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Rafał Mańko, The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunyacaixa (CJEU, 14 March 2013, Case C-415/11)

Abstract: The Court of Justice of the EU (CJEU) is well known for its preference for extra-legal legal arguments over intra-legal ones. Indeed, in the CJEU’s interpretive practice, as a rule, linguistic arguments give way to systemic and teleological ones, and the Court’s prevalent approach favours policy arguments (i.e. extra-legal ones) over linguistic interpretation (i.e. a paradigmatic form of the deployment intra-legal arguments). The object of this study is a single decision of the CJEU, namely its judgment of 14 March 2013 in Case Aziz v Catalunyacaixa (Case C-415/11) in scope of proportion and significance of extra-legal and intra-legal arguments.

Keywords: Court of Justice of the EU (CJEU), legal argumentation, unfair terms.

1. Introduction

The Court of Justice of the EU (CJEU) is well known for its preference for extra-legal legal arguments over intra-legal ones. Indeed, in the CJEU’s interpretive practice, as a rule, linguistic arguments give way to systemic and teleological ones, and the Court’s prevalent approach favours policy arguments (i.e. extra-legal ones) over linguistic interpretation (i.e. a paradigmatic form of the deployment intra-legal arguments). As such, it is praised by some
authors, who endorse this approach to legal interpretation, and criticised by others, who would prefer that the CJEU give precedence to strictly legal arguments, such as textualist, originalist and systemic ones, rather than teleological ones. The aim of this paper is not, however, to put forward a normative theory of interpretation for the CJEU or to subject its current practice to a critique. Rather, the paper aims at providing a closer analysis of how CJEU’s famously teleological reasoning actually works in practice in the specific field of contract law.

It should be noted here that for instance in Poland, private law adjudication is characterised by a high reverence to textual arguments, sometimes overridden by systemic arguments; however, teleological arguments – even if invoked by the Civil Chamber of the of Poland’s Supreme Court – rather do not have a decisive role. This perceived contrast between the methods of reasoning of the Polish Supreme Court and the CJEU makes is all the more worthwhile to study in-depth the approach of the latter in the field of private law.

The object of the case study undertaken in the present paper is a single decision of the CJEU, namely its judgment of 14 March 2013 in Case Aziz v Catalunyacaixa (Case C-415/11). The choice of a single case, rather than an overview of the entire case-law of the CJEU on contract law, follows not only from the limits imposed by the form of a journal article, but above all from the intent to illustrate the issue by a detailed case-study, in which the formulation of the CJEU’s decision can be subject to a close and attentive reading, amounting in fact to a theoretical exegesis.
The choice of Aziz as an exemplary judgment worth a case study is dictated by two reasons. First of all, it is a decision which interprets the Unfair Terms Directive (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts8 (‘the Directive’) – without doubt, one of the most important legal acts in the field of EU contract law as it touches upon the very substance of contractual agreements.9 In fact, the Directive controversially10 resorts to general clauses (such as ‘good faith’), and other open-ended terms (such as ‘significant imbalance’) in order to define when a contractual term is to be deemed unfair.11 The use of such a legislative technique is an explicit invitation towards taking into account extra-legal considerations in the process of the Directive’s interpretation.12

Secondly, out of some three dozen CJEU decisions interpreting the Unfair Terms Directive rendered so far, Aziz undoubtedly stands out for a number of reasons, regarding both its legal content and its socio-economic implications. On a legal plane, Aziz is the first CJEU decision on the Directive in which the Court decided to give a direct interpretation of the general clauses used in the directive – until Aziz, the Court had consequently abstained from doing so, leaving more discresional power to national courts.13 Furthermore, Aziz is definitely a law-making judgment,14 in which the Court introduces legal novelty praeter legem, going beyond a strict

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8 OJ L 95, p. 29-34.
12 Cfr. L. Leszczyński, Stosowanie generalnych klauzul odsyłających [The Application of General Referring Clauses] (Kraków: Zakamyczce, 2001), p. 71: ‘the law-maker can, through general clauses, refer to moral, political and economic criteria’ (emphasis added). See also ibid., p. 73: ‘A definitional feature of a referring clause is the directing of the attention of the subject applying the law to making axiological choices on the basis of criteria not determined clearly by the provisions of the legal system’ (emphasis added).
13 This line of case-law was began by CJEU judgment of 1.4.2004 in Case C-237/02 Freiburger Kommunalbauten v Hofstetter, ECLI:EU:C:2004:209.
interpretation of the very wording. In doing so, Aziz is not, of course, the first CJEU judgment on the Directive of this kind (the very first one – Océano – inaugurating a line of praeter legem case law).

Furthermore, Aziz was rendered in a specific socio-economic context of the on-going economic crisis and the agonism dividing banks and consumers. This agonism has become particularly acute in such countries as Spain (from where the Aziz case originates), leading to a large number of home evictions. Mr Aziz, the plaintiff in the Aziz v Catalunyacaixa case, was one of the victims of this shameful phenomenon, and the CJEU took his side in his “David vs. Goliath” style struggle with the powerful bank. As Sara Iglesias Sánchez points out:

‘the most salient element of the [Aziz judgment] lies in the particular socio-economic context (...): the preliminary reference, introduced [by the Spanish court] in 2010, was answered at a time of considerable social and political debate on the overall system of mortgage enforcement proceedings in Spain, in the context of a severe economic and financial crisis. (...) [T]he Court’s decision has had a profound effect with regard to an urgent and dramatic social problem, (...) The factual background and, particularly, the economic situation of the debtor and the terms of the mortgage loan agreement, make this case a paradigmatic example of the situation of thousands of families in Spain. (...) [T]he seriousness of the economic situation in which the effects of this judgment apply has endowed it with an immense social impact (...).’

All these reasons definitely make Aziz v Catalunyacaixa a good sample for a case study.

However, methodologically the approach based on an in-depth study of a single case definitely has its limitations. Unless supplemented by a broader pool of case studies (building up a representative sample), it allows only to draw conclusions limited to the concrete case itself. However, what could perhaps be seen as a disadvantage in casu, should not be viewed as such from the perspective of the discourse of legal science in toto – every single case study adds a brick to the edifice of knowledge, and hopefully this piece of scholarship will be useful for

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17 However, it should be pointed out that following the law-making decision in Oceano the Court’s subsequent decision in Freiburger Kommunalbauten signalled a deference to the division of tasks between the legislative and judicial branches. As N. Reich noted, in Freiburger the CJEU “implicitly opted for a theory of judicial restraint on contract law matters” (Reich, “Protection of consumers’ economic interests by EC contract law – some follow-up remarks”, 28 Sydney Law Review (2006), 50), thereby treating the legislator’s use of a ‘dilatory formula’ as broadening the discreitional powers of the iudicium facti (in casu, the national judge) rather than granting law-making powers to the iudicium iuris (in casu, the CJEU). Aziz definitely departs from this trend.
those wishing to paint a broader picture of the CJEU’s approach to the judicial interpretation and application of EU law.

2. Types of Legal Arguments: Intra-Legal vs. Extra-Legal

The division of arguments into ‘intra-legal’ and ‘extra-legal’ ones does, per se, entail any kind of evaluation of the two types of arguments – I do not criticise here ‘intra-legal’ arguments as formalist, nor extra-legal ones as ‘illegal’ or as necessarily entailing illegitimate judicial law-making. The typology of arguments simply serves as a tool allowing to describe and understand the approach taken by the CJEU, which can be a step towards building a descriptive theory of CJEU interpretation or a comparative study of reasoning of highest courts (e.g. an analysis of the methods of interpretation of European contract law by the CJEU and by the Polish Supreme Court).

The criterium divisionis of arguments into ‘intra-legal’ and ‘extra-legal’, adopted in this case study, is based on the premise of each argument. Namely, if the premise of an argument refers to a legal text (its semantics or its structure) it will be treated as an ‘intra-legal’ argument, whereas if the premise does not refer to a legal text, it will be an extra-legal argument. This approach means that the category of intra-legal arguments is a closed one (and corresponds, essentially, to linguistic and systemic arguments), whereas the category of extra-legal arguments is an open one (the types of extra-legal arguments are not listed in the definition, but simply treated as any kind of argument which is not an intra-legal one). However, on the basis of accepted classifications of arguments in judicial discourse it is possible to list the most typical extra-legal arguments:

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19 This distinction roughly corresponds to the dichotomy of ‘intra-legal standards’ and ‘extra-legal standards’ used by Marcin Matczak in his study regarding the formalism of Polish administrative law adjudication (M. Matczak, Summa iniuria. Błąd formalizmu w stosowaniu prawa [Warszawa: Scholar 2010], p. 37lf). Matczak, describing his ‘intra-legal standards’ (standardy wewnętrzne wobec prawa) writes: ‘These standards have a formal, rather than substantive, character. This group encompasses e.g. such standards as the primacy of linguistic interpretation of a legal text, conformity of the decision with the literal meaning of the text or the systemic coherence of the law. They are approximated to values building the internal morality of the law according to Fuller; they can also be compared to the ‘inner premises’ which K. Palecki writes about.’ In his empirical study, Matczak used the following typology of intra-legal standards (see ibid., p. 37 n. 7): ‘application of a linguistic interpretation; limitation to the effects of a literal interpretation (prohibition of interpretation of a text which does not cause any doubts); systemic interpretation (…); rationality of the legislator (argumentum ad absurdum); non-contradictory character of the legal system; (…) lex specialis derogat legi generali (…); the essence (nature) of the regulation; reference to earlier judicial decisions (…); references to legal literature (…); other internal standards.’

originalist arguments – arguments which refer not to the legal text as such, but to the intent of the legislator as expressed elsewhere, e.g. in the preparatory materials\(^2\) (motives of the original bill, parliamentary discussions, political or policy declarations; what is essential for the demarcation of this category is the fact that the argument is based on a text which was not enacted into law;

teleological arguments – arguments which are based on a purpose which the legal rule is aimed at pursuing;\(^2\) the aim is obviously a phenomenon (state of affairs) which lies outside the legal text; however, the aim can be deduced from the legal text, especially from its preamble; the difference between a ‘teleological’ and ‘originalist’ interpretation is that searching for the telos of the legislation does not entail analysing the actual intent of the empirically existing legislators (e.g. members of government or of parliament who proposed or adopted the legislative act);

consequentialist arguments – arguments which analyse not so much the aim (telos) of the legal rule, but rather the actual consequences which a given interpretation will have on society;\(^2\)

ontological presuppositions – arguments based on a vision of socio-economic and political reality assumed by the legal text;\(^2\)

arguments from precedent – arguments based purely on an earlier decision as the reason to adopt the new decision; in a dichotomic classification, whereby arguments are classified as either being ‘intra-legal’ or ‘extra-legal’, the classification of case-law is always controversial, especially in legal systems in which case-law is a binding source of law, either as precedent (as in the common law system) or as established case-law (jurisprudence constante, as in the EU legal order).\(^2\) For the purposes of the present paper, I have decided to treat argument from


precedent as belonging to ‘extra-legal’ arguments, due to the fact that legal arguments are those which are based on *lex* (i.e. statutory law), whilst precedent is based on *ius.*

The first four main types of extra-legal arguments are closely interconnected; an originalist interpretation can easily blend into a teleological one, and the teleological reasoning is often supported by consequentialist considerations. Furthermore, the *telos* and assumed consequences of a legal text often follow from its ontological presuppositions.

3. The Unfair Terms Directive – a very brief introduction

The Directive, enacted in 1993, aimed at bringing about minimum harmonisation of national laws on the judicial review of terms in pre-formulated consumer contracts (standard terms contracts). It contains a general prohibition of unfair terms, which resorts to general clauses (‘good faith’ and ‘significant imbalance’), as well as a list containing examples of unfair terms. Importantly, the scope of the Directive is limited to non-negotiated terms in consumer contracts, regardless whether they were pre-formulated for a large number of contracts or only for a one-off transaction. The review of unfairness does not extend to the main subject-matter of the contract, nor to the balance between the price paid by the consumer and the counter-performance of the trader.

The Directive contains also a number of detailed rules, in particular the requirement of transparency, whereby terms must be written in clear and intelligible language and the corresponding *contra proferentem* rule which obliges courts to seek a consumer-friendly interpretation of vague terms. Finally, the Directive contains a procedural rule which requires Member States to introduce measures allowing for consumer organisations to seek, by way of an *actio popularis*, the elimination of unfair terms from standard contracts following their *in abstracto* review.

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26 I would like to thank Professor Witold Wołodkiewicz for his valuable critical comment about the classification of arguments from precedent for the purposes of my research. However, the treatment of precedent as ‘extra-legal’ departs from the approach taken by M. Matczak, *Summa iniuria...*, p. 37. Nevertheless, from the perspective of Polish legal culture, to argue *only* on the basis of case-law *qua* case-law (and not an interpretation of the *verba legis*) does seem to be an ‘extra-legal’ argument.
(Case C-415/11)

4.1. Facts of the case

The facts of the case are presented here as they have been set out in the Court’s decision. In 2007 Mr Aziz signed a loan agreement with the Catalunyacaixa bank for EUR 138,000, secured by a mortgage on a house he had owned since 2003. Mr Aziz was supposed to reimburse the loan over 33 years. The contract provided for an annual default interest of 18.75%, automatically applicable to sums not paid when due, without the need for any notice (clause 6). Furthermore, the contract conferred on Catalunyacaixa the right to call in the totality of the loan if Mr Aziz was late in his payments (clause 6a). Finally, the contract also provided that the bank could unilaterally determine the amount of Mr Aziz’s debt for the purposes of enforcement proceedings (clause 15).

In June 2008 Mr Aziz stopped making his monthly payments. In October 2008 the bank unilaterally declared that his debt amounts to EUR 139,764.76 and demanded immediate payment of that sum, corresponding to the unpaid monthly instalments, including contractual and default interest. When Mr Aziz failed to pay, the bank instituted enforcement proceedings against him before the Juzgado de Primera Instancia No 5 de Martorell, seeking recovery over EUR 180,000 (including interests and costs). Mr Aziz failed to make an appearance in court, and in December 2009 the court ordered enforcement. Mr Aziz did not react.

In July 2010 a judicial auction of Mr Aziz’s house was arranged, but no bid was made. Therefore, in accordance with the provisions of the Spanish Code of Civil Procedure, the Juzgado de Primera Instancia No 5 of Martorell adjudicated the house to the bank at 50% of its value. The court decided that the house would be repossessed by the bank on 20 January 2011 with the result of evicting Mr Aziz from his family home.

Before the eviction took place, on 11 January 2011, Mr Aziz applied to the Juzgado de lo Mercantil No 3 de Barcelona for a declaration seeking the annulment of clause 15 of the mortgage loan agreement, i.e. the one which allowed the bank to determine Mr Aziz’s debt in a unilateral fashion. Mr Aziz pleaded that it is unfair.

However, Spanish law made it very difficult for the debtor to plead the unfairness of the mortgage loan contract at the stage of mortgage enforcement proceedings. In particular, such
objections could be made only at a later stage and without the effect of suspending the eviction from the house. The Spanish court considered that those rules of national law made it extremely difficult for a Spanish court to ensure effective protection of the consumer. Furthermore, the Spanish court considered that the loan mortgage contract could also contain more unfair terms, in particular the term providing for very high default interest rates.

Therefore, the national court submitted two questions to the ECJ, one procedural one, regarding the possibility of analysing the unfairness of terms at the stage of mortgage enforcement proceedings and a substantive one, regarding the fairness of certain clauses in Mr Aziz's contract. Regarding the substantive question, the national court wanted to know how to understand 'disproportion' in the rights and duties of the parties with regard to three terms of the contract:

- the acceleration clauses, allowing the bank to demand repayment of the whole debt in case of consumer default, whilst that debt was to be spread over 33 years;
- very high default interest rates exceeding 18%;
- the right of the bank to unilaterally determine the consumer's debt for the purposes of enforcement proceedings.

4.2. The reasoning of the CJEU

4.2.1. The first (procedural) question

Considering the first (procedural) question, the ECJ pointed to economic considerations of unequal bargaining power:

‘44. In replying to that question, it should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (Banco Español de Crédito, paragraph 39).’ (Emphasis added.)

This argument, opening the CJEU’s reasoning on the Directive, is a classical passage which occurs in almost all judgments on the Directive. The Court states that ‘the directive is based on the idea that…’. It seems that this argument could be classified as an intentionalist (originalist)

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27 For a detailed discussion of the Spanish provisions see e.g. S. Iglesias Sánchez, op.cit., pp. 957-958.
one, if we assume that ‘the idea’ on which the Directive ‘is based’ is an actual idea which was in the heads of the drafters back in the early 1990s. However, because the Court does not refer to any empirical materials, such as the motivation of the original draft or the parliamentary records, it cannot be said that the statement that ‘the directive is based on the idea that the consumer is in a weak position’ is actually an originalist argument. Rather, it refers to the objective assumptions of the Directive’s normative framework. As such, it refers to the state of affairs in the real world of socio-economic affairs as assumed by the legislative text, i.e. it refers to the ontological presuppositions of the text, and therefore is an extra-legal one.

Analysing the normative meaning of Article 6(1) of the Directive, which stipulates that unfair terms are ‘not binding’ upon consumers, the CJEU did not engage in a linguistic analysis (e.g. it did not check what is the dictionary definition of the term ‘to bind’, as a Polish court would usually do in this situation). Instead, it relied on a number of extra-legal arguments. The CJEU wrote:

‘45. As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (see Banco Español de Crédito, paragraph 40 and case-law cited).’

First of all, the Court once again reiterated the statement about the ‘weaker position’ of the consumer, i.e. referred to an ontological presupposition attributed to the legal text. Then it recalled the text of the law, i.e. that ‘unfair terms are not binding on the consumer’. However, it did not subject this rule to any analysis with reference to intra-legal arguments (linguistic or systemic). Instead, it first invoked the (extra-legal) argument from precedent, indicating the ‘[a]s it is apparent from the case-law…’. The authority of a statement beginning from these words stems purely from the Court’s earlier decisions, i.e. it is an argument from precedent. This precedent is authority for classifying Article 6(1) as ius cogens (‘this is a mandatory provision’).

Following that, the Court went on to indicate the purpose (telos) of the rule, indicating that it ‘aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them’. The contractual balance established by ordinary rules of contract law is dubbed as ‘formal balance’, whereas the telos of the Directive is presented as providing for an ‘effective balance’.
The Court builds, therefore, a binary opposition of ‘formal’ vs. ‘effective’, which essentially is a distinction of form vs. substance, a classical philosophical and legal topos of European legal culture. This ‘effective’ or substantial balance is, in the words of the CJEU, a factor enabling to re-establish ‘equality’ between the parties (trader and consumer). Incidentally, one could observe that the Court does not explain what exactly ‘equality’ should mean in this context.

Turning to the duty of the national court to analyse the fairness of terms ex officio, the ECJ relied on two arguments: (1) from its own case law (Pannon GSM, Banco Español de Credito), and (2) a socio-economic argument:

‘46. In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (Pannon GSM, paragraphs 31 and 32, and Banco Español de Crédito, paragraphs 42 and 43).’ (Emphasis added.)

Once again, in order to justify the duty of the national court to analyse the fairness of terms ex officio, the ECJ did not refer to a linguistic-logical or even systemic analysis of the Directive. The normative source of this duty is to be found purely in the ECJ's own case-law, which is additionally justified by socio-economic considerations (‘compensating this way for the imbalance which exists between the consumer and the seller or supplier’).

The court further adduced its earlier case-law (Pénzügyi Lízing) according to which a national court must assess the fairness of terms of the underlying contract also in proceedings not considered with the merits of the litigation, in casu when a consumer lodges an objection against an order for payment:

‘47. Thus, in ruling on a request for a preliminary ruling submitted by a national court before which inter partes proceedings, initiated following an objection lodged by a consumer against an order for payment, had been brought, the Court held that that national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer falls within the scope of the directive and, if it does, assess of its own motion whether such a term is unfair (Case C-137/08 VB Pénzügyi Lízing [2010] ECR I-10847, paragraph 56).’ (Emphasis added.)
It is characteristic that in para 47 the ECJ relied exclusively on an argument from its own case-law, without adducing even any socio-economic arguments to support its view. The commented paragraph is an example of a pure argument from precedent, where an earlier decision of the adjudicating body constitutes a sufficient reason to adopt a given view.

In the following paragraph of the judgment’s grounds, the ECJ referred to Banco Español de Crédito regarding the court's duty to analyse the fairness of terms even in the absence of a consumer's objection, at any stage of the proceedings whatsoever:

‘48. The Court has also held that the directive precludes legislation of a Member State which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in limine litis or at any other stage during the proceedings, even though it already has the legal and factual elements necessary in that regard, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, where that consumer has not lodged an objection (Banco Español de Crédito, paragraph 57).’ (Emphasis added.)

Characteristically, here too the only argument adduced is that from the Court's own case-law. Just like in the preceding paragraph, the Court does not even attempt to justify its findings in any different way – be it a textual, intentionalist or even pragmatic argumentation. Passages of this kind are, as a matter of fact, the best evidence providing that, taking the internal point of view of the CJEU, one must admit that case-law is, indeed, a source of law. Incidentally, it should also be added that the questions referred to the CJEU by the national court were actually based on the premise that earlier CJEU case-law interpreting the Directive in a creative way (praeter legem), is binding and in fact sought a clarification and development of this judge-made law.  

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28 Of course, adopting an external point of view, i.e. reading the Treaties and secondary EU legislation in an impartial one may lead to a different result. Nevertheless, for all practical purposes, anyone wishing to participate in the discourse of the CJEU (e.g. by pleading a case) must accept this assumption regardless of its validity. Cfr. P. Marcisz.


In the subsequent paragraphs the court engages into a form of reasoning known to the Common Law system, namely distinguishing of cases. It begins by pointing out that:

‘49. However, the case at issue in the main proceedings can be distinguished from those which led to the abovementioned judgments VB Pénzügyi Lízing and Banco Español de Crédito because it concerns the definition of the duties of the court hearing declaratory proceedings linked to mortgage enforcement proceedings, with the objective of ensuring the effectiveness of any judgment in the declaratory proceedings declaring unfair the contractual term on which the right to seek enforcement and thus to initiate those enforcement proceedings is based.’ (Emphasis added.)

After recalling the principle of procedural autonomy of the Member States, and a detailed analysis of the Spanish rules in question, the ECJ concluded that that the present case cannot be distinguished from VB Pénzügyi Lízing and Banco Español de Crédito. The ECJ's conclusions with that regard are based on an argument from legal practice (law-in-action). It pointed out that the possibility for the consumer to make a preliminary registration of his claim of unfairness would be highly unlikely in practice:

‘58. In that regard, taking into account the progress and the special features of the mortgage enforcement proceedings at issue in the main proceedings, such an eventuality must however be regarded as remote because there is a significant risk that the consumer in question will not make that preliminary registration within the period prescribed for that purpose, either because of the rapidity of the enforcement proceedings in question or because he is unaware of or does not appreciate the extent of his rights (see, to that effect, Banco Español de Crédito, paragraph 54).’

Here we have an interesting combination of an argument based on law-in-action (rapidity of enforcement proceedings) with an argument based on social considerations, i.e. the consumer's lack of legal knowledge and experience ('unaware of or does not appreciate the extent of his rights'). It is characteristic that the court uses psychological statements ('unaware of', 'does not appreciate'), referring to the consumer's state of mind in a profoundly realistic perspective. By admitting that consumers are usually unaware of their rights or do not understand their true extent, the ECJ departs from the classical maxim vigilantibus iura scripta sunt. The consumer need not be vigilans.31 This reasoning is corroborated by a purely social argument:

'61. That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.’

The ECJ essentially points out that it is crucial for the national court to analyse the unfairness of the terms at the stage of enforcement proceedings, because if it does so only later, the consumer will lose his home irreversibly, even if in the end he will obtain adequate financial compensation. The court does not treat the object which is encumbered by mortgage just as an abstract res of private law, but enters into the social context, underlining that it is the ‘family home of the consumer’ and that the enforcement proceedings, if uninterrupted by the court on account of the unfairness of certain terms in the contract, will lead to the ‘definitive and irreversible loss of that dwelling’. The abstract res becomes a concrete domus.32

In conclusion, the ECJ found that the Spanish legislation violates the principle of effectiveness, and therefore is not caught by the principle of procedural autonomy of the Member States, but must be set aside in order to ensure the full effectiveness of the Directive.

4.2.2. The second (substantive) question (what is an unfair term?)

In its second question the national court sought guidance on applying in concreto the prohibition of unfair terms to three controversial clauses in the mortgage loan contract between Mr Aziz and the Catalunyacaixa. The ECJ started from pointing out that the concepts of ‘good faith’ and ‘significant imbalance’ used in the Directive ‘merely define in a general way the factors that render unfair a contractual term that has not been individually negotiated’ (para 67).

By stating that the general clauses ‘merely define in a general way’ the notion of unfairness, the ECJ openly downplays the role of linguistic-logical reasoning. What is most characteristic, is that the ECJ does not enter into an analysis of the meaning of the terms ‘good faith’ and ‘significant imbalance’, as the Polish Supreme Court does in similar cases.33


33 For instance, in Case I CSK 694/09 MZ v Inter Polska (judgment of 13.10.2010) the Polish Supreme court interpreted the criteria of unfairness by resorting to linguistic methods of interpretation. For instance, it ruled that ‘good customs’ (the equivalent of ‘good faith’ in the Polish Civil Code) can mean either ‘customary and moral norms, commonly accepted conduct, customary principles of honest behaviour’; or ‘traditional elements of ethics, principles of loyalty, respect for other people, as well as behaviour not making use of disinformation, ignorance, credulousness or insufficient information’ of the consumer. As regards second standard in the general prohibition of unfairness in the Polish Civil Code, i.e. a ‘flagrant violation of consumer interests’, the Court explained that: ‘Synonymous with the adjective ‘flagrant’ are the words ‘dramatic’ and ‘screaming’. The adjective ‘flagrant’ means, in the sense of a negative feature, ‘clear’, ‘uncontested’, ‘obvious’. In other words, the violation of
Instead of opting for a linguistic analysis, the Court immediately jumps a judicial fiat, proposing a solution without any specific arguments:

68. [...] in order to ascertain whether a term causes a ‘significant imbalance’ in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.

What the ECJ essentially did, is a reception of the German notion of Leitbild des dispositiven Gesetzrechts, i.e. the idea that unfairness should be assessed against the background of ius dispositivum which would apply should there be no contractual term on a given topic.34 What is characteristic, the Court does not provide any arguments (linguistic, systemic, teleological) in order to justify its approach. The German notion of a Leitbild is simply imposed by way of a judicial fiat, without any explanation why this is the correct reading of the notion of a ‘significant imbalance’.35

However, on a somewhat more favourable reading it could be said that the ECJ's fiat contains implicitly a systemic argument to support it, because it refers to the background rules of national law, i.e. to the systemic context. Nevertheless, this is not a systemic reading of the directive as such, therefore, it cannot be treated as a systemic argument.

consumer interests must be characterised by a high level of intensity. The term ‘consumer interests’ is understood broadly, as encompassing not only economic interests, but also the discomfort resulting from the loss of time, inconvenience, or satisfaction with the conclusion of the contract, etc. Such a broad understanding of consumer interest is reduced in this way that it may not infringe the justified interests of entrepreneurs engaged in an economic activity.34 Cfr. K. Kańska, ‘Ochrona…’, p. 83-84. The idea is enshrined in § 307 II(1) BGB: ‘An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision: 1. is not compatible with essential principles of the statutory provision from which it deviates (…).’ BGB translation according to: http://www.gesetze-im-internet.de/englisch_bgb/ (13/12/2015).

35 It should be recalled once again that the object of the analysis in this paper is the reasoning of the CJEU, and not the substantive quality of the interpretive choices made.
As regards the ECJ's interpretation of the notion of ‘good faith’ (*bona fides*), the Court makes a textual reference to the preamble to the Directive:

‘69. With regard to the question of the circumstances in which such an imbalance arises contrary to the requirement of good faith’, having regard to the sixteenth recital in the preamble to the directive (…), the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, *could reasonably assume that the consumer would have agreed* to such a term in individual contract negotiations.’

However, the Court does not engage in a textual exegesis of Recital 16. The conclusion reached by the ECJ, namely that the requirement of good faith is fulfilled only if the consumer would have agreed to the term in question in individual contract negotiations does not follow in a logical and necessary manner from Recital 16. Recital 16 mentions the ‘strength of the bargaining positions’, an ‘inducement to agree to the term’, ‘dealing fairly and equitably’, and ‘legitimate interests’, which are quite open notions, nevertheless it seems that the ECJ’s interpretation goes farther (in favour of the consumer) than the text of Recital 16. Furthermore, owing to the fact that the preamble is to be an aid in the interpretation of the main part of the Directive, and not a source of normative content in its own right, it must be observed that the ECJ’s interpretation is not based on the text of Article 3(1) of the Directive.

However, it should also be observed that ‘good faith’ is a general clause, that is an open norm which serves to make the law more flexible. In the European legal legal tradition, to which the CJEU did not refer, good faith was understood as referring to the parties acting to one another *bona fide*, i.e. in good faith. Indeed, this meaning is enshrined in Recital 16 when it sayst that the trader must ‘deal fairly and equitably’ and take the consumer’s ‘legitimate interests’ into consideration.

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36 The notion of *bona fides* has, of course, a very long tradition dating back to Roman law (see e.g. W. Dajczak, ‘Doświadczenie prawa rzymskiego a pojęcie dobrej wiary w europejskiej dyrektywie o klauzulach niedozwolonych w umowach konsumenckich’, *Zeszyty Prawnicze UKSW* 1 (2001): 79-99. Unfortunately, the CJEU does not refer to that tradition at all.

37 That recital provides, with regard to good faith, as follows: ‘Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account’. 

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Nevertheless, stating that anything in the standard terms to which the consumer would not have agreed in free negotiations goes beyond that text. In particular, the Court did not analyse (by way of a systemic interpretation) how this fits with, on the one hand, the explicit prohibition of analysing the *essentitia* negotii and, on the other hand, the possibility (mentioned in Recital 19) of taking the price/quality ratio into account. ³⁸ For in effect in order to answer the question whether a consumer would agree to a certain term in free negotiations one must take into account the *quid pro quo* – if the price is very low, the consumer is more likely to agree to a more unfavourable term.

Commenting on the CJEU’s notion of *bona fides* Sara Iglesias Sánchez pointed out that:

‘as to compliance with the requirement of “good faith”, the Court sets up a test that seems to differ from an objective conception of this notion. Although, admittedly the “good faith” of the seller is assessed regardless of the subjective will of the seller or provider, following the 16th recital of Directive 93/13, the judgment of the Court seems to imply a notion of the “rational consumer”: the national court must assess whether the consumer would have agreed to the term in question in the framework of individual negotiations.’

Indeed, Iglesias Sánchez is correct in pointing out that the test put forward by the CJEU in *Aziz* is a normative novelty which cannot be deduced logically neither from the text of the Directive, nor even from its preamble. The present paper being limited to an analysis of the Court’s reasoning, and not the substantive merit of its decision in *Aziz*, it will suffice here to observe that the introduction of the fragment of the judgment stating that ‘the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations’ is indeed a normative *novum*. As such, it is not directly supported by any specific arguments, neither intra-legal nor extra-legal. It should also be underlined that the formula itself requires the Court to analyse the hypothetical psychological will of the consumer (‘would have agreed’), which, arguably, establishes a link between the

³⁸ Recital 19: ‘Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer’. Cfr. K. Kańska, ‘Ochrona…’, p. 54-55.
strictly legal criteria and the actual economic circumstances (what would a concrete consumer agree to).

Passing towards an evaluation of the specific terms in the contract, the CJEU underlined that the annex to the Directive is only indicative:

‘70. In that regard, it should be recalled that the annex, to which Article 3(3) of the directive refers, contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (see Invitel, paragraph 25 and case-law cited).’

The only argument invoked in support of the legal view that the Annex is ‘indicative and non-exhaustive’ is an argument from case-law (Invitel case).

In the following paragraph the Court found that:

‘71. Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it (Pannon GSM, paragraph 39, and VB Pénzügyi Lízing, paragraph 42). It follows that, in that respect, the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system (Freiburger Kommunalbauten, précité, paragraph 21, and the order in Case C-76/10 Pohotovost [2010] ECR I-11557, paragraph 59).’

The part of the Court’s reasoning is mainly supported by intra-legal arguments. Let us recall that it is Article 4(1) of the Directive which explicitly mentions the criteria to be taken into account when assessing an unfair term:

‘(...) the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.’

A comparison of para. 71 sentence one of the Aziz judgment and the very wording of Article 4(1) of the Directive reveals that the references to case-law at the end of that sentence (pointing to Pannon GSM, paragraph 39, and VB Pénzügyi Lízing, paragraph 42) are patently superfluous.
the norm restated by the Court is a word-by-word reproduction of the Directive’s text. The fact that the Court nevertheless cites its case-law as additional authority shows how important argument from precedent is in the hierarchy of argumentative strategies employed by the CJEU.

In the second sentence of para. 72 of the Aziz judgment the Court addst that ‘[i]t follows that (...) the consequences of the term under the law applicable to the contract must also be taken into account, requiring consideration to be given to the national legal system’, citing two cases (Freiburger Kommunalbauten and Pohotovost) as authority. Although the duty of the national court to analyse the legal significance of the contentious terms under national law is not explicite mentioned in the Directive, it would be an absurd not to accept such a duty. Indeed, a term of contract understood as a set of signs, in order to have a meaning must be read in light with juridical rules of meaning, i.e. in the light of the applicable law. The need to refer to national law follows, therefore, not from the wording of the directive, but rather from the fundamental principles of language and meaning, whereby omnia sunt interpretanda.

Departing from its earlier prevailing practice of not giving national courts direct guidelines as to the fairness of individual terms, the CJEU in Aziz decided to give such guidance (thereby following e.g. the practice of the Polish Supreme Court which, although being a iudicium iuris, regularly pronounces itself on such issues in cassation proceedings). However, this part of the judgment do not contain any arguments, but simply apply the earlier considerations to the terms at hand. One can therefore speak here of a subsumption of the facts (the wording of the terms) under a legal norm (formulated in the preceding paragraphs). Therefore, these paragraphs will not be the subject of my analysis. Likewise, the final paragraph of the judgment which contains the conclusions (repeated later in the operative part) also does not contain any new legal argumentation and therefore is left outside the present exegesis.

5. Conclusions

The case study has illustrated the way in which the CJEU deploys extra-legal arguments in its judicial reasoning. In answering both questions submitted by the national court – the procedural and the substantive one – the Court resorted to a number of extra-legal arguments. In particular,

Mańko, The Impact..., p. 86. As of mid-April 2014, the Polish Supreme Court has analysed the fairness of specific contract terms in 17 decisions in various areas of private law(six times in banking contracts, four times in insurance contracts, three times in telecommunications services contracts, as well as one timeshare contract, one education services contract, one leasing contract, and one housing development contract).

Aziz, paras. 72-75.

Aziz, para 76.
with regard to the first question, the Court considered the weaker economic position of the consumer, the practical aspects of the enforcement proceedings in Spanish law which make it very difficult for the consumer to protect his rights, and finally the nature of the object of such proceedings, namely the family house of the consumer. In finding that rules such as those in force in Spain violate the Directive as read in conjunction with the principle of effectiveness, the Court relied not so much on a textual comparison (wording of Spanish law as compared to the wording of the Directive), but rather focused on the functioning of Spanish law in practice (law-in-action) and the social interests at stake (irreversible loss of family home). The dominant role of extra-legal arguments is clearly visible here.

Answering the second, substantive question, the Court’s reasoning is clearly thinner. The test for a violation of good faith – a normative novum proclaimed in the judgment and, as regards the private law aspects one of the most significant developments in the Court’s case-law on the Directive, is announced as a simple judicial fiat. From the standpoint of the quality and persuasiveness of legal reasoning, that part of the judgment could certainly be more substantiated. In particular, the Court could have elaborated its position both on the introduction of a German-style ‘Leitbild rule’ (seemingly modelled on § 307 II BGB) and on the ‘hypothetical will’ test.

As such, the Aziz judgment is symptomatic for the CJEU’s style of case-law. Firstly, modes of interpretation which traditionally have been given precedence – linguistic and systemic interpretation – do not play a significant role. As a matter of fact, in Aziz not a single legal view expressed by the Court was based on either of the two arguments. Secondly, extra-legal arguments are deployed broadly and used to support many of the views expressed by the court. Thirdly, however, many legally significant developments are introduced as a simple judicial fiat, lacking a persuasive support in the form of intra- or extra-legal arguments.
Renata Świrgoń-Skok, The impact of consumer law towards domestic law in the example of the timesharing contract

Abstract: Timesharing is a legal construction which functions in the Polish legal system since quite recently. Timesharing is an institution which touches not only material law but also contract law and it is mainly an institution utilized in tourism, which leads to the fact that timesharing has a consumer character. Such a character of the discussed institution has been granted by directive 94/47/EC of the European Union and the Polish act of year 2000. Also the act of timeshare of 2001 is only utilized in consumer trade, that is in case of conducting contracts between a consumer and entrepreneur. The features do not determine a consumer contract but it is determined by its parties (consumer-entrepreneur). The aim of this publication is to try to present how directives of the European Union have impacted the shape of current legal rules which regulate the matter of timesharing and also have created the consumer character of timesharing contracts.

Keywords: timesharing, EU law, Polish law, consumer-entrepreneur relationship.

Introduction

Timesharing is a legal construction which functions in the Polish legal system since quite recently\(^1\). It was introduced by the act of July 13\(^{th}\) 2000 concerning the protection of acquirers of the title to utilize buildings or property in a defined timeframe in each year and the change of the Civil Code, Code of Offence and act of land and mortgage register\(^2\) in order to implement guidelines of the Community contained in directive 94/47/EC\(^3\). Currently, the matter is regulated by the act of September 16\(^{th}\) 2001 of timeshare, in effect from April 29\(^{th}\) 2012\(^4\), which was the implementation of directive 2008/122/EC of the European Parliament and Council of

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\(^{2}\) Dz.U. Nr 74, poz. 855 with changes.


\(^{4}\) Dz. U. Nr 230, poz. 1370
January 14th 2009 concerning the protection of consumers in reference to some aspects of timeshare contracts, contracts of long term vacation products, resale and exchange contracts.

Timesharing is an institution which touches not only material law but also contract law and it is mainly an institution utilized in tourism, which leads to the fact that timesharing has a consumer character. Such a character of the discussed institution has been granted by directive 94/47/EC of the European Union and the Polish act of year 2000. Also the act of timeshare of 2001 is only utilized in consumer trade, that is in case of conducting contracts between a consumer and entrepreneur. The features do not determine a consumer contract but it is determined by its parties (consumer-entrepreneur).

The aim of this publication is to try to present how directives of the European Union have impacted the shape of current legal rules which regulate the matter of timesharing and also have created the consumer character of timesharing contracts.

Historical view

Timesharing is a term which comes from the English language that can be translated as “sharing of time”, “co-sharing time” or “division of time”. In the French terminology the following terms are present: time propriété and multипropriété a temps parta, in German - Teilzeitnutzungsrecht and Teilzeitigeigentum. In the Polish doctrine there is no equivalent of the term timeshare, so the foreign term is commonly used.

Timeshare means the right to use an object, mainly real estate (for example a tourist centre, hotel, guesthouse, suite) in determined, regularly repeated lapses of time in each year. The institution can be also utilized in case of repeated use of for example machines, devices, sailing boats or trailers, or even cars.

The institution of timesharing functions since the second half of the sixties of the XX century. It was initially used in France and the United States of America, and it appeared in Poland only

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5 Dz. U. L 33 z 3.2.2009
8 B. Fuchs, Timesharing, Rejent 1997, p. 34.
9 L. Stecki, op. cit., p. 71 and other. But views are presented that the subject of timesharing can be non-material objects – see K. Zaradkiewicz, Timesharing – szczególne stosunek prawa rzeczowego, p. 53.
in the nineties. Functionally, *timesharing* is related to the tourism industry (it is mostly utilized in order to acquire the right to use real estate which is located in touristically attractive places). That is why the necessity of a legal regulation of this institution was noticed in touristically attractive locations such as Portugal, Greece, Spain or Turkey. This was performed by introducing the *timesharing* regulations on the basis of current law, granting it separate institutional legal solutions. And so, some legal systems treat *timesharing* as specific contract law, for example in Greece it is treated as a kind of lease or as a separate kind of material law for example in Portugal, Spain and Turkey. Another solution was implemented by the French jurisdiction where timesharing was formed as a law linked to share in partnership by the act of 1986.

However, the biggest meaning for the European law in the scope discussed, was made by the European Union regulation of 1994 concerning *timesharing* and that was directive 94/47/EC of the European Parliament and Council concerning the protection of acquirers in reference to some aspects of contracts of acquisition of law to use real estate in a particular timeframe. This directive was supposed to provide an answer for the irregularities of the market and abuse of entrepreneurs offering *timesharing* services. The initiative of introducing such a regulation appeared in 1986 and factual work was commenced in October 1988. The first project of the directive was introduced in 1992 and it suggested *timesharing* to be based on ownership divided in time. In the final version, this idea was rejected, leaving the matter of legal character of *timesharing* beyond the scope of legal regulation of member countries. The passage of the directive took place on October 16th 1994. It seems that the main positive aspect of the 94/47/EC directive is the fact that this act created the direction of further legislative actions of individual countries of the European Union, including Poland.

The Polish law and EU Directives

During the first few years of its presence on the Polish market, *timesharing* was a new and not attractive phenomenon for the society and the law due to its limited practical meaning in the beginning. This lead to the lack of interest of the legislator to legally determine it. However,
the necessity was present because timesharing in Poland evolved in an “aggressive” and unfriendly manner for the consumer. The entrepreneurs forced unfavorable contract clauses for the customers, such as for example the necessity to pay very high compensation or determined the costs of the service in an inaccurate manner. They also used dishonest and unreliable marketing strategies (phone offers promising potential rewards such as trips, temporary ownership, the necessity to make a decision at once, rejection of reading the content of the offer or leaving the contract subject to foreign legal systems and foreign jurisdiction). This led to many conflicts between those offering and acquiring legal timesharing rights. Courts, while dealing with this new institution, showed many discrepancies in legal judgment. In extreme cases, they approved contracts which were often unclear and often unjust for the clients, considering freedom of conducting contracts expressed in article 353 of the Polish Civil Code, as the basis of such. On the other hand, timesharing contracts which were identified as illegal on the grounds of the Polish law, were considered as void13.

The situation changed due to the approaching participation of our country in the European Union. This resulted in the need to implement EU directives to the Polish legal system, including directive 94/47/EC of the European Parliament and Council of October 26th 1994 regarding the protection of acquirers in reference to some aspects of contracts concerning the acquisition of laws to use real estate in a determined timeframe14. This was even more important because the consumer topic has been a matter of high interest and broad regulations in the EU15.

During the work of the Codification Board of Civil Law in the subject of implementation of individual acts of EU law, it was agreed that the consumer law of contracts should be fully implemented to the Civil Code in the scope which is impossible to perform beyond the code16.

14 Members of the European Union use various models of implementation of consumer directives. There is either full implementation of consumer directives to the civil code (BGB, Dutch civil code), or contrary solutions as for example in France where consumer law was implemented in separate acts and regulations (Code de la consommation) or there is a mixed model which considers the implementation of partial consumer matters to the civil code and the rest to separate codes (for example central European countries).
This resulted in the fact that there was no firm consumer regulation in the Polish legal system and each of the matters are divided among the Civil Code (for example the definition of the consumer) and other acts. In case of protection of the consumer and its place in the Polish legal system, professor Z. Radwański made a statement a few years ago: “in this point of view, a real revolution in law is taking place and it introduces separate systems of protection of the interests of consumers. This is a direction especially promoted by the European Union. These matters need to be placed in the Civil Code by all means, among others, to protect the interests of the consumer from danger arising from his lack of consciousness and possibility to embrace these new situations which occur in the economy and on the market. New regulations of this field disassemble the legal system and their scatter in various legal acts is becoming a problem. This is considered one of the biggest dangers for a legal system”17.

However, the performance of this postulate is hard in practice, which can be shown by new acts that regulate the consumer matter18. This also refers to the title term of timesharing.

Timesharing in the Polish law

Poland regulated the matter of timesharing by the act of July 13th 2000 of protection of acquirers of law to use a building or residential rooms in a determined timeframe in each year and of the change of the Civil Code, Code of Offence and act of land and mortgage register. The aim of the directive was mainly to protect the consumers. The scope of protection was extended and applies to various aspects of the timesharing trade. In those acts the obligations and rights of the parties were generally precisely determined, concerning the matter of pre-contract protection, proceedings of conduction and termination, and minimal content of the timesharing contract, and its shape. Directive 47/94/EC determined the use of real estate more precisely than the Polish act of 2000, and the Polish legislation imposed the obligation on the


17 Compare Z. Radwański, Kodeks cywilny wymaga unowocześnienia, Kancelaria 2010, no 7-8, p. 18.

18 The newest legal regulation is the act of May 30th 2014 concerning consumer laws (Dz.U. 2014 poz. 827), and additionally act of September 14th 2012 concerning the change of the act of consumer credit and act of responsibility of corporate entities for illegal performance under penalty (Dz.U. 2012 nr 0 poz. 1193); act of September 16th 2011 concerning the protection of the acquirer of a premise or one family house (Dz.U. 2011 nr 232 poz. 1377); act of change of September 19th 2011 of the banking law and consumer loan; act of May 12th 2011 concerning consumer loan (Dz.U. 2011 nr 126 poz. 715); timeshare act of September 2011 (Dz. U 2011 r., nr 230, poz. 1370); act of December 19th 2009 about pursuing claims in group proceedings (Dz. U 2010 r., nr 7, poz. 44); act of September 23rd 2007 concerning counteraction towards unjust market practice (Dz. U 2007 r., nr 171, poz. 1206); act of February 16th 2007 concerning the protection of competition and consumers (Dz. U 2007 r. Nr 50, poz. 331 with changes.)
entrepreneur to supply more information concerning the prospect than the directive. The differences were noticed also from the formal and language side\(^{19}\). However, this act secured the interest of acquirers of timesharing laws and gave them the same protection as the one of European Union consumers.

While the Polish legislator implemented directive 94/47, he did not limit himself to legal-consumer matters but defined the timesharing contract itself instead of determining the character of this law. In article 1 section 1 he states that a timesharing contract is a contract conducted for at least 3 years, in which the acquirer – a natural person conducts a contract beyond the scope of potential business activity – “he obtains from the entrepreneur the right to utilize the building or utility room in a determined timeframe and obliges himself to pay to the entrepreneur a lump sum”. In order to precise a permissible figure of this law, the legislator determined that timesharing can be created as material law which is a kind of utilization or contract relation. In order to enable the creation of timesharing as a kind of limited material law, article 270\(^{1}\) modifying the institution of utilization, has been added to the Civil Code.

The insufficiency of directive 94/47/EC caused the fact that new work concerning a new timesharing regulation was commenced, in case when the consumer is a party of a contract. Many remarks and requests were placed since its implementation. Mainly, the too narrow scope of usage of the directive was criticized together with the lack of accuracy of terminology and also substantial lack of it, and additionally too excessive particularity concerning the prospect and the contract. Another reason is linked to the sudden development of the touristic branch and the appearance of new products not included in the scope of the validity of law concerning the utilization of real estate in a determined timeframe (timeshare), that is: long term vacation products (vacation clubs), systems of exchange, resale and other kinds of additional contracts to the timeshare one. These products are sold in a way being similar to timeshare. They were not included in the scope of directive 94/47/EC, which enabled unreliable entrepreneurs to go around legal regulations. Consequently, such an occurrence was the source of significant problems not only for the consumers but also for the entrepreneurs offering services as of directive 94/47.

On January 14\(^{th}\) 2009, the European Parliament and the Council of the EU implemented directive no 2008/122/EC concerning the protection of consumers in reference to some aspects

\(^{19}\) M. Jagielska, *Polskie prawo konsumenckie*, p. 160 and other.
of *timeshare* contracts, contracts of long vacation products, resale and exchange contracts. This directive replaced directive 94/47, significantly decreasing the scope and manner of regulating *timesharing* on the EU level. According to the intention of the founders, the new directive is supposed to support the increase and productivity of the *timeshare* industry and long-term vacation products. It is also supposed to increase legal confidence through a higher level of harmonization of regulations of EU members, and enable consumers and entrepreneurs to take full advantage of benefits arising from the existence of the European Union internal market. The regulations implementing the new directive to the internal legal order of EU countries, as indicated by article 16 section 1 subsection 2 of this directive, should enter into force on February 23rd 2011. However, the Polish parliament passed the act of *timeshare* on September 16th 2011, which entered into force on April 29th 2012.

According to article 1 of the act, it regulates the rules and mode of conducting contracts between the entrepreneur and consumer: *timeshare*, about long-term vacation products, intervention in *timeshare* resale or long-term vacation product and participation in the system of exchange. It also introduces, according to the pattern of the directive, the explanation of many terms. It was clearly underlined that the sole term of entrepreneur and consumer would occur in the meaning which was imposed on it by the Polish Civil Code.

It is necessary to underline that directive 94/47/EC and act of 2000 did not contain the term of *timesharing*. The legislator decided not to introduce this term to the legal language, despite the fact that this term was present in the legal language, using descriptive terms instead. In directive 2008/122/EC the European legislator accepted a different concept. In article 2 section 1 the *timeshare* term was introduced, on the basis of which the definition of *timesharing* was framed, determining it as the right to utilize at least one sleeping place of accommodation during more than one period of utilization. The motives of this performance were pointed in the

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22 Directive 2008/122 is based on the rule of maximal harmonization. It left the member countries the possibility to provide their own solutions only in matters concerning: means of legal protection in general provisions of contract law, registration of real estate or material objects and the transfer of ownership of real estate; - conditions of performing business activity or systems of permission or requirements regarding licenses and - the legal determination of laws being the subject of contract contained in this directive. This kind of harmonization is commonly called “maximal directional harmonization”.
24 Article 2.1. “By the timeshare contract, a contract is understood, on the basis of which a consumer for a fee, acquirers the law to utilize in a timeframe determined in the contract, at least one place of accommodation, conducted for a period longer than one year”.

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premises of the bill of *timeshare*, where a statement was included which concerned the fact that the extended title of the act of 2000 is little legible, and that it insufficiently performs the “designation” of the act in the spoken language\textsuperscript{25}.

Moreover, it was not prejudged on the character of the right acquired. Article 1 section1 subsection 2 point d) of this directive states that it does not interfere into the domestic legislation which refers to the character of laws being the subject of contracts included in directive 2008/122. This term should be regulated by domestic laws of each country. It should be underlined, that the material scope of the EU regulation has been significantly changed. Next to the *timeshare* agreement, directive 2008/122 introduces three other contracts (about the long-term vacation products, resale and exchange), which can only have a contract character due to its nature. That is why it is not possible to extend article 270\textsuperscript{1} of the Civil Code by adding all kinds of laws arising from those contracts. The acceptance of an analogical solution to the one present in act of 2000, would require the creation of a new specific regulation referring solely to the *timeshare* contract.

