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Submission

1) **articles** – texts should not be longer than 60 000 characters. Authors are also expected to attach a short abstract in English (not longer than 1500 characters).

2) **book reviews** – books reviewed should be published during the last year period - in case of Polish publications - or two years period - in case of foreign publications. Book reviews should not be longer than 20 000 characters.

3) **glosses** – rulings adressed should have a substantial influence on the case law and should develop or change it in a significant way. Alternatively rulings adressed should refer to the entirely new cases. Glosses should not be longer than 30 000 characters.

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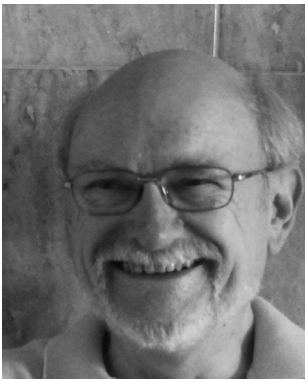
The Republic Can Never Be Taken for Granted. Ronald J. Oakerson on Vincent Ostrom's Legacy



Ronald J. Oakerson

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It is now 10 years since the Nobel Prize for Economics was awarded to Elinor Ostrom. We are a few months after the sixth Workshop on the Ostrom Workshop WOW6 at Indiana University in Bloomington, which was attended by researchers from all over the world. In parallel, the International Association on the Study of Commons holds its biennial conference every two years. Most recently in Peru, in two years' time in the United States. It can be said that the Ostroms' heritage is developing dynamically and globally. Research is conducted using a variety of methodologies: from political economy and field research on the management of commons to highly specialized economic, sociological, urban and legal analyses, anthropology, cybersecurity and internet governance, history and media studies. Also in Poland, there is a growing interest in the achievements of the Ostroms' school: new publications are being published and Polish scientists participate in thematic conferences.[1] The first issue of the

1 Publications, e.g.: K. Safarzynska, *The impact of resource uncertainty and intergroup conflict on harvesting in the common-pool resource experiment*, „Environmental and resource economics" 2018, vol. 71, no 4, pp. 1001–1025; G. Blicharz, *Commons – dobra wspólnie użytkowane: prawnoporównawcze aspekty korzystania z zasobów wodnych* [Commons – jointly-used goods: comparative aspects of the use of water resources], Bielsko-Biała 2017; Z. Łapniewska, *(Re)claiming space by urban commons*, „Review of Radical Political Economics" 2017, vol. 49, no 1, pp. 54–66; G. Blicharz, T. Kisielewicz, *Prawne aspekty zarządzania commons wobec technicznych wyzwań rozwoju smart city*, "Forum Prawnicze" 2017, vol. 39, no 1, pp. 34–54; K. Safarzynska, *Intergroup cooperation prevents resource exhaustion but undermines intra-group cooperation in the common-pool resource experiment*, „Ecology and Society" 2017, vol. 22, issue 4:10. Conferences, e.g.: WOW6 2019, Bloomington, IN: Karolina Safarzynska, and Marta Sylwestrzak, "Are Groups Less Cooperative Than Individuals? Groups as Likely as Individuals to Help an Outgroup If It Is Economically Beneficial, but Not under Resource Inequality"; Grzegorz Blicharz, "Legal Aspects of Governing the Commons and Technical Challenges of Smart City Development"; Franciszek Longchamps

Interview with Prof. Ronald J. Oakerson by Grzegorz Jan Blicharz

"Legal Forum" journal began with an interview conducted by Prof. Małgorzata Korzycka with Elinor Ostrom – the first female Nobel Prize winner in economics.[2] From the perspective of these years, we now want to look more closely at the figure of Vincent Ostrom. His works were also the first to be available to the Polish reader.[3] Professor Oakerson, your doctoral dissertation[4] was among the first to develop and apply the core ideas of institutional analysis, drawn from Vincent Ostrom's work, later formulated and elaborated by Elinor Ostrom and colleagues as the Institutional Analysis and Development (IAD) framework.[5] You have in fact accompanied Vincent and Elinor along the way to create and bring up the generations of scholars keen on political thought of Vincent, and Elinor's research on management of the commons.

G.B.: The first research conducted by Vincent Ostrom concerned the management of water resources in Wyoming and in California. Already then, he attached great importance to legal solutions, especially to the jurisprudence of courts. He inspired Elinor to investigate the Pasadena groundwater reservoir case. Where did Vincent Ostrom's interest in the law come from?

> **What we call "intergovernmental relationships" are not peripheral arrangements but are at the core of public administration.**

R.O.: *Vincent's point of departure on his intellectual journey – his original focus – was the study of public administration, culminating in* The Intellectual Crisis in American Public Administration, *published in its first edition in 1974. In his study of water administration, he began to see that public administration in America could not be sufficiently well understood through the study of intra-organizational relationships within bureaucratic agencies but, rather, that what we call "intergovernmental relationships" are not peripheral arrangements but are at the core of public administration in the U.S. It followed that public law would come to the fore as the basic coordinating mechanism of such a system, in contrast to a bureaucratic hierar-*

de Bérier, "Pragmatism, Tolerance, and Compromise: Values behind Governing an Ancient Megaorganization" and Mikołaj Herbst, "The Persistent Legacy of the Fallen Empires: Assessing the Effects of Poland's Historical Partitions on Contemporary Social Norms towards Education".

2 *Wywiad z Elinor Ostrom* by Małgorzata Korzycka, „Forum Prawnicze" 2010, vol. 1, no 1, pp. 5–11.

3 V. Ostrom, *Administrowanie dobrami i usługami publicznymi w świetle badań* (Public Goods and Public Choices), trans. M. Korzycka, „Administracja" 1989, no 2 = V. Ostrom, *Federalizm Amerykański. Tworzenie społeczeństwa samorządnego*, Warszawa–Olsztyn 1994, pp. 159–180.

4 R. Oakerson, *The Erosion of Public Highways: A Policy Analysis of the Eastern Kentucky Coal-Haul Road Problem* (1978), PhD diss., Indiana University, Bloomington. See also R. Oakerson, "Analyzing the Commons: A Framework", in *Making the Commons Work: Theory, Practice, and Policy*, ed. D.W. Bromley, et. al., San Francisco 1992, pp. 41–59.

5 E. Ostrom, *Understanding Institutional Diversity*, Princeton 2005; E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, New York 1990.

chy or chain of command. Somewhat later, Vincent found that Alexis de Tocqueville had addressed the same puzzle in Democracy in America *and came to the same conclusion: the enforcement of rights and duties among public agencies at different levels of government in American federalism lies with the courts – an independent judiciary.*

R.O.: *Good point! The republicans of the founding generation in the U.S. were well aware of the potential for individuals to abuse their liberties; they called such abuse "license." We need to assume that some abuse of speech and press liberties will always occur. To an extent, this is the price we pay for liberty. At the same time, we also know that individuals develop social norms, which constrain the use of liberty and can do so without recourse to governmental coercion. Thus, over time, newspapers have developed standards of journalism that subject members of the press to a form of self-regulation. In the era of electronic social media, however, the abuse of speech and press liberties has reemerged as a critical problem.*

We also know that individuals develop social norms, which constrain the use of liberty and can do so without recourse to governmental coercion.

G.B.: What is the role of law in the concept of a "compound republic"? What is the role of lawyers and judges then?

R.O.: *The "compound republic," which is James Madison's phrase, refers to the way in which the separate states, as fully functioning republics, are nested within the general republic called the United States. The U.S. Constitution assigns "enumerated powers" to the Federal Government, while reserving all other powers of government to the states. Given the power of judicial review exercised by the Federal Courts, the Constitution thus exposes any action of the Federal Government to potential legal challenge on constitutional grounds. In addition, the principle of the separation of powers, found at both Federal and State levels in the compound republic, means that administrative actions taken by executive agencies must be authorized by law that is agreed to by independent legislative bodies; this also exposes any administrative action to potential legal challenge in the courts as "ultra vires," not authorized by law. Moreover, the inclusion of a Bill of Rights in both Federal and State constitutions gives individual persons the authority to contest governmental actions in court as potential violations of constitutionally protected liberties.*

G.B.: Modern democracies rely heavily on the concept of individual rights and freedoms, which are fundamental. Today, are we not forgetting too often the social dimension of norms, their cultural context and the common good?

G.B.: What role can the media play in a compound republic and what role can especially social media play – do they foster the creation of nested structures?

R.O.: *This is one of the great unanswered questions of the day. At present in the U.S., it is the focus of much public discussion. Newspapers historically applied filters to the dissemination of ideas and opinions. Though I have tried numerous times, I have never had a letter to the editor published by the* New York Times*! Filters can be a source of frustration, but they are an essential means of maintaining the integrity of the press. Our safety valve has been the plurality of press outlets, though even this has been eroded by media consolidation. Today, American politics is continually roiled by the unfiltered expression of opinion that easily reaches mass audiences, a problem for which no clear remedy is in sight. Yet, conceivably, social media could greatly expand public discourse, provided that we can find a way to apply appropriate filters. Vincent was fond of pointing out that, in an assembly, only one person can speak at a time, notwithstanding freedom of speech – implying*

the need for a system of order in assemblies and a way of governing that order. Much the same can be said for expression through social media, which today has produced a cacophony of opinion and disinformation, the reverse of orderly public discourse.

Though I have tried numerous times, I have never had a letter to the editor published by the New York Times! Filters can be a source of frustration, but they are an essential means of maintaining the integrity of the press.

G.B.: Today we can observe the formation of closed – identity groups, media – people read, watch, listen to those who think in the same way, and those who create, provide information baked for such recipients. In this way, a network of communities is created, but often completely isolated from each other.

Though he was a great admirer of James Madison, Vincent dissented from Madison's view of the republic as constituted by representation.

R.O.: *Yes. Instead of a nested structure of discourse, in which particular identity or opinion groups are nested in a wider exchange of views, creating a conversation across diverse sets of ideas, the public realm is increasingly divided among groups that have little intelligible discourse with one another.*

G.B.: You have just mentioned the public realm. Vincent Ostrom perceived the public realm as the core of the republic (*res publica*). What did he mean by that?

R.O.: *Though he was a great admirer of James Madison, Vincent dissented from Madison's view of the republic as constituted by representation. In* Federalist 10*, Madison contrasted republican governance, by which he meant governance by elected representatives of the people, with democratic governance, meaning governance by the people in assembly. Though the republic is not composed of the people in assembly, it is nevertheless the people, for Vincent, who compose the republic – as members of the public realm. By this he means a realm of individual and collective action independent of government and thus dependent on willing consent. The defining characteristics of the public realm are (1) its openness to individuals and (2) its independence from government.*

G.B.: To what extent are the freedoms protected by the First Amendment conducive to the creation of a republic?

R.O.: *First Amendment freedoms are in fact constitutive of the public realm. Freedoms of speech, press, and assembly provide individuals with the constitutional authority to create and sustain relationships with one another without prior authorization by government. Any person can challenge government actions that*

infringe upon the public realm by invoking the First Amendment liberties in court.

G.B.: What significance does the freedom of association have for the shape of the contemporary republic?

R.O.: *Individuals in association comprise much of the public realm and thus give it structure. Tocqueville saw this clearly in the context of American democracy. Individuals in isolation are relatively powerless, but in association they have the ability to shape the process of governance. The ability to associate without prior authorization by government is essential to the republic.*

G.B.: You said recently, "Public freedom is the product of constitutional choice, but social constraint is the product of emerging social norms." Why is social constraint important for our rights and freedoms and where does it come from?

R.O.: *Though the public realm is created by constitutional liberties, its productivity depends on social constraint. By definition, the public realm develops independently of government, a product of public liberty. But, as we discussed earlier, liberty (like authority) is subject to abuse. Freedom of speech is abused when it is used to disrupt a lawful assembly. Freedom of the press is abused when it is used to distribute falsehoods. Freedom of assembly is abused when it is used to propagate violence – a mob is not a lawful assembly. The productivity of the public realm therefore depends as much on the restraint of liberty as on liberty itself. But the source of restraint must be primarily social rather than governmental, based largely on social norms rather than the enforcement of law backed by the coercive power of government. Otherwise, the independence of the public realm is lost to governmental regulation. Social constraint is "enforced" not by the extraordinary powers of government but by the ordinary powers of individuals in the context of their social relationships. When social relationships are based on willing consent, it is possible for individuals to withdraw their consent. Because individuals depend on the approval of others, they are subject to shared norms of conduct. Social norms – whether standards of journalism that constrain freedom of the press or social manners that constrain freedom of speech – are essential to the public realm. Yet, being based on liberty, the public realm must be self-governing; governmental regulation has the potential to destroy it.*

Yet, being based on liberty, the public realm must be self-governing; governmental regulation has the potential to destroy it.

G.B.: Which idea of Vincent Ostrom is the most important for you?

R.O.: *Without question, it is the open public realm, though the idea that draws most attention today is "polycentricity." This is Vincent's supposition that a political system can be composed of numerous semi-autonomous centers of authority, multiorganizational arrangements held together by a rule of law rather than a single sovereign. But the critical importance of polycentricity is that it brings the process of governance into the public realm. As Vincent put it in a paper titled "Federalism, Polycentricity, and Res Publica," delivered at a conference on "Res Publica: East and West" held in Dubrovnik in 1988, "The process of governance occurs in the public space afforded by the concurrent operation of these multiorganizational arrangements."*[6] *Governance here refers to the whole process of prescribing, invoking, applying, and enforcing rules of law. The separation of powers is a polycentric configuration of*

6 V. Ostrom, "Federalism, Polycentricity, and Res Publica: Some Reflections on the American Experiments in Republican Government", in *The Practice of Constitutional Development: Vincent Ostrom's Quest to Understand Human Affairs*, ed. by F. Sabetti, B. Allen, and M. Sproule-Jones, Lexington Books, 2009, p. 37.

authority to govern. In order for government to act, the separation of powers requires that legislative, executive, and judicial officials interact with one another; in order to govern, they must act jointly, in harmony. The interaction of autonomous governmental officials necessarily occurs to some extent in the public realm. Bicameralism, likewise, is a polycentric configuration of authority in a legislature, one that brings the process of legislation – the process of prescribing law – into the public realm, where members of the public can contribute to the process. Federalism is a polycentric configuration of governmental authority that not only creates multiple governments, compounding the republic, but also creates multiple publics and therefore contributes an important nested structure to the public realm. This is where governance occurs in such a republic: in the public realm, subject to public scrutiny and open to public participation.

G.B.: What are the most important problems of today's American republic and other contemporary democracies?

R.O.: *The republic can never be taken for granted. Democratic republics face two perennial problems: one is maintaining the openness of the public realm to the whole public and the independence of the public realm from government; the other is keeping the process of governance firmly embedded in the public realm, where it is visible to the public, rather than allowing it to disappear inside the walls of government. The U.S. is challenged on both fronts today. The openness of the public realm depends on public liberties, including freedom of the press, but the outbreak of an openly adversarial relationship between the highest levels of government and leading press agencies is a troubling development that, by undermining the legitimacy of a free press, potentially threatens its role in the republic. When members of the public no longer think they can depend on the press for information and honest discourse, the ability of the public realm to serve as a forum for open discussion and scrutiny of government is seriously weakened. Attacks on the press by high ranking government officials can also lead to intimidation, threatening the independence of the press from government and ultimately the independence of the public realm, in which the press is a key institution. An even deeper problem, however, is the difficulty of keeping the process of governance embedded in the public realm. The primary source of the immediate problem in the U.S. lies in the decline of Congress as a deliberative body. Increasingly, legislation is drafted behind closed doors rather than openly in committee deliberations, violating long-standing social norms among members. Closing the legislative process to public scrutiny and foreclosing public participation, opens the door to secret deal-making with private interests – Madison's "factions" – that betray the public good.*

> **The primary source of the immediate problem in the U.S. lies in the decline of Congress as a deliberative body.**

G.B.: Are there contemporary threats to the republic from within the public realm? Is political correctness one of them?

R.O.: *There definitely are new threats to the republic from within the public realm: the collapse of social norms that previously constrained the political process – the contest for power within the electoral process – and a conception of public liberty in which "anything goes," leading to the decline of public discourse. In this sense, older versions of "political correctness," based on public manners that sustained a sense of mutual respect and civility, are disappearing, replaced by newer versions that often threaten to silence dissenting voices. The fragmentation of the public realm among opinion groups that internally reinforce the views of their members is conducive to a new political correctness that stifles*

the exchange of diverse points of view, which is vital to public discourse.

G.B.: Do religions – communities of believers – allow for the creation of a more nested community, often exceeding political differences?

R.O.: *When political differences become so great that there is unwillingness to listen to one another across a political divide, discourse based on the free exchange of diverse ideas is threatened. If sufficiently open and diverse, religious communities can soften political differences among their members and make discourse more tolerable, and religious leaders can seek to cultivate these sorts of communities. Counteracting this in the U.S., however, is a tendency toward more narrowly sectarian or ideological religious communities, driven perhaps as much by political views as by tradition or theology. Gone are the days when Tocqueville could observe a common body of Christian belief in America, constraining political discourse. Sad to say, in many cases religiosity now tends to fan the flames of divisiveness.*

G.B.: In contemporary Poland but also in the United States, there are many divisions of a political nature. There is a very sharp dispute – how can our societies get out of the spiral of what is sometimes even "hatred" to rebuild the social fabric?

R.O.: *This is the big question of the day, and I certainly don't have a complete answer. But I think that one component of healing social and political division is to rebuild a shared conception of self-governance and what it entails, fostering a common commitment to its essentials, which includes embedding governance in the open public realm. The basic processes of self-governance must be sustained and take priority over partisan agendas. In America, this historically has taken the form of an overriding commitment to the Constitution and the rule of law, including an understanding that no political end justifies any and all governmental means. Limitations on the means of governance take priority because it is those limitations that sustain the long-term ability of a people to govern themselves in the public realm. Absent this shared understanding and commitment, it becomes impossible to bridge partisan differences. Admittedly, rebuilding a common understanding of the means of self-governance is the work of at least a generation, not of an election cycle.*

When political differences become so great that there is unwillingness to listen to one another across a political divide, discourse based on the free exchange of diverse ideas is threatened.

G.B.: In today's politics, much depends on "narration." What role does it play? What does an effective narrative depend on?

R.O.: *You're right, political competition consists in great part of competing narratives. Members of the public respond to stories that make intelligible connections between ideas and policies. Policy "wonkery," program details and accompanying analysis, does not make for an effective political campaign. To be effective, a narrative must somehow connect to the experience of listeners, thus making sense to them.*

G.B.: In one of your speeches you point out that "We must therefore attend to the stories we tell as much as to the rules we write." How much can the narrative affect the observance of the rules: how can the narrative influence the observance of rules: social, moral, but also legal?

R.O.: *Sustaining the public realm is inherently an intergenerational project. Social norms are carried from one generation to the next primarily through the stories we tell and the lessons they convey. Stories concretize*

abstract ideas. Both the abstraction and the illustrative story are important. Institutionalists working in the tradition of Vincent and Elinor Ostrom, including myself, have been focused primarily on "getting the rules right." But the intergenerational transmission of

Policy "wonkery," program details and accompanying analysis, does not make for an effective political campaign.

institutions depends on more than keeping the rules. We must also keep the norms that support the application and enforcement of those rules. The keepers of the republic are not only rule-makers and rule-followers but also story-tellers. Part of what Vincent's concept of the public realm has shown me is that we institutionalists have not told the whole story of the republic. In the midst of an impeachment process in the U.S. House of Representatives, it turns out that the current keepers of the republic are neither politicians nor academics but civil servants who have the courage to speak out, step-

The keepers of the republic are not only rule-makers and rule-followers but also story-tellers.

ping out of the shadows of bureaucratic administration into the light of public realm. They speak from a lifetime of experience as much as from an abstract set of ideas. It is their concrete experience – their personal story as a governance practitioner – that tells them what they must do in the current, wholly unanticipated circumstance. Their story can now be woven into the larger narrative of the republic.

G.B.: In your pioneering works *The Erosion of Public Highways: A Policy Analysis of the Eastern Kentucky Coal-Haul Road Problem* (1978) and *The Anatomy of Public Problems. Building A Methodology of Policy Analysis* (1980)[7] you presented the methodological basis for research on commons and public policies. From the perspective of time, how do you assess your assumptions from that time, to what extent did they work, to what extent did they need to be modified?

R.O.: *What I have been saying about the focus on rules to the exclusion or de-emphasis of norms requires correction. Rules can be formally prescribed and thus directly changed, but not norms. Social norms are an emergent property of institutions, not a design element. Yet, just as we have always tried to anticipate the strategies that individuals will be inclined to choose, given a set of rules, we should also seek to understand the social norms that are likely to follow from the design of an institutional arrangement. Institutional design does more than create what we call the "rules of the game," behavioral do's and don'ts. Institutional design also creates ongoing relationships, and in those relationships individuals can be expected to develop social norms, arising from patterns of approval and disapproval among the members of an interdependent community. Some of those norms actually precede institutional*

7 Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, IN Series:Working Paper, No. W80-21 [online] http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4467/roaker03.pdf?sequence=1&isAllowed=y [last accessed: 26 November 2019].

design, at least in an inchoate form, but they remain norms, enforceable through social interaction rather than by third-party determination.

G.B.: Do you consider law (legal norms) as social norms or as rules? Are there legal norms which emerge from ongoing relationships or are they predominantly a design element?

Moreover, the legal system – the process of applying and enforcing law – also depends on norms of conduct shared by the legal community.

R.O.: *I consider the content of law to consist of rules, but it should be a coherent body of rules. The whole body of law should fit together in a logical sense, guided by common principles widely shared as norms within the legal community, which consists not only of judges and lawyers but also of law professors and legal critics, who strive for coherence. Moreover, the legal system – the process of applying and enforcing law – also depends on norms of conduct shared by the legal community. Just as freedom of the press depends on journalistic standards to be productive, and just as "due deliberation" (to use Alexander Hamilton's evocative phrase, often cited by Vincent) depends on norms shared by legislators, so does "due process of law" depend on shared norms among jurists. Furthermore, commitment to the "rule of law" requires norms shared across the separation of powers as well as among members of the public at large, for example, the norm that requires executive officers to obey and enforce court orders (absent an enforcement power in the judiciary). In the U.S., these norms have emerged from the relationships created by the constitutional separation of powers. But many of the norms surrounding due process of law also preceded the writing of the U.S. Constitution. This what allowed the drafters of the Fifth Amendment due-process clause to refer abstractly to the concept of due process without any enumeration of its elements. As well, the process of applying law requires reference to shared norms of interpretation (increasingly difficult to sustain in the U.S. as any watcher of the U.S. Supreme Court well knows). There is still much to be explored regarding the relationship of norms to rules in the process of governance. It is an area ripe for inquiry.*

Law professors may need to be good story tellers, highlighting the role of legal actors in maintaining the republic, as well as competent expounders of the law and its basic principles.

G.B.: What kind of legal research or legal education do you think is needed in the field of governance and institutional design?

R.O.: *I don't feel especially well qualified to answer your question, given that my experience with legal education is limited to the 14 credit hours I earned in the IU School of Law for a graduate minor required for the Ph.D. I enjoyed the case method of instruction, but as*

the exclusive method it is also somewhat limiting. The broader issue, however, is the intergenerational transmission of professional norms. A thorough rethinking of the meaning of the republic, constituted at its core by the open public realm, will entail reassessing how the relevant professions, including the legal profession, transmit professional norms to future generations of practitioners. In addition to reading cases, students of law may need a systematic exposition of the logic of governance by means of law, as well as its institutional requirements, including the application of law to those who exercise prerogatives of government. Instruction in the norms of the legal profession more generally is also important, shared perhaps as much through informal narrative as through systematic exposition. Law professors may need to be good story tellers, highlighting the role of legal actors in maintaining the republic, as well as competent expounders of the law and its basic principles.

If the state apparatus manages to prevail, and the public realm is eclipsed, much of the world may enter a new dark age.

G.B.: What issues in Vincent Ostrom's heritage require special attention and further research?

R.O.: *I have been increasingly drawn to the study of governance in developing countries, as was Vincent as his work matured. Perhaps this is because developing countries present the problem of institutional design in its most basic form. Yet, it is also apparent that there is an "organic" quality about institutional development that depends on the institutional base of a country. One never writes new institutions on a blank slate. The travails of much of Sub-Saharan Africa seem to be connected to a widespread disposition to ditch traditional forms of governance in favor of a modern form, generally viewed (in Weberian terms) to require a monopoly of coercive authority in society. The fact that institutional development depends on social norms as much as on rules, however, suggests that traditional patterns of governance may contain important social assets of use in crafting governance processes adapted to conditions of life in the twenty-first century. Elements of continuity are always important in development, no matter how drastic the change. But it is not just the so-called developing world that stands on the precipice of such change. So does the developed world, in particular, what we call The West. The prevailing global understanding of governance is based on nation-states. Vincent challenged this conception. Though hardly sanguine about the immediate future of the United States, he expected that the "state," based on a monopoly of force, would eventually wither away. He sought to develop an alternative understanding based on the human capability to build much more complex governance structures than the state, expanding and elaborating the public realm as a highly nested structure that can reach deep within state boundaries and well beyond them. But, if the state apparatus manages to prevail, and the public realm is eclipsed, much of the world may enter a new dark age. Vincent has provided important ideas and conceptions for approaching the task of institutional creativity in challenging times. We cannot foresee what may emerge in 200 years. But we can open our minds to alternative possibilities and endeavor to respond creatively – and with requisite courage – to the critical problems at hand, one innovative institutional step at a time.*

G.B.: As regards building *more complex governance structures than the state* – do you think that the sovereignty of states and national identity will play a much lesser role? What kind of shared identity would make people cooperate, or act together?

R.O.: *The sources of shared identity vary widely across the peoples of the world. Many of the variables associated with nationality are relevant and important: shared history, language, religion, and other aspects of*

human culture. But there is no one basis for political association. As a result, we should expect the means and scale of association to vary widely. In the world order, there should be a place for various forms of association as the basis for governance – from cities to nations both small and great. The basic organizational principle on which such a world order can be constituted is nestedness (though never as elegant to view as Russian dolls). Much of my empirical work has been concerned with metropolitan organization and governance in the U.S. Many critics of the American system of local government decry its messy appearance on a map. It looks disorderly because the way that governmental units are nested is never uniform across a metropolitan area. The cause of variation is the bottom-up method by which nesting develops, as smaller communities (of various sizes and shapes) create overarching units at various scales of organization. Visual order is not the point. Building mutually productive relationships among varying communities of identity and interest – that is the point. The construction of a mutually productive world order should follow the same pattern, reiterating the process of constitutional choice (as Vincent would say) at differing scales of organization. Often this will sustain or even strengthen existing national identities, but not always. The demands of sub-national communities for greater autonomy, and of stateless communities for recognition and a means of common governance, are demands that cannot simply be ignored. We can expect both the devolution of some governance functions to communities within existing nation-states and the development of supra-national regimes that assume particular, well-defined governance functions from their member nations. In the process, concepts of state sovereignty will necessarily become much more attenuated. In their place, we need to be able to articulate more meaningful concepts of republican governance, so that the organizational nesting that occurs is not merely the nesting of governments but primarily a nesting of communities of citizens, extending and elaborating the structure of the open public realm – constituted in public liberty and regulated by shared norms of public conduct. In an increasingly polycentric world, this is where governance will occur, in a public realm of nested communities.

We need to be able to articulate more meaningful concepts of republican governance, so that the organizational nesting that occurs is not merely the nesting of governments but primarily a nesting of communities of citizens, extending and elaborating the structure of the open public realm.

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Evidence and Its Proof. Designing a Test of Evidence

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1. Introduction

Nowadays knowledge and truth are under attack, and, as a consequence, we are losing the notion of evidence as "obvious". Probably that's why George Orwell[1] considered that one of the principal duties of today's world is to recover what is obvious. In these days, when the manipulation of language for political ends grows strongly, when «war is peace», «freedom is slavery», «ignorance is strength», we must rediscover the basic principles of our reason. «We have now sunk to a depth at which restatement of the obvious is the first duty of intelligent men».

Understanding how human knowledge functions has always been complex. In general, it is accepted that we can understand reality from various sources: from immediate evidence (evidence from the senses or intellect), from more or less complex reasoning, as well as faith in some authority. From all of these sources evidence plays a crucial role, because all knowledge is built on it: analyzing what is evident we draw conclusions, and the new ideas or hypotheses are confronted with the most obvious to confirm its truth. Knowledge is constructed in layers, atop the floor of evidence.[2]

But evidence is not an exclusive subject in philosophy; it also interests the judge, the lawyer and those who continually raise its argument about the pillar of

1 Orwell, G., Facing Unpleasant Facts: Narrative Essays. Boston: Mariner Books 2009.

2 The levels of understanding have been studied from diverse perspectives. Already in Aristotle's Organon, founder of logic, it appears that the syllogisms form from the senses, the senses from the concepts, and the concepts from the perception of the senses. From the levels of knowing, cf. Maritain, J., Los grados del saber. Alfredo Frossard (trad.). Buenos Aires: Desclée de Brouwer 1947, Maritain, J., El orden de los conceptos. Gilberte Motteau de Buedo (trad.). Buenos Aires: Club de Lectores 1967; Cruz Cruz, J., Intelecto y razón. Las coordenadas del pensamiento clásico. Pamplona: Eunsa 1982, 45–67.

what is evident: Should what is evident be proven when everyone attacks it? And, more difficult still: How to test that the obvious is evident, when it suffers from a general threat?

In an age like the one in which we live, we have lost the sense of what is real and what is evident. Nowadays it becomes imperious to know if there is any kind of proof which defines what things are evident. In order to find it we will proceed in the following manner: first we will review how evidence has been understood in classic philosophy, besides seeing some current relevant contributions (Chapter II); then we will get into it in a systematic method of understanding what is evident, from its types, characteristics and functions (Chapter III), with this background to be able to postulate a test about whether something is evident, confirming if it meets the characteristics of what is evident.

2. The Notion of Evidence in Philosophy

It is interesting to see how the first thing discovered in history is that evidence is related to the senses. A footprint has stayed in the language: the word anchors its origin in the Latin term *evidentia*, which comes from *videre,* vision. In this sense, evidence is what falls under our eyes. Something similar happened in ancient philosophy with Epicurus. He considered all knowledge to be based in sensory perception: if something is perceived by the senses, it is evident, it is always true.[3]

Aristotle went beyond that concept of evidence as a simple passive perception of the senses. He observed that, although all superior animals could have sensory experiences of things, only human beings had to conceptualize them and penetrate more and more into their reality.[4] This certain understanding that the intellect obtains things when it sees them, it makes it in an innate and necessary way (it is not something acquired, as can be the habit of science, of which he speaks in Ethics IV). For Aristotle the evidence it not merely the passive perception of reality, but a gradual process of discoveries, a knowledge that "determines and divides" better and better the "undetermined and undefined": it begins with what is most evident for us, in order to end with what is truer and more evident in nature.[5]

Thomas Aquinas will later deepen the distinction of evidence *quad nos* and *quad se* already suggested by Aristotle.[6] Neither of the two understood evidence in purely logical or formal terms, like many schools of thought tend to understand today.[7] His theory of knowledge proves to be much richer. In philosophical realism, the senses (sight, sound, etc.) provide correct data of what reality is; they do not lie to us, unless they are atrophied. When the *sensitive species* (or the Aristotelian *phantom*) formed by the inferior powers is captured by intelligence, it immediately knows and abstracts data from reality; the intelligence with its light, through "study," "determination" and "division" will end up forming concepts, judgements and reasoning. That first immediate acquisition of reality, devoid of structured reasoning, is the first evidence captured by the intellect. Then the intellect is aware of other obvious truths (such as 2+2=4 or that "the total is greater than or equal to the part") when it compares and relates the previously assimilated knowledge.

Scholastic tradition considered that there existed some "primary principles of practical reason," known as immediately and clearly, that could never be broken or repealed. These moral principles would be the most nuclear of natural law. But in addition to those, there would be another part of natural law (formed by deductions or specifications of those principles) that could vary with time and with changing circumstances.[8] In this way, natural law would be comprised

3 Cf. Letter to Diogenes Laertius, X, 52.

4 Cf. Aristóteles, Metafísica (trad. de V. García Yebra). Madrid: Gredos 2012, 449, b; same, About the Memory, 452, a; same, Física. Trad. de G. Rodríguez de Echandía. Madrid: Gredos 1995, I, c. 1.

5 Cf. Morán y Castellanos, J., Evidencia de la naturaleza en Aristóteles. Tópicos: revista de Filosofía, 4(6), 1994, 71–87.

6 Cf. Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001.I, q. 2, sol.

7 Meaning that "formal evidence" is merely logic. According to it, it is clear that "if all elephants have wings and all the winged beings fly, then all elephants fly."

8 Cf. Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001.I–II, q. a. 5, sol.

of some small immutable principles and by enormous variable content.

