The historical development of anti-usury laws in Austria and Poland

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Virtually all modern legal system attempts to balance the interests of debtors and creditors. Both categories of parties are equipped with instruments protecting their interests where the law (precisely: the social and moral convictions prevalent in the society that tend to determine the content of the law) deems such protection justified. Just as creditor protection concentrates on dealing with dishonest debtors and preventing fraud, debtor protection has been crafted to shield debtors from abusive interest rates or other – excessively detrimental – contractual provisions (e.g. clauses that unconscionably expand debtors’ liability or render their defences effectively inoperative). Such practices, especially charging excessive interest, have been called usury. In contemporary Polish law the system of debtor protection is multi-layered, with various instruments whose scope often overlaps. That such system exists and how it operates is a direct result of the historical development of instruments aimed at combating usury. This text aims to recapture how anti-usury legislation developed in Austria, whose legal system is closely related to Polish, and to describe how legal systems tend to arrive at very similar outcomes – notwithstanding the differences in the globality of circumstances. The authors employ legal comparative and historical methods, supplanted by formal-dogmatic ones, to present the evolution of anti-usury legislation in Austria as well as the state of anti-usury private law legislation in Poland.

Keywords: interest; usury; undue influence; Polish law; Austrian law.

Introduction

Interest – the most prevalent form of payment for using another person’s capital – is deemed to be one of the foundations of modern economy. It’s vital for the proper functioning of markets1. Early modern scholars’ efforts to explain the notion of interest had led to them proffering the following definitions: “interest is understood as consideration owed to someone for the possibility of using a sum of money or, more generally, fungible items – alienated by him voluntarily or taken away from him [without his consent] – depending on the contractual relationship and the duration of

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1 As early as in 1908, J.B. Clark has said that capital “lives” by migrating from body to body, by moving again and again—almost like a soul of the capitalist economy (J.B. Clark, The Distribution of Wealth: A Theory of Wages, Interest and Profits. London 1908, p. 120, quoted by: M. Machaj, Money, Interest, and the Structure of Production: Resolving Some Puzzles in the Theory of Capital, Lanham-Boulder-New York-London 2017, p. 4.

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use", or: "The percentage that a borrower of money must pay to the lender in return for the use of the money, usu. expressed as a percentage of the principal payable for a one-year period". These definitions bear a striking similarity to the modern Polish attempts at clarifying the term "interest".

Therefore, an interest premium is essentially a certain objectified and generally accepted mean of calculating the payment for using someone else's capital, on contractual basis or in lack thereof, whose amounts is correlated with the amount of capital in question and the time of its use. Closely related to the notion of interest is the concept of "usury", understood in a varying manner over the centuries - be it as collecting excessive interest (in Roman law and nowadays), or as charging of interest of any kind on monetary amounts in general (as in the Jewish, Islamic or Catholic teaching).

The social context related to credit makes charging interest a moral issue, hence the notion of usury is used in everyday language in an evaluative, condemning manner, regardless of which of the two meanings indicated is chosen. As William Blackstone aptly reflected in his Commentaries on the Laws of England: "When money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use, the increase is called interest by those who think it lawful, and usury by those who do not". Indeed, until modern times usury and interest collection were treated as synonyms in European legal circles; this has now undoubtedly changed. However, usury has always been treated as a reprehensible practice forbidden by legal systems all over the world, and the laws making it inadmissible were never deemed to breach fundamental – in the contemporary meaning – principles of private law (freedom of contract, volenti non fit iniuria).

In Poland, the term "usury" is not currently used in the language of the law, however it is often employed in the lawyers' language (where, however, it has already attained a slightly outdated meaning). Article 388 of the Polish Civil Code, combating is centered around the notion of "undue influence". Usury, under the dictionary meaning mentioned above, undoubtedly falls within the meaning of "undue influence", which, nevertheless, is broader and includes any unjustified disparity of parties' performances. Apart from that, usury has also frequently appeared as a highlight-phrase in media, especially in the collocation "anti-usury laws" (or similar ones). The last decade has seen the issue of anti-usury become one of the main problems to be dealt with in legislation (especially in the broader sense of usury, which may be to also cover excessive collateralization).

Thorough analysis of usury, undue influence and interest in civil law would far exceed the scope of this text. The authors, therefore, intend to compare the history of Austrian legislation regarding usury since the 18th century with the modern Polish development of anti-usury laws. Such comparison is justified as in the periods in questions the legislation regarding interest and usury was substantially modified four times (as in the case of Austria) and five times (Poland). Hence, both compared systems offer excellent examples that show the timeless issues related to the regulation of interest and usury, despite different political, social and temporal circumstances. Also, the Austrian legal system, because of the Habsburg rule over Central Europe before 1918, remained binding in southern Poland (former Galicia) until 1918. Therefore, the present Polish regulation might be perceived as a continuation of the 19th century Austrian legislation, whose important elements – as it will be shown – were coined in Galicia.

