*, Sustainability 2015, vol. 7, p. 11632–11656; K. Carlisle, R. Gruby, *Polycentric Systems of Governance: A Theoretical Model for the Commons: Polycentric Systems of Governance in the Commons*, https://onlinelibr ary.wiley.com/doi/full/10.1111/psj.12212 (last access 3.12.2018); E. Ostrom, Polycentric Systems as One Approach for Solving Collective-Action Problems (September 2, 2008). Indiana University, Bloomington: School of Public & Environmental Affairs Research Paper No. 2008-11-02. Available at SSRN: https://ssrn.com/abstract=1936061 or http://dx.doi.org/10.2139/ssrn.1936061; G. Blicharz, T. Kisielewicz, *Service continuity of critical energy systems in the light of present legal experience*, (in:) D. Kuchta (ed.), *Decisions in situations of endangerment: research development*, Wrocław 2016, p. 221–236

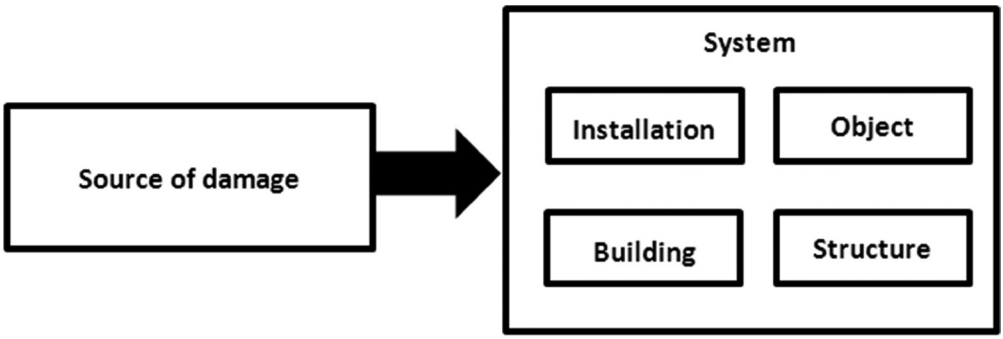


Fig. 5. Schematic representation of the infrastructure that can be endangered by an external source of damage

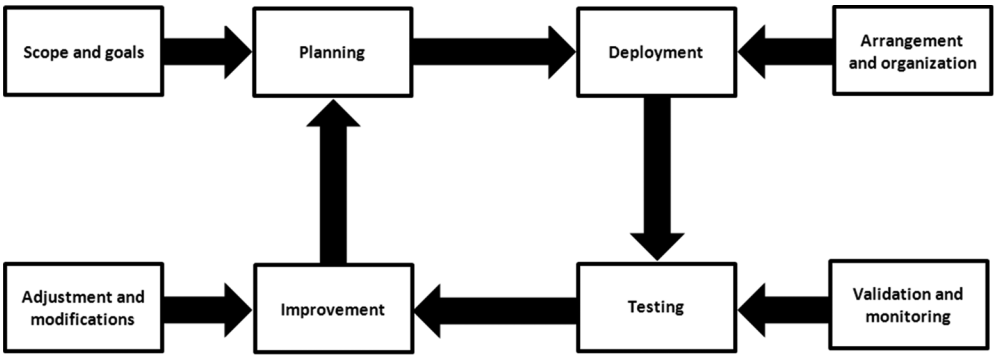


Fig. 6. Simplified scheme on service continuity provision of power systems.

distribution networks and delivered to end users in the residential, commercial, industrial and transport sectors. Digitalization opens up the opportunity for millions of consumers as well as producers to sell electricity or provide valuable services to the grid. Connectivity is the key factor. It permits the linking, monitoring, aggregation and control of large numbers of individual energy-producing units and pieces of consuming equipment. A simplified Deming cycle[28] for the service continuity is shown in Figure 6.

There are two meanings of decentralized energy systems. In the first one it signifies the energy system which is based on a large number of small generating facilities. In the second, decentralized system means that there are different sources of energy supply, e.g. renewable energy, etc.[29] In the UK there was a strong movement towards decentralizing the power system structure – that it will belong exclusively neither to state, nor to big companies. Consumers organized into a group could have become a decision unit in terms of

28 E. Luiijf, M. Klaver, *Critical infrastructure awareness required by civil emergency planning* In: *Critical Infrastructure Protection*, First IEEE International Workshop on IEEE 2005, p. 8.

29 E. D. Rown, J. M. P. Cloke, J. Harrison, *Governance, decentralisation and energy: a critical review of the key issues*, Loughborough 2015, p. 7.

power supply, and transfer.[30] The economic and technological arguments promoting this approach were based on the premise that there is too much waste of energy from the generating plant to the end-user (waste in distribution due to expanded power system). The lack of power due to unbalanced demand for energy that does not meet the supply capabilities generates enormous losses that are counted even in billions of dollars.[31] However, what the US report reveals, the problem does not lie only on the side of the energy producers. There is usually enough or even more power generated than the actual demand. Losses of power appear during the energy transition. Network structure and quality imperfections cause in the USA that more than 50% of generated energy is lost on the way to the energy consumers. US report of 2010 showed huge losses in distribution/transmission: only 39,97 quads out of 94,6 quads produced, were actually delivered to and used by consumers or end-users.

The idea of decentralized power system was connected in the UK with the promotion of low carbon energy sources. The effect that was said to be achieved has been called – democratization of energy.[32] In the UK the power system infrastructure is more complex than in Poland. Thus, it is more open to projects of decentralization of power system and of managing the power system through cooperation of numerous units, than through one-subject management (central one). There are small and medium RE generation plants, district heating systems and CHP initiatives which are household-scale technologies for heating, cooling, and electricity generation.[33] Due to that, consumers have more control over consumption, and this approach can reduce system-wide losses. Putting production in the hands of many small producers is one of goals that are considered to be achieved.[34] There are presented two ways in which modern digital tools can drive a power system: towards centralized management through Big Data or towards a network of small-scale intelligent producers, so called smart homes. Due to digitalization smart homes will be able to produce, collect, and share energy, and create a kind of energy network – an energy blockchain. This approach is not only inspired by the success of blockchain phenomena in other markets, e.g. cryptocurrencies, investments, or services. The idea to use blockchain phenomenon to power system has been recently analyzed by the experts from PwC, Ernst&Young, and presented as a solution for future power systems in the MIT report.[35]

There are some arguments in favor of decentralized energy power system. It is more efficient, more sustainable, and more suited. Since e.g. energy is generated locally, there are less losses between the power supply center and end-users. Secondly, decentralized power system is more accessible, and that is why less dependent on one structure or supply network. Thirdly, it is more secure, since any breakdown affects less number of users, than in a big centralized structure.[36] Many scholars point out that the decentralization of a power system within a country is all about security, just like the diversification of power supply sources from other countries.[37]

However, there is no clear proof or argument that decentralized system is always better than centralized.

30 E. Melville, *Persistent problems of polycentric governance as a tool for improving UK energy system governance*, http://hdl.handle.net/10535/10366 (last access 21.11.2018), p. 4.

31 *Electric Grid Security and Resilience Establishing a Baseline for Adversarial Threats*, ICF International 2016, p. 52.

32 Ibidem, p. 14.

33 J. Roberts, F. Bodman, R. Rybski, *Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy*, London 2014, p. 18.

34 Ibidem, p. 19.

35 *Blockchain – an opportunity for energy producers and consumers?* PwC 2016 https://www.pwc.com/gx/en/ industries/assets/pwc-blockchain-opportunity-for-energy-producers-and-consumers.pdf (last access 2.02.2018); M. Orcutt, *How Blockchain Could Give Us a Smarter Energy Grid*, https://www.technologyreview.com /s/609077/how-blockchain-could-give-us-a-smarter-energy-grid/ (last access 24.01.2018); *Overview of blockchain for energy and commodity trading*, https://www.ey.com/Publication/vwLUAssets/ey-overview-of-blockchain-for-energy-and-commodity-trading/%24FILE/ey-overview-of-blockchain-for-energy-and-commodity-trading.pdf (last access 4.12.2018).

36 Ibidem, p. 20–22.

37 K. Verclas, *The Decentralisation of the Electricity Grid – Mitigating Risk in the Energy Sector*, https://www.aicgs.org/publication/the-decentralization-of-the-electricity-grid-mitigating-risk-in-the-energy-sector/ (last access 4.12.2018).

It depends on the context, and situation.[38] Firstly, the security of decentralized energy system depends on the organization of small units, small producers, and how they meet security requirements. Second issue is how small producers are controlled. If small producers are interconnected on local, regional or state level, as it usually is, any breakdown of one producer will affect more than its own area, however, it will still be easier to stop the breakdown to pass on other areas, and to avoid a crisis on state level. Thirdly, decentralized energy system is less dependent on the geopolitical situation, however only if the imported energy comes from different sources, so the energy supply is diversified. Usually, dependence on geopolitical situation can be limited if decentralized energy system means a set of multiple producers of renewable energy. Although, decentralized system does not have to be based on renewable energy, there is a strong connection between these phenomena. Fourthly, decentralization can make energy system less vulnerable to the errors made by central management of power system. Decentralized system means that energy producers, and providers consist of small-scale units, which belongs either to communal ownership, or private owners, or to public entities.

Many scholars point out that the decentralization of a power system within a country is all about security, just like the diversification of power supply sources from other countries.

IV. Conclusions

The paper gives an overview on selected problems of service continuity provision. In particular interdisciplinary analysis underlined that in order to improve the safety of power systems and provision of service continuity both technical and legal rules should be taken into account. Legal analysis shows that both technical and legal norms and standards should be interconnected and should enhance each other to be followed by the power system operators. Legal dimension broadens the technical studies by introducing the tool that can promote new technologies through soft law and political decisions.

The preliminary results of ongoing interdisciplinary researches focus on power systems protection can be classified in three main areas, namely interdisciplinary area, technical area as well as legal area. The interdisciplinary achievements underlined that protection of power systems in technical and legal framework can be properly analyzed thanks to coordination and cooperation of trained experts only. In addition it is necessary to stress that the experts skills development is possible thanks to ongoing coordination to the policy and lines of operation regarding power systems protection. The technical achievements demonstrated that proper protection of traditional and centralized power systems is based on developed safety solutions (methodologies), whereas smart and decentralized power systems, in principal enhance reliability when external threats occur. New technologies in centralized and decentralized power systems need to be tested in real conditions to assess and improve their regular operations. The legal analysis showed that service continuity provision of power systems can be achieved thanks to coordinated application of IEC, ITU, and ISO standards both on international, European, and national levels. Moreover diligent and proper formation and application of legal rules aligned

38 C. R. Kager, W. Hennings, *Sustainability evaluation of decentralised energy production*, „Renewable and Sustainably Energy Reviews" 2009, vol. 13, p. 583–593.

to the best technical standards increase effectiveness and efficacy of power systems protection.

