THE IDEA OF OBLIGATION IN POLISH LAW

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In Western legal tradition jurisdictions, the transition from the Roman idea of obligatio to the doctrine of the legally binding relationship was not a universal process. Anglo-Saxon lawyers discuss contract and tort theories separately. Different doctrines have emerged from the development of the theory of the legally binding relationship in the Civil Law Tradition. This article shows how this process has played out in the Polish legal discussion. The specific premises of the Polish legal experience were that applied Roman law had little influence in Poland until the end of the 18th century, Austrian law served as the foundation for the development of the Polish doctrine of the legally binding relationship, the Polish Code of Obligations of 1933 replaced French, Austrian, German and Russian law on Polish territories, and the development of the Polish theory of private law after WWII was influenced by the dominance of Marxist theory. Consequently, the Polish legal experience provides a particular perspective on the premises supporting or blocking the relationship between the doctrine of legally binding relationships and social reality.

Key words: obligation; legally binding relationship; civil law tradition; legal positivism; extra-legal values

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1. INTRODUCTION[1]

Obligation means legal or moral duty as opposed to physical compulsion.[2] The idea of a legal obligation, first defined in Justinian's Handbook from the 6th century[3], was transformed in the civil law tradition into the doctrine. A manifestation of this change in some continental legal languages was the replacement of the word obligation by the phrase of a 'legally binding relationship' (German: *Schuldrechtsverhältnis*, Polish: *zobowiązaniowy stosunek prawny*).[4] The course and outcome of this process have varied between jurisdictions in continental Europe. Since the 16th century, the Roman idea of obligation has been an element of Polish jurists' reflections on the following topics: how to describe the existing law, how to shape Polish private law and how to build a doctrine to support the application of this law. However, there are clear differences in how this idea is referred to. The definition of obligation (*obligatio*) from the Justinian handbook was placed by a 16th century Polish jurist at the beginning of a passage on verbal contracts (*De obligationibus verborum sive stipulatio*).[5] In the reference work entitled 'Civil Law of the Polish Nation' from the end of

1 Marko Petrak, professor at the Faculty of Law in Zagreb, passed away in January 2022. I highly valued him as a researcher and enjoyed my friendship with him. During my visit to Zagreb in 2014, he asked me to give an introductory lecture on the law of obligations. I dedicate this article, which gives a special perspective on the idea of obligation, to his memory. This article is an expanded and modified version of the lecture given by the author at the Conference "Obligation, Structure and Sources" organized by the Associazione Internazionale per la Ricerca Storico-Giuridica e Comparatistica at the University of Padua on 16 - 18 June 2022.

2 Cfr. Pener, J. E., *The Law Student's Dictionary*, Oxford University Press, Oxford, 2008, p. 202.

3 I. 3, 13 pr.

4 This phrase is used in my paper to highlight the specificity of contemporary continental doctrines of the law of obligations. The phrase 'legally binding relationship' reflects the formal structure involving its parties, the complex of rights and duties and what they relate to. In England this phrase is used to denote the effect of an agreement that is intended to create rights and obligations between the parties. Cfr.: Delegado de Molina Rius, A., *Smart Contracts: Taxonomy, Transaction Costs, and Design Trade-offs*, in: Allen, J. G.; Hunn P. (eds.), *Smart Legal Contracts: Computable Law in Theory and Practice*, Oxford University Press, Oxford, 2022, p. 113; Merkin, R.; Sainter, S., *Poole's Casebook on Contract Law*, Oxford University Press, Oxford, 2023, p. 160.

5 Cervus, I. T., *Farraginis actionum iuris civilis et provincialis Saxoni municipalisque Magdeburgensis et iuris Polonici libri septem. Per Joannem Cervum Tucholiensem olim collecti et revisi. Nunc vero, propter exemplarium inopiam recusi*, ed. 8., Typographia Academiae, Zamość, 1607, p. 282 (III, 12).

the 18th century, a paraphrase of the Justinian explanation of *obligatio* can be seen in the initial part of the consideration of contracts.[6] The co-drafter of the Polish Code of Obligations of 1933 pointed to the definition of *obligatio* from the Justinian Institutions as the generally recognized 'classical definition of the concept of obligations'.[7] Today's debate on the challenges of the law is accompanied by the idea that 'the modern Polish law of obligations was formed at the turn of the 19th and 20th centuries'.[8] The Polish doctrine of law has come a long way from an idea of obligation to a doctrine of legally binding relationships. A path, from an idea repeated after Roman law to a theory, requires the identification of specific elements forming the structure of a legal institution. A historical-comparative reflection on the significance of the concept of obligation for the understanding of private law in Poland may be put into a sequence of questions: what role did the idea of obligation have in the systematic description of private law until Poland lost its sovereignty in 1795? What were the fundamental sources of inspiration for the adoption by Polish jurists of the doctrine of legally binding relationships (obligation) as one of the tools for the interpretation and drafting of private law? What were the crucial points of Polish theoretical reflection on the structure of legally binding relationships in the 20th century? The questions were posed to determine the structure of this paper. The answers to the individual questions give rise to a general reflection in conclusion: what does Polish legal experience say about the importance of the theoretical development of the doctrine of legally binding relationships as an intellectual bridge between social reality and the existing law?