According to the President of the Office of Fair Trading, such a solution (the division of contract having only a contract character and the *timeshare* contract being able to have also a material scope) would be unjust in the context of system coherence and could lead to many practical problems while using the provisions of the act (there is a close relation among particular contracts determined in directive 2008/122). Moreover, legal frames determined in directive 2008/122 do not comply with article 270\textsuperscript{1} §2 of the Civil Code, according to which utilization, which is determined in §1 expires the latest after fifty years of its creation. Directive 2008/122 does not create a maximal timeframe of a *timeshare* contract. Taking into account the fact that it is based on the maximal harmonization rule, such a time limitation could be considered a wrong implementation of its provisions. Also, the doctrine underlines that it would be proper to accept a contract character of the *timeshare* contract in the implementing directive 2008/122. It is also being mentioned that this law could be strengthened by the possibility of its disclosure in the land and mortgage register and this is how it would obtain extended efficiency\textsuperscript{26}. However, this did not happen because according to article 20 of *timeshare* “in a *timeshare* contract, the right of utilization can be created to the benefit of the consumer. For the purposes

\textsuperscript{25} Additionally, the matter of implementation of a new timeshare frame instead of the commonly used timesharing term to the Polish legal order can be deliberated - *Założenia do projektu*, p. 9.

\textsuperscript{26} B. Fuchs, *Timesharing w prawie wspólnotowym – wnioski dla polskiego ustawodawcy*, Rejent 2009, no 2, p. 32.
of utilization, articles 254, 255, 259, 260 and 266 of the Civil Code of April 23rd 1964 are not applied accordingly. Article 270\(^1\) of the Civil Code has been annulled.

A detailed analysis of the provisions of the 2008/122/EC directive and the act of *timeshare* is not possible in the current elaboration. It is worth mentioning that the above mentioned legal acts are more expanded since it was tried to avoid drawbacks which were contained in its predecessor\(^27\).

**Conclusion**

In order to briefly sum up the matters linked to the impact of EU legislation on the Polish contract system in the example of consumer regulations to which the discussed matter concerning *timesharing* can be included, it can be pointed that EU directives significantly impacted the shape of the Polish law regulating the trade with the participation of consumers.

The location of consumer regulations including *timeshare* matters has remained a discussion in the doctrine. Should they be fully placed in the Civil Code, or as the legislator currently suggested, should it be partly contained in the Civil Code (for example the definition of the entrepreneur and the consumer) and partly in various acts. It seems that following the particularly justified point of view of B. Fuchs\(^28\), the fact that the content of the *timeshare* act is close to contract of utilization of belongings of another person, the full placement of it in the Civil Code is not and will not be possible. Leaving those matters behind the code does not mean that they would lose its civil character. However, it can be analyzed whether it is justified to introduce a new, named contract to the Civil Code, which content would be the possibility of utilization of an item in a determined timeframe, real estate of material item, in a precisely determined timeframe\(^29\).

Another problem is the legal character of *timeshare* contracts. It seems that they should have a contract character instead of a legal-material one.

\(^{27}\) One of the most important changes is the extension of the deadline to withdraw from the contract and the contrary determination of its results.

\(^{28}\) B. Fuchs, *Regulacja timesharingu*, p. 165 and other.

\(^{29}\) B. Fuchs, *Regulacja timesharingu*, p. 166.
Sławomir Kursa*, Contractual Set-off in Roman Law and in Polish Law

Abstract: The topic of the article is the analysis of the cases of the contractual set-off, reported in the sources of the Justinian law and an attempt of their confrontation with the contractual set-off admitted by the Polish law. It is assumed that it will lead to the establishment of the substantive links of the contractual set-off institution admitted in the Polish law with the one known by the Roman law.

Keywords: contractual set-off, Justinian, Digest, Codex, Roman law, Polish law.

Law and practice prove that one of the most useful institutions in the business transactions is the set-off, that is, deduction. It had a well-founded position in the system of Roman law¹, and nowadays it exists in various systems of civil law, also in Polish law. In light of these systems, two basic types of a set-off may be distinguished – a compulsory and a voluntary one. Not getting into details, it should be noted that a compulsory set-off in the abovementioned legal systems exists in a form of a judicial and non-judicial set-off while a voluntary set-off is

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performed on the basis of an agreement\textsuperscript{2}. The topic of the present article is the analysis of the cases of the contractual set-off, reported in the sources of the Justinian law and an attempt of their confrontation with the contractual set-off admitted by the Polish law. It is assumed that it will lead to the establishment of the substantive links of the contractual set-off institution admitted in the Polish law with the one known by the Roman law.

**Contractual set-off in the Digests of Justinian**

The contractual set-off contained in the Digests occurs as a supplementary agreement (\textit{pactum}) concerning the mutual set-off of liabilities, annexed to the main agreement – a pledge (mortgage) agreement, a purchase and sale agreement or a contract of mandate. It has an accessory character by its nature, in other words, it does not exist on its own.

The case of the contractual set-off in relation with the mortgage was described by Papinian in the eleventh book \textit{responsorum}.

\textbf{D. 20,1,1,3 (Pap. 11 resp.): Pacto placuit, ut ad diem usuris non solutis fructus hypothecarum usuris compensarentur fini legitimae usurae. Quamvis exordio minores in stipulatum venerint, non esse tamen irritam conventionem placuit, cum ad diem minore faenore non soluto legitimae maiores usurae stipulanti recte promitti potuerunt.}

It implies that a debtor who took an interest-bearing loan and secured it by establishing a mortgage, concluded an agreement with a creditor stipulating that the latter in place of the interest may derive benefits from the mortgaged property. This is the case of setting off the benefits with the interest as indicated directly by the expression \textit{fructus hypothecarum usuris compensarentur}. In this case it was performed on the basis of the \textit{pactum antichreticum}.

A similar case of the contractual set-off is mentioned in a fragment of the same book of Papinian’s \textit{responsorum}.

\textbf{D. 46,3,96,3 (Pap. 11 resp.): Cum eodem tempore pignora duobus contractibus obligantur, pretium eorum pro modo pecuniae cuiusque contractus creditor accepto facere debet nec in arbitrio eius electio erit, cum debitor pretium pignoris consortioni subiecerit: quod si}

\textsuperscript{2}W. Rozwadowski rightly notes that the beginnings of the Roman set-off should be derived from the contractual set-off and not the compulsory one. See: \textsc{W. ROZWADOWSKI}, \textit{Reskrypt Marka Aureliusza… Cz. I. Przegląd krytyczny doktryny…}, p. 1-2.
It regards a debtor who secured his debt with two pledges and subsequently concluded a supplementary agreement with a creditor that the latter will be able to sell the pledged property in order to satisfy his liability if a debtor does not pay off his debt in a fixed date (pactum de vendendo). This agreement stipulates that after the estimation of the value of the pledges and their sale, a set-off was performed in such a way that a debt was set off from the amount received from the sale of the pledged property and the surplus of the price of the sale the creditor returned to the debtor.

A possibility of the set-off on the basis of pactum de vendendo annexed to the pledge agreement is also indicated by a commentary of Martian which refers to the conditional sale for a just price of a property pledged to the creditor being a pledgee.

D. 20,1,16,9 (Marc. lib. sing. ad form. hypoth.): Potest ita fieri pignoris datio hypothecaeve, ut, si intra certum tempus non sit soluta pecunia, iure emptoris possideat rem iusto pretio tunc aestimandam: hoc enim casu videtur quodammodo condicionalis esse venditio. et ita divus Severus et Antoninus rescripserunt.

In this case the just price is the subject of a set-off with the amount of a debt. According to S. Solazzi, the expression iusto pretio tunc aestimandam in the abovementioned text was added by the compilers in order to reconcile the text of Martian with the prohibition of the use of lex commissoria issued by Constantine. He also explains that in the classical period a sale of the pledged property for a price amounting to a debt may have been agreed either at the beginning of an agreement, or afterwards. In such case the obligation and the debt were settled\(^3\).

The case commented by Scaevola placed in the D. 18,1,81pr. indicates that the set-off agreement was also possible on the basis of a conditional purchase and sale agreement.

D. 18,1,81pr. (Scaev. 7 dig.): Titius cum mutuos acciperet tot aureos sub usuris, dedit pignori sive hypothecae praedia et fideiussorem Lucium, cui promisit intra triennium proximum se eum liberaturum: quod si id non fecerit die supra scripta et solverit debitum fideiussor creditorì, iussit praedia empta esse, quae creditoribus obligaverat. quaero, cum non sit liberatus Luctius fideiussor a Titio, an, si solverit creditorì, empta haberet supra

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The case concerns some Titius who took interest-bearing loans securing them with a mortgage on his lands and established a guarantor in a person of some Lucius to whom he was obliged to, within the nearest three years, free him from the necessity to provide a performance in his place, that is, to pay the debt. Otherwise, if he did not do it in the indicated period of time and the guarantor paid for him the guaranteed debt, a debtor entitled the guarantor to acquire these lands on account of a purchase. The answer to the question whether Lucius, who was not against the given pledge freed from the guarantee by Titius, but paid off his debts, acquired the described lands as a purchase in this case, is that the lands should be considered as acquired by means of the conditional purchase. Paying off the Titius’s debt to his creditor, Lucius became the Titius’s creditor, who, hence, owed him what he had owed before to the first creditor. Lucius had not received those lands before as a pledge. Therefore, there was no pactum de vendendo here but Lucius acquired the abovementioned lands on account of the conditional purchase. This purchase, since it was supposed to serve as a settlement of Titius with his guarantor, proves the existence between them of a set-off agreement.

Another fragment adopted from Pomponius and placed under the title concerning the priority of the creditors claiming their liabilities from the same pledged property, indicates the existence of the contractual set-off.

D. 20,4,4 (Pomp. 35 ad Sab.): Si debitor, antequam a priore creditore pignus liberaret, idem illud ob pecuniam creditam alii pignori dedisset et, antequam utrique creditoris solvent debitis, rem alienam priori creditori vendiderat creditumque pensaverit cum pretio rei venditae, dicendum est perinde haberis debere, ac si priori creditoris pecunia soluta esset: nec enim interesse, solvent an pensaverit: et ideo posterioris creditoris causa est potior.

It refers to the case of a debtor who before paying off the debt to the first creditor, gave the same property to another creditor as a pledge. However, before paying off his debts, he sold to

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4 One may have the opposite impression in regard of the statement of W. Osuchowski who, commenting on the D. 18,1,81pr., writes the following: ‘For if the pledged property is to be sold to the bond creditor for the amount amounting to his liabilities, it is admitted that, in case of this liability not being returned in the fixed period of time, the creditor may retain the property in his possession on account of a purchase’. This statement does not, however, suit the analyzed case. See: W. OSUCHOWSKI, Historyczny rozwój kompensacji..., p. 132.

5 S. SOLAZZI, La compensazione..., p. 228: ‘la vendita è conclusa per compensare con un debito futuro e Scaevola decide che s’intende fatta sotto condizione’.
the first one some other property and agreed with him that the price of the sale will be set off with whom he incurred debt (rem aliam priori creditori vendiderat creditumque pensaverit cum pretio rei venditae). As a consequence, a debt towards the first creditor was remitted and, at the same time, a pledge established for him expired while the second creditor became his only pledgee. The text of this case shows that the set-off agreement was not here connected with the pledge agreement but with the purchase and sale agreement\(^6\).

Subsequently, a fragment coming from the twenty-ninth book of the commentary of Ulpian ad edictum mentions the link between the contractual compensation with the purchase and sale agreement.

\begin{quote}
D. 15,3,7,4 (Ulp. 29 ad ed.): Idem ait et si hereditatem a servo tuo emero quae ad te pertinebat et creditoribus pecuniam solvere, deinde hanc hereditatem abstuleris mihi, ex empto actione me id ipsum consecuturum: videri enim in rem tuam versum: nam et si hereditatem a servo emero, ut quod mihi ab ipso servo debebatur compensarem, licet nihil solvi, tamen consequi me ex empto quod ad dominum pervenit. Ego autem non puto de in rem verso esse actionem emptori, nisi hoc animo gesserit servus, ut in rem domini verteret.
\end{quote}

Ulpian considers there the consequences which would be caused by an agreement concluded with a slave concerning setting off the slave’s debt with the price of the sale of the inheritance to his master.

In the D. 2,14,52,1 there is a description made by Ulpian of the contractual set-off connected with the concluded contract of mandate.

\begin{quote}
D. 2,14,52,1 (Ulp. 1 opin.): Si inter debitorem et eum, qui fundum pigneratum a creditore quasi debitoris negotium gereret emerit, placuit ut habita compensatione fructuum solutoque, quod reliquum deberetur, fundus debitori restitueretur: etiam heres pacto, quod defunctus fecit, fidem praestare debet.
\end{quote}

During his life a testator incurred the debt and secured it with a pledge on his land. When, after the date of the payment came, a creditor started the execution of the debt by giving this land for sale, the debtor (testator) gave a disposition to his mandate so he bought the pledged land for him, paying off the rest of his debt and agreed with him that he could obtain benefits from this land after setting off the amount that he gave to the creditor, with the value of the benefits which

\(^6\) Similarly, see: S. SOLAZZI, La compensazione..., p. 231; W. OSUCHOWSKI, Historyczny rozwój kompensacji..., p. 131.
the land would bring and so that he returned it to the debtor. If the debtor died before the settlement was made with the mandate, his heir would take his place. As a consequence, setting off may take place between the mandate and the heir of a debt, as indicated by the words *etiam heres pacto, quod defunctus fecit, fidem praestare debet*.

S. Solazzi raises doubts as to the validity of such contract of mandate, explaining that it stops existing with the moment of the death of one of the contracting parties\(^7\). One can agree with him as to the fact that the contract of mandate expired due to the death of one of the contracting parties\(^8\) but only when the mandatory did not begin the realization of the contract of mandate, which is confirmed by the text of Gaius.

G. 3,160: *Item si adhuc integro mandato mors alterutrius alicuius interveniat, id est vel eius, qui mandarit, vel eius, qui mandatum susceperit, solvitur mandatum [...].*

While in the abovementioned case it is the completion of the contract of mandate begun during the life of the debtor after his death. Therefore, the sett-off performed by the mandatory with the heir of the person giving mandate may not be doubted, as done by S. Solazzi.

The possibility of the contractual set-off of the existing liability with the future liability on the basis of a contract of mandate is indicated by another text of Ulpian.

D. 2,14,51,1 (Ulp. 26 ad ed.): *Idem eodem loco scribit, si debitorem tuum iussisti solvere Titio, cui legatum falso debere existimas, et debitor pactus sit cum Titio suo debitor constituto: neque tibi adversus tuum debitorem neque ipsi adversus suum actionem peremptam.*

The abovementioned fragment shows that if a creditor, mistakenly believing\(^9\) that he is obliged to provide the legacy to some Titius, gave a mandate to his debtor so that he performed this legacy and the debtor performed it, despite that the debtor would still remain a creditor exclusively towards Titius. Therefore, the sett-off between the debtor and Titius would be impossible. Nevertheless, they could conclude, which they did, *pactum de non petendo* so that

\(^7\) S. SOLAZZI, *La compensazione*, s. 237 footnote: 19: ‘il dubbio poteva nascere solo per il mandato che si estingue con la morte di uno dei contraenti’.

\(^8\) D. 17,1,26pr. (Paulus lib. 32 ad ed.) *Inter causas omittendi mandati etiam mors mandatoris est: nam mandatum solvitur morte. si tamen per ignorantiam impletum est, competere actionem utilitatis causa dicitur. Iulianus quoque scripsit mandatoris morte solvi mandatum, sed obligationem aliquando durare;* D. 17,1,58pr. (Paulus lib. 4 quaest.)*[...] quia mandatum morte mandatoris, non etiam mandati actio solvitur [...] C.4,35,15: (Imperatores Diocletianus, Maximianus) Mandatum re integra domini morte finitur.

the debtor did not demand his liability from Titius and Titius did not demand the execution of the legacy from the creditor of a debtor. This pact, although it secured the interest of the creditor, could not constitute the basis of the contractual set-off between the creditor of a debtor and Titius because Titius was the exclusive creditor of the creditor of a debtor. The only possibility of a set-off would take place if a debtor performed the legacy for Titius in the interest of his creditor, and then he alone would become a creditor of his creditor. The text, however, does not allow to state that it was a case of the set-off agreement annexed to the contract of mandate.

According to S. Solazzi, the text of the D. 2,14,51,1 concerns the set-off performed in a form of a pact regarding the relinquish of a debt (pactum de non petendo). He wrote the following: ‘Non sempre la volontà di compensare si manifestava con un patto aggiunto alla vendita. Talune volte la compensazione si attua con un patto di remissione del debito. […] Il patto concluso fra B [creditor] e Tizio non può essere altro che un « pactum de non petendo »’10. W. Osuchowski repeats after him that: ‘the contractual set-off was not only present in the legal practice as an agreement annexed to the purchase and sale agreement; but often it also had a character of an agreement of the relinquish of the debt. It may be implied from the statement of Ulpian referring in this case to Celsus in the D. 2,14,51,1’. The D. 2,14,51,1 W. Osuchowski comments in the following way: ‘A creditor gives a mandate to his debtor so that he paid to Titius an amount that he mistakenly believed to owe to him on account of the legacy. Whereas, the debtor being the creditor of Titius concludes an agreement with him in which he promises not to demand the performance on account of the legacy. The agreement of the debtor with Titius was aimed at setting off the debt with the mutual liability of the debtor. Since, however, the legacy did not in fact exist, the creditor would have a claim towards his debtor and the latter to Titius. Therefore, by obliging Titius in a form of pactum de non petendo – which is established in the relinquish of his liability on account of the legacy – a debtor sets of his liability with the debt which he owed to the creditor’11. Moreover, also L. Bianco is convinced that ‘si dà il caso che il debitore dell’erede, incaricato di pagare Tizio, abbia un credito verso lo stesso Tizio: i due ricorrano alla compensazione e concludono tra loro un pactum de non petendo’12. Confronting their opinions with the above analysis, it should be stated that the connotation made by S. Solazzi, W. Osuchowski and L. Bianco of the contractual set-off with pactum de non petendo as an agreement allowing the existence of the set-off is groundless, also because, as rightly indicated in his textbook by W. Osuchowski, both the set-off and pactum de non petendo were the ways

10 S. Solazzi, La compensazione..., s. 234-235.
11 W. Osuchowski, Historyczny rozwój kompensacji..., p. 132.
of the redemption of the obligation *ope exceptionis*\(^\text{13}\). Therefore, since they resulted in the same consequence, the application of one of these means rendered the application of the other unnecessary.

**Contractual set-off in the Justinian’s Code**

Apart from the judicial set-off in the Justinian’s Code one may find several references concerning also the existence of the contractual set-off in the system of the Roman law. Particularly interesting in the respect of the contractual set-off is the regulation of the emperors Valerian and Gallien of 259.

> C. 4,49,2 (Imperatores Valerianus, Gallienus): *Venditi actionem ad recipiendum residaum pretium intendere adversario tuo poteris. 1. Nec quod in compensationem venerit, quasi et tu invicem deberes, id obeses tibi poterit, si in bona fidei contractu, in quo maiores etiam viginti quinque annis officio iudicis in iis quae dolo commissa sunt adiuvantur, iusto errore te ductum vel fraude adversarii captum, quasi debitum id esset, quod re vera non debebatur, pepigisse monstraveris. 2. Fructus quoque perceptos ante venditionem contractam, quos, cum venditioni non accessissent, eundem emptorem invasisse proponis, eodem iudicio reposces.*

The abovementioned constitution contains ruling in which their authors granted the right of *actio venditi* to the seller in case of the deceitful extortion by the buyer of a consent to the set-off of a non-existing debt. At the beginning of this ruling they contained the instruction that in case of the good faith contracts, in case of a fraud, a judge should intervene to the benefit of the harmed person\(^\text{14}\). It should be stressed that this intervention was required also if the case regarded mature persons (*maiores etiam viginti quinque annis*). This statement allows a conclusion that a judge should, the more, come with help to the minor in such situation. It should be stressed that no matter if any of the parties of the purchase and sale agreement committed a crime or remained mistaken as to the obligation of the performance, the abovementioned constitution proves that the parties when concluding an agreement *emptio-venditio* could conclude a supplementary agreement concerning setting off the mutual liabilities. Such additional agreement gained legal protection on account of the conclusion of the main agreement, that is, the purchase and sale agreement. On the basis of *actio venditi* the

\(^{13}\) Compare: W. OSUCHOWSKI, *Zarys rzymskiego prawa...*, p. 447-448.

\(^{14}\) Some authors indicate the interpolations of this constitution, see: S. SOLAZZI, *La compensazione...*, p. 232 and subsequent; and afterwards W. OSUCHOWSKI, *Historyczny rozwój kompensacji...*, p. 214.
harmed person could also claim the return of the taken benefits which the buyer had appropriated by making the illegal set-off.

The contractual set-off is also confirmed by the constitutions of the emperors Diocletian and Maximian. In the constitution placed in the C. 5,74,1 the emperors replied to the request of one son who wanted to remove the negative consequences of the unfair set-off performed due to the sale of the rural land of his father without the permission of the regent of the province by his curator\textsuperscript{15} to the heir of his creditor for a reduced price which his father agreed to, being mistaken as to the value of the land in question\textsuperscript{16}. The basis of the set-off in this case was also the purchase and sale agreement (superfluum pretii in compensationem deduci).

C. 5,74,1 (Imperatores Diocletianus, Maximianus): Cum proponas curatorem patris tui non interposito praesidis decreto praedium rusticum heredi creditoris seu tutori eius destinasse venundare eamque venditionem deceptum patrem tuam ratam habuisse, si minore pretio distractum praedium est et in consistulo errore lapsum patrem tuum perperam venditioni consensum dedisse constiterit, non ab re erit superfluum pretii in compensationem deduci: quod praesidis provisione fieri convenit, cuius sollicitiae congruum est, si diversa pars bonam fidem non amplectatur, in arbitrio eius ponere, an velit possessionem cum fructibus restituere, ita ut fenebris pecunia cum competentibus usuris restituatur.

The text implies that the son’s doubt was right. According to S. Solazzi and W. Osuchowski the emperors based their ruling on the fact of the minority of the mistaken father\textsuperscript{17}. A question should be raised as to which reasons were the basis for his son’s intervention. Hypothetically, two situations could be analyzed: 1) a son intervenes as due to the reduction of the price of a sale, despite the performed set-off, a father’s debt still existed; 2) a son intervenes despite the redemption of the father’s debt by means of the performed set-off because he assumed that a creditor should settle the harm sustained by his father due to the reduction of the real value of the land.

W. Osuchowski defends the first of the hypotheses claiming that ‘the price agreed by the parties was not sufficient in order to fully redeem the seller’s debt by the set-off’\textsuperscript{18}. Similarly, S. Solazzi

\textsuperscript{15} According to B. Biondi and S. Solazzi also this constitution was subject to the interpolations; see: B. BIONDI, La compensazione..., p. 259; S. SOLAZZI, La compensazione..., p. 229.

\textsuperscript{16} This case, from the point of view of the lack of the goodwill, is considered by W. DAJCZAK, Pojęcie bona fides w konstytucjach Dioklecjana dotyczących prawa kontraktów [in:] Honeste vivere… Księga pamiątkowa ku czci Profesora Władysława Bojarskiego, edited by E. GAJDA, A. SOKALA, Toruń 2001, p. 31-33.

\textsuperscript{17} S. SOLAZZI, La compensazione..., p. 229; W. OSUCHOWSKI, Historyczny rozwój kompensacji..., p. 214.

\textsuperscript{18} Ibidem, p. 215.
claims that the agreed price was too low to set off the debt with the price of the sale\textsuperscript{19}. The rescript indicates that if the guardian of the heir of the creditor purchasing the land agreed to raise the price, the set-off performed before would be verified. On the other hand, if he did not agree, the regent had a right to oblige the purchasing creditor to return the land with the benefits and the son to pay the creditor of the father the due amount with interest, that is, order \textit{restitutio in integrum}. It should be stressed that such ruling of the emperors neither excludes any of the hypothetically indicated situations, nor it allows its application to every one of them.

The same emperors in the constitution placed in the C. 4,44,11 referred to the set-off agreement performed on the basis of the purchase and sale agreement sued by the son of the debtor.

C. 4,44,11 (\textit{Imperatores Diocletianus, Maximianus}): \textit{Venditor factum emptoris, quod eum tempore contractus latuit, post arguendo, non qui eo tempore scierit, quo id ageretur, et consensit, de dolo queri potest. 1. Igitur cum patrem tuum, ut maius comprehenderitur instrumento pretium, quam rei quae distrahebatur esse convenerat, consensisse profitearis, propter hoc solum de circumscriptione frustra queritur. 2. Sane si placitum pretium non probetur solutum vel in quantitatem debiti per errorem facti compensari cautum fuit, hoc reddi recte postulatur.}

In the case concerning the purchase and sale agreement presented to the emperors for their ruling in order to perform the contractual set-off, the father of the suing son agreed with the purchasing creditor the just price of the purchase which exceeded the value of his debt. The son tried to prove that the father was entitled to the difference between the agreed price of the purchase and his debt. However, the emperors decided that in this case there was no deception or baseless enrichment on the part of the creditor of the father because the price of the purchase and the size of the debt were confirmed in the purchase and sale act. Since the father knew that he was entitled to something more on account of the sale of the land and the performed set-off but he did not demand it, it meant that he intended to give the difference in question, which was probably little. As justly decided by the emperors, the son’s claim concerning the payment of the difference was futile because neither on the part of his father, nor on the part of the buyer was a mistake or deception. In § 2 of the said constitution they stressed that one may claim the payment only if the price of the purchase was not paid or if it was paid on account of the debt within the performed set-off due to the factual mistake\textsuperscript{20}.

\textsuperscript{19} S. \textsc{Solazzi}, \textit{La compensazione...}, p. 230: ‘il fondo rustico era stato venduto all’erede del creditore, evidentemente per compensare il debito col prezzo, ma il prezzo convenuto era troppo basso’.

\textsuperscript{20} On interpolations of this constitution see: S. \textsc{Solazzi}, \textit{La compensazione...}, p. 233-234.
Subsequently, the rescript of the emperors Diocletian and Maximian, addressed to Florus indicates the possibility of the contractual set-off as one of the means of the redemption of the obligation secured by the pledge.

C. 8,30,3 (Imperatores Diocletianus, Maximianus): Si reddita debita quantitate vel rebus in solutum datis sive distractis compensato pretio satis ei contra quem supplicas factum adito praeside probaveris, vel si quod residuum debetur obtuleris ac, si non acceperit, deposueris consignatum, restitui tibi res pacto pignoris obligatas providebit, cum etiam edicto perpetuo, actione proposita pecunia soluta creditor vel si per eum factum sit, quominus solveretur, ad reddenda quae pignoris acceperat iure eum satis evidenter urgueri manifestum sit.

The emperors replied to Florus, who came up with the supplication against his creditor that if he proves before the regent of the province that he satisfied the demands of his creditor by paying him the due price or providing him with some other things in return, or setting off the price of the sold pledged property with his debt, and the creditor does not return him what he owed him, he will have a right of the complain on account of the pledge. This text shows that the debtor, in case of giving some property to the creditor as a pledge, had a right to their full return only if he paid off the debt fully or there was datio in solutum. Whereas, if there was a sale of the pledged property, a pledgee could claim the return only of what exceeded his debt (quod residuum debetur). The set-off discussed here was, as evident, linked with the pledge agreement and it could come through only when there was no payment of the debt and return of the pledged property.

Similarly, some Cornelian turned to the emperors Diocletian and Maximian for a reply to his question as to what he should do in order to recover his pledged property from the creditor if after the performed set-off it turned out that he still owed something to the creditor.

C. 4,31,12 (Imperatores Diocletianus, Maximianus): Invicem debiti compensatione habita, si quid amplius debeas, solvens vel accipere creditore nolente offerens et consignatum deponens de pignoribus agere potes.

The emperors granted a right of a complaint concerning the return of the pledged property (actio pigneraticia directa) to Cornelian, under the condition of meeting one of the two following

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21 S. Solazzi and W. Osuchowski link the set-off occurring in this case directly with the purchase and sale agreement. See: S. SOLAZZI, La compensazione..., p. 229; W. OSUCHOWSKI, Historyczny rozwój kompensacji..., p. 216.

22 According to S. Solazzi the reference to the set-off agreement was added by the compilers. See: S. SOLAZZI, La compensazione..., p. 233 footnote. 9.
possibilities – either he pays to the creditor the remaining part of the debt or in case of the refusal of the acceptance of an offer of paying off the rest of the debt\textsuperscript{23}, he will return it to the deposit confirmed in writing\textsuperscript{24}. In the abovementioned text the performance of the contractual set-off is indicated by the expression *Invicem debiti compensatione habita*\textsuperscript{25}. It does not unequivocally follow from the text on the basis of what the agreement of the set-off was performed. Since the pledgee demanded the return of the pledge and the emperors commended him to pay off the rest of the debt so that he could recover the pledged property, thus the pledge could not be the basis of the set-off. It is highly probable that the purchase and sale agreement of some other property than the pledged one was the basis of the set-off.

The pledge agreement, as a basis of the contractual set-off, is also exposed by the constitution of the emperors Diocletian and Maximian of 294, so far unnoticed in the monographs concerning the set-off.

C. 8,42,20 (*Imperatores Diocletianus, Maximianus*): Si operas certi servi pecunia sumpta creditoirem sibi in debitum compensare placuit, his secundum conventionis fidem praestitis de mancipio restituendo pacti tenor servari debet.

It may be read there that the debtor agreed so that his creditor set off, on account of the payment of the pecuniary debt, the performance of the works by his slave and after their performance the slave was supposed to be returned to the debtor in accordance with the wording of the pact. It follows from it that the slave was given to the creditor as a pledge, with the entitlement to the use of the work of such slave (*pactum antichreticum*) and the obligation to return him to the pledgee after the agreed works were performed\textsuperscript{26}.

Subsequently, the offer of the contractual set-off is mentioned in the constitution of Diocletian and Maximian addressed to Bassus.

\textsuperscript{23} S. Solazzi, and after him W. Osuchowski mistakenly identify a proposal to pay the rest of the debt with the proposal of a set-off, however, the text discusses the previous set-off, the performance of which did not fully cover the obligation of the debtor. Compare: S. SOLAZZI, *La compensazione...*, p. 237-238; W. OSUCHOWSKI, *Historyczny rozwój kompensacji...*, p. 216.


\textsuperscript{25} W. Osuchowski understands the expression *accipere creditore nolente offerens* as making an offer of the contractual set-off. However, such interpretation seems to be not so logical; it would be allowed if Cornelius was not a debtor per saldo from the already performer set-off but still remained a creditor towards the person to whom it owed the surplus from the set-off. See: W. OSUCHOWSKI, *Historyczny rozwój kompensacji...*, p. 216.

C. 4,31,13 (Imperatores Diocletianus, Maximianus): Si velut in id debitum, quod sollemnium publicarum pensitationum debueras nomine, compensaturo tibi nihil petiturum postea Muciano scripsiisti, redditis quae venerant in compensationem non indebiti soluti repetitio, sed ante debiti competit exactio.

It can be found in it that Bassus obliged to pay the fiscal receivables wrote to the tax collector Mucianus so that he set off from the Bassus’s liabilities towards him, what he owed to the State Treasury, that is, he offered him the contractual set-off. However, Mucianus did not settle the Bassus’s debt and the latter had to pay it by himself. The emperors decided that in such case, as there was no set-off, Bassus has the right to claim the return of the whole debt from Mucianus. The lack of the consent on the part of Mucianus resulted in the Bassus’s proposal remaining an offer of a set-off only. If there was an agreement between them, the performed set-off would meet the requirements of the contractual set-off also due to the fact that a future liability of Mucianus towards Bassus would be the subject of the set-off, which was not possible in case of a judicial set-off. Although, the brief text of the abovementioned constitution does not directly refer to the question what contract would be the basis of the set-off, from the fact that Bassus turned, in writing, to Mucianus for the payment of his debt towards the State Treasury, it follows that the contract of mandate would be such agreement.

Links between the Roman contractual set-off with the contractual set-off applied on the basis of the provisions of the Polish Civil Code

The analyzed sources indicate that in each case, in order for the contractual set-off to be performed, there had to occur the capability of the set-off of the mutual liabilities which comprised two elements: cumulative occurrence of all the necessary material legal preconditions of the liabilities and the consent of both parties to make the set-off. Among the material legal preconditions, which were required by the Roman law for the contractual set-off, there may be distinguished the subject precondition referring to the persons performing it and the object precondition concerning the liabilities which were subject to the set-off.

The analyzed cases confirm that in the Roman law the contractual set-off could only occur between the persons having double position towards each other – a creditor and a debtor, mutually obliged and entitled towards each other as in accordance with the definition of Modestyn, his role comprised the mutual crediting of the debt and the liability (compensatio est
debitori et crediti inter se contributio)\textsuperscript{27}. Thus, the set-off supposed the bilateral relations in which two same subjects participated, in accordance with the rule eius quod non et debetur, qui convenitur, sed alii, compensatio fieri non potest\textsuperscript{28} (there may not be any set-off with the liability of another party than the one that brings their liability against the liability of the other party). Certainly, the participants of the set-off had to possess the capability to perform legal acts.

The analysis of the cases concerning the contractual set-off conducted in the paragraphs above, allows to draw a conclusion that among the subject preconditions of the compulsory set-off were: mutuality, homogeneity, chargeability, actionability and fluidity of the liabilities, which were required by the Justinian law\textsuperscript{29}, while the contractual set-off only required the mutuality of the liabilities. The admission of the non-homogeneity of the liabilities subject to the set-off confirm the cases presented in the D. 20,1,1,3 where the interest was set off from the loan with the benefits from the land and in the C. 8,42,20 where the set-off regarded the work of the slave and money. In the majority of the analyzed cases the set-off agreement provides for the set-off of the future liabilities, not yet due at the time of its conclusion. The confirmation of the natural set-off is indicated by the general principle expressed in the D. 16,2,6\textsuperscript{30}. As far as the precondition of fluidity is concerned, introduced by Justinian as one of the requirements of the compulsory set-off, it should be stated that in case of the contractual set-off it did not have to be met because the parties, agreeing to set off the mutual liabilities, allowed their existence. Thus, the contractual set-off, as opposed to the compulsory set-off did not pursue its executive function\textsuperscript{31}.

The consent to its performance constituted the relevant and unnecessary element of the contractual compensation. It came through only when the parties expressed their consent in a fully aware and voluntary way for the mutual set-off of their liabilities. The conducted set-off was impaired by the mistake on the part of a contracting party as to the factual state (both the existence of the liability and its size). The lack of the consent on any of the parties made it impossible to perform it and rendered the offer of the other party futile. The sources do not indicate that the expression of this consent required any special form.

\textsuperscript{27} D. 16,2,1.
\textsuperscript{28} C. 4,31,9.
\textsuperscript{29} See: S. KURSA, Potrącenie przymusowe..., p. 165-168.
\textsuperscript{30} D. 16,2,6: (Ulpianus 30 ad Sab.) Etiam quod natura debetur, venit in compensationem.
\textsuperscript{31} It is similar as in the Polish law; see: M. PYZIAK-SZAFNICKA, Potrącenie w prawie cywilnym, Kraków 2002, p. 344-345, 348.
The feature of the contractual set-off was also the fact that it did not occur on its own but it had an accessory character, that is an agreement concerning its performance had to be annexed to another agreement. As a result of the conducted analysis it was established that the main agreements were a pledge agreement, a purchase and sale agreement and a contract of mandate. A thesis may be posed that in case of a pledge adding *pactum antichreticum* or *pactum de vendendo* was a means of expressing the will of the performance of the contractual set-off.

Beside the compulsory set-off (art. 498 Polish Civil Code), the Polish law admits the contractual set-off, also known as the contractual compensation in the doctrine and judicature. The admissibility of its application derives from the principle of the freedom of contract (art. 353 of the Polish Civil Code). According to W. Bryl, ‘since as in the article 453 a creditor may agree to accept from the debtor a different performance instead of the due one, and as in the article 506 the parties may perform novation of a legal action and thus the obligation expired, there are no justified grounds not to take the admissibility of the redemption of the liabilities by means of the set-off into account.’ According to J. Lachowski, the subjects performing the contractual set-off have freedom to shape its preconditions, its scope and the moment of the occurrence of the consequences.

In accordance with the Polish law, a case when in order to redeem two or more liabilities on the basis of an agreement concerning the set-off may only be effective if its parties have a double position towards each other, similarly as it was in the Roman law, that is: a debtor and a creditor. Therefore, there prevails the same principle as provided for by the Roman law in the C. 4,31,9. As a consequence, the set-off of the liabilities, which the parties of the agreement are not entitled to but a third party, is impossible. As in the Roman law, also in the Polish law the

34 Article 353 of the polish Civil Code: ‘Parties executing a contract may arrange their legal relationship at their discretion so long as the content or purpose of the contract is not contrary to the nature of the relationship, the law or the principles of community life’. See: M. PYZIAK-SZAFNICKA, *Potrącenie w prawie cywilnym...*, p. 337-344, where the author considers the admissibility and legal character of the contractual set-off.
36 J. LACHOWSKI, *Kompensata umowna...*, p. 43-44.
37 Ibidem, p. 42. However, the set-offs performed on the basis of multilateral agreements are admissible; see: J. LACHOWSKI, *Kompensaty umowne wierzytelności przyszłych...*, p. 17.
precondition of the contractual set-off is the mutuality of the claims constituting a condition stipulating that they could be accounted for the mutual redemption.

In the operative part of the judgement of 17 December 1998, the Supreme Court unequivocally stated that in the contractual set-off the mutual liabilities do not have to be homogeneous\(^{38}\). The Supreme Court justified that thesis by indicating that by the use of the freedom of contract, the parties may agree that they will accept every type of a performance if possible to perform the set-off with the mutual performance. Moreover, the contractual set-off does not require the maturity of the liabilities or the actionability of the performances. According to J. Lachowski, ‘the maturity of the liabilities redeemed due to the contractual set-off is […] legally indifferent’ but the parties within the principle of the freedom of contract may also make the natural liabilities the subject of the agreement\(^{39}\).

The contractual set-off, in light of the Polish law, does not need any specific legal form in order to be effective. Statements of the will of the parties may have a deducted character and the set-off agreement comes trough by any type of conduct of the parties which reveal their wills in a sufficient way\(^{40}\). Even here one may notice the similarity with the Roman law.

The relevant difference between the contractual set-off in the Roman law and the Polish law concerns the character of the set-off, which due to the existence of the freedom of contract in the Polish law, does not have the accessory character and may be performed without any relation with the other actionable agreement.

Taking all the characteristic features and the requirements of the contractual set-off, it should be stated that both in times of the Roman law and in the contemporary legal system, its legal substance is that it is not the legislator that decides about the redemption of the mutual liabilities by crediting them but the will of the parties of the bonded relations which the redeemed liabilities result from. Due to the fact that it is not expressly determined by the legal provisions, the understanding of its nature is possible only by the analysis of the judicial cases, similarly to the case of the Roman law. The need for the further study of its substance and limits by the science of law is justified by the fact that it may be applied in the business transactions as a

\(^{38}\) II CKN 849/98, OSN 7-8/1999, position 128.

\(^{39}\) J. LACHOWSKI, Kompensata umowna…, p. 43-44. Such view is also presented by the Polish judiciary. For in the justification of the abovementioned judgement of 17 December 1998, the Supreme Court stressed that the parties, within the freedom of contract, may perform the contractual set-off also of the liabilities which are not yet chargeable.

\(^{40}\) M. PYZIAK-SZAFNICKA, Potrącenie w prawie cywilnym…, p. 350.
convenient and quick means of the settlement between the parties, without the excessive engagement of the judicial institutions.
Edyta Sokalska*, Historical and Philosophical Background of the Code of Obligations of 1933

Abstract: In 1918, after the period of partitions of Poland, the country had to face a very difficult and tough period of the organization of central and local administrative bodies that were able to undertake new functions. The Code of Obligations of 1933 is considered one of the best legal acts of Polish legislation of private law in the twentieth century. It is indicated as an outstanding work distinguished not only Polish experience, but also regarding foreign jurisprudence. In the first years of its existence it has been noted by prominent European lawyers. It was emphasized the modern character of the Code, precision in the provisions and legislative diligence. There have been appreciated the efforts pointing at avoiding casuistic recognition of legal institutions, as well as openness of the creators to the latest achievements of the world science. Ernest Till and Roman Longchamps de Bérier are considered the main authors of the draft code. In developing Polish law of obligations, the creators decided not to formulate completely new legal solutions, but they focused instead on making the synthesis of already existing rights, taking into account those days’ realities and the achievements of science.

Keywords: law, administration, history, code, obligation, unification.

Introduction

In 1918, after the period of partitions of Poland, the country had to face a very difficult and tough period of the organization of central and local administrative bodies that were able to undertake new functions. Despite the fact of having the tradition of the local self-government, a few varied solutions were taken into account. The Polish state formed its borders and built the parliamentary democracy. However, the enormous difficulties of political, economic and legal nature there should have been overcome.

At the time of regaining independence in 1918 and the formation of the state’s borders, there were several varied legal systems left by the invaders on the Polish lands in parallel. In the area of the Prussian occupation there was the legal system of Prussia, in Galicja and Cieszyn Silesia - Austrian law, in the areas of Orava and Spiss region - Hungarian law, in areas annexed by Russia and eastern borderlands - Russian law. In the area of the former Congress Kingdom of

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Poland in the field of civil law there was existed as a separate Polish-French legislation coming from the first half of the XIX-th century. In addition, there were some regulations issued in the years of World War I by the German and Austrian, and introduced by the pro-Polish authorities. So, in other words there were some differences not only among the partitions but also within one partition¹.

It should be noted, that there were several systems of administrative law on the Polish lands. The structure of the local administrative bodies was also shaped differently in the individual partition. The existing self-government system on the Polish lands was also inherited from the occupying countries². This diversity of various legal and administrative regimes significantly disrupted the administration of the entire area of a free state. The first plan was the desire of the authorities to speed up the process of unification of the state at the political, legal and administrative levels. The starting point there was adopted the principle of adapting the old partitioning institutions to the new conditions. The difficulty of the situation in the initial period was deepening by the lack of the single center of the central authorities³.

The intensive preparations for the convening of the Polish parliament started with the regaining independence. The functioning of Sejm – Polish parliament was closely associated with the concept of independence by all Poles. It was quickly organized a new state apparatus. Parliamentary elections were held two months after disarming the occupiers. In three months time the government started to function. Despite the fact of occurring some difficulties and impossibility to hold the elections in some administrative units due to extraordinary circumstances, Sejm Ustawodawczy (the main legislative body) started to work on the 10th of February. During the meetings it was visible the diversity and variability of varied political groups within the legislative body. None of the parliamentary representation and political

¹ For more see, Artur Korobowicz, Wojciech Witkowski, Historia ustroju i prawa polskiego (1772-1918) passim (2013).
² The differences of the legal solutions concerning local self-government in the partitions indicates Edyta Sokalska, The concepts of the local self-government in Poland in the first years of regaining independence, 28 Studia Prawnoustrojowe 305-320 (2015). Polish literature on the subject of the building of central and local administration in the inter-war period is quite impressive. Among the authors who were interested in the subject there could be mentioned: M. Jaroszyński, J. Starościak, J. Panejko, A. Wereszczynski, T. Bigo, M. Jaroszyński, A. Ajnenkiel, A. Łuczak, H. Izdebński Z. Leśni, J. Szeniawski, J. Sobczak, B. Jastrzębski and others. The literature is cited in the work of Edyta Sokalska mentioned above.
parties received within a few years a sustainable advantage and that fact unfortunately led to the frequent changes of the cabinet⁴.

The unification and codification of varied areas of law was one of the main objectives of the newly created legislative bodies⁵. The aim of this essay is the presentation of some chosen historical aspects and philosophical background of creating *The Code of Obligations* of 1933. *The Code of Obligations* was a legal act regulating the Polish law of obligations; the Code took effect from 1 July 1934. It was introduced by the regulation of President of the Republic of Poland of 27 October 1933 (Dz. U. No. 82, item. 598). The act was repealed by the act of 23 April 1964 (Dz. U. No. 16, pos. 94), with the exception of the provisions connected with labour law which were valid up to 1 Jan.1975. The literature on the subject of the codification of Polish law of obligation is quite impressive. As far as Polish-language researchers are concerned, there can be mentioned: Roman Longchamps de Bérier, Leonard Górnicki, Zbigniew Radwański, Katarzyna Sójka-Zielińska, Stanisław Grodziski, Adam Lityński, Jan Halberda, Adam Redzik and Jarosław Kola⁶.

**The organization of codification works**

The creation of the Code of obligations should be examined in social and political context. It should be remembered that the impulse to work on the creation of the Polish legal system was the rebirth of the Polish state. It should be noted, that the duty of the unification of law in such conditions was an extremely difficult task. The creation, organization and activities of the Codification Committee of the Republic of Poland in the area of contract law are here interesting issues⁷.

In the years of 1916-1918 there were the attempts of writing projects of law for the re-borning Polish State. Smaller and larger bodies wrote their own projects. In 1919 the work on the projects was intensified. The member of the PPS Zygmunt Marek put forward the proposal to the Legislative Sejm on the appointment of the Codification Committee. After a short period, the

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⁶ The works of the scientists mentioned above will be included in the bibliography.
⁷ About the works of Codification Committee see Katarzyna Sójka-Zielińska, *Organizacja prac nad kodyfikacją prawa cywilnego w Polsce międzywojennej*, 27/2 *Czasopismo Prawno-Historyczne* 271-280 (1975).
Sejm unanimously approved the bill of June 3 1919 on the Codification Committee of the Republic of Poland.8

The issue of the legal status of the Codification Committee has already been thoroughly examined and described in the studies of Grodziski, Lityński and Górnicki. The first president of the Codification Committee - prof. Franciszek Ksawery Fierich - defined Codification Committee as an independent entity, an advisory institution in relation to the Parliament.9

Codification Committee was assuming as the authority of a temporary nature. Although, the time was not specified, it was clear, that the existence in this shape should have been up to the completion of its basic tasks – the unification of the Polish legal system. The Commission and its activities had considerable standing in both: national legal authority and international, and also they enjoyed a great esteem in society. So, it was not surprising that over time there were demands that after the completion of the work, it would be transformed into a professional institution with advisory character, and it would gather the eminent lawyers for their opinions and draft legislation.

Leonard Górnicki stated that it was the central organ of the state; however, it was not coordinated with the prevailing political system in the state system. Codification Committee as a formally autonomous central state authority had an advisory character and its role was to prepare drafts of laws to unify legal system in the Republic of Poland.

There were forty-four lawyers appointed, representing the areas of all three former partitions to the first composition of the Codification Committee. The first chairman was an expert in civil procedure Franciszek Ksawery Fierich (a professor of the Jagiellonian University). In the executive committee there were also: Stanisław Bukowiecki – a highly regarded lawyer, Ernest Till - an outstanding expert in civil law (a professor of Jan Kazimierz University in Lviv) and Louis Cichowicz (also a lawyer). After the death of professor Fierich and several years of vacancy the Codification Committee joined Boleslaw Norbert Pohorecki (murdered in 1940 in Katyn), prof. Ignacy Koschembahr-Lyskowski, Wiktoryn Mańkowski and prof. Karol Lutostański. The composition of Codification Committee underwent numerous changes due to

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the death or resignation of its members during the work of the Commission. The organizational structure of the Committee also has changed. The visible trend of changes of the Committee evolved towards working in small teams of specialists in a certain field.

The unification of the law of obligations and its main creators

The codification of obligation law was the subject of works of the Section of Civil Law within the Codification Committee. In 1921 Ernest Till introduced the project “o wynagrodzeniu czynów bezprawnych”. In 1922 gathered around prof. Till Lviv scholars - Mauryce Allerhand, Aleksander Doliński, Roman Longchamps de Berier and Kamil Stefka designed the project of the part of the law of obligations. Consequently, the Commission decided that the law of obligations will not be included in the future into Civil Code, but it will be dealt with quickly through a separate legal act, and as a starting point for the further work there were identified existing projects developed under the guidance of prof. Till. In January 1924 within the Codification Committee it was created the permanent Subcommittee of the Law on Obligations. The biggest influence on the drafting of the law of obligations had no prof. Ernest Till and the lawyers from Lviv\textsuperscript{10}. After the death of prof. Till in 1926, the main coordinator of the project was prof. Roman Longchamps de Bérier.

In developing Polish law of obligations, the creators decided not to formulate completely new legal solutions, but they focused instead on making the synthesis of already existing rights, on taking into account those days’ realities and the achievements of science. In other words, the purpose of their efforts made primarily Polish unification of the legal system in the field of the law of obligations\textsuperscript{11}. The draft Code of Obligations was submitted to the Minister of Justice on July 25 1933. Its content was even slightly modified by the actions of the government and BBWR, and with the Regulation of 27 October 1933 it was passed and it took effect from 1 July 1934.

Ernest Till and Roman Longchamps de Bérier are considered the main authors of the draft code. Prof. Ernest Till (1846-1926) as an eminent scientist was a member of the Polish Academy of Sciences. He was born in Brzeżany and attended high school in Lviv, in the years of 1865-1870 he studied law and economics at the University of Lviv. In 1871 he received the degree of Doctor of Law. Then he worked in Prokuratoria Skarbu in Lviv, after that he took the practice

\textsuperscript{10} See Adam Redzik, Prawo prywatne na Uniwersytecie Jana Kazimierza we Lwowie 230 (2009).
\textsuperscript{11} For more see Leonard Górnicki, Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939 314 (2000).
of a candidate to the Bar. Since 1878 he led the well-known law firm in Lviv. From 1873 he was a lecturer of agricultural law at Agriculture Academy in Dublany and forest law in the School of Forest Holding in Lviv. In 1877 he at Jagiellonian University he introduced his professor work about the importance of ownership on the acquisition of real estate and he has been an assistant professor in the Department of Civil Austrian Law at Lviv University. In 1888 he became an associate professor, and after the resignation of the Bar in 1905 – a professor. In the years of 1905-1917 he was the head of the chair of the Austrian private law, and in the academic year 1906/1907 he was dean of the Faculty of Law. In 1921 he was appointed an honorary professor and he continued lectures. In 1897 he was appointed a member-correspondent of Polish Academy of Sciences. In 1917 he received the Austrian nobility degree. In 1926 he received the title of doctor honoris causa of the University of Lviv. In the scientific work dealt with civil law - property law, estate law and obligations.