In the last decades the New School of Natural Law has reopened the debate on which all its out evidence of these primary principles. It is a cardinal question within the School, on which all its argumentative structure is built. From the beginning, Grisez[9] proposed the existence of basic human values and principles that would be self-evident, a doctrine that would be followed and developed by Finnis.[10] Authors of this school will point out that there are seven basic goods (life, knowledge, friendship and sociability, play, aesthetic experience, practical reasonableness and religion), the pre-moral principles which express an acceptable character of the basic human goods and the evident moral principles which express the proper connection among certain types of human actions and the basic goods.[11] Such a justification in evidence will awaken the satisfaction or rejection of many, and a series of opposing writings.[12]

Finnis, Grisez and Boyle[13] point out that what is self-evident cannot be verified by experience, nor derived from any previous knowledge, nor inferred from any basic truth through a middle ground. Immediately they point out that the first principles are evident *per se nota*, known only through the knowledge of the meanings of the terms, and clarify that "This does not mean that they are mere linguistic clarifications, nor that they are intuitions-insights unrelated to data. Rather, it means that these truths are known (nota) without any middle term (per se), by understanding what is signified by their terms." Then when speaking specifically about the practical principles, they point out that they are not intuitions without contents, but their *data* come from the object to which natural human dispositions tend, that motivate human behavior and guide actions.[14] Those goods to which humans primarily tend, which cannot be "reduced" to another good (it is to say, that they are not a means to an end), they are considered "evident": "as the basic good are reasons with no further reasons".[15]

Finally, in order to find the complete list of evident principles of practical reason, they create a method that calls for: (i) analyzing actions and their most profound reasons; (ii) theoretical studies about human beings which detect with precision natural inclinations; (iii) anthropological studies which examine motives and purposes of the behavior of all cultures; it would look like everyone seeks to subsist, to know, to live in harmony, etc.; (iv) to take some candidates from the list of principles in dialectic form, it is to say, comparing the basic goods with those that supposedly are.[16] It is about a way to discover a list of evident contents, not to test its evidence.

In the last century, Husserl and phenomenology made some contributions to the understanding of what is evident, as we will see in the following chapter.

9 Grisez, G., The First Principles of Practical Reasons: A Commentary on the Suma Theologiae, 1–2, Question 94, Article 2. Natural Law Forum, 44(4), 1965, p. 44.

10 Finnis, J., Ley Natural y Derechos naturales. Cristóbal S. Orrego (trad.). Buenos Aires: Ed. Abeledo-Perrot 2000, p. 34–35, 86.

11 See especially Finnis, J., Natural Law. Aldershot: Dartmouth 1991, xi.

12 Porter, J., Basic Goods and the Human Good in Recent Catholic Moral Theology, The Thomist, 57(1), 1993, p. 27 will say that the justification in the evidence of basic goods is arbitrary and false. Bradley, G.V. and George, R., The New Natural Law Theory: A Reply to Jean Porter. The American Journal of Jurisprudence, 39, 1994, p. 303–315 will emerge, pointing out that the school faithfully follows the Thomistic idea of evident principles, also pointing out that is not so clear that the new school speaks of the self-evidence of basic goods. Sayers, M., Knowledge as a Self-Evident Good in Finnis and Aquinas: When is the Immediately Obvious Not So Immediate. Australian Journal of Legal Philosophy, 23, 1998, p. 92–101 also doubts the fidelity of the Thomistic principles of the New School. In favor of O'Connell, I., Self-Evidence in Finnis' Natural Law. Theory: A Reply to Sayers. Australian Journal of Legal Philosophy, 25, 2000, p. 111–119. Cf. Orrego S., C., John Finnis. Controversias contemporáneas sobre la teoría de la ley natural. Acta Philosophica, 10(1), 2001, p. 73–92.

13 Finnis, J., Grisez, G. and Boyle, J., Practical Principles, Moral Truth, and Ultimate Ends. American Journal of Jurisprudence, 32, 1987, p. 106.

14 Ibid., p. 108.

15 Ibid., p. 110.

16 Ibid., p. 113.

3. Understanding What is Evident

3.1. Notion of What is Evident

Evident is a clear understanding that captures in an immediate and direct way what things are.

In general, we can say that evident is a *clear understanding that captures in an immediate and direct way what things are*. We will attempt to explain it.

The most palpable in this case is that evidence has to be seen with *clarity*. In addition to what is attested to by philosophers,[17] perseverance of this also exists in the language. Merriam Webster's Dictionary defines evident as "clear to the vision or understanding".[18] A similar notion appears in French, German and other languages. Also, the Greek term ἐνάργεια (enargeia) means the clarity of what is luminous or translucent. And we have already seen that the Latin term *evidentia* comes from *videre*, vision. Therefore, we conclude that evident is that which we see in a clear manner.

Truth and clarity are two key elements for understanding evidence. We remember that truth was that adaptation between the thing and the intellect (truth of correspondence). Both in classical philosophy, like in phenomenology, things in reality shine, manifest, show themselves to the intellect. When the intellect illuminates the phantom and captures the glow of things, evidence appears. Evidence is not the thing, nor the intellect, nor the brightness, nor the truth, but "the presence of a reality as unequivocal and clearly given to intelligence".[19] Such presence is *knowledge*.

But the obvious is not any type of knowledge but an *immediate and direct knowledge*[20] of vision, where no new operation or intellectual inspection is necessary in order to understand. Here the intellect sees and automatically captures the truth. This means that evidence is *patent* in itself.[21] It is often said that it is "self-justifying" or *self-evident*, which applies more to intellectual evidence (which certainly self-justifies, because the predicate is included in the subject), and applies less to sensory evidence which comes through the simple apprehension of the senses (that in ownership does not self-justify but is patent). In any case, the obvious things do not require further justification, to such a point that the most obvious becomes unprovable.

Evident is a clear understanding that captures in an immediate and direct way what things are.

For us there are things which are more obvious than others, from where a certain *analogy* of the concept emerges. In the same place where Aquinas studies evidence, he points out that "that this proposition, 'God exists,' of itself is self-evident, for the predicate is the same as the subject, because God is His own existence" but, as "because we do not know the essence of God, the proposition is not self-evident to us".[22] From the

17 Descartes associates evidence with "clarity and distinction" (Descartes, R., Meditationes de prima philosophia. Hay traducción castellana de Mígues, J.A. Meditaciones Metafísicas. Santiago de Chile: Arcis 2004, discurso VI). Leibniz (Leibniz, G., Nouveaux essais sur l'entendement humain. París 1765, IV, cap. 11§10) conceives evidence as a luminous certainty, which results from the combination of ideas. D'Alambert, J., L'Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers 1739, p.127, for his part, he calls evidence the clarity of a sentence which is sufficient to understand its truth.

18 In Spanish – as well as other romance languages – *evidencia* differs absolutely from *prueba* (proof). The Spanish Royal Academy (Real Academia Española, Diccionario de la Lengua Española. Madrid 2016) defines evidence as the "clear certainty and states what cannot be doubted."

19 Llano, A., Gnoseología. Pamplona: Eunsa 1991, p. 52.

20 Corazón González, R., Filosofía del conocimiento. Pamplona: Eunsa 2002, p. 161–162.

21 That is why it is understood that Kant conceives it as "an apodictic certainty."

22 Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 2, a. 1, sol.

passage we infer that the *analogatum prínceps* must be the *quad se* evidence (in itself), and the derived analogies will give the *quad nos* evidence (in that which is most evident for us). One of these derivatives will justly be the English *evidence* (which fundamentally means "proof"),[23] which can be justly called "evidence."

The most obvious things are the first that the intellect assimilates. When a child opens his/her eyes to the world he/she captures a series of sensations that he/she does not know yet how to interpret. Then arises a question: What is it? It captures that there is something, that "something is." The being is the first that captures what is evident. The determinations of that being will later be captured: that something is good or bad, that the hand is mine, etc. The perception of time also appears in a natural way, from movement, the sense of causality, together with the first metaphysical and logical principles (e.g. the principle of no contradiction, the principle of the identity, the principle of the excluded third party, etc.). From these first ideas all subsequent knowledge will assemble. Without evidence there is no possibility of any knowledge.[24]

The obvious often opposes discursive knowledge, which certainly is less obvious. Discursive knowledge is that which is obtained based on reasons which are more or less articulated, which goes from what is known to the unknown, from the sure to the doubtful or hypothetical, from what is clear to the initial obscure or unknown conclusions. Evidence is an intellectual understanding of vision, while discourse implies a more exhausting inspection. The argument presupposes discourse, discourse presupposes intellectual evidence, and intellectual evidence presupposes sensitive evidence.

3.2. Types of Evidence

Classifications can be infinite. Here we will only use four criteria:

a. *According to corporality*, there is evidence of the simple apprehension of the senses and intellectual evidence. At the same time, phenomenology distinguishes *evidence of disclosure* (or direct capture of the object) and the evidence that captures the *truth of correctness* (or intellectual evidence), giving primacy to the evidence that is obtained from direct experience of the things.[25]

b. *According to point of view*, there is *quad se* and *quad nos* evidence. They are *self-evident things* that the knowledge obtained by simple sensorial apprehension and propositions which: (i) result from intuitive knowledge; or (ii) they have a predicate that is included in the subject necessarily.[26] In this case it suffices to know the terms of the proposition in order to immediately notice that the predicate suits the subject. But it can follow that what is evident for one citizen is not evident for another. For a mathematician the most elementary theorems will be evident, like those of Tales, Bayes, or Pythagoras, while they will prove strange to most musicians.[27] The *quad nos* evidence only reaches those who know all the terms

23 Concerning the English notion of "evidence" and its relation to intellectual evidence, see Sokolowski, R., Introduction to Phenomenology. Cambridge–New York: Cambridge University Press 2008, p. 159–162. Perhaps the concept of analogy could have been explored more.

24 Aristotle pointed out that "the most knowable are the first principles and causes, since by them and from them they come to know other things, and not of them through what is subordinated to them" (Aristóteles, Metafísica (trad. de V. García Yebra). Madrid: Gredos 2012., I, 2, 982b 2–4).

25 Cf. Sokolowski, R., Introduction to Phenomenology. Cambridge–New York: Cambridge University Press 2008, p. 158–162.

26 In this sense it is pointed out that "the intellect is always right as regards first principles; since it is not deceived about them for the same reason that it is not deceived about what a thing is. For self-known principles are such as are known as soon as the terms are understood, from the fact that the predicate is contained in the definition of the subject" (Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 17, a. 3, ad 2).

27 Aquinas explained in a more abstract and general way: "experience shows that some understand more profoundly than do others; as one who carries a conclusion to its first principles and ultimate causes understands it better than the one who reduces it only to its proximate causes" (Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 85, a. 7, sed).

which constitute the subject and the predicate.[28] In any case, the most obvious things are for everyone, and not just for some.

Sometimes we speak of objective and subjective evidence, terminology which enters into some ambiguity. The objective evidence (or "truth") supports the same object which offers understanding. It is called objective because in it that attention is mainly concentrated on the object which is manifested, and less on the mind which knows it.[29] Its counterpart is subjective evidence (or "credibility"), which supports the fact of being accepted as credible without any doubt.[30]

Other authors prefer to speak of evidence which designates "the clear ostension, revelation or enlightenment which a fact presents for itself" and of a spiritual 'vision' of evidence which welcomes the relevance or illumination of the object." Both dimensions are correlated and therefore cannot be separated from each other. The expressions objective evidence and subjective evidence can cause distortions, as if they were separable entities. The meaning in such expressions is: 'evidence considered from the object' and 'evidence considered from the subject'.[31] This accurate observation points to the core of the same concept of truth and evidence: truth is an adaptation between two extremes (the thing and intelligence), just like evidence, which makes this adaptation obvious. Therefore, what is evident can be considered both in the objective manifestation of the thing, as in the intellectual capture of this manifestation.

c. *According to the content*, there may be formal or logical evidence, if it deals with the structural correction of propositions (thus, it is evident that if all elephants have wings and all winged beings fly, then elephants fly); material evidence when it alludes to reality, rather than about the way of saying it (thus, it is evident that it has rained if we see the street is wet); moral evidence when it affirms an irrefutable moral postulate. We could add other types of evidence, after depending on how other content is determined.

d. *According to its intensity*, various degrees of evidence fit, following what is accepted by Aristotle, phenomenologists and many others.[32] There are more certain and less certain evidences. A long equation can be evident to a mathematician after hours of deduction, although it is not uncommon that at the end of the road you harbor a doubt about if it is well resolved; a simpler formula will be more obvious to him/her.

Evident is true, is coherent with other truths, is a necessary reasoning. Evident is the simplest. Requires no justification. It is full of light.

3.3. Characteristics of What is Evident

Evident is true, is coherent with other truths, is a necessary reasoning. Evident is the simplest. Requires no justification. It is full of light.

28 Corazón González, R., Filosofía del conocimiento. Pamplona: Eunsa 2002, p. 182–183.

29 According to Corazon, "it is said that this evidence is objective because when it occurs, the subject, as it were, withdraws, disappears from the scene, turns completely into the known and becomes overwhelmed. It is not an extraordinary phenomenon which happens only one or two times in life; it is something that we live daily, because we are continually presented with data observed by the senses, for example, that which we cannot deny: if we see someone leaving a hotel room, we have immediate and direct evidence of that fact" (Corazón González, R., Filosofía del conocimiento. Pamplona: Eunsa 2002, p. 180).

30 Cf. Ferrater Mora, J., Diccionario de filosofía abreviado. Buenos Aires: Ed. Sudamericana 1970, p. 155.

31 Brugger, W., Diccionario de filosofía. Barcelona: Herder 1998, p. 226.

32 Corazón González, R., Filosofía del conocimiento. Pamplona: Eunsa 2002, p. 179 speaks of diverse levels "of certainty."

Once the previous is reviewed, we can now specify which characteristics are evident, work that will serve us later to design the "test of evidence." And the first thing we must do is a fundamental distinction: on the one hand we have the intrinsic characteristics of what is obvious, which are related to its very being and do not depend on external factors or subjects; on the other hand there are external characteristics, which depend on the knower and their circumstances, which will result in more volumes than the first and which will not always be given.

The *intrinsic characteristics* are the following:

(i) What is evident is *true*. Therefore, what is false or irrational is not evident although sometimes it has the appearance of being evident.

(ii) Based on the previous, what is evident is *coherent with other truths* acquired through knowledge; an insurmountable incoherence would demonstrate that in some place error or falsity loom;

(iii) What is evident is a *necessary reasoning*, in the sense that in all evidence the subject necessarily includes the predicate.[33] If such an inclusion were contingent it would not be evident. For example, the affirmation "if I kick a ball I score a goal": (after kicking a goal a thousand distinct possibilities exist), is not obvious, but yes, "if I scored a goal, I should have done something so that the ball enters the net" is obvious ("one of my actions" is included in "I scored a goal").

(iv) The most evident is the *simplest*.[34] It explains itself; in itself, it does not require argumentation in order to appear in the intellect (although for the uneducated certain *quad se* evidence requires a rational discourse).[35]

(v) What is evident *does not require justification*, it is indubitable,[36] it imposes itself though intelligence, without demanding discourse, argument or further proof.

(vi) What is evident is clear, translucent, full of light. It gives way to an immediate and spontaneous understanding. Upon seeing what is directly evident, people should know it, should capture it without anything else. Notice that the luminosity is its own quality of the thing, not of vision: if the stars did not have light, they could not be seen (the view is only perceived as bright).

Regarding the *extrinsic characteristics* which seem to surround obvious things, we have:

(i) the obvious *causes certainty*, generates in the knower that subjective security of having adhered to the truth.

(ii) At least in the beginning, what is evident *is assumed as something natural* – remember Aristotle –, without force, in a peaceful manner, through being innate to the intellect. In what is evident honest intelligence breathes fresh air, and moves with ease. Certain truths can cost (thus, although it is known that harming another is bad, anger can push you to act "against the principles"), but if the intellectual procedure is honest, the will will end up accepting the obvious; on the other hand, a perturbed and licentious mind will look for any excuse to dismiss those evidences which are uncomfortable.[37]

33 Some philosophers, mainly rationalists, have spoken of evidence as "something necessary." It is not clear of what this necessity consists. Ulrici, for example, understands evidence as "the objective necessity of thinking". Sigwart points out that evidence comes from "the capacity to distinguish objectively necessary thinking from what is not necessary" (cf. Eisler, R., Wörterbuch der philosophischen Begriffe. Berlin: Mittler 1904, "Evidenz"). When Aristotle speaks of necessity (Aristóteles, Física. Trad. de G. Rodríguez de Echandía. Madrid: Gredos 1995, I, 1.2, 18–19) it is more precise: through being evidence something innate, it is necessary that the intellect accepts it. In this case the characteristic of necessity will easily subsume the characteristic of the connaturality of evidence.

34 Thomist in short: If God is the simples, and if God is the most obvious, then the simplest must be most obvious.

35 Intentionally I do not put like a characteristic of evidence the *irreducibility*, posed by Finnis, Boyle and Grisez (1987: 100–102, 127, 131, 133) and criticized by others, because I admit a gradation in evidence. Certain math formulas are obvious but to capture its evidence it is necessary to know all terms (terms which can be simpler and, therefore, more evident). In fact, Finnis, Boyle and Grisez (Finnis, J., Grisez, G. and Boyle, J., Practical Principles, Moral Truth, and Ultimate Ends. American Journal of Jurisprudence, 32, 1987, p. 119–120) explain that all evident principles of reasoning depend on a prior principle (which, therefore, would be more evident): the principle of no contradiction.

36 Corazón González, R., Filosofía del conocimiento. Pamplona: Eunsa 2002, p. 161–162.

37 Cardona (Cardona, C., Metafísica de la opción intelectual. Madrid: Rialp 1973, p. 158) states that "before these truths

(iii) As a consequence of everything prior, what is evident seems to be *profusely shared*. Therefore, it is so related to common sense, understood as a set of generally accepted opinions. The most obvious things must be taken as such by the majority of mortals (although the blind will never be absent unless the undeniable captures it, because the human intellect is weak and can only access *quad nos* evidence, not the evidence itself).

(iv) What is evident is *fertile*: concerning evident knowledge other scientific knowledge is well-constructed, and in the practical field, the evident ethical principles generate a more successful culture and a greater well-being. "Through their fruits you will know them," was once said by the most celebrated Israelites.

The mentioned characteristics allow gradualness, because what is evident is an analogous concept. Human knowledge is constructed in layers: initially there are the first apprehensions which we capture from reality (e.g. "there are things," "I have hands," "I exist," etc.), then the simplest judgements appear ("this is good," "we have to do good," "I have to avoid evil," etc.). Only later we arrive at the most complex reasonings of geometry, arithmetic and other sciences. The first truths are more evident, simpler, more clear, more shared through human kind and with greater certainty:[38] the first apprehensions are clearer than the judgements, the first judgements are simpler and clearer than the articulated reasonings, a reasoning is easier to verify than a system of thought composed of many reasons. Conversely, proof does not always show strong evidence: it is not always clear who confesses to be a criminal, nor does any testimonial statement generate great certainty. A jury can be divided by listening to the victim or criminal, and even a video can deceive us.

Evident things cause certainty, are assumed as something natural and tend to be profusely shared. Evident is fertile.

Evident things cause certainty, are assumed as something natural and tend to be profusely shared. Evident is fertile.

3.4. Function of Evidence

The main function of evidence is to be a "criterion of truth".[39] A criterion of truth is the means from which the truth is made clear. If we doubt an affirmation and want to verify if it is true, we have to check it with other more certain, clear and undoubted knowledge. At the end of the road we must check everything with what is more evident: there is no prior instance of thought which appeals to judge the value of the known: "that

which arrive soon, tyrannically imposing with its unsuspecting evidence, maybe violating other convictions and attitudes, we tend to react with disgust, accepting them only provisionally, while we do not discover its weak side. In general, this occurs when it's about truths which have consequences and – for more speculative understandings – when they are consequence of some other affirmation of that which we disagree." Intelligence does not think in an autonomous way, but in play with willpower. "It seems natural and positive that our willpower intervenes when the work of reason affects life, in its totality of feeling or in points which determine the conduct. What is not natural or positive is ignore this intervention intending that intellect works only with rational and scientifically proven evidence."

38 Through these common topics we can talk with others. If there were no common ideas among human beings, the dialogue (which presupposes ideas and *signs of those common ideas*) will turn out to be impossible. The fact that we can speak shows that there is a common substratum among human ideas (reflected later in words, signs and symbols).

39 In this sense, cf. Millán-Puelles, A., Obras completas, t. VII. Madrid: Rialp 2015, p. 276–279.

instance, if it existed, would be by definition irrational or prerational".[40]

All science is constructed to confront hypothesis with evidence that has been previously acquired.[41] All scientific knowledge is arrived upon from what is evident. If it were not like this, science would be pure fiction, pure fantasy. Science is built upon the secure pillars of the undoubted, its hypotheses and theories do not start from nothing, and they gain support when contrasted with what is the obvious. As Polo would say, "the obvious is that which awakens, the only thing that avoids running through the branches, the superficiality (...) it is clear that philosophizing requires not slipping on the obvious. Not knowing what is paramount in things consists precisely of not starting to focus on what is obvious."[42] We cannot "pretend that philosophy is a 'new start,' as if no valid prior knowledge existed".[43] The same must be said of legal science, which cannot rise above emptiness either.

In order to not fall in absurd idealism or absolute relativism where all and nothing can be right, the elaboration of the legal doctrine must be built on the primary concepts and principles extracted from the rock of an evident reality. In another place we have worked on the topic of legal concepts, which define the law to a good extent.[44] But as we saw there, the legal conceptions do not appear through the art of magic but are formed progressively. First the immediate knowledge of external reality (of people, things, and the environment) must be forged, because without this knowledge there is no possibility of reasoning, nor any intellectual conclusion. In order to have conclusive reasoning first it should have judgements, and in order to have judgements before there must be those obvious notions directly captured from reality. Once extramental reality is known, the intellect will be able to draw the first legal conclusions, which make up what we call natural juridical conception. For example, someone who knows that the electromagnetic spectrum is limited will understand the doctrine of the scarce resources of telecommunications law and will understand why the State holds unique powers to distribute the frequencies. Someone who understands sexual human nature and its natural purposes will rapidly grasp the first principles of matrimonial law. Ignorance of these fundamental legal issues will deal a mortal blow to the law, because it is here where legal reflection begins. Without knowledge of human purpose, human freedom remains reduced to a whim, a passing emotion, and, finally, a useless passion (as Sartre maintained); on the contrary, an accurate understanding of reality will give wings to the rights and freedom. All the very first principles of law come to us through the channel of evidence. However, the derived principles seem to be less evident.[45]

Over the last few years the debate about the "symbolic function" of laws began.[46] North American law has had some welcoming of the labeling approach or "theory of definitions," which emphasizes the important role which labels or labels with which different types of things are rated. The thesis has in its favor showing how the changes in normative language are not always products of chance, but often obey political, social or cultural mutations which good or bad

40 Corazón González, R., Filosofía del conocimiento. Pamplona: Eunsa 2002, p. 161.

41 Cf. Millán-Puelles, A., Obras completas, t. VII. Madrid: Rialp 2015, p. 276.

42 Polo Barrena, L., Curso de teoría del conocimiento, vol. I. Pampona: Eunsa 2004, p. 61–62.

43 Artigas, M., Filosofía de la ciencia. Ansoáin: Eunsa 1999, p. 17.

44 Cfr. Riofrío Martínez-Villalba, J.C., Síntesis de la teoría de la pirámide invertida. Ponencia del I Congreso de Filosofía del Derecho para el Mundo Latino. Alicante 2016, p. 13 y ss.; Riofrío Martínez-Villalba, J.C., Las causas metafísicas como fuentes del derecho. Revista Telemática de Filosofía del Derecho, 15, 2012b, p. 277–282; Riofrío Martínez-Villalba, J.C., De la pirámide de Kelsen a la pirámide invertida. REDESG Revista Direitos Emergentes na Sociedade Global, 2(2), 2013, p. 455–460.

45 Thomas Aquinas wrote that "we must observe that as the intellect naturally and of necessity adheres to the first principles," and not only to those but also "there are some propositions which have a necessary connection with the first principles" Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 82, a. 2.

46 E.g. Hegenbarth, Hill, Ryfell, Noll, Amelung; cf. Hassemer, W., Derecho Penal Simbólico y protección de Bienes Jurídicos. E. Larrauri (trad.). En J. Bustos Ramírez (ed.). Pena y Estado. Santiago: Conosur 1995, p. 23–36.

introduce new definitions of reality. Some supporters of this theory are rather radical: for them the "legality" or "unlawfulness," the "lawfulness" or "illegality," the "validity" or "invalidity" of the rules and legal acts are no more than labels or moving categories which only make sense when they defined or typified; they would lack, therefore, any ontological or factual justification. Such radical approximation to normative language ignores what is evident, omits just the first step of knowledge which comes through sensitive contact with reality, from which the intellect extracts the first concepts; if human language (to which concepts are attributed) was not anchored in reality, any communication would be vain, the rules, written or verbal, would have no legal effect. It is necessary to start from concepts linked with evident reality.

We conclude, then, that in law the formulation of the evident is crucial in order to draft real legal definitions, to detect the natural purpose of people and things, to discover the first principles of law, as well as to develop a healthy realistic hermeneutic and to verify if the conclusions reached by the doctrine are valid by coinciding it with reality.

4. The Proof of the Obvious

Now we will investigate how to prove or detect what is obvious, first in a generic manner and later in the field of law. At first sight, this seemed to be a futility[47] because, as we saw, the proof of what is obvious is precisely its own evidence: the obvious is clear, does not require justification. However, we think that this task turns out to be very necessary nowadays for two reasons: (i) because the most evident is so luminous that it blinds our eyes;[48] and (ii) because a less than honest intellect tends to justify the unjustifiable.[49]

In the relativist period we went through, where all and nothing is valued, it has become essential to rescue the obvious. Orwell already observed that we have sunk to such a depth that the reformation of the obvious has become the primordial obligation of intelligent men.[50] And this is what we propose.

> **"We have now sunk to a depth at which the restatement of the obvious is the first duty of intelligent men" (Orwell)**

"We have now sunk to a depth at which the restatement of the obvious is the first duty of intelligent men" (Orwell)

4.1. The Possibility of Proving the Obvious

It has been repeated many times that what is obvious does not require proof, that it is "irreducible," that it imposes itself on the intelligence without the necessity of additional evidence. Proof of the obvious

47 "It is ridiculous to pretend to demonstrate that nature exists," says Aristóteles, Física. Trad. de G. Rodríguez de Echandía. Madrid: Gredos 1995, 1.6.

48 The idea is from Aristotle: before the evidence of nature our understanding makes the same of the owl in front of the rays of the sun (Aristóteles, Metafísica (trad. de V. García Yebra). Madrid: Gredos 2012, II, Iα c.1 n.2: BK 993b9). It is also recorded in the Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 1, a. 5, sol.

49 *Vid.* Stated in footnote 35.

50 "We have now sunk to a depth at which the restatement of the obvious is the first duty of intelligent men" (Orwell, G., Review of Power: A New Social Analysis by Bertrand Russell. En J. Carey (ed.) George Orwell. Essays. New York: Everyman's Library 2002, p. 107). The same author complained that "All political thinking for years past has been vitiated in the same way. People can foresee the future only when it coincides with their own wishes, and the most grossly obvious facts can be ignored when they are unwelcome".

would call for, among other things, evidence which then should also be justified. The fish bites its tail. Aristotle showed that whoever wants to negate the principle of non-contradiction should use it, and use it as if it were valid; otherwise it is impossible to do so any other way. Basically, if we required proof of the obvious, we would have to appeal to other more direct and immediate knowledge, and, because it is so, would be just evident. We would then fall on an *ad infinitum* solution, where you always sought and never found.

Speaking with rigor, what has been stated is only valid for the most obvious things. The most obvious is indemonstrable. But it follows that there are less evident things which are proven with the most obvious. That is how math equations occur (self-evident), which are "tested" with the most obvious: no one proves the equality of 1=1, but with equality, more complicated equations are tested.

The most evident certainly cannot be proven *in recto*, because the cause of what is evident can never be demonstrated, it will never be deduced from another prior postulate (but that would not be so obvious). But nothing prevents that it can argue its existence *in oblicuo*, attending to its effects[51] or demonstrating how absurd it would be to deny the obvious or affirm its opposite. In any case, we have to accept that oblique tests will not be as conclusive as direct tests.

In particular, we think that indirect evidence can be made by checking whether the characteristics of the evident are verified in the *sub examine* (sub-statement). If we find that an affirmation is simple, clear, incontestable, accepted by all, we will probably face something very obvious. On the contrary, if reasoning is confused, rarely articulated, unknown by experts, we will very well be faced with something lacking evidence. Consequently, we have two ways to verify if something is evident: a positive one, which confirms the existence of characteristics of the evident to affirm "this is evident," and another negative, which only verifies that the characteristics are not observed which is to say, "this is not evident." Let's analyze them.

4.2. The Negative Test

We will begin with the negative route, which is the simplest. It does not intend to point out which elements are false, obscure, complex or rare, but only determine which statements are not evident. If an affirmation did not pass the negative test, the conclusion simply would be that it is not evident *quad nos*.

According to the negative test, it is not evident: (i) that which has demonstrated to be false or different from reality, the absurd, the irrational, by lacking in truth; (ii) that which contradicts other more evident truths; (iii) that which contradicts itself; (iv) the complex or overly articulated reasons, the rare or strange ideas, and all that is not captured immediately, through lack of simplicity; (v) that which is only accepted through faith, through lack of auto-justification; (vi) that which is not captured from the start, the invisible or untenable, through lack of clarity; (vii) the uncertain or poorly expressed statements, the superficial, the mere options and perceptions, but they do not cause certainty in those who listen to them; (viii) the imposed ideology through those who have power, the doctrines bombarded by massive public campaigns against common beliefs, and, in general, that which causes the intellect to reject, because it does not arrive in a rational and natural way to the subject, but imposing itself with some force; (ix) neither do the ideas shared only through small groups, specific sectors of society or via a few generations seem evident, because the obvious spreads in the most profound way; and, finally, (x) those affirmations from which fatal things follow for society.

The assumptions (iii) to (x) only define that an assertation does not seem evident, although eventually it would be true, and could be proven through empirical or deductive processes, as it has happened with the existence of Higg's Boson. Assumptions (i) and (ii) also determine the falsity of the claim.

51 The same idea is stated in the Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 2, a.2, sol., where it is stated that "Demonstration can be made in two ways: One is through the cause, and is called *a priori*, and this is to argue from what is prior absolutely. The other is through the effect, and is called a demonstration *a posteriori*; this is to argue from what is prior relatively only to us. When an effect is better known to us than its cause, from the effect we proceed to the knowledge of the cause." Later he concludes that the existence of God "is not self-evident to us" but "can be demonstrated from those of His effects which are known to us".

4.3. The Positive Test

After passing the negative test we must perform the positive test. Unlike the previous, here we look to determine if something is evident. The conclusion of the positive test will rarely be apodictic, but at least it will yield an approximate criterion of evidence. The test is carried out by verifying if the intrinsic and extrinsic characteristics of the evidence are met: the more characteristics that are verified in an affirmation, the greater the evidence will be.

a. The Verification of Intrinsic Characteristics

The verification of Intrinsic Characteristics of the evident (truth, coherence, necessity of reasoning, simplicity, unnecessary justification and clarity) represents not such a small challenge. The most obvious things simply cannot be tested in a direct manner, because in order to test them we would need to go to something even more evident and prior.[52] The less evident something is (e.g. derived truths) the easier it will be to prove its evidence through other previous evidences.

If the first three characteristics are verified (truth, coherence and necessity), what is said is evident, because it fulfills all the essential elements of evidence. If we do not verify the three in unison, but if there are various intrinsic characteristics, there will be serious signs that the statement is evident.

Let's analyze them:

(i) *Truth*. The truth is tested by comparing the affirmed with the reality. Things are reflected in our intelligence, like in a mirror: if the reflection is bad, there will be no truth. The confrontation of idea-reality can be made in a theoretical or empirical manner, through the hypothetical-deductive method, the inductive, among other methods.[53]

Finnis, Grisez y Boyle[54] in some way have suggested this path. When defining which practical principles are evident, they mentioned that this probably could be done through studies about human beings that accurately detect natural inclinations and using anthropological studies which examine the motives and purposes of behaviors in all cultures.

The test of truth is the most difficult among the most obvious things and ends up being absolutely impossible in evidence of simple apprehension.

(ii) *Coherence*. Here it is necessary to compare the affirmed with other already proven or evident affirmations. If an affirmation agrees with all the knowledge known in certainty, it is probable that it is true and evident.

