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Defence of Fraud against the Disobedient Heir. A Comparison of D. 44.4.8.1 and § 663 ABGB (Austrian Civil Code)*

*Michael Binder***

Abstract

After the due date of a claim, the creditor can, of course, sue his debtor. However, not every creditor wishes to enforce his claim against his debtor. If the creditor himself is not willing to sue his debtor, the debtor could – after the death of the creditor – be sued by the heir of the creditor. However, it is possible for the creditor to order that his heir exempt the debtor from his debt. In this article, cases involving such an order are analysed in the context of Roman law and Austrian civil law. The main focus of this work is whether the debtor can defend himself with an objection against an heir who tries to sue the debtor and, thus, does not follow the order of the deceased.

Keywords: *Roman law; legatum liberationis; juristic rules; dolo facit, qui petit quod redditurus est; abuse of rights; exceptio doli; Austrian civil law; fideicommissum.*

1. Introduction

In Roman law, it was possible for a testator to order his heir to free his (the testator's) debtor (the *legatarius*, legatee) from the obligation (*legatum liberationis* [1] or *liberatio legata* [2]). However, such an order did not automatically free the debtor. The heir would receive the testator's claim (the receivable) against the debtor at the time of the succession, and thus, could try to sue the debtor.

In Austrian civil law, the same problem can occur. According to section 663 of the Austrian Civil Code, the heir is obliged to exempt the debtor if the testator has ordered that the debtor should be freed from his obligation (*legatum liberationis*).

Both in Roman law and Austrian civil law, the question arises regarding whether the debtor can defend himself in case the heir disobeys the order of the testator and tries to enforce the claim against the debtor that he received from the testator by succession. In the following sections, possible defences of the debtor against the heir are analysed.

2. Roman law

2.1 *Legatum*

In Roman law, a testator who did not intend to leave all of his belongings to his heir had the possibility to leave some assets to a third party (the *legatarius*) using a *legatum*. The testator could choose between [3] a *legatum per damnationem*, a *legatum sinendi modo*,[4] and a *legatum per vindicationem*.[5]

For a valid *legatum*, the testator needed to use a formula such as "*heres meus L. Titio Stichum servum meum dare damnas esto*" (*legatum per damnationem*), "*heres meus damnas esto sinere L. Titium*

* This paper is based on my presentations conducted on September 24th, 2024, "Defence of fraud against the disobedient heir", at the "LXXVIIe Session de la Société Internationale Fernand De Visscher pour l'Histoire des Droits de l'Antiquité (SIHDA)" in Osaka (Japan) and on June 22nd, 2024, "Schutz des Legatars beim Befreiungsvermächtnis", at the "XXVII. Internationales Sommerseminar zur Antiken Rechtsgeschichte" in Trier (Germany). I wish to thank Prof. Dr. Philipp Scheibelreiter for his revision and feedback on this article.

** Dr. Michael Binder currently works as a postdoctoral researcher at the Department of Roman Law and Antique Legal History, Faculty of Law, University of Vienna, Vienna, Austria; email: m.binder@univie.ac.at / ORCID 0000-0001-8479-1468.

1 WATSON, A., The Form and Nature of "acceptilatio" in Classical Roman Law. In: *Revue Internationale des Droits de l'Antiquité*, vol. 8, 1961, p. 413.

2 SANTALUCIA, B., *I legati ad effetto liberatorio nel diritto romano*, Napoli, 1964, p. 10.

3 The question of whether a *legatum per praeceptionem* could be left to a third party was fiercely debated among Roman jurists. According to the Proculeian school, a third party could receive a *legatum per praeceptionem,* whereas the Sabinian school granted only co-heirs the right to receive a *legatum per praeceptionem*; see KASER, M., *Das Römische Privatrecht I*, 2nd edn. München, 1971, p. 744; KASER, M. – KNÜTEL, R. – LOHSSE, S., *Römisches Privatrecht*, 22nd edn. München, 2021, p. 485.
Gai. 2. 221: *Sed diversae scholae auctores putant etiam extraneo per praeceptionem legari posse, proinde ac si ita scribatur: "Titius hominem Stichum capito", supervacuo adiecta prae syllaba; ideoque per vindicationem eam rem legatam videri. Quae sententia dicitur divi Hadriani constitutione confirmata esse.*
Translation: GORDON, W. M. – ROBINSON, O. F., *The Institutes of Gaius*, London, 2001, p. 233: *But the authorities of the other school think that a preceptive legacy can be left even to a third party, as if the wording were: "Let Titius take the slave Stichus", the phrase "as a preference" being superfluous; and so the thing is regarded as left by proprietary legacy.*

4 See KASER, M., Das legatum sinendi modo in der Geschichte des römischen Vermächtnisrechts. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 67, 1950, p. 320-359.

5 See KASER, *Privatrecht*, p. 743-744.

hominem Stichum sumere sibique habere" (*legatum sinendi modo*), or "*Titio hominem Stichum do lego*" (*legatum per vindicationem*).[6]

The *legatum liberationis/liberatio legata* is a subtype of a *legatum per damnationem* or *legatum sinendi modo*.[7] According to Krüger, the formula of a *legatum liberationis,* which has the effect of a *legatum per damnationem*, must be reconstructed as follows: *"heres meus damnas esto Titium debitorem liberare"*.[8] In the next source, Paulus[9] discusses a case with a *legatum liberationis* in his commentary *ad Plautium*.[10]

D. 44.4.8 pr. (= D. 50.17.[11]173.3)-1 (Paulus *libro* 6 *ad Plautium*)

pr. Dolo facit, qui petit quod redditurus est. 1. Sic, si heres damnatus sit non petere a debitore, potest uti exceptione doli mali debitor et[12] *agere ex testamento.*

pr. A person who claims what he will have to return acts fraudulently. 1. Thus, if an heir has been condemned not to claim from a debtor, the debtor can employ the defense of fraud, as well as bring an action[13] *based on the will.*[14]

In the text, Paulus first refers to the *regula iuris* (juristic rule/ legal maxim)[15] *dolo facit, qui petit quod redditurus est*,[16] which states that the creditor (the plaintiff) acts fraudulently if he claims what he would have to give back to the debtor (the defendant). According to D. 50.17.1, a juristic rule was only a reflection of the law, which could, over the course of time, become defective.[17] The origin of the juristic rule *dolo facit, qui petit quod redditurus est* is unknown. Most modern legal scholars assume that this rule was invented by Paulus,[18] whereas other legal scholars have suggested that this rule could also have been developed by Plautius.[19]

After the introduction of the juristic rule *dolo facit, qui petit quod redditurus est*, the text (D. 44.4.8 pr.-1) continues with a typical phrase (*sic, si*) for introducing an example. As highlighted by Lenel,[20] this example was likely analysed in the broader context of a *dos* (a dowry), where the juristic rule *dolo facit, qui petit quod redditurus est* had great significance.[21]

In the example, three parties were involved in the case: the testator (the creditor), his *heres* (the heir), and the *debitor* (the *legatarius*) of the testator. Specifically, the testator ordered that his *heres* should not be able to sue his *debitor* (*heres damnatus sit non petere a debitore*).

It is unclear whether the testator only ordered that the *heres* should not enforce his claim against the *debitor*. According to some modern legal scholars, the testator would have to order his heir to free the debtor, as otherwise the debtor would receive only an *exceptio doli* and no *actio ex testamento*.[22]

After the death of the testator, the *heres*, who received the claim of the testator, did not follow the testator's order and, instead, sued the *debitor*. In this case, it was questionable whether the *debitor* could defend himself against the disobedient *heres*.

According to Paulus, the *debitor* could raise the *exceptio doli* against the *heres* (*potest uti exceptione doli mali*). Furthermore, the *debitor* could sue the *heres* with the *actio ex testamento* and,

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6 KASER, *Privatrecht*, p. 743-744.

7 WIMMER, M., § 60. Dinglich wirkendes Vermächtnis (legatum per vindicationem). In: BABUSIAUX, U. – BALDUS, C. – ERNST, W. – MEISSEL, F.-S. – PLATSCHEK, J. – RÜFNER, T. (ed.), *Handbuch des Römischen Privatrechts II*, Tübingen, 2023, p. 1671.

8 KRÜGER, H., Die liberatio legata in geschichtlicher Entwicklung. In: *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*, vol. 21, 1894, p. 319.

9 For more information about the Roman jurist Iulius Paulus, see KUNKEL, W., *Herkunft und soziale Stellung der römischen Juristen*, 2nd edn. Graz et al., 1967, p. 244-245.

10 For more information about the Roman jurist Plautius, see KUNKEL, *Juristen*, p. 134.

11 The juristic rule *dolo facit, qui petit quod redditurus est* is mentioned twice in the Digest of Justinian. This rule can be found in the context of the *exceptio doli* (D. 44.4: *De doli mali et metus exceptione*; D. 44.4.8 pr.) and in the context of the *regulae iuris* (D. 50.17: *De diversis regulis iuris antique*; D. 50.17.173.3).

12 The *debitor* received an *exceptio doli* against the *heres* and could sue the *heres* with an *actio ex testamento*. It seems that the word *et* only highlights that the *debitor* has two different options to enforce the *legatum liberationis*. He could, most likely, not defend himself with the *exceptio doli* and sue the *heres* with the *actio ex testamento* at the same time; see BINDER, M., Zur optionalen exceptio doli bei wechselseitigen Klagemöglichkeiten. In: *Revue Internationale des Droits de l'Antiquité*, vol. 70, 2023, p. 230-232.

13 The *legatarius* could initiate a lawsuit against the heir based on the will of the *testator*.

14 Translation: BEINART, B. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 150.

15 See STEIN, P., *Regulae Iuris. From Juristic Rules to Legal Maxims*, Edinburgh, 1966, p. 153-179.

16 See WACKE, A., Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. In: *Juristische Arbeitsblätter*, vol. 10, 1982, p. 477-479; ZIMMERMANN, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 668; LAMBRINI, P., *Dolo generale e regole di correttezza*, Padova, 2010, p. 47.

17 D. 50.17.1 (Paulus *libro* 16 *ad Plautium*): *Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum.*
Translation: CRAWFORD, M. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 470-471: *A rule is something which briefly describes how a thing is. The law may not be derived from a rule, but a rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down and, as Sabinus says, is, as it were, the element of a case, which loses its force as soon as it becomes in any way defective.*
For more information about D. 50.17.1, see BÖHR, R., *Das Verbot der eigenmächtigen Besitzumwandlung im römischen Privatrecht. Ein Beitrag zur rechtshistorischen Spruchregelforschung*, München – Leipzig, 2002, p. 17-48.

18 RIEZLER, E., *Venire contra factum proprium. Studien im römischen, englischen und deutschen Civilrecht*, Leipzig, 1921, p. 133; SÖLLNER, A., *Zur Vorgeschichte und Funktion der actio rei uxoriae*, Köln – Wien, 1969, p. 96; WACKE, Rechtssprichwort, p. 477; BENTELE, F., *Gesamtschuld und Erlass. Eine rechtsvergleichende Untersuchung zum deutschen und französischen Recht vor dem Hintergrund der europäischen Rechtsvereinheitlichung*, Tübingen, 2006, p. 48 n. 196.