A historical look at usury under Austrian law

The first comprehensive early modern regulation of usury in the Habsburg realms was brought about by Empress Maria Theresa by a patent of 26 April 1751. It established a maximum interest rate of 5% (essentially maintaining the rate introduced by prior legislation, dating back to the 16th-17th centuries), with an exception for commercial transactions (where a higher maximum rate of 6% applied). Exceeding these restrictions was tantamount to the agreement attaining a usurious character and was subject with penalties such as forfeiture of the loan amount as well as corporal and honor punishment.

This regulation was replaced by a patent of Emperor Joseph II of 29 January 1787, an undoubtedly breakthrough in the realm of legal regulation of usury. This short law was intended to have a stimulating effect on the economy – as stated in its preamble, it was to "facilitate private credit, constrained by the statutory regulation of interest". Thus, on purely economic grounds, all pre-existing legislation penalizing usury was repealed. The restrictions on maximum interest rates were abolished. Parallel to that, tax burden was reduced.

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4 See e.g.: Interest means payment for using money or fungible goods (capital interest, percentage) or compensation for late payment of pecuniary obligations (interest for delay), calculated as a fraction of the principal amount further to an interest rate and the time of using (delay), M. Lemkowski, Odesetki cywilnoprawne, Lex/ed. 2007, Ch. 24.; "Interest is traditionally understood as payment for using someone else's capital for a certain period of time, or for a delay in the payment of a sum of money already due" A. Żbietień-Turszańska [in:] K. Osada (ed.), Kodeks cywilny. Komentarz. Legis/ed. 2020. Commentary to Article 359 of the Polish Civil Code, item 1; T. Dybowski [in:] A. Pyrzyska (ed.), System Prawa Prywatnego tom V, Warszawa 2012, p. 273.


Such a far-reaching liberalization was met with criticism that ultimately led to the reform being just an ephemeral experiment. The brief period of “freedom of interest” (Zinsfreiheit) lasted only several years, ended by a patent of Francis II of December 2, 1803\(^{11}\) on usury (hereinafter: Usury Patent). Usury Patent was an extensive piece of legislation (encompassing 39 paragraphs) which comprehensively regulated the issue of usury in its broad meaning, regulating not only excessive interest, but also undue influence in contract in general. The maximum interest rate was re-introduced, amounting to, in principle, 6%. As the Usury Patent’s contemporaries had stated, it was a “rebirth” (Wiedergeburt)\(^{12}\) of pre-Josephine regulations. Although Usury Patent had been in force for nearly 65 years, its provisions regarding interest rates had been repealed much earlier replaced by civil code regulation.

The reason for it was that in 1811, the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch), commonly known as ABGB\(^{13}\), one of the most important legal monuments of modern Europe, still in force up to date, entered into law. Its provisions on interest are included in the Code’s Chapter 21, titled “On the loan contract”\(^{14}\), consisting of §§ 983 through 1001 ABGB. Under Section 984, the loan contract which provided for interest (interest contract, Zinsenvertrag), was a special form of the loan, distinguished from the no-interest loan dubbed as loan “proper” (reines Darlehen)\(^{15}\). Such regulation of interest was later criticized by scholars – due to the fact that the obligation to pay interest could result not only from the loan agreement, but in any case where someone received a certain amount of things identified as to their kind\(^{16}\).

The regulation of percentages (commission) was covered by §§ 993-1000 ABGB. Its § 993 stipulated that in the event of a reservation in the loan agreement on interest (regardless of whether the subject of the loan was money or consumables – negligible items, verbrauchbare Sachen\(^{17}\)) was a special form of the loan, distinguished from the no-interest loan dubbed as loan “proper” (reines Darlehen)\(^{15}\). Such regulation of interest was later criticized by scholars – due to the fact that the obligation to pay interest could result not only from the loan agreement, but in any case where someone received a certain amount of things identified as to their kind\(^{16}\).

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Maximum interest rates were laid out in § 994; they were not to exceed, for secured (collateralized) credit, five per cent per annum, raised, in cases of unsecured credit, to six per cent. Collateral was interpreted as to also cover mortgage. The discussed provision was also construed as to entail a presumption that maximum interest rate had been applicable if the charging of interest had been provided for in an agreement without its rate specified\(^{18}\); therefore, it was the debtor who was fully encumbered with the consequences of vague or imprecise wording of an agreement.

