JERZY ZAJADŁO

MINIMA IURIDICA

(Reflections on Certain Legal (Un)commonplaces)

Wydawnictwo Uniwersytetu Gdańskiego

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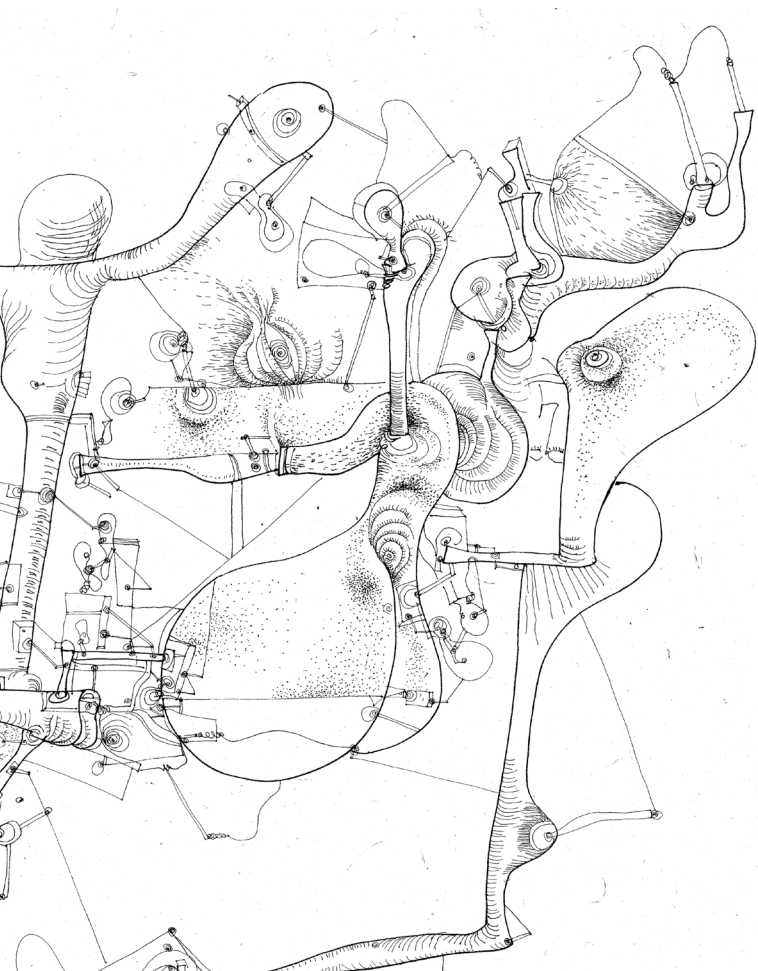

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(Reflections on Certain Legal (Un)commonplaces)