19 KRÜGER, Liberatio legata, p. 317 n. 35; WATSON, A., Acceptilatio, p. 413 n. 62.

20 LENEL, O., *Palingenesia iuris civilis I*, Lipsiae, 1889, p. 1158.

21 BINDER, M., Die promittierte Mitgift im Scheidungsfall. Ein wirkungsloses Versprechen? In: HORN, J. K. – VERRICO, F. (ed.), *Acta Maceratensia*, Macerata, 2024, p. 99-109.

22 See KRÜGER, Liberatio legata, p. 316; SANTALUCIA, *Legati*, p. 114; KASER, *Privatrecht*, p. 751.

thus, enforce an exemption from his debt.[23] Such an exemption could be performed using an *acceptilatio* or a *pactum de non petendo*.[24] As the *debitor* received an *exceptio doli* against the *heres*, it seems likely that the obligation of the *debitor* resulted from a *stipulatio* between the testator (the *stipulator*) and the *debitor* (the *promissor*). In this case, the *heres* would have to perform an *acceptilatio*.[25] However, an *exceptio doli* was also possible in the context of *bonae fidei iudicia*.[26]

If the obligation did not arise from a verbal contract, an *acceptilatio* would not be possible.[27] In such a case, it seems that the *heres* would have to exempt the *debitor* with a *pactum de non petendo*. According to Lenel, a *pactum de non petendo* was mostly performed in cases in which multiple debtors were involved but only one debtor should be freed as an *acceptilatio* would have freed all of the debtors. If the obligation did not result from a verbal contract, it would be possible to replace this obligation with a verbal contract (*novatio*), and thus, the creditor could exempt the debtor with an *acceptilatio*.[28]

Paulus stated that the *heres* acted fraudulently because he claimed from the *debitor* what he would have to return to the *debitor* (*dolo facit, qui petit quod redditurus est*). However, some legal scholars argue that the reference to the juristic rule *dolo facit, qui petit quod redditurus est* is incorrect.[29]

However, this reference seems correct, because Paulus likely considered the claim of the *heres* against the *debitor* and the claim of the *debitor* against the *heres* as equal. At first, it may seem problematic to consider both claims as equal, as the *debitor* most likely owed a certain payment (*dare*-obligation), whereas the heir was obliged to free the *debitor* from his debt (*facere*-obligation).[30] Generally, *dare*-obligations and *facere*-obligations were not equal.

Paulus likely made an exception and qualified the *dare*-obligation and *facere*-obligation as equal. The concept of *condemnatio pecuniaria* existed in Roman law, meaning that the defendant could only be condemned for the payment of money.[31]

D. 44.4.8.1 does not contain information about the claim that the testator (and later the *heres*) had against the *debitor*. Therefore, the amount of money the *debitor* would be condemned for is unknown. Since the *debitor* could demand from the *heres* the exemption of his obligation, it is clear that the *heres* would be condemned for the amount that his claim comprised if he refused to perform an exemption.

Both condemnations would be for the same sum, and thus, it can be assumed that if the *heres* refused to perform an exemption and sued the *debitor*, the *heres* would, thus, claim from the *debitor* a sum that he would have to return to the *debitor*.[32] In this case, the *debitor* could defend himself against the *heres* with an *exceptio doli* due to the juristic rule *dolo facit, qui petit quod redditurus est*.

If the *debitor* made a payment to the *heres*, he could only demand his payment back if he had wrongly[33] assumed that

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[23] MADER, P., Dolo facit qui petit quod redditurus est. In: SCHERMAIER, M. J. – RAINER, J. M. – WINKEL, L. C. (ed.), *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, Köln et al., 2002, p. 417-418; BINDER, M., The Fraudulent Claim of One's Own Fundus (D. 21.2.73). In: TAUCHEN, J. – KOLUMBER, D. (eds.), *Edge of Tomorrow: the Next Generation of Legal Historians and Romanists: Collection of Contributions from the 2022 International Legal History Meeting of PhD Students*, Brno, 2022, p. 14-15.
Different: KRÜGER, Liberatio legata, p. 317.

[24] MADER, Dolo facit, p. 417-418.
D. 34.3.3.3 (Ulpianus *libro* 23 *ad Sabinum*): *Nunc de effectu legati videamus. Et si quidem mihi liberatio sit relicta, cum solus sim debitor, sive a me petatur, exceptione uti possum, sive non petatur, possum agere, ut liberer per acceptilationem. Sed et si cum alio sim debitor, puta duo rei fuimus promittendi, et mihi soli testator consultum voluit, agendo consequar, non ut accepto liberer, ne etiam conreus meus liberetur contra testatoris voluntatem, sed pacto liberabor. Sed quid si socii fuimus? Videamus, ne per acceptilationem debeam liberari: alioquin, dum a conreo meo petitur, ego inquietor. Et ita Iulianus libro trigesimo secundo digestorum scripsit, si quidem socii non simus, pacto me debere liberari, si socii, per acceptilationem.*
Translation: JAMESON, S. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 158: *Now let us look at the effect of such a legacy. Where release has actually been left to me when I am sole debtor, if I am sued, I can plead a defense; if I am not sued, I can sue for formal discharge. But also where I am debtor together with another, for instance, where both of us have been answerable as principals for the debt, and the testator has had only my interests at heart, by bringing suit I shall not gain release by receipt; for that releases my co-debtor too, contrary to the testator's intention, but I shall be released by covenant. But what if we have been partners? Let us see whether I ought not rather to be released by discharge; otherwise, when my fellow debtor is sued, I am put to trouble. And Julian has made the following observation in the thirty second book of his Digest, that if, in fact, we are not partners, I should be released by covenant; if we are partners, by discharge.*

[25] ARNDTS VON ARNESBERG, K. L., *Lehrbuch der Pandekten*, 14th edn. Stuttgart, 1889, p. 533.

[26] FINKENAUER, T., Zur Inhärenz von Einreden im bonae fidei iudicium. In: *Iura: rivista internazionale di diritto romano e antico*, vol. 68, 2020, p. 90-131.

[27] KASER, *Privatrecht*, p. 641.

[28] LENEL, O., *Über Ursprung und Wirkung der Exceptionen*, Heidelberg, 1876, p. 112.

[29] VON VANGEROW, K. A., *Lehrbuch der Pandekten III*, 7th edn., Marburg – Leipzig, 1869, p. 348; ARNDTS VON ARNESBERG, *Pandekten*, p. 532-533.

[30] For more information about the different types of obligations, see BENKE, N. – MEISSEL, F.-S., *Roman Law of Obligations. Origins and Basic Concepts of Civil Law II. Translated by Caterina Maria Grasl*, Wien, 2021, p. 5-6.

[31] BENKE, N. – MEISSEL, F.-S., *Roman Law of Property. Origins and Basic Concepts of Civil Law I. Translated by Caterina M. Draschan-Mitwalsky*, 2nd edn. Wien, 2024, p. 158.

[32] BINDER, Klagemöglichkeiten, p. 233-234.

[33] See D. 12.6.26.7 (Ulpianus *libro* 26 *ad edictum*): *Adeo autem perpetua exceptio parit condictionem, ut Iulianus libro decimo scripsit, si emptor fundi damnaverit heredem suum, ut venditorem nexu venditi liberaret, mox venditor ignorans rem tradiderit, posse eum fundum condicere: idemque et si debitorem suum damnaverit liberare et ille ignorans solverit.*
Translation: BIRKS, P. In: WATSON, A. (ed.), *The Digest of Justinian I*, 2nd edn. Philadelphia, 1998, p. 382: *A perpetual defense so effectively gives a condictio that Julian writes in the tenth book that if the purchaser of land ordains that his heir shall discharge the vendor from the bond of sale and then the vendor, not knowing this, hands the property over, the condictio lies to the vendor to recover the land. The same applies where a creditor ordains that his heir shall discharge a debtor, and he, not knowing it, pays.*

he actually owed the payment to the *heres*.[34] If the *debitor* made a payment whilst knowing that he did not have to make the payment, the payment could not be recovered. Such a payment would have a similar effect to a *donatio* (donation).[35]

2.2 *Fideicommissum*

A *testamentum* had to meet certain formal requirements,[36] as otherwise, it would be invalid.[37] For a valid *legatum*, the testator had to create a *testamentum* or confirm *codicilli*.[38] A *fideicommissum* did not require a certain form and, thus, could be declared verbally.[39] The legal position of the *fideicommissarius* was similar to that of the *legatarius*.[40] In the next source, Papinianus discusses a case in which the deceased declared that his heir was not allowed to enforce his (the deceased's) claim against the debtor (the *fideicommissarius*).[41]

D. 34.3.22 (Papinianus *libro* 19 *quaestionum*)

"Quod mihi Sempronius debet, peti nolo": non tantum exceptionem habere debitorem, sed et fideicommissum ut liberetur petere posse responsum est.

"I do not wish Sempronius's debt to me to be recovered"; the opinion has been given that the debtor not only has a defense but also can apply under the fideicommissum for his release.[42]

In this case, *ego* declared[43] that his *heres* should not enforce his (*ego*'s) claim against the debtor (Sempronius; the *fideicommissarius*). Such an order could be qualified as a *fideicommissum liberationis.*[44] If *ego*'s *heres* tried to sue Sempronius, Sempronius could defend himself with an *exceptio doli* against the *heres* of *ego*.

Furthermore, Sempronius could sue the *heres* of *ego* with an *actio ex fideicommisso*[45] and, thus, demand an exemption[46] from his debt. The legal position of Sempronius (D. 34.3.22) is almost identical to that of the *debitor* mentioned in D. 44.4.8 pr.-1. Therefore, the *exceptio* in D. 34.3.22 can also be explained with the juristic rule *dolo facit, qui petit quod redditurus est*.

Another example in which the *fideicommissarius* could defend himself against the action of the *heres* with an *exceptio doli* is presented in the next source.

D. 34.3.3.1-2 (Ulpianus *libro* 23 *ad Sabinum*)

1. Sed et si chirographum quis decedens debitori suo dederit, exceptionem ei competere puto, quasi pro fideicommisso huiusmodi datione valitura. 2. Iulianus etiam libro quadragesimo digestorum scripsit: si quis decedens chirographum Seii Titio dederit, ut post mortem suam Seio det aut, si convaluisset, sibi redderet, deinde Titius defuncto donatore Seio dederit et heres eius petat debitum, Seius doli exceptionem habet.

1. But also where a man on his death has given the debtor a note [of release] in his own hand, I submit that a defense is available to him, as if a gift of this kind were valid as a fideicommissum. 2. Julian has also observed in the fortieth book of his Digest that if, on his death, a man

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[34] Different: KRÜGER, Liberatio legata, p. 317-318 assumes that the *debitor* had the choice to either make a payment to the *heres* and later claim the payment back with the *actio ex testamento* or to immediately defend himself with the *exceptio doli*.

