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Governing the Commons In the Era of Decodification and Self-Responsible Societies. Elinor Ostrom's Theory and the Challenges for Legal Science

1. Introduction

It may seem that the studies of E. Ostrom are an example of a purely modern application of sociology and the theories of economy in empirical field studies, which aim at describing the behavior of societies governing the commons, as well as drawing conclusions that allow economy models to be evaluated. In fact, E. Ostrom did not limit herself to studying the present. On the contrary, the study of the historical experience is one of the pillars of her project. The analysis of documents, historical accounts and the work of other researchers, who had the opportunity to study the communities empirically, is one of the basic methods applied by E. Ostrom. In her studies, the analysis of history and the present combine, to evaluate the experience, and to draw useful conclusions for the future. It is worth mentioning that the communities governed by commons in the medieval times, modern times and at present, are in the scope of her interests (Ostrom 1990, 58). What is interesting is the fact that communities, which successfully manage a limited resource, turn out to be the oldest ones. Examples include *huertas,* located in the west coast of Spain, with a thousand years of tradition. The written laws of the *huertas* date back to the 29th of May 1435 but some of them were in application much earlier than that, in the time of the Arab rule (Ostrom 1990, 69.) In Törbel, Switzerland, the model for governing the pastures for grazing cattle is known since the early medieval times. The first entries, specifying the division of land date back to 1224, and the rules for governing, still in effect today, were drafted under the association, established by the members of the community on the 1st of February 1483 (Ostrom 1990, 62). It was then established, that the method for using meadows, forests and wastelands needs to be improved. Alternatively, *zanjeras* in Ilocanos, Philipines are governed by the users of these irrigation channels, ever since the arrival of the first missionaries. The irrigation systems in question were first mentioned in 1630. A similar experience in the villages of Hirano, Nagaike and Yamanoka in Japan, also dates back to the 17th century (Ostrom 1990*,* 65). Strong neighbor and family bonds, present in societies of long heritage facilitate effective cooperation (Rodgers, jr. and Burleson 2005, § 1:1). Nevertheless, the success of self-governing can be found in younger communities as well. The system for governing

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water reservoirs in California, which has existed for 50-60 years, can be used as an example. E. Ostrom witnessed its creation and it became an inspiration for her studies, which encompassed almost all continents. The mixture of history and the present accounts for the universal nature of the grassroots creation of norms, laws and rules. Proving this universal nature with empirical tools is a novelty though. History and empirical studies are essential to the analysis of the grassroots creation of norms. Although the process of establishing norms within a society is a success in itself, applying and following them is an indication of the efficiency of governing. This can only be observed in the course of time.

„There is a challenge for a standard system of jurisdiction and formalized courts. Equitable and fair solutions are possible to discover by cooperating societies. The problem is how to provide the sphere of justice – a public place to resolve conflicts without high costs and pending decisions of the court. The increasing popularity of negotiations and arbitrations, the alternative dispute resolution (ADR) are not the only signs of searching for economically effective solutions. These phenomena also show that the problem lies not in deciding what is equitable and fair – that is understandable for everyone. The problem lies in finding the trustworthy people who can provide a fast and justified judgement that respects the governing principles of society. The problem lies in the feeling of uncertainty and lack of security due to complicated and enormously expanded legal system, legal rules and acts" (Blicharz 2017, 102)

„The common good and governing the commons are connected with the issue of the state as a participant in the rule-making and rule-following processes. How far is it reasonable to take advantage of self-governance of communities in that respect? At the same time, there is a deep relation with the problem of the process of decodification. It means that legal codes are losing their importance. The process is observed mainly in continental Europe and is connected with an unparalleled amount of specific legislation, acts and statutes which modify the solutions provided by the legislator in a code, i.e., Civil Code, Commercial Code, etc. Moreover, the legislation at the state level is changing due to the globalization and political unification rules: that of the European Union, of the US federal law, or due to the rules established by global organizations. At the end of the day, the idea that a branch of law can be unified in a single act and limited to the territory of a given state is now being falsified. The legal order should reflect these changes. There is a hidden opportunity that multilayered legal systems of the present Western legal orders could be better governed by small communities which are more adjustable to the changing reality. This experience

is somehow present, though in a different context, in the heritage of Elinor Ostrom and her studies on polycentricity as a way of governing in metropolitan areas" (Blicharz 2017, 95).

2. California and the revolutionary change in the groundwater doctrine

Successful governing of three water reservoirs by local communities: Raymond Basin, Central Basin and West Basin, was mostly possible due to the application of the jurisdiction based on equity. California does not recognize the division of courts into courts of law and courts of equity. However, in the course of legal proceedings, courts can base their decisions on one of these principles. The community using the Raymond reservoir engaged in the legal proceedings, with the stipulation that the ruling was to be based on an agreement, which was entered into by the members of the community. Thirty out of thirty two communities using the reservoir signed an agreement, which was drafted in the course of six months. Thanks to that, high costs generated by establishing the factual circumstances, that is the level of water and the property rights, were avoided. What is more, handling the case in the regular fashion would most likely lead to high costs connected with the appeal against the decision. Most importantly however, community members wanted to limit the uncertainty of the judgement and adjudication of water rights. The unpredictable nature of the ruling forced the parties involved to come up with an agreement, which turned out to be economically strong and socially acceptable till the present day. Interestingly, the agreement, which was presented to and accepted by the judge, could not be based on any law but equity. The ruling could not result from the Californian law for ground water. As a result, the verdict had a high risk factor. A group of people, who were not satisfied with the ruling, appealed against it to the Supreme Court of California. The court upheld the decision and the United States Supreme Court denied certiorari.