Furthermore, § 997 limited the possibility to charge interest in advance, i.e. future interest – it was rendered only admissible for a period no longer than half a year. ABGB’s leading legislator derived this restriction from the desire to safeguard the proportionality of the party’s performances\(^{19}\). Irrespective of the sanctions for excessive interest, the law provided that in such case (i.e. charging interest in advance), the amounts paid as interest in advance shall, from the date of payment, be deducted from the principal amount. Furthermore, § 998 ABGB prohibited charging compound interest, a measure motivated especially by the desire to protect reckless debtors from greedy creditors, setting short payment due dates\(^{20}\). It bears noting, however, that contemporary Austrian legal literature took the stance that the prohibition on charging compound interest did not render unlawful charging interest on unpaid interest already due\(^{21}\).

The Code’s regulation concerning interest rates was complemented with § 1000, a provision referring the issues of usury proceedings to Usury Patent (in particular with respect to jurisdiction and criminal law); as stated by ABGB’s leading draper, F. Zeiller, ABGB included only that what was necessary to regulate the mutual rights of the debtor and the creditor. Thus, the Austrian lawmaker decided to split the usury and interest regulation, which had hitherto been entirely covered by Usury Patent, between two acts – Usury Patent and ABGB.

The regulation of usury and interest introduced by Usury Patent and the original 1811 wording of ABGB without any changes for over half a century. This is not tantamount to saying, however, that it was not criticized; to the contrary, the dissatisfaction with it grew with time. The 1850s and 1860s were, in German-speaking area, dubbed Gründerzeit – “founders’ period”, an economic phase characterized by a dynamic development of trade, banking and general industrialization, attributed inter alia to the expansion of the steel industry, and the emergence and development of railways. These processes were fueled by risky investments and as such required considerable capital – access to which was significantly hindered by anti-usury laws, especially to the extent that it limited interest rates. After the catastrophic defeat in the Austro-Prussian War of 1866, the Habsburg monarchy found itself in a critical position. This gave an impulse for a thorough internal reconstruction, the adoption of the constitution, the Ausgleich\(^{22}\). Apart from strictly political measures, the then-dominant liberals employed their new-found influence to push through the demands for liberalization interest rate limits.

\(^{11}\) Patent vom 25. Dezember 1803, JGS 525, 240.

\(^{12}\) C. Chorinsky, Der Wucher in Österreich, Vienna 1877, p. 29.

\(^{13}\) Patent vom 1. Juni 1811, JGS No. 946, hereinafter referred to as: “ABGB”.

\(^{14}\) Quotations from the original version of ABGB from 1811 according to the translation by M. Stojowski, published in Vienna in 1811; original spelling and punctuation are preserved.


\(^{16}\) L. von Kirchstetter, F. Matich, op. cit., p. 512.

\(^{17}\) The fee for the use of things other than consumables was rent (Zins) in the nomenclature of Austrian law - see J. von Schey, Die Obligationsverhältnisse des österreichischen allgemeinen Privatrechts, Band I. Heft 1: Einleitung - Das Darlehen, Wien 1890, p. 129.

\(^{18}\) F. von Zeiller, op. cit., p. 259.

\(^{19}\) Ibidem, pp. 259-260


\(^{21}\) The Austro-Hungarian Compromise of 1867.
On 14th December 1866, an act repealing the statutory restrictions on the amount of interest and amending the laws on the punishment of usurers was passed. Like the Patent of Joseph II of 1787, it was a brief piece of legislation (measuring just ten sections), but fruitful as to its effects. It's very first section repealed the restrictions regarding conventional (contractual) interest, additional performance and compound interest (thus repealing §§ 994, 996 and 998 ABGB).

In the following part of the act there were penal provisions, criminalizing usury, in this case characterized as a gross disproportion of objects of performance, intertwined with the abuse of someone's plight, recklessness, inexperience or frailty (§ 3). The legislators intended thus to capture, in general, the essence of usury – departing from defining it as simple violation of the ban on charging excessive interest or additional benefits. The wording of the discussed provision had seemingly shifted toward what would be now deemed as modern a approach to usury, one that we now know under the name undue influence (cf. Article 388 of the Polish Civil Code).

The 1866 act was as much a landmark law as it was incomplete. Hence, it achieved only provisional significance. It concerned the issues of usury and interest just selectively, covering only pecuniary loans. It was only in force for a year and a half when it was replaced by the Act of 14 June 1868 repealing the existing anti-usury laws. Its § 1 stated: the existing statutory restrictions on the contractual interest rate and the amount of the contractual penalties for loans and credit claims shall be repealed. Maximum interest rates were abolished. Compound interest had become legal - subject to providing for such in a contract or in cases where interest already accrued was to be claimed, from the date of serving of a claim. The act, in its § 5, allowed for loan agreements to stipulate in that a larger amount of money or larger quantity of things or things of better quality were to be returned by the borrower to the lender; what is to be returned, however, must be of the same kind as what was given.