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Michał Dudek

Remarks on the Non-Essentialist Approach to Legal Pluralism of Brian Z. Tamanaha[1]

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The purpose of the article is to present basic argumentation of Brian Z. Tamanaha leading him to his original non-essentialist approach to legal pluralism[2] which

1 Previous version of this article was presented at the scientific conference *Bliski Wschód a Europa. Problemy tożsamości i różnorodności* [Middle East and Europe. Problems of Identity and Diversity] on 16-19th November 2017 in Hebdów, Poland. I would like to take this opportunity to express my gratitude to the participants and organisers (especially Bartosz Bodziński-Guzik) for the invitation and inspiring comments. This of course, does not alter the fact that only I am responsible for any substantive shortcomings of this paper. This paper is a translation of paper published originally in Polish: *Komentarz do nieesencjalistycznego ujęcia pluralizmu prawnego Briana Z. Tamanahy*, „Forum Prawnicze" 2017, no. 6 (44), p. 25–38.

2 Although Tamanaha discusses legal pluralism in few publications (see esp. *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, „Journal of Law and Society" 1993, vol. 20, no. 2 or *Understanding Legal Pluralism. Past to Present, Local to Global*, „Sydney Law Review" 2008, vol. 30, no. 3), the broadest dimension of his non-essentialist approach can be observed in *A General Jurisprudence of Law and Society*, Oxford 2001, p. 171–205 (where he not only repeats, but also develops earlier *A Non-Essentialist Version of Legal Pluralism*, „Journal of Law and Society" 2000, vol. 27, no. 2). Hence, this article focuses on B. Z. Tamanaha, *A General Jurisprudence…*, op. cit. In addition to a very frequent reference in the literature to legal pluralism offered by Tamanaha, it is also the subject of more complex comments, many of which, however, seem to focus on general theses on law, related obviously to the concept of non-essentialist legal pluralism, see e.g. K. E. Himma, *Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law*, „Oxford Journal of Legal Studies" 2004, vol. 24, no. 4; V. Saleh-Hanna, *Women, Law, and Resistance in Northern Nigeria. Understanding the Inadequacies of Western Scholarship* (in:) V. Saleh-Hanna (ed.), *Colonial*

refuses to make any assumptions about the characteristics that law must display to be recognized as law; it is also an attempt to evaluate this concept and its justification. Legal pluralism itself, most fundamentally understood as the situation of parallel functioning of many (minimum two) different legal orders in a given time and area,[3] is an issue noticed in the field of sociology of law basically from its beginnings. Conceptualization of this phenomenon can eventually be noticed not only in the work of Eugen Ehrlich, but also Leon Petrażycki.[4] Those, of course, are not the only names cited in the context of the discussion about legal pluralism. Leaving aside the controversies whether authors themselves interpret their ideas as concepts of legal pluralism or possible changes to original approaches,[5] it is also worth mentioning Sally Falk Moore, John Griffiths, Gunther Teubner and Roger Cotterrell.[6] It should be noted, however, that this indication is far from an exhaustive list of scholars trying to impose a certain theoretical framework on the phenomenon they are interested in.

In the context of the current, rich discussion about legal pluralism, it is Tamanaha, however, who turns out to be its most interesting theoretician, as he seems to reject all previous conceptualizations of the phenomenon and in their place, he proposes a new, specifically radical approach. As he argues, its benefit is primarily to avoid one fundamental issue with current concepts of legal pluralism – overly wide conceptualization of law, which makes distinguishing law from non-law almost impossible. As will be argued below, not only Tamanaha's solution to this problem seems questionable. The non-essentialist concept of legal pluralism leads to many other issues. An attempt at a more accurate enumeration of advantages and disadvantages of the discussed idea will be needed before it is generally assessed and decided to be applied in the analyses of specific realities. In the end, even a brief observation of the phenomena related to a political or legal practice in a broad sense, not only the most recent ones[7]

Systems of Control. Criminal Justice in Nigeria, Ottawa 2008, p. 329–336; W. Twining, *General Jurisprudence. Understanding Law from a Global Perspective*, Cambridge 2009, esp. p. 88–121 (a shorter version of idem, *A Post-Westphalian Conception of Law*, „Law & Society Review" 2003, vol. 37, no. 1); B. Dupret, *Prawo w naukach społecznych* [Law in Social Sciences], transl. J. Stryjczyk, Warszawa 2010, esp. p. 191–195; idem, *Adjudication in Action. An Ethnometodology of Law, Morality and Justice*, transl. P. Ghazaleh, Farnham 2011, esp. p. 31–35; V. M. Muñiz-Fraticelli, *The Structure of Pluralism. On the Authority of Associations*, Oxford 2014, esp. p. 143–149; K. M. Ehrenberg, *The Functions of Law*, Oxford 2016, p. 141–145; T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa* [Methodological Dichotomies. A Critique of Positivist Theories of Law], Warszawa 2017, esp. A. Dyrda, p. 237–251; D. v. Daniels, *A Genealogical Perspective on Pluralist Jurisprudence* (in:) N. Roughan, A. Halpin (eds.), *In Pursuit of Pluralist Jurisprudence*, Cambridge 2017, esp. p. 175–181. Against this background, this paper focuses solely on the non-essentialist approach to legal pluralism. The aim below is to avoid repeating the issues perceived by previous commentators with Tamanaha's reflections on law in general, legal pluralism itself or both of these strands viewed together. Instead, it aspires to highlight the previously largely unstressed controversies in the 'content' of concept of the non-essentialist legal pluralism and argumentation in its favour.

3 J. Winczorek, *Pluralizm prawny* [Legal Pluralism] (in:) A. Kociołek-Pęksa, M. Stępień (eds.), *Leksykon socjologii prawa* [Lexicon of Sociology of Law], Warszawa 2013, p. 181–182; A. Kojder, *Pluralizm prawny* [Legal Pluralism] (in:) A. Kojder, Z. Cywiński (eds.), *Socjologia prawa. Główne problemy i postacie* [Sociology of Law. Main Problems and Figures], Warszawa 2014, p. 295.

4 J. Winczorek, *Pluralizm prawny wczoraj i dziś. Kilka uwag o ewolucji pojęcia* [Legal Pluralism Yesterday and Today. A Few Remarks on the Evolution of the Concept] (in:) D. Bunikowski, K. Dobrzeniecki (eds.), *Pluralizm prawny. Tradycja, transformacje, wyzwania* [Legal Pluralism. Tradition, Transformations, Challenges], Toruń 2009, p. 18–19.

5 Cf. for example approach of Moore herself and Griffiths' change of view described in: B. Z. Tamanaha, *Understanding Legal Pluralism…*, op. cit., p. 392–396.

6 J. Winczorek, *Pluralizm prawny wczoraj i dziś…*, op. cit., p. 23–24, 25–31.

7 The phenomenon of regionalization of interpretation, not limited to the period of any of the previous terms of office of the Sejm of the Republic of Poland, see e.g. T. Stawecki, *Prawo w książkach i prawo na dyskach – konsekwencje dla praktyki wykładni prawa* [Law in Books and Law on Disks –

and not only noted in the domestic reality,[8] but also outside Poland[9] can justify the assumption that legal pluralism is a fact and as such, requires appropriate theoretical tools. It is then worth taking the trouble of answering the following question: in the face of suggested phenomena and tendencies, what is the sense and degree to which Tamanaha's concept can be useful? However, before an answer is provided and a number of other comments to it are presented, one should introduce it, at least briefly.

Tamanaha begins his reflections on legal pluralism as well as the pursuit of his own concept by pointing out the most important in his view errors in previous conceptualizations.[10] Above all, he believes that it is wrong to start analyzing the phenomenon of legal pluralism from adopting a specific and more or less extensive definition of law; though not only among theoreticians of legal pluralism but also in general (regardless of whether it is 'ordinary' people or learned lawyers, sociologists, anthropologists or philosophers) there has never been and most probably will not be a consensus as to any definition. However, not only insisting on defining the law is wrong despite each definition being seemingly more or less questioned, but Tamanaha also argues that the definitions offered by the existing theoreticians of legal pluralism usually make it impossible to distinguish law from what either is not law or is difficult to be recognized as law. As an example, he provides the mentioned classic Ehrlich who is criticized not only by Tamanaha for his approach to law being simply too general to be used as a basis for detailed (and so assuming subtle distinctions) analyses.[11] Without considering here the extent to which Tamanaha's general conclusions are in fact adequate to all other approaches to legal pluralism,[12] it should be noted that the commented author is actually keen in using similar and very broad generalizations.

The analysis of definitions constructed by the said theoreticians of legal pluralism or used by them for their own purposes leads Tamanaha to distinguishing *de facto* only two basic ways of defining the law.[13] Firstly, referring mainly to works from the field of anthropology or anthropology of law, or part of sociology of law, he indicates the recognition of law as stable patterns of specific activities in given groups or entire communities. Of course, it is right on the ground of such conceptualizations where it becomes very difficult, if not even impossible, to distinguish law from what is not law or what would rather not be defined as one. In the end, if only certain patterns of behaviour developed in social practice among a specific population are to be considered as law, then the rules of mutual neighbourly help on collection of agricultural crops, backyard football matches or proper dressing according to an occasion, or rules of politeness can also be considered so. In fact, it is dif-

Consequences for the Practice of Interpreting the Law] (in:) S. Lewandowski, H. Machińska, J. Petzel (eds.), *Prawo, język, logika. Księga jubileuszowa profesora Andrzeja Malinowskiego* [Law, Language, Logic. The Jubilee Book of Andrzej Malinowski], Warszawa 2013, p. 243.

8 A series of disputes that are part of the wider constitutional crisis in Poland, see e.g. P. Radziewicz, P. Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016* [Constitutional Dispute about the Limits of Changes in the Organization and Rules of Operation of the Constitutional Tribunal: June 2015 – March 2016], Warszawa 2017. Nevertheless, it should also be noted that pluralisation/departure from monism of the Polish legal order, also in reference to the activities and impact of the Constitutional Tribunal, was noticed much earlier, see T. Stawecki, W. Staśkiewicz, J. Winczorek, *Między policentrycznością a fragmentaryzacją. Wpływ Trybunału Konstytucyjnego na polski porządek prawny* [Between Polycentrism and Fragmentation. The Impact of Constitutional Tribunal Rulings on the Polish Legal Order], Warszawa 2008, p. 76.