Roman Longchamps de Bérier (1883-1941) as an eminent lawyer was also a member of the Codification Committee and the last president of the University of Lviv. He came from a well known family of Lviv of French origin. In 1901 he was graduated from high school in Lviv. In the years 1901-1905 he studied at the Faculty of Law and Political Skills at Lviv University. During his studies he attended the seminars of professors Ignacy Koschembahr-Łyskowski, Władysław Ochenkowski, Aleksander Doliński, Ernest Till. In 1906 he received the title of Doctor of Law. In the same year he joined Prokuratoria Skarbu in Lviv up to 1920.

After graduating, he continued scientific interest under the guidance of prof. E. Till. In the academic year 1907/1908 he was a student in Berlin and he attended the seminars of professors Theodor Kipp and Joseph Kohler. After returning from college he developed a very valuable monograph Studia nad istotą osoby prawniczej (Lwów 1911). In 1916 he became a professor in Austrian private law at the Faculty of Law, University of Lviv.

In Lviv in November 1918 he was a member of Ochotnicza Liga Obywatelska and Milicja Obywatelska which he was later awarded with the „Krzyż Obrony Lwowa” and “Krzyż Małopolskich Oddziałów Armii Ochotniczej”. In May 1920 Roman Longchamps de Bérier was appointed associate professor of civil law at the Faculty of Law and Political Skills at Jan Kazimierz University in Lviv. In the years of 1920-1939 he also taught civil law at the Catholic

12 For more see Adam Redzik, Profesor Ernest Till (1846-1926) – w stusześdziesięciolecie urodzin i osiemdziesięciolecie śmierci, 3-4 Palestra 125-132 (2006).
University of Lublin. Since 1933 he was a member of the adoptive Scientific Society in Lviv, and since 1931 a member of the Polish Academy of Sciences.

At Jan Kazimierz University prof. Longchamps de Bérier held a number of functions and dignities. In the years of 1923/24 and 1929/30 - 1931/32 he was the dean of the Faculty of Law UJK. In the years of 1924/1925 and 1932/1933 – 933/1934 he was vice-dean, from 1934/1935 - from 1937/1938 vice-rector of UJK. In June / July 1939 he was elected rector. In September 1939, as the rector of UJK he was the head of Komitet Obywatelski Obrony Lwowa. In January 1940 he was fired from the university (as well as the majority of Polish professors and junior academic staff of the Faculty of Law) and restored again in autumn 1940. In 1940-1941 he taught civil law focusing on the selected issues of Soviet law.

Roman Longchamps de Bérier was the participant of a lot of scientific legal undertakings and conferences in Poland and Europe: Polish lawyers conventions, Congresses of Comparative Law in The Hague (1932, 1937), the International Legal Week in Paris (1937) and the Congress of Slavonic Jurists in Bratislava (1933). He participated in the work on the projects of the codification of the law of obligation in Europe. He was one of the initiators of appointment and the president of the Polish-French Legal Agreement. Roman Longchamps de Bérier all the time continued the work of his master - prof. E. Till13.

Creators of the project were guided by the principles of liberalism, equality, nominalism and the freedom of contract. It was created under the visible influence of sociological school. The Codification Commission was dominated by two trends: the liberal-individualistic and sociological - demanded restrictions will of the parties for the sake of realizing the principles of social justice. The meeting was chaired by Roman Longchamps de Bérier, who was also the referent of the project. The project of the code finally developed a number of solutions from the Napoleonic Code, the ABGB, BGB, ZGB and the draft of French-Italian Code of Obligations of the years of 1927-1931. Polish Code consisted of seventeen titles (of which the first five acted as a general part with the amount of 645 articles. It was based on the principle of equality between the parties and freedom of contract. General Clauses allowed the judge to take into account the specific conditions of the actual situation and determination of the case, which has not led to the victimization of one of the parties. It was in connection with the

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13 See, for example, Adam Redzik, Roman Longchamp de Bérier (1883-1941), 2006/1 Kwartalnik Prawa Prywatnego 5-10.
principle of nominalism, but it took into account the indexation and the court valorization. Numerous solutions had been transferred from the Code of Obligations to the current Civil Code\textsuperscript{14}.

During the works on the Code the Codification Commission stressed the specific nature of the activity and required the direct involvement of the small groups of lawyers, but it was underlined repeatedly that the emerging Polish regime should first and foremost comply with the needs of the society and as such should take into account the aspirations of all society groups. The second chairman of the Committee - Bolesław Pohorecki - stated that the new law should be, not only a uniform law for the whole state, but also better than the previous law. It should reach the highest possible level in terms of legislature technique. It should also satisfy the needs of the population with the fundamental provisions and it should express the views of the society\textsuperscript{15}. It seems that legislators believed that they had to take into account certain existing non-passing values respecting the legal tradition specific to the legal culture of the society in which they operate.

It should be taken into account that the circumstances of the works of the Codification Committee were very difficult. The lawyers had to overcome not only legal obstacles, but also the problems of surrounding reality, including a tough economical situation. The first meeting of the Commission was held in a private apartment of prof. Fierich, because at that time the Commission did not have its permanent place. As S. Posner reported, in the initial period the members paid from their own resources the cost of the offices. The Commission budget was limited and since 1922 and the members were not paid for their work. From today's perspective the lawyers had a great sense of responsibility. Despite the obstacles, the works on Polish legal system were carried out with full commitment, a strong sense of mission and awareness that the importance of projects is visible on every step\textsuperscript{16}.

\textsuperscript{14} About chosen institutions of the Code of Obligations see, for example, Jan Halberda, \textit{Instytucja niesłusznego zbogacenia w polskim Kodeksie zobowiązań z 1933 roku na tle współczesnych kodyfikacji}, 5(4) Krakowskie Studia z Historii Państwa i Prawa 307-328 (2012);
\textsuperscript{15} For more see Leonard Górnicki, Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939 80 (2000).
\textsuperscript{16} Jarosław Kola, op.cit. 256.
Conclusions

In 1918 after the period of partitions the Polish country underwent a very difficult and tough period of the organization of central and local administrative bodies. The Polish state formed its borders and built the parliamentary democracy. The Code of Obligations is considered one of the best legal acts of Polish legislation of private law in the twentieth century. It is indicated as an outstanding work distinguished not only Polish experience, but also regarding foreign jurisprudence. In the first years of its existence it has been noted by prominent European lawyers. It was emphasized the modern character of the Code, precision in the provisions and legislative diligence. There have been appreciated the efforts pointing at avoiding casuistic recognition of legal institutions, as well as openness of the creators to the latest achievements of the world science.

It should be noted that Franciszek Longchamps de Bérier assumes that it was a serious challenge to create those times such regulations, but the lawyers were for this probably better than we prepared. Undoubtedly, each legislator is faced with challenges and the means appropriate for the time.

There could be pointed out varied factors attributed to the creation of the Polish Code of obligations. Of high significance it should be the patriotic attitude of the nation that waited the liberty for over a century, and consequently the sense of mission accompanying the main actors of the state actions. The fact that it was created the great work concerning the law of obligations can be explained with quite practical circumstances, the fact that the relations regulated by the Code, were the most common, and thus their legislation was the most necessary and urgent.

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17 For more see Edyta Sokalska, Przemiany strukturalne władz lokalnych w Polsce w II połowie XX w., 11.3 Zeszyty Prawnicze UKSW 315-336 (2011).
18 Franciszek Longchamps de Bérier, Po sześćdziesięciu latach, in: Roman Longchamps de Bérier, Zobowiązania 5 (1999).
19 Leonard Górnicki assumes that: „po pierwsze, należało wyczuć życie prawne, jego potrzeby, warunki jego rozwoju, bo przecież ustawodawca nie działa w próżni i zastaje już w sferze prawa jakiś stan. Po drugie, ponieważ wyczucie, intuicja, to jeszcze nie wszystko, ustawodawca powinien zbadać kierunki rozwojowe prawa, dostrzec słabe strony i wspomóc elementy wartościowe, przy czym podporą stanowić tutaj musiała nauka prawa. Po trzecie, ustawodawca ustalić miał zasady formułowania postanowień prawnych, czyli dojść do właściwej techniki prawodawczej. Po czwarte wpływu epoki na tworzenie prawa, po piąte – zasadniczych form zdań prawnych, po szóste – naczelnych pojęć podstawowych gałęzi prawa i po siódme – regul techniki prawodawczej”, see Leonard Górnicki, op.cit. 80-81.
Franz-Rudolf Herber*, Property, Expropriation and Socialisation According to the German Constitution in the Light of the European Economic and Philosophical History

Abstract: The paper treats, if the German constitutional model prefers capitalism, socialism or a mixture of both; the latter seems to be the chosen solution, because expropriation and socialisation are allowed. Both measures were intensively discussed during the last worldwide economic depression as a package of measures against (German) bad banks, but in the end the German Government did take rather conventional rescuing measures. The paper gives an overlook about modern German constitutional history: It is illustrated that the German reunification in 1990 did start a discussion on constitution, but did not lead to significant changes. It is analysed that the subject matter of property and expropriation is determined by the jurisdiction of the German Constitutional Court that sometimes does take on the role of the legislative power in deciding, what property is or not. Furthermore, the paper has a view at the European economical and philosophical development of the idea of property; the basic passages e.g. in the texts of Aristotle, Thomas Aquinas, Thomas Hobbes and Adam Smith are treated.

Keywords: expropriation, property, socialization, legal history, German Constitution.

I) Introduction

To the organizers of this conference at the capital of Poland I am very thankful that it is possible to make a lecture on German constitutional law. I am aware of the military violence the greatest war criminal of human history – Adolf Hitler (1883 – 1945) and his crazy followers – had brought to Poland¹. It is one of the great miracles of the 20th century that the relationships between Poland and Germany were normalized and today there is no longer the axis Paris – Berlin, but the axis Paris – Berlin – Warsaw. For me the journey to the capital of Poland is always something very particular, because I do owe to Poland more than words may express: From Pruszkow – that is only of a few kilometers from here – is my wife Grazyna Ewa².

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² To the ideologically motivated expropriations by socialist nationalization Grazyna Ewa Herber: Reconstruction of Warsaw’s old town after the 2nd World War. The conflict between historic preservation principles, political enslavement and social expectations. Bamberg, 2014, p. 224 sqq.
Poland was at the beginning of my career: Already in the first month as a lawyer in the Federal Ministry of Transport I came intensively in touch with the Republic of Poland; it was in December 1991\(^3\): The Ministries of Transport of the Republic of Poland and of the Federal Republic of Germany were concerned with the preparation of state treaties for the planning and construction of border bridges. The competent authorities of the Republic of Poland and of the Federal Republic of Germany planned this bridges and road connections “lege artis”. But what should happen, if owners of private land, that was necessary for the realisation of the road projects, were not inclined to sell their land to the Polish state respective to the German state? The legal solution would have been expropriation for compensation\(^4\); any other solution would have been an unacceptable result. This leads to the questions of property, restrictions for property and expropriation. This paper is concentrated on the German constitutional law.

II) The Basic Law is the Constitution

The Basic Law of the Federal Republic of Germany contains fundamental rights in its Article 14. There is given a concise system for guaranteeing property and for guaranteeing the right of inheritance; the latter – the right of inheritance\(^5\) – should remain excluded from our considerations in this lecture:

“(1) Property and the right of inheritance are guaranteed. Its contents and limits are each determined by law. (2) Property obliges. Its use shall also serve the public good. (3) Expropriation is only permissible for the public good. It has to be equipped by law or pursuant to law that determines modus and extent of compensation. The compensation shall be determined with due regard to the interests of the public and of the stakeholders. In case of dispute on the amount of compensation the civil jurisdiction has to decide”.

First of all, there may be some wondering, why Germany has not a constitution, but only a basic law\(^6\): This is to be explained by the division of Germany after World War II\(^7\), that the Germans

\(^3\) On the importance of expropriation in the Roman Empire and in modern Europe, Franz-Rudolf Herber, in: European Scientific Journal, January 2015 edition vol. 11, No. 1, ISSN: 1857 – 7881 (Print)/ISSN: 1857 (1858) (Online).


\(^6\) There are several good commentaries on the Basic Law; these can be found by this address https://de.wikipedia.org/wiki/Liste_von_Grundgesetz-Kommentaren.

had instigated under the leadership of the war criminal Adolf Hitler\textsuperscript{8} and brought untold sorrows to the world. West Germany originated and prospered under the shelter of the so-called West Allies\textsuperscript{9} after World War II and had good luck; East Germany, however, had bad luck and had to survive under the imperial Soviet Union. Thanks to the resistance movement in Poland under the leadership of the trade union Solidarność\textsuperscript{10} the new Poland had expelled the imperial Soviet Union – in some regard not only from Poland itself. In the wake of German reunification\textsuperscript{11} the question was given, whether the Basic Law of the >old< West German Republic of Germany should be supplemented by elements of the Constitution of the East German Republic\textsuperscript{12} of Germany:\textsuperscript{13} This process was stopped by the German chancellor Dr. Helmut Kohl\textsuperscript{14}, who was concerned that a constitutional reform might jeopardize the difficult process of reunification of Germany. So the modest title "Basic Law" remained – nevertheless this "Basic Law" is functioning as a constitution in the best sense of this word.

The German reunification touches sustainable issues of ownership and economic power. We do all remember the overwhelming images and one of the most heart slogans: "If the >D-Mark< does not come not come to us, let's go to her!"\textsuperscript{15} The effect of this slogan that announced an exodus of (young) East German people to West Germany was enormous:

- The so-called >D-Mark< did come as soon as possible to East Germany.
- Following the introduction of the >D-Mark< in East Germany there was guaranteed an exchange by 1: 1 for wages, salaries, pensions, rents and other recurring payments. This meant that the citizens of the dying East German Republic should be given this very strong West-currency.
- Following the introduction of the D-Mark in East Germany there happened a second economic miracle in the German territory: Stores and sales markets opened in East

\textsuperscript{8} To this crazy monster-person: Georges Van Vrekhem: Hitler and his God – The Background to the Hitler Phenomenon. New Delhi, 2006.
\textsuperscript{9} I.e. United States of America, Great Britain and France.
\textsuperscript{11} It was enacted on the 3rd of October 1990.
\textsuperscript{12} The reunification was declared by the East German Parliament ("Volkskammer") on the 23rd of August 1990.
\textsuperscript{13} The document by which the reunification was declared is found in this archive: https://www.bundesarchiv.de/oeffentlichkeitsarbeit/bilder_dokumente/01525/index-16.html.de.
\textsuperscript{14} To him and his era: Christian Wicke: Helmut Kohl's quest for normality: His representation of the German nation and himself. New York, 2015.
Germany so to speak overnight and offered goods to the East German people that these had neither seen before nor seen in this diversity and quality. This miracle in 1990 did make remembrance of the first economic miracle in the West German territory that started after the 20th of June 194816. Ludwig Erhard (1897 – 1977)17 is the name of the economic and politician that became the symbol for this miracle. Erhard was very successful as reformer (1945 – 1948)18 and as minister for economical affairs (1949 – 1963), but very unsuccessful as German chancellor (1963 – 1966)19. But now back to the German reunification in 1990: The leaders of particular Western European countries – e.g. François Mitterrand (1916 – 1996)20 – postulated a political price for the consent to the German reunification: This price was an economical one and did refer to the abolishment of >D-Mark< or in other words to the introduction of an European currency, later named >Euro<. The >Euro< was introduced as currency on the 1st of January 200221. The aim of some of the leaders of particular Western European countries was failed: The economic power of Germany is still unbroken. This, however, is a very good indication for the fact that policy cannot manipulate the world market. This economic power is based on a tradition and comprehension of property that is embedded in a constitutional text that tries to hold the balance between free market and social welfare state; the two words “Property obliges”, which are a full sentence in terms of philology, does express it22.

III) To the institutional guarantee for property

Now we are going back to the constitutional text of Article 14 in the Basic Law: “(1) Property and the right of inheritance are guaranteed. Its contents and limits are each determined by law. (2) Property obliges. Its use shall also serve the public good. (3) Expropriation is only permissible for the public good. It has to be equipped by law or pursuant to law that determines modus and extent of compensation. The compensation shall be determined with due regard to

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20 To him Ulrich Lappenküper: Mitterrand and Germany. The riddled Sphinx. Munich, 2011.
the interests of the public and of the stakeholders. In case of dispute on the amount of compensation the civil jurisdiction has to decide”.

There is a consensus in the literature on constitutional law that Article 14 in the Basic Law presupposes very fundamental functions:

- There is given an institutional guarantee for property. The cited constitutional text itself does not define, what property is, but it relies insofar on the regulations and systematics of private law. Here is immediately clear that this word does not only refer to immovable property and movable property, but also to certain intellectual property rights.
- It is ensured by constitution that property is a subjective defense right for citizens and companies against interventions by state. Such interventions may be unjustified, for example an expropriation for the sake of an illegal road construction project. This so very modern understanding of property goes in its tracing-line back to the English philosopher Thomas Hobbes (1588 – 1679) who postulated that the state (the so-called Leviathan) is obliged to protect the property of individuals and companies; the state has to guarantee law and order in the >bellum omnium contra omnes<. Hobbes, however, was a philosopher in the very best sense, but afterwards economical reasoning became very important in English philosophy that did influence the European mainland. The economic theory of Adam Smith (1723 – 1790) is for example rather alien to a modern comprehension of property and may still have followers:

“Civil government, so far as it is instituted for the security of property, is, in reality, instituted for the defense of the rich against the poor, or of those who have property against those who have none at all.”

After World War II and during the conflict between United States and the Soviet Union new insights were worked out. Pope John XXIII (1881 – 1963) was a very prominent voice; his

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25 It is also the title of his main work that appeared in 1651.
26 In English it is “The war of all people against all other people”.
encyclica >Pacem in terris<[^30], that was published in the year 1963, is even today a very modern text. In its part one, that deals with basic rules for the living of mankind, there is documented a very modern understanding of property[^31]:

“21. As a further consequence of man's nature, he has the right to the private ownership of property, including that of productive goods. This, as We have said elsewhere, is "a right which constitutes so efficacious a means of asserting one's personality and exercising responsibility in every field, and an element of solidity and security for family life, and of greater peace and prosperity in the State.

22. Finally, it is opportune to point out that the right to own private property entails a social obligation as well”.

It has to be seen that the long-lasting conflict between United States and the Soviet Union was solved under the participation of another very important Pope: It was Pope John Paul II (1920 – 2005)[^32], who did act as a professional politician and protected his Polish Solidarność[^33], the Polish society and the whole world.

IV) Legal restrictions to property usage

From these philosophical considerations it is clear that property is a fundamental human right, that is embedded by the laws of modern countries – here by the laws of the Federal Republic of Germany. For Germany the following is of outstanding importance: Every citizen can appeal by means of the constitutional procedural complaint to the Federal Constitutional Court, if property is withdrawn or in an unconstitutional manner restricted[^34]. This is a very significant difference to the legal constitution of the so-called Republic of Weimar (1919 – 1933)[^35], whose constitution was written in the city, where Johann Wolfgang von Goethe[^36] had worked a century

[^30]: The text starts with the statement that mankind needs the help of God to make peace: “Pacem in terris, quam homines universi cupidissime quovis tempore appetiverunt, condì confirmarique non posse constat, nisi ordine, quem Deus constituit, sancte servato”.

[^31]: Quoted from https://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html.

[^32]: To him: George Weigel: The Pope of freedom. John Paul II. His last years and his legacy. Paderborn et. al., 2011.

[^33]: Cfr. footnote 10.


before. The right to property shall not be used without limitations. The German Constitution provides for the possibility of limiting the exercise of property rights. Constitutional limits for property may be anchored in public law as well as in civil law. Here is concentrated on the limits, that are set by public law; here are given few examples:

- There is the obligation that citizens do have to attach house numbers to their homes at their own costs. It is clear that the discoverability of addresses is a matter that serves both private interests and public interests.
- There is the obligation that citizens have to clean the sidewalks that are bordering to roads. This obligation is necessary to maintain public safety and public cleanliness. But is this private cleaning service justified constitutionally? The hitherto prevailing opinion in literature and in case law justifies this obligation by the consideration that the riparians may take advantages from the immediate proximity to the road in relation to all other road users, i.e. the access rights and the right of attaining a compensation in the case of civil works on the roads.
- The following is a very interesting question: Who does own the forest and other natural beauties? The Bavarian constitution gives a rather clear answer in its Article 141 para 3:

“The enjoyment of the natural beauties and relaxation in the outdoor areas – especially entering of forests and mountain pastures, navigating the waters and using wild forest fruits – is permitted everyone. Everyone is obligated to deal carefully with nature and landscape.

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37 The Civil Code (Bürgerliches Gesetzbuch), that was valid at 1st of January 1900, was a very great achievement. It is known that this Civil Code was breathing the spirit of liberalism: The creators of this Code had assumed that the presumed partners of any contract were socially equal partners, in particular landlords and tenants. The landlords, of course, had been in most of the cases the significantly stronger partner. Even during the Weimar Republic and even more in later West Germany the so-called social tenancy is an important issue; the main questions are today the following: What maximum amount of a deposit may be required by landlords? Is it allowed to prohibit tenants from installing a satellite dish on the house wall in order to receive private TV in the apartment? Under what conditions are tenants obliged to provide so-called cosmetic repairs if the contract is finished? It may seem surprising at first glance, that according to the jurisdiction of the German Constitutional Court the tenant is constitutionally protected by Article 14 para 1 of the Basic Law and in so far put on the almost same level as the owner. Here it becomes quite clear that the legislator has to protect tenants on the one side, but has to appreciate the ownership of the landlords as well.


39 § 126 para. 3 German Building Code.


41 Article 51 in the Bavarian Roads Law.


State government and local governments are obliged to keep free the entrances to mountains, lakes, rivers and other natural beauties for the public. This shall be guaranteed in disregard of ownership; walking trails and recreation parks shall be provided”.

This means that it is not within the power of landowners to refuse access to lakes and other places. The Free State of Bavaria wants to make clear in its constitution that lakes and other natural beauties should be open for the public.44

For a moment we are sticking to the law of infrastructure: Some German motorists – especially the male motorists – do feel being expropriated unjustly because the concrete usage of their cars, that are undoubtedly their property, is limited by road traffic law45:

- Why are we not allowed to drive on highways consistently 200 km/h?46
- Why should we have to pay tolls for the use of freeways?47
- Why should cars not have still more powerful engines so that we might go even quicker and quicker?48

V) To expropriation

The strongest impact on the right of ownership is the full respectively partial deprivation of property. According to German constitutional law there is a distinction between expropriation by law itself and administrative expropriation which is executed by an administrative decision on the basis of a yet existing law. Expropriation by law itself is according to the jurisprudence of the Federal Constitutional Court49 the exceptional case, because otherwise the recourse to the courts would be shortened. The Federal Constitutional Court does permit expropriation for the realization of infrastructure projects that are justified by the common good50: Procurement of land for the construction of roads51, railways52, waterways53 and energy

44 Very controversial is the discussion about horse-riding in woods.
46 Germany is the only country in the European Union where there is no general speed limit for freeways.
47 The German project for introducing tolls for passenger cars, that are using freeways, seems to be stopped by the European Union.
48 This is the true reason for the manipulations in the so-called VW-dieselgate; cfr. http://www.zeit.de/wirtschaft/2015-09/vw-abgase-manipulation-faq.
49 BVerfGE 24, 367.
51 Cfr. § 19 Federal Highways Act.
52 Cfr. § 22 General Railways Act.
industries. Let us have a quick, but an instructive look at the road sector\(^{54}\): The history of road construction and road regulations can be concentrated on the public interest for the planning process and the later usage: Road planning shall be ruled by public interest and is committed to the common good. Private ownership may therefore be disponible and may be transferred to the state. As a rule this is done with the approval of the owners: The state acquires the necessary area for the realization of the planned road. The expropriation as coercive measure of the state is the “ultima ratio”. Expropriation is here the planned and targeted access to land for the realization of infrastructure projects. Depending on the significance of each infrastructure project a particular planning process is necessary, that is called plan approval procedure. Within this complex planning process there has to take place a comprehensive consideration that refers inter alia to the public concerns in favor of the project and the private interests that argue against the project. If a plan approval procedure becomes resistant, the administrative decision enters a so-called expropriation legal advance effect. This means that the expropriation with forensic means cannot be averted, but the amount of compensation offered must not be accepted and can be appealed attacked at the civil jurisdiction.

It is clear that coercion measures should only be used by government, if the voluntary principle does not promise success. In modern law it is the case that the instrument of expropriation is only used if freehand purchase cannot be achieved on reasonable terms. Freehand purchasing means that the state has to initiate intensive efforts to acquire the land, that is necessary for the realization of infrastructure projects, on the estate market at market prices\(^{55}\). The economic problem, that occurs since ancient times, is the following: If a property owner recognizes that government planning\(^{56}\) may jack up prices for land, he is hardly inclined to sell. The planning law, however, should not make it possible that the land owner may dictate the prices for the freehand purchasing by the state\(^{57}\). Otherwise land owners could decide, whether a public infrastructure project shall be realized or not\(^{58}\). For the benefit of the common good it should

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\(^{54}\) Following Franz-Rudolf Herber: On the importance of expropriation in the Roman Empire and in modern Europe, in: European Scientific Journal, January 2015 edition vol. 11, No. 1, ISSN: 1857 - 1881 (Print)/(Online).


\(^{57}\) To the fact that roads are built on the basis of municipal development plans: Bernhard Stuer: Development planning. 5th edition. Munich, 2015.

be taken into account how the price expectations of the potential seller were, if a planning project implementation would not exist.

VI) To socialization

It may be surprising, but it is in fact not a drafting error that in Article 15 in the Basic Law there is provided for the possibility, that property may be socialized:

“Land, natural resources and means of production can for purpose of socialization be transferred by law to public ownership or other forms of public enterprise; the law has to regulate nature and extent of compensation. For the compensation Article 14 para. 3 sentence 3 and 4 shall apply mutatis mutandis”.

Of course, the principles, that are laid down in this text, were not invented by the German Parliamentary Council, when its members did discuss the conception for the German Constitution. The philosophical background is traced back to ancient times. Already Aristoteles (384 – 322 BC) makes the point, that there may arise problems if property is common:

"If they do not share equally enjoysments and toils, those who labor much and get little will necessarily complain of those who labor little and receive or consume much. But indeed there is always a difficulty in men living together and having all human relations in common, but especially in their having common property."

How did the doctrines of Aristotle come to us: The multi-scholar Thomas Aquinas (1225 – 1274) is a powerful commentator to Aristotle and teaches that the public interest is to be seen and may be placed over private interests. It is to be seen that his principles did dominate in some regard further philosophy, but not the upcoming economical reasoning: In the late 18th century Adam Smith (1723 – 1790) is of the convinced opinion that property as a result of labour is inviolable:

"The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him. As it hinders the

60 Politics, 1261 b 34.
62 To him cfr. footnote 27.
one from working at what he thinks proper, so it hinders the others from employing whom they think proper. To judge whether he is fit to be employed, may surely be trusted to the discretion of the employers whose interest it so much concerns. The affected anxiety of the law-giver lest they should employ an improper person, is evidently as impertinent as it is oppressive."

Jean-Jacques Rousseau (1712 – 1778)\textsuperscript{64} – who lived almost at the same era as Adam Smith – takes almost the opposite position and regards property as the main reason for inequality among people and discord among people\textsuperscript{65}:

"The first man who, having enclosed a piece of ground, be thought himself of saying 'This is mine,' and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch (…)"

Pierre-Joseph Proudhon (1809 – 1865)\textsuperscript{66} seems to be the most radical philosopher of the new age and assumed that property is theft\textsuperscript{67}:

"If I were asked to answer the following question: What is slavery? And I should answer in one word, It is murder!, my meaning would be understood at once. No extended argument would be required to show that the power to remove a man's mind, will, and personality, is the power of life and death, and that it makes a man a slave. It is murder. Why, then, to this other question: What is property? May I not likewise answer, It is robbery!, without the certainty of being misunderstood; the second proposition being no other than a transformation of the first?"

Karl Marx (1818-1883)\textsuperscript{68} – who seemed to be supposed to be an unconditional fan of Proudhon’s theory – did criticise the expression "property is theft" as self-refuting and unnecessarily confusing\textsuperscript{69}:

\textsuperscript{64} To him: Dieter Sturma: Jean-Jacques Rousseau, Munich, 2001.
\textsuperscript{65} Jean-Jacques Rousseau: Discourse on inequality. 1754.
\textsuperscript{69} Karl Marx, "Letter to J. B. Schweizer", from Marx Engels selected Works, Vol. 2, first published, in: Der Social-Demokrat, Nos. 16, 17 and 18, February 1, 3 and 5, 1865.
“... 'theft' as a forcible violation of property presupposes the existence of property...” and condemning Proudhon for entangling himself in "all sorts of fantasies, obscure even to himself, about true bourgeois property."

It is no very big surprise that the above mentioned constitutional text has had no real relevance in constitutional reality. However, it should be noted that this text was discussed in the context of the recent global economic crisis\textsuperscript{70}. The last world economic crisis was a banking crisis: Banks carried out transactions, that real economy by far could not manage. A striking example is mentioned here: It cannot be a prudent and honest behavior that banks did grant large loans to citizens, who did not have own assets or only very little own assets. Therefore it is rather obvious that the last global economic crisis was not inevitable; the bankers did run full risk and knowingly they allowed that greed and money might regulate the future of mankind.

The solution that politics offered all around the world was rather easy, but presented with cunning words and phrases: Major banks were bailed out with taxpayers' money so that a collapse of the world economy was stopped in the almost last minute. To put it clear: One may say that the money that rescued the bank system were government grants, but a closer look makes clear that the given money were citizens' grants.

But what happened then? Many politicians and many economists are turning back to business as usual and in the broadcasting the market prices at the stock markets are again very important news and the bankers are awaiting the next crisis in the confident reliance that politicians will help again – and I do add, hopefully not too late. The afore mentioned big banks did remain in private hands, socialization did not take place. Here is to be seen the following: That the state has no staff for monitoring such bank companies is an unproven assertion, that is often given by representatives of neo-liberalism. There are already very good examples, that do show that privatization of state and municipal functions is quite successful. To avoid any misunderstanding: In Germany no representative group does argue for socialization according to Article 15 in the Basic Law. On the other hand it is clear that in such disasters as the last economic crisis Article 15 in the Basic Law offers a reasonable solution: Officials of the State, that would lead these (bad) banks, would never act like managers, but would also take into account aspects of the public welfare. It is only a rather theoretical problem, that authors want to doubt that the word “Produktionsmittel” (“means of production”) in Article 15 in the Basic Law...
Law can be referred to money. The answer is rather easy: Who can reproduce anything without money?

VII) To eternal guarantees in the German Constitution/Basic Law

It is very interesting that property is not put under the so-called eternity guarantee in Article 79 para 3 of the Basic Law:

“Amendments to this Basic Law affecting the division of the Federal Republic into countries, the fundamental participation of the countries in the legislation or the principles laid down in Articles 1 and 20 is not permitted”.

Article 14 in the Basic Law, that does protect property, is not regarded in Article 79 para 3 of the Basic Law and therefore it seems to be that property is not guaranteed in eternity. But this is a wrong interpretation, because property is to be regarded as an integral part of human dignity, which is laid down in Article 1 in the Basic Law that is guaranteed in eternity. Of course, we do understand that no written law can give eternal guarantees. But we do have already understood that the so-called eternity guarantee in Article 79 para 3 in the Basic Law is an answer to Adolf Hitler and his followers! All women and all men in Germany, that do have good sense, are called to protect humanity against abuse.

VIII) What does the Bible say about property?

The constitution of Germany and the constitutions of other European countries are not arisen out of nowhere: One main source is until now not discussed in the considerations above; it is the Bible, that is the book of the books. It has to be seen that European countries are still Christian countries. The Bible tells us something about how people should deal with property: the following passage from Matthew chapter 6,2,25 (following) calls for respect for creation and nature; the Evangelist Matthew offers this so very impressive reference:

“25 Therefore I tell you, do not worry about your life, what you will eat or drink; or about your body, what you will wear. Is not life more than food, and the body more than clothes?”

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73 To him cfr. footnote 8.
74 In Old Greek the Bible is called βιβλία (plural modus).
76 Cited according the new international version https://www.biblegateway.com/passage/?search=Matthew+6%3A25++&version=NIV.
26 Look at the birds of the air; they do not sow or reap or store away in barns, and yet your heavenly Father feeds them. Are you not much more valuable than they? 27 Can any one of you by worrying add a single hour to your life? 28 “And why do you worry about clothes? See how the flowers of the field grow. They do not labor or spin. 29 Yet I tell you that not even Solomon in all his splendor was dressed like one of these. 30 If that is how God clothes the grass of the field, which is here today and tomorrow is thrown into the fire, will he not much more clothe you—you of little faith? 31 So do not worry, saying, ‘What shall we eat?’ or ‘What shall we drink?’ or ‘What shall we wear?’ 32 For the pagans run after all these things, and your heavenly Father knows that you need them. 33 But seek first his kingdom and his righteousness, and all these things will be given to you as well. 34 Therefore do not worry about tomorrow, for tomorrow will worry about itself. Each day has enough trouble of its own”.

With all due respect it is a relatively unimportant issue whether this beautiful speech can be attributed to Jesus of Nazareth in person or to any other of his followers. More interesting are the big philosophical points in this speech; these are the following:

- This text calls for modesty and argues against arrogance.
- This text asks to be content with the necessary and not to strive for untold wealth.
- This text is, of course, not an invitation for dull laziness. The text wants to point out that sorrows and fears do not help, the decisive attitude is the reliance on God.

It is very interesting that the guidelines of ancient philosophy, that had been produced long before the era of Jesus Christ, are very close to Christian belief that originated later. >Secundum naturam vivere< is an ancient Greek philosophical attitude that can be traced in almost every important ancient school of philosophers, for example to the Stoics. The Roman philosopher Cicero, who was an eclecticist, transported this principle into ancient Roman philosophy. It

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79 In English it is “to live according the principles of nature”.
82 Cfr. De Finibus, 5,9: “Omne animal se ipsum diligit ac, simul et ortum est, id agit, se ut conservet, quod hic ei primus ad omnem vitam tuendum appetitus a natura datur, se ut conservet atque ita sit affectum”.
is clear that living according to the principles of nature is not an end in itself, but leads mankind
to questions that involve the structure of societies and the constitution of states.

IX) Results

The German constitutional model does neither prefer capitalism nor socialism; the German
constitutional model prefers a particular mixture of both. It is out of doubt that expropriation
and socialisation are allowed for public welfare. The German reunification in 1990 did start a
discussion on constitution, but did not lead to significant changes. Socialisation was intensively
discussed during the last worldwide economic depression as a package of measures against
(German) bad banks. In the end German Government did take rather conventional rescuing
measures and rescued banks with the money of the taxpayers. It is shown in this lecture that
the subject matter of property and expropriation is determined by the jurisdiction of the German
Constitutional Court, that does have an exorbitant power and is always searching the
demarcation lines to the jurisdiction of the Court of Justice of the European Union. In Germany
the Constitutional Court sometimes does take on the role of the legislative power; the court
decides, what property is. Nevertheless, it should not be forgotten, that modern constitutional
law is the result of a very long-lasting process, in which there developed a synthesis of ancient
philosophy and of the teaching of Jesus Christ. Thomas Aquinas\textsuperscript{84} was that philosopher and
that Christian, who steered this process in this direction.

\textsuperscript{84} To him cfr. footnote 61.
Abstract: The issue of contracts of inheritance is very interesting and extremely important, both in theoretical and practical terms. My task will be to attempt to give insight into the essence of contracts concluded in the event of death. To find the best legal solutions in this field, I am going to begin my discussion with solutions in old Roman law, and then I will present mechanisms currently used in regulations applicable outside Poland. Next, having analysed the provisions of Polish inheritance law, I will formulate specific postulates for the law as it should stand (de lege ferenda). The issue specified in the title seems to be topical insofar as scholars of law increasingly often formulate reasonable postulates on the advisability of extending the list of permitted mortis causa dispositions, by which the testator will be able to better determine the future use of his/her assets, than with the use of testament. Moreover, it is worth bearing in mind the ongoing work on unification of private law in Europe, including regulation of issues of inheritance.

Keywords: contract of inheritance, donation mortis causa, testament, testator, heir, contracting party, inheritance.

1. Einleitende Bemerkungen

Der Erbvertrag ist eine interessantes Problem und dabei von der juristischen, praktischen und sozialen Seite aussergewöhnlich wichtig. Obwohl es viele wissenschaftliche Bearbeitungen zu diesem Bereich gibt, so beschreiben sie meistens dieses Thema als Nebenfall oder flüchtig. Diesen Umstand scheint die Tatsache der Berufung durch die Kodifikation – Ausschuss für Zivilrecht, der an dem Justizministerium tätig ist, zu beweisen. Aufgabe des Ausschusses ist es das neue Zivilgesetz zu bearbeiten, darunter auch des Erbrechts-Teils. Ausserdem findet man in der Literatur immer mehr begründete Forderungen der Zweckmässigkeit die Erweiterung des Katalogs der zulässigen mortis causa Verfügung, dank dem der Erblasser wirksam die Schicksal des angesammelten Vermögens bestimmen kann. Man kann auch über die Tatsache, dass in den letzten Jahren deutlich die Arbeiten...


Die sich aus dem wirtschaftlichen Wachstum ergebende Bereicherung der Gesellschaft, ist ein von vielen Gründen, die dazu beitragen, dass natürliche Personen immer mehr auf eigene Vermögensverfügung von Todes wegen achten und dadurch die Gespräche über die Notwendigkeit der ständig Verbesserung der rechtlichen Mechanismen, die der Eigentumsübertragung zwischen den Generationen dienen, unvermeidlich werden³.


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3 J. Turłukowski, Sporządzanie testamentu w praktyce, Warszawa 2009, s. 11.
4 Tak J. Gwiazdomorski, [w:] Encyklopedia Podręczna Prawa Prywatnego, t. 1, Warszawa 1934, s. 541; Por. E. Rott-Piętrzyk, Umowa dziedziczenia – uwagi de lege lata i de lege ferenda, „Rejent” 2006, Nr 2, s. 164-165.
5 M. Pazdan, [w:] Kodeks cywilny, Komentarz do art. 450-1088, t. 2, Warszawa 2005, s. 1103; tenże, Umowy dziedziczenia w prawie prywatnym międzynarodowym, „Studia Iuridica Silesiana”, 1979, t. 5, s. 151. Por. A. Mączyński, Kolizyjna problematyka czynności prawnych na wypadek śmierci (zagadnienia wybrane), „Krakowskie Studia Prawnicze” 1979, t. 12, s. 77 i n.
2. Geschichte und Rechtsvergleich

In dem alten römischen Recht waren die Erbverträge nicht nur unbekannt, sondern die Idee einer Erbvertrags abgeschlossen ist die sog. Testierfreihheit, die man mit der fundamentalen Regel *pacta sunt servanda* nicht in Einklang bringen konnte. Der Erbvertrag hat schon von der Annahme ausgehend die Möglichkeit einer einseitigen Berufung oder Änderung des Inhaltes ausgeschlossen. Die einzige, zulässige Ausführung dieser Handlungen konnte eine Parteien-Verständigung sein. Aus diesen Gründen haben sich die römischen Juristen einstimmig für die Unzulässigkeit gültiger Erbverträge ausgesprochen, mit der Begründung sie seien sittenwidrig (*contra bonos mores*) und begrenzen die Freiheit in dem Prozess der Aufnahmen verbindlicher Entscheidungen.

Die Mehrheit der europäischen Gesetzgebung hat dem römischen Lösungen zu folgen nennt unter den Titeln, die zum Erbe berechtigen, keine Erbverträge. Solche Verträge sind in Frankreich, Spanien, Griechenland, Benelux-Ländern, Russland, Litauen, Lettland, Estland, Tschechien, Slowakei oder Ukraine nicht zulässig. Zu den Ländern, in denen Erbverträge funktionieren gehört: Deutschland, Schweiz und Österreich. Es lohnt sich dabei zu betonen, dass in dem letzten Rechtssystem sog. mittleres Konzept ausgewählt wurde, das auf:

- der Begrenzung des Subjektkatalogs- die Vertragsparteien werden auf Eheleute und Verlobte begrenzt,
- der Abhängigkeit der Wirksamkeit des abgeschlossenen Vertrages von dem Abschluss einer Ehe,
- der Begrenzung der Vertragserben, ausschliesslich zu den Parteien des entstandenen Schuldverhältnisses (§ 1249 ABGB) beruht.

Diese Art von Begrenzungen wurde weder im deutschen, noch im schweizerischen Recht eingeführt. In Hinblick darauf, dass das polnische Erbrecht dem deutschen Recht am nächsten ist, werde ich mich bei weiteren Überlegungen vor allem auf den Lösungen konzentrieren, die im West funktionieren. Zu den grundsätzlichen Eigenschaften des deutschen Erbvertrages gehören:

a) Vertragserbe, der gem. Erbvertrag berufen wird, kann sowohl die Vertragspartei als auch eine Drittperson bedacht werden (§ 1941 Satz 2 BGB);

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6 E. Rott-Pietrzyk, *Umowa dziedziczenia...*, s. 163-164.
b) Vertragsgegenstand kann nicht nur das ganze Vermögen des Erblassers sein, aber auch einzelne Teile;

c) grundsätzlich können Erbverträge nicht einseitig widerrufen werden, obwohl der deutsche Rechtsgeber es ausnahmsweise zulässt vom Vertrag zurückzutreten (§ 2294 und f.f. BGB) oder den Vertrag gem. Parteien-Verständigung (§ 2290 BGB) aufzuheben⁹;

d) trotz gültigem Erbvertrag, kann der Erblasser zu Lebzeit weiterhin Rechtshandlungen vornehmen, die auf die Verwaltung des vertraglichen Vermögens abzielen;

e) ungültiger Erbvertrag kann in ein gültiges Testament konvertiert werden (§ 2301 BGB)¹⁰;

f) der Erbvertrag ist einer von den stärksten deutschen Erb-Berufungstitel, das mit sich die Unwirksamkeit späterer Testamente oder Erbverträge, die die Berechtigungen der ersten Vertragspartei verletzen, zu Folge haben (§ 2289 BGB)¹¹.


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¹¹ E. Rott-Pietrzyk, *Umowa dziedziczenia...,*, s. 175-176.

Rechtshandlungen *inter vivos* vornehmen, die die einzelne Vermögensteile des Erbes umfassen werden\(^{13}\).

Spezifische Regeln gelten auch bei dem Abschluss deutscher Erbverträge. Grundsätzlich kann man diese unter folgenden Regeln zusammenfassen:

- Anordnung persönlicher Verhandlung – durch den Erblasser (§ 2274 BGB), mit Ausschluss der Handlungen eines Vertreters;
- die Pflicht der unbeschränkten Geschäftsfähigkeit (§ 2275 AbS. 1 BGB), mit Ausnahme von Minderjährigen, die eine Ehe geschlossen haben (ABS 2 i und der Vorschrift), für die die Zustimmung eines gesetzlichen Vertreters erforderlich ist;
- Erfordernis gleichzeitiger Anwesenheit der Parteien beim Abschluss eines Erbvertrages in form einer Urkunde (§ 2276 AbS. 1 BGB), wobei die Willenserklärung mündlich oder schriftlich erklärt werden kann;
- Befehl der Feststellung der Tatsache des Vertragsabschlusses im Protokoll, das durch einen Notar erstellt, daraufhin vorgelesen und durch die an der Rechtshandlungen teilnehmende Parteien unterschrieben werden soll;
- Pflicht der Vertragsübergabe in die amtliche Aufbewahrung oder Einreichung, nach Einverständnis beider Parteien, in der notariellen Dokumentensammlung\(^{14}\).


1) einseitige, zweiseitige und mehrseitige Erbverträge,
2) Verträge zu Gunsten der Vertragsparteien oder Drittpersonen,
3) Verträge, mit denen man den Erben, das Vermächtnis oder eine Empfehlung bestimmt,

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13 A. Duda, *Umowa dziedziczenia...*, s. 119-121. Odmienne § 657 Abs. 1 ungarisches Zivilgesetz, was sich daraus ergibt, dass in Ungarn der Erblasser den Erben gegen Rente oder Heimvertrag bestimmt. Tak E. Rott-Pietrzyk, *Umowa dziedziczenia...*, s. 176.
14 Tak A. Duda, *Umowa dziedziczenia...*, s. 122-126.
15 Tamże, s. 126-128.
4) Verträge, die mit anderen Verträgen verbunden sind (entgeltlich oder unentgeltlich)\textsuperscript{16}. Gleichzeitig wird der Erblasser mit dem Abschluss eines Erbvertrages mit eigener Verfügung verbunden. Dieses Tatsache schliesst im Prinzip deren einseitige Modifikation aus, auch im Wege späterer \textit{morti causa} Handlungen. Diese Tatsache ist eine spürbare Begrenzung und manchmal bedeutet das den Ausschluss der Testierfreiheit im Bereich des vertraglichen Vermögens. Der Erbvertrag nimmt die Rechtskraft allen vorherigen Verfügungen von Todes wegen im vertraglichen Bereich, der die Nutzniesser-Rechte verletzt, weg. \textit{Per Analogie} zeigt sich der Fall, wenn es um spätere Verfügungen zu der letzten Willenserklärung geht. Dieser Beschränkungen unterliegen gem. § 2286 BGB die \textit{inter vivos} Rechtshandlungen, die durch den Erblasser veranlasst werden, nicht. Es ist nämlich zu betonen, dass die Verordnungen im Vertrag einen erbrechtlichen Charakter haben, der sich nur auf die \textit{mortis causa} – Verfügungen bezieht. Da der Vertrag den Erblasser im Bereich sachrechtlicher Verfügungen nicht bindet, so bleibt er in dieser Materie der einziger, vollberechtigter Disponent von seinem Vermögen\textsuperscript{17}.


Die erwähnte Absicht der Verletzung des Vertragserbens in Korrelation mit eigenem Interesse des Erblasser wurden in drei Alternativfällen ausgeschlossen, die \textit{de facto} die obigen Forderungen des Vertragserben ausschliessen. Hierzu zählen: der Wille dem Erblasser eine Pflege oder Verbesserung seines Lebensunterhalts zur späterer Zeit; zu sichern; Schenkung um den Lebensunterhalt des Ehepartners des Erblassers oder seiner Verwandten zu gewähren; Schenkung, die als Folge der

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\textsuperscript{16} Por. K. Osajda, \textit{Ustanowienie spadkobiercy w testamencie w systemach prawnych common law i civil law}, Warszawa 2009, s. 174, przyp. 374.

\textsuperscript{17} A. Duda, \textit{Umowa dziedziczenia...}, s. 136-142.

\textsuperscript{18} Por. O. Palandt, \textit{Beck’sche Kurzkommentare. Bürgerliches Gesetzbuch...}, s. 2420 i n.; H.G. Bamberger, H. Roth, \textit{Kommentar zum Bürgerlichen Gesetzbuch...}, s. 2248.

\textsuperscript{19} Tak A. Duda, \textit{Umowa dziedziczenia...}, s. 143-144, 146. Por. O. Palandt, \textit{Beck’sche Kurzkommentare. Bürgerliches Gesetzbuch...}, s. 2417; H.G. Bamberger, H. Roth, \textit{Kommentar zum Bürgerlichen Gesetzbuch...}, s. 2241-2244.
Dankbarkeit des Schenkers für bestimmte Leistungen zu betrachten ist\(^{20}\). Zu dem anderen rechtlichen Schutz der Vertragserbe zählen: die Möglichkeit der Rückgängigmachung der Handlungen *inter vivos* des Erblassers wegen Sittenwidrigkeit oder Gesetzwidrigkeit (kommt selten in der Praxis vor); Abschluss eines Vertrages über die Unterlassung konkreter Handlungen durch den Erblasser *inter vivos*; sowie sachliche Sicherung durch bedingte Verpflichtung des Erblasser zur Eigentumsübertragung (verlangt die Urkundenform)\(^{21}\).

Wie man schon früher hingewiesen hat, ist Deutschland das einzige Land, in dem die Erbverträge mit Erfolg funktionieren. Zu solchen Ländern gehört auch die Schweiz. Auf Grundlage dieser Verträge können die Parteien zum Erbe nicht nur sich gegenseitig berufen, aber auch Drittpersonen. Zu den schweizerischen Verträgen verwendet man mit etwas Modifizierung die Vorschriften zu den Testamenten:

- der Erbvertrag verlangt die Einhaltung der Form eines öffentlichen Testaments (Art. 512 ZGB), mit Ausnahme von handgeschriebenen und mündlichen Testamenten;
- die Willenserklärungen der Parteien müssen gleichzeitig vor dem Beamten in Anwesenheit von zwei Zeugen erklärt werden;
- der Vertrag kann jederzeit auf Grund der Parteienverständigung geändert werden (Art. 513 ZGB);
- einseitige Vertragslösung kann nur in einer Form erfolgen, die für Testamente vorgesehen ist und sollte die Enterbung der Partei begründen, dagegen nach dem Tod einer Vertragspartei ist es unzulässig\(^{22}\).
- ungültiger Erbvertrag kann durch ein gültiges Testament konvertiert werden (Art. 245 AbS. 2 ZGB)\(^{23}\).


\(^{20}\) A. Duda, *Umowa dziedziczenia...*, s. 145-146.
\(^{21}\) Tamże, s. 143 i 148.
\(^{22}\) W. Klyta, *Testamenty wspólne*, „Rejent” 2006, Nr 2, s. 99-100.
deren Vermögen nach dem Tod dem anderen Ehepartner oder Kindern, die aus der Ehe in der Zukunft geboren werden (Art. 1082 des französischen Zivilgesetzbuch). Diese Verträge, auch les donations sur des biens à venir genannt, werden als Schenkungsverträge der künftigen Sache betrachtet, die während der Dauer der Ehe widerrufen werden können.25


3. Polnische „Erbverträge“


Das Thema der Zulässigkeit der Erbverträge weckt viele Zweifel nach dem polnischen Recht. Es lohnt sich dabei zu betonen, dass in der Zwischenkriegszeit in Polen unterschiedliche Stellungen hierzu funktionierten:

- in Westpolen hat man in der Praxis eine unbegrenzte Möglichkeit der Erstellung von Erbverträgen zugelassen;
- in Zentralpolen hat man Zwischenlösungen eingeführt, das heisst eine Personen-Begrenzung der Zulässigkeit der Erstellung von solchen Verträgen bis auf die Eheleuten oder Verlobte (Art. 231 des Zivilgesetzes des Kongresskönigreiches im Jahr 1825);

25 J. Pisuliński, Pojęcie umowy dziedziczenia w prawie prywatnym międzynarodowym oraz umowy dotyczącej spadku w rozporządzeniu spadkowym, [w:] Nowe europejskie prawo spadkowe, red. M. Pazdan, J. Górecki, Warszawa 2015, s. 146-147.
in Ostpolen hat man definitiv die Möglichkeit der Erstellung von Erbverträgen ausgeschlossen\textsuperscript{26}.