[35] See BENKE – MEISSEL, *Obligations*, p. 294.
D. 39.5.29 pr. (Papinianus *libro* 10 *responsorum*): *Donari videtur, quod nullo iure cogente conceditur.*
Translation: TUPLIN, C. J. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 413: *Anything that is granted to someone without legal compulsion counts as a gift.*
D. 46.2.12 (Paulus *libro* 31 *ad edictum*): *Si quis delegaverit debitorem, qui doli mali exceptione tueri se posse sciebat, similis videbitur ei qui donat, quoniam remittere exceptionem videtur. Sed si per ignorantiam promiserit creditori, nulla quidem exceptione adversus creditorem uti poterit, quia ille suum recepit: sed is qui delegavit tenetur condictione vel incerti, si non pecunia soluta esset, vel certi, si soluta esset, et ideo, cum ipse praestiterit pecuniam, aget mandati iudicio.*
Translation: BEINART, B. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 213: *A person who delegates a debtor who was aware that he could protect himself by the defense of bad faith is to be regarded like a man making a gift, since he [the debtor] is deemed to waive his defense. But if he promised the creditor in ignorance, he can use no defense against the creditor who is simply taking what is his due. But the person making the delegation is liable to condictio, for an uncertain amount if the money is not yet paid, for a specific sum if it has been paid, and so, should he himself have provided the money, he can bring the action on mandate.*
D. 50.17.53 (Paulus *libro* 42 *ad edictum*): *Cuius per errorem dati repetitio est, eius consulto dati donatio est.*
Translation: CRAWFORD, M. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 474: *What can be reclaimed, if given in error, is a gift, if given designedly*.

[36] KASER, *Privatrecht*, p. 678-690.

[37] KASER, *Privatrecht*, p. 690-691.

[38] KASER, *Privatrecht*, p. 746.
Gai. 2. 270a: *Item legatum codicillis relictum non aliter valet, quam si a testatore confirmati fuerint, id est, nisi in testamento caverit is testator, ut quidquid in codicillis scripserit, id ratum sit; fideicommissum vero etiam non confirmatis codicillis relinqui potest.*
Translation: GORDON – ROBINSON, *Gaius*, p. 257: *Again, a legacy left in codicil is not valid unless the codicil has been confirmed by the testator, that is, unless the testator has provided in his will […] that whatever he puts in a codicil is ratified; on the other hand, a trust can be left even by an unconfirmed codicil.*

[39] KASER, *Privatrecht*, p. 758.

[40] LENEL, *Exceptionen*, p. 114 n. 2.

[41] For more information about the Roman jurist Aemilius Papinianus, see KUNKEL, *Juristen*, p. 224-229.

[42] Translation: JAMESON, S. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 161.

[43] Generally, a *fideicommissum* had to be declared to the *heres*. Whether a *fideicommissum* could also be declared to the *fideicommissarius* was debated among Roman jurists; see WIEACKER, F., Erlass-Schenkung "mortis causa" und "liberatio fideicommissa". In: *Studi in onore di Giuseppe Grosso V*, Torino, 1972, p. 16-18; SCHANBACHER, D., Der schenkweise Erlass von Todes wegen unter dem Blickwinkel historischer Rechtsvergleichung. In: HARKE, J. D. (ed.), *Facetten des römischen Erbrechts. Studien zur Geschichte und Dogmatik des Privatrechts*, Berlin – Heidelberg, 2012, p. 122-126.

[44] WACKE, A., Die letztwillige Befreiung vom Mitgiftrückgabeversprechen. Zur Entwicklung des Testierrechts über die dos. In: SLAPNICAR, K. (ed.), *Tradition und Fortentwicklung im Recht. Festschrift zum 90. Geburtstag von Ulrich von Lübtow am 21. August 1990*, Rheinfelden – Berlin, 1991, p. 66.

[45] In the literature, the terms *actio fideicommissaria* (see LENEL, *Exceptionen*, p. 114 n. 2) and *actio fideicommissi* (see KASER, *Privatrecht*, p. 759 n. 29) can also be found.

[46] See WACKE, Befreiung, p. 66.

has given a note [of release] to Titius in respect of [a debt owed by] Seius, to give to the latter after his death, or, in the case of his recovery, to return to him, then, [if] on the donor's death Titius has given it to Seius, and the donor's heir sues for the debt, Seius has the defense of fraud.[47]

Firstly, Ulpianus[48] made it clear that the transfer of a note of release from the creditor (*aliquis*) to his debtor (*debitor*) had to be treated the same way as a *fideicommissum* (*quasi pro fideicommisso huiusmodi datione valitura*). Therefore, the debtor could defend himself against the *heres* of the creditor with an *exceptio* (*exceptionem ei competere puto*).

Secondly, Ulpianus referred to a case[49] of Iulianus.[50] In this case, *aliquis*, who was in danger of dying due to a disease, handed a note of release to Titius (*si quis decedens chirographum Seii Titio dederit*). *Aliquis* made the order that Titius should give this note of release to Seius (the debtor) in case of his (*aliquis*') death (*ut post mortem suam Seio det*). However, if *aliquis* became healthy again, Titius would have to return the note of release back to *aliquis* (*aut, si convaluisset, sibi redderet*).

Aliquis did not survive the disease, and thus, Titius followed the order of *aliquis*. After Titius handed the note of release to Seius (*deinde Titius defuncto donatore Seio dederit*), the *heres* of *aliquis* tried to sue Seius (*heres eius petat debitum*). However, this action turned out to be unsuccessful, as Seius could defend himself against the action of the *heres* of *aliquis* with an *exceptio doli* (*Seius doli exceptionem habet*).

According to Papinianus (D. 34.3.22), the *fideicommissarius* had the possibility to enforce the exemption from his debt using an *actio ex fideicommisso*. However, such an action is not mentioned in D. 34.3.3.2. It seems that the purpose of such an action was to immediately clarify the legal situation between the parties, and such a clarification would only make sense if the creditor remained passive.

In D. 34.3.3.2, the *heres* of *aliquis* tried to enforce his claim against Seius, and thus, Seius had the opportunity to defend himself with an *exceptio doli* against the *heres* of the *aliquis*. After the acquittal of Seius, the *heres* of *aliquis* lost his claim, and as a result, it was no longer necessary for Seius to enforce an exemption with the *actio ex fideicommisso*.

However, the claim of Seius against the *heres* of the *aliquis*, which could be enforced with the *actio ex fideicommisso*, was the reason for Seius receiving an *exceptio doli* against the *heres* of *aliquis*. It can be questioned why the behaviour of the *heres* of *aliquis* was determined to be fraudulent.

Firstly, in this case, it is obvious that the *heres* of *aliquis* acted against the will of the deceased (*aliquis*), and according to Marcellus, an *heres* who tries to enforce a claim against the will of the deceased acts fraudulently (*[…] exceptione doli mali tueri se possint. Marcellus respondit posse: nimirum enim contra voluntatem defuncti heres petit ab eo*).[51] However, this statement of Marcellus contains a broad generalisation. It seems unlikely that every behaviour of an *heres* that contradicted the wishes of the deceased would automatically be viewed as fraudulent.[52]

Secondly, the legal position of Seius (D. 34.3.3.2) was very similar to that of the *debitor* (D. 44.4.8 pr.-1).[53] In both cases, the deceased, who had a claim against his debtor, made it clear that his *heres* should not sue the debtor. Seius could demand an exemption with the *actio ex fideicommisso* and defend himself with the *exceptio doli* against the *heres* of *aliquis* (D. 34.3.3.2). Moreover, the *debitor* could demand an exemption with the *actio ex testamento* and defend himself with the *exceptio doli* against the *heres* (D. 44.4.8 pr.-1).

In D. 44.4.8 pr.-1, the *debitor* received an *exceptio doli* against the *heres* because the *heres* claimed from the *debitor* that which he would have to return (*dolo facit, qui petit quod redditurus est*). Therefore, it is logical to assume that in D. 34.3.3.2, the *exceptio*

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47 Translation: JAMESON, S. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 157-158.

48 For more information about the Roman jurist Domitius Ulpianus, see KUNKEL, *Juristen*, p. 245-254.

49 A similar case of Iulianus is mentioned in the following source: D. 39.6.18.2 (Iulianus *libro* 60 *digestorum*): *Titia chirographa debitorum suorum Septicii et Maevii donatura illis Ageriae dedit et rogavit eam, ut ea, si decessisset, illis daret, si convaluisset, sibi redderet: morte secuta Maevia Titiae filia heres extitit: Ageria autem, ut rogata erat, chirographa Septicio et Maevio supra scriptis dedit. Quaeritur, si Maevia heres summam, quae debebatur ex chirographis supra scriptis, petat vel ipsa chirographa, an exceptione excludi possit? Respondit Maeviam vel pacti conventi vel doli mali exceptione summoveri posse.*
Translation: TUPLIN, C. J. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 416: *Wishing to give her debtors Septicius and Maevius their documents of debt, Titia gave them to Ageria and asked her to give them to Septicius and Maevius in the event of her death but to return them to her in the event of her getting better. After Titia's death Maevia, her daughter, became her heir. But Ageria gave the documents to the above-mentioned Septicius and Maevius, as she had been requested to do. The question arises of whether, if the heiress Maevia seeks to obtain the sum owed under the above-mentioned documents, or the documents themselves, there is any defense by which she can be barred. I replied that Maevia can be resisted by a defense either of pact made or of fraud.*

50 For more information about the Roman jurist Salvius Iulianus, see KUNKEL, *Juristen*, p. 157-166.

51 D. 39.6.28 (Marcellus *libro singulari responsorum*): *Avunculo suo debitori mortis causa donaturus quae debebat ita scripsit tabulae vel chirographum tot ubicumque sunt, inanes esse neque eum solvere debere: quaero, an heredes, si pecuniam ab avunculo defuncti petant, exceptione doli mali tueri se possint. Marcellus respondit posse: nimirum enim contra voluntatem defuncti heres petit ab eo.*
Translation: TUPLIN, C. J. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 417: *Someone who wished to make a gift mortis causa to his uncle, who was his debtor, of all that the latter owed him wrote as follows: "Let all the accounts and bonds in existence, wherever they may be, be void," meaning that his uncle did not have to pay. If the heirs claim the money from the deceased's uncle, can he defend himself by means of a defense of fraud? Marcellus replied that he can, since the heir is certainly making a claim against the wishes of the deceased.*

52 See KOSCHAKER, P., Bedingte Novation und pactum im römischen Recht. In: *Festschrift für Gustav Hanausek*, Graz, 1925, p. 147 n. 4.

53 TER BEEK, L. J., *Dolus. Een semantisch-juridische studie II*, Nijmegen, 1999, p. 885 n. 5; WIEACKER, Erlass-Schenkung, p. 6; see further section "2.1 *Legatum*".

doli of Seius against the *heres* of *aliquis* can be explained with the juristic rule *dolo facit, qui petit quod redditurus est*.[54] If the *heres* of *aliquis* tried to enforce his claim against Seius, he would be claiming something from Seius that he would have to return to Seius.