9 For example the dispute on the independence referendum in Catalonia on 1st October 2017.

10 B.Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 172–175.

11 Ibidem, p. 176; See also A. Kojder, *Z Czerniowców w szeroki świat… Eugen Ehrlich i narodziny idei socjologii prawa* [From Czernowitz to the Wide World… Eugen Ehrlich and the Birth of Idea of Sociology of Law] (in:) A. Flis (ed.), *Stawanie się społeczeństwa. Szkice ofiarowane Piotrowi Sztompce z okazji 40-lecia pracy naukowej* [Becoming of a Society. Sketches Offered to Piotr Sztompka on the Occasion of 40th Anniversary of Scientific Work], Kraków 2006, p. 143–144.

12 For example whether similar delimitation issues are noticed with the mentioned Petrażycki.

13 B.Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 175–181.

ficult to point out something that is not the law. As a consequence, demonstrating the multiplicity of 'laws' may turn out to be a relatively easy task, although another perspective is allowed, according to which if generally recognized patterns of a social behaviour are considered the law, then pluralism understood as a coexistence of minimum two different orders will not occur. After all, almost everything will fit or be able to be contained in one law. Therefore, the existence of two legal orders next to each other, not to mention a larger number, can be considered very unlikely.

If generally recognized patterns of a social behaviour are considered the law, then pluralism understood as a coexistence of minimum two different orders will not occur. After all, almost everything will fit or be able to be contained in one law.

The second method of defining law indicated by Tamanaha is, in turn, associated above all with the tradition of analytical theory and philosophy of law under the sign of Herbert L. A. Hart. It boils down to perceiving law as an institutionalized application or enforcement of norms that arose within the activity of specific institutions. This method of recognizing law is also criticized for inadequacy. Concededly, one can suppose that the definitions using the category of institutionalization in fact support the modern state and laws created within its structures, but it must be remembered that such institutionalized creation, application, and even enforcement of rules are also present outside the state's structures. It is sufficient to give an example of the activity of contemporary sports federations or scientific associations and try to answer the question whether the rules created within such structures are the law, in order to fully realize it. Thus, despite the significant narrowing approach to this method of grasping the law in comparison to the first one distinguished by Tamanaha, it still seems to be overly wide. Again, giving up an attempt to assess the extent in which Tamanaha's only two reconstructed ways of defining the law are adequate to the wealth of previous attempts to grasp its alleged essence, one may agree with the following statement of his. Within both these basic ways of defining law, one formula is finally sought that would be adequate to the entire field. According to Tamanaha, the use of some more specific form of the first or second way of defining law by theoreticians of legal pluralism is not the last fundamental mistake that they make.

Namely, Tamanaha also opposes broadly understood functionalism in definitions of law.[14] He specifically means formulas containing an indication of the most crucial purposes that law is supposed to implement in order to be referred to as the law. He recognizes formulas similar to the following one – 'the law provides social order' – as wrong not only because only some elements of law are effective in achieving the assumed function, but also because this depends on circumstances, as general functional effectiveness of the law may undergo significant changes, and in the face of its decrease one must eventually take into account the question whether the law losing its effectiveness is still the law. The functionalist conceptualization of law is also wrong because a given function supposed to be brought about by the law, which can include not only the mentioned social order, but also the social exchange, socialization or basically anything that any given theoretician would be ready to accentuate, can

14 Ibidem, p. 176, 179, 180.

actually be successfully implemented by something other than the phenomenon defined by this function. In the end – is it in fact only the law that is responsible for the social order? If not, and so when the social order could also be explained by referring to something else than the law, e.g. morality, customary and even religious norms, then defining and identifying law on the basis of the function of providing the social order turns out to be simply inadequate. Since the function favoured in a given functionalist definition of law is actually performed by many other phenomena or objects in social life, it is incapable of grasping law and nothing more but law. Tamanaha, again, at a very large and not undisputable level of generality, points out an erroneous way of conceptualizing law, which can also be used while discussing legal pluralism.

However, as already presented, Tamanaha does not criticize current legal pluralism for the sake of sheer criticism, but on the basis of his observations and analyses, he wants to propose the new theoretical framework. In the face of the indicated issues, he suggests to abandon the essentialist conceptualization of law, that is, defining law by any characteristics necessary for it to be defined as such. Instead, while dealing with the phenomenon of legal pluralism, one should make a starting assertion that the law is what is recognized as the law by people.[15] Such a specific escape from the effort of formulating a more substantial concept of law Tamanaha justifies by the conclusion from analyses carried out by him and briefly presented above which, in turn, lead him to a judgment that what the law is and what it does cannot be put into one universal formula. The law seems to always escape essentialist conceptualizations to a greater or lesser extent and for this reason, it should be grasped in the most formal way without implying its necessary characteristics. Tamanaha concludes that the best way to address such non-essentialism in the conceptualization of law is to say that the law *de facto* is what people 'label' as the law; what they call as that. He also adds that, in principle, his proposal is not a classic definition, but a way to delimit law from what is not law; something with which, as has been mentioned, the vast majority of theoreticians have a big problem, regardless of which of the three methods of conceptualizing law (referring to patterns of behaviour, institutionalization or function) indicated above they opt for. Additionally, in accordance with Tamanaha's reconstruction, when the foregoing theoreticians of legal pluralism begin their deliberations from certain substantial, essentialist definitions of law, it leads to the very phenomenon of legal pluralism being grasped as a co-occurrence of various manifestations of law (in a specific time and area), which is understood on the basis of one, particular formula assumed by a given scholar.[16] Tamanaha's position precludes a similar research practice, for at the beginning of his analysis he rejects the assumption of the existence of any specific characteristics or properties that the law is supposed to have, also in its many parallel manifestations. According to his views, legal pluralism will occur when various phenomena are eventually 'labeled' as the law by people and between these social identifications there are smaller or larger differences.[17] In other words, when at a given time and place, among a given population there are different opinions as to what the law is, that is when, for instance, one part of a society sees it in given objects and phenomena, whereas the other does not necessarily share that opinion and identifies with it different things, then according to the statement – 'law is what people define as such', one can talk about legal pluralism. Not in a sense of coexisting various manifestations of what meets the requirements of a specific concept of law, adopted by any given theoretician (reminiscent of the approaches criticized by Tamanaha), but in terms of the multiplicity of different social identifications of law.

As it may be easy to guess at this stage, while developing his non-essentialist approach to legal pluralism Tamanaha proposes to perform analyses on two different levels in a specific order[18] during its application.

15 Ibidem, p. 193. Tamanaha sustains this formula in the later text on legal pluralism, see idem, *Understanding Legal Pluralism*…, op cit., p. 396, and also as part of his latest monographic work, which deals in law in general, but no longer takes into consideration the pluralism itself so explicitly, see idem, *A Realistic Theory of Law*, Cambridge 2017, e.g. p. 194.

16 B.Z. Tamanaha, *A General Jurisprudence*…, op. cit., p. 194.

17 Ibidem.

18 Ibidem, p. 195–197.

Since the main emphasis is put on what people treat as the law, one should first determine what exactly and by whom is identified as such. The first step in a practical implementation of the non-essentialist approach to legal pluralism is to try to provide an empirically based answer to the question of what is 'labeled' as law in a given time interval and area inhabited by a specific population. Upon collection of such 'folk' testimonies and views on what the law is, one should go on another level of analysis, which consists in attempting to identify on the basis of collected empirical data (social opinions) the general features or properties of what has been 'labeled' as the law. To simplify, one can say that Tamanaha proposes to first ask people about what they treat as the law (by applying appropriate empirical research methods), and then with reference to the gathered data, one should carry out generalizing analysis, the result of which would be the characteristic of what particular groups specify as the law.

Although Tamanaha just discerns these two levels of analysis, one may wonder whether it would be necessary to add another level which could be regarded as a control one. Namely, it cannot be ruled out *in abstracto* that identifications of law in a given population are so numerous, mutually inconsistent and ultimately address many different objects and phenomena, that generalizations carried out on the second level may not be sufficiently subtle to preserve adequacy of certain social testimonies collected as part of the first stage. Since Tamanaha clearly supports the formulation of empirically established assertions, it is worth submitting a postulate to supplement his research scheme with a third stage – the presentation of compiled generalizations from the second stage to seek opinion of the representatives of a given population, whose identifications of law were collected during the first stage. If they accept that the conducted generalization conveys their view on the law, the fundamental research effort can be considered successful. If, however, the people whose testimonies were collected in the first stage did not find their full view reflected in the generalizations from the second stage, then such negative result of the third, control stage would prompt appropriate adjustments in the analyses conducted with the empirical material. Although such a direction for the development of Tamanaha's findings is possible, it is difficult to speculate at this point whether he would accept it.

It is certain, however, that many other remarks can be made in regards to Tamanaha's non-essentialist legal pluralism. Following Tamanaha's analysis, who upon presenting the bases of his approach focuses on indicating what he considers to be advantages and disadvantages of this concept, one can observe that it is worth dealing first with the advantages, both the undisputed and the doubtful ones, as well as those noticed and unnoticed by the commented author himself.

As an undisputed advantage of his own view, based on the non-essentialist legal pluralism, Tamanaha recognizes the fact that one can successfully distinguish law from non-law.[19] Although at first glance this positive assessment should not raise any doubts, it must be said directly that it is legitimate, and so the non-essentialist approach to legal pluralism does not fall into delimitation issues of previous concepts on one crucial condition. Subjective beliefs of several people about an object or phenomenon should simply be equated with the very subject (a reference point) of those beliefs. Tamanaha's position turns out to be entangled in a very subtle yet significant ontological problem as he seems to identify the subject of individual views – the law – with those views, i.e. opinions about what the law is or what can be considered the law. The acceptance of such position or its lack depends, of course, on the views on social constructivism in a general sense, to which he refers.[20] The supporters of constructivism may simply accept the radical position of Tamanaha as to defining or distinguishing law from non-law, along with suggested consequence of identifying the subject of beliefs with the very beliefs. On the other hand, those assuming, to a lesser or greater degree, the objectivity of certain social life phenomena and thus not necessarily seeing equality between the law and people's views on what it is, may be sceptical about Tamanaha's concept. For them, the collected statements about what the law is from the perspective of several people are not at all the basis for identifying it and distinguishing it from what it is not. The most crucial asset of Tamanaha's concept perceived by him –

19 Ibidem, p. 197.

20 Ibidem, p. 142, 162.

the ability to distinguish law from non-law – ceases then to be an objective and undeniable advantage. Whether one actually grants the commented author the achievement which he seems to claim credit for depends on the preferences of people evaluating his concept and the extent to which they accept or reject basic ideas of social constructivism. To that effect, the cited advantage of Tamanaha's position turns out to be strongly relative.