The ruling in question was made on the 3rd of June 1949, in the case of *City of Pasadena v. City of Alhambra* [1949], in which the Supreme Court of California resolved the case, initiated on the 23rd of September 1937 by the city of Pasadena. The case subject was the scope of laws regarding the use of the Raymond Basin reservoir, located in the eastern part of Los Angeles County. The city of Pasadena initiated the proceedings, to establish the laws regarding water and to limit the use of water above the annual limit, due to the alarming condition of the reservoir. After the official reports were published by the state committee governing ground water, it turned out that the level of water has been insufficient for the last 20 years, which could result in the depletion of the reservoir. Every year, members of the community used an excessive amount of water. According

to the report, published by the Division of Water Resources of the Department of Public Works, the state of overdraft, which meant that the safe yield has been breached, lasted from 1913-1914 to 1934. In years 1934-1935 and 1936-1937 the level of water remained stable, just to decline below the safe yield, that is the level required to supply water to the landowners (*City of Pasadena v. City of Alhambra* [1949, 922]). The safe yield was estimated at 18,000 acres of water drafted annually from the Raymond reservoir. Meanwhile, the actual average annual draft from the reservoir was estimated at 24,000 acres, which resulted in a 6,000-acre overdraft (*City of Pasadena v. City of Alhambra* [1949, 922]). The city authorities realized that the water supply for the city may soon be in danger. The issue is not a novelty in California. Even today, the problem of proper irrigation and the search for new sources of water remain key issues for the Californian communities (The Atlantic 2016). The problem has not been solved by the construction of the huge Colorado River Aqueduct, built as a part of the New Deal. In the mid 30s, the community was faced with a question how to avoid a disaster. A few years after the court ruling, E. Ostrom witnessed an efficient system for governing the common reservoir. The young researcher was fascinated by the community's ability to maintain a constant, optimal level of ground water, despite the harsh climate and geological conditions. It turned out that the success was based on an agreement, established a few years earlier by the members of the community. The agreement however, came into full effect only after being confirmed in the course of legal proceedings. At the core of the solution was a legal dispute on the complex network of rights regarding water, applicable in the state of California. Accepting the agreement, established by the community, was only possible through a revolution in the judicial practice. The precedence, which emerged in the *Pasadena* case, had a significant impact not only on governing the commons, that is the Raymond reservoir, but also in regard to the legal basis of using water in California.

As a matter of fact, the agreement of the community using the Raymond reservoir was based on re-formulating the legal rights of the users. The city of Pasadena initiated the legal proceedings with an amicable resolution in mind. In other scenarios, the court would be forced to establish the priority and the nature of the rights to the reservoir for each party involved. The reluctance towards any form of amicable solution was expressed by the biggest tycoon in the community, the California-Michigan Land and Water Company. It was a company, which was responsible for, among others, supplying water outside of the Raymond community. In the 20s, the company acquired a significant amount of land around the reservoir, therefore claiming the right to draft a considerable amount of water. The process of land acquisition began in 1911, when the company bought 171 acres of land (*City of Pasadena v. City of Alhambra* [1949, 941, J. Carter dissenting]).

At the day of the trail, 10% of this land was exclusively owned by Cal-Mich, but the company also reserved its right to the water on the remaining part (*City of Pasadena v. City of Alhambra* [1949, 941, J. Carter dissenting]). A quarter of the water drafted by the company was distributed within the Raymond Basin community and three quarters were sold to other communities. It was the dynamic activity of the company, which led to the constant decrease in the level of water in the reservoir. At the end of the 1918-1919 period, Cal-Mich drafted 370 acres per year, out of which 284.25 acres were sold to customers outside the Raymond community. In years 1923-1924, the company drafted 403 acres of water. Before 1928-1929, the company was constantly raising the water draft, up to 521 acres per year. In 1933-1934 the company forced its rights to 390.75 acres which, together with 130.25 acres, added up to a sum of 521 acres. Starting from 1937, which was the beginning of the legal proceedings initiated by the city of Pasadena to establish the water rights, Cal-Mich increased the water draft. In 1938, the company drafted 613.12 acres, in 1939 – 618.73 acres, and in 1940 – 626.06 acres. In 1941, there was a temporary decrease in the draft, to 578.88 acres, but in 1942 and 1943 the draft increased to 701.30 and 866.60 acres respectively (*City of Pasadena v. City of Alhambra* [1949, 941, J. Carter dissenting]). Ever since the company began its activity in the region, it drafted more water than the amount indicated by its overlying rights. It comes as no surprise that the company was on its own in the dispute against all other members of the community, who participated in the agreement and constituted the majority of citizens: the city of Pasadena and 26 other participants (*City of Pasadena v. City of Alhambra* [1946]). The trail court established that the claims of all parties using the Raymond reservoir, amounted to 25,608 acres of water, with the safe yield of 18,000 acres (*City of Pasadena v. City of Alhambra* [1949, 922]). Those who did not enter the agreement or were not parties to the legal proceedings, were entitled only to 340 acres per year. This indicates a strong position of the parties involved in the trial and further confirms that those, who have not entered the agreement, had a much weaker position in comparison to Cal-Mich (*City of Pasadena v. City of Alhambra* [1949, 922]). The trial court decided to limit the water rights for everyone, including Cal-Mich, to 359 acres of water per year (*City of Pasadena v. City of Alhambra* [1946]). The company turned out to be the only party appealing against the ruling of the trail court and taking the case further to the Supreme Court. The court confirmed that the agreement was the right solution and obliged everyone, including the appealing party, to follow the ruling of the trial court.