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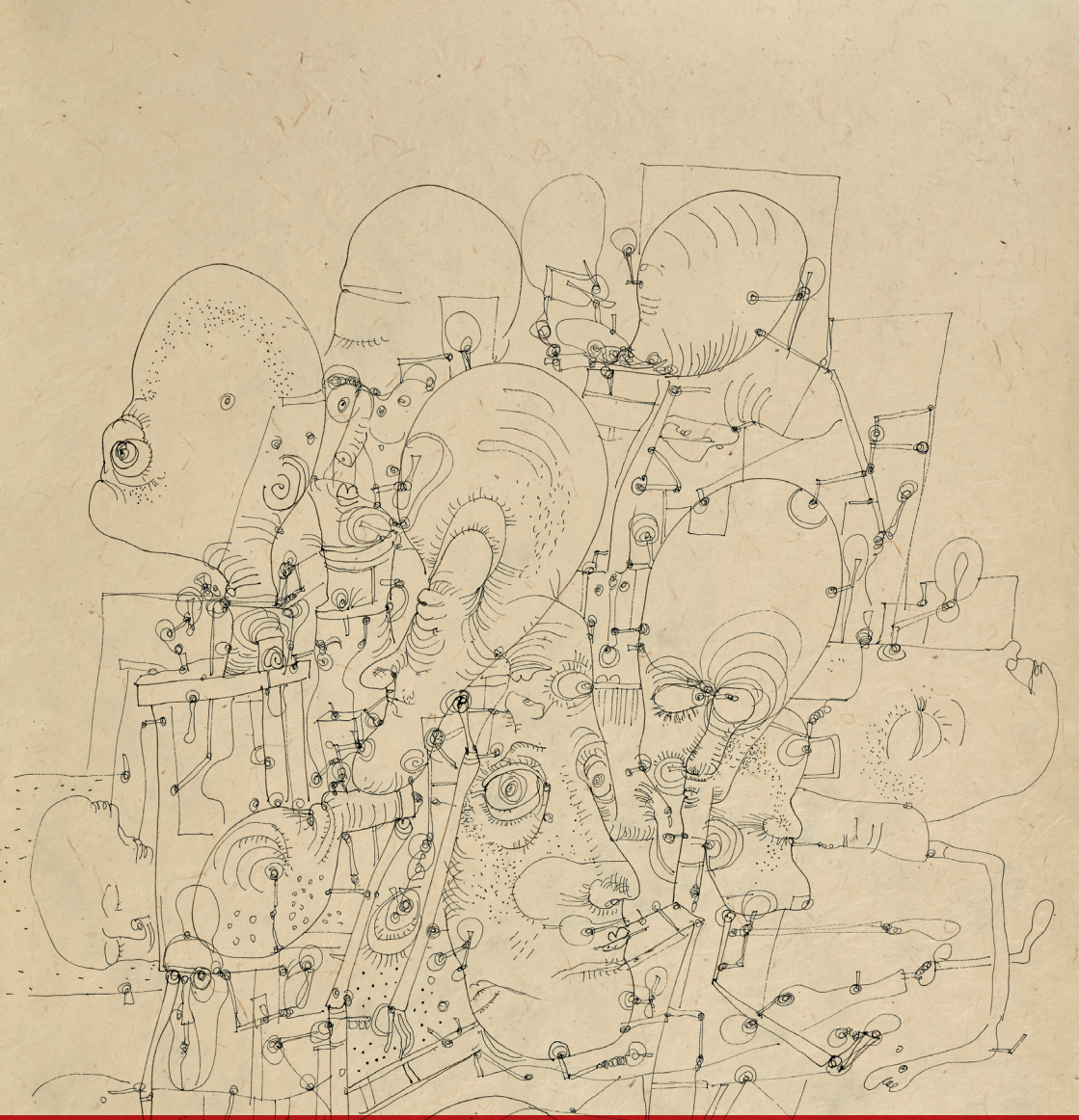

Foreword

The title of this book refers, of course, to Theodor Adorno's well-known study,[1] even though some may find that very reference to be going too far, to be completely inappropriate, and, thus, quite unjustified. However, it is only a paraphrase of sorts, a play on words, a stimulus to the author's imagination, reflection, and association called up by the German philosopher's title – and nothing more than that. Beyond those, there are no links in terms of content. When I first came across Adorno's text, *minima moralia* suggested to me an elementary morality, and only later did it become clear that Adorno's book is about something quite different. But my first association stuck and became an inspiration for the following book. In Adorno's text, the concept of *minima moralia* relates to form rather than content; in our discussions here, it relates to both – to short forms (*minima*) about basic legal issues (*minima iuridica*).

However, although Adorno's book is very pessimistic and dealt with "Reflections from a Damaged Life," my book has been intended right from its conception to be optimistic and it comments on "legal certainties" that are embodied in well-known Latin sayings. Just to be sure, I have placed the suffix "un" in parentheses, because life shows us that these certainties, these commonplaces, are not so certain for or common to all jurists, although they should be. Both titles are linked by an

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1 T. Adorno, *Minima Moralia. Reflections on a Damaged Life*, trans. E.F.N. Jephcott, Verso, London – New York 2005.

idea awakened in the author's mind: just as trampling on moral minima (*minima moralia*, although in Adorno's writing this phrase of course has a completely different meaning) may result in a damaged life, so, too, violence done to legal certainties and commonplaces (in this book, the phrase *minima iuridica* means precisely this) may sooner or later end in a damaged law.

