Final remarks

Summing up the deliberations presented in this book, reference must once again be made to its title: "Creation and enforcement of financial market law in the light of the economisation of law". Its essence is contained in the last three words. They refer to the relationship that exists between law and economy, a relationship which is not indifferent to the process of creating and enforcing law.[1] This relationship has been accurately expressed by Leon Petrażycki who said: "Very odd, strange and abnormal is the condition and the relationship of two important and valuable sciences: the science of law in general and civil law in particular on the one hand and the theory of economic phenomena on the other. These two sciences, actually researching the same thing, but approaching it from different sides, do not know each other, exist separately not recognizing their mutual relationship or the fact that they share the same object of research, on the grounds of their presence fall in considerable misunderstanding."[2] This state of affairs is particularly apparent in the case of financial market law which in recent years has been growing into a separate branch of law, feeding on the legacy of public law (financial law) and private law (broadly understood civil law).

This hybrid structure is a result of the nature of the regulated matter which is very extensive and complicated and consequently requires a new philosophy on the basis of which a legal framework could be built with laws to be observed by the entities to which it applies. This philosophy is still being researched and numerous solutions that have already been proposed are of varied territorial and legal scope. The best example here is the activity of the EU's legislator. This activity, perceived as somewhat excessive, aims at regulating all the main aspects of the functioning of the European financial market. The use of the adjective "European" is rather arbitrary. What is certain is the global, supranational character of contemporary financial markets, which also means that the supervision authorities developed for these markets extend beyond national borders. What is more, these

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[1] L. Balcerowicz, *Prawo a ekonomia*, in: Ruch Prawniczy, Ekonomiczny i Socjologiczny, No 2 2006, pp. 88-93.

[2] L. Petrażycki, *Teoria prawa i państwa w związku z teorią moralności*, Vol. II, Warszawa 1960, p. 599.

supervision and control bodies are equipped with instruments of soft law[3] which until recently have mainly been present in international law, but take a completely new form in financial market law. They include recommendations, guidelines and opinions but also binding technical standards. Their "flexibility" is to be the feature that will help us to cope effectively with all the challenges of the financial market which, together with the legislator, participates in a sort of game called "regulatory dialectics" and which started together with the emerging epoch of market triumphalism to cite Michael Sandel, dating back to the years preceding the financial crisis of 2008. In Sandel's opinion, this epoch is now coming to an end because "the financial crisis not only cast a shadow on the market capabilities of efficient risk management, but also produced a universal perception that the market has detached itself from morality and now the two must be somehow joined back together. No one really knows though, how to go about it".[4]

Certainly it is law, and more precisely broadly understood financial market law, that should serve as a link here. The proposed optics requires that 'nuances' of the adopted solutions be noticed. An example will be prudential regulations which although naturally considered as elements of the public law sphere, do exercise a certain impact of the private law sphere as well. These regulations are intended to have a supervisory function over the risk undertaken by financial institutions (public sphere) which are in turn compelled to implement solutions that require the development of certain relationships between financial institutions and their clients (private sphere). Thus when talking about financial market law, a tendency that is present in this market i.e. publicisation (as well as Europeisation) is emphasized. The public law optics have largely dominated the considerations presented in this book. This was so because much deeper thought was needed and answers to many questions needed to found. What is more, some preliminary assumptions on how law is to be understood and its role in society had to be made.[5] When formulating these assumptions, the author drew on some anthropologicaI studies which

[3] Z. Ofiarski, *Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nadzoru Finansowego*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warszawa 2016, pp. 137-160.

[4] M. Sandel, *Czego nie można kupić za pieniądze*, Warszawa 2013, p. 19.