The essence of the solution, which was supposed to guard the common resource, was the process of reformulating the existing water rights. There are three basic types of rights to ground water, recognized in the Californian law: the overlying right, the appropriative right and the

prescriptive right, acquired through a clear period of continuous use for a period of five years. The overlying right matches the Riparian water right, applicable to surface water. This means that the owner of the land, located in a given basin or in an area of a reservoir, can draft ground water only to supply the land in question. The law is connected with ownership rights and is of an accessory nature. It cannot be revoked due to the lack of use, that is not drafting ground water. However, it can be revoked in a situation, in which another user drafts ground water on the basis of uninterrupted use, fulfilling the conditions of prescriptive right *City of Pasadena v. City of Alhambra* [1949, 927]. In accordance with the division accepted in the ruling regarding the *City of Los Angeles v. Hunter* case in 1909, ground water is defined as the water which reaches the ground and accumulates in an aquifer, which is an underground water reservoir. Surface water is referred to as the water, which flows on the surface, or under the surface through surface material, as well as the water flowing under the surface in known and definite channel. The most recent regulation in the state of California defines ground water as follows – *Sustainable Groundwater Management Act of 2014* (with 2015 Amendments): *10721 (g)"Groundwater" means water beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels.*

Nonetheless, since the ruling from 1899 in the case of *Los Angeles v. Pomeroy* (124 Ca. 597), it is assumed that all underground water is percolating ground water. The right of the land owners is limited to reasonable and beneficial use of ground water. The requirement of reasonable use of all types of water was included in Article 10, section 2 of the Constitution of the State of California in 1928 : *It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare (...).*

Moreover, the rights of the owners to draft ground water from under their land are correlative in nature. This means that all users, drafting water from a given basin, are taken into consideration when establishing reasonable water use. It is clear then that the amount of water that a user can draft changes according to the natural conditions. Each land owner is entitled to the amount of water, which would not deprive other users of water. In times of water shortage, the land owners will have to decrease their draft proportionally. It is worth mentioning though, that the correlative doctrine of

the rights to water, granted to land owners, appeared no sooner than the beginning of the 20th century. The Supreme Court of California, in the ruling regarding the *Katz vs. Walkinshaw* [1903] case confirmed that the absolute ownership right, established through common law, is no longer in effect. The doctrine, based on the work of W. Blackstone, formulated in the European *ius commune* by Accursius, who was inspired by a text of a Roman jurist Paulus, stated that the right of the land owner extends from heaven to hell – *Cuius est solum eius est usque ad coelum (et ad inferos) – (*Sax 2002, 281-282). According to the common law, in California, the land owner could use the water under his land without limits. In reality, unfolded to the Supreme Court of California in the case of *Katz vs. Walkinshaw*, the land owner sued his neighbor for excessive drafting of water, which led to the depletion of his own well. The court indicated that all land owners are obliged to use ground water in a way that will not deprive other users of water. By doing so, the court introduced the rule of correlation in regard to overlying right, granted to land owners. As the next step, in 1911, the state lawmaker established that all water in California belongs to the people and it is only the right to pump and use water that can be granted and revoked on a legal basis – Cal. Water Code §102: *All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.*

Given this state of the law, it became clear that the legal doctrine focused on the differentiation and interpretation of the limited property right regarding water draft. Using water located under a land owner's property was limited on the condition of rational and correlative use of the resource. As indicated by the ruling in the *Pasadena* case, the ground water present under the property of overlying owners is treated as common good. As a result, each owner is obliged to use the water up to a limit, in the periods when the reservoir cannot supply enough water to fulfill the needs of all land owners *City of Pasadena vs. City of Alhambra* [1949, 926].

The appropriative right is granted through drafting ground water for reasonable and rational reasons. The appropriative right is effective only in regard to the surplus of water, considering the needs indicated by the overlying law. Therefore, the appropriative right allows a user to draft water, which is not needed to fulfill the needs of a land owner. As a result, appropriative right is a right to a defined amount of water. It is not based on the right to the property, from which the water is drafted. Furthermore, the water does not have to be used in the place where it was drafted (in the basin or around the reservoir). Owing to this fact, the water can be exported and sold outside the area of a given reservoir. The law is based on the actual use. Following the „use it or lose it" rule, a user who ceases to draft water for a period of few years (five years in California), can lose the appropriative right. Another rule governing the appropriative right is the „first in time, first in right" rule. A well

know Roman legal maxim in Californian law states that the priority to draft water is granted based on the date of first use. The person, who was the first to draft water, has the right to draft it before other users. Despite that fact, the first person has to make way to the land owner with the overlying right.