With the simplest and most evident truths maybe the only thing that fits is showing how absurd it would be to affirm the contrary. This is the form in which Finnis, Grisez and Boyle[55] argued in favor of the evidence of the seven goods which they considered basic. Finnish[56] states that «although it is not possible to demonstrate the basic goods as goods, it is possible to demonstrate that to deny the basic goods is to fall into that philosophical quagmire of self-refutation; the basic goods cannot be coherently doubted».

The reduction of absurdity does not directly prove the truth of the claim, much less its evidence, but makes it more probable and verifies some of its coherence.

(iii) *Necessity of Reasoning*. According to the classics, if the predicate is found in the subject, what is stated is evident. This occurs in mathematical equations and in many affirmations. We are facing a conclusive proof of evidence, of course, if it is proven. The problem here is that generally we do not always have a complete idea of the extremes of the claim. Therefore, Aquinas, after

52 In any case, it could be found. Think about the *cogito ergo sum*, reasoning that cannot be done without previously knowing those three concepts (the concept of "I know," "then," "I exist"). In reality, that first Cartesian idea is not the first at all: before must be the idea of "knowing," and even before the idea of "prior-subsequent," and much before the idea of "existence."

53 About the variety of methods, see Riofrío Martínez-Villalba, J.C., La selección del método en la investigación jurídica. 100 métodos posibles. Revista de Educación y Derecho, 12(2), 2015, 1–27.

54 Finnis, J., Grisez, G. and Boyle, J., Practical Principles, Moral Truth, and Ultimate Ends. American Journal of Jurisprudence, 32, 1987, p. 113.

55 The authors titled this test the "Dialectical Defense" of the evident. Finnis, J., Grisez, G. and Boyle, J., Practical Principles, Moral Truth, and Ultimate Ends. American Journal of Jurisprudence, 32, 1987, p. 111.

56 Finnis, J., Scepticism, Self Refutation and the Good of Truth. En P.M.S. Hacker and J. Raz (eds.). Law, Morality and Society. Essays in Honour of H.L.A. Hart. Oxford: Clarendon Press 1977.

affirming that the existence of God is self-evident in itself since in God the subject and predicate are the same, he observes that "because we do not know the essence of God, the proposition is not self-evident to us; but needs to be demonstrated".[57]

(iv) *Simplicity*. The simplicity of things is found by quantifying the parts which comprise them. The simplest knowledge is that of "simple apprehension," where the mind imagines what is captured by the senses. Upon seeing, hearing, smelling or touching we form an idea of what things are. The senses do not make mistakes, unless they are atrophied or suffer some type of illness; it is the mind which composes the images, sounds, smells, etc. can make mistakes. A concept depends on many apprehensions, and a judgement (A is B) requires more than a concept. Therefore, the judgement is less simple than the concept, the concept less simple than the "simple apprehension." Many judgements produce reasons, and the connection of reasons generates systems of thought. Here you have the application of Ockham's razor, through which two theories of equal conditions have the same consequences, the simplest theory has more probabilities of being correct than the complex one:[58] we have to go to the simplest and evident truths first, it is not convenient to begin with the complex and rare.[59]

We have to keep in mind that ideas enter the human intellect in layers: the first ideas are structured in *forma mentis*, a mold that will accommodate or impede subsequent knowledge. The simplest ideas tend to be better served to articulate more complex thoughts. The simple tends to measure and judge the complex.

(v) *Unnecessary Justification*. The justification of the obvious is a rather tedious task, and the direct justification of the most evident is an impossible undertaking, because the self-evident finds itself in its justification. "I exist," "there are five people here" are truths that we know via simple apprehension; "the total is greater than or equal to the part," 2+2=4, are truths that we know through intellectual evidence. The evident is axiomatic. The very impossibility of denying or proving the veracity of the affirmed says something about its evidence.

(vi) *Clarity*. Clarity is an essential characteristic of the obvious. We repeat that the evident implies the presence of a reality as unequivocal and clearly given to intelligence. The extremely evident is extremely luminous to intelligence, which through its clarity can see. A legible essay, a clear exposition, good intonation, a complete presentation, etc. help to realize the plentitude of evidence. However, the source of this characteristic is more difficult to prove; it could be done by examining the degree of understanding acquired in those who have heard of some theory, assertion or fact.

b. The Verification of Extrinsic Characteristics

The simplest proof that something is evident is made by verifying if it has manifested itself as externally evident. It is the test for the effects. The characteristics which the obvious tends to gather (certainty, connaturality, generalized knowledge and fertility) can be easily verified through empirical tests (exams, interviews, statistics, etc.) which define how true and natural an affirmation is to the public and how many shares it.

If the three extrinsic characteristics in an affirmation are confirmed, it is probable that it is evident. Let's study them:

57 Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, I, q. 2, a. 1, sol.

58 Cf. Audi, R. (ed.), Ockham's razor. The Cambridge Dictionary of Philosophy, 2a ed. New York: Cambridge University Press 1999; Thorburn, W., The Myth of Occam's Razor. Mind, 27, 1918, p. 345–353.

59 Leibniz, Kant, Menger, Einstein and many others have criticized the reasoning of Ockham for being too superficial. Sometimes more elements are necessary to explain reality. Against the assertion that *pluralitas non est ponenda sine necessitate* (plurality must not be proposed without necessity), Kant responded in his *Critique of Pure Reason* that "the variety of beings shouldn't necessarily be diminished" and Menger pointed out that "it is vain to do with less that which requires more." Cf. Maurer, A.A., Medieval Philosophy. New York: Random House 1962 and Maurer, A.A., Ockham's Razor and Chatton's Anti-Razor – Mediaeval Studies, 46, 1984, p. 463–475. We consider the reason of Ockham does not work to find the truth, neither like a method for delineate theories or hypothesis, but can have a modest use to detect if something is obvious or not.

(i) *Connaturality.* We say that, at least when the obvious is recently captured, that it assumed to be something natural. One does not notice: nobody states, "it's true, I have seen the moon." I have just seen it. On the one hand, faced with an affirmation that is not evident (which tends to be obscure and complicated) the public will be afraid to accept it. The ideas which require a constant and mass propaganda to establish themselves in a society do not tend to be evident, precisely because they were not introduced naturally to people. That its acceptance causes foul language or embarrassment (at least initially, before people or society have self-excused) neither tends to be evident (what happens with many sexual behaviors). On the other hand, over years that which peacefully belongs to the "common sense" of a society tends to be evident.

(ii) *Certainty.* The perception of the transparent has as an effect that the sensation of security of having known that it is called "certainty." Certainty does not generate doubts: who sees the moon does not question if he/she has seen it. On the other hand, when faced with uncertain doubts they naturally rise to the surface: "is it true that I have seen a ghost?" Here we refer to serious doubts, which in morals is called "positive doubt": that which houses the possibility of the contrary to what is believed exists. You can always muddle over superfluous doubts like those of the evil genius Descartes, but those do not cause true uncertainty but to a madman.

Connaturality and certainty can be proven and by tested by the sense of security and naturality with which persons received the information. But for such a test there will have to be selected a very good focus group, because "things are revealed to men in various ways, according as they are variously disposed".[60] A doctor will experience more difficulty grasping the evidence of physics equations than an engineer, because they are not a part of his science. A wimp or someone who is fickle will have less certainty of what is known and more fear of not having arrived at the truth.[61] Whoever is full of prejudices against a subject or current of thought will have difficulty grasping the truth which comes from that source. In these examples we see various obstacles which reduce the effects caused by the evidence: there are obstacles external to the evidence that do not undermine its existence, but its manifested effects (it avoids the external manifestation of the obvious).

When it comes time to prove the certainty and naturalness with which information is received we have to select a more educated, coherent[62] and sensible public, avoiding the crazy and foolish people.[63] A panel of physics experts will be able to say more reliably whether an equation is evident or not; the most serene and calm people probably will be in a better position to capture the light of evidence than that exalted and biased by a position.

(iii) *Generality.* Whether or not the aforementioned external obstacles exist, it seems clear that the most obvious things will be grasped by a greater number of intelligences. Something widely shared by different cultures and generations will show greater betas of evidence. Many values hold unbeatable evidence: think about loyalty, veracity or honesty, so widely shared in cultures throughout time. No culture has infidelity, deceit, theft, or fraud as a value (although you will always find a rare bug, a blind man unable to grasp the obvious, who will make any leitmotiv from any stupidity).

While most people share an affirmation and while less contradict it, the more likely there is evidence. The

60 Tomas de Aquino, Suma Teológica. París-Italia. Traducción al castellano de BAC. Suma Teológica de Santo Tomás de Aquino, 4ª ed. Madrid: BAC 2001, III, q. 55, a. 4, sol. Then the Summa explains how the diversity occurs: "for, those who have minds well disposed, perceive Divine things rightly, whereas those not so disposed perceive them with a certain confusion of doubt or error: 'for, the sensual men perceived not those things that are of the Spirit of God,' as is said in 1 Co 2, 14".

61 See footnote 52.

62 Whoever claims to be sure of a doctrine, but does not live according to it, in reality is insecure about it.

63 In fact, theological science considers the life of the saints and their doctrine as *locus theologicus,* that is to say, as a source of scientific knowledge. These theological places help to understand divine science, "but a new public revelation they do not accept as pertaining to the divine deposit of faith" (Concilio Vaticano II, Lumen Gentium. Vaticano: Editrice Vaticana, n. 25§4; cf. Concilio Vaticano I, Constitución dogmática Pastor Aeternus. Vaticano: Editrice Vaticana, n. 4); that is why they are corroborating sources, not constituents of revelation.

opinion of the majority is no the truth, not less the evidence, but a piece of evidence among others. Only here it can be argued that which is naturally shared as safe by the majority of people shows serious signs of evidence. Although it is not apodictic, the generality says something about the evidence. It is used by those looking to base ethics in the shared values of society, and something is right in such work.[64]

Generality it is perhaps the simplest characteristic to prove and it can be done in different ways:

– *Statistics*. Statistics show how many have accepted a certain thesis at the time and how many have been its detractors.[65] It seemed to be quintessential proof of evidence. However, when we speak of evidence, the size of the audience is very large (all people of all times), which demands a sample which is difficult to achieve; and, as we know, if we reduce the sample, we reduce the viability of the results. On the other hand, the statistics are not always available, nor are they always done well.[66]

– *Historical Documents*. The annals of history collect many centuries-old and immemorial customs which reflect the way people think for centuries. The words also possess historic traces and their etymology allows us to detect how ancient people understood them at that moment, only in that moment closest to the first absolute apprehension related to the term. Additionally, we have sayings which repeat and reformulate in different generations: the sayings are a privileged formula of transmitting evident truths.

It is also possible to access the feelings of our ancestors through their most distinguished interlocutors: the classis artists, the best writers and geniuses. From prehistory we do not have letters, but art, which we are still trying to decipher. With the appearance of writing we can trace what our first parents thought. Homer through the Iliad and the Odyssey, Sophocles with Antigone's tragedy, and Virgil through the Aeneid and the Bucolic, speak to us about thought during the VIII, V, and I centuries B.C. Literature and classic music are different from fashionable novels and ballads because fashion is fleeting, while the classic pleases an infinite number of generations who find in that art something beautiful, true and sublime.

– *Art.* Art is a good vehicle for expressing truths, both the most obvious and simple, and the most profound and difficult to understand. Thomas Aquinas pointed out that "just as human reason fails to grasp poetical expressions on account of their being lacking in truth, so does it fail to grasp Divine things perfectly, on account of the sublimity of the truth they contain: and therefore in both cases there is need of signs by means of sensible figures" (*Summa Th.* I–II, q. 101, a. 2, ad 2). Such a representation many times takes us from the easy to the profound. As Kahil Gibran said, "art is a step from what is obvious and well-known toward what is arcane and concealed."[67]

But not all art works in the same manner to express the obvious, because the expressivity of art is very variable and because artists do not always know what they represent. Architecture, building decorations, goldsmithing and costume jewellery, music without lyrics, together with absolutely abstract art, fail to manifest but a joining of sensations which rarely can be described as true or false. landscape painting shows with its tonalities how things are valued, but much does the one representing the mythical or real characters, caring for their luminosity and gala, or filling them with shadows and cold nuances. A good portrait expresses more than a photograph. Something similar happens with a sculpture when it keeps feminine pro-

64 However, moralists would be wrong if they did not go further, only maintaining the opinion of the majority. It is good to know what each country values, but then you have to study the underlying reasons why each thing is considered valuable. If we do not reach the ontological and practical levels, we remain in the moral of the majority, in a relativism lacking of any sense, incapable of surviving just one generation.

65 A basic principle of statistics is to count both the data in favor, and the data against it. One piece of data compliments and corrects the other.

66 Polo Barrena, L., Quién es el hombre. Madrid: Rialp 1991, p. 34 observes that "physicists say that we turn to the statistical explanation when we do not have another, because the statistical explanation is the weakest. In addition, statistical explanations have a limit, since not everything can be explained statistically. When many factors enter into the calculation, there is no way to establish the statistics. This is technically called the '*white noise*'."

67 Gibran, K., The Wisdom of Gibran: aphorisms and maxims. New York: Philosophical Library 2010.

portions or shows the strength of heroes, proclaiming day and night the ideal of beauty or civic values.

More expressive is the art which moulds language to show values, principles or ideas: poetry, songs with lyrics, thick literature, theater and the movies. Poetry encloses little truth, but may contain that which seems to the poet to be evident and feels driven to proclaim through the feeling of security that produces the idea. In a certain sense, the evident is scarce. Songs also manifest the truth observed by musicians: certainly, there we will not find the theorem of Tales, nor of Bayes, nor of Pythagoras, but the truth of emotions, that of the impetus of the heart. Many ballads and boleros speak very well of love, on occasion better than the great philosophers. Aristotle wrote excellent lines about friendship, but more convincingly a love song, a novel or a friend's life of flesh and bones. While describing the superficial, to capture the impressions and produced emotions, to feel the reality of interpersonal relationships, and to describe some other phenomenon, artists excel in multiple aspects of philosophy.

(iv) *Good Fruits*. Here only attends to the effects of kindness. When something is based on a well-developed science, which is to say, when without that piece various sections of that science fall, that piece normally is evident. In practical reasoning the same occurs, but also there we have to verify the positive or negative effects. An anti-Semitic principle is capable of constructing a Nazi morality in good rule, but that does not mean that the starting principle will be evident. Only the practical principle that has generated a culture of peace, well-being and harmony will seem evident.

Authors such as Finnis, Grisez and Boyle[68] have also appealed to this path when, upon speaking of the primary principles they pointed out that although there is no direct proof of their evidence, it is possible to appeal to "dialectical arguments" to demonstrate that its negation carries unacceptable consequences.

4.4. Evidence in the Law

Evidence is a corner where the procedural law and theory are found. Procedural law is interested in defining what tests contain sufficient evidence to judge in a certain way, while the theory of law is interested in proving what is truly fair, lawful or legitimate in each case. In this last type of evidence – more theoretical and less factual – we will dedicate ourselves to this next.

In order to define the most fundamental structure of law, in order to detect which are its primary principles, its most secure and indubitable directives, jurists of all times have turned to a series of institutions (also within the judicial processes) that show which are the more generalized legal concepts.[69] Specifically, we are speaking of customs with the greatest longevity, aphorisms and maxims, traditions, common opinion and the constant doctrine of doctors.

Juliano considered the inveterate custom forced as much as the law,[70] in a system where the law already has its weight. In fact, an *immemorial* custom repeated in the majority of cultures probably manifests a point of obvious legal truth. Think, for example, about the diverse cultural forms of celebrating matrimony, where nevertheless, care is taken that the man and the woman always have a moment to express their will in a clear and free manner. The union of wills is not something incidental or accessory, but nuclear to the marriage, something undoubtedly evident.

Other *customs with longevity* and several *legal traditions* would also be able to manifest obvious rights or obligations, while there are no opposing uses or traditions in another time or place. Something similar could be said of *common opinion* and *legal practices*, when they turn out to be very widespread: if all citizens understand the law in a certain way, if everyone applies it in a certain way,[71] we face an unanswered point of law.[72]

68 Finnis, J., Grisez, G. and Boyle, J., Practical Principles, Moral Truth, and Ultimate Ends. American Journal of Jurisprudence, 32, 1987, p. 111.

69 Cfr. Riofrío Martínez-Villalba, J.C., Fines, valores y principios comunes a la propiedad intelectual, al derecho a la competencia y a otros derechos. Ius Humani. Revista De Derecho, 3, 2012a, 37–50.

70 *Inveterada consuetudo pro lege non immerito custoditur* (Juliano, *Digesto* I.3.32.1).

71 The Roman genius pointed out that laws resemble the old customs confirmed by consensus (*diuturni mores consensu utentium comprobati legem imitantur*, in *Inst*. 1.2.9).

72 We also remember that Paulo, and later many other jurists, maintained that the custom is the best interpreter of the law. *Optima est legum interpres consuetudo* (Paulo, D. 1.3.37). See also X. 1.4.8, where he states that *consuetudo est* **óptima**

The *common* and *constant doctrine of doctors* tend to present various characteristics of a deeper knowledge of evidence: clarity, certainty, and qualified generality. Not in vain in international processes renowned lawyers "prove" what national law is, when they all share a common opinion about a specific issue. Precisely for that reason, who attacks that test has to intervene presenting other experts of equal fame that sustain the contrary.

The problem with aphorisms are their simplicity: although this highlights its evidence, its application is not always adequate to all cases which cross the mind. Facing an uncomfortable aphorism, the rhetoric recommends defending itself by invoking a contrary aphorism, which does not stop being but a show solution. In the end, they will have to carefully clarify which legal principle applies adequately to the case and

Old aphorism and maxims of law shows the best guarantees of the evident.

Old aphorisms and maxims of law show the best guarantees of the evident.

The doctrinaires and lawyers also frequently use adages, sayings, aphorisms, brocades and maxims of law, to support the claims that they make in their writings and allegations. And this is extremely convenient, because they present a good dose of evidence. *Pacta sunt servanda*, *ad impossibilia nemo tenetur*, *alterum non laedere*, *suum cuique tribuere*...are indubitable truths which are studied at the beginning of the career and create a base upon which subsequent legal knowledge will settle. *An aphorism is the genius of an illustrious jurist, who pronounces himself/herself synthetically upon a specific point of law, repeated later by subsequent generations who have immediately found in that phrase the clear expression of some true*. These maxims show the best guarantees of the evident: they are extremely simple, they have great clarity, they do not require great justification, they assume a natural way, they are shared by scholars and laypersons, they pose a certain capacity to settle controversies and are cited in treatments in order to structure all subsequent knowledge on them. Its abundant use in different eras, cultures and legal systems denotes an overwhelming generality, typical of the most evident.[73]

which must be rejected.[74] If, however, two clearly contradictory aphorisms arise on exactly the same point of law, it is probable that we are not faced with something obvious, and that only one of them is justified.

5. Conclusions

We can summarize the conclusions of this paper, as follows:

1. According to what was wrote, it is evident that clear knowledge immediately and directly captures what things are. If differs from certainty, from faith, experience, intuition and common sense.

legum interpres and Coke when he says that *optimus interpres legum consuetudo* (*Institutes*, II: 18 y 228).

73 Naturally not all phrases of ancestors come to be obvious maxims, because not all of them have the same type of diffusion, simplicity, clarity and certainty. Therefore, we greatly appreciate the particularized study of actual aphorisms made by Domingo Osle, R., Ortega, J. y Rodríguez-Antolín, B., Principios del derecho global. Cizur (Navarra): Aranzadi 2003.

74 As Otaduy states (Otaduy, J., En Comentario Exegético al Código de Derecho Canónico, v. 1, 3ª ed. Pamplona: Eunsa 2002, p. 364), "many of the legal phrases of traditional authority, many of the 'regulae iuris' or 'brocarda,' formulated as proverbial axioms or legal apothegms for the interpretation of the law, have a very labile use, which can be contradictory if used without discernment; in fact, many of them are contradictory to each other, because they were born to solve issues which merited very diverse solutions. They give some help for the interpreter, in the sense that they formulaically condense a solution of experience, valid for some cases. But they do not spare the interpreter the fundamental task of unraveling the particular cause that is discussed."

2. The obvious shows ten characteristics. Its intrinsic characteristics are: truth, coherence, necessity of reason, simplicity, its unnecessary justification and clarity. Its extrinsic characteristics are: certainty, innateness, generalized knowledge and fertility.

3. A method was designed to detect the obvious, which consisted of a positive test which verifies if the ten mentioned characteristics are fulfilled, to conclude "this is evident," and in a negative test that analyzes if they are not met to infer "this it is not evident."

4. Certain sources of law manifest the characteristics of the evident in a special way. Specifically, the longest-standing customs, common opinion, constant and common doctrine of doctors; but above all, what has the most nuances of evidence, are the aphorisms, brocades or maxims of law, which condense in a simple phrase an uncontested affirmation of law.

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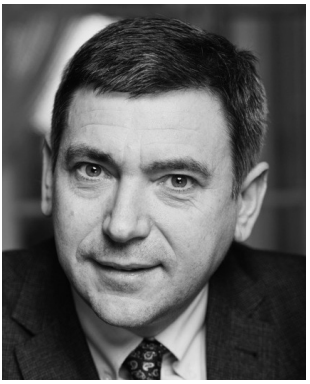
Venire contra factum proprium nemini licet – Changing Fortunes of the Maxim Demanding Constancy in Conduct



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1. Introduction

The *venire contra factum proprium nemini licet* legal maxim in legal argumentation expresses objection to inconsistent behaviour. The prohibition on contradicting one's own behaviour, conceived in this maxim, or estoppel in common law countries, constitutes the concept from the Civilian tradition that is renowned for protecting a commitment to loyalty.[1] An estoppel, says William Blackstone, "…happens where a man hath done some act or excluded some deed which estops or precludes him from averring anything to the contrary."[2] However, opinions regarding the significance of this maxim are not uniform in discussions among civil law jurists. The more we look into it, the bigger our embarrassment might be. The maxim's genesis is connected with Roman law[3] but sources render it possible to connect its origins with legal science in the late Middle Ages.[4] A picture of those origins which can be relatively easy for us to access is a collection of legal maxims entitled *Brocardia sive generalia iuris,* whose author is said to be Azo – a jurist who lived at the turn of the 12th

1 Cfr. T. L. Sombra, The Duty of Good Faith to a New Level: An Analysis of Disloyal Behaviour, "Journal of Civil Law Studies", 2016, issue 9, p. 29.

2 W. Blackstone, *Commentaries on the Laws of England*, Book the third, Oxford 1768, p. 308 (III, ch. 20).

3 See H. W. Dette, *Venire contra factu proprium nulli conceditur. Zur Konkretisierung eines Rechtssprichtwortes*, Berlin 1985, p. 13; R. Singer, *Das Verbot wiedersprüchlichen Verhaltens*, München 1993, p. 354; P. Mazur, *Powoływanie się na nieważność czynności prawnej z naruszeniem zasady venire contra factum proprium niemini licet*, "Przegląd Sądowy" 2017, issue 10, p. 57.

4 See E. Riezler, *Venire contra factum proprium. Studien im römischen, englischen und deutschen Civilrecht*, Leipzig 1912, p. 1.

and 13th centuries.[5] Those maxims were formulated mainly on the basis of the sources of ancient Roman law. They were proliferated in our legal tradition thanks to fifteenth-century printed editions.[6] The divergence between the wide use of the maxim in the pre-codification science and practice of adopted Roman law and the fact that there is no mention of it in nineteenth-century pandectist theory of private law was explained by the aspiration of the latter for fidelity to the Roman sources of law.[7] A visible increase of the maxim's significance in legal science from the beginning of the 20th century is related to a book by Erwin Riezler dedicated to it.[8] Azo justified the authority of the maxim and the limits of its application through the texts of ancient Roman law. Riezler indicated it as the source of a number of rules of the German Civil Code.[9] But, what is more, he indicated the maxim as the expression of an idea which helps to overcome the gaps in codification; an idea which can support *ad casum* judicial argumentation in order to achieve "results which are satisfactory in terms of their purpose, when the code does not specify them expressly" (*von Fällen teleologisch befriedigende Lösungen gewinnen, die das Gesetz mindestens nicht ausdrücklich vorschreibt*).[10] However, linking the maxim in legal discussions of the 20th and 21st centuries with the good faith clause, combating the abuse of law and protecting legitimate expectations resulted in doubts concerning the correctness of such an argumentative practice.[11] Research results which indicate a "definitely smaller than expected"[12] argumentative significance of the *venire contra factum proprium* prohibition do not hinder making an expressive reference to this maxim in supranational attempts to unify the law of contract[13] or to declare the maxim as one of the basic principles of private law.[14] Finally, we notice an inconsistency between a thesis stemming from legal history stating that the discussed maxim is a guideline used for orientation rather than an order,[15] and an assessment that "Polish law does not fully implement the *venire contra factum proprium nemini* principle" and a related postulate to introduce a norm which renders it possible "in special circumstances" to pursue claims resulting from an invalid legal transaction.[16]

Opinions regarding the significance of this maxim are not uniform in discussions among civil law jurists.

The discussed maxim also gained argumentative significance outside private law with which it is histor-

5 H. Lange, *Römisches Recht im Mittelalter*, vol. 1, *Glossatoren*, München 1997, p. 270.

6 *Brocardica Azoni sive generalia iuris Azonis Bononiensis*, Basileae 1567. I used this edition. For other editions see: *Brocardia Aurea Azonis Bononiensis Antiquorum Iurisconsultum in quibus omnes fere iuris antinomiae resolvuntur*, Venetiis 1566; *Brocardica seu Generalia iuris Azonis Bononiensis Iurisconsultum facile principis*, Beuliaqua 1577; *Aurea brocardica azonis bononiensis*, Venetiis 1581; *Aurea Brocardica Azonis Bononiensis Antiquorum Iurisconsultum*, Venetiis 1584; *Aurea Brocardica Azonis Bononiensi, Summa Azonis: locuples iuris civilis thesaurus*, Venetiis 1596; *Aurea Brocardica Azonis in quibus omnes fere iuris antinomiae resolventur*, Venetiis 1610; Azo (Porcius), *Summa Codicis: Institutionum et Digestorum et Brocardica*, Frankfurt am Main 2008

7 E. Riezler, *Venire*…, p. 54.

8 F. Festi, *Il divieto di "venire contro il fatto proprio"*, Milano 2007, p. 32.

9 E. Riezler, *Venire*…, p. 110–123.

10 E. Riezler, *Venire*…, p. 128.

11 H. W. Dette, *Venire*…, p. 109–110; R. Singer, *Das Verbot*…, p. 353.

12 R. Singer, *Das Verbot*…, p. 352.

13 See F. Festi, *Il divieto*…, p. 15ff; N. Jansen, R. Zimmermann (eds.), *Commentaries on European Contract Law*, Oxford 2018, p. 153.

14 P. Mazur, *Venire*…, p. 58.

15 F. Astone, *Venire contra factum proprium*, Napoli 2006, p. 74.

16 P. Mazur., *Venire*…, p. 65.

ically connected the most.[17] It is a constituent of European legal tradition. The long history of the maxim is indicated as the source of its contemporary vitality.[18] Therefore, the embarrassment raised by the outlined inconsistencies draws attention to experience supporting the *venire contra factum proprium* maxim. It inspires the following questions: Why was the discussed maxim introduced into legal argumentation? Can we notice any systemic elements in using the maxim before it was included – probably by the inspiration of E. Riezler – in the interpretation of the statutory good faith clause? If we can notice elements of a systemic approach in the pre-codification history of the maxim – can they inspire a contemporary view on a useful method of referring to the maxim in private law and if so, how?

The long history of the maxim is indicated as the source of its contemporary vitality.

The publication of the very first and extended historical and legal paper on the origins and basics of the *venire contra facrum proprium*[19] maxim in 2017 should be received with satisfaction and interest. I take an overview of the method assumed by its Austrian author Lisa Isola and her findings made as the starting point of a search for the answers to the questions asked above.

2. *Lisa Isola's approach to the* venire contra factum proprium *maxim in Azo's* Brocardia

Azo's Brocardia, published in printed form in the 16th century, provides us today with a relatively easily accessible picture of the first methodological considerations on the binding power of the *venire contra factum prorpium nulli conceditur* maxim.[20] *Prima facie*, they show the fundamental significance of the texts included in the Justinian compilation for such considerations in late-medieval legal science. From among more than fifty fragments treated as *ratio scripta* and cited to confirm (26 texts) or reject (24 texts) the binding power of the maxim and, finally, as guidelines regarding its validity limits (6 texts), only two did not come from the Justinian compilation.[21] The formal structure of Isola's paper at its core reproduces the structure of the Brocardia. Explaining the content of the Roman texts cited by Azo to the contemporary reader and the state of discussion regarding them in the contemporary knowledge of ancient Roman law resulted in the fact that three pages in the Brocardia correspond to 384 pages in the mentioned monograph. In this way, the author indicated that medieval jurists had legitimated the maxim using texts from different fields of law. Apart from linking it with the enforceability of contracts, it was confirmed by texts concerning procedural and public law.[22] Such a presentation of arguments used for the assessment of the maxim also renders it possible to notice the consistency in establishing the limits of the maxim's application between considerations based on Roman texts and those coming from the *Decretum Gratiani*.[23] Finally, the texts used in the Brocardia, included in the opposing arguments (*contra*), render it possible to notice how medieval jurists individualised the values which they used to explain inconsistencies between a purely dogmatic consequence of an act and

17 See, e.g. EUECJ C-140/08 (29 October 2009); EUECJ C-177/13P (13 February 2014); judgement of the Voivodeship Administrative Court in Warsaw IV SA/Wa 551/16 (6 September 2016).

18 W. Dette, *Venire*…, p. 14; F. Astone, *Venire*…, p. 2; J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2003, p. 86 and 95.

19 L. Isola, *Venire contra factum proprium. Herkunft und Grundlagen eines sprichwörtlichen Rechtsprinzips*, Frankfurt am Main 2017.

20 *Brocardica*…, p. 121–123.

21 These are two fragments of the *Decretum Gratiani*.

22 L. Isola, *Venire*…, p. 427.

23 L. Isola, Venire…, p. 428–429.

its assessment used to protect such a value. In this context, the Austrian author underlines favour for freedom (*favor libertatis*).[24] Should they strictly follow the structure of Azo's Brocardia, the contemporary reader can easily notice elements of systemic thinking about the application of the maxim in the medieval handbook of legal reasoning, thanks to the work of Lisa Isola. There are a few levels of differentiation in the closing fragment of the *Brocardia*[25] – which I would call Azo's matrix. Behaviour contrary to the maxim was generally excluded when it violated a previous lawful act (*factum legitimum*). However, exceptions to such a connection with the maxim – resulting from Roman texts – were allowed.[26] The acts not included in *facta legitima* were divided into two groups. The first was constituted by acts made against a legal prohibition (*factum lege prohibente*). It was possible not to observe them in later behaviour. The second group was constituted by acts which are unclear for the contemporary lawyer, in the case of which "the law was non-present" (*factum lege non asistente*). They had to be observed. The cases of acts which did not meet the form required by law[27] were dominant among Roman examples justifying the distinction of the last of the indicated groups. On the occasion of the presentation of the principles formulated by Azo, the Austrian authoress indicated another classification of the application's fields of the maxim. This other classification was presented by Baldus in his commentary on the Justinian code. This brief mention tells us that the so-called Azo's matrix constituted only a part of the way of thinking about the role of the *venire contra factum proprium maxim* in the legal reasoning of the late Middle Ages. Lisa Isola can be given credit for explaining this important part of legal history to the contemporary reader. The conclusions of ancient jurists, presented thoroughly by the Austrian author, definitely included inspirations for a kind of method of using the discussed maxim which has been crystallising since the late Middle Ages. However, in my opinion, we can go further in our reflections about elements of the systemic thinking about the maxim by lawyers *ius commune* than Lisa Isola did when formulating two accurate, yet general, findings. Firstly, she stated that it was of key importance for the authors of the maxim to set the limits of being bound by a performed act, not to protect another person's trust.[28] Secondly, she confirmed that the discussed maxim – just like many other maxims formulated in the Middle Ages – renders it easier to go through *Corpus Iuris Civilis* in the first place.[29]

The contemporary reader can easily notice elements of systemic thinking about the application of the maxim in the medieval handbook of legal reasoning.

I believe that further searching for answers to the above questions asked by me needs a change of approach to the sources. Lisa Isola placed the ancient texts included in Azo's Brocardia at the heart of her explanations of the *venire contra factum proprium* maxim. In my opinion, such an approach is worth being replaced by focusing on sources which explain the history of the maxim from the late Middle Ages to civil codifications. In such case, sources selected *pars pro toto* from an extensive, dispersed and largely unexplored mass of *ius commune* sources can constitute the basis for consideration. We will see if going this way can mitigate the embarrassment of the contem-

24 L. Isola, *Venire*…, p. 384 i 431.

25 *Brocardia*…, p. 123.

