FORUM PRAWNICZE

ISSUE 6 (74)
2022

Table of Contents

Submission

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

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

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

We kindly ask all interested in having their texts published in Forum Prawnicze to attach to their submission a short biographical note (name and surname, degrees and titles, academic achievements, positions held).

All documents should be send to e-mail address: redakcja@forumprawnicze.eu

Texts submitted to Forum Prawnicze will be a subject to the blind review process, results of which will be the basis for the decision regarding the eventual publication of the texts.

Exception from the rule above is made for the polemics, statements, reports, obituaries and the texts prepared by the editorial board (editorials, interviews and reviews of case law).

FORUM PRAWNICZE

Issue 6(74) | 2022
Published every two months
ISSN: 2081-688X

OWNERS OF THE JOURNALS TITLE

Uniwersytet Jagielloński
ul. Gołębia 24
31-007 Kraków

Fundacja „Utriusque Iuris"
ul. Majdańska 7/74
04-088 Warszawa

EDITORIAL OFFICE ADDRESS

Fundacja „Utriusque Iuris"
ul. Majdańska 7/74
04-088 Warszawa
www.forumprawnicze.eu
redakcja@forumprawnicze.eu

Free Credit for All?

Court cases sometimes arouse great emotions. For several years now, emotions have been running high in Poland with regard to cases concerning mortgage loans denominated in or indexed to the Swiss franc (CHF) to consumers seeking to purchase a flat or a house. Following the rulings of the Court of Justice of the European Union, the Polish courts assumed that "after finding that certain terms of a loan agreement indexed to a foreign currency and subject to an interest rate directly linked to the interbank rate of the currency concerned are unfair, from taking the view, in accordance with its domestic law, that that contract cannot continue in existence without those terms because the effect of their removal would be to alter the nature of the main subject matter of the contract".[1] The settlement between the bank and the consumer after a loan has been declared void has raised further questions. Among them is the question of whether banks can claim back from a former borrower for the use of money received from the bank to which they had no legal title because the contract was declared void. Emotions have been fired these days by the Advocate General's opinion in Szcześniak v. Bank M. S.A. According to this opinion, the bank is not entitled to restitution by way of the benefit obtained by the consumer from the use of the bank's money without legal title, because, "should a bank suffer any disadvantage following the annulment of a mortgage loan agreement containing unfair terms, it should not be compensated for that disadvantage since it arose as the exclusive result of its own unlawful conduct".[2] Already the day after this opinion was announced, the Chairman of the Polish Financial Supervision Authority stated that "granting consumers a multi-year, 'free credit' - will have dramatic consequences from the point of view of the stability and security of the financial market".[3] Underlying this game of emotions and economic concerns is the historical argument used by the Advocate General. Crucial to the Advocate General's reasoning was his reliance on "the generally accepted legal principle *nemo auditur pro-*

1 Judgement of 3rd October 2019, Dziubak, C-260/18.

2 Opinion of the Advocate General, Szcześniak, C-520/21.

3 https://www.knf.gov.pl/komunikacja/komunikaty?articleId=81171&p_id=18 (18.02.2023).

priam turpitudinem allegans, a party cannot derive any economic advantage from a situation it has created by its own unlawful conduct".[4] To the discussion of the Advocate General's opinion, one can add the question of whether the origin and history of the medieval maxim used by him supports the conclusions reached in his opinion. I believe that the historical extension of the legal argument shows a simplification in the Advocate General's understanding of the maxim. Editorial is not the right place to present the history of the maxim I was concerned with.[5] However, by taking this issue of *Forum Prawnicze* in which there are several texts referring to legal experience, I want to draw attention to the usefulness of thinking about the law in this way. Emotions about mortgage loans denominated in or indexed to the Swiss franc make the maxim *nemo audiatur propriam turpitudinem suam* used by the Advocate General a good example. From a historical and comparative perspective, I see simplifications in this application of the maxim. Firstly, it is worth recalling that it was introduced in the 14th century by Bartollus de Saxoferrato as a justification for the narrowly applied exclusion in Roman law of the restitution of unjust enrichment to one who acted with a wicked purpose.[6] Secondly, in unjust enrichment litigation in the pre-codification period, the maxim was linked to the question of whether the claimant was making good use of their right.[7] Thirdly, the departure from the Roman approach to unjust enrichment in codified French law has made the maxim a criterion applied flexibly by the courts, sometimes justifying, for reasons of good morals, the exclusion of the return of what was delivered under a void contract.[8] The flexible approach to the maxim was not changed by the modernisation of the French Civil Code in 2016. Historical experience argues in favour of a rather restrained, flexible application of the maxim *nemo audiatur propriam turpitudinem suam* in cases where it is shown that restitution of unjust enrichment would be contrary to good faith. The traditional understanding of good faith referred to three values: to live honourably, not to harm any other person, and to render to each his own.[9] According to this way of thinking, restitution of unjust enrichment would be contrary to good faith, once it is shown that the principle to live honourably clearly takes precedence over the principles not to harm any other person and to render to each his own. The General Advocate's maxim-based reasoning does not consider and, consequently, does not convincingly resolve this conflict of values. Moving to this level of discussion on 'free credit' for consumers would also broaden the field of evaluation of the arguments of the chairman of the Polish Financial Supervision Authority, who opposes the opinion of the General Advocate and refers to the values protected by the financial market regulator. It is worth talking about what values the law should protect and how they should be protected. The articles published in this issue proffer new examples of how a broader historical and comparative view of the law helps one to see and understand it.

I invite you to read this issue of the Law Forum in English. In announcing the organisational changes of the "Forum Prawnicze" in 2023, I offer my sincere thanks for the ten years in which I have led the journal.

Wojciech Dajczak

4 The opinion of Advocate General, Szcześniak, C-520/21.

5 W. Dajczak, *L'arricchimento ottenuto mediante una prestazione per uno scopo contrario alla legge o ai buoni costumi. Una prospettiva storico-comparatistica*, in: S. Patti, L. Vacca (eds.), *Studi in memoria Berthold Kupisch e di Paolo Maria Vecchi*, Napoli [Jovene Editore] 2019, 85–105; W. Dajczak, Świadczenie niegodziwe – trudne dziedzictwo rzymskiej inspiracji, "Studia Iuridica", 72 (2017), 113 – 131.

6 Bartolus de Saxoferrato, *Commentaria*, 1516, (reprint, Roma, 1996), Vol. II, 42

7 H. Zoesius, *Commentarius ad Digestorum seu Pandectorum Iuris Civilis*, Lovanni 1656, s. 288; M. Wesenbeck, *Commentarii in Pandectas Juris Civilis et Codiem Justinianeum olim dicta Paratitla*, Amstelodami 1665, 244; J. Brunnemannm, *Commentarius in Pandectas*, Vol. I, Lugduni 1714, 433.

8 H. Honsell, *Die Rückabwicklung sittenwidriger oder verbotener Geschäfte*, München [C. H. Beck] 1974, 130; F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, Paris [Dalloz] 2002, 421–422 and 1003.

9 D.1,1,10,1.

Juan Carlos Riofrío

The Natural Law Formula and the Missing Link: Tracing and Updating Aquinas' Methodology

Juan Carlos Riofrío

Associate Professor at Strathmore University. Professor at Universidad Hemisferios. Lecturer of Jurisprudence and Human Rights at Strathmore University (Nairobi, Kenya) and fellow of the Center for Studies of Law and Religion (CSLR) at Emory University (Atlanta, US).

✉ jcriorio@strathmore.edu

https://orcid.org/0000-0003-4461-1025

Research dedicated to natural law usually analyzes the same commonplaces to deduce natural rules and natural rights. Recurrently it focuses its attention on some specific elements of reality (e.g., the human being, its possibilities, inclinations, and goods) in order to assess what should be achieved (e.g., happiness, the ultimate end, or human flourishing) and how it can be done. Observing how it proceeds, what kind of methods guides it, we discover that it connects these elements following similar patterns. The connection of these elements, as variables in a formula or links in a chain, is called here "the Natural Law Formula." The first chapters explain the nature of the eight links of the chain and how they are intrinsically connected. It means that if we change one variable, the whole equation will change producing different results. The last chapters show how the formula can be used to arrive at several natural law conclusions. Works of the most influential natural jurists are reviewed, and those of Aquinas, where almost all the puzzles of the formula were completed and fit tightly together. Some mentions of human rights discourse, evolutionary biology, axiology, and other recent sciences that did not exist centuries ago are included.

Key words: legal realism, natural law, human rights, axiological hierarchy, teleological hierarchy

https://doi.org/10.32082/fp.6(74).2022.1070

1. Introduction

Every method is a road that takes people from one specific place to another. From the historical method of Savigny we can only reach the historical school; from the Pure Theory of Kelsen we can only arrive at positivism; and from the Rawlsian veil of ignorance we can only deduce some adjudication guidelines of things that appertain to everyone. If we hope to reach a deep understanding of natural law, the first thing to do is open the epistemological map and look for the roads that lead us to our desired destination. Immediately we will find that there is no single path, but multiple possible ways used by many authors during the last three thousand years. However, the bulk of traffic seems to be concentrated in one large, wide highway that crosses several points.

Although I am not planning to do a quantitative analysis here, some data can give us an overview of the matter. In a big data research on HeinOnline conducted in October 2021, we found 79,040 papers that mention "natural law" and 1,341 that included both words in the title. In this last group, an occurrence of word analysis was made in the most cited articles. After filtering irrelevant data (pronouns, adverbs, quantifiers, conditional, and other generic words), the one hundred most repeated words were the following:

TABLE 1. Words most repeated in the 111 most influential articles about natural law

n°	Word	Occurr.
1.	law	17403
2.	right/s	11130
3.	natural law	9933
4.	moral/ly-ity	5766
5.	constitution/s-al	5474
6.	court/s	5133
7.	legal	4692
8.	theor/y-ries	4639
9.	natural	4262
10.	state	4030
11.	human	3993
12.	principle/s	3749
13.	justice	3644
14.	reason/s-able-ing	3639
15.	good/s	3296
16.	nature	3129
17.	property	2910
18.	power/s	2876
19.	rule/s	2824
20.	government/s-al	2741
21.	judge/s	2465
22.	public	2402
23.	laws	2240
24.	people	2171
25.	positiv/e-ism-ist	2155
26.	individual/s	2153
27.	judicia/l-ry	2042
28.	politic/s-al	2025
29.	person/s	1886
30.	fact/s	1755
31.	decision/s	1746
32.	value/s	1699
33.	social	1698
34.	being/s	1696
35.	claim/s	1686
36.	life	1673
37.	necess/ary-arly-ity	1642
38.	doctrine	1629
39.	action/s	1570
40.	society	1567
41.	cases	1557
42.	philosoph/y-ical	1533
43.	order	1521
44.	citizen/s/hip	1503
45.	dut/y-ies	1485
46.	tradition/al	1445
47.	statut/e-es-ory	1440
48.	legislat/ure-ive	1376
49.	nation/s-al	1338
50.	authority	1326
51.	equal/ity-lly	1313
52.	liberty	1293
53.	just	1285
54.	international	1270
55.	interest/s	1211
56.	purpose/s	1192
57.	interpretation	1185
58.	need/s	1185
59.	subject/s	1172
60.	contract/s	1160
61.	end/s	1152
62.	process	1126
63.	argument	1085
64.	norm/s	1078
65.	free	1075
66.	means	1070
67.	history	1067
68.	Aquinas	1030
69.	freedom	1029
70.	jurisprudence	1027
71.	force	1000
72.	judgment/s	972
73.	meaning	964
74.	trust	948
75.	obligation/s	931
76.	sovereign/ty	918
77.	copyright	913*
78.	Finnis	912
79.	belie/f-ve	892
80.	Locke	883
81.	protection	879
82.	idea	848
83.	intent/ion/s	835
84.	religio/n-us	830

85.	private	816
86.	economic	815
87.	practical	795
88.	relations/hip	790
89.	understanding	780
90.	Fuller	737
91.	fair/ness	736
92.	community	729
93.	ethic/s-al	722
94.	congress	704
95.	Dworkin	691
96.	practice	676
97.	[J.] Wilson	649**
98.	respect	622
99.	self-defense	620
100.	legislation	618

Source: Self-created table with data taken from HeinOnline on October 6, 2021.

Notes: Papers offered by HeinOnline with more than ten citations were selected, in total 111. One article that did not contain a proper investigation into find natural law was not selected. Occurrences of words with the same root and meaning were merged: for example, "right" with 4246 occurrences and "rights" with 6884 occurrences were merged in "right/s" with 11130 occurrences.

* "Copyright" had 1024 occurrences. We did not count the 111 times in which the word was not part of the article.

** "Wilson" had 681 occurrences, but not all of them are from James Wilson.

This data gives an idea of where the natural law discussion is centered nowadays, who are currently the most influential authors, and what sort of arguments they tend to have. Today, the most cited authors related to natural law who appear in Table 1 are six, in order: Aquinas, Finnis, Locke, Fuller, Dworkin, and Wilson one of the drafters of the U.S. Declaration of Independence. We can appreciate how the natural law debate has been slightly displaced from the abstract medieval analysis to a more concrete scrutiny of "moral rights" (words that are among the top four of Table 1) and rules (related to constitutions, courts, property, government, judges, laws, judiciary, cases, process, judgments, legal relationships, congress, and legislation, in that order). Table 1 also shows some of the most recurrent arguments used to justify natural law: morality and ethics, human nature, principles, justice, reason, goods, laws, facts, decisions, values, necessity, traditions, liberty, and freedom, needs, ends, force, religion, and respect. However, this list of words only provides a general glimpse of the topic.

In addition, in another project in which I spent twenty years[1] I have traced the way in which hundreds of authors have arrived at their conclusions in natural law. "Human nature," "reason," "principles," "goods," "ends," "powers," and "values" were some of the most common starting points to bring up natural law and natural rights,[2] which coincides with the previous list of occurrences. On the contrary, other elements such as local traditions, culture, customs, or religion were less frequent.[3] The most interesting part of these essays, at least for our purposes here, is how they link these commonplaces, how they deduce principles from inclinations or shape the common good from human ends. In this article we will examine the eight most important commonplaces used by these authors and

1 This project is aimed at producing a natural law summary or code, a systematic exposition of what is reasonable and does not need legal approval from the authority in each branch of law. For information, *see* Juan Carlos Riofrio, "CIN Codex Iuris Naturalis," (Dec. 1, 2023), accessed 20.02.2023, https://jcriofrio.wixsite.com/codex.

2 Gahl draws a general overview of the natural law traditions at Robert A. Gahl Jr., "Natural Law Approaches to Comparative Law: Methodological Perspectives, Legal Tradition and Natural Law," *Journal of Comparative Law* 8 (2013): 179. All elements mentioned above appear there.

3 Giovanni Ambrosetti, "Christian Natural Law: The Spirit and Method Of," *American Journal of Jurisprudence*, vol. 16 (1971): 290; Jonathan Jacobs, "Judaism, Natural Law and Rational Tradition," *The Heythrop Journal* 8 (2013): 166; Hu Shih, "The Natural Law in the Chinese Tradition," *Natural Law Institute Proceedings*5 (1953): 117; Daisetz T. Suzuki, "The Natural Law in the Buddhist Tradition." *Natural Law Institute Proceedings* 5 (1953): 89; M. S. Sundaram, "The Natural Law in the Hindu Tradition," *Natural Law Institute Proceedings* 5 (1953): 67. On the occurrences list the respectively closet words related to one specific religion are "Christian" and "Catholic" repeated 381 and 333 times; they are not in the 100 most repeated words. Notwithstanding the validity of these approaches, we will not consider them owing to their less common use.

how they connect them. By joining these links a *chain* will appear or, even better, a *formula* will arise where if we change the meaning of one variable, everything else will change. This is the so-called "Natural Law Formula."

Instead of a quantitative analysis, we will do here a qualitative investigation. Otherwise, we will miss the most critical aim of this study: that is to say, to see how authors deduce natural law conclusions connecting the different commonplaces or elements of natural law.

Today, the most cited authors related to natural law are: Aquinas, Finnis, Locke, Fuller, Dworkin, and Wilson (one of the drafters of the U.S. Declaration of Independence).

After examining their remarkable works, one author especially stood out: the most complete methodology, which includes the analysis of most abstract elements and many particularities of reality as such, was found in Thomas Aquinas. Not in vain is he still today the most cited author on natural law. For this reason, we will follow more closely his way of argumentation.

Thomist followers regularly use a similar approach, although they often overlook some elements deeply explored by their master. Perhaps the most disregarded component of Aquinas' methodology is the explanation of how potencies (powers) work on human nature, defining inclinations, goods, and ends of the individual. "Potency" was one of the most noteworthy discoveries of Aristotle and a crucial notion for Aquinas, that their followers will miss. Practically the metaphysical notion of "powers" hardly appeared in the 111 most influential articles about natural law.[4] This is undoubtedly the missing link of the formula that we will try to recover in the following lines.

Nevertheless, Aquinas was a man of his time. In the thirteenth century economics, human rights, axiology, and evolutionary biology did not exist as autonomous sciences. It was simply impossible for him to include a treaty of human rights in the Summa Theologica, or to develop a theory of values following Hartmann's schemes. At the same time, we should take care not to interpret his words according to our current understandings. For instance, while today "inclination" is an ambiguous notion with different meanings in psychology, sociology, and anthropology, for Aquinas it was a technical word with a deep metaphysical sense related to the appetitive powers.[5] If Thomas Aquinas had lived today, he would probably have used some technical notions that did not exist eight centuries ago. This necessary update is the main task of contemporary Thomism.

This paper is devoted to delineating the variables of the formula, the commonplaces where natural law authors have centered their attention, and to examining how these links work together in a single chain. As it is impossible to cite hundreds of authors every time, we will track the most renowned names (especially the six most cited authors mentioned in Table 1), not to explain their whole cosmovision, but only to show how they link some elements of the formula. From now on, I apologize for an occasional quick review of some of their points of view. Although I can eventually express my opinion on their positions, my main aim is to clarify how the formula operates, not to critique or validate anyone.

4 The "potency" or "potencies" (as human powers) did not appear at all in the 111 most cited papers on natural law. A peripheral mention of "human power/s" (11 occurrences) and "power of reason" (5 occurrences) appeared without further explanation. Normally "power/s" (2876 occurrences) is used in the legal sense.

5 We will deal with this notion in Chapter III.2.

2. Synthesis of the Natural Law Formula

The complete quest to find natural law content can be summarized in five concise questions that ordinary people usually consider in solving their moral and legal issues: *What is this reality? What really matters here? What should be achieved? How? When and where?* Imagine that we are living in Wuhan in early 2019, where many cases of severe pneumonia are spreading very quickly. The first thing that we will do is examine what is happening, what is the cause, and the odds of being infected. One day we hear that the Wuhan Institute of Virology announced that there is a new virus, very contagious with high rates of fatality, called Coronavirus-19. Now at least we know *what this reality is*, although multiple questions will ensue. In medical issues *what really matters* is obvious: to save our lives and health. Intuitively we will conclude: life and health *should be* protected. But *how*? How can they be protected? Nobody knew very well what to do at the beginning of the crisis. Some individuals began wearing masks and parents kept their kids away from those who were coughing, fulfilling their parental duties according to their conscience. Soon the authorities realized that Wuhan was facing a crisis and tried their best, tackling the first cases even with an excess of force. As the virus was spreading everywhere, legal measures became stronger: social distancing, restrictions on the media, lockdown were imposed, first in China and then in other places.

This natural method used by common citizens to deal with moral and legal cases has been perfected and systematized by scholars since antiquity. More or less, the argument goes as follows:

1. It all begins by trying to understand *reality* as much as possible: what is the human being, its properties (*e.g.*, life, health, identity, and mortality) and possibilities (*e.g.*, to smell, see, move and know)? The same question applies to animals, things, the environment, and other parts of reality. An analysis of the human powers, their objects, and inclinations should be made here.

2. After solving the previous questions, it is possible to deduce what things are "good" for each being: some wavelengths from 380 to 700 nanometers are good for the human eye, and certain sounds in a frequency range from about 20 Hz to 20 kHz are good for our ears. However, a virus that kills or changes the sense of smell, sometimes irrevocably, is not good for our nose.

3. With an idea of what is good in mind, the will feels a particular inclination to it. When we see, hear or eat reality, we provide it with a personal meaning making it part of our life project. For example, a reliable vaccine would have enormous value in a society with a high fatality rate due to a certain virus, and medicine is equally considered something very valuable for sick people.

4. When things become "valuable" and "good" to us, we consider them as ends to be achieved. The first ethical and legal principles arise at the same time: a simple affirmation of what is good (*e.g.*, *pro homine*, *pro liberty*, *pro health*), which contains an implicit negation of the contrary. This is the meaning of the phrase *good is to be done and pursued, and evil is to be avoided*.[6]

5. After clarifying what should be achieved, the question of the means arises. How can the ends be reached? We are well aware that our time and resources are limited, and that not all ends deserve the same efforts to achieve them. That is why we do not pay the same price for every product on the market. Without a doubt, life and health should be protected firstly because without them we cannot eat and digest food. At a certain point we distinguish some means that are necessary to reach the main ends (*e.g.*, healthy food, clean air, medicines for illness) and we will prioritize them in our mind. Sometimes these priorities will appear as rules to follow or as rights to be respected.

6. Now, the intellect shows two things to the will: what should be achieved and some possible means to that end. The will is aimed now at adopting one option, creating a positive rule: a legal law if that is the will of the authority. Laws are created to achieve human goods, to fulfill the first principles of law and

6 St. Thomas Aquinas, *Summa Theologica*, I-II, q. 94, a. 2, trans. Fathers of the English Dominican Province, 1920–1922, hereafter be referred to as S.T. An excellent explanation of this principle appears in Germain G. Grisez, "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1–2, Question 94, Article 2," *Natural Law Forum* 10 (1965): 168.

practical reason (*pro homine*, *pro libertate*, *pro health*, *good is to be done*) and to choose among the means that we understand are possible to be adopted. If we do not have a medicine to cure Coronavirus, that is not an option.

7. Finally, the specific circumstances should be taken into account. The reasonability of the measures against Coronavirus was different at the beginning of the pandemic, when nobody knew how to deal with the virus, than after one year of research on the topic. Particular cases deserve particular policies. Personal perceptions, traditions, needs, and certain conditions must also be considered when making the overall moral and legal analysis.

In this way, by comparing our circumstantial choices with our understanding we test the morality, validity and legality of our actions.

We can distinguish the key elements of the argument. First, there is the study of reality: the being of all things, their potencies, and inclinations, as well as the objects that are good for them. Second is the investigation of personal understanding: what we consider valuable, first principles of reason, and some conclusions about rules and rights. Third is the inspection of human decisions. Finally, everything is considered under some specific circumstances. Connecting sequentially these elements we obtain the formula:

> Being – Potencies, objects, and inclinations – Goods and values – Ends and means – Principles – Laws – Rights – Personal relationships, cases and circumstances.

All these variables are naturally interconnected in such a way that, if we modify one, the whole equation will change. If there is no Coronavirus or if its fatality rate is inferior to the common flu, the lockdown, social distancing, and strong vaccination measures will make no sense. If we have no idea how to deal with a crisis, the level of reasonability of measures could decrease, and the use of some unproven means might be more acceptable. The next Chapter explains how these links are intrinsically connected.

Connecting sequentially these elements we obtain the formula: Being – Potencies, objects, and inclinations – Goods and values – Ends and means – Principles – Laws – Rights – Personal relationships, cases and circumstances.

3. Eight links of the chain

Almost all elements of the formula appear in Table 1.[7] Almost all, except those of the second link: the potencies, objects, and inclinations.[8] We will explain now how these elements are linked, following closely the methodology used by the most influential authors.

3.1. Being (reality)

Let's begin with the first metaphysical experience that every person has in life. When babies are born, they open their crossed and bleary eyes. After the darkness of the womb, the world is too bright, and everything

7 These words appear in Table 1 explicitly: "being" (place 34), "goods" (place 15), "values" (place 32), "principles" (place 12), "ends" (place 61), "means" (place 66), "laws" (place 23), "rights" (place 2), "cases" (place 41), "relationship" (place 88). There are other words related to some notions, like "human" (place 11) and "nature" (place 16) with the notion of being. "Circumstances" only has 383 occurrences.

8 *See* note 4 above.

is blurred; the objects they can see best are between 8 and 10 inches from their faces. With time they will learn to focus their pupils. They perceive that there *is* something. After learning how to align their pupils, they will distinguish shapes, colors, and depth better, and they will be able to trace different objects. That is how humans grasp knowledge. Technically, "the first thing conceived by the intellect is being; because everything is knowable only inasmuch as it is in actuality."[9] Focusing our attention, little by little the eyes of the face and the eyes of the soul will pass from generic and blurred knowledge to a very defined, clear, and deep one.[10] As an ancient Roman philosopher said, "brains avail when the mind is attentive."[11]

The whole scientific effort follows a similar process. "Being implies the habitude of a formal cause."[12] While metaphysics is interested in what is in act, *habitude*, and existence, the other sciences will "cut"[13] progressively into pieces the multiple forms of reality to investigate them. Ophthalmology will "cut" the eyes to see what a healthy eye is, biology will "cut" the living things of the universe to understand corporeal life, and ethics will "cut" human actions to determine how to achieve happiness.

The importance of focusing on being in any analysis of natural law cannot be emphasized enough. Being determines everything: the nature of things, their potentialities, actions and ends, what is good, and what we know about reality. The nature of things is principally constituted by the forms that habitually exist in act. Mere potency (pure matter) is a working hypothesis that has never existed; potency is always a potency "of something or someone" that is in act—only what is in act can act, actualize, create, enlighten or move things (active powers) or receive some actualization from outside (passive powers). The greater the act, the greater the power. Things beyond each nature, beyond its potentialities, cannot be ends of that nature. Hence, the potentialities of what is in act mark the ends of things and what is "good" for each being.[14] And "everything is knowable so far as it is in act, and not, so far as it is in potentiality."[15] Only actual light can illuminate our eyes.[16] Scientific theories and hypotheses are constructed on things known, trying to understand them better. All scientific research struggles to grasp reality, as much as possible.

Strictly speaking, there cannot be any sort of method of natural law that does not take into account reality and its forms (that is to say, being and its nature). Any "method of natural law" that deserves the name must dig into reality as much as possible, and work with essential inputs from metaphysics, medicine, psychology, cosmology, and other sciences. For example, no experimental science can operate without the principles of non-contradiction or causality. Indeed, any non-idealistic approach to morality and the law

9 S.T. I, q. 5, a. 2, where Aquinas adds that "being is the proper object of the intellect, and is primarily intelligible; as sound is that which is primarily audible."

10 According to Aristotle, "a child begins by calling all men father, and all women mother, but later on distinguishes each of them" (Physics, I, 1). For the works of Aristotle we use the revised Oxford translation, *The Complete Works of Aristotle*, edited by Jonathan Barnes, 1991. Aquinas explains that it is "because he who knows a thing indistinctly is in a state of potentiality as regards its principle of distinction; as he who knows 'genus' is in a state of potentiality as regards 'difference'" (S.T. I, q. 85, a. 3).

11 Sallust, *Conjuration de Catilina*, trans. Joseph Roman, 1924, c. 51. It means that the intellect is strengthened where the mind focuses its attention.

12 S.T. I, q. 5, a. 2, ad 2. The being has many dimensions. The merit of the Greeks was great for having arrived at certain crucial concepts, such as substance and accidents, act and potencies, habits and second acts (actions). However, they did not go beyond the "essence," in the "mode of being" of things. The philosophical notions of "person" and "act of being" opened up their understanding later in the disputes on the Trinity, and especially with Boethius and Aquinas. Metaphysics is the main science concerning the study of these notions.

13 The expression is from Evandro Agazzi, *Spécificité des sciences humaines en tant que sciences* 39 (1979).

14 "In idea being is prior to goodness" (S.T. I, q. 5, a. 2). Genesis 1 draws a parallel when it states that, *after* each day creation "God saw that it was good." According to this anthropomorphism, first is existence and second the appreciation of goodness.

15 S.T. I, q. 87, a. 1. *See:* Aristotle, *Metaphysics*, IX, 8.9.6.

16 Possibilities of things can be deduced after knowing the act. The intellect "does not know primary matter except as proportionate to form" (S.T. I, q. 87, a. 1). *See* Aristotle, *Physics*, I, 7.

[17] will be based on reality to draw from it certain conclusions, without which practical reason cannot work.[18] Our courts do not judge fictitious characters, no matter how evil the archenemy may be; nor are cases of foreign multiverse judged, nor any patent of alien technology registered in public offices. Only real people, with real cases can knock on the doors of the judiciary or the public administration.

One typical kind of reductionism of some scholars is to pay exclusive attention to human nature while missing the greater picture. For sure, it was not a fault of Aquinas, who spent 119 long questions of the First Part of his Summa Theologica, dedicated to the nature of God, angels, humans, animals, plants, and things,[19] before dealing with moral matters. Natural law should take into account all types of reality: living and non-living beings; persons, humans, and non-humans; things and their environment; the micro and macro-cosmos; natural things and any product of human invention. I do not see any objection to developing a natural computer law dedicated to examining the nature of such equipment, or a natural environmental law devoted to ecological matters.

3.2. Potencies, objects, inclinations, tendencies, appetites, and passions (reality)

From this conception each human being is a complete individual that *exists* with his own identity, endowed with absolutely all the features and goods of our species *in potency*. Humans are beings in constant growth. Some powers will be developed earlier than others. While the heart starts beating from around five or six weeks of pregnancy, the capacity for sexual reproduction will appear many years later. Fine motor of the hand develops in the first year after birth: by the second month babies realize they have hands; then it can take two more months until they see something and try to grasp it with their hands, swiping or hitting it occasionally, and after scratching at toys and things they gradually will cultivate fine motor.[20]

But humans will never fly on their own as birds or Superman do. Human powers are limited and have their objects, inclinations, tendencies, appetites, and passions. Everything is connected. Powers are real capacities of being, of what exists in reality, not hypothetical possibilities of the imagination. Human eyes can see but cannot throw laser rays as some superheroes can. The higher the being, the higher the potency. At the same time, there is no inclination or tendencies without powers, precisely because they are inclinations and tendencies of those powers.

Although Aquinas dedicated a huge part of the Summa Theologica to explain the nature, types, scope, and hierarchy of potencies, many of his followers will miss this crucial part of the investigation. Indeed, in recent decades there has been a plain lack of analysis of human powers in natural law studies—most of them do not even mention the word.[21] We saw in the introduction that in the

17 Rhonheimer warns against incurring in the "dualistic fallacy," a deficient understanding of the Natural Law that presumes a dichotomy between the natural order (objective) and reason (subjective). Martin Rhonheimer, "The Cognitive Structure of the Natural Law and the Truth of Subjectivity," *The Thomist: A Speculative Quarterly Review, The Catholic University of America Press* 67, no. 1 (January 2003).

18 According to Hume, "ought statements" cannot be derived from "is statements," from physical goods there cannot be derived moral goods—the so called "naturalistic fallacy" by Moore. Certainly, from theoretical sciences it is not possible to deduce *immediately* ethical or legal conclusions. David Hume, *A Treatise of Human Nature* (1896): 245. George Edward Moore, *Principia Ethica*, edited by Thomas Baldwin (1993). However, we cannot absolutely dissociate ethics and law from reality. That would be the fallacy of the "naturalistic fallacy." Carlos I. Massini-Correas, "The Fallacy of the Naturalistic Fallacy," *Persona y Derecho* 47 (1993): 29.

19 Part I contains the treatises of God (qq. 2–43), creation (qq. 44–49), angels (qq. 50–64), corporal creation (qq. 65–74), human nature with its potencies and inclinations (qq. 75–102). With this background, Aquinas analyzes in Part I-II salvation (qq. 1–5), human acts (qq. 6–21), passions (qq. 22–48), habits (qq. 49–54), virtues (qq. 55–67), and ethics and the law in general. For García-Huidobro, it is possible to avoid the first part of the Summa Theologica without losing the meaning of the second. Joaquín García-Huidobro, "How Is the Natural Law Known?," *Rechtstheorie* 30(1999): 479, 481. However, if key notions of the first part are avoided the moral arguments will be much weaker.

20 Cynthia Ramnarace, "Fine Motor Milestones," *Parents* (2021), accessed 20.02.2023, https://www.parents.com/baby/development/physical/fine-motor-milestones/.

21 *See* note 4 above.

111 most influential articles about natural law the notion of human potencies hardly ever appeared. From Locke, passing through James Wilson and the Declaration of Independence, natural law theory suffers seriously from the intellectualistic sting that hampers the connection between human reason and human nature. The "pursuit of happiness," good actions, rights, and equality are self-evident;[22] we get everything by feeling or intuition,[23] without any need of reflection on the real world.[24] That natural law could be the same for an angel, a demon, or a human person because the analysis of each nature and its possibilities does not really matter at the end of the day. The paradigmatic example is the book *Natural Law and Natural Rights*, in which Finnis examines only the "power of understanding,"[25] overlooking all inferior potencies. By such an intellectualistic approach, natural law has not yet become well anchored in the potencies of human nature. Certainly, today the notion of potency is the missing link that prevents an efficient functioning of the natural law formula.

By an intellectualistic approach, natural law has not yet become well anchored in the potencies of human nature. Certainly, today the notion of potency is the missing link that prevents an efficient functioning of the natural law formula.

We must return to Aquinas. In his core investigation about human nature, he asks whether we should distinguish five genera of powers in the soul.[26] In his answer he shows the deep intrinsic relationship that exists between *powers-objects-inclinations/tendencies-ends and appetites*. One element cannot subsist without another. The first premise states that "the powers of the soul are distinguished generically by their objects."[27] As far as there are three souls, there should be three genera of powers. The object of power of the vegetative soul "is only the body that is united to that soul,"[28] the object of power of the sensitive

22 The Declaration of Independence (1776) states that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

23 According to Wilson, who signed this Declaration, God put in our conscience or moral sense a paternal precept to pursue our own happiness, and law directs us to this proper end for our own good. About how we can know that precept, "I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther." James Wilson, *Collected Works of James Wilson 1*, 508, ed. Kermit L. Hall and Mark David Hall (2007). According to Wilson, we apprehend the first moral principles intuitively, because they are self-evident, and the secondary principles by deductive discourse (*Id*., 508, 599). *See* Justin Buckley Dyer, Reason, Revelation, and the Law of Nature in James Wilson's Lectures on Law," *American Political Thought* 9 (2020): 264.

24 However, the intent to ground everything in "the Laws of Nature and of Nature's God" is still present in the Declaration of Independence. Nevertheless, both laws are presented in a dichotomous way.

25 John Finnis, *Natural Law and Natural Rights* (2nd ed., 2011), 393–5, 400–4. By the way, in the 111 papers most cited on natural law, there is no single mention of the "power of understanding" but five "power of reason."

26 S.T. I, q. 78, a. 1.

27 S.T. I, q. 78, a. 1. The same idea in S.T. I, q. 77, a. 3, ad 4. It presupposes that "every faculty, as such, is *per se* directed to its proper object" (S.T. I, q. 85, a. 7). *See* also S.T. I, q. 1, a. 3.

28 S.T. I, q. 78, a. 1. The powers of the vegetative soul include nutrition, development, and reproduction.

soul is something extrinsic, "namely, *every sensible body*, not only the body to which the soul is united,"[29] and the object of power of the intellectual soul is also something extrinsic, but "more universal… namely, not only the sensible body, but *all being* in universal."[30] Then, "forasmuch as the soul itself has an *inclination* and *tendency* to something extrinsic,"[31] there are two kinds of powers in the last two souls: the *appetitive power* "in respect of which the soul is referred to something extrinsic as to an *end*, which is first in the intention"[32] and the *locomotive power* "in respect of which the soul is referred to something extrinsic as to the term of its operation and movement; for every animal is moved for the purpose of realizing its desires and intentions."[33] Note that the last two powers (appetitive and locomotive powers) appear in the sensitive soul, as well as the intellective soul, and that both souls have their own inclinations, tendencies and ends.[34] Finally, passions are identified with the movements of the sensitive appetite.[35]

Without hesitation, Aquinas strongly advocates for a *hierarchical order* of the potencies. It is evident that losing one's sight is not the same as losing smell or taste, and losing these faculties is not the same as losing reason, or the capacity to love. To the question if among the powers of the soul there is order, his answer is as brilliant as it is simple: "Since the soul is one, and the powers are many; and since a number of things that proceed from one must proceed in a certain order; there must be some order among the powers of the soul."[36] Not all powers are equal. Some of them are able to unify more things and better. According to the order of nature and perfection, the intellectual powers are prior to the sensitive powers,[37] and both prior to the vegetative powers.[38] A second argument is related to the *openness* of the powers, their capacity of being united with more universal things. On this basis, among the sensible extrinsic powers the vision occupies the first place, because with the vision we can reach even the stars;[39] however, as the intellectual object is more universal, it should be considered the first human power. With the same argument, an omnipotent power should be put above all. This hierarchy of human powers will determine the hierarchy of the inclinations, tendencies, appetites, and ends of powers.

It is important to delimit the contours of the Thomistic notion of *inclinations*. The notion refers normally to the inclinations of the sensitive and intellective soul, although elsewhere he states that "each power of the soul is a form or nature, and has a natural inclination to something. Wherefore each power desires by the natural appetite that object which is suitable to itself."[40] An eye does not desire sounds or tasty food, neither darkness nor too much light. Inclinations, as such, are facts, are features of human nature. In itself they can be considered good—an ontological good—; that is why Aquinas avoids talking about "evil inclinations."[41]

29 *Id.* Here are included internal potencies (memory, imagination, fantasy, and estimative/cogitative) and external ones (vision, smell, taste, etc.), as well as self-motion ("locomotive power").

30 *Id.* As is known, this soul includes the powers of intelligence and the will.

31 *Id.*

32 *Id.* In ad 3 he defines *natural appetite* as
That inclination which each thing has, of its own nature, for something; wherefore by its natural appetite each power desires something suitable to itself. But the 'animal appetite' results from the form apprehended; this sort of appetite requires a special power of the soul—mere apprehension does not suffice. For a thing is desired as it exists in its own nature, whereas in the apprehensive power it exists not according to its own nature, but according to its likeness. Whence it is clear that sight desires naturally a visible object for the purpose of its act only—namely, for the purpose of seeing...

33 *Id.*

34 For in those which lack knowledge, the form is found to determine each thing only to its own being—that is, to its nature. Therefore this natural form is followed by a natural inclination, which is called the natural appetite. But in those things which have knowledge, each one is determined to its own natural being by its natural form, in such a manner that it is nevertheless receptive of the species of other things (S.T. I, q. 80, a. 1).

35 S.T. I, q. 24, a. 3.

36 S.T. I, q. 77, a. 4.

37 In S.T. I, q. 82, a. 3, it is plainly stated that the intellect is the noblest potency in absolute.

38 *Id.*

39 *Id.*

40 S.T. I, 80, a. 1, ad 3.

41 In the whole *Summa Theologica* he never talks about "evil inclinations." Some editions inexactly translate the words

However, some movements of the inclination—the passions—can be branded as evil when they are inordinate, when they move against reason.[42]

Aquinas explicitly stated that inclinations "belong to the natural law."[43] Thomists usually consider only the general classification mentioned in article 2 of question 94: there are some inclinations that man shares with all substances (self-preservation), others that he shares only with animals (such as sexual intercourse, education of offspring and so forth), and others according to the nature of his reason (such as to know the truth about God and to live in society). He also wrote in a previous question that "each power of the soul is a form or nature, and has a natural inclination to something,"[44] so that at least a dozen inclinations must be considered part of the natural law. Unfortunately, natural lawyers will get trapped in question 94, forgetting the previous questions of the Summa Theologica. The link between inclinations and human powers is almost always missed in natural law research: consequently, hierarchical inclinations are not easily accepted. This happened not only in the new schools of natural law[45] but even in most classical Thomism.[46]

Inclinations have received a picturesque variety of interpretations throughout history.[47] Their role as the basis of natural law[48] will be very much disregarded in the modern era[49] and later will be recovered with subtle or manifest shades of desire, spontaneity, or aspiration. Occasionally someone will talk about "normative inclinations."[50] Today sciences such as behavioral biology, sociology, and ethnography, also study certain inclinations of the species or communities: the instinct to eat specific seeds or fruits or to attract mates flapping both wings, the tendency to celebrate

affectionibus pravis that appears in S.T. II-II, q. 157, a. 4, as "evil inclinations."