[5] A work worthy of note here is a publication which is a result of an in-depth study by P. Chmielnicki, A. Dybała and M. Stachura entitled: *Reguły działania człowieka gospodarującego w społeczeństwie jako źródło norm prawnych* (*Rules of behaviour of economic man in society as the source of legal norms*), Warszawa 2010, pp. 7-10. It commences with important questions asked by the authors, and include such ones as: How do changes that occur in the economy correlate with the creation of certain types of legal norms?; Does the number of sources of law relating to specific matters result from the principles of the legislative techniques and the political will of the decision making centre, or does it depend on the demand for specific regulations, which is contingent upon the phenomena occurring in the economy?; Is the creation of certain types of legal norms ahead of certain macroeconomic phenomena, or do the tendencies occurring in the economy come first and are followed by legal regulations adopted subsequently?; How do the principles of market behaviour and the rules according to which social structures are built correlate?

he felt particularly close to his own beliefs[6], and which have also been referred to in economic publications on the financial market, in which, among other things, two possible perspectives of perceiving the world around us have been identified: the perspective of an effective equilibrium and the perspective of the common good. According to Paul. H. Dembinski, the anthropological reference in the context of the first "is ensured by a classical *homo oeconomicus,* or in other words his grandson *homo financiarius*. The anthropological foundations of the common good are fundamentally different; the common good refers to a person not to an individual and a human being becomes a person through entering into relationships with other human beings. Thus no one, as an autonomous entity, is entirely independent of others. The self or one's self develops by constant relationship (entered into) with others."[7]

The question may of course be asked whether such an anthropological perception of law is at all possible and whether a legislator is capable of implementing the assumptions that lie at its foundations. The answer to this question shows that in fact the lack of an anthropological perception was most certainly among the reasons for the recent crisis. Numerous regulations had been adopted and enforced, but they were frequently detached from reality. They did not account for its specific features, failed to take into consideration its complexity, or, more importantly, the behavioural aspects which, as is the case of financial markets, occur on both sides, i.e. the financial institutions (or managers of those) and clients (those with less professional knowledge, in particular, consumers). Adding to that there is information overload[8] and the advancing financialization of life[9] which manifests itself in the growing presence of the financial sector in our everyday lives. And yet, as Garry S. Becker and Richard A. Posner noted. There are many "non-obviousnesses" (uncommon sense) present in the financial sector[10], and thus a new look at the process of creating and enforcing law is needed.[11]

The above observations, and the deliberations presented in this book in particular, allow us to formulate some concluding remarks, which should begin with the statement that the process of creating and enforcing financial market law must be carried out with the conviction that a financial market as part of a financial system constitutes one of the pillars of a social system. Therefore the legislator's activity ought to focus on the protection of certain goods and values that are im-

[6] See also R.H. Thaler, *From Homo Economicus to Homo Sapiens*, in: Journal of Economic Perspectives, Vol. 14 No 1 2000, pp. 133-141.

[7] P.H. Dembinski, S, Beretta, *Kryzys ekonomiczny i kryzys wartości*, Kraków 2014, p. 99.

[8] J. Fazlagić, *Zjawisko „nadmiaru informacji" a współczesna edukacja*, in: e-mentor, No 4 2010, pp. 37-42.

[9] See E. Engelen, *The Case for Financialization, in: Competition&Change*, Vol. 12 No 2 2008, pp. 111-119.

[10] G.S. Becker, R.A. Posner, *Nieoczywistości. Ekonomiczna teoria wszystkiego*, Warszawa 2013.

[11] See also D. Heremans, K. Bosquet, *The Future of Law and Finance After the Financial Crisis: New Perspectives on Regulation and Corporate Governance for Banks*, in: University of Illinois Law Review, No 5 2011, pp. 1551-1576.

portant for the society. In the case of a financial market, these goods include safety and stability, which are indispensable for the protection of the supreme value in that market (and therefore in the social system as well), which is trust. As shown in the book, this approach can be noted in the activity of today's legislator, especially the EU's legislator. In a number of EU legislative acts the importance of trust and the need to protect it is emphasised.