26 See C. 7,16,1 (*favor liberorum*); C. 8,44,25 (*favor libertatis*).

27 D.1,7,25pr.; D.8,3,11; I,2,23,12.

28 L. Isola, *Venire*…, p. 387–388.

29 L. Isola, *Venire*…, p. 425.

porary lawyer towards the sense of the *venire contra factum proprium* maxim, which has been repeated for centuries.

3. The oldest traces of the maxim

3.1. The origins of the maxim in light of the Digestum vetus manuscript kept in the Kórnik Library

The reading of a text from the Opinions of Ulpian, a jurist of the 2nd and 3rd centuries, kept through the Justinian Digests, allows one to come to the conclusion that the language of the discussed maxim was anciently inspired. The Roman jurist was considering the problem of whether a father could question the effectiveness of his daughter's testament if her testamentary capacity was based on emancipation (*emancipatio*) which the father had executed without observing formal requirements. The jurist excluded the possibility of claiming that the emancipation was not made legally by justifying this concisely in that the father could not proceed against his own act (*adversus factum suum… prohibetur*).[30] The manuscript of the first part of the Justinian Digests – dated at the turn of the 12th and 13th centuries and kept in the Kórnik Library[31] – shows that in the discussed Ulpian's text, the word *factum* drew the attention of glossators. The explanation thereof – added probably as part of updating the manuscript in the 13th century[32] – begins with a paraphrasing of the words of the Roman jurist with the following: *no quem non posse venire adversus factum suum*.[33] A further part of the explanation includes a distinction between cases when an act was made against the law (*faciat quod est prohibitum a lege*) and when it was not prohibited by the law *non est prohibitum*). The Roman conclusion acknowledging the fact that the father was bound by the executed emancipation was classified by medieval jurists as an act belonging to the second group. They stated that the father did not violate the law but omitted the requirements of formality (*omissa illa solemnitatem*). This very part of the manuscript shows that the Roman explanation *ratio decidendi* triggered the formulation of the maxim, with which the question of its binding power has been connected since its beginning – probably and finally in the 12th century. The consistency of the content core between the wording of the gloss in the manuscript and in its more extended printed version[34] renders it possible to conclude that the maxim has never been treated either in a simplified or an absolute way.

> **The maxim has never been treated either in a simplified or an absolute way.**

3.2. Including the maxim in Azo's Brocardia

The *Brocardia*,[35] a collection of legal maxims compiled and most probably supplemented by Azo, is a legal text which is useful when solving legal problems. One of its *rubricas* (sections) is dedicated to the unambiguity of acts (*De aequalitate factorum*).[36] Judging by the wording of thirty-five maxims collected therein, the aim of this *rubrica* was to render it easier to assess when and which legal consequences can be connected with a specific act. All the max-

30 D. 1,7,25 pr.

31 See J. Frońska, *The Memory of Roman Law in an Illuminated Manuscript of Justinian's Digest* (in:) E. Brenner, M. Cohen, M. Franklin-Brown (eds.) *Memory and Commemoration in Medieval Culture*, Farnham 2013, p. 164.

32 Zob.: J. Frońska, *The Memory…*, p. 164ff.

33 BK 824, p. 21.

34 See *Corpus Iuris Civilis. Digestum vetus*, vol. 1, Lugduni 1627, p. 68.

35 See H. Lange, *Azón (+ ca. 1220)* (in:) R. Domingo (ed.) *Juristos universales*, vol. 1, Madrid 2004, p. 383.

36 *Brocardia…*, p. 103–130.

ims were linked to respected texts, mainly stemming from Roman law. This *rubrica* includes unambiguous guidelines such as the following: an action or omission shows the intention (*ex facto vel non facto animus est eventus*),[37] a later delict or action does not harm what was correctly done (*quod recte factum est, superveniente delicto vel facto non vitiatur*),[38] and the statement that if a person does not do what they should, it is assumed that they do what they should not (*qui non facit quod facere debet, intellegitur facere quod non debet*).[39] There are also mutually exclusive maxims[40] or questionable ones, which were expressed by the fact that the quoted legal sources include texts which both confirm the maxim and which are contrary to it (*contra*).[41] The *venire contra proprium factum nulli conceditur* maxim, which is included in the ending part of the *rubrica*, belongs to the last of the mentioned groups.[42] Considering the purpose and content of Brocardia's *rubrica* in which it was added, we can conclude that it was not of an especially argumentative or normative status. In the Brocardia, it was one of many elements used to subordinate the assessment of acts (*facta*), with which legal consequences are connected. It specified the richness of such situations. Explanations regarding the scope of application of the maxim in the *Brocardia* directed rather than decided on a legal assessment. They reminded one about the necessity of assessments valuing inconsistent behaviour. We can assume that creating the *venire contra factum proprium* prohibition in the Brocardia by Azo, a jurist who was significantly distinguished by his authority and influence among lawyers contemporary to him,[43] contributed to drawing more attention to problems connected with the maxim. For instance, a collection of legal principles of renowned jurists of the late Middle Ages which was published at the end of the 16th century included in comments regarding acts (*factum*) a range of maxims coming from the *rubrica* (section) entitled *De aequalitate factorum* in Azo's Brocardia.[44] In particular, explanations concerning the *venire contra proprium factum* maxim[45] were repeated in full therein. The question of how to reconcile its flexibility with some subordination of legal thinking, which was clear thanks to Azo's Brocardia, was taken by following generations of jurists of the late Middle Ages.

4. *Late medieval schemes specifying the application of the* venire contra proprium factum *maxim*

Petrus de Bellapertica (1250–1308), a professor of law in New Orleans and Toulouse, was one of the forerunners in legal method. It consisted of assigning a key role – as in philosophy[46] – to special distinctions (*distinctiones*) and striving at the precision of argumentation systematised this way.[47] Such a methodological approach also brought a slightly richer explanation regarding the scope of application of the discussed maxim. Bellapertica's disquisition started with stating that the maxim did not apply to revocable acts (*factum de sua natura est revocabile*).[48] With regard to acts which are irrevocable by their nature (*de sui natura non est revocabile*), the French jurist gave special importance to the connection between the validity of the maxim and the foulness (*turpitudo*) of the person performing the acts. He thought that a person acting justly is not bound by an act which they performed against the law (*contra legem*). Whereas with regard to lawful acts (*secundum legem*), he declared that there can be deviations from being bound by the maxim for certain reasons. He found that they occur in the case

37 *Brocardia*…, p. 103.

38 *Brocardia*…, p. 113.

39 *Brocardia*…, p. 124.

40 *Brocardia*…, p. 119: *quod fieri debet, non nocet omissum esse* and *quod fieri debet, nocet omissum esse.*

41 E.g. *Brocardia*…, p. 109–111: *quod non est, videtur esse, quia potest esse.*

42 *Brocardia*, p. 121–123.

43 H. Lange, *Römisches Recht*…, p. 260; Azo and Accursius were the only glossators to have a significant impact in the following centuries.

44 I. Baptista Nicolaus, *Regularum iuris civils quam pontificii ex celeberrimis et excelentissimis doctoribus*, vol. 2, Francofurti ad Moenum 1586, p. 444–450.

45 I. Baptista Nicolaus, *Regularum*…, p. 449–450.

46 G. Guyon, *Pierre de Belleperche (1250–1308)* (in:) R. Domingo (ed.), *Juristos universales*, vol. 1, Madrid 2004, p. 480.

47 H. Lange, M. Kriechbaum, *Römisches Recht im Mittelalter*, vol. 2, *Kommentatoren*, München 2007, p. 556.

48 P. de Bellapertica, *Quaestiones et decisiones aureae*, Basileae 1607, p. 162.

of unfairness of the other party of a given act who committed fraud or duress.[49] The flexibility of the maxim's application, noted from the beginning, was here clearly linked with the protection of the effects of the act which a person acting in a lawful and just way can expect.

by the legally invalid emancipation as an example of the validity of the maxim in relation to acts made outside of the law (*praeter legem*). However, he drew attention to heterogeneity of using the maxim in cases specified this way.[54] As to acts made against the law (*contra legem*), Bartolus specified explanations of the

The aspiration of medieval jurists to specify exceptions from the *venire contra factum proprium* maxim found its theoretical crowning in the commentary of Baldus de Ubaldis.

The commentary of Bartolus de Saxoferrato (1313–1357) on a part of the Justinian Digests which inspired the maxim[50] shows that this grand-disciple[51] of Petrus Bellapertica, who was one of the most influential European lawyers until the 16th century, chose the path of a creative synthesis of understanding the maxim. Similar to Bellapertica, he took the division into revocable and irrevocable acts as the starting point. He clearly confirmed the non-application of the maxim in the case of the first group, illustrating it with an example of a will and a death-bed gift (*donatio mortis causa*).[52] With regard to acts which are irrevocable by their nature, Bartolus clearly followed the scheme of the trifurcation of the gloss. However, he modified it towards Azo's *Brocardia*. Bartolus distinguished three intensity levels of deviation from the maxim. In the case of a lawful act (*secundum legem*), he allowed for deviations exceptionally in specific cases.[53] The jurist specified the mentioned text with regard to the fact of it being bound gloss in such a way that he linked the lack of being bound by the maxim with acting in the public interest or in the interest of a party affected by such an act.[55]

The aspiration of medieval jurists to specify exceptions from the *venire contra factum proprium* maxim found its theoretical crowning in the commentary of Baldus de Ubaldis (1327–1400), a disciple of Bartolus who gained similar authority in the European legal science of the 15th and 16th century.[56] He focused on a systematic presentation of differences in the field of deviations from the *venire contra factum proprium* prohibition.[57] Baldus divided them into four groups. He excluded the application of the maxim in a situation when an act was not supposed to lead to the creation of a legal duty.[58] The jurist also explained that if a given act did not cause an intended legal effect (*actus non valuit*), the principle is basically not binding. However, it is sometimes possible to follow it and, in such situations, he illustrated it with the fact of it being bound

49 P. de Bellapertica, *Quaestiones*…, p. 162.

50 D.1,7,25pr.

51 G. Guyon, *Pierre*…, p. 482.

52 Bartollus de Saxoferrato, *Commenmtaria*, vol. 1, *Digstum vetus*, Venetis 1516 (*repreint* Roma 1998), col. 31.

53 His comment reffering to the *glossa ordinaria* and opinions of doctores is consistent with the *Brocardia* of Azo.

54 E.g. C.11,48,7 cited as an example of a *praeter legem* act.

55 Bartollus de Saxoferrato, *Commenmtaria*…, col. 31: …*aut per favorem publicum aut favore volentis contravenire*…

56 See H. Lange, M. Kierchbaum, *Römisches Recht*…, p. 751ff.

57 Baldus' comment referred to the withdrawal from the sale of a seller's child (C. 7,16,1).

58 Baldus de Ubaldis, *Super VII, VIII et IX Codicis commentaria*, Lugduni 1539, p. 11: …*faciendo de facto non de iure*.

with the formally incorrect emancipation. Previously, this case had been classified in a less clear way as an act made when "the law was absent" (*factum lege non asistente*)[59] or as an act made outside of the law (*praeter legem*).[60] Whereas in a situation when a given act caused intended legal effects (*actus est ad solutionem*), Baldus – inspired by Roman texts – allowed for two groups of exceptions to being bound by the maxim: acting on someone else's behalf[61] and behaviour based on favour for freedom.[62]

The outlined output of late medieval legal science shows that the flexibility of the application of the *venire contra factum proprium* prohibition, noted from the very beginning, triggered a search for a scheme which renders it easier to use the maxim in legal reasoning. With the aim of offering a more precise meaning of such a scheme, the field of the application of the maxim has been clearly restricted to acts (*facta*) which were supposed to lead to the creation of a legal duty. We can also notice a striving for the certainty of dogmatic assessment criterion of the validity acts (a clear antinomy of *contra* and *secundum legem* or *actus non valet* and *actus ad solutionem*). This was accompanied by underlining the flexibility of the consequences of such an assessment, which was made in several ways; firstly, by making reference to respected Roman sources which include solutions breaking the *venire contra factum proprium* prohibition. Secondly, by linking the consequences of a dogmatic assessment – inspired largely by Roman texts – with an order to consider the foulness of the person performing a given act or the protection of certain values or interests. Such an approach to the maxim became a point of reference to it in the 16th and 17th century. This was the time when practice willingly followed schemes which were organising legal reasoning and a new systematic law order began to be sought in jurists' debate.

5. *The presence of the* venire contra factum proprium nemini licet *maxim in jurists' debate from the 15th until the 17th century*

It is significant that the manual of legal argumentation by Nicolaus Everard, *Topicorum seu de loci legalis,*[63] published for the first time in 1516 – considered nowadays as one of the most important books in European legal culture[64] – does not include the maxim forbidding *venire contra factum proprium*. Nor was it included in an extended version of this work.[65] Papers connected with legal practice constitute a field of *ius commune* which ensured the duration of the discussed maxim. Even a very limited reading of these kinds of papers makes it possible to believe that early modern jurists were following trends in setting the limits of being bound by the *venire contra factum prorpium* prohibition, which were visible in the late Middle Ages.

Papers connected with legal practice constitute a field of *ius commune* which ensured the duration of the discussed maxim.

59 *Brocardia*…, p. 123.

60 Bartollus de Saxoferrato, *Commentaria*…, col. 31.

61 Baldus de Ubaldis, *Super VII, VIII et IX Codicis*…, p. 11: … *Ipso iure non tenet agit volle alieno.*

62 Baldus de Ubaldis, S*uper VII, VIII et IX Codicis* …, p. 11: … *libertatis favorem.*

63 N. Everardus, *Topicorum seu de locis legalibus*, Lovanium, 1516.

64 See A. Wijffels, *Everardus. A Book on Topics* (in:) S. Dauchy, G. Martyn, A. Musson, H. Pihlajmäki, A. Wijffels (eds.) *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing*, 2016, p. 65–67.

65 See N. Everardus, *Argumentorum legales*, Lugduni 1568.

5.1. Application of the venire contra factum proprium *prohibition and the purely dogmatic approach to legal transactions effects*

A dogmatically clear connection between being bound by one's own act and its legal validity which was made by Baldus (*actus ad solutionem*) was incorporated by him – as a principle – into practice which consisted in providing legal opinions.[66] Such a determination of one of the limits of the *venire contra factum proprium* prohibition was maintained by Alexander Tartagus (1423/24–1477), a disciple of Baldus, whose opinions were highly respected.[67] In one of his opinions, he assessed a dispute whose starting point was an agreement on the disposal of real property concluded without formalities for transferring the property of land. He explained that despite the consenting to and transfer of the real property, no effective transaction took place[68] and therefore, the *venire contra factum proprium* prohibition was not applicable.[69] An explanation accompanying the assessment of an invalid lease contract, included in the opinion of Roberto Marante (1490–1539), an Italian jurist of the 16th century – indicates the consolidation of the criterion which links the assessment of being bound by an act (*factum*) with its legal effectiveness. He stated that a person can act against their own act which is not enforced by law (*iure improbatum*).[70] An opinion of Ioannes Surdus,[71] a jurist who lived in the second half of the 16th century, confirms the proliferation of the dogmatically clear limit of the discussed prohibition. A dispute about a testator's donation constituted an occasion for jurists to make comprehensive considerations[72] about the validity of the maxim prohibiting *venire contra factum proprium*, which has many references to legal literature. Also in this case, at the beginning of argumentation was the statement that anyone can act against a performed action if the act is invalid (*nullum*).[73] However, striving for clarity in legal reasoning did not undermine the flexibility of the *venire contra factum proprium* prohibition. The bases for challenging an act made as a result of fraud or duress,[74] inspired by Roman law, were indicated as an exception to this prohibition, justified by equity (*ex summa aequitate*). However, cases regarding the fact

> **Cases regarding the fact of being bound by the consequences of an invalid act became a focus point in reflections about the boundaries of the application of the maxim.**

66 See Baldus de Ubaldis, *Repertorium in omnia consiliorum*, Venetiis 1580, p. 104: *…quis potest venire contra factum suum, quando est ipso iure nullum*.

67 See F. Cuena, Alej*andro Tartaña (1423/1424–1477)* (in:) R. Domingo (ed.) *Juristos universales*, vol. 1, Madrid 2004, p. 556–557.

68 A. Tartagnus, *Consiliorum seu responsorum*, 2nd book, Venetiis 1610, Cons. XCIII, p. 81: *Consensus simplex non confert titulum.*

69 A. Tartagnus, Consiliorum…, p. 81: *Venire quis potest contra factum suum nullum*.

70 R. Maranta, *Conislia sive responsa*, Coloniae Agrippinae 1599, Cons. XXIX, p. 148: *…potest quis venire contra factum proprium, quando fuit illicitum vel invalidum, et iure improbatum…*

71 See Chr. v. Bar, P. Dopffel (eds.), *Deutsches Internationales Privatrecht im 16. und 17. Jahrhundert*, vol. 1, Tübingen 1995, p. 643.

72 See E. Riezler, *Venire…*, p. 45.

73 I. P. Surdus, *Consiliorum sive rsponsorum*, 2nd book, Francofurti ad Moenum 1630, Cons. CCLXXXIV, p. 934–936: *Factum proprium impugnare potest quilibet, si est nullum…*

74 A. Faber, *Codex Fabrianus definitionum forensium et rerum in sacro Sabaudiae Senatu*, Lugduni 1610, p. 129; N. Acosta, *Tractatus de privilegiis credito*, 1645, p. 99.

of being bound by the consequences of an invalid act became a focus point in reflections about the boundaries of the application of the maxim.

5.2. Criterion of the interest or justice of behaviour and the application of the maxim in the case of the invalidity of an act

Connecting the *venire contra factum proprium* prohibition with the result of a dogmatic assessment as well as with the result of based on the values evaluation of an act, which was visible in the case of late-medieval lawyers, found its creative continuation. We can find functionally consistent opinions in the legal literature of the 15th and 16th centuries which show how a dogmatic assessment of being bound by an act (*factum*) was supplemented by a reference to the honesty of a person performing the act and taking into consideration interests which are worth protecting. As a matter of fact, such considerations came down to searching for an answer to the question whether and to what extent a person who performed an invalid act can act against it.

A reading of the mentioned opinion of Ioannes Surdus renders it possible to acknowledge that in legal discussions of the 16th century, an opinion was formed according to which the invalidity of an act could not be invoked by a person who, by acting in an unjust way, caused the invalidity of the act and wanted to use that in their own interest[75] or in the interest of a person for whom the invalidity was caused.[76] The explanation provided by Antoine Favre (1557–1624) can be perceived as an example of extension in the direction of strengthening the *venire contra factum proprium* prohibition. This influential representative of French legal humanism assumed the discussed maxim as an argument confirming the fact of being bound by an act when the act consisted in the intentional approval of improper behaviour.[77]

The flexibility of the *venire contra factum proprium* prohibition, noticed from the very beginning, was visibly based on Roman sources in the late Middle Ages. The output of *ius commune* allowed Ioannes Surdus to make the synthetic statement that deviations from the principle of binding of the party by his/her legally valid action are possible in the public interest[78] or in the interest of an entity which was represented by the person performing a given act[79] or in the case of faultless violation of the formalities of an act required by law.[80]

Linking the maxim with a practical description of applied Roman law closed the possibility for innovation.

The presented outline of references to the *venire contra factum proprium* prohibition in the opinions of jurists of the 15th and 16th centuries enables one

75 I. P. Surdus, *Consiliorum*…, p. 935: … *quod faciens pactum prohibitum favore tertii contravenire non possit,* (…) *quod contractus est nullus, quoad alios non ad facientis commodum.*

76 I. P. Surdus, *Consiliorum*…, p. 935. …*non placet, quia ubi actus annullatur favore alterius, si solus allegat nullitatem, in cuius favorem fuit inducta…*

77 A. Faber, *Codex Fabrianus*…, p. 129: …*restitui non potest ad improbandum factum procuratoris quod ipse semel approbaverit – nemo enim factum proprium impugnare potest…*

78 I. P. Surdus, *Consiliorum*…, p. 934–935: *Factum proprium impugnare quis potest, quando anullatur favore publico* (…) *Resopndeo etiam contrarium procedere, quando actus anullatur favore publico.*

79 E.g. I. P. Surdus, *Consiliorum*…, p. 934–935:*Praelatus potest nomine ecclesiae impugnare alienationem, quam nullam fecit: …venire potest contra proprium contractum, ex quo gerit duplicem personam, et impugnat alieno nomine…*

80 I. P. Surdus, *Consiliorum*…: p. 935:… *potest impugnare factum proprium nullum, quando actus simpliciter non prohibetur, sed datur certa forma servanda, qua non servata annullatur…*

to notice that subsequent trends from the late Middle Ages came with modifications. Their essence lay in clearly focussing on the fact of being bound by an invalid act by the person who performed that act. In that area, distinctions in terms of assessment regarding the fairness of the behaviour of the person performing a given act and justified interests of other entities were proliferated. Examples of references to the *venire contra factum proprium* maxim consistent with those

> **The maxim had equally marginal importance in German pandectisim.**

regularities can be found also in legal reasoning in the 17th century.[81] However starting from that century, such usage of the maxim has been accompanied by searches for new legal methods. In the German states, the focus was placed on striving to help practitioners to "go through the obscurities" of applied Roman law. Searches for a new systemic order of the law brought about more significant changes. They constituted the foundations for the theories underlying civil codifications of the 19th century. Different purposes of developed legal methods resulted in a different approach to the maxim prohibiting *venire contra factum proprium*.

6. *Significant differences of importance assigned to the maxim in the systemic approach to the law from the 17th century until the 19th century*

6.1. *The* venire contra factum proprium *maxim as an axis of a description of applied Roman law*

On 11th April 1688 the Council of the Law Faculty of the Viadrina University in Frankfurt (Oder) approved a dissertation by Johann Schacher regarding the legal possibility of behaviour contrary to an act performed before (*De impugnatione factii proprii*). The dissertation defence was chaired by Samuel Stryk, namely the person who was setting directions for legal practice *usus modernus* at the beginning of the 18th century.[82] At the beginning of his dissertation Johann Schacher stressed that stability and loyalty bring glory to people, however, the law sometimes allows deviations from the principle ordering such behaviour. The work focuses on an extensive presentation of manifestations of the principle and exceptions thereof.[83] Explanations of the nature of the principle show that it was linked with the ultimacy of the legal consequences of valid acts[84] and the impossibility of invoking unjust behaviour by a person who led to the invalidity of acts.[85] A bigger part of the text – organised in five chapters – was constituted by a description of legal rules specifying the principle and allowing for revoking the consequences of a legal act. Schacher's reasoning was based on Roman law used in the religious and political context of absolutist monarchies. The spirit of his considerations may be illustrated by examples of exceptions from the principle, such as: the dissolution of marriage due to a violation of marital fidelity,[86] the withdrawal from a sales agreement due to the defects of a thing,[87]

81 E.g. I. Brunnemann, *Commentarius in Codicem Iustinianeum*, Lispae 1708, p. 1279.

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

83 J. Ch. Schacher, *Disputatio iuridica. De impugnatione facti proprii*, 1688, p. 3–4.

84 J. Ch. Schacher, *Disputatio…*, s. 9: *…Pacta itaque dum servanda diximus, (…) Sicuti enim quis venire non potest contra id, quod voce propria fuit attestatus…*

85 J. Ch. Schacher, *Disputatio…*, p. 12: *…Senatus contractum non potest impugnare, forte ex eo capite, quod sine consensu civum fuerit initus* (…) *Turpitudunem vereo propriam regulariter nemo allegare potest.*

86 J. Ch. Schacher, *Disputatio…*, s. 26 (the chapter on the law of persons).

87 J. Ch. Schacher, *Disputatio…*, s. 50 (the chapter on legal transactions *inter vivos*).

the revocation of a will,[88] the change of position in an appeal procedure,[89] a withdrawal from the disposing of church real estate made without legitimate cause[90] or the breaking of an agreement by a sovereign if he has a good reason for doing so.[91] Such use of the principle meant a significant change in the approach to explaining its flexibility. On one hand, it put the argumentative value of the *venire contra factum proprium nemini licet* maxim on an equal footing with the maxim excluding the possibility of invoking own foulness (*turpitudinem suam allegans nemo audiatur*), which is also well-established in practice. On the other hand, it made the maxim become only a guideline, helping to present the extensiveness and diversity of dogmatic considerations which focused on the possibilities of acting against a performed legal or procedural act. Such an approach could have consolidated the maxim's presence in legal argumentation. However, linking the maxim with a practical description of applied Roman law closed the possibility for innovation.

Focus on the discussed maxim by Erwin Riezler in the first years of codified private law in Germany was linked with a thesis on limitations resulting from codification.

6.2. The marginalization of the maxim in dogmatic reflections of theories from which contemporary civil codes originated

Permanent inclusion of the maxim in European legal science based on Roman texts resulted in the fact that the maxim was present in the argumentation of practitioners[92] and in collections of legal maxims[93] also in the times of the codifications of the 19th century. However, it was not included in explanations about the bases and scope of the reliance in the fundamental works of the rational school of the law of nature.[94] Consequently, the maxim did not become a visible element of discussions from which the first modern civil codes originated, such as, in French Code Civil[95] in particular. The maxim had equally marginal importance in German pandectisim, which created an original theory of legal transactions. An exception in that German legal discussion of the 19th century was constituted by the use of the maxim as an argument for combating the dishonesty (*exceptio doli generalis*) of a husband who was demanding the return of dotal land sold by him contrary to the law.[96] According to such a way of thinking, remembering about the maxim in legal discussions resulted in the paper of Ernest Riezler, which I have already mentioned.[97] It was published twelve years after the

88 J. Ch. Schacher, *Disputatio…*, s. 59 (the chapter on *mortis causa* acts).

89 J. Ch. Schacher, *Disputatio…*, s. 83 (the chapter on proceedings in law).

90 J. Ch. Schacher, *Disputatio…*, s. 85 (the chapter on acts in ecclesiastical matters).

91 J. Ch. Schacher, *Disputatio…*, s. 105 (the chapter on the binding of a sovereign by his acts)

92 E. Rezler, *Venire…*, p. 54.

93 E.g. F. Vaccaro, *Juris aphorismi ordine alphabetico digesti*, Napoli 1842, p. 45.

94 Cf. H. Grotius, *De jure belli ac pacis*, Amstelaedeami 1720, p. 436 (Lib. II, cap. XV, XIV–XV); S. Puffendorf, *De jure naturae et gentium*, Francofurti ad Moenum 1684, p. 386–388 (Lib. III, cap. 4, § 1–2);

95 The drafters of Code civil have not adopted the binding effect of an offer.

96 A. Brinz, *Lehrbuch der Pandekten*, 2nd edition, vol. 3, Erlangen 1888, p. 697, fn. 32.

97 See above: p.

introduction of the German Civil Code, which was based on the pandectist theory of private law.

7. Conclusions

Since the moment of the creation of the *venire contra factum proprium nemini licet* maxim in the late Middle Ages, lawyers have been noticing the flexibility of its application. Its history in the theory and practice of the pre-codification period can be determined synthetically as specifying the consequences of that flexibility for legal reasoning. We can see elements of a systemic approach in this type of attempt. A discussion on this was opened by Azo's *Brocardia* dated at the end of the 12th century. His work shows that at the beginning of the setting of different intensity areas of being bound by the maxim, the most difficult thing was to generalise the differences of being bound by acts which did not comply with the required formalities of a transaction. In the course of discussions of jurists of the 13th and 14th centuries, this was developed within the connection of the application of the maxim with the assessment of act validity. Consequences of such an assessment were corrected using criteria referring to the fairness of the behaviour of a party which caused the invalidity of a given act as well as values or interests inspired by Roman legal texts. According to the sources, we can assume that inspirations stemming from such an approach led, in the 15th and 16th century, to focussing on the question about being bound by the maxim by a person who performed an invalid act. Permitted cases of acting against such an act by the person who performed it included acting in the public interest or in the interest of a party which was represented by the person performing a given act and in the case of a faultless violation of the formalities of an act required by law. The culmination of such a way of thinking about the *venire contra factum proprium* prohibition can be noticed in the seventeenth-century science of then-applied Roman law (*usus modernus*). It consisted in the fact that being bound by an act by a person who wrongly caused its invalidity was linked with the maxim excluding the possibility of invoking the consequences of one's unjust behaviour in one's own interest (*turpitudinem suam allegans nemo audiatur*). However, the presence of the maxim prohibiting *venire contra factum proprium* did not result in including it in legal discussions from which private law theories constituting foundations for codification originated, in particular, the pandectist theory of legal transactions. Even so, we can indicate a range of codification provisions which can be linked with the maxim;[98] the experience behind it was not used when developing provisions coming from theoretical considerations about legally relevant behaviours.

The immanent flexibility of the maxim should inspire moderation in declaring the *venire contra factum proprium* prohibition as one of the basic principles of private law.

Focus on the discussed maxim by Erwin Riezler in the first years of codified private law in Germany was linked with a thesis on limitations resulting from codification. He drew attention to the fact that it limits

98 For German Civil Code: E. Riezler, *Venire*…, p. 110–123, e.g.: Sec. 116 (mental reservation); Sec. 145 (binding effect of an offer); Sec. 151 (acceptance without declaration to the offeror); Sec. 164 p. 3 (effect of a declaration made by the agent); Sec. 226 (prohibition of chicanery). For Italian Civil Code: F. Festi, *Il divieto*…, p. 2–5: e.g.: Sec. 367 (statement about the guardian's debts and claims towards the minor), Sec. 590 (confirmation or voluntary fulfilment of the wills disposition); Sec. 1059 (easement created by a co-owner); Sec. 1372 (principle – agreements must be kept);

access to legal past. Riezling found that such access can help in finding *praeter legem* solutions, which will be used where "the statutory regulations do not provide satisfactory protection of interests" (*der Gesetzeswortlaut den Bedürfnissen nach Interessenschutz nicht Genüge tut*).[99] In this context, he presented the *venire contra factum proprium* prohibition as a legal idea which can support the achievement of such results.[100] Postulating references to the maxim in order to combat benefiting from dishonesty (*exceptio doli generalis*), he drew attention to potential possibilities rooted in declaring the *venire contra factum proprium* prohibition as one of the basic principles of private law. This moderation strengthens the absence of the maxim in legal topics collection by Nicolaus Everard, which is significant for legal argumentation in the pre-codification period, and in the works which are fundamental for modern civil codifications. Secondly, the connection of the discussed maxim with the objection against benefiting from unfair behaviour, which stands out in historical experience, should inspire the possibly of a wide usage of the maxim in such a way.[102]

Legal experience inspires the consideration of the adoption of a new statuatory rule referring to the legal effects of a legal transaction.

general clauses. Legal science and practice showed that such an idea found its substantiation in an interpretation of the good faith clause based on the doctrine of abuse of law or protection of reliance.[101] In such argumentative practice – which, however, raises doubts as to the usefulness of the maxim – we can notice functional similarities between the practice of pre-codification times and using modern theories *ad casum*. However, I think that the limitations in access to legal experience, which were signalled by Riezler more than a hundred years ago, are still valid in modern debate about the maxim *venire contra factum proprium nemini licet*.

The presented outline of those experiences constitutes the basis to put a few remarks under the consideration of a contemporary lawyer. Firstly, the immanent flexibility of the maxim should inspire moderation in And finally, the effect of being bound by an act by a person who wrongly caused its invalidity, which has been based on the maxim in pre-codification legal practice, is worth thinking through in the world of developed theories of legal transactions. Legal experience inspires the consideration of the adoption of a new statuatory rule referring to the legal effects of a legal transaction. In specific cases, the new rule would force one to treat an invalid legal transaction as valid. The factors connected to the adoption of this hypothetical rule would be two-fold; firstly, the invalidity of a legal transaction would have to be the result of the unfair behaviour of a person who would benefit from its invalidity. Secondly, treating the legal transaction as valid would have to not violate public interest or the legitimate interest of others.

99 E. Riezler, *Venire*…, p. 126.

100 E. Riezler, *Venire*…, p. 128.

101 E.g.: Sec. 242 German Civil Code; Sec. 5 Polish Civil Code. This trend in legal dogmatic is consictent with intuitions of ancient jurists, cf. F. Longchamps de Bérier, *L'abuso del diritto nell'esperienza del diritto privato romano*, Torino 2013, p. 211; W. Dajczak, *The Nature of the Contract in Reasoning of Civilian Jurists*, Poznań 2012, p. 29, fn. 80.

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102 Cf. A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 128.

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Adaptation of Contracts to New Circumstances in Polish Law

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The aim of the article is to analyse selected issues relating to the statutory provisions and contractual terms which allow to amend or terminate a contract in the event of a change in circumstances occurred after the conclusion of the contract. Many provisions of the Polish Civil Code[1] grant in such a case one of the parties the right to unilaterally amend or terminate the contract by its declaration of will or a right to demand for a change or dissolving the contract by the court. The parties may also agree the specific terms in the contract which allow adopting their contractual relation to new circumstances. If a party affected by change of circumstances exercises its right to modify the contract it should be considered a problem of how the interests of the other party should be protected. Particularly the question arises whether the statute or the contract grants such a party the right to terminate the contract.