3. Austrian civil law

3.1 Introduction

Parts of the Austrian Civil Code have their foundations in Roman law. However, Austrian legislators did not implement the concept of *fideicommissum*, meaning it is not possible to enforce an informal request of the deceased according to which a third party should be freed from his obligation (*fideicommissum liberationis*).[55] Conversely, the Latin terms *legatum liberationis*[56] or *liberatio legata*[57] are used by Austrian legal scholars. The testator has the possibility to order his heir to free the debtor from his obligation, as is explicitly stated in the following section of the Austrian Civil Code.

§ 663 ABGB (Austrian Civil Code)

Das Vermächtnis einer Forderung, die der Verstorbene gegen den Vermächtnisnehmer hatte (Befreiungsvermächtnis), verpflichtet den Erben, die Forderung samt den rückständigen Zinsen zu erlassen.

The legacy of a receivable which the deceased had against the legatee (legacy to satisfy an obligation) obliges the heir to release the legatee from the debt and overdue interest.[58]

Similar to the legal situation in Roman law, a *legatum liberationis* does not automatically free the *legatarius* (the debtor). Therefore, the heir has the obligation to free the *legatarius* from his obligation, meaning that the claim that the heir receives from the testator does not expire.[59] The claim only expires if the heir exempts the *legatarius* from his obligation.[60]

The *legatarius* can, of course, enforce an exemption[61] with an action.[62] However, the heir can try to enforce his claim against the *legatarius* before the exemption takes place. Section 663 of the Austrian Civil Code does not contain any information about a possible objection that the *legatarius* could raise against the heir. In the literature, it is often mentioned that the *legatarius* has an objection against the heir,[63] but this objection has not been further characterised. Before a characterisation can be made, it is necessary to discuss the claim for exemption in Austrian civil law.

3.2 Claim for exemption

A claim for exemption cannot only arise from a *legatum liberationis* but also from a tortious liability, as discussed by Torggler in relation to the following situation:

If a shareholder of a GmbH (Gesellschaft mit beschränkter Haftung) enters into a contract with the GmbH (e.g., by selling something to the GmbH) but is – due to his negligence – not aware that the managing director is not allowed to enact a contract between the GmbH and a shareholder, the GmbH receives a claim for exemption against the shareholder.[64]

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[54] AMELOTTI, M., *La "donatio mortis causa" in diritto romano*, Milano, 1953, p. 193; SIMONIUS, P., *Die Donatio Mortis Causa im klassischen römischen Recht*, Basel, 1958, p. 260; see further WIEACKER, Erlass-Schenkung, p. 6; TER BEEK, *Dolus*, p. 885 n. 5.

[55] See WELSER, R. – ZÖCHLING-JUD, B., *Grundriss des bürgerlichen Rechts II. Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, 14th edn. Wien, 2015, p. 569; ECCHER, B. – UMLAUFT, M., *Erbrecht. Bürgerliches Recht VI*, 7th edn. Wien, 2020, p. 64.

[56] WELSER – ZÖCHLING-JUD, *Grundriss*, p. 603; CHRISTANDL, G., § 647-694. In: FENYVES, A. – KERSCHNER, F. – VONKILCH, A. (ed.), *ABGB § 647 bis 755. Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, 3rd edn. Wien, 2021, p. 164, § 663-668/2; NEUMAYR, M., § 531-694. In: BYDLINSKI, P. – PERNER, S. – SPITZER, M. (ed.), *Kommentar zum ABGB. Allgemeines bürgerliches Gesetzbuch, EheG, KSchG, VGG, IPRG, Rom I-, Rom II- und Rom III-VO*, 7th edn. Wien, 2023, p. 686, § 663/1.

[57] CHRISTANDL, *Kommentar*, p. 164, § 663/2.

[58] Translation: ESCHIG, P. A. – PIRCHER-ESCHIG, E., *Das österreichische ABGB – The Austrian Civil Code*, 2nd edn. Wien, 2021, p. 239.

[59] WELSER, R., *Der Erbrechts-Kommentar. § 531-824 ABGB*, Wien, 2019, p. 186, § 663/1; CHRISTANDL, *Kommentar*, p. 165, § 663/5.

[60] CHRISTANDL, *Kommentar*, p. 165, § 663/5; NEUMAYR, *Kommentar*, p. 686, § 663/1. See § 1444 ABGB (Austrian Civil Code): *In allen Fällen, in welchen der Gläubiger berechtiget ist, sich seines Rechtes zu begeben, kann er demselben auch zum Vortheile seines Schuldners entsagen, und hierdurch die Verbindlichkeit des Schuldners aufheben.*

Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 515: *In each case in which the creditor is entitled to waive his right he can waive the right also in favour of his debtor and cancel the obligation of the debtor in this way.*

In the literature it is fiercely debated whether a contract or only a unilateral act is necessary to exempt the debtor; see DULLINGER, S., § 1438-1444. In: RUMMEL, P. (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II. § 1175 bis 1502 ABGB; Nebengesetze. 3. Teil: § 1342 bis 1502 ABGB*, 3rd edn. Wien, 2002, p. 527, § 1444/3; BYDLINSKI, P., § 1438-1450. In: BYDLINSKI, P. – PERNER, S. – SPITZER, M. (ed.), *Kommentar zum ABGB. Allgemeines bürgerliches Gesetzbuch, EheG, KSchG, VGG, IPRG, Rom I-, Rom II- und Rom III-VO*, 7th edn. Wien, 2023, p. 2026, § 1445/2.

[61] Unlike in Roman law, in Austrian civil law, the heir has to exempt the *legatarius* from his debt, which means that the obligation of the *legatarius* has to expire; see CHRISTANDL, *Kommentar*, p. 166, § 663/7. Therefore, a *pactum de non petendo* would not be sufficient, because in such a case, the claim of the heir would not expire.

For more information about the *pactum de non petendo* in Austrian civil law, see BYDLINSKI, *Kommentar*, p. 2027, § 1444/7.

[62] CHRISTANDL, *Kommentar*, p. 166, § 663/7.

[63] PFAFF, L. – HOFMANN, F., *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche II*, Wien, 1877, p. 441; KRALIK, W., *Das Erbrecht*, 3rd edn. Wien, 1983, p. 228; RABL, C., Das Nachlaßinventar – Inhalt und Zweck. In: *Österreichische Notariats-Zeitung. Monatsschrift für Notariat und freiwillige Gerichtsbarkeit*, vol. 131/5, 1999, p. 139-140.

[64] TORGGLER, U., 4. Lieferung. § 18-21. In: STRAUBE, M. (ed.), *Wiener Kommentar zum GmbH-Gesetz*, Wien, 2008, p. 48, § 20/40; TORGGLER, U., § 18-21. In: TORGGLER, U. (ed.), *GmbH-Gesetz (GmbHG). Kurzkommentar*, Wien, 2014, p. 205-206, § 20/26.

According to Torggler, it would not be possible for the shareholder to successfully sue the GmbH (e.g., claim the purchase price) because he would be abusing[65] his right. After a successful exemption, the shareholder would have no *causa* that could justify keeping the payment that he received from the GmbH, and thus, the GmbH could claim the payment back. Indeed, Torggler highlights that the plaintiff (the shareholder) cannot – according to the juristic rule *dolo facit, qui petit quod redditurus est* – claim something that he has to return to the defendant (the GmbH).[66]

This solution seems to be correct. Indeed, a *compensatio* would not be possible due to the differences[67] between the GmbH's claim against the shareholder and the shareholder's claim against the GmbH. These claims are not equal because the shareholder can demand a certain payment (*dare*), and the GmbH can demand the exemption from the debt (*facere*).[68]

However, after a successful exemption, there would be no *causa* that could justify a payment from the GmbH to the shareholder. Therefore, a payment could be reclaimed with a *condictio ob causam finitam* (*condictio causa finita*).[69] If the GmbH were forced to make a payment to the shareholder and later claim it back, this would represent an unnecessary form of litigation[70] and waste of resources.

According to section 7[71] of the Austrian civil code, natural legal principles are part of Austrian civil law. The juristic rule *dolo facit, qui petit quod redditurus est* is – as emphasised by Kramer[72] and Kodek[73] – such a natural legal principle. Therefore, a plaintiff who claims something that he has to return to the defendant abuses his right.

3.3 *Legatum liberationis*

A *legatarius* who receives a *legatum liberationis* has a claim for exemption against the heir. This claim for exemption, which is based on a *testamentum*, has the same effect as a claim for exemption that results from a tortious liability.[74] Therefore, the objection that the *legatarius* can raise against the heir can also

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[65] In the Austrian Civil Code, this abuse of right is mentioned in sections 94 (2), 1295 (2), and 1305.
§ 94 (2) ABGB: *Der Ehegatte, der den gemeinsamen Haushalt führt, leistet dadurch seinen Beitrag im Sinn des Abs. 1; er hat an den anderen einen Anspruch auf Unterhalt, wobei eigene Einkünfte angemessen zu berücksichtigen sind. Dies gilt nach der Aufhebung des gemeinsamen Haushalts zugunsten des bisher Unterhaltsberechtigten weiter, sofern nicht die Geltendmachung des Unterhaltsanspruchs, besonders wegen der Gründe, die zur Aufhebung des gemeinsamen Haushalts geführt haben, ein Mißbrauch des Rechtes wäre. Ein Unterhaltsanspruch steht einem Ehegatten auch zu, soweit er seinen Beitrag nach Abs. 1 nicht zu leisten vermag.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 17-18: *The spouse who manages the joint household complies with his obligations pursuant to para 1 in this way; he is entitled to maintenance against the other spouse. In this connection a spouse's own income must be reasonably considered. This also applies after the separation of the joint household in favour of the spouse entitled to maintenance so far unless the entitlement to maintenance would, in particular due to the reasons leading to the separation of the joint household, constitute an abuse of such right. A spouse is also entitled to maintenance if he is not able to comply with the obligation to contribute in accordance with para 1.*
§ 1295 (2) ABGB (Austrian Civil Code): *Auch wer in einer gegen die guten Sitten verstoßenden Weise absichtlich Schaden zufügt, ist dafür verantwortlich, jedoch falls dies in Ausübung eines Rechtes geschah, nur dann, wenn die Ausübung des Rechtes offenbar den Zweck hatte, den anderen zu schädigen.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 465: *Whoever causes damages with malicious intent in a way which violates public policy is liable as well, however, if this happened when exercising a right, only if the exercise of the right obviously had the purpose of harming the other party.*
§ 1305 ABGB (Austrian Civil Code): *Wer von seinem Rechte innerhalb der rechtlichen Schranken (§ 1295, Absatz 2) Gebrauch macht, hat den für einen anderen daraus entspringenden Nachteil nicht zu verantworten.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 468: *Whoever makes use of his right within the legal framework (section 1295 para 2) is not responsible for the negative consequence for someone else in connection therewith.*
For more information about sections 94 (2), 1295 (2), and 1305 of the Austrian Civil Code, see BYDLINSKI, F., Skizzen zum Verbot des Rechtsmißbrauchs im österreichischen Privatrecht. In: BERNAT, E. – BÖHLER, E. – WEILINGER, A. (ed.), *Festschrift Heinz Krejci zum 60. Geburtstag II. Zum Recht der Wirtschaft*, Wien, 2001, p. 1082-1084; MOSER, J., *Verwirkung und Rechtsmissbrauch im Ehegattenunterhaltsrecht*, Wien, 2016, p. 6-25, 87-144.