This need is most certainly the driving force of many initiatives whose aim, apart from protection, is the regulation of the main aspects of financial market activity. A detailed analysis of the EU legislation leads to the conclusion that especial focus has been put on comprehensive regulation of all the current and future activity of the financial market. As a result there are countless legislative acts and other forms of regulations taking the form of opinions, directives, recommendations and the like. There are so many of them that practically no one is capable of knowing them all, even in respect to only one selected segment of the market. We may thus only hope that enforcing these regulations will be still possible because recently financial market supervisory authorities being introduced in the EU are equipped with many powers, including the right to intervene in situations where such intervention had been till recently reserved for Member States only. This change has been enforced by the changing market in which international entities (e.g. financial conglomerates) started to play a dominant role, often making very risky investment decisions. As stated earlier, risk may be analysed in two ways: as a risk of a loss and a risk of potential profits. The concept of the first type, a loss risk predominates in the common conscience and it has negative connotations arising from the experience of previous crises originating in financial markets. Speaking about crises, there is a thesis expressed by Anna Kociołek-Pęksa which is worthy of mention although is not frequently heard. It states that a crisis is a necessary mechanism of meliorism. Meliorism is a situation in which, within one system, institutions and structures are not only capable of self-regulation, but owing to their considerable ability to adapt, are capable of self-improvement as well.[12] This thesis ought to be developed, proposing that law is an important factor in this self-improvement. However, "the discourse of law making cannot ignore a phenomenon such as an economic crisis. There are at least two reasons why an economic crisis plays a role in law-making: firstly, because it may be an impulse prompting (taking) legislative activity aimed at eliminating or mitigating the crisis and its consequences.[13] Secondly, because the change which it exerts in the economic, social and political conditions influences the legislative processes already implemented or planned for the future."[14]

[12] A. Kociołek-Pęksa, *Kryzys jako konieczny mechanizm melioryzmu*, in: J. Oniszczuk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, Warszawa 2010, p. 81.

[13] See A.N. Rechtschaffen, *Capital markets, Derivatives and The Law*, Oxford 2014, pp. 3-62.

[14] S. Wojtczak, *Kilka uwag o sposobie patrzenia na kryzys gospodarczy z prawniczej perspektywy*, in: J. Oniszczuk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 309.

These processes constitute an element of law which should be approached in the context of a law policy according to which law ought to be used to achieve set goals. The notion ”law policy” in jurisprudence extends on the policy of law-making as well as the policy of its enforcement.[15] Law may also be regarded as a tool serving to direct praxeologically a relationship between a regulation and the reality to which this regulation is to apply.[16] As Artur Nowak-Far has rightly noted, the problem which appears here arises from the fact that each regulatory intervention in more complex social-economic phenomena requires knowledge of these phenomena as well as of the praxeological relations between them and the adopted regulation.[17] The process of financial market regulation which refers to the law policy should be understood broadly and imply, apart from creating and enforcing law, also the axiological and sociological elements related to it. Law as a cultural phenomenon is built upon certain values and its purpose is to realise and protects these values. Values on the other hand are an inseparable element of each culture, be it moral, scientific, political or any other. In the case of a financial market, and this must be emphasized once again, trust is such a value. The essence of this value is examined in this book. (See Fig. 1).

The need for this value originated in the conviction that the notion of ”trust” so frequently referred to in legislative acts regulating the financial market is not an element requiring deeper thought. One might get the impression that trust is a universally known and understood phenomenon. However, when analyzed more deeply, it may lead to similar conclusions as those formulated by St Augustine on the notion of ”time”. In his *Confessions* St Augustine asks “What is time? If no one asks me about it, I know; but when I am trying to explain to the one who has asked, I don’t know.”[18] The same words may be applied to the notion of ”trust” which is easy to describe but more difficult to define, and even much more so to put in a framework of legal deliberations. However, as it turns out, “law as it is today, made up of extensively elaborated sets of rules and principles of behaviour, rules about granting competences to act, or determining the consequences of certain behaviours, is very strongly tied to the relationship between people and this relationship is called trust. It seems to me that this aspect of law has largely remained unnoticed by lawyers who have analysed and shaped the practice of the creation and enforcement of law as well as those who have attempted to describe, explain, understand or design such practice.”[19]

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[15] S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 1997, p. 125.