1. Introduction

Adaptation to new circumstances does not only apply to long-term contracts creating continuous contractual relationships (such as lease or hire),[2] but also to those contracts where a one-

1 Act of 23 April 1964, consolidated text: Journal of Laws of 2019, item 1145, as amended, hereinafter referred to as "CC".

2 Polish civil law distinguishes two types of contracts: a tenancy/hire contract [*umowa najmu*] and a lease contract [*umowa dzierżawy*]. By the contract of tenancy (hire) a landlord undertakes to give to the tenant the thing for use for a definite or an indefinite period of time and the tenant undertakes to pay the landlord the agreed rent [Art. 659 § 1 CC. By the contract of lease the landlord undertakes to give to the lessor a thing for use and collection of profits for a definite or an indefinite period of time and the lessor undertakes to pay to the landlord the rent agreed on (Art. 693 § 1 CC).

off performance is extended in time.[3] This can, for example, be a construction contract under which the deadline for performance of the obligation (delivering a building to an investor) may be even as long as several years from the conclusion of the contract. If there is a longer period between the conclusion of the contract and the performance of the obligation, a change in circumstances, a contract may either be amended automatically if the conditions set out in such a contract are met (e.g. an automatic increase of the interest rate in the event of a change of LIBOR) or following a declaration made by one of the parties (e.g. a change of rent resulting from a notice given by the landlord).

Parties often do not expect that there will be any changes in circumstances or that such changes will have an impact on the possibility of performing their contract.

or if a long-term contract has been concluded, the circumstances may change and the contract may need to be revised. Where the parties expect that circumstances may change after the conclusion of their contract, they may introduce contractual provisions which will provide for the effects of such changes. These may be provisions allowing both an amendment of the contract and its termination (this is particularly important in the case of fixed-term contracts, as the assumption behind them is that they cannot be terminated before the end of their term as specified in such contracts).[4] In the event of

However, parties often do not expect that there will be any changes in circumstances or that such changes will have an impact on the possibility of performing their contract. Then, the contract may only be amended or terminated in cases provided for in statutory pro-

3 The problem of a change of contract in the event of a change of circumstances will not arise when the conclusion of a contract coincides with its performance (e.g. when a contract of sale is concluded in a shop, as in the case of everyday shopping, or a contract of carriage by public transport which is performed immediately after a ticket has been purchased).

4 See Resolution of the Supreme Court (SC) of 27.10.1997, III CZP 49/97, *Orzecznictwo Sądu Najwyższego Izba Cywilna (OSNC)* (Rulings of the Supreme Court Civil Chamber) 1998, No. 3, item 36, in which the Supreme Court held, in relation to a fixed-term lease, that it was ineffective to reserve a contractual right to terminate the lease at any time because such a provision was contrary to the nature of a fixed-term contract; the Supreme Court expressed a similar opinion on a tenancy agreement in its resolution of 3.3.1997, III CZP 3/97, OSNC 1997, Nos. 6–7, item 71; on the other hand, in a resolution of 7 Supreme Court Judges of 21.12.2007, III CZP 74/07, OSNC 2008, No. 9, item 95, a reservation of the right to terminate a fixed-term lease or hire/tenancy agreement was accepted as long as such a right is reserved for cases specified in a given contract (the Supreme Court disagreed with the practice of reserving the right to terminate without specifying the grounds on which such a right can be exercised). See also Art. 673 § 3 CC which currently allows to reserve the right to terminate in a fixed-term hire/tenancy agreement in cases specified in such an agreement (this legal provision applies accordingly to lease agreements – Art. 694 CC). The issue of whether it is permissible to reserve the right to terminate a fixed-term contract is also controversial in the literature, cf. M. Romanowski, *Dopuszczalność wypowiedzenia umowy zawartej na czas oznaczony w świetle zasady swobody umów* (Permissibility of terminating fixed-term contracts in the light of the freedom of contract principle), Przegląd Prawa Handlowego 2002, no. 11, p. 47 et seq. (according to the author, no general rule should be formulated to prohibit or restrict the freedom to terminate such contracts).

visions.[5] If the change of circumstances affects both contractual parties to a similar extent, there will usually be no problem negotiating a change of contract or even terminating it. In most cases, however, changes do not affect the legal situation of both parties to the same extent; therefore, the party which is affected more will be the one that wants to amend the contract or to terminate it. Statutory provisions may allow such a party to amend the content of the contract or to terminate it. A contract may be amended in two ways:

- the law may allow for a unilateral amendment of the contract by making a declaration to the other party resulting in a change of contract, or for termination of a contract – also by a unilateral declaration to the other party;
- the law may allow the party affected by a change of circumstances to request the court to change the content of the contract or to terminate it by way of a court ruling; in such a case, the change or termination will take place once the court's ruling becomes final and unappealable, and the ruling may also determine settlements between the parties relative to their partial performance of the contract.

The purpose of this paper is to present examples of such statutory regulations, as well as discussing the permissibility of contractual provisions which serve to adapt a contract to new circumstances. The final part will discuss the problem of protecting the other party's interests in the event that the right granted by law or contract to change the content of a contract or to terminate it is exercised.

5 In Polish civil law, courts are not empowered to change the content of civil law relationships, unless authorised to do so by statutory law.

2. The right to amend or terminate a contract under statutory provisions

2.1. Provisions allowing for the amendment of a contract

There are many examples of provisions in the Polish Civil Code that allow for the amendment of a contract if circumstances change after its conclusion. They can be divided into two groups: provisions allowing to amend the content of a contract if there is an extraordinary change of circumstances after the contract was concluded, which is referred to as the *clausula rebus sic stantibus* doctrine (e.g. Art. 357^1, Art. 632 § 2 CC) and those that allow for an amendment to the content of the contract even if the change of circumstances is not extraordinary (Art. 358^1 § 3, Art. 685^1, Art. 700, Art. 907 § 2, Art. 913 § 1 CC). The change of the contract procedure may either be to allow the affected party to modify the contract unilaterally (e.g. to cancel the rent, cf. Art. 685^1 CC) or to apply to a court (bring an action) for a change of contract (e.g. Art. 357^1, Art. 358^1 § 3, Art. 913 § 1 CC). Sometimes, however, the law does not determine the change procedure explicitly (e.g. Art. 632 § 2, Art. 700, Art. 907 § 2 CC). Where the law provides that a party is entitled to demand a change in a contractual term (e.g. the agreed amount of remuneration or rent), and the other party does not agree to the proposed change, the party so entitled may demand that the content of the contract be changed by the court. For example, if, as a result of a change in relationships which could not have been foreseen at the time of concluding a contract of specific work [*umowa o dzieło*], such a performance would pose a risk of a serious loss to the person who accepts the order for that work, such a person may bring an action for a change of the fixed remuneration agreed in the

There are many examples of provisions in the Polish Civil Code that allow for the amendment of a contract if circumstances change after its conclusion.

contract[6] or even demand that the court terminates the contract (Art. 632 § 2 CC).[7]

However, the foregoing legal provisions do not specify the time within which a party may request the court to change the content of a contract. With reference to a demand to adjust a consideration (performance of a monetary obligation) following a significant change in purchasing power after the obligation arose (Art. 358^1 § 3 CC), the Supreme Court held that a creditor may make such a request even after the debtor has performed his/her obligation.[8] The Supreme Court held that to perform the obligation at the nominal amount – despite a significant drop in the purchasing value of money – would be contrary to the principles of community life [*zasady współżycia społecznego*] (Art. 354 § 1 CC).[9] In such a situation, performance at a nominal amount does not satisfy the creditor's interests. However, the Supreme Court qualified this by stating that the obligation expires if the creditor does not make, upon accepting the performance, a reservation that he/she demands an adjustment of the consideration. There are doubts whether the ruling is correct, since a change in purchasing power does not automatically lead to a change in the amount of consideration, and a constitutive court ruling is necessary for such a change to be effected.[10] It is also doubtful whether such a solution can be applied to other cases in which the amendment of a contract is demanded following a change of circumstances (e.g. where a lessee paid the agreed rent, even though he/she could have demanded its reduction as a result of a significant decrease in the income from the leased property[11] – the lessee can only demand a reduction in rent for the future, provided that the conditions for demanding changes in the rent are still met).[12]

The Polish Civil Code contains only two general provisions which allow a party to request that an obligation be modified by the court if circumstances have changed after the contract was concluded. These are Art. 357^1 CC and Art. 358^1 CC. Other provisions referred to above relate to changes in the content of individual nominate contracts (e.g. contracts for a specific work [*umowy o dzieło*],[13] hire/tenancy agreements

6 This is because, where a fixed (flat-rate) remuneration is agreed, the general rule is that the person who accepts the order cannot demand that the remuneration is increased, even though it was not possible to predict the size or the cost of work at the time of concluding the contract for a specific work (Art. 632 § 1 CC).

7 This provision applies to construction work contracts accordingly; see resolution of the Supreme Court of 29.9.2009, III CZP 41/09, OSNC 2010, No. 3, item 33. Some scholars speak against the applicability by analogy of the provisions on a contract for a specific work, which are not listed in Art. 656 CC, to construction work contracts, cf. K. Zagrobelny, *Odpowiedzialność inwestora z umowy o roboty budowlane* (Investor's liability in respect of a construction work contract), Warsaw 2013, p. 62 et seq. (he believes that, being an exceptional provision, Art. 632 CC cannot be applied by analogy, but, in the event of an extraordinary change of relationship, Art. 357^1 CC can be applied to a construction work contract).

8 See, for example, resolution of the Supreme Court of 3 April 1992, I PZP 19/92, OSNC 1992, No. 9, item 166; judgment of the Supreme Court of 28 September 1993, I CRN 7/93, OSNC 1994, No. 7–8, item 162; judgment of the Supreme Court of 5 February 2003, II CKN 1245/99, Lex (database) No. 80235.

9 This provision stipulates that the debtor must perform his/her obligation in accordance with its content and in a manner consistent with its socio-economic objective and the principles of community life and, where there are certain customs, also in accordance with those customs.

10 See P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2017, p. 673; G. Kozieł, in: M. Załucki, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2019, p. 845.

11 If income from the leased property is reduced as a result of circumstances which do not relate to the lessee and for the occurrence of which the lessee is not responsible, the lessee may demand a reduction in the rent pursuant to Art. 700 CC. The provision does not require the change of circumstances to be a result of extraordinary and unforeseen events. Art. 700 CC is based on the assumption that the lessee pays rent from the funds obtained from the sale of benefits derived from the leased asset. If such benefits are significantly lower or the price falls and the income from their sale decreases, it may be difficult for the lessee to pay the agreed rent. Therefore, this legal provision allows the lessee to pass on the risk of reduction in income to the lessor.

12 If there is another change of circumstances and the leased property begins to generate a higher income (again), the right to demand a change in rent expires.

13 By a specific work contract the party accepting the order undertakes to complete a specific work and the party order-

[*umowy najmu*], and lease agreements [*umowa dzierżawy*]). The regulation in Art. 685[1] CC is exceptional. This is because that provision does not specify any circumstances on the occurrence of which the landlord's right to cancel the contractually agreed amount of rent would depend.[14] Such a right of the landlord is only restricted under separate legal provisions in relation to residential premises.[15] This is where Art. 685[1] CC provides for a significant departure from the overall principle of *pacta sund servanda*. This is all the more important given that the possibility to cancel rent applies not only to tenancy agreements made for an indefinite duration, but also to fixed-term ones which should be more stable.

The Polish Civil Code contains only two general provisions which allow a party to request that an obligation be modified by the court if circumstances have changed after the contract was concluded.

The aforementioned Art. 357[1] CC expresses the so-called *clausula rebus sic stantibus* doctrine.[16] It allows a party to demand a change of contract by court if there has been an extraordinary change in the parties' relationship after the conclusion of the contract, which the parties did not foresee, and, as a result of which, the contractual performance would involve excessive difficulties or pose the threat of a serious loss to the debtor. If these conditions are met, the court may, at the request of the affected party, after considering the interests of both parties and in accordance with the principles of community life,[17] modify the manner in which the obligation is to be performed, change the amount of the consideration to be provided or even terminate the contract.[18] On the other hand, Art. 358[1] § 3 CC allows parties to demand a change in the amount of monetary performance if there is a significant change in purchasing power after the obligation arises and before it expires.[19] A party

ing the work undertakes to pay him/her remuneration (Art. 627 CC).

14 Other provisions, such as Art. 632 § 2 and Art. 700 CC, specify the conditions which must be fulfilled in order to demand an amendment of the contract.

15 A rent may not be changed (increased) more frequently than every 6 months (cf. Art. 9.1b of the Act of 21 June 2001 on the protection of tenants' rights, consolidated text: Journal of Laws of 2018, item 1234). Furthermore, pursuant to Art. 8a.3 of that Act, in order to be valid, a declaration (notice) to cancel rent should be made in writing. The annual rent after an increase must not, as a rule, exceed 3% of the replacement value of the flat (Art. 8a.4 in conjunction with Art. 9.8 of the Act).

16 For more information on this regulation, see A. Brzozowski, *Wpływ zmiany okoliczności na zobowiązania. Klauzula rebus sic stantibus* (How changes in circumstances affect obligations. Clausula rebus sic stantibus doctrine.), Warsaw 2014.

17 Principles of community life [*zasady współżycia społecznego*], also referred to as principles of social coexistence, are understood to be the non-legal standards of appropriate, commendable and honest conduct of people towards each other which are generally accepted in society, cf. A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej* (Civil law. Outline of the general part), Warsaw 2018, p. 89. The principles of social coexistence play a similar role as a good faith principle in other legal systems. Particularly a legal act which is contrary to the principles of social coexistence is void (Art. 58 § 2 CC).

18 Unlike in some other legal systems, the Polish Civil Code does not require the affected party to attempt to negotiate an amendment to or termination of a contract with the other party before bringing an action.

19 A significant change in purchasing power does not need to be abrupt. Parties must take account of changes in purchasing power, which is normal in the economy. Therefore, only a

affected by a change in purchasing power may bring an action for a change in the amount of monetary performance (e.g. a creditor may demand an award of an amount higher than the one which was agreed) or in the manner of performance (e.g. to decrease the number of instalments agreed, and shorten or extend the payment period). When making its decision, the court is obliged to consider the interests of both parties in accordance with the principles of community life. The conclusion courts draw from this obligation, as can be seen in case law, is that they should not place the burden of changes in purchasing power on one party only[20] (therefore, both parties should share the risk of changes in the purchasing power, not necessarily equally).[21] The right under Art. 358[1] § 3 CC is not vested in a party who runs a business if the obligation is connected with such business activities (Art. 358[1] § 4 CC). Furthermore, Art. 358[1] § 3 CC does not – by virtue of separate provisions[22] – apply to changes in the amount of monetary performance in bank account and loan agreements.

The relationship between Art. 358[1] § 3 and § 4 CC and Art. 357[1] CC is not fully clear.[23] According to some authors, Art. 358[1] § 3 CC should be regarded as a specific provision in relation to Art. 357[1] CC.[24] This view is questionable because the scope of and conditions for the application of the two provisions are different. Firstly, Art. 357[1] CC applies only to contractual obligations, while Art. 358[1] § 3 CC applies to all obligations in which the original obligation is to pay a specific amount of money (argument from Art. 358[1] § 1 CC).[25] Secondly, Art. 357[1] CC applies to every obligation arising from a contract,[26] while Art. 358[1] § 3 CC applies to monetary obligations only. Thirdly,

The relationship between Art. 358[1] § 3 and § 4 CC and Art. 3571 CC is not fully clear.

significant change in purchasing power (such as the one in the early 1990s in Poland when annual inflation was as high as several hundred per cent) can be accepted as the basis for demands to modify an obligation, cf. P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 671.

20 See, for example, Supreme Court judgment of 20.5.1998, I CKN 690/97, Legalis (database) No. 336432, Supreme Court judgment of 6.11.1998, III CKN 2/98, Legalis No. 1760266; in literature see, for example, P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 673; G. Kozieł, in: M. Załucki, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2019, p. 845; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna* (Obligations – General Part), Warsaw 2014, p. 74.

21 Id. P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 673.

22 See Art. 13 of the Act of 28 July 1990 on amendments to the Civil Code, Journal of Laws No. 55, item 321.

23 For more information on this topic, see A. Brzozowski, *Wpływ zmiany okoliczności…* (How changes in circumstances affect…), p. 216 et seq.; W. Robaczyński, *Kilka uwag na temat relacji między art. 357[1] art. 358[1] § 3 k.c.* (Several comments on the relationship between Art. 357[1] and Art. 358[1] § 3 CC), Rejent 1996, No. 11, p. 70 et seq.

24 See J. Gołaczyński, *Wybrane problemy waloryzacji świadczeń pieniężnych w świetle przepisu artykułu 358[1] § 3k.c.* (Selected problems of consideration adjustment in the light of Art. 358[1] § 3 CC), Acta Universitatis Wratislaviensis No. 1690, Prawo CCXXVIII, Wrocław 1994, p. 57.

25 Therefore, this provision does not apply to those obligations in which the monetary obligation is of a secondary nature (e.g. when it consists in paying the equivalent of improvements made or benefits obtained without the underlying legal basis). Nor does it apply to payments of damages, since the determination of damages is based on prices as at the date of adjudication (Art. 363 § 2 CC), which makes it possible to take account of any price changes in the period between the dates of damage and determination.

26 However, in its rulings the Supreme Court allows the application of Art. 357[1] CC to obligations which do not arise from contracts (see the decision of the Supreme Court of

Art. 357[1] CC allows for an amendment or termination of a contract only in the event of an extraordinary change in relationship, which could not have been foreseen at the time of concluding the contract. On the other hand, Art. 358[1] § 3 CC does not require a change in purchasing power to result from extraordinary circumstances,[27] nor does it limit the possibility of changing [*the contract*] to a situation where the parties could not foresee the change in purchasing power.[28] Fourthly, entrepreneurs are not allowed to demand that an obligation be modified (Art. 358[1] § 4 CC), while Art. 357[1] CC currently does not provide for such a limitation.[29] Therefore, it should be concluded that the scope of application of the two provisions overlaps[30] and, therefore, Art. 358[1] CC does not exclude the application of Art. 357[1] CC to monetary obligations arising from a contract.[31]

2.2. Provisions allowing for termination of contract

As has been mentioned earlier, some of the provisions allowing the amendment of a contract in new circumstances also provide that the contract may be terminated. Such a termination may be effected through the submission of an appropriate declaration (notice) by one of the parties or following a court ruling. The first group of provisions, i.e. those allowing for the termination of a contract following a unilateral declaration of one of the parties, may include for example: Art. 631 CC;[32] Art. 644 CC;[33] Art. 716 CC;[34]

Needed is a review of the special part of contract law with regard to the rights to demand a change of contract.

26.11.1992, III CZP 144/92, *Orzecznictwo Sądów Polskich* (Jurisprudence of Polish Courts) 1993, No. 11, item 215).

27 Changes in purchasing power usually result from changes in the market situation which are a normal feature of a market economy.

28 However, if parties expect a change in purchasing power, they may include an adjustment clause in their contract (Art. 358[1] § 2 CC) by which they can link the amount of contractual monetary performance to a measure of value (certain goods or even another currency) they specify in the contract. In such a case, generally, the right to demand a change in the amount of monetary performance is excluded, since the parties have included an adjustment mechanism for this purpose in their contract (see the judgment of the Supreme Court of 7 November 1995, I PRN 40/95, *Orzecznictwo Sądu Najwyższego Izby Administracyjnej, Pracy i Ubezpieczeń Społecznych* (Rulings of the Supreme Court, Administrative, Labour and Social Insurance Chamber) 1996, No. 12, item 168).

29 In 1996, Art. 357[1] § 2 CC was repealed. The article provided that a party may not demand that the manner of performing the obligation be changed or that the contract be terminated if the consideration is related to the business run by the party.

30 Id. W. Robaczyński, *Kilka uwag…* (Several comments…), p. 78

31 Id. W. Robaczyński, *Kilka uwag…* (Several comments…), p. 82. The applicability of Art. 357[1] CC to monetary obligations was also supported by the Supreme Court in the statement of grounds for the resolution of 7 judges of 29.12.1994, III CZP 120/94, OSNC 1995, No. 4, item 55 (the case related to an insurance contract).

32 This provision grants the party who orders a specific work the right to rescind the contract in the case of substantially increasing the remuneration based on a cost estimation.

33 According to this provision the party ordering a specific work may at any time, until the specific work is completed, renounce the contract while paying the remuneration agreed on. More about this provision see below.

34 Pursuant to this provision the lender is entitled, among others, to demand the return of the thing borrowed for use if the thing becomes necessary to the lender for reasons not expected at the moment of the contract's conclusion, even though the contract has been concluded for a definite period of time.

Art. 746 CC;[35] Art. 764[2] § 1 CC,[36] Art. 830 § 1 CC;[37] Art. 844 § 1–2 CC;[38] Art. 859[7] CC;[39] Art. 869 § 2 CC.[40] The second group includes, for example: Art. 357[1] CC, Art. 632 § 2 CC (discussed earlier).

A termination may be effected through the submission of an appropriate declaration (notice) by one of the parties or following a court ruling.

Two subgroups can be distinguished among the provisions mentioned in the first group. The first includes provisions which allow for termination by a unilateral declaration of will of the party in whose interest the agreement was made. Such a solution is primarily characteristic of service contracts (these are the provisions concerning e.g. contract for a specific work, mandate contract [*umowa zlecenia*], storage contract or insurance contract). An example of such provisions would be Art. 644 CC, which gives the client (principal) who orders a specific work the right to rescind the contract until the work has been completed. However, the client (principal) is obliged to pay the remuneration agreed in the contract.[41] Similarly, a client (principal) may terminate a mandate contract [*umowa zlecenia*] at any time pursuant to Art. 746 § 1 CC, but is obliged to reimburse the provider (party accepting the mandate) for expenses incurred by the provider to properly perform the contract, and if a remuneration was agreed – to pay a portion of the remuneration corresponding to the activities performed by the provider. If the contract is terminated without a good reason,[42] and the provider was to be paid for his performance, the client (principal) is also obliged to redress the damage caused to the provider. It follows from Art. 746 § 3 CC that the right of ter-

35 More about this provision see below.

36 According to this provision the contract of agency, even though it has been concluded for a definite period of time, may be terminated by notice without notice as a result of non-performance of duties in their entirety or in part by one of the parties as well as where extraordinary circumstances occur.

37 This provision grants the insuring party the right to terminate the insurance contract by notice at all times while observing the time limit specified in the contract of personal insurance or in general insurance terms; and in its absence – with immediate effect.

38 Although this provision does not use the term 'termination', it allows taking back an item given for safekeeping, which is equivalent to the termination of contract, id. A. Klein, *Problem jednostronnego ukształtowania czasu trwania zobowiązaniowego stosunku prawnego o charakterze ciągłym* (Duration of Continuous Legal Relationships – Problem of Unilateral Determination), in: *Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa oferowana Profesorowi Józefowi Skąpskiemu* (Papers on Polish and European Private Law. A commemorative book offered to Professor Józef Skąpski), Kraków 1994, p. 165; A. Pyrzyńska, *Zobowiązanie ciągłe jako konstrukcja prawna* (Continuous obligation as a legal construct), Poznań 2017, p. 538.

39 More about this provision see below.

40 More about this provision see below.

41 According to the opinion expressed by the Supreme Court in the judgment of 26 January 2001, II CKN 365/00, OSNC 2001, No. 10, item 154, payment of remuneration is not a condition for the declaration (notice) of termination to be effective. For a different view in the literature see e.g. K. Zagrobelny, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny* (Civil Code). Commentary, Warsaw 2017, p. 1314, according to whom the payment of remuneration is to secure the interests of the provider.

42 An important reason for termination within the meaning of this provision is, for example, the provider's failure to furnish information concerning order fulfilment or loss of confidence in the provider's honesty or skills (see P Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 1451.

mination for good reason cannot be excluded from the contract.[43] Those provisions show a certain relation, namely the obligation to pay the other party the agreed remuneration, or a part thereof, if the contract provides for payment for the service and is terminated before the service is provided.

which provides for the right (of both the mandatory and the mandator) to terminate the contract for services for good reason. Good reasons are understood to include reasons which relate to the person himself/herself as well as those relating to the property of the party that terminates the contract. Such reasons could

In the event of termination by notice for good reason, the other party is not entitled to demand compensation for damage caused by the premature termination of the contract.

The second sub-group are the provisions that allow for termination of contract – even a fixed-term one (which is more stable) – for good (important) reason [*ważne powody*].[44] This idea is referred to, for example, in: Art. 859[7] CC which allows a warehouse keeper to demand, for good reason, that the person who deposited items for storage in the warehouse takes them back, even if the storage contract was concluded for a fixed term[45] (this is equivalent to termination of the storage contract); Art. 869 § 2 CC, which allows a partner in a civil partnership to terminate, for good reason, his or her participation and thus leave the partnership, even if the partnership contract is concluded for a fixed term; Art. 746 CC, already quoted, be e.g. bad health of a party, loss of trust in the other party or discontinuation of certain activities. Good reasons justifying termination also include a breach of obligation by one of the parties.[46] Some scholars[47] derive (by *analogia iuris*) a more general rule from these provisions, according to which any fixed-term contract[48] that creates a long-term relationship may be terminated, even if the statutory provisions do not expressly provide for such a possibility. Moreover, it would not be permissible to exclude, in a contract, the right to terminate it for good reason.[49] In the event of termination by notice for good reason, the other party

43 Legal provisions on the mandate contract [*umowa zlecenia*] apply as appropriate to other contracts for supply of services not regulated in other provisions (Art. 750 CC). Because of this reference, there is a discussion in the literature on whether it is admissible to apply Art. 746 CC to such innominate contracts for supply of services, see: A. Pyrzyńska, *Zobowiązanie ciągłe…* (Continuous Obligation…), p. 405 et seq.

44 For more information on this topic, see G. Tracz, *Sposoby jednostronnej rezygnacji z zobowiązań umownych* (Methods of unilaterally cancelling contractual obligations), Warsaw 2007, p. 148 et seq.

45 The warehouse keeper should set an appropriate time limit for the person who placed items in the warehouse to collect them.

46 See G. Tracz, *Sposoby jednostronnej rezygnacji…* (Methods of unilaterally…), p. 189.

47 See G. Tracz, *Sposoby jednostronnej rezygnacji…* (Methods of unilaterally…), p. 208 et seq.

48 If a contract is made for an indefinite term, each party may – as a rule – terminate such a contract in accordance with Art. 365[1] CC by giving a notice with such a period of notice as determined by the statute, contract or custom. In the absence of such a time limit, the obligation expires immediately after the notice of termination has been given. This rule is imperative; therefore, parties cannot exclude (but only restrict temporarily) termination of contracts made for an indefinite duration (this is a consequence of the prohibition to conclude eternally binding contracts – see Z. Radwański, A. Olejniczak, *Zobowiązania…* (Obligations…), p. 52).

49 Cf. Art. 746 § 3, second sentence in Art. 869 § 2 CC.

is not entitled to demand compensation for damage caused by the premature termination of the contract.[50]

3. Contractual provisions allowing for unilateral change of contract

If the law does not permit the party affected by change of circumstances to change the content of the contract (whether by its own declaration of will or by way of a court ruling), the parties may stipulate in the contract that one or both of them may modify the content of their contract. Such contractual clauses (e.g. those which grant banks the right to change interest rates stipulated in contracts) are assessed on the basis of general legal provisions governing a review of the content of contracts (e.g. Art. 58 CC).[51] Furthermore, if such rights are included in standard contract terms (e.g. in rules or in general terms and conditions), they may be subject to a review on the basis of provisions on unfair contractual clauses. In Polish law, such provisions relate only to the review of terms contained in standard contracts used in B2C relationships (Art. 385^1 – Art. 385^3 CC). Pursuant to Art. 358^3 CC, contractual provisions which may[52] be considered impermissible in B2C relationships include those which reserve the right of a business to unilaterally amend the contract without good reason specified in the contract, the right of a business to change the essential features of the contractual consideration without good reason, or to set or increase the price or remuneration after the contract has been concluded without granting the consumer the right to rescind the contract in the event that such a right is exercised.

On the other hand, there are no provisions in Polish law which would allow a review of standard contracts used in the B2B context. It is only competition law that provides for such a review.[53] If one of the parties uses its dominant market position to impose contractual terms and conditions on the other (not necessarily only by using a standard contract), such terms may be declared invalid under Art. 9 of the Competition and Consumers Protection Act. There are exceptions where legislators decided to extend consumer protection by a standard contract review to standard contracts used in B2B relationships. Such an exception can be found in Art. 805 § 4 CC under which provisions on unfair contractual clauses in B2C contracts must also be applied, as appropriate, to general terms and conditions of insurance concluded with sole proprietors (businesses of natural persons). However, there is no such regulation for other financial services contracts between businesses and financial institutions.

> **The parties may stipulate in the contract that one or both of them may modify the content of their contract.**

4. Protection of the other party in case of a change of contract

If a party affected by change of circumstances exercises its right to modify the contract unilaterally by making its declaration of will, the resulting issue is how to protect the interests of the other party. There are two solutions possible here. First, a statute or contract may lay down the conditions for and the permissible extent of a change of contract (e.g. a bank reserves the right to change the contractual interest rate in the event of a change in the central bank refinancing rate

50 This results, e contrario, from Art. 746 § 1–2 CC.

51 Art. 58 CC provides that legal transactions which are contrary to the statute or principles of community life are considered null and void.

52 Under the Civil Code, a consumer shall be taken to mean a natural person who conducts a legal transaction which is not directly related to his or her business or professional activity (Art. 22^1 CC).

53 See the Competition and Consumers Protection Act of 16 February 2007, consolidated text: Journal of Laws of 2018, item 798.

or sets a maximum limit by which it may increase the contractual rate). If the required conditions for exercising the right to change the contract have not been fulfilled, the declaration of the party who declared such a change of contract is ineffective. However, a problem arises as regards the effectiveness of such a change of contract declaration where it fails to meet the criteria of a contract or a statute (e.g. a bank declares that it increases the interest rate more than provided for in the contract). Is the declaration entirely ineffective then, or is it perhaps effective, but results in a limited change of contract only (in the example which has been given – the interest rate is actually increased within the contractually defined limits)?

There are no provisions in Polish law which would allow a review of standard contracts used in the B2B context.

The second solution, which serves to protect a party in the event that the other party exercises its right to change the contract, is to grant such a party, whether by a statute or contract, the right to terminate the contract. This applies particularly to cases where a change of contract materially affects the original balance of rights and obligations between the parties to the contract. For example, if the landlord increases the rent by 100% compared to what was agreed in the contract,[54] the tenant should be able to terminate the lease even if it was concluded for a fixed term. This is because the tenant should not be forced to pay a higher rent. Unfortunately, there is no general rule in the Polish Civil Code which would regulate such a case of one party changing the content of a contract. Therefore, the parties have to reserve such a right for the other party in the contract in case the party affected by a change of circumstances decides to exercise its right to change the contract, unless the right to terminate is provided for in a statute. An example of such a statutory provision can be found in Art. 631 CC, which allows the client to rescind a contract for a specific work in a situation where it was necessary to significantly increase the remuneration agreed in the contract. However, the client should do so immediately after he or she has become aware of the need to pay more than the agreed remuneration (e.g. when additional work is needed which was not provided for in the contract).[55] The client is also obliged to pay a part of the agreed remuneration for the work which has already been carried out by the provider.[56]

5. *Conclusions*

Having assessed the Polish Civil Code provisions relating to the amendment of a contract or its termination (before the agreed term) in the event of a change in circumstances, it should be concluded that they are not based on a single and clear concept, and the solutions which are adopted are sometimes quite haphazard. With the growing complexity of legal relationships on the one hand, and globalisation leading to sudden

54 Pursuant to Art. 688[2] CC, the landlord may increase the rent by giving the tenant a notice specifying the new amount of rent. The new rent becomes effective from the end of a three-month notice period. As this provision applies to an indefinite-term tenancy, the tenant may terminate the lease agreement if he or she does not agree to pay a higher rent.

55 For example, if a car cannot be driven and is taken for repair because of an engine leak, and the cylinders are found to be damaged making it necessary to replace the entire engine, which the parties did not anticipate at the time when they were entering into the contract, the client may rescind such a contract.

56 The example given in the previous footnote may relate to the remuneration of the provider for the work of dismantling the engine and evaluating the extent of work needed for the repair.

and unpredictable economic changes on the other, it needs to be possible to adapt contractual relationships to changes. The existing solutions in the Polish Civil Code are certainly insufficient in this respect.