The best evidence for the possibility of combining *minima moralia* with *minima iuridica* so conceived is offered in a symbolic sense by the famous short story by Louis Aragon *Le droit romain n'est plus* (Roman Law Is Dead and Gone), but, on the other hand, by the well-known poem by Mieczysław Jastrun *Z pamiętnika byłego więźnia obozów koncentracyjnych* (From the diary of a former prisoner held in concentration camps).[2] Aragon's text does this in a symbolic manner because in its encounter with Nazi barbarism, Roman Law did, in reality, cease to exist for a short time, but that is only a poetic metaphor. In fact, with all its humanist message embodied in Latin legal maxims, it never ceased to exist nor will it ever cease to exist.

In the consciousness of contemporary jurists, Latin has survived mainly by virtue of the short maxims, phrases, turns of speech, terms, and concepts. Thanks to the specific rhythms of Latin, they appeal to our ears and captivate us with their succinct and synthesizing qualities; at the same time, an exceptional

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2 M. Kuryłowicz, *Symbol prawa ludzkiego. Szkice o prawie rzymskim w utworach Louisa Aragona i Mieczysława Jastruna*, Wydawnictwo UMCS, Lublin 2008.

philosophical-legal wisdom accumulated over centuries often speaks through them.[3] Perhaps we do not know in detail the contents of all Cicero's works, letters, political and trial speeches, or of the extracts from the *Digest* (*Pandects*) containing the views of Gaius, Paulus, or Ulpian, but, nonetheless, we often quote them in contemporary legal discourse: their message seems in many cases to be universal and beyond time.

It is worth looking closely at many of them if only to understand their meaning, both the sense in which they were originally used, and that in which we apply them today. These will not always be the same, because each of these maxims or phrases was formulated in a specific historical, political, legal, and social context, but, just the same, long ago they broke away from those contexts and started to live a life of their own. In several cases, the contemporary meaning differs substantially from the original one. The fact that they are, however, still present in contemporary legal discourse is best witnessed by the frequency with which they turn up, for example, in the activities of the Advocate General and the European Court of Justice.

But there is an example that is better and closer to Poles. On the pillars that surround the building of the Supreme Court (*Sąd Najwyższy*) in Warsaw, there are eighty-six Latin

[3] Of course, this legal and juridical wisdom accumulated over centuries goes beyond maxims and embraces Roman law and Roman jurisprudence in broad terms, including legal philosophy and the philosophy of jurists; T. Giaro, *Römische Rechtswahrheiten. Ein Gedankenexperiment*, Vittorio Klostermann, Frankfurt am Main 2007.

inscriptions. A decided majority of these came from the *Digest* of Justinian, and so their authors were Roman jurists, mainly from the classic period. Some of the maxims (*regulae iuris*)[4] derive from other sources. Their presence there is not arbitrary or a matter of chance, because all (and many others too) embody a legal wisdom accumulated over centuries, and, thus, are *minima iuridica* in the sense we have adopted here. When as jurists we cross the threshold of a Polish court, and not just of the Supreme Court, we should do so along with them. And that basically is what this book is about.

We hope that the book will encourage jurists to read further and to continue to enrich their language with the philosophical-legal wisdom contained in numerous Latin maxims and expressions. It is an exceptionally interesting matter that contemporary medical persons and jurists are members of the only professions that in their current activities still use Latin concepts, turns of phrase, and maxims. The only exception may be priests, but in this case, we are dealing not just with a profession, but with a vocation. It is also typical that for some time in both medical and legal circles there are stormy discussions on the subject of extirpating Latin from the contemporary professional language. Below, I attempt to justify my conviction that, as least to some degree, this is not, to my mind, an

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4 *Regulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej*, ed. W. Wołodkiewicz, 3rd ed., Wydawnictwo C.H. Beck, Warszawa 2010.

appropriate or desirable tendency. Perhaps jurist understand this matter better than medical people: although Latin is gradually vanishing from medical studies programmes, and is being replaced by a specialist English, in legal studies there is a renaissance not so much of Latin but of Latin legal terminology. In the case of medicine, this is quite surprising since many Latin maxims stress the close link between medicine and philosophy. On one hand, *Medicina soror philosophiae* (Medicine is sister to philosophy); on the other, however, *Medicus philosophus est, non enim multa est inter sapientiam et medicinam differentia* (The doctor is a philosopher; there is no great difference between wisdom and medicine).