[66] TORGGLER, *Wiener Kommentar*, p. 48, § 20/40; TORGGLER, *Kurzkommentar*, p. 205-206, § 20/26.

[67] See § 1438 ABGB (Austrian Civil Code): *Wenn Forderungen gegenseitig zusammentreffen, die richtig, gleichartig, und so beschaffen sind, daß eine Sache, die dem Einen als Gläubiger gebührt, von diesem auch als Schuldner dem Andern entrichtet werden kann; so entsteht, in so weit die Forderungen sich gegen einander ausgleichen, eine gegenseitige Aufhebung der Verbindlichkeiten (Compensation), welche schon für sich die gegenseitige Zahlung bewirket.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 513-514: *In the case of mutual claims which are valid, equal, and of a nature that an asset to which one is entitled as creditor can also be given by him as debtor to the other, a set-off of the mutual obligations takes place to the extent the amounts of the claims equal each other (set-off), which effects mutual payment as such.*

[68] See section "2.1 *Legatum*"; BYDLINSKI, *Kommentar*, p. 2018, § 1440/1.

[69] For more information about this *condictio* in Austrian civil law, see WELSER – ZÖCHLING-JUD, *Grundriss*, p. 471. For more information about the *condictio ob causam finitam* in Roman law, see KASER, *Privatrecht*, p. 596 n. 31.

[70] See TRENKER, M., Geschlossene Fonds: Einwendungslose Außenhaftung des Treugeberkommanditisten. In: LEUPOLD, P. (ed.), *Forum Verbraucherrecht 2017*, Wien, 2017, p. 167.

[71] § 7 ABGB (Austrian Civil Code): *Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 2: *If a matter can neither be determined by the wording nor by the natural meaning of a law, similar matters which have been regulated by law and the purpose of other related laws must be considered. If the matter still remains ambiguous, it must be decided based on the diligently gathered and thoroughly considered facts in line with the natural legal principles.*

[72] KRAMER, E. A., Die "natürlichen Rechtsgrundsätze" des § 7 ABGB heute. In: FISCHER-CZERMAK, C. (ed.), *Festschrift 200 Jahre ABGB II*, Wien, 2011, p. 1181.

[73] KODEK, G., § 1-14. In: RUMMEL, P. – LUKAS, M. (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen. § 1-43 ABGB (Einleitung, Personenrechte)*, 4th edn. Wien, 2015, p. 138, § 7/85.

[74] See section "3.2 Claim for exemption".

be explained – as in Roman law[75] – with the juristic rule *dolo facit, qui petit quod redditurus est.* The heir abuses his right if he sues the *legatarius*. Indeed, after a successful exemption, the heir would have no *causa* that could justify keeping the payment from the *legatarius*, and thus, the heir would have to return the payment back to the *legatarius*.

3.4 *Dolo facit, qui petit quod redditurus est*

In Austrian civil law, a debtor who has a claim for exemption against the creditor does not have to take the initiative and start a lawsuit. Such a claim for exemption can, as highlighted in previous sections, result from a tortious liability[76] or a *legatum liberationis.*[77] A claim for exemption can also arise from contract.[78] Furthermore, certain provisions of special laws grant a claim for exemption to a party.[79]

If a creditor tries to sue the debtor, the debtor can – due to his claim for exemption – raise an objection. Similar to the legal situation in Roman law[80] and German civil law,[81] the objection of the debtor against the creditor can be explained with the juristic rule *dolo facit, qui petit quod redditurus est*.[82]

4. Conclusion

Both in Roman law and Austrian civil law, the testator can order the heir to free his debtor. However, such an order cannot free the debtor immediately. After the death of the testator, the debtor can sue the heir and enforce an exemption from his debt.

In Roman law, the *legatarius* could sue the heir with the *actio ex testamento*. If there was no valid *legatum* but the deceased had ordered his heir to free the debtor (*fideicommissarius*), the debtor would have had an *actio ex fideicommisso* against the heir. In Austrian civil law, the *legatarius* who receives a *legatum liberationis* can sue the heir with an action and, thus, enforce the exemption from his debt.

If the *legatarius/fideicommissarius* first sues the heir, no further problems occur, as after the exemption, the heir has no claim against the debtor. If, however, the heir acts quickly and, thus, sues the *legatarius/fideicommissarius* before the *legatarius/fideicommissarius* can sue him, the situation becomes more complicated. In such cases, it is questionable whether the *legatarius/fideicommissarius* can defend himself against the heir.

In Roman law, the *legatarius* could raise an *exceptio doli* against the heir. Paulus explained this *exceptio* with the juristic rule *dolo facit, qui petit quod redditurus est*.[83] According to Papinianus and Ulpianus, the *fideicommissarius* could also bring forward an *exceptio doli* against the heir. Since the *fideicommissarius* had a legal position similar to that of the *legatarius*, the *exceptio doli* of the *fideicommissarius* can also be explained with the juristic rule *dolo facit, qui petit quod redditurus est*.[84]

In Austrian civil law, a claim for exemption does not only give the debtor the right to enforce an exemption with an action. Indeed, the debtor can also stay passive and wait until he is sued by the creditor, as he can then raise an objection against the creditor's action. Such an objection can be explained – as in Roman law – with the juristic rule *dolo facit, qui petit quod redditurus est*.[85] In this case, the creditor (the plaintiff) claims a payment that he would have to return to the debtor (the defendant) and, thus, abuses his right.

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[75] See section "2.1 *Legatum*".
[76] See section "3.2 Claim for exemption".
[77] See section "3.3 *Legatum liberationis*".
[78] TRENKER, Geschlossene Fonds, p. 146-152, 167.
[79] These provisions are listed by WERDERITSCH, L. – SCHWEIGER, M. M., Der Freistellungsanspruch im Schadenersatzrecht. In: *Zivilrecht aktuell*, 2023, p. 5 n. 4.
[80] See D. 44. 4. 8 pr.-1 (section "2.1 *Legatum*").
[81] MÖLLERS, T. M. J. – GRASSL, P., Zur Europarechtswidrigkeit der Schrottimmobilien-Rechtsprechung des XI. Senates – Die Umsetzung der EuGH-Rechtsprechung zur Haustürwiderrufs-RiL 85/577/EWG durch deutsche Gerichte. In: *Verbraucher und Recht*, 2010, p. 9; MAIER, A., § 215 BGB und die verjährte "dolo agit"-Einrede. In: *Verbraucher und Recht*, 2015, p. 410; REGENFUS, T., "Unselbstständigkeit" und "Verjährungsabhängigkeit" der Dolo-agit-Einrede. In: *Wertpapier-Mitteilungen. Zeitschrift für Wirtschafts- und Bankrecht*, 2019, p. 1578.
[82] See sections "3.2 Claim for exemption" and "3.3 *Legatum liberationis*".
[83] See section "2.1 *Legatum*".
[84] See section "2.2 *Fideicommissum*".
[85] See sections "3.2 Claim for exemption", "3.3 *Legatum liberationis*", and "3.4 *Dolo facit, qui petit quod redditurus est*".

Cicero's Responsibilizing Narrative and Moral Decision Making in Roman Law

Margot Callewaert[*]*, Mitja Kovac*[**]

Abstract

The question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains represents one of the most puzzling and extensively debated legal issues. This question has fascinated scholars in philosophy, law and history from ancient times and has produced an impressive amount of literature, decisions and comments. This paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particularly the famous Cicero's decision on the famine at Rhodes. Moreover, paper suggests that Cicero's moral judgement and its centuries long circulation via the extensive network of narratives spread widely and influenced the development of the modern legal regimes around the globe. Finally, paper argues that Cicero's responsibilizing narrative is an instrument of mind and its circulation among lawyers and legal scholars helped to develop and sustain better social and legal norms.

Keywords: *Moral reasoning; narratives; fraud; Cicero; Roman law.*

1. Introduction

As Robert Shiller, Nobel prize winner, notes, "the "narratives" we spin for ourselves about the economy. Narratives not only reflect economic reality, they shape it, in a self-fulfilling manner – even if those narratives do not match macroeconomic models."[1] Shiller as a pioneer of growing studies on the role of narratives in economics also suggests that we need to incorporate the contagion of narratives into economic and other behavioural theories.[2] Otherwise we may remain blind to a very important mechanism for economic and social change, as well as crucial element for economic forecasting.[3] Namely, if we do not understand the epidemics of popular narratives, we do not fully understand how standards of fairness, morality and ethics are formed, changed, transmitted and how they influence social behaviour. Moreover, it seems that humankind is almost unable to get on without stories and without story telling.

In this respect, countless lawyers from ancient times[4] have been wondering what the moral thing is to do and have produced numerous decisions and, as we will argue, ground-breaking narratives. The aim of this paper is of course not to answer that immemorial question, but instead to analyze what types of legal structures lead to responsibilizing rationales to spread widely throughout legal systems. More particularly, we explore the classic narrative of the question on circumstances under which an individual has a moral duty to disclose valuable information unknown to the person with whom she bargains represents one of the most puzzling and extensively debated legal issues. Does the party have the right to remain silent and profit from her secret knowledge? These questions have fascinated scholars in philosophy, law and history from ancient times and have produced an impressive amount of literature, decisions and comments. Most recently, it has also gained extensive attention among prominent legal and economics scholars investigating the legal and economic system of ancient Rome. For example, recent law and economics studies illustrate a fruitful potential of legal-economic theory for shedding light on the institutions of the ancient world, and in particular for enhancing our understanding of the legal and economic arrangements found in the Roman Empire.[5] Moreover, while there is an extensive schol-

* Margot Callewaert, Department of Managerial Economics, Strategy and Innovation, Faculty of Economics and Business, University of Leuven, Belgium, email: margot.callewaert@emle.eu / ORCID 0000-0002-9977-1926.

** prof. Dr. Mitja Kovac, Department of Management and Organization, Faculty of Economics and Business, University of Ljubljana, Slovenia, email: Mitja.kovac@ef.uni-lj.si / ORCID 0000-0003-0308-1865.

1 SHILLER, R. J., Narrative Economics. In: *American Economic Review,* Vol. 107, No. 42, 2017, p. 967–1004.

2 SHILLER, R. J., *Narrative Economics: How Stories Go Viral & Drive Major Economic Events*. Boston, 2019, p. xvii.

3 Ibid.

4 See e.g. WAUTERS, B. – DE BENITO, M., *The History of Law in Europe. An Introduction*. Cheltenham, 2017; and DYMOND, J., Ciceronian Jurisprudence and the Law of Nations. In: *The Historical Journal*, Vol. 67, No. 1, 2024, p. 1–20.