The advantage of Tamanaha's concept which, in turn, seems non-relative and independent of the adopted assumptions or assessing criteria, is that a lot of research issues are generated on its basis. Although Tamanaha himself focuses on the following research question which in virtue of his arguments is immediately obvious – 'who, why and what one identifies as law',[22] there are definitely other interesting issues worth considering. Not only it is worth thinking through

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A similar character seems to have the second advantage that Tamanaha claims to himself, which ultimately is closely related to the first one. Namely, he argues that his concept enables much richer conceptual instruments where the categories of different types of social norms (normative pluralism) as well as internal pluralisms of the distinguished categories of those norms and legal pluralism itself are clearly distinguishable from one another.[21] With reference to an earlier remark, one can ask whether the basic types of social norms themselves and their possible internal pluralisms will be distinguishable, or whether it will actually be possible to distinguish or separate only social assertions, identifications of moral, legal, religious or customary norms based on which one will be able to determine the degree of pluralization of views on a certain topic in a given population. Again, accepting the remark on this advantage of the non-essentialist legal pluralism seems to ultimately depend on whether one shares the controversial views on the mentioned social constructivism.

correlation between responses to the indicated question with different socio-demographic variables of respondents, but also determining, in the light of the collected testimonies, any specific borderline conditions to identify certain phenomena as legal ones in a given society or within specific, identifiable social groups. The latter can, however, be arranged within the mentioned framework of the second level of legal pluralism analyses distinguished by Tamanaha, whereas the obtained results may possibly be subject to control as part of the suggested third stage or its appropriate modification. Although a very modest analysis of Tamanaha's concept in terms of its empirical application or prospect for socio-legal research suggests its great potential, the author himself does not seem to notice it. Instead of developing the strand of this significant advantage, he goes on to point out another positive side of his concept, which, however, may raise serious doubts just like the previously commented elements of Tamanaha's affirmative self-evaluation.

21 Ibidem, p. 198.

22 Ibidem, p. 199.

Namely, he argues that the discussed assertion that the law is what people signify as such is positive in regards to not only avoiding any presuppositions about law, but also assumed hierarchies of validity and significance of its different types.[23] However, in view of such a statement, the question may arise as to whether the lack of hierarchy of different types of law is desired. This thread, however, will be discussed later in reflections on the flaws of the concept in question.

Tamanaha himself indicates some issues related to his concept, but as it is shown below, one can wonder whether he pays attention to all and most important ones. If the law is to be what people recognize as such, then he notices the need to supplement his concept with an answer to the following question: 'who exactly and how many people must recognize something as the law in order for it to «count»'?[24] In fact, complementing his concept with a solution to this issue seems necessary. It should be noted, however, from a more critical perspective that the introduction of certain quantitative or qualitative measures, which must be met by the social identifications of law and people expressing them, can always raise doubts that ultimately a very particular approach to law is supported instead of a neutral description of certain phenomena and trends. As it will be further developed below, Tamanaha's concept seems completely devoid of even the simplest elements of a more suspicious, critical view of law as well as theoretical constructions concerning it.

Continuing the matter of issues with his own concept, Tamanaha rightly formulates the next question: 'what uses of the concept of law should be treated as relevant in determining what people treat as the law, and thereby investigating what it is (on the basis of a given population or its part)?'.[25] In fact, Tamanaha puts emphasis on determining what people are sticking the 'label' of law to, whereas he treats laconically the issue of what people seem to be or may be associating with the very word 'law', and this can actually connote a lot. Namely, the fact that a person defines something as the law – in other words, 'puts the label' of law – does not mean that he or she thinks of the law as e.g. the product of the legislative bodies. The key term in this context after all is also used to designate certain empirical regularities. This, however, is not the most important problem. Even if someone uses the term 'law' in a way that Tamanaha himself seems to have in mind, that is, as an identification of a certain type of normativity that appears (or may exist) in human societies, it is also worth bearing in mind such possible uses of this term, which may not be expressed seriously and with confidence, but ironically or without certainty. Although this is truly a very significant issue about the commented concept, its author himself while recognizing this controversy, devotes surprisingly little room for any, even a preliminary attempt to solve it at least partially. This seems necessary if one wants to use Tamanaha's concept in accordance with one of its purposes – to conduct empirical research. Without addressing the issue raised here, adequate interpretation of the collected empirical data, that is, the views of the society or its part on what the law is, will be very difficult if not impossible.[26]

Meanwhile, Tamanaha rapidly goes on to indicate another problem which in his opinion are linguistic (as well as cultural) differences related to the word 'law'.[27] He claims that, although in many ethnic languages one can find words that are equivalent to the Polish wording 'prawo' ('law'), they can ultimately mean something different or be used in subtly distinct contexts. For instance, is it possible to juxtapose the Poles' statements about what 'law' is to them with those by the Germans indicating what '*Recht*' is to them? In other words, Tamanaha fears to encounter great difficulties while comparing the empirical researches carried out in different countries. In light of the previously raised fundamental problem of using the concept of law even

23 Ibidem, p. 199–200.

24 Ibidem, p. 200, and also p. 166–167.

25 Ibidem, p. 200, and also p. 168–169.

26 Added to this can be the concern for individual prejudices of interpreters/researchers and their impact on analyzing empirical data, see B. Truffin, O. Struelens, *Through the Looking Glass of Diversity. The Right to Family Life from the Perspectives of Transnational Families in Belgium* (in:) G. Corradi, E. Brems, M. Goodale (eds.), *Human Rights Encounter Legal Pluralism. Normative and Empirical Approaches*, Oxford–Portland–Oregon 2017, p. 207–208.

27 B. Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 200, and also p. 169.

on the basis of just one ethnic language, which would be taken into account in empirical research, it is surprising that Tamanaha, without solving it, considers using his own concept also on an international scale. Without even putting a solution forward to problems related to the possible use of his concept on the scale of one country, he claims that it can be used for comparative studies. Most likely, this is where the issue of identifying the relevant use of the concept of law will pile up with the problems of translation.

Clearly focusing on the word 'law' and its equivalents in other ethnic languages leads Tamanaha to see another problem, in his own opinion – the inadequacy of his concept towards indigenous, aboriginal or tribal communities that may not contain the word 'law' in their languages.[28] In other words, he admits that his concept is not of a universal range, and it cannot be applied to all human communities. Although this is a legitimate observation, one may wonder whether the non-universality of a similar concept should be assessed in terms of its flaws or imperfections.

Although the commented author seems to notice some significant issues of his own construction, one can get the impression that he does not pay too much attention to even partially referring to them in a more critical way. In addition, there are other controversies that may be pointed out in regards to his non-essentialist legal pluralism, which are not raised by the author at all.

First of all, the following questions arise when confronted with this concept. Does the law really only is to be constituted by the fact that a certain group of people seems to mark something as law? Is the law just a 'label' put by people to various objects and phenomena? Would the people chosen by Tamanaha to undergo an assessment in accordance with his assumptions agree with his concept? In his position, a specific tension can be identified. On the one hand, he rightly wants to explore and get to know what people perceive as law. On the other, however, he comes from rather unpopular and counterintuitive thesis that law is empty, without any slightest essence, and only the subjective views ultimately decide on what it is. He, therefore, seems to favour the 'folk', democratic view on the law but, as a consequence, proposes in its own way a radical, theoretical construction with, in all likelihood, negligible social support. Certainly, a closer look at the discussed concept will probably lead to a conclusion that Tamanaha, by claiming that law is what people identify as law, really operates at the level of certain meta-views and does not set his notion in the same row with specific views on the subject matter, which certainly in the majority of cases are essentialistic (more or less). One can, however, doubt whether Tamanaha clearly enough emphasizes the status of his own assertions, suggested here.

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28 Ibidem, p. 203–205.

Such emphasis of the level on which Tamanaha seems to operate is necessary especially if one imagines a growing popularity of his thesis which claims that the law has no essence and is only what people consider it to be. For if the members of a particular society will begin to increasingly believe in this thesis, some negative social consequences can be expected to follow. When people are convinced that in fact their subjective judgments determine what the law is and what it is not, and their views are not compatible with one another, one can expect an increase in the antagonisms between the representatives of different views or not necessarily socially functional nonconformism (violating something that some perceive as the law by those who disagree with this opinion). In light of this statement, Tamanaha surely wants to include as many social views as possible and represents a kind of democratic descriptivism. One may wonder, however, if he is not going too far, or, as a consequence, is not seemingly trying to opt out from taking into account and suggesting solutions to predictable or actually existing deep political and social disputes over the law. The disputes concerning the Polish Constitutional Tribunal or the referendum in Catalonia of 1st October 2017, mentioned at the beginning of this paper, can obviously be easily included in Tamanaha's general idea, according to which people may disagree in their identifications of law. Colloquially speaking, some may simply think one thing, while others another. Between such groups, there may be clear and sometimes even fierce conflicts in which each party will uphold their original thesis, and thus insist on their identification of law. It must, however, be openly said that a more general theoretical concept is not needed to draw similar conclusions. In light of a general life observation that people tend to disagree over specific issues, and so in the face of pluralization of views on particular matters, the non-essentialist legal pluralism seems to become a rather trivial concept. It remains only a very general frame for describing certain phenomena.

Tamanaha, however, does not in any way propose or even seem interested in answering the question of how to proceed in the light of certain cases of legal pluralism. It is right here that Tamanaha's far-reaching lack of commitment and his emphasis on descriptiveness are manifested with complete omission of a critical discussion about how to assess manifestations of legal pluralism and react to negative cases. In other words, he does not bother to take into account the social reality when argues that the definitions of law or hierarchies of the types of law are inadequate. From the perspective of a theoretician, it may be that even the majority of them are actually wrong. One should, however, keep in mind that definitions or hierarchies can also perform social functions by structuring interactions in a given population, contributing to greater predictability of life and being one of the pillars of the social order. Should a situation really be deemed inappropriate when a given definition of law or hierarchy of the types of law become more popular in a society or even simply accepted by its members as a result of adequate, thorough and non-coercive argumentation in their favour? Are definitions and hierarchies unconditionally wrong from this social perspective? Tamanaha seems to completely ignore these questions or not notice them. It is in a way paradoxical to be dealing with legal pluralism as a social phenomenon, arising from the fact that people differently identify the law, while omitting the importance of its broadly recognized definitions for the functioning of a society. There should be no illusions though that various manifestations of legal pluralism may cause more social problems than constitute their solutions. The latter, however, are not even suggested by Tamanaha in any way. It thus seems that his approach of a socially non-involved scholar prevails over the will to take into account the current realities and their problems or needs.[29] In this sense, Tamanaha is quite a conservative sociologist of law. He describes but does not even consider different alternatives in relation to something that cannot always be positively evaluated.