42 The malice of some men can be called natural, either because of custom which is a second nature; or on account of the natural proclivity [*inclinationem*] on the part of the sensitive nature to some inordinate passion, as some people are said to be naturally wrathful or lustful; but not on the part of the intellectual nature (S.T. I, q. 63, a. 4, ad 2).

43 All the inclinations of any parts whatsoever of human nature, *e.g.* of the concupiscible and irascible parts, in so far as they are ruled by reason, belong to the natural law, and are reduced to one first precept, as stated above: so that the precepts of the natural law are many in themselves, but are based on one common foundation" (S.T. I-II, q. 94, a. 2). "It is evident that virtues perfect us so that we follow in due manner our natural inclinations, which belong to the natural right. (S.T. II-II, q. 108, a. 2).

44 S.T. I, 80, a. 1, ad 3.

45 Grisez, Boyle and Finnis refuse the doctrine of hierarchical principles and ends, because their basic goods are incommensurable. We will talk about them in the next chapter.

46 Constable criticizes the lack of hierarchy in Grisez, Boyle, and Finnis precisely comparing their thoughts with the Thomistic doctrine of inclination. In George W. Constable, "A Criticism of *Practical Principles, Moral Truth, and Ultimate Ends by Grisez, Boyle, and Finnis*", *American Journal of Jurisprudence* 34 (1989): 19. However, he directly connects inclinations with ontological goods, forgetting that inclinations are *inclinations of potencies*, and that Aquinas studied deeply the hierarchy of human powers. Indeed, he just mentions there the power of the will. In another discussion on the topic with Furton—another classical Thomist—the link between powers and inclinations did not appear. Edward J. Furton, Restoring the Hierarchy of Values to Thomistic Natural Law, 39 Am. J. Juris. 373 (1994); George Constable, *The Problem of a Hierarchy of Values in Natural Law - A Response to Professor Furton*, *American Journal of Jurisprudence* 41 (1996): 63. Constable never mentions anything about human powers (or potencies). Furton dedicates only one paragraph to the power of reason on page 389.

47 Brian McCall, *The Architecture of Law: Rebuilding Law in the Classical Tradition* (2018), 81–126; Peter P. Cvek, "Thomas Aquinas and John Locke on Ultimate Reality and Meaning: Natural Law and Natural Inclinations," *Ultimate Reality and Meaning* 4 (2015): 34; Jonathan Crowe, "Natural Law and Normative Inclinations," *Ratio Juris* 28, no. 1 (March 2015): 52–67; Peter Karl Koritansky, *Natural Inclination as the Basis for Natural Law*, "Reading The Cosmos: Nature, Science, and Wisdom" (Giuseppe Butera ed., 2011): 205–14.

48 Koritansky, *supra* note 47, at 205–14.

49 *Id.*, at 207–13.

50 Crowe, *supra* note 47, for whom inclinations are "learned and resistible," distinguishing them from reflex movements and instincts. Although he quotes the Summa Theologica, his scheme differs substantially. Aquinas never talk about any "normative inclination." In S.T. I-II, q. 94, a. 2 there appear three inclinations (self-conservation, sensitive inclinations and rational inclinations) as a basis of some natural law precepts, not directly as a law.

feasts or to live in community. It must be noted that these new senses do not match exactly with the ontological notion of inclinations, although they are not completely unconnected.

We cannot *immediately* deduce ethical or legal conclusions from theoretical sciences. At the same time, we cannot absolutely dissociate practical reason from reality.[51] Today some biological studies fall plainly into the naturalistic fallacy,[52] inferring directly and in a naturalistic way certain legal conclusions from biological data. For example, after establishing that some apes have an inclination to be "serial monogamous" they infer that human beings should be monogamous but not for life;[53] other researches pretend to ground the right to property on the fact that some animals and insects have a tendency to possess a territory in an exclusive manner.[54] Yet there is a leap into the void in that argumentation, emphasized by Barros[55] and others:[56] from mere facts it is difficult to infer directly moral or legal mandates, without any practical argument.

Nevertheless, biology cannot be dismissed. After denying any "biological mandate," Barros, Leiter, and Weisberg have observed that some behaviors should be considered in legal analysis. To that end, they distinguish two kinds of behaviors: one that is learned and mutable, and another that is not. If "a behavioral trait is neither learned nor mutable, then legal systems will face great difficulty in establishing effective rules that run counter to that trait."[57] In the hypothesis that human health requires eating meat, the promotion of vegetarianism by authorities should be criticized as something contrary to human nature. On the contrary, if the behavior is learned an analysis of its malleability (non-innate)[58] and plasticity (modifiability)[59] should be made. It makes no sense to regulate non-plastic behaviors: this regulation is doomed to failure. According to them, authorities should be aware that only "normative positions that are consistent with basic human

51 *See* note 18.

52 *Id.*

53 "We concluded that an examination of comparative anatomy combined with the results of modern understanding of neuroscience does provide significant support for our thesis that humans are primed for pair-bonding, but not necessarily long-term fidelity." June Carbone & Naomi Cahn, *Examining the Biological Bases of Family Law: Lessons to Be Learned for the Evolutionary Analysis of Law*, 2 Int'l J. L. Context (2006): 277, 285. However, they recognize that "biological insights do not stand alone; they must be integrated with more traditional legal and/or sociological analysis" (*Id.*, at 291).

54 Stake argued in 2004 that there is an evolutionary basis for an instinct to respect possession. Jeffrey Evans Stake, "The Property Instinct," *Philos Transactions Royal Society* 1451, (2004): 1763–74. More recently, Ori Friedman and Karen Neary suggested that there are psychological grounds that suggest that both adults and children tend to associate prior possession with ownership. Ori Friedman & Karen R. Neary, "First Possession beyond the Law: Adults' and Young Children's Intuitions about Ownership," *Tulane Law Review* 83 (2009).

55 Barros denies "an easy connection" between human and animal behaviors.
Even with primates, the link between animal and human behavior is hard to establish, but the examples used by Stake—ants, salamanders, and spiders—are so evolutionarily remote from humans that the bar for relevance must be set even higher. The evolutionary lines of humans and any of these species diverged so long ago that it is preposterous to suggest that present behaviors are a shared heritage received from a common ancestor. [D. Benjamin Barros, *The Biology of Possession*, 20 Widener Law Review 291 (2011): 307.].

56 Brian Leiter & Michael Weisberg, "Why Evolutionary Biology Is (So Far) Irrelevant to Legal Regulation," *Law & Philosophy* 29 (2009): 31, criticizing the use of nonhuman animal examples in arguments about human behavior.

57 Barros, *supra* note 55, at 304.

58 Etiological studies analyze the origin of species behavior and how they evolve, focusing on its causes. According to some authors, while etiological facts play almost no role in legal analysis, facts about the innateness and malleability of behavior would be highly relevant. These last characteristics are better established through research on actual human behavior, than in etiological studies. Barros, *supra* note 55, at 315–6; Leiter & Weisberg, *supra* note 56, at 39–41.

59 If a certain human behavior is solely the product of evolution, then regulations aimed to change it will be futile; otherwise, if it is caused by environmental factors, the best strategy is to regulate these factors, not the behavior. Yet, if the behavior is not plastic at all, the regulation will have no effect. Leiter & Weisberg, *supra* note 56, at 39–45.

tendencies are more likely to be effective than those that run counter to basic human tendencies."[60]

Theoretical sciences provide three important insights for practical reason: first, crucial notions of things, explaining the features of each species, based on evidence. "It is the definition that shows the specific nature."[61] No method of natural law can work without a certain understanding of what human nature and the environment are. Second, sciences should explain what is impossible, possible, and probable for each element. Third, they should try to delimitate what specialized powers are for (*e.g.*, the eye to see, the ear to hear), which are the aims of each organ, what sort of things complete or perfect each nature.

3.3. Goods, values, virtues, and assets (reality and understandings)

Following the most natural process of knowledge, we can observe how newborns grasp the first notions of what is good. After several months of living in a warm environment, babies are born. Outside of the womb things are quite different. It is too cold! Immediately they will take their first mouthful of air—another new experience—and they will try to express their discomfort by crying and moving about. Newborns do not know that if they cross their arms they will feel better—they do not even realize that they have arms. Suddenly, the weather changes. Now it is warm again—that is "good"! Then comes the first hug from mummy. After this experience, instinctively the baby will turn its head toward anything that strokes its cheek or mouth, searching for the object.[62] Once the umbilical cord is cut, in some way they feel the need for food. Breastfeeding should ideally start soon after birth. One myth suggests that babies are born with the reflex to look for their mother's breast. The mother should put her breast towards her baby's mouth, and after pushing a little, the baby's tongue will feel the nipple and instinctively[63] will suck—that feels "really good"! Breastfeeding takes time and practice for both parties, but soon babies will seek, fasten onto, and suck their mother's breast *naturally*. When time passes and the child attains the use of reason, the little girl will not remember the first events of her life, but will understand what breastfeeding was for and why it was "good" for her. If later she gets married and gives birth to a beautiful boy, the mother consciously will apply the means to fulfill her pleasant duty of feeding her firstborn.

In this example there are four types of knowledge about the same human good. (i) *Sensible knowledge*. Human inclinations (in this case, reflex movements and desires) show by experience what is good but in a blurred way. "Good milk" is not an innate idea, it is simply the object of one power; when the tongue perceives the presence of its object,[64] it will be activated and will activate the nervous system providing information to the brain. Experience of actual goods causes sensible knowledge. (ii) *The acquaintance of how to reach the good*. After realizing that certain actions provided a good experience (warm environment and nutrition), the child will instinctively repeat them when she feels the need for the same experience (to avoid cold or hunger).[65] (iii) *The abstract comprehension of*

60 Barros, *supra* note 55, at 304.

61 S.T. I-II, q. 1, a. 3. This important art of giving good definitions of essences, on which crucial issues depend, has no name until now. We can call it "ousiology." For example, if we do not include in the definition of human being the human egg fertilized by the sperm, laws that protect human life will not apply to the fertilized egg.

62 It is also due to the rooting reflexes that are present at birth but disappear around four months, as it gradually comes under voluntary control. Mijna Hadders-Algra, "Early Human Motor Development: From Variation to the Ability to Vary and Adapt," *Neuroscience & Biobehavioral Revew* 90(2018): 411–27.

63 *Id.* The sucking reflex, common to all mammals, causes the child to instinctively suck anything that touches the roof of their mouth.

64 A thing is knowable only in the degree that it is actual; hence our intellectual potency attains to self-knowledge only through possessing an intelligible object in a concept, and not by directly intuiting its own essence. This is why the process of self-knowledge has to start from the exterior things whence the mind draws the intelligible concepts in which it perceives itself; so we proceed from objects to acts, from acts to faculties, and from faculties to essence. [Aquinas, *Commentary on Aristotle's De Anima Book II*, Chapter IV, § 308, trans., Kenelm Foster & Sylvester Humphries (1951)].

65 Aquinas realized that "through the deficiency of his age, a child cannot use the habit of understanding of principles,

the human good. Only after reaching the use of reason will the individual understand why breastfeeding matters, why milk is so important for mammals and for human health. (iv) *The practical understanding of the good*. Finally, the mother will see the same good (milk) as something that *should be* given to the firstborn. Only at this stage do the moral and legal reasoning begin to work.

Grisez, Finnis and Boyle[66] pointed out that the first notion of good is pre-moral, prior to any substantive moral deliberation. To some extent, the same idea could be applied to other parts of reality discovered by our senses or by other sciences (*e.g.*, the notion of human being, its powers, and inclinations). Some authors consider the basic goods self-evident.[67] It seems to me that they are considering only the first two types of knowledge of human goods. In any case, even if these goods have some level of self-evidence—a thesis that I fully accept[68]—nothing precludes this knowledge being enriched by experience, reflection, or faith.

Aquinas tightly connects many of these elements in a single paragraph:

> What is apprehended and what is desired are the same in reality, but differ in aspect: for a thing is apprehended as something sensible or intelligible, whereas it is desired as suitable or good. Now, it is diversity of aspect in the objects, and not material diversity, which demands a diversity of powers.[69]

"Good" and what "is desired as suitable"[70] are considered equivalent notions. In the same line, the Stagirite defines that good is that at which all things aim.[71] Today we can track this idea of "good" in our language, which defines this word as something "very satisfactory, enjoyable, pleasant, or interesting," "suitable, convenient, or satisfactory," and "kind or helpful"[72] for someone about something. It means that one thing is good when: (i) it is something that the individual can receive, is able or in *potency* to receive; (ii) this thing is *suitable* for the individual;[73] and (iii) because of its suitability, it is *desired* by the individual.

Since a *value* is something that is interesting, important, worthy, or good for something or someone,[74] the relationship between values and goods seems to be

or the natural law, which is in him habitually" (S.T. I-II, q. 94, a. 1, ad 3). Animals also "know"—not by the abstract reason—what things are good for them, and that is why they seek them. Then, it should be concluded that the apprehension of what is good should precede the use of abstract reason.

66 Germain Grisez, Joseph Boyle, and John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, *American Journal of Jurisprudence* 32 (1987): 99, especially at 126; Finnis, *supra* note 25, at 34.

67 For Grisez and Finnis, the basic goods are self-evident and underived, not the result of the speculative enquiry into the natural properties of humans or anything else. Finnis, *supra* note 25, at 33–6, 64–9; John Finnis, "Is and Ought in Aquinas," in *Collected Essays-I-Reason in Action* 147 (2011); and Grisez, *supra* note 6, at 168–201, especially at 173.
In this point there can be significant differences between Finnis and Aquinas. *See* Mark W. Sayers, "Knowledge as a Self-Evident Good in Finnis and Aquinas: When is the Immediately Obvious Not So Immediate," *Australian Journal of Legal Philosophy* 23 (1998): 92, especially at 99.

68 We will analyze this topic a little more in Chapter IV. About the degrees of self-evidence, *see* Juan Carlos Riofrio, *Evidence and Its Proof. Designing a Test of Evidence*, 2019 Forum Prawnicze 14 (2019).

69 S.T. I, q. 80, a. 1, ad 2.

70 *Id.* Aquinas repeats the idea in many places. "Each power desires by the natural appetite that object which is suitable to itself" (S.T. I, q. 80, a. 1, ad 3); "The ratio of good is the ratio of appetibility, as said before (q. 5, a. 1), and since evil is opposed to good" (S.T. I, q. 19, a. 9).

71 Aristotle, Nicomachean Ethics, I, 1.

72 *Cambridge Dictionary Online*, s.v. "Good, *a.*," accessed October 31, 2021, https://dictionary.cambridge.org/dictionary/english/good.

73 Something can be considered suitable because it is a perfection of the power, or "completes" it, or allows the power to reach higher aims, or at least fits well with the power and do not harm it.

74 *Cambridge Dictionary Online*, s.v. "Value, *n.* and *v.*," *supra* note 72. One classical definition states that value is "any object of any interest." Ralph Barton Perry, General Theory of Value (1926). Commonly axiologists distinguish two kinds of values: instrumental and intrinsic values, "between what is good as a means" and "what is good as an end." *See* Brian Duignan, *Axiology*, Enc. Britannica Online, 2021, https://www.britannica.com/topic/axiology. According to Dziedziak, defining "value" is an extremely difficult enterprise. Some of its basic meanings are:

a fairly straightforward assignment. In short, both notions can be connected simply by defining that value *is what is considered as good because it is convenient for one subject and its powers*.[75] However, Aquinas never undertook this task. Notwithstanding the long treatise of virtues and the vast analysis of the value of multiple entities (God, persons, cosmos, substance, accidents, virtues, actions, etc.), he never wrote a treatise of values. Axiology, as a science, only appears at the turn of the nineteenth century.[76] Despite this, it appears clearly throughout his work that he adopts a cognitivist, monistic, and hierarchical axiology. Cognitivist, because he understood that values should be objectively grounded on the objects of the human powers, on truth and being,[77] making it possible to distinguish true and false values. Monistic, because all values can be intrinsically weighted according to one criterion, being: "In things, each one has so much good as it has being, since good and being are convertible."[78] And hierarchical, because everything can be ranked according to the level of being that each one has.[79] Other natural lawyers can have similar or different axiological approaches.[80]

The Aristotelian and Thomistic ethics of virtue is underpinned in this axiology. Each virtue is of worth because they enhance human powers, make it easier to achieve human ends, and allow higher levels of happiness.[81] Today the theory of values also has consequences in the legal domain, where judges—principally in human rights and constitutional courts—define the most critical cases by weighing several values: contrasting privacy with transparency (*e.g.*, the right to the truth or to information), balancing the value of life and the freedom of decision (*e.g.*, taking a pregnancy to term or euthanasia), weighting diversity versus identity, social versus individual values (*e.g.*, for conscience clauses), minority values versus the general values of the legal system. Jurists have made some efforts to connect the "real values" of natural law, not just conventional mores, with the courts' decision process.[82] Yet, the classical approach to natural law still offers crucial insight into legal axiology, although

1) That what is judged positively by a human being (something precious), 2) that what is in accordance with nature, 3) that what ought to be, 4) that what is the object of desire, 5) that what demands coming into being, 6) that what is an aim of human aspirations, 7) that what fulfils certain needs, 8) that what demands fulfilment, 9) ideas, 10) absolute good, 11) that w|hat obliges the receiver or appeals to them, 12) everything that is considered to be good. [Wojciech Dziedziak, "Axiological Basis for the Application of Law—a Perspective of the Equitable Law," *Studia Iuridica Lublinensia* 24 (2015): 49, 50].

75 A close definition was provided by Hervada, who stated that "value is the estimation of being as good, which obeys an objective and real dimension of being." Javier Hervada, *Lecciones Propedéuticas de Filosofía del Derecho* (3th ed., 2000), 68. "The theory of values must start from the valuable nature of the human person, in itself and in relation to its ends" (*Id.*, at 67).

76 The term "value" originally meant the worth of something, chiefly in the economic sense of exchange value, as used by Adam Smith in the eighteenth century. A wider use of the term in philosophy will occur during the nineteenth century under the influence of a variety of thinkers and schools, as Rudolf Hermann Lotze, Albrecht Ritschl, Friedrich Nietzsche, Alexius Meinong, Christian von Ehrenfels. The name "axiology" was first used by Paul Lapie, in 1902, and Eduard von Hartmann, in 1908. Duignan, *supra* note 74; Paul Lapie, *Logique de la volonté* (1902); Eduard von Hartmann, *Grundriss der Axiologie (1907–1909).*

77 We reached that conclusion relating values and desires. *See* note 70 above.

78 S.T. I-II, q. 18, a. 1.

79 *Id.* and S.T. I, q. 5, a. 1. Indeed, the S.T. II-II is fully dedicated to ranking virtues.

80 Authors such as Edith Stein, Julian Marías, Constable and Furton will adopt this hierarchical theory of values. *See* Edith Stein, *La Struttura della Persona Umana* 62 (2000); Julián Marías, *Historia de la Filosofía* (20th ed., 1967), 406–12; and note 46. Instead, Finnis and Grizes maintain the irreducibility and incommensurability of seven basic values. Those who refuse natural law, like Joseph Raz, tend to disagree with a hierarchical theory of values. *See* Nien-hê Hsieh. "Incommensurable Values," in *Stanford Encyclopedia of Philosophy* (2016), https://plato.stanford.edu/entries/value-incommensurable/.

81 S.T. II-II, q. 108, a. 2.

82 Michael S. Moore, "A Natural Law Theory of Interpretation," *Southern California Law Review* 5 (1985): 277, a very influential article with 1994 citations. It should be highlighted how Moore links reality, values and the intentions or pur-

it probably needs an update to be able to speak with the same language and technicalities that courts use in their axiological reasoning.

An additional legal notion intrinsically connected with the ones mentioned is that of "assets." Assets are real goods, goods embodied materially in reality, objects of the legal relationship that can be owed or due to justice. They must have some external manifestation—mere dreams or thoughts are not of interest to the law—and be able to be distributable. Assets are understood as "something having value, such as a possession or property, that is owned by a person, business, or organization."[83] Following the links of the natural law chain, if there is a hierarchy of goods and values, of aims and means, there should also be a hierarchy of assets. This is another legal element of the natural law formula that can be developed more extensively.

Usually moralists and theologists are more interested in virtues and less in constitutional values and assets. In all honesty, jurists are not very concerned about virtues but about other things. It seems that the same formula can provide different results—though not contradictory—for different sciences.

3.4. Ends and means (personal understandings)

While the notion of value adds a subjective appreciation to the notion of good, the notion of end confers dynamism to both. Values and goods are seen as ends *to be achieved*.[84] Properly speaking, the investigation of practical reason begins here, evaluating what ends should be achieved and how, with what means. Nevertheless, no practical argument can be drawn without some previous understandings about human nature, its potencies, and goods.

Let us consider for a moment the Summa Theologica structure. As was mentioned, only after considering God, creation, the nature of angels, the human being and its potencies in Part I,[85] Aquinas feels comfortable to deal with morality and the law. All previous investigations will back moral and legal research, which Part II is dedicated for.[86]

Part I-II starts by dealing with human ends. The first article analyzes whether it belongs to humans to act motivated by an aim, and concludes that "it is clear that whatever actions proceed from a power, are caused by that power in accordance with the nature of its object. But the object of the will is the end and the good. Therefore all human actions must be for an end."[87] On this cornerstone all moral and legal reasoning will be based. *Power's objects mark the end.* This simple, obvious, and quite overlooked consideration is utterly crucial for the delimitation of human ends. Our nature, and specifically our powers, determine what our aims are. It is not part of our happiness—nor part of our ends—to enjoy living one meter under the earth where there is little oxygen, trying to find carrots or roots to eat, as naked moles-rats do, nor flying opening our arms as birds open their wings, nor hibernating without clothes for five months at thirty degrees Celsius below zero, as polar bears do. These kinds of happiness are not only improbable but quite impossible for humans. Human potencies are not designed for any of these—they are not human ends.

The investigation of what sort of goods constitute human happiness appears in question 2. After considering "natural wealth" (connected directly to human powers, such as food, drink, clothing, cars, dwellings,

poses of the law. We will add more explanations at the end of Chapter III.6.

83 *Cambridge Dictionary Online*, s.v. "Asset, *n.*," *supra* note 72.

84 Aristotle and Aquinas explicitly link the notions of end and good. The very first sentence of Nicomachean Ethics declares that "every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim" (book 1.1). Also at the beginning of the Summa Theologica we read: "goodness has the aspect of the end, in which not only actual things find their completion, but also towards which tend even those things which are not actual, but merely potential" (S.T. I, q. 5, a. 2, ad 2).

Although there is no explicit link between end and values, he wrote that "all agree in desiring the last end: since all desire the fulfilment of their perfection, and it is precisely this fulfilment in which the last end consists" (S.T. I-II, q. 1, a. 7). As values can be understood as some personal desires of goods, ends and values can be connected.

85 *See* note 19 above.

86 Part I-II will be dedicated to the general principles of morality and law, and Part II-II to specific moral issues.

87 S.T. I-II, q. 1, a. 1.

and such like), "artificial goods" invented by the art of man (like money), honors, fame, power, bodily goods and pleasure, Aquinas concludes that "it is impossible" that happiness essentially consists in created goods. Our body and powers exist for something else, so the "last end cannot consist in the preservation of its being;"[88] wealth also "is sought for the sake of something else, viz. as a support of human nature;"[89] and honors, fame and pleasure are just consequences or "can result from happiness."[90] Then Aquinas concludes that the gist of our happiness is related to the Divinity. The ultimate end is principally an uncreated good, the infinite good (namely, God) and, in a secondary way, the "attainment or enjoyment of the last end. Now the last end is called happiness."[91] Notwithstanding that, happiness indirectly includes certain honors, fame, glory, and sensitive pleasures.[92]

What really matters in Part I-II is how to attain human happiness (the ultimate end), to which all human powers, actions, goods, and values point. According to this view, these elements are considered means to achieve the ultimate end. "Human flourishing," "human excellence," or a "fulfilled life" require the use of human powers[93] to achieve their ends, integrating them in a project of life aimed at reaching the gist of happiness.

It is well noted that following the Thomistic schemes the ultimate end has a certain priority over all human goals.[94] But we should stress that in that scheme *all human ends are ranked*. The higher the power, the higher the end, the higher the happiness. Without order in our existence, there are only sparks of pleasures; instead of happiness the result is sadness. There is no happiness at all for who dies practicing a risky sport. Bliss can admit the occasional lack of some lower ends but never of the highest. An uncultivated man who consumes drugs because nobody loves him, obtains a significant temporal pleasure in all his intoxicated corporal senses: that is an animal "happiness," not a human one. Conversely, an old grandmother with her body worn out during long years of housework is extremely happy feeling the love of her big family and seeing her children and grandchildren succeeding in life. Only the last can be called a "fulfilled life." As we can see, the order of the ends appears as master strokes of the architectural plans for the construction of the person; they show what a "flourishing life" means.

Individuals and societies can specify their ends (*e.g.*, choosing one friend or another, buying one house or not, eating fish or meat), can prioritize when to achieve each end, and decide how to do that. However, it is not in their power to choose unhuman ends, to decide that knowledge or food are not aims to be achieved, or to change their natural hierarchy.

The ends mark the order. According to the philosophical maxim which affirms that *there is no order without end*, there is no possible moral or a legal order without human ends.[95] Each real order has only one principle of order, only one last end.[96] Food is not a right because one glorious day a benevolent authority granted it as a privilege: no, food is a right because the law, written or not, has to protect individuals with this one specific nature which needs food to survive.

Since there is no more than one human nature, *human ends should be the same for every human science*. Therefore, ethics, economics, psychology, health, and legal and political sciences must share the same ultimate human ends. Nevertheless, as sciences "cut" reality into pieces to investigate isolated parts,[97] each science can focus its attention on some specific middle-aims, having different means to achieve their aims. For instance, while personal ethics is interested in how to achieve happiness by means of a virtuous life, poli-

88 S.T. I-II, q. 2, a. 5.

89 S.T. I-II, q. 2, a. 1.

90 S.T. I-II, q. 2, a. 2.

91 S.T. I-II, q. 3, a. 1. Previously, it was observed that "the end is twofold: namely, the thing itself, which we desire to attain, and the use, namely, the attainment or possession of that thing" (S.T. I-II, q. 2, a. 7).

92 S.T. I-II, q. 2 and 3, a. 3.

93 S.T. I-II, q. 3.

94 "To an ultimate end the purposes of every practical science are directed" (S.T. I-II, q. 1, a. 5).

95 About unity and order in the legal system, *see* Juan Carlos Riofrío, "Unidad y Orden Metafísicos en el Ordenamiento Jurídico," *Dikaion* 23 (2015): 299.

96 "Nature tends to one thing only" (S.T. I-II, q. 1, a. 5). Compared to the last end, immediate aims are transformed into means to achieve the last one.

97 *See* note 13 above.

tics will seek the best policies that produce community peace and welfare, and the law will protect the most relevant human aims, even with coercion.

3.5. Principles (personal understandings)

The mention of principles in certain forums is seen as the dogmatic path where some "fanatics" try to impose their views, without solid grounds because these partisans believe that their principles are self-evident. That was the attack of Holmes, who labelled "naïve state of mind" the jurists who believe in "the supposed *a priori* discernment of duty or the assertion of a preexisting right."[98] Opponents of natural law clearly reject the idea of an evident law, an easy flank to attack if certain precisions are not stated. We should demystify this dogmatic notion of principles.

In its etymological sense[99] and in its first sense in Latin and the Romance languages, *principle* is "what is at the beginning,"[100] what has certain *priority* or is in its *primary* stages. Principles also have a foundational function of those things that come later: for instance, in the sequence of numbers there is no two without one, because the notion of two (twice one) requires the notion of one. Commonly, principles are divided in two groups: those predicated from material reality, and those applied to reason. While material things are governed by cosmological principles (*e.g.*, gravity, cause-effect, inertia), mental entities are structured according to rational principles (*e.g.*, non-contradiction, logic, coherence). As the law is rational,[101] all legal principles should be rational too. Apropos, let us analyze legal reasoning.

What is at the beginning of legal reasoning? The answer is easy, "the first premise," but this requires an explanation. Consider a fine imposed by a policeman on a taxi driver who did not see a red light. The law states that everyone who passes a red light should be fined $100 (premise 1); the taxi driver passed a red light (premise 2), so the driver must be fined $100 (conclusion). In this syllogism the statement of the law is the first premise, the "principle," the first argument that supports the imposition of the fine. Without it the policeman would act in a very different way. So, necessarily any fine, any sanction, any judgment, any written law, or any legal argument must be based on rational premises which provide them with rational support. Only irrational statements lack principles.

Of course, this statement of the law is not the first principle of the legal system. Why not? Simply, because the red-light statement is grounded in other previous reasons (or principles): people should obey the law, the law is for the common good, security is part of the common good, we have to secure life, life cannot be put at risk while driving, life must be protected, and so on. At the end, the most fundamental principles in their simplicity shine out by themselves and can be expressed in a few words, affirming what is of worth: *pro life* or *pro security*, for example. "Life" alone is not a principle of the practical reason because a noun alone does not indicate anything to be done; instead of that, the affirmation of life ("*pro life*") sheds some light on practical reason. Life should be respected or protected, no one can harm it. Without the *pro life* principle, the red-light statement makes no sense.

Therefore, principle of law is a *logically prior proposition in a point of law*. This proposition should be at the beginning of legal reasoning. If we talk about the first principles of the legal system, they can usually be stated concisely in a general way,[102] because they are

98 Oliver Wendell Holmes, "Natural Law," *Harvard Law Review* 32 (1918–1919): 40, 42. This article has been very influential, receiving 297 citations. "Holmes" appears 339 times in the 111 most influential articles of natural law.

99 "Principle" comes from late Middle English, from Old French, and derives from the Latin *principium* "a beginning, commencement, origin, first part." It also means "source" and "foundation." *Online Etymology Dictionary*, s.v. "Principle, *n.*," accessed October 31, 2021, https://www.etymonline.com/word/principle.

100 What "est in principio" (Latin), "está al principio" (Spanish), "è al principio" (Italian), "está no princípio" (Portuguese). Translation mine.

101 "The end is the first principle in all matters of action but it belongs to the reason to direct to the end. Since directing to an end is the function of law—law is an act of reason" (S.T. I-II, q. 90, art. 1).

102 Aquinas realized that virtually all science is contained in the principles of science. S.T. I-II, q. 3 a. 6. So, principles should be stated in a general way to be able to contain several elements of each science.

the most basic pieces of legal reasoning. Aphorisms like *neminem laedere*, *in dubio pro children* or *pacta sunt servanda*, are widely accepted as general principles of the law: they are the first arguments that support all legal reasoning, and without them nothing can stand on its own. Even positivists need some non-written principles, some previous ideas, to analyze the law in their analytic schemes. The most striking example is the principle of reasonability, widely used by constitutional courts worldwide even if no constitutional provision recognizes it.[103] The very first principles of the legal and moral order should even be simpler. They are just affirmations of the being, ends, goods, or values: *pro homine*, *pro family*, *pro children*, *pro nature*, *pro Deo*, *pro action*, *pro life*, *pro freedom*, *pro welfare*, for example. For each good there is one first principle. Without these smallest of elements, there are no middle principles,[104] no complex moral reasoning, no legal reasoning, and no possible legal system.

It is still possible to take one step more, the last step, simplifying *pro life*, *pro Deo*, *pro homine*, and all principles into one.[105] We can simply say "*pro good*." Using the language of human rights declarations, we can say that "good" should be respected, protected and fulfilled, as much as possible.[106] However, natural lawyers may prefer the ancient formulation of the first principle of practical reason: "Good is to be done and pursued, and evil is to be avoided."[107] According to Aquinas, here are contained all principles and precepts of natural law.[108]

Using the language of human rights declarations, we can say that "good" should be respected, protected and fulfilled, as much as possible. However, natural lawyers may prefer the ancient formulation of the first principle of practical reason: "Good is to be done and pursued, and evil is to be avoided."

103 As Gavara said, "the main problem posed by the application of the principle of proportionality in a broad sense is the non-provision of its application in the constitutional text." Juan Carlos Gavara de Cara, *Derechos Fundamentales y Desarrollo Legislativo. La Garantía del Contenido Esencial de los Derechos Fundamentales en la Ley Fundamental de Bonn* (1994), 313.

104 For instance, there is no *neminem laedere*, *in dubio pro children* or *pacta sunt servanda* if previously there are no *pro health*, *pro children*, *pro truth* or *pro loyalty* principles.

105 Aquinas observes "that the precepts of the natural law are many in themselves, but are based on one common foundation" (S.T. I-II, q. 94, a. 2, ad 2).

106 The third word also can be "achieved," "developed," or "promoted." It contains a programmatic duty. About these words, *see* Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties," *Human Rights Law Review* (2005): 81.

107 Good is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle of practical reason is one founded on the notion of good, viz. that 'good is that which all things seek after.' Hence this is the first precept of law, that 'good is to be done and pursued, and evil is to be avoided.' All other precepts of the natural law are based upon this. (S.T. I-II, q. 94, a. 2). *See* Grisez, *supra* note 6.

108 After explaining that the principle *pro good* is coined in one personal habit, the synderesis, Aquinas stated: "synderesis is said to be the law of our mind, because it is a habit con-

In conclusion, legal archeology (the science of legal principles) is intrinsically connected with legal axiology. And legal axiology must be rooted in legal teleology (the science of aims),[109] and both in legal ousiology (the science of defining the nature of things, with its powers and inclinations). Natural law is not just a theoretical approach that connects the law with some ideal or moral principles, but a methodology that uses practical principles based on human nature to understand the law in depth. We need to root natural law in nature. Without staying grounded in human nature, there is no "natural" law properly speaking.

If the previous connections are accepted, we can also accept that the self-evidence of some ends, goods and values will permeate the principles to some extent. The first premises of practical reason, the simple affirmation of self-evident goods, will be self-evident too; instead, the secondary or derived principles will be less evident for us.[110] From the previous connection we also can conclude that principles will inherit a hierarchy of potencies, goods and ends explained above. For example, if the value depends on the level of being, and the value of every human (dignity) exceeds the environmental value, and the infinite value of Divinity overcomes both, there should be a hierarchical order between the principles *pro natura*, *pro homine*, and *pro Deo*.[111]

A benchmark here is the discussion maintained between Fuller and Hart in the 1960's. In his book *The Morality of Law*,[112] Fuller formulated eight principles of what he called "the inner morality of law," which requires that laws be general, public, prospective, coherent, clear, stable, and practicable. Hart cast doubts upon the "morality" of these principles, which in his view were more instrumental principles for effective legislation.[113] Fuller responded by denying the mere instrumental function, explaining that governments should apply these principles to avoid harming freedom and dignity.[114] Although these principles can be traced back to the Greeks, Isidore of Seville and Aquinas, and other moralists,[115] and although its non-observance can produce pernicious consequences, it is true that many of them have little moral flavor. The mandate of promulgation (principle 2), non-retroactivity (principle 3), and the *stare decisis* support (principle 7) are universal principles of the law, rarely studied in ethics. These secondary principles of the law have traits that are more legal, than moral.

3.6. Natural laws and positive laws (understandings and voluntary actions)

Traditionally there is a distinction between natural law and positive laws: the first is produced by God with

taining the precepts of the natural law, which are the first principles of human actions" (S.T. I-II, q. 94, a. 1, ad 2).

109 For every human end there is one practical principle. That is because "the end is the first principle in all matters of action but it belongs to the reason to direct to the end" (S.T. I-II, q. 90, a. 1).

In general, teleological approaches to any kind of morality or legal theory have consequences for their axiologies. As Schroeder observes, teleological theories "are committed to claims about value, because they appeal to evaluative facts, in order to explain what is right and wrong, and what we ought to do—deontic facts." Mark Schroeder, "Value Theory," *Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2021), https://plato.stanford.edu/archives/fall2021/entries/value-theory/.

110 Properly speaking these are not innate principles. What is innate are the human powers, with their objects and inclinations; when human powers are activated by the presence of their goods, they activate the synderesis producing the first principles. Sounds are not innate ideas. When music is played, the ear captures its melodic notes, the intellect understands the lyric, the will loves everything, and the synderesis concludes "music should be heard."

111 The maxim is encoded in Scripture: "we must obey God rather than men" (Acts 5, 29). "In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person" (John Paul II, Encyclical Letter Centesimus Annus n. 47 (1991)). So, the *pro natura* principle cannot prevail over *pro homine* principles, nor can either of the two can prevail over the *pro Deo* principle.

112 Lon L. Fuller, *The Morality of Law* (1964).

113 Hebert L. A. Hart, "Essays," in *Jurisprudence and Philosophy* 347 (1983).

114 Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630.

115 Robert Henle, "Principles of Legality: Qualities of Law Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville," *American Journal of Jurisprudence* 39 (1994): 47.

the creation of human nature, and the second are produced by the human will. Some natural lawyers omit the mention of God, maintaining that human nature can be studied without theological considerations, which methodologically is possible because, as was stated, every research "cuts" one part of reality to study it.[116]

The law is a product of the intellect and the will. Both sources appear in the classical definition of the law, as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[117] The intellect will enquire what is good, what possible means exist to achieve it, and how reasonable they are; after this research the intellect will finally *conclude* what sort of actions are appropriate (physically, ethically, legally, and economically) to achieve that good. The intellect can conclude that some means are necessary to attain the end, while other are only more or less convenient, due to the diversity of means for that purpose. "An innocent person does not deserve punishment," is an example of a necessary conclusion; "a criminal could deserve ten or eleven years in prison," is an example of two convenient conclusions. Bearing in mind the whole of human existence, the *necessary conclusions of the intellect will create the hard core of the natural law.* If many suitable means appear to reach one end, the will of the authority has to choose or *determine* which one of them will be the law in the community. Evidently, the will cannot act in a vacuum—it needs some propositions of the intellect to accept or reject. *These determinations of the will are the essence of positive laws.*[118] Aquinas admits both ways to derive positive laws from natural law.[119]

Natural inclinations are not *simpliciter per se* natural precepts. First, they should be "apprehended by reason as being good," as "objects" (objects of human power) and, second, the practical reason should put them as ends to be pursued.

Now let us look more closely how necessary conclusions are obtained. First, the intellect should discover what is good for the person and society. As was seen, this task is done by analyzing what things are (being, powers, inclinations, etc.), what they are for (ends), and what kind of principles govern them. In this way, Aquinas obtains the first precepts of natural law:

116 *See* Chapter III.1 and note 13 above.

117 S.T. I-II, q. 90, a. 4. The same applies to the eternal and natural law that, according to Aquinas, are product of the intellect and the will of God.

118 The thesis appears in S.T. I-II, q. 95, a. 2, where Aquinas states that "it must be noted that something may be derived from the natural law in two ways: first as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details."
A similar idea appears on Nicomachean Ethics V, 6, where Aristotle distinguishes a *natural justice* that does not depend on human opinion, and a *legal justice* whose origin is indifferent, but once determined, is mandatory. The master of Aquinas distinguished three types of natural law: the *essentialiter law*, composed by the first practical principles, the *subpositive law*, which are the conclusions immediately connected to the first principles, and the *particulariter law*, which is a particular determination due to the positive will of the legislator. Albertus Magnus, Summa de Bono, tract. V, q. 1, a. 3 (1933).