2. THE IDEA OF OBLIGATION BY POLISH JURISTS OF THE PRE-CODIFICATION ERA

According to the dominant view, the indirect reception of Roman law on Polish territories occurred in the 19th century, during the Partitions.[9] The earlier references of Polish jurists to the Roman law applied in Western Europe (*ius*

6 Ostrowski, T., *Prawo cywilne narodu polskiego*, *vol*. 1, Drukarnia J. K. Męi y Rzeczypospolitey, Warszawa, 1787, p. 230.

7 Domański, L., *Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny*, Marian Gitner – Księgarnia Wydawnictw Prawniczych,Warszawa, 1936, p. 39.

8 Machnikowski, P., *Prawo zobowiązań w 2025 roku. Nowe technologie, nowe wyzwania*, in: Olejniczak, A. *et al.* (eds.), *Współczesne problemy prawa zobowiązań*, Wolters Kluwer SA, Warszawa, 2015, p. 379.

9 Kodrębski, J., *Prawo rzymskie w Polsce XIX w*., Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 1990, p. 258.

commune) must be linked to their individual erudition.[10] The series of treaties on the laws written in 16th century Poland opened with a work published for the first time in 1531, including Magdeburg, Saxon and Polish law as applied in Polish territories.[11] One of the elements in the taxonomy of the work is the notion of *contractus (*contract). The book thus titled is divided into sections corresponding to the types of contracts known from the theory applied in Western Europe Roman law (*ius commune*) and then other sources of personal claims (*actiones in personam*). The following sentences illustrate the use of the word *obligatio* in the introductions to some of the book's titles: *nullum esse contractum, nullam obligationem quae non habet in se conventionem* (no contract, no commitment without agreement)[12], *debitum est quod aliquis alteri ex naturali vel civili obligatione tenetur* (a debt is what someone is obliged to do by a natural or civil obligation)[13], *obligationes aut ex contractu nascuntur, aut ex quasi contractu, aut ex maleficio aut quasi ex maleficio* (obligations arise either from a contract, quasi-contract, a wrongful act or a quasi-wrongful act)[14] or *obligationes quae ex quasi maleficio oriuntur, quattuor actiones pariunt* (obligations arising from a quasi-wrongful act (delict) give rise to four claims).[15] These sentences show that the Roman idea of obligation, familiar to the author, has not become a systematic category. Taken over from the *ius commune*, sentences containing the word *obligatio* acted as a link between the transactions or events being switched in successive titles.

The use of the word *obligatio* to denote obligations arising mainly from contracts is shown in a collection of constitutions of Polish kings published at the beginning of the 17th century.[16] The notion of *obligatio* as a category of systematic description of Polish private law was applied in the work 'On the Law of the Kingdom of Poland' of 1702 by Mikołaj Zalaszowski.[17] The second part of

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10 The influence of Roman law in pre-partition Poland has been the subject of controversy since the 19th century.

11 Bojarski, W., *Jan Jelonek Cervus z Tucholi i jego twórczość prawnicza*, Uniwersytet Mikołaja Kopernika, Toruń, 1989, p. 210.

12 Cervus, *op. cit.* (Note 5), p. 239.

13 *Ibid*., p. 255.

14 *Ibid*., p. 283.

15 *Ibid*., p. 314.

16 Szczerbic, P., *Promptuarium Statutorum omnium et Constitutionum Regni Poloniae. Per Paulum Sczerbic Secretarium S. R. M. concsriptum. Cum Indice Rerum et Verborum copiosissimo singulari euisdem Pauli Sczerbic studio et diligentia confecto. Cum Gratia et Privilegio S. R. M*, Schoenfels Georgius, Brunsbergae, 1604, p. 136 (Pars II, cap. XIV).

17 Zalaszowski, M., *Tomus Secundus Iuris Regni Poloniae ex Statutis et Constitutionibus eiusdem Regni, et M. D. L. Collecti et Additionibus ex Jure Civili Romano, Canonico, Saxonico*, Posnanieae Typis Academicis, Posnaniae, 1702. Cfr. Lewandowska-Malec, D., *Mikołaj Zalaszowski (1631 – 1703)*, in: Longchamps de Bérier, F.; Domingo R. (eds.),

the third book of this work consists of seventeen titles arranged according to the criterion of generality, as the titles *De obligationibus in genere* (on obligations in general) and *De contractibus in genere* (on contracts in general) are followed by particular types of contracts. The author clearly linked the use of the word *obligatio* to contracts and events similar to them (quasi-contracts).[18] The restriction of the idea of obligation to contracts is clearly shown in the work of Teodor Ostrowski, which was an academic study of Polish law in the last years before Poland lost its sovereignty in 1795.[19] In Ostrowski's original systematics, after the parts 'On persons' and 'On things', the third part was entitled 'On contracts'.[20] At the beginning of its first title, Ostrowski explained that the word *obligatio* 'means a duty of one person towards another'.[21] Like Zalaszowski, he linked the explanation of *obligatio* to the meaning of the distinction between natural and civil obligations. Then, like Zalaszowski, he presented the divisions of contracts.