5 MILLER, P. G., Rome and the Economics of Ancient Law II. In: DARI-MATTIACCI, G. – KEHOE, D. P. (eds.), *Roman Law and Economics Volume II*. Oxford, 2020, p. 1.

arly literature on the modern reception of Roman law,[6] and on the influence of Cicero's writings on modern legal thought,[7] Abatino and Dari-Mattiacci also argue that for example non-disclosure remedies provided by Roman law were efficient in their sphere of application.[8] In addition, emphasizes the central role of Roman law as a major source for a European unification and suggests that Roman ius commune can be served as a common cultural basis for a European civil codification, even if this is planned only for the remote future.[9]

Furthermore, extensive economic literature stresses the importance of narratives in sustaining better social norms.[10] Namely, Bruner suggests that we organize our experience and our memory of human happenings mainly in the form of narrative – stories, excuses, myths, reasons for doing and not doing.[11] However, the concept of narratives was only cautiously taken into account by legal scholars who analyzed judgements[12] and until today "the vast majority of the work on narratives in law is concerned with the analysis of legal decisions in domestic law."[13] Otten also suggests that "generally narratives are seen as part of the literature, as an art and as such cannot possibly have anything to do with law."[14]

This paper joints this debate and explores the role of legal profession and its transmission of narratives on the formation of moral arguments providing reasons for what a person "should do." More particularly, while focusing on the disclosure duties in the contract law of ancient Rome and famous Cicero decision on the famine at Rhodes case the paper overcomes an old legal and moral crux and critically examines the legal obligations (and related narrative) of parties to disclose private information to their counterparties in contract for sale of ancient Roman law. Furthermore, paper suggests that Cicero's moral judgement and its centuries long circulation via the extensive network of narratives spread widely and influenced the development of the modern legal regimes around the globe. Cicero's responsibilizing narrative is an instrument of mind and its circulation among lawyers and legal scholars helped to develop and sustain better social and legal norms. Finally, paper argues that legal profession might be seen as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsibilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do.

This paper complements our earlier work on the "disclosure duties" in five noteworthy respects.[15] First, this paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particularly the famous Cicero decision on the famine at Rhodes. Second, this paper explores whether the same outcome as in the famine at Rhodes case could still be envisaged today while applying law & economics concepts and whether his decision actually corresponds with the economically inspired optimal rule. Third, paper offers modern examples of narratives in the Belgium law of contracts. Fourth, paper suggests a plurality of roman law narratives still exists today and they can have a strong influence on the understanding and the development of modern contract law. Namely, we employ Cicero's moral judgement and its centuries long circulation via the extensive network of narratives to show how it might influenced the development of the modern legal regimes around the globe. Fifth, paper suggests that Cicero's brilliant decision in the famine at Rhodes case might be an ancient social equilibrium of fairness and efficiency. This argu-

[6] See e.g. STEINBERG, M., The Twelve Tables and Their Origins: An Eighteenth-Century Debate. In: *Journal of the History of Ideas*, Vol. 43, No. 3, 1982, p. 379-96; PALMER, B. W., An Imperishable System: What the World Owes to Roman Law. In: *American Bar Association Journal*, Vol. 45, No. 11, 1959, p. 1149-221; TURPIN, C. C., The Reception of Roman Law. In: *Irish Jurist*, Vol. 3, No. 1, 1966, p. 162-74; PLANK, J. W., The Survival of Roman Law. In: *American Bar Association Journal*, Vol. 51, No. 3, 1965, p. 259–61; and WHITTUCK, E. A., Roman Law in the Modern World. In: *Journal of Comparative Legislation and International Law*, Vol. 2, No. 1, 1920, p. 104-109.

[7] See e.g. BERNO, F. R. – LA BUA, G., *Portraying Cicero in Literature, Culture, and Politics*, Amsterdam,2022; PLESSIS DU, P. J., *Cicero's Law: Rethinking Roman Law of the Late Republic*., 2016; COLEMAN-NORTON, P. R., Cicero's Contribution to the Text of the Twelve Tables. In: *The Classical Journa*l, Vol. 46, No. 2, 1950, p. 51–60; and BROOKS, O. R., *Cicero and Modern Law*. London, 2009.

[8] ABATINO, B. – DARI-MATTIACI, G., The Dual Origin of the Duty to Disclose in Roman Law. In: DARI-MATTIACCI, G. – KEHOE, D. P. (eds.), *Roman Law and Economics Volume II*. Oxford, 2020, p. 401–427.

[9] KAUFFMANN, P., Spreading the Law – Comparative Legal Traditions. In*: Journal on European History of Law*, Vol. 4, No. 2, 2013, p. 33-41.

[10] Shiller for example suggest that human brain have always been highly tuned towards narratives, whether factual or not, to justify ongoing actions, where those narratives motivate and connect activities to deeply felt values and needs; SHILLER, R. J., Narrative Economics. In: *American Economic Review*, Vol. 107, No. 42, 2017, p. 967–1004.

[11] Bruner suggests that narrative is a "conventional form, transmitted culturally and constrained by each individual's level of mastery and by his conglomerate of prosthetic devices, colleagues and mentors. Narratives, then, are a version of reality whose acceptability is governed by convention and narrative necessity rather than by empirical verification and logical requiredness;" BRUNER, J., The Narrative Construction of Reality. In: *Critical Inquiry*, Vol. 18, No. 1, 1991, p. 18.

[12] See e. g. SCHEPPLE, K. L., Foreword: Telling Stories. In: *Michigan Law Review*, Vol. 87, No. 3, 1989, p. 2073.

[13] OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 188. See also CLAPHAM, A., Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups. In: *Journal of International Criminal Justice*, Vol. 6, No. 5., 2008, p. 900; and GUDRON, G. M. – GAMPER, A., *Legal Narratives: European Perspectives on U.S. Law in Cultural Context*. Wien-New York, 2009.

[14] OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 188. For example, Weisberg states that law, proud law, dressed in a little brief authority, stubbornly resists full recognition of its basically narrative nature; WEISBERG, H. R., Three Lessons from Law and Literature. In: *Loyola of Los Angeles Law Review*, Vol. 27., No. 1, 1993, p. 285.

[15] DE GEEST, G. – KOVAC, M., Formation of Contracts in the Draft Common Frame of Reference. In *European Review of Private Law*, Vol. 17, No.2, 2009, p. 67-82; and CALLEWAERT, M. – KOVAC, M., Does Cicero's Decision Stand the Test of Time? Famine at Rhodes and Comparative Law and Economics Approach. In: *Comparative Law Review*, Vol. 12, No. 1, 2023.

ment is also in line with Neumann's findings that legal aspects of Cicero's oration on behalf of Tullius, particularly the '*actio de vi coactis armatisve hominibus*,' and his interpretation of the action is probably "correct" and relevant to this day.[16]

In this article, the analysis is as positive as it is normative. The analytical approach employs the classical comparative law and economics approach.[17] However, a caveat should be stated. Namely, the aim of the paper is not to impose a final word on the matter, but to undertake an exploratory analysis of the relationship between the development of roman law and its economic effects.

This paper is structured as follows. The first part offers conceptual framework and literature review for the categorization of narratives. It provides a conceptual approach to narratives, to what they are and how they function. The second part examines the duty to disclose in Roman law, introduces an ancient "famine at Rhodes" case and presents Cicero's reasoning and his reflections on the concepts of justice and fairness. The fourth part localizes an example of narratives in roman law – a moral duty to disclose information and provides a comparative treatment of the Belgium contract law and related disclosure duties. Finally, some brief conclusions are presented.

2. Conceptual Framework and Literature Review

Cicero was a prominent political figure during this time period as well, and his writings are the best preserved of his contemporaries.[18] His works take up a considerable part of the surviving Classical Latin literature and since Classics is a millennia-old study, an important and influential figure like Cicero has been the topic of hundreds of books and biographies.[19] Rollinger for example used evidence largely from Cicero's letters to create a social network map in order to analyze the problem of debt as experienced by the orator and his peers.[20] Whereas Mather shows that the medieval revival of ancient Roman law led to a vast improvement in the legal systems of Western Europe.[21] What had been rather primitive bodies of law were transformed into modern. and comprehensive systems, enlightened in their moral foundations and sophisticated in their practical details.[22] Sellers also argues that Cicero's influence was significant in the centuries following his death, throughout the middle ages, and during the renaissance of European culture, but never so much nor so directly as in the emergence of modernity and in the development of modern law and constitutional government.[23] He concludes that the modern world would not have developed where it did, when it did, nor as it did were it not for the life and the writings of Marcus Tullius Cicero.[24]

On the other hand, the study of mind, has as Bruner notes, centered principally on how man achieves a true knowledge of the world.[25] Jones suggests that we do not achieve our mastery of social reality by "growing up as little scientists, little logicians, or little mathematicians.[26] Instead, as Bruner argues, we "organize our experience and our memory of human happenings mainly in the form of narrative – stories, excuses, myths, reasons for doing and not doing and so on."[27] Narratives are "stories people tell themselves, and each other, to make sense of human experience – that is, to organize, explain, justify, predict and sometimes influence its course; they are instruments of mind in the construction

[16] NEUMANN, A., Ciceros Rede pro Tullio Revisited. Überlegungen zur Tulliana aus Rechtshistorischer Sicht. In: *Journal on European History of Law*, Vol. 16, No. 2, 2024, p. 2–11. See also SKRZYWANEK-JAWORSKA, D., Marek Kuryłowicz: Rzymskie Prawo Oraz Zwyczaje Grobowe i Pogrzebowe. Studia i Szkice. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 210-211.

[17] VAN DEN BERGH, R., *The Roundabouts of European Law and Economics.* Den Haag 2018, p. 21-28.

[18] For a collection of essays on Cicero's influence on modern law, see BROOKS, O. R., *Cicero and Modern Law*. London, 2009. For a broader study of Cicero's influence through the ages, see THADDÄUS, Z., *Cicero im Wandel der Jahrhunderte*. Leipzig, 1929. See also TUCK, R., The "Modern" Theory of Natural Law. In: PAGDEN, A. (ed.), *The Languages of Political Theory in Early-Modern Europe*. Cambridge, 1987, p. 99-119.

[19] MARLEY, A. C., *Sentiments, Networks, Literary Biography: Towards a Meso-analysis of Cicero's Corpus*. Iowa City, 2020. See also BAJÁNHÁZY, I., Urkundenfälschung im Römischen Recht, Cicero als Schriftsachverständiger. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 219-226.

[20] ROLLINGER, C., *Solvendi Sunt Nummi: die Schuldenkultur der Späten Römischen Republik im Spiefel der Schriten Ciceros*. Heidelberg, 2009. See also GILLES, G. H., *Family or Faction? Using Cicero's Letter to Map the Political, Social, and Familial Relationships between Senators during the Civil War of 49–45 Bc*. Reading, 2016.