Bei der Gesetzgebungsarbeiten an dem Erbrecht\textsuperscript{27}, hat man ähnlich wie bei der Bearbeitung des Zivilgesetzes\textsuperscript{28}, die Notwendigkeit der Ergänzung der Berufungsgrundlage zum Erbe um weitere, darunter Erbverträge nicht, wahrgenommen. Diese Tatsache folgte nicht nur aus der Bindung an die römische Tradition, aber auch aus der Dominanz der damals geltenden „politischer Korrektheit“. Nur ein paar Vertreter der polnischen Lehre, wie K. Przybyłowski, haben die Vorteile der Einführung in das Erbrecht von neuen Erbtitel gesehen\textsuperscript{29}.


Art. 1047 des Zivilgesetzbuches ist mit dem Art. 941 des Zivilgesetzbuches auszulegen. Das Ziel der genannten Vorschriften stimmt überein – der Schutz der Testierfreihe\textsuperscript{32}. Abschluss eines Erbvertrages

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\textsuperscript{26} Tak E. Rott-Pietrzyk, \textit{Umowa dziedziczenia...}, s. 169.
\textsuperscript{27} Dekret vom 8. Oktober 1946 – Prawo spadkowe, GBL. 1946, Nr. 60, pos. 328.
\textsuperscript{29} K. Przybyłowski, \textit{Prawo spadkowe. Wedle stenogramu wykładów uniwersyteckich}, Lwów 1929, s. 40. Siehe auch interessante Erwägungen zu dem Thema der Zulassung von Pflichtteil-Verzicht-Vertrag /Zob. auch ciekawe rozważania
\textsuperscript{30} E. Rott-Pietrzyk, \textit{Umowa dziedziczenia...}, s. 165-166.

In der Literatur betont man, dass das Verbot Verträge über das künftige Erbe abzuschliessen einen allgemeinen Charakter hat, was wiederum bedeutet, dass diese Androhung sowohl bei gesetzlicher, als auch bei Testament – Erbschaft verwendet wird. Es gibt eine Ausnahme zu diesem Verbot und diese wurde im Art. 1048 des Zivilgesetzes vorgesehen, wonach der gesetzliche Erbe mit dem künftigen Erblasser vertraglich auf das Erbe verzichten kann (dieser Vertrag verlangt die Form einer notariellen Urkunde). Gesetzlicher Ausschluss der Möglichkeit Erbverträge abzuschliessen betrifft solche Handlungen, deren Gegenstand das ganze Vermögen, sein Bruchteil oder einzelne Vermögensgegenstände des Lebenden ist, die als künftige Erbschaft betrachtet werden34. Das Verbot aus Art. 1047 des Zivilgesetzes gilt sogar dort, wo der Vertragsinhalt zu dem bestimmten Vermögen oder einem Teil eine Bedingungen beinhaltet, dass der Veräußerer erst nach der konkreten Person zu dem Erbe berufen wird35. In der Lehre Herrscht die Ansicht, dass das Verbot des Abschlusses von Verträgen über das künftige Erbe Verträge zwischen:

- Lebender und dem potenziellen Erbe oder Drittperson, die Vertragserbe werden sollte (sog. Erbvertrag),
- den potenziellen Erben der lebenden Person,
- den potenziellen Erben der lebenden Person und der Drittpersonen36.


33 J. Namitkiewicz, Kodeks zobowiązań. Komentarz dla praktyki, t. 1, Część ogólna, Łódź 1949, s. 89; M. Niedośpiał, Darowizna na wypadek śmierci, PIP 1987, z. 11, s. 53.
34 Zob. M. Pazdan, Umowa o zrzeszenie się dziedziczenia w polskim prawie spadkowym, „Rejent” 1997, Nr 4, s. 185 i n.
35 Tak E. Skowrońska-Bocian, J. Wierciński, Komentarz do art. 1047 Kodeksu cywilnego, „Rejent” 1997, Nr 4, s. 185 i n.
37 OSNC 2014, Nr 10, pos. 98.
polnischen Erbberufungs-Titel um den Erbvertrag nicht erweitert. J. Pisuliński hat mit der Behauptet recht, dass „das Oberste Gericht die Tatsache der Klassifizierung des Vertrages von Todes wegen als einen normalen Schenkungsvertrag betrachtet, aber ausgestattet mit der Bedingung (eventuelle Bedingungen und Fristen). In dieser Auffassung ist es ein schulddrechtlcher Vertrag, die man nicht mit einer Handlung des Erbrechts verwechseln kann. Zur Folge gibt es hier keinen Raum für die Problemanalyse der Testierfreiheit, der Haftung für Erbschulden oder von Art. 961 des Zivilgesetzes, denn die Rede ist hier vom „normalen“ inter vivos Vertrag\textsuperscript{38}.

Wie T. Justyński zutreffend bemerkte, „hat das Oberste Gericht seine Stellung auf dem Fundament der Negation gebildet, dass die Schenkung von Todes wegen eine mortis causa Handlung sei. Es ist zwar schwierig die grundlegende Kohärenz der Argumentation abzulehnen, aber man möchte sagen, dass wir so nicht weiter kommen. Eine Schenkung von Todes wegen ist eine mortis causa Handlung nicht nur deswegen, weil ihr allgemeiner Name so lautet, aber aus vielen anderen Gründen, darunter vor allen aus dogmatischen Gründen (…). Das Oberste Gericht hat nämlich angenommen, was umstritten ist und was ich definitiv nicht teile, dass Schenkungsverträge mortis causa zu den Rechtshandlungen inter vivos gehören.Diese Betrachtung lässt die rechtliche Zulässigkeit dieses bedingten und eventuell zeitlichen Vertrages (entsprechend den Umständen) zu. Somit ist es eine Zulassung der inter vivos Handlungen, die die volle Wirksamkeit dieser Rechtshandlung von dem dem Tod des Schenkers abhängig macht . Die Überzeugung, dass die Schenkung mortis causa als eine inter vivos Handlung zu betrachten ist, untermauert das Oberste Gericht mit der Bemerkung, dass diese Schenkung unwiderruflich ist (sein sollte). Daraus wiederum soll die Schlussfolgerung folgen, in Ansicht des Gerichts, dass es hier um eine Handlung geht, die zur Kategorie inter vivos gehört\textsuperscript{39}.


\textsuperscript{38} J. Pisuliński, Glosa do uchwały SN z dnia 13 grudnia 2013 r., III CZP 79/13, PiP 2015, z. 10, s. 124.
\textsuperscript{39} T. Justyński, Glosa do uchwały SN z dnia 13 grudnia 2013 r., III CZP 79/13, OSP 2014, z. 10, s. 91.
Beim Abschluss dieses Teils der Überlegungen ist zu beachten, dass der Erbvertrag gewisse Nachteile besitzt, bei denen am wichtigsten:

- der Verstoß gegen die grundlegende und zwingend geltenden Abberufungsfreiheit der mortis causa Verfügung,
- Ausschluss der Berechtigungen des Erblassers zur einseitiger Vertragskündigung,
- Bindung der Vertragsparteien an das Prinzip pacta sunt servanda, Verstoß gegen den persönlichen und geheimen Charakter der letzten Willenserklärung des Erblassers,
- schwacher Rechtsschutz der Vertragserben ist\(^{40}\).


\(^{40}\) E. Rott-Pietrzyk, *Umowa dziedziczenia...*, s. 169, 177-178.
Es ist dabei daran zu denken, dass der Begriff Erbvertrag autonom zu verstehen ist. Nach der oben genannten Definition wird dieser Vertrag ein Vertrag sein, deren Gegenstand eine Verständigung ist, dass man eine verbindliche Verfügung von Todes wegen ausgeführt hat. In der Folge kann die Verfügung nicht einseitig durch keine Partei oder ohne Einhaltung zusätzlicher Formalitäten, die über die, die für die Abberufung eines Vermächtnis verlangt sind hinausgehen, geändert werden. Interessanterweise und es ist auch zu betonen, dass der europäische Erbvertrag gem. der gemeinschaftlichen Erbverfügung nicht nur Erbverträge sensu stricto, aber auch ERb-Verzicht-Verträge, die nach dem polnischen Recht zulässig sind, umfasst.


Wenn es um die Form geht, wird der Erbvertrag gültig sein, wenn er nach dem Recht des Staates erstellt wird: in dem der Vertrag geschlossen wurde; oder in dem mindestens eine der Personen angehört, zu deren Erbe sich der Vertrag bei Vertragsabschluss oder im Zeitpunkt des Todes bezieht; oder in dem mindestens eine der Personen, zu deren Erbe sich der Vertrag bei Vertragsabschluss oder im Zeitpunkt des Todes bezieht, den Wohnsitz hatte; in dem mindestens eine der Personen, zu deren Erbe sich der Vertrag bei Vertragsabschluss oder im Zeitpunkt des Todes bezieht, den gewöhnlichen Aufenthalt hatte; oder in dem sich unbewegliches Vermögen befindet (Art. 27 Erbverfügung).

Die anerkannten, europäischen Lösungen, die nur signalisiert wurden, stellen ein weiteres Argument, der die Richtigkeit der Überlegung der Möglichkeit der Ergänzung des polnischen Verfügungskatalogs mortis causa um weitere Erbverträge dar. Es ist nämlich schwer vernünftige Gründe zu

42 M. Czepelak, Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego, Warszawa 2008, s. 436 i n.
43 A. Wysocka-Bar, Prawo właściwe dla formy rozrządzeń na wypadek śmierci według rozporządzenia spadkowego, [w:] Nowe europejskie pravo spadkowe, red. M. Pazdan, J. Górecki, Warszawa 2015, s. 138.
44 Ch. Döbereiner, Testamenty i umowy dotyczące dziedziczenia przy szczególnym uwzględnieniu wyboru prawa oraz kształtowania się regulacji w zakresie prawa o udziałach obowiązkowych, [w:] Materiały z konferencji pt. „Rozporządzenie na temat prawa spadkowego UE”, 15 listopada 2013 r., Centrum Edukacyjne DAI w Berlinie, Berlin 2013, s. 73.
45 A. Bonomi, [w:] Le droit européen des successions. Commentaire du Règlement no 650/2012 du 4 juillet 2012, red. A. Bonomi, P. Wautelet, Bruxelles 2013, s. 142 i n.
nennen, für die ein Pole, der in Deutschland lebt die Wohltat des Erbvertrages nutzen kann, während der polnische Staatsbürger, der in seiner Heimat lebt, so eine Berechtigung nicht nutzen kann.

4. Schlussbemerkungen und Schlussfolgerungen


Es ist klar zu betonen, dass man bei der Suche und Einführung der besten Rechtsvorschriften zum Erbvertrag sich geprüfter ausländischer Lösungen, die oft bei der Verteidigung oft seit Jahrhunderten funktionieren, bedienen soll. Zu berücksichtigen ist auch, dass der Erbvertrag als eine Institution des

46 OTK 2001, Nr 1, pos. 5.
Erbrechts betrachtet werden sollte (d.h. ein zusätzliches Erb-Berufungstitel, neben dem Testament und dem Gesetz) und nicht als eine schuldrechtliche Institution.

Abstract: The subject of alimony can be discussed in scientific research in the field of causality of legal acts. A question can be formed, whether the alimony benefit is a causal disposing act or just a factual performance of the obligation. Moreover, the doubt of alimony towards the term of increment should be pointed out. It is unclear, whether the consideration of causality on the grounds of alimony law possesses a cognitive dimension. That is why the intention of this work is to try to provide an answer for the above mentioned questions.

Keywords: causa donandi, causa solvendi, causa obligandi, alimony, civil law.

Introductory concepts

Among actions of increment, obliging and disposing acts can be distinguished.¹

a. The first ones are performed in order to obtain one of two possible results. If the person is performing an acquisition of a particular claim for the benefit of another person to obtain a dual claim, then we call it a *causa obligandi vel acquirendi*² increment. There is not always the “something in return for something” condition with every obligation. It also happens, that the person who performs the obligation is not interested in an equivalent in return but acts only on the basis of generosity. Such an obligation is called *causa donandi.*³

b. In case of disposing acts it should be pointed out that those acts are always performed *causa solvendi.* It is about the fact that they are used for the benefit of the person obtaining the increment to be released from the obligation.

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¹ The indicated distinction is a kind of simplification which includes typical situations. For example the renunciation of servitude can occur *causa donandi* in a situation which is not preceded by an obliging action.

² In case of a sales contract, it can be pointed out that on each of the sides an obliging action causa obligandi can be indicated where (according to article 535 of the Civil Code), the vendor obliges himself to transfer the ownership to the buyer and the buyer obliges himself to accept this item and pay the price to the vendor. In the moment when each of the parties proceeds to perform the obligation, causa solvendi will take place on both sides.

³ In the doctrine, some have tried to doubt the relevance of the distinction of causa donandi. More: A.Szłęzak, *Przewłaszczenie na zabezpieczenie rzeczy przyszłych, rzeczy oznaczonych co do gatunku oraz nieruchomości*, Rejent 1995, nr 2, p.117.
The literature contains various opinions being against the creation of causal constructions together with acts of the first kind, that is obliging acts.\(^4\) Not analyzing this subject deeper, it should be mentioned that on the basis of alimony law the settlement of this ambiguity seems to be totally pointless, since the alimony relation does not arise from a bilateral legal action conducted as a consequence of declaration of intent of both parties, but it is a relation regulated by fully obliging provisions and as such it arises from the sole law.

The problem might be current with the so called obliging alimony contracts where as a consequence of the conducted contract, one of the parties is obliged to provide material aid for the benefit of the other one. In this place the character of causa as \textit{causa obligandi} or \textit{causa donandi} can be questioned, but not this matter shall be the subject of analysis because those kinds of contracts do not create solely alimony relations on the basis of the Family and Guardianship Code, but so called quasi-alimony obliging relations which shall be ruled under general provisions of the Polish civil code and not family-legal regulations. In this place another matter should be touched.

In case of contracts creating \textit{quasi} alimony duties a dangerous will of creating an additional alimony \textit{causa} can arise.\(^5\) This can be a consequence of the presence of various \textit{causa} understanding which is sometimes combined with a motivation sphere of the provider, and another time with the social-economical aim of the contract. Such a view does not seem persuasive, so the matter of causality will be promptly characterized below.

1.2. Causa as a motivation sphere of the provider.

The comparison of causality with the motivational sphere of action is the so called currently dropped subjective conception, which is ideally explained by S.Grzybowski. Person X gives to person Y a watch. In the first moment it might seem that the motive of X is the will of donating a watch to Y. This action of increment has not just surprisingly arisen; behind the motive there might be another hidden reason, for example the will to express gratitude for a favor. And this need might have its source in further motives such as for example: trying to get rid of an unpleasant feeling of ingratitude, or the need to secure friendly relations.\(^6\)

The presented example explicitly shows that each of the motives, not only the closer ones but also the further ones, can be grouped in a special kind of layered structure. On top of this structure, as it seems, are those motives which directly start the civil legal trade. Donation can be suggested as an example. Other motives, being on lower stages of the structure do not directly affect the civil legal trade—they vary and are usually more personal. In the field of such a layered classification of mental stages of the persons performing actions of increment—the so called subjective causa conception has been formed, where causa is placed only in those motives which start the civil legal trade. In this concept the aim relations being subject to will, are underlined.

Causa is comprehended in a differently by the supporters of the so called objective concept. They mainly underline the mistaken equality between the motive and causa. Legal effects cannot be expressed in consequence of legal reasons or motives. This would not be consistent with the general concept of a legal act. The aim refers to a subjectively understood future stage and it is a psychological term.

In the same time, causa of increment is focused on the legal reason or retrospectively in case of causa solvendi, or prospectively in case of causa obligandi and donandi. The person performs increment of causa solvendi because the legal reason is the will to be released from the obligation or a party performs increment of causa obligandi since the legal reason is to obtain a mutual claim, or a party performs increment of causa donandi due to the fact that the legal reason is the enrichment of another person without obtaining increment of this person.

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7 J.M.Łukasiewicz, Pytanie o zasadność causa wspólnoty życiowej przy czynnościach przysparzających pomiędzy konkubentami, Studia Prawnicze PAN 2013, z.1, p.117 and other.
11 R.Wawrzyńczak, O pewnym modelu działania i dwu jego aplikacjach, Wrocław 1985, p.58.
In case of conducting analysis of various situations the motivational sphere should be separated from the technical legal sphere. In other words, *causa* cannot be a mental feeling but it must be objectively expressed in the subject of an action of increment (for example in sales contract the reasons of mutual increments as *causa obligandi* increments) or in any kind of behavior (for example the factual performance in accordance with the law in order to be released from the legal duty to perform increment).

### 1.3. Causa as an economical aim of the contract

It is sometimes pointed out in literature that the *causae* term should be understood as a “necessary aim which reflects the economical core of a particular action”• Such a point of view does not seem to be correct. In this place it makes sense to cite G.Tracz, who clearly points that the legal aim of the increment is not part of a social-economical aim of the contract.

It should be mainly underlined that the sole contract (legal action) does not contain *causae*, but in the content of the contract there are *causae* of particular increments. In other words *causa* does not refer to the performance of increment but a performance of increment contains in its content the *causam* of particular increments. Moreover, a legal action of increment cannot lead to more than one increment and *causa* shall always be determined for each increment separately. Otherwise the legal action cannot be judged properly.

This thesis is confirmed by S. Rudnicki stating that the (economical) aim of the contract is not identical with the legal base (*causa*) of a contract. On a contrary example, that is identifying *causam* with the economical aim of a contract it should be necessary to add particular *causam* (*c.obligandi, c.donandi, c.solvendi*) to the traditional *causarum* catalogue. For example, the alimony *causa* should be distinguished for the pension contract, since the aim of the pension is alimony, and for the lending contract or lease a lease *causa*, since the aim of those contracts is

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12 The definition of causae as a technical-legal term due to the economical effect was used by por. S.Szer, *Prawo Cywilne; część ogólna*, Warszawa 1950, p.124. It can be stated that causa is the ratio legis of legal action. A.Kubas, *Causa czynności*, p.46.


14 G.Tracz, Aktualność generalnej reguły kauzalności czynności prawnych przysparzających w prawie polskim, KPP 1997, nr 3, p.519.


the return of an item to be used by the entitled one\textsuperscript{17}. In case of a security contract, a security \textit{causa} should be utilized (\textit{causa cavendi})\textsuperscript{18}, and in case of acceptance, a determining causa.\textsuperscript{19}

Similarly, in case of mutual benefits of concubines on the basis of a frame contract, the causa of mutual existence should be considered.\textsuperscript{20} However, this is not the right place to discuss this matter since this would exceed the intent of this work. Still, it seems that the presented irregular types of causarum are based on the comparison of causa with the social-economical aim of the contract.

1.4. The character of alimony benefits

In order to return to the mainstream of the work, a question about the character of the alimony benefits should be pointed: if it has a factual action nature, legal action, or if it depends on a particular situation, and then it should be determined if the alimony benefit lies in the category of increment.

1.4.1. Increments on the example of a sales contract

In the beginning it should be underlined that the causa concept is clearly distinguishable in cases of division of an obliging and disposing act. In the example of obligation law, entity X intends to buy a book from entity Y, but those two entities mutually agree that their contract will create solely obliging results. The mechanism of performance will proceed the following way:

1. With an obliging act (which comprises of two declarations of intent that is declaration of X and declaration of Y) a mutual obliging sales contract is created. This relation shall contain “obligations”, precisely the duties of the vendor and buyer who will be mutually responsible to each other. It can be said that as an effect of an obliging action (through the arisen obliging relation) two increments have been created.\textsuperscript{21}

\begin{thebibliography}{9}
\bibitem{Sz} A. Szłęzak, \emph{Przewłaszczenie...}, p.116.
\bibitem{Py} M.Pyziak-Szafnicka, \emph{Uznanie długu}, Warszawa 1996.
\bibitem{Na} M.Nazar, \emph{Rozliczenia majątkowe konkubentów}, Lublin 1993.
\bibitem{Cz} W.Czachórski. \emph{Czynności prawne}, p.105.
\end{thebibliography}
a) X has obtained a claim to transfer the ownership of a book together with its release (causa obligandi)

b) and moreover Y has obtained a claim to pay the price of the book (causa obligandi)

2. Afterwards, two disposing acts are created between X and Y:

   a) a disposing act which leads to the increment of causa solvendi of an amount of money\textsuperscript{22} for the benefit of Y

   b) and a disposing act which leads to the increment of causa solvendi for the benefit of X who obtains the ownership of Y.\textsuperscript{23}

The above presented mechanism describes a situation where the parties “broke” a contract for two acts; first an obliging one and then a disposing act. It should be pointed out that the second part of transferring ownership requires a legal disposing act, since the sole transfer of possession does not determine what the aim of the transfer was. A mutual declaration of intent is required to perform the transfer. This declaration is not a declaration of knowledge but a declaration of intent. The debtor wishes the described item to be included in the estate of the creditor and the creditor accepts it to fulfill the debt which consequently disappears.\textsuperscript{24} This is current for the transfer of items labeled as to species (for example money) and items labeled as to identity.

It should be underlined that the regulations of the Civil Code in the Polish legal order determine the so called double result. In principle of article 155 § 1 of the Polish Civil Code a sales contract, exchange contract, donation contract or contract of property transfer or another obliging contract to transfer ownership of an item labeled as to identity transfers the ownership to the buyer (...). The legislator imposed a material effect on the obligation contract. As W.J.

\textsuperscript{22} From the sole fact of giving an amount of money does not indicate the reason of such performance. A mutual declaration is necessary to determine the use of the payment. That is why the Supreme court, in the justification of the resolution of March 3rd 1992 I PZP 19/92, OSNC 1992/9/166 indicated that the fulfillment of a benefit can be discussed only if it is offered by the debtor and accepted by the creditor. This can lead to the conclusion that the fulfillment of the benefit will always be a legal action. However, it seems to be different. A view can be suggested that indicated that not only offering the benefit but also accepting it may (but not have to) be performed by determination of will. For example, passing of a work and its collection are both only factual actions. But, mutual determination of will performed by the debtor and collector concerning the transfer of ownership in the performance of a sales contract with a sole disposing effect comprise the subject of legal action since in order to perform a disposing contract it is necessary to conduct a disposing contract, so the payment occurs through the legal action. The character of the benefit is crucial. Por. J.M. Lukasiewicz, M. Antas, Dwugłos w sprawie pojęcia świadczenia w polskim prawnie cywilnym – zarys problematyki (cz.II), Zeszyty Prawnicze UKSW (in printing).

\textsuperscript{23} Por. także S.Zer, op.cit, p.123.

\textsuperscript{24} Por. uzasadnienie uchwały SN z 3.4.1992 r., I PZP 19/92, OSNC 1992/9/166. This raises doubts of other nature. Since an offer of the debtor and acceptance of the creditor is always essential to fulfill a benefit (both actions are part of the declaration of will), this would doubt the relevance of the thesis of the Supreme Court in the above mentioned resolution, according to which the fulfillment of a benefit is not always a legal action.
Katner aptly ascertains, such a contract comprises of two layers that is a variable and obliging dependent layer and also a constant one in structure which transfers ownership.\textsuperscript{25}

Consequently, the legislator accepts the model of a dual obliging-disposing result. However, according to the content of article 155 § 2 of the Civil Code: \textit{“if items labeled as to species are the subject of a contract, the transfer of possession is necessary to transfer ownership. The same applies to (…) future items”}\textsuperscript{26}. The pointed article does not mean that an obliging contract is conducted first, and then a disposing contract. Most importantly, the legislator does not mention anything in article 155 § 1 of the Civil Code that the transfer of ownership shall require any additional agreement of the parties (as he does in article 157 § 2 of the Civil Code).\textsuperscript{27}

Consequently, the transfer of ownership cannot be treated as a separate contract in any case. Similarly to the content of article 155 § 1 of the Civil Code, a contract with dual effect occurs in this place. This is not a real act. This one requires the transfer of possession in order to be valid while article 155 § 2 of the Civil Code does not refer to the matter of validity but only points out that the transfer of possession results in the transfer of ownership. This means that the discussed article refers to a consensual obliging-disposing act about the postponed effect of the transfer.\textsuperscript{28}

For example in case of conduction of a sales contract of an item marked as to species, for example tons of coal, such a contract shall be valid from the moment of determination of will, and the transfer of ownership occurs at the moment of possession transfer. Similarly to the situation of sale of a book through an obliging-disposing contract of determination of will concerning the payment which shall be “contained” in the exact contract, and only the result of acquisition of ownership of financial goods shall occur in the moment of the actual payment.

\textsuperscript{25} W.J. Katner, \textit{Umowne nabycie…}, p.48.
\textsuperscript{26} Full legal results of a transfer of items labeled as to identity, that is the obligation ones and material ones can only occur when the vendor is the owner of the item at the moment of disposal. This arises for the unwritten rule \textit{nemo plus iuris in alium transferre potest, quam ipse habet}. More about this subject: S. Breyer, Przeniesienie własności nieruchomości, Warszawa 1975, s.63, W.J. Katner, M. Stahl, W. Nykier, \textit{Umowa sprzedaży w obrocie gospodarczym}, Warszawa 1996, p. 145, and also about these matters and exceptions: A. Gola, \textit{Nabycie własności ruchomości od nieuprawnionego}, Warszawa 1982, p. 36, A. Szpunar, \textit{Nabycie własności od nieuprawnionego}, Zakamyczce 1998, p. 30 and other., M. Wilke, \textit{Nabycie własności rzeczy ruchomej na podstawie umowy z osobą nie uprawnioną}, Warszawa-Poznań-Toruń 1980, p.29 and other.
\textsuperscript{28} W.J. Katner, \textit{Umowne nabycie…}, p.48.
In such a case a contract with a dual result will create four increments: two *causa obligandi* and two additional *causa solvendi*.

1.4.2. Alimony increments

In the context of the alimony duty it should be underlined that the alimony relation arises from the sole law and that is why looking for *causa donandi* or *causa obligandi* is pointless in this case. Moreover, the core of family-legal relations which is the basis of the alimony duty, speaks against the consideration of increments performed on the grounds of this duty as aiming to obtain financial benefits or creating financial benefits for another entity without an equivalent, with the lack of duty to perform such action. The sole alimony performance takes place through a disposing material act, which *causa solvendi* serves to the release of the obligation. As it has already been underlined, the sole fact of transfer of an amount of money, or transfer of items marked as to species does not indicate the reason of the performance of the increment. It is not clear, what the aim of the increment was. A mutual agreement of both parties is necessary to determine the future of the increment.

On the grounds of the Family and Guardianship Code a doubt arises which has a totally different nature, and that is article 129 of the Family and Guardianship Code which states that the alimony duty can not only comprise of providing financial support to live but also support to bring up. This leads to a question which has a dual nature. Firstly, if the performance of alimony through personal efforts come into force through legal action and moreover, if such a performance is an increment. In reference to the first matter, it can be accepted that the alimony duty causes a duty to fulfill a particular action and because of the fact that the performance of services does not lead to the transfer of a certain law or item the use of a material contract is excluded.

Consequently, it is not necessary to obtain a separate statement of will of the performing entity that the alimony performance comprising on “personal efforts” leads to the fulfillment of needs of the entitled one. So, there is no necessity to introduce another separate disposing act. A separate matter is the question whether the performance discussed causes increment. As it is underlined in the doctrine, increment should be understood as a beneficial change of estate of

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29 A separate subject are civil-legal contract which create the so called *quasi* alimony duties such as the contract of pension. In such cases the causal problem can be analyzed on analoical and typical civil-legal contract concerning obligation.

30 An obligation which arises from the law, so it does not require a declaration of will.

someone. This change can mean an increase of estate of the person on whom the increment was performed or the reduction of liabilities. Such understanding is correct in accordance with the Polish language, where “to increase” means “enlarge”, “multiple”. One can question whether an increment is also a factual act being the performance of services having a regular wealth value.

The answer can be provided by article 410 of the Polish Civil Code which concerns undue benefit. If undue benefit is at the same time unjust enrichment then it can be stated that each performance leads to enrichment and so to increment. In other words the performance of services for example bringing up should be considered as an increment for the benefit of the beneficiary. The provisions of the Family and Guardianship Code can be interpreted as such. Among others, according to article 43 § 3 of the Family and Guardianship Code in order to determine the extent of mutual estate, the extend of personal performance is considered. What is more, despite the fact that article 135 §2 of the Family and Guardianship Code states that the alimony performance towards a child of disabled person can be provided through personal efforts of the obliged one, then in practice the obliged one can also provide alimony towards other persons who are not contained in this article. This way, the practice confirms the financial assets of personal services of the obliged one.

1.5. The cognitive virtue of the causality of the alimony benefit

Due to the above performed analysis it arises that causa solvendi answers the question why the increment for the benefit of one person has occurred. If it additionally comes out that there was no obligation, causa solvendi action loses its legal base and the subject of the benefit shall be returned. In case of alimony benefit, the content of article 411 § 11 of the Civil Code shall be considered, according to which the return of the undue performance is excluded if this performance is justified in accordance with the principles of community life. Consequently, the doubt considering the relevance of causality of alimony law seems to be relevant, if the action fulfilled on the basis of alimony shall be returned.

1. Most importantly not every alimony benefit fulfills the principles of community life.

For example, one can imagine a situation in which one of the spouses performs alimony

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32 W. Czachórski, Czynności prawne, s.82 and other.
33 M. Antas, Pojęcie świadczenia w świetle przepisów o bezpodstawnym wzbogaceniu, ZNUR 2012, nr 77, p.11-16. In this place it should be underlined that those are benefits which are not included in actions of kindness or other actions which do not require protection.
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for the benefit of the ex-spouse without having the knowledge that this ex-spouse has conducted another marriage. According to article 60 § 3 of the Family and Guardianship Code, the alimony duty terminates with the moment of conduction of another marriage by the person entitled to alimony. Taking into consideration the main article 118 of the Civil Code which provides a 3-year period for periodical actions, the relevance of the return of the subject of the action cannot be excluded.

2. Performance belongs to the category of alimony actions only when it “arises” from the alimony relation determined by the law. This is about a causal relation. In case of doubts whether the performance has the character of an alimony relation, and what is next, whether Family and Guardianship provisions should be applied to such, a question should be answered first: is it performed *causa solvendi* on the basis of the legal alimony relation. The connection of alimony benefit with an obligation relation qualifies the alimony benefit as a strict alimony one. Thanks to this an incorrect statement can be avoided which would state that other benefits similar to the alimony benefit, arising from obligation or material contracts, are such.

3. The causal link of alimony benefit with an obligation alimony relation enables to distinguish alimony of other financial increments. More than once parents perform increments towards a child, which are higher than regular needs of that child. Such kinds of actions are part of the donation contract and not an alimony benefit, which can have meaningful results for i.a. legal-tax aspects.

4. The causal concept of alimony increment is consistent with regulations of material and obligation law. It has already been indicated that in some cases increment has to be a legal action and in other it can be a factual action. In each case, its legal reason is *causa solvendi*. 
Magdalena Rzewuska, *Vertrag über die Bestellung einer Hypothek – Anmerkungen*  
de lega lata *und* de lege ferenda (*Mortgage contract – remarks de lege lata* *and*  
de lege ferenda)

**Abstract:** The present elaboration concerns an important, above all from a practical point of view, legal issue: mortgage contract. The topic analyzed herein still gives rise to many controversies among representatives of both doctrine and judicature. The author attempts to make some remarks *de lege lata* and *de lege ferenda* on the subject matter. She indicates that, in order to improve business trading, it would be worthwhile to introduce to the Polish legislation a possibility for the parties to make a provision in the mortgage contract that establishing the mortgage requires the issuing of a relevant bond. Therefore, she proposes to introduce a bonded mortgage.

**Schlüsselworte:** Vertrag über die Bestellung einer Hypothek, Absicherung der Forderungen, Verwalter der Hypothek, Briefgrundschuld.

**Keywords:** mortgage contract, security for a debt, mortgage administrator, bonded mortgage.


\(^2\) Gesetz vom 23. April 1964 – Zivilgesetzbuch (Gesetzblatt Nr. 16, Pos. 93 mit Änderungen).
für oder gegen die Richtigkeit der ausgearbeiteten Standpunkte in dieser Materie auszusprechen
und zeitgleich ein Versuch, bestimmte Forderungen de lege ferenda zu erheben.

Die Fragen der Bestellung einer vertraglichen Hypothek werden durch die Vorschriften des
Zivilgesetzbuches und des Gesetzes über Grundbücher und Hypothek geregelt. Aus diesen
Vorschriften geht eindeutig hervor, dass zu den unabdingbaren Elementen der Entstehung
dieses beschränkten dinglichen Rechts der Vertrag, der zwischen dem Hypothekengläubiger
(Hypothekar) und dem Rechtssubjekt, das den Gegenstand der Hypothekenabsicherung
bestimmt, geschlossen wurde, sowie ein Absicherungseintrag in das Grundbuch gehört. Für den
Bedarf dieser Ausarbeitung werde ich meine Überlegungen auf das erste der genannten
Elemente beschränken.

Bei der Analyse des G.ü.G.u.H. kann man eine gewisse Unregelmäßigkeit feststellen – mal
verwendet der Gesetzgeber die Wendung „Hypothekenbestellungsvertrag“, ein anderes Mal
benutzt er die Worte „Vertrag über die Bestellung einer Hypothek“. Das wirft die Frage auf, ob
es eine bewusste und zielorientierte Handlung des Gesetzgebers oder ein Versehen, das
bedeutet, dass es gleichbedeutende Begrifflichkeiten sind, ist? Nach K. Zaradkiewicz sind diese
Begriffe nicht identisch. Der Autor zeigt, dass die Formulierung „Hypothekenbestellungsvertrag“ als eine Bezeichnung eines Rechtsgeschäfts verwendet wird, das die Grundlage der Hypothekenbestellung bildet. Dagegen ist der Begriff „Vertrag über die
Bestellung einer Hypothek“ für einen separaten Vertrag mit einer Sachfolge, deren Ziel die
genommen werden, wo im Satz 1 vom Gesetzgeber der Begriff „Vertrag über die Bestellung
einer Hypothek“ verwendet wird, doch schon im Satz 2, der denselben Vertrag betrifft, vom „Hypothekenbestellungsvertrag“ die Rede ist 5.

Eine wesentliche Rolle in der Sache der Bestellung einer Hypothek spielt die Vorschrift des
Art. 245 § 1 des Zivilgesetzbuches, die uns auf die Vorschriften über die Eigentumsübertragung

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4 Ähnlich A. Bieranowski, Forma umowy o ustanowienie hipoteki - głos w dyskusji, Rejent 2011, Nr. 5, S. 139.

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7 B. Swaczyna [in:] Hipoteka po nowelizacji..., S. 128-129.
8 Swaczyna, Hipoteka..., S. 54; dieser, [in:] Hipoteka po nowelizacji..., s. 129.

Bei der Analyse der formalen Anforderungen an den Vertrag über die Bestellung einer Hypothek sollte allerdings die durch den Gesetzgeber direkt zum Ausdruck gebrachte Abweichung von der Notwendigkeit der Form einer notariellen Urkunde für die Willenserklärung des Eigentümers im Falle einer Bankhypothek beachtet werden. Diese besondere Art der Hypothek erfordert zu ihrer Gültigkeit die Willenserklärung des Eigentümers des Grundstücks nur in der Schriftform bei sonstiger Nichtigkeit (Art. 95 Abs. 4 des Bankrechts)\(^\text{10}\). Der Eintrag in das Grundbuch erfolgt auf der Grundlage der von der Bank ausgestellten Dokumente. Es gilt der Meinung von T. Czech zu folgen, der aufzeigt, dass eine derartige „künstliche Konstruktion“ in der Praxis verhältnismäßig oft zu unerwünschten Folgen in Form einer Steigerung der Transaktionskosten führt, was dadurch begründet ist, dass einige Gerichte fordern, dass die Bankerklärungen, die die Grundlage der Eintragung der Hypothek in das Grundbuch bilden, dokumentiert werden\(^\text{11}\). Der Autor schlägt vor, dem durch die Einführung der Möglichkeit der Eintragung der Bankhypothek in das Grundbuch auf den schriftlichen Antrag des Eigentümers des belasteten Grundstücks vorzubeugen (was gleichzeitig eine Ausnahme von der Regelung aus Art. 31 Abs. 1 G.ü.G.u.H. bilden würde). Die Forderung von T. Czech verdient die volle Akzeptanz, umso mehr, als – wie der Autor aufzeigt – so eine Möglichkeit auf der Grundlage des Gesetzes über die genossenschaftlichen Spar- und Kreditkassen, dessen Abs.2 Art. 29 besagt, dass „die Grundlage der Eintragung der Hypothek, die den durch die Kassen gewährten Kredit oder das Darlehen absichert, in das Grundbuch bildet die Erklärung des Eigentümers über die Bestellung einer Hypothek zu Gunsten der Kasse, die zu ihrer Gültigkeit der Schriftform bedarf“\(^\text{12}\) zulässig ist.

In der Literatur wird dem Gesetzgeber oft vorgeworfen, die Banken in dem betrachteten Bereich mit zu vielen Privilegien auszustatten. Außerdem wird angemerkt, dass die gewöhnliche Schriftform im Widerspruch zu der Bedeutung der Grundbücher im polnischen Rechtssystem


\(^{11}\) T. Czech, Uwagi do nowelizacji przepisów o hipotece, Przegląd Legislacyjny 2009, Nr. 3/4 , S. 161-162.

\(^{12}\) Gesetz vom 5 November 2009. (GBl. 2013.1450 einheitliche Fassung).
steht\textsuperscript{13}. Es muss allerdings beachtet werden, dass \textit{rationis legis} des Gesetzgebers, der die Vorschriften des Gesetzes über das Bankrecht novellierte, die Entformalisierung der Art und Weise der Bestellung einer Bankhypothek war\textsuperscript{14}.

Die Frage der Legitimierung des Auftretens als Partei eines Hypothekenvertrags regeln die Vorschriften des Zivilgesetzbuches. Der genannte Vertrag kann dabei durch einen Vertreter, der die eine oder andere Partei vertritt, geschlossen werden. Die Form der Willenserklärung des gesetzlichen Vertreters oder des Bevollmächtigten, der auf der Seite des Eigentümers des belasteten Gegenstandes auftritt, entspricht den Anforderungen für die Willenserklärung des Subjektes, das von ihm vertreten wird. Somit wird es grundsätzlich die Form der notariellen Urkunde, und im Falle einer Bankhypothek oder einer Hypothek, die einen durch die genossenschaftlichen Spar- und Kreditkassen gewährten Kredit oder ein Darlehen absichert, eine vom Vertreter abzugebende Willenserklärung, die zu ihrer Gültigkeit der Schriftform bedarf, sein. Im Falle einer Bevollmächtigung muss bedacht werden, dass die Erteilung der Vollmacht in der gleichen Form erfolgen muss, wie sie für die Erfüllung der Handlung erforderlich ist, also grundsätzlich in Form einer notariellen Urkunde und in zwei Fällen, von denen in dem obigen Satz die Rede ist, die Schriftform \textit{ad solemnitatem}. Für die Bestellung einer Hypothek wird sowohl die Erteilung einer Spezialvollmacht als auch einer Gattungsvollmacht\textsuperscript{15} für richtig erachtet.


\textsuperscript{13} A. Bieranowski, \textit{Forma...}, s. 144.
\textsuperscript{14} Begründung des Beschlusses vom 20. Juni 2007, III CZP 50/07, \textit{LEX} Nr. 270437.
Grundstücks ohne den Schutz der Interessen des Gläubigers zu vernachlässigen, da er die Befriedung seiner Ansprüche beim Erwerber des Grundstücks geltend machen kann\footnote{Ja, B. Swaczyna, Hipoteka..., S. 48 nn.}.

Obwohl das G.ü.G.u.H. nicht alle notwendigen Elemente des Inhalts des Vertrages über die Bestellung einer Hypothek bestimmt, müssen folgende Elemente als unabdingbar betrachtet werden:

- Bestimmung der Parteien des Vertrages,
- Bestimmung des Gegenstandes der Absicherung,
- Bestimmung des Betrages der Hypothek und der Währung, wobei beachtet werden muss, dass die Währung der Hypothek sich von der Währung der abzusichernden Forderung unterscheiden kann\footnote{Unzulässig ist die Bestimmung der Hypothekensumme mit Hilfe einer Wertsicherungsklausel – J. Pisuliński, System Prawa Prywatnego..., S. 642.}.
- Nennung des Rechtsverhältnisses, aus dem die Forderung hervorgeht oder in der Zukunft hervorgehen wird, sowie der Forderung selbst\footnote{B. Swaczyna [in:] Hipoteka po nowelizacji..., S. 138-139.}


Es ist ebenfalls jedes Mal lohnenswert zu beachten, dass der Inhalt des Hypothekenvertrages um zusätzliche, übereinstimmende Bestimmungen der Parteien ergänzt werden kann. Die


22 Ebenda.
Gerichts erforderlich\textsuperscript{27}. Einige Vertreter der Lehre weisen darauf hin, dass es am besten wäre, diese Berechtigung als „eine Grundlage zur Einreichung durch den Eigentümer des belasteten Grundstücks einer Klage auf die Gestaltung des Rechtsverhältnisses durch das Gericht“ anzuerkennen\textsuperscript{28}.


\textsuperscript{27} Ł. Przyborowski, Uprawnienie do zmniejszenia..., S. 88 nn.
\textsuperscript{30} Ł. Przyborowski [in:] Hipoteka..., S. 191.
\textsuperscript{31}Ebenda, Uprawnienie do zmniejszenia..., S. 99 nn.
\textsuperscript{32}Ebenda, S. 92.


33 B. Jelonek-Jarco, J. Zawadzka, Praktyczne problemy…”, S. 41.
34 P. Armada-Rudnik, Prawo hipoteczne…, S. 11.
36 Sie werden von I. Heropolitańska [in:] Ustawa o księgach wieczystych…, S. 207 aufgezählt.
39 K. Zaradkiewicz, Nowa regulacja…, S. 15.
Konsequenzen in Form von Ungültigkeit des Vertrages über die Bestellung einer Hypothek (Art. 58 des Zivilgesetzbuches)\textsuperscript{40}.


Die Einschränkungen der Regelungen bezüglich der Ausführlichkeit der Hypothek haben eine wesentliche Bedeutung für die Praxis. In Art. 68\textsuperscript{1} G.ü.G.u.H. wurde die Möglichkeit zugelassen, mehrere Forderungen aus unterschiedlichen Rechtsverhältnissen, die dem gleichen Gläubiger zustehen, mit der gleichen Hypothek abzusichern. Eine wesentliche Anforderung für eine wirksame Durchführung dieses Ziels ist die Bestimmung in dem Hypothekenbestellungsvertrag (Art. 68\textsuperscript{1} Abs. 2 G.ü.G.u.H.) von Rechtsverhältnissen und den sich daraus ergebenden Forderungen, die abzusichern sind. In der Praxis erlaubt die Regelung des Art. 68\textsuperscript{1} G.ü.G.u.H. die Absicherung mehrerer Kredite, die von der gleichen Bank, jedoch für unterschiedliche Zwecke vergeben wurden\textsuperscript{43}, mit einer Hypothek.

\textsuperscript{40}M. Sekuła-Leleno, \textit{Uprawnienie dłużnika hipotecznego do zmniejszenia sumy hipotecznej. Teza nr 1}, Rejent 2013.10.50, LEX Nr.185247/1
\textsuperscript{41}T. Czech, \textit{Uwagi do nowelizacji…}, S. 153-156.
\textsuperscript{42}Ebenda, S. 156.
\textsuperscript{43}P. Armada-Rudnik, \textit{Prawo hipoteczne…}, S. 9.
De lege lata wenn eine Hypothek mehrere Forderungen aus unterschiedlichen Rechtsverhältnissen absichern darf, so muss demnach als zulässig anerkannt werden, dass mit einer Hypothek mehrere Forderungen aus einem Rechtsverhältnis abgesichert werden\textsuperscript{44}.

Art. 68\textsuperscript{2} G.ü.G.u.H. sieht wiederum die Möglichkeit vor, mit einer Hypothek mehrere Forderungen, die unterschiedlichen Personen zustehen, und zwar unter der Bedingung, dass sie als Ziel die Finanzierung derselben Unternehmung haben, abzusichern. Eine Umsetzung dieses wurde davon abhängig gemacht, ob in dem Hypothekenbestellungsvertrag der Umfang der Absicherung jeder Forderung genannt und das identische Ziel bestimmt wurde (Abs. 1 Art. 68\textsuperscript{2} G.ü.G.u.H.). Um mit einer Hypothek mehrere Forderungen, die unterschiedlichen Subjekten gehören, aber der Finanzierung derselben Unternehmung dienen, abzusichern, müssen die Gläubiger einen sog. Verwalter der Hypothek berufen (Satz 1. Abs. 1 Art. 68\textsuperscript{2} G.ü.G.u.H.). Der Vertrag über die Berufung dieses Subjets ist schriftlich anzufertigen, bei sonstiger Nichtigkeit (Art. 68\textsuperscript{2} Abs. 2 G.ü.G.u.H.)\textsuperscript{45}. Die Funktion des Verwalters kann sowohl einer der Gläubiger als auch ein Dritter erfüllen (Satz 2 Abs. 1 Art. 68\textsuperscript{2} G.ü.G.u.H.), wobei in der Literatur unterstrichen wird, dass es eine natürliche oder eine juristische Person oder eine Organisationseinheit, die keine juristische Person ist, doch durch besondere Vorschriften die Geschäftsfähigkeit erlangt hat\textsuperscript{46}, sein kann. Der Verwalter ist berechtigt, den Vertrag über die Bestellung einer Hypothek abzuschließen und entsprechende Rechtsgeschäfte, die mit diesem Recht verbunden sind, zu tätigen, jedes Mal auf Rechnung aller abgesicherten Gläubiger (Abs. 3 Art. 68\textsuperscript{2} G.ü.G.u.H.). Dieses Subjekt sollte im Grundbuch als Hypothekengläubiger eingetragen werden. Er wird es auch solange bleiben, bis die übrigen Gläubiger einen Antrag auf Änderung des Verwalters stellen oder bis Ablauf des Berufungsvertrages für diese Funktion (Art. 68\textsuperscript{2} G.ü.G.u.H. Abs. 5 und 6). Nach der Meinung des Gesetzgebers sollte das Institut des Hypothekenverwalters die Arbeit der Bankkonsortien beschleunigen und verbessern\textsuperscript{47}.

Die analysierte Rechtskonstruktion des Hypothekenverwalters erweckt jedoch viele Zweifel. Insbesondere scheint die Frage der nicht präzisen Bedeutung der Feststellung „Finanzierung

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\textsuperscript{44}Ebenso I. Heropolitańska \textit{[in:] Ustawa o księgach wieczystych...}, S. 212; H. Ciepła, \textit{[in:] Ustawa o księgach wieczystych i hipotece. Komentarz po nowelizacji prawa hipotecznego. Wzory wniosków o wpis. Wzory wpisów do księgi wieczystej. (Komentarz do art.68¹ u.k.w.h.)} herausgegeben von E. Balan-Gonciarz, H. Ciepła, LEX 2011, nb 2.

\textsuperscript{45} Über die Kontroversen bezüglich der Form des Vertrages über die Berufung des Hypothekenverwalters siehe: B. Jelonek-Jarco, J. Zawadzka, \textit{Praktyczne problemy nowelizacji ustawy o księgach wieczystych i hipotece (Część II)}, Rejent 2010, Nr 10, S. 52.

\textsuperscript{46} B. Jelonek-Jarco, J. Zawadzka, \textit{Praktyczne problemy...}, S. 47.


Nicht rational bleibt die Anforderung, im Vertrag über die Bestellung einer Hypothek zu Gunsten des Verwalters den Absicherungsumfang der einzelnen Forderungen und des beschriebenen Vorhabens zu nennen, weil derartige Informationen in dem Vertrag über die Berufung des Hypothekenverwalters enthalten sein sollten, denn nur so können die zuständigen Organe prüfen, ob die in Art. 68 Abs. 3 G.ü.G.u.H genannten Voraussetzungen erfüllt worden sind.

Ebenfalls unverständlich ist die gegenständliche in Art. 68 Abs. 1 Satz 1 G.ü.G.u.H. bestimmte Einschränkung auf eine gemeinsame Unternehmung, umso mehr, als dass bei einem Pfandverwalter so eine Einschränkung nicht vorkommt. Solche Einschränkungen treten auch


In der analysierten Fragestellung treffen wir erneut auf Inkonsequenz des Gesetzgebers, der auf der einen Seite den Rigorismus der Bankhypothek mildert und auf der anderen Seite ihn in bestimmten Fällen verschärft. Meiner Ansicht nach sollte diese Sache vereinheitlicht werden.

Allerdings sind in der Literatur auch gänzlich gegensätzliche Ansichten zu finden, die den Rigorismus des Grundbuchverfahrens in dem gegenständlichen Bereich noch weiter verschärfen. P. Siciński vertritt die Ansicht, dass zur Bestellung einer Hypothek zu Gunsten eines Verwalters der Abschluss des gesamten Vertrages in Form einer notariellen Urkunde erforderlich ist, also sowohl die Willenserklärung des Eigentümers des belasteten Grundstücks

57Begründung…, Drucksache Nr. 1562.
59T. Czech, Hipoteka…, S. 176.


Eine Hypothek kann auch in der Folge der Umsetzung der sich aus dem Vertrag ergebenden Verpflichtung zur Bestellung einer Hypothek entstehen. Diese Verpflichtung unterscheidet sich grundsätzlich von den aus dem Vertrag hervorgehenden Verpflichtungen zur Eigentumsübertragung an einem Grundstück, die von der Hypothese des Art. 156 des Zivilgesetzbuches betroffen sind. Es muss diesen Vertretern der Lehre zugestimmt werden, die einen Verpflichtungsvertrag zu Bestellung einer Hypothek wie einen Vorvertrag

60 P. Siciński, Notarialne i wieczysto księgowy aspekty nowelizacji ustawy o księgach wieczystych i hipotece, Nowy Przegląd Notarialny 2010, Nr. 3, S. 43 nn.
61 A. Bieranowski, Forma..., S. 139 nn.
62 B. Swaczyna, Hipoteka..., S. 63.
64 Begründung des Obersten Gerichts vom 3. Oktober 2007, IV CSK 193/07, LEX Nr. 435607.
65 Ebenda; A. Wolter, J. Ignatowicz, K. Stefaniuk, Prawo cywilne..., S. 265-266.

Auf der Grundlage unserer Gesetzgebung ist es unzulässig, eine vertragliche Hypothek zu Gunsten eines Dritten zu bestellen, was sich aus dem Verfügungscharakter der Bestellung einer Hypothek ergibt.