The works of Polish jurists from the 16th to the 18th century presented here show that, in the systematic descriptions of private law, references to the idea of *obligatio*, known from the *ius commune*, and the Roman four-element systematics of the sources of obligations, were an expression of the jurists' erudition rather than their doctrinal plan. The lack of precision in the distinction between *obligatio* and *contractus* evident in the discussion of Polish jurists and the emphasis on the obsolescence of Roman *obligationes ex delicto* (torts) can also be seen in the influential 18th century textbook by Heineccius.[22] However, in the 18th century European legal debate, there were already considerations, inspired by the law of nature, which can be described as a transition from the idea of obligation to a reflection, opening up the construction of an obligation as a legal institution.[23] By contrast, in the works of Polish lawyers from the 16th to the 18th century, there was a linguistic preference for using the word *contractus*, which was less

Law and Christianity in Poland. The Legacy of the Great Lawyers, Routledge, London, 2023, pp. 100 – 108.

18 Zalaszowski, *op. cit.* (Note 17), p. 602.

19 Zdrójkowski, Z., *Teodor Ostrowski (1750 – 1802). Pisarz dawnego polskiego prawa sądowego*, Wydawnictwo Prawnicze, Warszawa, 1956, p. 282; Godek, S., *Teodor Ostrowski (1750 – 1802)*, in: Longchamps de Bérier, F.; Domingo, R. (eds.), *Law and Christianity in Poland. The Legacy of the Great Lawyers*, Routledge, London, 2023, p. 117 – 122.

20 Ostrowski, *op. cit.* (Note 6), p. 229.

21 *Ibid*., p. 230.

22 Heineccius, J. G., *Elementa Iuris Civilis secundum ordinem Insitutionum*, Typographia Balleoniana, Neapoli, 1778, p. 256ff (Lib. III, tit. XIV).

23 See: Nettelbladt, D., *Systema elementare universae iurisprudentiae naturalis*, Officina Libraria Rengeriana, Halae Magdeburgicae, 1767, pp. 72 – 89.

abstract, when constructing a systematic description of private law. The word *obligatio* served to indicate duty as an element of a contractual relationship. Consequently, we do not find in Polish legal literature until the loss of sovereignty in 1795 any attempt to develop the idea of obligation into the theoretically described legal institution.

3. THE INTRODUCTION OF THE DOCTRINE OF LEGALLY BINDING RELATIONSHIP INTO THE POLISH LEGAL DEBATE

Poland's loss of sovereignty opened the way for the gradual replacement of Polish law by foreign laws in the partitioned territories. The process of the introduction of German, French and Austrian civil codifications brought an important change in the discussion among Polish jurists. In the Austrian partition and part of the Russian partition, where the French Civil Code had been in force since 1808, it was also practised in Polish.[24] The adoption of these civil laws and the development of the accompanying doctrines are described as an indirect reception of Roman law on Polish territories.[25] The concept of obligation as a legal institution was introduced into a legal discussion in Polish by Ernest Till in his book published in 1895 under the title 'Lecture on the theory of legally binding relationships. General Part'. It can be described as part of the pandectisation of the Austrian Civil Code. The starting point for the reasonings of Till was not the text of the Austrian Civil Code but a definition of a legally binding relationship (*Schuldrechtsverhältnis*) inspired by the German theory of private law (so-called Pandectistic).[26] Following the pandectistic doctrine, Till introduced a taxonomy new to Polish-language legal discussion. In the structure of his work, Till distinguishes chapters on the concept, subjects and object of the legally binding relationship; the formation of the legally binding relationship; the modification of the legally binding relationship and the termination of the legally binding relationship. Based on this, he interpreted the meaning of §§ 307 and 859 of the Austrian Civil Code. Till's aim was to introduce a doctrine that organises and clarifies the code's provisions for the various elements that build the structure of a legally binding relationship. However, this was not a pure formalisation of legal reasoning. By introducing a doctrine of legally binding relationships (obligation) to support the interpretation of the provisions

[24] See: Dajczak, W., *Historical development of private law in Poland*, in: Dajczak, W.; Nieborak T.; Wiliński P. (eds.), *Foundations of Law. The Polish Perspective*, Wolters Kluwer SA, Warszawa, 2021, p. 49 – 50.

[25] Kodrębski, *op. cit.* (Note 9), p. 258.

[26] Till, E., *Wykład nauki o stosunkach obowiązkowych. Część ogólna*, Księgarnia Seyfartha i Czajkowskiego, Lwów, 1985, p. 6.

of the code, Till drew attention to the fundamental importance of the social relations to which these provisions refer. In his introduction to contractual obligations, he noted that 'the statutory regulation is only a formal reason for the enforceability of a contract'. He drew attention to its deeper justifications, such as social need, the condemnation of lying, the restriction of one's freedom by the debtor or the protection of reliance.[27] In the section on non-contractual obligations, he explained the meaning of unjust enrichment and tort liability by saying that, 'living in an organised society, everyone has the right to demand that the conditions of existence he has are not taken away from him without just cause'.[28] Till's description of the elements of a legally binding relationship (obligation) as a legal institution, formulated in Polish, became a matrix. Its essential features began to shape the Polish legal language and the Polish legal discussion. Ernest Till's work defines the main elements of the structure of legally binding relationships as a theoretical construct used in Polish legal theory from the regaining of independence in 1918 until today. Two issues can be taken as hallmarks of significant changes within the 'Till matrix'. First, the understanding of the extra-legal prerequisites of a legal obligation; second, modifications of the theoretical construction of the legally binding relationship.