[21] MATHER, H., The Medieval Revival of Roman Law: Implications for Contemporary Legal Education. In: *The Catholic Lawyer*, Vol. 41, No. 4, 2002.

[22] In large part, this transformation was due to the skill with which medieval lawyers made careful and critical studies of ideas borrowed from legal history, comparative law, and philosophy. This skill was achieved by means of the curricular structure and teaching methods of the medieval law schools; ibid. See also CANTONI, D. – YUCHTMAN, N., Medieval Universities, Legal Institutions, and the Commercial Revolution. In: *The Quarterly Journal of Economics*, Vol. 129, No. 2, 2014, p. 133-138.

[23] See SELLERS, M., *The Sacred Fire of Liberty: Republicanism, Liberalism and the Law*. Cambridge, 1998. See also MCILWAIN, C. H., Constitutionalism Ancient and Modern. Ithaca, 1947; VAN GELDEREN, M. – SKINNER, Q., *Republicanism and Constitutionalism in Early Modern Europe: A Shared European Heritage*. Cambridge, 2005; and BOÓC, A., Comments on the Concept of Arbiter in Roman Law. In: *Journal on European History of Law*, Vol. 10, No. 2, 2019, p. 233-243.

[24] SELLERS, M., *The Influence on Marcus Tullius Cicero on Modern Legal and Political Ideas*. Baltimore, 2009. Moreover, Carlyle drew the line between the ancient and the modern at Cicero. See CARLYLE, R. W. – CARLYLE, A. J., *A History of Medieval Political Theory in the West*. London, 1903, p. 1-2. See also CUMMING, R., D., *Human Nature and History*. Chicago, 1969; and HORN, J. K., Gaius Libro Septimo Decimo ad Edictum Provinciale D.29,5,25 – Betrachtungen zum SC Silanianum in Gaius' Kommentar ad Edictum Provinciale. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 233-243.

[25] Where classic rational and empiricists traditions have dominated our conception of how mind grows and how it gets its grasp on the real world; Bruner, supra note 7, p 1. See also GARDNER. H., *Frames of Mind: The Theory of Multiple Intelligence*. London, 2011; and BRUNER, J., *Acts of Meaning*. Cambridge, 1990.

[26] EDWARD, J. E., *Interpersonal Perception*. New York, 1990.

[27] BRUNER, J., The Narrative Construction of Reality. In: *Critical Inquiry*, Vol. 18, No. 1, 1991, p. 4. See also BRUNER, J., Life as Narrative. In: *Social Research*, Vol. 54, No. 1, 1987, p. 11-32; and GONZALEZ, M. J., Jerome Bruner and the Challenges of the Narrative Turn: Then and Now. In: *Narrative Inquiry*, Vol. 21, No. 2, 2011, p. 295 – 302.

of reality."[28] Moreover, narratives are employed by variety of fields to advance knowledge as are viewed as central features of all societies.[29] Namely, narrative analysis uses stories to describe human experience and action, since people give meaning to their lives through the stories they tell.[30] Narratives we hear and that we tell shape the meaning and the quality of our lives and they connect us with others and with our own histories, through time, place and crossroad and advice on how we might live our lives.[31] Narratives create images, myths and metaphors that carry moral resonance and contribute to our knowing and being known.[32] Narratives offer a journey into the world of practical ethics and join the worlds of thought and feeling.[33] Oliver suggest that narrative analysis is a "research methodology that offers insights into how people construct the meaning of their experience."[34] This chapter summarizes narrative literature from various fields and provides a conceptual framework on which we seek to build a narrative-based approach to comparative law.

2.1 Theoretical and Conceptual Mechanisms

In our paper we focus on narratives as rationales or justifications of certain behavior or decision-making and which shape standards in economic decisions.[35] These narratives of one should do or should not do is also the focus of our paper. Namely, as Benabou, Falk and Tirole suggest the most important narratives pertain to actions with moral or social implications and which involve externalities/internalities and reputational concerns.[36] Moreover, we also employ their definition of "narrative as any news, story, life experience or heuristic that has the potential to alter person's beliefs about the tradeoff between private benefits and social costs (or the reverse) faced by decision maker, who could be herself, someone she observes, or someone she seeks to influence."[37] Benabou, Falk and Tirole show that positive narratives or responsibilities increase the pressure to do the moral thing and that narratives involve a critical-contagion aspect where such narratives spread moral arguments through a population inducing a cascade of pro-social behavior.[38]

Moreover, extensive literature shows that moral-identity and social-reputation concerns are the driving forces behind prosocial behavior.[39] Moreover, Hagenbach and Koessler show that show that agents who are more central in terms of preference tend to communicate more and to have a greater impact on decisions,[40] whereas Galeotti et al argue that the influential

[28] Narratives are version of reality whose acceptability is governed by convention and narrative necessity rather than by empirical verification and logical requiredness; BRUNER, J., The Narrative Construction of Reality. In: *Critical Inquiry*, Vol. 18, No. 1, 1991, p. 6. See also BRUNER, J., *Actual Minds, Possible Worlds*. Cambridge, 1986; SARBIN, R. T., *Narrative Psychology: The Storied Nature of Human Conduct*. New York, 1986; BRUNER, J. – KALMAR, D. A., Narrative and Metanarrative in the Construction of Self. In FERRARI, M. D. – STENBERG, R. J. (eds.), *Self-awareness: Its Nature and Development*. New York, 1998, p. 308-331; and CHARON, R. – MONTELLO, M., *Stories Matter: The Role of Narrative in Medical Ethics*. New York, 2002.

[29] For example, narratives are used in anthropology, psychology, sociology, history, epidemiology, marketing, psychoanalysis, literary studies, neuroscience and neurolinguistics. For a synthesis see SHILLER, R. J., *Narrative Economics: How Stories Go Viral & Drive Major Economic Events*. Boston, 2019, p. 14-17. See also JULLIEN, T. – JULLIEAN, D., Narrativity from the Perspectives of Economics and Philosophy: Davis, Ross, Multiple-selves Models and Behavioral Economics. In: *GREDEG Working Papers 2016-19, Groupe de REcherche en Droit, Economie, Gestion (GREDEG CNRS)*, Université Côte d'Azur, 2016; MACMULLEN, R., *Feelings in History: Ancient and Modern*. New York, 2003; NORTH, C. D., *Understanding the Process of Economic Change*. New Jersey, 2010; MORSON, G. S. – SHAPIRO, M., *Cents and Sensibility: What Economics Can Learn from the Humanities*. New Jersey, 2017; and VARTANIAN, O. – BRISTOL, A. S. – KAUFMAN, J. C., *Neuroscience of Creativity*. Boston, 2013.

[30] POLKINGHORNE, D. E., Narrative Configuration in Qualitative Analysis. In: HATCH, J. A. – WISNIEWSKI, R. (eds.), *Life History and Narrative*. Washington, 1995, p. 5-24.

[31] WITHERELL, C. – NODDINGS, N. (eds.), *Stories Lives Tell: Narrative and Dialogue in Education*. New York, 1991; and CONNELLY, F. M. – CLANDININ, D. J., Stories of Experience and Narrative Inquiry. In: *Educational Researcher*, Vol. 19, No. 5, 1990, p. 2-14.

[32] COLES, R., *The Call of Stories: Teaching and the Moral Imagination*. Boston, 1989.

[33] Ibid.

[34] OLIVER, L. K., A Journey into Narrative Analysis: A Methodology for Discovering Meanings. In: *Journal of Teaching in Physical Education*, Vol. 17, No. 1, 1998, p. 244-250.

[35] The other type is narratives as sense making employed by people when they seek to give meaning to disparate or random events – evolutionary programmes for pattern seeking, planning and anxiety-reduction purposes. See for example KARLSSON, N., – LOEWENSTEIN, G., – MCCAFFERTY, J., The Economics of Meaning. In: *Nordic Journal of Political Economy*, Vol. 30, No. 1, 2004, p. 61-75; and CHATER, N., – LOEWENSTEIN, G., The Under-appreciated Drive for Sense-making. In: *Journal of Economic Behaviour and Organization*, Vol. 126, No. 2, 2015, p. 137–154.

[36] BENABOU, R., – FALK, A., – TIROLE, J., Narratives, Imperatives, and Moral Reasoning. In: *CRC TR 224 Discussion Paper Series crctr224_2019_070*, University of Bonn and University of Mannheim, Germany, 2019.

[37] It may be received fortuitously, searched for and thought of by the individual himself, or strategically communicated by someone else, Ibid.

[38] Ibid.

[39] BENABOU, R. – TIROLE, J., Incentives and Prosocial Behavior. In: *The American Economic Review*, Vol. 96, No. 5, 2006, p. 1652-1678. See also ELLINGSEN, T. – JOHANNESSON, M., Pride and Prejudice: The Human Side of Incentive Theory. In: *The American Economic Review*, Vol. 98, No. 3, 2008, p. 990-1008; ARIELY, D. – BRACHA, A. – MEIER, S., Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Pro-socially. In: *The American Economic Review*, Vol. 99, No. 1, 2009, p. 544-555; DELLA VIGNA, S. – LIST, J. – MALMENDIER, U., Testing for Altruism and Social Pressure in Charitable Giving. In: *Quarterly Journal of Economics*, Vol. 127, No. 1, 2012, p. 1-56; EXLEY, C. L., Excusing Selfishness in Charitable Giving: The Role of Risk. In: *Review of Economic Studies*, Vol. 83, No. 2, 2016, p. 587-628; and GROSSMAN, Z. – VAN DER WEELE, J., Self-image and Willful Ignorance in Social Decisions. In: *Journal of the European Economic Association*, Vol. 15, No. 1, 2017, p. 173-217.