Strittig bleibt ebenfalls die Frage der Behandlung des Vertrages über die Bestellung einer Hypothek als eine kausale Handlung. In diesem Bereich gibt es unterschiedliche Standpunkte. S. Rudnicki vertritt die Meinung, dass bei einer Hypothek die zutreffende Rechtsgrundlage der Erbringung eines Vermögensvorteils **causa obligandi vel acquirendi** ist, weil das Ziel der Hypothek in der Erbringung von Vermögensvorteilen für den Gläubiger durch Bestimmung einer Absicherung seiner Forderung besteht. Wobei weist er darauf hin, dass mit dem Fehlen der Rechtsgrundlage grundsätzlich die Ungültigkeit der Hypothek verbunden sein wird. Es lassen sich ebenfalls Ansichten finden, nach denen die Rechtsgrundlage einer solchen Erbringung eines Vermögensvorteils meistens die **causa cavendi** darstellt, deren Ziel in der Absicherung der Forderung besteht. Meiner Ansicht nach sind die Stimmen am zutreffendsten, die besagen, dass im Falle einer Hypothek die Kausalität durch die Akzessorität ersetzt wird. Um diesen Standpunkt zu begründen, kann man eine der neuesten gerichtlichen

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68 Urteil des Obersten Gerichts vom 12 Mai 2000, V CKN 30/00, LEX Nr. 47028.
69 B. Swaczyna [in:] *Księgi wieczyste i hipoteka...* 2014, S. 669.
70 Ebenda
72 B. Swaczyna, *Hipoteka...*, S. 34-35.
73 S. Rudnicki, *Hipoteka...*, S. 49.
Entscheidungen in dieser Materie anführen, in der das Oberste Gericht entschieden hat, dass „die Einführung in Bezug auf den Vertrag über die Bestellung einer Hypothek einer zusätzlichen Voraussetzung der Gültigkeit in Form vom Grund der Erbringung des Vermögensvorteils ähnlich grundlos ist, wie in Bezug auf Verträge, die zu Eigentumsübertragung verpflichten oder in Bezug auf Verträge, die zu Eigentumsübertragung verpflichten und gleichzeitig eine verfügende Wirkung ausüben oder in Bezug auf Verträge, die zu einer Forderungsabtretung verpflichten (auch solcher, die gleichzeitig eine verfügende Wirkung ausüben)…“

Von Kausalität kann nur in solchen Fällen die Rede sein, wenn die Bestellung einer Hypothek auf Grund der Bestimmung eines Gesetzes oder Vertrages, die zu Bestellung einer Hypothek verpflichtet, erfolgt.

Inkohärent sind auch die Standpunkte bezüglich des kostenpflichtigen oder unentgeltlichen Charakters des Vertrages über die Bestellung einer Hypothek. Ich werde auf diese Fragestellung nicht näher eingehen und verweise auf die Literatur, in der die ausgearbeiteten Standpunkte, sowohl diejenigen, die diese Art des Vertrages für kostenpflichtig halten, als auch die entgegengesetzten, de facto nicht überzeugend sind. Nach meiner Ansicht ist es unmöglich bei der Beschreibung der Hypothek, sie als eine kostenpflichtige oder unentgeltliche Handlung zu bewerten. Dafür spricht:

- die absichernde Funktion der Hypothek
- die Erbringung von Vermögensvorteilen zu Gunsten des Gläubigers, die in der Eröffnung der Möglichkeit der Befriedung seiner Forderung aus dem mit der Hypothek belasteten Gegenstand ausschließlich innerhalb der Grenzen der unbezahlten Forderung besteht.

Außerdem sollte beachtet werden, dass die Aufteilung der Rechtsgeschäfte in kostenpflichtige und unentgeltliche ausschließlich verpflichtende Handlungen betrifft. Der Vertrag über die Bestellung einer Hypothek ist dagegen ein Verfügungsgeschäft. Einen ähnlichen Standpunkt vertritt B. Swaczyna, der darauf hinweist, dass eine Hypothek keine Handlung ist, die mit Güter- oder Dienstleistungsfluss verbunden ist und keine eigenständige Bedeutung im

76 Urteil des Obersten Gerichts vom 27. März 2013, V CSK 191/12, LEX Nr. 1341707.
Rechtsverkehr hat, was dazu führt, dass sie als eine sog. neutrale Tätigkeit betrachtet werden sollte – also solche, die weder kostenpflichtig noch unentgeltlich ist\textsuperscript{81}.

Trotz der zweifellos großen Bedeutung der Novellierung des Gesetzes über Grundbücher und Hypothek vom 26. Juni 2009 wäre es, nach der Ansicht der Verfasserin der vorliegenden Ausarbeitung, zwecks der Verbesserung des Wirtschaftsverkehrs lohnenswert, in die polnische Gesetzgebung die Möglichkeit des Vorbehaltes durch die Parteien im Inhalt des Vertrages über die Bestellung einer Hypothek, dass zur Entstehung der Hypothek die Ausstellung eines entsprechenden Briefes erforderlich sei, einzuführen. So ein Dokument sollte als ein Wertpapier behandelt werden, das ein bestimmtes Pfandrecht inkorporiert. \textit{De lege ferenda} beantrage ich also die Einführung einer Briefgrundschuld in unser Rechtssystem\textsuperscript{82}. Die Festsetzung eines neuen Models der Hypothek sollte vor allem in Anlehnung an die in Deutschland funktionierenden Lösungen (§ 1116 des BGB) erfolgen. Am Beispiel der deutschen Briefgrundschuld können viele Vorteile so einer Absicherung beobachtet werden, insbesondere während der Übertragung der Briefgrundschuld\textsuperscript{83}. Hier handelt es sich um eine vereinfachte und zeitgleich „günstige“ Abtretung, die zu ihrer Gültigkeit keinen Eintrag in das Grundbuch erfordert\textsuperscript{84}. Grundsätzlich ist für eine rechtlich relevante Übertragung der Briefgrundschuld ausreichend:

- eine Erklärung des Verkäufers über die Übertragung der Absicherung, die in Schriftform abgegeben wurde,
- Ausgabe des Schuldbriefes\textsuperscript{85}


Insbesondere ist die Bedeutung, die der Briefform der Absicherung zugeschrieben wird, in der Situation der sog. vorläufigen Finanzierung wichtig. Die Vertreter der Lehre unterstreichen, dass es hier vor allem um die Finanzierung von Bauvorhaben geht. Bei derartigen

\textsuperscript{81} B. Swaczyna [in:] Hipoteka..., S. 154-155.
\textsuperscript{82} Mehr über die Briefgrundschuld – M. Rzewuska, Hipoteka listowa, Palestra 2010, Nr. 3, S. 64 nn.
\textsuperscript{84} K. Pleyer, Nowoczesne prawo zastawnicze na nieruchomości, Rechtsmonitor 1995, Nr. 8, S. 235.
\textsuperscript{85} J. Pisuliński, O długu na nieruchomości, Transformacje Prawa Prywatnego 2001, Nr. 1, S. 22.


Es sollte keine Zweifel wecken, dass die Vereinfachung des Verfahrens der Änderung des Gläubigers einen Beitrag zu der Entwicklung der Verbriefung und dadurch zu der Verbesserung des Verkehrs mit Forderungen leistet 89.

Die Briefformen der Absicherung der Forderungen bewähren sich hervorragend in der Praxis der Schweiz und in Skandinavien 90. Warum sollten wir also nicht die Erfahrungen, die mit dem Funktionieren von erprobten rechtlichen Lösungen in Ausland verbunden sind, nutzen?

86 K. Pleyer, Nowoczesne..., S. 236.
87 A. Drewicz-Tułodziecka, Prawna infrastruktura finansowania nieruchomości w Polsce dziś i po wejściu do Unii Europejskiej, Bankrecht 2003, Nr. 6, S. 37.
88 http://www.money.pl/gospodarka/wiadomosci/artykul/wtorny;rynek;kredytow;hipotecznyc;mglyby;powstacz;za;2-3;lata.218,0,39898.html
Małgorzata Lewandowska*, Analysis of legislative lawlessness against comparative legal analysis

Abstract: Trying to assess the prevalence of lawlessness in the rule of law - understood as a legally protected system - seems to be self-contradictory. One can observe a kind of polarization to the idea of the rule of law with its functioning, or at least with the foundation which it should create. The ideal assumption is to put forward a thesis that the evolution of law caused the elimination, at least assumedly, of “unlawful activities” and subjected to sanctions the appearing ones, where the primary goal is to exclude them. However, it would be a perfect assumption - and therefore impossible on the ground used, functional.

Keywords: legislative lawlessness, liability of the state, legal theory.

Introduction

Trying to assess the prevalence of lawlessness in the rule of law - understood as a legally protected system - seems to be self-contradictory. One can observe a kind of polarization to the idea of the rule of law with its functioning, or at least with the foundation which it should create. The ideal assumption is to put forward a thesis that the evolution of law caused the elimination, at least assumedly, of "unlawful activities" and subjected to sanctions the appearing ones, where the primary goal is to exclude them. However, it would be a perfect assumption - and therefore impossible on the ground used, functional.\textsuperscript{1}

The notions of illegality - because at this point it is appropriate to cite even a general outline and comparison - is in most legal systems similar. First of all, virtually everywhere the concept of illegality is a broader concept than contradictory to the law. This is true not only in legal systems based on general tort clause, based on the French Civil Code. Similarly, in the German law interpretation of the concept of legally protected interest and breach of the principles of good manners has led to a significant expansion in the catalog of standards. The contradiction with these standards requires to treat such behavior as unlawful. Even in Greece the jurisprudence reaching in spite of the literal wording of the act has led to the transformation of the provisions on tort liability of the Greek civil law into a general clause which separates

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\textsuperscript{1} M. Lewandowska "Geneza odpowiedzialności państwa za bezprawie legislacyjne", Studia Prawnicze, Warsaw 2(202)/2015, p. 65
the recognition of the behavior as unlawful from the violation of a specific legal and positive rule. Similarly, in English law *tort negligence* causes that the catalog of tortious acts stops to be a closed catalog. The exception in this respect is Portugal, where the illegality is understood only as a contradiction to the written law or agreement.\(^2\)

However, regardless of the process or the definition’s origin and development of the very concept of illegality, the right of a victim and the corresponding obligation of the perpetrator to compensate the damage, after an unlawful act - as legally protected – setting a certain ideal, in fact realized judicial social order, that is a condition in which the victim gets a due compensation for damage.\(^3\) It is a kind of compensation for the committed infringements thanks to that the victim may have or also has the conviction that "justice is done".

Compensatory liability for the operations of the legislator is a special case of state compensatory liability for acts of public authority. This responsibility in turn is seen as a particular problem of general civil liability for causing damage. Trying to resolve the issues one will face the problems associated with the notion of compensatory liability in general, and in particular the liability of public authorities.\(^4\)

The complexity and intricacy of the given issue, both formerly and currently has been repeatedly emphasized by the authors dealing with such problematics.\(^5\) The authors dealing closely with the issue of liability for legislative acts show its complexity.\(^6\) The adoption of the concept of state liability for this type of lawlessness may raise the socio-political and financial

\(^2\) J.M. Kondek, "Bezprawność jako przesłanka odpowiedzialności odszkodowawczej", Warsaw 2013, p. 18 and other.


\(^4\) B.P. Wroblewski "Odpowiedzialność odszkodowawcza państwa za działania ustawodawcy” Warsaw 2011, p. XLI.


consequences, thus accepting liability for legislative actions is one of the most difficult problems regarding state liability.  

The genesis of normative lawlessness

In the literature, there is no consistency as to the beginning of the formation of the institution of state liability for the actions of its officers and bodies. This is important because the legislative lawlessness is a kind of derivative of that kind of liability. The majority of Polish authors dealing with the problematics indicates the second half of the nineteenth and twentieth century. As the beginning of this type of liability is also indicated the development of the idea of human rights which is a major element of the "rule of law". Contrary to popular notion there are also positions, according to which the formation of compensation liability of "community" as a synonym for state (ed. the author) dates back to ancient Greece and Rome. Personally, I incline to the concept of seeking the origins of the compensation liability of the state as sovereign in antiquity, seeing here the connotation of natural law. Therefore, there is a thesis of the creation of state liability for legislative lawlessness, as a consequence of natural law theory and institutions. All the more that the natural law appeared as the law where any infringement should be repaired. Although "natural" compensation for damage allegedly has been a little forgotten in the Middle Ages it does not change the fact that the formation of the liability for legislative lawlessness has its origins in antiquity (ed. the author)

The existence of legal mechanisms aimed at compensating for impairments caused by interference of public authority outlines the background of the oldest legal institutions, namely on the background of property right. This should be seen in confirming the issue research regarding the issue of expropriation. Although the absence in antiquity a kind of compensation institutions the admission of the concept of non-existence of any form of compensation

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inherently should be considered false. As indicated in science the view that the principle of appropriate compensation for expropriation was fully recognized in the law of Greek states and at least in "many regions of the Greek world" expropriation of property for compensation was a constant practice.\textsuperscript{12}

In the case of the analyzed issue we can successfully refer to Roman law, where the given issue remains controversial.\textsuperscript{13} It should also be indicated that the issue of compensation for damages or the widely understood liability of the state for the expropriation reaches the presence. The fact of adjustment of the right to compensation for expropriation is very up to date even under Polish law and judgments of the European Court of Human Rights in relation to Poland.\textsuperscript{14}

Beside signalled state liability for interference in property right to both in Greece and in Rome – according to the researchers - the injured individual could demand compensation for the damage from the perpetrators, ie. in this case from officials.\textsuperscript{15} With regard to expropriation and liability resulting from public works, the basis for liability determined, in accordance with the law, actions of state bodies and in this case, this liability had tortious character. However, it is also indicated that officials in ancient Greece were to be liable for damages caused while doing their duties on the same basis as individuals and it could be brought to accountability also being on duty\textsuperscript{16}. Similarly, in Roman law the compensatory obligation to repair the damage caused in the exercise of public authority focused personally and was governed by the provisions of private law\textsuperscript{17}. Analyzing the responsibility of the state for actions of public authorities in times of ancient Greece and Rome one can not forget the famous maxim of Ulpian, \textit{princeps legibus solutus}, which in modern times has become a classic formula of absolutism and irresponsibility of the state. In the days of the republic it was used to the exclusion of state liability in both individual cases as well as to certain persons\textsuperscript{18}.

\textsuperscript{12} E. Karabélia, \textit{op.cit.} p. 22 and other.
\textsuperscript{13} B.P. Wróblewski, ,, Odpowiedzialność Odszkodowawcza państwa za działania ustawodawcy”, \textit{op.cit.},p.5.
\textsuperscript{14} Pilotage in compensation matters for Poland sentence of the European Court of Human Rights on Broniowski v/Poland of 22\textsuperscript{nd} June 2004 with complaints no. 31443, which as a consequence of the lack of regulation connected with compensation regaring assets left led to a settlement between the Government of the Republic of Poland, and the complainant on the amount of compensation.
\textsuperscript{15} C. Kundrewicz, ”Historyczny rozwój odpowiedzialności urzędników w ptolemejskim , rzymskim i bizantyjskim Egipcie”, [in:] Studia z rzymskiego prawa administracyjnego, Łódź 1991, p. 21 and other p. 40 and other , p. 60 and other.
\textsuperscript{17} C. Kundrewicz, op.cit. p. 29 and other.; J. Zabłoci, A.Tarwacka, Publiczne Prawo rzymskie, Warsaw 2005, p. 110 and other.
\textsuperscript{18} D.Wyduckel, ” Princeps Legibus Solutus,.EineUntersuchung zur frühmodernen rechts- und Staatslehre, Berlin 1979, p. 49.
In the meaning gave by Ulpian it would mean the lack of binding of Roman Emperor by limits of marital law\textsuperscript{19}. Definitely metamorphosis was to take place under the influence of oriental trends and Byzantine royal ideas, according to which the Ulpian formula has gained a whole new dimension, namely the absolute dominion of the Roman emperor (dominus) not subject to the laws and unbound by law\textsuperscript{20}. And thus the lack of liability for legislation\textsuperscript{21}.

Medieval Ages - against present convictions – is the thinking about the law without precise distinction between the rights of morality\textsuperscript{22}. Legally natural concepts seem a little forgotten. The view expressed by Thomas Aquinas together with Augustine of Hippo, that "the unjust law is not law" defines precisely the medieval ages. There was a conviction that only what is pleasing to God - the old creed - could be right, therefore anything contrary to the law of God was contradictory itself\textsuperscript{23}.

It did not arise any doubts that all human authority, and thus also the legislative authority, remained the law. This was primarily the law of God and the natural law- often associated with it or deriving from it, with which the whole system of human rights had to be consistent\textsuperscript{24}. While the authority was related with contractual law, customary law or even independently constituted law\textsuperscript{25}. Moreover, in the medieval doctrine of ius commune, one can observe the formation of liability for damage caused by interference of the authority in private law, and in relation to them the development of certain concepts of authority liability institutions in France or in the countries of the Iberian Peninsula. On the other hand, under German law, one can notice the functioning of principles of community liability for the actions of their members. In English law there are the rules of compensation of damages caused by the actions of the monarch and a subordinate administrative apparatus\textsuperscript{26}. Chronology of the discussed issues obliges to emphasize while presenting compensation liability the legislative of issues regarding the protection of rights acquired or vested. It is understood that the concept of this kind of liability has developed in the medieval centuries\textsuperscript{27}. Although the very concept of \textit{iura guaestia} meaning acquired rights appears for the first time probably in the late thirteenth and fourteenth

\textsuperscript{19} W.Litewski, "Historia źródeł prawa rzymskiego", znuj 1989 , no. 131, p. 79
\textsuperscript{20} Footnote B.P. Wróblewski, "Odpowiedzialność odszkodowawcza państwa za….", op.cit. p. 11 and other.
\textsuperscript{21} M. Lewandowska, op.cit. p. 69 and other.
\textsuperscript{22} B. Szlachta henry de Bracton jako filozof prawa i myśliciel polityczny, www.omp.org.pl
\textsuperscript{23} H.Hattenhauer, op.cit. p. 328, point 935
\textsuperscript{24} Princieps legibus solutus, op.cit., p. 84 and other [14]
\textsuperscript{25} F. Kern, Recht und Verfassung im Mittelalter, op. cit., p. 76 and other.; D. Wyduckel, Princeps Legibus Solutus, op. cit., p. 53 and other.
\textsuperscript{26} B.P Wróblewski, "Odpowiedzialność odszkodowawcza państwa" p. 17 and other.
\textsuperscript{27} B.P Wróblewski, "Odpowiedzialność odszkodowawcza państwa" p. 84 and other.
century. Determination of protected rights of private individuals "vested rights" adopted as it appears in the era of the dominance of rationalist laws of nature.

The genesis of this phenomenon should be sought while considering the possibilities and conditions of interference by the public authority in the rights of individuals. The starting point was here a single regulation allowing the possibility to withdraw or restrict the property rights of private parties.

On this basis, the medieval jurists created the original concept of the protection of acquired rights. Of particular importance were two issues - the competence of the public authorities to interfere in the rights of individuals and the existence of associated with this interference the compensation obligation - a remedy. Many different views were presented here by more than a half thousand years. One can, however, reduce these view to only two concepts, for precursors of which are considered the twelfth century glossarist from Bologna Martinus and Bulgarus. The first one claimed that the emperor, and consequently also other guardians of public authority under Roman law have the unrestricted right to interfere into the rights of individuals. Whereas Bulgarus believed that deprivation or restriction of at least some of these rights can be made only in exceptional cases, namely ex iusta causa. Both of the presented views had their representatives by the end of the sixteenth century, however, the trend started by Bulgarus found numerous followers. It was a direction that in consequence helped to crystallize the idea of acquired rights protection, where in the fourteenth century its basic elements were already recognized. The concept of acquired rights protection with regard to this study, in my opinion, is of great importance. Formation of the elements of the authority liability for individuals rights violations indirectly affects the concept of the liability of the government for the legislature. Perhaps this simplification (the author's note) is far-fetched but, in my opinion, it is important to submit the creation of the concept of damage compensation of the unit for infringement of its personal law. Moreover, these assertions lead to the conclusion that the liability of public authorities developed much earlier than it is shown in the literature, and the development of the concept of human rights protection is one of the stages of the evolution of liability for the lawlessness of public authority - but is not its beginning. In realtion to the German Empire and the Middle Ages the belief regarding the connection of the ruler with law and his liability was

28 Compare therein p. 18
29 Corpus iuris civilis.
31 Compare therein. p. 87.
32 B.P Wróblewski p. 19.
widely known. During the coronation of newly elected king, just as later "selectable emperor" had solemnly promise to protect the law and resist injustice, increase the wealth of the Reich and do not allow to make it poorer. Neglecting this duty by the rulers gave the princes electors the right to bring him to justice, or even of impeachment."33

Old German tradition imposed on the ruler, like on other members of the tribe, the subordination of customary law. In the event of its infringement, there was the opportunity to dismiss the ruler or even kill.34 This belief was strengthened under the influence of Christian thought according to which the monarch was to be assessed not only in accordance with customary law but also with the law of nature.

The principle of the authority and the law compilation was to be connected with the rule of compensation liability of the community (state, city, church, municipality, guild, etc.) for the unlawful conduct of its organs and members " which can be placed from the days of Otto von Gierke. German Middle Ages present a kind of thinking about state and law as the unification of the individual and the community. The individual (the community member) was seen not as independent unit but as part of this community. In conclusion, it should be assumed that the actions of individuals were to be treated as the actions of the whole community. Therefore, the individual was responsible for the actions of the community as well as the community for the actions of its members35. Freeing up the community from such liability could only take place through the exclusion of the guilty person from the community. The liability of the community concerned all its illegal actions - including its members and a commitment to repair the resulting damage. In reference to the French law during the medieval ages the origins of compensation liability should be searched in an expropriation institution. Already in the thirteenth century-one can observe in the preserved sources the phenomenon of authoritarian interference of the feudal lords in the ownership of movable and immovable property, in particular in relation to the conduct of military operations (victualling humans and animals), construction of military buildings (ramparts, fortresses, etc.), construction of roads and shifting of watercourses and the size of water reservoirs (stacking rivers, creating and expanding ponds, etc)36. It is highly important that apart from the damage caused by the military actions one can notice a regular compensation practice or providing compensation for damage in another form. As the latest findings indicate,

33 F. Härtung, Deutsche Verfassungsgeschichte, Vom 15, Jahrhundert bis zur Gegenwart, Stuttgart 1959, edition 7, p. 35:
34 B.P Wróblewski, op.cit, p. 23 and other.
35 M. Lewandowska, op. cit , p. 72 and other.
36 L. Waelkens, L'expropriation dans le ius commune médiéval, op. cit., p. 124.
in the fourteenth century in France the effect of “theoretical concepts ius commune on practice law” begins to be strongly marked. Their significance for the formation of the institution of expropriation is not undermined in any way, because they were to contribute to its “discipline, domestication and to subordinate the demands of the general interest”\(^{37}\).

In any case, in the fifteenth century the original form of expropriation as an institution of feudal law was no longer to play any practical role and the institution of expropriation shaped under the influence of legal science was essentially to correspond with the assumptions formulated by commentators. And here, beside the requirement to demonstrate an adequate public interest, the rule is the obligation to pay appropriate compensation by the authority intervening in the ownership law (royal, princely, municipal, church)\(^{38}\). The research of issues regarding the compensation liability in relation to the English law in the Middle Ages lead to the conclusion that in the thirteenth and fourteenth in the English law the ruler, despite numerous privileges remained, like all other members of the community, obliged by the law and responsible for his actions. Thus, "The King is not subject to a man, but to God and the law, because the law constitutes the king"\(^{39}\). As a consequence, therefore, it must seem logical to adopt a concept according to which any action of the king have be appropriate in both aspects the nature of things and ex lege, and "The King can not act unlawfully" (the king can do not wrong)\(^{40}\). Contrary to later indicated importance of this maxim, initially it was to express the belief that, like all other members of society the king must not violate applicable laws. The lord was not only bound by law but also, in accordance with the rule expressed in the Charter of Rights in 1215 and repeatedly invoked in practice, could not "refuse or delay right and justice"\(^{41}\). After about two centuries the maxim assuming initially inability to act unlawfully by the monarch gained the meaning that the monarch is privileged by the absence of negative consequences with respect to his actions, and therefore, not acting unlawfully was natural. In the science there is an expressed view concerning the basic feature of the "modern state" within the Latin

\(^{37}\) B. Auzary-Schmaltz, op. cit., s. 22 and other.

\(^{38}\) J.-L. Harouel, op. cit., s. 45 and other and p. 53: B. Auzary-Schmaltz, op. cit., s. 27 and other.

\(^{39}\) H. de Bracton, On the Laws and Customs of England, Translated, with Revisions and Notes, by S. E. Thorne, b. 2, Cambridge 1968, p. 33:

\(^{40}\) The formula the king can do no wrong inferred precisely of the quoted statement, de Bractona. Por./., Ehrlich, Proceedings against the Crown (1216-1377), op. cit., p. 42. The term wrong L. Ehrlich is understood as most compliant with contemporary unlawful acts (torts) and is interchangeably used with the Latin notion Iniuria. Compare therein p. 14 and p. 42. In the Polish language the word wrong is translated in this context usually as “lawlessness”. Compare e.g. S. Rostnarin, op. cit., p. 21. It should be noted, however, that this term is in English ambiguous. It means inter alia: evil, sin, offense, injustice, harm, suffered injury, damage, loss, guilt, crime. Compare / Stanislawski, Wielki słownik angielsko–polski. The Great English-Polish Dictionary, b. 2, edition. 17, Warsaw 1995, p. 529.

\(^{41}\) B.P Wróblewski op. cit.
civilization which is observed in a gradual release from the medieval notions of bounding the state with the law.\textsuperscript{42}

In the medieval ages, the belief in the existence of legal restrictions involving state authorities and its guardians was dominant. However, the opposite tendency, already visible in the last centuries of the Middle Ages, and closer to the ancient formulas, begins to strengthen in the first centuries of modernity. The processes of consolidation of state authority and emancipation from the influence of the church and the emperor\textsuperscript{43} were accompanied by the doctrinal stream trying to break free from any legal constraints. It leads to the consequence that in the first centuries of modernity the sovereign ceases to be the law and becomes the state. A State which is still in practice identified with the visible bodies of sovereignty: the monarch, aristocracy or the people. It is perfectly expressed by a well-known maxim attributed to the French King Louis the XIV - "I am the state" (l'État c'est moi). The modern theory of the state begins to emerge in the last centuries of the Middle Ages and the first centuries of the modern era. It was tried to be justified by the concept of sovereignty. It was seen as the most essential feature of a state, meaning its all-comprehensive, continuous and undivided authority. According to the theorists of absolutism it was to involve the legislature, the executive and judicature. However, if the medieval ideas were dominated by the view of authority as a judge, a modern sovereign, although perceived as the supreme judge controlling the courts, was primarily a legislator, because - as Bodin wrote - "(...) the first trait of a sovereign prince is the ability to issue acts binding for all in general and for each individual"\textsuperscript{44}. Legislature stops being hampered by any eternal, and other more obsolete rules and regulations which leads to a situation that it starts to move towards the creation of an autonomous legal order. This process was conducted in the name of more or less enlightened absolutism, aristocratic or democratic liberalism, finally egalitarian or even totalitarian revolution. Grounds could be various, even opposing ideologies, but the result was the same\textsuperscript{45}. Even for Bodin, naturally important concept of sovereignty was the sovereign independence of statutory law. For some thinkers of the later period of sovereign


\textsuperscript{43} H. Coing, Europäisches Privatrecht 1500 bis 1800, t. 1, München 1985, s. 48 i n. oraz s. 159 and other.

\textsuperscript{44} Bodin, Sześć ksiąg o Rzeczypospolitej, op. cit., b. I, chapter. X, p. 183: "(...) pierwszym znamieniem suwerennego księcia jest możliwość wydawania ustaw obowiązujących wszystkich w ogólności i każdego z osobna". Odnośnie do późnośredniewiecznej refleksji w tej materii por. D. Wyduckel, Princes Legibus Solutus, op. cit., p. 152 and other.

\textsuperscript{45} This process was determined by Sten Gagnér as „Convergence to legal positivism” (Konvergenz zum Gesetzespositivismus). Compare S. Gagnér, op. cit., p. 107 and other, footnote B.P Wróblewski.
authority become both *de iure* and *de facto* legally omnipotent. In support of this thesis the philosophical, religious, legal and historical arguments were quoted. Sovereign character of supreme authority was reflected in the previously mentioned maxim of modern absolutism of monarchical *princeps legibus solutus est* and its national equivalents. Underlying beliefs were defined in the literature as "the science of the inability of the state to unlawful actions" (*die Lehre von der Unrechtsunfähigkeit des Staates*). In the ideas of Thomas Hobbes, Jeana Jacques Rousseau and Immanuel Kant one can observe more consistent realization of the view that the state or the ruler naturally identified with it, as not binded by any superior law could not act unlawfully, and the very notion of unlawful action lost any meaning for them.

**Summary**

With regard to the above, and in contrary to nowadays popular concepts, or at least the majority of them and almost in all legal orders one can notice the existence of at least some forms of compensation liability of the state. In many cases there is no basis for assuming that there is some historical continuity between them. Even before the eighteenth century there were institutions and concepts of the public authority liability. The first one is to be found already in ancient Greece and Rome. Their aim was to ensure the compensation protection of individuals affected by intervention of public authorities in ownership right and seem to correspond to the contemporary institution of expropriation. More information is derived from the Middle Ages, where both German law and English law were to include the rules of liability for damages caused by the actions of public authorities. In the area of the German Empire the liability of community based on the applicable rules of law Germanic was in force. In England in turn the monarch and his subordinate administrative apparatus, although the existence of numerous protecting privileges, were liable on the same basis as private entities. However the practical significance of these institutions since the late Middle Ages began to weaken. In the fourteenth century commentators developed the concept of private entities compensation protection in

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43 J.J. Rousseau, *Umowa społeczna* (przełożył oraz wstępem i przypisami opatrzył A. Peretiatkowicz, Kęty 2002, b. I, chapter VI, p. 18 and other and book. II, chapter. VI, p. 34 and other. J.J. Rousseau used the path traced by T. Hobbes. According to his concept entering into a contract that creates a state, the will of individuals (*volonté de tous*) merged in the general will of all (*volonté générale*). Consequently, the conclusion of the social contract all individuals lose the laws held in a state of nature, and their sole disposal remains - presented in the form of metaphorical will of the people - the state.
50 B.P Wróblewski, *op.cit.*, p. 48 and other.
cases of interference by a public authority in private law which in turn is a lasting achievement of European legal thought. This impact can be seen at the end of the Middle Ages which leads to the emergence of expropriation institutions in the Romanesque countries, particularly in France and the Iberian countries. This concept in ius commune science remains alive until the eighteenth century. It influences neo-scholastics from the school in Salamanca, and through them H. Grotius and other representatives of the rationalist school of nature law. In the end it gives the base to the institution of state liability for infringement of acquired rights which was developed on areas of the German Empire State. On the other hand, the narrower approach contributes to the formation of the modern concept of expropriation in France at the turn of the eighteenth and nineteenth centuries. It should be added that in eighteenth century France also visible was constant practice of compensation, though perhaps only ex gratia, of damage in the course of public works. On the other hand, the only legal order analyzed at work, where it was not possible to detect any institutions of compensation liability is England at the end of the seventeenth and eighteenth centuries. Nevertheless also there some individuals could sometimes count to obtain compensation for incurred impairments, but also only ex-gratia51.

Analysis of the described issues allows and even forces to confirm the thesis regarding the formation of liability for legislative lawlessness of the state already in the early development of the law in general. The adoption of a different concept - coincidentally propagated in Polish literature- is incomprehensible in relation to the above considerations. There is no doubt that the concept of compensation for damage caused by the legislature in the sixties of the twentieth century, experiences only a renaissance, but its genesis goes back to much earlier periods. It seems quite understandable and logical because the natural law was "a simple, literal law" – at least I perceive it this way. That is why a fault was connected with compensation, damage compensation of harm regardless a type or the subject of the perpetrator52. It is actually natural circumstance for most modern legal systems based on the idea of compensation – compensation for the damage. Moreover- in my opinion- the very idea of law is based on the indemnity for culpable harm. In case of other concepts it would be difficult to speak about any other legal concepts.

51 Compare therein., p. 78.
52 M. Lewandwska, op. cit. p. 78.
Abstract: This article shows the path followed in some countries of Europe and set a common base; moreover, the study aims to demonstrate it is crucial an effective national coordination. I will argue that the relation between state and regional R&D funding policies can be expressed in the Latin phrase “divide et impera”. The process of weakening state's direct control of the R&D activities (“divide”) needs to be followed by a stronger coordination (“et impera”), in order to control the R&D by other means, so as to avoid the effects of an uncontrolled “law anomie”.

Keywords: innovation, R&D, governance, funding science.

Introduction
Innovation is a word very popular nowadays, there is no future without innovation, as in the Silicon Valley usually say, innovate or evaporate. In history many empires were based on technological superiority; it produces no surprise that states always put their efforts to craft science policies which may positively affect the science field. This article shows the path followed in some countries of Europe and set a common base; moreover the study aims to demonstrate it is crucial an effective national coordination. I will argue that the relation between state and regional R&D funding policies can be expressed in the Latin phrase “divide et impera”. The process of weakening state's direct control of the R&D activities (“divide”) needs to be followed by a stronger coordination (“et impera”), in order to control the R&D by other means, so as to avoid the effects of an uncontrolled “law anomie”. To make the aforementioned more transparent, it is possible to use the following assumption:

Historically, R&D projects were a direct emanation of governments' projects or policies. The state directly decided which project to implement or carry out. For example the nuclear projects or the concorde project in France (Laredo, 2001).

This demonstrates that the general theory of law defines the “state supreme power” (Kelsen Hans, 1991) or “state imperium”. The state used its unconditioned power (imperium) to determine the most proficuous decisions in the R&D field. Currently, states tend less to directly exercising this sort of supreme decisional power and leave more “self-determination” to R&D players. A collateral effects of uncontrolled freedom of choice in the R&D field poses a threat.
For example a proliferation of similar projects which subsequently risk being under financed (in such a case I would use the aforementioned Latin word “divide”).

The state may find a remedy to this perilous proliferation through the implementation of its “coercive power”. The state's authority determines R&D policies in a subtler way. For this reason the phrase “divide et impera” is still a valid description of the state's coercive power. The state cedes power of choice to individual institutional actors. At the same time, the coercive power allows the state to balance the proliferation and preserve its authority over the R&D field.

This paper will focus on the analysis of French, Spanish and Italian experiences in the R&D field. More specifically this article will focus on the Spanish experience because in the opinion of the author, the evolution of the Spanish R&D system is an example of positive achievements produced by an excellent capacity of adaptation.

It is common knowledge that the European Union is gradually implementing a certain kind of multilevel governance. Although this concept mainly concerns political-administrative aspects, nevertheless it influences a vast amount of different fields, among them the R&D field.

Multi-level governance is a concept with less than two decades of history (Draetta, 2015), it is a notion very popular in many fields. To better understand this specific concept and its relevance in the R&D field, a short discussion of its major components is needed.

The idea of multilevel governance was created in regard to the European integration process (Adam, 2014). It starts from the consideration that the “state imperium” i.e. authority is shifting not only from states up to the European Union, but also down to sub-national authorities. Multilevel theory is strongly connected to polycentrism, as a way to stay closer to the real need of the society (Piattoni, 2009). Multilevel governance is generally understood as sharing responsibilities and cooperating between the various levels of governance and it is often associated with the principle of subsidiarity (Draetta, 2015). It is not possible to completely understand multilevel governance without introducing the subsidiarity concept.

Subsidiarity is based on the belief that the decision chain should be as short as possible in the meaning that the decision making process should be as close as possible to the citizens, so that

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1 i.e. Regions, Provinces…
the implementation of the decision process could be the utmost effective, and related to the real needs of citizens.

For example, if a given social policy is to be implemented, it should be decided, thought and implemented from a decisional entity as close as possible to the beneficiaries, (i.e. a construction of a school should be decided by a regional government and not by a ministerial meeting).

In practice, multilevel governance is based on the idea that the best policies are chosen and implemented when decisions are taken with the participation of the final beneficiaries of such a policy.

An effective multi-level governance has to contain a quantity of subsidiarity, but at the same time coordination can not be missing. In fact, the policy results depend on good coordination between all levels of government, both in the decision making process and in the implementation process. In such a sense, “mutatis mutandis” an efficient plan for financing R&D has to be based on a previous deep knowledge of the current condition of R&D sector in a particular state.

France, Italy and Spain have dealt with developing an R&D public funding system. All three of those states had a slightly different approach which hugely effected the characteristic of public policies implemented in their respective countries.

History influences the future, hence Spain and France had a system definable as very centralistic. Both countries have been, for a period, the centre of vast empires; those empires were characterised by a strong centralisation and control over possessions. Phrases as “L'État c'est moi” allegedly mentioned by king Luis XIV or the phrase, "el imperio en el que nunca se pone el sol” related to the vast amount of the dominions of the Spanish empire. Those phrases are much more than simple expressions; these phrases are a representation of an immaterial concept which transcend the words and explain what kind of political and administrative systems they represent. These systems were mainly hierarchical, i.e. decisions came from the political centre and were implemented by local authorities. Therefore, taking into account all

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2 Mutatis mutandis can be translated as the necessary changes having been made.
3 Italy had a different history, it was unified only during the second half of the 19th century
4“L’État c’est moi”
5 The empire on which the sun never sets.
the aforementioned, it is true (as we will see) that French and Spanish system shifted from a state centric system to a more “shared system”. Nevertheless in this new system there are visible traces of “centralised control” (Reppy, 2000)6.

An efficient plan for financing R&D has to be based on a previous deep knowledge of the R&D situation in the State; taking inspiration from architectural jargon, it is possible to affirm that “architectural and components knowledge are key elements for understanding the organisational capabilities of the system to create”.

France

France with “Colbertism” was the first state to codify state intervention in the economy. “Colbertism” was an economic and political doctrine of the seventeenth century, created by Jean-Baptiste Colbert7. Colbert’s central principle was that the wealth and the economy of France should serve the state. Hence today France with other European countries is an example in the field of state intervention in crucial national fields (Rich and Cole, 1964).

In France, during the 1960’s a new vogue for “Colbertism” started in every field of economic activities. This “neo Colbertinism” did not remained without pronounced effects on the French R&D sector too8 (Laredo, 2001) The French government often directed public policies to promote R&D among the so called “champion national”9. Moreover it is worth noting that the national defence and military sector is still today considered a key field in R&D policy and the national defense expenses are used as a lever for growth (Guichard, 2003).

In other words, the French R&D system is based on strong state coordination, which is expressed by the construction of the French national innovation system (NIS). This concept emerged over the past decades as a response to the recognition that innovation within a national economy needs a plan so to increase positive R&D outcomes (PIETTRE, 1986).

Traditionally, French technology and innovation relied on the targets of the central state, performed and implemented in the framework of grands programmes (PIETTRE, 1986)10. The

6 This control activity may appear in different form, lighter or not nevertheless this control activity is always present.
7 French Minister of Finance under Louis XIV.
8 In such a sense it is possible to use the term “technological Colbertism”, cf. Larédo/Mustar 2001).
9 A national champion is a firm chosen by the state to become the dominant producer or service provider on the national market and overtake or hinder foreign competitors in this market.
10 It is admissible to consider that the grand programmes spirit is still present in the nowadays in the so called La stratégie nationale de la recherche.
main industrial actors have been the national champions\textsuperscript{11}. However, this general pattern has changed over the last years. Technology transfer nowadays focuses on the validation and transfer of research results generated in universities, public scientific and technological research organisations, and research organisations. A national innovation system is based on the assumption that the better planned the system is, the better results will be reached (OECD, 1997). R&D stakeholders, are part of the same system, and as part of a same system they are equally needed altogether as no part of the body can live separated. In such a sense it is the French national innovation system, which has to connect the R&D stakeholders so to underline the interdependence between the national R&D stakeholders; moreover the stakeholders play the main role thanks to their linkage, mutual commitment and their own interactions. France had set a national R&D intensity in 2012 of about 2.2\textsuperscript{12} percent of gross domestic product, which conferred a top position within the EU states.

As expressed above French technology and innovation relied on the targets of the central state, performed and implemented in the framework of “grands programmes”. These programs were mainly concentrated in and implemented by the national champions (Laredo, 2001). The state created a mechanism which had to support the national champions in an effort to maintain or gain an international leadership role in the given field of activity\textsuperscript{13}. During the last decades of the 20\textsuperscript{th} century the aimed result was to some extent reached. In fact France has always had a gross domestic product intensity proportionally higher than other direct competitors (European Commission, 2014), and the fields on which French R&D sector was the utmost significant were those fields whose national champions companies were operating in (Directorate-General for Research and Innovation, 2014).\textsuperscript{14}

France reached such positive results during the last two decades of the 20\textsuperscript{th} century thanks to the fact that two main changes occurred: the political side created new agencies, entities devoted to fostering an increment in R&D\textsuperscript{15}; France, keeping a centralised form of power, opened the way to a feeble regionalisation\textsuperscript{16}(Boudon, 2014).

\textsuperscript{11} In french champions nationaux.
\textsuperscript{12} Research and Innovation performance in the EU Innovation Union progress at country level 2014 edited by Directorate-General for Research and Innovation
\textsuperscript{13} The Government set special legislative and financial aid in order to defend the national champions against the international concurrence
\textsuperscript{14} For example: Aeronautics, energy, transport and defence.
\textsuperscript{15} For example: Agence Nationale de la Recherche, Agence d'Evaluation de la Recherche et de l'Enseignement Supérieur, Pôles de Recherche et d'Enseignement Supérieur.
\textsuperscript{16} Please notice that regionalisation doesn’t have to be understood as a federalisation of the state.
The second occurrence which significantly changed French R&D “modus operandi” was the importance the regional level acquired in the French political system, the so called “regionalisation”\textsuperscript{17}. The 26 French regions (which do not have legislative power), receive part of the national tax income and have a budget to bestow in their priority areas. Regions negotiate their priority fields with representatives of the state and they have an elected council (conseil régional) which is responsible for the regional administration. Regions are competent for social questions, transport, education, culture, local development, for this reason, to a certain extent Regions have competence for R&D (Office of the Prime Minister, 2012)\textsuperscript{18}.

Nowadays French R&D is characterised by an unequal dichotomy between central government and regional government. France passed from a \textit{dirigiste} form of R&D to a new form of governance where the function of the state is to facilitate\textsuperscript{19} the R&D development. In this cooperation between central and regional authority the so called “contrat de plan État-région” (CPER) has a salient importance. CPER is in a state-region plan contract, a document in which the state and region are committed to a multi-year programming and funding major projects (among which R&D projects as well)\textsuperscript{20}.

In this path of regionalisation via state-region plan contract, many centers for scientific research\textsuperscript{21} were created. The fundamental idea of such a policy was to create over the country a fertile soil for R&D, so those centres were established not in a single city or in the capital, but in different cities of the country. It is quite interesting that although these national centres had to spread R&D over the state so to foster a diffused pro R&D environment.

The obtained results of this regionalisation were not adequate to the central government’s expectations; important differences in results within regions were observed (Beatson, 2007). In 2005 a shift in French R&D \textit{modus agendi} occurred ; previously there was the so called principle of regional equality (it consisted in sharing the same quantity of funds to all the regions). Nevertheless this drive for equality brought extreme differences in results. Therefore, the central government shifted towards rewarding networks and clusters of scientific

\textsuperscript{17} It is important to clearly express that regionalisation is something different from the so called devolution federalisation or power devolution. Federalisation has never been in the French political agenda.
\textsuperscript{18} It may be of some interest that in 2014, the French Parliament passed a law that will reduce the number of regions in Metropolitan France from 22 to 13. The new regions will take effect on 1 January 2016.
\textsuperscript{19} Also known as Etat facilitateur “State facilitator”. In such a sense it is possible to affirm that from the 70’s definition l’Etat entrepreneur” we passed to ”l’Etat facilitateur”.
\textsuperscript{20} Along with the CPER are there other different project where regions have a key role in the R&D implementation, nevertheless due to unity matters this paper concentrates on the CPER importance.
\textsuperscript{21} In French Centre National de la Recherche Scientifique.
excellence; it was set as an R&D System, which had as common base the fact that to the regions were given an equality of opportunity to compete for scientific resources, and not a simple equality in resources. The regions were given the possibility to compete for obtaining higher financial means. This reflected a more gradual evolution in French policy towards equity rather than equality as a precondition for competitiveness\textsuperscript{22}; in such a sense the system drifted towards the so called “Pôle de compétitivité” technology clusters characterised by the presence of a given zone of highly qualified R&D players (i.e. research centres, universities, highly specialised factories).

Spain

Despite the low gross domestic product percentage on R&D, Spain concentrated its financial means on specific technological fields, obtaining among others important results in the field of new sustainable sources of energy\textsuperscript{23}. The Spanish R&D's incentive system is composed of two major elements:

- national plan (which changed consistently in time);
- incentives tools which we may define as a group of combined law provisions.

The national plan is a direct expression of the government's guidelines, instead the group of combined provisions of law, is an instrument orientated forward creating a common ground which is created to foster R&D financing, beyond the limits set by government guidelines.

In Such a sense Spain created two parallel systems for financing R&D, which under different paths had to provide the same result; augmenting R&D quality and quantity(Muñoz, 2006).

The “Plan Nacional de Investigación Científica y Desarrollo Tecnológico (National Plan of Scientific Research and Technological Development) has to be considered as the main instrument used by the Spanish government to coordinate and encourage scientific and technical research.

The 1986 science act, created a better coordination among the different R&D players. The Spanish government, developed science and technology policies; these policies were and still are carried out in accordance with the national scientific research plan. In order to reach the

\textsuperscript{22} Equity represents a means of striving for equality within the reasonable limits of efficiency' (Baudelles and Peyrony 2005).

desired results many important administrative bodies were set out by the Science Act. The inter ministerial commission on science and technology (CICYT) is the leading national agency for scientific and technological policy and the angular stone on which the national plan system is based. The CICYT is responsible for planning, drafting, coordination and follow-up. The CICYT is presided by the office of the prime minister and includes the ministries 24 involved in scientific and technological policy (Muñoz, 2006).

The CICYT is assisted by the following bodies:

- a general council for science and technology, which is the CICYT's consultative body devoted to promote coordination among the different Autonomous Communities and the central administration;
- a support and monitoring committee which is led by the prime minister's Economic Office and it is responsible body for inter ministerial coordination in planning the follow-up policy on R&D;
- the Spanish Foundation for Science and Technology (FECYT), which is part of the ministry of science and innovation, it is the responsible body for providing technical support to the scientific and technological decision-making bodies in Spain.

The 1990's mark a turning point in the R&D System in Spain. The pursued idea by the Spanish government was to strength a set of laws to promote R&D activities outside the National Plan.

It is possible to affirm that with this reform the Spanish government tried to implement in Spain what in France is defined as “etat facilitateur” 25 in the meaning that the state had to maintain a role, but this role had to be less evident. The state had to prepare fertile conditions allowing an independent but at the same time controlled “R&D blossom”. The main idea was that the state showed the path to succeed but at the same time the state left more freedom on how to implement R&D activities.

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24 Minister of Economic Affairs and Competitiveness; Minister of the Treasury and Public Administrations; Minister of Foreign Affairs and Cooperation; Minister of Defense; Minister of Public Works; Minister of Education and Culture; Minister of Employment and Social Security; Minister of Agriculture, Food and Environmental Affairs; Minister of Industry, Energy and Tourism; Minister of Health, Social Services and Equality.

25 State with a “facilitating role”
The Spanish system during the 1990s appeared well framed, with pieces of legislation, providing a system on research more reliable; this system was based on a strong legal basis (GUTIÉRREZ LOUSA, 2008).

It is worthy of attention the combined provision of Law 43/1995 after modified with the law 55/1999 on corporate tax.

It is extremely significant that Spain shifted to a science financing system characterised by vigorous tax incentives; in such a sense the Spanish government tried to limit its direct “imperium”, desisting from imposing government central will as occurred before. It is possible to affirm that the choice carried by the Spanish government was to leave more decisional space to the R&D player and to the market (Navarro, 2009).

The reform was based on the principle that the state had mainly to set the R&D framework but the national plan tool had to be to some extent less invasive; for this reason R&D tax incentives were implemented as well through a broadening of fiscal incentives in accordance with the mentioned laws (GUTIÉRREZ LOUSA, 2008).

The base principles applied to this regulation, deserve to be mentioned:

- the deduction application had to be neutral, it could not radically modify the conditions of the company subject to incentive, unless it contributed to overtake market inefficiencies;
- tax deduction had the main intent to increase the competitiveness of the Spanish Economic System;
- the main fiscal ease concerning the R&D consisted in what was generally known as “Amortization freedom” (Libertad de Amortization).

The difference between tax reduction and amortisation freedom lies in the slight distinction that tax reduction reduces tax debt settlement. Instead amortisation affects tax base, allowing a “tax deferral”, but not a reduction. It entails that it was possible to amortise the R&D expenses qualified as intangible assets; but it is important to notice that it was not possible to extent such ease to expenses relating to innovation matters. Tax reduction had a very large extent, depending on the investigation activity set. According to corporate law, development may be defined as follows: “application of the research results in order to produce new materials or commodities”.

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I would like to underline the words “application of the research results”. This affirmation implicates a strong connection with the research result, which had to be classifiable as positive. Hence it was obligatory that the antecedent research, gained a positive result so that the new product or material could be defined as a direct consequence of research. Because it was not clearly defined, if a development process consisted in something that could be defined as new; a closer contact was set between the research institution and the ministry for research and the tax administration (Muñoz, 2006).

The Law 55/1999 set a change in the Spanish R&D panorama, it surly represented a turnaround compared to the Law 43/1995. Before 1999, technological development was quite peculiarly not considered a part of R&D activities. It was connected to industrial activities more than R&D activities. In this regard, only from the beginning of this century, the words “investigación (research), desarrollo (development) y innovación (innovation)” were used together to express the Spanish R&D policy, earlier the words “Investigación, desarrollo” were used and the so called innovación tecnológica was a concept treated separately.

It is possible to define technological innovation as the activities whose result is a step forward in the technological field, which help in obtaining new products, new productive procedure or consistent improvements in the existing ones.

Discerning simple R&D activities from activities involving technological innovation is not always possible; it may occur that technological innovation is a positive final step of an R&D process.

Under the earlier Spanish law provision, research activities, were not conditioned by the result reached. This means the research could even not reach a positive result but still the activity carried out would be qualified as “research”.

Instead technological innovation required new products or innovative procedures or consistent improvements in the existing ones, and reaching a positive result was obligatory (Muñoz, 2006).