[16] A. Nowak-Far, *Wątroba Prometeusza. Kryzys jako czynnik wyzwalający prometeizm prawa*, in: J. Oniszczuk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 242.

[17] *Ibidem*.

[18] Święty Augustyn, *Wyznania*, Warszawa 2001, p. 234.

[19] T. Stawecki, *Prawo i zaufanie. Refleksja czasu kryzysu*, in: J. Oniszczuk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 117; On the relationship between social capital and trust also

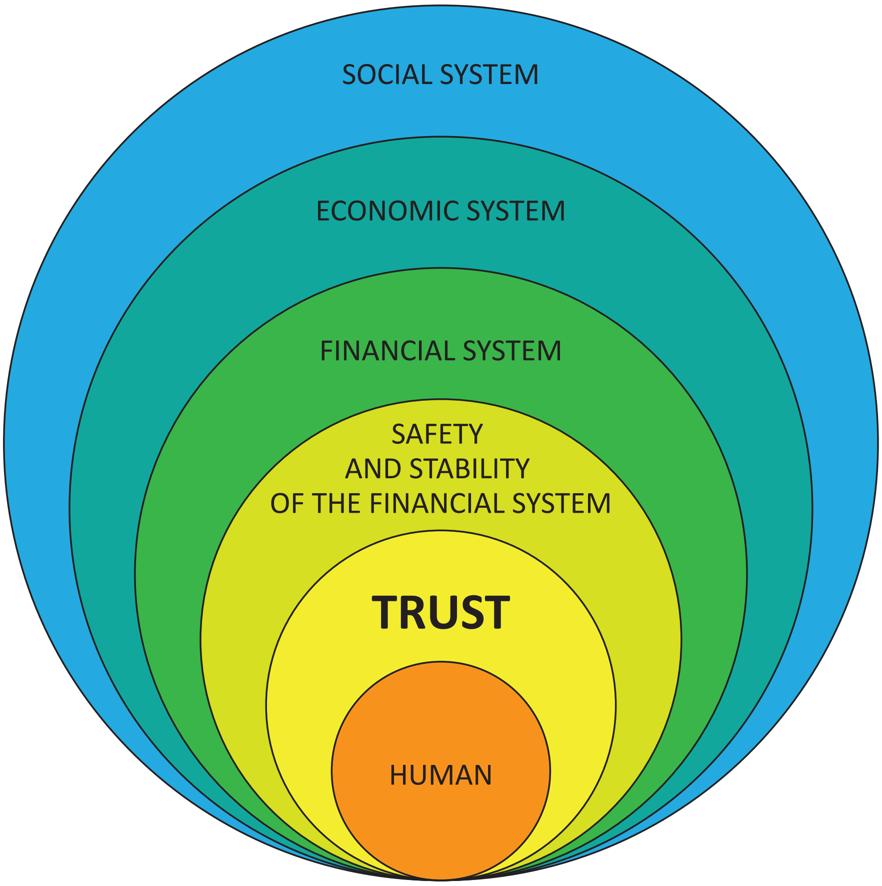

Figure 1. Trust as a fundamental value of a financial market

Source: the author's own study

Therefore, when determining the essence of financial market law by analysing values such as trust perceived as a subject of protection, as a recognized legal value lying at the basis of the process of creating financial market law, it is necessary that the legislator take into account the social and political mechanisms of a given society which are not indifferent to the law mentioned above, created in an organized and systematic manner. The functioning of these mechanisms is based on individuals who make up a given community, and those who belong to it, whose conduct, reactions and emotions have been referred to by Leon Petrażycki. Understanding these elements which among others refer to the behavioural aspects of the functioning of a human being ought to be an important part of the politics of law, and of financial market law in particular. A behavioural approach draws on the achievements of the sciences of economics and psychology and most certainly may be applied to law.[20] It is believed that behavioural economy developed as an answer to the insufficiency of using only theoretical economic models for describing empiri-