The appropriative right can become a prescriptive right. It can be granted to the users, who started to draft water later, as long as the use is continuous and uninterrupted for five years (according to the Californian law) and against the person with the right to draft water – the land owner *City of Pasadena vs. City of Alhambra* [1949, 926]. This way, they can gain equal priority to draft ground water, as the person against whom they are drafting. This can happen against the appropriative users, or against the land owner, that is the overlying owner, who did not try to stop the violation of his right to draft water. Two conditions have to be fulfilled, in order to turn the appropriative right into the prescriptive right. First, the actual process of drafting water has to be adverse and hostile *City of Pasadena vs. City of Alhambra* [1949, 926]. The hostile nature of drafting water is indicated by the excessive use of the reservoir, when the draft exceeds the amount supplied to the reservoir. This condition is referred to as overdraft and it can result in the depletion of the water resource. Enforcing the right to draft water is not possible when a surplus of water, the amount left after fulfilling the rational and reasonable needs, is drafted *City of Pasadena vs. City of Alhambra* [1949, 926]. Prescriptive right can only be enforced only in times of a general water shortage. In the event of an "excessive use", all users are obliged to reduce the amount of drafted water. The first to limit, are the users with the appropriative right only. If the shortage persists, the land owners have to limit their use as well. Given such a situation, if the user with the appropriative right continues to draft water in a continuous and uninterrupted manner for five years, he has a chance to enforce his prescriptive right to water, thus gaining the priority equal to the land owners. A second condition must be fulfilled in order for this to happen: drafting water from a reservoir with an insufficient amount of water has to be open, notorious and under claim of right *City of Pasadena vs. City of Alhambra* [1949, 926-927]. It means that all other users of a given basin are notified of a decrease in the level of water in the reservoir. The notification can be direct in nature, based on factual evidence of an excessive water draft. The condition is fulfilled when there is an observable decrease in the level of water or in the ground, where water is accumulated. The notification can also be of an implied nature, when users should be aware of an overdraft based on common knowledge. If the aforementioned conditions are fulfilled, a user, who is drafting water uninterruptedly for five years under these conditions, may enforce his right to draft. As a result, during the period of prescription, whenever the water level changes, there is no possibility to

establish the prescriptive right to this water. For example, if after two years the drafted amount evens out with the supply, or the supply exceeds the amount of drafted water, the overdraft is gone and, as a consequence, the main condition for enforcing the right to the water remains unfulfilled. The user can still claim water on the basis of the appropriative right. Therefore, if the supply of water declines again and the reservoir will be in the state of an overdraft, all users will be obliged to reduce their draft. The users with the appropriative right will be the first to reduce and the owners with overlying rights will be the last.

In this legal order, the users of the Raymond reservoir set out to resolve the situation, in which, according to the trial court, preserving the way in which the water was drafted, could lead to an irrational reduction of the level of water and eventually, to the depletion of the reservoir and the destruction of the natural resource irrigating the area *City of Pasadena vs. City of Alhambra* [1949, 922]. The community comprised both of the land owners with the overlying rights and of users, who drafted water based on the appropriative right. Finally, among the community, there were surely users, who enforced their right to draft water. Solving the case in the course of legal proceedings would require granting each user a certain kind of right. As a result, the appropriative users would be the first to reduce or stop drafting water. Then, it would be necessary to examine which of the users fulfill the condition allowing the enforcement of the right to draft equally to land owners with prescriptive rights. The court used the term “wrongful taking”, which it declared synonymous with fulfilling all the conditions necessary to acquire the right to draft through prescription *City of Pasadena vs. City of Alhambra* [1949, 925]. The legal proceedings involving the city of Pasadena, the majority of users of the Raymond reservoir and the California-Michigan Land and Water Company proved to be a challenge, due to the system of property law regarding ground water, which existed in the community. Not only did Cal-Mich draft water for its own purposes, but also exported the water to users outside of the Raymond community. The company evaluated that a quarter of the drafted water comes from overlying rights. The remaining three quarters would be then attributed to appropriative rights or prescriptive rights. Using the water outside the community, beyond the rational use of the owner, is either a surplus or a hostile draft in an overdraft situation.

The agreement between the members of the community was an acknowledgement of the fact, that the rights of all members are equal in priority. Therefore, every member declared a proportional decrease in the draft, in order to preserve a safe level of water in the reservoir. The full scope of the right to draft water was established according to the number of acres of water drafted by the community in a recent period. The law reduced the draft to two thirds of the original level.

The only objecting party was the California-Michigan Land and Water Company. The reduction stipulated by the agreement would reduce the draft below the level necessary to supply the clients outside the Raymond community. The company indicated that its rights have to be preserved because of the priority it gained towards other users.

Was the court right in establishing the scope of right to draw water and in dividing the obligation to reduce draft proportionally between all the users? The agreement breached all the existing rules of law and after being confirmed by state courts, it revolutionized the law. Although the agreement allowed the problem of the Raymond reservoir to be solved, it would not necessarily be a good solution in other circumstances. Therefore, the Supreme Court had to amend the solution of the *Pasadena* case in a new case, which was brought up in the 70s – *City of Los Angeles v. City of San Fernando* [1975].

In *Pasadena* case, the legal status of the three types of eligible water users has been equalized: those who have overlying, appropriative or prescriptive rights were given the same priority on the basis of „mutual prescription" doctrine. The possibility of introducing such a fiction was limited to the situation of drawing water in a state of shortage of groundwater reservoirs. In fact, however, in California such situations are often encountered. The solution used in the *Pasadena* case poses a major risk to property owners. Their right could be equated with the rights of people who actually collect water and are on their way to prescription, which would mean that the owners would have to proportionally reduce the amount of water pumped out. The ability to use the Pasadena doctrine has been particularly disadvantageous for public entities - cities - which most often have ownership rights to groundwater.