119 S.T. I-II, q. 95, a. 2.

> Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. (…)[120]

Natural inclinations are not *simpliciter per se* natural precepts. First, they should be "apprehended by reason as being good," as "objects" (objects of human power) and, second, the practical reason should put them as ends to be pursued. After using many links of the natural law formula (being, powers, inclinations, objects, goods, and ends), Aquinas can conclude that there is an "order of natural inclinations" that cause—precisely because everything is connected—"the order of the precepts of the natural law." So, the hierarchy of human powers causes the hierarchy of its inclinations, tendencies, ends, goods, and, consequently, the hierarchy of precepts. The paragraph then analyzes three natural inclinations (to self-preservation, sensitive and rational inclinations) and the natural law precepts that can be obtained from them.

In addition, any law should be founded on some rational principles. As already explained,[121] a "principle" is not only a position (the first or "primary" idea), but mainly a foundation of what comes after. There is no two without one, there is no norm without previous rational premises. Just laws are underpinned on natural law principles of reason in a logical, teleological, axiological, and archeological way. Logically, because any norm is a "complex precept of reason," and there is no complexity without composition of various simpler elements. Principles are the simpler elements by which any complex reasoning (a syllogism, a theory, a commandment) begins. As there is no syllogism without a first premise, neither is there a commandment without the existence of a first statement or presupposition. The rule "in case of doubt among several interpretations of a norm, the most favorable one for the worker must be applied," requires the previous acceptance of a general principle called *in dubio pro operario*, and, in turn, this statement presupposes the idea of *pro operario*. Teleologically and axiologically, because laws are precepts promulgated *for the common good*, what is a specific application of the first principle of the practical reason (good is to be pursued). Each law is intended to respect, protect, achieve and develop some part of the common good (*e.g.*, freedom, health, security). And archeologically, because the reasonability of the law is supported by the reasonability of its first principles. When all is said and done, the *pro good* principle is always a condition of reasonability of the law.

It is worth noting that "the entire science is virtually contained in its principles,"[122] although in a general and undetermined form. Once this is accepted, it is easy to realize what role the first principles of the law can play in the legal system. In civil law tradition, jurists[123] agree that the general principles of law serve: (i) as an informative criterion of the legal system, filling the normative gaps; (ii) as a guiding criterion for the interpretation of current norms; (iii) as a limiting criterion to avoid abuse of the law or excesses contrary to the highest ends and values; (iv) as a rational justification for the rules and, therefore, (v) as an integrating criterion of the various norms in a simpler general justification. In the common law system these functions are less studied,[124] although principles still have a wide use in many areas of the law.[125]

120 S.T. I-II, q. 94, a. 2.

121 *See* Chapter III.5.

122 S.T. I-II, q. 3, a. 6. From a slightly different point of view, Andorno affirms that "the natural law is part of positive law; moreover, it constitutes its own nucleus." Roberto Andorno, *Universality of Human Rights and Natural Law*, 38 Persona & Derecho 35, 37 (1998).

123 Giorgio Del Vecchio, *General Principles of Law (Felix Forte trans., 1956); Ángel Sánchez de la Torre, Los Principios Clásicos del Derecho* (1975), 123–81; Orges Ripert, *La Règle Morale dans les Obligations Civiles* (4th. ed., 1959), 158; Luis Díez Picazo, *Sistema de Derecho Civil* vol. I, 171 (4th. ed., 1981); Federico De Castro, *Derecho Civil de España, General Part* v. 1, 473 (1955).

124 As an exception, *see* Percy E. Corbett, "The Search for General Principles of Law," *Virginia Law Review* 47 (1961): 811.

125 In the common law system, it is more usual to deal with some moral, constitutional, or international principles, than with the "general principles of law." There is a profuse use of many

The human mind tends to unify and absolutize multiple elements that appear together or have something in common: we call "legal system" a collage of hundreds of thousands of norms approved by quite different authorities, of different ranks and jurisdictions, who lived in different centuries and circumstances. Such collage of laws resembles the picturesque image of the chain novel of Dworkin:[126] a book written by a group of uncommunicated novelists, one after the other, without any previous agreement about the content. If we know how the novel was written, it will be foolish to query the general intention of the author. There is not one single intention but many. Likewise, the whole legal system will be a collage of unconnected manuscripts if the principle of unity is merely the will of the different authorities. Without general principles of law tightly anchored on human nature—I mean, on hierarchical human powers, ends, goods, and values—a harmonic interpretation of the whole legal system would remain just a fairy tale.

Some scholars have dedicated magnanimous efforts to developing a natural law theory of interpretation that can overcome textualism, originalism, and other positivistic readings of the law. The most cited author here is Michael S. Moore,[127] whose "realist theory" asserts that the meaning of certain words is not conventionally fixed but linked to reality. "Death," for example, refers to a natural kind of event that occurs in the world: what is arbitrary is the symbol, the five letters that compose the word "d-e-a-t-h," not the referent.[128] Ultimately, language founds a stable point of support on reality (the being with its features). Not everything in the law is convention. Only on these understandings, when the words of a judgment refer to a real case, does the role of the precedent make sense.[129] Moore later analyzes the hermeneutic role of the intention and values. About the intention, "the realist maintains that there is a right answer to whether intentions are hierarchically ordered as means to ends or whether they act on a coordinate basis in causing behavior."[130] And about the second topic he argues that our courts balance "real values," weighting real—not conventional, fictional, or hypothetical—weights to find what is just.[131]

A completely different hermeneutic approach is taken by Greenberg with his "Moral Impact Theory,"[132] a consequentialist reading of the law that weights the general impact of promises, agreements or statutes on personal obligations, rights, powers, and so on, in light of fairness, democracy, the rule of law, and other relevant values. Finally, we find other natural lawyers who attempt to provide a moral reading of the constitution, according to the canons of natural law.[133]

principles in natural law essays. *E.g.*, Philip A. Hamburger, "Natural Rights, Natural Law, and American Constitutions," *Yale Law Journal* 102(1993): 907; Paul Savoy, "The Spiritual Nature of Equality: Natural Principles of Constitutional Law," *Howard Law Journal* 28 (1985): 809; Richard A. Epstein, "From Natural Law to Social Welfare: Theoretical Principles and Practical Applications," *Iowa Law Review* 100 (May 2015): 1743; Rena Cain Cohen, "Bentham's an Introduction to Principles of Morals and Legislation: Analytical Jurisprudence, or Another Natural Law Theory," *Mercer Law Review* 16 (1965): 433; Srdan Budisavljevic, "Principles of Internal Morality of Law in Lon Fuller's Natural Law Theory," *Collection of Papers, Faculty of Law* 77 (2017): 189; and Henle, *supra* note 115. It is also good to remember the memorable debate materialized in these three articles: Finnis, Grisez and Boyle, *supra* note 66; Ralph McInerny, "The Principles of Natural Law," *American Journal of Jurisprudence* 25 (1980): 1; and John Finnis & Germain Grisez, "The Basic Principles of Natural Law: A Reply to Ralph McInerny," *American Journal of Jurisprudence* 26 (1981): 21.

126 Ronald Dworkin, "Natural Law Revisited," *University of Florida Law Review* 34 (Winter 1982): 164.

127 Moore, *supra* note 82. Moore adheres to a natural law theory of interpretation that does not take a position about the justice of the law. *Id.*, at 398.

128 *Id.*, at 294.

129 *Id.*, at 368–76.

130 *Id.*, at 346.

131 *Id.*, at 379–96.

132 Mark Greenberg, *Legal Interpretation and Natural Law*, 89 Fordham L. Rev.109 (2020).

133 Michael S. Moore, "Justifying the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69 (April 2001): 2087; R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation*, 4 S. Cal. Interdisc. L. J. 463 (1995); James E. Fleming, "Fidelity to Natural Law and Natural Rights in Constitutional Interpretation," *Fordham Law Review* 69 (2000–2001): 2285. Although Ronald Dworkin was a hesitant natural lawyer, we must mention

In Moore we come across a well-finished natural law theory of interpretation, that connects reality, its possibilities, goods, values, ends, and means with the correct reading of the law. Perhaps his missing link is the principles of law, that appear only implicitly in his text. Greenberg merely connects some values within a consequentialist moral framework. To come to the point, none of these hermeneutic efforts would be plausible if the written law had no connection with reality, with some goods, principles, values, or ends of the human being. Everything is connected.

3.7. Natural and positive rights (understandings and voluntary actions)

In this human rights era, the most challenging goal for natural law is to define and delimit natural rights. None of the greatest ancient or medieval thinkers developed a theory of "rights," a word that only centuries later will be widely used.[134] Authors normally derivate positive and natural rights from one of the elements of the formula (from ends, values, and principles mainly), using the *via positiva* or the *via negativa* either.[135] For the analysis of this rich and extensive topic, which is impossible to cover in a few pages, we have dedicated another specific research.[136]

3.8. Personal relationships, cases, and circumstances

The last link of the natural law formula is the circumstantial reality of each individual: its existence in one specific environment, society, culture, and legal system. Aquinas realized that "the general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people."[137] And even the positive law "can be rightly changed because of the changed condition of man, to whom different things are expedient according to the difference of his condition."[138] Many natural lawyers will try to explain in many ways how universal values and immutable precepts can suffer some adaptations in the present century.[139]

It is imperative to arrive at this last stage, to speak seriously about real natural laws and real natural rights. As MacIntyre stated in his critique of human rights, we cannot conceive human beings as monads, prior to any interpersonal relations, lodged in no particular culture or tradition. Since these humans never existed, neither can theoretical rights subsist, and are only "moral fictions," "chimeric rights," a check for payment in a social order that lacked the institution of money.[140]

One classical example can give us some lights. A British citizen is always entitled to all natural rights and to the constitutional rights of his country. However, when Robinson Crusoe remained alone on his island, he could not ask anyone for the fulfillment of his hypothetical rights. Until the arrival of Friday, the second island settler, Robinson Crusoe could have the whole natural law theory in his mind, and he would trust seriously that as a British citizen he was entitled to those things recognized in the Magna Carta. However, all rights remained inoperable—almost as a "fiction" or "chimera"—until the apparition of another rational individual. Technically, these natural and

here his book Freedom's Law: The Moral Reading of the American Constitution (1996, 2005).

134 "Dikaion" and "ius" were the most used notions used by the jurists that have no equivalent in English and cannot be translated as "law" or "right." Michel Villey, *Leçons d'Histoire de la Philosophie du Droit* (2002).

135 The via negative obtains rights from duties: what is detected to be a duty of someone should be at the same time a right for another. *See* Felicien Rousseau, *La Croissance Solidaire des Droits de l'Homme: Un Rétour aux Sources de l'Ethique* (1982), 163.

136 Juan Carlos Riofrio, "How to Deduce Human Rights From Natural Law and Other Sciences," *Ius Humani* 12 (2023), *pro manuscrito*.

137 S.T. I-II, q. 92, art. 2.

138 S.T. I-II, q. 97, art. 1.

139 In the first half of the twentieth century, Stammler's conception of natural law gained notoriety. He saw it as "a permanent ideal of variable content," since under certain empirical conditions some precepts can be corrected. Rudolf Stammler, *The Theory of Justice*, trans. I. Husikde trans. (1902, 1925), 181–5. The idea entered the public debate and got many clarifications. Georges Renard, for example, will talk about a "natural law with a progressive content," while others will prefer the formula of a "natural law of changing and progressive application." Jacques Leclercq, *Le fondement du droit et de la société* (4th ed., 1957). Translation mine.

140 Alasdair Maclntyre, *After Virtue* 65 (2007), 65.

positive rights were *potential rights*,[141] rights awaiting one specific actualization: not only the arrival of someone to the island, but the whole configuration of a concrete interpersonal relationship in which the respect of each right could be asked of one real debtor.

We have said that to get the hypothetical conclusion of one *natural right* many primary and secondary principles should come into play. Now we add that to get the conclusion that Pedro has here and now one specific natural right, *practical reason and facts* must play together. What kind of facts? The facts of legal relationship, facts of the case law. The universal principles, values and ends of natural law are just theory, and have no effect at all, without the contingent reality.[142]

4. Conclusion

After reviewing how hundreds of the most influential authors deal with natural law we detected some similar patterns in their *modus operandi*. Still today the most complete methodology, that includes the analysis of many abstract elements as well as many particularities of reality, was found in Thomas Aquinas. He never dedicated a treatise to explain how and from where natural law can be dug up from. Nevertheless, in his investigations of human nature, powers, inclinations, ends, goods, principles, rules, and virtues it is possible to track his method smoothly. It is clear that the whole puzzle of what we call "the natural law formula" was complete and fit tightly in his mind.

Definitely, Aquinas was a man of his century. In his outstanding and extensive works it is neither possible to find any economics or human rights treatise, nor a systematical study of values or evolutionary biology. Economics, human rights, axiology, evolution, and biology simply did not exist as autonomous sciences eight centuries ago. However, he has set the basis to develop all human sciences on a solid ground, explaining slowly and with precision how human nature plays a crucial role in them. To some extent, this natural law formula constitutes the backbone of any human science, giving them structure, unity, and order.

The above mentioned formula is a chain composed of the following links: *Being – Potencies, objects, and inclinations – Goods and values – Ends and means – Principles – Laws – Rights – Personal relationships, cases and circumstances*. All these elements are necessarily linked and work together, as has been explained in this article. A change in any variable of the equation will affect the whole equation. If by any means we solve one variable of the formula, others will be solved too. For example, if from chance, faith, evidence, or reflection we got the famous seven basic goods of Finnis, we can deduce from them some human ends and natural rights.

Several generations of authors have explained how to deduce legal content from reality, from the "basic goods," and from other elements of the formula. It is up to us that their experience does not fall on deaf ears.

141 About human rights as "potential rights," *see* Juan Carlos Riofrío, "La hiperinflación de los derechos fundamentales: consideraciones sobre sus límites, potencialidades y sobre su relativa indisponibilidad," *Revista de Direito Brasileira* 18 (2017): 49.

142 Juan Cianciardo, "The Culture of Rights, Constitutions and Natural Law," Journal of Comparative Law 8 (2013–2014), 267, where the author explains the classical position of Aquinas, Aristotle, Plato, and St. Augustine.

Bibliography

Agazzi, Evandro. *Spécificité des sciences humaines en tant que sciences*, 1979.

Ambrosetti, Giovanni. "Christian Natural Law: The Spirit and Method Of." *American Journal of Jurisprudence*, vol. 16 (1971), 290–301.

Andorno, Roberto. "Universality of Human Rights and Natural Law." *Persona & Derecho* 38 (1998), 35–50.

Aquinas, Thomas, St. *Commentary on Aristotle's De Anima Book II*, translated by Kenelm Foster & Sylvester Humphries, 1951.

Aquinas, Thomas. St. *Summa Theologica*, I-II, translated by Fathers of the English Dominican Province, 1920–1922.

Barros, Benjamin D. "The Biology of Possession." *Widener Law Review* 20 (2011), 291–318.

Budisavljevic, Srdan. "Principles of Internal Morality of Law in Lon Fuller's Natural Law Theory." *Collection of Papers, Faculty of Law* 77 (2017), 189–204.

Carbone, June, and Cahn, Naomi. *Examining the Biological Bases of Family Law: Lessons to Be Learned for the Evolutionary Analysis of Law*, 2 Int'l J. L. Context 2006.

Castro, Federico de. *Derecho Civil de España, General Part*, 3th. ed., 1955.

Cianciardo, Juan. "The Culture of Rights, Constitutions and Natural Law." *Journal of Comparative Law* 8 (2013–2014), 267–287.

Cohen, Rena Cain. "Bentham's an Introduction to Principles of Morals and Legislation: Analytical Jurisprudence, or Another Natural Law Theory." *Mercer Law Review* 16 (1965), 433–440.

Constable, George W. "A Criticism of Practical Principles, Moral Truth, and Ultimate Ends by Grisez, Boyle, and Finnis." *American Journal of Jurisprudence* 34 (1989).

Constable, George W. "The Problem of a Hierarchy of Values in Natural Law - A Response to Professor Furton," *American Journal of Jurisprudence* 41 (1996), 63–68.

Corbett, Percy E. "The Search for General Principles of Law." *Virginia Law Review* 47 (1961), 811–826.

Crowe, Jonathan. "Natural Law and Normative Inclinations." *Ratio Juris* 28, no. 1 (March 2015), 52–67.

Cvek, Peter P. "Thomas Aquinas and John Locke on Ultimate Reality and Meaning: Natural Law and Natural Inclinations." *Ultimate Reality and Meaning* 4 (2015) 4–29. https://doi.org/10.3138/uram.34.1–2.4

Dworkin, Ronald "Natural Law Revisited." *University of Florida Law Review* 34 (Winter 1982), 165–188.

Dyer, Buckley, Reason, Justin. "*Revelation, and the Law of Nature in James Wilson's Lectures on Law.*" *American Political Thought* 9 (2020), 264–284.

Dziedziak, Wojciech. "Axiological Basis for the Application of Law—a Perspective of the Equitable Law." *Studia Iuridica Lublinensia* 24 (2015), 49–71. https://doi.org/10.17951/sil.2015.24.2.49

Epstein, Richard A. "From Natural Law to Social Welfare: Theoretical Principles and Practical Applications." *Iowa Law Review* 100 (May 2015), 1743–1772.

Finnis, John. *Natural Law and Natural Rights*, 2nd ed., 2011.

Finnis, John, and Grisez, Germain. "The Basic Principles of Natural Law: A Reply to Ralph McInerny." *American Journal of Jurisprudence* 26 (1981) 21–31.

Finnis, John. "Is and Ought in Aquinas." in *Reason in Action. Collected Essays-I-Reason in Action*, vol. 1, essay 9 (2011), 144–155.

Fleming, James. "Fidelity to Natural Law and Natural Rights in Constitutional Interpretation." *Fordham Law Review* 69 (2000–2001), 2285–2296.

Friedman, Ori, and Neary, Karen R. "First Possession beyond the Law: Adults' and Young Children's Intuitions about Ownership." *Tulane Law Review* 83 (2009), 679–690.

Fuller, Lon L. "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71 (1958), 630–672.

Gahl, Robert A. Jr. "Natural Law Approaches to Comparative Law: Methodological Perspectives, Legal Tradition and Natural Law." *Journal of Comparative Law* 8 (2013), 179–194.

García-Huidobro, Joaquín. "How Is the Natural Law Known?." *Rechtstheorie* 30(1999), 479–494.

Gavara de Cara, Juan Carlos. *Derechos Fundamentales y Desarrollo Legislativo. La Garantía del Contenido Esencial de los Derechos Fundamentales en la Ley Fundamental de Bonn*, 1994.

Greenberg, Mark. "Legal Interpretation and Natural Law." *Fordham Law Review* 89 (2020), 109–144.

Grisez, Germain G. "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1–2, Question 94, Article 2." *Natural Law Forum* 10 (1965), 168–201.

Grisez, Germain, Boyle, Joseph, and Finnis, John. "Practical Principles, Moral Truth, and Ultimate Ends." *American Journal of Jurisprudence* 32 (1987), 99–151.

Hadders-Algra, Mijina. "Early Human Motor Development: From Variation to the Ability to Vary and Adapt." *Neuroscience & Biobehavioral Revew* 90 (2018), 411–427.

Hamburger, Philip A. "Natural Rights, Natural Law, and American Constitutions." *Yale Law Journal* 102 (1993), 907–960.

Hartmann, Eduard, von. *Grundriss der Axiologie,* 1907–1909.

Hebert, Hart, "Essays." in *Jurisprudence and Philosophy* 347 (1983).

Henle, Robert. "Principles of Legality: Qualities of Law Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville." *American Journal of Jurisprudence* 39 (1994), 47–70.

Hervada, Javier. *Lecciones Propedéuticas de Filosofía del Derecho*, 3th ed., 2000.

Holmes, Oliver W. "Natural Law." *Harvard Law Review* 32 (1918–1919), 40–44.

Hume, David. *A Treatise of Human Nature* (1896): 245. George Edward Moore, *Principia Ethica*, edited by Thomas Baldwin, 1993.

Jacobs, Johnattan. "Judaism, Natural Law and Rational Tradition." *The Heythrop Journal* 8 (2013), 930–947.

Koch, Ida Elisabeth. "Dichotomies, Trichotomies or Waves of Duties." *Human Rights Law Review* (2005), 81–104.

Koritansky, Peter Karl. *Natural Inclination as the Basis for Natural Law*, "Reading The Cosmos: Nature, Science, and Wisdom," edited by Giuseppe Butera, 2011, 205–214.

Lapie, Paul. *Logique de la volonté*, 1902.

Leclercq, Jacques. *Le fondement du droit et de la société*, 4th ed., 1957.

Leiter, Brian, and Weisberg, Michael. "Why Evolutionary Biology Is (So Far) Irrelevant to Legal Regulation." *Law & Philosophy* 29 (2009), 31–74.

Lon L. Fuller, *The Morality of Law* (1964).

Marías, Julián. *Historia de la Filosofía*, 20th ed., 1967.

Massini-Correas, Carlos. "The Fallacy of the Naturalistic Fallacy." *Persona y Derecho* 47 (1993), 47–96.

McCall, Brian. *The Architecture of Law: Rebuilding Law in the Classical Tradition* (2018), 81–126.

McInerny, Ralph. "The Principles of Natural Law." *American Journal of Jurisprudence* 25 (1980), 1–15.

Moore, Michael S. "A Natural Law Theory of Interpretation." *Southern California Law Review* 5 (1985), 277–398.

Moore, Michael S. "Justifying the Natural Law Theory of Constitutional Interpretation." *Fordham Law Review* 69 (April 2001), 2087–2118.

Picazo, Luis Díez. *Sistema de Derecho Civil* vol. I, 4th. ed., 1981.

Ramnarace, Cynthia. "Fine Motor Milestones." *Parents* (2021), https://www.parents.com/baby/development/physical/fine-motor-milestones/ (accessed 20.02.2023).

Rhonheimer, Martin "The Cognitive Structure of the Natural Law and the Truth of Subjectivity." *The Thomist: A Speculative Quarterly Review, The Catholic University of America Press* 67 (January 2003), 1–44.

Riofrio, Juan Carlos. "Evidence and Its Proof. Designing a Test of Evidence." *Forum Prawnicze* 14 (2019), 14–32.

Riofrio, Juan Carlos. "How to Deduce Human Rights From Natural Law and Other Sciences," *Ius Humani* 12 (2023), *pro manuscrito*.

Riofrío, Juan Carlos. "La hiperinflación de los derechos fundamentales: consideraciones sobre sus límites, potencialidades y sobre su relativa indisponibilidad." *Revista de Direito Brasileira* 18 (2017), 49–62.

Riofrío, Juan Carlos. "Unidad y Orden Metafísicos en el Ordenamiento Jurídico." *Dikaion* 23 (2015), 299–326.

Ripert, Orges. *La Règle Morale dans les Obligations Civiles*, 4th. ed., 1959.

Rousseau, Felicien. *La Croissance Solidaire des Droits de l'Homme: Un Rétour aux Sources de l'Ethique*, 1982.

Sánchez de la Torre, Ángel, *Los Principios Clásicos del Derecho*, 1975.

Savoy, Paul. "The Spiritual Nature of Equality: Natural Principles of Constitutional Law." *Howard Law Journal* 28 (1985), 809–912.

Sayers, Mark W. "Knowledge as a Self-Evident Good in Finnis and Aquinas: When is the Immediately Obvious Not So Immediate." *Australian Journal of Legal Philosophy* 23 (1998), 92–102.

Shih, Hu. "The Natural Law in the Chinese Tradition." *Natural Law Institute Proceedings* 5 (1953), 119–153

Stake, Jeffrey Evans. "The Property Instinct." *Philos Transactions Royal Society* (2004), 1763–1774.

Stammler, Rudolf. *The Theory of Justice*, translated by I. Husikde.

Stein, Edith. *La Struttura della Persona Umana*, translated by Michele D'Ambra, 2000.

Sundaram, M. S. "The Natural Law in the Hindu Tradition." *Natural Law Institute Proceedings* 5 (1953), 67–88.

Suzuki, Daisetz T. "The Natural Law in the Buddhist Tradition." *Natural Law Institute Proceedings* 5 (1953): 89–116.

Vecchio, Giorgio del. *General Principles of Law*, translated by Felix Forte, 1956.

Villey, Michel. *Leçons d'Histoire de la Philosophie du Droit*, 2002.

Wilson, James. *Collected Works of James Wilson 1*, 508, edited by Kermit L. Hall and Mark David Hall, 2007.

Wright, George. "Is Natural Law Theory of Any Use in Constitutional Interpretation." *Southern California Law Review* 4 (1995), 463–488.

Cristina Piga

Principle of Laicity and Religious Concepts. An Italian and Japanese Perspective

Cristina Piga

PhD student of the Society of the Future interdisciplinary programme, Doctoral School of Social Sciences at Jagiellonian University in Krakow.

✉ cristina8.piga@student.uj.edu.pl

https://orcid.org/0000-0001-8465-3284

The present research analyses the principle of laicity, aiming to understand whether religious concepts can be introduced and positivised in a lay State, taking the Japanese and Italian constitutions as case studies. The purpose is to understand how religious concepts, if positivised, can contribute to higher protection of fundamental rights. The first phase focuses on the definition of the concept of laicity by separating it from secularism. The second phase deals with the principle of neutrality and non-identification of the lay state towards the religious sphere, deepening the positivisation of religious concepts and their introduction into legal analysis, with particular attention to Habermas' studies on the translation of religious concepts into a universally accessible and independent language. The third phase carries out a comparative constitutional analysis focusing on the principle of laicity in the Italian and Japanese constitutions to understand the different declinations the principle of laicity may take and the potential terrain for religious concepts to be introduced after an imperative translation into universal language independent of any religious interpretation.

Key words: laicity, secularism, neutrality, state, religion, syncretism, constitution, human rights, positivisation, religious concepts, legal systems, Italy, Japan

https://doi.org/10.32082/fp.6(74).2022.1077

Introduction

The present article aims to analyse the different expressions of the principle of laicity and its complex relationship with the religious sphere, as formulated by two very different constitutional, cultural, social, and political realities, by considering the Italian and Japanese constitutions as a case study.

Firstly, I will delineate an initial definition of the principle of laicity, separating it from the concept of secularisation: both of them start from the fundamental idea of the separation of political power from religious influence, in the case of the principle of laicity taking a further step: one of active interaction, not one of total closure, towards the religious sphere.

Secondly, the research focuses on the principle of neutrality and non-identification of the lay State

towards the religious sphere. Following, I believe relevant to address the crucial question of the positivisation of religious concepts in democratic legal systems and the imperative translation into a universal acceptable language, with particular reference to the observations of the German philosopher Jürgen Habermas.

Thirdly, I will test these considerations through a comparative constitutional analysis of the principle of laicity in the Italian and Japanese constitutions. Thereby, I attempt to demonstrate how a different formulation of the principle of laicity at the constitutional level does not a priori mean lower protection of the right to religious freedom and a lower degree of neutrality, non-identification, and tolerance by the State towards the religious streams present in the territory. Eventually, the goal is to understand whether and to which extent a potential positivisation of religious concepts translated into universally acceptable language is possible in the two secular States taken as examples.

1. Principle of laicity. A distinction from secularism

A greater understanding of the State and religion relationship and the following freedom of religion and conscience, is relevant in this first reasoning. The formulation of the principle of laicity allows to define the fundamental characteristics of a State's power legitimated by the "people", according to democratic and pluralistic assumptions, not in specific religious principles and ethics.

Hence, the limits of the present research in the definition of the principle of laicity should be defined, avoiding the sole perspective of linguistics, but considering the cultural-historical point of view of the legal system considered.

The meaning given by Italian scholars to the term laicity emerge as peculiar regarding that one given by French ones. The issue of the translation from foreign languages and the selection of terms and context in which are reported cannot be sidestepped. This statement counts also for the Italian translation, especially for what concerns the term "secularism" or "secular" from foreign languages (English, French and German), often translated into the Italian "*laicismo*" or "*laico*" (respectively laicity and lay).

This translation highlights an important issue of interpretation of the concepts of secularism and laicity, which are differently perceived in the Italian legal literature[1]. The translation from secularism to the "Italian laicity" does not perfectly match, in a philosophical and juridical application. This statement aims to highlight not a wrong translation of "foreign" text (from an Italian perspective) but to underline the intrinsic difference that a term has in different languages and the peculiarity that the translation from a language to another has.

The crucial point here is that the perfect translation of a concept, not limited to this specific case, is rarely possible. This clarification is useful not just to define the limits of this research, but also to introduce an important element to the definition of the concepts of religion and secularism in the Italian and Japanese legal systems.

The "Italian approach to laicity", as called by some authors[2], constantly relates itself to the strong influence that the Catholic Church had on the Italian territory (and still has today) at a social and ethical level and differs from France, as well as England and Germany. Consequently, this research does not aim to formulate a universal definition of laicity, but it intends to present

1 See Stefano Sicardi, "Il principio di laicità nella giurisprudenza della Corte costituzionale (e rispetto alle posizioni dei giudici comuni),", in *Rigore costituzionale ed etica repubblicana*, (Università degli Studi di Roma "La Sapienza", 2006): 13, (*Title in English: The principle of secularism in the jurisprudence of the Constitutional Court (and in relation to the positions of ordinary judges)*); Vincenzo Pacillo, "Alcuni problemi (teorici e pratici) della libertà religiosa diciassette secoli dopo l'Editto di Milano, Lugano," *RTLu XVIII (3/2013), (Title in English: Some problems (theoretical and practical) of religious freedom seventeen centuries after the Edict of Milan)*; E. Ripepe, *Secolarizzazione e diritto costituzionale*, in *Esperienza giuridica e secolarizzazione* a cura di Danilo Castellano and G. Cordini (Milano, 1994), 228 (*Title in English: Secularisation and Constitutional Law, in Legal Experience and Secularisation*).; V. ATRIPALDI, "Cultura dei costituenti del '48," in *Esperienza giuridica e secolarizzazione* edited by di Danilo Castellano and G. Cordini (Milano, 1994), 210 (*Title in English: Culture of the Constituents of 1948, in Legal Experience and Secularisation*).

2 See Stefano Sicardi, *Il principio…*, 13, Vincenzo Pacillo, *Alcuni problemi…*, 384.

the interpretation and the definition that the Italian and Japanese legal systems have on the principle and how this is expressed in the Constitutions and interpreted by the two highest Courts in relevant judgments.

It is fundamental for this research to identify that, even if the concepts of laicity and secularism are close in their original context and meaning, these take different forms, which outline a heterogeneous relationship between the religious and the political sphere. Furthermore, within the analysis of the process of secularisation, it should be considered that in the majority of cases and studies, it refers to the European, Western process, with a special connection with the Christendom and that this mechanism has developed through different areas of the world, in this peculiar case, the Japanese one.

Although concepts as "secularity" and secularism" have been developed in a mainly Eurocentric sense, a different interpretation and formulation can be identified beyond the European borders, considering States that "have all developed their particular secularist ideologies and their models for classifying and regulating religion", as Japan.

To get a greater understanding of the definition of laicity and secularism and where they differ from each other, a reflection over the etymology of the two terms should be opened, to identify the peculiar interpretation given in different legal systems and in different languages.

Firstly, the term "lay" or "laic" as adjective derive from Latin "*laicus*" and from ancient Greek "*laikos*", which have the same meaning: "of or belonging to the people", from Greek word "*laos*" that means people or common people, in distinction with the ecclesiastics.

In English, the adjective "laic"[3] has a direct reference to its Latin origin. In Italian, language of reference of the previous research, the word "laico" (laic or lay) has the same origin and an additional reference to the words "*laitos*" or "*leitos*" which mean public, and are related to the literary term "*laudis*", later "*Leute*" in German, which means "the people"[4].

The word secular has its origins in the term "*saeclum*" or "*saeculum*", regarding both Italian and English etymology, which refers to the verb "*serere*", from the verbal root "*sa*", which means to spread, to sow, and from noun "*semen*", referring to the product of the work of men, the seeds [5].

In Japanese the adjective "laic" can be translated with 在家 (*zaike*), a laic person, word, however, uniquely related to Buddhism. Another term is 信徒 (*shinto*) or 平信徒 (*hirashinto*), which mean a layperson, laity, a believer, adherent of follower. For non-Japanese speakers, it is crucial to not confuse these terms with the word "*Shintō*", the religion, 神, for the similar pronunciation.

The term 俗 (*zoku*) is equally used regarding a layperson, in opposition to the Buddhist monk, as laity, a man of the world and it refers also local manners and local customs.

This last meaning is particularly close to the Latin *serere* and *semen*, as product of men and in connection to the world and to local manners, from which has its origin also the Italian "*secolo*" (century) and the later adjective secular from Latin "*saecularis*" about the "span of time", to the progression of time and future generations.

Although a more precise research would be important to give a more contextualised definition of the concepts, this brief attempt, with all its limits, allows to gain a better understanding of the reasoning expressed at the beginning of the paragraph. In this case, is relevant to understand and do not misunderstand the principle of laicity, expressed in the two Constitutions here analysed.

The two Constitutional Texts have different cultural-historical backgrounds, together with the interpretation and implementation of these concepts, considering what said ahead. However, it can be recognised that they have a common concept on the basis, i.e. the crucial separation between the secular and the religious, despite their diverse definition.

The reasons behind the perception of this concept are not different solely between Western and Eastern legal systems of the world, but also within countries in the same region. In France and Italy, for example,

3 José Casanova, "The Secular, Secularizations, Secularisms," in *Rethinking Secularism*, ed. Craig Calhoun, Mark Jürgensmeyer and Jonathan Vanantwerpen (Oxford, 2011), 11 ss, 57.

4 Ibidem, 56 ff.

5 Ibidem.

the reasons and the dynamics of the process of secularisation should not be considered the same. The process of separation between the two spheres depends on the definition given to the "religious" in the legal system and only subsequently this division is possible to define the limits between it and the secular.

An unprecise identification of the religious sphere is more likely to be confused or "mixed" with judicial norms and political "directives", whose peculiar interpretation could be prejudicial in its influence.

An unprecise identification of the religious sphere is more likely to be confused or "mixed" with judicial norms and political "directives", whose peculiar interpretation could be prejudicial in its influence.

The distinction attempted in the following passage is formulated by the scholar Casanova, who distinguishes between the three concepts of secular, secularisation and secularisms (intentionally left plural from the text)[6].

The concept of secular, in its strict meaning, is connected to its Latin origin of "what is not religious, ecclesiastic", but, as the scholar specifies, in modern epoch, this is perceived in substitution of the religious, as a reality that does not go alongside the religious one but that takes its place. In this sense, the process of secularisation is perceived, as a gradual separation of politics and secular law, from religious doctrines.

However, a sole reference to the separation between the religious and the secular would be inaccurate, if another legal perspective of secularisation would be excluded from this reasoning, which occurs between the secular law and the canon law.

The process of separation from the secular started by the ecclesiastic power, in a complex political dynamic, in the XIII century. As H. J. Berman explains, the process of secularisation starts from the pontifical revolution of Pope Gregory VII. The complex formulation of canon law, the shape given to the pontifical legal system is later picked up by the secular law, starting from the merchant law (*lex mercatoria*).[7]

In Casanova's second distinction, the process of secularisation has to be understood certainly as the necessary separation of politics from religion, but it should be considered that the formulation of the canon law constitutes the formal basis for the later structure given to legal systems and codes of modern States.

In the XI and XII centuries, the canon law was the only one with the complexity and unitary of modern and contemporary States. While in Europe modern States were still embryonal, the feudal law was in force and it was characterised by fragmented political unities that the Sacred Roman Empire could not manage to keep unified, after the death of Charles the Great. The canon law gave the basis to the secular one to give to *consuetudo* and *usus* a formal and enacted structure[8].

The Revolution of Pope Gregory VII, as Berman defines it, is the first formal standpoint and declaration of intent from the Catholic Church to divide the religion from the secular power. Through the *Dictatus Papae*, the Church strongly opposes the secular customs and the temporal power of the kings and feudal princes all around Europe, with peculiar attention to Heinrich IV.

At article IX e.g. "*quod solius pape pedes omnes principes deosculentur*" ("all princes shall kiss the feet of the Pope alone") is given a strong declaration

6 Ibidem, 55 ff.

7 Harold J. Berman, *Law and Revolution. The formation of the Western Legal Tradition* (Cambridge, Massachusetts and London, 1983).

8 Harold J. Berman, *Law and…*, 60 ff.

of supremacy of the Church over secular powers in Europe, but more important is the limits of the religious sphere clearly separated from the multitude of secular ones, fragmented and not unified, despite the formal maintenance of the Holy Roman Empire[9].

At this point, it can be affirmed that the process of secularisation did not start just as a unilateral action from the secular power to get independence from religious one, but it is a more complex and longer process. This parenthesis allows analysing the further distinction given by Casanova, who further distinguishes the concept of secularisation in two dynamics.

The first one is inherent to the Christendom, as protection of monasterial life from the mundane one, held by priests which tended even more often were involved in feudal affairs[10], as their common marriages and union with feudal princes, the main reason of the later prohibition imposed by the Vatican, in force still today.

On the other side, the concept of secularisation is more often considered as an initiative of the secular power from the control of religious principles, containing it into the private sphere, as the example of the French Revolution gives, as the liberal one.

Afterward, in the definition of the theory of secularisation, Casanova makes a further distinction in three components. The one first refers to the institutional differentiation of secular spheres, the State, the economics and the science of religious institutions; the second one, the theory of the progressive decline of the religious beliefs and its practices[11] at the same time of the process of modernisation; the third one, the theory of privatisation of religion as precondition of democratic and secular modern politics.

The scholar underlines that it does not exist a unique interpretation of the concept of secularisation and that the relationship with the religious has different shapes, depending on the legal system and the society in which this process happens: "There are in this respect multiple competing secularisms, as there are multiple and diverse forms of religious fundamentalist resistance to those secularisms"[12]

Another interesting point is the perception that the process of secularisation may have from the viewpoint of societies outside the European "borders". If in Europe is considered as "a general or universal process of human or societal development"[13], on the other side, eastern societies of the world may perceive it merely as an "a particular Christian and post-Christian historical process"[14].

This awareness is fundamental in this research, since the analysis focuses on the principle of laicity as interpreted differently from the European one and allowing to define not just the limits of this research, but to understand more objectively, the two phenomena in the social, political and not least judicial context of the two Constitutions.

Finally, Casanova analyses the concept of secularism, intended as "a whole range of modern worldviews and ideologies concerning religion", in a broader meaning of the term, which refers to the legal-constitutional framework adopted by the legal system of the State which determines the limits, the borderline, with the religious, according to a definition of secularism as "statecraft doctrine"[15], not as ideology.

For this reason, his arguments focus on "secularisms" defined as differently interpreted in multiple societies. Secularism should not be perceived as substitution of the religious, as a sort of "new religion", but conversely it should refer to the normative and political structure of the State and to the legitimation of power itself, which does not lie in religious precepts, but democratic theories, free from particularism.

2. The introduction of religious concepts in the juridical analysis

Introducing the principle of neutrality under the legal perspective is crucial to understand the relations the lay State decides to take with the religious sphere, not underestimating the role of religions within the society. I stress that the separation between politics and the Christian religion in the European context is not synonymous of complete closure by the State, which contrarily exhort the participation to the pub-

9 Ibidem, 71 ff.

10 Ibidem, 88.

11 Jose Casanova, *The secular…*, 60.

12 Ibidem, 63.

13 Ibidem, 61.

14 Ibidem, 66.

15 Ibidem, 67.

lic debate, considering the potential contribution and resourceful participation to a greater defence of human rights within the juridical system.

Böckenförde identifies the principle of neutrality or non-identification as one of the major sources of the legitimacy of the lay State, specifying that this principle stands at the beginning of the modern State, just as freedom of conscience stands at the beginning of individual freedom[16].