The revolution initiated in 1866 took its next step with § 7 of the 1868 Act, which repealed in their entirety the Usury Patent and the Act of 14 December 1866, as well as § 485 of the Criminal Code of 1852, and, what was particularly significant, the provisions of §§ 993–998, 1000 and 1196 ABGB; in general, all provisions of civil and criminal law, contrary to the provisions of the 1868 Act, were repealed. The primary consequence of this regulation was, foremost, the complete abolition of criminalization of usury – a development for which the way had already been paved by the 1866 law, one which, nevertheless, stopped at a compromise position (coinciding with most legislation nowadays).

And so, the advent of the so-called constitutional era brought about a legal experiment exceptional in the history of Europe. The normative principle of contractual freedom was finally – though with respect to interest rates – entirely fulfilled. And to the widest possible extent – with the concepts of "usury" and "undue influence" (Wucher) effectively removed from the language of the law. After 80 years, Austrian law saw a return to the solutions previously introduced by the short-lived Josephine patent of 1787. However, the triumph of liberal approach toward the regulation of interest rates was hardly permanent, its dawn soon turning into dusk. Arguably, the main reasons for it due were factors both political and economic that weakened the ruling liberals, which eventually led to them being permanently removed from government.

As regards the economy, the golden age of Austrian liberalism was struck by the great crash on the Vienna Stock Exchange in May 1873; its expansion bubble bursting. The wave of bankruptcies and social turmoil brought about an increase in anti-Semitism and (connected therewith) widespread criticism of usury and speculation. Especially so in Galicia, where usury had already been a crucial problem, discussed by the Diet of Galicia and Lodomeria – as K. Sójka-Zielińska noted, referring to the 1868 law: "this law, considered an extreme manifestation of economic liberalism's victory, caused serious damage and strong social resistance, especially in Galicia".

Such were the circumstances that led to the Council of State – in response to resolutions and various other attempts made by the Galician Diet – passing on 19 July 1877, a law on remedies against unfair conduct in loan agreements, applicable only in Galicia with Krakow and Bukowina. This act, however particular, i.e. in force only locally, amended the generally applicable provisions of civil and criminal law and therefore could not be passed by the Diet in Lviv.

The act was quite laconic, having only eight paragraphs. Its main provision was found in § 1(1) – aa criminal rule penalizing usury, which was here understood similarly as under the 1866 Act; furthermore, § 2(1) of the Act obliged judges in criminal proceedings to nullify usurious agreements; hence, this regulation differed vastly from the one set forth in § 993 ABGB, where an usurious act (i.e. one that provided for interest exceeding the maximum rate) was null and void by virtue of law itself. On the other hand, § 2 ss. 2 protected, to some extent, the "creditor-usurer" – he was entitled to compensation for damage incurred by not being

28 Der Landtag von Galizien.
30 The lower chamber of the Austrian Parliament.
31 RGBl. 1877, no. 66.
32 Whoever, while granting credit, agrees with the debtor such conditions that the creditor knows must, through exaggeration of benefits owed to the creditor, inevitably bring to the debtor economic perdition, or contribute thereto, and that the debtor – due to weakness of reason, lack of experience or disturbance of mind – can not see properly, shall be punished with arrest from one to six months or with fines from 100 to 1000 gulden.
able to utilize the loaned amounts, including by seeking satisfaction from the collateral, if such had been put up.

This approach, however, a little return to pre-1866 resolutions. The new law was indeed of novel quality – the legislation did not repeal the 1868 act nor reinstated the restrictions found thereunder. Usury now was intended to broadly encompass “unfair practices related to credit agreements”. Considering the statutory test for usury (§ 1 ss. 1 of the 1877 Act) one can recognize the characteristic elements of what now is known as exploitation.

Emphasis was placed not so much on simply exceeding a statutory interest rate cap, but on taking advantage of a weaker party in a way that endangered her economic well-being. This evolving approach can be seen in that commercial transactions, where the debtor is to be considered a merchant or on an equal footing with a merchant were excluded from scrutiny under the new legislation – hence, professionals were granted freedom of contract while simultaneously attempting to protect the “least of the brethren” without blocking the movement of capital or availability of credit.