In particular, a general provision should be introduced in the general part of the contract law to allow for the termination of continuous obligation contracts[57] for good reasons and to specify what effects the exercise of such a right would have, especially with regard to settlements between parties. A general provision should also be introduced in the general part of contract law to provide for the right to terminate a contract in order to protect a party in case the other party exercises its right to unilaterally change the contract, which would be particularly relevant in the case of fixed-term contracts.

Unfortunately, there is no general rule in the Polish Civil Code which would regulate a case of one party changing the content of a contract.

As long as such an amendment of the Civil Code is not adopted a party in case the other party exercises its right to change the contract may be protected by the narrow interpretation of the statutory provisions which provide a right to amend the contract because of a change of circumstances. The scope of application of these statutory provisions which do not grant another party the right to terminate a contract after an amendment of a contract should be limited only to the contracts which are concluded for an indefinite period of time. Pursuant to Art. 365[1] CC each party may terminate the continuous contract by a notice if this contract is concluded for an indefinite period of time. Thus, if one party of such a contract exercises his/her right to amend the contract the other party is entitled to terminate the contract unless the other party accepts this modification. In the case of fixed-term contracts a party affected by the change of circumstances should not have the right to unilaterally amend the contract unless the parties agree in their contract to grant the other party the right to terminate the contract if the affected party exercises his/her right to change the contract.

Furthermore, what is needed is a review of the special part of contract law with regard to the rights to demand a change of contract in the event of a change in circumstances applicable to individual nominate contracts, as the application of many of these legal provisions is open to doubt.

57 This has been proposed e.g. by A. Klein, *Problem jednostronnego ukształtowania czasu trwania zobowiązaniowego stosunku prawnego…* (Duration of Continuous Legal Relationships – Problem of Unilateral Determination), p. 173.

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

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1. Introduction

Prescription[1] or, more broadly, various instruments which allow for the passage of time to be taken into account in law, represents a permanent element in continental civil law regulations;[2] as permanent as to be widely considered self-evident.[3] Another frequently observed phenomenon relating to prescription is that it is thought of as an institution of a technical,

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

2 Which besides prescription include chiefly usucapion and varied time-bars/preclusive time-limits. In Polish private law jurisprudence, a range of institutions relating to the recognition of the legality of a state of fact which exists and remains undisputed for a period of time are referred to using the notion of 'dawność [expiration/forfeiture]'; see e.g. E. Till, *Polskie prawo zobowiązań. (Część ogólna). Projekt wstępny z motywami*, Lwów 1923, p. 175. Prescription is regulated in the civil codes of e.g. France (Art. 2219 ff.), Germany (§ 194 ff.), Italy (Art. 2934 ff.), Portugal (Art. 300 ff.), the Netherlands (Art. 3:306 ff.), Czech Republic (§ 609 ff.), Poland (Art. 117 ff.). The functional equivalent to prescription (see footnote 1) is also to be found in common law (limitation of actions), though there are certain differences – see R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, Cambridge 2010, p. 69 ff.

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

arithmetical nature.[4] And yet, over the centuries and in diverse legal systems that technical and arithmetical mechanism gave rise to numerous controversies, quandaries and problems (which have been debated with particular intensity in recent decades).[5] This is the third distinctive trait of prescription. Doubts concerning the *ratio* (rationale) of the institution – which likewise prove universal historically and geographically – constitute the fourth characteristic. The said doubts are associated not so much with the substance of the motives but with the legitimacy of their being considered.[6]

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

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

Recent years have witnessed yet another wave of projects to modify prescription regulations, in the wake of the first, broadly known reforms of the German *Bürgerliches Gesetzbuch* (*Schuldrechtsreform* of 2001) and the French *Code civil* (reform of 2008), which indeed establish new horizons of approaching prescription. One such recent proposal is the project of the new general part of the Swiss Code of Obligations (hereinafter OR 2020),[7] published in 2013. A second proposal is the project of Book One (General Provisions) of the Polish Civil Code of 2015, drafted by the Civil Law Codification Committee (subsequent version of the project presented in 2008; hereinafter as KC 2015).[8] Both projects are thus concurrent in time, and were developed in the same context, spanning the aforesaid earlier reforms as well as projects such as Principles of European Contract Law, UNIDROIT Principles and Draft Common Frame of Reference, the first of which has a particularly pronounced effect in the domain of prescription.[9] One should also underline the associations between the Polish and the Swiss

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

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

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

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

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

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

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

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

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

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

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

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

This is by no means easy to achieve, since determining the *ratio* of prescription may be exceedingly beyond the theoretical plane either. They are subsequently reiterated, sometimes discussed and criticized. Attempts at systematization are made as well, but their actual utility is limited.[11] Reflection conducted in this manner, used subsequently in argumentation relating to specific questions and problems, does little to change the state of affairs and fails to facilitate an understanding of the essence of the institution of prescription or promote satisfactory solutions.

2.1. *The notion of the* 'ratio *of prescription' and method of analysis*

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

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

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

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

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

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

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

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

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

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

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

2.2. *A universal* ratio *of prescription?*

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

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

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

In the light of preliminary observations relating to *ratio* of prescription, the method described above was utilized in the aforesaid dissertation[14] to study Roman, French and Polish law, in which the institution of prescription regulated in the general provision of the current Polish Civil Code of 1964 (Art. 117–125, hereinafter KC) served as a point of departure. The general regulation of prescription in the antecedent Code of Obligations of 1933 (Art. 273–287, hereinafter KZ) was also taken into account. *Pars pro toto*, I also analyzed certain particular periods of prescription in the domain of the law of obligations. Their selection was dictated by the existence of a corresponding comparative model in French law (thus affecting the persistence of such solutions) and the significance in legal transactions (e.g. time-limit for claims on account of the physical defects of a sold item). The period studied spanned a timeframe from the preparatory works on the KZ to July 2018.

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

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

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

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

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

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

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

15 As for pre-codification law, I paid particular attention to the treaties of such authors as Dunod, Domat, and Pothier. On the one hand, their works recapitulated the previous achievement of the pre-codification law, and at the same time exerted the greatest influence on the substance of the prescription regulation contained in the original *Code civil*.

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

2.3. Conclusions on the ratio *of prescription*

At this point, it would be perfectly natural to ponder the particular findings regarding *ratio* of prescription. One should set out with the observation that in ancient Rome, in France and in Poland (and, it is worth stressing, in other countries as well) one can speak of an unwritten obligation of diligence. The latter means an obligation to pursue one's affairs in an efficient, prompt and 'timely' manner, an obligation which – among other things – derives from a psychological foundation. In particular, it is the history of temporal limitations in Roman law – where, as already noted, general prescription of *actiones* appeared only in the fifth century CE – which demonstrated that it was something that could not have been ignored in practice. Thus, the psychologically relevant factor of long-term inaction should also be legally valid. If one fails to notice that, the solutions dictated by law seem unnatural, unanticipated, unfair and provoke resistance. A readily available proof for the existence of such an obligation and a token of a dependency between human psyche and law is seen in the emotions and defences triggered by a demand formulated after a considerable lapse of time, which 'seemed' a thing of the past.

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

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

The *ratio* of prescription is therefore a complex question, even doubly so. In general, many *rationes* substantiate prescription as a legal institution. Additionally, with virtually every claim (complaint) which is subject to prescription, and most certainly with each so-called specific period, the set of the *rationes* behind it differs to a degree. Nonetheless, the conducted studies cogently show that the fundamental *ratio* of prescription is to regulate the relationships of the parties (in view of the obligation of diligence),[16] whereas other *rationes* (such as e.g. certainty or sta-

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

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

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

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

The above conclusions concerning the *ratio* of prescription do have a practical dimension, as they translate into specific indications, establishing points of reference for the prescription regulation at various stages: its enactment, interpretation, application and scholarly-oriented reflection. A practical instance of the application of the above contentions may be seen in the conclusion (also supported by historical evidence)[17] that it is correct to treat the so-called general period as a subsidiary one; in such an arrangement, the so-called specific provisions do not constitute exceptions and the often invoked requisite of their narrow interpretation can thus be dismissed.[18]

The conclusions presented here are at odds with the reiterated declarations and assumptions relating to the supremacy of the public interest. They demonstrate that there is a need to revise the widespread and persistent demands deriving from that value, which call for a straightforward, lucid, rigorous regulation that ensures certainty, promptness, and security.[19] Prescription is not a technical, arithmetical institution. Encountered throughout the European legal tradition, the dilemmas relating to prescription coincide with the chief axes of the debate on private law: flexibility – certainty, equity – justice, private interest – public interest, autonomy of will – protection of particular categories of subjects. Here, *ratio* of prescription is distinctly biased in favour of the need for flexibility, equity, private interest and autonomy of will.

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

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

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

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

18 I pass over the issue of reservations that could be raised regarding the said order of narrow interpretation. See J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung* (in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemiene Teil…*, p. 91.

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

ratio of prescription dovetails with the presence of temporal limitations whose regimes vary; in general, the broadest possible scope of allowing for the factor of long-term inaction; case-dependent consideration of the object of temporal limitations (catalogue of claims/complaints) and reasons for an interruption of the period of prescription; model of taking prescription into account by way of defence (with the possibility of waiving defence); relatively extensive so-called specific regulation (numerous specific provisions pertaining to the length and the run of the period of prescription); presence of elements within the regulation which are strongly linked to the behaviour of the parties (especially generally construed suspension of the run of the period, reasons for interruption in the form of acknowledgment of debt) and relatively far-reaching flexibility of such elements; existence of the so-called equitable safety valve, which makes it possible for the entirety of circumstances of the case to be taken into consideration (regardless of the form of such a mechanism); allowing for subjective factors when determining the starting point of the prescription period; existence (within certain bounds) of the possibility of contractual modification of the prescription regulation; general nature of provisions (i.e. use of indeterminate phrases and general clauses).

The above recommendations do not mean that one ultimately surrenders when faced with the numerous theoretical and practical issues that prescription engenders. They should not be interpreted as consent to chaos, groundless distinctions or flexibility which paralyzes the participants of legal transactions. It is both possible and desirable to remedy the shortcomings owing to defective legislation or objective difficulties that formulation of the prescription regulation presents. However, approaching the discussed institution realistically, one should accept a certain (fairly substantial) degree of uncertainty and the limitations in pursuing a maximally simple, unambiguous and easily applied regulation whose shape depends almost exclusively on the will of the legislator. Prescription (at least in part) puts the presumptions associated with e.g. the idea of codification and the positivist vision of law to the test.

This conclusion should draw attention to the experience of Roman law in which – given its relatively advanced development – the degree of accepted flexibility (and resulting uncertainty) was higher than in contemporary systems of enacted law (Polish for example). In the light of my inquiry into the experience of Roman and French law, the evolution of rules in the course of the application of law proves to have considerable significance. Also, concerns about the potential outcomes of the judicial interpretation of law are often expressed in the doctrine, which sees it as an intervention of case law into the statutory domain. Nevertheless, the example of the French reform of 2008 demonstrates that it is possible for a majority of adopted solutions to stem from case law.[20]

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

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

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

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

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

4.1. General regulation

Both drafts represent proposals of changes in the so-called general parts of the respective codes,[21] while the provisions they contain are to be treated as general. Also, it is necessary to draw attention to one of the most emblematic provisions in that respect, namely those which stipulate the length of the period/s. Both projects (Art. 149 OR 2020, Art. 150 KC 2015) provide so-called general periods, whose application is to be as rare as possible. It is underlined in the supplementary material attached to the drafts that the so-called specific periods are to be created only sparingly (Art. 150 OR 2020, Art. 153 KC 2015), while at the same time one should strive for far-reaching uniformity of the period system, which should rely chiefly on the so-called general period.[22] Such an aspiration is not in the least surprising. The trend has been clearly tangible in the European discussion on prescription so far, and in the proposals/reforms which that discussion engendered,[23] since it represents the answer to one of the most acute maladies of the discussed institution: the unfounded distinctions and the grossly inflated and complex system of periods.[24]

> **Far-reaching generalization is rarely desirable.**

However, bearing in mind the results of presented studies, such an approach to periods of prescription should be treated with some skepticism. First, given the *ratio,* far-reaching generalization is not desirable.[25] Regulating relationships between the parties – the fundamental *ratio* of prescription – involves the necessity to consider the 'realities' of particular legal relationships, allow for the peculiar circumstances in which the parties function and the power configuration established by law and extra-legal factors. Using all too general solutions which have not been tailored to settle specific disputes leads to unsatisfactory outcomes and attempts to create or exploit special solutions for the sake of case-specific adjustments. The proposal to reduce the number of periods as far as possible is appealing from a general, theoretical standpoint. On a microscale, assuming the viewpoint of the court which adjudicates in a specific dispute reveals significant risks and shows that radical proposals in that respect are not practically feasible. This was noted in the course of preparations for the French reform of prescription of 2008, which resulted in a critical re-evaluation of the demand to achieve maximum uniformity; consequently, the reform went no further than reducing – realistically – the number of special periods.[26] In the partial amendment of the general prescription regulation in 2018, the Polish legislator also decided to shorten one of the three so-called general periods from ten to six years (see art. 118 KC in the current wording).[27] In line with the findings on the *ratio* of

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

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

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

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

25 See J. Kruszyńska-Kola, *Zeit, Gesetz und Ordnung – Gründe für die Voranstellung des Allgemeinen Teils aus Sicht der Verjährung* (in:) Christian Baldus, Wojciech Dajczak (eds.), *Der Allgemeine Teil…*, p. 92–93.

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

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

prescription, relations between periods as well as the role of the so-called general period can be defined by presuming the latter to be a subsidiary period (which it indeed is). Special periods – as an instrument better suited to shaping the balance between parties and to preclusive time-limits (Art. 162 OR 2020 and Art. 161–164 KC 2015 which concerns the notion of a preclusive time-limit, as well as withholding of its termination and suspension of its run). An important value is the flexibility of regulation of temporal limitations,

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

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

4.2. Diversity of regimes of temporal limitations

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

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

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

29 See ibidem, p. 616.

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

From the standpoint of *ratio*, the effect and the manner in which prescription is taken into account in a lawsuit are vital issues. OR 2020 provides for a classic solution, i.e. effect in the form of refusal of performance available to the debtor (Art. 148 (1) OR 2020) and prohibition of considering prescription *ex officio* (Art. 161 OR 2020). In contrast, in the Polish draft – given the mass nature of legal transactions, the risk of discrimination of its weaker participants and the efficient functioning of the judiciary – the proposed solutions are altogether different. According to the project (Art. 147 § 1 KC 2015), once the period of prescription has elapsed the claim cannot be pursued, therefore it would be considered by the court *ex officio*. However, in exceptional cases (Art. 149 KC 2015) and after having weighed up the interests of both parties, the court would not have to consider the lapse of the period of prescription, if equity required it. In particular, the court should examine: 1) the length of the period of prescription; 2) the duration of time from the lapse of the period of prescription to the moment in which the claim was pursued; 3) the nature of circumstances which caused the entitled party not to pursue their claim, including the impact of the behaviour of the obligated party on the delayed pursuit of the claim by the entitled one. The proposal draws on the solutions in Polish civil law in the communist period (i.e. from the moment that KC of 1964 came into force until the amendment of 1990).[30] As part of the amendment of the general prescription regulation of 2018, the presented solution was adopted into KC, and applies to claims against consumers (Art. 117 § 2^1 and Art. 117^1 KC).[31] The explanatory memorandum to the amending act invokes certain *rationes* justifying prescription in general, namely to protect the debtor (who in this case enjoys the privileged status of the consumer), to mobilize the creditor, and to ensure the conformity of the state of fact and the legal state.[32]

If one were to assess the above proposals, it would have to be stated that – given the general nature of the regulation – the solution which corresponds best with the findings concerning general *rationes* of prescription is the classic model, which provides for the emergence of defence. Hence the proposal in OR 2020 deserves to be endorsed, whereas the solution in KC 2015 should be evaluated in less positive terms.

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

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

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

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

32 See explanatory memorandum, p. 3–4: <http://orka.sejm.gov.pl/Druki8ka.nsf/0/573F488F5A1D2DB9C1258220003DC2CC/%24File/2216.pdf>.

peculiar set of *rationes*. The adopted solution promotes the realisation of the chief motives in the discussed area to a greater extent than taking prescription into account by way of defence. What is more, it deserves attention in view of the possibility of waiving consideration of prescription *ex officio*, which ensures the necessary flexibility, especially as the reasons for the notion of 'force majeure' cited in the rationale,[34] or the interpretations to date,[35] it is doubtful whether such narrowly delineated reasons can ensure satisfactory results when the law is applied. An inquiry into French and Polish law (in which the liberalism of the French model was consistently opposed since the drafting of the KZ as, against the will of the legislator,

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

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

4.4. Suspension of the run of the prescription period

From the standpoint of the *ratio* of prescription, the reasons to suspend the run of the prescription period are another highly important element in the regulation of that institution. The most significant among those reasons is occurrence and potential formulation of reasons other than those pertaining to the characteristics of entitled subjects or particular relationships between parties to an obligation. The OR 2020 project provides for the reasons of the inability to pursue claims before a court or obstacles to the pursuit of claim in the shape of *force majeure* (Art. 153 (1) (8) and Art. 10 OR 2020). KC 2015 also contains a reason for the suspension of the run of prescription with respect to the claim which the entitled was unable to pursue or enforce due to *force majeure* (Art. 157 § 1 (5) KC 2015).[33] Considering sample explanations of the former reinstituted the principle of *Contra non valentem agere non currit praescriptio*) demonstrates a much greater need to accommodate an evaluation of the behaviour of the entitled (parties) and allow for considerations of equity (which is associated with the essence of prescription identified above). In the Polish regulation, the restrictive approach to *force majeure* as the reason for suspending the run of prescription affected, among other things, the assessment of the defence of prescription in the light of the prohibition of the abuse of rights (Art. 5 KC). In other words, the need to consider e.g. the inability of the entitled to undertake action more broadly than within a scope limited to *force majeure* events found an outlet through recourse to Art. 5 KC, which regulates an institution of exceptional nature.

4.5. Starting point of the prescription period

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

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

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

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

2020, Art. 150 KC 2015) deserves positive appraisal. To some degree, it mitigates the stringency of formulating the aforesaid reasons for the suspension of the run (allowing for the most fundamental cause – the lack of ability to act – to be taken into account). A survey of the amendments of the prescription regulation in other legal systems as well as in the previously mentioned international projects may lead one to believe that this approach to the starting point of the prescription period has largely become a standard.[36] However, in spite of the proposal contained in KC 2015 and the critique of the pertinent regulation currently in force, which provides for objective determination of the starting point of the so-called general period of prescription (maturity date),[37] the Polish legislator failed to introduce such a change as part of the most recent amendment of 2018, even though the period has been reduced by nearly half. And yet, it is crucial to jointly consider at least the duration of the period and its starting point, because a detailed study of the discussed institution shows that it does resemble an array of communicating vessels.[38]

4.6. Contractual modifications

Similarly, bearing in mind the conclusions concerning the *ratio* of prescription, one should positively appraise the proposals providing for the possibility of modifying the statutory regulation by mutual agreement, found in both projects (Art. 159 OR 2020 – only regarding the length of some of the periods, Art. 154 KC 2015 – only regarding the length and end of the run of the prescription period for claims arising from agreements between entrepreneurs as part of their business activity and extension of the period of prescription for claims to which consumers are entitled).

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

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

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

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

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

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

39 See ibidem, p. 376.

the evolutionary trends observed in other elements, such as the shortening of prescription periods (the shorter the period the lesser the concern that the relationships of parties in view of the existing (albeit unwritten) obligation of diligence in exercising one's rights. Such an answer to the question about *ratio* is in

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

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

5. Concluding remarks

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

On the other hand, the method outlined and employed in this paper offers answers to the question concerning the *ratio* of prescription from a practical standpoint and contribute new elements to the discussion in connection with the prospective changes in Switzerland and Poland. Also, it enables one to appreciate that the *ratio* of prescription is a complex matter; nevertheless, one predominantly seeks to regulate the consonance with the varied aspects of the prescription regulation and its development trends seen in a historical-comparative perspective. Above all, however, it empowers creating solutions which are likely to be satisfactory in the long term.

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Strategic Litigation: the Problem of the Abuse of Law and Other Critiques

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The word "abuse" seems to be made of two parts. The root "use" stands for "to take advantage of something" – implicitly – in a casual, normal way. The prefix "ab", however, changes the meaning of the root, indicating that it concerns something beyond the casual, normal usage.[1] The comparison of any random definition of strategic litigation with a simple semantic analysis of the term "abuse" immediately gives rise to a view that strategic litigation can be easily described as a kind of abuse of the practice of litigating. This notion arises because the primary purpose of strategic litigation does not refer to the interest of the party to the proceedings (like in conventional litigation); instead, it is aimed at "bringing social change", always deprived of any evaluation.[2]

In my opinion, the observation above is hardly the only reason supporting the necessity of investigating possible critiques of the strategic litigation. The contemporary literature devoted to this institution presents certain instances of its critique; nevertheless, it provides us with possible allegations or doubts addressed exclusively from the perspective of strategic litigation's proponents (or proponents of aims of strategic

1 The situation looks similar when it comes to the Polish equivalent of "abuse" – word "nadużycie", which also encompasses core-part "użycie" and prefix "nad", that adds a negative connotation to the whole construction.

2 See e.g.: *Strategic Litigation Impacts. Insights from Global Experience*, New York 2018, p. 31, accessible: https://www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience (last accessed 31.5.2019); Interview with Martin O`Brien, [in:] S. Hansen, *Strategic litigation*, New York 2018, p. 11; *Public Law Project: Guide to Strategic Litigation*, p. 5, accessible: https://publiclawproject.org.uk/wp-content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf (last accessed 31.5.2019).

litigation).[3] As a result, such a criticism has an ostensible character, focusing mostly on the inefficiency of strategic litigation, rather than on more down-to-earth sceptical reflection on ideas standing behind the whole concept.

The first impression regarding the possibly abusive character of strategic litigation plays a crucial role in the present paper; nevertheless, other probable points of criticism are voiced in further parts of the paper. Firstly, the paper presents the concept of strategic litigation, particularly its meaning, history and some dilemmas posed by the proponents of this concept. Furthermore, I will demonstrate the stages of development of the construction of the abuse of rights. Third part of the paper is an attempt to state certain general conclusions on the applicability of the argument of law abuse as pertains to strategic litigation, whereas the fourth part deals with further possible points of criticism of the concept.

1. Strategic litigation

Adam Bodnar, currently the Commissioner for Human Rights in Poland, and formerly a human rights activist, in one of his articles assures that it is the client`s interests that play the primary role during strategic litigation.[4] This statement seems to be at odds with the distinctive feature of strategic litigation, whose emphasis is put on the outer effects. Should his statement be true, strategic litigation would not be distinguishable from non-strategic forms of litigating. It goes without saying that every legal proceeding concerning a socially sensitive issue could have far reaching effects going beyond the legal situation of the parties involved in a particular dispute. From this perspective, the quoted opinion should be treated only as a form of a euphemism concealing some less elevated facts about strategic litigation. The following part of the paper aims to verify this bitter observation.

1.1. The concept of strategic litigation

The subject literature, especially widespread guides easily accessible *via* the Internet, offer a variety of names to refer to the same phenomenon. James A. Goldston enumerates the following: "public interest litigation", "human rights litigation", "test case litigation", "impact litigation", "social action litigation", "social change litigation" and last but not least: "strategic litigation".[5] Some of the expressions are indeed meaningful – they focus on the aims of litigation (impact, human rights, social change) or methods being applied (test case litigation, social action litigation).[6] "Human rights lawyering"[7] could be regarded as a related institution, though it is not necessarily associated with applying any special strategies or achieving far-reaching goals, which is characteristic for strategic litigation.

As outlined above, strategic litigation could be defined as designed to achieve ends reaching beyond success in a particular legal dispute, aiming to obtain some extra benefits for a wider circle of stakeholders.[8] In this sense, strategic litigators try to turn the court proceedings which traditionally involve two parties[9]

3 See e.g.: Interview with Martin O`Brien, [in:] S. Hansen, *Strategic litigation*, p. 14; H. Duffy, *Strategic Human Rights Litigation: 'Bursting the Bubble on the Champagne Moment'* (inaugural lecture given on 13 March 2017 at Leiden University), p. 8, 13, accessible: https://openaccess.leidenuniv.nl/handle/1887/59585 (last accessed 31.5.2019)

4 A. Bodnar, *W poszukiwaniu precedensów – litygacja strategiczna w praktyce Helsińskiej Fundacji Praw Człowieka*, [in:] *Precedens w polskim systemie prawa*, ed. A. Śledzińska-Simon, M. Wyrzykowski, Warszawa 2010, p. 141.

5 J. A. Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, "Human Rights Quartely" vol. 28/2006, p. 496.

6 This description is particularly interesting when we take into account that the overwhelming majority of strategic litigation is run directly or supported indirectly by non-governmental organisations. This leads to the conclusion that modern society could be exclusively identified with a non-governmental sector. On the critique of this stance see P. S. Załęski, *Neoliberalizm i społeczeństwo obywatelskie*, Toruń 2012, p. 149–212.

7 See e.g.: R. J. Wilson, J. Rasmusen, *Promoting Justice. A Practical Guide to Strategic Human Rights Lawyering*, Washington 2001, accessible: http://www.sbdp.org.br/arquivos/material/280_IHRLG_-_International_Human_Rights_Law_Group_-_Promoting_justice_-_a_pratical_guide_to_strategic_HR_lawyering.pdf (last accessed 31.5.2019).

8 See J. A. Goldston, *Public Interest Litigation in Central and Eastern Europe*, p. 496.

9 In the contexts of strategic litigation, in the overwhelming majority of cases those are: citizen as claimant and government as defendant.

into *actio popularis* or a collective complaint. Bearing this in mind, strategic litigation's proponents usually distinguish two groups of pursued goals: 1) intra-legal objectives, concerning the interpretation, application or content of law, 2) extra-legal objectives, which for example include raising social awareness of a discussed problem or exerting pressure on political actors.[10] The authors of the paper delivered under the auspices of the *Open Society Justice Initiative*, an organisation supported by George Soros, leading in the area of strategic litigations, enumerates three possible effects of strategic litigation: 1) material outcomes that include direct changes such as financial compensation, transfer of property, or prosecution of perpetrators, 2) instrumental impacts that include changes in policy, law, jurisprudence, or institutions, 3) non-material impacts e.g. changes of public attitude, particularly the opinions of policymakers, teachers, police officers, but also ordinary citizens.[11]

The next feature which could be – without a doubt – associated with contemporary strategic litigations is that they are mostly run by specialised non-governmental organisations. Numerous handbooks about strategic litigation emphasize the necessity of engaging highly specialised and personally involved lawyers and other supporters of the case raised in a given instance of the litigation, which seems to be self-evident. As a result, strategic litigation is described as an action taking place between social movements and state institutions. Strategic litigation can take the form of direct pleading before the courts, when lawyers provided by a non-governmental organisation represent one of the parties, or indirect support e.g. delivering *amicus curiae* opinions.[12]

In this sense, strategic litigators try to turn the court proceedings which traditionally involve two parties into *actio popularis* or a collective complaint.

As a strictly target-oriented activity undertaken by specialised representatives, strategic litigation is very often accompanied by other forms of influence on the contested problem. Proponents of strategic litigations claim that this form of enforcing social changes could be the most efficient when conducted simultaneously with press coverage and other media campaigns, lobbying, and legislative advocacy. Cummings and Rhode observe that:

> "A key lesson from law and social change research is the importance of situating litigation within broader political campaigns – of using it as means to an end, rather than an end in itself. Unlike early models of public interest litigation in which lawyers looked for test cases that could establish important principles, this approach explores multiple strategies from the outset, including not just lawsuits but also policy, organizing, and media initiatives."[13]

Considering the fact that it is the outlining of a social problem that is the sole purpose of at least some of the proceedings initiated by strategic litigators, even losing a single proceeding could be perceived by them as successful. Losing of a case could provide the suf-

10 See *Equinet Handbook on Strategic Litigation,* Brussels 2017, p. 9, accessible http://equineteurope.org/2019/02/21/strategic-litigation-handbook/ (last accessed 1.6.2019); *Public Law Project: Guide to Strategic Litigation*, p. 5.

11 *Strategic Litigation Impacts. Insights from Global Experience*, p. 43.

12 A. Bodnar, *W poszukiwaniu precedensów*, p. 142.

13 S. L. Cummings, D. L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, "Fordham Urban Law Journal " vol. XXXVI/2009, p. 615. See also *Strategic Litigation Impacts. Insights from Global Experience*, p. 33.

ficient basis to draw public attention to the problem in question.[14]

The proponents of strategic litigations often proclaim themselves as defenders of the marginalized, the poor, or social outcasts.[15] This view could be, however, perceived as contrasting with the fact that organisations specialised in strategic litigations are very often forced to initiate kinds of enrolments to find persons interested in becoming a party in court proceedings brought against a government.[16] Naturally, in the circumstances of an oppressive regime violating basic civil rights, where a citizen suing a government is able to predict that he or she will inevitably become a victim of the government's vengeance, such an approach is legitimate and hardly surprising. Nevertheless, it is difficult to equate such situations with the presumed position of a defender of marginalised groups, who need to recruit parties interested in initiating a legal action, acting in the conditions of a liberal democracy, in which the right to a fair trial is ensured for everyone. Adding two assumptions to this reasoning: 1) if I am oppressed, I am looking for help, 2) if I am oppressed and countermeasures are available to me, I use them, it will allow us to raise the question of whether strategic litigators are the real servants of the victims of oppression, if it is necessary for them to recruit so called "friendly victims".

Leaving aside these doubts, it should be admitted that the popularity of strategic litigation is increasing all around the world.[17] Due to different circumstances, strategic litigation could vary in exerted impact: "while strategic litigation may be more *effective* in democratic societies, it may be more *significant* in illiberal societies where it is often one of the few forms of advocacy permitted".[18] However, as James A. Goldston noticed after inquiring into the status of strategic litigation in Central and Eastern Europe, this institution is seen very positively in newly established democracies.[19] These observations move us to the issue of the origins of strategic litigations.

The proponents of strategic litigations often proclaim themselves as defenders of the marginalized, the poor, or social outcasts.

1.2. History and examples

Strategic litigation, as an institution relying on the power of the courts, is generally linked with the common law system. It is also believed that this phenomenon has quite a short history, reaching back no longer than the past thirty years. Both statements are incorrect in a way.

Referring to the first statement, it has to be noticed that it is mainly thanks to the development of international courts, such as the ECHR or CJEU, that strategic litigation gained significance also beyond common law countries. Generally, it is presupposed by strategic litigators that each legal dispute began before national courts, if not won there, would find its continuation before international bodies. NGOs recruiting parties to the proceedings inform that their aim is to go through all domestic instances just to open the door to pleading before international courts.

14 A. Bodnar, *W poszukiwaniu precedensów*, p. 125, 140.

15 A. Bodnar, *W poszukiwaniu precedensów*, p. 161; *Strategic Litigation Impacts. Insights from Global Experience*, p. 36.

16 See e.g. https://kph.org.pl/poszukiwane-pary-jednoplciowe-do-litygacji-strategicznej/ (last accessed 1.6.2019).

17 H. Duffy, *Strategic Human Rights Litigation*, p. 1.

18 *Strategic Litigation Impacts. Insights from Global Experience*, p. 17.

19 J. A. Goldston, *Public Interest Litigation in Central and Eastern Europe*, p. 493.

When it comes to the second statement (concerning the history of strategic litigation), one should be aware that first proceedings aimed generally at procuring changes (not only to win a case for the represented party), were brought to courts already in the 18th century. According to the literature devoted to this issue, litigations provoked by the British anti-slavery movement, including the famous *Somerset v. Stewart* judgement delivered in 1772, or *The Society for Suppression of Vice* efforts promoting public morality with the usage of a legal path, had such a character.[20]

Strategic litigation had its revival in the 20th century, when it initiated many positive social changes. One of the most remarkable and uncontroversial examples is *Brown v. Board of Education of Topeka*, decided by the US Supreme Court in 1954, which brought the practice of racial segregation in the United States to an end.

More recent history also delivers countless examples of the positive effects of strategic litigations. Significant changes were brought thanks to cases before Indian, Colombian or South African supreme courts.[21] In Europe, cases concerning the desegregation for Roma students in Czech and Hungarian schools were exceptionally significant (e.g. *D. H. v. Czech Republic)*.[22] They can be undoubtedly considered as successes of strategic litigation. In contrast to these uncontroversial cases, strategic litigation nowadays is used with regard to highly disputable issues, for example in cases concerning surrogate motherhood.[23]

Supporters of strategic litigation tend to portray it as an institution that could be equally useful for left-wing and right-wing activists.[24] It could be surprising when compared with their other claims, especially those concerning "social change" seen as the main purpose of strategic litigation. The pursuit of social change seems to be an exclusively leftist ideal, whereas right-wingers make efforts rather to preserve the current state of affairs.[25] Still, to do so, taking advantage of some instruments developed in the field of strategic litigations could prove effective. It is worth indicating the activity of the *European Centre for Law and Justice*[26] as an example of exercising this strategy in cases regarding religious freedom or surrogate motherhood. Lawyers involved in the ECLJ pleading before ECHR and other bodies, or presenting *amicus curiae* opinions, defend the idea of human rights based on natural law, which could be seen as a sort of a counter-strategic litigation activity.