It is also worth emphasizing that for Tamanaha himself his concept seems quite difficult for consistent adherence. On the level of assumptions, he wants to study people's identification of different objects and phenomena as law, putting thereby significant

29 This can, in turn, be associated with his previous remarks on the political involvement of part of the Anglo-American sociology of law, which are not lacking truth; see. B. Z. Tamanaha, *Realistic Socio-Legal Theory. Pragmatism and a Social Theory of Law*, Oxford 1997, p. 20–24.

emphasis on subjectivity. However, in many points of his deliberations, Tamanaha mentions the study of the relationship between different types of law and even performs simplified analyses, such as the relation between the state law and religious law.[30] It can, therefore, be said that in these passages, he discusses not just the subjective beliefs, but what these beliefs can relate to. Tamanaha can obviously be accounted for not giving up in these passages his fundamental constructivist assumption that it is the law what people identify as such. It can be claimed, however, that he is considering relations between the already identified and generalized characteristics of specific types of law, established on the basis of empirical research. What remains problematic, however, is that Tamanaha has not conducted such research nor even has referred to studies that could serve him as a basis for such generalization and a discussion about the relationships between different kinds of laws. This detail, however, is not the only one in Tamanaha's argumentation that may raise doubts.

Although this is undoubtedly a very strong wording, one can find in his deliberations some contradiction almost bordering with hypocrisy. At the core of non-essentialist legal pluralism, Tamanaha declares some kind of openness to various views in line with the statement that law is what people recognize as such, but on the other hand, he carries quite strong criticism leading eventually to rejecting other ways of identifying law, which, like even Hart's concept, have gained great recognition and it cannot be ruled out that they form a part of informal intuitions about law. It is difficult to criticize, without contradicting oneself, the common definitions of law and legal pluralism conceptualizations built on their basis, by assuming that the law is ultimately what people deem it to be. Tamanaha's discussion with the concept of already mentioned Teubner is an exemplification of this state of affairs.[31] It is also worth quoting for it allows disclosing perhaps a further issue with Tamanaha's concept, which can be reduced to the following accusation of incomplete pursuance of own assumptions and thus falling in contradiction which can even be described as fundamental or basic.

Teubner, as one of the recognized representatives of systemic or autopoietic theories of law, by referring to the work of Niklas Luhmann, assumes that the law is ultimately a set of messages (communications) made on the basis of a binary code of the legal/illegal. To simplify, certain phenomena which relate to messages based on the codes such as profit/loss or power/lack of power, and so constituting respectively economic or political phenomena remain legally irrelevant until they are observed from the perspective of the legal binary code, regardless of whether they are referred to as legal or illegal. On the other hand, when a legal communication is formulated, even regarding a phenomenon very rarely associated with official law or objectively not constituting the subject of formally binding regulations, it becomes a part of the system-theoretically understood law. Beginning with such general assumptions, for Teubner legal pluralism means 'multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal',[32] and – by adding – different observations of the same broadly understood subject do not have to coincide in coding. The same can be recognized by specific messages as legal and, at the same time, illegal by others.

Apart from the question on how reliable and adequate Tamanaha is in conveying the concept of Teubner,[33] it must be said that his most important objection, in the discussed context, is imputing huge complexity in the identification of law based on a binary code due to the fluidity and dynamics of communication as well as the fact that the legal/illegal distinction is invoked not only clearly and explicitly, but also implicitly. In other words, Tamanaha criticizes the focus on language or privileging of communication processes in the conceptualization of law and legal pluralism in Teubner. Although similar doubts may be raised, it is

30 B. Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 199; idem, *Understanding Legal Pluralism…*, op. cit., p. 396–409.

31 B. Z. Tamanaha, *A General Jurisprudence…*, p. 186–191.

32 G. Teubner, *The Two Faces of Janus. Rethinking Legal Pluralism* (in:) K. Tuori, Z. Bankowski, J. Uusitalo (eds.), *Law and Power. Critical and Socio-Legal Essays*, Liverpool 1997, p. 128.

33 Cf. R. Nobles, D. Schiff, *Observing Law through Systems Theory*, Oxford–Portland–Oregon 2013, p. 91–99.

quite puzzling and even paradoxical that such criticism is formulated by Tamanaha. After all, he ultimately favours language or rather just one word – 'law' – and its possible counterparts in other ethnic languages. He claims that '(…) if no group within a society refers to «law», then there is no law in that society'.[34] The law exists when a given group of people defines something as the law, using a proper word in the right meaning. Not only it is possible, therefore, to see the specific hypocrisy of Tamanaha in his assessment of Teubner, linguistic marking of specific objects and phenomena as law and possible research perspectives; almost excessive descriptivism and specific non-criticality and lack of traces of engagement in the face of actual and predictable manifestations of socially negative (destructive) legal pluralism; not recognizing important social functions of definitions and hierarchies of law; raising doubts confidence in the non-essentialism of his own concept and the possibility of delimiting on its grounds the law from non-law. Of course, against

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but also start wondering whether Tamanaha ultimately does not contradict himself and yet fails to carry out all the deliberations in line with the original assumptions. In the end, does Tamanaha actually avoid any assumptions about the even minimum essence of law if he pays so much attention to whether there are people in a specific community who describe something through the specifically understood word 'law' and its counterparts in other languages?

As can be noted from the above comment, Tamanaha's concept is controversial and problematic on many levels. Certain doubts may also arise from the argumentation that leads to it and justifies it. Its author can be accused, among other things, of the following: very broad and exceptionally bold generalizations used as a starting point; bringing charges against others while seemingly duplicating some of the criticized schemes; not developing important strands regarding other conceptualizations of legal pluralism, the idea of Tamanaha seems to allow a much clearer distinction between the law and non-law, with acceptance of a constructivist perspective. In this regard only, reaching for this concept can be explained. However, one has to be conscious of it in a more complete way as a tool for potential use in one's own ventures. The above considerations are conceived as a more detailed, critical analysis of non-essentialist legal pluralism, which suggests to those interested, either theoretically or empirically, sometimes subtle yet significant problems whose solving, even partially, may require modification of the original Tamanaha's proposal, reaching for another theoretical basis or creating own concept of legal pluralism. The latter method may be desirable particularly when aspiring to analyze certain realities (e.g. a particular state in a given time interval). Tamanaha, in turn, undoubtedly has universal ambitions about his own concept. This general idea is to be applicable to numerous different situations.

34 B.Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 201.

Perhaps, however, this is another mistake not only made by Tamanaha, and the concepts of legal pluralism should not look for such a broad, global appeal. Instead, perhaps the most appropriate approach is to build many concepts of legal pluralism focused on very specific realities, such as those in contemporary Poland, Spain, Ireland, Canada, Japan, Indonesia, India, Turkey, Lebanon etc. In order to assess whether such a scenario will actually produce better results than the non-essentialist legal pluralism, an attempt must be made to implement it.

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Radosław Zyzik

Did Leon Petrażycki Set the Foundations of the Behavioural Economic Analysis of Law?

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The foundation of political economy and, in general, of every social science, is evidently psychology. A day may come when we shall be able to deduce the laws of social science from the principles of psychology.[1]

Vilfredo Pareto (1903)

Law is a psychological factor of social life and acts in a psychological way.[2]

Leon Petrażycki (1925)

Never has law relied as heavily on psychology as it does today.[3]

Jeffrey J. Rachlinski (2011)

1. Introduction

Leon Petrażycki may be considered the founder of the second generation behavioural economic analysis of law. His views regarding the role of psychology in legal sciences, conviction about the influence of legal principles on the decision-making process of the addressees of legal norms as well as the conviction that law can be analysed as an empirical fact using available scientific tools which are the best at a given moment, make his research programme, namely "the scientific legal policy", surprisingly similar to the papers of psychologists, lawyers and economists who identify themselves with the movement of the behavioural economic analysis of law. Furthermore, it seems that Petrażycki may be perceived nowadays as the founder of a more mature behavioural analysis, *inter alia* due to his conviction about the dependence of legal systems (and, in fact, psychology) on cul-

1 V. Pareto, *Manual of Political Economy: A Variorum Translation and Critical Edition*, Oxford 2014, p. 20.

2 L. Petrażycki, *O ideale społecznym i odrodzeniu prawa naturalnego*, Warsaw 1925, p. 21.

3 J. J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, "University of Illinois Law Review" 2011, No. 5, p. 1675.

tural factors which determine the effectiveness of specific regulations.[4]

2. Scientific Legal Policy

The scientific legal policy is a wide-ranging research programme which entailed the necessity of conducting new research in logics, psychology, sociology, philosophy and legal sciences because none of those fields was scientific – according to the requirement of the Polish philosopher and sociologist of law. Nevertheless, if we undertake to reconstruct the characteristics of Petrażycki's legal policy, we will encounter an obstacle. He outlined the general frameworks of this new field of legal sciences in his book entitled *Wstęp do nauki polityki prawa* (Introduction to Legal Policy), which was originally published in 1897.[5] However at that time, Petrażycki outlined only a "road map" and he began systematic studies on psychology, sociology, philosophy and law only later. Due to the lack of another complete description of the legal policy concept from later years, it befits to present the primary assumptions in a way in which they were presented by their author. The legal policy was to be based on four theses: 1) on the social ideal, 2) on ethical progress, 3) on the educational role of law and 4) on legal psychology.