The Galician anti-usury law placed this marginal (as seen from Vienna’s viewpoint), poor and derelict crown land of Austria-Hungary on the forefront of legal counterrevolution. And though the period that the act was in force proved short, the only reason therefor was that after almost four years it was, subject to minor modifications, introduced all throughout Cisleithania34. This happened with the enactment of the Act of 28 May 1881 on remedies against unreliable conduct in credit transactions34. The statute repeated most of the provisions of the Galician Act of 1877 but was slightly longer (17 paragraphs) and contained some legislative innovations35.

In particular its § 8, repeating in general the provision of § 2 of the Galician Act of 1877, clarified that what the creditor and the debtor performed to each other, they shall return with interest calculated from the date of performance36. Similar to the 1877 Act, the new restrictions were not designed to apply to credit institutions, however this problem proved controversial in Austrian jurisprudence36. § 13 of the 1881 Act introduced limited retroactivity of the law, not yet present in the Galician Act.

The law of 1881 turned out to be a durable piece of legislation, though it concerned only usury with respect to financial capital. It wasn’t until the subsequent statute – whose enactment was accompanied by the horrid murmur of cannon salvos of the Autumn of 1914 – ultimately made the notions of “usury” and “exploitation” as synonymous, thus, in the dying hours of the Habsburg monarchy, securing the transition of its anti-usury legislation into contemporary times. The outbreak of the Great War, the last chord of the Habsburg Monarchy’s life, accelerated extensive legislative action aimed at turning the state into a war machine.

As a result, as early as on 12th October 1914, the Emperor’s regulation on usury37 was enacted, replacing the 1881 statute. The regulation, again, was very brief, yet carried tremendous weight: though a piece of extraordinary legislation drafted ad hoc, it reflected new legal trends. The way usury had been regulated therein has survived in Austrian law till now. It is also similar to the contemporary Polish regulation of exploitation.

The regulation in its § 1 contained a civil law rule invalidating usurious agreements, defined as such wherein someone exploits the recklessness, force of circumstance, inability of the mind, inexperience or distress of another person in such manner that he accepts, for himself or a third party, consideration or promise thereof, whose monetary value glaringly exceeds what is owing to that person. Hence, though the essence of usury remained the taking unfair advantage over one’s contracting party, the objective elements of the usury test changed substantially – not anymore was it necessary that the debtor’s payment under the agreement lead to his financial ruin, it became sufficient that it was glaringly disproportionate to the consideration owing from the creditor.

Usury was covered in a general manner; it did not only concern “credit transactions”, but all contracts of reciprocity. Moreover, contrary to the provisions of the 1881 Act, invalidity of contract would arise by virtue of law itself, while parties were obliged to return to each other what they had received under the invalid agreement (§ 7) plus statutory interest. These changes undoubtedly proved convenient for the courts, which no longer had to examine in detail the entire circumstances related to the parties, including the economic condition of the party that had fallen prey to usury – essential became only the comparison between the benefits themselves was decisive. Thus, the Austrian law embarked on a standard very similar to the current Article 384 of the Polish Civil Code. The Polish law, however, opted for less serious consequences of exploitation (see infra). Again, anti-usury law was coupled with a far-reaching retroactive effect (§ 10 of the 1914 regulation).

Hence the new law polished and corrected the existing regulation, treating usury as exploitation. This concept proved successful, as evidenced by it soon being introduced into ABGB, part whereof it remains until nowadays. This introduction was effected by the last of the three great amendments to ABGB, by imperial regulation of 19th March 1916, one which simultaneously remodeled substantially the law of obligations.

Importantly, § 879 ABGB, which listed the catalog of contract invalid by virtue of law itself, was also amended. Originally, it was structured around a case-by-case enumeration of contract deem inadmissible due to ethical reasons. The 1916 amendment modernized this provision: § 879 now began with a general clause regulating invalidity of contracts that were contrary to the law or fair dealing, while the following paragraphs contained an open catalogue of
invalid agreements; paragraph 4 regulated usury (or rather, using contemporary Polish terminology, exploitation). That provision, which has been in force since then, is an almost literal repetition of the first section of the 1914 Regulation. The Austrian law has thus returned to a method of regulating usury similar to that used in 1811, with substantial civil law issues placed in ABGB, and procedural issues and criminal sanctions contained in a separate act (the 1914 Regulation, which was not repealed). Nowadays, the provision of §879(2)(4) remains unchanged, an inconspicuous relic of the great disputes and efforts that have been valid since the 18th century.

However, this regulation expresses not only continuity but, as we will see, also a common heritage of Polish law.