The pursuit of social change seems to be an exclusively leftist ideal, whereas right-wingers make efforts rather to preserve the current state of affairs.

1.3. Exemplary strategies

Strategic litigation guides accessible *via* the Internet and provides us with a comprehensive system of step-by-step advices, teaching how to select a case, and then commence, conduct and win a litigation.

20 See *Strategic Litigation Impacts. Insights from Global Experience*, p. 31; *Public Law Project: Guide to Strategic Litigation*, p. 6–7.

21 H. Duffy, *Strategic Human Rights Litigation*, p. 3.

22 Application no. 57325/00, judgement by European Court of Human Rights delivered on 13 November 2007 (Grand Chamber).

23 See Ł. Mirocha, *„Macierzyństwo zastępcze" w aktualnym orzecznictwie Europejskiego Trybunału Praw Człowieka*, „Prawo w działaniu" vol. 34/2018.

24 *Public Law Project: Guide to Strategic Litigation*, p. 6–7.

25 See R. Scruton, *Co znaczy konserwatyzm*, transl. T. Bieroń, Poznań 2014.

26 Official web page: https://eclj.org/institutions (last accessed 1.6.2019).

Hints presented in handbooks are very detailed, each stage of legal proceedings and extra-legal activities linked with strategic litigation are deeply analysed. For example, it concerns choosing an appropriate case (from the perspective of the presupposed aim), recruiting parties, collecting funds, developing a press and media strategy. One can easily find both guides addressed to amateurs – wannabe activists, and handbooks targeted at improving the professional skills of lawyers dealing with strategic litigation. Armed with such guides, any person can grasp what strategic litigation is all about. An analysis of handbooks allows us to realize that strategic litigation is hardly an activity performed by amateur, undisciplined idealists; instead, it is a serious undertaking conducted by committed, professional officials gathered around NGOs. To quote the content of the guides in this paper would be redundant; however, bearing in mind the aims of the paper, it is important to draw attention to the selected recommendations included in them.

First of all, each handbook pays a lot of attention to the sources of financing every such undertaking. Strategic litigators are aware that carrying this sort of activity is – to put it simply – an expensive task. Contrary to the stereotypical image of NGOs' activity, as mainly based on volunteers' support, strategic litigation relies on professionals, which entails costs.[27] Taking into account that the desirable social changes planned as an effect of litigations are rarely widely supported, strategic litigators are advised to search for funds abroad.[28] For example, the *Open Society Foundations*, an organisation associated with the above-mentioned *Open Society Justice Initiative*, informs via its official web page that it has spent over 15 billion dollars "focused on supporting people who are trying to make their communities fairer, freer, and more harmonious".[29] This sum includes 35 million dollars spent on strategic litigation activity.[30]

The next advice I would like to discuss has been signalled in the previous part of the paper: strategic litigations require a "friendly victim", or a person who is ready to become a party to the proceedings and go through all domestic instances until the case is referred to the international courts. What is particularly interesting is that the preparations to strategic litigations presuppose the necessity of involving more than one potential party to the proceedings,[31] as one of the represented persons may drop the case prematurely, or opt for a settlement with the sued government.[32] In my opinion, such an approach, once again, raises questions as to whose interests is strategic litigation devoted to.

Contrary to the stereotypical image of NGOs' activity, as mainly based on volunteers' support, strategic litigation relies on professionals, which entails costs.

Timing is also a crucial issue for strategic litigators. The quoted handbooks warn against commencing the dispute too early, when society is "not ready yet" for targeted changes. In the worst case scenario, a strategic litigator risks the so called negative precedent, political backlash, or even social resistance.[33] To avoid these risks or limit their impact, strategic litigations are proceeded step-by-step. Such an attitude

27 *Public Law Project: Guide to Strategic Litigation*, p. 29.

28 J. A. Goldston, *Public Interest Litigation in Central and Eastern Europe*, p. 525–526.

29 https://www.opensocietyfoundations.org/ (last accessed 2.6.2019).

30 *Strategic Litigation Impacts. Insights from Global Experience*, p. 23.

31 See e.g. announcement in the footnote no. 16, above.

32 A. Bodnar, *W poszukiwaniu precedensów*, p. 153.

33 *Equinet Handbook on Strategic Litigation*, p. 31.

can be observed in cases dealing with the problem of same-sex partnerships[34] or surrogate motherhood[35] in domestic legal systems which do not accept them. The claimants do not try to directly challenge binding national regulations; instead, they point to their negative effects and, at the same time, try to circumvent them by forcing national authorities to recognize the legal consequences of decisions and acts adopted by foreign bodies using other legislation. After the issue of recognizing the legal consequences of using foreign legal regulations is overcome, one can directly attempt to introduce new institutions in the domestic legal system which are similar to foreign ones.

1.4. Constraints of strategic litigation: inner perspective

The literature regarding the problem, and even widespread handbooks on strategic litigation, almost always voice criticism towards the institution. It is hard to decide whether the reason for placing such a critique by the proponents of the whole concept is to fulfil the scholarly requirement of presenting a balanced point of view, or courtesy to other authors. The fact is that commonly presented caveats do not change their authors' positive evaluation of strategic litigation. Two popular strands of such a "critique" are presented below: inefficiency and unavailability.[36]

Firstly, as noted above, the proponents of strategic litigation are aware that even the winning of specific cases does not spontaneously lead to social change.[37] It is the basic drawback of strategic litigation, the answer to which is to conduct other activities aimed at improving the social consciousness, or the lobbying of political actors at the same time. As Cummings and Rhode admit: "litigation cannot itself reform social institutions".[38] Claims that funds sacrificed for strategic litigation could be spent in a more efficient way are also raised. However, in this group of problems, another one seems to be most troublesome for supporters of the conception: the risk of creating a "negative precedent", which means losing the case and, as a result, reinforcing legal provisions or social attitudes towards the challenged legislation. The most significant example of this phenomenon is the *Plessy v. Ferguson* judgement, issued by the American Supreme Court in 1896, that started the infamous practice of "equal but separate" in the United States.[39] Furthermore – as Cummings and Rhode indicate in their analysis – even the victory in a court can bring negative effects affecting other litigations – it can likely provoke an institutional backlash. They illustrate this thesis stating that:

> "Courthouse victories fueled a conservative reaction seeking to limit federal authority over civil rights and civil liberties, economic and environmental regulation, and social welfare. As the right gained power in the 1980s and 1990s, national governance structures were reshaped. An increasingly conservative federal judiciary became less hospitable to the claims of liberal public interest groups."[40]

Adam Bodnar adds that the resistance of the lawmaker could occur not only in the institutional sphere (shortening procedural opportunities for strategic litigators), but also take the form of a parliamentary majority disapproving judicial solutions and trying to "overrule" it by enacting appropriate substantive law.[41] The story of tensions between the judiciary branch and legislator caused by the *Employment Division v. Smith* judgement delivered by the American Supreme Court in 1990 is a great example of such consequences; another one is the recent action of the Polish Attorney

34 See e.g. *Orlandi and Others v. Italy*, ECHR 2017, application no. 26431/12; 26742/12; 44057/12 and 60088/12).

35 See P. Mostowik, *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka od „rodziców jednopłciowych" na tle orzecznictwa sądów administracyjnych w 2018 r.*, Warszawa 2019, accessible https://iws.gov.pl/wp-content/uploads/2019/03/IWS-P.-Mostowik-problem-rejestracji.pdf (last accessed 2.6.2019).

36 I omit technical problems raised by strategic litigators, such as the issue of financial problems of NGOs supporting this undertaking, or the problem of the identification of lawyers with the cases carried out by them.

37 Interview with Martin O`Brien, [in:] S. Hansen, *Strategic litigation*, p. 14.

38 S. L. Cummings, D. L. Rhode, *Public Interest Litigation*, p. 604.

39 H. Duffy, *Strategic Human Rights Litigation*, p. 8.

40 S. L. Cummings, D. L. Rhode, *Public Interest Litigation*, p. 607.

41 A. Bodnar, *W poszukiwaniu precedensów*, p. 155.

General, who tried to question (before the Constitutional Tribunal)[42] the provisions by virtue of which the Polish Supreme Court sentenced the man accused of purportedly illegitimate refusal of service to an LGBT association.[43]

The criticism towards the accessibility of strategic litigation for ordinary citizens has at least three aspects. First of all, it should be noticed that legal proceedings are generally expensive, thus limiting the number of potential claimants.[44] The fact that in most cases strategic litigations are led by NGOs makes little difference, because NGOs tend to select the most interesting (from their perspective) cases rather than provide help for the people whose needs are the most urgent.[45] Secondly, litigations usually last long, which also affects their availability (as an effective instrument), because the party in need would rather resign from a lawsuit if a few years of the duration of a trial are anticipated. The next risk connected with the issue of the availability of litigations raised by proponents of the institution are the potential repressions of claimants, their families or even a wider group of associates by the government.[46] Such an approach of the state can effectively discourage potential claimants from initiating proceedings; however this sort of risk seems to be most common in the case of third-world countries or oppressive regimes.

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Adam Bodnar claims that "the legislator must accept that his role has changed and that the courts would play an increasingly important role in shaping legal provisions"; he adds that "it would be harmful if the legislator did not comply with the will of the courts".[47] This opinion may sound tempting and even convincing for some; however, it is difficult to reconcile with the basic principle of the legal order, such as the separation and cooperation of powers, sometimes equated with the checks-and-balances system. The quoted opinion favours the courts and judicial power, which abuses the entire idea of the division of powers. In order to conclude these remarks, it should be remembered that strategic litigators often portray themselves as the defenders of rights. Though it could be true in some cases, the analysis of their activity as far as morally sensitive issues are concerned leads to a different evaluation – they are the designers of new rights, based on often unclear, open-texted provisions of human rights treaties interpreted in various ways. In connection with the abovementioned remarks, it provokes the question

Such an approach of the state can effectively discourage potential claimants from initiating proceedings; however this sort of risk seems to be most common in the case of third-world countries or oppressive regimes.

42 Case no. K 16/17.

43 See Ł. Mirocha, *Polskie orzecznictwo w perspektywie wyroku w sprawie Masterpiece Cakeshop*, „Forum Prawnicze" vol. 2 (46)/2018.

44 H. Duffy, *Strategic Human Rights Litigation*, p. 2, 4–5.

45 Of course, there are NGOs specialised in providing legal help for the poor regardless of the sort of the case, but the concept of strategic litigation presupposes the selection of cases based on more strict criteria, just to achieve previously defined aims.

46 *Strategic Litigation Impacts. Insights from Global Experience*, p. 66.

47 A. Bodnar, *W poszukiwaniu precedensów*, p. 154–155.

whether social changes driven in the described way have any democratic legitimation, or perhaps they are only the realisation of the expectations of determined NGOs' officers assisted by skilful lawyers.

2. *Abuse of law*

According to an old Latin sentence: *neminem laedit qui suo iure utitur*. The maxim reflects one of the basic legal principles, which is – unfortunately – increasingly questioned due to the fact of misusing granted rights. As in the case of almost every argument based on a Latin sentence, we can indicate a counter-maxim, i.e. *sic utere iure tuo ut alterum non laedas* or *nemo ex propria turpitudine commodum capere potest*, that sum up the essence of the modern principle of prohibition of the abuse of rights (or law).[48] The following part of the paper attempts to present sources and the development of this institution in three branches of law, in which strategic litigation can frequently occur. The order of the following part illustrates the stages of development of the abuse of the institution of law.

2.1. *Domestic legal systems*

The modern history of the institution under analysis begins in the mid-19th century in France. The concept of the abuse of rights (and its prohibition) was worked out in the area of property law, especially regarding neighbourhood disputes concerning the malicious construction of useless fences or chimneys. During the course of law`s development, the concept spread among other fields of civil law and other branches of law, earning the status of its basic principle.[49]

The concept of the abuse of rights is characteristic for civil law legal systems; it was also acknowledged in socialist legal systems. Neither the common law nor the legal systems of Nordic countries recognize it.[50] There are several reasons of resistance to the concept when it comes to common law countries. Their legal practice focuses on objective circumstances, not on the intentions of the parties of legal relationship. The uncertainty concerning the results of application of this institution, and even the principles of its application are another reason for its rejection.[51] It is sometimes suggested, however, that common law acknowledges the concept of the abuse of law, or tries to reach its effects in other ways. The use of sophisticated aspects of the tort law may serve as one example; another one would be interpreting situations in which civil law would recognise the abuse of one's rights as if there were no rights at all, because a perpetrator`s behaviour extended the potential scope of the application of the rights.[52]

The concept of the abuse of rights is characteristic for civil law legal systems; it was also acknowledged in socialist legal systems.

Julio Cueto-Rua enumerates four criteria (concepts) of recognising when rights are misused: 1) when they are exercised for the purpose of causing dam-

48 A. Kiss, *Abuse of Rights*, p. 1, accessible: https://files.pca-cpa.org/pcadocs/bi-c/1.%20Investors/4.%20Legal%20Authorities/CA301.pdf (last accessed 9.6.2019); R. Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, "Netherlands International Law Review" vol. 53.1/2006, p. 18.

49 J. Cueto-Rua, *Abuse of Rights*, "Louisiana Law Review" vol. 35.5/1975, p. 965, 967, 979–981.

50 A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, "European Review of Private Law" vol. 6/2010, p. 1125.

51 J. Cueto-Rua, *Abuse of Rights*, p. 967–969.

52 M. Byers, *Abuse of Rights: An Old Principle, A New Age*, "McGill Law Journal" vol. 47/2002, p. 395 and 414 respectively.

age or harm, 2) when they are exercised without any legitimate or serious interest, 3) when they are exercised against good customs, moral rules or good faith, 4) when they are exercised contrary to the aims for which a given right was designed to.[53] Michael Byers points out that some of the abovementioned criteria refer to external values (such as good customs, good faith, and aim of the right) – such a phrasing was characteristic for socialist legal systems (and is still present in the Polish legal system, *vide* art. 5 of the Civil Code or art. 8 of the Labour Code). On the other hand, western European legal systems tend to shorten the definition of the abuse of rights, connecting it with the fact of harming another party, or bearing malicious intentions, or both..[54]

It is noteworthy that the institution of the abuse of rights in municipal legal systems is often connected somehow with the concept of good faith. It is sometimes derived from the former (like in the case of German law), or it replaces the construction of good faith (like in French law).[55]

2.2. *International law*

According to Hersch Lauterpacht:

> "only the most primitive of societies could allow the unchecked exercise of rights without regard to their societal consequences, and that the determination of when the exercise of a right becomes abusive must depend on the specific facts of each case, rather than the application of an abstract legislative standard"[56]

Therefore, it is unsurprising that this originally domestic institution started gaining influence in the area of international law. Notwithstanding, the status of the prohibition of the abuse of law is still controversial in international law. It is claimed, e.g., that it should be perceived as one of international law's general principles or a part of customary law.[57] However, doubts are also raised regarding the fact that the concept of the abuse of law is not commonly applied, so it cannot be proclaimed as a general principle or element of customary law.[58] Caveats similar to those issued in the case of domestic legal systems are voiced. Those who oppose the treatment of the institution of the abuse of law as belonging to international law emphasise that it is difficult to distinguish it from rigorous law enforcement.[59] An uncertain character seems to be an inherent burden of this institution.

Notwithstanding, the status of the prohibition of the abuse of law is still controversial in international law.

Leaving aside these concerns, one should notice that the concept of the abuse of rights is used by international courts, and, moreover, it is directly mentioned in international agreements.[60] The European Court of Justice refers to it in its judgements, in contrast to the fact, that in European law this principle generally has still an uncodified character.[61] It should be emphasized that the abuse of rights in international

53 J. Cueto-Rua, *Abuse of Rights*, p. 985 and following.

54 M. Byers, *Abuse of Rights*, p. 393–395. Compare also A. Lenaerts (*The General Principle of the Prohibition of Abuse of Rights*, p. 1127) who distinguishes subjective tests (based on intention) and objective tests (based on effects) of establishing whether the abuse of rights occurred or not.

55 See S. Reinhold, *Good Faith in International Law*, "UCL Journal of Law and Jurisprudence" vol. 2/2013, p. 42–43.

56 Quoted by M. Byers, *Abuse of Rights*, p. 406.

57 See M. Byers, *Abuse of Rights*, p. 397.

58 A. Kiss, *Abuse of Rights*, p. 3; S. Reinhold, *Good Faith in International Law*, p. 53.

59 See S. Reinhold, *Good Faith in International Law*, p. 52.

60 For examples see M. Byers, *Abuse of Rights*, p. 397 and following; A. Kiss, *Abuse of Rights*, p. 5 and following.

61 A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights*.

relations can be referred to in the field of both substantive and procedural law.[62]

Alexandre Kiss singles out three possible situations which can be classified as abusive: 1) exercising a right in the way that prevents or makes it more difficult for another country to exercise its rights, 2) exercising a right for the purposes it was not designed to, 3) arbitrarily exercising a right to the detriment of another country.[63] One can observe that the common feature of all abusive practices, stemming from these three examples, is that the abusing party does not reckon with other parties' interests. The prohibition of the abuse of law aims at mediating between conflicting rights and thus enabling to draw proper boundaries of rights' scope of application.[64] It should be noticed that in the area of international law, the institution of the abuse of rights plays a certain role not only in state-to-state relations, but also in relationships between international institutions and non-state actors.[65]

Referring once more to the origins of the concept of the abuse of rights in international law, one should pay attention to an older, although similarly controversial institution of good faith. It has a much stronger legal basis than the prohibition of the abuse of law. It is considered to be one of the most important principles of international law and is also widely employed in international treaties,[66] despite the fact that – just as the abuse of law – it is difficult to define in a fixed manner, with the use of legal terms.[67] To mention the principle of good faith is crucial in this context, because it is perceived as an important source of the prohibition of the abuse of law. The latter is considered to be a more precise illustration of the application of the good faith principle, and its concretization.[68] Should both institutions be split, they would still have the same aims – to protect certain common interests from being supressed by individual ones.

2.3. Human rights law

Documents on human rights often contain counter-abusive provisions. As an example we can indicate article 30 of the Universal Declaration on Human Rights (which is the model for other similar statements), article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, ECHR), or article 54 of the Charter of Fundamental Rights of the European Union. Though these provisions look very similar, it is worth quoting one of them. Article 17 of the ECHR states the following:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The need to place such a provision in the document on human rights stemmed from the tough historical experiences of its authors, especially the observation that it was by no means a democratic process that the Nazis obtained power in Germany. It demonstrates that rights can be severely misused.[69] The provision considers the distortion of any rights and freedoms entered into the Convention as a sole criterion of the abuse of rights; the malicious intention of a perpetrator or causing harm is not required in recognising a given practice as abusive. Attempts to apply this principle were undertaken especially in cases concerning racist or xenophobic statements, such as activity of

62 P. Janig, *The General Principle of 'Abuse of Rights' and its Application by International Courts and Tribunals With a Special Focus on its Impact on Treaty Shopping in International Investment Disputes*, p. 6, accessible: https://ssc-rechtswissenschaften.univie.ac.at/fileadmin/user_upload/s_rechtswissenschaft/Doktoratsstudium_PhD/Expose1/Voelkerrecht/The_General_Principle_of__Abuse_of_Rights__and_its_Application_by_International_Courts_and_Tribunals.pdf (last accessed 9.6.2019).

63 A. Kiss, *Abuse of Rights*, p. 1–2.

64 M. Byers, *Abuse of Rights*, p. 417 and 429 respectively.

65 A. Kiss, *Abuse of Rights*, p. 7.

66 S. Reinhold, *Good Faith in International Law*, p. 40, 59 and following.

67 R. Kolb, *Principles as Sources of International Law*, p. 13.

68 R. Kolb, *Principles as Sources of International Law*, p. 19.

69 I. C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, accessible: Lex Omega (last accessed 9.6.2019).

the communists or neo-Nazis.[70] It did not gain in popularity in the case-law of the European Court of Human Rights, so it is still difficult to derive any fixed and standardized definition of the abuse of law from the Court`s approach to the problem.[71] The Court tends to resolve disputes exclusively on the basis of questioned rights, especially due to fact that many of the provisions guaranteeing them (see articles 8–11 of the ECHR) directly indicate limitation clauses. Hence, according to the Court's stance, there is no need to recall the principle of the abuse of rights.

What needs to be remembered is that the scope of the application of this institution depends on the manner in which legal provisions are written: the more open-texted character, the greater risk of its misuse.

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Annekatrien Lenaerts convincingly explains that:

> "The concept of abuse of rights refers to situations in which a right is formally exercised in conformity with the conditions laid down in the rule granting the right, but where the legal outcome is against the objective of that rule. Thus, the tension between the strict application of a rule and the true spirit of that rule is at stake. In such situations, the principle of the prohibition of abuse of rights functions as a corrective mechanism to the strict application of a rule of law: it will reduce the 'abusive' exercise of the right granted by that rule to a normal use, through reliance on fundamental standards of behaviour, such as good faith, fairness, morality, justice, or the respect of the finality of the law."[72]

She is also right when pointing out that – generally speaking – the importance of this institution is increasing; the prohibition of the abuse of rights spread among different branches of municipal law and international law as well. The institution indicates that there is a "distinction between the existence of an individual right and the exercise of such rights", as Alexandre Kiss concludes.[73] What needs to be remembered is that the scope of the application of this institution depends on the manner in which legal provisions are written: the more open-texted character, the greater risk of its misuse.[74] Due to this, the argument on the abuse of rights can be perceived as useful in the field of strategic litigations, which are mainly based on flexible provisions of human rights treaties.

3. Application of the abuse of law argument in the area of the strategic litigation

It is time to consider the potential applicability of the argument based on the prohibition of the abuse of law in the area of strategic litigation. This task requires distinguishing between areas of the substantive law and procedural law, as well as between domestic proceedings and those pending before international courts. The argument of the abuse of law is not applied in actual

70 M.A. Nowicki, *Komentarz do Konwencji o ochronie praw człowieka i podstawowych wolności*, [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, accessible: Lex Omega (last accessed 9.6.2019).

71 I.C. Kamiński, *Ograniczenia swobody wypowiedzi*.

72 A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights*, p. 1122.

73 A. Kiss, *Abuse of Rights*, p. 1.

74 See P. Janig, *The General Principle of 'Abuse of Rights'*, p. 6.

cases very often; hence the following analysis has a more theoretical character and is based on remarks presented in the previous parts of the paper.

It is difficult to make any general remarks when it comes to an analysis of substantive law, simply because cases which are a part of strategic litigation can vary considerably. However, there is one, in my opinion characteristic feature of strategic litigations which gives an opportunity to apply the argument of the abuse of law. It is the fact that such litigations very often employ conflicting rights, rules (also moral or customary), or interests (including private-public interest's conflicts). The proponents of strategic litigation are aware of this problem;[75] however, they respond to this situation not by giving up such cases, but rather conducting them in possibly a gentle manner, in order to avoid offending parties representing opposite interests. This response is obviously subordinated to achieving predetermined goals, thus having a "strategic" character.

As an example of such a situation – an application of the argument on the abuse of law – we can indicate the case of *D. and others v. Belgium*, examined by the European Court of Human Rights.[76] Claimants held that the Belgian authorities, issuing permissions to bring a child born by a surrogate mother in Ukraine to Belgium, should do it in a timely manner; otherwise, a delay violates (among all) article 8 of the Convention, i.e. the right to privacy. During the proceedings, the abovementioned *European Centre for Law and Justice* has submitted *amicus curiae* opinion, raising the argument that a "surrogate pregnancy was contrary to human dignity for both the surrogate mother and the child, and that the practice should be prohibited in all the member States of the Council of Europe". Furthermore the organisation claimed that the applicants themselves created the situation they complained about, so their complaint should be treated as violating article 17 of the Convention. The first observation seems to fit perfectly into the scope of application of the indicated provision – there is a reasonable basis to claim that surrogate motherhood is opposite to the values on which the Convention was established. Eventually, the Court did not share this view directly; however, it decided the case contrary to claimants' interests, indicating that the lawsuit was manifestly ill-founded.

It is apparent that complaints brought for strategic purposes attempt to exercise rights (already recognised by the courts, or these that are to be created as a result of litigation) against good customs, moral rules, or good faith. These criteria can play an important role on the domestic level of a legal dispute, during the course of evaluating the substantive law basis of the complaint. Noteworthy is the fact that one of the features of abusive conduct is that it does not take into account the interests of others, or rules other than the one recalled as the basis of a lawsuit. There are numerous examples of such practice. The biased interpretation of rights indicated by claimants can lead to absurd results, i.e. deriving the right to death from the right to (worthy) life, the right to have an abortion from procedural guaranties, or the right to have a child from the right to privacy.[77] The prohibition of the abuse of rights aims at balancing conflicting interests or principles; it helps to avoid the extremist understanding of legal provisions. When it comes to substantive law, it is its mission in the area of strategic litigations.

Chances to apply the argument of the abuse of law to the area of procedural law are even more promising. Especially two criteria from those enumerated by Julio Cueto-Rua can play a significant role here. These are the following: 1) exercising a right without any legitimate or serious interest and 2) exercising a right contrary to the aims for which the right was designed for. Comparing these criteria with purposes assumed by strategic litigators leads to the conclusion that many proceedings initiated for purely strategic reasons can be treated as abusive, because they do not serve the primary goal of the proceedings. Attempts to create new rights, clarify the meaning of legal provisions,

75 *Equinet Handbook on Strategic Litigation*, p. 31.

76 Application no. 29167/13; the decision on the inadmissibility of the application issued on 8.7.2014.

77 To recall only a few examples of remarkable revaluations made recently. Obviously, I am using the term "right" in its colloquial meaning – as a possibility to do something, not in the strict legal sense. See cases: *Tysiąc v. Poland* (application no. 5410/03, judgement of ECHR delivered on 20 March 2007); *Mennesson v. France* (application no. 65192/11, judgement of ECHR delivered on 26 June 2014).

examine a current social or political approach to a certain problem are examples of such conduct. These purposes – frequent in strategic litigations – go far beyond the primary aims of legal proceedings, and, in conjunction with the fact that achieving some of them does not even require winning the trial, demonstrate that the right to a fair trial or the right to complain could be misused in such cases.

Notwithstanding, the practical application of this notion could be difficult. It would not be easy to prove that a legal case was set up not for the reasons declared by its authors. To understand the real intentions of a given motion, the announcements concerning the enrolment of the "friendly victims" could be helpful. They often reveal primary objectives of the NGOs setting up the whole litigation. Also, due to fact that they expressly admit that it is necessary to recruit more than one applicant because the NGO's and claimants' goals can vary.[78] The latter circumstance draws our attention to the next problem – who is, in such proceedings, its real trustee and decision-maker. An actual example of the doubts concerning this question is the case of the so called "Lodz printer", cited above.[79] The public prosecutor and the defender of the accused in their appeals asked whether the legal person for whom the "real victim" of the accused – natural person – served as a volunteer, could be recognised as the victim in the proceedings.

Naturally, the examining of the question of the "real claimant" can be difficult, but it is not impossible. It is worth recalling the practice of informing the trial parties that they can resign from the legal service of the lawyers, who tend to demand disproportionate salaries in compensation cases, due to irregularities in this area in Polish courts. After it has been demonstrated that legal offices representing claimants in such cases reserve sometimes more than 30% of the whole amount obtained as a result of the trial, judges often decide to announce this fact to the public prosecutor. This example indicates that courts *ex officio*, but also as a result of an action of the party to the proceedings, can investigate the relation between a claimant and their supporters. The effects of such an inquiry can bear certain consequences, for example, as far as the motion's admissibility is concerned.

One should bear in mind that the procedural provisions of domestic and international bodies provide us with numerous measures that directly pertain to the institution of the abuse of law, or indirectly refer to the abovementioned criteria singled out by Julio Cueto-Rua. The measures often allow challenging strategic complaints already in the first phase of a litigation. The rules of proceedings before the European Court of Human Rights are a perfect example of such opportunities. The criteria of admissibility of an application are really comprehensive and create a dense structure of positive and negative requirements – also based on merits of a given case – that have to be fulfilled prior to the application`s submission.[80] It is worth pointing out that one of the first instances when the newest admissibility criterion was employed – "lack of significant disadvantage" – took place before the ECHR in the case concerning neighbours' dispute,[81] which brings to mind the origins of the idea of the abuse of law.

4. *Further reservations*

In the first part of the paper I referred to doubts concerning strategic litigation and its relations with the principle of the division of powers. The proponents of the concept – which is easily recognisable – tend

78 We have to bear in mind, however, that legal provisions very often expressly foresee the participation of NGOs in legal proceedings. Sometimes this participation is restricted to the situation connected with the social or common interest. The question whether the NGO is going to support the general or particular interest should be raised. About strategic litigation`s opportunities of NGOs in Polish law see: J. A. Rybczyńska, M. Płoska-Pecio, *Działania prawne w interesie publicznym (litygacja strategiczna) jako forma działania organizacji ochrony praw człowieka*, "Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia Sectio K" vol. 12/2005, p. 99–115.

79 See the judgement of the Łódź District Court delivered on 26 May 2017, V Ka 557/17; more information about the case in the paper is indicated in footnote no. 42.

80 See *European Court of Human Rights Practical Guide on Admissibility Criteria*, Strasbourg 2018, accessible: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (last accessed 11.6.2019).

81 Dafče Jancev against the former Yugoslav Republic of Macedonia, ECHR First Section Decision on inadmissibility delivered on 4 October 2011, application no. 18716/09.

to promote judiciary power at the expense of other powers. It is also not a secret that strategic litigations rely on the particular approach to the profession of the judge, known as judicial activism. The controversy between the doctrine of judicial restraint (passivism) and judicial activism has a long history, and arguments of both sides are very well established. Let me, however, give a reminder of the reasons put forward by the opponents of judicial activism. The arguments are deeply connected with the aforementioned issue of the division of powers.

seems to be particularly convincing, as this institution is exclusively designed to bring social change, that is – implicitly – against the will of the majority of society. Therefore, the undemocratic character of the way in which courts, as subjects deprived of democratic legitimacy, affect the shape of legal provisions, is strengthened by the fact that cases being examined are targeted to cause counter-democratic (or at least counter-majority) effects. What is more, due to the specific strategies applied by litigators, it is hard to prove that things are as described above. Litigators

The proponents of the concept – which is easily recognisable – tend to promote judiciary power at the expense of other powers.

Most commonly, scholars condemning judicial activism claim that courts do not have sufficient democratic legitimization to make laws. (This argument is of course less valid for common law countries). Furthermore, courts lack the appropriate measures to enforce their decisions. Thirdly, courts do not bear responsibility for their decisions – the democratic mechanism allowing changing the decision-maker in the event of their incompetence does not apply here; on the contrary: the judges are irremovable.[82] All these reservations are accurate when it comes to the problem of strategic litigation; however it is the first argument concerning the lack of democratic legitimacy[83] that may for example use a "step-by-step" strategy, which makes it difficult to recognise current social attitudes to a given problem, or even prevents from conducting any comparative research. The following situation may illustrate the problem here: if we were to ask citizens whether it should be legal to pay a strange woman living in a poor country to give birth to a child for another women who pays for it and who would be considered as a mother, it would certainly meet with a social backlash. Strategic litigators do not even attempt to ask such a question, as they are rather inclined to frame the question (and legal problem) in other way, asking different questions instead, such as: should the recognition of personal data documents of a child born abroad be allowed when a child lives with its legal parents? Such an approach is a way to conceal the real – easily foreseeable – intentions of strategic litigators from the court or public opinion. For the opponents of strategic litigations, the application of the slippery slope argument seems to be almost natural – the next step would be to legalise surrogacy in the domestic legal system. However, for a court, sometimes faced with drastic circumstances of a case, it is not as easy. This example – modeled on the *Mennesson v. France*

82 See L. Morawski, *Legal policy and courts*, [in:] *Politics of Law and Legal Policy. Between Modern and Post-Modern Jurisprudence*, ed. T. Biernat, M. Zirk-Sadowski, Warszawa 2008, p. 186–187. It is noteworthy that the third reason could be perceived as well as an argument in favour of judicial law-making; guaranties provided for judges who protect them against undue impacts or sheer opportunism.