The R&D activities, producing a positive result, can be defined as an objective innovation, instead the TI (technological innovation) activities may produce a result which may be defined as a “subjective Innovation”. The innovation has to be new in regard to the subject which has promoted and supported the TI research. Incentives on technological innovation activities are a further implementation of what was already set throughout the R&D legislation. Technological
innovation activities are now compared to all other R&D activities with no additional distinction provided, reaching a positive result is not anymore a condicio sine qua non.

The Parliamentary strongly believing in the État facilitateur against the concept of État dirigiste characterised by a strong economic planning (Galindo Martín, 2003), increased the size of the tax deduction percentage. However this decision did not produce the expected results; it did not reached a concrete improvement in the Spanish gross domestic product percent dedicated to R&D; unfortunately the expectations before set, were not entirely met.

In 2006, the Spanish government started to make relevant change on Spanish R&D policies. The change was as vast that it is possible to define it as revolutionary. It was decided to leave the deduction system, which was characterised by large freedom given to the R&D players. The government created a new R&D policy once again based on National Programs set by the government itself. The emanation of this new Law 35/2006 represents a fundamental change in the R&D field.. This is very well explained in the law preamble which in few words explain the limits of the previous R&D policy. Citing the exact words is due to to the semantic pregnancy of the text” en muchos casos, los estímulos fiscales a la inversión son poco eficaces, presentan un elevado coste recaudatorio, complican la liquidación y generan una falta de neutralidad en el tratamiento fiscal de distintos proyectos de inversión”, which says “In many cases the fiscal stimulus to investments is not cost effective; high collecting costs complicate settlements and generate a lack of neutrality in the fiscal treatment of different investment projects”.

This new policy consisted in leaving “the incentives era”; the government focused on developing a system based again on national and regional programs (Buesa, 2014). There are great differences between the two approaches. The incentives form is more market respectful, creating new national and regional programs allows the government to address the efforts in financing R&D activities. In such a sense the government decided, through national plans, which R&D fields were worth to be financed. This new policy was generated by the government belief that a R&D system, more based on national plans, is capable of reaching far better results. Through this new national plan the government set the goals to be achieved and the priorities to be followed in the R&D field.

26 Please see the note above.
The 2008/2011 R&D National Plan introduced a new structure and new way in managing the R&D issue. It was decided to create a new version of the Comisión Interministerial de Ciencia y Tecnología (CICYT), which is possible to define as a reinforced CICYT; this new version of CICYT entered into service in 2006; the pyramidal structure of the commission, formed by the R&D key actors, allowed to set a better performing national plan, the commission was formed as follows:

- a chairing body responsible for the elaboration processing of the plan. This sub commission had the key role to supervise all the procedure, and a group responsible about the concrete elaboration of the plan. The first group is a group formed by experts of administration having the main task of policy coordination. The second group formed by science and technology experts,
- three consulting sub commission designed to analyse specific problems,
- a commission for institutional and budgetary matters,
- a commission on financial instruments. This commission is responsible for finding the financial means to be used in order to implement the national plan. That group has a core function; it is designed to discover and analyse if what set in the previous 20 years in Spain was successful and to which extent ,
- a commission on key topics, devoted to determine the main topics to be discussed.

The purposes of the National R&D&I Plan (2008-2011), which was set up in line with the provisions of the National Strategy for Science and Technology, were: placing Spain at the European cutting edge of knowledge, and creating a favourable environment for investment in R&D&I (“Erawatch Spanish National R&D&I Plan 2008-2011 (+2012),”).

This new form of national plan for R&D has a structure based on three areas directly related to the plan’s general objectives and linked to instrumental programs which pursue specific objectives:

- generating knowledge,
- fostering cooperation in R&D,
- strategic actions.
Evolution in the time of the Spanish R&D financing system

Due to the importance of the Spanish experience, it worth to summarise the evolution in the time of such experience. It is due to be noticed that the Spanish R&D financing system has been for a long period a sort of “work in progress”.

The results of the first national plans were not as positive as expected, the Spanish gross domestic product percent on R&D did not meet expectations previously set. This is the reason why the Spanish government at the end of the 1990’s tried a fresh start through the adoption of a set of laws overcoming the limits of the national plan system. Thanks to the consistent increase of the Spanish gross domestic product during the 1990s the total amount spent on R&D increased (Muñoz, 2006).

During the same period a privatisation process occurred; the “Spanish national public champions”, companies such as Endesa, Acciona and Telefonica were privatised. The state (however was, and in some cases still is) owner of a majority of shares, characterised by special powers allowing the government special competences. Thanks to the so called “golden shares” the ministry of economy had the possibility to orientate the companies main decisions. The Adoption of the national plans and the clever use of the golden shares allowed a significant concentration of the R&D funds in key sectors, structurally fundamental to the Spanish development. Year by year, the gross domestic product percent on R&D was increasing and results as well. Between 2000 and 2008 the gross domestic product percent on R&D continued to increase.

Thanks to a clever and efficient use of the national plans, Spain obtained vast results in the renewable energies field. Spain pursued with tenacity R&D on renewable energies. In 2006, 20%\(^{28}\) of the total electricity demand was produced with renewable energy sources, and in January 2009 the total electricity demand produced with renewable energy sources reached 34.8%\(^{29}\). Some autonomous regions in Spain lead Europe in the use of renewable energy technology and they plan to reach 100% renewable energy generation in a few decades\(^{30}\). Castile and León and Galicia are especially near this result, producing in 2006 70%\(^{31}\) of their

\(^{28}\) http://www.energia.jcyl.es/.
total electricity demand from renewable energy sources, and 5 communities produce more than 50% from renewable.

Final Considerations on Spain R&D financing system

The Spanish national plan system permitted a better and more profitable use of financial means; a coordinate direction is the heart of the R&D Spanish system; that however does not mean just a “hierarchical passiveness”, instead it means a virtuous cooperation among all R&D players, made possible by an “illuminated direction”. The inside organisation of the national plan system is an effective mix of check and balances allowing tangible and pragmatic results.

Sole tax incentives do not represent an adapt answer in case of shortage of means; providing companies with economic aids is, for sure, important, but not as crucial as providing with a structure capable to back the R&D effort.

Spain created a flexible and supporting structure composed by all relevant players in the R&D field: government, universities, research centres, entrepreneurs. In short terms the government opens the way for a round table to decide which goals have to be achieved, after that, thanks to a strong connection between universities and research centres, the most capable institution to perform the research is chosen by an ad hoc commission (García-Quevedo, 2008).

When the R&D is performed by a private institution the national plan consents to establish cooperation between the private institutions and public ones. Cooperation is the main factor leading to R&D success32. Equally important is the moment when the government decides which research fields qualify as research fields of national interest.

An effective research field determination is vital, for this reason the Spanish government, within the national plan, created the mentioned permanent round table formed by political and technical members in order to determine the field of research classifiable of national interest.

This kind of structure produces beneficial effects on R&D activities of small dimensions, because Small R&D- centres which have limited R&D resources, may find in the national plan a way to overcome dimensional obstacles and they have the possibility to move toward new types of cooperation that can lead to positive results.

32 http://www.idi.mineco.gob.es/portal/site/MICINN/menuitem.7eeac5cd345b4f34f09df11007432ea0/?vgnextoid=83b192b9036c2210VgnVCM111d04140aRCRD.
In a world characterised by perfect competition, no R&D financial aid would be needed. Nevertheless, basic research, due to the not direct commercial effects, in absence of a concrete state financial aid and incentives, risks a critical slowing down. This is the reason why Spain used the tax incentives methodology.

Quality is the key word in the evolution of the Spanish R&D financing. Spain concentrated energies on specific areas taking into account relevance; so there is not an inconsistent division of financial means, on the contrary, there is an R&D selection\(^{33}\) which allows reaching concrete results.

For all the reasons expressed above, a strong collaboration among the R&D players is an imperative, a “condicio sine qua non”. Costs and benefits considered, there is no doubt about the positive effects produced by the Spanish R&D financing system.

### Italy

Although Italy is trespassing a period of economic austerity, the Country is still among the ten most developed Countries in the world for gross domestic product and it is the third market for magnitude in the Euro Area, this makes it possible for Italy to have a discreet R&D national system which needs to be improved (European Commission, Directorate-General Enterprise & Industry, 2014).

The Italian R&D legal system is based on two main pillars, the national research plan (Piano Nazionale per la Ricerca now on PNR) and productive clusters (distretti produttivi) (Italian government, 2014). The PNR is set by the Parliament and the Council of Ministries. Its coordination within the government is under the responsibility of inter-ministerial committee for economic planning. The Ministry for Education, University and Research (MIUR) coordinate national and international scientific activities, distributes funding to universities and research agencies, and establishes the means for supporting R&D. The Ministry of Economic Development supports and manages industrial innovation (Italian government, 2014)\(^{34}\).

The PNR\(^{35}\) defines the objectives and modes of implementation of specific interventions in priority areas, disciplinary sectors, actors involved, and projects which qualify for funding. The goal is to ensure the coordination of research with other national policies, bringing Italian

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\(^{33}\) The word selection has to be intended more in a sense of structure than with a sense of procedure.

\(^{34}\) Other Ministries (Health, Agriculture, etc) manage research funding in their specific fields.

research into alignment with the strategic vision defined at European level and creating the conditions necessary for a progressive integration of public and private research. The PNR is formulated by the Ministry of Education, Universities and Research (MIUR), after extensive consultation with the actors of the innovation systems (e.g. scientific and academic communities, economic powers and competent administrations). It is implemented after approval by the Inter - ministerial Committee for Economic Planning. The first PNR was formulated during the period 2001 - 2003. Assessments have indicated that in order to obtain tangible effects on the country’s R&D environment, simultaneous action on several levels were necessary. To achieve its objectives, the first PNR proposed a set of integrated actions, each of which involves various initiatives over the short, medium and long term. The main objective was to simplify funding mechanisms, rationalise the administration modus operandi, and identify forms of monitoring to ensure that funding is efficiently applied in pursuit of the stated objectives\(^36\).

A weakness of the first Italian PNR was a lack of a permanent scheme or structure comparable to the Spanish or French ones, meaning for that, a general lack of a steady plan and continued in the time (Belussi, 2004). This fact does not mean that Italy was gravelly lacking on R&D, but it means that Italian R&D was different in the approach, not based as much as French and Spanish on a national R&D plan \(^37\). For many years the PNR hugely changed in scopes and terms, moreover before 2014 The Italian national PNR was an instrument through which the government substantially performed a very light and inconsistent activity of fund distribution.

Based on historical data the Government was distributing “R&D” funds for generic projects or studies\(^38\). Those funds quite often were used for covering personnel costs, which had very little in common with R&D.

Moreover is due to be noticed that from the second half of the 1990 Italy shifted from a centralised form of administration, similar to the French system, to a federal administration which has some characteristics in common with the Spanish autonomous regions system. The central government shared part of its competences within the regions; R&D is a field on which central government and regions have the so called “competenza concorrente” (concurrent

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\(^36\) PNR aims too at encouraging technology transfer between the actors in the innovation system.

\(^37\) The Italian PNR structure highly changed during the years, not allowing a consistence in the long run.

\(^38\) Projects which often coincided with regular Universities programs and founds were used to support the universities.
competence). This concurrent competence in the R&D field produces a risk of overlapping regulation and discrepancies in the policies implementation.

There is a relevant divergence in level of gross domestic product of the different regions. The North and the Centre of the country have a gross domestic product per capita which is about 115-125% of EU average, with the North being one of the industrial cores of Europe, while the South has a gross domestic product per capita which is the 70% of EU average. This federalization produced positive results in the decentralisation process and increased stakeholder consultation; however at the same time increased the risk for a not effective coordination between policy-makers (national and regional) and produced the above mentioned risk of overlap. In my opinion the major deficiency is the short-term view on policy-making, and a subsequent decrease of efficiency of the mentioned policies. Even if regions on the basis of their local specialisation and areas of expertise, participate and provide their contribution to projects of national importance, this participation is strongly lacking of coordination; the division of competences for the implementation of the R&D policy is fragmented into three levels: central competence, regional competence and in some cases interregional competence.

Beside the national plan and the mentioned federalized structure, the Italian R&D system is strongly based on the so called “Distretti Produttivi” productive districts (Bertamino, 2011). These Districts are characterised by a virtuous circle formed by the elements learning, linkage and investment. These districts are sort of self sufficient system where, leading R&D players have a direct linkage within universities and schools established in the mentioned district. This represents a sort of virtuous linkage that fosters positive cooperation. Companies need research activities which are performed by universities/research centres in the districts with which the mentioned companies have a “trust linkage”. At the same time companies take specialised labour work force from the territorial schools.

The so called productive districts for all intents and purposes are to be considered as public policy instruments to foster innovation (Coletti, 2007). Based on the theory “the closer it better” it implements competitiveness of local production systems by creating synergies between companies, universities, research centres and “local authorities” located within limited territorial boundaries. A quite important characteristic is that often these districts are “self created”, in the meaning that R&D players located in the given zone, start a stronger

39 To be interpreted in lato sensu. Territorial administration is divided between, Regioni, Provincie and Comuni, and often they have a concurrent competence on R&D matters.
cooperation and the local authority recognising such stronger cooperation try to assist through a better administrative cooperation (Italian government, 2014)\textsuperscript{40}.

Final remarks

In conclusion, state control is still needed. The form of this control changed in the time but it is still present. Even if an initial analysis could produce in the reader the sensation that the R&D French System is characterised by a multilevel governance where R&D actors have to play in a multilevel system without a state control. Under a more prudent analysis, it is perceptible how the central government’s hand is still strong and powerful. In terms of forms of public interventionism; new modes of steering and management are noticeable. In such a direction the French government is creating frameworks leading to more selective action and leading to a resources concentration. In other words the central government still uses its steering, power (Imperium); this power is now put into use in a less dirigiste way, but still is visible a quite strong hint of neo Colbertinism. At the same time both in Spain and in Italy even if to a less degree than France, are going into the same path of a modern “Etat facilitator” where the state while letting freedom to the R&D players at the same time create a framework where is the state who directs the main line of the R&D policy through a “moral suasion” given by the national plan; because it is the national plan which encourages the R&D players to follow a determined path.

The evolution of the Spanish R&D system is remarkable. Even if exiting from a dictatorship, the Iberian country started a very interesting implementation of national plans which had as main function augmenting the R&D activity. No doubt the result was to some extent achieved. Afterwards the Spanish government in the 1990’s, tried without the expected results, to swift to a system characterised by incentives. This incentives were planned to be sort of a neutral tool in the meaning that the market had, in the idea of the legislator, to determine the path on which proceed.

At the beginning of the century Spain came back to a stronger implementation of the national plan demonstrating in this way that the state cannot completely dismiss its leadership in the R&D field.

\textsuperscript{40} Other times are regions that a priori propose the creation of productive districts so to foster investments in the territory.
References


Archibugi, D., 2000. TECHNOLOGICAL GLOBALISATION OR NATIONAL SYSTEMS OF INNOVATION.


Belussi, F., 2004. The Italian system of innovation: the gradual transition from a weak “mission-oriented” system to a regionalised learning system.


Bertamino, F., 2011. LOCAL POLICIES FOR INNOVATION: THE CASE OF TECHNOLOGY DISTRICTS IN ITALY.


Coletti, R., 2007. ITALY AND INNOVATION: ORGANISATIONAL STRUCTURE AND PUBLIC POLICIES.

Cooke, P., 2004. The role of research in regional innovation systems: new models meeting knowledge economy demands.


European Commission, 2014. Research and Innovation performance Innovation Union progress at country level in the EU.


European Commission, Directorate-General Regional Policy, 2010. EXPEREXPERT EVALUATION NETWORK DELIVERING POLICY ANALYSIS ON THE PERFORMANCE OF COHESION POLICY 2007-2013 TASK 1: POLICY PAPER ON INNOVATION.


Furtado, A., 1996. The French system of innovation in the oil industry some lessons about the role of public policies and sectoral patterns of technological change in innovation networking.


GUTIÉRREZ LOUSA, M., 2008. LOS INCENTIVOS FISCALES A LA INNOVACIÓN. SU SITUACIÓN EN ESPAÑA.
ISTAT, 2014. Research and development In Italy.
Laredo, P., 2001. RESEARCH AND INNOVATION POLICIES IN THE NEW GLOBAL ECONOMY.
Muñoz, E., 2006. The Spanish system of research Research and innovation in Spain.
Navarro, M., 2009. TYPOLOGIES OF INNOVATION BASED ON STATISTICAL ANALYSIS FOR EUROPEAN AND SPANISH REGIONS.
Padua University, 2005. THE ITALIAN INNOVATION SYSTEM AND ITS POTENTIAL FOR HIGH-TECH START-UPS.
Piattoni, S., 2009. MULTI-LEVEL GOVERNANCE IN THE EU. Does it Work?
Queipo Rodriguez, P., 2014. EUROPEAN EXPERIENCES: SPAIN.
Joseph P Garske*, Anglophone Legal Culture in the Global Age: Fundamental Aspects

Abstract: There are many ways to understand the project of globalization taking place around the world today. Probably most often it is thought of in terms of technology, of communication, and economics. In fact, there are also two primary traditions of law on which the framework of global affairs is being constructed. Both originated in the West: they are the Continental, or Civil tradition, and the Common, or Anglophone tradition of law. Each of them comprises a distinct legal culture, and although, in obvious ways, they both attempt to do the same work, they actually do it by very different means, and for very different purposes. Partly because of these differences, the Anglophone nations are in many ways the predominant influence in the project of globalization being carried out today.

Keywords: globalization, legal culture, cultural influence.

1. The global project

There are many ways to understand the project of globalization taking place around the world today. Probably most often it is thought of in terms of technology, of communication, and economics. Yet, among the many ways it could be understood, perhaps no approach is more useful than examining the legal mechanism that gives the project shape and provides its foundation. Though mostly obscured from public view, legal methods comprise the authority and method to foster the development of technology, regulate the flow of communication, and provide a stable framework for finance and trade around the world.

In taking such a view, it is also important to remember that every legal regime has two essential elements: the coercive, or adjudicative, as well as the persuasive, or educative. A legal method may be imposed in the short term by mere brute force. Yet, for continuity and stability over the long term, the public living beneath its authority must be taught to understand it in terms of the benefits it confers; they must be instilled with a habit of compliance. By combining these two elements, the judicial and educational, both dimensions of a legal culture are established.

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In fact, there are also two primary traditions of law on which the framework of global affairs is being constructed. Both originated in the West: they are the Continental, or Civil tradition, and the Common, or Anglophone tradition of law. Each of them comprises a distinct legal culture, and although, in obvious ways, they both attempt to do the same work, they actually do it by very different means, and for very different purposes. Partly because of these differences, the Anglophone nations are in many ways the predominant influence in the project of globalization being carried out today.

Examining the early development of that law in past centuries can be useful in understanding its movement to global oversight and regulation. Because one remarkable thing about the English legal tradition is its proud fidelity to customs and methods from its medieval past. Those early patterns still greatly determine its method of constructing a global Rule of Law in the twenty first century.

2. Two laws

Perhaps the best way to understand how Anglophone legal culture became so central a part of the global project, is to contrast the origin of that law with the origin of Civil law. Both traditions began with near simultaneous events occurring in medieval Christendom during the eleventh century. The Continental tradition began with the founding of the University at Bologna, Italy in 1088; from the beginning, that university was primarily an institution for the study and teaching of law. Guided by its founders Irnerius and Accursius, its doctors and scholars worked to adapt the universal principles of the ancient Roman Corpus to the circumstances of a medieval world.

Because the Continental law was born simultaneously with the first European university, the traditions of law and learning were henceforth closely related. Over time, the university broadened its instruction and became custodian of a venerated heritage of arts and sciences. Combined with the classical learning of both ancient Greece and Rome, the study of law came to be inseparably connected with the larger universe of knowledge. For this reason, the development of modern European law came to reflect the values and standards represented within the university, within the educated public, and through them, among the public generally.

By contrast, the origin of what came to be the English Common law, was the Norman Conquest of England, in 1066. During that invasion, much of the population of the island kingdom was decimated; those who survived were reduced to a servile existence under the harsh rule of
foreign monarchs. The legal regimen established there by Lanfranc, drawn from the ancient Lombard Code, was virtually a law of occupation. Later, because many of the succeeding kings were absentee rulers, much of the responsibility for administering affairs of the Kingdom was left to the judicial guildsmen, who administered the three Royal Courts of Justice, located in London.

One primary concern of the Norman kings was assessment and taxation, sources of revenue for the royal treasury. During that early period, the primary form of wealth was land, and the work of the law guilds of the Royal Courts was mainly concerned with matters of title and possession of land. The arrangement worked well for the king, because the court functionaries served at no direct cost to the monarchy; instead, they supported themselves with fees and gratuities collected for transacting procedures and litigating disputes.

Thus, over time, even though the Romanist advocates on the Continent and the barristers in England were both part of Latin Christendom, they continued to operate in very different legal worlds. Although European law comprised a specialized science, employing a particular vocabulary of Latin terms, it was not purposely esoteric. In fact, one of its virtues was the extent to which its workings were intelligible by conventional language and logic.

By contrast, Common law artifice was passed down from master to apprentice in a closed assemblage. Like all medieval guildsmen, the court lawyers did their work by a method and a vocabulary never divulged outside their fellowship. As a guild system, its commerce was based in the monopoly granted by the King, for trade in litigation and the opaque complexity of its tenets were shielded by a strict division of knowledge. Thus, from early times its legitimacy among the public rested to some extent, less on understanding, and more on the medieval ritual and regalia that surrounded its proceedings. Even as the system emerged into the modern period, it maintained a strict barrier to guard its internal knowledge.

3. Medieval to modern

The single greatest turning point in the development of both Western legal traditions, from their eleventh century origins to modern times, was brought about by a momentous technical advance that occurred around the year 1500. What were called the three great inventions—maritime compass, gunpowder weapons, and printing press—began to transform a rather backward medieval world. The immediate effect of these was dramatic: navigation improvements brought an enormous increase in foreign trade and monetary wealth; firearms brought the onset of mass
armies and catastrophic warfare; and printing brought a proliferation of knowledge and learning—especially during the period of what historians call the Renaissance.

Perhaps the best known effect of printing during this tumultuous period was a revival of the ancient *Studia Humanitas*, the art of Greek rhetoric passed down in Latin through the writings of Cicero and Quintilian. These widely published works provided much more than simply training in oratory; they were intended to create a superior man of refined speech and gesture, a man with broad learning—the ideal of the amateur generalist. He would be regarded by those around him as a natural leader, wise in the ways of the world. Skeptical in questions of truth, an empiric who disdained philosophic or theological speculation, he preferred the certainty of material proof. From the *Studia*, a new strata of gentlemen and court nobility arose. Eventually, they would displace the proud men at arms as the guiding influence in royal councils and courts.

In fact, the advance in printing had an immediate impact on structures of government and law as well. It was possible to print books without the slow and laborious method of the scribe. Also, with the advent of moveable type, books could be produced in a language other than Latin, simply by changing the order of characters. Very soon, legal manuscripts, including the Roman Codes, were widely published and studied. Moreover, because books of law could easily be issued in the different European languages, national jurisdictions began to arise—a forerunner to the modern system of nation-states.

The impact of printing on legal practice was everywhere profound, but the innovation had similar effects among the broader public as well. No longer restricted to standard religious and classic texts, original works were produced, and collections were assembled into large libraries. Compared with the past, when even a university might possess only a few precious volumes, books now became plentiful and relatively inexpensive, were widely available, and the ability to read began to become common.

Inevitably, this onset of change made possible by these innovations—the amassing of wealth, the destructiveness of war, and the spread of literacy—brought new challenges and new questions about governing. The old pattern of Pope and Emperor, king and noble, lord and peasant, was no longer tenable. How might a new regimen of rule be constructed? How would succession to power be made peaceful? Who would command the mass of conscripted soldiers? How could the multitude of each nation be taught respect and obedience within the new frame of authority?
To a great extent, it was a cultivated Humanist aristocracy--schooled in manner and speech--that held the Latin realm together through this period of upheaval; their presiding influence was important both on the Continent and in the Kingdom of England. But their thoughts and actions were still very much shaped in an atmosphere of deep religiosity that had originated centuries earlier. Furthermore, one very important aspect of the combined law and religion was that it was universal in its outlook and transcendent in its authority; extending even to include England. Beneath that high panoply, the law of the English Royal Courts was emphatically parochial, adapted and suited to the topography of only one kingdom and people.

4. Ministers and magistrates

The revival of the ancient arts of the Studia Humanitas, the cultivation of speech and manner, the worldly wisdom of the aesthetic individual, the sense of rank and privilege, had a profound effect on the developing legal culture of Europe. But a generation later, around 1550, another influence emerged that would equally impact the tumultuous events of the sixteenth and seventeenth centuries, these were the teachings of John Calvin. Although he is most often remembered by historians as a religious figure, actually, Calvin lived at a time when the two realms of law and religion were inseparably connected.

Trained in both jurisprudence and theology, his contribution was to provide an alternative structure of theocratic rule. Calvin not only rejected the old methods of Roman Christianity, Germanic kingship, and imperial order, he also disdained the widely studied classical Greek and Latin models of polity. Instead, he drew upon the one anomalous mode of governance with which peoples of the time were most familiar: the Respublica Hebraeorum, patterned on the legalistic methods of Biblical and Rabbinic Judaism.

It is not entirely appropriate to either credit or blame the rabbis for what Calvin and his followers would derive from their teachings. The Calvinists, after all, had one element in their approach the rabbis never possessed: the concentrated resources and power of a territorial estate. With this added dimension, the Hebraism of Calvin took on a particularly severe and often brutal form--an approach founded in two basic theological doctrines that underlay its law. First was the assumption of an indelibly corrupt nature common to the mass of humankind, a race predestined for Hell. Balanced against that was the idea of a chosen Elect of Magistrates and Ministers, overseers who, by imposing the harsh retribution of corporeal punishment, performed the redeeming work of God.
Calvin was originally from France, but his most important work was done after he had established at Geneva a center of legal and religious dominion. It was intended to be the capital city of a Christian commonwealth, an alternate to the Papal City of Rome. His teachings spread across much of Europe in the sixteenth century, where they became highly influential in the religious and civil wars taking place there at the time. As with many ideas that originated on the Continent, their arrival in England was somewhat delayed. Eventually, his doctrines were realized there primarily in the form of the Puritan Sect, whose important jurists, Richard Hooker, Edward Coke, and John Selden were highly influential in shaping what came to be the modern incarnation of English Common law.

By the mid-seventeenth century the influence of Calvinist Hebraism had waned on the Continent, under the influence of a rational and secular Cartesian philosophy, but it remained deeply rooted in England. Its imprint was not only in the religious atmosphere of the Kingdom, but equally so in its law. Puritan acerbity was combined with the elegance of the Studia to form a peculiarly English character—and a rigid separation of class. The upper strata was manifest in the speech and manner of the English gentleman, the lower, in the coarse hardship and grim/intrepid piety of the great British underclass. The ethos of Selden, Coke, and Cromwell survived in the rancorous method of court procedure.

Beyond all of that, it was with the teachings of Calvin that the perspective of universality first entered the closed precincts of the Common law. But it was not the vision of a universal brotherhood based on cosmopolitan principles. Instead, it was the vision of a universal elect presiding over a teeming and contentious world multitude—but it was still expressed in the idiom of religion.

5. Modern education

After nearly two centuries of bitter religious conflict, there came to be a general revulsion across Europe against the mixing of law and religion. During the period of what historians call The Enlightenment of the eighteenth century, there were set forth new abstract principles of governance, separate from religion. But an answer to the problem of establishing a new correlated judicial and educational method did not come until the nineteenth century. This momentous step occurred symbolically with the founding of the University of Berlin in 1810, and, with it, the development of a system of childhoo education based on the Prussian model. Finally, institutions and ideas had been set forth that were both avowedly secular, and able to
provide a basis of public understanding for stable government. They were detached from the differences of religious belief that existed among the population.

The entire method was centered on the technology of the book. That mode of communication had the advantage of a fixed text from which a standard pattern of knowledge could be widely propagated. The book could also be used to summarize one complete discipline within the covers of a single volume. The approach of the new system of learning was to divide the universe of knowledge into categories, or disciplines—for example, biology, geology, physics, and mathematics. Courses would be taught by licensed professors, whose function was to inculcate what was published in the book, in the standardized way that would be equally intelligible to every student.

Modern science would be learned, cultural standards would be maintained, and the national history and civic ideals would be inculcated. From the university, these ideas would descend down to the populace generally, through a system of public schools. In the same uniform way, children across the nation would be instructed in a set and standardized structure of knowledge and values. All of this entailed the enormous expense of brick and mortar buildings for the university and a comparable structures for the local schools. It involved a time consuming and labor intensive process of rote learning that required scores of professors and hundreds of teachers.

The purpose was to instill a structure of knowledge that would prepare both the university and school student to function in the modern world, especially within the boundaries of the nation. It sustained a paradigm of common belief that unified the nation and provided the practical skills necessary for its preservation and prosperity. It would prepare the student to be a productive and loyal citizen, who would fulfil his or her obligations in both times of peace and times of war. In sum, a modern legal culture of law and learning had been developed—but, once again, the educative method developed different tendencies in the European and in Anglophone worlds.

6. Two universities

In modern governance, the coercive methods of the judicial were correlated with the persuasive methods of the educational—but no longer on the premise of religion. In Europe, this new form of legal atmosphere was directly descended from the heritage of culture and learning that had come down through the university. It also reflected the conception of knowledge that prevailed
in a tradition that extended back to the world of ancient Greek philosophy. However, even though the new education would be avowedly secular and scientific in its approach, its course of study would be imbued with attitudes and values that, in important ways, were vestiges of the Christian tradition it had displaced.

The premise of Continental education began with certain basic assumptions. First, that there were universal and timeless truths or principles, they were both logical and consistent, and they were knowable. In this philosophical view of knowledge, ultimately the universe was understandable and, more than that, the many categories and types of knowledge actually comprised one complete, unified whole. Because of this unity of knowledge, no segment of learning was completely divisible from the others. Thus, for example, theology was related to biology, geology was related to psychology, and sociology was related to medicine. For this reason, all studies, including law, could be undertaken along with all other disciplines at the university. The scholar was the center of the law, and equally immersed in learning with all other scholars.

Central to these assumptions was the natural equality of human beings that made universal brotherhood, and a cosmopolitan order, possible. Another assumption was the fact of human reason, the ability of every person to think freely and rationally for themselves. These tenets were both the foundation for its system of law, and the guiding principles of its education method. In its own way, the Continental tradition asserted these as the positive attributes of humanity and of nature. The purpose of both law and education was to advance those positive attributes.

Following on this, the Europeans also took an active approach to culture—the approach of cultivation. The assumption was that persons trained in manner and taste, high and low, rich and poor, would, to a great extent, be able to govern themselves, and that a population of such persons would conduce to a happier and more stable society. In this view, the force of law was looked upon, not so much as the basis of society, but rather as a necessary supplement. The real foundation was the cultivated actions and attitudes of each individual person.

In many outward ways the universities of the Anglophone world appeared to be very similar to their European counterparts. But, because they functioned as crucial elements of a different legal regime, the modern institutions of authoritative learning in the English-speaking countries worked on a different premise, and for a somewhat different purpose. Those differences can be
understood as deriving from certain fundamental elements of English legalism that have remained constant throughout its unique history. The most basic of these characteristics is probably its emphatic division of knowledge, a barrier that set law apart from all other categories of learning. Thus, instruction in law remained insular, even though its schools were often located within the precincts of a university.

This division was also related to a second aspect unique to Anglophone law: the artificial vocabulary and peculiar logic it employed. To sustain the work of the guild fellowship, its legal methods were maintained as exclusive property, accessible only by those admitted to membership. From its inception, these unique aspects of Anglophone legality had a profound effect on the methods and content of study and instruction at the university. Not only was the law guild separate from, and often in opposition to, the work of the university—the famous town versus gown divide: More than that, the relationship between the judicial and the academic was one of superiority and subjection. The range of instruction set forth within the Anglophone institution was different from its European counterpart, in that it occurred within the implicit, yet inviolable, boundaries set by law.

Interior workings of the law were wholly exempt for academic study, enclosed by an absolutely inviolable barrier of separation. This made a holistic examination of the entire social, or economic, or political structure, from an academic standpoint, virtually inconceivable. More than that, the values that underlay the Anglophone legal culture were utilitarian and material. They reflected the ultimate criterion upon which the premise of legal rule was based—knowledge as a way to property and wealth. Thus, cultural values such as prevailed on the Continent were not wholly relevant for the way of life under an Anglophone jurisdiction.

Such limitations, however, provided at least two advantages when compared with the sometimes disruptive intellectual ferment of the European institutions: Anglophone scientists and scholars were strong in the orderly production of new knowledge. Especially valuable were the pragmatic and practical advancements they contributed, without disruptive challenges to the established order of law and learning. In a way very different from the Civilian approach, the ultimate legitimacy of Common law was neither philosophical nor rational, but continued to be expressed as something like a faith or belief. Even into the twenty first century, there remained a frequent affinity between the aged Common law tradition and the Judeo-Christian heritage.
7. Modern empires

Another major turning point in the parallel development of Western law occurred during the nineteenth century as well. This event was also precipitated by major technological advances, especially as manifest, once again, in three innovations: steamship, railroad, and electronic telegraph. Although the impact of these devices was not as profound as those of the fifteenth century, they were actually more important in one particular way: their effects were felt around the entire world. More than that, they provided ways to export and impose Western methods of rule, of finance and trade, to all localities and peoples of the earth.

Their most obvious combined effect was the rise of the first modern empires around the world. With the new means of transportation and communication, with new abilities to wage war at great distance, there began a kind of race among the Western Powers to conquer and annex any remaining unclaimed territories. In the competition for territories, Great Britain had a great advantage; it already controlled a vast collection of colonies and outposts, nearly a quarter of the land and population of the earth. However, it had not incorporated that scattered collection into a formal imperial regime. To construct an empire required a means of authority and regulation, oversight and administration--in other words, a system of imperial law. Despite the geographic advantage it had over its Continental opposites, in a legal sense, it was at a distinct disadvantage.

English law was of an organic, idiosyncratic type, well-adapted to the customs and topography of an island kingdom. But it was not a rational and clearly defined system, and would not be intelligible or transportable to other areas and cultures, and most of all would not be translatable into other languages. More than that, because it was a fraternal law, resting on the bonds of collegiality, it was not transmittable by mere instruction. Instead, expanding its jurisdictions required the patient building of highly personal attachments and professed loyalties among a stratum of fellows—and this required that they be fluent in spoken English. By contrast, the various Continental systems of law were based on rational principles adaptable to any location or people. With the exception of certain specialized Latin terms, they could readily be translated into a native language. Because of this, the law of France--and especially of Germany—had come to be adopted in remote regions of the world where leaders wanted to modernize or westernize.

Until that time Britain had relied on naval force, and obsequious colonial populations to maintain its system of hegemony—the Pax Britannica. But with the rise of competing powers,
also equipped with modern navies, that strategy of forced predominance was becoming less workable. For some of its leaders, the answer lay in constructing a fellowship of law around the world, based on the same collegial practices that governed the mother country. For England, the contest of imperial rivalry had become more than a geopolitical struggle, or a contest of military power. Most of all, it had become a conflict of laws.

8. A rule of law

The growing urgency of world events beginning around 1870 prompted a generation of British jurists to examine the English tradition of law in a different way. They attempted to analyze it, and extract from it—or impose upon it—certain intelligible principles and methods that could be formulated into a credible science of law. Geopolitical reality required that a legal mechanism be constructed by which an assorted collection of colonies and dependencies could be centrally ruled, as an empire. But this new legal derivative, and its accoutrements, also needed to be posed as a science—a science in the sense of a composite of knowledge that would be explicable and exportable to other peoples, and that could withstand comparison to the rationality of its Civilian counterparts.

Moreover, the purpose was not merely to construct an imperial law, a law to formalize rule of the many British holdings. Beyond that, the purpose was to construct a transcendent type of legality that could be projected beyond the confines of the Empire to all Anglophone peoples, including those who lived in the former colonies of North America. Coupled with that was the need to construct a general atmosphere of understanding that would provide a context of meaning and value, as well as engender an attitude of compliance among its public. Only because of the new abilities to travel and communicate, to publish and disseminate across the seas, was such a venture possible.

The Common law had originated as a guild fellowship based on medieval technology—a law without books, to rule over a population that could not read. But now it became emphatically a law of books. Not only were many concepts adopted into its method—often drawn from Civilian sources—but also a schema of medieval and Christian historiography was developed to surround it and explain its origins. This new version of the old law would be highly intellectualized, yet both its members and the public would be taught to conceive of it as a kind of looming immanence, elevated and majestic. Following on Hooker, Coke, and Selden, it combined historicism, religiosity, and scientism in a way that merged secularity with sanctity.
Under James Bryce, A.V. Dicey, Lord Balfour, Frederic Maitland and others, a turning point in the development of Common law was achieved. By extensive theorizing, historical interpretation, and elements of legal fiction, a new and exportable legal culture was developed. English law had become identified with the book of law, and strenuous efforts were made to implant those books, not only among members of the newly consolidated Empire, but also in the outlying former territories of North America. By the late nineteenth century a vast and transcendent fellowship of law had begun to reach across much of the world.

However, adapting the English system was not simply a matter of scholarly instruction. Instead, it entailed the difficult task of developing a fraternity of practitioners. The Common law had always been a graded system, and in its new incarnation a marked divergence would exist between those members within the Empire and those outside it. To a large extent, the difference in approach between the two reflected the historic disparity between the gentlemanly manner of the Studia, as opposed to the acerbic and contentious approach of the Calvinist. This unequal coupling of such disparate methods was described at the time by Matthew Arnold, in his essay on Hellenism and Hebraism.

But that division proved to be a minor impediment when, in 1914, the martial tendencies of competing empires erupted into the first modern worldwide war. By its conclusion, the imperial dreams of most of the protagonists had been forever extinguished. But the outlines of one crucial realm had been firmly cemented. For the first time, the English-speaking peoples had been united in a worldwide contest and had emerged victorious, together.

9. Progress and apocalypse

As worldwide events continued to unfold in the early twentieth century, the new inventions that had made the modern empire possible were having an impact on individual nation-states as well. Both the railroad and telegraph, as well as other inventions allowed the state to be strengthened industrially and militarily. More than ever before, each enclave could protect its own borders and build national solidarity. However, in the decades following the first great worldwide war, another technical revolution began to take place, one that moved far beyond inventions of the previous century. It involved not only the automobile and the airplane, but, more importantly, radio and cinema; they would have a profound effect on the nation-state.

Quite obviously, these new electronic devices provided great commercial opportunity as channels for news reporting, the popularizing of sports, and theatrical entertainment. But radio
and cinema also provided channels of mass communication that could reach entire populations of the same language—and mold public understanding. Because of the ability to broadcast sound and project image, the new technologies had important implications for purposes of governance. More than ever before, national leaders could orchestrate the atmosphere of awareness, not only by the slow and methodical learning of the printed book, but also by the rapid and timely means of electronic mediation. The nineteen thirties became the high point of national development, as leaders of governments were able to mobilize the industrial and military power within each territorial state.

The totalizing potential of the governing structure in both the Civil and Common law countries was greater than ever before. This heightened potential contributed to the eruption of a second worldwide conflict. It was notable as a thoroughly modern war, wherein the population of each belligerent nation virtually unanimously believed it was in the right. But this heat of nationalistic fervor reached a frightening technological conclusion with the advent of atomic weapons. By mid-century, it was clear that the risks of war were too great, and the growing power of the state had to be restrained, or at least channeled.

Among legal theorists, the focus shifted from the independent state to relations between states. The search for an international legal order began in earnest. There had been one attempt after the first great war—the League of Nations, a union patterned on Civil law methods. After the second great war, another institution with a similar purpose was founded—the United Nations Organization, which was constructed on Continental principles of universal, rationality, and full representation for all recognized states.

Ultimately, there developed, in the latter half of the twentieth century, an overlay of the national states by the outlines of an international legal regime. It was intended to discourage conflict between states, and to mediate conflicts if they occurred. Because of the obvious need for clarity and rationality in such a program, this move to international order followed Civilian principles as well. But, within a few decades, the inventions of the past had been far exceeded, becoming simply a prelude to the astonishing technologies of the future. As with all the other inventions before them, the new devices presented both opportunity and danger. Just as nationalism had been overtaken a generation before, the project of internationalism would be overtaken as well, by innovations that no person could have possibly foreseen.
10. The postmodern era

It is difficult to exaggerate the impact television had on modern society, and the impact computers had on the world system, beginning in the late decades of the twentieth century. For the first time, a kind of alternate reality of televised sound and image could be projected into any separate domicile, to the midst of any family, anywhere in the world. The reception of this innovation by national leaders, jurists, academics, and the wider public was a combination of fascination and foreboding. On one side, it provided great opportunities for cultural development, and for encouraging the kind of understanding between peoples that could be the educative basis of peaceful order around the world.

But, for many persons, television seemed more generally to have become a conduit for low grade, superficial, and tasteless diversion. Along with that, it was condemned as being mostly a device for commercialization on a mass scale. Parents and educators feared a decline in literacy, behavior, and citizenship. In the Anglophone nations, especially, there was concern about its destructive impact on religious values. In Civil law countries, the alarm was more related to its potentially degrading effect on cultural standards. In both legal realms, the important issue was its deleterious effect on the shaping of public mores and attitudes of responsibility.

The second major technical innovation of the period, the computer, quickly brought with it the computer network. Very soon it was possible for any person to transmit any quantity of information from any location on earth to any other, and to do so instantaneously. The usefulness of this capacity was initially realized in the world of finance and trade. By its natural suitability to matters of quantity and calculation, the new device could orchestrate commercial enterprise on a worldwide scale. From a corporate location in the West, distant resources and labor could be exploited much more efficiently; major financial transactions could be done electronically and at great distance.

In a symbolic way, the power of these technologies became apparent when their convergence produced wholly new and unexpected disturbances—and on a worldwide scale. For example, in the remote locations where newly equipped corporations operated, on distant continents, local voices were being raised in protest and revolt. Previously, these little known and little understood peoples were unable to be heard. But, by the medium of television, they could now attract sympathetic allies around the world. Suddenly, the historical, religious, and ideological basis on which Western predominance had been constructed, was being challenged.
These events, as well as other perceived social injustices occurring at home, were now openly broadcast. Especially, for the rising generation, the ideals they had been taught were contradicted by realities they now witnessed, live, on television. One result was an atmosphere of unprecedented civil discord, culminating in the student uprisings of 1968—and a near breakdown of legal culture in several countries. This type of worldwide disturbance could not have occurred without the connections made possible by the new technologies.

The implications of such events—the impact of technology, its effects on society and its ability to destabilize even the foundations of government—very soon became the focus of leading theorists and scholars, especially in Europe. Of the many notable figures from the era, perhaps three were most representative: Michel Foucault of France, and what was generally called French Theory; Jurgen Habermas of Germany, representing Critical Theory; Raymond Williams of England, who advanced the program of Cultural Studies. Each, in his own way, worked to evaluate the impact of the new media on structures of power and meaning across the modern world.

Over time, the response in Europe to the new technological abilities was best exemplified in the birth of the European Union, and in the values it claimed to represent. In effect, the modes of communication and computation were deployed as new structures of governance, finance, and trade. These measures were taken in the pattern of Civil law candor and clarity, by which the attempt was made to unite the Continent under a transnational legal culture. In each member state, the focus of law and learning became less specifically national and more determinedly European.

Reaction in the Anglophone world to the same developments was equally as urgent, but it was different. In those countries, very important battles were fought in the closed venues of legal fellowship. The events of the nineteen sixties had deeply shaken not only the universities, but also the institutions of law. There was required a profound re-examination of its legal methods, a process that would lead to visceral internecine conflicts between factions and schools. But one fundamental advantage now existed that had never existed before: the English language had become the universal language of business and world affairs. The question was, how that advantage might be exploited. Ironically, the answer came, once again, from Europe—especially in the teachings of French theorist Jacques Derrida. He would help return English language law to its seventeenth century roots. He also opened for it a vast global opportunity, and he did so in the idiom of postmodernity.
11. A legal culture of globalization

The new technologies had an impact, not only on communication, finance, and trade, but also on the spread of knowledge, the conduct of war, and even on government itself. Like the dramatic effect of the three great inventions of the fifteenth century, the astonishing advances coming with the twenty-first century seemed to change human life dramatically and irreversibly—similarities that make comparison of the two periods instructive. But, just as with developments five hundred years earlier, the later impact was not because of the technologies themselves, but, rather, how they were used, and the purposes for which they were employed.

The importance of Derrida in the changes that would occur in Anglophone legal culture did not necessarily reflect the content of his teachings, nor did it necessarily reflect the ideas his detractors accused him of teaching. Instead, changes in that legal regime were patterned on meanings ascribed to him by various legal interpreters. Later in life he would become a harsh critic of Anglophone law and his name would disappear from the venues of legal discourse. Nonetheless, his influence was profound, and in important ways he not only freed that law from the artificial forms of moralism, religiosity, and historicity that had been constructed around it during the Victorian Era, beyond that, he revealed a new expansiveness, based on the universality of its language.

He began by making ethics his First Philosophy, a move that had important consequences for Civil law, but also for English practice. By implication it simply eliminated the former importance attached to historical and religious meta-narratives that had formed the basis of a highly manufactured Common law mythology. More than that, his emphasis on ethics perfectly suited the autonomous governance of a collegial fellowship. Derrida also, rejected voice or speech as the most consequential mode of human expression. For him the long history of the text had proven it to be the more reliable anchor of stability, especially in the realm of law. This teaching fit well with the use of internal precedent, and imputed to judges an enlarged hermeneutic role of acting upon a fixed written text to derive useful meanings. Finally, his view of human life as being fundamentally contentious, a conflict of Others, expressed in his teaching of differance, fit well the adversarial methods of Common law.

Now unencumbered by the weight of historicity and religiosity, or a restrictive moralism, this postmodern law was perfectly suited to a transcendent global paradigm of legality and understanding, able to preside over all places and peoples, all ethnicities and cultures. However, with the new technologies, a correlate change could be implemented among the public as well.
In the new regimen, the understanding of persons living under legal rule would no longer be based in an instilled structure of fixed beliefs, religious or educational. Instead, shaping the public mind for purposes of governance would entail a method that was not precisely centered in learning at all. Instead, it would rely on the continuous electronic dissemination of information, a method much more efficient than old labor-intensive forms of preaching and teaching—and it could now be done around the world, in English.

In the new age, the student needed to develop a habit of critical evaluation, formulating opinions or beliefs, within an atmosphere of continuously flowing stimuli. Such an atmosphere was made possible by the immersive reach of media. Unity of the public no longer required concepts and precepts, permanently remembered or learned. In fact, a mind with inflexible religious concepts and old patterns of civic principle might prove a liability in a world where the dominant fact of reality was unending change. Instead, the habit of critical evaluation was much more useful, and with access to the flow of information, each person could function in both private affairs and in the responsibilities of public participation.

Amid this continuously moving stream of electronically transmitted sound and image, the global Rule of Law would be anchored in the firm stability of the legal text. The law would be administered by a collegial order, elevated above the contentions and confusions of public life, and joined together by the same spoken language. Anglophone law was no longer merely the quaint and idiosyncratic vestige of a medieval kingdom, or the gentlemanly calling in a nineteenth century empire. Instead, it now comprised a fellowship of agencies, initiatives, councils, schools, associations, and firms that was beginning to provide a transcending oversight. Once again, after a period of five centuries, the Continental and Common law traditions had undergone another transformation. Once again, the Anglophone collegium employed the new inventions in a different way, and for different purposes. They were constructing a legal culture, and this time, on a global scale.

Sources
Arnold, Matthew: *Culture and Anarchy*, Oxford 2006
Bellomo, Manlio: *The Common Legal Past of Europe*, CUA Press 1995
Bryce, James: *The American Commonwealth*
Bryce, James: *The Ancient Roman Empire and the British Empire in India*, Forgotten Books 2015
Buzan, Barry: *From international to World Society*, Cambridge University Press 2006
Cable, Vincent: *Globalization and Global Governance*, Chatham House 1999
Cosgrove, Richard: *Our Lady the Common Law* Law, NYU 1987
Cusset, Francois: French *French Theory*, University of Minnesota 2008
Dworkin, Ronald: *Law’s Empire*, Harvard 1986
Habermas, Jurgen: *The Divided West*, Polity 2008
Lesaffer, Randall: *European Legal History*, Cambridge University Press 2010
Litowitz, Douglas: *Postmodern Philosophy and Law*, University of Kansas 1997
Ong, Walter: *Orality and Literacy*, Routledge 1988
Readings, Bill: *The University in Ruins*, Harvard 1996
Slaughter, Anne-Marie: *A New World Order*, Princeton, 2004
Williams, Raymond: *Culture and Society*, Columbia University Press 1983
Articles
Evaluation of microchimerism after transplanting sexually non-compliant kidneys on the basis of DNA tests performed with STR-PCR method from peripheral blood and urine

Abstract: A study on microchimerism has been conducted following kidney transplantation on a sample of 20 patients. It was found that STR multiplex kits NGM and Y-filer can be used for microchimerism detection in urine, which is of great importance in the evaluation of DNA mixture in forensic medicine.

Keywords: microchimerism, STR, DNA mixture.

Introduction

More than a million people live in the world with the adaptation that, and every year carries over 90,000 such treatments, whose number is growing exponentially. In 2008, the rate of organ transplantation in the European Union averaged 55/1 million inhabitants and in Poland 29/1 million residents, including 60 people per 1 million inhabitants require a kidney transplant.

More than a million people live in the world with the adaptation that, and every year carries over 90,000 such treatments, whose number is growing exponentially. In 2008, the rate of organ transplantation in the European Union averaged 55/1 million inhabitants and in Poland 29/1 million residents, including 60 people per 1 million inhabitants require a kidney transplant. In Poland is carried out every year about 1000 kidney transplants and the number of them is increasing [9]. In Poland is carried out every year about 1000 kidney transplants and the number of them is increasing [9]. Bearing in mind the above, consideration should be given to the possibility of biological material (blood, urine) of the recipient after transplantation in evidence that secure tracks statutory court medics on the spot. This has also been reflected in the evaluation of such matters, where special attention should be given to the possibility of making a mistake when they don't we take into account the likelihood of applying such a trace by a person after transplantation Bearing in mind the above, consideration should be given to the
possibility of biological material (blood, urine) of the recipient after transplantation in evidence that secure tracks statutory court medics on the spot. This has also been reflected in the evaluation of such matters, where special attention should be given to the possibility of making a mistake when they don't we take into account the likelihood of applying such a trace by a person after transplantation.