Having developed on accomplishments of European legal systems, introduced in Poland in the time of the country’s Partitions, the Polish civil law regulation of debtor protection has at least four layers. One, an example of the most obvious anti-usury regulation, comprises rules establishing maximal admissible interest rates. The other, related to it to some extent, but nonetheless different, is concerned with provisions regulating maximum costs of credit and other rules established in consumer protection laws. Then there are rules aimed at dealing with over-collateralization – this area saw a very recent development. Lastly, the law creates provisions counteracting exploitation (abuse of contractual power), just as in the case of Austrian law – based on a general clause, rid of rigid benchmarks like maximum interest rates or cost caps, based on flexible valuation structured around open-texture norms. What is interesting is that surprisingly numerous of these instruments are relatively new developments in Polish law – introduced well after the first wave of pro-market civil law reforms of the 1990s. In addition to the civil law instruments of debtor protection, Polish law imposes criminal law measures to combat usury.

**Maximum interest rates in Polish law**

Polish law has featured rules counteracting abusive interest rates. However, an existence of a statutory cap for maximum interest rates intended for ordinary periods is a relatively new development. The first chiefly Polish modern piece of legislation, the Code of Obligations of 1934, was not concerned with limiting interest rates. It was aptly noted in literature that the law should not limit interest rates, with anti-usury provisions regarding exploitation being sufficient instruments of debtor protection – and interest rate caps being an anormal measure for anormal times. Yet apparently, either such extraordinary measure was deemed necessary at all times, or the country was in a state of perpetual extraordininess, as through the whole period from its enactment in 1924 till the entry into force of the new Civil Code of 1964, presidential regulation limiting interest rates remained in force. The regulation limited the general interest rates for all kinds of transactions and allowed for secondary legislation to prescribe maximum interest rates in bank credits. The maximum interest rates changed during the times of the Second Polish Republic, their exact amounts fall beyond the scope of this text, however it is telling that the initial maximum rate was 24%, ultimately lowered to 15%. Interest rates (both statutory and maximum) in the pre-war period The regulation operated in that it rendered void the agreements providing for higher interest rates – yet only to the extent that an agreed rate fell in excess of the maximum statutory rate (§ 3 of the regulation). The cited provision contained an interesting exception – it did not prejudice broader nullity if such resulted from the law on usury (exploitation, see infra). Apart from the above, a peculiar instrument aimed at keeping interest rates in line with the market conditions was created by § 90 PCO. In accordance therewith, in cases where the agreed interest rate exceeded statutory rates by two units and the creditor did not agree to reduce the rate to the statutory level, the debtor might have terminated the agreement at six months’ notice.

The Civil Code of 1964, which repealed the Code of Obligations, set no maximum interest rate levels, but chose to leave this issue to be determined by secondary legislation and regulation of the Council of Ministers (Article 359 § 3 PCO). However, the discussed provision was authoritativeness that it ordered that the Council of Ministers to set statutory interest rates, leaving the issue of maximum interest rates (i.e. whether a cap should be instated) to the Council’s discretion. Initially, the Council of Ministers chose 8% as the statutory rate and 12% as the cap – whose exceeding resulted in contracts being void with respect to amounts owing in excess of 12%. In the 1980s, due to hyperinflation, the maximum interest rates changes numerous times, only to be abolished altogether in 1989 in order to deal with the galloping inflation and meet the demands of an increasingly market-based, credit-hungry economy.

For the following 16 years the law prescribed no maximum interest rates. Judge-made law tried to step in and fill the void vacated by statute by striking down contractual provisions setting excessive interest rates through applying

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39 As e.g. the rule that in case of consumer’s early repayment of credit the total credit costs are decreased by the amount of those costs that related to the period of agreement that has been shortened by early repayment, see: Article 49 of the act on consumer credit, infra.

40 Regulation of the President of the Republic of Poland of 27th October, 1934 – Code of Obligations (Journal of Laws of the Republic of Poland of 1934 no. 82 item 598 as amended, hereinafter referred to as: the Code of Obligations or PCO).


42 Ibidem.
the general requirement that contracts be congruent with the principles of community life (Article 3531 PCC). The case-law proposed that the insurmountable obstacle that invalidated the above principles is the act of agreeing or charging interest at an excessive rate, one not justified either by inflation nor by profits made in the normal course of a fair business47. Scholars suggested that general anti-usury clause may also be employed to target excessive interest rates48.