4. LEGALLY BINDING RELATIONSHIP AND EXTRA-LEGAL PREREQUISITES OF DUTY

Ernest Till became vice president of the Codification Commission on 3 June 1919. In 1923, this Commission published a draft of the general part of the law of obligations, which he drafted with the participation of his colleagues at the Faculty of Law in Lwów, a city in south-eastern Poland (now western Ukraine).[29] The first Polish codification of the law of obligations has been approved by the President in 1933, thirteen years after the death of Ernest Till. Article 1 of the Code of Obligations provided that 'obligations arise from declarations of intent and from acts and other events to which the law attaches the creation of an obligation'. Till's disciple, the chief referent of the Code of Obligations, Roman Longchamps de Berier, in his rationale of the Code of Obligations, linked the binding force of a contract to a reference to social reality.[30] Longchamps

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27 Till, *op. cit.* (Note 26), p. 59, n. 1.

28 *Ibid.*, p. 206.

29 Górnicki, Ł., *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919 – 1939*, Kolonia Limited, Wrocław, 2000, p. 397.

30 See: Redzik, A., *Roman Longchamps de Bérier (1883 - 1941)*, in: Longchamps de Bérier, F.; Domingo, R., (eds.) *Law and Christianity in Poland. The Legacy of the Great*

de Berier explained that 'the need for reliance in trade requires that the legal effects be linked first and foremost to the statement'. He further stated that 'making the statement the subject of interpretation (...) in a certain independence from the internal will is capable of preventing individualistic, egoistic and unsocial exuberance in individuals while respecting their legitimate interests'.[31] The rationale of the code also shows that references to social reality have accompanied the drafting of provisions defining and identifying other sources of obligations. For example, the unauthorised management of another person's affairs (*negotiorum gestio*) opens with the statement that 'an absolute prohibition on meddling in other people's affairs without an authorisation (...) would not be desirable because it would unnecessarily deter altruistic action, which is a natural and positive symptom of social life'.[32] The adoption of the general delictual clause in Article 134 of the Polish Code of Obligations is explained briefly in its rationale by the fact that this provision is modelled on Article 1382 of the French Civil Code, 'the broad formulation of which has proved very useful in practice'.[33]

The Code of Obligations was replaced at the beginning of 1965 by the Civil Code, which is still in force today. At the beginning of the book entitled 'Obligations', there is a rule explaining the essence of this concept (Article 353 Polish Civil Code, further KC). According to this provision, 'an obligation exists where a creditor may demand performance from a debtor, and the debtor should make the performance'. Different from Article 2 of the Code of Obligations, which clarifies the essence of the obligation —and 'contrary to the common linguistic sense'[34]—the content of Art. 353 KC emphasises that the legally binding relation consists of rights, the correlate of which are duties. Intuitively, there is a link between obligation and duty. In the first commentary on the Civil Code, this change was not assigned practical significance.[35] However, a further academic discussion has shown that this modification opens the way to

Lawyers, Routledge, London, 2023, pp. 194 - 195.

31 *Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu w opracowaniu głównego referenta projektu Prof. Romana Longchamps de Berier, Art. 1-167*, Komisja Kodyfikacyjna, Warszawa, 1934, p. 63.

32 *Uzasadnienie*, *op. cit.* (Note 31), p. 165.

33 *Ibid.*, p. 193.

34 Grzybowski, S. (ed.), *System prawa cywilnego*, *vol. III, part 1*, *Prawo zobowiązań, część ogólna*, Zakład Narodowy im. Ossolońskich, Wrocław, 1981, p. 41.

35 Błahuta, F., in: Resich, Z. *et al.* (eds.), *Kodeks cywilny. Komentarz*, *vol.* 2, Wydawnictwo Prawnicze, Warszawa, 1972, p. 843.

presenting the structure of the obligation, taking either rights[36] or duties[37] as a starting point, depending on the theoretical assumptions made.