According to the first thesis, the aim of law is to achieve the social ideal, which was named by Petrażycki – somewhat poetically – the ideal of love. This aim is to be achieved in an evolutionary, yet controlled way. We should not wonder why it is love that constitutes the social ideal, the direction of which the provisions of law should lead us to,[6] because the ideal of love is the axiom of a practical mind. It does not need any proof, the same as the statement that love is the highest good, which also does not need any proof. Petrażycki was thinking of the ideal of love as a situation where there is no law or morality because altruistic behaviours are the dominant pattern of behaviour.[7] The role of legislators, and thus the aim of legal rules, is to intentionally accelerate the ethical development of societies and promote "the highest rational ethics among people".[8] Already at first glance there appears a question whether it is practically possible to fulfil such an ideal. Andrzej Kojder called Petrażycki a "Big Romanticist" because he did not believe, most probably similarly to Petrażycki, that such a situation could be achieved in the foreseeable future.[9]

The ideal of love has practical application because it should serve as a tool which allows for the identification of dominant ethical views in society and thus it may help in the proper selection of legal acts so that they are appropriate for the current level of ethical development of society. Even if we were to agree with the above statements, there remains a question how the legislator can change the ethical views of an entire society. How to encourage citizens to altruism-based behaviours?

The thesis about the social ideal assumes that some form of the ethical evolution of society and entire mankind is possible and takes place. To be honest, that thesis makes sense only when the ethical evolution is already pending. Petrażycki was searching for proof of that evolution but he was conducting his search using methods which were available at the end of the 19th century. The legal systems of previous eras, in particular Roman law, constituted the subject matter of the search. Being a lawyer and a philosopher, he believed that historical and legal studies on changes of legal systems from ancient times until the beginning of the 20th century would enable him to identify the ethical evolution and thus to specify the stages of that evolution in particular societies.[10]

The ethical evolution thesis and the ethical behaviour thesis are interconnected. The first one assumes the existence of the evolution of values and behaviours and possibilities of accelerating it thanks to the use of

4 L. Petrażycki, *O dopełniających prądach kulturalnych i prawach rozwoju handlu*, Warsaw 1936.

5 L. Petrażycki, *Wstęp do nauki polityki prawa*, Warsaw 1968.

6 Ibidem, p. 25.

7 A. Habrat, *Ideał człowieka i społeczeństwa w teorii Leona Petrażyckiego*, Rzeszów 2006, p. 11–18; H. Leszczyna, *Petrażycki*, Warsaw 1974, p. 69–90; K. Motyka, *Optymizm Petrażyckiego*, "Kamena" 1981, No. 11, p. 9.

8 R. Zyzik, *Ideał społeczny w polityce prawa. Perspektywa ewolucyjna*, "Archiwum Historii Filozofii i Myśli Społecznej" 2015, No. 60, p. 175–188.

9 A. Kojder, *Godność i siła prawa: szkice socjologicznoprawne*, Warsaw 1995, p. 123.

10 L. Petrażycki, *Wstęp do nauki…*, op. cit., p. 25–28.

an appropriate legal motivation on a large scale. The second one assumes that the evolution moves towards the ideal of love, namely a state in which egoistic behaviours are marginal and law and morality are no longer needed. However, before the ideal of love is achieved, it may – according to Petrażycki – serve as an objective assessment criterion of legal norms understood as impulses influencing the behaviours of citizens in a way which, on one hand, is in line with the ethical level of society and, on the other, brings them closer to achieving the ideal of love. When putting forward those two theses, the researcher identified the aim of law and indicated a mechanism thanks to which we can try to achieve that aim. Those two theses may be confirmed empirically, according to their author.

The researcher identified the aim of law and indicated a mechanism thanks to which we can try to achieve that aim.

The third thesis of the scientific legal policy underlines the educational role of law. Law, asa tool with unprecedented strength of impacting the psyche of millions of people, successfully influences the ethical development of societies.[11] If the legislator tries to establish law which is contrary to the values shared by the majority of society, they will definitely not be able to achieve the intended goals and ensure that such law is used properly and observed. Petrażycki assumed that the evolution from egoism to altruism, from hatred to love, from distrust to trust is real and continuous, however, as every evolutionary process – it is slow, full of mistakes and dead-ends and sometimes even steps backwards. Nevertheless, it may be "corrected" if legislators create law in accordance with the requirements of the scientific legal policy. Only then will law constitute a tool of the conscious ethical education of a society; only then will it be possible to accelerate the ethical development of members of society and create habits of desired behaviours. However, to that end, the legislator should be aware which measures can be used in a specific situation and which should be resigned from, thanks to which they will be able to assess which goals from among those intended by the legal system are achievable at all.

The last thesis which constitutes the core of Petrażycki's scientific legal policy is the thesis regarding legal psychology. Psychology which tests the influence of law on behaviours of the addressees of norms. Law can influence behaviours through short-term motivations as well as motivations which take effect even when the enacted law does not exist anymore. The author of that theory was expecting – which nowadays seems right – that provisions of different law branches, and even provisions of the same law branch, activate different psychological mechanisms. In different social situations, different psychological processes will be responsible for making decisions.[12] Thus assuming one decision-making model in law (e.g. the rational decision-making model) is an incorrect strategy of creating law. The legislator should use the entire spectre of behaviour motivations: starting from desire for profit, love for the country, responsibility, empathy

11 A. Habrat, *Ideał człowieka*…, op. cit., p. 62–83.

12 Compare R. Zyzik, *Spójność czy prawda? Rola reguły ‚istnieje tylko to, co widzisz' w postępowaniu cywilnym*, "Przegląd Sądowy" 2015, No. 5, p. 83–94; idem, *Decyzje pojedyncze i łączone w orzekaniu środków karnych. Kazus nawiązki*, "Przegląd Prawniczy, Ekonomiczny i Społeczny" 2014, p. 147–157; idem, *Wokół intuicyjnych decyzji sędziego*, "Zeszyty Prawnicze UKSW" 2014, No. 2, p. 187–200; idem, *Błąd perspektywy czasu a odpowiedzialność odszkodowawcza*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2015, No. 2, p. 131–141; R. Zyzik, *Dlaczego zmęczenie decyzyjne może być zagrożeniem dla niezawisłości sędziego?* "Forum Prawnicze" 2014, No. 3, p. 17–24.

and even unwillingness to act, ending with fear of punishment. The contemporary psychological literature successfully identifies psychological processes responsible for various actions, even those undertaken in legal or moral contexts.[13]

Studies on behaviour motivations are just one side of the coin, studies on "legal pedagogy", namely on mechanisms responsible for the formation of habits of behaviour, constitute the other side. How are habits formed? Can law successfully form long-lasting habits of desired behaviour? How can we change habits which already exist? Those are the questions which legal pedagogy should answer. According to Petrażycki, the first task of law is to create such motivations which will successfully convince people to specific behaviours. However, the legislator will be fully successful only when, even after the derogation of a given legal norm, individuals behave as if it was still valid (provided that no new legal norm is enacted).[14]

We should once again underline here what was mentioned when discussing the thesis regarding social behaviour. The knowledge about changing behaviours, forming habits and learning about motivations should come not only from psychology because it is culture-dependent (knowledge as well as psychology).[15] Only when we answer the question about the level of society's ethical development, about the values which are commonly shared and which political, legal, social and economic institutions enjoy the biggest support, will we be able to use psychology as a tool of forming successful and long-lasting patterns of behaviour.

If we were to enumerate, in a specific scope, fields which constitute the components of the scientific legal policy, we should list: philosophy of science (what does it mean that a given field is scientific?), philosophy (the social ideal as the axiom of the practical mind), sociology, evolutionary sciences as well as the history of law (the ethical progress of societies) and, last but not least, cognitive and social psychology and cognitive neuroscience (legal psychology and legal pedagogy). Already this short list makes us realise how complex Petrażycki's legal policy is, nevertheless, those are only those fields which play the main roles in developing the scientific legal policy.

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It seems that the behavioural economic analysis of law may be perceived as the long-awaited continuation of the scientific project of the Polish philosopher and sociologist of law. Obviously, the contemporary behavioural analysis of law does not, to any extent, use his papers. However, interesting similarities between those two projects deserve a closer analysis because Petrażycki's wide-ranging theoretical studies may enrich the practically oriented movement of the behavioural economic analysis of law.

3. Behavioural Economic Analysis of Law

It does not matter for these considerations, whether the behavioural economic analysis of law (hereinafter: BEAL) is only a school, a scientific movement, a

13 D. Kahneman, *Thinking, Fast and Slow*, Poznań 2012; K. Stanovich, *Rationality and the Reflective Mind*, Oxford 2011; R. Thaler, C. Sunstein, *Impuls: jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, translated by J. Grzegorczyk, Poznań 2008.

14 L. Petrażycki, *Wstęp do nauki*…, op. cit., p. 30.

15 R. Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently*, New York 2005.

research paradigm or already a legitimate scientific field. It is even not easy to identify BEAL's development directions. Nevertheless, the starting point for all scientists who identify themselves with the behavioural analysis of law[16] is to focus on actual psychological processes that occur at the moment of making decisions. Therefore, it is based on empirical data provided by cognitive psychologists, economists but also lawyers.

According to Jeffrey Rachlinski, an American psychologist and theoretician of law, two texts had a significant influence on the development of BEAL. The first one was *A Behavioral Approach to Law and Economics written* by Christine Jolls, Cass Sunstein and Richard Thaler.[17] The second one was *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics* by Thomas Ulen and Russel Korobkin.[18] Those two articles, whose theses were subsequently developed in thousands of other publications, include the presentation of BEAL's main goals, description of methodology and description of cases in which BEAL might be used. In fact, those two articles created the behavioural economic analysis of law.

However, before we move on to presenting the general description of the behavioural analysis of law, it is worth examining Rachlinski's remarks regarding its status. He believes that the non-recognition of BEAL's psychological origin constitutes one of the biggest defects of BEAL. Even though nowadays, the behavioural analysis is used in an obvious way by economically oriented lawyers, legally oriented economists, psychologists and public policy specialists, among others, it is psychology that constitutes the foundation of the behavioural economic analysis of law.[19]

Psychologists Daniel Kahneman and Amos Tversky and economist Richard Thaler are its founding fathers. Thaler undertook to empirically test decision-making processes under the influence of contacts with Daniel Kahneman as well as huge differences which he identified between the then-existing psychology and the assumptions of economy.[20] Christine Jolls, one of the first people who were dealing with that issue, defines BEAL in the following way:

> "Behavioural law and economics involves both the development and the incorporation within law and economics of behavioural insights drawn from various fields of psychology (…). Behavioural law and economics attempts to improve the predictive power of law and economics by building in more realistic accounts of actors' behaviour".[21]

Similarly, Jolls, Sunstein and Thaler define the characteristics of BEAL in their text in the following way:

> "The unifying idea in our analysis is that behavioural economics allows us to model and predict behaviour relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behaviour, and more accurate predictions and prescriptions about law".[22]

One of the characteristics of the behavioural economic analysis of law is the use of psychology in order to better understand the way of decision-making, which later might be used to more effectively apply law to shape the behaviours of the addressees of legal norms. The behavioural economic analysis of law was not created or developed because more refined mathematical models appeared but because a lot of

16 The term "behavioural analysis of law" will be hereinafter used interchangeably with the "behavioural economic analysis of law" and "BEAL".