see R. Hardin, *Zaufanie*, Warszawa 2009, pp. 83-106; T. Szlendak, *Zaufanie*, in: M. Boguni-Borowska [ed.], *Fundamenty dobrego społeczeństwa. Wartości*, Kraków 2015, pp. 331-364.

[20] See also R. Veil, *Challenges for Academic Research and Teaching*, in: R. Veil [ed.], *European Capital Markets Law*, Oxford 2013, pp. 59-67.

cal discoveries. An analysis of socio-economic rules allows us to depart from the ideal of "economic man" in favour of "real man".[21] This "real man" constitutes the most important element of financial market regulation. It can be seen, for example, in the concepts of the EU legislator which, through the legislative acts passed, has led to the development of the idealistic model of a "reasonable consumer", a kind of superhero who, on the basis of information provided, makes rational decisions. In this context information is considered to be a guarantee of the values and goods of the financial market. It is obvious that such an assumption is only theoretical and there are numerous examples of legal solutions which have been analysed in this book. Such a theoretical assumption enforces a situation of information overload on the one hand, and on the other it fails to take into account the behavioural elements referred to above, and whose existence has been proved empirically.

A legislator must take into account the dynamics of the changing world but must also remain faithful to the values on the basis of which he constructs a given legal system. Thus, it must be said, to repeat once again the conclusions formulated at the end of the last Chapter of the book, that due to its characteristics as described above financial market law is certainly not an easy area of research and requires adopting, beforehand, a certain optics (viewpoint) and some assumptions. Experience as well as an analysis of the existing legislation and the doctrine have been the basis upon which the concept of this book was constructed. Further, and this also needs to be repeated again, this concept was developed based on the adoption of the thesis that the existence of contemporary financial markets is contingent upon the protection of values and goods which the legislator ensures (using new forms of regulation such as for example soft law as well as extensive supervisory systems). Fundamental goods include the safety and stability of the market, which in turn serve to protect a value in the form of trust. Trust is based on interhuman relationships (interactions).[22] Thus the road to trust leads through the understanding of human nature, emotions, behaviours and the like. This is impossible to achieve without reference to behavioural sciences such as psychology, sociology, economics or law. The latter, however, has been waiting very long for a research workshop which could subsequently be adopted by other branches of science[23]. This is particularly true, especially since the research done by repre-

[21] M. Czerwonka, *Finanse behawioralne a klasyczna teoria finansów*, in: J. Ostaszewski [ed.], *Finanse*, Warszawa 2010, p. 43.

[22] It must be remembered that trust is also an important component of authority. As analyses show, apart from personal trust there is institutional trust which builds up in situations where the whole institutional system guarantees security of transactions, contracts and other forms of activity. For more see A. Kojder, *Autorytet i zaufanie*, in: A. Kojder, Z. Cywiński [eds], *Socjologia prawa. Główne problem i postacie*, Warszawa 2014, pp. 40-44.

[23] It is necessary to develop a comprehensive and coherent theory supported by experimental research on the impact of legal norms on people's behaviour and the impact of this behaviour on the legal norms being created.

sentatives of the above mentioned sciences is (as is shown in the book) not just abstract, but the theses formulated in them are grounded in empirical studies.