Possible restrictions on the use of groundwater would result in the need to import water and increase public spending. It is worth noting that shortly before the start of the Pasadena process, that is, in 1935, an amendment was introduced to the California Civil Code, which guaranteed that no use by a "person, firm or company" of rights, including water rights can lead to their prescription against the city or the county. In the Pasadena case the center of the dispute was the collective prescription of rights against each eligible person, including both public and private entities. The decision was based on a settlement in which cities and other public entities voluntarily agreed to limit their water rights. The only dissatisfied was the private company. Thus, in the light of the judgment in Pasadena case, a public body may itself agree to limit its water rights and may, without prejudice, exercise its water rights vis-à-vis private parties.

The acceptance by the Supreme Court of California of an agreement between the Raymond Basin parties made prescriptive rights equal to overlying rights. Due to the fact that the court

adjusted the allowances of all water users taking as the starting point the highest amount of water pumped out over the five year period of overdraft, the "race for water" began. Now anyone using groundwater has had an interest in increasing the amount of water taken to get a better starting position when judging the amounts due. Undoubtedly, this effect was the complete opposite of the agreement that the community carried out around Raymond Basin. What worked there, because worked out jointly, in other areas led to the irrational use of groundwater. Users of other water basins, however, began to think that they would apply exactly the same rules as in Pasadena.

Similar concerns were also expressed by cities and public bodies who, for the sake of certainty, also began to participate in this race, not wishing to lose their rights to the number of acres of water they needed. Probably this was the basis for the amendment of the Civil Code in 1968, when section 1007 extended the scope of public bodies protected against deprivation of their water rights by way of prescription. In addition to city and county, the term "state or any public entity" has been introduced, thus extending the catalog of protected public entities. The *San Fernando* judgment in 1975 was a novelty in the interpretation of this section of the California Civil Code. The court found that the term "any person, firm or corporation" also included municipalities. So, the court found in the *San Fernando* case that public entities cannot acquire by prescription the water rights against other public entity. The California Supreme Court in the *San Fernando* judgment distinguished the facts of the case from the one in *Pasadena*. This allowed him to limit and reform the doctrine of "mutual prescription" water laws. The reform concerned primarily the right of public entities - cities.

First, the court found that the doctrine of "mutual prescription" could be applied to public entities only with their explicit consent. Thus, it boils down to an agreement between private and public entities on the reciprocal limitation of the amount of water pumped out. Second, the court changed the understanding of water shortage - overdraft. It does not stop if there is a temporary addition to the basin level or even a surplus, as evidenced by the difference in water absorption from the ground and the smaller losses in the water circuit. Deficiency occurs when more water acres are pumped out than safe yield plus any temporary surplus of water. Naturally, the extension of this definition is relevant for counting the time of prescription of water right and fulfilling the premise of hostile draft. Extending the scope of the definition of overdraft has made it necessary to pump out the amount of water that exceeds not only the safe yield but also the level of temporary surplus. This, in turn, contributed to a more intense race for water, in which it became essential for all to have so much use of the basin, so that there was no doubt that the state of overdraft would remain unbroken for five years.

Third, the court changed the way of understanding the next requirement of the prescription of water rights, ie the awareness of other people entitled to take water during the overdraft. According to *San Fernando* judgment the way to fulfill requirement of a notice is more difficult than in the *Pasadena* case. The mere fact that the water level falls or the ground is lowered due to the excessive loss of groundwater is not enough. Now it must be given a notice of the state of deficiency. This meant that at the time of the judgment, the user would have to meet this requirement by providing other eligible persons with appropriate studies confirming the current state of the basin. On the one hand, the *San Fernando* court has refused to apply the *Pasadena* doctrine, arguing that, unlike the situation, the city here did not agree or conclude an agreement that would allow water rights to be shared. In this way, the Supreme Court has reverted to the prior doctrine of overlying and correlative water rights. On the other hand, he pointed out that in every situation the parties should work out the actual way of using water, which may deviate from obtaining certain rights before the court - so called *physical solution*.

However, in cases where there are only private parties, the *Pasadena* decision and the prescriptive doctrine created there continue to apply. The obligation to work out "the physical solution" is, however, imposed in disputes between private and public entities, or between public entities. This was settled in the 1990 issue of Mojave Basin. The City of Barstow and the Mojave Water Agency have initiated court proceedings in which an agreement was reached between the majority of users of the water body. They entered negotiations to determine how to manage and limit the water pumped out. 80% of all users of Mojave Reservoir agree to waive prior water rights and to establish a new way to use the water pool - the physical solution. The court asked the question whether those who disagreed with the terms of the agreement could retain their existing powers to collect water. In a 2000 judgment, the Supreme Court of California confirmed that resource users could enter into an agreement in which they waived their existing rights and created a new way of managing water intake. Self-management has thus become a legacy of the *Pasadena* judgment and a confirmation of the current involvement of the community in commons management.

On the other hand, the court found that such an agreement could not deprive the right to collect water that landowners owed to - and thus maintained overlying rights. Owners who have not entered into negotiations may continue to collect water, either surface or ground water, but only to a reasonable and beneficial use for land use in the Mojave Basin. The Supreme Court of California maintained both the doctrine of *Pasadena* and *San Fernando*, recognizing the merits of distinguishing both precedents. In the *Pasadena* case, advocating the doctrine of ownership would

lead to the deprivation of water by many temporary users of the resource. In the *San Fernando* case, the issue was not about the priority of water rights, but how much of it was eligible.
If the court applied the "mutual prescritpion" doctrine, it would prevent the use of the reservoir by temporary users. In the Mojave Basin, the court established that by promoting the physical solution, based on an agreement, the fundamental overlying rights should not be violated, unless the owners themselves allow the existing rights to be changed.