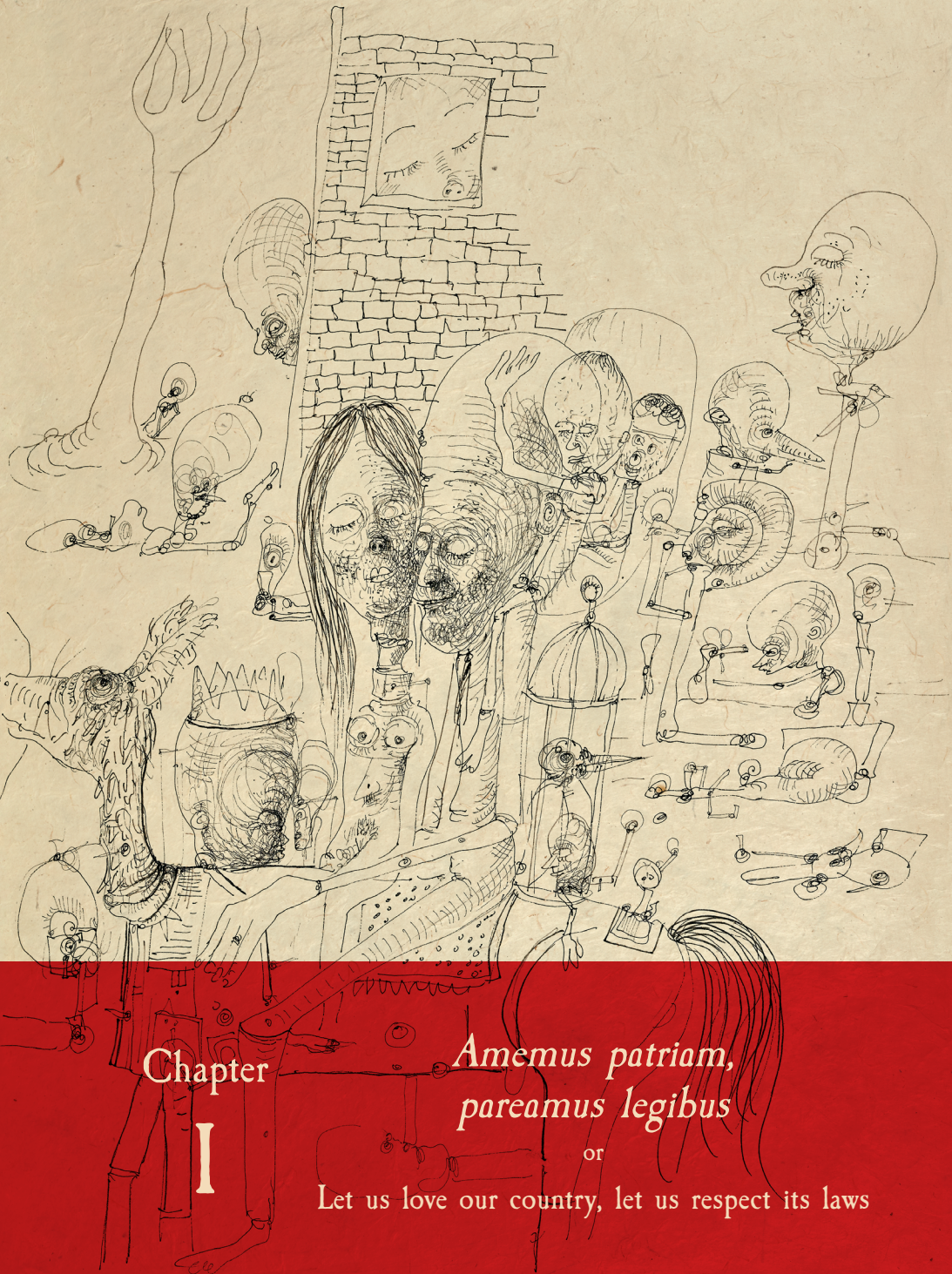
In both professions, Latin fulfils two basic functions: firstly, an instrumental function – since it should be not just a rhetorical embellishment, but rather part of professional skills in the shape of concepts, terms, expressions, etc., which create certain linguistic codes that facilitate communication among medical people and jurists; secondly, a humanist function – since many maxims express wisdom that creates an ethical framework for the medical or legal profession that is universal and beyond time.