In this respect, 'by progressively dismantling existing identifications, the state has opened the way for individual freedom', since only through the state's non-identification, through a 'religion-free' approach is it possible to guarantee religious freedom within a pluralist society and thus prevent a particular religion from influencing the formulation of the state's laws, inevitably coming into conflict with other religious denominations.

Another relevant aspect concerning the relationship between the political and the religious, specifically the Christian one, lays on the neutrality demanded to the State, not to be imposed to the religious confessions when they freely intervene in the public debate, and as Habermas reminds, "It must not discourage religious persons and communities from also expressing themselves as such in the political arena, for it cannot be sure that secular society would not otherwise cut itself off from key resources for the creation of meaning and identity"[17] adding also that "The liberal state must not transform the necessary institutional separation between religion and politics into an unreasonable mental and psychological burden for its religious citizens."[18], pointing out that "They should therefore also be allowed to express and justify their convictions in a religious language even when they cannot find secular "translations" for them"[19].

The distinction between religious and secular meanings, interpretations and language must be made by the legislator, especially when a Christian concept is transposed (and thus) positivised within the legal system. As Habermas again specifies, religious traditions, including the Christian tradition "have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In corresponding political debates, this potential makes religious speech into a serious vehicle for possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language"[20].

Such contents can take on a universal character when they are subsequently positivised in the legal system and thus, to specify further, a religious concept can be positivised when a potentially universal message is recognised, which goes beyond relative religious interpretation and for which a translation into a universal legal language is required, detached from religious interpretation.

However, I emphasise the focus on the introduction of religious concepts into the democratic legal system, stressing the centrality of the secular state's principle of neutrality and the ultimate goal of protecting the fundamental rights by democratic institutions. The positivisation of a religious concept, if not carried out following the two pivotal points mentioned above rigorously "by opening parliaments to conflicts over religious certainties, governmental authority can become the agent of a religious majority that imposes its will in violation of the democratic procedure"[21].

Thus, as much as a religious concept may correspond to and represent universal values in the substance of its meaning, it nevertheless remains a religious concept, and as such cannot be positivised in order to further protect, for example, a specific fundamental right.

I consider it necessary to introduce the second imperative step in this analysis, namely the 'translation' of religious concepts before their actual positivisation in the secular legal system. As Habermas remarks: "For without a successful translation the substantive content of religious voices has no prospect of being taken up into the agendas and negotiations within political bodies and of gaining a hearing in the broader polit-

16 Ernst Wolfgang Böckenförde, *Stato, costituzione, democrazia: studi di teoria della costituzione e di diritto costituzionale* vol. 73, (Italian edition, Giuffrè Editore, 2006), 296.

17 Jurgen Habermas, *Between naturalism and religion: Philosophical essays* (Polity, 2008), 131.

18 Ibidem, 130.

19 Ibidem, 130.

20 Ibidem, 131.

21 Ibidem, 134.

ical process"[22] which makes it imperative to translate them into a generally accessible language so that the population as a whole can benefit from fundamental rights accessible in both form and substance.

The key element for a peaceful and civilised coexistence within the state is precisely the use of a universally accessible language. Otherwise "majority rule mutates into repression if the majority deploys religious arguments in the process of political opinion- and will-formation and refuses to offer publicly accessible justifications that the out-voted minority, be it secular or of a different faith, can follow and evaluate in the light of shared standards"[23].

The key element for a peaceful and civilised coexistence within the state is precisely the use of a universally accessible language.

If, on the one hand, religious doctrine and concepts cannot influence the public normative at any level, on the other hand, the religious cannot be relegated to the private only, and should not be prohibited to believer citizens to manifest and express their faith in public: it would violate the principle and the right to freedom of religion and conscience, the pillar of the liberal democracy.

The controversies on this last point emerge at the academic level and also within society. Two main examples in Europe would be the exposition of the cross in public places in Italy[24] and the prohibition to wear hijab in public places in France[25]. The principle of neutrality of the State, as explained by Böckenförde[26] and Habermas[27], considers religious concepts not as a threat to state legitimation, but as a resource, with a specific look at the protection of fundamental rights by the State.

The so-called process of "de-secularisation"[28] should be intended as a further step in the relationship between State and religion, although keeping in mind that the introduction of religious concept is inadmissible in a legal system and a "linguistification of the sacred"[29] is mandatory, as process of translation in a judicial language.

This reasoning aims to underline that the principle of laicity should not be confined in the mere separation of secular and religious spheres, contrarily it should be referred to a constant dialogue with the religion, albeit keeping their fundamental separation.

Although this research analyses the principle of laicity in the light of the protection of human rights, the State cannot be "neutral" towards their protection. The protection of human rights matches with the protection of the democratic system of values, the Wertordnung; for this reason, the State has to protect human rights to preserve its democratic values and the principle of neutrality of the State explains this crucial connection.

According to this view, laicity refers to the identification of the moral intuitions at the basis of the recognition and pursuing of the Good. The plurality of "declinations" and the definition of Good and Evil,

22 Ibidem, 132.

23 Ibidem, 134.

24 Consiglio di Stato, 15 febbraio 2006, decisione Sez. 4575/03-2482/04. *(Council of State, 15 February 2006, decision Section 4575/03-2482/04).*

25 LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (1).

26 See Böckenförde, Stato, costituzione…

27 Habermas, *Between…*, Chapter 4, *Prepolitical Foundations of the Constitutional State?*, 101 ff.

28 Atripaldi, *Cultura dei Costituenti…*, 210.

29 Francesco Callegaro, *Justice as the sacred in language: Durkheim and Habermas on the ultimate grounds of modernity and critique*, vol. 17/4, 342–60.

given by religions, can be identified regardless of the specific religious interpretation, although expressed by religious language.

The distinction with secularism lies in the association of laicity with the protection of human and fundamental rights through the identification of human dignity as a starting point, as moral intuition at the basis of the democratic thought.

Nevertheless, it should be clear that the dialogue with religion, this "de-secularisation", cannot remodel and homogenise again religion and secular "jurisdiction". Albeit some originally religious concepts are considered useful to a greater expression of the protection of a right, are subjected to the process of translation "filter" to the juridical language. This should be constantly reminded.

If religious concepts are considered suitable to greater protection of fundamental rights within legal systems, the principle of laicity reveals itself as a further step, regarding secularism.

Despite the different application of the principle of laicity from one society to another, the definition here given refers to the religious sphere in its broader meaning, without the identification to a specific belief, but as the identification of the transcendent, beyond the temporal experience.

On the other hand, the secular is identified as the political and legal one, and has a specific reference to the democratic Form of government, aiming at the general definition of this relationship. Conversely, in a more specific perspective, the Italian and Japanese dimensions, combined with the given definition of laicity, brings out a peculiar interpretation and application of the principle of neutrality and laicity.

In the following reasoning, a focus on the constitutional provisions is formulated, analysing the interpretation given by the Supreme Court of Japan and the Italian Constitutional Court, keeping the premises given ahead.

3. Evolution of perception of Shinto: syncretism and freedom of religion in Meiji Era

In the observation of the concept of laicity in Japan, it is necessary to point out that the secular has to relate to several religions in the territory and to a phenomenon that has peculiar forms in Japan, the syncretism between Shintō and Buddhism. Therefore, when one goes to analyse the concept of secularism in Japan, it is necessary not only to discern the term "religion" from that of monotheistic ones, but also from the perception that the boundary between religions must necessarily be precisely defined.

The case of Japan is not only about the mixing of several religions, but also about reinterpreting at a local level the different doctrines wherewith the population comes into contact. Over the centuries, the Japanese people have adopted the Buddhist doctrine, the ethics of Confucianism while maintaining a strong link with Shintō. The same imperial family, the same emperor once conferred the title becomes a Buddhist monk, but he continues to be an *Arahito-Gami*[30], a god on earth, a descendant of the goddess Amaterasu and the two religious spheres do not conflict, but mutually strengthen each other.

The case of Japan is not only about the mixing of several religions, but also about reinterpreting at a local level the different doctrines wherewith the population comes into contact.

30 Yuki Shiose, "Japanese Paradox: Secular State, Religious Society," *Social Compass* 47(3) (2000): 317–28.

Syncretism means merging several religious beliefs and rites, following a fluid approach towards spirituality, which presents a very low degree of conflict, if compared to monotheistic religions. The syncretic element, on the one hand, implies a more complex approach by the legislator towards this "alternative" way of perceiving and practicing religion, if seen through the lens of the Christian religion, for example, but which should not be considered alternative and identified as different instead.

However, as I specified before, the principle of secularism is not alien to Japan and the concept of religion itself should not be considered under the Christian perspective of the term. The peculiarity of Japan is expressed not only in the evolution of its forms of State and Government, but also and particularly in the ways in which syncretism leads to the conception of secularism, itself in a "fluid" way, if it is allowed to use this term.

Precisely the concept that was expressed previously, not to define a specific *a priori* delimitation between religion and secularism, follows the need to redefine the notion of secularism itself, beyond national borders and to identify such a border more gradually, through a process of localisation and contextualisation, as is being done by the Japanese Supreme Court and the Italian Constitutional Court in their respective judgements.

Syncretism is important in this analysis because it is the very essence of the peaceful coexistence of Shinto and Buddhism, in cults, rites and doctrine, where it is present. From a purely legislative point of view, the approach to religion follows the one analysed in the previous paragraph, but it is nevertheless interesting, in this analysis, to highlight how much syncretism can be an element which facilitates the very concept of freedom of religion and tolerance, connected to it in a multi-religious State since its origins.

While some scholars still tend to consider Shinto as a non-religion today, due to the lack of dogmas and sacred texts, over the centuries it has permeated not only the religious sphere but also the political and legal spheres. Even in times before the period that more or less coincides with the European Middle Ages, the Shinto shaped not only social interactions but also legal ones, so that "the crime was punished not as antisocial, but as sacrilegious"[31], in a dimension in which the religious and secular spheres were strongly entwined, always keeping in mind the nature of the Shinto religion, which some refer to ancient animist cults, which changed in rites and changed from region to region, if not from village to village.

The tendency is to think of the religious situation at the time in terms of the coexistence of two distinct traditions, namely, Buddhism and the cult of the Gods (Shintō). But it can be perceived in terms of the integration of the two in individual belief where people entrusted their fate in the afterlife to the Buddha, and their fate in this world to the Gods[32]

While Buddhism was imported to Japan around the 6th century, Shintō is to be considered the island's true native religion. It should be noted that the particular relationship that Shintō always had with political power is peculiar, since it was used as a real legitimation of the political power of the imperial family, which still today is considered a descendant of the goddess (approximate translation for the word kami) Amaterasu Ōmikami, at the top of the hierarchy of the gods of Shintō.

The exploitative use of the Shintō religion in the Meiji era must be taken into account in the formulation of the current principle of secularism in Japan and the need to protect religious freedom in the country. As the scholar Yuki Shiose underlines, quoting Berthon, "by becoming the state's main legitimising force for nationalisation and unification, Shintō lost its religious element and became the tool of the state"[33].

In the light of the reflection made in the previous paragraph, Shintō is not deliberately considered a religion in order to be, in substance, elevated to state religion. Furthermore, "the rich variation of folk and shrine Shintō tradition became diluted, and the imperial, "expurgated" version of State Shintō

31 Giorgio Fabio Colombo, "Stato, diritto e sincretismo religioso in Giappone: lo sguardo del giurista," in *Quaderni di diritto e politica ecclesiastica*, Fascicolo speciale,(december 2016): 22.

32 Michiaki Okuyama, *Religious Nationalism in the Modernization Process State Shintō and Nichirenism in Meiji Japan* (Nagoya, 2002), 48.48: 4, cit., 24.

33 Yuki Shiose, *Japanese Paradox…*, 319.

enjoyed the quasi-monopoly of the state organised religious market"[34].

The position occupied by Shintō during the Meiji modernisation era has consequences especially from the point of view of the violation of the rights of citizens of Buddhist faith (above all), who are persecuted, Buddhist temples and symbols destroyed and monks forced to officiate Shintō rites.

While it is easy to see that the mixing of the two religions has always been fundamentally peaceful, this radical change at the political level does not "break out" without a particular reason.

While it is easy to see that the mixing of the two religions has always been fundamentally peaceful, this radical change at the political level does not "break out" without a particular reason.

The nationalist movement, which has been taking hold since the early 1800s, is becoming increasingly strong and the Buddhist religion is "material imported from abroad" and the great predominance of Buddhist rites also at a local level is not without friction among the Shintō clergy. placed in a position compared to that of Buddhist monks, who also at a local level occupy more important positions in city councils and "this situation did not pass entirely without protest, but organised resistance among Shintō priests transcending domain boundaries was virtually unknown before Meiji"[35]

It should be noted that since 1870 the "Great Promulgation Campaign" has been carried out, with the aim not only to standardise Shintō teaching in Japan (a process that had already begun a few decades earlier) but also to make Shintō stronger than Buddhism, which on the other hand had monks much more prepared and influential than the Shintō priests, as mentioned above. Shintō was not structurally organised[36].

The philosophical school of *Kokugaku* was one of the most influential in this process of unification, and it "seemed to offer a way out of Shintō's centuries-old, enforced subordination, and this anticipation exploded with violence in the *haibutsu-kishaku*, (movement to destroy Buddhism) outbreaks just after the Meiji Restoration, which aimed to abolish Buddhism once and for all."[37]

The promulgation campaign lasted about 15 years, during which time Buddhist monks gradually became part of "The National Evangelists"[38] (*kyōdōshoku*) in large number. "However, they were quick to perceive that uprooting their religion was one of the Campaign's covert goals. Joint Shintō-Buddhist proselytisation atrophied after the 1875 withdrawal of Jodo Shinshu, when it had become clear that the Campaign was campaigning for Shintō as a state religion."[39]

The creation of the Great Teaching (*taikyō*) was intended to "level out" and eradicate the different sects in the area and to unify the Shintō according to a single teaching and doctrine and make it stronger. However, these teachings were not clear, and even among the evangelists and the bureaucratic organisation was not efficient, so that "staff were transferred to other government offices with such blinding rapidity and frequency that they did not have enough time in any given post to accomplish anything, even if internal strife had not

34 Ibidem.

35 Helen Hardacre, "The Great Promulgation Campaign and the New Religions," *The Journal of Japanese Studies* vol. 12, no. 1 (Winter, 1986): 29–63, 33.

36 Ibidem.

37 Ibidem, 36.

38 Ibidem, 44 for further explanations on "*kyōdōshoku*".

39 Ibidem, 47.

divided them among themselves"[40] and the government campaign needed the "restoration" of Shintō as the dominant religion in Japan, especially in official rituals.

Although this brief parenthesis allows only a partial understanding of the complexity of the principle of secularism in Japan today, it highlights the instrumentation of Shintō by the Government of the Meiji era of religion for political purposes. If in theory Shintō was not made to fall into the category of "religion", it was essentially proclaimed State religion, in violation of the Meiji Constitution (1868–1945). In Article 28 it states that "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief".

However, it must be kept in mind that the Meiji Constitution is judged negatively by many scholars precisely on the protection of religious freedom in the country. In fact, it is said that the wording of the article has led to the "limitation of the freedom" in the country "within the limit not prejudicial to peace and order and not antagonistic to the duties as subjects"[41].

While in the light of Yoshida Abe's analysis the protection of religious freedom by the Constitution can be considered guaranteed, it should be noted once again that the definition of the Shintō religion as non-religion undermines the very wording of Article 28 of the Meiji Constitution, and a substantial violation of religious freedom can be observed. It is also considered that even in the absence of effective persecution and limitations of other religions by the government, a basic prejudice is created which, if at the legislative level defines freedom of religion as a right, it is then frustrated by the different categorisation of the Shintō, as analysed above. For this reason, it is fundamental to understand how the Supreme Court of Japan today interprets the principle of secularism in the country and how this is fundamental, precisely in the light of this process of instrumentation of the Shintō in the Meiji Era, although briefly described here[42]

4. Principle of laicity in the Japanese and Italian constitutions

If in the more general theory the definition of religion is essential for a precise distinction with the secular, this becomes even more relevant in the Japanese case.

The analysis of the interpretation and application of laicity should be preceded by a focus on the definition of the term religion, to better understand the borderlines with the secular and to highlight the discontinuity between the Meiji and current Constitution. The stress on the interpretation given at juridical and political stage, which changes the expression of the laic and secular State and the following perception of the freedom of religion, before and after World War II.

The term 宗教 shūkyō, in its modern meaning, has been introduced in the Meiji Constitution and interpreted as a "prototype of a belief-centred Protestant-style Christianity in mind"[43], stage that sees the State Shintō 国家神道 or 國家神道 (*Kokka Shintō*) defining Shintō religion as non-religion, according to a perception of the concept of religion assimilated to the Christian/Western one.

Bypassing Meiji Constitution provisions, Shintō is considered a non-religion and no violation of the constitution is highlighted, neither the principle of laicity and the recognition of freedom of religion, although Shintō substantially becomes State religion, considered as national ideology and unified national and secular wave with a "compulsory participation of its subjects in shrine rites without infringing upon the constitutionally granted freedom of religion"[44], with the creation of a dichotomy between the *shūkyō* and the *dōtoku*, the secular, confining the first one at the sole private dimension and the second as a question of morality understood at national level.

Nevertheless, if the analysis on the concept of religion in Japan stops at the translation of the term from its western meaning, as given by the *Kokka Shintō,* there is a high risk to exclude from the analysis an

40 Ibidem, 53.

41 Yoshiya Abe, "Religious Freedom in the MaKmg of the Meiji Constitution," *Contemporary Religions in Japan*, vol. 9, no. 4, 57. *It should be highlighted that the author brings a positive analysis of article 28 of Meiji Constitution in his paper.*

42 Yuki Shiose, *Japanese Paradox…*, 319 ff.

43 Hans Martin Kramer, "Recovering the Secular in Early Meiji Japan: Shimaji Mokurai, Buddhism, Shinto and the Nation," *Journal of the International Research Center for Japanese Studies* vol. 30, (July 24th 2017): 63–77, 89.

44 Ibidem, 90.

important basis for the future process of "laicisation" of Japan.

In this analysis is essential the concept proposed by Kleine[45] to look for not a lexical analogy, a sole formal one, but would be more appropriate to study what the scholar defines the "structural analogies to the binary code religious/secular"[46], and so looking for the substantial analogies between the concept of religion in the Western, better Italian articulation and the Japanese one of the term. As said before, would be misleading and inaccurate researching and analysing the concept of religion and the later of laicity without considering the different perspective and application given at normative level.

Kleine specifies that it is not fundamental to find a semantic equivalent of the term "religious", to analyse the dichotomy with the secular, although the importance to find a "binary code" referring to two separate and opposed spheres: that one of "transcendence", which follows religious patterns that can be associated both to Christendom and Buddhist and Shintō, without considering relevant the different expression (ceremonies, sacred texts, etc.) of different spiritual cults.

Hence, "if we take Japan as an example, Christian missionaries, as well as Buddhist priests in the sixteenth century, presupposed that Buddhism and Christianity belonged to the same polythetic class"[47] considering "regardless of all differences between the two "cultic systems"[48]. In this case, the term "cult" has been used to underline that these moral systems can be both traced back at the same thought category, stressing that the different formal definition is not an obstacle, contrarily, is crucial for this analysis to define the principle of laicity in Japan and Italy.

The debate among scholars on whether or not using the term "religion" when concerns Japan is quite important. Nevertheless, this analysis does not focus on this emblematic linguistic and historical issue, albeit it takes into account, understanding that the term "religion" used here refers not just to Western dialectics, but also the native behaviours and cults that are conveniently called religion, with nothing to do with the Western conception of it.

The analysis aims to understand how the principle of laicity is interpreted in the Japanese Constitution in force and how the principle of separation of the transcendent sphere from the secular one has been applied by the Supreme Court in its judgments. To approach the analysis of the principle of laicity in Japan is fundamental to begin based on article 20 of the Japanese Constitution.

"Freedom of religion is guaranteed to all. No religious organisation shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity."[49]

In the text, are used the terms 信教の自由 (*shinkyō no jiyū*) freedom of religion, and 宗教 (*shūkyō*) religion. The first term 信教 (*shinkyō*) refers to the concept of faith and religious belief. The Constitution identifies, in this way, that the religious dimension, the transcendent, is protected as right and is protected by the State to any citizen and human being, in a broader meaning.

It specifies that no religious organisation should have any privilege from the State and no political authority. Following, it indicates the core of the principle of laicity, whereby every State's body must refrain from practicing any religious activity and the religious principles cannot influence politics. To better understand the interpretation given to this principle, two specific judgments of the Supreme Court of Japan are going to be analysed.

The Court's Judgment of July 13th, 1977[50] specified the definition of religious activities and to do so the

45 Christoph Kleine, "Religion and the Secular in Premodern Japan from the Viewpoint of Systems Theory," *Journal of Religion in Japan* 2:1 (2013): 1–34.

46 Ibidem.

47 Christoph Kleine, *Religion and the Secular…*, 7.

48 Ibidem.

49 Japanese original text: 信教の自由は、何人に対してもこれを保障する。いかなる宗教団体も、国から特権を受け、又は政治上の権力を行使してはならない。
何人も、宗教上の行為、祝典、儀式又は行事に参加することを強制されない。
国及びその機関は、宗教教育その他いかなる宗教的活動もしてはならない。

50 Supreme Court of Japan, judgment. N. 1971 (Gyo-Tsu) 69. Reporter: Minshu Vol.31, No.4, at 533, *Judgment on a case*

Court follows the definition of laicity itself in Japan and focuses on their peculiar relation. The principle of neutrality is expressed in the abstention of the State from interfering in any religious belief or individual conscience, which goes beyond the political dimension.

This step refers to what has been mentioned before regarding State Shintō and its interpretation of the principle of freedom of religion, distorted from its right meaning established by 1889 Constitution (the Meiji Constitution), which however guaranteed "within limits not prejudicial to peace and order, and not antagonistic to [the peoples'] duties as subjects"[51].

A strict and limited perception of freedom is given, especially regarding its interpretation by State Shintō, in which Shintō religion was declared as national ideology (not religion), through the interpretation mentioned before regarding the juxtaposition of the meaning with the Western perception of religion and with the creation of a State which is neutral just in theory, which contrarily establishes Shintō religion with mandatory attendance to the public rites violating that freedom of religion and freedom of conscience stated in the Constitutional Text.

In 1977 judgment the Supreme Court specifies that the multi-religious nature of Japan not only requires the definition of freedom of religion as guaranteed to everyone, but also that the State might be neutral to avoid any connection with any kind of religious belief existing on the territory.

If in Western legal systems the process of secularisation first and the introduction of the principle of laicity later is crucial to avoid further interferences from the religious on the political decision and normative formulations, including the protection of human rights of citizens in the State. In Japan, the development and formulation of a plurality of cults and behaviours are greater rooted than in other States in a different way than, for example, Western cultures, and this affects also the interpretation given on the principle of neutrality.

As the Court further specifies, is necessary not to find a hard demarcation line between the two spheres, but accepting that a complete separation cannot subsist and that attempting a "complete separation would inevitably lead to anomalies in every area of social life"[52], and that should be interpreted as violation of the article 20 "only if that connection exceeds a reasonable standard determined by consideration of the conduct's purpose and effects in the totality of the circumstances"[53].

Regarding the judgment, the Court had to clarify the nature of a Groundbreaking ceremony 地鎮祭 (*jichinsai*), "performed at the start of construction of a building to pray for a stable foundation for the building and safe construction of work"[54] and the nature of the payment given to the Shintō priest.

The ceremony as far as formally religious loses the religious connotation and gets closer to a secular custom and "most people would perceive it as a secularised ritual without religious meaning"[55] and in the context in which the ceremony has been held, it did not have a particular religious meaning since "such a ceremony is well within the bounds of general usage widely observed over many years" and even the owner of the construction site aimed to meet "the demand of construction workers to observe a social formality that has become customary at the start of work"[56].

Following, the Court clarifies that the perception of the Japanese population on religion is certainly different from that one of Western countries and that the use of this kind of religious ceremony instead of another cult represent the mixed religious consciousness and that in the case of Shintō occurs a lack of proselytism that can be found in other religions.

The Court considers the context in which the ceremony has been held which is linked to a more "secular ceremony conducted in accordance with general social custom". Moreover, the payment for the ceremony, around 7000 yen, does not violate article 89 of the Constitution, since it can be considered as the payment for a given service, not as financing that specific religion.

concerning the meaning of "religious activity" under Article 20, Paragraph 3 of the Constitution, 1977.07.13.

51 Extract from Article 28, Meiji Constitution.

52 Supreme Court of Japan, judgment. N. 1971 (Gyo-Tsu) 69.

53 Ibidem.

54 Ibidem.

55 Ibidem.

56 Ibidem.

The interpretation given to the ceremony follows the interpretation of the majority of the judges, however, the a dissent note is enclosed to the judgment by some members of the Court who contrarily consider the ceremony as non-convertible to a secular tradition because too soaked in religious symbols and rites, with the further element that the city mayor took part to the ceremony together with other public authorities, underlining the potential preferential treatment that could occur after the ceremony between the local administration and the shrine.

In a further note, the judge Fujibayashi Ekizo[57] specifies that the principle of neutrality of the State should not imply the complete indifference towards religion, which should be respected, also thanks to the right to the freedom of religion, guaranteed by the State.

Another clarification was given by judge Fujibayashi; even if article 20 of the Constitution has western origins, with a specific connection with the American one, it does not follow in toto the principle of laicity as perceived in Western Constitutions, it takes a further step. For this reason, although the judge himself quotes the first amendment of the American Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[58].

The Japanese provision is more specific when it states that "The State and its organs shall refrain from religious education or any other religious activity". According to the Supreme Court judge, the provision should be interpreted as a strict prohibition to any State body and representatives to be involved in any activity with religious implications, not only activities with a formal religious purpose.

The second judgment of April 2nd, 1997[59] on "the constitutionality of the prefecture's expenditure from public funds to religious corporations which held ritual ceremonies" regards the first decision of the District Court on non-constitutional expenses connected to religious activities prohibited by article 20 of the Constitution for two reasons. the first one refers to the fact that "the purpose of the offerings had religious meanings"[60], but also to the fact that "the effect of them would support and promote the religious acts of both Yasukuni and Gokoku Shrines"[61].

The case moves to the High Court in appeal, which challenges the previous judgment overturning it establishing that the case does not violate article 20 with no interference with other religions, even if the donation had religious purposes, which are considered by the Court as minimum personal contribution (from 5000 to 8000 yen per ceremony, according to the defendant), specifying that those were donations to bereaved families of World War II.

However, the Supreme Court affirms that these motivations cannot be accepted in the light of article 20 paragraphs 1 and 3 and article 89.

The state authority finds its representation on the territory in the local administration, which cannot refrain to implement and respect the principle of laicity. The further connection to the Meiji Constitution and its article 28 on freedom of religion, bypassed by the misinterpretation of the concept of religion, forbid any privileged relationship with any religion. The 1997 judgment takes back the principles established by the same Court in 1977.

At this point, the Court itself clarifies that the money offer 玉串料, *tamagushiryo*, should be analysed keeping in mind the context of important traditional ceremonies held in shrines, in religious places of worship with purposes that the Court separates from those of 1977 judgment. If in the previous case the owner wants to ensure safe foundations for his construction site, which was considered with a non-religious meaning. Furthermore, the Court specifies that the local authorities were involved without any doubt and intentionally in the religious group, with the aggravating element that the amount given for the donation had no precedents. The assimilation with the offers for 香典, *kouden*, given to the bereaved family during the funeral ceremony should not be misunderstood, neither with the 賽銭,

57 Judge's note has been translated and reported by the Supreme Court itself, from the same judgment document.

58 Supreme Court of Japan, judgment. N. 1971 (Gyo-Tsu) 69.

59 Supreme Court of Japan, judgment N. 1992 (Gyo-Tsu) 156. "*Judgment upon constitutionality of the prefecture's expenditure from public funds to religious corporations which held ritual ceremonies*".

60 Ibidem.

61 Ibidem.

saisen, given during the visit to the shrine, which is anonymous, unlike this case.

Resuming the interpretation given to article 20 and 89, with the principle of laicity, with the specific focus on the interpretation given by the Supreme Court, the delimitation given between the two spheres is not "complete" and the attempt of delimiting any contact between them would be impossible. Even the Supreme Court states that this purpose would be impracticable in substance. It could cause negative effects on society. Religion likewise politics are creation and expression of men, in their structures and rites and for this reason cannot be perceived as two divided spheres.

The principle of laicity, as elaborated by several scholars, lies in the relation of the State towards religion; in its constant and gradual regulation, the limits between the two spheres are maintained respecting the neutrality of the State on the one hand and the freedom of religion on the other. As the Supreme Court defines, it is important the context of a specific case, which cannot prescind from its grounds and socio-cultural context. As in the above-mentioned two cases, which gives two opposite decisions of the Court, it is necessary, in every single case, to understand how the boundaries move and how the concept of religion develops and changes in time. As in the case of the ground-breaking ceremony, secular reasons held by a religious ceremony which does not"exceed such reasonable limits"[62] is tolerable according to the interpretation of the Court on articles 20 and 89.

In the case of the Italian Constitution and the interpretation given by the Constitutional Court, it can be stated that the approach is similar in the identification of the context in which the religious act is held and the importance of the influence on the political sphere is always taken into consideration, together with the perception of the society.

The landmark judgment of the Court 203/1989 defines the mandatory attendance to religion class till high school, according to Lateran Treaties signed with the Vatican State of 1929 February 11th, according to which the Constitutional Court recognises the value of the religious culture in the country and takes into account that "the principles of Christendom are part of Italians' historical heritage"[63] with the further commitment to assure the teaching of Catholic religion in public schools (excluding Universities). The Court identifies four significant elements to explain its method. First, the recognition of the religious culture of the country; second, the principles of Christianity as part of the historical heritage of Italians; third, the continuity of commitment of the State to assure the pact with the Vatican; four, the teaching of religion as the teleological purpose of education.

The Court specifies that the confessional decision taken by the Albertine Statute, to establish Christian religion as the state religion, is formally abandoned by the Parliamentary Republic according to the Additional Protocol to the Agreement of 1985, re-affirming the Republic as a Laic State, in its bilateral relations with the Vatican State.

Furthermore, the Court indicates articles 2, 3, 7, 8, 19, and 20 of Constitution as legal basis for this statement and it defines, as the Supreme Court of Japan, that the principle of laicity does not mean indifference towards religion, contrarily, it guarantees the safeguard of freedom of religion, in a confessional and cultural pluralism regime. This crucial judgment states that even if "religion" as a subject in school, it cannot be mandatory for those students who decide not to follow it, for any reason. Under the age of 16, they should have the approval of their parents, after that, they can choose freely to follow it or now. And this decision cannot be a reason for discrimination at school, from students and teachers. The students who take this decision cannot be forced to follow another subject. This provision, at the same time, guarantees the commitment to the Lateran Treaty, respects the cultural-historical heritage, but at the same time does not constrain students, citizens from other religions or simply, people who are non-believers to not to follow "religion" as subject and not being discriminated at school, especially regarding the academic evaluation of the student.

As mentioned before, the interpretation of the principle of laicity in the State refers to a general theory

62 Supreme Court of Japan, judgment N. 1992 (Gyo-Tsu) 156.

63 Corte Costituzionale Italiana, Sentenza 203/1989. Giudizio Di Legittimità Costituzionale In Via Incidentale. (*Italian Constitutional Court, Judgment 203/1989. Judgment of Constitutional Legitimacy on incidental plea.*)

of separation of politics from religion, but what this research underlines is the particular interpretation of this principle and the historical and cultural context behind the decision of the two Courts.

Bibliography

Sicardi, Stefano. "Il principio di laicità nella giurisprudenza della Corte costituzionale (e rispetto alle posizioni dei giudici comuni)." In *Rigore costituzionale ed etica repubblicana*, Università degli Studi di Roma "La Sapienza" 2006.

Pacillo, Vincenzo. "Alcuni problemi (teorici e pratici) della libertà religiosa diciassette secoli dopo l'Editto di Milano, Lugano," *RTLu XVIII* (3/2013).

Ripepe, *Secolarizzazione e diritto costituzionale*, in *Esperienza giuridica e secolarizzazione* a cura di Danilo Castellano and G. Cordini, Milano 1994.

Atripaldi, V. "Cultura dei costituenti del '48," in *Esperienza giuridica e secolarizzazione* edited by di Danilo Castellano and G. Cordini, Milano 1994.

Casanova, José "The Secular, Secularizations, Secularisms," in *Rethinking Secularism*, ed. Craig Calhoun, Mark Jürgensmeyer and Jonathan Vanantwerpen, Oxford,2011.

Wolfgang Böckenförde, Ernst. *Stato, costituzione, democrazia: studi di teoria della costituzione e di diritto costituzionale* vol. 73, Italian edition, Giuffrè Editore 2006.

Habermas, Jurgen. *Between naturalism and religion: Philosophical essay*, Polity 2008.

Callegaro, Francesco. *Justice as the sacred in language: Durkheim and Habermas on the ultimate grounds of modernity and critique*, vol. 17/4, 342–60.

Shiose, Yuki. "Japanese Paradox: Secular State, Religious Society." *Social Compass* 47(3) (2000), 317–28.

Giorgio Fabio Colombo, "Stato, diritto e sincretismo religioso in Giappone: lo sguardo del giurista," in *Quaderni di diritto e politica ecclesiastica*, Fascicolo speciale,(december 2016): 22.

Okuyama, Michiaki. *Religious Nationalism in the Modernization Process State Shintō and Nichirenism in Meiji Japan*, Nagoya 2002.

Hardacre, Helen. "The Great Promulgation Campaign and the New Religions." *The Journal of Japanese Studies* vol. 12, no. 1 (Winter, 1986), 29–63.

Abe, Yoshiya. "Religious Freedom in the MaKmg of the Meiji Constitution." *Contemporary Religions in Japan*, vol. 9, no. 4.

Kramer, Hans Martin "Recovering the Secular in Early Meiji Japan: Shimaji Mokurai, Buddhism, Shinto and the Nation." *Journal of the International Research Center for Japanese Studies* vol. 30, (July 24th 2017), 63–89.

Kleine, Christoph. "Religion and the Secular in Premodern Japan from the Viewpoint of Systems Theory." *Journal of Religion in Japan* 2:1 (2013), 1–34.

Grzegorz Blicharz, Franciszek Longchamps de Bérier, Álex Corona Encinas

Modernizing the City: Legal Mentality and Multiple Scale of Actions in Historical Perspective

Grzegorz Blicharz

PhD, MPhil, Assistant Professor at the Chair of Roman Law at the Faculty of Law and Administration of the Jagiellonian University in Kraków; Colaborador honorífico at the Department of Roman Law at the UNED (Madrid).

✉ grzegorz.blicharz@uj.edu.pl

https://orcid.org/0000-0001-8221-8983

Franciszek Longchamps de Bérier

LLM Georgetown University, Professor of Law at the Jagiellonian University in Kraków.

✉ f.lb@uj.edu.pl

https://orcid.org/0000-0002-1485-0976

Álex Corona Encinas

PhD, Lecturer in Roman law at the University of Valladolid (Spain)

✉ alex.corona@uva.es

https://orcid.org/0000-0002-3413-7414

By merging three different historical examples, this article shows that legal mentality influences the management of similar public goods, the composition of institutional change in the urban sphere and finally the character of legal regulations best fitted in a given circumstances for arriving at desired outcome. The authors proved that the inclinations for ex ante *and* ex post *models are dependent on the concept of public administration and most particularly of administrative law. In a way, in the mixed public administration presented in the Roman law example, where both centralized and polycentric governance were applied, much depends on the narrative and values which accompany the institutional change in urban settings.*

Key words: complex commons, legal mentality, governance, Roman law, institutional change

https://doi.org/10.32082/fp.6(74).2022.1096

1. Introduction

Modernization and regulation are two issues that currently feed the debate on the concept of smart city. In this article, we intend to analyze both issues on the basis of historical examples of 19th century London and Paris. After that, we will immerse them into the discussion on public administration and administrative law by reference to the framework of ancient Rome. The two modernizing cities addressed themselves very different problems, implying different visions of modernity. The different nature of the problem in the two cases is closely related to the legal means used to face each situation. The big question in this context is: why did England and France perceived different problems when they looked at their cities?

In Paris—*Ex Post* Adaptation model—the state, relying on a one-man-management model, occupies territory without looking at the costs. It introduces reforms from above, which are blocked over time due to legal conflicts and economic problems, but technological change is effectively introduced and ex post verification cannot erase that step, although it mitigates costs and the management model. In London—*Ex Ante* Adaptation model—technological change is supposed to be introduced from below. As a result of imposed standards, private owners become obliged to introduce certain solutions under the control of a public official, who has wide discretion, which serves to reduce the possible burdens and costs of the modernization process. Both cities were interested in indivisibilities that transcended the scale of an individual building project. But London was not trying to reshape the streetscape as in Paris, being interested in indivisible attributes on a smaller scale having to do with health and safety. So the two cities adopted very different legal approaches: 1) in London, detailed building regulation of private parties with *ex ante* modifications by granting exceptions and 2) in Paris, expropriation that allowed for the reshaping of the streetscape, for both aesthetic and efficiency reasons, with *ex post* mitigations for adverse effects at a micro level.

Both models appeared in London and Paris at the time when a new branch of law—administrative law—was born, both in the legal systems of continental Europe and in the Anglo-Saxon systems. Ways of understanding public administration and administrative law influence the models and modes of governance adopted. The distinction between public administration and administrative law[1] leads to the recognition of the existence of the latter only in the 19th century. It is pointed out that modern administrative law is not related to the legal tradition of ancient Rome, and the possible influences of Roman law are, at best, "second-hand." Therefore, it seems only fair to ask ourselves if the history of administrative law started only 200 years ago. It happened to the administration to be active and effective before the French created its structures by legal regulations and the modern civil law concepts were invented in the 19th century Germany on the basis of Roman law[2]. The language of theories of governance and administration is not often applied to organizations of ancient times, but in ancient Rome we can indeed find some the roots of the strong legal mentality of European legal tradition, which turned out to influence the 19th century management of modernization processes in Paris and London.

1.1. The Dataset

The analysis is structured to uncover certain schemes of governance by description of situation and legal regulation, and the problem which is to be resolved. In regards to the description of legal regulation we are focused on: *The Metropolitan (London) Building Act of 1844*; *Décret du 26 mars 1852 relatif aux rues de Paris*, and several imperial constitutions from the times of emperor Justinian I (Novels) which regulated the local institution of *defensor civitatis*. Our analysis focuses primarily on legal texts, which are interpreted taking into account social, economic and political context. We do not limit ourselves to the analysis of the provisions of legal acts, but also reach out to adjudication of rights, i.e. the effects of regulatory regime, and on

1 Franciszek Longchamps (1912–1969), "W sprawie pojęcia administracji państwowej i pojęcia prawa administracyjnego" [Remarks on terms 'state administration' and 'administrative law'], *Zeszyty Naukowe Uniwersytetu Wrocławskiego*, seria A, No. 10 (1957): 19–21.

2 Tomasz Giaro, "Diritto Romano attuale. Mappe mentali e strumenti concettuali," in *Le radici comuni del diritto europeo. Un cambiamento di prospettiva*, eds. Pier Giuseppe Monateri, Tomasz Giaro, Alessandro Somma (Roma: Carocci editore 2005), 149.

competing values protected by law and legal institutions that influenced the law enforcement.