A major change in the water law of California was introduced 100 years after the first regulation for ground water use. The Sustainable Groundwater Management Act was introduced in 2014. The act introduces an obligation for cities, counties and water districts to create management plans for ground water reservoirs. The aim is then to create factual plans for water use, in order to to preserve reservoirs and to ensure rational water use. The time perspective for such plans is 20 years. During that time the level of water should be stabilized and further water shortages should be prevented. Communities are encouraged to take preventive action in the scope of water management. This is enforced through penalties and by granting the competence to create water management plans to state agency. Nonetheless, the issues regarding water rights will still be resolved by courts. The 2014 act has been criticized on the basis of the fact that the management plans are in conflict with the rights of community members and will have to be settled in court as well. The act does not propose an alternative mean of settling disputes by negotiations or agreements. The reform of the civil law procedure in 2015 alleviated the problem to a certain extent. The reform introduces a special legal procedure, in order to settle issues in a cheaper and faster way. Without a shadow of doubt, the new reform introduces a deeper intervention of the state in the existing rights of land owners. A positive aspect of this situation, is the promotion of cooperation, in order to establish a common way of using a reservoir. The consequences of the lack of cooperation can prove costly for the society and can lead to the enforcement of an authoritative solution in the long run.

3. Polycentricity and the legal order

The beginning of Elinor Ostrom's studies has much in common with the concept of polycentricity as a way of governing metropolitan areas. In its core, polycentricity deals with the idea that only the governance through many decision centers, having limited and autonomous prerogatives, can yield better results. They should be connected with each other by a guiding set of rules, principles that should be followed. However, in practice, the decision making process should

be granted to the lower-level communities or networks. The very same phenomenon can be traced to the realm of law. The decodification process means the multiplication of centers which have legislative power – state, national, supranational, and on the other hand, the multiplication of the sources of law: codes, statutes, court decisions, executive orders, etc. Nowadays, legislators and lawyers should answer the question of how to shape the legal order and how to act within the "polycentric" legal system. The reality of a multilayered legal order should be analyzed within the perspective of the common good and community self-governance. (Blicharz 2017, 99-100)

L. Fuller, inspired by the concept of polycentricty in a similar fashion to V. and E. Ostrom, indicated that every ruling is just a fragment of a complex reality. Undoubtedly, a ruling in a case can greatly affect the families, employers, employees and other companies associated with the parties involved (Fuller 1978, 354-355). The chain of cause and effect is hard to predict for a judge, who is about to pass a verdict and get involved in a set of subjects affecting the condition of an individual. L. Fuller noticed, when analyzing the work of a judge, that the key question to be posed, is about the scope of the court's prerogative. Which cases should be solved by courts and which should be left to the free market or to the political process? How far should the competence for judging particular cases reach(Fuller 1978, 355)? Subjecting too many cases to the court, forces the judges to solve issues of high economic or political importance. As a result, in the course of the legal proceedings, the judges have to adapt a broad situational scope and foresee the impact of the verdict on parties, which are not represented in court. Owing to this, the possibility of a judge's error increases, which may lead to negative social impact, hard to predict by an individual. From this perspective, L. Fuller suggests that polycentricity is a better solution, encompassing both courts and political and economic procedure. The three modes for solving social issues are contracts, elections and adjudication (Fuller 1978, 363). According to Fuller, negotiations and political vote may yield better social results than leaving most of the decisions to judges (Fuller 1978, 399-400). The jurisdiction of a judge should be set by the level of "polycentricity" of the case in question (Fuller 1978, 398). How does the ruling of a judge influence the network of legal relations, situations etc.? Fuller gave the example of cases such as establishing the prices of raw materials by courts, deciding on the location of paintings owned by two museums and settling the payments between employers and worker unions (Fuller 1978, 394-397). In numerous cases, managerial supervision, subjecting the issue to the free market or leaving it to political methods, for example the parliament, renders much better results (Fuller 1978, 400). Fuller's remark is in conjunction with the phenomenon of the excessive political influence on courts, namely with using supreme courts to resolve social issues (Scalia 2009). Recently, in the USA, this debate was turned into a

question: which cases should be solved by the Supreme Court and which should remain within the jurisdiction of the state (Dajczak and Longchamps de Bérier 2015, 11)? The question echoed loudly when Neil Gorsuch was undergoing the scrutiny of the senate, to become a new judge of the Supreme Court. L. Fuller's postulate was based on an observation of the process of establishing the jurisdiction of court, known as justiciability (Serrand and Szwedo 2014). He indicated that the level of engagement of courts in cases of economic nature, is mostly dependent on the interpretation of legal rules. According to Fuller, the risk of leaving the decision to courts, which are not always competent to pass a judgment in a particular case, increases with a more relaxed approach to interpretation (Fuller 1978, 398). He explicitly stated that the institution of court transgresses the boundaries of its jurisdiction, when instead of formulating the rules of agreements, it begins to write the agreements itself (Fuller 1978, 404). L. Fuller recognizes three major threats for a court, which decides to solve a case so „polycentric", that the court enters an area, which should be regulated by the free market or by politics. First of all, a ruling of the court can prove ineffective, due to social reaction and unforeseen consequences. Secondly, a judge may go beyond his role, negotiate and look for a solution outside the legal proceedings, for example with other parties, which can be affected by the consequences of the ruling. The court can assume that some issues are solved and adapt a more relaxed approach to interpretation, in order to achieve a more satisfying result. Thirdly, a court can approach a complex issue in an inflexible way, prioritizing set rules above the nature of the case. It often leads to the reformulation of the problem itself and reducing it to an issue which can be solved in court (Fuller 1978, 401). These three consequences exemplify the importance of the correct classification of social issues and the importance of a broader view on the issue-solving mechanisms, which are not limited to the court room. This does not equal limiting the authority of courts, as every issue is multi-dimensional and may impact broad social circles. Nonetheless, the legal experience showcased that there are "political" cases, which became exempt from the jurisdiction of the Supreme Court, as well as economic cases, which should not be taken to court, such as regulating the prices of raw materials (Fuller 1978, 355; 361). L. Fuller uses polycentricity to show, on the one hand, the complexity of each case to be decided by a judge and, on the other hand, legal system as one of the many means to solve key issues in the society.