83 See H. Duffy, *Strategic Human Rights Litigation*, p. 2. "Lack of democratic legitimacy" is, of course, a simplification – courts share indirect democratic legitimacy, because it is accepted that they have the right to resolve cases; the problem concerns their right to create law.

case – shows that the counter-democratic effects of strategic litigations are an actual threat.[84]

There are two aspects left, which in my opinion deepen the problem of the counter-democratic character of strategic litigations. First of all, strategic litigations are not necessarily based on actual social needs. NGOs, often dependent on foreign financial support, select areas, specific problems and finally cases, which are worthy of their attention, rather than provide support for those in need. Of course, such an attitude results from the main value of strategic litigations – their efficiency. What could undermine the NGOs' efficiency is the fragmentation of support instead of the focus on one predetermined issue; however, there is still the problem of non-democratic consequences. Secondly, apart from the problem of who is the administrator of a lawsuit, strategic litigations usually represent only particular interests. If a court reckons with the side-effects of its decision, an economic or social result seem to be one cause of concern for strategic litigators. They are more inclined to focus on one targeted aspect of the issue in question, than on the analysis of other aspects of the problem, which is the primary duty of the legislator. This feature of strategic litigation has the potential of feeding social tensions due to the win-or-lose character of court disputes.[85]

What could undermine the NGOs' efficiency is the fragmentation of support instead of the focus on one predetermined issue; however, there is still the problem of non-democratic consequences.

The last observation links with notions that are more philosophical than legal. To conclude this part of the paper I should make an attempt at presenting that it is possible to construct a plausible philosophical critique of strategic litigations from both leftist and conservative positions. In order to illustrate the former, I should refer to the famous distinction between instrumental and communicative rationality. In brief, the concept, developed by Jürgen Habermas, assumes that social activity can take two forms: 1) target-oriented and governed by technical principles (instrumental rationality), 2) aimed at achieving a consensus, building social bonds (communicative rationality).[86] Bearing in mind the probable conflicting results of strategic litigation and also the language applied by their proponents ("strategy" as a part of the naming of the whole concept), it is clear that instrumental rationality better reflects the character of the institution under study. It stands at odds with the concept of the "social change" advocated by strategic litigators.

84 French law directly prohibited the conclusion of surrogate motherhood agreements when the case was examined; see Ł. Mirocha, *„Macierzyństwo zastępcze" w aktualnym orzecznictwie Europejskiego Trybunału Praw Człowieka*, p. 170 and following.

85 Such a critique of rights-based liberalism and the significant role of the courts that stems from it is for example provided by John Gray (see B. Polanowska-Sygulska, *John Gray i krytyka liberalnego legalizmu*, Kraków 2017, p. 175 and following, especially 202). Of course, we can argue with that vision of the courts' role, especially when it comes to the activity of international bodies, which – pursuant to legal acts governing their activity – have to take into account such values as (e.g.): public safety, public order, morals, rights and freedoms of others (see articles 8–11 of the European Convention on Human Rights).

86 About the leftist brand of J. Habermas and briefly on the commented difference: R. Scruton, *Głupcy, oszuści i podżegacze. Myśliciele nowej lewicy*, transl. F. Filipowski, Poznań 2018, p. 219 and following.

The second critical approach – the conservative one – refers to the division between internal goods and external goods of the analysed practices. The concept was developed by Alasdair MacIntyre, a communitarian thinker, but is deeply inspired by the Aristotelian virtue ethics. The essential idea behind this differentiation is that each social practice can be associated with the following: 1) goods that define it, single out the practice from among other practices (internal goods); and: 2) goods that are being subject to a competition and lead to the instrumental use of the practice (external ones). What can be seen as the internal goods of lawyering is the polishing of skills and knowledge in the field of law, or providing people with help to resolve their legal disputes. These goods became common, available for community members; they are characteristic for lawyering as a practice. Pursuant to this point of view, in the case of lawyering, money earned by a lawyer could be considered as external goods.[87] When we apply these observations into the problem of strategic litigations, we can infer that this sort of litigation is focused on the external goods of the analysed practice – strategic litigators pursue aims that are not necessarily tied to the practice of litigating.

5. Conclusions

The paper attempted to analyse the possible results of the encounter of two institutions, stemming from different legal cultures: strategic litigation (brought from the common law system, with its judicial law-making) and the prohibition of the abuse of law (the origins of which date back to the classic civil law regulations).

It cannot be denied that strategic litigation has brought many positive legal and social changes; however, the concept and its implementation are, in my opinion, particularly vulnerable to the risk of misuse of rights. It is hard to resist the impression that strategic litigation, with its rush towards changing established social attitudes or traditions, could be one of the factors accountable for the currently observable backlash against international courts.[88] Many countries, protecting their societies' right to self-determination, under the influence of unwanted changes, tend to assert that human rights treaties were not designed to transfer the legislative process from the state`s capital cities to international courts. Recent reforms of the European Court of Human Rights,[89] underlining the value of the subsidiarity principle and limiting the right to individual application in some way, reflect this kind of resistance. As a result, ordinary people struggling with problems, to which the solution could be found before international bodies, can lose valuable opportunities in fighting for their rights, due to, e.g., someone`s desire to buy a child in a foreign country.

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87 See A. MacIntyre, *Dziedzictwo cnoty: studium z teorii moralności*, transl. A. Chmielewski and others, Warszawa 2007, p. 339.

88 See M. Rask Madsen, P. Cebulak, M. Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, "International Journal of Law in Context" vol. 14.2/2018; *Strategic Litigation Impacts. Insights from Global Experience*, p. 42.

89 See additional protocols no. 14 and 15.

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A Troubling Trio of Family Law Issues: Contributions from Comparative Law

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Marriage, Children, and Family: Modern Challenges and Comparative Law Perspective[1] is a timely collection of essays commissioned by the Center for Family Research at the Nicolaus Copernicus University in Toruń (Poland) as well as part of the work of the Institute of Justice of Warsaw. The authors, all experts with international reputations for their contributions to family law development, explore three discrete topics: the nature of marriage, sexualization of children, and involuntary commitment for addiction. While not obvious at first, these topics relate deeply to each other and to public policies promoting a healthy civil society.

Marriage has long been understood to be the foundation for creation of healthy families, and family is "the natural and fundamental group unit of society."[2] Virtually all societies throughout history have recognized marriage as the social structure in which childbearing is both approved and expected.[3] When marriage falters,

1 G. Blicharz (red.), *Marriage, Children, and Family: Modern Challenges and Comparative Law Perspective*, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, Warszawa 2019.

2 Universal Declaration of Human Rights, Art. 16 (1948). *See also* Pontifical Council for Justice and Peace, The Compendium of the Social Teaching of the Church, § 211 (2004) ("The family, in fact, is born of the intimate communion of life and love founded on the marriage between one man and one woman. It possesses its own specific and original social dimension, in that it is the principal place of interpersonal relationships, the first and vital cell of society."), and Constitution of RP, Chapter I „Rzeczypospolita" art. 18, 1997.

3 S. Girgis, R. T. Anderson, R. P. George, *What is Marriage? Man and Woman: A Defense*, Encounter Books, 2012, p. 38.; J. Corvino, M. Gallagher, *Debating Same Sex Marriage*, Oxford University Press, Oxford 2012, p. 96; A. Wax, *The Family Law Doctrine of*

family formation is stymied or warped.[4] When marriages fail to form (or fail after being formed), children often lose the protection of their biological parents and become more vulnerable to sexual assault[5] and premature sexual debut.[6] The plague of substance abuse and addiction is but one cause of such failure, and can destroy the family[7] or threaten grave harm to its members.[8]

Marriage, Children, and Family is rich in addressing these issues. Foreign authors provide clear and readable commentary on the state of their own domestic law, allowing readers to compare both jurisprudential and technical differences in national treatment of difficult family law issues. Polish contributors provide careful analysis of the law and often provide specific suggestions for legislative reforms. Overall the book is a valuable contribution to all who care about Polish law and public policy.

The authors explore three discrete topics: the nature of marriage, sexualization of children, and involuntary commitment for addiction.

1. *Marriage and Conflict-Solving Measures*

Part I of the book is devoted to the nature of marriage and the role of the law in identifying relationships encompassed within the legal definition of that relationship. Individual chapters summarize the current state of the law in the United States and Poland while identifying some of the ongoing debates or challenges in each country. Two additional chapters explore the nature of domestic violence in the United States and

Equivalence, „Michigan Law Review" 2009, vol. 107, issue 6, pp. 999–1017.

4 D. Svyrydenko, D. Tułowiecki, *Family Policy of the State as a Response to Social Security Threats*, „Future Human Image" 2018, vol. 10, pp. 92–102, https://www.ceeol.com/search/article-detail?id=730295; M. Such-Pyrgiel, *Legal Changes Against the Family and Single People in Twenty First Century in Poland*, „Annales Univeristatis Apulensis. Series Jurisprudentia" 2014, vol. 17, pp. 148–156, https://www.researchgate.net/publication/328956687_LEGAL_CHANGES_AGAINST_THE_FAMILY_AND_SINGLE_PEOPLE_IN_TWENTY_FIRST_CENTURY_IN_POLAND; A. Å. Kastbom, G. Sydsjö, M. Bladh, G. Priebe, C. G. Svedin, *Differences in sexual behavior, health, and history of child abuse among students who had and had not engaged in sexual activity by the age of 18 years: a cross sectional study*, „Adolescent Health, Medicine and Therapeutics 2016, vol. 7, pp. 1–11.

5 "Compared to the control group, the girls with suicidal behaviors and the girls with violent behaviors were more likely to come from reconstructed families (pseudo-R2 Nagelkerke = 0.21; p = 0.00) and to have experienced divorce/separation of their parents (pseudo-R2 Nagelkerke = 0.06; $p < 0.05$) or consequent absence – physical and/or emotional, of the biological father (pseudo-R2 Nagelkerke = 0.06; $p < 0.05$).", K. Sitnik-Warchulska, B. Izydorczyk, *Family Patterns and Suicidal and Violent Behavior among Adolescent Girls – Genogram Analysis*, „International Journal of Environmental Research and Public Health" 2018, vol. 15, issue 9, pp. 1–16.

6 A. Å. Kastbom, G. Sydsjö, M. Bladh, G. Priebe, C. G. Svedin, *Differences in sexual behavior...*, pp. 1–16; A. Å. Kastbom, G. Sydsjö, M. Bladh, G. Priebe, C. G. Svedin, *Sexual debut before the age of 14 leads to poorer psychosocial health and risky behaviour in later life*, „Acta Paediatrica" 2015, vol. 104, issue 1, pp. 91–100.

7 Addiction is considered a reasonable basis for divorce by 77% of Poles. D. Tułowiecki, *Family as a Value in Contemporary Polish Society. Principles of the Christian Family in the Modern World. The 30th anniversary of the „Familiaris Consortio"*, red. Z. Struzik, Warszawa 2012, pp. 177–213.

8 *See* K. Sitnik-Warchulska, B. Izydorczyk, *Family Patterns and Suicidal...*; J. Heitzman, M. Lew-Starowicz, M Pacholski, Z. Lew-Starowicz, *Children Sexual Abuse in Poland – 257 Sexual Offenders against Minors*, „Psychiatria Polska" 2014, vol. 48, issue 1, pp. 105–120 (reporting almost 30% were of surveyed sex offenders were under influence of alcohol or another substance during the crime).

Poland, while arguing that a proper understanding of marriage can contribute to substantial declines in such violence.

1.1. The American Experience in Redefining Marriage

In *Judges Rewrite History and Law to Redefine Marriage*, Professor Helen Alvare provides a brief legal history of the definition of marriage in the United States from the country's founding in 1776 through the U.S. Supreme Court's redefinition of marriage in its 2014 opinion, *Obergefell v. Hodge*.[9] For more than 200 years, the American people and courts accepted the legal definition of marriage as the union of one man and one woman. This consensus was so strong in 1879 that a unanimous Supreme Court rejected a claim that the practice of polygamy was constitutionally protected under the First Amendment's free exercise of religion clause. The Court rejected the claim based on its perception that polygamy, as a family structure, would undermine American constitutional norms of democratic governance.[10]

It was not until the 1990s that the American consensus began unraveling, largely through litigants' attempts to redefine marriage through the courts, rather than through the democratic process.[11] The challenges were couched in constitutional language with claims that the historic and natural definition of marriage violated either equal protection because same-sex couples provided most, if not all, of the same public goods of married couples – stabilization of sexual relationships, mutual support, and nurturing of children. While natural procreation remains impossible in same-sex unions, these couples argued that they were in no different position that other adoptive or step-parents in providing healthy and secure homes to children created through natural or artificial means. A second constitutional challenge was grounded in claims that exclusion of such couples from the state's definition of marriage violated substantive due process.[12]

> **When marriage falters, family formation is stymied or warped.**

Unlike the Polish Constitution, the United States Constitution has no express protections for marriage, parents, or families. At the time of its adoption in 1788, the national constitution was seen primarily as a compact among sovereign and independent states for the purpose of defining and allocating powers between the national and state governments.[13] Notwithstanding the debate and passage of a national bill of rights in 1791, individual rights such as speech, religious liberty, and due process were understood to be primarily the concern of state constitutions.[14] Marriage, parentage, and family has little role in these discussions as

9 576 U.S. ___, 135 S.Ct. 2584 (2015).

10 Reynolds v. United States, 98 U.S. 145 (1878).

11 H. Alvare, *Judges Rewrite History and Law to Redefine Marriage*, (w:) red. G. Blicharz, *Marriage, Children and Family: Modern Challenges and Comparative Law Perspective*, Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2019, pp. 13–32.

12 H. Alvare, *Judges Rewrite History…*, pp. 17–18.

13 See generally J. S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, Oxford University Press, Oxford 2018.

14 The original thirteen states were constitutional entities before the adoption of the federal constitution in 1787. Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia all enacted constitutions in 1776. Georgia and New York wrote constitutions the following year, 1777. Massachusetts adopted its constitution in 1780. Only Connecticut and Rhode Island continued to function under their colonial charters until they replaced them with constitutions in 1818 and 1842 respectively.

evidenced by their absence from state constitutions predating the federal constitution.

It was only with the emergence of the practice of polygamy in the mid-1800s in the United States that the definition of marriage became a matter of constitutional concern. As noted by Professor Alvare, the U.S. Supreme Court rejected the practice in *Reynolds v. United States*,[15] observing, "there never has been a time in any State of the Union when polygamy has not been an offence against society." A few years later in *Murphy v. Ramsey*, the Court noted that "certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony…"[16] That opinion largely concluded the legal debate for the next century in the United States.

One hundred years later a new challenge emerged seeking to redefine marriage as the public union of any two adults. In the face of that challenge state after state recommitted itself to the historic definition of marriage as the union of one man and one woman. "Between 2003 and 2012, over 30 U.S. states passed laws defining marriage as the union of one man and one woman; and refusing to recognize as a "marriage" a same-sex marriage contracted in another state." Ultimately, however, the challengers prevailed, not by political persuasion but by judicial mandate when the Supreme Court, in the guise of constitutional interpretation, imposed a new gender-free definition of marriage on all fifty states.

While this history provides insight into one path to redefining marriage, given the differences in the constitutions of Poland and the United States, Polish readers may be more interested in Professor Alvare's description of the consequences of the Court's redefinition of marriage. Clashes over the religious liberty of citizens who continue to adhere to the historic definition of marriage, and government confusion over the rights of children to know and be raised by their biological parents are just two of the damaging conflicts that have emerged from the U.S. Supreme Court's overruling of the political process.[17]

Unlike the Polish Constitution, the United States Constitution has no express protections for marriage, parents, or families.

The religious liberty questions raised by redefining marriage are serious and severe. Yet as Professor Alvare notes, a recent U.S. Supreme Court decision, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[18] largely sidesteps these questions,[19] instead focusing on the unconstitutionality of anti-religious bias by government officials administering anti-discrimination laws. While a valuable win for Christians and others who are deliberately targeted for their religious beliefs, the opinion leaves open the question of whether neutral enforcement of laws that require participation in same-sex ceremonies by all wedding vendors is con-

15 98 U.S. 145, 165 (1879).

16 114 U.S. 15, 45 (1885).

17 Professor Alvare provides a greatly expanded version of her arguments in her new book H. Alvare, *Putting Children's Interests First in US Family Law and Policy: With Power Comes Responsibility*, Cambridge University Press, Cambridge 2017, https://www.cambridge.org/core/books/putting-childrens-interests-first-in-us-family-law-and-policy/8F8E7BDE74E7C7E43645A55DC83F05BE#fndtn-information.

18 138 S. Ct. 1719 (2018).

19 H. Alvare, *Judges Rewrite History…*, p. 24.

stitutionally permissible. Such mandated participation is particularly troubling given a recent South African court mandating recognition of same-sex unions for ordination purposes by the Dutch Reform Church.[20]

1.2. Polish Legal Recognition of Marriage

Protection of the Institution of Marriage as a Union of a Woman and a Man by Dr. Tomasz Barszcz follows Professor Alvare's chapter with a thorough textual analysis of Polish law defining marriage. His treatment of the domestic constitution and international agreements of Poland will be invaluable to those seeking to understand why the American experience need not foreshadow the outcome of the present Polish debate on the nature and definition of marriage. He observes that the intent of existing legal provisions are clear, but provides concrete suggestions for avoiding any claims of ambiguity by proponents of polygamy and same-sex unions. Polish legislators and government officials charged with implementing and defending the law will gain a detailed understanding of how each word in the statutory scheme contributes to the conclusion that legal recognition of marriage is, and should remain, limited to only the union of one man and one woman.

1.3. Communal Value of Traditional Marriage

The discussion of the nature and definition of marriage is rounded out by Aude Mirkovic's chapter, *The Social Dimension of Marriage We Should Discover Again*. She recognizes the social necessity of an institution that promotes the creation and nurturing of children by their biological parents. Professor Alvare makes this point in her analysis of U.S. definition of marriage, but Dr. Mirkovic dives more deeply into the reasons for rewarding opposite-sex couples who undertake the public obligations of marriage.

She notes that, unlike same-sex couples, only the sexual union of a man and a woman can result in the creation of a new human being. From the moment of creation, each human being is vulnerable and needs the support and protection of others. During pregnancy, the mother shelters and nourishes the child within her body, often rendering herself physically or economically vulnerable during this period of intense dependency. The dual dependency of mother and child imposes responsibilities on the man who fathered the child, and marriage has emerged as the social structure to ensure men fulfill this responsibilities.[21]

Marriage recognizes and privileges stable long-term sexual unions between men and women who publicly commit to undertake the important work of forming a family through the creation and care of children. Property and inheritance rights, favorable tax treatment, and joint decisional authority over issues of mutual support and the care of offspring are just some of the ways societies have honored marriage over other social arrangements or sexual liaisons. Yet these privileges are quickly fading as governments increasingly fail to provide distinctive benefits to married couples.

In concluding his chapter, Dr. Mirkovic urges lawmakers to resist efforts to reduce marriage to that of other domestic arrangements. She warns that the well-being of children, their parents, and ultimately the larger society is undermined when marriage is treated as having no greater social utility than that of roommates or same-sex couples.

1.4. Prevention of Domestic Violence

Part I of *Marriage, Children, and Family* concludes with two articles addressing domestic violence and its relationship to marriage. Professor Helen Alvare provides a depressing, but useful, summary of the nature and extent of domestic violence in the United States. Based on government statistics, surveys, and expert analysis, she notes that women who cohabitate are far more likely to suffer abuse than married women. An underlying theme of the chapter is the state's limited capacity to provide meaningful remedies to all victims of domestic violence, but particularly those involved in non-marital relationship. Sadly, this capacity is even further diminished when society ignores the real differences existing between men and women, and instead substitutes a false quality based on the myth of sameness. Marriage, properly understood, has its foundation in commitment and care of others,

20 Gaum and Others v Van Rensburg NO and Others (40819/17) [2019] ZAGPPHC 52; [2019] 2 All SA 722 (GP) (8 March 2019) at http://www.saflii.org/za/cases/ZAGPPHC/2019/52.html.

21 S. Girgis, R. T. Anderson, R. P. George, *What is Marriage?…*

which in turn encourages collaboration in the place of conflict. This fact alone should induce government officials to promote marriage as the safest and best living situation for women and their children.

Dr. Tomasz Barszcz opens the final chapter of Part I with the provocative question, "what are the legal remedies that can be used to end violence in marriage without destroying it?" He provides the same sort of careful textual analysis of Polish laws governing domestic violence within marriage as he provided in his earlier chapter on laws defining marriage. In this case, however, he identifies several troubling gaps and ambiguities in the law. Among the most disturbing are the differences in the remedies available to wives seeking protection through civil law and those available to women who resort to the criminal law for help. His analysis suggests almost a perverse incentive to resort to criminal law using the full coercive power of the state, instead of seeking protection under the civil law with its greater flexibility to accommodate individualized solutions. He also carefully notes the some of the barriers to practical implementation of the law's promises for assistance in obtaining shelter and counsel during periods of estrangement and danger. Again, this chapter should be mandatory reading for legislators and government offices involved in reform and enforcement of these laws.

My only disappointment with Dr. Barszcz's chapter is that he never effectively answers his opening question. No doubt, this is due to his careful attention and analysis to the detailed statutory scheme governing domestic violence, but I remain disappointed. I am skeptical that positive law can simultaneously protect husbands and wives from spousal violence, and provide the sort of moral and psychological guidance that leads to authentic reform and restoration of the couple's relationship. That said, I look forward to reading future articles by Dr. Barszcz addressing whether law can end violence in marriage without destroying the marital relationship.

2. *Unwanted Sexualization of Children*

Part II of *Marriage, Children, and Family* examines the problem of unwanted sexualization of children, the harms that accompany such sexualization, and the challenges of legally deterring practices creating the problem. Authors examine legal attempts by the United States, Great Britain, Australia, Hungary and Poland to eliminate, or severely limit, such practices. Comparing these legal structures provides readers with some insights into the strengths and weaknesses of each nation's approach.

Lawmakers should carefully note the brief section, Sexual Materials in Schools, since instruction in "preparation for family life" is a required part of the national curriculum in Poland.

Professor Alvare opens Part II with a detailed review of United States laws aimed at regulating the portrayal of sex by, with, or to minors. Communal responses to sexual imagery and activities related to children range from treatment as sexual abuse and trafficking of a child to commercial rewards for production of apparel intended to emphasize the sexual potential of children and teens. The chapter provides a valuable history of the law's evolution, as well as developments driven by changing technology and social mores.[22]

22 Readers interested in somewhat dated, but excellent historical analysis of U.S. laws regulating sexual conduct will enjoy R. E. Rodes, *On Law and Chastity*, „Notre Dame Law Review" 2001, vol. 76, issue 2, pp. 643–740, https://scholarship.law.nd.edu/law_faculty_scholarship/240.

Lawmakers should carefully note the brief section, Sexual Materials in Schools, since instruction in "preparation for family life" is a required part of the national curriculum in Poland.[23] Similar to the U.S. experience,[24] the Polish requirement initially was introduced "to educate young people about the anatomical and biological concepts of sexual life, as well as issues related to parenthood and family."[25] Activists, both domestically and internationally, have urged expanding the curriculum to include new definitions of family and questionable claims of healthy sexual conduct.[26] Typically introduced as "comprehensive sexuality education," proponents claim that such curricular changes will reduce sexually transmitted infections, teen pregnancies, and violence against girls and women. Yet empirical evidence supporting these claims is conflicting, and should be critically examined prior to implementing curricular changes.[27]

For legislators and policy makers Professor Alvare's chapter provides a treasure trove of ideas about the various motivations and means that drive the sexualization of children in, as well as the U.S. government's wide-ranging, yet only modestly successful, attempts to protect children.

> Research from the American Psychological Association informs us that girls who internalize the messages of the hypersexualized pop culture tend to have more depression, anxiety, lower self-esteem, eating disorders, and risky sexual behavior. Moreover, girls are more at risk for rape, battery, and being trafficked in a society where pornography is normalized. While girls are not the major consumers of pornography, they suffer the consequences because they engage in sexual relationships with boys and men who have had their sexual templates shaped by mainstream online violent pornography.[28]

Ksenia Bakina's chapter presents an in-depth discuss of pornography's sexualizing effects on children, and attempts by the United Kingdom to limit access in the internet age. Acknowledging from the outset that pornography is not the sole, or perhaps even the primary means of sexualizing children, Ms. Bakina briefly describes "the 'pornification' of the UK culture and the encroachment of pornography in many spheres of everyday life." Gone are the days of licensed sex shops and topless females appearing weekly in a national tabloid. Today regulators are dealing with pervasive access to pornography via computers – whether desktop, laptop, tablet, or cell phone. The author reports that by the age of nine, 52 per cent of British children have a mobile phone by the age or 15 the number rises to 95%. Contradictory evidence of parents' ability to effectively police access by their children leave public officials discouraged and unwilling to rely exclusively on parental supervision – and parents' do not want to be primarily responsible either.

This has led to legislative focus on the distributors of pornographic material. What will probably interest the reader most is Ms. Bakina's description of the age verification requirements for access to online video and pornography. Such a requirement would seem to be largely innocuous, and consistent with good

23 Regulation of the Minister of National Education from February 17th 2012, Dz.U. 2012 poz. 300.

24 A brief history of American family life education as well as examples of objectionable content are contained in T. S. Collett, *Government Schools, Parental Rights, and the Perversion of Catholic Morality*, „Journal of Markets & Morality" 2018, vol. 21, issue 1, pp. 95–115; University of St. Thomas (Minnesota) Legal Studies Research Paper No. 18–03, https://ssrn.com/abstract=3112784.

25 M. Woźniak, *Sexuality education in Polish schools*, „Przegląd Socjologiczny" 2015, vol. 64,issue 1, pp. 121–135.

26 Two examples of materials prepared by activists are the Universal Declaration of Sexual Rights, a product of International Planned Parenthood Federation, and the Yogakarta Principles, prepared at an international gathering of academics. These documents, often cited as authoritative, have no legal standing. See UN Commission on Human Refugees at https://www.refworld.org/docid/48244e602.html.

27 S. Gennarini, M. Orlandi, R. Oas, *Seven Reasons to Reject „Comprehensive Sexuality Education"*, https://c-fam.org/briefing_paper/seven-reasons-reject-comprehensive-sexuality-education.

28 G. Dines, *Growing Up With Porn: The Development and Societal Impact of Pornography on Children*, „Dignity: A Journal on Sexual Exploitation and Violence" 2017, vol. 2, issue 3, pp. 1–9, https://digitalcommons.uri.edu/dignity/vol2/iss3/3.

business practices to ensure payment since the most common way to purchase access to pornography is through credit cards. Nevertheless, privacy experts are concerned that to prove legal compliance distributors would maintain records of identifying information. The chapter provides two tragic examples of unscrupulous people obtaining access to such records and blackmailing those identified. Critics also warn that the development of databases identifying sexual practices or preferences of citizens, if obtained by the government, could result in dystopian monitoring of the private lives of us all.

By the end of the chapter, I remain convinced that government has a role in protecting our young from pornography, but I confess to feeling unsettled and discouraged about law's ability to address what in the end may be more a matter of communal morality, than commercial activity.

In the third chapter of Part II Professor Filip Ciepły provides a thorough compendium of Polish criminal law protecting children from sexualization. He includes domestic statutes, annotations to cases and commentary explaining their proper interpretation, constitutional provisions, as well as international and regional agreements ratified by the Polish government. This compendium informs his brief comparison with British and Australian criminal laws on the same topic. The chapter concludes with specific suggestions for enhancing the protections afford by Polish law, as well as calling for the integration of provisions addressing sexual tourism. While perhaps too technical for the casual reader or lawyer practicing in other areas, this chapter will be of immense value to those charged with drafting and enforcing the law.

In chapter four László Detre introduces Hungarian law as a delicate balance between respecting constitutional protections of freedom of communication and protecting the freedom for minors from the negative effects of the unwanted sexualization. After introducing Hungarian cases applying the freedom of communication to varied means of communication, the author notes that public morality, which not specifically recognized in the Hungarian constitutional provision, is recognized in European Convention on Human Rights, and thus an integral part of Hungarian legal analysis.

Two key principles have emerged from cases dealing with sex-related communications: first, that prepublication censorship is strongly disfavored, subject only the strongest public justification; and second, that commercial communications or advertisements are provided a lower level of protection than other forms of communication. In 2010, the Hungarian Parliament enacted legislation to provide guidance to the press, the media, and advertisers regarding sexually motivated content. In each of these areas, the legislation relies for compliance upon the self-regulatory bodies of the media service providers, of the providers of complementary media services, of the publishers of press products, of the broadcasters and intermediary service providers. When self-regulation fails, the Media Council has regulatory authority to issue legally enforceable rulings. These rulings may include imposing a fine, requiring public notice of a transgression, or suspending operation for defined time. While not appealable within the council, the rulings are subject to judicial review.

Adam Szafrański provides the fifth and final chapter of Part II of the book. In concluding this section of the book Professor Szafrański provides a brief summary of Polish law on pornography in public spaces, then introduces the 2015 parliamentary draft resolution of 2015 calling on the Minister of Administration and Digitization to guarantee parents the right to the Internet free of pornography. The resolution was ultimately withdrawn due to a lack of enforceable regulations, but provides a starting point for lawmakers to begin addressing the distribution of pornography via internet.

While guardedly in favor of the regulation, Professor Szafrański notes the common concerns about censorship and regulation of extraterritorial activities by pornography distributors. He describes the British experience with parental controls, and the challenges to age-verification requirements. He appears confident that constitutional means of limiting minors' access to pornography exists given the state's interest in public morality and emerging evidence that access harms the mental and emotional health of minors, but warns than any restriction on rights of economic activity, speech, and privacy must be proportional to the harms suffered by children due to pornography.

3. Government Response to Addiction and Substance Abuse

Part III of *Marriage, Children, and Family* is both the shortest, comprised of only three chapters, each with substantial descriptions of the various procedures used in civil or criminal commitment. The use of government power to deal with the problems of addiction and substance abuse is challenging given current understanding of individual autonomy and personal responsibility (or culpability), as well as the legitimacy, limits, and dangers of government coercion in matters of medical and psychological treatment.

Krisztina Petra Gula examines commitment proceedings from the competing aims of retribution and deterrence inherent in criminal law, and restoration or restraint at the heart of compulsory medical treatment. Culpability for a crime is largely dependent upon the mental state of the perpetrator. In this chapter the reader is introduced into various European countries' definition of insanity and mental illness. Based upon their definition, each country adopts either the framework of criminal law, its substantive, procedural, and executive branch or the medical and administrative laws of the state in dealing with a mentally impaired person. The English, German, and Polish approaches are described and compared to each other and to Hungarian law. The author concludes that some overlap in the two models is inevitable, but all approaches must guarantee that treatment must be available, and that the duration of restraint within the medical model be consistently evaluated to avoid unjust indefinite imprisonment.

Dr hab. Joanna Długosz's contribution to Part III analizes Polish law dealing with involuntary treatment of drug and alcohol addiction through the lens of international and regional agreements, as well as comparing Polish law to the German and Austrian approach. Unlike the prior chapter, the analysis is strictly statutory with less consideration of the overall jurisprudential aims of various approaches. While Krisztina Petra Gula provides helpful background to the reasons for varying approaches, Dr Hab. Joanna Długosz gives both detailed procedural insights for litigation arising from Polish law, and concrete suggestions for Polish legislators.

Filip Ciepły authors the final chapter of the book. Professor Cieply provides a short history of compulsory therapy before setting out the constitutional and legal requirements of Polish law. He then provides an overview of compulsory treatment law in the United States, Great Britain, and Australia. His is description of the law is both thorough and readable.

This is a book to be read slowly and kept on the reference shelf for frequent reference by legislators and family law attorneys.

Based on his survey of history, the law and the scant evidence of the success through compulsory treatment, Dr. Cieply concludes:

> [I]t seems reasonable to return to the classic, personalistic concept of man as the basic assumption of social and legal institutions. The correction of disorders, improvement of behaviours or treatment of addictions on this basis cannot be guaranteed by means of legal instruments. Therapeutic and rehabilitative orientation of state coercion measures instrumentalizes and infantilizes the issue of liability in law and cannot be the basis for creating and applying the state coercion measures. No man should be treated as an object of interactions consisting in compulsory therapy or sociotechnical correction of character."

If readers read only one chapter in Part III of this book I would recommend Professor Cieply's chapter.

4. Conclusion

This is a book to be read slowly and kept on the reference shelf for frequent reference by legislators and family law attorneys. Each of the three parts provides chapters on foreign law as well as chapters providing clear summaries of existing Polish law. This mix of chapters offers the reader not only a sound grounding in Polish law, but insights into how other nations address common questions surround the nature of marriage, the unwanted sexualization of children, and compulsory treatment due to addiction. As with any collection individual readers will find some chapters more helpful or interesting that others, but each chapter will provide new ideas to those who spend the time with this collection.

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