Legal mentality differs due to different balance of values promoted by each legal order. In this sense, we agree that the nature of public good is not the only factor that influences the mode of governance. Different approaches to governance may be taken depending on the legal mentality and the way we define the issues to achieve the desired public good, which sometimes consists of a series of simple and complex public goods to ensure the delivery of a mixed public good. Why different, but still effective, ways of governance of similar mixed public goods were chosen is embodied in other factors as well, like politics, economics and the social context. However, we would like to stress one specific factor—less commonly referred to—i.e. legal mentality, which makes that for a given managing body different ways of regulation are considered as optimal. Recent literature refers to this phenomenon as to path dependence. Both courts decisions regarding administrative law, and generally legal constructs and legal doctrine in civil law and common law rest on legal tradition and historical experience of particular legal order which are followed for different reasons.[3] Even though at the same time London and Paris were looking at each other carefully and comparing their legal regulations, they still chose to pave their own way to implement technological changes. London was immersed more in its common law history and feudal attitude toward property gradually evolving in the times of the clash between the idea of freedom of contract and social responsibility. Paris followed Roman law constructs reshaped by the revolutionary legislative intervention into the legal order in the form of the Civil Code of 1804. Very similarly, the emperor Justinian the Great, in the 6th century AD, while looking back at the old good times of Roman empire and willing to restore ancient law (an example of path dependence in his times), made the decision to reform city management according to his own mind and project.

Both in London and in Paris during the 19th century, city management bodies were endeavoring to modernize city, but they followed very different approaches to provide this mixed public good. Firstly, there was an imposed and different sensitivity to the idea of modernization, both in terms of values and goals, and, thus, different issues were chosen to be resolved, i.e. different simple and complex public goods were at stake. Secondly, provision of such envisaged public good was set to be achieved on different scale of actions, which was the consequence both of different sensitivities and issues, and as we claim, different legal mentality. We are finishing our analysis by expanding on the notion of legal mentality, and its importance for polycentric governance of mixed public goods. The multiple scales of action in both urban cases takes us directly to the ancient Roman imperial case. This point is also connected with the city management being a part of the structure of a mega-organization.

Why did England and France perceived different problems when they looked at their cities?

2. London: Ex Ante *Adaptation Scheme at Microscale Level*

The Metropolitan Building Act was not the first piece of legislation which regulated buildings in London, but the first one since previous regulation of 1774. The act of 1844 was then in many ways pioneering. Most importantly it introduced many solutions proposed in the Normanby Bill of 1841 which was the first, but unsuccessful try to establish a nationwide legislation

3 Monika Stachowiak-Kudła, Janusz Kudła, "Path dependence in administrative adjudication: the role played by legal tradition," *Constitutional Political Economy* vol. 33 (2022): 301–25; Yun-chien Chang, Henry E. Smith, "An Economic Analysis of Civil versus Common Law Property," *Notre Dame Law Review* vol. 88 (2012): 9.

regarding building regulations. Soon after enacting Metropolitan Building Act of 1844 it was followed by the whole body of building regulations in the second part of the 19th century, and building regulations covering the field regulated but this Act were gradually being extended at large. In London grand scale politics was not so much at stake in regards to modernization of city, but the fear against the smallpox epidemic encouraged to replace already outdated building regulation of 1774 with the regulation which reflected the idea of modern city both in terms of infrastructure and sanitary conditions. The epidemic of 1837–40, perhaps, also thanks to the technological improvement sanctioned by the act of 1844, especially in terms of securing proper ventilation of the city and sufficient distance between houses, turned out to be the last "smallpox in its old colours".[4] This context influenced how modernization was understood in London, and thus which issues were prioritized, what approaches were taken to ensure the modernization of city and how effects of governmental intervention were accommodated.

2.1. What does modernization mean?

The question, then, lies in determining what was regarded as "smart" solutions (using today's terminology) for London at that time. Reading *The Metropolitan Building Act* uncovers the meaning which the legislator attached to the concept of modernization. The modernization of London was to be driven through the regulation of construction and the use of buildings in the metropolis and its neighborhood. Reference to "construction" and "use" of buildings signifies that the modernization was to be achieved through a technological change both in terms of the design of the city's architecture, and the use of architecture. From the commons standpoint, it influenced various scales of issues uncovering a perplexity of private and public interests in everyday urban life. The regulation interfered with both outer (design) and inner (use) side of city life. Just like roads, and sidewalks, buildings are an important constituting element of the public space, especially in the case of their frontages.[5] However, unlike roads and sidewalks, buildings are private, so the use of them does not constitute an immediate element of public life. Yet, often buildings are used not only by their owners, for they will also allow the public or a specific individual to use them. Moreover, even solely private use of buildings may at some point influence the public space of the city, and thus, it turns out to be within the realm of public regulation or putting it differently: it flips within the boundaries of the urban commons. That is the point where "the rubber meets the road". There is no way to overcome the clash of what is public and what is private without establishing a certain compromise with private owners. It may be achieved only by presenting a clear framework of goods that are to be met through the regulation of design and use. The regulation sets out a complex structure of goods. However, the main goal of technological change that is referred to in the Preamble, is the Health of Inhabitants, which at one point is coined as the Health and Comfort of Inhabitants. Regulation operated at different scales of action in order to deliver a complicated public good.

First of all, it redefined the physical boundaries of urban commons in order to provide a complex public good to all inhabitants of metropolis. Regulation covered new buildings that extended nearly in continuous lines or streets far beyond the city limits. Thus, on the one hand, escaping previous buildings regulations, but, on the other hand, *de facto* extending the structure of the city. The act provided a flexible procedure for readjustment of current regulation coverage for future cases and possible extensions of buildings outside new limits.

Secondly, and most importantly the act introduced specific provisions related to simple public goods whose delivery was headed towards the improvement of the health and comfort of the inhabitants. That goal was to be done by:

4 Anne Hardy, "Smallpox in London: factors in the decline of the disease in the nineteenth century," *Medical history* 27 (1983): 112.

5 Just recall the example of speculative building developed by John Wood, the Elder in the city of Bath, at the Queen Square, where he leased the land and designed only the frontages of buildings and sub-let the land to others who were to build walls and cover buildings with roofs, as they wished, by the frontages had to be made according to the Wood's project.

- facilitating and promoting the improvement of drainage of the houses.
- securing a sufficient width of street, lanes, and alleys in order to bring about proper ventilation and to lower the risk of accident by fire due.
- discouraging and prohibiting the use of buildings or parts of buildings unfit for dwellings to lower the risk of spreading the disease.
- regulating the construction of buildings where explosive materials are used and buildings used for habitation or for trade which are within the safe distance from such places.
- adopting expedients for carrying deleterious and noisome works and businesses or allowing such activities at safer distance from buildings used for habitation.

In most of the initiatives listed above, the protection of the health of the inhabitants is specifically mentioned and in some of them the main aim is clearly implied. Only in regards to the last issue ("deleterious works") a reference to both health and comfort of inhabitants was used. In fact, by the mix of simple public goods which serve to provide a complex public good we obtain a panorama of how modernization was understood and how it was to be accomplished.

Modernization was to be fulfilled through cooperation between state apparatus and private owners. It is confirmed by the language of the act in which the legislator used a variety of means: from facilitating, promoting, and discouraging, to prohibiting, regulating, securing and adopting expedients.

Thirdly, the act changed the rules for the control and supervision of the compliance with technical standards of buildings and the use of such buildings. Among the officials applying the already existing legal acts, various practices were developed, which differed in city districts, but also started to lead to the rise of costs and delays in construction of buildings (sec. 1). Legislator acted then on the level of monitoring rules and clarifying law enforcement mechanisms. For these reasons, the lawmaker decided to make the application of statutory standards more flexible.

Legislator introduced technological change justifying it with very broad set of values and specific goals that should made interference with private property more understandable. Without doubt, it influenced the effectiveness of enacted provisions, and that is why we are calling it *ex ante* adaptation scheme: it tries to accommodate profits and burdens so as to diminish the possibility of legal disputes and economical losses both on side of private owners and the state. It continues in line with the Anglo-Saxon understanding of administrative law, which treats state–individual relation according to the consensual model. Therefore, we are looking at the act, which is a reaction to the previous management of urban space and to a most rapidly developing city, which faces all new technological problems in building business.[6] Thus, it introduces new solutions aimed at coordinating the technological improvement of the city.

Is it really that modern administrative law is not related to the legal tradition of ancient Rome?

2.2. How to effectively employ legal regulation to modernize the city?

It is interesting to observe that the English legislator indicated three values to which the application of the act should be subordinated: practicality, preservation of the purpose of the act and reduction of economic costs of applying the law, in order to foster economic development, which uncovers yet another aspect of *ex ante* adaptation.

First of all, a new office has been established—the Office of Surveyor—with the authority to appoint offi-

6 Roger H. Harper, *The Evolution of the English Building Regulations 1840–1914*, vol. I, (a thesis for the degree of doctor of philosophy at the University of Sheffield) 1978, 67.

cials and supervise the application of the law (sec. 1). Most importantly, the new office has been given the power to relax the rigid rules, if strict compliance with the law is impractical or opposes the purpose of the act or unnecessarily burdens the building business and its future.

Secondly, a derogation from strict compliance with the statutory norms has been made possible by further provisions of the act in the event that such compliance would involve great loss or inconvenience for the party. Where the reconstruction of old buildings was concerned, it was allowed to comply with the new law "as near as may be practicable," provided that the external walls and party-walls were of sufficient thickness and height (sec. 12).

Thirdly, the legal regulation was enriched with annexes, while the content of the regulations contained only references to schedules with detailed technical *Particulars, Rules and Directions*. For example, the enclosed Schedule C indicated the division of buildings into classes and rates for buildings in a given class (First Class—Dwelling-House Class; Second Class—Warehouse Class; Third Class—Public Building Class). Subsequently attached schedules D, E, F, G, H, I, K contained detailed technical data concerning dimensions and materials of external walls, party-walls, number and height of stories, rooms, timbers, drainage, projections, etc. The Act had 118 sections and 12 Schedules attached which in the printed version prepared by David Gibbons in 1844 covered 160 pages.[7]

Fourthly, several duties on the builder to submit a notice to the Surveyor at his Office at different stages of the building process were introduced (sec. 13–16). The builder, understood broadly –master builder, any person employed to complete any work, the owner of the building or other person who ordered such work to be done– was obliged, e.g. to submit a notice two days before "any building shall begin to be built" or "any opening shall be made in any party-wall" etc. (sec. 13). Such notice should be submitted on a specified form annexed to the Act. It is important to mention that the Act allowed officials to supervise and to check that the statutory criteria are met at every building site at any moment and to order to amend the irregularities (sec. 13–14). There was another duty imposed both on the builder and the architect to submit another notice when the building or its renovation or any other work was completed (sec. 15). There was also an appropriate form provided for by the Act. If the building met all the statutory requirements, it received an official certificate and could be used.

Fifthly, violation of the statutory rules gave rise to legal liability. If the building was used before the certificate was obtained or if the building was not reported on the relevant form within 14 days of completion, then a 200 pounds fine could be charged for each day of such use. There were also other fines specified for different cases, e.g. 20 shillings, 20 pounds, 200 pounds. It is also worth noting that if building process was considered a nuisance, the demolition of the work or even a prison sentence for the builder could be ordered (sec. 18).

2.3. Context

In London new regulation of building law was prepared meticulously. In fact, it was the first so important and direct interference with the sphere of private property and the rights of urban owners. Thus, it came about under the pressure of the public with huge interest on trade magazines. *Ex Ante* adaptation model although very generous and consensual was not immediately effective in terms of technological change. From the very beginning, the act of 1844 was constantly accommodated and, at the same time, immediately amended and adjusted. In fact, works on new legislation started already when the act of 1844 was yet to be enforced. It has been ultimately repealed by new Metropolitan Building Act of 1855. Before that, it was amended by several bills and especially surrounded by nationwide legislation, which was aimed at extending sanitary requirements in other towns and cities through: Towns Improvement Act of 1847, which targeted especially building cellars and street widths, and Public Health Act of 1848, which dealt with drainage, sewerage, water supply, paving and cleansing.[8]

7 *Metropolitan Building Act of 1844, 7th & 8th. Vict. Cap. 84 with notes and an index by David Gibbons* (London: John Weale 1844).

8 Anne Rebecca Neeves, *A Pattern of Local Government Growth: Sheffield and its Building Regulations 1840–1914* (PhD thesis at the University of Leicester, 1991), 123–125.

It was not easy to meet the standards envisaged in the legal act. It contained new solutions, but huge pressure from building business and private owners blocked their implementation, and soon they were removed or changed by new acts. On the one hand, the interference with private property was considered too harsh and, thus, it raised objections and public criticism. One of them dealt with strict provisions that prohibited back-to-back houses in London.[9] On the other hand, the act *prima facie* contained many exceptions, which should made for a flexible application, i.e. provided *ex ante* adaptation. In fact, there were no cases or legal disputes regarding these provisions reported, even though control over design and use was considered as a significant one.

In fact, there were previous regulations in other cities, but the idea of unification of urban regulations was abandoned. In the second part of 19th century regulation of urban structure was still governed by by-laws rather than national legislation which only produced certain model by-laws which could have been followed by cities. Moreover, some cities defended their style of buildings despite state pressure whose prominent example is Leeds.[10] Finally, the most optimal construction standards for sanitary and emergency purposes were enforced through by-laws prepared by Local Government Board. The Local Government Act of 1858 allowed towns and cities to shape their requirements freely while implementing especially Metropolitan Building Act of 1855 and Towns Improvement Act of 1847. In 1877, the Local Government Board successfully based its legal claim on its own model by-laws. Many other local authorities followed this example and by 1882 over 1500 of them had their own by-laws. However, local standards could not be implemented without cooperation with commercial and private agents. *Ex Ante* Adaptation model proved its consensual character and found its way towards gradual implementation of technological change first in London, and then nationwide. The court system was used to protect and enforce local building regulations (by-laws), which further delineated the balance of power between centralists and protectors of the autonomy of towns.

3. Paris: Ex Post *Adaptation Scheme at Largescale Level*

The analysis of the example of Paris shows how property law is important for making a city smarter. The structure of ownership proved essential for the development of the city. The law established in 1852 allowed Georges Haussmann to expropriate entire blocks, and remade layout and infrastructure of the city. Unlike in Metropolitan Building Act of 1844, detailed rules and standards "as regards the height of houses, attics and dormer windows" were to be introduced by "a subsequent decree, issued in the form of public administration regulations" (art. 7), and not by annexed schedules to the main act. It applied a top-down model with expropriation mandate as a symbol of public action rather than a collective action.

3.1. What does modernization mean?

Unlike Metropolitan Building Act of 1844, the *Décret du 26 mars 1852 relatif aux rues de Paris* was very short: it contained only 9 articles. There were two main goals in the *Décret*: to remake the city infrastructure and to ensure that buildings of Paris were safe. The regulation refers "to the interests of public sustainability, the health and beautification of the city."[11] Article 4 secured that builders must "comply with the instructions given to them, in the interests of public safety and health." In the regulation directed primarily to the streets of Paris certain provisions, which immediately placed burden on private owners of buildings, were included. The *Décret* was enacted in order to provide complex goods: public safety and health, and in an important deviation from the London act, it expressly mentioned the beautification of the city. However, unlike in the London act there was no detailed justification that could explain the strong interference within the realm of private property.

9 Joanne Harrison, "The Origin, Development and Decline of Back-to-Back Houses in Leeds, 1787–1937," *Industrial Archaeology Review* 39/2 (2017): 106.

10 Ibidem, 107.

11 Jean Déjamme, *Application aux villes du décret du 26 mars 1852 sur les rues de Paris* (Paris 1887), 3.

3.2. How to effectively employ legal regulation to modernize the city?

The most crucial provision was contained in the art. 2 and referred to the beautification of the city infrastructure by the use of expropriation law. Furthermore, it allowed the so-called extended expropriation: "It may likewise include in the expropriation, buildings outside the alignment, when their acquisition is necessary for the suppression of old public highways deemed useless." This last provision turned out to be a decisive factor in introducing technological change in Paris. The crux of the matter was the definition of alignment, and the interpretation when it is necessary to acquire buildings outside the alignment. Territorial-spatial factor was present in London regulation as well—extension of territorial limits along the lines and streets beyond the city limits—however it was centered both on the design and the use. In the case of Paris, due to the beautification of city, the design appeared to be the most prominent complex good to be achieved, and the city management was equipped with the most powerful tool to impose technological change into the city.

The application of expropriation mandate produced, however, harsh social and economic consequences for both the city and its inhabitants. Georges Haussmann tried to employ risky bargaining on rocketing prices of private lands in order to keep the project economically viable. In this context, the Haussmann's reforms were challenged in courts numerous times by private owners. The *Conceil d'Etat* declared the illegality of certain expropriations in 1856. Two years later, on December 27 the same Council ordered to return to private individuals the property not used directly for reshaping or making of the new streets. Thus, it confirmed their rights to the lots expropriated under art. 2, which were outside the new alignment, and confirmed the upgraded value of their property.[12] In 1860, the Court of Cassation allowed the private owners to seek compensation for illegal expropriations from the city and to base their claims on the upgraded value of the real estates.[13] Nevertheless, the Haussmann's improvements caused a total change of the city structure and infrastructure and had to be considered an enormous architectural success. The goal of beautification of the city was reached. The standard regulation set up for Paris was possible to be applied by other cities—art. 9: "The provisions of this decree may be applied to all cities that so request by means of special decrees issued in the form of public administration regulations," and, in fact, many cities in France requested and obtained the application of the decree.[14] Haussmann's Paris became a model city also for other European and Western capitals. Yet, the development of city and the expropriation law created enormous debts for the city, and perturbances on the real estate market in France.

3.3. Context

Politics were at stake in Paris: the return of Napoleonic order and the idea to promote France as a leading empire. In the case of modernizing Paris, the private interest eventually prevailed. However, for many years the state interest was well enforced by one person backed by political power of Napoleon III. Together with the change of politics and the lack of political influences, Hausmann project and effectiveness of the legal regulation were curtailed and private interests prevailed. It happened through *ex post* mitigation by the courts.

Private interest was endangered at large by grand scale vision and wholesale approach: the state control over urban planning was enlarged by broadening the definition of alignments which were exposed to expropriation and by blocking any modifications introduced by private owners to buildings within the reach of new urban architectural project. Again, private owners clashed with the state interest. Here the French legislator did not act with delicacy, with the idea of *ex ante* accommodation. All problems were confronted or resolved afterwards. Grand political vision was at

12 Antoine Paccoud, "Paris, Haussmann and property owners (1853 – 1860): researching temporally distant events," in *Distance and cities: where do we stand? Writing cities: working papers (2)*, eds. Günter Gassner (London School of Economics and Political Science, 2012), 7; Michelline Nilsen, *Railways and the Western European Capitals: Studies of Implantation in London, Paris, Berlin, and Brussels* (Springer 2008), 203.

13 M. Nilsen, *Railways and the Western European Capitals…*

14 J. Déjamme, *Application aux villes…*, 8–10.

the bottom of legislation, which was more focused on delivering beautification than healthy conditions. Even securing the width of Paris boulevards was not merely to provide better air circulation than in London, but to effectively curtail possible street demonstrations by the maneuvers of army. The project anyway was completed with success even though at the end the model of governance was broken with disastrous economical effects for the city. The public good was delivered: Paris became and still is the symbol of urban planning.

4. London and Paris Compared

Modernization projects of London and Paris in the 19th century were employed in a special situation in Europe and in the United Kingdom. On the level of politics, we need to take into account phenomena like the Revolutions of 1848, the rise of communism, and nation states. In terms of economics, the industrial revolution and the rise of free commerce and entrepreneurship. In terms of law, the rise of idea of subjective rights based predominantly on the concept of private property and ownership, constitutional protection and individual freedoms together with the freedom of contract, and, at the same time, the counter cry for social protection and state control of mighty owners. On the level of health conditions, in the first part of the 19th century there was a smallpox epidemic, which gave rise to the idea of modernizing housing and sanitary conditions in overpopulated cities of London and Paris. This last factor together with tensions between private owners and the state, and political issues in the background, influenced modernization projects of London and Paris.

Legal mentality makes that for a given managing body different ways of regulation are considered as optimal.

In modern architectural thought we discover similar problems. State control and state watch over the city are contrasted with the vision of urban architecture that builds on the perspective of citizens, inhabitants. Top-down planning today depends on business models, on grand vision which is not attached to the inner life of districts, streets, pubs; which does not take into account peculiar social life which makes city vivid, attractive and even offers social control better than the state one.[15] The top-down model even today often uses expropriation or, as it is called in the United States, "eminent domain". Ultimately, such projects can prove costly and not deliver the desired results. In Paris, the strong regulation only with *ex post* mitigation was introduced, however, not only to allow city management to act arbitrarily. In fact, it could have been a tool to overcome ineffectiveness of previous regulations, and the strong position of private owners who profited and were enriched on public city planning. Eventually, the idea to curtail such phenomenon failed both due to political and legal grounds. On the other hand, private owners were appealing to the existing legal protection of ownership title to land which was challenged by broad interpretation of the *Décret*.

In both examples—of London and Paris—there was interference of the state with the private sphere, but also reshaping public elements of streets. It is where starts the problem of delivering technological change in terms of both the design and the use. At this stage, the legislator may take two approaches: *ex ante*, or *ex post*. It may lead to similar results. However, which way is chosen depends not only on the nature of public good, but also on different conditions, different ways of solving problems, different problem identification, and also different legal mentality, which depends on values promoted, politics entailed, and sensitivity to social concerns. In London, the design and use of rules was coordinated by the new office with wide discretion, by gradual uniformization of design and use of infrastructure through a variety of sanctions

15 Jane Jacobs, *The Death and Life of Great American Cities* (New York 2016), 11–12; 337; 420.

and controls which was based more on collective action of owners, building business and public officials. A top-down model was used in Paris, where one person—an architect—had the discretion of *ex lege* expropriations. This model of changing the design and use of rules and infrastructure caused numerous litigations in courts.

5. Legal Mentality: Values behind Governing and the Roman Law Pedigree

The examples of 19th century London and Paris were not chosen arbitrarily. In fact, the idea of administrative law as a distinct concept from public administration arose in the 19th century in France. The interest in administration starts during the Enlightenment with French bureaucracy of the 18th century. The phenomenon of administrative law constituted an important element for the legal mentality of the French legislator and the managing bodies. The top-down approach proved that the unequal relationship between the state and individuals and the developed system of administrative courts turned out to be an effective tool in *ex post* mitigation of public administration. In civil law system, and particularly in France, the concept of administrative law signifies a special relation, which is grounded in public law principles deviating from the private law paradigms. One of its important aspects is alternative court system with *Conceil d'Etat* as the Court of Appeals and the Court of Cassation. On the other hand, *ex ante* adaption scheme of English legislator still presented the idea of administrative activity, which is flexible enough to continuously accommodate the effects of its decisions. The idea of administrative law slightly differently understood evolved in common law systems where it was similar to private law relationships. That is why *ex ante* adaptation scheme was more plausible. It ended up with numerous acts and decentralized regulations and extended period in which certain minimal rules regarding urban planning were introduced at large scale. Somewhere in the middle ground between these two models, we find the experience of Roman law which lies at the bottom of legal mentality both of common law and civil law.

The present study, drawing on the tradition of building analytical frameworks for the study of the commons[16] seeks to marry the experience of European legal history with governance issues. In this regard, we consider mining history as source of good data on relevant problems. Inspired by other historical studies on the commons and especially on the historical commons[17] we are looking at certain examples of the commons from the legal perspective and even more particular in the light of the ancient and modern law. In fact, many modern legal concepts like property rights, joint-ownership, or rules of access and use of goods common to all mankind are grounded in Roman law, and modern law developed along the lines drawn already by the ancient tradition.[18] Needless to point that the 19th century turn from the absolute theory of unlimited ownership title to more social, correlative or communitarian view of exercising our own rights can find its origins in Roman law as well. The modernization rush of the 19th century cities: London in 1844, and Paris in 1852 follows two different paths of implementing legislative change which have their origins in the Roman law of governing a megaorganization which not only served as basis of a wholesale theory of ownership as a dominion with strong *ex post* legal protection (*rei vindicatio* claim), but also employed certain limitations to private property because of public interest especially in the urban context, so crucial for the imperial management which required collective action of citizens and public officials being an example of *ex ante* adaptation.

16 Ronald Oakerson, "Analyzing the Commons: A Framework," in *Making the Commons Work: Theory, Practice, and Policy*, eds. Daniel W. Bromley et. al. (San Francisco 1992), 41–59; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York 1990); Michael D. McGinnis, and Elinor Ostrom, "Social-ecological system framework: initial changes and continuing challenges," *Ecology and Society* vol. 19, No. 2, (2014): 30.

17 Tine De Moor, *The dilemma of the commoners: Understanding the use of common-pool resources in long-term perspective* (Cambridge University Press 2015).

18 G. Blicharz, *Commons – dobra wspólnie użytkowane. Prawnoporównawcze aspekty korzystania z zasobów wodnych* (*Commons – Jointly-used Goods: Comparative Aspects of the Use of Water Resources*), (Bielsko-Biała: Wydawnictwo Od.Nowa, 2017), 167–168.

Roman law is the legacy of legal thought. It allows us to illustrate how law reflects values and what those values might be from the legal point of view. The perspective offered by Roman law warns against a naïve faith in progress and the linear development of History. In taking such a position, it seems instructive to look at the evolution of Roman law as an example of legal discourse and a strong factor influencing legal mentality.

> **Rome is us—you and me, but fully you and fully me, so I with you. The State conceived as being a community of citizens was never separate from the citizens.**

For the sake of clarity, it is worth reminding that the Roman Empire adopted two forms: the principate and the dominate. It might have seemed at the first glance that the dominate should be the natural object of researches on governing the Empire and urban spaces. The dominate had well-developed bureaucracy—an official apparatus that was supposed to control the permanent economic and social crisis. However, the principate and its focus on decentralization is more interesting for anyone interested in smart governing of an extensive empire. In the era of the principate, the tiny central imperial office and provincial governors cared only about some of the most important issues: peace, defense of borders, maintenance of order and observance of the law, collection of taxes, and higher degrees of what we now call the system of justice—a truly public *utilitas*. The rest remained in hands of the cities, hence where they did not exist like in Gaul conquered by Julius Ceasar, Romans had to found them in order to rule efficiently over large areas of new territories. Urban elites identified themselves with the Capital. The paths of career were open to provincial Roman citizens who started in order to make them feel closer to the central power of the City.

A comparative approach to the matter of urbanism and public management of goods seems like a convenient element to consider. At this respect, the managerial activity in Ancient Rome could be public or private. It is worth to note that *utilitas* was the crucial criterion for distinguishing private law from public law. The jurist Ulpian wrote: "Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests (*utilitas*), some matters being of public and others of private interest. Public law covers religious affairs, the priesthood, and offices of state."[19] Romans would certainly agree that the reason the office of *praetor* existed and that his duties were performed was the common good—*utilitas*—either of the individual citizens or the State made up of them. Indeed, every aspect of social life achieves its full potential through reference to the common good: even when it is a category that is not explicitly recognized, and even when the thought that all men are equal is only beginning to gain wider recognition. And that is what can be observed based on the example of Rome and Roman legal experience. The clash between public and private interest is particularly visible in the urban community where public sphere is created on the intersection of private interests. We will analyze it on examples of two officials—*praetor* acting at the beginning of the principate and *defensor civitatis* as restored in the late Roman Empire of Justinian.

6. Praetor *and* Defensor Civitatis*: Two Examples of Roman Administrative Praxis*

The concept of the State was understood differently in Rome than we understand it now; although,

19 D. 1,1,1,2 Ulpian, *Institutes*, book 1.

in fact, it was more favorable for what we understand today as the common good. The State was conceived as being a community of citizens, and was therefore referred to as a public thing – res publica. It was not separate from the citizens; it did not exist in isolation from them. Idealistically, in Kantian fashion, we would call it a community of free individuals in its pure form.[20] In Martin Buber's wording, the idea could be expressed as follows: Rome is us – you and me, but fully you and fully me, so I with you. Let us add that—despite references to humanitas[21]—there was no room in Rome for mercy, the way it is understood in Christianity. Moreover, the claim that the ancients mastered the seven deadly sins to perfection appears to be thoroughly justified.[22] Finally, the entire public legal order in Rome, in which the praetor held a special place, was different too. The person and the office were perceived in conjunction with one another, which is emphasized when it comes to clarifying the ambiguity of the word ius. The magistrate and place where he performed his official function merged to the extent that the two were simply called—the law. This should come as no surprise, since in our times the court tends to be identified with justice, and the militia (now the police) with power. Since the early days of the Republic, the body entrusted with the function nowadays known as the judiciary was the praetor.[23] Seated on his chair, i.e. sella curulis, the praetor was not only a statuesque embodiment of the law in action, law which was close to the citizens of the Republic. In the earlier statements made in the above-cited text by Paulus it is clear that the Romans had no doubt that the process of enforcing the law not by an ordinary citizen, but by an official appointed for one year and endowed with said authority, was law par excellance. Created by officials, and therefore called ius honorarium—from honor, meaning "office"—it was law, like natural or civil law, although not in the same way. Besides specific references to goodness and justice, the term ius is also used as a category that does not express any judgment: what matters is who administers the law, who exercises jurisdiction, and not whether it is in compliance with the existing legal order. It is only the outcome of official acts that is judged, like any law: from the point of view of goodness and justice. Through the activities of the magistratus—the praetor—the law is brought up to date for citizens, which is why a passage from a textbook by the jurist Aelius Marcianus, who said: "praetorian law is the living voice of civil law", should be appreciated for its accuracy and aptness.[24] A citizen was elected to hold the office of praetor and to administer and enforce the law in accordance with his knowledge and experience. Through his official acts as a magistrate, he had to ensure that goodness and justice prevailed in specific circumstances of everyday life. It seems reasonable to perceive in the performance of his official duties the institutional expression of concern for what is meant today by the idiomatic expression "the common good".

The pragmatic aspects of the praetor's work can be seen in the remedies he employed, now referred to as praetorian non-procedural measures. The protection he offered was provided more by his power than by jurisdiction (*magis imperii quam iurisdictionis*): he restored to an original state (*in integrum restitutio*), ordered the presentation of someone or something, prohibited or ordered specific behaviour (*interdicta*), authorized entry into possession of someone's property (*missio in possessionem*), demanded obligations to be assumed orally in the form of stipulations (*cautiones*). The praetor exercised jurisdiction through the legis actiones or the formulary system of procedure, refusing to refer the case to a private judge (*denegatio actionis*), granting claims made by parties against a suit (*exceptiones*), editing the texts of developed litigious formulas, or instructions for judges. To extend that

20 Zbigniew Stawrowski, *Dobro wspólne a filozofia polityki* [*Common good and filosophy of politics*], in *Dobro wspólne. Teoria i praktyka* [*Common good. Theory and praxis*], eds. Walter Arndt, Franciszek Longchamps de Bérier, Krzysztof Szczucki (Warszawa 2013), 22.

21 Henryk Kupiszewski, *Prawo rzymskie a współczesność* [*Roman law and the contemporary world*], eds. Tomasz Giaro, Franciszek Longchamps de Bérier (Warszawa 2013), 239–66.

22 Franciszek Longchamps de Bérier, *L'abuso del diritto nell'esperienza del diritto privato romano* (Torino 2013), 201.

23 Ignazio Buti, *Il 'praetor' e le formalità introduttive del processo formulare* (Camerino 1984), 42–3.

24 D. 1,1,8 Marcian, *Institutes*, book 1. Cf. e.g. B. Frese, *Viva vox iuris civilis*, in ZSS 43 (1922): 466–84.

protection, he introduced fictions into the formulas, switched subjects, employed analogy, constructed new solutions by creating ad hoc complaints based on facts. We are quite familiar with the arsenal of measures employed by the magistratus, and it is on their basis that we endeavor gain an idea about his day to day work. The question is to what extent can we succeed.

The praetors were neither lawyers, nor professional magistrates specialized in efficient governance or administration. Neither of these shortcomings was necessarily a drawback, if the attainment of the common good[25] as necessitated by the needs and expectations of a particular generation of Roman citizens is considered to be of crucial importance. The praetors were mature men, held in high esteem by society as is confirmed by their election. They usually held their office for the first time ever, and, therefore, had no more experience than what could be gained from mere observation. Observation, however, or even understanding is one thing, and the ability to act efficiently is quite another. Thus, praetors often consulted advisors, among them jurists. Furthermore, they contributed their own experience in looking for practical and rational solutions. From their experience of everyday life, they were aware of established or acceptable courses of action, as well as being aware of social expectations. This had to suffice to prudently and creatively manage a high-ranking office, and to perform their duties—with a little good will and involvement—in the best interests of society. The office was held for a short term, and the praetor was not expected to implement any long-term policies. The office was, to some extent, embodied in decrees, which until the very end were adopted on an ancillary basis. "In the common model of legal development, the decrees, issued occasionally, were more a record of changes that have already occurred than an innovation, and more a case study than a general rule".[26] Praetors corrected existing regulations and created new ones when practicing their administration. They made the edict into an extensive collection which not only provided for a comparatively broad protection of private rights, but which also specified when the praetor could be counted on for assistance. The political system, the manner in which the praetor was appointed, and the powers he was granted gave him considerable autonomy. Thus, the intention was to have him act at

We are interested in solutions adopted in similar social situations or when dealing with problems of a similar nature—even if they result from various sources and inspirations and when historical continuity cannot be proved.

25 The concept of the common good does not seem to be an invention of modern times, even though it was not authoritatively and convincingly taken up until recently by the Second Vatican Council. It is thus rightly associated with the social teachings of the Church, which has been invoked, to a greater or lesser extent, by nearly all political parties over the past twenty years, including post-Communist ones, in their political programmes. It is therefore not surprising that the category of the common good has become the subject of a constitutional consensus; indeed, it can found at the very beginning (in Article 1) of the Constitution of the Republic of Poland of 1997: "The Republic of Poland shall be the common good of all its citizens".

26 Wojciech Dajczak, Tomasz Giaro, Franciszek Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego* [*Roman Law. At the Foundations of Private Law*] (Warszawa 2009), 44.

his own discretion. The most important thing was that he should decide about the most appropriate solution at a particular time. The praetor's work represented par excellance the actualization of the common good under specific conditions and for particular persons. It can therefore safely be said that the "balance between traditionalism and conservatism on the one hand, and innovation on the other"[27] in Roman law was to a large extent the result of the praetors' promotion of the common good.

In 1995, various articles were published in the "Journal of Institutional and Theoretical Economics," which demonstrate another courageous opening of a new research perspective. A professor of history from Zurich wrote about the Roman Empire as an ancient megaorganization[28]. Professor of civil and Roman law—then from Saarbrücken, and now from Munich—submitted a paper entitled "Roman law and Rome as a megaorganization."[29] In 2001, professor from Salerno in Italy wrote an article with a clearly programmatic character: "For Roman administrative law,"[30] reminding that in the last 30 years a lot of work of Roman law specialists has been devoted to the history and the public law of Rome. A number of topics that were covered by Roman law specialists related to the Roman administration: provincial administrative systems, internal organization of particular cities, the activity of municipal officials, tax collection and systems of public "concessions" to organizations of tax collectors, prerogatives of imperial officials. These books and papers, however, were not advertised as elements of reconstructing "Roman administrative law," nor even as a legal history of Roman administration[31].

It is quite fortunate to recognize the existence of administration in Rome, and even in earlier countries and domains than the Roman Empire. Why, then, arbitrarily cutting off all the pre- Enlightenment history of administration? Is not it simply a blind shortening to keep lectures in the history of administration more compact? It is true that continuity of administrative institutions can easily be demonstrated only starting from the time of the Enlightenment—from regulations enforced by absolute monarchies of Europe. Today, however, a history researcher does not need to feel constrained to show the continuity. She is not enslaved by questions about the reception of legal institutions. We are more interested in solutions adopted in similar social situations or when dealing with problems of a similar nature—even if they result from various sources and inspirations and when historical continuity cannot be proved. The phenomenon of megaorganization is brought by the Roman Empire led by emperors from Augustus to Theodosius, i.e. from 27 BC till AD 395. One efficient administration for centuries over one and a half million square miles, and 40 to 60 millions of inhabitants. It is, therefore, not without reason that researchers are fascinated how it was possible to manage a gigantic state at a time when a journey to Rome from Trier, the capital of Constantine the Great, took a month of traveling.

In a way, the figure of the *defensor civitatis* during the reign of Justinian I (527–565 AD) is situated in the middle between top-down and bottom up management of late Roman Empire. A local city official whose mode of election has evolved, but has always been linked to balancing the interference of the state and local authorities. In fact, the office aimed to protect the population from the abuses of the state apparatus but also of the nobility, which had a great importance in the cities. Therefore, the *defensor civitatis* represents a particular example of administrative control – not in the form of administrative law and a separate judiciary system – but a public

27 Wiesław Litewski, *Podstawowe wartości prawa rzymskiego* [*Basic values of Roman law*] (Kraków 2001), 18.

28 Franz Georg Maier, "Megaorganisation in Antiquity: The Roman Empire," *Journal of Institutional and Theoretical Economics* 151/4 (1995): 705–13.

29 Alfons Bürge, "Roman Law and Rome as a Megaorganisation," *Journal of Institutional and Theoretical Economics* 151/4 (1995): 725–33. Cf. also Jochen Martin, "The Roman Empire: Domination and Integration," *Journal of Institutional and Theoretical Economics* 151/4 (1995): 714–24, Sumantra Ghoshal, Peter Moran, Luis Almeida-Costa, "The Essence of the Megacorporation: Shared Context, not Structural Hierarchy," *Journal of Institutional and Theoretical Economics* 151/4 (1995): 748–59.

30 Francesco Lucrezi, "*Per un diritto amministrativo romano*," in *Atti dell'Accademia Romanistica Costantiniana. XIII convegno internazionale in memoria di Andre Chastagnol* (Napoli 2001), 783–84.

31 Ibidem, 778–779.

official, standing, as it were, on the sidelines, which has the competence to look at the hands of the authorities. This shows how different channels the Roman empire was administered through. Neither did it operate with monopoly power only nor did it leave everything to the decision of local governments. Multiple forms of governance were used, which in effect were supposed to guarantee desirable outcomes of management. Here we have many useful factors in order to establish a comparison with the *utilité publique* known today from the French theory of administration.[32]

example of an urban controlling office, which evolved through centuries up to the times of Justinian I, who decided to revitalize it in order to provide a better management at multiple scale of actions. For the sake of a systematic and more comprehensive approach, it is possible to summarize the functions carried out by the *defensor* in four categories: protection and defense of the lower orders of society, judicial and legal attributions, auxiliary administrative functions and maintenance of public order and morals. Even though since 4th century the *defensor* had a looser connection with

The evolution of *defensor civitatis* in the times of Justinian shows the importance of legal mentality in providing a change into the city management.

The institution of the *defensor civitatis* played a key role in the development of the municipal government and the urban life during Late Antiquity. It sits exactly on the borderline between public *utilitas* and private interests of urban community, and uncovers the interplay between top-down and polycentric management resembling *ex ante* adaptation model. What is more, it proves as well that there is no straight-forward progress and the linear development of urban management. The observed tendency towards a theoretical decentralization of the local administration during the reign of Justinian (527–565 AD), in the interest of a higher efficiency and a better provision of public services and management of the commons has to be placed in a context where the pre-existing political-administrative urban regime had shown signs of exhaustion with the decline of the classical magistracies and the municipal councils. In practice, it is safe to assume that a certain degree of decentralization masked the search of a closer connection with the imperial power.

Although it does not deal with building regulations strictly speaking, the *defensor civitatis* is a perfect

the local elites, and that since 5th century was elected by people of the city—*honorati et plebs*—it is important to bear in mind that the appointment had to be approved by the emperor. Taking that argument even further, it has been suggested that an increased control of the local government by the imperial administration substantiated an increasing divergence between the theoretical responsibilities of the local bodies and their actual level of power.