The idea of polycentricity was also applied in the Polish law, to analyze the role of courts in the lawmaking process (Stawecki, Staśkiewicz and Winczorek 2008). The polycentricity of the legal order is defined as a manifestation of legal pluralism (Stawecki, Staśkiewicz and Winczorek 2008, 77). It assumes that there is no central source of law, no hierarchy and the multicentric legal order ceases to be a system. Polycentricity is different from the fragmentation of the legal order in a way

that it comprises the cooperation between the lawmaking bodies, connected with each other through common rules of operation, with their competences defined in a more or less specific way (Stawecki, Staśkiewicz and Winczorek 2008, 78). The application of the idea of polycentricity in the Polish legal science leads to conclusions much different from the ones put forward by Fuller. It should serve the better cooperation of various court bodies, which is made possible through more relaxed rules for interpretation. It is often stated that the literal and system interpretation should be limited, in order to facilitate the acknowledgment of rulings made by courts, which are not officially related to each other, for example courts in different European countries (Stawecki, Staśkiewicz and Winczorek 2008, 80). This way, the idea of polycentricity, which was usually attributed to pluralism in the bodies dealing with social issues, and resulted in the ideas close to the "minimal state", federalism or subsidiarity, was applied to the institution of court (Stawecki, Staśkiewicz and Winczorek 2008, 78). In the Polish context, polycentricity served to answer the question of shaping the relations between court bodies, comprised of a complex structure of common courts, the Supreme Court of Poland, the Supreme Administrative Court and the Constitutional Tribunal (Stawecki, Staśkiewicz and Winczorek 2008, 79). As a matter of fact, it became a spark for the discussion about the polycentric nature of the governing bodies (Stawecki, Staśkiewicz and Winczorek 2008, 81). A successful cooperation between them relies on establishing a common mode of operation, which is made possible with the good will of all three branches of government (Stawecki, Staśkiewicz and Winczorek 2008).

The globalization and the Europeanization of the law are most intriguing when combined with the decodification process, which exemplifies the imperfections of the idea to create a single act, containing a set of legal tools, sufficient to settle interpersonal relations. The lack of uniform regulations on the European level unleashes creativity and forces the lawmakers to return to the fundamental rules of private law in the interpretation of national courts and the CJEU. The increasing activity of judges revives the pre-codification reality. Facing numerous sources of the law and the need to balance between terms, the interpretation becomes a kind of "surrogate of the act". Ensuring the certainty of the sources of legal knowledge is impossible, even among lawyers. What can be done though, is to ensure the certainty of the application of law, embodied by the use of the intuitively applied, western legal tradition (Blicharz 2017, forthcoming).

4. Conclusions

The examined perspective concerns the possibility of changing the paradigm of state control and state initiative towards the legislative process. What does it mean that ius is more flexible and intuitive than lex set up by a public authority? Could better effects be achieved with self-governed communities than with the centralized power system? (Blicharz 2017, 95).

The development of rights to ground water in California is a unique example of intertwining of the rights of private owners, public interest and solutions established by the involved parties themselves. The act of 1914 and the amendment to the constitution from 1928 confirmed that the ground water resources belong to the people, due to public interest. The absolute right of land owners to all things below their ground was thus limited. A tripartite division of the water rights was introduced in place of the existing solution. The owners were granted the overlying right, which was placed in the social context and should be used in a rational and beneficial way not only for the owner, but also with respect to the basic rights of neighboring owners. In the ruling regarding the Pasadena case from 1949, contrary to the tripartite division, the court confirmed the revolutionary solution. In case of a long period of water shortage, in order to preserve at least a portion of rights for all users, a mutual prescription doctrine was introduced, which equated water users in their priority. Twenty six years later, in the San Fernando ruling, the "mutual prescription" doctrine was limited to situations, in which protecting overlying rights would lead to negative social impact, defined as revoking the right to water for a large number of community members. Moreover, public entities would have to agree, in order for the rule to take effect. Finally, the so called factual use of water was allowed. This kind of water use is independent from the overlying rights to a water reservoir. In the year 2000, the Supreme Court of California established that using physical solutions cannot violate the basic overlying rights to ground water. The ruling was called the "Mojave Golden Rule". The reform of 2014 constitutes the next step: it allows the intervention of a state agency in cases where an agreement cannot be reached between local communities. In the course of 100 years, a significant shift in competences towards the state, in managing a key resource that might be depleted if used carelessly, can be observed. The history of Californian law proposes an alternative solution – self-governance of the water resource. The Pasadena ruling became the basis of E. Ostrom's study on the effective management of goods through communities. Moreover, the creativity of local owners and users led to a change in the legal doctrine of the whole state and became a benchmark, used to the present day. The change was limited in 1975, due to public interest and in 2000 it was emphasized that it cannot violate the overlying rights of owners, who do not wish to participate in self-governing. Nowadays, courts will have to evaluate if these