During the period of dominance of Marxist social theory, from the 1950s to the 1980s, there was a revival of the search in general legal theory for inspiration for progress in the understanding of legally binding relationships. A leading example of this process is the theoretical innovations introduced by Zbigniew Radwański. He framed the exercise of the freedom to stipulate and form contracts within the concept of competence taken over from public law. According to this doctrine, the law recognises and delimits the competence to perform legal transactions, in particular, to enter into contracts. The obligation to perform the contract is explained by the fact that the injunction contained in the competence norm is addressed not to the entity that has the competence but to the one in relation to whom the entity having the competence has made use of it.[38] In such a theory of contract, the idea of a legally binding relationship as something secondary to the social relationship, as perceptible in Till, was obliterated. The theory of competence meant that an obligation bond existed through and because of the law. 'The "complex relationship" between legally binding relationships and social relations has found a new theoretical form. The content of the legally binding relationship was defined as a fragment of social reality'.[39] Consistent with the theory of competence, the rejection of extra-legal legitimacy for the enforceability of an agreement has been balanced by legally indicated references to social reality, such as principles of social coexistence, economic interests or customs.[40] The return of the primary importance of the freedom of the parties for the creation and formation of contractual obligations can be seen in the provision of Article 353[1] KC, introduced shortly after the political breakthrough of 1989. It declares the freedom of the parties to arrange their legal relationship at their discretion, so long as the content or purpose of the contract is not contrary to the nature of the relationship, the law or the principles of social coexistence. However, the most recent discussion of the legally binding relationship also limits its legal legitimacy. The situation of the creditor and the debtor is referred to as 'normative modality', which, in the case of the creditor, means that it has the power to require payment by the

36 Grzybowski, *op. cit.* (Note 34), pp. 41 – 42.

37 Machnikowski, P., *Struktura zobowiązania*, in: Gniewek, E. (ed.), *System prawa prywatnego. Prawo zobowiązań – część ogólna*, *vol*. 3, C. H. Beck, Warszawa, 2020, p. 151.

38 Radwański, Z., *Teoria umów*, Państwowe Wydawnictwo Naukowe, Warszawa, 1977, p. 35.

39 Klein, A., *Elementy zobowiązaniowego stosunku prawnego*, in: *Dzieła wybrane*, *vol*. 1, Wydawnictwo Księgarnia Akademicka, Kraków, 2021, p. 18.

40 Radwański, *op. cit.* (Note 38), p. 258.

debtor.[41] A purely positivist approach to obligation as a legal institution must have consequences for the consistency of the approach to obligation as a legal and social relationship. This is well illustrated by the question of whether the creditor's interest, which is unknown to the law, can be used when assessing the performance of an obligation. At the dawn of the 1980s, an innovative view was formulated in an academic discussion that 'the creditor's interest is the justification for the creation and continued existence of the contractual relationship'.[42] According to this view, the satisfaction of this creditor's interest, even by means other than performance, leads to the termination of the obligation.[43] This way of thinking was also expressed by combining the creditor's interest with the achievement of the state expected according to the content of the legally binding relationship.[44] These views have provoked and continue to provoke criticism. In the 1980s, they were countered by the thesis that 'there is no such correlation between the debtor's conduct and the creditor's conduct that the debtor's conduct itself can be equated (...) with the satisfaction of the currently creditor's interest'.[45] Such contemporary criticism is based on arguments that the creditor's interest criterion is not expressed in the law, and the law does not provide a general basis for claiming that satisfaction of the creditor's interest means that the obligation is terminated. The approach to legally binding relationships (obligation) adopted in the second half of the 20th century during the dominance of Marxism, therefore, shows vitality to this day.

5. MODIFICATIONS OF THE DOCTRINE OF LEGALLY BINDING RELATIONSHIP

Alfred Klein's work on the elements of the legally binding relationship is a leading example of innovation in the approach to the structure of the obligation as a legal institution. A work published in 1964[46], reissued after the Code of Obligations was replaced by the Civil Code, and then twice after the political breakthrough of 1989.[47] Klein's aim was to refine the notion of obligation as

41 Machnikowski, *Struktura…*, *op. cit.* (Note 37), pp. 149 and 154.

42 Grzybowski, *op. cit.* (Note 34), p. 75.

43 *Ibid*., p. 75.

44 Pajor, T., *Odpowiedzialność dłużnika za niewykonanie zobowiązania*, Państwowe Wydawnictwo Naukowe, Warszawa, 1982, p. 67.

45 Klein, A., rev. of T. Pajor, *Odpowiedzialność dłużnika za niewykonanie zobowiązania*, Państwo i Prawo, *vol*. 38, no. 11, 1984, p. 119.