In patients after organ transplant vascularized bone or we are dealing with a phenomenon microchimerism. This is a situation in which one body there are two genetically different populations of cells, one of which occurs in very low titre. Microchimerism is clearly linked to the difference in the donor and recipient HLA antigens [4]. This is a situation, when there are two genetically different populations of cells within one organism, whereas one of these populations occurs within a very low titre. Microchimerism is clearly related with diversity in HLA antigens of the donor and the recipient [4]. According to Starzl [5] presence of small number of cells from the donor in the organism of the recipient may be related with the phenomenon lying in creating immunological tolerance and improvement in functioning of the transplant. Identification of inter-individual based DNA analysis is a very young field. Over the past years developed very dynamically, leading to the development of highly specialized and sensitive molecular techniques. Currently investigates mainly the regions of niekodującego DNA, called STR (Short Tandem Repeats), with a number from 2 to 7 repetitions of a particular theme. The study uses a set of 16 DNA markers with 15 markers were localized on chromosomes autosomalnych and one on chromosomes pays, also set that all 16 markers were localized on chromosome Y.

Objective

The aim of the thesis was to examine whether it is possible to use multiplex sets of DNA markers widely used in forensic medicine to perform microchimerism examinations after kidney transplant.

Materials and methods

The analysis covered 20 patients after transplantation of sexually non-compliant kidney, including 14 women and 6 men. The transplantation has been performed between 10 months and 10 years ago. The analysis focused on peripheral blood and urine, whereas 20 urine samples and 17 blood samples were examined (Tab. 1).
Table 1

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Isolation of the DNA

DNA was isolated from samples by means of PrepFiler (Applied Biosystems, USA) DNA isolation set. The set is based on technology of magnetic balls absorbing DNA. DNA from peripheral blood was isolated with the help of a standard isolation protocol. In order to isolate the DNA from urine, between 30 and 45 ml of urine was collected, which was then centrifuged in 50ml centrifuge test-tubes with 5000 RPM for 4 minutes. After centrifuging, the supernatant was poured and the sediment from walls of the test-tube was collected with sterile swabs. The tip of the swab stick was then cut off and it was used to isolate the DNA with standard isolation protocol.

Amplification of the DNA

AmpFlSTR® SGM Plus™ and AmpF STR® Yfiler™ systems (Applied Biosystems, USA) were used in the study. Universal AmpFlSTR® SGM Plus™ set produced by Applied Biosystems was selected due to its great popularity and high degree of amplification in examined samples. This set is utilised in personal identification. PCR reactions were performed by amplifying obtained isolates with commercial AmpFlSTR® SGM Plus™ set produced by Applied Biosystems. Within this set the areas of the following STR loci are being amplified: D3S1358, vWA, D16S539, D2S1338, D8S1179, D21S11, D18S51, D19S433, TH01, FGA and amelogenin marker. Markers utilised in this multiplex set are located on autosomal chromosomes and sex-determining chromosomes. PCR reactions were conducted with the help of GeneAmp® PCR System 9700 Thermal Cycler produced by Applied Biosystems. PCR reaction was performed according to the instruction of the manufacturer.

AmpFlSTR® Yfiler™ set produced by Applied Biosystems was selected due to its vast popularity. It was used to examine the presence of microchimerism, in cases where the recipient was a woman, and the donor was a man. PCR reactions were performed by amplifying obtained isolates with commercial AmpFlSTR® Yfiler™ set produced by Applied Biosystems. Within this set the areas of the following STR loci are being amplified: DYS19, DYS385, DYS389 I, DYS389 II, DYS390, DYS391, DYS392, DYS393, DYS437, DYS438, DYS439, DYS448,
DYS456, DYS458, DYS635 (Y GATA C4) and Y GATA H4. PCR reactions were conducted with the help of GeneAmp® PCR System 9700 Thermal Cycler produced by Applied Biosystems. PCR reaction was performed according to the instruction of the manufacturer.

After amplification of samples with multiplex sets, the samples were analysed with the use of ABI PRISM 3130 genetic analyser. Results were elaborated by means of Gene Mapper ID-X 1.1 programme (Applied Biosystems) (Tab 2 and 3).

Table 2. Results of DNA polymorphism analysis in AmpFlSTR® SGM Plus™ system.

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Table 3. Results of DNA polymorphism analysis in AmpFlSTR® Y-Filer™ system.

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As far as studies on microchimerism in case of transplanting sexually non-compliant kidney are concerned, we did not observe microchimerism in peripheral blood. This was the case both in the group of women recipients (men donors), as well as men recipients (women donors). However, presence of microchimerism was observed in urine of the examined patients. Within

|   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 2M | 15 | 13 | 25 | - | 17 | - | 10/14 | 13 | 10 | - | 23 | - | 12 | 14 | 11 | 21 |
| 3K |   |   |   |   |   |   |   |   |   |   |   |   |   |   | Female – Lack of profile |
| 3M | 15 | 13 | - | - | 17 | - | 10/14 | 13 | 12 | 13 | - | - | 15 | 10 | 20 |
| 5K |   |   |   |   |   |   |   |   |   |   |   |   |   |   | Female – Lack of profile |
| 5M | 15 | 13 | 24 | 31 | 19 | - | 14/15 | 13 | 10 | 15 | 23 | 11 | 11 | 15 | 10 | 20 |
| 6K |   |   |   |   |   |   |   |   |   |   |   |   |   |   | Female – Lack of profile |
| 6M | 15 | 13 | 24 | 29 | 17 | - | 11/14 | 13 | 11 | - | 23 | - | - | 14 | 12 | 19 |
| 7K |   |   |   |   |   |   |   |   |   |   |   |   |   |   | Female – Lack of profile |
| 7M | 16 | 13 | 24 | - | 16 | - | 10/14 | 13 | 10 | - | 23 | - | 12 | 14 | 11 | 20 |
| 9K |   |   |   |   |   |   |   |   |   |   |   |   |   |   | Female – Lack of profile |
| 29M | 15 | 13 | 24 | 30 | 15 | - | 11/14 | 13 | 10 | 10 | 23 | 11 | 13 | 14 | 11 | 20 |
| 31K |   |   |   |   |   |   |   |   |   |   |   |   |   |   | Female – Lack of profile |
| 31M | 16 | 13 | 24 | 30 | 15 | - | 11/14 | 13 | 11 | 10 | 23 | 11 | - | 14 | 11 | 20 |

Review of results

As far as studies on microchimerism in case of transplanting sexually non-compliant kidney are concerned, we did not observe microchimerism in peripheral blood. This was the case both in the group of women recipients (men donors), as well as men recipients (women donors). However, presence of microchimerism was observed in urine of the examined patients. Within
a group of 14 women recipients (men donors) microchimerism was observed, which was examined with SGM Plus system in 8/14 (57%) cases. Whereas, in the same group examined with the use of the Y-Filer system microchimerism was observed in 13/14 (92%) cases. When 6 men recipients (women donors) were examined with SGM Plus system, microchimerism was stated in 2/5 (40%) cases. The longest period after transplant of functioning kidney, after which DNA profile of the donor was reported in urine, equalled 10 years.

Discussion

Results of the studies suggest that the usage of DNA isolation and amplification method may be used for studying microchimerism with kidney transplant. Both the SGM Plus multiplex set, as well as Y-filer set allowed detecting microchimerism in the urine of patients after transplant. It turned out that when the recipient was a woman and the donor was a man, microchimerism was detected with the use of Y-filer set in urine of as much as 92% of cases. However, when the same group was examined with SGM Plus set, the level of detecting microchimerism in urine only reached the level of 52%. C. Fourtounas et al. indicated in their study, with the use of DYZ1 marker, that the level of microchimerism in a group of 17 women (men donors) reached 48% [6]. While Zhang et al. within their study on a group including 17 women (men donors), using SRY markers, reported microchimerism in 14 (82%) of cases [7]. In our study on a group of 14 women, taking advantage of multiplex Y-filer set, we have indicated microchimerism in 92% of cases. Hakemi et al. examined the peripheral blood of 25 women (men donors) and observed microchimerism with the use of SRY markers in 59% of cases [8]. What concerns our study, we did not observe microchimerism in peripheral blood in none of the examined people, both when testing with Y-filer, as well as SGM Plus set.

Conclusions

The utilised method of isolating DNA, as well as the sets of DNA markers, which area usually used in forensic medicine, may be widely used to detect microchimerism in urine of patients after kidney transplant. Test results constitute the basis to extend them with quantitative tests. Until now events of rejecting the transplant were described both in case when microchimerism occurred, and when it did not occur. [9] Comparison of the quantitative evaluation of post-transplant microchimerism with the evaluation related with the whole profile concerning the immunological response and the transplant function will make it possible to answer the question whether its presence influences the phenomenon of establishing immunological tolerance, or it results in chronic rejection process. The evaluation of post-transplant microchimerism may be
of considerable significance for forensic medicine, as it indicated the presence of strange DNA profile in the urine of the donor, which is of noteworthy importance in judiciary assessment.

References:


Anna Małkowska, Halina Matsumoto, Mirosław Szutowski, Magdalena Bamburowicz-Klimkowska, Marcin Łukasik, Determination of Ethyl Glucuronide in Human Urine – Method and Clinical Application

Abstract: (1) Background: Ethylglucuronide (EtG) is a minor but direct metabolite of ethanol. Only about 0.02% of the ingested ethanol is metabolized in the liver to produce EtG. In many cases EtG can be the only sensitive and specific marker to indicate and monitor alcohol consumption. EtG can be detected in body fluids (blood and urine) for a long period of time after the originally ingested ethanol has completely disappeared. Sensitive and specific methods for analysis of EtG are now available, either involving gas chromatography with mass spectrometry (GC-MS) or liquid chromatography (LC-MS, LC/MS/MS). An enzyme immunoassay is also available to screen for EtG. Finally, the results of the immunochemical tests should be confirmed by GC-MS or LC/MS methods to rule out possible mistakes. The present paper describes a simple method for determining EtG in urine using GC-MS in the selected-ion monitoring (SIM) mode and indicates the need of such a method to verify patients’ self-reports of alcohol consumption. (2) Methods: EtG levels were determined with a GC-MS method. The method was validated in terms of selectivity, linearity, LOD, LOQ, intra-day and inter-day precision and accuracy. (3) Results: None of the patients (n=50) admitted to having ingested alcohol within the 7 days preceding the study-related urine sampling. However, 13 patients (26%) showed positive EtG results (between 0.4 mg/L and 1.76 mg/L). (4) Conclusion: The utility of the presented method was confirmed based on the analysis of urine samples from 50 alcohol-dependent patients. The use of the EtG marker is expected to lead to significant improvement of withdrawal treatment programs and contribute to reducing the risk of relapse.

Keywords: Ethyl glucuronide, Urine, Gas chromatography-mass spectrometry, Alcohol Abuse, Alcohol Monitoring.
Introduction

Ethyl glucuronide (EtG) is a direct ethanol metabolite formed in low amounts (0.02–0.06%) after alcohol consumption and can be determined in various body fluids, tissues, and hairs (1). EtG is nonvolatile, water soluble, stable upon storage, and can be detected in urine for an extended time period of up to 80 hours after complete elimination of alcohol from the body (2). As a direct metabolite, EtG can be regarded as a highly specific marker of alcohol intake, which is appealing in terms of monitoring for alcohol consumption during withdrawal treatments or in situations where it is important to exclude alcohol use (e.g., workplace, pregnancy, accident) (3). The presence of EtG in urine provides a strong indication of recent alcohol consumption, even if ethanol itself is no longer detectable. Urine EtG can be used as a laboratory test to detect recent alcohol consumption. Determination of EtG in urine samples helps to fill the gap between short-term biomarkers (ethanol) and long-term biomarkers (carbohydrate-deficient transferrin [CDT], gamma glutamyltransferase [GGT], mean corpuscular volume [MCV]) used as traditional markers of alcohol consumption (4-8).

In recent years, EtG has evoked increasing interest as a biomarker of acute alcohol intake and has been recommended for use in clinical and forensic assessments of alcohol intake (9, 10). In doping control, EtG was identified as a useful marker for alcohol-induced changes in the steroid profile (11). EtG has been proposed as a sensitive and specific analytical tool for ascertaining prenatal alcohol exposure (12). The usefulness of EtG detection has been repeatedly confirmed in situations where alcohol consumption was tentatively assumed, but not confirmed. A study in alcohol-dependent patient during alcohol detoxification demonstrated highly variable inter-individual detection periods for EtG after admission to the hospital, ranging from 40 hours up to 130 hours (13). The use of this marker and patients’ self-reports are expected to lead to significant improvement in treatment effectiveness, as well as have health and social benefits.

Quantitative analysis of EtG is now possible thanks to sensitive and specific methods either involving gas chromatography with mass spectrometry (GC-MS) or liquid chromatography (LC/MS, LC/MS/MS) (7, 14).

Qualitative EtG screening via an enzyme immunoassay is also possible (15, 16), however false-positive ethyl glucuronide results associated with the use of chloral hydrate were reported (17). Apart from EtG, an ethyl glucuronide assay can also show cross-reaction with short-chain aliphatic alcohol glucuronides, which may lead to false-positive results regarding ethanol
consumption. Therefore, mass spectrometric detection of EtG is mandatory for confirmation of positive immunological EtG screening(18).

The present paper describes a simple method for the determination of EtG in urine using GC-MS in the selected-ion monitoring (SIM) mode. The utility of the presented method was confirmed based on the analysis of urine samples from 50 alcohol-dependent patients.

Material and methods

Chemical reagent and standards

The following chemical reagents were used in this study: ethyl glucuronide (EtG) and pentadeuterated ethyl glucuronide (EtG-D₅) standards (both from Medichem[Germany]), GC-MS-grade ethyl acetate (Sigma), acetone (POCH SA), methanol (LAB-SCAN), and N-methyl-N-(trimethylsilyl)trifluoroacetamide (MSTFA; Sigma-Aldrich).

Analytical procedures

EtG levels were determined using a GC-MS apparatus (GCMS-QP2010 Plus, Shimadzu), equipped with a ZB-5MSi column (length, 30 m; inner diameter, 0.25mm; film thickness, 0.25µm; Zebron, Phenomenex). The injector and GC-MS interface temperatures were 270°C, and the ion source temperature was 250°C. The oven temperature was held at 100°C for 2 min, then increased to 270°C at a rate of 20°C/min, then maintained at 270°C for 5 min. Helium was used as the carrier gas, with a flow rate of 1 ml/min. The mass selective detector was operated in the electron impact (EI) mode with electron energy of 70 eV. The following ions were monitored: m/z 261, 292, 375, and 405 for EtG and m/z 266, 410 for EtG-D₅. Quantification of EtG was performed using the following ions: m/z 261, 405 for EtG and m/z 266 for EtG-D₅ (used as an internal standard). With ions 261 and 266, biological background interference was negligible.

Patients and sampling

This study was conducted in alcohol-dependent patients hospitalized at a Psychiatric Clinic in Warsaw for alcohol detoxication. EtG-free urine samples were collected from a person who had not consumed alcohol or alcoholic beverages during the previous 7 days. The study protocol was approved by the local Ethics Committee at the Medical University of Warsaw, Poland (KB/9/2008). The urine samples for determination of EtG were collected on admission to the
hospital. The urine specimens were stored in plastic urine containers without preservatives at -20°C.

**Sample preparation**

A 100-µL aliquot of aqueous solution of internal standard (EtG-D₃ 10 µg/mL) was added to each 0.1-mL urine sample. The final volume was brought to 1 mL with methanol. The mixture was vortexed and centrifuged (10 min, 14 000 g). The supernatant was evaporated to dryness under a stream of nitrogen at 70°C in a heated metal block. The residue was derivatized with a mixture of 50 µLMSTFA and 50 µL ethyl acetate (60 min, 80°C). One microliter was injected into the GC-MS system.

**Results and discussion**

Analytical validation of the method was performed by establishing selectivity, linearity, limits of detection (LOD) and quantitation (LOQ), intra- and inter-day precision and accuracy.

Calibration was evaluated by analyzing six replicates of spiked urine samples at 0.5, 1, 2.5, 5, 7.5, 10, 25 and 50 mg/L. The peak areas of EtG and the EtG-D₃ were plotted against the EtG concentration. A calibration curve, determined by the least-squares regression algorithm, was linear over the range of 0.5–50 mg/L. The equation of the regression line was $y = 0.522 x + 0.236$, with the mean correlation coefficient of 0.998, which shows a good proportionality between GC-MS response and the evaluated range of concentration. LOD and LOQ were 0.125 mg/L and 0.38 mg/L, respectively. Intra-day precision was determined by assaying four replicates of each calibration concentration (Table 1). Inter-day precision and accuracy were evaluated by three determinations per single concentration on 4 different days (Table 2). The results were expressed as the relative standard deviation (RSD) for each concentration level.

Alvares et al. (19) assessed the stability of the trimethylsilyl (TMS)-derivatized analyte over a period of 4 hours. In our study the stability of the TMS derivative of EtG in urine was assessed by comparing TMS-EtG levels at nine different dilutions at three time points after the derivatization process (12, 24, and 36 hours). The three regression functions were compared statistically (Fig. 1) and no significant differences were found (20). These results show that the product of TMS derivatization was stable for at least 36 hours at room temperature.
None of the patients (n=50) admitted to having ingested alcohol within the 7 days before the study-related urine sampling. However, 13 patients (26%) showed positive EtG results (ranging from 0.4 mg/L to 1.76 mg/L). The EtG-positive test results are shown in Table 3.

Incidental exposure to alcohol is a relatively common event and involves the use of certain mouth-wash solutions (21), ingestion of OTC medicines or food products containing alcohol as an ingredient (22, 23), ”non-alcoholic” beer consumption (24) or dermal exposure (25). In order to avoid claims of false-positive test results, certain cut-off values for urine EtG levels have been proposed. Skipper et al. (10) declared incidental exposure as extremely unlikely with urine EtG levels exceeding 0.5 mg/L. Other authors made similar suggestions about urine EtG cut-off in the range from 0.1 mg/L to 1 mg/L (8, 13, 23, 26).

Since 1995, when a report on the synthesis and determination of EtG was first published (27), various research teams have attempted to enhance the knowledge on this marker. With the use of GC-MS, Schmitt et al. (27) found EtG concentrations in urine samples from 12 drunken drivers in the range of 3–130 mg/L. Wurst et al. (28) reported GC-MS-derived EtG values between 3 and 70 mg/L and the detection window of up to 80 hours in 33 alcoholics hospitalized for detoxification at an acute alcohol withdrawal clinic. The usefulness of EtG determination using the GC-MS method was confirmed in a study with forensic psychiatric patients who had committed a substance-related offense. Fourteen out of the 146 examined urine samples were positive for EtG, whereas urine and breath ethanol tests were positive in only one case. Blood phosphatidylethanol (PEth) testing yielded negative results in each case and %CDT did not exceed the reference value (9). Skipper et al. analyzed EtG in urine using LC-MS/MS for monitoring health professionals involved in an alcohol recovery program. These authors found that out of the 100 urine samples, which were found to be negative for alcohol using standard testing, seven were positive for EtG in the range between 0.5 and 196 mg/L, suggesting recent alcohol use (10). One study compared urine EtG levels, breath alcohol test results, and self-reporting as ways to reveal recent drinking in 18 liver transplant candidates diagnosed with alcoholic liver disease and undergoing group therapy treatment for alcohol addiction. None of the patients admitted to alcohol consumption, and only 1 out of 127 breath alcohol tests turned out positive. However, 9 patients showed positive EtG results in at least some of their urine samples (nearly half of their urine samples were positive for EtG). These results demonstrate the unreliability of self-report data and the low sensitivity of breath alcohol testing (29). The observation that urine EtG testing could improve verification of abstinence in alcohol-dependent patients was also made by Junghanns et al. In comparison with the interview and breathalyzer
data, the presence of EtG in urine significantly increased the detection of relapsers among alcohol-dependent patients (30). Our study in patients questioned about alcohol consumption confirmed the unreliability of self-report data and showed the usefulness of routine EtG testing in human urine. Considering 0.5 mg/L as the cut-off level, 11 of our 50 patients were disclosed as drinkers (Table 3). In this way urinary EtG testing may improve verification of abstinence in a number of studies in alcohol-dependent patients. Table 4 presents the proportion of false declarations, which were discovered after EtG measurement. The presence of this ethanol metabolite in urine indicates alcohol consumption within up to three or five days before sample collection. Therefore the GC-MS method presented here could indicate that alcohol consumption took place even if ethanol itself is no longer detectable.

The positive EtG results in our patients (Table 3) clearly indicate that undisclosed alcohol consumption took place. Many life situations require total alcohol abstinence. This can be confirmed by analytical tests. The most popular sobriety verification tool to date is an ethanol breathalyzer. Breath alcohol testing is a practical and efficient tool in roadside alcohol screening. However, the usefulness of this method for confirming alcohol abstinence in other situations (e.g. addiction treatment programs, patient qualification for surgical procedures, workplace sobriety monitoring, or doping testing) is very limited due to the short detection window.

Conclusion

EtG can be a useful marker of recent alcohol consumption because it is a direct metabolite of ethanol with good sensitivity, specificity and significantly longer detection window than urine ethanol testing.

GC-MS was found to be specific, sensitive and selective enough for determination of EtG in human urine.

During hospitalization as well as after treatment of alcohol-dependent patients, it is necessary and important to monitor abstinence.

The use of the EtG marker is expected to lead to significant improvement of withdrawal treatment programs and contribute to reducing the risk of relapse.
Table 1 Calibration data for determination of EtG in human urine

<table>
<thead>
<tr>
<th>Nominal Concentration (mg/L)</th>
<th>Detected EtG concentration (mg/L), mean ± SD</th>
<th>RSD (%)</th>
<th>Accuracy (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.5</td>
<td>0.49 ± 0.04</td>
<td>7.36</td>
<td>8.00</td>
</tr>
<tr>
<td>1</td>
<td>1.02 ± 0.02</td>
<td>1.49</td>
<td>102.33</td>
</tr>
<tr>
<td>2.5</td>
<td>2.42 ± 0.17</td>
<td>7.03</td>
<td>96.93</td>
</tr>
<tr>
<td>5</td>
<td>4.82 ± 0.09</td>
<td>1.93</td>
<td>96.33</td>
</tr>
<tr>
<td>7.5</td>
<td>7.44 ± 0.42</td>
<td>5.69</td>
<td>99.24</td>
</tr>
<tr>
<td>10</td>
<td>10.47 ± 0.20</td>
<td>1.90</td>
<td>104.67</td>
</tr>
<tr>
<td>25</td>
<td>25.74 ± 0.19</td>
<td>0.73</td>
<td>102.96</td>
</tr>
<tr>
<td>50</td>
<td>49.63 ± 2.17</td>
<td>4.38</td>
<td>99.26</td>
</tr>
</tbody>
</table>

The standard deviation (SD) was determined via repeated experiments (n=4). Intra-day precision was expressed as relative standard deviation (RSD)
Table 2 Inter-day precision (RSD) and accuracy of EtG level testing in human urine.

Measurements were done independently for four days.

<table>
<thead>
<tr>
<th>EtG concentration (mg/L)</th>
<th>RSD (%)</th>
<th>Accuracy (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2.75</td>
<td>104.33</td>
</tr>
<tr>
<td>2.5</td>
<td>5.42</td>
<td>99.93</td>
</tr>
<tr>
<td>5</td>
<td>4.58</td>
<td>94.51</td>
</tr>
<tr>
<td>10</td>
<td>8.46</td>
<td>97.35</td>
</tr>
<tr>
<td>25</td>
<td>6.05</td>
<td>103.99</td>
</tr>
<tr>
<td>50</td>
<td>3.75</td>
<td>99.68</td>
</tr>
</tbody>
</table>
Table 3 EtG concentration in the evaluated urine samples (n=50)

<table>
<thead>
<tr>
<th>Patients</th>
<th>EtG mg/L</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1.53</td>
</tr>
<tr>
<td>2</td>
<td>1.07</td>
</tr>
<tr>
<td>3</td>
<td>1.76</td>
</tr>
<tr>
<td>4</td>
<td>1.00</td>
</tr>
<tr>
<td>5</td>
<td>0.96</td>
</tr>
<tr>
<td>6</td>
<td>0.62</td>
</tr>
<tr>
<td>7</td>
<td>2.30</td>
</tr>
<tr>
<td>8</td>
<td>1.58</td>
</tr>
<tr>
<td>9</td>
<td>1.68</td>
</tr>
<tr>
<td>10</td>
<td>0.4</td>
</tr>
<tr>
<td>11</td>
<td>1.75</td>
</tr>
<tr>
<td>12</td>
<td>1.02</td>
</tr>
<tr>
<td>13</td>
<td>1.14</td>
</tr>
</tbody>
</table>

Positive = >LOD (0.125 mg/L) and <LOQ (0.38 mg/L)
Table 4 The proportion of false declarations regarding alcohol consumption

<table>
<thead>
<tr>
<th>Number of patients participating in study</th>
<th>False declarations (%)</th>
<th>The reason for verifying abstinence status</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>26</td>
<td>detoxified alcohol-dependent patients</td>
<td>This study</td>
</tr>
<tr>
<td>100</td>
<td>7</td>
<td>health professionals recovering from substance-related disorders</td>
<td>(10)</td>
</tr>
<tr>
<td>18</td>
<td>50</td>
<td>patients awaiting liver transplantation</td>
<td>(29)</td>
</tr>
<tr>
<td>96</td>
<td>13.5</td>
<td>detoxified alcohol-dependent patients</td>
<td>(30)</td>
</tr>
<tr>
<td>23</td>
<td>17.4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Fig. 1. Stability of the TMS derivative of ethyl glucuronide after 12, 24, and 36 hours

The differences between the three regression lines were insignificant: $F_{(2,48)} = 0.11; P = 0.895$ for the slopes and $[F_{(2,50)} = 0.342; P = 0.713]$ for the elevations (20)
References:


Abstract: The paper presents history of development and evaluation of International Scientific – Practical Conferences “Criminalistics and Forensic Examination: Science, Studies, Practice” on the occasion of 10th jubilee event held in Ukraine in 2014. It provides brief overview of each edition of the Conference demonstrating how it changed from the local project into major international event gathering renowned scholars from both Eastern and Western Europe and providing platform for exchange of information and experience in the fields of criminalistics and forensic examination.

Keywords: criminalistics, international cooperation, conference, forensic examination.

Introduction

On 26-27 June 2014 in Zakarpattia Oblast of Ukraine, in the 'Voyevodino' resort a Jubilee 10th International Scientific – Practical Conference “Criminalistics and Forensic Examination: Science, Studies, Practice”. It was organized by Lithuanian and Ukrainian institutions – International Criminalists' Congress (Ukraine), Criminalist's Association of Lithuania, Forensic Science Centre of Lithuania and Yaroslav the Wise National Law University in Kharkiv (Ukraine). The jubilee is a good reason for reflection and assessment of this traditional Conference in the context of european map of such scientific events.

The idea of Conferences in question was born in the Chair of Criminalistics\(^1\) of the former Lithuanian Law University (currently - Mykolas Romeris University) in Vilnius. Aiming at achieving increase of scientific and research activities as well as didactics and promotion of forensic science developments among law enforcement officers and employees of judicial institutions it was decided that the Chair of Criminalistics takes initiative in conception of Criminalists’ Association of Lithuania and steps in as the host of international bi-annual scientific – practical conferences regarding the subject matter. The planned conferences were developed as a platform for discussion and exchange of practical experience and information between representatives of criminalistics and forensic science with law enforcement and judicial institutions employees as well as law practitioners. Such discussions, initiated at

\(^{*}\) Professor of the Security Institute of National Pomeranian Academy in Słupsk (Poland).
\(^{1}\) The Author was a Chairman of the Chair of Criminalistics at the time.
national level, were to be extended into international stage in order to integrate European scientific community dealing with forensics.

Performed analysis of criminalistics papers and publications from different parts of Europe led to the conclusion that we knew very little about priorities and paths of development of criminalistics and forensics in different parts of Europe. It could be even said – the bigger country, the lower interest in criminalistics of neighbors, which can be explained in the context of self-sufficiency concept in criminalistics. This inadequate knowledge concerned even our closest neighbors and it was extended to very specific areas of forensic research and practical aspects of fight with the crime. Taking this into account we planned to start with development of closer ties with our neighboring countries and then to move into exchange of information and experience with representatives of other basic schools of criminalistics.

Retrospection of International Scientific – Practical Conferences “Criminalistics and Forensic Examination: Science, Studies, Practice”

The first conference we organized in 1999 was a low key event as among a dozen of speakers there were only representatives of Lithuania and Poland. The later was represented by Wroclaw University (prof. Z. Kegel, prof. M. Bojarski, prof. R. Jaworski, dr M. Szostak, mgr G. Kopczyński), Warsaw University (prof. T. Tomaszewski) and Police Academy in Szczyno (W. Kędzierski, dr G. Kędzierska). Lithuania was represented by Lithuanian Law University (doc. dr H. Malewski, doc. dr E. Kurapka, dr J. Juškevičiūtė, dr R. Burda and others), members of expert's community (doc. dr J. Rinkevičius, G. Juodkaitė-Granskienė, D. Talaiienė, A. Žalkauskienė) and law enforcement (S. Liutkevičius and others). The conference subjects were expert's knowledge and its application in the investigations, theoretical aspects of forensic expertise, legal mechanisms limiting such expertise, procedures of expert's trainings and general development of criminalistics. The Chairman of Chair of Criminalistics of Lithuanian Law University doc. Henryk Malewski and Vice-chairman of said University doc. Egidijus Kurapka presented conceptual paper on the place of criminalistics in the framework of comprehensive reform of legal system „The science of criminalistics in the process of law development“. Interesting paper „Principal rights and duties of the expert in the Criminal


See: Jurisprudencija, Lietuvos teisės universiteto mokslo darbai, 18 (10) tomas, Vilnius 2000
Procedure of Poland“ was presented by prof. Tadeusz Tomaszewski. Vice-chairman of Wroclaw University prof. Marek Bojarski presented paper „Criminal and professional liability of expert witnesses“. Doc. Jurgisa Rinkėvičiusa and Gabrielė Juodkaitė-Granskienė delivered paper „About possible types of regulation of forensic examination“. The issue of private experts has been presented by Włodzimierz Kędzierski in his speech „Private experts in Poland“, while his second paper developed together with Paweł Rybicki concerned „Training of expert criminal examiners in the Netherlands“. Dr Grażyna Kędzierska presented „Experts’ training in Poland“. Dr Ryszard Burda and Head of Investigations Department of Lithuania Home Affairs Ministry of Lithuania Stanislovas Liutkevičius discussed issue of „Use of special knowledge in work of the inspector“ . The other papers and presentations concerned issues of particular areas of forensic expertise and applications of criminalistics in the neighboring countries.

Looking back in 2015 we can say that from the first issue of our Conference there are five distinctive areas of scientific interest that are always represented on a different scale. These are general issues of criminalistics tactics in connection with legal and procedural issues, analysis of the practice of actions undertaken within investigations, general theory of forensic expertise and analysis of particular forensic research. Finally issue of didactics and trainings that provides connection between criminalistics theory and practice is always an important issue evaluated at our Conferences.

Ever since second edition of our Conference the geography of participants constantly grows. The only change introduced in the Conference formula from 2001 was publication of conference book ( monography ) at its start so all the participants have opportunity to read included papers and be an active part of conference discussion regarding topics of interest. In the second Conference there were participants not only from Lithuania but also renown representatives of criminalistics from Russia (prof. T. Averyanova, prof. N. Mailis), Latvia (prof. A. Kavalieris) and Germany (dr hab. M. Hecker, dr G. Vordermaier). Poland was represented by scholars from the main academic communities of Wrocław, Warszawa, Toruń, Poznań, and Szczyno. The keynote speaker of the Conference was prof. dr hab., doctor honoris causa Zdzisław Kegel ( Poland ) who presented paper regarding cooperation of expert witnesses with parties of the criminal procedure.

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4 See: Jurisprudencija, Lietuvos teisės universiteto mokslo darbai, 22 (14) tomas, Vilnius 2001
Among 33 printed papers it is worth to mention these that provided analysis of theoretical and legal aspects of forensic expertise and evaluated issue of trainings of experts. These were deliverables of prof. Tatyana Averyanova „A Modern Condition and Prospects of Development of Forensic Examination“ (Russia); doc. dr Jurgis Rinkevičius „The Independence of Forensic Experts“ (Lithuania); prof. Hubert Kolecki „The Evaluation of Procedural Evidence by the Results of Technical Forensic Examination (a Real Possibility or Myth?)“; dr Piotr Girdwoyń „An Evaluation of an Expert-Witness Opinion. Problems of Process and Criminalistics“ (Poland); dr Ewa Gruza „Expert Opinion against a Background of an Adversary System in Court Proceedings“ (Poland); dr hab. Manfred Hecker „Requirements for Scientific Expert Opinions as Established by the German Supreme Court“ (Germany); prof. Anrijs Kavalieris „The Issues of Training and Certification of Forensic Experts, Developing and Approving Methodologies of Making Examinations“ (Latvia); dr Monika Böhme „Tasks and professional training of the forensic experts at the C.I.D. of Mecklenburg-Vorpommern“ (Germany); prof. Tadeusz Tomaszewski „Private Examination in Practice of Investigation and Court in Poland“ (Poland). There was a number of papers concerning polygraph expertise provided by prof. Ryszard Jaworski „Forms of Application of Polygraaph Examination in Lega Proceedings Following Changes in Polish Penal Procedure“ (Poland); Włodzimierz Kędzierski and prof. Mariusz Kulicki „Polygraphic Expertize as Method for Examinatio of Human Understandig of Crime Situation“ (Poland); Uldis Mikelsons „Usage of the Polygraph in Latvia“ (Latvija). A couple of articles concerned various aspects of forensic technics – like paper of dr Gottfried Vordermaier „Technical Development in the Field of Forensic Comparison of Toolmarks: The German Project to Develop a Computerized System for Analysing and Identification of Toolmarks“ (Germany). Dactyloscopy was discussed by doc. dr Sergei Samishchenko (Russia); issue of arms was presented by Vladimir Terechovich (Latvia), dr Eduardas Vaitkevičius (Lithuania). Dr Iwona Zieniewicz (Poland) and Anelė Žalkauskienė (Lithuania) discussed handwriting examination. Other papers concerned preparation of material for expert's research, osmology, forensics in civil proceedings, rights of parties to the criminal proceedings and prevention in criminalistics. Finally Prof. Samuelis Kuklianskis and Eglė Kažemikaitienė (Lithuania) discussed „The Conception of Criminalistics Informatics“.

Participants of the 3rd Conference ( 2003 ) were in majority from Poland, Russia, Germany, Latvia and Lithuania again. It has to be noted that beginning from the 3rd edition the Conference was mainly organized by Criminalist's Association of Lithuania with supporting

roles of Forensic Science Centre of Lithuania and Lithuanian Law University. Among 43 papers that have been published in 43(35) Volume of Journal of Lithuanian Law University there were both criminalistics and forensic expertise issues presented. The authors were Lithuanian scientists: R. Burda, J. Juškevičiūtė, V. Justickis, G. Valinskas, E. Kažemikaitienė, R. Krikščiūnas, E. Kurapka, H. Malewski, E. Latauskiene, S. Matulienė, R. Raudys, E. Radzevičius, R. Ryngevič, R. Sitienė, J. Varnaitė, A. Zakaras. Germany was represented by D. Kauczinski, D. Schulze and A. Rapp. Poland Z. Kegel, R. Cieśla, M. Szostak, M. Trzciński, V. Kwiatkowska-Darul, K. Maksymowicz, J. Kawecki, T. Jurek, Ł. Szleszkowski and H. Szatny. Russia was represented by T. Averyanowa and N. Mailis.


In order to facilitate organization of the future Conferences the board of Criminalist’s Association of Lithuania decided that invitations to the future events will include specification of the main conference topics – to enable better and focused preparation of papers and participants.

In the 4th edition of the Conference held in 2005 over 70 participants from Lithuania, Poland, Czech Republic, Slovakia, Russia, Hungary, Sweden, Latvia and Ukraine provided 52 papers (over 40 were presented) – and these were published in „Jurisprudencija“ journal. As it happens everywhere, not all presented papers have been published – in our case an example could be

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paper „International Forensic Cooperation in the Identification of Unknown Victims of Seaquake in Thailand” by Andreas Wallow, a German expert who participated in identification of victims of 2004 tsunami that hit Thailand.

A good tradition of our conferences is to publish papers in a couple of languages: Lithuanian, English, Polish, Russian and German with summaries in Lithuanian and English. Although it put an additional burden on editorial board, it is considered to be attractive for all participants of our events. The papers are published within six sections: Common Issues of Criminalistics Theory; Crime Investigation and Tactics of Criminalistics; Studies, Training, Personnel Training; Common Issues of Forensics; Special Issues of Forensics; Special Knowledge and Criminalistics Identification. The first one „Common Issues of Criminalistics Theory” consisted of 8 papers from Hungary, Russia, Latvia and Lithuania. Doc. dr Csaba Fenyvesi in his paper „Development Tendencies and Perspectives of Forensic Science“ (Hungary) presented Hungarian approach to the modern criminalistics and future development of this science, „Some Theoretical Problems of Modern Russian Criminalistics“ authored by prof. Aleksandr Filippov (Russia) concerned basic issues of theory of criminalistics, definition of this discipline, its range, structure and practical aspects. Prof. Anrijs Kavalieris (Latvia) analyzed in his paper „Place of the Criminalistics in the System of Sciences“ placing of criminalistics in the system of sciences from different points of view. Other papers in this section included these prepared by Vladimir Terehovich and Elita Nišande (Latvia), Alvydas Barkauskas, Eglė Kažemikaitienė, Snieguolė Matulienė, Ernestas Lipnickas and Lina Novikovienė (Lithuania). The second section „Crime Investigation and Tactics of Criminalistics” also consisted of 8 papers - by dr Csongor Herke from Hungary („The Tactics of Compulsory Measures that Terminated Individual Liberty“), dr Violetta Kwiatkowska-Darul from Poland („Particular Subjects of Interrogation as Unceasing Challenge for Interrogators“), dr Bence Mézháros from Hungary („Secret Agent in Hungarian Law“), prof. Tatjana Volčeckaja and Natalija Fočenkova from Russia („The Transnational Environmental Crime and its Investigation“), doc. dr Ryšardas Burda from Lithuania („Features of Formation of Traces in Economic Crimes“), dr Rolandas Krikščiūnas from Lithuania („System of Criminal Tactical Means: Features and Concepts“), prof. Egidijus Kurapka and prof. Henryk Malewski from Lithuania („A Contemporary Conception of Crime Investigation and its Criminalistic and Procedural Assurance: Current Scientific Achievements and Perspectives“), Gintarė Šatienė from Lithuania („The Peculiarities in Describing Corruption’s Criminalistic Description“).

The remaining 19 papers of three sections concerned theoretical and practical aspects of forensic expertise. These include: prof. Tatyana Averyanova „Moral Certainty of Expert as Rational Base of his Morality“ (Russia); dr Rafał Cieśla „Specialistic Expertise in the Polish Doctrine of Penal Proceedings and Criminalistics“ (Poland); prof. Jiří Straus and prof. Viktor Porada „Concise Biomechanics of Extreme Dynamic Loading on Organism“ (Czech Republic); dr Rolandas Krikščiūnas and doc. dr Janina Juškevičiūtė „Inspection Act Analyses and Evaluation in Civil Law“ (Lithuania); Liudmila Kuzničenko „Problems of Theory and Practice of Forensic Qualifier Authorship Examination“ (Ukraine); prof. Nadežda Maišlis „The Modern Approaches at Research of Products of Mass Manufacture“ (Russia); dr Krzysztof Maksymowicz, Jakub Trnka, Janusz Markiewicz, Hanna Maksymowicz „The Application of Computer Tomography in the Diagnosis of Penetrating Gunshot Wounds Caused by Non-lethal Weapons“ (Poland); dr Marzena Anna Wasilewska „Significance of Pathological Changes of Handwriting and Disturbances in Current and Contents of Thoughts Perceptible in Written Statements“ (Poland); doc. dr Janina Juškevičiūtė „Opportunities of Examination of Latent Blood Traces“ (Lithuania); Audrona Spiečiūtė and Marius Barkauskas „Economical Examination in Lithuania in 2004 Year“ (Lithuania); Rasa Tamošiūnaitė „Preparation of Experimental Samples for Examination of Handwriting Objects“ (Lithuania); Anelė Žalkauskienė „System of Criminalistic Linguistic Examination Tasks“ (Lithuania); dr Piotr Girdwoyń „New Methods of Identification in the Courts’ Practice“ (Poland); dr Zoltán Hautzinger „The Present and the Future of Forensic Identification“ (Hungary); prof. Jerzy Kasprzak „Forensic Otoscopy – New Method of Human Identification“ (Poland); dr Miroslaw Jan Lisiecki „Identity Parade – Executable Identification by Procedural Institution or Specialist or Expert“ (Poland); prof. Viktoras Justickis „Limits of Usage of Special Psychological Knowledge in Law“ (Lithuania); Egidijus Radzevičius „Problems of Application of Special Knowledge to Investigation of Criminal Work Safety Violation Facts in Lithuania“
(Lithuania); dr Bernardas Šalna and Juozas Kamarauskas „Problems and Prospects of Forensic Automatic Speaker Recognition by Voice“ (Lithuania).

The 5th International Scientific – Practical Conference “Criminalistics and Forensic Examination: Science, Studies, Practice” (2007) was a major event with over 50 delegates from a number of countries participating (Austria, Czech Republic, Kazakhstan, Latvia, Poland, Germany, Russia, Slovakia, Slovenia, Ukraine, Hungary and Italy) as well as large number of Lithuanian representatives – this included not only academic scholars but also experts, law enforcement officers and employees of judicial institutions. Over 60 papers were delivered at the Conference, most of them have been published in conference book delivered at the beginning of the event7. Again there were instances when not published but presented papers had significant impact on the conference participants – good examples would be presentations by German Criminalistics Association prof. Rolf Ackermann concerning current issues and development trends of German criminalistics and the one prof. Ingmar Weitemeier (Germany) concerning prospects on international cooperation in fighting internet crime.

51 published papers were split into 4 sections. In the first „Theoretical Questions of Criminalistics“ there were 18 papers by: dr Petras Ancelis (Lithuania), dr Herke Csongor (Hungary), prof. Aleksandr Filippov (Russia), doc. dr Gabriëlè Juodkaitė-Granskienė and dr Voldemaras Jankauskas (Lithuania), prof. Olga Chelysheva and prof. Stanislav Yalyshev (Russia), prof. Viktoras Justickis (Lithuania), doc. dr Janina Juškevičiūtė (Lithuania) and doc. dr Alla Vereschagina (Russia), dr Eglė Kažemikaitienė and Tatjana Bilevičienė, prof. Vidmantas Egidijus Kurapka and prof. Henryk Malewski (Lithuania), doc. dr Ivan Kogutich (Ukraine), Aleksandr Kovalenko and Livija Maslauskaitė (Lithuania), doc. dr Svetlana Kushnirenko (Russia), Leonid Makans (Latvia), dr Snieguolė Matulienė and Gediminas Bučiūnas (Lithuania), doc. dr Vladimir Terehovich and dr Elita Nimande (Latvia), dr Lina Novikovienė, Ugnė Adomaitytė and Barbara Kuzinevič (Lithuania), prof. Jiří Straus and prof. Viktor Porada (Czech Republic), Mindaugas Šatas (Lithuania). Topics of particular interest to the conference participants were presented by prof. Olga Chelysheva and prof. Stanislav Yalyshev (Russia) „Criminalistics and Education: Problems of the Theory and Practice“, prof. Vidmantas Egidijus Kurapka and prof. Henryk Malewski (Lithuania) „Criminalistics in

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Lithuania: Insight into the Future“ and prof. Aleksandr Filippov (Russia) „Criminalistics and Forensic Examination in Russia: Achievements and Unsolved Problems.

Within the second section „Special Questions of Criminalistics“ there were 11 papers by: Bettina Bogner, Hermann Miesbauer and Erust Oppitz (Austria), doc. dr Ryšardas Burda i Mantas Šriupša (Liwa), doc. dr Csaba Fenyvesi (Hungary), prof. Anrijs Kavalieris (Latvia), Marek Łachacz (Poland), dr Egidijus Radzevičius (Lithuania), dr Ireneusz Sołtyszewski, dr Krzysztof Krassowski, dr Jarosław Moszczyński (Poland), prof. Jiří Straus (Czech Republic), Gintarė Šatienė i Mindaugas Šatas (Lithuania), dr Maciej Trzciński (Poland). This section was very diverse with most of the papers based on new developments in forensics or own research, as well as case studies. Bettina Bogner and co-authors analyzed case of double homicide where analysis of mineral and biological micro-traces led to detection of perpetrators. Csaba Fenivesi in his „Value and Application of the Analysis of the Special Profiling“ discussed criminal profiling in Hungary. Police databases and information capabilities were the topic of paper of dr Ireneusz Sołtyszewski, dr Krzysztof Krassowski and dr Jarosław Moszczyński.

Third section „Theoretical Questions of Forensic Examination“ brought also 11 papers presented by: prof. Tatyana Averyanova (Russia), Jolanta Grebowiec-Baffoni (Italy), doc. dr Michail Zsymbal, dr Ella Simakova-Yefremyan and dr Larisa Derecha (Ukraine), dr Ludmila Golovchenko (Ukraine), prof. Hubert Kolecki (Poland), Marius Stračinskas (Lithuania), Constantine Kapustnik and Alexey Khomutenko (Ukraine), prof. Nadezhda Mailis (Russia), Milena Pugnaloni (Italy), dr Violetta Kwiatkowska-Darul and prof. Józef Wójcikiewicz (Poland). Prof. Tatyana Averyanova presented „Expert Service of the Ministry of Internal Affairs of Russia and Prospect of its Development“. Representatives of Italy delivered the following papers: Jolanta Grebowiec-Baffoni „Graphology as an Instrument of Investigation on Graphic Surveys in Italy“ and Milena Pugnaloni „Document Examination. Graphology: a Forensic Science“. An interesting paper has been presented by dr Violetta Kwiatkowska-Darul and prof. Józef Wójcikiewicz, it concerned „The possibilities and Limitations of the Evaluation of Expert Witness Opinion“.

The 4th section „Special Questions of Forensic Examination“ consisted of 11 papers by: prof. Ewa Gruza and Paweł Waszkiewicz (Poland), dr Hans Ditrich (Austria), prof. Ryszard Jaworski (Poland), Alfonsas Jurevičius and Ramunė Sitienė (Lithuania), dr Sylwia Skubisz-Ślusarczyk and dr Iwona Zieniewicz (Poland), dr Bernardas Šalna, Juozas Kamaraskas, Žavinta Pikutienė and Elena Šalnaitė (Lithuania), doc. dr Eduardas Vaitkevičius, dr Daina Vasiliauskienė and
Marija Sinkevičienė (Lithuania), dr Marzena Anna Wasilewska and Wojciech Achrem (Poland), dr Renata Wodarczyk (Poland), Gintarė Žalkauskaitė (Lithuania), Vadim Khosha (Ukraine). Among the topics issue of new technologies utilized for forensic research was evaluated in the papers of dr Hans Ditrich „Forensic Use of Confocal Scanning Laser Microscopy – Bridging Two Worlds“, prof. Ewa Gruza and Paweł Waszkiewicz „Use of Closed Circuit Television (CCTV) Recordings in Criminalistic Expertise“. Dr Bernardas Šalna and co-authors „Determination of Authenticity of Digital Sound Recordings“. Information concerning this edition of the Conference has been published in various journals including Russia, Ukraine and Italy. Some of the presentations submitted for our Conference were also separately published in Russia and Ukraine

The VI-th Conference (2009 r.) was held in Trakai near Vilnius in historical medieval castle from XIV-th century. 25 scientists from 7 foreign countries participated including prof. T. Averyanova, N. Mailis, A. Filippow, S. Jalyshew (Russia), Z. Kegel, T. Tomaszewski, P. Girdwoyń, G. Ojecewicz (Poland), V. Krajnik (Slovakia) and A. Kavalieris (Latvia). A large group of Lithuanian scientists, experts and law enforcements representatives was present as every year. Both Minister of Home Affairs of Lithuania R. Šimašius and Chief of Police V. Tėlyčėnas took part in Conference proceedings. A collective monography has been published with 35 papers originating from 8 countries included\(^8\). One of the achieved goals was to present through this publication diverse spectrum of issues of modern criminalistics and forensic expertise. These are concerning both theory and very practical applications of the science in question. It has to be pointed out that didactics play an important role as only through education and trainings level of competence of police and other law enforcement institutions can be raised and modern knowledge shared as necessary. In particular new research methods and opportunities are of interest not only to experts but also law enforcement officers, lawyers and other concerned parties.

In the first part of the monography there are chapters by T. Averyanova, A. Filippov, A. Gorbatkov, G. Juodkaitė-Granskienė and A. Kivita, Y. Komissarova, S. Kushnirenko, H. Malewski, E. Simakova-Jefremian, V. Terehovich and E. Nimande. Prof. T. Averyanova, one of the initiators of the new discipline – the theory of forensic expertise presented paper „Role of scientific and empirical prognostication in formation of forensic science theory“. Prof. A.

Filippov in his paper „Criminalistics in Russia and Europe“ presented his views on particulars of criminalistics in Russia and selected countries of Europe. It turned out to be a starting point for a wider research project on thus science in Europe published in the journal „Vestnik kriminalistikii“ («Вестник криминалистики»). Prof. H. Malewski presented paper „The main schools of criminalistics and formation of modern criminalistics model in Lithuania”, where he discussed trends and scenarios of development of criminalistics in Lithuania.

Second part of monography consisted of 9 chapters by P. Ancelis, E. Bilevičiūtė and T. Bilevičienė, G. Bučiūnas i S. Matulienė, A. Kavalieris and L. Makans, K. Krassowski, I. Soltyszewski and M. Bednarek, Ž. Navickienė, G. Ojcewicz and R. Włodarczyk, M. Šatas, U. Szymańska, E. Zębek and K. Krassowski. Prof. Petras Ancelis in his paper „Precondicions for investigation and disclosure of criminal acts in the pretrial investigation institutions” presented analysis of law enforcement actions after new criminal procedure entered into the force in 2003 coupled with his vision how to improve activities of the aforementioned institutions. An issue of cooperation between prosecutors and law enforcement officers has been a topic of few papers – including „Criminalistical expertise in the sexual crime cases”, by dr Krzysztof Krassowski, dr Ireneusz Soltyszewski and Monika Bednarek. An interesting presentation was delivered by prof. Grzegorza Ojcewicz and dr Renata Włodarczyk concerning cause of death of known Russian poet Sergiusz Jesienin. Controversial issue of utilization of hypnosis in interrogations was discussed by prof. A. Kavalieris and L. Makans from Latvia.