A clear endorsement of the restoring intention of the institution by Justinian, with an obvious use of the classicist ideology and the institutions and terminology of the Roman past, is located in the preface of Novel 15.[33] The imperial willingness to pursue a rapprochement of the *defensor* in accordance with its original setup is clear and Justinian stresses the need to maintain the equivalence of the term with the original meaning of the *defensor* as a protector of the local citizens.[34] The theory of the positioning of the

32 Jan Zimmermann, *Prawo administracyjne* [*Administrative law*] (Warszawa: Wolters Kluwer 2008), 33.

33 Nov. 15 *praef.*

34 Nov. 15 *praef.* Interestingly, the same spirit could be perceived in previous imperial constitutions, which were also incorporated to the Code of Justinian, such as C. 1,55,5, enacted during the reign of Valentinian II.

defensor as one of the key figures in the local administration and the urban life of the period is supported by the special protection granted to the institution in the legislation passed by Justinian. In this respect, it is prescribed that any contravention of his proceedings by any other public officer should be notified to the corresponding provincial governor, so that the subsequent punishment was issued.

At the same time, the reshaping of the office as a boosting element of the urban life and public spaces is clear. The expansion of its functions would also aim to complement the provision of several fundamental services held by other institutions for the proper functioning of the local administration, mainly regarding the resolution and provision of justice and taxation management and the order in public spaces. That trend fits in with the context of a reformist approach perceptible in the legislation of the time on the local administration but, simultaneously, reflects a historicist and *continuist* perspective with reference to the original concept of the *defensor* in terms of acting both as a guardian of the rights of the citizens and a supervisor of the public local institutions, which were directly entitled to the management of the common local resources. To this extent, it is remarkable that the emperor did not choose to articulate a brand-new office, for he elected to make use of a pre-existing figure as a starting point. The combination of all these factors, allows to affirm that the *defensor* was in fact one of the most relevant local figures during the period, with a series of prerogatives and attributions, as well as with a significant and deeper development in the legal sources, especially in comparison with other offices (such as the *pater civitatis* or the *curator civitatis*).

Quite interestingly, in the Justinian's Code —C. 1,55,5—the compilers incorporate a precept which should be associated with the growing concern about the excesses and abuses of the civil service in the cities. Correspondingly, it may be assumed that, despite of the laudable original goals, the *defensor* was neither foreign to some of the flaws which significantly affected the public service of the time. Hence, the institute seems to have displayed a lower degree of effectiveness in comparison with other spheres (especially, the bishops) in defending the rights and interests of the citizens. This is quite possibly a result of the lack of a stronger bond with the imperial power, as John B. Bury notes,[35] in addition to the abovementioned increase of the functions since the 4th century.

Even though there is still a certain lack of determination regarding certain aspects connected to the categorization of the office (most notably, whether it was considered as a local magistrate) or to the nature of the appointment for the position[36], the existing resources show that the reshaping of the institution during the age of Justinian was a useful tool in trying to alleviate some of the administrative dysfunctions of the cities, seeking a higher efficiency on the public services and structures (such as administration of justice, tax collection or order in public spaces). Those factors are part of a broader common local dimension and of the will to strengthen the ties with the imperial power. In that context, Justinian attempted to implement an innovative series of administrative reforms towards the consolidation of a strongly centralized model but, most of all, a far-reaching political, social and religious program which affected the cities and urbanism directly. Some authors like Haldon understand that the essential feature resulting from the reforms of the local administration in the early Byzantine age is the disruption of the "character of autonomous or semi-autonomous units" of the cities,[37] one of the traits par excellence of the Roman *civitas*.

The evolution of *defensor civitatis* in the times of Justinian acts beyond the dominate-principate dichotomy and shows the importance of legal mentality in providing a change into the city management. A remarkable number of studies have considered Justinian as both a source of innovation and a strong defender of classicism and it does seem plausible to believe that

35 John Bagnell Bury, *History of the Later Roman Empire*, vol. 2 (New York: Dover Publications 2016), 336.

36 More on problems faced by the office, such as the improper intervention by the provincial governors in the access to the position and the development in the *Novellae* 15 in A. Corona Encinas, "Sobre la reforma en el cargo de defensor civitatis en época justinianea. Aproximación exegética a Nov. Iust. 15", *Revista General de Derecho Romano*, 34 (2020): 1–17.

37 John Haldon, "The idea of the town in the Byzantine Empire," in *The idea and ideal of the town between late Antiquity and the early Middle Ages*, ed. Gian Pietro Brogiolo, Bryan Ward-Perkins (Leiden: Brill 1999), 10.

the emperor was certainly aware of "the instrumental value of portraying change as a development within, or a recovery of, traditional values."[38] It should also be highlighted that some of the assignments of the institution are closely linked to the political and religious ideology of the emperor. Although it could hardly be considered as groundbreaking, the competencies related to the religious and moral spheres represent an evident example of the strong religious influence during the reign of Justinian and are also a sign of the advances on the process of Christianization of public spaces, which would set the early Byzantine city in an intermediate point between the classical Roman *civitas* and the Middle Ages city.

6. Conclusions

By merging three different historical examples, this paper shows that legal mentality influences the management of similar public goods, the composition of institutional change in the urban sphere and finally the character of legal regulations best fitted in the given circumstances for arriving at a desired outcome. We showed that the inclinations for *ex ante* and *ex post* models are dependent on the concept of public administration and most particularly of administrative law. In a way, in the mixed public administration showed in the Roman law example, where both centralized and polycentric governance are applied, much depends on the narrative and values that accompany the institutional change in urban settings.

In London, Paris and ancient Rome the governing bodies were interested in indivisibilities that transcended the scale of an individual building project or an individual city official. So the two modernizing cities of the 19th century addressed themselves to very different problems, implying different visions of modernity. The different nature of the problem in the two cases is closely related to the legal means used to address each problem: detailed building regulation or expropriation that allowed for the reshaping of the streetscape. England and France look at their cities and see different problems because their legal mentality biased each of them toward different approaches to problem-solving. We suspect that the differing mentalities inclined them both to see different problems and to use different approaches to problem–solving. According to our analysis, much depends on the concept of administrative law that evolved at this time and differences between consensual model applied in Anglo-Saxon world, and top–down model in French bureaucracy. Justinian decided to overcome managerial problems of the Empire with the reform of tiny city official of *defensor civitatis*. There is no way the Roman Empire could have succeeded by acting only at a single grand scale. So even Justinian found it necessary to introduce elements of polycentricity into its pattern of governance, which was highly dependent on strong and influential legal mentality, and the interplay between *ex post* and *ex ante* adaptation schemes.

> Much depends on the concept of administrative law.

Bibliography

Blicharz, Grzegorz. *Commons – dobra wspólnie użytkowane. Prawnoporównawcze aspekty korzystania z zasobów wodnych* (*Commons – Jointly-used Goods: Comparative Aspects of the Use of Water Resources*), Bielsko-Biała 2017.

Bürge, Alfons. "Roman Law and Rome as a Megaorganisation." *Journal of Institutional and Theoretical Economics* 151/4 (1995), 725–733.

Bury, John Bagnell. *History of the Later Roman Empire*, vol. 2, New York 2016.

Buti, Ignazio. *Il 'praetor' e le formalità introduttive del processo formulare*, Camerino 1984.

38 Charles Pazdernik, "Justinianic Ideology and the Power of the Past," in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press 2005), 186.

Chang, Yun-chien, Smith, Henry E. "An Economic Analysis of Civil versus Common Law Property." *Notre Dame Law Review* vol. 88 (2012), 1–56.

Corona Encinas, Álex. "Sobre la reforma en el cargo de defensor civitatis en época justinianea. Aproximación exegética a Nov. Iust. 15." *Revista General de Derecho Romano* no. 34, (2020), 1–17.

Dajczak, Wojciech, Giaro, Tomasz, Longchamps de Bérier, Franciszek. *Prawo rzymskie. U podstaw prawa prywatnego* [*Roman Law. At the Foundations of Private Law*], Warszawa 2009.

Déjamme, Jean. *Application aux villes du décret du 26 mars 1852 sur les rues de Paris*, Paris 1887.

Ghoshal, Sumantra, Moran, Peter, Almeida-Costa, Luis. "The Essence of the Megacorporation: Shared Context, not Structural Hierarchy." *Journal of Institutional and Theoretical Economics* 151/4 (1995), 748–759.

Giaro, Tomasz "Diritto Romano attuale. Mappe mentali e strumenti concettuali." In *Le radici comuni del diritto europeo. Un cambiamento di prospettiva*, edited by Pier Giuseppe Monateri, Tomasz Giaro, Alessandro Somma, Roma: Carocci editore 2005, 77–168.

Haldon, John. "The idea of the town in the Byzantine Empire." In *The idea and ideal of the town between late Antiquity and the early Middle Ages*, edited by Gian Pietro Brogiolo, Bryan Ward-Perkins, Leiden 1999, 1–23.

Hardy, Anne. "Smallpox in London: factors in the decline of the disease in the nineteenth century." *Medical history* 27 (1983), 111–138.

Harper, Roger. *The Evolution of the English Building Regulations 1840–1914*, vol. I, (a thesis for the degree of doctor of philosophy at University of Sheffield) 1978.

Harrison, Joanne. "The Origin, Development and Decline of Back-to-Back Houses in Leeds, 1787–1937." *Industrial Archaeology Review* 39/2 (2017), 101–116.

Jacobs, Jane. *The Death and Life of Great American Cities*, New York 2016.

Kupiszewski, Henryk. *Prawo rzymskie a współczesność* [*Roman law and the contemporary world*], edited by Tomasz Giaro, Franciszek Longchamps de Bérier, Warszawa 2013.

Litewski, Wiesław. *Podstawowe wartości prawa rzymskiego* [*Basic values of Roman law*], Kraków 2001.

Longchamps, Franciszek. "W sprawie pojęcia administracji państwowej i pojęcia prawa administracyjnego [Remarks on terms 'state administration' and 'administrative law'], *Zeszyty Naukowe Uniwersytetu Wrocławskiego* seria A No. 10 (1957), 19–22.

Longchamps de Bérier, Franciszek. *L'abuso del diritto nell'esperienza del diritto privato romano*, Torino 2013.

Lucrezi, Francesco. "*Per un diritto amministrativo romano*." In *Atti dell'Accademia Romanistica Costantiniana. XIII convegno internazionale in memoria di Andre Chastagnol*, Napoli 2001, 777–788.

Maier, Franz George. "Megaorganisation in Antiquity: The Roman Empire." *Journal of Institutional and Theoretical Economics* 151/4 (1995), 705–713.

Martin, Jochen. "The Roman Empire: Domination and Integration." *Journal of Institutional and Theoretical Economics* 151/4 (1995), 714–724.

McGinnis, Michael D., and Elinor Ostrom. "Social-ecological system framework: initial changes and continuing challenges." *Ecology and Society* vol. 19, no. 2, (2014), 1–12.

Moor, Tine de. *The dilemma of the commoners: Understanding the use of common-pool resources in long-term perspective*, Cambridge University Press 2015.

Neeves, Anne Rebecca. *A Pattern of Local Government Growth: Sheffield and its Building Regulations 1840–1914* (PhD thesis at the University of Leicester), 1991.

Nilsen, Michelline. *Railways and the Western European Capitals: Studies of Implantation in London, Paris, Berlin, and Brussels*, Springer 2008.

Oakerson, Ronald. "Analyzing the Commons: A Framework." In *Making the Commons Work: Theory, Practice, and Policy*, edited by Daniel W. Bromley, et. al., San Francisco 1992, 41–59.

Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Action*, New York 1990.

Paccoud, Antoine. "Paris, Haussmann and property owners (1853–1860): researching temporally distant events." In *Distance and cities: where do we stand? Writing cities: working papers (2)*, edited by Günter Gassner, London School of Economics and Political Science, London 2012, 24–32.

Pazdernik, Charles. "Justinianic Ideology and the Power of the Past." In *The Cambridge Companion to the Age of Justinian*, edited by Michael Maas, Cambridge 2005, 185–212.

Stachowiak-Kudła, Monika and Janusz Kudła. "Path dependence in administrative adjudication: the role played by legal tradition." *Constitutional Political Economy* vol. 33 (2022), 301–325.

Stawrowski, Zbigniew. "Dobro wspólne a filozofia polityki (Common good and filosophy of politics)." In *Dobro wspólne. Teoria i praktyka* [*Common good. Theory and praxis*], edited by Walter Arndt, Franciszek Longchamps de Bérier, Krzysztof Szczucki, Warszawa 2013, 13–22.

Zimmermann, Jan. *Prawo administracyjne* [*Administrative law*], Warszawa 2008.

Maciej Błotnicki

Forfeiture under the Polish Criminal Code. A Regulation Free of Defects?

Maciej Błotnicki

Research and teaching fellow at the Department of Criminal Law and Criminology of the Faculty of Law and Administration of the Maria Curie-Skłodowska University, attorney.

maciej.blotnicki@mail.umcs.pl

https://orcid.org/0000-0002-1946-2606

The essence of forfeiture is an essential issue from the point of view of the rationality of the means of criminal legal response provided for offenders. This measure should be an effective weapon, realizing its goals. For this to be the case, the norm contained in Article 316 § 1 of the Criminal Code should be adapted to the wording of the typifying provisions of Chapter XXXVII of the Criminal Code. According to the wording of the provision, money, documents, and tokens of value counterfeited, forged, or with the sign of cancellation removed, as well as counterfeit or forged measuring instruments, as well as objects used to commit the crimes specified in this chapter are subject to forfeiture, even if they are not the property of the perpetrator. Consideration of the measure of criminal legal response will be limited only to those elements of the subject scope relevant to the criminal protection of money and its surrogates.

Key words: forfeiture, special basis, money, money sign, other means of payment

https://doi.org/10.32082/fp.6(74).2022.1111

It is necessary to begin by pointing out the ratio legis of the specific basis for the imposition of a punitive measure. The element that unites all views on this issue is the reference, albeit with varying intensity, to the preventive function of forfeiture. On the one hand, it is based on exposing the unprofitability of committing criminal acts by taking away their "fruits," on the other hand, hindering or preventing further criminal conduct[1]. The views of doctrine representatives on this subject can be put into three groups. According to the first, the imposition of forfeiture of objects is motivated by their creation of a danger to monetary circulation[2].

1 Janusz Raglewski, *Materialnoprawna regulacja przepadku w polskim prawie karnym* (Kraków 2005), 36–37.

2 It is worth noting here that already, in the course of the work of the Substantive Criminal Law Section of the Codification Commission, when designing the normative basis for the forfeiture of objects, close attention was paid to this circumstance. This is because it was pointed out

The second rationalize the application of the measure with the will to prevent the reproduction or the production of counterfeit money or securities[3]. The view from the last group is the most representative. It refers to the prevention or reintroduction of the object of the executive action. In addition, the application of forfeiture implies the impossibility of reusing objects used to commit a criminal act[4]. There are two problematic issues to consider that are relevant for further analysis. The first is the nature of the closing institution of Chapter XXXVII of the Criminal Code. The second is the relationship between the analyzed basis of forfeiture and the regulations of Article 44 § 1–2 and § 6 of the Criminal Code[5]. Discussing these will help indicate the subject matter scope of the interpreted criminal measure.

Regarding the first issue, Article 316 § 1 of the Criminal Code includes an institution whose application is mandatory. The regulation is based on a norm of a firm nature, which is evident from the phrase: "shall be subject to forfeiture." If the prerequisites are met, the court must rule on the measure of criminal responsibility. Failure to do so should be read as a gross violation of the substantive law within the meaning of Article 438.1a of the Code of Criminal Procedure[6]. As for the second, it should be stated that Article 316 § 1 of the Criminal Code does not create a unique variety of forfeiture from those functioning in the Criminal Law[7]. The statement of O. Górniok that: "(…) Special provisions provide for perpetrators of this category of crimes only one criminal measure - forfeiture of objects, listed in Article 39, point 4 of the Criminal Code, and constituting a particular form of forfeiture regulated in Article 44 of the Criminal Code."[8]. Due to the enumeration of elements constituting the scope of the subject matter, the provision can be an exceptional basis for deciding on the forfeiture of objects[9]. Verifying the presumption requires an analysis of the General Part of the Criminal Law provisions directed at the application of this punitive measure.

It is appropriate to draw attention to Article 44 § 1 of the Criminal Code. Under this provision, the court shall order the forfeiture of items directly derived from

that the existence of an adequate measure of criminal legal response stems from the desire to remove: "(…) from the circulation of objects, violating the balance of economic life", see Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja prawa karnego. Tom V. Zeszyt 4 …, 113; L. Peiper, Kodeks…, 392. Moreover, "(…) the instruments of a criminal act have such clear features of their purpose that the necessity of their forfeiture is undoubtedly in the general interest" see Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja prawa karnego. Tom V. Zeszyt 6…, 24.

3 Zbigniew Ćwiąkalski *Kodeks karny. Część szczególna, t. III* eds. Włodzimierz Wróbel, Aandrzej Zoll, 990.

4 Zbigniew Ćwiąkalski in *Kodeks karny…*, eds. Włodzimierz Wróbel, Aandrzej Zoll, 990; Jerzy Skorupka in *Kodeks…*, Ryszard A. Stefański, 1839; Jerzy Skorupka in *Kodeks karny. Komentarz*, eds. Andrzej Wąsek, Robert Zawłocki, 1720; Jerzy Skorupka, *Przestępstwa przeciwko obrotowi pieniędzmi i papierami wartościowymi. Rozdział XXXVII Kodeksu karnego. Komentarz,* 167–68; Mateusz Błaszczyk in *Kodeks karny. Część szczególna, Tom II*, eds. Michał Królikowski, Robert Zawłocki, 1093; Zygfryd Siwik in *Kodeks karny. Komentarz*, ed. Marian Filar, 1684; Oktawia Górniok, *Przestępstwa…*, 146–7.

5 It is worth noting the statement of W. Makowski, who, in the context of the specific normative basis for the decision on the forfeiture of money, documents, and other objects that were used to commit a crime, stated that: "Although the general provisions of the criminal law provide for the confiscation of instruments and fruits of crime, however, when it comes to the forgery of money (…) they found it necessary to devote a separate provision to this matter, providing for the confiscation of made forgeries, materials, instruments, etc. objects, as far as the forgery of money and securities is concerned, and this even though no one has been sentenced to punishment", see Wacław Makowski, *Prawo…*, 231.

6 The determination of forfeiture under Article 316 § 1 of the Criminal Code must be distinguished from the facts falling under the disposition of Article 34(1) of the National Bank Act. According to the latter's content, monetary signs that do not meet the conditions established by the President of the National Bank of Poland as a result of wear or damage cease to be legal tender in the territory of the Republic of Poland and are subject to exchange.

7 Zygfryd Siwik in *Kodeks…* Marian Filar (ed.) *Kodeks…*, 1684.

8 Oktawia Górniok, *Przestępstwa…*, 146–7.

9 Jerzy Skorupka in *System Prawa Karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, ed. Robert Zawłocki, 766.

the crime. Considering Article 44 § 5 of the Criminal Code, this institution is relatively obligatory. Juxtaposing the norms of Article 316 § 1 of the Criminal Code and Article 44 § 1 of the Criminal Code allows the scope conflict rule to conclude. First, the regulation in question is, on the one hand, richer in content, on the other hand, narrower in scope, due to the indicated catalog of objects, than the mandatory basis for the forfeiture of objects directly derived from the crime. The second argument can be found in the view of Z. Siwik. The author expressed that: "(…) at the same time, Article 316 § 1 has a broader scope than Article 44 § 1 if within the framework of these strictly enumerated objects it applies to objects both constituting the property of the perpetrator and not constituting it"[10]. It is worth noting that in the absence of a basis for forfeiture in the particular part of the Criminal Law, it is not Article 44 § 1 of the Criminal Code that would apply to counterfeit, forged, or with the sign of redemption removed money or documents. This thread will be developed later in work.

It is worth considering the issue of the relationship of the forfeiture included in the special part of the Penal Code to the institution of Article 44 § 6 of the Penal Code[11]. Addressing this issue will make it possible to answer whether Article 316 § 1 of the Criminal Code regulates the specific normative basis for the forfeiture of objects that should be considered producta or *obiecta sceleris*. The issue is controversial in the science of criminal law, and its resolution is relevant to the practice of law application. The observation will initiate the analysis that the distinction between the two ranges of objects is not free from interpretative doubts. It is objectionable to include counterfeited, forged, or with the sign of redemption removed money or documents among the "fruits of crime" or its "products." It should be recalled that an object within the meaning of Article 44 § 1 of the Criminal Code is one whose condition for obtaining it is the realization of the elements of the type of criminal activity[12]. Prima facie, it is possible to assume that the result of the forgery activity is the effect of the commission of the criminal act. In opposition, voices are raised that the forgery can be treated as an object from the disposition of Article 44 § 6 of the Criminal Code[13]. The doctrine indicates that it refers to the objects of direct action, which belong to the statutory elements of the type[14]. Attention should be paid to the statement of B. Mik, who sees the differentiating element between the two forms of forfeiture in the genesis of the source of the prohibition. In the author's opinion, if the prohibition is interpreted from norms devoid of criminal-legal provenience, the punitive measure should be adjudicated based on Article 44 § 6 of the Criminal Code. When the prohibition has a strict criminal-legal source, the application of the forfeiture should be seen in Article 44 § 1 of the Criminal Code[15]. Worthy of mention is the analysis of W. Wróbel, who concluded that: "(…) There is no reason why objects for which the prohibition of manufacture, possession, circulation, or transportation has been established cannot at the same time be objects directly derived from a crime if the condition is

10 Zygfryd Siwik in *Kodeks*…, ed. Marian Filar, 1685.

11 Marek Kulik in *Kodeks* op. cit., ed Marek Mozgawa, LEX/el art. 44 teza 16; Damian Szeleszczuk in Alicja Grześkowiak, Krzysztof Wiak (ed.) Kodeks…, 507–508; D. Gruszecka in Jacek Giezek (ed.) Kodeks karny. Część ogólna…, 427; Krzysztof Szczucki in Michał Królikowski, Robert Zawłocki (ed.) Kodeks Karny. Część ogólna…, 833–834; Janusz Raglewski, Włodzimierz Wróbel in Włodzimierz Wróbel, Andrzej Zoll (ed.) Kodeks karny. Część ogólna. Tom I, Komentarz do art. 53–116…, 857–860; Jerzy Skorupka in Mirosława Melezini (ed.) System…, 831–835; Ryszard A. Stefański in M. Filar (ed.) Kodeks…, 292; Andrzej Marek, Kodeks…, 122; R. Góral, Kodeks…, 90; Z. Sienkiewicz in Oktawia Górniok et. al., Kodeks…, 483; Janusz Raglewski, Materialnoprawna…, 162–168; K. Postulski, M. Siwek, Przepadek…, 138–142.

12 Instead of many: Supreme Court Judgment of April 15, 2008, ref. II KK 29/08, Proc. and Pr.-orz. 2008, no. 10, item 2; Judgment of the Supreme Court of April 14, 1977, ref. I KR 39/77, OSNKW 1977, no. 6, item 62.

13 Mateusz Błaszczyk in Michał Królikowski, Robert Zawłocki (ed.) Kodeks karny. Część szczególna, Tom II…, 1094–1095; Damian Szeleszczuk in Alicja Grześkowiak, Krzysztof Wiak (ed.) Kodeks…, 507–508; Krzysztof Szczucki in Michał Królikowski, Robert Zawłocki (ed.) Kodeks karny. Część ogólna…, 828, 833–834; Zygfryd Siwik in M. Filar (ed.) Kodeks…, 1683–1684; B. Mik, Nowela antykorupcyjna z dnia 13 czerwca 2003 r. Rys historyczny i podstawowe problemy interpretacyjne, Kraków 2004, 86.

14 Jan Waszczyński, Kary dodatkowe w nowym kodeksie karnym, PiP 1969, z. 10, 535; K. Postulski, M. Siwek, Przepadek…, 138.

15 B. Mik, *Nowela*…, 86.

fulfilled that, thanks to the commission of the crime they came into the perpetrator's power"[16]. Argumentation leads the Author to point out that: "(…) the decision as to whether forfeiture is mandatory or optional in this case must be based on the rule of specialty. There is no reason why objects directly derived from the crime, manufactured by the perpetrator, should be subjected to a more lenient (optional) regime of forfeiture," and the conclusion that Article 44 § 6 of the Criminal Code is *lex specialis* to Article 44 § 1 of the Criminal Code[17]. This view deserves to be taken into account. The obligatory nature of the regulation of *producta sceleris* cannot have a decisive influence in determining the relationship between the two forms of forfeiture. What is crucial is their subject matter scope. This means that the forfeiture of imitation money or documents under Article 316 § 1 of the Criminal Code provides a special basis for the forfeiture of *obiecta sceleris*. The above view seems to be shared by K. Szczucki[18], D. Szeleszczuk[19], Z. Siwik[20] and M. Błaszczak[21].

Next, attention should be paid to the relationship of the regulation in question to the forfeiture under Article 44 § 2 of the Criminal Code. According to the wording of this provision, the court may declare, and in cases indicated by the law shall declare, the forfeiture of objects that served or were intended for the commission of a crime. Several remarks are worth making. First, a special case of mandatory adjudication of a punitive measure against objects used in the commission of a crime is precisely Article 316 § 1 of the Criminal Code. Second, the general regulation is broader in scope than that provided for in Chapter XXXVII of the Criminal Code[22]. This is justified by the fact that Article 44 § 2 of the Criminal Code, in addition to objects used in the commission of the crime, provides for the forfeiture of objects intended for the crime's commission. This means that the regulation from the special part is *lex specialis* to Article 44 § 2 of the Criminal Code, only to the extent that the provision regulates the forfeiture of objects constituting *instrumenta sceleris* as serving to carry out the criminal act. In the case of the commission of an offense against the foundations of the financial system, the forfeiture of objects intended for the commission of the offense may fall under a provision from the general part of the law. This inconsistency is not justified, and de lege ferenda requires amendment.

Initiating the third issue, attention should be drawn to Article 44 § 7 of the Criminal Code. According to this provision, if the objects listed in Article 44 § 2 or

The obligatory nature of the regulation of *producta sceleris* cannot have a decisive influence in determining the relationship between the two forms of forfeiture. What is crucial is their subject matter scope.

16 Włodzimierz Wróbel, Środki karne w projekcie Kodeksu karnego, cz. 2, Przepadek…, 106.

17 Ibidem. In the same way argues Janusz Raglewski, see, Janusz Raglewski, Materialnoprawna…, 95.

18 Krzysztof Szczucki in Michał Królikowski, Robert Zawłocki (ed.) Kodeks karny. Część ogólna…, 833–834.

19 Damian Szeleszczuk in Alicja Grześkowiak, Krzysztof Wiak (ed.) Kodeks…, 507–508.

20 Zygfryd Siwik in M. Filar (ed.) Kodeks…, 1683–1684.

21 Mateusz Błaszczyk in Michał Królikowski, Robert Zawłocki (ed.) Kodeks …, 1094–1095.

22 Zygfryd Siwik in *Kodeks*…, ed. M. Filar, 1685.

§ 6 of the Criminal Code are not the property of the perpetrator, their forfeiture may be pronounced only when the law so provides; in the case of joint ownership, the forfeiture of the share belonging to the perpetrator or the forfeiture of the equivalent of this share shall be pronounced. On the other hand, the objects or items enumerated in Article 316, paragraph 1 of the Criminal Code used in the commission of crimes are subject to forfeiture, even if they are not the perpetrator's property. The basis for the imposition of a measure of criminal justice, which is included in the special part, is precisely an "accident" within the meaning of Article 44 § 7 of the Criminal Code. This leads to the conclusion of the admissibility of the application of forfeiture, regardless of whether the object subject to forfeiture is the property of the perpetrator[23]. The argument should be supplemented with an apt observation by Z. Ćwiąkalski, who points out that, by way of forfeiture, property may be deprived of any entity appearing in the market which is not the perpetrator of a type of criminal act, i.e., a natural person, a legal person or an organizational unit which is not a legal person, to which special regulations grant legal capacity[24]. The determination of the loss of the right in rem to the objects is made in isolation from the good or bad faith of the purchaser[25]. The position of J. Raglewski, who disputes that Article 316 § 1 of the Criminal Code excludes - on a special basis - the application of Article 44 § 7 of the Criminal Code, should be highlighted. He motivates his view by saying that: "Indeed, the wording of Article 316 § 1 of the Penal Code of 1997 indicates that this provision contains only a normative clause, providing for certain categories of objects listed therein, which may be subject to forfeiture, the permissibility of their adjudication regardless of whose property they are."[26].

The subject scope of the forfeiture under review requires discussion. The presentation of the issue, supported by examples from court case law, will allow us to expose the doubts related to the wording of Article 316 § 1 of the Criminal Code. The catalog of objects indicated in its content can be divided into two categories.

The first is counterfeit, forged, or with the sign of redemption removed money or documents. The term "document" in the provision's wording could prima facie suggest a reference to the legal definition in Article 115 § 14 of the Criminal Code, which would lead to a broad application of the regulation. However, this conclusion would be misguided. The wording should be read in specific content and systemic context. It is not about any document but a document constituting the subject of executive action on the grounds of Chapter XXXVII of the Criminal Code. The documents relevant within the framework of Article 316 § 1 of the Criminal Code include those that: entitle to receive a sum of money or contain an obligation to pay capital, interest, profit sharing, or state participation in a company (Article 310 § 1 of the Penal Code); are related to trading in securities (Article 311 of the Penal Code)[27]. This class can be defined as the *obiecta sceleris* of the acts stipulated in Chapter XXXVII of the Criminal Code. Reviewing the positions presented in the case law as "objects of the crime," it is possible

23 Marek Kulik in Marek Mozgawa op. cit., LEX/el art. 316 teza 1; Zbigniew Ćwiąkalski in *Kodeks karny. Część szczególna* vol III…, eds. Włodzimierz Wróbel, Andrzej Zoll, 991; Tomasz Oczkowski in *Kodeks…* ed. Violetta Konarska-Wrzosek (ed.) Kodeks…, 1429; Mateusz Błaszczyk in *Kodeks karny. Część szczególna*, vol. II Michał Królikowski, Robert Zawłocki (ed.) …, 1093–1095; Zygfryd Siwik in *Kodeks…*, ed. Marian Filar, 1684; Joanna Piórkowska-Flieger in Tadeusz Bojarski (ed.) Kodeks op. cit., LEX/el art. 316 teza 1; Andrzej Marek, *Kodeks…*, 578; R. Góral, *Kodeks…*, 522; Andrzej Krukowski in *Systems…*, eds. Igor Andrejew, Leszek Kubicki, Jan Waszczyński, 523; Mieczysław Siewierski in *Kodeks…*, eds. Jerzy Bafia, K. Mioduski, Mieczysław Siewierski, 542; W. Świda in *Kodeks…*, eds. Igor Andrejew, Witold Świda, Władysław Wolter, 738; Igor Andrejew, Kodeks…, 207; Włodzimierz Gutekunst in *Prawo…*, eds. Olgierd Chybiński, Włodzimierz Gutekunst, W. Świda, 434; Judgment of the Court of Appeals in Lublin of March 27, 2013, ref. II AKa 40/12, LEX No. 1298954.

24 Zbigniew Ćwiąkalski in *Kodeks karny. Część szczególna,* vol. III, eds. Włodzimierz Wróbel, Andrzej Zoll, 991.

25 Włodzimierz Gutekunst in *Prawo…*, eds. Olgierd Chybiński, Włodzimierz Gutekunst, W. Świda, 434.

26 Janusz Raglewski in *Kodeks…*, ed. Włodzimierz Wróbel, Andrzej Zoll, 860; Jerzy Skorupka in *System…*, ed. Mirosława Melezini, 802.

27 G. Łabuda in *Kodeks…*, ed. Jacek Giezek, 1539; Zygfryd Siwik in *Kodeks…*, ed. Marian Filar, 1686.

to draw attention to three statements of the appellate courts. The first - is set still on the grounds of the 1969 Criminal Code. - it was pointed out that: "(…) in the jurisprudence of the courts it was emphasized that the legal basis for the ruling on the forfeiture of counterfeit money (…) is a provision of the special part of this code (as *lex specialis*), establishing the obligatory nature of their forfeiture"[28]. In turn, concerning another carrier of a legal good, the Cracow Court of Appeals stated that: "(…) The legal basis for the forfeiture of a counterfeit bill of exchange (another document authorizing the receipt of a sum of money, a means of payment or money) is Article 316 § 1 as a special provision."[29]. The Court of Appeals presented the most recent view in Szczecin, which stated that: "If the offender is convicted of an act under Article 310 § 1, the substantive legal basis for the forfeiture of the counterfeit means of payment should be Article 316 § 1 as a special provision."[30]. Among representatives of the doctrine, an analogous view was expressed by A. Marek[31], J. Skorupka[32] and Z. Siwik[33].

The second category includes objects used to commit crimes regulated in Chapter XXXVII of the Criminal Code, i.e., their *instrumenta sceleris*[34]. In this context, there is a refinement of the subject scope and an indication of raw materials, tools, equipment, and technical means that the perpetrator consumed or planned to use at any stage of the implementation of the criminal act[35]. Before presenting the examples highlighted in the literature and case law, it is necessary to resolve doubts about the nature of objects used to commit a crime. Specifically, we are talking about the issue of whether the judgment of forfeiture is possible only concerning objects specifically adapted to the implementation of a criminal act or whether such a decision can also be made for objects devoid of this feature, although used for a criminal purpose. This issue is essential for applying the law and affects the material scope of objects threatened with forfeiture. The problem should be resolved individually concerning each object. O. Górniok[36], M. Gałązka[37], and Z. Ćwiąkalski[38] advocate the first solution. The last Author's view deserves mention. He indicated that: "(…) Do not constitute such [objects used for the commission of a crime - note M.B.] those of them which do not have characteristics specially predestinating them for use in a given crime, especially facilitating its commission by their properties or additional adaptation, and which the perpetrators use only on occasion, as it were, by their purpose"[39]. This means that the regulation of Article 316 § 1 of the Criminal Code should be applied only to objects that have permanent

28 Judgment of the Court of Appeals in Cracow of January 1, 1991, ref. II AKr 13/90, KZS 1991, z. 1, item 8.

29 Judgment of the Court of Appeals in Cracow of April 17, 2003, ref. II AKa 72/03, KZS 2003, z. 5, item 38.

30 Judgment of the Court of Appeals in Szczecin of February 14, 2013, ref. II AKa 8/13, LEX No. 1283239.

31 Andrzej Marek, *Kodeks*…, 578.

32 Jerzy Skorupka in *Kodeks*…, ed. R. A. Stefański, 1839; Jerzy Skorupka in *Kodeks*…, eds. Andrzej Wąsek, Robert Zawłocki,1720; Jerzy Skorupka, *Przestępstwa*…, 167–8.

33 Zygfryd Siwik in *Kodeks*…, ed. Marian Filar, 1683–4.

34 Zbigniew Ćwiąkalski in *Kodeks*…, ed. Włodzimierz Wróbel, Andrzej Zoll 990–92; Marek Gałązka in *Kodeks*…, ed. Alicja Grześkowiak, Krzysztof Wiak, 1643; Tomasz Oczkowski in *Kodeks*…, ed. V. Konarska-Wrzosek, 1429; Mateusz Błaszczyk in *Kodeks karny*…, eds. Michał Królikowski, Robert Zawłocki, 1093–5; Joanna Piórkowska-Flieger in *Kodeks*…, ed. Tadeusz Bojarski, LEX/el art. 316 teza 1; Andrzej Marek, 578; Oktawia Górniok, *Przestępstwa*…, 147; Kazimierz Buchała in *Komentarz*…, eds. Kazimierz Buchała, Piotr Kardas, J. Majewski, Włodzimierz Wróbel, 241– 2; Andrzej Krukowski in *System*…, eds. Igor Andrejew, Leszek Kubicki, Jan Waszczyński, 523; Mieczysław Siewierski in *Kodeks*…, ed. Jerzy Bafia, K. Mioduski, Mieczysław Siewierski, 542; Leon Peiper, *Kodeks*…, 393; Wacław Makowski, *Prawo*…, 231; Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja prawa karnego. Tom V. Zeszyt 6…, 24.

35 Zbigniew Ćwiąkalski in *Kodeks karny*…, ed. Włodzimierz Wróbel, Andrzej Zoll, 992; Marek Gałązka in *Kodeks*…, eds. Alicja Grześkowiak, Krzysztof Wiak, 1643; Mateusz Błaszczyk in *Kodeks karny*…, eds. Michał Królikowski, Robert Zawłocki, 1095; Joanna Piórkowska-Flieger in *Kodeks*…, ed. Tadeusz Bojarski, LEX/el art. 316 teza 1; Andrzej Marek, *Kodeks*…, 578; Oktawia Górniok, *Przestępstwa*…, 147.

36 Oktawia Górniok, *Przestępstwa*…, 147.

37 Marek Gałązka in *Kodeks*…, ed. Alicja Grześkowiak, Krzysztof Wiak, 1643.

38 Zbigniew Ćwiąkalski in *Kodeks*…, ed. Włodzimierz Wróbel, Andrzej Zoll, 992.

39 Ibidem.

or imparted properties that enable the commission of a criminal act. A different view - in the opinion of the proponents of the first view - can lead to absurd conclusions in the form of the forfeiture of any object used by the perpetrator[40]. However, it is worth noting that adopting a narrow view does not solve the problems arising from the vague nature of forfeiture. Applying the measure to specially adopted objects shifts the interpretive doubts from the aspect of "serving to commit a crime" to the valuation of whether and when an object meets the criterion of specialness. A broad interpretation of object forfeiture under Article 316 § 1 of the Criminal Code was advocated by: G. Łabuda[41], M. Blaszczyk[42] and J. Piórkowska-Flieger[43]. The authors point out that there are no doubts about the sentencing of a punitive measure against objects specially manufactured or adapted for the commission of a crime and those that serve legitimate activity but were used in criminal activity. This interpretation is also fraught with shortcomings. Among the most important are the difficulties in achieving the desired results and functions associated with the imposition of forfeiture when applied to objects of everyday use.

Despite the doubts arising from, among other things, the weakening of the preventive function of forfeiture[44], the proponents of a broad approach are right[45]. In order to avoid the undesirable consequences of adopting this view, a restrictive interpretation of individual cases is necessary. The interpretive result must consider the conclusions from applying purpose and functional directives. As W. Dashkevich pointed out, "(…) otherwise the application of a legal norm could lead to paradoxical situations, passing by common sense - a rule that should guide every interpreter of the law"[46]. It is worth verifying that forfeiture is, on the ground of law enforcement practice, applied when it is substantively justified.

The resolution of this issue makes it possible to exemplify the application of the measure in question. The argument should begin with such objects, which are immanent or even intuitively associated with a crime against the foundations of the financial system. Objects used to commit a crime within the meaning of Article 316 § 1 of the Criminal Code include printing machines and equipment, lathes, punches, locksmith tools, paper, inks, metals, and their alloys, xerographs, magnifying glasses and microscopes, blanks of various kinds, calibrators, seals, sealers, plates, photographic instruments[47]. In addition, elements for securing money, like holograms or specialized computer programs for counterfeiting money, are mentioned[48]. There is no objection to applying the punitive measure to the cited range of objects and their media in CDs, floppy disks, hard drives, or portable disks. Some doubts have arisen in jurisprudence when deciding on the forfeiture of items such as computers, multifunction devices, or photocopiers. Existing reservations are a consequence of advocating a narrow interpretive model. It is worth noting the reasoning adopted by the ordinary courts, where the application of a punitive measure was approved[49]. The Cracow Court of

40 Zbigniew Ćwiąkalski in *Kodeks…*, eds. Włodzimierz Wróbel, Andrzej Zoll, 992; Marek Gałązka in *Kodeks…*, ed. Alicja Grześkowiak, Krzysztof Wiak, 1643; Oktawia Górniok, *Przestępstwa…*, 147; Judgment of the Court of Appeals in Katowice of August 1, 2013, ref. II AKa 234/13, Prok. i Pr.-orz. 2014, no. 2, item 31; Judgment of the Court of Appeals in Cracow of November 26, 1997, ref. II AKa 224/97, KZS 1997, z. 11–12, item 53.