Not long ago, the immanent link between Latin and medicine was still resolutely maintained, since one of the first sentences in any lecture to medical students was the maxim *Nulla est medicina sine lingua Latina* (There is no medicine without Latin). In fact, in legal studies there is no direct equivalent of this sententia, although there is no doubt that jurists employ Latin to the same degree as medical practitioners. What

Hippocrates was for doctors, Ulpian (the Roman jurist from the second century CE) was for lawyers. The Romans had a rather distanced stance towards philosophy, and, in fact, the one philosophical school that had a substantial influence on the thinking of many Romans was Stoicism. Figures such as Cicero, Seneca, and Mark Anthony were Stoics *par excellence*, above all in the sphere of ethics. Ulpian was also influenced by Stoicism and, thus, many of his maxims have a profound philosophical dimension, especially a moral one. Envying medical practitioners the maxim *Nulla est medicina sine lingua Latina*, I decided, as a jurist and a philosopher, for the purposes of this study to play the Ulpian a little and to propose the following sententia: *Nulla est iurisprudentia sine latina sapientia* (There is no jurisprudence without Latin wisdom).

Thus, this book is ultimately in a sense a collection of essays, in which each essay is independent and different in length. This was partly determined by the material that they relate to. Latin maxims and expressions are not uniform. Some are purely technical and relate to basic legal skills. A typical example are the rules of collision expressed in Latin maxims. These are chronological (*lex posteriori derogat legi priori*), content-related (*lex specialis derogat legi generali*), and hierarchical (*lex superior derogat legi inferiori*). In turn, other are more theoretical and philosophical, and to these we need to devote more space and deeper reflection. I am thinking here of such formulae as *apices iuris non sunt iura*, *ius et lex* or *summum ius summa iniuria*.

There is a reason behind my choice of Maciej Świeszewski's sketches to illustrate the discussions in this book. Out of an apparent chaos of lines a clear image of things and figures emerges. And that is what I, too, have tried to achieve, searching through the vastness of legal thinking for what is most important and unshakable: the *minima iuridica* themselves.



Chapter I

Amemus patriam, pareamus legibus

or

Let us love our country, let us respect its laws

On the surface, this widely used and widely known maxim seems, like, indeed, many others, to be only a pretty verbal embellishment and a handy rhetorical device from Cicero, who is, of course, widely known for his literary, political, and forensic eloquence. The arrangement and sequencing of famous maxims in this book are alphabetical, and so from the point of view of content are fundamentally arbitrary, but there is a certain happy chance that it is this one that begins our discussions.

For this fine sounding expression has its own broader context and that context alone makes it possible for us truly to understand the sense of the words it contains. On the surface, they seem so obvious as to be banal: after all, it is clear to everyone that it behoves one to love one's country and to respect the laws that obtain there. However, if we take a multi-faceted look at the context, it turns out that behind the innocent pathos of the formula *amemus patriam, pareamus legibus* (let us love our country, let us respect its laws) there lies an entire complex intellectual system, and that here rhetoric interweaves with philosophy, history, politics, and law. This is the basis for the *modus operandi* adopted in this book, one of recalling and commenting on several maxims and expressions. We will show the context in which they first appeared and the functions they then fulfilled, and then we will attempt to show their possibly universal message and the possibility of understanding and implementing them today in situations in which they are torn out from the original context.