Chapters concerning various types of forensic expertise were placed in the third part of monography. Among 12 papers by dr H. Ditrich and B. Bogner, K. Graželis, D. Kazlauskaitė and doc. dr G. Juodkaitė-Granskienė, doc. dr J. Juškevičiūtė, G. Nedveckis and S. Boldyrev, A. Kovalenko, V. Saldžiūnas and Ž. Navickienė, doc. dr A. Lall, doc. dr V. Pristanskov, doc. dr L. Radzevičius and dr E. Radzevičius, doc. dr Renata Ryngevič, V. Rudnev, dr B. Šalna and J. Kamaraukaskas, G. Žalkauskaitė, A. Žalkauskienė there were ones concerning ballistics, psychichemical research, documents examination and polygraph. An interesting deliverable by Hans Ditrich and Bettina Bogner from Austria was presented (“Gun smoke distribution from various firearms”). Lithuanian authors from Forensic Science Centre of Lithuania presented another interesting „Scope and possibilities of forensic investigation of images”.

Prof. Vaclav Krajnik presented two papers ( second together with dr Magdalena Krajnikova) concerning a need for permanent research in criminalistics and osmology research.
Representative of Estonia Raivo Epik provided information on training system of Estonia Police Academy.

The 7th Conference took place in 2011 in Šiauliai. Three-volumes monography has been published and delivered to participants at the start of an event, 43 chapters by authors originating from 11 countries were included. International Scientific – Practical Conference “Criminalistics and Forensic Examination: Science, Studies, Practice” organized by Criminalist’s Association of Lithuania with other Lithuanian partners become significant event in the European criminalistics thanks to high scientific level, participation of renown scholars and systematic approach to organization of an event. It led to proposals to organize Conference on annual basis, set up permanent scientific committee and allow to organize conference in different countries. Taking into account such proposals, the board of Criminalist's Association of Lithuania took a decision to organize conference in odd years in Lithuania and in even years in interested countries with participation of the Association. A distinction was made through conference edition numbers – these in Lithuania are signed with Latin digits while foreign editions in Arabic ones. The first agreed foreign 8th edition was to be held in St. Petersburg, Russia and organized by Petersburg State University together with Criminalist’s Association of Lithuania.

The leading topic of the VII-th conference edition was corruption. The part of monography „Corruption – Threats and Challenges for Democracy” consists of 9 chapters by authors originating from 5 countries. These doc. dr Ryszard Burda and Algimantas Kliunka (Lithuania) „Problems of Lithuanian practice to investigate corruption”, prof. dr hab. Tatyana Averjanova (Russia) „Counteraction against crime investigation as one of the elements of corruption”, prof. dr hab. Bachit Nurgalijev and dr hab. Maratkalı Nukenov (Kazachstan) „Modern schemes of corruption. Detection and investigation”, doc. dr Marek Fryšták (Czech Republic) „Combating corruption in the Czech Republik in the period 2006-2012”. Authors of remaining papers regarding corruption doc. dr S. Kushnirenko (Russia), and Lithuanian colleagues: dr G. Šatienė, doc. dr L. Novikovienė and doc. dr A. Novikovas, prof. dr E. Bilevičiūtė and doc. dr T. Bilevičienė. The first part of mongraphy consists also of chapters by: prof. dr V. E. Kurapka and doc. dr S. Matulienė, dr M. Šatas, J. Baltrūnienė from Lithuania, dr V. Terehovich and dr E. Nimande from Latvia as well as prof. dr hab. S. Yalyshev and dr M. Ignatiev from Russia.

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Second part of monography consists of chapters concerning connection between forensic expertise and actions undertaken in the framework of investigations. The authors of chapters were: prof. dr hab. Nadezhda Mailis (Russia), prof. dr hab. Józef Wójcikiewicz and dr Violetta Kwiatkowska-Wójcikiewicz (Poland), prof. dr Vaclav Krajnik (Slowacja), doc. dr Janina Juškevičiūtė, Genrikas Nedveckis and Giedrius Mickus, Aleksandras Kovalenka and Vitas Saldžiūnas, prof. dr Vidmantas Egidijus Kurapka and doc. dr Snieguolė Matulienė, Jurgita Jurėnienė (Lithuania), dr Michał Gramatyka, dr Marek Leśniak and prof. dr hab. Tadeusz Widla, dr Ireneusz Sołtyszewski, dr Krzysztof Krassowski and Zygmunt Gidzgier (Poland), prof. dr hab. Marat Arystanbekov (Kazachstan), prof. dr hab. Tatjana Volchetskaya and doc. dr Ekaterina Osipova (Russia), prof. dr hab. Valery Shepitko (Ukraine), doc. dr Annika Lall (Estonia). Both general issues of the aforementioned connections and case studies were provided. Prof. V. Krajnik discussed correlation between criminalistics and forensic expertise, prof. N. Mailis discussed „Integrated reconstruction of crime“. An interesting presentation was delivered by prof. J. Wójcikiewicz and dr V. Kwiatkowska-Wójcikiewicz („A handsome perpetrator returns: the role of an expert witness in the field of eyewitness identification“). Two chapters concerned polygraph: A. Kowalenka and V. Saldžiūnas „Legal regulation and practice of application of polygraph examinations in the Republik of Lithuania“ as well as dr M. Gramatyka, dr M. Leśniak and prof. T. Widla (The „voice polygraph“ or the conventional polygraph – a confrontation attempt). Doc. dr J. Juškevičiūtė presented first experience with profiling of criminals in Lithuania while Head of Police Forensic Laboratory G. Nedveckis together with G. Mickus presented results of utilization of AFIS database system. Few papers discussed investigation of classic crime – among them by prof. M. Arystanbekova „Algorithmization of investigation process of the mercenary – violent crimes“, prof. V. Shepitko „Some problems of investigation of organized murders“, prof. V. E. Kurapka and doc. dr S. Matulienė „Problematic issues of violent crimes in Lithuania: the pre-trial investigation practice and recommendations“ and also I. Sołtyszewskie, dr K. Krassowski and Z. Gidzgiera „Drowning – criminalistics and forensic medicine aspects“. Interesting case study was delivered by doc. dr A. Lall („Application of special knowledge during the investigation of criminal case No. 1-05-259“).

Third volume of published monography is dealing with experts' issues. Legal constrains regarding forensic expertise and prospects for a change in the subject matter were presented by doc. dr G. Juodkaitė-Granskienė, prof. dr Henryk Malewski and doc. dr Remigijus Merkevičius (Lithuania). Similar issues were analyzed by dr Yaroslava Komissarova „Optimization of legal
status of forensic experts in criminal procedure in the contest of his professional activity” (Russia). Subjectivity in an expertise was evaluated dr Jarosław Moszczyński (Poland). There was a number of papers concerning research on handwriting - Milena Pugnaloni (Italy) presented „Mould gestures” in dissimulated signatures”. Dr Iwona Zieniewicz with dr Sylwia Skubisz-Ślusarczyk discussed procedures of provision of necessary information for an expert. Prof. dr hab. Tadeusz Tomaszewski, dr Mieczysław Goc, Andrzej Łuszczuk and Krystyn Łuszczuk (Poland) presented „Computer-based graphometry – new quality in forensic analysis of handwriting”. Few presentations on handwriting expertise were delivered by Lithuanian experts: Gintarė Žalkauskaitė; Diana Girčė, Antanas Misius, Zita Staponienė and Anelė Žalkauskienė; Rasa Tamošiūnaitė, Liuda Raubaitė i Ramutis Jatulis. Also papers on application of new technologies to image research as well as fonoscopy were presented by dr Bernardas Šalna and dr Juozas Kamaraukas (Lithuania) „Use of combined method in forensic speaker identification”; Andrius Chaževskas, Kęstutis Graželis, Tomas Džiovalas and dr Andrej Gorbatkov (Lithuania) „Forensic examination of information technologies: state, objects and performance peculiarities”. Turkish experts Aysen Celebioglu, Adalet Kilic i Emel Yardımcı presented „Validation of the Plexor® HY System for DNA Quantitation” where they underlined a need for new procedures in DNA examination.

In June 2012 in St. Petersburg first foreign edition of the International Scientific – Practical Conference “Criminalistics and Forensic Examination: Science, Studies, Practice” took place. 120 participants from 9 countries attended. The interest was overwhelming and initially over 100 presentations were scheduled – this number was limited in practice since lot of participants were interested in listening to the presentations of foreign colleagues – and reasonable consensus was worked out. There were 95 scientific papers submitted for the Conference10, published as always beforehand. There were 3 parts of monography this time: theory and methodology of criminalistics, special knowledge and its utilization in investigation, methodology of crime detection and investigative actions. The papers were published mostly in Russian language with some English entries. Majority of authors originated from Russia (61), 10 from Ukraine, 7 from Poland and Lithuania and single ones from Italy, Czech Republic, Austria, Serbia, Kazakhstan, Estonia and Latvia.

10 See: Криминалистика и судебная экспертиза: наука, обучение, практика. 8-я (внеочередная) международная научно-практическая конференция. Под общей ред. С. П. Кушниренко. СПб.: Издательский Дом СПбГУ, 2012.
The participants were welcomed by the Vice-chairman of the St. Petersburg State University doc. dr M. Lavrikov and Dean of Faculty of Law prof. dr hab. N. Shevelev. Keynote speech regarding Criminalist's Association of Lithuania and the Conferences was delivered by prof. dr Henryk Malewski (Lithuania). A number of papers was dedicated to the theoretical and methodological aspects of criminalistics and links of this discipline to other areas of science. Such were the deliverables of doc. dr hab. E. Smachtin (Russia), prof. dr hab. Valery Shepitko (Ukraine) and doc. dr Gabrielė Juodkaitė-Granskienė (Lithuania). Issues of strategy in criminalistics was presented by prof. dr Branislav Simonović (Serbia) and prof. dr Aleksandr Filippov (Russia). Classification of forensic expertise was analyzed by prof. dr hab. Elena Rossinskaya (Russia). Prof. dr hab. Tadeusz Tomaszewski with prof. dr. hab. Piotr Girdwoyn (Poland) presented paper on education in criminalistics at Warsaw University. An interesting paper „How „Scientific“ is „Forensic Science“ was delivered by dr Hans Ditrich (Austria). Doc. dr Marek Fryšták (Czech Republic) discussed issues of importance of education and training of officers in fight of economy crime. Prof. dr hab. Hubert Kolecki (Poland) evaluated current state and perspectives of fight of financial and economy crime in Poland. Avoidance of taxes was analyzed by prof. dr hab. L. Shapiro (Russia). Very interesting presentation was made by doc. dr Nikolaj Perebytiuk (Ukraine) concerning fighting gambling crime.

The published monography covered a lot of interesting aspects of theory and practice of criminalistics prof. dr hab. Maciej Trzciński (Poland) discussed forensic archeology. Prof. dr hab. Stanislav Yalyshev (Russia) wrote about need for changes in the subject and structure of criminalistics. A number of papers from Italy concerned handwriting examination. Training of experts in Estonia is analyzed in paper by doc. dr Annika Lall. Prof. dr hab. Jiří Straus (Czech Republic) provided paper on „Biomechanical analysis of extreme dynamic loading on organism“.

At the last session of the Conference representatives of Criminalist's Association of Lithuania invited participants to the next 2013 edition in Vilnius. Representatives of Ukraine informed about establishment of International Criminalists' Congress having seat in Kharkiv. It was decided closer cooperation is necessary between scientific communities in neighboring countries in connection with consolidation of forensic research and even wider exchange of
information and experience in fighting the crime. Developed memorandum has been published in a number of scientific journals and on the webpages of International Criminalists’ Congress\textsuperscript{11}.

The IXth Conference in Vilnius (2013) was attended by over 80 participants from Czech Republic, Estonia, Lithuania, Latvia, Poland, Russia, Slovakia and Ukraine and two-volumes monography consist of 63 chapters including theses provided by scientists from Austria, Kazakhstan, Germany, Hungary and Italy\textsuperscript{12}. Proceedings of the conference consisted of 44 presentations, however only 28 were actually delivered making it possible to run Conference on plenary sessions only. Inviting to this edition the organizers proposed particular topics for discussion – criminalistics strategy and investigation of crime against life and health.

Conference was opened by Dean of Faculty of Law of Mykolas Romeris University prof. dr Rima Ažubalytė. General Prosecutor of Lithuania Darius Valys and Deputy Minister of Justice Giedrius Mozuraitis participated in the opening session. Papers submitted for the conference could be divided into three groups: theory of criminalistics, legal issues impacting criminalistics and practical aspects of forensic research. The first group was represented by presentations of prof. dr hab. V. Shepitko (Ukraine) „Subject, system and task of criminalistics in XXI century”, prof. dr H. Malewski (Lithuania) „Criminalistic strategy, strategy in criminalistics or strategy of criminalistics policy?”, dr G. Kędzierska (Poland) „Meanders of the 21 st century criminalistics”, prof. dr hab. S. Yalyshev (Russia) „Criminalistical characteristic of crime – of what kind it should be?”, dr V. Terehovich and dr E. Nimande (Latvia) „Peculiarities of defining the system of methods in criminalistic cognition”, prof. dr E. V. Kurapka (co-authors: prof. dr E. Bilevičiūtė, doc. dr S. Matulienė, S. Stankevičiūtė (Lithuania)) „Conception of the vision for European Forensic Science 2020 implementation in Lithuania and the main activities”, doc. dr hab. J. Smachtin (Russia) „The role of criminalistics knowledge in the investigation or crimes: history and current status”.

A number of papers concerned actions undertaken in investigations and utilization of special knowledge in criminal proceedings. These topics were present in papers by doc. dr Marek Fryšták (Czech Republic), prof. dr R. Jurka (Lithuania), doc. dr E. Ivanova (Russia), prof. dr R. Burda (Lithuania), doc. dr J. Metenko (Slovakia), R. Opik (Estonia), J. Baltrunienė

\textsuperscript{11} http://crimcongress.com
Traditionally there were papers concerning both general and specific issues of forensic expertise. Such were the ones presented by doc. dr G. Juodkaitė-Granskienė and V. Vaitekūnas (Lithuania) „Probabilistic conclusions: trustful or not?“, prof. dr hab. J. Moszczyński (Poland) „DNA identification – golden standard or golden exception?“, prof. dr hab. I. Perepechin (Russia) „Prospects of the forensic DNA studies of the health information: potential and legal problems“, dr I. Sołtyszewski „Perspectives of DNA typing for law enforcement purposes“. Dr M. Shepitko (Ukraine) evaluated issue of expert’s errors. An interesting papers regarding forensic linguistics were provided doc. dr E. Chubina (Russia) „Methodological aspects of forensic linguistic expertise of the advertising text“ as well as doc. dr T. Sokolova (Russia) „Expertise of titles/names: theoretical and methodological problems“.

The papers that require particular attention were presented by prof. dr hab. Yelena Rossinskaya (Russia) „General theory of forensic science as part of forensic expertology“ and prof. dr hab. Nina Klimenko (Russia) „Integration function of expertology“.

A number of presentations concerned forms of utilization of special knowledge, assessment of expert’s opinion and interrogation of expert witness. These have been presented by V. Vardai (Hungary), E. Ivanova and A. Semikalenova (Russia), dr E. Simakova-Yefremian (Ukraine), doc. dr E. Yelagina (Russia). Linguistic research in Lithuania was presented doc. dr R. Valunė and A. Żalkauskienė, also by dr G. Żalkauskaitė. Linguistics are also a subject of paper by M. Podkatilina (Russia). Handwriting examination was discussed by dr I. Zieniewicz and dr S. Skubisz-Ślusarczyk (Poland), R. Tamošiūnaitė (Lithuania), M. Pugnaloni and R. Federikoni (Italy).

Second volume of the monography consisted also chapters by prof. dr E. V. Kurapka (co-authors doc. dr S. Matulienė and prof. dr E. Bilevičiūtė) „Criminalistics didactics in Lithuania: expectations and opportunities“; prof. dr hab. I. Komarov (Russia) „About some criminalistical aspects in proving process“; Two bios of renown scholars were also included in the publication – of Petras Vladas Danisevičius (Lithuania) and Aleksandr Filippov (Russia).

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At the closing session of the Conference participants were invited to the 10th conference edition in Kharkiv, Ukraine in June 2014, organized by International Criminalists’ Congress chaired by prof. Valery Shepitko\textsuperscript{14}.

10th International Scientific – Practical Conference “Criminalistics and Forensic Examination: Science, Studies, Practice”\textsuperscript{15}

The 10th Conference was to be held – in accordance with agreement between Criminalist's Association of Lithuania and Ukrainian colleagues - from 26 to 27 June 204 in Kharkiv. There was a great interest in participation as over 100 papers were proposed and accepted for publication in the two-volumes monography\textsuperscript{16}. The authors originated from 11 different countries.

Unfortunately due to political developments initiated in Kiev the standard course of conference preparations was significantly disturbed. Due to unrest and riots that took place in Kharkiv area, where the conference was supposed to be held, the organizers faced serious dilemma – should the event be cancelled or not – and if not, then where is it supposed to happen. As by March 2014 there were over 90 applications to participate, the Ukrainian colleagues decided that in accordance with Roman principle pacta sunt servanda, the event should happen in Ukraine. Following agreement with Lithuanian side, it was moved to Zakarpattia Oblast of Ukraine, into the 'Voyevodino' resort and the dates were kept for 26 – 27 June 2014. Finally approximately 40 representatives of Ukraine attended together with over a dozen representatives of Czech Republic, Lithuania, Poland, Slovakia and Hungary. Unfortunately due to uncertain situation many participants were forced to cancel their presence in the weeks immediately before the conference started.

The conference program consisted of 4 plenary sessions and 26 selected presentations as well as 17 short summaries of already published papers. The official languages of the Conference were English, Ukrainian and Russian.

\textsuperscript{14} Professor dr hab. Valery Shepitko is the Chairman of Chair of Criminalistics of the Yaroslav the Wise National Law University in Kharkiv (Ukraine).

\textsuperscript{15} This part of the paper is based on the publication printed in Zagadnienia Społeczne Niepaństwowej Wyższej Szkoły Pedagogicznej w Białymstoku.

The jubilee conference was opened by co-chairmen prof. dr. hab. Valery Shepitko and prof. dr Henryk Malewski who presented goals of the event and wished participants fruitful discussions.

Prof. dr hab. Valery Shepitko delivered the keynote speech „Criminalistics in the system of legal sciences and its role in the global world” where he concentrated on theoretical methodological problems of criminalistics, its trends and role in the system of sciences in the context of globalization. Noting that the paradigm of criminalistics is changing today he observed that, comparing with other sciences the unification processes in modern criminalistics are progressing slowly, encountering resistance (with exception of technics). New technologies have changed the world including crime and fight with crime. This requires new development strategies both for science of criminalistics and implementation of its achievements for effective fight with crime.

Prof. dr hab. Anna Koziczak (Poland) presented her paper on issues of identification with special attention to the measurements within the forensic research. Dr Istvan Laszlo Gala (Hungary) discussed corruption problems in Hungary. Prof. dr hab. Valery Tishchenko (Ukraine) presented paper „On the content and scope of criminalistical investigation methods”. He examined controversial issues related to the principles of the formation, classification and content of criminalistics methods of crime investigation. Prof. Tishchenko noted that nowadays there are new methodologies are being proposed which is justified because there are new types of crimes developing. Still such methodologies do not always meet requirements of the practice – therefore a need exists to develop base (model) methodologies that can be tuned for investigation of particular crime. This presentation was followed by lively discussion on range of criminalistics, new challenges arising and actual definition of this science.

At the second session prof. dr Henryk Malewski presented paper „Assessment of results of expert’s research” prepared together with doc. dr Gabrielė Juodkaitė-Granskienė. Analysis of levels of assessment of expert’s opinions were discussed. Except for formal legal assessment of an opinion by the court of law, there are also other levels – for example assessment by the prosecutor or an attorney. Although the later do not have procedural consequences, it may lead to initiation of actions aimed at establishment of another expert or application to perform other evidence proceedings. Professional assessment of an expert is another issue that has to be taken into account – this can be undertaken both by expert’s supervisor, other expert and the expert himself – in the form of self-assessment. Dr Jozef Metenko (Slovakia) evaluated issue of digital traces in the criminalistics and their place in detection of crime committed in the internet. Prof.
dr Iwan Kohutych (Ukraine) presented issues of tactics and technics in the criminalistics, their scope, structure and range. Ferenc David (Hungary) presented his views on potential terrorist threat in Hungary and ways to minimize it. Prosecutor Jurgita Baltrunienė (Lithuania) presented her research on tobacco smuggling with particular attention to international legal aspects of fighting this form of crime.

Third session was opened doc. dr Marek Fryštak and doc. dr Dagmar Bartonikova (Czech Republic) who discussed handwriting examination. They presented their views regarding need to regulate evidence proceedings, including these involving expert’s examination of handwriting. Following presentation concerned the scale of conclusions in handwriting opinions and was delivered by Rasa Tamošiūnaitė (Lithuania). Prof. dr Jozsef Orban (Hungary) concentrated in his speech on subjectivity in forensic examination with particular attention on Bayesian network. Doc. dr Helen Aleksandrenko (Ukraine) presented paper „To the issues of the structure of methods of investigation of serial sexual murders“ where she postulated specific methodology needs to be developed to examine this particular type of crime. Doc. dr Roman Blahuta (Ukraine) presented paper on use of force within investigative actions.

On the second day of the Conference, dr Ella Simakova-Yefremian (Ukraine) presented paper concerning training of experts and development of common research methodologies. Dr Galina Avdeeva analyzed issues of establishment of an expert in the context of the new code of criminal procedure in Ukraine. Dr Larisa Derecha (Ukraine) discussed international cooperation in forensic examination. Olga Perepichka (Ukraine) presented her opinions concerning utilization of special knowledge within contradictory proceedings. Discussions that followed third and fourth sessions of the conference allowed for short speeches to be delivered by dr Michail Shepitko, doc. dr Olesya Vashchuk, doc. dr Vasyl Bilous and others.

Following the closure of conference proceedings a meeting of International Criminalists' Congress chaired by prof. Valery Shepitko was held. Two important decisions were taken. Firstly a Herbert Manns (renowned scholar, professor of criminalistics at universities of Irkutsk and Saratov) medal was established – a honor to be presented for outstanding services for development of the science of criminalistics and promotion of international cooperation in the subject matter. Secondly a memorandum calling for even closer international cooperation of the scientific community dealing with criminalistics was developed and approved by the present meeting participants.
Last but not least an invitation to the next Conference was presented by prof. V. Shepitko. It was also underlined that despite difficult times, the 10th jubilee conference has been successful thanks to dedication of organizers both on Ukrainian and Lithuanian side.

Conclusions

Presented International Scientific – Practical Conferences “Criminalistics and Forensic Examination: Science, Studies, Practice” provided major benefit first of all for Lithuanian Criminalistics – as representatives of our community – scientists, experts, law enforcement officers, prosecutors have had an opportunity to meet renowned scholars and also get familiar with developments of the science of criminalistics in other countries – as well as with the problems faced by foreign communities. This allows for an objective and critical assessment of the state of forensic research and its value for the fight with crime. Conference meetings provided opportunity to generate new ideas and benefit from experience of other countries in development of new domestic programs of both prevention and fighting the crime.

It has to be also recognized that conferences provided international platform – a bridge between representatives of main schools of criminalistics and also initiated research projects among European countries. Direct contacts and cooperation resulted in new initiatives that benefited large number of scientists. One of such initiatives was establishment of International Criminalists' Congress in Kharkiv, other include collective international research and publications.

Over 500 scientific papers that have been published in connection with our conferences allows for determination of the current state of the science of criminalistics, problems, challenges and development opportunities – extending into the area of forensic examination. The project of Practical Conferences “Criminalistics and Forensic Examination: Science, Studies, Practice” is undoubtedly a success. Taking into account our activities where academic scholars are particularly visible part of community (which is not a case in Western Europe) and activity of European institutions like ENFSI or CEPOL, we can really claim that what we do together impacts European criminalistics in a positive way.
Abstract: One of the signs of modern solutions referring to the Roman law is the concept of limited liability. It is derived from the solutions developed within the framework of the so-called slave law. The beginning of the concept of limited liability is associated with peculium, and therefore with the separation of the mass from the property and transferring it to a slave in the free management. Legal actions executed by a slave had natural character but were not civilly recoverable. That moment connected with the lack of civil responsibility made by a slave for legal action in connection with peculium could be overcome by creating a Praetor's actio de peculio. On the basis of this complaint, dominus was responsible on the base of presumed consent for making these activities at the moment of establishing peculium. Through medieval monastic law and seventeenth-century commercial law principle of limited liability can be found in modern legal systems.

Keywords: limited liability, roman law, civil law, European legal culture, slavery.

Introduction

W.W. Buckland and A.D. McNair wrote in 1936: All this involves a conception of slavery very different from that to which we are accustomed. In this statement the authors prescind from the phenomenon of slavery as such and its negative manifestations from the social or humanitarian point of view, contemporary criteria for valuation. Both authors refer to the law and slavery that has accumulated around the institution of slavery, indicating its impact on local solutions in modern legal systems. Similarly, it is with a numerical determination of people to identify individuals, Universal Electronic System for Registration of the Population or tax identification, institution from other disgraceful experiments of mankind, i.e. the practices relevant to German death camps during World War II.

To the cultural heritage derived from ancient Roman slavery law, among others, we can bracket, the modern concept of representation of legal persons (art. 38 of the Civil Code), in other words

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* SWPS University of Social Sciences and Humanities.
1 Roman Law and Common Law, ed. 2, Cambridge 52, p. 28.
2 It is rightly repeated in legal doctrine, including Roman law doctrine, that one of the most shameful law institutions in the history of humanity is slavery. This opinion is all the more relevant in the context of the current restoration of the institution of slavery by the self-proclaimed Islamic state. Nevertheless, it does not mean that it should not discussed or described, the more so it overgrown in numerous doctrinal considerations and solutions also useful today. See H. Kupiszewski, Roman law and the contemporary, Warsaw 1988, p. 176 et seqq.
making and accepting declarations on behalf of various bodies, e.g. municipalities, cooperatives, residential communities, trade unions. However, the most important legal institution derived from the slavery law, which remained to the present days and is still widely used, is the concept of limited liability. This institution takes its origin from peculium, that is, the resulting solution based on separation of property under a certain weight from the property owner (dominus), entrusted to slave.

The object of this elaboration is to determine the pathways of the concept of limited liability of the debtor and its reception to modern legal systems. The aim is to demonstrate in the very narrow range the origins, continuity and the importance of this institution in contemporary legal culture. Undertaking this project is justified by the fact that despite the far-reaching technicality current law it is necessary to reflect on the process of development of the various legal institutions or specific solutions. Indirectly, the development will show another side of slavery in ancient Rome than this, which is commonly known from literature and films, namely, how the slavery law contributed to the development of European legal culture, not changing the negative assessment of the institution of slavery.

Peculium

Romans considering that all human beings are born free, and only on the basis of ius gentium some of them are free and other are slaves, sought through practical solutions to take advantage of their ability, among others, in terms of economic activity, thereby contributing to improve the situation, at least some of them3. Hence, they were used to carry out various legal actions as representatives of their owners. A definite step forward was the creation of the slaves the right to entrust them the management of separate assets called peculium and to develop a system of liability, which will be discussed in the next section.

The term peculium, according to Festus4 comes from the word pectus meaning cattle or animals in the herds or ungulates as cows, oxen, horses and sheep. Peculium therefore probably originally meant a dozen or so of ungulates hand over by owner to slave in management in order to develop in him more involvement in the performed work. It was a natural incentive to

3 Florent. 9 Inst. (D. 1.5.4 pr.-1): pr. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. 1. Servitus est constituitio iuris gentium, qua quis dominio alieno contra naturam subicitur.
4 Fest. de lingua Latina 75: P e c u s ab eo, quod `perpascebant': a quo pecora universa quod in pecore pecunia tum pastoribus consistebat, et standi fundamentum pes — a pede `pecudem' appellantur, ut ab eodem `pedicam' et `pedisequam' et `peculatoriae' oves aliudve quid: id enim `peculium' primum; hinc `peculatum' publicum primo ut s cum pecore dicetur multa, et id esset coactum in publicum, si erat aversum.
more efficiently slave's work and an opportunity to "buy" his freedom. It can be agreed with O. Jurewicz that originally peculium institution was established in rural relations (familiae rusticae), and then in urban areas relations (familiae urbanae)\textsuperscript{5}. Formation of this institution has been the subject of interest of many ancient writers, including Plaut\textsuperscript{6} who wrote about peculium, Lucius Columella\textsuperscript{7}, Marcus Varro\textsuperscript{8} or Cicero\textsuperscript{9}. Today, many Romanists and historians of antiquity still deal with the subject\textsuperscript{10}.

The best-known definition of peculium is that which has been provided by Pomponius, a Roman lawyer who lived in the second century AD.

Pomp. L. septimo ad Sab. (D. 15.1.4 pr.): *Peculii est non id, cuius servus seorsum a domino rationem habuerit, sed quod dominus ipse separaverit suam a servi rationem discernens: nam cum servi peculium totum adimere vel augere vel minuere dominus possit, animadvertendum est non quid servus, sed quid dominus constituendi servilis peculii gratia fecerit.*

The quoted excerpt shows that peculium was an estate separated by the owner from his own property. Peculium could not be considered if the things were given to the slave by the owner just for his maintenance. Neither, things given him for temporary usage had such a status e.g. in order to return some tools to the neighbor. We cannot talk about peculium also when the slave took some things or money from the owner's property, especially without awareness of his dominus.

From the above mentioned exemptions we can conclude that in order to create peculium there always had to be a clear instruction to an expression of the will of the ownership intended to establish whether the distinct the asset. Hence peculium established by dominus was sometimes called profectitia, like dowry given to daughter by pater familias. The Pomponius's text clearly shows that the establishment of peculium had to be made through the expression of the will of


\textsuperscript{6} Plaut has referred many times in his comedies institutions of slavery and peculium. A broader analysis of the his Comedies in this regard see O. Jurewicz, op. cit., 192-194.

\textsuperscript{7} Columella, *De re rustica*.

\textsuperscript{8} Var. *De re rustica* 1.1.10 n.

\textsuperscript{9} Cic. *De orat.* 1.249.

the ownership - ... *quid dominus constituendi servilis peculii gratia fecerit*. F. Serrao shows that in sources there are such phrases as *concedere* or *constituere peculium*\(^{11}\). Act of transferring separated components of the estate to slave was treated as a donation, which was counted to *obligatio naturalis*\(^{12}\).

*Peculii concessio*, expression of the will, was needed due to later legal transactions (*negotia*) with such a slave by third parties. In this way, the establishment of *peculium* to the slave became public information, and the very act of establishing became the beginning of the owner's liability based on a complaint *actio de peculio*, which will be discussed below.

On the other hand Quintus Aelius Tubero, a Roman lawyer and consul from the beginning of 11 BC., in a excerpt preserved by Ulpian, defined *peculium* in a different way.

\[
\text{Ulp. 29 ad ed. (D. 15.1.5.4): Peculium autem Tubero quidem sic definit, ut Celsus libro sexto digestorum refert, quod servus domini permissu separatum a rationibus dominicis habet, deducto inde si quid domino debetur.}
\]

According to Tuberon, things included in the *peculium* even though belong to the owner, were separated from his property, creating a distinct mass of assets. In the legal meaning *dominus* still owned *peculium*. However, in the economic sense *peculium* began to form a separate property, entrusted to the slave, to administer it. The most important thing in this definition is what Tuberon rightly pointed out that *peculium* is an estate caused by the separation of some tangible and intangible assets of the owner's property, but after deducting what a slave was in dept to his owner - ... *deducto inde a quid domino debetur*. This statement is so important that it determines in this way a limit of the owner liability on the basis of *actio de peculio* for acts carried out by a slave under the free board of the mass of assets entrusted to him\(^{13}\). This issue is, however, broadly addressed below on the occasion of the owner's liability under the *actio de peculio*.

Ulpian determined possible components of *peculium*, referring in this aspect to the Labeon's opinion.

\(^{11}\) See F. Serrao, *Impresa e responsabilità a Roma nell’età commerciale*, Pisa 1989, p. 62. *Peculium* could not be established by *impubes lub furiousus*. See Ulp. 29 ad ed. (D. 15.1.7.1); Cels. 6 dig. (D. 15.1.6); Ulp. 29 ad ed. (D. 15.1.3.3); Ulp. 29 ad ed. (D. 15.17.3). S. Tafaro, *Pubes e viripotens nella esperienza giuridica romana*, Bari 1988, p. 45 et seqq.

\(^{12}\) Paul. 4 ad Sab. (D. 15.1.8): *Non statim quod dominus voluit ex re sua peculii esse, peculium fecit, sed si tradidit aut, cum apud eum esset, pro tradito habuit: desiderat enim res naturalem dationem.*

According to Labeon, peculium consisted of movable property, real estate, and even slaves (servi servorum, servi peculiares, servi vicarii). There could also be included res incorporales e.g. receivables, claims for theft (actio furti), or other civil claims, and inheritance, legacies, donations made inter vivos or mortis causa, things data in favor of a slave with the consent of the owner. The peculium could include things that were the result of a slave's work, or saved things or money, i.e. from savings which they have obtained while realizing a specific project entrusted to slave by the owner. Using the modern language we can say that peculium was an estate of syntaxis tangible and intangible established by the owner in order to free management by a slave\textsuperscript{14}.

To create the peculium it was necessary the actual owner made a factual hand over of these things. Dominus, using brevi manu traditio institutions could also express the will as to make certain things that are already in the hands of a slave came to peculium. Items given to a slave, had also to be suitable for enlargement of the separated legally and economically part of the property. Such things were not such as clothes a slave, or his personal belongings. Thus, not without reason peculium term comes from the word pecus, or a four-legged animal, which by its nature reproduce.

The management of peculium - towards the empowerment of slaves

According to Gaius slave was counted among the category of material things that can be touched (res corporales), as well as land, clothes, gold and silver\textsuperscript{15}. Varro, in turn, defined slaves as instrumentum vocale unlike animals, which ranked among the instrument semivocale\textsuperscript{16}. Qualification of slaves to the category of res undoubtedly had an impact on their


\textsuperscript{15} G. 2.13.

\textsuperscript{16} Varron, Re risticarum 1.17: Quas res alii dividunt in duas partes, in homines et adminicula hominum, sine quibus rebus colere non possunt; alii in tres partes, instrumenti genus vocale et semivocale et mutum, vocale, in quo sunt servi, semivocale, in quo sunt boves, mutum, in quo sunt plaustra.
plight and objective treatment. This position was not changed by the fact the Romans took action to improve their fate\textsuperscript{17}. 

Separation of the asset made by \textit{dominus} from his property and to entrusting it to a slave (\textit{constituere peculium}) was an expression of the practical attitude of the Romans to the effective use of slaves who evinced some capacity in terms of economic activity. The assumption had entrusted their wealth to multiply it, like the proverbial evangelical ministers entrusted talents\textsuperscript{18}. If so, the following questions arise: how slaves managed the assets entrusted to the ground? what legal action could they take? and what the legal consequences were born by action made by slaves?

The first question concerns how to manage assets entrusted to slaves. Well, in literary sources there are models of a perfect slave. The slave should be honest, hardworking, trustworthy and have the capacity needed to perform certain tasks. By the assumption, slave should strive to expand the enlarged property. Ways to accomplish this task depended on the composition of the asset base. Otherwise, it looked for \textit{peculium} provided to the slave working on the land, e.g. entrusting him with herds of sheep or cows, and otherwise looked for a slave in the city, where he could get chattels, real estate and money. In the case of managing \textit{peculium}, slave could freely use its components independently of the will of the owner, with the tightening of the ban on his deduction\textsuperscript{19}.

The second question concerns the type of legal action that slave could make, as part of his \textit{peculium}. In fact, it’s about how to manage this asset of material and in such a way that it is enlarged. In the literature it is assumed that it was \textit{plena} or \textit{libera administratio}.

\textit{Ulp. 17 ad. Ed. (D. 6.1.41.1.): Si servus mihi vel filius familias fundum vendidit et tradidit habens liberam peculii administrationem, in rem actione uti potero.}

\textsuperscript{17} We can point to a number of limitations of the original dominus absolute power over his slave, known as \textit{ius vitae ac net}. According to Suetonius (Claud. 25) the cruelty of owner could cause obligatory sale of a slave. Vespasian forbade prostitution of slaves (Mode. D. 37.14.7). Over time, the separation of slaves families was introduced (C. 3.38.11). A child born of a slave who during pregnancy had a moment as a free person, was born free - \textit{favor libertatis} (IJ. 1.4, D. 50.17.20). Claudius authorized the release of slaves as a reward for saving the life of the owner or the discovery of his murderers (Marcianus L. Rule 5. 40.8.5). On the basis of the \textit{lex Petronia} a ban on the use of slaves to fight with animals (Modest. L. 6 rules. D. 48.8.11.2). Although there were cases of slaves feeding of wild animals kept for shows (Senec. Clemency 1.26.1; Suet. Calig. 65.70) Mt. 25.14-30. The Millennium Bible the word servant, while in Latin test was used directly the word servant. For Jesus clearly referred to the slaves peculium institutions entrust with the duty to reproduce.

\textsuperscript{18} Mt. 25.14-30. The Millennium Bible the word servant appears, while in Latin text the word servant was used directly. Jesus clearly referred to the slaves institution of peculium entrusted to slaves with the duty to reproduce.

\textsuperscript{19} See O. Jurewicz, \textit{op. cit.}, pp. 192-193.
The Ulpian’s text shows that slave analogous to *filius familias*, could freely dispose his assets. Permission (*voluntas*) to make legal action in relation to individual elements mass of assets received from *dominus* in the very fact of entrusting him *peculium*. Ulpian clearly indicates that slave could sell individual elements of *peculium*.

In view of the possibility of a fairly broad dispose of components of *peculium* by slave raises the question about the limits *libera administratio*? We can take as O. Robleda that *servus* could not diminish the value of the obtained estate. He was obliged therefore to keep for its owner the components of the assets or its equivalent, especially if they were expendable things. Therefore slaves featuring *peculium* were not able to make donations or make dispositions *inter vivos* or *mortis causa*. The slave could not spare one debt to *peculium*, provided, however, that in return his fortune gained something. If, however, forgiving debt by the slave did not lead to a makeweight property *peculium* is such action was not considered as valid.

In the end, it becomes necessary to answer to the third question posed at the beginning of the editorial unit, namely, what were the legal consequences of legal action (*nego*ti) made by slaves? The answer to this question requires first stop on a new and fundamental for us Ulpian’s text.

Ulpianus libro 43 ad Sabinum (D. 50.17.32): *Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.*

Ulpian clearly distinguishes two legal systems, which are separated from each other, i.e. civil law and natural law. In the first case the legal actions carried out by slaves did not entail any legal consequences. This solution was the result of enumerating slaves to categories of goods, as mentioned above. Such a position is repeated in many other sources.

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21 O. Robleda, *op. cit.*, pp. 75-76.
22 Ulp. 49 ad Sab. (D. 39.5.7 pr.): *Filius familias donare non potest, neque si liberam peculii administrationem habeat: non enim ad hoc ei conceditur, libera peculii administratio, ut perdat.*
23 G. 1 ad ed. provinc. (D. 2.14.28.2): *Si filius aut servus pactus sit, ne ipse peteret, inutile est pactum. Si vero in rem pacti sunt, id est ne ea pecunia peteretur, ita pactio eorum rata habenda erit adversus patrem dominumve, si liberam peculii administrationem habeant et ea res, de qua pacti sint, peculiari sit. Quod et ipsum non est expeditum: nam cum verum est, quod Iuliano placet, etiamsi maxime quis administrationem peculii habeat concessam, donandi ius eum non habere: sequitur ut, si donandi causa de non petenda pecunia pactus sit, non debeat ratum haberi pactum conventum. Quod si pro eo ut ita pacisceretur aliquid, in quo non minus vel etiam amplius esset, consecutus fuerit, rata habenda est pactio.*
24 Slave does not have any rights Paul. 11 ad ed. (D. 4.5.3.1): *… servile caput nullum ius habet.* Zob. Marcianus l. 2 Inst. (D. 48.10.7); Ulp. l. 43 ad Sab. (D. 50.17.32); Ulp. l. 1 ad Sab. (28.1.20.7). In economic relations: Ulp. l.
The second law is the law of nature. According to Ulpian in that normative order all people are equal - *hominès aequales sunt omnes*. Such a statement reflects Florentine’s view mentioned earlier, according to which all human beings are born free, and only by *ius gentium* people are divided into free ones and slaves. For this reason, in order *ius naturale*, legal actions carried out by the slaves had the same legal status as free men. From this point of view, after O. Robleda we can say about a gradual empowerment of slaves in Roman law. What indeed was reflected in its earlier order of Roman religion, which hardly existed as sharp division between free men and slaves²⁵.

How, then, from the domestic point of view explain the effectiveness of legal actions carried out by slaves as part of *peculium*? The starting point must be the fact that the tasks were categorized as *naturalis obligatio*, operations that never bore civil effects, but de facto recognition of their existence. Fulfilling the natural commitment by the slave or counterparty created real civil consequences, e.g. transfer of ownership to movable by its release - *traditio*. Thus can be seen that slave's exclusion from civil order mainly concerned the exclusion of the possibility of redress in civil proceedings by him or against him. We must, however, be aware that such a solution is closer to the modern concepts of legal and dogmatic than Roman law. It was therefore unnecessary to examine specific cases, even if only preserved the Digest, but this is no longer the subject of the study²⁶.

**Responsibility of dominus based on actio de peculio**

At this point we come to the substance of this work, namely to demonstrate that through establishing the institutions of *peculium* the limited liability of *dominium* was created for the obligations of a slave. For slave's legal acts, *dominus* could be liable on the basis of one of the

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²⁵ Slave had legal capacity in the area of religion, and so the owner could allow it to slave or made a promise religious - ULP. 1. Singul. de offs. curatoris rei publicae (D. 50.12.1.1), promised by oath - Ven. l. 7 actionum (D. 40.12.44 pr.). The place where he was buried slave became holy (*locus religiosus*), as well as the burial place of a free man: ULP. 25 ad ed. (D. 11.7.2) and ULP. 25 ad ed. (11.7.31.1). With the permission of their owners (*volentibus Dominis*) slaves can be members of religious associations (*collegia tenuiorum or funeratitia*) on equal terms with free - Marcianus l. 2 Judica. public. (D. 47.22.3.2). See L. Westerman, *The Slave System of Greek and Roman Antiquity*, Philadelphia, 1995, p. 108.

²⁶ According to O. Robledy we can talk about the negative protection of civil legal actions made by slave - *soluti retentio*. If a slave paid for goods or services, the creditor could not demand payment from the owner or from the slave after his possible liberation. IUL. 53 dig. (D. 46.1.16.4); Gaia. l. 2. Aureorum (44.7.10). See O. Robleda, op. cit., p. 91.
complaints belonging to the group of complaints known as *actiones adiectitiae qualitatis*. These were the following complaints: *actio tributoria, actio quod iussum, actio de in rem verso, actio exercitoria, actio institoria and actio de peculio*. In connection with the activities made by slave within the *peculium* Praetor gave the latter complaints, i.e. *actio de peculio*\(^{27}\).

*Dominus* responsibility for the legal activities of slave (*negoti*) made in connection with *peculium* entrusted to him was strictly limited to this particular mass property. It can be also said that the responsibility was attributed not so much to the owner of a slave, but to the weight of property, or even to different value of *peculium*\(^{28}\). This principle therefore diverged from *dominus* responsibility for the actions of a slave, when he worked under the command of the owner or manager of a slave owner established part of the property, but without separation, e.g. directing the tavern. In this case, the owner was responsible to the full extent of the damage with all his assets.

Rules of *dominus* liability for slave's *negoti* made in connection with *peculium* was perfectly described by Gaius.

Gai. Inst. 72: *Praeterea tributoria quoque actio in patrem dominumue constituta est, cum filius seruusue in peculiari merce sciente patre dominoue negotietur; nam si quid eius rei gratia cum eo contractum fuerit, ita praetor ius dicit, ut quidquid in his mercibus erit, quod inde receptum erit, id pater dominusue inter se, si quid debebitur, et ceteros creditores pro rata portione distribuant et si creditores querantur minus sibi distributum, quam oporteret, in id quod deest hanc eis actionem pollicetur, quae ut diximus, tributoria uocatur.*

According to Gaius, slave could make legal actions, as part of his *peculium*. It was assumed that these operations were carried out with the knowledge of the owner. Awareness about the actions of a slave owner was an implicit and resulted to the creation of *peculium*, or consent to make an block legal actions in respect of components of *peculium*. On the *dominus* side therefore there was no need to be aware of making a particular activity by the slave. What's more, he could do the appropriate legal actions with its own slave.

The basic rule for payment of creditors with *actio de peculio*, was the one according to which the owner could not satisfy his claims before creditors. He had to take into account the claims of the slave's creditors on a par with his - *id pater dominusue inter se, si quid debebitur, et*

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\(^{27}\) Reconstruction of the complaint on the basis of Gaius institutions was made by O. Lenel, Das Edictum Perpetuum, ed. resumed, Aalen 1985, p. 279.

ceteros creditores pro rata portion distribuant. A separate, but necessary thing was calculating the value of peculium, and thus determining the amount to which the dominus could take the responsibility. But this issue is no longer within the scope of our discussion.

Limitation of liability of the owner for the value of peculium, which certainly had already taken place at the time of Plautus\(^29\), was a clear and logical departure from the principle of liability of the debtor with all his fortune. Consequently, the owner was not a subject to extremely severe executions carried out on the basis of venditio bonorum, so the auction of all the assets, including incurring a penalty infamy. Therefore, it was possible to bring an actio de peculio even if peculium did not have any value. Owner was released from liability for the slave's obligations, which led to desolation peculium\(^30\).

Limitation of liability in civil law - contemporary traces of Roman institutions

In modern legal systems, despite the rejection of slavery, the principle of limited liability is commonly used not only the debtor, but also the heir of a shareholder, the shareholder, the board and officials. They are responsible for a limited amount, circled by the value of the pledge or mortgage stake in the company, the value of shares, the value of the inheritance or some average salaries.

The creation of the peculium institution in Roman law by excreting a separate property allowed in later centuries, firstly to produce, often anecdotal cases of limitation of liability and later to move to the concept of limited liability. Already in Roman law, Justinian introduced the institution of the benefit of inventory (benefice inventari), so that connection with the mass of the estate's assets of heirs does not occur. He limited his liability for the debts under the succession only up to the value of the estate\(^31\). The creation of such a concept was possible thanks to the possibility of separating the masses of separate property with a separate regime of responsibility, just as it was in the case of peculium.

The principle of limited liability has been used in the fifteenth century in monastic England. Monks' responsibility for obligations was limited to the asset base of a religious house, not the entire order as such or as it is currently in corporations. The various religious houses gradually gained the same legal entity, although it remained in the community of the same order.

\(^29\) See O. Jurewicz, *op. cit.*, p. 194.
Likewise, modern corporations are organized similarly, having organizational and economic uniformity, but individual components are independent legal existence. In the seventeenth century, the limited liability was seen as a privilege of forming the companies, including so it was in the case of the East and Hudson campaign\textsuperscript{32}.

The principle of limited liability came to the legal system for the first time in 1811 in New York, and then in 1855 in England on the basis of Joint Stock's Companies Act. But we should keep in mind that the application of this principle in corporate law even in the nineteenth century aroused negative evaluation. It was believed that it is not ethical that creditors left without what they rightly should have\textsuperscript{33}.

The modern concept of limited liability is important for the relationship which exists between creditors (claims) and debtors (debt), e.g. the responsibility of a mortgage or lien, or shareholders (shares in LLC) (art. 151 § 4 of the Commercial Companies Code)\textsuperscript{34} or shareholders (shares) (art. 301 § 5). Limitation of liability also applies when a limited partner, who is liable only up to the amount of commendams sum (art. 111 CCC)\textsuperscript{35}. It can also be applied in the law of succession, by limiting the liability of the heir to the value of the estate (art. 1012 Civil Code). The common denominator for all these cases is to separate assets under a certain weight or the amount for which liability is limited to the debtor's heirs, shareholder.

With the concept of limited liability, increases the risk of creditors who need to factor it in the cost of the activity carried out by them. In order to reduce this risk, the legislator has been making efforts for a long time for statutory guarantee of assets and financial debtor or a limited liability of company or a joint stock company. Information instrument about the financial health of companies and other possible risks for contractors is the National Court Register. Unavoidable duty of updating any data, especially in capital companies arises from the art. 5 Code of Commercial Companies. The same contractor, which is a potential creditor is required before the transaction to verify the financial and legal situation of the company. It cannot then


\textsuperscript{34} Commercial Companies Code provides for situations when shareholders may also be liable for the liabilities of his assets.

justify ignorance e.g. the fact of bankruptcy when it was entered in the register. This risk is difficult to mitigate in the case of inheritance, where it is not possible to predict the moment of principal's death.

Limited liability is one of the basic features of modern corporate law. As F.H. Easterbrook and D.R. Fischel\textsuperscript{36} claim, limited liability is extremely desirable for economic reasons, especially for the further development of the corporation. In turn, R. Cooter and Th. Ulen write that the concept of limited liability led to the separation of ownership from control\textsuperscript{37}. Investors and shareholders are not interested in the company's control, ways in investment by managers, but they are interested in the way how to reach a profit on the invested capital. This kind of construction is possible thanks to previous experiences and legal solutions derived from the law of slavery, which was peculium.

Conclusion

It is generally accepted that the Roman law has significantly contributed to the development of modern legal culture, as European and Anglo-Saxon, especially in the so called private law. One of the signs of modern solutions referring to the Roman law is the concept of limited liability. It is derived from the solutions developed within the framework of the so called slave law, which rules on the functioning of one of the most infamous institution in human history, that is slavery. The paradox, however, is that, slave law allowed the initiation in the classic period and period of codification such important for us legal institutions.

The beginning of the concept of limited liability is associated with \textit{peculium}, and therefore with the separation of the mass from the property and transferring it to a slave in the free management - \textit{libera administratio}. The slave has received the consent of his \textit{dominus} to make legal transactions (\textit{negoti}) so that the property be increased or to increase the \textit{dominus} assets. Legal actions executed by a slave had natural character but were not civilly recoverable. That moment connected with the lack of civil responsibility made by a slave for legal action in connection with \textit{peculium} could be overcome by creating an Praetor's \textit{actio de peculio}. On the basis of this complaint, \textit{dominus} was responsible on the base of presumed consent for making this activities at the moment of establishing \textit{peculium}. \textit{Dominus} was liable only up to the value of \textit{peculium}.

Through medieval monastic law and seventeenth-century commercial law principle of limited liability can be found in modern legal systems. We can find this principle in civil law (pledge, mortgage, inheritance with benefit of inventory), but also in commercial law, e.g. the responsibility of shareholders limited to the invested amount, without the risk of losing their own property. In this way, the concept of limited liability led to the separation of ownership from control. Investors and shareholders are not interested in the company's control, ways of investing by managers, but they are interested in reaching profits on the invested capital.