17 C. Jolls, C. Sunstein, R. Thaler, *A Behavioral Approach to Law and Economics* (in:) C. Sunstein (ed.), *Behavioral Law and Economics*, Cambridge 2000, p. 13–58.

18 T. Ulen, R. Korobkin, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, "California Law Review" 2000, No. 4, p. 1051–1144.

19 J. J. Rachlinski, *The Psychological Foundations…*, op. cit., p. 1679.

20 D. Kahneman, A. Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, "Econometrica: Journal of the Econometric Society" 1979, No. 2, p. 263–291; A. Tversky, D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, "Science" 1974, No. 4157, p. 1124–1131; R. Thaler, *Toward a Positive Theory of Consumer Choice*, "Journal of Economic Behavior& Organization" 1980, No. 1, p. 39–60.

21 C. Jolls, *Behavioral Law and Economics*, "National Bureau of Economic Research" 2007, No. 12879, p. 2.

22 C. Jolls, C. Sunstein, R. Thaler, *A Behavioral Approach…*, op. cit., p. 1.

work was done by cognitive psychologists but also by evolutionary biologists or cognitive neuroscientists[23]".

Jolls, Sunstein and Thaler identified three interconnected tasks which should be performed as part of BEAL. Those are the following: a descriptive task, a prescriptive task and a normative task. The descriptive tasks is the starting point for any other research. Actually, it is not only the starting point but also the *sine qua non* condition for the whole behavioural analysis.

How does law influence human behaviour? How do people make decisions under conditions of uncertainty? How do they decide on concluding an agreement? What guides them when they decide to break the law? How will citizens react to introduced regulations? How does law motivate to action? Those are only examples of puzzles, questions which the representatives of BEAL try to solve as part of the descriptive task. We can see at first glance that any person who undertakes to answer such questions, will have to use psychological knowledge.[24] The descriptive tasks consist in the need of understanding the determinants of the actual human behaviour and the influence of legal provisions on that behaviour. The descriptive tasks consists in answering the "how is it?" type of question. The description of psychological processes which are behind decisions made by people and the description of the way in which legal provisions influence human behaviour will constitute the final result of performing the descriptive task.[25]

The next step in BEAL is the performance of the prescriptive task. If we assume that the descriptive task is a part of descriptive and theoretical sciences, then the second task should be characterised as the one which falls within the competences of practical social sciences. The legislator, when trying to achieve a specific goal, establishes legal principles with specific wording. Therefore, they should be equipped with tools and knowledge regarding the achievement of goals using the most effective methods to do so. They should be able to effectively motivate people to a desired behaviour or on the contrary: if they consider a particular behaviour harmful, they should be able to successfully prevent people from such behaviour. Legislator's aims are different and thus there are also different means to achieve them – from prohibition on certain behaviours to an order of desired behaviours by encouraging or facilitating the undertaking of initiatives which are important from the point of view of the addressees of legal norms themselves. The prescriptive task consists in using knowledge about the relations between psychological processes and behaviours and impulses of behaviours in the form of legal norms. When performing that task, the question such as the following one are answered: "How to use knowledge about X in order to achieve goal Y using legal provisions?".[26]

Last but not least, BEAL should perform one more task. The normative task, because that is the one referred to, consists in identifying, formulating and assessing the main aims of the legal system. The issue regarding the aims of law, the aims of the legal system is an everlasting problem of legal philosophy. Despite the fact that BEAL owes its current success to a modes step-by-step strategy – from using specialist knowledge about the mechanisms of human behaviour in complex social situations, to using tools in order to achieve intended goals – the question about the intended goals had to be asked at some point. As admitted by Jolls, Sunstein and Thaler, the issue of a dispute between paternalism and libertarianism lies exactly there. How should then the legislator select goals which are to be achieved by legal actors?[27] The supporters of BEAL try by all means to avoid accusations of paternalism. Therefore, Thaler and Sunstein suggested libertarian paternalism as the philosophy of a social change underlying the behavioural analysis of law. This term is supposed to mean that the legislator changes the decision-making situation of legal actors in such a way to convince them, by anticipating their possible behaviours, to choose such a solution which will be compliant with the interest of the whole of society. Nevertheless, the freedom of choice of par-

23 N. Wilkinson, M. Klaes, *An Introduction to Behavioral Economics*, New York 2010, p. 15–18.

24 G. Mitchell, *Taking Behavioralism Too Seriously? the Unwarranted Pessimism of the New Behavioral Analysis of Law*, "William and Mary Law Review" 2002, No. 5, p. 1907 et al.

25 C. Jolls, C. Sunstein, R. Thaler, *A Behavioral Approach…*, op. cit., p. 2.

26 Ibidem.

27 Ibidem, p. 2–3.

ticular addressees of legal norms will not be limited. The term "paternalism" results from the state's attempt to directly or indirectly influence choices made by particular members of society and the adjective "libertarian" indicates that the final choice lies with an individual. That proposal caused a dispute between supporters and opponents of the behavioural analysis. The former believe that libertarian paternalism is possible and constitutes the best solution for the legislator who wants to successfully influence society and, at the same time, does not want to deprive its members of the freedom of choice. However, the opponents argue that this is nothing else than a very sophisticated form of manipulation because it is the legislator who knows more about the ways of behaviour of members of society in specific situations and uses that knowledge in order to achieve their own goals. Thus the freedom of choice, even if seemingly kept, is an illusion which is supposed to hide the paternalistic tendencies of legislators.[28]

The three above-mentioned tasks constitute the main goals of the behavioural economic analysis of law. As underlined by Korobkin and Ulen: because the provisions of law constitute impulses which either encourage people to undertake specific actions or discourage them from doing so, psychological knowledge about decision-making processes should be incorporated in the legal models of decision-making.

28 C. Sunstein, R. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, "The University of Chicago Law Review" 2003, No. 4, p. 1–43.

4. A few words about Petrażycki's contemporary period

We should explain here how Petrażycki's theoretical papers can enrich the behavioural economic analysis of law. The first issue that should be examined is the non-trivial issue of paternalism. The second issue concerns the cultural dependency of the legal policy and law in general, which is often ignored or unnoticed by BEAL supporters.

The term "paternalism" results from the state's attempt to directly or indirectly influence choices made by particular members of society and the adjective "libertarian" indicates that the final choice lies with an individual.

If the issue regarding the aims of law was put aside at the initial stage of works on BEAL, paternalism became a significant practical issue at the moment when the possibility arose to broadly use behavioural analysis in the law-making process. By contrast, the issue of the cultural dependency of legal policy and law in general is important already at the stage of developing methods and tools because it concerns the universal effectiveness of BEAL. Something that can work properly in the conditions of Anglo-Saxon law in the American version does not necessarily work as effectively in the civil law legal system applicable in the countries of Central and Eastern Europe.

Leon Petrażycki suggested the social ideal as the aim of the legal policy but also as the assessment criterion of specific legal solutions. Maybe this criterion may not be used in the case of every new normative act, however, the area of its usage does not necessarily need to be narrow. Nevertheless, the fact that the social ideal was put forward as the aim of the legal policy does not mean that its author was a supporter of paternalism. However, staying on the grounds of that theory, we can see that the ethical evolution

of society is a fact. The evolution runs from egoistic and unfair societies which limit the group of legal actors to a narrow group of citizens – to societies which are more solidary and characterised by less severe punishments and a broad group of legal actors. Thus the order of implementing the social ideal through legislative processes is not, in its essence, an order of a normative but of a prescriptive character. And prescriptive judgements, unlike normative ones, may be justified scientifically – even though, there is a pending dispute regarding the scientific justification of normative judgements in philosophy – because they are based on descriptive statements identifying casual dependencies. So, if a specific descriptive statement ("The ethical evolution of societies is a fact") is true, then a prescriptive statement ("If the legislator wants to strive for the achievement of the social ideal, they should observe the requirements of the scientific legal policy") is a statement which is empirically justified.

The above reasoning makes sense as far as the ethical progress of society is a fact. Even though, Petrażycki's arguments in that field are interesting, nowadays, proof of the empirical character of ethical progress may be found in other scientific fields which, by the way, did not exist when Petrażycki was writing his *Wstęp do nauki polityki prawa* (Introduction to Legal Policy). The question about progress, or what is more correct now – ethical evolution immediately forces us to draw attention to contemporary evolutionary sciences and primatology. Studies on the evolutionary character of cognitive processes and more broadly: the human mind render it possible to assume a new perspective in assessing the ethical progress assumed by the Polish lawyer. For instance, Frans de Waal, one of the most famous representatives of evolutionary sciences and primatology, notices in his book *Primates and Philosophers. How Morality Evolved?*:

> "If we assume this vision of the evolution of morality – morality which constitutes a logical consequence of co-operative tendencies – it will turn out that we do not go against our nature by taking care of caring moral attitude, similarly to the civil society which is not a chaotic garden being taken care of by a gardener with the sweat of his brow, as imagined by Huxley. Moral attitude has been with us from the very beginning and the gardener – as brilliantly expressed by Dewey – is a supporter of a natural growth. An effective gardener creates conditions for the growth of plants which normally would not yield a good crop on a given territory, "however, they belong to the nature as such". In other words – when we act in a moral way we are not hypocrites lying to everybody: we make decisions which are based on social instincts that are older than the humankind, even if we add to it typically human unselfish care for other people and for the society as a whole[29]".

Frans de Waal states that morality is a part of our nature and it is based on inborn tendencies to co-operative behaviours. Morality is a part of our evolutionary structure and therefore, proper ruling should not be done contrary to our evolutionary tendencies. Law, as a tool of constant influence on human behaviours, can create an environment in which our inborn evolutionary tendencies can develop without hindrance or on the contrary: it may promote behaviours which do not necessarily lie in our evolutionary-understood nature. However, there is something that distinguishes us from among other creatures, namely typically human care for society as a whole and unselfish care for others. Even though evolution has no aim and in the case of evolutionary processes, we cannot talk about

Morality is a part of our nature and it is based on inborn tendencies to co-operative behaviours.