This maxim comes from the *oratio pro Sestio* from 56 BCE. Formally, it was a courtroom speech given in defence of the People's Tribune Publius Sestius, who stood accused of electoral malpractice (*lex Tullia de ambitu*) and of use of armed violence (*lex Plautia de vi*). However, in fact, for various reasons and in terms of its content, it took on something in the nature of a political programme or manifesto. Let us also note that in the original source the formula sounded somewhat different than in the version that is generally used today. Cicero did not in fact say *pareamus legibus* (let us respect its laws), but *pareamus senatui* (let us obey the Senate).

The *oratio pro Sestio* has always aroused great interest among modern scholars of Cicero's thought, that of historians of antiquity, historians and theoreticians of rhetoric, political philosophers, and legal philosophers. Of course, they focus, above all, on the entirety of the speech and its contexts, and not on the one sententia that interests us here. If anyone did take it out of the content of the speech and referred to it outside its internal and external contexts, they were almost exclusively classical philologists and connoisseurs of Latin grammar: the expression *amemus patriam, pareamus legibus* is a classic example of a mode that appears only in the first person plural, expressing encouragement or summons (*coniunctivus hortativus*).

Therefore, the contexts of not just this one maxim, which seems to be a rhetorical embellishment, but of the entire *oratio pro Sestio* are more interesting. First, the internal context is linked in general terms with Cicero's philosophical, political,

and rhetorical thinking. Second, the external context relates to the details of Cicero's biography seen against the backdrop of the dramatic political and social events in the declining years of the Roman Republic. In the former, it is matter of the specific concept *cum dignitate otium*, which was one of the central notions of Cicero's political philosophy, and which is very clearly expressed in the *oratio pro Sestio*. The latter concerns a specific period in Cicero's biography, when he returns from exile and tries to establish a place within the political realities of a Rome shaken by political conflicts.

However, both these contexts are linked with each other in a particular manner. When they write of Cicero's political philosophy and his legal philosophy, contemporary scholars concentrate on his two basic works, *De re publica* (On the State) and *De legibus* (On Laws). Both were produced between 54 and 51 BCE, when Cicero withdrew from active public life for a time and devoted himself to writing. If we bear in mind that the *oratio pro Sestio* was given on 1 March 56 BCE, that is barely a few years earlier, and that in its content it went beyond the context of a concrete dispute in court, we can boldly insist that it is in a way a prelude to *De re publica* and *De legibus*. The concept of *otium*, besides the public dimension raised by Cicero, meant a period of private silence, rest, lack of active engagement, but not of complete inaction. It indicated the *via contemplativa* as opposed to the *via activa*, in brief, in Cicero's case, a time to write, *inter alia*, *De re publica* and *De legibus*. According to Classical Latin, the word *otium* meant unoccupied time; freedom

from duties, rest after work, holidays, vacations; safety, peace; inactivity, idleness. But in modern philology, it is stressed that the word could radically change its meaning depending on context. As Benjamin Harter writes, in ancient Rome, a time of peace (*otium*) had many daughters. It took on spatial or temporal meaning, and thus it must be presented in such different contexts as work, idleness, honour, the spiritual life, escape, freedom, the idyll, or happiness.[5] At the same time, in public space, *otium* was put together with concepts like *pax* (peace), *quies* (calm), and *tranqillitas* (silence).

In the *oratio pro Sestio*, the *otium* context connected with *dignitas* may, however, be made concrete: here it relates not only to the private sphere but also to the public sphere and to certain civic positions *vis-à-vis* problems of the Roman state and its institutions. In this sense, the position *cum dignitate otium* can be found throughout Cicero's entire output from the end of the 60s and the beginning of the 50s BCE. It can be seen both in Cicero's many letters to his friends and in his public orations. Against this backdrop, the formula *amemus patriam, pareamus legibus* appears different to us: it is not only a lovely rhetorical embellishment; behind it lies a profound piece of republican political philosophy.

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5 B. Harter, "*De otio*, oder die vielen Töchter der Muße. Ein semantischer Streifzug als literarische Spurensuche durch die römische Briefliteratur," in: *Muße und Rekursivität in der antiken Briefliteratur. Mit einem Ausblick in andere Gattungen*, ed. F.C. Eickhoff, Mohr Siebeck, Tübingen 2016, pp. 21–42.