46 Klein, A., *Elementy zobowiązaniowego stosunku prawnego*, Państwowe Wydawnictwo Naukowe, Wrocław, 1964.

47 Klein, A, *Elementy zobowiązaniowego stosunku prawnego*, Wydawnictwo Uniwersytetu

a legally binding relationship in line with the direction of evolving academic discussion. He considered it crucial to move away from the 1930s-appropriate linking of the structure of this relationship with the structure of subjective law, to move away from the 'dictatorship of subjective law'.[48] He followed the apparent focus on 'the relationship (...) as such, rather than the subjective right itself' since the 1950s.[49] He linked this to the desire to significantly deepen the reflection on the individual elements of the legally binding relationship (obligation). Klein's innovation was based on increasing the formalisation of legal thinking. He recognised that the expansion of the theoretical structure of the legally binding relationship would give a structure to support the interpretation of the law of obligations.[50] In place of the three elements of the legally binding relationship (obligation) introduced into the Polish legal discussion by Till—i.e. subject, object and content—Klein distinguished more than a dozen of them. This development was a consequence of the adoption of a number of distinctions. Firstly, since there may be more than one entity on each side of a legally binding relationship, Klein distinguished three elements of that relationship: the entitled party, the obliged party and the civil law entities on each side of the legally binding relationship.[51] Secondly, Klein assumed that the law allows for different forms and correlations of rights and duties in various types of contracts. Therefore, Klein replaced the element referred to in the doctrine as the content of the legally binding relationship with six elements such as: right (subjective right) and debt (duty to perform); specific duty functionally related to debt and specific right functionally related to subjective right; specific duty not functionally related to debt and a specific right not functionally related to subjective right; specific duties of the creditor relating to the debt not having a counterpart in the form of a right; specific duties of the creditor not relating to the debt not having a counterpart in the form of a right; and subjective rights to unilaterally establish, modify or terminate a legally binding relationship.[52] Thirdly, instead of the object of the legally binding relationship, Klein introduced seven elements: performance as the object of a debt and the indirect object of a right; an object of creditor's right; performance as the object of and at the same time an element of the creditor's behaviour; a specific action

Wrocławskiego, Wrocław, 1980; Klein, A., *Elementy zobowiązaniowego stosunku prawnego* (ed. P. Machnikowski), Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2005; Klein, A., *Elementy...*, *op. cit.* (Note 39).

48 Kein, *Elementy*..., *op. cit.* (Note 39), p. 21.

49 *Ibid.*, p. 23.

50 *Ibid.*, p. 25.

51 *Ibid.*, p. 36.

52 *Ibid.*, p. 57.

of the debtor; the object of a specific action of the debtor; a specific action of the creditor; and the object of a specific act of the creditor.[53] The identification of these elements of the legally binding relationship structure can be described as an attempt to theoretically classify the possible problems of evaluating a social relationship on the basis of positive law. Central to Klein's innovation was the effort to bring the new doctrine of legally binding relationships (obligation) closer to the diversity and complexity of social relations, but only using the tools of legal positivism. The multiplicity of factual situations was to be clearly reflected in the extensive formalized doctrine of the legal relationship. To prove such a result, Klein pointed to the advantages his doctrine gives in distinguishing between performances and understanding a mutual contract. With regard to the subdivision of performances, he argued that the distinction he adopted between performance as an object of debt and as an element of the debtor's specific actions made it possible to distinguish between the performance of delivery and the specific action of delivery. Klein contended that this distinction allows for the performance of the landlord's obligation by a third party based on a provision giving this possibility in the case of 'performance consisting in the delivery of a thing of a given kind', even though the performance in a lease contract does not consist in the delivery.[54] However, there is a simpler solution to this issue in Roman Longchamps de Berier's 1939 handbook. He identified the lease contract as an example of an obligation in which the debtor's duty may consist of delivery without an obligation to transfer ownership.[55] Klein's reasoning has also not been adopted in practice. In the published decisions of the Polish courts, there is no case of performance by a third party concerning the lease of a thing of a giving kind.

Referring to the notion of a mutual contract, Klein argued that its identification of specific duties functionally related to a debt and specific rights functionally related to a subjective right allows a given legally binding relationship to be qualified as mutual on this basis and not on the basis of a contract type.[56] The effect of this reasoning was to make the reciprocity of the contract independent of the equivalence of mutual performances.[57] In this way, he defined mutual obligations as interest-bearing loans, payments for safekeeping and sales for a symbolic penny. In the interpretation of the Polish Code of Obli-

[53] *Ibid.*, p. 77.

[54] *Ibid.*, pp. 90 – 91.

[55] Longchamps de Berier, R., *Zobowiązania*, Księgarnia Wydaw, Gubrynowicz i syn, Lwów, 1939, p. 25.

[56] Klein, *Elementy...*, *op. cit.* (Note 39), p. 151.

[57] *Ibid.*, p. 148.

gations, this was an innovation because the main drafter of this code, Roman Longchamps de Berier, excluded from the category of mutual contracts precisely the interest-bearing loan and the paid safekeeping.[58] However, the practical significance of this difference was reduced by the analogous application of the rules for mutual contracts.[59] In the practice of Polish courts, doubts persist as to whether to recognise a specific contract as mutual. Their overcoming is not based on referring to types of contracts but on the content of the specific contract.[60] This is in line with the Klein doctrine. However, the resolution of doubts in practice is not based on the application of his doctrine. The courts focus on the economic sense of the transaction. They link the mutuality of a contract to the equivalence of performances.[61]

Klein's doctrine is still presented as an innovation in the Polish academic discussion of legally binding relationships. In the introduction to Klein's book, reissued after forty years, we read that this work is 'constantly useful in academic work and teaching'[62], and that the publication of this book in 1964 marked the caesura of Polish textbooks on the law of obligations.[63] In Polish private law theory, the distinctions introduced by Klein between the contract and the legally binding relationship as it is, concrete and abstract legally binding relationships, as well as the subject and party to the legally binding relationship, are widely accepted. The leading Polish compendium of the law of obligations in the multivolume work *System prawa prywatnego* (System of Private Law) for 2020 shows that Klein's idea of how to bring the theoretical concept of obligation closer to social reality retains an important place in Polish legal theory.[64] This is expressed by referring to Klein's doctrine, which emphasises the complexity of the legally binding relationship as a set of elementary legal relations, the essence of which is explained by the provision of Article 353 KC.[65] The difficulty in constructing a doctrine of legally binding relationships (obligation) is explained as a result of the fact that different authors understand the words 'right', 'debt',

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58 *Ibid.*, p. 151.