41 G. Łabuda in *Kodeks…*, ed. Jacek Giezek, 1539.

42 Mateusz Błaszczyk in *Kodeks…*, eds. Michał Królikowski, Robert Zawłocki, 1095.

43 J. Piórkowska-Flieger in *Kodeks…*, ed. Tadeusz Bojarski, LEX/el art. 316 teza 1.

44 A. Spotowski, *Konfiskata…*, 104.

45 K. Mioduski in *Kodeks…*, ed. Jerzy Bafia, K. Mioduski, Mieczysław Siewierski, 186; Witold Świda, *Prawo…*, 266.

46 Quoted in Janusz Raglewski, *Materialnoprawna…*, 139.

47 Zbigniew Ćwiąkalski in *Kodeks…*, ed. Włodzimierz Wróbel, Andrzej Zoll, 992; Marek Gałązka in *Kodeks…*, ed. Alicja Grześkowiak, Krzysztof Wiak, 1643; Joanna Piórkowska-Flieger in *Kodeks…*, ed. Tadeusz Bojarski, LEX/el art. 316 thesis 1; Judgment of the Court of Appeals in Katowice of August 1, 2013, ref. II AKa 234/13, Prok. i Pr.-orz. 2014, no. 2, item 31; Judgment of the Court of Appeals in Cracow of January 18, 2006, ref. II AKa 260/05, KZS 2006, z. 3, item 35.

48 Mateusz Błaszczyk in *Kodeks…*, ed. Michał Królikowski, Robert Zawłocki, 1095.

49 Judgment of the Court of Appeals in Warsaw of November 9, 2015, ref. II AKa 323/15, LEX no. 1932002; Judgment of the Court of Appeals in Wroclaw of December 19, 2014, ref. II AKa 392/14, LEX no. 1630910.

Appeals expressed the view that: "(…) The allegation that these items should be excluded from this scope is misplaced because they do not have characteristics predestinating them for such an action but are objects of common use, and the accused merely used them for their normal purpose. Without using them, the accused would not have been able to forge banknotes, just as it would have been impossible in the past without printing equipment, also after all not manufactured to counterfeit money."[50]. This conclusion deserves approval. It is supported by arguments based not only on the methodology of committing crimes against the foundations of the financial system or pointing to the results of applying purpose-functional directives but also on pragmatics. It is, after all, the case that a computer and a multifunctional device are used not only to carry out a criminal act. No less, the features and technical characteristics that the tools above possess make it possible to commit the crime of forgery because the perpetrator has used them in a certain way. If they are so used, they constitute *instrumenta sceleris* within the meaning of Article 316 § 1 of the Criminal Code. In the doctrine, the above position was approved by Z. Siwik[51], M. Blaszczyk[52], G. Łabuda[53], and Z. Ćwiąkalski[54]. It is worth pointing out objects that both jurisprudence[55] and doctrinal considerations[56] exclude from the group of those used to commit the analyzed crimes. We are talking about means of transportation and facilities used for storage. The decision of the Court of Appeals in Krakow, where we read that: "(…) if even if the defendants distributed counterfeit money by moving in a car leased and owned by the bank, the price of which had not yet been paid, it was not a technical means used or intended for the commission of a crime and therefore subject to mandatory forfeiture. There were no special devices in the car related to the crime, so the car was an ordinary means of transportation."[57]. The perpetrator's use of the locomotive function, typically attributed to motor vehicles, cannot automatically translate into a qualification recognizing them as a means of performing a criminal act. This conclusion would be hasty. Similarly, it is not reasonable to declare the forfeiture of storage means (suitcases, bags, nets, boxes, or containers) unless their modification was found to realize the criminal act[58].

It is worth analyzing the content scope of Article 316 § 1 of the Criminal Code from the point of view of the criterion of completeness and adequacy. It should begin with the apt observation of Z. Siwik that the content scope of the forfeiture, especially concerning the disposition of the relevant typifying provisions of Chapter XXXVII of the Criminal Code, raises concerns[59]. The primary issue is to try to answer whether the state of affairs is due to the legislature's selective approach to the compilation of objects at risk

50 Judgment of the Court of Appeals in Katowice of August 1, 2013, ref. II AKa 234/13, KZS 2013, z. 10, item 87; Judgment of the Court of Appeals in Cracow of January 18, 2006, ref. II AKa 260/05, KZS 2006, z. 3, item 35.

51 Zygfryd Siwik in *Kodeks*…, ed. M. Filar, 1685.

52 Mateusz Błaszczyk in *Kodeks*…, ed. Michał Królikowski, Robert Zawłocki, 1095.

53 Gerard Łabuda in *Kodeks*…, ed. Jacek Giezek, 1539.

54 Zbigniew Ćwiąkalski in *Kodeks*…, ed. Włodzimierz Wróbel, Andrzej Zoll, 992.

55 Judgment of the Court of Appeals in Cracow of January 18, 2006, ref. II AKa 260/05, KZS 2006, No. 3, item 35; Judgment of the Court of Appeals in Cracow of November 26, 1997, ref. II AKa 224/97, KZS 1997, z. 11–12, item 53.

56 Zbigniew Ćwiąkalski in Włodzimierz Wróbel, Andrzej Zoll (ed.) Kodeks karny. Część szczególna. Tom III…, 992–993; Zygfryd Siwik in M. Filar (ed.) Kodeks…, 1685; Oktawia Górniok, Przestępstwa…, 147.

57 Judgment of the Court of Appeals in Cracow of November 26, 1997, ref. II AKa 224/97, KZS 1997, z. 11–12, item 53.

58 Zbigniew Ćwiąkalski in *Kodeks*…, ed. Włodzimierz Wróbel, Andrzej Zoll, 992; Joanna Piórkowska-Flieger *Kodeks*…, ed. in Tadeusz Bojarski, LEX/el art. 316 thesis 1.

59 Leaving aside at this point the doctrinal disputes related to the interpretation of individual phrases in Article 316 § 1 of the CC, it is necessary to signal a certain sloppiness of the legislator and inconsistency in the chosen terminology. As an example, let us take the example of the legislator's use of the phrase that "tokens of value" are subject to forfeiture in a situation where, on the grounds of the acts stipulated in Article 313 § 1 and 2 of the Penal Code, reference is made to official tokens of value. Only through appropriate interpretive procedures, available through the use of all the directives of interpretation of the legal text, is this provision applicable to official signs of value, see Zygfryd Siwik in *Kodeks*…, ed. Marian Filar, 1686.

of forfeiture or whether such and not such a different inventory of objects contained in Article 316 § 1 of the Criminal Code is a consequence of inaccuracies and shortcomings in the course of designing the provision.

Against the background of the indicated institution, significant doubts have arisen. They are related to the achievement of divergent interpretive results, in particular, whether it is possible to break the linguistic meaning of the legal text in order to interpret from it - according to some Authors - the elements not expressed there. It requires consideration whether it is acceptable to have an interpretative result created for the decision on applying a punitive measure, which breaks away from the results inherent in the typifying provisions included in Chapter XXXVII of the Criminal Code. The relevant issues for consideration can be put into two problematic issues. The first relates to the ruling on the forfeiture of a monetary sign that has been established as legal tender but has not yet been put into circulation under Article 316 § 1 of the Criminal Code. The second is related to the admissibility of applying forfeiture to means of payment other than money. It is worth reviewing the positions in both areas.

According to Article 316 § 1 of the Penal Code, money and documents forged, counterfeited, or with the sign of redemption removed are subject to forfeiture. It is not controversial to state that the catalog above does not expressly mention the money sign, which has been established as legal tender but has not yet been put into circulation. The question arises as to whether this inclusion of the legal text precludes the application of forfeiture on a specific basis. The answer seems to be in the affirmative. Although this will be discussed when analyzing the ruling on the forfeiture of other means of payment, it is worth noting that linguistic, systemic, and axiological reasons support this conclusion. What is different on the subject side of the types is money, and what is different is a monetary sign that has been established as legal tender but has not yet been put into circulation. Attempts to equate these concepts, from the point of view of the linguistic and systemic directives of interpretation, must fail. It is worth highlighting the view of M. Blaszczyk, who states that: "(…) under Article 316 § 1 of the CC, only those monetary signs could be forfeited that were counterfeited even before they entered circulation, but at the time of adjudication such legal monetary signs were already functioning in circulation. In contrast, there is no basis for subjecting to forfeiture those counterfeit monetary signs that have been established as legal tender but have not yet been put into circulation at the adjudication stage."[60]. This opinion needs to be more convincing for at least two reasons. First, it seems inaccurate to take the date of adjudication as the appropriate differentiating criterion about the qualification of the object of the executive action as an object fit to be forfeited. The relevant "status" of the object of direct action should be determined as of the date of the act. The object in question is either money within the meaning of Article 316 § 1 of the Criminal Code, or it is deprived of this status due to its non-entry into circulation. Changes that may occur in this field between the commission of the criminal act and the date of sentencing should not matter. This means that the introduction into circulation by the competent state authorities of a monetary sign equivalent to the counterfeit in question and its acquisition of the characteristic of legal tender does not imply the admissibility of their forfeiture. Secondly, if, regardless of the timing of the binding determination of the status of the object to be forfeited, one would partially share the Author's view, it should be pointed out that these considerations do not introduce any novelty into the existing analysis and do not affect the inclusion or not of monetary signs in the catalog of Article 316 § 1 of the Criminal Code. Forfeiture in the factual situation indicated by M. Blaszczyk would be subjected not to a counterfeit, altered, or with the redemption mark removed "money sign" but to an imitation of money functioning in circulation.

De lege lata, it is impossible to declare the forfeiture of a money sign established as legal tender but which has not yet been circulated under Article 316 § 1 of the Criminal Code. This object does not fall within the scope of the provision in question. This is supported by applying the linguistic directives of the legal text, in particular, the prohibition of synonymous interpretation and the order to take into account the internal systematics of the legal act. It should be emphasized

60 Mateusz Błaszczyk in *Kodeks*..., ed. Michał Królikowski, Robert Zawłocki, 1094–5.

that fundamental considerations spoke in favor of making a distinction of this element of the object side on the grounds of crimes under Chapter XXXVII of the Criminal Code. It is impossible to equate it with money. The conclusion is also justified by systemic considerations, in particular, the need to preserve the coherence and completeness of the legal system. This does not mean that Polish legislation does not provide a normative basis for the forfeiture of these objects. In such a case, it is necessary to "reach" the regulations contained in the general part of the Criminal Law, i.e., Article 44 § 6 of the Criminal Code. As part of de lege ferenda postulates, it is necessary to modify Article 316 § 1 of the Criminal Code by including a money mark corresponding to the designations of Article 310 § 1 of the Criminal Code.

It is necessary to proceed to an analysis to resolve doubts regarding the ruling on the forfeiture of other means of payment under the provision in question. It is necessary to present selected views expressed in the literature on the subject. Among the representatives of the doctrine, one can notice voices both approving and denying the forfeiture of other means of payment under Article 316 § 1 of the Criminal Code. Tracing the arguments cited by supporters and opponents of a given position is necessary. It is worth noting that based on judicial jurisprudence, this issue is not the subject of deeper reflection[61]. There is little implicit acceptance of the application of the provision in question to means of payment other than money. For example, the Court of Appeals in Szczecin indicated that: "(…) in the case of a conviction of the offender for an act under Article 310 § 1, the substantive legal basis for ruling on the forfeiture of counterfeit means of payment should be Article 316 § 1."[62]. Such a general formulation does not allow the reproduction of the thought process that led to the signaled conclusion. Among the representatives of the doctrine in favor of ruling on the forfeiture of another means of payment under Article 316 § 1 of the Criminal Code, unequivocally advocated: M. Gałązka[63], G. Łabuda[64], T. Fołta, and A. Mucha[65]. The view of the first two authors can be reduced to the formula that another means of payment should be considered a document within the meaning of the specific basis for the judgment of forfeiture of objects. One searched in vain for arguments to prove the chosen position, and T. Fołta and A. Mucha carried out the most detailed argument. The view of these Authors provided a point of reference for others who accept the application of Article 316 § 1 of the Criminal Code to other means of payment.

It is impossible to declare the forfeiture of a money sign established as legal tender but which has not yet been circulated under the Polish Criminal Code. This object does not fall within the scope of the provision in question.

61 Judgment of the Court of Appeals in Cracow of April 17, 2003, ref. II AKa 72/03, LEX No. 81570; Judgment of the Court of Appeals in Cracow of January 1, 1991, ref. II AKr 13/90, KZS 1991, z. 1, item 8.

62 Judgment of the Court of Appeals in Szczecin of February 14, 2013, ref. II AKa 8/13, LEX No. 1283239.

63 Marek Gałązka in Alicja Grześkowiak, Krzysztof Wiak (ed.) Kodeks…, 1643.

64 G. Łabuda in Jacek Giezek (ed.) Kodeks…, 1539.

65 T. Fołta, A. Mucha, Glosa do wyroku Sądu Apelacyjnego w Krakowie z dnia 17 kwietnia 2003 r., sygn. II AKa 72/2003, Prok. i Pr. 2008, nr 7–8, 241–242.

This justifies the analysis of the said authors' reasoning and the verification of the formulated conclusions. Attention is drawn to the distinction of three groups of premises to motivate the forfeiture of surrogate money. The first indicates that another means of payment is a particular type of document that corresponds in scope to the designator of the object to be forfeited[66]. The second is to state that: "(…) other means of payment" referred to in Article 310 § 1 of the Criminal Code is, as it were, an intermediate category between "money" and "documents" mentioned in this provision. "Other means of payment" by fulfilling the function of payment is, as if to put it, functionally identical to the category of "money."[67]. In turn, the third exposes the functions attributed to promissory notes as means of payment or documents authorizing the receipt of a sum of money. This allowed the authors to express a view based on argumentum ad absurdum. It would be difficult, in their view, to accept the imposition of forfeiture when a promissory note is the designator of a document under Article 310 § 1 of the Criminal Code. At the same time, it would be inadmissible to apply a punitive measure when it is a means of payment[68]. The totality of the circumstances gave rise to the claim that other means of payment fall under the disposition of Article 316 § 1 of the Criminal Code. It is worth mentioning that the above view seems to be supported by M. Blaszczyk. When formulating the position, she does so with great caution. On the one hand, the author points out that: "As for "other means of payment," in light of Article 115 § 14 of the Criminal Code, they should be considered a special type of document. Falsified ones will be subject to forfeiture under Article 316 § 1 of the Criminal Code."[69], to conclude the findings with the statement that the special basis for forfeiture covers only the items enumerated therein and, as a de lege ferenda postulate, there is a need to supplement the content scope of the provision[70].

66 Ibidem, 241.

67 Ibidem, 242.

68 Ibidem.

69 Mateusz Błaszczyk in *Kodeks*…, ed. Michał Królikowski, Robert Zawłocki, 1094–5.

70 Ibidem.

It is also worth considering the arguments of the polemicists of the above position. Knowing both sides' motives will allow us to present our views and the presentation of counterarguments. Against the admissibility of ruling on the forfeiture of other means of payment under Article 316 § 1 of the Criminal Code, O. Górniok[71], Z. Siwik[72], Z. Ćwiąkalski[73] and J. Skorupka argued[74]. The first two Authors, the inapplicability of the provision in question to the forfeiture of other means of payment infer from the results of applying the linguistic and systemic directives of interpretation. As O. Górniok states, "(…) After all, this provision does not list all the objects of the act constituting the elements of the types of crimes of this chapter"[75]. In succor of this is the thesis of Z. Siwik, who states that: "(…) Article 316 § 1 does not mention other objects of the crime specified in the commented chapter, such as other means of payment (Article 310 § 1 and 2, Article 312)"[76]. Moreover, he points out that from a systemic point of view, this is an incomprehensible and undesirable state of affairs. The argumentation leads both to conclude that the items are forfeited, although under Article 44 of the Criminal Code[77].

It is worth noting the position of J. Skorupka, which has evolved and changed over the years. Initially, the author advocated applying the rules set by Article 316

71 Oktawia Górniok, *Przestępstwa*…, 147.

72 Zygfryd Siwik in *Kodeks*…, ed. Marian Filar, 1684–5.

73 Zbigniew Ćwiąkalski in *Kodeks*…, ed. Włodzimierz Wróbel, Andrzej Zoll, 990–91.

74 Jerzy Skorupka in *Kodeks*…, ed. Ryszard A. Stefański, 1839.

75 Oktawia Górniok, *Przestępstwa*…, 147.

76 Zygfryd Siwik in *Kodeks*…, ed. Marian Filar, 1684–5.

77 It was intentionally omitted here to indicate the detailed normative basis contained in the text of Article 44 of the Criminal Code. This is justified by the fact that these authors express divergent views on the nature of the forfeiture under which other means of payment should fall. Oktawia Górniok proclaims the position that they may be subject to forfeiture, which has an optional character (Article 44 § 6 of the Criminal Code); see Oktawia Górniok, *Przestępstwa*…, 147. In turn, Zygfryd Siwik believes that counterfeited, forged, or with the sign of redemption removed other means of payment are subject to forfeiture under Article 44 § 1 of the Criminal Code, see Zygfryd Siwik in *Kodeks*…, ed. Marian Filar, 1684–5.

§ 1 of the Criminal Code to adjudicating a punitive measure against other means of payment[78]. He justified this view in the same way as the proponents of the first view[79], and interestingly enough, this opinion is still cited by them in support of their rationale[80]. It is necessary to notice the modification of the view by J. Skorupka in the direction of stating that Article 316 § 1 of the Criminal Code does not provide a sufficient basis for the forfeiture of another means of payment[81]. Indeed, he pointed out: "(…) Since the "means of payment" referred to in Article 310 § 1 of the Criminal Code (e.g., so-called bank money or electronic money) does not have a material form, it is not possible to order its forfeiture. On the other hand, it is possible to forfeit tangible media or means of payment, such as payment cards, credit cards, and electronic money instruments. The forfeiture of such items and the forfeiture of a legalized probationary instrument should be ruled based on Article 44 of the Criminal Code."[82]. The statement leads to a rejection of the previously held position and in favor of the thesis that the legal norm allowing the adjudication of forfeiture of surrogate money should be sought in the general part of the Criminal Act. The argumentation of Z. Ćwiąkalski appears to be the most detailed. According to the Author, only the objects laxative enumerated in Article 316 § 1 of the Criminal Code are subject to forfeiture[83]. Motivating the position taken, reference was made to the linguistic and systemic directives of interpreting the legal text. It was argued that: "(…) If one were to accept the argumentation of the polemicists, one would have to ask for what reason, however, the legislator distinguished in Article 310 "other means of payment" from "a document authorizing the receipt of a sum of money or containing an obligation to pay capital, interest, participation in profits or a statement of participation in a company." He used the conjunction "or" for this purpose. Using different concepts in one provision also requires consistency in the interpretation of further provisions. Particularly if the legislator explicitly refers in Article 316 to "the crimes specified in this chapter."[84]. The argumentation led the Author to conclude that other means of payment do not fall under the scope of the designators indicated in the norm interpreted from Article 316 § 1 of the Criminal

It should be noted that it is impossible to carry out an interpretive procedure, the effect of which would be to identify other means of payment with the documents constituting the subject of the executive action of each type. Although it leads to a satisfactory and expected interpretative result, the different optics are close to lawmaking, detached from operative interpretation.

78 Jerzy Skorupka, *Przestępstwa*…, 167–8; Jerzy Skorupka in *Kodeks*…, ed. Andrzej Wąsek, Robert Zawłocki, 1720.

79 Ibidem.

80 Marek Gałązka in *Kodeks*…, eds. Alicja Grześkowiak, Krzysztof Wiak, 1643; T. Fołta, A. Mucha, Glosa…, 241.

81 Jerzy Skorupka in *Kodeks*…, ed. Ryszard A. Stefański, 1839.

82 Ibidem.

83 Zbigniew Ćwiąkalski in *Kodeks karny*…, ed. Włodzimierz Wróbel, Andrzej Zoll, 990.

84 Ibidem, 991.

Code. Their forfeiture can be decreed only based on a provision from the general part of the Criminal Law.

Presented the arguments for and against the admissibility of the punitive measure, it is appropriate to motivate our assessment. The position of those Authors who contest the application of a specific basis for the imposition of forfeiture to other means of payment deserves approval. The resolution of the doubts that arise is not straightforward because, to some extent, convincing arguments have both sides of the doctrinal dispute. However, it is difficult not to resist the impression that those who accept the forfeiture pretive effect can be obtained only by considering the linguistic context, including sentence formation and inter-word connections. Based on the regulations in Chapter XXXVII of the Criminal Code, it should be noted that it is impossible to carry out an interpretive procedure, the effect of which would be to identify other means of payment with the documents constituting the subject of the executive action of each type. Although it leads to a satisfactory and expected interpretative result, the different optics are close to lawmaking, detached from operative interpretation. The fact that the same object, depending on its

There are no rational arguments that would justify the forfeiture of a counterfeit coin on a special basis while surrendering the counterfeit payment card to the regulations contained in the general part of the Code. This remark can only be part of *de lege ferenda* postulates.

of other means of payment based on Article 316 § 1 of the Criminal Code are, de facto, performing such interpretative procedures that lead to the interpretative result postulated by many, but which does not correspond to what results from the application of all the directives of the analysis of the legal text.

It should be pointed out that the admissibility of forfeiture of other means of payment under Article 316 § 1 of the Criminal Code would follow in circumvention of the prohibition of synonymous interpretation. It should be recalled that phrases that sound different and are located within a single normative act should not be given the same meaning. When interpreting, it is necessary to remember and refer to the semantic relations between the different phrases used in individual provisions of the same legal act (the so-called sentence mini context)[85]. The correct interfunctions, can fall under another means of payment or a document authorizing the receipt of a sum of money does not introduce a variable. It is not a justification leading to a break in the linguistic meaning of the analyzed provision[86]. Also unconvincing is the argument of T. Folta and A. Mucha, who, in motivating the ruling of forfeiture under Article 316 § 1 of the Criminal Code, pointed to the "indirect" nature of other means of payment between fiat money and individual documents[87].

In support of the chosen position, it is worth pointing out that the regulation of forfeiture, which closes Chapter XXXVII of the Criminal Code, constitutes a special normative basis for adjudicating a measure of criminal legal response. Its atypicality is due to its mandatory nature and the necessity of its application,

85 Piotr Wiatrowski, *Dyrektywy…*, 94–109.

86 T. Fołta, A. Mucha, Glosa…, 241–2.

87 Ibidem, 242.

in isolation from the issue of the material rights of other persons. Consequently, Article 316 § 1 of the Criminal Code is a *lex specialis* to the provisions of Article 44 § 1–2 and § 6 of the Criminal Code. If it is correctly assumed that the provision has the character of an exception to the rules of the general part, then conclusions should be drawn from this. Exceptions should be interpreted strictly (exceptions non sunt extendae). Then, from a systemic and axiological point of view, it is possible to preserve the purpose that justifies the exception introduced in the special part. The rational legislator regulating the relevant narrowing consciously made the exclusion of specific objects from the scope of application of the analyzed institution. Respecting this state of affairs refers to the need to preserve the coherence and completeness of the legal system. Whether this procedure was carried out correctly by considering all systemic and axiological rationales is a separate issue. There are no rational arguments that would justify the forfeiture of a counterfeit coin on a special basis while surrendering the counterfeit payment card to the regulations contained in the general part of the Code. In addition, the adoption of a broad model of interpretation of Article 316 § 1 of the Criminal Code would undermine the guarantee aspect of criminal law regulations. It could lead to undermining the principle of nulla poena sine lege.

The linguistic meaning of a legal text does not constitute an absolute limit of interpretation. Its transgression, however, requires a strong basis of a systemic nature and the support of purpose-functional arguments. These, however, need to be added on the grounds of the legal discourse being conducted. It is not the case that excluding other means of payment from the group of objects subject to forfeiture under Article 316 § 1 of the Criminal Code leads de lege lata to unacceptable consequences. The court is "forced" to look for the source of the normative basis of the decision to apply the law in the general regulations on the forfeiture of objects instead of located in Chapter XXXVII of the Criminal Code. The interpretative model preferred in the text does not detach itself from the axiological consistency expressed by the legislator because such institutions can be applied, which allows for achieving the assumed goals. At the same time, there are no relevant interpretative doubts.

This article is funded by the National Science Centre in Poland, under the project „Zagadnienie fałszu pieniądza na gruncie polskiej ustawy karnej i w ujęciu prawnoporównawczym" [The issue of money forgery in the polish criminal code as well as in the comparative law approach] No UMO-2018/29/N-HS5/01091.

Bibliography

Andrejew, Igor. *Kodeks karny. Krótki komentarz*, Warszawa 1988.

Królikowski, Michał and Robert Zawłocki, ed. *Kodeks karny. Część szczególna*, vol II, *Komentarz do artykułów 222–316*, Warszawa 2017.

Buchała, Kazimierz, et al. ed. *Komentarz do ustawy o ochronie obrotu gospodarczego*, Warszawa 1995.

Wróbel, Włodzimierz, and Andrzej Zoll, ed. *Kodeks karny. Część szczególna*, vol. III. *Komentarz do art. 278–363 k.k.*, Warszawa 2022.

Grześkowiak, Alicja, Wiak, Krzysztof, ed. *Kodeks karny. Komentarz*, Warszawa 2021.

Góral R., *Kodeks karny. Komentarz*, Warszawa 2005.

Górniok, Oktawia, *Przestępstwa gospodarcze. Rozdział XXXVI i XXXVII Kodeksu karnego. Komentarz*, Warszawa 2000.

Giezek, Jacek ed. *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2021.

Chybiński, Olgierd, and Włodzimierz Gutekunst, Witold Świda, ed. *Prawo karne. Część szczególna*, Warszawa-Wrocław 1980.

Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja prawa karnego, vol V/4, Warszawa 1930.

Andrejew, Igor, and Leszek Kubicki, Jan Waszczyński, ed. *System Prawa Karnego* vol. IV, *Część 2: O przestępstwach w szczególności*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1989.

Mozgawa, Marek, ed. *Kodeks karny. Komentarz*, LEX/el art. 44.

Makowski, Wacław. *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego i rosyjskiego, obowiązującego w Polsce*, Warszawa 1924.

Marek, A., *Kodeks karny. Komentarz*, Warszawa 2010.

Mik, B., *Nowela antykorupcyjna z dnia 13 czerwca 2003 r. Rys historyczny i podstawowe problemy interpretacyjne*, Kraków 2004.

Konarska-Wrzosek, Violetta, ed. *Kodeks karny. Komentarz*, Warszawa 2020.

Peiper, Leon, *Komentarz do kodeksu karnego*, Kraków 1936.

Bojarski, Tadeusz, ed. *Kodeks karny. Komentarz*. LEX/el.Postulski Kazimierz, Siwek, Marcin. *Przepadek w polskim prawie karnym*, Kraków 2004.

Raglewski, Janusz. *Materialnoprawna regulacja przepadku w polskim prawie karnym*, Kraków 2005.

Górniok, Oktawia et. al., ed. *Kodeks karny. Komentarz*, Gdańsk 2004.

Bafia, Jerzy, Mioduski, K., Siewierski, Mieczysław. *Kodeks karny. Komentarz*, Warszawa 1971.

Filar, Marian, ed. *Kodeks karny. Komentarz*, Warszawa 2016.

Melezini, Mirosława ed. *System prawa karnego*, vol. 6: *Kary i inne środki reakcji prawnokarnej*, Warszawa 2016.

Zawłocki, Robert, ed. *System prawa karnego*, vol. 9: *Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa 2015.

Stefański, Ryszard, ed. *Kodeks karny. Komentarz*, Warszawa 2018.

Skorupka, Jerzy. *Przestępstwa przeciwko obrotowi pieniędzmi i papierami wartościowymi. Rozdział XXXVII Kodeksu karnego. Komentarz*, Warszawa 2002.

Spotowski, Andrzej. "Konfiskata mienia i przepadek rzeczy (uwagi de lege ferenda)." *Prokuratura i Prawo* 3 (1989).Andrejew, Igor and Witold Świda, Władysław Wolter, *Kodeks karny z komentarzem*, Warszawa 1973.Waszczyński, Jan. "Kary dodatkowe w nowym kodeksie karnym." *Prokuratura i Prawo* 10 (1969). Wiatrowski, Piotr. *Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego* 2013.

Wojciech Dajczak

Is Russia Part of the Civil Law Tradition?

Wojciech Dajczak

Professor of Law at Adam Mickiewicz University in Poznań; Editor-in-chief of Forum Prawnicze.

dajczak@amu.edu.pl

https://orcid.org/0000-0002-1565-0319

Key words: legal traditions, Russian law, law and religion

https://doi.org/10.32082/fp.6(74).2022.1099

1. Recurring question on Russian legal identity

Linking codification to rationality indicates that the civil law tradition also includes Eastern European countries and Russia. Looking at Russia from the outside, we examine its legal tradition in a way similar to that of other countries with civil law tradition.[1] In 2014, Martin Avenarius published a comprehensive work in German on the influence of Roman law on Russian legal culture in the 19th century.[2] I began my review of Avenarius's work with the observation that the results of his legal-historical research, after the Russian invasion of Crimea, seem to be more relevant and inspiring for discussion than its beginning.[3] I had the same feeling when, shortly after the Russian aggression against Ukraine in February 2022, I read *Law and the Christian Tradition in modern Russia*, edited by Paul Valliere and Randall A. Poole.[4] An interesting work published in the Law and Religion series on the significant influence of Orthodox Christianity on the thinking of selected Russian jurists from the 17th to the early 20th centuries. This book has inspired me to return to the question, is Russia part of the civil law tradition? Common to both the works mentioned here is the use of a conceptual framework, typical of civil law tradition. A precise description of the impact of Roman law on the modernisation of civil law in Russia, from the beginning Tsar Alexander I's reign in 1801 to the promulgation of the Civil Code of Soviet Russia in 1922, led Avenarius to recognise that today's Russia belongs to the Western legal tradition; although, he recognised that the historical experience of the Russian Empire and Soviet Russia reinforced the risk of individual rights being dominated by the

1 Patrick Glenn, *Legal Traditions of the World* (Oxford 2014), 142–3.

2 Martin Avernarius, *Fremde Traditionen des römischen Rechts* (Göttingen 2014).

3 Paul Valliere, Randall Poole (eds.), *Law and the Christian Tradition in modern Russia* (Routledge 2022).

4 Wojciech Dajczak, "Tradycja recepcji a recepcja tradycji, czyli o prawie rzymskim w Rosji," *Forum Prawnicze* 6 (2014): 50.

interests of the state and its associated 'conglomerates'.[5] In a review of this work, I expressed the doubt whether relying exclusively on the formal premises of the academic concept of the reception of Roman law and noting the tensions between this theoretical model and the social reality of Russia, was legitimate to include Russian law in the civil law tradition.[6] This doubt may be reinforced by Yosif Pokrovsky's view of the relationship between private law and freedom, which he set forth in a book he published in Russia between the February and October revolutions of 1917. This author, considered by Avenarius to be the most eminent Russian private law specialist at the turn of the 20th century, stated that at a time when "Russian citizens had truly become the creators of their own law", they should strive towards the good, the direction of which is determined by "the combination of freedom with social solidarity".[7] In my review of Avenarius' work, this sentence acted as the starting point for my doubts concerning Russia's inclusion in the civil law tradition. I formulated the hypothesis that the further development of law in Russia without the Bolsheviks could have led to a new Russian legal tradition in which rationality would have been linked to the special role of social solidarity. These cultural peculiarities of Russia were also evident in the Russian theory of private law at the time. The Bolshevik Revolution excluded the possibility of such a development. During Soviet Russia, the specificity of codified Russian law was most often referred to as the socialist legal tradition.[8] The book edited by Vallier and Poole is a stimulus to revisit the question of how the cultural identity of Russian law shaped the Bolshevik Revolution. It inspires one to ask to what extent legal-historical considerations can enrich today's discussions of the world's legal traditions and the interpretation of contemporary political-legal processes.

2. Western legal concepts in a Russian context

John Witte Jr, in his foreword, declares in a manner familiar to the Western legal tradition that "volume included careful analysis of a range of Russian arguments for human dignity, religious freedom, rule of law and ordered liberty".[9] The thirteen jurists or ideologues of Russian law discussed in the book are presented by Witte as "the Russian equivalents of Western legal titans like Grotius, Blackstone, Beccaria (…) all of whose writings were known to their Russian legal contemporaries".[10] In Avenarius' work, my concern was with the weight he attributed to the formal marks of the theoretical model of the reception of Roman law, when assessing the cultural identity of Russian law.[11] The quoted passage from Witte's introduction raises the question of whether they will create a bias in the reader to focus attention on individual Russian 'legal titans' and their inclusion in the civil law tradition.

The further development of law in Russia without the Bolsheviks could have led to a new Russian legal tradition.

5 Martin Avenarius, *Fremde Traditionen*…, 665.

6 Wojciech Dajczak, *Tradycja*…, 55.

7 J. Pokrowski, *Osnownye problemy graždanskogo prawa* (Petrogrod 1917), 2–3.

8 Konrad Zweigert, Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Tübingen 1984), 341–349

9 John Witte Jr., *Foreword*, *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole, (Routledge 2022), IX.

10 John Witte Jr. *Foreword*.., X.

11 Martin Avenarius, *Fremde Traditionen*…, 122, 662.

To marginalize what may appear to be extraneous. It should be noted, although this does not prejudge anything, that completely different Russian lawyers are heroes of both Avenarius' and Vallier and Poole's works.[12] In reading the latter, I focused on questions designed to correct the indicated bias and relate to the hypothesis of the formation of a specific Russian legal culture before the Bolshevik Revolution. In reconstructing the reception of Roman law in nineteenth-century Russia, Avenarius recalled Slavophiles' hostility to the Western approach to law. This was the attitude of many representatives of the great Russian culture of the time. Perhaps the best-known example of opposition in Russian culture to 'modern' theories is Dostoevsky's idea of a Christian rebirth of man 'towards a new life'.[13] The positivist approach to the law was criticised by Leo Tolstoy as seen in his novel 'Resurrection', a theme discrediting the value of an education containing Roman law.[14]

3. Western legal tradition vs. Russian legal tradition?

The importance of such an approach to law in pre-revolutionary Russia is confirmed and brilliantly clarified by the opinions of the vast majority of lawyers discussed in the book edited by Vallier and Poole. Konstantin Pobedonostsev (1827 - 1907), who combined law, religion and Russian conservatism, criticised the tendency to include in academic lectures "German university elements alien to an Orthodox ecclesiastical school",[15] unambiguously supported "unlimited autocracy", which he saw as "critical to Russia's survival"[16] and questioned the relevance of the formal law claiming that he had "more faith in an improvement of people than institutions"[17]. Anatolii Fedorovich Koni (1844 - 1927) portrayed as an apostle of 'civil heroism' was a jurist who believed in the groundbreaking nature of the Russian Judicial Reform of 1864. He felt that as a result of this change judicial statutes "were not a copy of Western models (…), but a means of hearing his own people".[18] He was against authoritarianism, but shared the idea that the "procedural approach to law dominant in the West reduced law to a lifeless formula, whereas in Russia law ascended directly to justice and truth".[19] Leonid Kamarovskii (1846 - 1912) was a lawyer appreciated for combining Christian values with international law. Although he was a signatory to the 1905 manifesto calling for Russia to be transformed into a state recognizing the principles of legality, political freedom, and representative government[20], he believed that granting Eastern Orthodoxy, a preeminent and official status in the Russian state was not incompatible with freedom of religion.[21] In his view, the foundations of international law regarded Russia as a "special world", a country that "differs more from Europe than the individual European nations differ from one another".[22] Vladimir Soloviev (1853 - 1900) a prominent representative of Slavophiles, mystic and philosopher of law criticised socialism and legalism.[23] He believed that the "godless human individual" of modern Western civilization imposes on Orthodox Russia the mission of proclaiming, and instantiating the good news of "divine humanity".[24] Pavel Ivanovich Novgorodtsev (1866 - 1924), faithful to the idea of natural law, underwent an evolution from liberal

12 The jurist mentioned in both of these books is Leon Petrażycki.

13 Martin Avenarius, *Fremde Traditionen*.., 298–302.

14 George Pattison, "Dostoeysky," in*The Oxford Handbook of Russian Religious Though*, eds.G. Pattison, C. Emerson, R. A. Poole (Oxford 2020), 169–83.

15 Lew Tolstoy, *Voskresenie*, chapt. 21.

16 Gregory L. Freeze, "Konstantin Pobedonostsev, religion, and Russian conservatism," in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022) 120.

17 Gregory L. Freeze, *Konstantin*…, 123.

18 Gregory L. Freeze, *Konstantin*…, 124.

19 Tatiana Borisova, "The civic religion of Anatolii Koni," in *Christian Tradition in modern Russiai*, eds. Paul Valliere, Randall Poole (Routledge 2022), 159.

20 Tatiana Borisova, *The civil religion*…, 169.

21 Vladimir A. Tomsinov, "Leonid Kamarovskii: Christian values and international law," in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole, (Routledge 2022), 188.

22 Vladimir Tomisinov, *Leonid*…, 189.

23 Vladimir Tomisinov, *Leonid*…, 186.

24 Pau; Valliere, "Vladimir Soloviev: Faith, philosophy, and law," in *Law and the Christian Tradition in modern Russia*, Paul Valliere, Randall Poole (Routledge 2022), 197.

views to a conservative turn. In his work from the early 20th century, referring to the Slaphophiles, Dostoevsky, and Soloviev linked their way of thinking with the Russian tradition of the understanding of law.[25] In the paper "On the Distinctive Elements of the Russian Philosophy of Law" published in 1922, in exile in Prague, he expressed his conviction that the new era of the philosophy of law would have "special features of Russian legal thought, among which "the law of Christ" as the basis of social solidarity comes first.[26] Sergei Kotliarevskii (1873 - 1939), the Russian theorist of the rule of law, regarded this key concept in the Western legal tradition as a step on the path toward the realization of divine humanity following the ideas of the prominent Slavophile Soloviov, and in particular his concept, the "justification of good".[27] Nikolai Alekseev (1879 - 1964), called an advocate of social justice and global peace, recalled that during the February Revolution of 1917, he was more of a leftist and "thought that the forms of Western democracy do not suit us".[28] In exile in Yugoslavia, he became involved in a movement that famously claimed that Russia was neither a part of Europe nor a part of Asia but a continent sui generis –"Eurasia". Alekseev shared the movement's view that the Russian Revolution was a popular reaction against the artificial Europeanization imposed by Peter the Great and expected Russia, rooted in the Orthodox religion, to become conscious of the country's Eurasian character.[29] Ivan Ilyin (1883 - 1954), a philosopher of law, force, and faith, in his pre-revolutionary works, considered legal consciousness as the central concept of legal discussions. After fleeing Soviet Russia, he spent decades publishing works aimed at fighting the Bolsheviks and rebuilding Russia after its collapse. After the Second World War, he expressed the view that, because of the imbalance between liberty and self-discipline, the conditions for democracy would not exist following the collapse of Soviet Russia. He identified not "democracy at all costs" but an "authoritarian" model as the appropriate solution for post-Soviet Russia.[30]

The belief in the cultural uniqueness of the Russian approach to law united influential jurists of the nineteenth and first half of the twentieth century.

4. How legal history can help understand Russia today

This brief overview demonstrates that the belief in the cultural uniqueness of the Russian approach to law united influential jurists of the nineteenth and first half of the twentieth century, who understood legalism, the rule of law or religious freedom, in different ways. This view is further strengthened by the fact that, of all the jurists of the period discussed in the volume, this way of thinking was alien only to Boris Chicherin (1828 - 1904), who categorically rejected the Slavophiles' notions of Russian uniqueness and religious

25 Paul Valliere, *Vladimir…*, 196.

26 K. M. Antonov, "Pavel Novogorodtsev. Natural law and its religious justification," in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022), 264.