In *De re publica* and *De legibus*, Cicero developed his philosophy of the state and of law,[6] but he put together an outline of it in his defence of Publius Sestius. He, thus, went beyond the conventions of classical defence speeches in court, but why he did that, despite appearing in the role of a lawyer, is especially interesting. Let us try to describe more closely both the contexts (the external and the internal) mentioned above. We will begin with the former because it constituted the political background and set out the factual situation that was the object of the proceedings in the case of Publius Sestius. A detailed description of the circumstances that, on one hand, led to Cicero's exile, and, on the other, made it possible for him to return to Rome, goes beyond the scope and requirements of this brief sketch on the meaning of *amemus patriam, pareamus legibus*. So let us focus only on what lead to the accusation against Publius Sestius.

At the time it was settled (not without difficulty and impediments), the issue of the motion in the Senate permitting Cicero's return to Rome from exile, there were bloody battles between Claudius's ruffians and the gladiators of his opponents, including those of both the people's Tribunes Annius Milon and Publius Sestius. Initially, Claudius was master of the situation, but later his position became substantially weaker. However

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6 For more on Cicero's philosophy in general and his political philosophy in particular see recently: *The Cambridge Companion to Cicero's Philosophy*, ed. J.W. Atkins, T. Benatouil, Cambridge University Press, Cambridge 2022; M. Schofield, *Cicero. Political Philosophy*, Oxford University Press, Oxford 2021.

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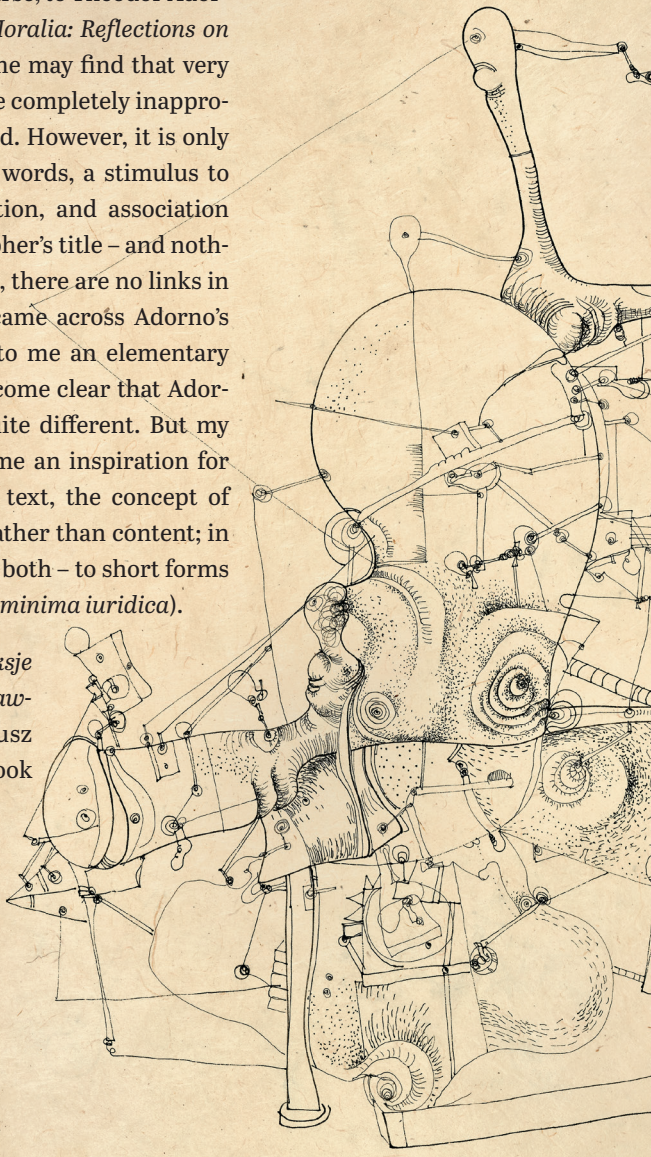

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