This assumption has been completed with the thesis that a legislator is in fact an architect of choice, someone who gives impulses that trigger off acts that are important from the point of view of a given society. The axiological grounds will of course always be there, underlying the actions taken.[24] It is important though, that a consideration of the addressees of the norms created was always there. This is of great importance for the regulation of the financial market, which for dozens of years has been laid on the concept of a reasonable man who makes rational decisions based on information provided. The author believes that such an assumption is wrong and does not account for existing reality. Thus a redefinition of this important assumption is needed as well as acceptance of the fact that a human participant in the financial market (and a consumer in particular) must be perceived an a reasonable being who is, however, subject to emotions and not always able to control the situation, passively submitting himself to the events created by the market. He is certainly not *a homo oeconomicus* as described in handbooks, but rather closer to *homo sapiens oeconomicus passivus*, a reasonable human being but a passive one, and thus subject to a great many impulses beyond his control.

Therefore development of this relatively young branch of law, as financial market law has recently been referred to increasingly frequently, ought to be accompanied by a reflexion similar to that articulated by representatives of economics, a social science related to law. Some of them express the opinion that the classical theory of finances is based on too many simplifications and assumptions detached from reality, which undermine its cognitive value and hinder its practical application by financial market participants.[25] "It seems that one of the greatest simplifications occurring in the classical theory of finance, with far-reaching cognitive, methodological and practical consequences, was the assumption that all financial market participants are fully reasonable human beings (*homo oeconomicus*). Too much emphasis was put on normative issues ("what it should be") at the cost of descriptive aspects ("what it really is"). In consequence, the actual behaviours of investors in the market as well as the functioning of the whole market at the aggregated level remained not fully understood."[26] This observation, when made

[24] On the dependencies between a legal system realistically approached and its determinants and on explaining it conception of axiological neutralization of values in law, see": K. Pałecki, *Neutralization of Values in Law – Main Concepts*, in: K. Pałecki [ed.], *Neutralization of Values in Law*, Warszawa 2013, pp. 22-59.

[25] A. Szyszka, *Systemowe zmiany na rynkach finansowych a poszukiwanie adekwatnej teorii finansów*, in: W. Frąckowiak, J. Szambelańczyk [eds], *Ku nowemu paradygmatowi nauk o finansach*, Uniwersytet Ekonomiczny w Poznaniu, Zeszyty Naukowe No 144, Poznań 2010, pp. 98-103.

[26] M. Czerwonka, J. Ostaszewski, M. Rzeszutek, M. Walczak, *W poszukiwaniu mainstreamu w dyscyplinie finanse*, in: J. Ostaszewski, E. Kosycarz [eds], *Rozwój nauki o finansach. Stan obecny i pożądane kierunki jej ewolucji*, Warszawa 2014, p. 25.

in respect of making and enforcing financial market law, means that this market ought to be grounded in the axiological context in which not only the human factor is accounted for, but also the role of financial markets in economic development, and therefore society. These markets have been stigmatized so often (although at times at their own request) but they are indispensable as a source of capital, an account settlement site, or a centre of innovation which contributes to the development of new investments, even if frequently difficult to understand and risky. Hence the legislator's role to regulate the matter in such a way that it ensures its stable and safe development, and thereby help to maintain the trust in the whole system. This role, however, must have a realistic function, among other things by initiatives undertaken to shape certain behaviours, for instance promoting education leading to increased financial awareness. Being an architect of choices, a legislator must send impulses to the addressees of norms. The nature of these norms and behaviours that they trigger (researched by behavioural scientists) must also be accounted for in the legislation created and by those who apply the regulations adopted. Behavioural concepts constitute a helpful tool for explaining the behaviours of a human being and the decisions he makes in legal contexts, as the latter are influenced by law and must also account for human behaviour. There are still many exciting issues to be researched, topics to be discussed and other challenges before researchers in financial market law who will have to collaborate with scientists representing other branches to develop new theories and research methods. This task is a real challenge and must be treated as confirmation of the thesis that law is dynamic, focusing first and foremost on the present and the future (*lex prospicit, non respicit*), although it may, and at time it must draw on the heritage of the past, as shown in Petrażycki's ideas which, it seems, owing to financial markets and their regulations, has been brought back to life.