Statutory provisions setting maximum interest rates were reintroduced in 200549, with effect 6 months post enactment. The new rules created a peculiar dualism: statutory interest rates were to be provided for in secondary legislation enacted by the Council of Ministers (Article 359 § 3 PCC), while maximum interest rates were capped by a provision of the Code yet in a flexible manner – the rate to be calculated with reference to Lombard credit rates of the Polish National Bank50 (Article 359 § 2 PCC). In cases where the agreed interest rate would exceed the maximum rate, just the maximum rate was to be paid. This dualism coupled with the executive’s leisurely tempo of updating secondary legislation led to statutory interest rates another reform of the law concerning interest rates came about in 2015. As a result, a new mechanism of calculating the maximum admissible interest rate was enacted, set as twice as the statutory interest rate – which, in turn, was modified as to use as a benchmark, in place of a product of multiplying a variable, a sum of a fixed amount – 3.5% – and the applicable reference rate of the Polish National Bank51. The legislators decided to separately regulate maximum interest rates for delayed payment (through amending Article 481 PCC, which previously only stated that interest rates should be paid in case of delayed payment), capped at a maximum level of two times the statutory interest rate for delayed payment (Polish National bank reference rate plus 5.5%). In cases of both statutory interest and interest for payment, the law prohibits the exclusion of rules determining maximum rates, even such effected by choice of law (Articles 359 § 2 and 481 § 2).

A separate issue which may only be indicated here is the growing concern paid the Polish lawgiver for the problem of late payment of commercial debts. The law tries to combat it inter alia through raising the levels of interest rates for delayed payment in commercial transactions. It may be said, then, that there is observable a growing disparity in the field of usury regulation, with the law concentrating on consumer credit, protecting the non-professional market participants, and liberalizing the regulations pertaining to business-to-business transactions.

Practical application of maximum interest rates’ laws has credibly shown that provisions setting such rates are hardly an effective measure of countering usury, as it has been very easy, especially for credit institutions, to make up for gains limited by maximum interest rates by charging high non-interest costs of credit (fees and other charges). Therefore, in the last decade, the predominant concern of the law, both in Poland as well as in the EU, shifted to the issue of non-interest costs of credit. In Polish case, a livid social problem was also related to the practice of using over-collateralization to an end consisting of buying out property

Maximum credit costs under the present Polish law

Apart from legislation limiting maximum interest rates, modern European legal systems, advancing on the strong back of EU law52, usually choose to combat usury through limiting the total costs charged from consumers in relation to credit agreements. Such regulation stems from the observation that capping interest rates is not an efficient measure of restricting excessive burdening of debtors with fees, costs and payments. Polish law is no exception. It attempts to, in line with European legislation, limit the – globally captured – costs that the consumer bears in connection with the credit agreement.

The Consumer Credit Act 2001 limited the amount of any and all fees, commissions and other costs related to the conclusion of a consumer credit agreement, with the exception of costs documented or resulting from other legal regulations, related to the establishment, change or expiry of collateral and insurance (including the costs of credit repayment insurance), to 5% of the principal amount53. Banks and other creditors abused this rule by charging unjustified additional fees charged related to costs captured by the exceptions, like e.g. insurance costs, especially repayment insurance offered by insurers associated with the creditors. As a result, the current act54 Polish law employs the notion of the total credit cost, borrowed from European legislation55, designed to encompass all costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs. This amount must be, together with the principal amount, unambiguously communicated to the consumer – constituting the total amount to be paid (Article 13(1)(7) of the Consumer Credit Act of 2011).

Over-collateralization

Over-collateralization is usually understood in the Anglo-Saxon world as to concern situations where the value of an

47 Judgment of the Polish Supreme Court of 27 July 2000, case no. IV KRN 85/00.
50 Quadruple the Lombard credit rate.
51 As of June 2020 – amounting to 0.1%.
52 Directive 87/102/EEC was the first body of law in the European Union aimed at harmonizing the measures of consumer protection in the field of consumer credit. It was implemented into Polish law by the Act of 2008 July 2001 on Consumer Credit (Journal of Laws of the Republic of Poland of 2001 no. 100 item 1081 as amended), which entered into force on 19th September 2002. It was the first general and overreaching regulation of credit agreements concluded with consumers in Polish law.
asset placed as collateral exceeds the amount of the loan per Article 387 of the Civil Code of the Republic of Poland, amended). The Polish law on mortgages states that in cases where the mortgage amount is excessive, the owner of the collateralized property may demand that the mortgage amount be reduced (Article 68 § 2 of the Polish mortgage act). The discrepancy between the amount of mortgage and the secured claim must be glaring. 