29 F. de Waal, *Małpy i filozofowie. Skąd pochodzi moralność?*, Polish translation by B. Brożek, M. Furman, Kraków 2013, p. 55.

any progress but only about adaptation and reproductive success, if we were to search for any regularities in the evolutionary history of humankind, undoubtedly, this would be an increasingly big role of cooperation and moral rules which guarantee it.

Leon Petrażycki could not study primacies because evolutionism – even though already popular – was only in its initial stages and evolutionary psychology did not exist at all at that time. Nevertheless, it seems that studies on the history of legal institutions put him on the right track. Civil law can be an indicator which helps to identify the ethical level of society. The group of legal actors in ancient times was much narrower than the group of legal actors in the 21st century. Slaves did not have the status of a person under law. In some cultures, foreigners could be killed and there were no legal consequences for the killer. Investigation methods used in the middle ages could be qualified today as torture. The status of children changed only at the beginning of the 20th century, when they stopped being treated as cheap labour. Women in Switzerland did not have voting rights until 1971. We can assume with great caution that Petrażycki had this exact type of ethical progress in mind when writing about the empirical foundations of ethical progress. Thus his statements regarding the role of evolutionary mechanisms and their influence on egoistic and altruistic behaviours even today seem legitimate.[30]

If we look at the social ideal thesis from such a perspective, on one hand, and at libertarian paternalism related to BEAL on the other, we can identify a common foundation of those two approaches to the legal policy. It starts from the words "If people knew". And then: if people knew how to behave, for sure they would behave this way and because they do not know, someone needs to help them. Petrażycki believed that the legislator should support a natural tendency to eradicate egoistic behaviours and strengthen solidarity ones. The supporters of BEAL contend that due to limited cognitive possibilities, the lack of strong will and the dominant motive of behaviour, people do not always behave in a way which will make their lives better, healthier and longer.

30 A. Biernat, *Poglądy filozoficzne Leona Petrażyckiego i ich interpretacje*, Toruń 2001, p. 43.

There are two common things of the scientific legal policy and BEAL. Firstly, faith in science and its capabilities of discovering important facts which can help legislators to create better and more effective law. And secondly, conviction that there exists key knowledge (mostly psychological but not only) which, if only used, will render it possible to increase the quality of life of individuals and whole societies. While BEAL gets tangled in an unsolvable dispute between libertarianism and paternalism, suggesting a middle solution – namely libertarian paternalism, the scientific legal policy avoids accusations of paternalism, by assuming the social ideal axiom based on the empirically-confirmed (even though, this is a disputable thesis) ethical evolution, because the choice of the main aim of law is not a normative but rather a prescriptive statement. Obviously, we may ask why we should strive for the social ideal and accelerate the ethical evolution or, at least, not hinder it. In that case, Petrażycki hides behind the axiomatic character of the ideal of love which, in turn, may not constitute a sufficient explanation for some people but only a way to avoid answering the actual question.

A statement that people think in the same way, regardless of whether they live in North America, Eastern Europe or the Middle East, constitutes one of the assumptions of BEAL. It is about an assumption that there exists an identical thinking mechanism in ethical, legal and moral categories. If specific motivational impulses in the form of legal norms work in the United States, there is probability verging on certainty that they will work also in Lithuania, India or Japan. Nevertheless, cultural psychology suggests something different (which was noticed by Petrażycki much earlier). The way of thinking is influenced by geographical, cultural, political, legal and economic conditions and all of them have far-reaching consequences.

Below, we will refer only to a few examples of studies conducted on the territory of the countries of Central and Eastern Europe, which show that the legal and economic history of a given society is important for the currently applicable legal principles.

Studies of Axel Ockenfels and Joachim Wienmann show that there are significant differences between the solidarity level of those societies which were unlucky enough to function within the socialist system imposed

by the USSR and the level of the societies of western democracy. People living in the socialist system were willing to offer significantly lower amounts of money (it was possible to offer a maximum of 10 German marks) than people which were lucky enough to find themselves on the western side of the Berlin Wall.[31] On the other hand, other studies confirmed that the citizens of Eastern Germany preferred the social policy of a redistribution character and, at the same time, they do not consent to the increase of public levies which allow for such redistribution. In addition, those people have much less trust to their co-citizens.[32]

It was also possible to establish, as part of conducted experiments, that the longer people lived in socialist conditions, the more prone they were to lie if the probability of discovering the lie is marginal. Nevertheless, even people who were born after the fall of the Berlin Wall but in families from Eastern Berlin were still lying more (although slightly) than people born in families from Western Berlin. And a higher tendency to lie may translate into higher public costs because the control of the behaviours of such citizens should be appropriately proportional to their tendencies to break the law and thus maximise their individual benefits.[33]

Studies on the influence of political, economic and legal systems on – using the language of Petrażycki – the ethical progress of societies are more and more common.[34]

Taking into consideration the results of the above-mentioned studies, we should recognise that the scientific legal policy should be culturally dependent in a sense that one of its elements should be the history of the evolution of legal, economic and political institutions, as stated by Petrażycki, but also the actual ethical state of societies which nowadays can be measured e.g. by measuring the confidence that citizens have in the state, the level of corruption, the grey zone or by learning about the assessment of issues which are important in terms of morality. None of those indicators alone would say much, however, a set of such data could be an indication which the legislator should take into consideration.

Some of the representatives of the behavioural economic analysis of law seem to notice that problem:

> "Yet it is not only the law that can differently shape the behaviour of legal actors, but also the broader social and cultural institutions it is embedded in. Specifically, a significant and growing literature documents systematic cross-cultural differences in different areas of judgement and decision-making, from probability judgements, through risk perceptions, to risk preferences and beyond. (…) Naturally, we should expect such systematic cross-cultural differences to impact (…) both the nature of a given culture's legal institutions and the ways in which these institutions, in turn, affect individuals' behaviour[35]".

The new generation of the behavioural analysis should take into consideration not only easily identifiable differences between the Anglo-Saxon and civil legal systems but also the cultural, social, economic and political characteristic of a given society. People might be different not only in terms of their views but also in terms of their ways of thinking and how they formulate opinions. They might present tendencies to lie and, on the other hand, to be guided by principles. Depending on a society, the effectiveness of orders, prohibitions or permissions may be different. According to Petrażycki, such differences exist and they should be taken into consideration by those legislators who abide by the requirements of the scientific legal policy.

31 A. Ockenfels, J. Weimann, *Types and Patterns: an Experimental East-West-German Comparison of Cooperation and Solidarity*, "Journal of Public Economics" 1999, No. 2, p. 275–287.

32 A. Alesina, N. Fuchs-Schündeln, *Good-Bye Lenin (or Not?): The Effect of Communism on People's Preferences*, "The American Economic Review" 2007, No. 4, p. 1507–1528.

33 D. Ariely et al.., *The (True) Legacy of Two Really Existing Economic Systems*, "Munich Discussion Paper" 2014, No. 26, p. 1–25.

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5. Summary

The aim of this paper was to present arguments supporting the thesis that Leon Petrażycki may be perceived as the founder of the behavioural economic analysis of law. Despite the fact that his theory is a result of research conducted in the 19th century and the first three decades of the 20th century, it is surprisingly compliant – in its assumptions and partially aims – with the behavioural economic analysis of law. However, the aim of the behavioural analysis is more modest and thus more realistic. It does not aim at making the world a better place and making people treat each other better. Its aim is to enable people to make right decisions regarding health, happiness and wealth, as we can read in the subtitle of *Impuls* – a classic book in the field of behavioural economics. It is about creating law which will encourage people in a non-invasive, easy to avoid and costless way to make decisions which will be better from their point of view.

The behavioural economic analysis of law may be characterised as an example of the *bottom-up* strategy. Its supporters do not start their work from identifying general ambitious goals of the legal policy but they focus on improving specific legal institutions using psychological and economic knowledge for that. On the other hand, Petrażycki's scientific legal policy resulted from using the *top-down* strategy. At first, he presented a general and very ambitious goal of the legal policy, then he identified a mechanism which will help to achieve that goal. And only then did he indicate where to find knowledge which would render it possible to create the desired law. Therefore, his research direction was totally opposite to the one assumed in the behavioural analysis.

Petrażycki's methodology has its pros and cons. The behavioural analysis is much easier to be used in practice. The relation between the social ideal and the practice of applying law is complicated and unnecessary in many cases. Not every regulation which will increase the quality of life of an individual or society has to fulfil the social ideal. Some regulations are simply irrelevant in those terms. From the perspective of the law application practice, it seems that the *bottom-up* strategy is effective.

Nevertheless, the questions about values need to be asked at some point. We should answer, more or less definitely, the question which values law should fulfil and to what extent psychological and economic knowledge is to be used. The normative task facing the supporters of the behavioural analysis is nothing else than the question about the values which are fulfilled by law. The use of the *bottom-up* strategy moves this problem away but it does not eliminate it completely because anyway the issue regarding the assessment of alternative aims of law will have to be solved at some point. The question about the criterion of such an assessment and its justification will be asked. In that sense, Petrażycki's social ideal and its empirical foundations, which are more or less convincing, constitute a way to avoid the accusation of arbitrariness in choosing the aims of law.

People might be different not only in terms of their views but also in terms of their ways of thinking and how they formulate opinions.

In addition, such an understanding of the aim of the legal policy limits the possibility of using the legal policy only in the interest of the current political power. Thus, on one hand, the social ideal may seem to be a limitation of the political power at least in the scope in which that power would want to fulfil particular interests at the expense of a society and, on the other hand, considering that ideal would constitute some form of a regulative idea which would have an indirect influence on the legislator so that they create law which supports co-operation, trust in other society members and in the public sphere.

Behavioural economy has made huge progress within the last decades. Therefore, it is not surprising that there are voices encouraging to expand and deepen the studies which are already being conducted. Studies on cultural factors influencing the effectiveness of legal regulations based on the results of analyses of a behavioural economy and cognitive psychology are supposed to constitute one of directions of that deepening. Petrażycki's statement regarding the evolutionary and cultural nature of the legal policy should be taken into consideration here. He had no doubt that social, economic and legal differences between countries translate into different patterns of behaviour, different assessments of legal and social institutions and, most importantly, different ways of thinking about values. Thus the behavioural economic analysis of law – which, in fact, was developed in the United States and Western Europe – does not necessarily need to have the same effective influence on the behaviours of the citizens of countries in Central Europe, Asia or South America. This is an extremely important fact and it requires deepened studies because it questions the character of behavioural analysis tools which have been universal so far.

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