27 Randall Poole, Sergei Kotliarevskii, "The rule of law in Russian liberal theory," in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022), 284.

28 Martin Beisswenger, "Nikolai Alekseev. Advocate of social justice and global peace," in *Law and the Christian Tradition in modern Russia* eds. Paul Valliere, Randall Poole, (Routledge 2022) 291.

29 Martin Beisswenger, *Nikolai…*, 293.

30 Paul Valliere, "Ivan Ilyin. Philosopher of law, force, and faith," in *Law and the Christian Tradition in modern Russia* eds. Paul Valliere, Randall Poole, (Routledge 2022) 320.

exceptionalism.[31] This jurist made a clear distinction between private law as a "sphere in which individualism predominates" and public law according to which a "member of the community is a free but subordinate person".[32] The call to liberate Poland, an act that "would raise Russia to that height that it had once achieved in the Napoleonic wars when it became the liberator of Europe"[33], demostrates his unique understanding of freedom in the public sphere while also shattering Slavophiles' theories in practice. The book edited by Vallier and Poole also inspires reflection on whether the traces of the maturation of a specifically Russian legal tradition are merely remnants of a past that was erased from Russia by the Bolshevik revolution. The formation of legal culture and legislation after the collapse of Soviet Russia can be seen as filling the space previously occupied by the façade of Soviet law, which did not put the declared values into practice.[34] A very interesting element of the profiles of several lawyers is the mention of their legacy and reception in post-Soviet Russia. In this way, the lawyers Konstantin Pobedonostsev[35], Nikolai Alekseev[36] and the philosopher Vladimir Soloviev[37] stand out. Pobedonostsev is regularly quoted in the strongly Orthodox discussions on Russian conservatism on the Ruska liniia portal. In addition to Martin Besswenger's chapter, it can be added that such interaction is ongoing. For example, on the 4th of June 2022 in criticism of free elections, cited Pobedonostsev's opinion that "history shows that real, beneficial changes for the nation, serious changes occur on the basis of the will of people representing the central state will, or on the basis of a minority distinguished by ideology and deep knowledge, and in opposition to this, the expansion of elections led to a lowering of state thought and vulgarization of opinions among the mass of voters".[38] The influence of Nikolai Alekseev is linked to the historical role assigned to him by Aleksandr Dugin, whose theory of Russia's inevitable confrontation with the West is the ideological basis for the ongoing aggression against Ukraine since February 2022.[39] From the perspective of a reader familiar with the Western legal tradition, exploring the links between pre-revolutionary Russian reflection on the rule of law and contemporary developments may reveal a bright spot. The words of Chichernin's memory-turner, the current chairman of the Constitutional Court of the Russian Federation, Valerii Zorkin, can be interpreted as a manifestation of a behaviour close to Chichernin's legacy. In June 2022, at a conference in St Petersburg, he stated that "the reinstatement of the death penalty is not possible in the Russian Federation, neither by changing the law, nor following a referendum or amending the Constitution. The reinstatement of the death penalty would be a great mistake to depart from the human-

The formation of legal culture and legislation after the collapse of Soviet Russia can be seen as filling the space previously occupied by the façade of Soviet law.

31 Gary M. Hamburg, "Boris Chicherin. Christian modernist," in *Law and the Christian Tradition in modern Russia* eds. Paul Valliere, Randall Poole, (Routledge 2022) 133.

32 Gary M. Hamburg, *Boris…*, 145.

33 Gary M. Hamburg, *Boris…*, 148.

34 Olimpiad S. Ioffe, *Soviet Law and Soviet Reality*, Dordrecht 1985.

35 Gregory L. Freeze, *Konstantin…*, 130–131.

36 Martin Beisswenger, *Nikolai…*, 304–305.

37 Paul Valliere, *Vladimir…*, 210–212.

38 Albin Repnikov, *Ruskie konservatory o prirodie i sustschestnosti samodierzavnogo gosudarstva i wlasti w Rosii*, fn. 33. Retrieved from https://rusk.ru/st.php?idar=115143 (access 23.09.2022).

39 Aleksandr Dugin, *Osnovy geopolityki*, Moskva 1999, 671ff.

istic direction of legal policy".[40] However, we should not forget the uniqueness of Chichernin in relation to the other jurists and philosophers of law presented in the book edited by Valliere and Polle. This work can be read and interpreted in different ways. The direction I chose stemmed from the doubts raised by John Witte Jr's foreword. My concern was whether the book actually provides a basis for assuming that concepts such as human dignity, religious freedom, rule of law and ordered liberty were introduced into Russian legal thinking in a manner similar to that of the West. I believe that a careful reading of the book challenges such a presumption of similarity. Moreover, it reinforces my hypothesis, based on Avenarius's work, that the formal similarities in Russian legal science to the civil law tradition may have led to the coalescence of Russian legal tradition, rather than the inclusion of Russian legal culture into the civil law tradition. Referring to the classical thoughts on Orthodoxy formulated by Sergei Bulgakov it can be assumed that Orthodoxy by its very nature does not determine the shape of Russian legal identity.[41] After a period of façade socialist law, this became a challenge for Russian lawyers of the late 21st century. After 1991, there was interest in pre-revolutionary literature on Roman law in the study of Russian private law. Some of them were republished in the series "classics of Russian civil law".[42] This is part of Russia's ongoing search for a Russian cultural and legal identity. It is justified according to *Law over the Christian Tradition in modern Russia*. However, today's popular references to some of the pioneers of the "true Russian legal tradition" can cause concern.[43]

The formal similarities in Russian legal science to the civil law tradition may have led to the coalescence of Russian legal tradition.

There are undoubtedly two general conclusions that can be drawn from the inspiring text edited by Valliere and Polle. Firstly, we should wish Russians, who are looking for their legal identity, to disseminate the fact that the importance of social solidarity was universally acknowledged by Orthodox Russian jurists of the nineteenth and early twentieth centuries, who recognised this specificity, but only some of them associated it with authoritarianism and the primacy of Orthodoxy in relation to the restriction of other religions. It is worth remembering Bulgakov's words that "Orthodoxy, which is a religion of freedom, combined with reactionary or class aspirations, is a contradiction that calls for vengeance, which can even be historically justified, but not dogmatically".[44] Secondly, there is no reliable historical basis for a uniform understanding of Russia and other Eastern European countries when defining the boundaries of the civil law tradition.

Bibliography

Avernarius, Martin. *Fremde Traditionen des römischen Rechts*, Göttingen 2014.

Blugakov, Siergiej. *Pravoslavie. Ocherki ucheniia o tserkvi*, Moskva 2014.

Borisova, Tatiana. "The civic religion of Anatolii Koni." In *Christian Tradition in modern Russiai*, edited by Paul Valliere, Randal Poole, Routledge 2021.

40 Retrieved from https://www.rbc.ru/politics/29/06/2022/62bc244c9a79470a8a48c66b (access 23.09.2022).

41 Siergiej Blugakov, *Pravoslavie. Ocherki ucheniia o tserkvi* (Moskva 2014), 178–179.

42 Anton Rudokvas, *Il diritto romano e la privatistica russa*, (in:) L. Vacca (ed.) *Nel mondo del diritto romano* (Napoli 2012), 284.

43 Anton Rudokvas, Il diritto…, 288.

44 Siergiej Blugakov, *Pravoslavie*…, 177.

Dajczak, Wojciech. "Tradycja recepcji a recepcja tradycji, czyli o prawie rzymskim w Rosji." *Forum Prawnicze* 6 (2014).

Dugin, Aleksandr. *Osnovy geopolityki*, Moskva 1999.

Glenn, Patrick. *Legal Traditions of the World*, Oxford 2014.

Ioffe, Olimpiad S. *Soviet Law and Soviet Reality*, Dordrecht 1985.

Pattison, George. "Dostoeysky." In*The Oxford Handbook of Russian Religious Though*, edited by G. Pattison, C. Emerson, R. A. Poole, Oxford 2020.

Pokrowski, J. *Osnownye problemy grażdanskogo prawa*, Petrogrod 1917.

Repnikov, Albin. *Ruskie konservatory o prirodie i sustschestnosti samodierzavnogo gosudarstva i wlasti w Rosii*, fn. 33. Retrieved from https://rusk.ru/st.php?idar=115143 (accessed 23.09.2022).

Rudokvas, Anton. *Il diritto romano e la privatistica russa*, (in L. Vacca (ed.) *Nel mondo del diritto romano*, Napoli 2012.

Valliere, Paul, and Randall Poole, ed. *Law and the Christian Tradition in modern Russia*, edited by Paul Valliere, Randall Poole, Routledge 2022.

Zweigert, Konrad, and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Tübingen 1984.

Lilla Nóra Kiss, Mónika Mercz

A Win-win Approach in Human Rights Advocacy? Lessons Learned from the Book Titled "Human Dignity and Law. Studies on the Dignity of Human Life"

Lilla Nóra Kiss

PhD, LLM, Visiting scholar and adjunct faculty at Antonin Scalia Law School, George Mason University, co-founder of the Freedom and Identity in Central Europe (FICE) working group.

✉ lkiss@gmu.edu

https://orcid.org0000-0002-2607-1806

Mónika Mercz

PhD student in the Doctoral School of Law and Political Sciences at Károli Gáspár University of the Reformed Church, Budapest. Professional Coordinator at Public Law Center of Mathias Corvinus Collegium.

✉ mercz.monika@mcc.hu

https://orcid.org0000-0001-5314-9253

The universal respect for human rights should be the tie that binds, not the tie that divides our societies. In recent years, we have experienced the monopolization of interpretation in several legal questions. The authors recognized that there is a need for competition in the 'marketplace of ideas' in order to respect our diversities and preserve alternative and valid legal interpretations in different cases. The book human dignity and law leads us to believe that based on our human dignity, we should rebuild a culture of respect for those who think and live differently. Its authors' contribution is vastly important in order for us to understand how we can build a better understanding going forward.

Key words: human dignity, human rights, legal interpretation, Roman law, EU law, constitution, diversity

https://doi.org/10.32082/fp.6(74).2022.1097

The universal respect for human rights should be the tie that binds, not the tie that divides our societies. In recent years, we have experienced the monopolization of interpretation in several legal questions, although we consider diversity and freedom of opinion as our fundaments, a common heritage of humankind. The unilateral interpretative tendencies lead to the weaponization of human rights in various social and political situations instead of protecting individuals on legal grounds – as they should do. One-size-fits-all legal interpretation minimizes the need and space for open discussions and exchange of views and, therefore, fastens the polarization process

in societies. As a result, questions related to human dignity, fundamental rights, and values are becoming wedges among us; however, they should be the essential ties for social cohesion. The Authors recognized that unilateral interpretation in human rights advocacy is a zero-sum game, where no win-win could be achieved. There is a need for competition in the 'marketplace of ideas' in order to respect our diversities and preserve alternative and valid legal interpretations in different cases. This book serves as a set of ideas on the various aspects of human dignity. The Authors' valuable contribution shows that we need new, renewed, alternative ways to approach social conflicts to prevent driving society to disintegration. Hyper-judicialization of human rights and applying only one solution for all cases only lead to injustice. Therefore, based on our human dignity, we should rebuild a culture of respect for those who think and live differently. In this process, retrieving and rediscovering the concept and content of human dignity is crucial. The Authors show us the 'know-how'.

Unilateral interpretation in human rights advocacy is a zero-sum game, where no win-win could be achieved. There is a need for competition in the 'marketplace of ideas' in order to respect our diversities and preserve alternative and valid legal interpretations in different cases.

The first lesson is that going back to the roots is helpful when we try to understand the present and prepare for the future. *Franciszek Longchamps de Bérier* returns to Roman law and the Justinian concept of *persona* as the bearer of rights and anthropology for law in the book's very first chapter. Roman law evolved over centuries; it became highly developed and dogmatically rich. One fundamental concept that Roman law has introduced is the *persona* which is the center of our culture (and not just the legal tradition). The core principle is '*Hominum causa (omne) ius constitutum est*', which is '(Every) law has been created for the sake of men (humankind).' The maxim implies that the law is a tool (rather than an end) and should aspire to improve the lives of persons – rather than to achieve doctrinal purity or to perfect abstract principles. This is the basis for the fundaments of the human dimensions of law.

The *persona* was considered the unit of the society, who could engage in contractual relationships with other society members and within the family. The concept of a person has developed over time – especially in the light of the *homo* (which term covered persons and things (*res*) too) and the development of the *homo* definition – and in Christian times, human dignity became the core of the way of thinking about the persona. The *hominum causa* precept has always been taken as inspiring and full of promise and became the basis for the continental way of thinking about persons as human beings and dignity, which is an undividable aspect of human nature. This leads us to Ulpian's – one of the five greatest Roman jurists – an innovative approach. Ulpian connected *ius* (law) with *iustitia* (justice) in order to connect law with human beings forever. From that point, *ius* and *iustitia* together became a point of reference, declaring that humans are the center of culture and not just the center of legal traditions. The persona existed before the law, and the law serves the persona as existing – which means that the person creates the law, and not the law creates the person; therefore, the person shall always be in the

center. This concept was more or less the base for the European approach towards persons – although the twentieth-century events and the legal positivist perspective to justify the discriminative laws had challenged that. The Author names Marxism as a factor that has invoked philosophy rather than used it and undertook its own anthropological reflection relatively late as a result of intellectual and academic confrontation with Thomism (which is a philosophical and theological school that arose as a legacy of the work and thought of Thomas Aquinas (1225–1274)). Thomas Aquinas's view does not link human beings' existence with cognition; the most important dimension of a human being is existence. Marx and Engels draw a new theory of alienation to deduce their concept of human nature, which considered man to be a socio-historical being who, in cooperation with people, creates himself and, in everyday life, is guided by basic life needs. In their understanding, it is a man who creates his world and draws his own responsibilities either for himself or by the community the person belongs to. This leads to alienation, which has always been a significant element of Marxist ideology. Since the man of the present cannot be happy, they must always seek liberation from various dependencies (God and religion, objective truth, human freedom, etc.). Marxism defined work as a way of liberation, leading to the unfortunate creation of the so-called "Málenkij Robot" (Forced Labor in the Soviet Union labeled as 'little work'). It has nothing to do with human dignity or the person as the center of laws; the laws served an absurd, atheist, and totalitarian system and were tools to oppress those who disagreed. The Author sees the conflict between Thomism and Marxism as the confrontation of the understanding of the man. Law and justice should be the base for an understanding of man (humankind) and should therefore provide a universal tool to serve the realization of human values. This might be a good starting point for further discussions about human dignity, especially when our common grounds and mutual understanding are often questioned.

Recently, the biotechnologies and the artificialization of the human, biocentric egalitarianism, and technological convergence along with the production of humanoids – are all challenging and imposing threats to human dignity. These new threats place human dignity on the agenda today. Human dignity is not just an ethical principle and a legal category. Still, it is a term determining all political and social relations as it is naturally linked to human existence.

Human dignity faces erosion as it is challenged by those contemporary threats about which *Maria do Céu Patrão Neves* writes in her chapter. The second lesson of the book is probably that although we consider our diversity a value, we tend not to respect it when it comes to concepts and their meanings. Dignity, human rights, and terms do not always invoke the same meaning. In contemporary discourse, the definitions sometimes cover very different or contradictory content. *Maria*

do Céu Patrão Neves presents the etymological and historical conceptualization of human dignity in the light of its ethical, legal, social, anthropological, and ontological dimensions. There are permanent threats to human dignity and contemporary threats which arise from time to time. Recently, the biotechnologies and the artificialization of the human, biocentric egalitarianism, and technological convergence along with Human Rights, Charter of Fundamental Rights, etc.). However, its universal respect is under threat every time – especially because the universality of legal protection and the diversity of individual features seemingly collide many times. However, diversity is a fundamental feature of human beings; therefore, human dignity and respect may include different societal treatment. Although, this does not mean that the

The main threat to human dignity is not our diversity but the new technologies that created a new possible dimension for life and human existence. A new capacity emerged by which humans can change and modify themselves partially or wholly. In addition, it became possible to create human life outside the human body, revive a body, suspend the death process, replace parts of a body with artificial parts (biological or mechanical), etc.

the production of humanoids – are all challenging and imposing threats to human dignity. These new threats place human dignity on the agenda today. Human dignity is not just an ethical principle and a legal category. Still, it is a term determining all political and social relations as it is naturally linked to human existence. The term – introduced to legal thinking by Cicero – means to deserve honor, to be worthy. Although the concept used to cover a prominent social or political position, by today, human dignity is linked to all human beings regardless of their social status unconditionally, absolutely, inalienably, and genuinely.

Human dignity[1] is the core of every international legal document (e.g., the Universal Declaration of level of legal protection should differ based on individual features. Since all human beings are equal, the protection given by law shall be universal. The Author of this chapter raises attention to the fact that human dignity is often invoked to justify certain decisions (e.g., to ban euthanasia) or to demand certain interests. That is why it is important to specify a crucial set of rules that determine human dignity in the first and second generations of human rights – according to the Author.

Regarding the first generation of rights, non-discrimination is the core principle according to the Author. In contrast, for second-generation rights, the promotion of

1 M. Sulyok, "Nation, Community, Minority, Identity - Reflective Remarks on National Constitutional Courts Protecting Constitutional Identity and minority", *Minority and identity in constitutional justice: case studies from Central and Eastern Europe* (edited by: Norbert Tribl), International and Regional Studies Institute, Szeged, 2021.

social, economic, and cultural development is the key. In recent years, the erosion of dignity is tangible due to the intensification of migratory movements and the changes in their triggering reasons (such as war, climate change, etc.) – among other circumstances. This leads to the marginalization of people and the polarization of societies based on the altering interpretative views on certain rights and dignity. The main threat to human dignity is not our diversity but the new technologies that created a new possible dimension for life and human existence.[2] A new capacity emerged by which humans can change and modify themselves partially or wholly. In addition, it became possible to create human life outside the human body, revive a body, suspend the death process, replace parts of a body with artificial parts (biological or mechanical), etc. These – at least on a social and legal level – challenge human dignity and open the debate over formerly considered to be obvious – often biological – facts. In addition, the artificial interventions to human existence raise religious concerns for many, which raises a new threat to human dignity in the dimension of different religious views. Another aspect is the legal consideration of humanoid robots in different legal systems. The Author highlights a case where 'Sophia'[3] – a humanoid – was provided Saudi citizenship, by which the state declared that that certain robot is equal to other citizens – presumably human beings.

Moreover, in 2017 Sophia became Ambassador for the United Nations Development Programmes and raised great attention with her speeches. The appointment to represent a country as an ambassador forces the international community to accept the human nature of the humanoid robot, regardless of whether other states would consider the robot as a *persona* or a '*res*' (thing). The Author closes with two important questions: who we are and who we intend to be as individuals in the community. Concludes as follows: "Human dignity is not a consequence of a previous reality, nor a reward that can be displayed; it is an essential and structuring feature of our unique and universal identity, inherent in being human, which is exercised as a responsibility in the development of oneself and society." Giving this up means losing ourselves – as humans.

The content of human dignity may vary based on what the current social and legal environment accepts as persons. Formerly, it was obvious that human dignity could only be linked to human beings; however, by enabling robots to represent sovereign countries before international organizations and extending the dimensions of formerly natural human life, the layers of dignity and legal protection are questioned. Suppose we accept that the law serves humans, and not the humans serve the law. In that case, we should be able to interpret these fundaments in light of the changing circumstances – e.g., emerging technological revolutions.

The third chapter is an outlook on the dignity of Native Americans and Africans enslaved in the Spanish Crown from a moralist point of view by *Guillermo F. Arquero Caballero.* The Author presents the views of the theologists and clergymen who dealt with the moral issues in the 16–18 centuries. The Author introduces the readers to the right of native Americans to property and land and the dignity of the enslaved people. Christianity changed the vision of the enslaved – since the enslaved humans were also considered to be the sons of God who deserved respect. The Author concludes that although the moralists accepted the institution of slavery according to the traditions and values of that time, they (the moralists) tried to defend the human dignity of these non-European minorities on moral and religious grounds. Moralists agreed on the essential ideas of protecting enslaved humans (for example, that these people have the right to property, their land, and resources, there is no ethnic base for slavery, etc.). However, they debated the intellectual maturity of the enslaved and the moral responsibility of those who purchased these enslaved people.

2 N. Tribl, "Predestined future or persistent responsibility? Constitutional idenitity and the PSPP decision in the light of the Hungarian Constitutional Court's most recent practice", *Minority and identity in constitutional justice: case studies from Central and Eastern Europe* (edited by: Norbert Tribl), International and Regional Studies Institute, Szeged, 2021.

3 Jack, Kelly, Sophia—The Humanoid Robot—Will Be Rolled Out This Year Potentially Replacing Workers, Forbes online, 2002, https://www.forbes.com/sites/jackkelly/2021/01/26/sophia-the-humanoid-robot-will-be-rolled-out-this-year-potentially-replacing-workers/?sh=1d1236906df2 (access: 30.08.2022).

Understanding the different humanitarian and fundamental legal aspects of slavery, the next lesson arises from the dehumanization of work. The chapter titled "Dignified work and dehumanization of work. Some reflections on the prehistory of labor law" by *José María Puyol Montero*, provides valuable insight into the process of dehumanization of work. *Montero* states that since the Industrial Revolution, the evaluation of labor has undoubtedly changed. This is indeed a fascinating idea because while mechanization decreased the price of and the need for them, it also created laws protecting workers from exploitation and inhumane working conditions.[4]

This chapter starts by providing context for how the fabric of society shifted during the 18th century and why it ultimately led to changes that are felt until this day.

After this introduction, the attempts to define "work". This definition is layered and mindful of the time period in which it was first created. It contains the balance of genders when it comes to work, the effect of religion on how we view labor, the personal aspects of the worker, and its implications for society – as a whole. When discussing labor and its context within economics, it is also vital to mention that work was seen as something unbecoming of nobility for a long time. This underlines the fact that the dehumanization of workers is something that has been around for a long time.

The chapter accurately showcases the author's thought process, which is about how the right to work is tied into the conversation revolving around negative views of labor. It is worth asking ourselves: how

In our modern society, particularly in Western countries, having a career is equally important as raising a family. With steps being taken to ensure that women become leaders, the wage gap disappears, and both genders have equal socioeconomic opportunities, we can safely say that work has become much more integral to the self-image of members of society than we have thought.

The birth of capitalism resulted in people migrating to live in cities, as opposed to continuing their rural lifestyle. This, of course, had its advantages and disadvantages, as it was the perfect opportunity to trap many workers in unfavorable situations, suffering through unacceptable conditions.

could something seen as undesirable become a sign of dignity in society? Of course, the right to work[5] encompasses the right to a dignified salary. Nowadays, work is a fundamental right that helps people realize their potential. One aspect of this was not particularly touched upon as a continuation of this thought process. Still, feminists often see work as a way of liberation for

4 G. Blicharz, "Humans as a Service: Ethics in the Sharing Economy and the Ancient Model", in: *Human Dignity and Law. Studies on the Dignity of Human Life*, J.M. Puyol Montero (eds), Tirant lo Blanch 2021, 144–145.

5 Section 27B of the Human Rights Act 2004 says that: Everyone has the right to work, including the right to choose their occupation or profession freely.

women.[6] In our modern society, particularly in Western countries, having a career is equally important as raising a family. With steps being taken to ensure that women become leaders, the wage gap[7] disappears, and both genders have equal socioeconomic opportunities,[8] we can safely say that work has become much more integral to the self-image of members of society than we have thought. The third part of this chapter is the one that delves into individual aspects of the right to work. Freedom is a facet of how much autonomy one can have in society. This concept ties into dignity, thus developing social rights. To put it simply, workers' dignity is a cornerstone of every fundamental right we have today. Industry and contracting are also mentioned as steps that have led to recognizing the importance of labor.

Furthermore, social welfare associations are mentioned in the text as having a long history of protecting the working class. They are integral to the development of dignity when it comes to working. The fourth section of this chapter is titled "Human dignity at work" and ties everything that came before into the present. The concept of dignity is explained in great detail, showing the reader how integral this is when discussing human rights. The fifth section picks up the birth of social rights,[9] mentioning Christianity, political changes, and the change in the role of the state as factors that all led to an intervention and the granting of rights to workers. A huge step toward this was the Declara-

The dignity of humans and work may be subject to threat due to improper legal categorization – or the new challenges of the technological revolution. Global corporations – such as the Big Five – have created a new kind of work-life relationship where trust has a significant role. However, algorithms and Artificial Intelligence measure everything in the digital environment. Trust is also measured this way by collecting and mining the user's personal data. How could human dignity be kept in a life where everything is online, shared, and visible?

6 R. E. Howard-Hassmann, "Universal Women's Rights Since 1970: The Centrality of Autonomy and Agency", *Journal of Human Rights* 10:4, 2011, 433–449.

7 R. H. Oostendorp, "Globalization and the gender wage gap", *World Bank Policy Research Working Paper 3256*, April 2004.

8 F. Blau - L. Kahn, "Understanding International Differences in the Gender Pay Gap", *NBER Working Paper* No. 8200. 2001.

9 W. Rosen, "The Most Powerful Idea in the World: A Story of Steam, Industry and Invention", University of Chicago Press. 2012. 149.

tion of the Rights of Man and the Citizen in 1789. As civil law was increasingly unable to provide adequate protection to workers, a need emerged for a separate branch of law dealing with these issues. This is how labor law was created,[10] with administrative policies aiming to protect the most vulnerable population and male adult workers. The chapter concludes that while we have made progress, we still have a long way to go when properly valuing labor.

Grzegorz J. Blicharz continues the dignity-labor law evaluation by his views about humans as a service in the light of the sharing economy. The chapter teaches us that natural law and its Roman legal connections help to understand the concepts of dignity and equality in the changing world. The fundamental legal and social principles had not changed over time – why should their legal evaluation change? Thus, the Author raises the question of whether universal rules for protecting human dignity in work-like relationships apply in the controversial and dynamic hiring modes nowadays. The Author declares that the gig economy as a business model is ancient and asks why we are not immersing ourselves in Roman law if we use its concepts for our relationships today. The dignity of humans and work may be subject to threat due to improper legal categorization – or the new challenges of the technological revolution. Global corporations – such as the Big Five – have created a new kind of work-life relationship where trust has a significant role. However, algorithms and Artificial Intelligence (AI) measure everything in the digital environment. Trust is also measured this way by collecting and mining the user's personal data. How could human dignity be kept in a life where everything is online, shared, and visible? The courts struggle to handle this challenge by extending the protection of labor law by classifying the new kind of relationships as employment – when they can. However, courts are not unified in this question since the European legal systems are not harmonized. There are no detailed labor rules for all European Union Member States; only principles and frameworks are applied. Significant differences could be found – e.g., different taxation rules, working hours, working ages, flexibilities, etc. That is why legal interpretations shall consider these differences. The Author closes his analysis on humans as a service by going back to ancient times and noting that work is interpreted as service – and not only as a commodity. Regardless of which category is better for the situation of the gig economy, there are universal moral assumptions that shall apply due to the fact that the contractors of these relationships are human beings who are the bearers of dignity and human rights. There is a significant similarity between the activities of the 'freedmen' and the gig economy. Many protective laws were based on respect for human nature or the principles of natural law.

The next chapter evaluates the Environment[11] as a Public Concern.[12] *Hugo S. Ramírez-García* talks about Ecological Citizenship. The chapter highlights the importance of environmental protection, but instead of the usual approaches, he proposes that citizenship entails the obligation to protect nature. The Author contrasts his point of view with those who are preparing to live in a damaged ecosystem or willing to accept the fact that we are going extinct. The Author highlights two phenomena that shape citizenship: globalization and sustainability. Both have an intriguing history and consequences that we can observe today, and both point toward a future where we must restructure our relationship with

10 S. Deakin - P. Lele - M. Siems, "The evolution of labour law: Calibrating and comparing regulatory regimes", *International Labour Review*, Vol. 146 (2007), No. 3–4.

11 O. J. Sziebig, "The Implementation of the Aarhus Convention's Third Pillar in the European Union – a Rocky Road Towards Compliance", *European Studies: The Review of European Law Economics and Politics* 6, 2019, 205–218. I. Olajos – M. Mercz, "The use of the precautionary principle and the non-refoulement principle in public law - Or how far the boundaries of constitutional principles extend", *Journal of Agricultural and Environmental Law,* Vol. 17 No. 32, 2022, 79–97. DOI: https://doi.org/10.21029/JAEL.2022.32.79. M. Mercz, "Constitutional or environmental law?", Constitutional Discourse, 2022, https://www.constitutionaldiscourse.com/post/monika-mercz-constitutional-or-environmental-law (access 28.09.2022)

12 This is underlined by Elliott and Esty's paper on this issue, "imposition of a credible risk of a risk without someone's informed consent, not merely provable actual injury, should be cognizable as a harm that environmental law should address to the extent practical"

nature. The relationship between morality and law must be reshaped in order for humanity to realize its vulnerability and act in a way that helps preserve our planet. This requires dependence, leaning on each other, and truly organizing a community of peers. While this chapter may sound particularly idealistic about the nature of humanity and our ability to organize a global scale of community, it is commendable that such a positive and hopeful idea was put forward. With technological advances, wars, and a pandemic, we are definitely heading towards a new world order, where concepts such as citizenship must be redefined in order for us to be able to continue living on this planet.

The next lesson could be learned from *María Luisa Gómez Jiménez*'s chapter on "Dignity and the Projection of the Red Queen Effect in Healthy Emergency Public Policies During COVID-19 Crisis". The Author presents dignity in light of the recent global pandemic, focusing on digitalization and artificial intelligence,[13] which have become more important because of COVID-19. As technology offers a significant improvement when it comes to our quality of life,[14] the author believes that it should be implemented to a further degree in public spaces, creating smart cities in the name of sustainability. In regards to the pandemic, the process of implementing smart devices and further building a digital era of society became vital,[15] as many researchers started focusing on bettering the quality of life[16] of those who had to stay at home due to illness. However, the digital gap leaves many members of society behind,[17] unable to participate in new technologies. This makes administrative law, an area of law that must be accessible to everyone, an awkward place. A possible solution for this problem shall emerge in the near future, which will probably be tied to further education on digital technologies, seeing that they will probably become a part of our lives to a further degree.

Luca Valera evaluates Human Dignity in the Digital Age. The chapter describes the difference between real and virtual to define a 'virtual body'. The Author raises ethical questions about dwelling with digital beings in an unnaturally curated environment. The Author provides definitions at the beginning of the chapter, with which we may discuss ethical questions in this newly developed environment. These definitions describe persons and bodies as inter-action, inter-acts, as well as interactions by the person. The virtual body is different per definition, as instead of the passive aspects, it is an interaction. We can conclude that it is an action that defines human interaction. But how can we preserve our dignity in the digital world?[18] The author states that humans are essentially ecological beings and cannot be separated from their physical surroundings. In *Luca Valera*'s perception, Dignity is irrevocably tied to the place in which a person lives. This chapter leaves the reader wondering if humans can or should flourish in such environments in the digital age.

The structure of this chapter is expertly done, as it leads to this question. The answer depends on many variables, of course, but to my mind, it is essential in our modern society, smart cities, and developing an understanding of AI further to discuss ethical behavior and self-expression in a digital concept.

Liviu Olteanu has done extensive research when it comes to how the global pandemic has affected policies

13 B. Szabó - A. Laczik, "The impact of coronavirus in the EU and in Hungary - especially in regulation", *Curentul Juridic*, 2021, http://revcurentjur.ro/old/arhiva/attachments_202201/recjurid221_3F.pdf.

14 New tendencies in e-government in the European Union, *Curentul Juridic* 20, No. 4 (71) 90–101. http://revcurentjur.ro/old/arhiva/attachments_201704/recjurid174_9A.pdf (access 20.09.2022)

15 R. Vaishyaa - M. Javaidb - I. H. Khan - A. Haleem, "Artificial Intelligence (AI) applications for COVID-19 pandemic", *Diabetes & Metabolic Syndrome: Clinical Research & Reviews*, Volume 14, Issue 4, July–August 2020, 337–339. https://doi.org/10.1016/j.dsx.2020.04.012

16 L. N. Kiss - O- J- Sziebig, "Defining the Common European Way of Life", *Hungarian Yearbook of International Law and European Law* 9, 2021, 111–131.

17 E. Hargittai, "Minding the digital gap: why understanding digital inequality matters", *In.: Media Perspectives for the 21st Century,* (Edited By: Stylianos Papathanassopoulos), London, 2010.

18 Perspectives on Digital Humanism (Edited by: Hannes Werthner, Erich Prem, Edward A. Lee, Carlo Ghezzi), Springer, 2022.

around the world, with an emphasis on COVID-19's effect on dignity. The chapter titled 'Questions and Answers on Human Dignity and the Legal Approach During Period of COVID-19 Pandemic, Violence and the Abuse of Power That Affects Vulnerable People. Based on Exchanges of Letters with The United Nations and the European Commission, Noting the Trends in The United States' is a result of a scientific investigation. The Author asked the European Commission four questions, namely about steps that could be taken against governments who abuse National Security and State of Emergency laws, how minorities could best be protected from the negative impact of the pandemic, how the UN can help combat famine and if religious freedom is still upheld to a satisfactory degree.

The UN High Commissioner for Human Rights referred to upholding human dignity as a key aspect of tasks the UN needs to prioritize. Despite the encouraging answers the author has received, it is noteworthy that the text mentions a consequence of the pandemic: we rely more on artificial intelligence. As has been discussed in previous chapters of this book, *Liviu Olteanu* also expresses concern about the possibility that by 2030, 75% of the global population could be enslaved by AI-based surveillance systems developed in China.[19] With the recent introduction of China's Social Credit System, this idea does not seem particularly far-fetched.

In addition to the questions asked by the United Nations and the European Commission, the chapter also discusses the issues surrounding refugees, health workers, and inalienable rights arising out of human dignity itself. Finally, the five subchapters of this work conclude with the author's thoughts about the possible future. *Olteanu* acknowledges that we have reached a crossroads and have an opportunity to reset our world's political stage while keeping our understanding of dignity intact. This can be achieved by education, justice, and according to the author's religious beliefs: God.[20]

Carlos Espaliú Berdud chose to base his chapter on an incredibly serious topic: smuggling and trafficking. The work is titled 'The EU Naval Operation Against Human Smugglers and Traffickers in the Mediterranean: Lights and Shadows'. In 2015, the EU launched a military-naval crisis management operation called Operation Sophia[21] to decrease criminal activity in the southern area of the Mediterranean region. The operation produced good results, as the area's illegal activity dropped by 95%. However, this operation failed to achieve the desired results, as the EU started hiding the real numbers of human traffickers apprehended from the public. Italy and the Libyan Coast Guard also took a role in this operation. In the sixth chapter of the paper, the Author concludes that while the business model of smuggling has not disappeared, the area has become generally safer after Operation Sophia was implemented.

On the other hand, the EU and Italian support of training for Libyan security forces has been heavily criticized because of human rights issues in relation to Libya. As a consequence of problems observed when it comes to Operation Sophia, the EU should take steps to change its course of action when it comes to similar decisions in the future. Furthermore, solidarity between the Member States should be taken more seriously if we desire the EU to be a defender of human dignity on a global scale.

Federico de Montalvo Jääskeläinen proposes in his chapter titled 'We Can Read Your Mind: Freedom of Thought and Law in the Age of Neurotechnology' that a new catalog of human rights will be necessary for the future because of the developments made in neurotechnology. In 2018, Microsoft patented a brain-computer interface technology,[22] which, together with other similar initiatives, could usher in an age where our thoughts could essentially be captured and controlled

19 J. Anderson - L. Rainie, "Concerns about democracy in the digital age", 2020. https://www.pewresearch.org/internet/2020/02/21/concerns-about-democracy-in-the-digital-age/

20 T. Cromwell, *The Triumph of Good: Cain, Abel and the End of Marxism*, Washington, DC 2021.

21 European Union Naval Force – Mediterranean Operation Sophia https://eeas.europa.eu/archives/docs/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf (access: 20.09.2022)

22 G06F3/015 - Input arrangements based on nervous system activity detection, e.g. brain waves [EEG] detection, electromyograms [EMG] detection, electrodermal response detection

using new technology. Furthermore, the mobile communication industry's interest was also raised by the idea of non-invasive brain control, which proves that there is a demand for these new processes.

The Author raises some interesting points regarding freedom of thought and how it may be protected from mechanisms that can influence human behavior. As these inventions will undoubtedly play an enormous part in our future lives, it is best to begin thinking about protecting our dignity and human rights from possible abuse as soon as possible. There will also be a negative effect on the legal and judicial systems because these systems are based on free will. The question raised in this chapter is if a legal system without a free will can be accepted. Naturally, judges' judgment, faults, and fallibility have always been questioned. But should machines make decisions instead of people in the name of impartiality? Should we give up on our humanity? These heavy questions will need to be looked at more deeply in the future.

Francesc Torralba's 'Death with Dignity. A 'Polisemic Approach' chapter revolves around the question of what it means to die with dignity, giving eight possible interpretations. The preface of this chapter supposes that every person wants and has a right to die with dignity, but not everyone can exercise this right.[23] The Author puts forward the notion that dying with dignity in the digital age is quite different from how humans have died in peace before. The topic itself raises an awkwardness and avoidance in Western culture. However, death is an undeniable fact of life and should be discussed, especially because vulnerability and futility are key aspects of understanding how we can die with dignity.

The meanings of this expression that the Author puts forward are: dying in peace; dying without physical, social, psychological, or spiritual suffering; dying according to the will of the patient; reconciliation with others and God; harmony with personal beliefs and values; death at home; the practice of palliative care or knowing the truth of the situation. These eight interpretations lead to the conclusion that every human nearing death deserves to have access to holistic care and autonomy to make their own decisions and exercise their right to die with dignity in every sense of the phrase.

Conclusion

Unitas via Diversitas – that is 'Unity in Diversity' – has been the motto of the European Union since 2000. However, are we really 'united in our diversity'? Or our diversity became a ground for distinguishing and dividing us. We are living in a very controversial world where our personal features and values have become our own enemies. As a result, societies became very polarized; politics and extreme rhetoric are circulating ideological themes wrapped in trendy new layers of the concepts of 'human rights' and 'dignity'. Human rights are supposed to provide cohesion at the social level due to their universality. However, the interpretation of human rights content and applicability might be various in each state or region. This led to a reform that would be designed to tilt the role of human rights and dignity into political weapons in ideological battles. A new layer of this is the digitalization and the evolution of certain technological solutions, which all affect human nature, human dignity, and its legal and social evolution.

The authors bravely deal with these sensitive issues and express their professional opinion about human dignity and its conceptual elements based on the lessons learned from Roman law. The fact that most of these chapters deal heavily with Artificial Intelligence and digitalization as part of the broader conversation about human dignity conveys a message about the state of human rights and which direction we should move. If we wish to preserve our environment, maximize our chances of avoiding another pandemic and uphold our rights in the digital age, new perspectives must appear in conversations about the place law holds in today's society. However, we have to keep an eye on the original concepts and from time to time, we should go back to the roots, reinterpret and rethink those in the light of our present. *Human dignity and law. Studies on the dignity of human life* is a book that starts a conversation about new aspects of the challenges we are facing and, in our opinion, does a thought-provoking job. It is an intriguing work that presents revolutionary ideas grounded in extensive research. Its 306 pages

23 P. Allmark, "Death with dignity", *Journal of Medical Ethics*, Volume 28, Issue 4, http://dx.doi.org/10.1136/jme.28.4.255

and 12 longer chapters contain intriguing information, which is necessary for the new generation of thinkers to prepare to face the unique challenges we are about to face. Since the Authors recognized that unilateral interpretation of human rights is a zero-sum game, where no win-win could be achieved, we applaud that they opened the floor to the marketplace of ideas on human dignity, human rights, and protection.