59 Longchamps de Berier, *op. cit.* (Note 55), p. 147.

60 Judgment of the Court of Appeal in Poznań of 10 October 2012 (I ACa 704/12).

61 Cfr. Judgment of the Court of Appeal in Warsaw of 6 February 2013 (VI ACa 1236/12); Judgement of the Court of Appeal in Warsawa of 8 January 2014 (VI ACa 694/13).

62 Machnikowski, P., *O „Elementach zobowiązaniowego stosunku prawnego" Alfreda Kleina*, in: Klein, E., *Elementy zobowiązaniowego stosunku prawnego* (ed. P. Machnikowski), Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 2005, p. 11.

63 *Ibid.*, p. 16.

64 Cfr. Machnikowski, *Struktura…*, *op. cit.* (Note 37), pp. 133f.

65 *Ibid.*, p. 133.

'subjective right' and 'claim' differently and as a result of the fact that 'lawmakers are sometimes inconsistent in their use of language'.[66] Today's authors emphasise the usefulness of the key term in Klein's doctrine, 'elements of obligation', despite the fact that they include 'ontologically different categories', namely subjects, their legal situations and their behaviour.[67] Klein's doctrine is still the most important innovation in the Polish academic discussion on the theory of legally binding relationships. Its aim was to bring the doctrinal model of obligation closer to the diversity of social relations. Klein and his followers identify progress along this path with a formal construct based on the Polish academic discussion of recent decades referred to as 'civil doctrine' and the provisions of existing law. This understanding of innovation is consistent with the marginalisation of reflection on the extra-legal factors justifying the existence of legally binding relationships and their social meaning. This explains why the reasoning in the contemporary Polish doctrine of contract law does not take its starting point from the experience of social life shown by legal history and other social sciences such as psychology, economics or sociology.

6. FINAL REMARKS

Polish legal theory has come a long way from the inclusion of the word *obligatio* in the systematic description of the law in the 16th century to the construction of doctrines of a legally binding relationship (obligation) since the 19th century. Several milestones can be identified along this path. The first was the adoption in the first half of the 16th century of the word *obligatio* as a link between contracts and events similar to them, which are the sources of a legally binding relationship. The second milestone was the introduction of the doctrine of legally binding relationships as an instrument to support the interpretation of the law, inspired by German pandectics. Finally, significant doctrinal innovations were brought about in the period of the dominance of Marxist theory in Poland.

Such a direction implied a generalisation of the legal discussion. Polish jurists were faced with the problem of how to strike a balance between the doctrine of obligation and the social reality to which it refers and which it should serve. Ernest Till's introduction in 1895 of the doctrine of the legally binding relationship (obligation) with a specific structure raised the formal rigour of the Polish-language discussion of Austrian law of obligations. This was accompanied

[66] *Ibid.*, p. 147.
[67] *Ibid.*, p. 135.

by a perception of the secondary nature of legally binding relationships in relation to the rationality of social life. Using philosophical-legal arguments, Till identified the primary extra-legal prerequisites for the enforceability of contracts. Traces of this approach can be seen in Till's disciple, Roman Longchamps de Berier, who led the preparation of the 1933 Polish Code of Obligations. The rationale of the code written by him shows that realistic references to social experience were important factors in the Polish codification of the law of obligations. In the 1950s, i.e. already during the dominance of Marxist social theory, the focus of the understanding of legally binding relationships shifted from the subjective right to the legal relationship as such. The common denominator of the mainstream Polish doctrine of obligation in the period from the 1960s to the 1980s was its neo-positivist character. This is illustrated by the rejection in the 1980s of the view of the well-known German jurist Karl Larenz, who allowed that 'socially typical human behaviour can be equivalent to the conclusion of a contract'.[68] Larenz's Polish critic pointed out that it would be 'dangerous for the rule of law' to extend the events creating legally binding relationships beyond the circle recognised by the statutory regulation.[69] The paradox of this approach was pointed out at the end of the 20th century by Andrzej Stelmachowski. He found it astonishing that 'under a Marxism closely associated with a historical understanding of the past and a social approach to problems, a legal neo-positivism (...) preaching the praise of formalism in law could spread'.[70]

The recent explanations of the structure of the legally binding relationship (obligation) show the persistence of the innovations introduced in the second half of the past century into the Polish doctrine of the legally binding relationship. The dominant approach to obligation as a legal institution is confronted with the current practices and academically perceived challenges facing private law today. These arise from the profound economic and technological changes of the present century. A collection of papers published in Poland on the subject a few years ago gives rise to two complementary opinions. The adoption of the doctrine of legally binding relationships, which has dominated Poland since the second half of the 20th century, leads to the prediction that 'the role of the law of obligations as a regulator of economic transactions will diminish'.[71]

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68 Larenz, K., *Allgemeiner Teil des deutschen bürgerlichen Rechts*, C. H. Beck, München, 1977, pp. 471 ff.