rights will be protected with regard to water management plans, enforced by a state agency. The most important conclusion for people involved in law, is the ability to accept economically viable solutions by the law, even though the solutions are not compliant with the legal structure. Working rules have been protected by the courts and began to be promoted in the scope of the so called "physical solution". The existing situation is even more interesting, owing to the fact that in California, which is following common law, the decodification, or at least the multicentricity of the law emerged. Besides the constitution, acts and the civil code, there is a multitude of judicial decisions based on a variety of legal doctrines, as well as the jurisdiction of the state water agency. Moreover, physical solutions, introduced by communities themselves and independent from the official sources of the law, are in effect. The multilayered structure of the regulations regarding the management of water sources allows to view the legal order as a good, which needs to be managed effectively. The success of self-government of water, which fascinated E. Ostrom, was converted into a specific legal doctrine in the Pasadena ruling. As rightly predicted by her, it was not a solution to cover all situations. The precedence caused the solution to be widely recognized and to become a binding doctrine in future cases. The narrowing of the solution to particular situations, as a result of the San Fernando ruling, further confirmed the experience of E. Ostrom. Making the courts recognize the so called "physical solutions" however, was a success. They are a permanent legacy, which is interesting in regard to the doctrine of governing the commons. Prioritizing factual solutions, established by the majority of involved parties is an acknowledgment of the successes achieved by self-governing communities and a promotion of bottom-up solutions. The unconventional granting of a wide spectrum of competence to small communities had to be included in the structure of ownership rights. The legal order clashed with the society described by Ostrom and, as a result, two limitations emerged: the protection of public entities and the protection of private owners, at least in the scope of rights to water for rational use within the area of the ground water reservoir. In essence, both limitations are a symbol of the boundaries set for local solutions: the protection of public interest, defined as preserving the supply of water for communities in cities and the protection of private property, exemplified by the right of the owner to all things below his or her property. The Californian model shows that, even if the ownership right to water is granted to the state, it does not mean that water use is exempt from the private-law regulations. The structure of various rights to ground water does not limit the owners' freedom to use water sources. Finally, the willingness to subsidiarity and local cooperation shows, that it is possible to introduce factual solutions in place of legal solutions, protected thanks to mutual trust of

the community members, which led to establishing an agreement, and thanks to the trust given by courts to local communities.

Bibliography:

Blicharz, Grzegorz 2017. „Decodification, Common Good, and Responsible Societies. Beyond the Elinor Ostrom's Theory of Governing the Commons" In *Transcendence and Love for a New Global Society*, eds. Alberto I. Vargas, Daan van Schalkwijk, Gonzalo A. Bastarreche, 91-101. Cuadernos de Pensamiento Español.

Blicharz, Grzegorz. 2017, forthcoming. „Samolotem lub pociągiem. Dekodyfikacja umowy przewozu w obliczu europeizacji i globalizacji prawa" In *Dekodyfikacja prawa prywatnego*, ed. Franciszek Longchamps de Bérier, 103-124. Wydawnictwo Sejmowe/Fundacja Utriusque Iuris.

Dajczak, Wojciech, and Longchamps de Bérier, Franciszek. 2015. „Wątpliwości co do oceny czasopisma prawniczego a spór o istotę prawa." *Forum Prawnicze* 35 (3): 3-22.

Fuller, Lon. 1978. „The Forms and Limits of Adjudication" *Harvard Law Review* 92: 353-409.

Ostrom, Elinor. 1990. *Governing the Commons.* Cambridge: Cambridge University Press.

Rodgers, William, H. jr., and Burleson, Elizabeth. 2005. *Environmental Law in Indian Country.* Thomson Reuters: Legal Solutions.

Scalia, Antonin. 2009. *Mullahs of the West: Judges as Moral Arbiters*. Warszawa: Rzecznik Praw Obywatelskich.

Serrand, Pierre, and Szwedo, Piotr. 2014. *Injusticiabilité.* Mare & Martin.

Stawecki, Tomasz, Staśkiewicz, Wiesław, and Winczorek, Jan. 2008. *Między policentrycznością a fragmentaryzacją. Wpływ Trybunału Konstytucyjnego na polski porządek prawny.* Warszawa: Ernst&Young.

The Atlantic. 2016. Accessed June 20. https://www.theatlantic.com/national/archive/2016/05/california-water/482064/

Court Cases:

Katz vs. Walkinshaw, 74 P. 766, Cal. (1903).

City of Los Angeles v. Hunter, 156 Cal. 603 (1909).

City of Pasadena v. City of Alhambra, 75 Cal. App. 2d 93 (1946).

City of Pasadena v. City of Alhambra, 33 Cal.2d 908, (1949).

City of Los Angeles v. City of San Fernando, 14 Cal. 3d 208 (1975).

City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224 (2000).

Legal Acts:

The Constitution of the State of California of 1879

The Water Commission Act of 1914

California Civil Code

California Water Code

The Sustainable Groundwater Management Act of 2014