The legal landscape with respect to over-collateralization changed for the first time since the enactment of the binding mortgage statute as a part of a package of legal instruments aimed at combating the economic and social consequences of the SARS-CoV-2 pandemic. A new Civil Code provision has been introduced – Article 387 of the Civil Code of the Republic of Poland, amended. This provision operates as to render void an agreement whereunder a natural person undertakes to transfer ownership of real property to satisfy his or her housing needs as collateral for claims arising out of this or any other agreement not directly related to that person’s economic or professional activity where the value of the property in question is higher than the value of secured pecuniary claims (plus maximum interest for delay owing for 24 months), or the value of monetary claims secured by this property is not delineated, or the collateralized property was not valued by an expert appraiser prior to conclusion of an agreement.

Inequality of bargaining power (undue influence) – Polish and Austrian similarities

As mentioned above, another example of how usury may be counteracted are, in civil law systems, certain legal institutions equivalent to the common law doctrines of inequality of bargaining power or undue influence – such as those that operate as to render voidable such contracts where a party takes abusive advantage of a position of power or influence over the other party. In Polish civil law, such equivalent may be now found in Article 388 § 1 of the Civil Code of the Republic of Poland, amended. Direct antecedent of the current regulation was introduced in Polish law by Article 42 § 4 of the Polish Civil Code of the Republic of Poland, amended. Doctrinal differences aside, these two provisions are almost identical. Three out of four qualitative elements upon which undue influence is conditional are the same (frailty, inexperience, force of circumstance), the only difference being that the pre-war law also covered recklessness. The other difference is the time limit for the party to exercise the rights under undue influence (one year under PCO and two years under PCC). Furthermore, the provisions of both Article 42 of the Civil Code of the Republic of Poland and Article 388 § 1 of the Civil Code of the Republic of Poland are virtually identical in how the relevant tests are structured to the relevant provision of the 1914 Austrian regulation and the contemporary § 879 of the Austrian Civil Code – a lasting example of influence of Austrian law over Polish system.

Summary

As the remarks above have shown, hopefully in a convincing manner, the historical development of anti-usury laws in Austria and in Poland had led to both countries’ systems adopting similar measures and methods counteracting what they perceive as a socially perilous of the force of circumstance, frailty or inexperience of the other party, in exchange for his performance accepts or reserves for himself or for a third party such performance whose value at the moment of the conclusion of the contract exceeds to a glaring extent the value of his own performance, the other party may demand a reduction in his performance or an increase in the performance due to him, and where both prove to be excessively difficult, he may demand invalidation of the contract.

Reading: If a party takes advantage of recklessness, frailty, inexperience of the other party or force of circumstance concerning that party, by way of accepting or reserving – for himself or a third party - a performance whose monetary value at the time of conclusion of the contract is glaringly high in relation to the value of performance in consideration, the other party may demand that his performance be reduced or that consideration be increased, or, if where both will prove to be excessively difficult, such party may vitiate its declaration of intent.

Undue influence under PCO was treated not as a vitiating factor resulting from a faulty declaration of intent in a legal transaction, nowadays it is – though it is a matter of long-standing controversy – a provision limiting freedom of contract, restrictively narrowing admissible contracts.

Visibly inspired by Austrian law, i.e. the 1914 Act on Usury and § 879 of the Austrian Civil Code, which still, up to date, covers recklessness (Leichtsinn). Note also that contemporary German law § 138(2) BGB), differently, does not mention recklessness – though mentions the weakness of will, a factor, in turn, not covered by Polish law (unless, arguably, existing to an extent worthy of being appraised as frailty).

Article 43 § 3 of the Civil Code of the Republic of Poland.

Article 388 § 2 of the Civil Code of the Republic of Poland.

The other difference pertains to dogmatic differences as to the consequences of the qualified form of undue influence (in cases where modifying both the harmed party’s and the abusive party’s performances proves to be excessively difficult) – as described in footnote 63 above, under PCO law the party could vitiate (free itself of legal consequences) of a faulty declaration of intent, while currently it may bring action to nullify the agreement.

Showing also that the Polish regulation of undue influence is not a local peculiarity, contrary to the suggestions of M. Gutowski (Cf. M. Gutowski, Wzruszalność czynności prawnych, Warszawa 2019, pp. 143–144).
phenomenon. The contempt toward usurious practices is common and seems likely to be shared by both societies and the legal systems built upon the foundation of these societies’ spirits.

As we have seen, anti-usury measures in Austria and in Poland had been in fact crafted and adopted in different times and varying circumstances. The main determinant had and continuously is unchanged – the social aversion toward usury and those dealing with them.

As it is often the case in law and as comparative legal inquiries help us notice, same necessities and motivations – even in quite different circumstances – to surprisingly similar results. Though Austrian anti-usury legislation has evolved for almost two and a half centuries and its Polish counterpart has been in development for less than ten decades, those countries’ systems of combatting usurious practices, encompassing general, far-reaching and open to interpretation norms, are very much alike.

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