69 Grzybowski, *op. cit.* (Note 34), p. 27.

70 Stelmachowski, A., *Zarys teorii prawa cywilnego*, Wydawnictwa Prawnicze PWN, Warszawa, 1998, p. 17.

71 Machnikowski, *Prawo…*, *op. cit.* (Note 8), p. 386.

In contrast, the innovative proposal for the regulation of service contracts is an example of going beyond the prevailing doctrine. It expresses the idea that the conclusion of a contract should not be linked to the determination of the essential elements of its content but should already be linked 'to the general idea of performance'.[72] Determining the content of the contract in parallel with its execution would be a significant change that would deepen the coherence between social and legal relations. However, the generality of this innovation calls it into question. The experience of sales contracts without an agreed price shows that the practical existence of such consistency has worked well for very specific transactions.[73] Article 55 of the United Nations Convention on Contracts for the International Sale of Goods, which gives this possibility, raises ambiguities and concerns.[74]

In conclusion, the long-term experience of the Polish legal debate shows a permanent tension between the sophisticated generalisation of the idea of obligation and the diversity of social relations. The neo-positivist doctrine of the legally binding relationship, which has dominated since the second half of the 20th century, has made this tension clearer today. The history of the notion of obligation in the Polish legal debate links the rise of this tension to three factors: generalisation, formalisation and marginalisation of extra-legal values. This observation is confirmed by three reflections on private law that accompany its transformation at the turn of the 20th and 21st centuries. First, there is an emphasis on understanding private law as 'the repository of our deepest intuitions about justice and personal responsibility'.[75] Secondly, it is a reminder that private law in action relies on the creative power of specific actors, and this power reflects societal ideas about operating principles and values.[76] Third, it is an observation that 'excessive nuancing of legal doctrines is a methodological abuse and not a legal method'.[77] A lesson from the Polish legal experience is the

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72 Pecyna, M.; Zoll, F., *Regulacja świadczenia usług jako wyzwanie legislacyjne*, in: Olejniczak, A. *et al.* (eds.), *Współczesne problemy prawa zobowiązań*, Wolters Kluwer SA, Warszawa, 2015, p. 573.

73 See: Pothier, R., *Traité du contrat de vente*, in: *Ouvres du R. J. Pothier*, *vol.* 1, Tarlier, Bruxelles, 1829, p. 291 (n. 28).

74 Schlechtriem, P.; Schroeter, U. G., *Internationales UN-Kaufrecht*, Mohr Siebeck, Tübingen, 2013, p. 223.

75 Weinrib, E. J., *The Idea of Private Law*, Harvard University Press, Cambridge (MA), 1995, p. 1.

76 Schur, W., *Die Bedeutung der Willensfreiheit für das heutige deutsche Privatrecht*, in: Lampe, E. *et al.* (eds.), *Willensfreiheit und rechtliche Ordnung*, Shurkamp, Frankfurt Main, 2008, pp. 246 – 247.

77 Diederichsen, U., *Auf dem Weg zur Rechtsdogmatik*, in: Zimmermann, R. *et al.* (eds.), *Rechtsgeschichte und Privatrechtsdogmatik*, C. F. Müller, Heidelberg, 1999, p. 73.

observation that the doctrine of legally binding relationships will act as a bridge between existing law and social reality if it opens more widely to historical experience, the test of reasonableness and intuitions about justice.

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Sažetak

Wojciech Dajczak*

KONCEPT OBVEZE U POLJSKOM PRAVU

*Prijelaz s rimskopravnog koncepta obveze (*obligatio*) na doktrinu pravno obvezujućeg odnosa u pravnim sustavima pripadnima zapadnoj pravnoj tradiciji nije tekao kao jedinstven proces. Anglosaski pravnici tako odvojeno raspravljaju o teorijama ugovora i teorijama o odgovornosti za naknadu štete. U pravnim sustavima rimske pravne tradicije razvile su se pak različite doktrine o pravno obvezujućem odnosu. U ovom se radu izlaže tijek navedenoga procesa u Poljskoj. Posebne okolnosti pravnog razvoja u Poljskoj sastoje se u tome što je primjena rimskog prava u praksi imala vrlo mali utjecaj sve do kraja 18. stoljeća, dok je temelj razvoja poljske doktrine o pravno obvezujućem odnosu bilo austrijsko pravo. Zatim, poljski Zakon o obvezama iz 1933. zamijenio je francusko, austrijsko, njemačko i rusko pravo koja su se prije toga primjenjivala na različitim područjima Poljske. Konačno, razvoj teorije privatnog prava u Poljskoj nakon Drugoga svjetskog rata bio je pod prevladavajućim utjecajem marksističke teorije. U skladu sa svime navedenim, poljsko pravno iskustvo pruža poseban uvid u okolnosti koje su utjecale, pozitivno ili negativno, na odnos doktrine o pravno obvezujućem odnosu i društvene stvarnosti.*

Ključne riječi: obveza, pravno obvezujući odnos, rimska pravna tradicija, pravni pozitivizam, izvanpravne vrijednosti

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