[40] HAGENBACH, J. – KOESSLER, F., Strategic Communication Networks. In: *The Review of Economic Studies*, Vol. 77, No. 3, 2010, p. 1072-1099. Extensive literature also studies the interactions between morality, prices and markets. See for example BREKKE, K. – KVERNDOKK, S. – NYBORG, K., An Economic Model of Moral Motivation. In: *Journal of Public Economics*, Vol. 87, No. 9-10, 2003, p. 1967-1983; ROEMER, J., Kantian Equilibrium. In: *Scandinavian Journal of Economics*, Vol. 112, No. 1, 2010, p. 1-24; AMBUEHL, S., An Offer you Can't Refuse? Incentives Change What We Believe. In: *University of Toronto, mimeo*, 2016; and ELIAS, J. – LACETERA, N. – MACIS, M., Efficiency-Morality Trade-offs in Repugnant Transactions: A Choice Experiment. In: *NBER working paper 22632*, 2016.

players in a community are those who diffuse information to many others who, in contrast, are poorly connected.[41]

Furthermore, narrative analysis originates from what Bruner calls one of two modes of cognitive functioning, or ways of knowing, which provide ways of understanding people's stories.[42] It is shown that narratives convince person of truth by means of lifelike-ness, or verisimilitude.[43] As Alverman et al. suggest an effective narrative results in a compelling message for the reader, a message that may cause the reader to "nod in agreement, pause in reflection, or take an action."[44] Narrative reasoning functions by attending to the diversity of people's behaviour.[45]

Related stream of literature investigates the cultural transmission (via narratives) of values, beliefs and ideas. For example, Bisin and Verdier show that cultural transmission mechanisms have very different implications than evolutionary selection mechanisms with respect to the dynamics of the distribution of the traits in the population.[46] They argue, that "if the direct socialization of children inside the family and their cultural adaptation and imitation from society at large operate as substitutes in the whole cultural transmission mechanism, then there exists an heterogeneous distribution of preferences in the population, which is globally stable."[47] Whereas Foerster and van der Weele show that image concerns work against person's hypocrisy.[48] Moreover, epidemiology have pursued mathematical models of the spread of disease epidemics which might be also applied to spread and transmission of narratives.[49] Berger for example suggests that human behaviour might be influenced by an old idea not talked about much but still remembered, or behavioural residue.[50] Yet, the spread of narrative may be also induced by the so called information cascade which occurs when individuals, having observed the actions and possibly payoffs of those ahead of them, take the same action regardless of their own information signals.[51]

Also, anthropologists such as Douglas Holmes have long studied how central bank language and rituals influence the economy and shows how central bankers have been engaging in communicative experiments that predate the financial crisis and continue to be refined amid its unfolding turmoil.[52] Andre et al. in their empirical investigation document that households' narratives are strongly heterogeneous and coarser than experts' narratives, focus more on the supply side than on the demand side, and often feature politically loaded explanations.[53] They also show that households' narratives strongly shape their inflation expectations and that today the media is an important source of narratives.[54]

On the other hand, Spiegler raises the intriguing possibility that narratives with a particular structure may affect peo-

[41] GALEOTTI, A. – GHIGLINO, C. – SQUINTANI F., Strategic Information Transmission in Networks. In: *Journal of Economic Theory*, Vol. 148, No. 5, 2013, p. 1751-1769. See also AMBRUS, A. – AZEVEDO, E. – KAMADA, Y., Hierarchical Cheap Talk. In: *Theoretical Economics*, Vol. 8, No. 2, 2013, p. 233-261.

[42] BRUNER, J., *Actual Minds, Possible Worlds*. Cambridge, 1986.

[43] Ibid.

[44] ALVERMANN, D. E. – O'BRIEN, D. G. – DILLON, D. R., On Writing Qualitative Research. In: *Reading Research Quarterly,* Vol. 31, No. 1, 1996, p. 114-120.

[45] OLIVER, L. K., A Journey into Narrative Analysis: A Methodology for Discovering Meanings. In: *Journal of Teaching in Physical Education*, Vol. 17, No. 1, 1998, p. 244-250.

[46] BISIN, A. – VERDIER, T., The Economics of Cultural Transmission and the Dynamics of Preferences. In: *Journal of Economic Theory*, Vol. 97, No. 1, 2001, p. 298-319. See also BENABOU, R. – TIROLE J., Belief in a Just World and Redistributive Politics. In: *Quarterly Journal of Economics*, Vol. 121, No. 2, 2006, p. 699-746; TABELLINI, G., The Scope of Cooperation: Values and Incentives. In: *Quarterly Journal of Economics*, Vol. 123, No. 3, 2008, p. 905-950; and DOHMEN, T. – FALK, A. – HUFFMAN, D. – SUNDE, U., The Intergenerational Transmission of Risk and Trust Attitudes. In: *Review of Economic Studies*, Vol. 79, No. 2, 2012, p. 645-677.

[47] On the other hand, "When family and society are substitutes in the transmission mechanism, in fact, families will socialize children more intensely whenever the set of cultural traits they wish to transmit is common only to a minority of the population; and, on the contrary, families which belong to a cultural majority will not spend much resources directly socializing their children, since their children will adopt or imitate with high probability the cultural trait most predominant in society at large, which is the one their parents desire for them;" BISIN, A. – VERDIER, T., The Economics of Cultural Transmission and the Dynamics of Preferences. In: *Journal of Economic Theory*, Vol. 97, No. 1, 2001, p. 298-319, p. 299.

[48] FOERSTER, M. – VAN DER WEELE, J., Denial and Alarmism in Collective Action Problems. In: *TI 2018-019/I Tinbergen Institute Discussion Paper*, 2018.

[49] LEGRAND, J. – GRAIS, R. F. – BOELLE, A. – VALLERON, J. – FLAHAULT, A., Understanding the Dynamics of Ebola Epidemics. In: *Epidemiology and Infection*, Vol. 135, No. 3, 2007, p. 610-21; BREDA, D. – DIECKMAN, O. – DE GRAAF, W. F. – PUGLIESE, A. – VERMIGLIO, R., On the Formulation of Epidemic Models. In: *Journal of Biological Dynamics*, Vol. 6, No. 2, 2012, p. 103-17; NSOESIE, O. E. BECKMAN, R. J., - SHASHAANI, S., - NAGARAJ, K., - MARATHE, M.V., A Simulation Optimization Approach to Epidemic Forecasting. In: *PLoS ONE*, Vol. 8, No. 6, e67164, 2013; and SHARAD, G. – ASHTON, A. – HOFMAN, J. – WATS, J. D., The Structural Virality of Online Diffusion. In: *Management Science*, Vol. 62, No. 1, 2016, p. 1-17.

[50] BERGER, J., *Contagious: Why Things Catch On*. New York, 2013.

[51] An information cascade is a situation in which an individual makes a decision based on observation of others without regard to his own private information. See e.g. BANERJEE, A., A Simpler Model of Heard Behaviour. In: *Quarterly Journal of Economics*, Vol. 107, No. 3, 1992, p. 797-817; BANERJEE, A. – FUDENBERG, D., Word-of-Mouth Learning. In: *Games and Economic Behaviour*, Vol. 46, No. 1, 2004, p. 1-22; and BIKHCHANDANI, S. – HIRSCHLEIFER, D. – WELCH, I., Information Cascades. In: DURLAUF, S. N. – BLURNE L.E. (eds.), *The New Palgrave Dictionary of Economics*. Cambridge, 2008.

[52] Holmes also shows how officials at central banks have created a new monetary regime that relies on collaboration with the public to achieve the ends of monetary policy; HOLMES, D.R., *Economy of Words: Communicative Imperatives in Central Banks*. Chicago, 2013.

[53] ANDRE, P. – HAALAND, I. – ROTH, C. – WOHLFAR, J., Narratives about the Macroeconomy. In: *CEPR Discussion Paper No. DP17305*, 2022.

[54] Ibid.

ple's actions by influencing the subjective beliefs they form from the data they observe.[55] Whereas Charles and Kendall while conducting extensive psychological experiments into how humans create explanatory frameworks to frame economic data argue that people almost always seek to fit new information into pre-existing narratives.[56] Moreover, they show that "causal narratives"[57] causally link an action variable to an outcome variable of interest by weaving in additional variables and that exogenously generated causal narratives manipulate the beliefs and actions of subjects.[58] Furthermore, they show that the shape of our storytelling matters, since "narratives with a particular structure may affect people's actions by influencing the subjective beliefs they form from the data they observe".[59] More specifically, the experiments suggest that "lever" narratives, which present linear causality frames (A leads to B leads to C, and so on) have the strongest grip on people's minds.[60] So-called threat narratives, which describe how offsetting forces both avoid and cause particular outcomes, are less potent.[61] Their experiments also show that people love "to share their homegrown narratives with other subjects, who are then persuaded by them."[62]

Finally, the importance of informal stories and narratives in the formation of person's beliefs and moral standards has been emphasized by Nobel prize laureate Shiller.[63]

2.2 Law and Narratives

In law, the possibility that there could be a story behind interpretation or behind law-making process is oftentimes rejected.[64] The concept of narrative was only cautiously taken into consideration by scholars which analyzed judgements, and until today the vast majority of the work on narratives in law is concerned with the analysis of legal decisions in domestic law.[65] Commonly, narratives are seen as a part of literature,[66] as an art and as such cannot possibly have anything to do with law.[67] However, Schepple suggest that narrative is a way of organizing, coping with, even acting on the world.[68] Namely, she suggests that stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world.[69] Some legal scholars have even explored the implicit norms inherent in legal testimony, which is principally narrative in form.[70] Delgado argues that traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. He suggests that this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions.[71] The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.[72]

Moreover, it has also been suggested that narrative is preconceptual, influencing both the way facts are perceived and factual substance itself, particularly in the criminal justice system.[73] Whereas Cover emphasizes that law itself is truly derived from the sacred narratives of our world.[74]

Furthermore, critical legal studies emphasize the narrative qualities of the law and challenge law's autonomy as a rational

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[55] SPEIGLER, R., Bayesian Networks and Boundedly Rational Expectations. In: *Quarterly Journal of Economics*, Vol. 131, No. 3, 2016, p. 1243-1290. See also STONE, A. D., Causal Stories and the Formation of Policy Agendas. In: *Political Science Quarterly*, Vol. 104, No. 2, 1989, p. 281-300; and KFIR, E. – SPEIGLER, R., A Model of Competing Narratives. In: *American Economic Review*, Vol. 110, No. 12, 2020, p. 3786-3816.

[56] CONSTANTIN, C. – KENDALL, W. C., Casual Narratives. In*: NBER Working Paper 30346*, 2022.

[57] This narrative implies a causal chain from an action (parental ban on social media use), to an auxiliary variable (social media use), to an outcome (depression); Ibid.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] KFIR, E. – SPEIGLER, R., A Model of Competing Narratives. In: *American Economic Review*, Vol. 110, No. 12, 2020, p. 3786-3816.

[62] Ibid.

[63] SHILLER, R. J., Narrative Economics. In: *American Economic Review,* Vol. 107, No. 42, 2017, p. 967–1004.

[64] OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 188.

[65] Otten also claims that in international law, there are only few instances in which scholars hint at the existence of stories or even set out to analyse them; Ibid.

[66] Narrative studies are in law generally connected with the law and literature studies. See e.g. CARDOZO, B. N., *Law and Literature: And Other Essays and Addresses*. New York, 1986; FLUDERNIK, M. – OLSON, G., "Introduction: Law and Literature Versus Law as Literature: Dissenting Opinions. In: FLUDERNIK, M. – OLSON, G., (eds.), *In the Grip of the Law: Trials, Prisons, and the Space Between*. London, 2004; and SCHENK, M.J., Reading Law as Literature, Reading Literature as Law: A Pragmatist's Approach. In: *Journal of Medieval and Humanistic Studies*, Vol. 25, No. 1, 2013, p. 9-29.

[67] Ibid.

[68] SCHEPPLE, L.K., Foreword: Telling Stories. In: *Michigan Law Review*, Vol. 87, No. 1, 1989, 2073.

[69] Stories re-present experience and can introduce imagination and new points of view; Ibid.

[70] See e.g. MASSARO, M. T., Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?. In: *Michigan Law Review*, Vol. 87, No. 1, 1989, 2099; WINTER, S. L., The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning. In: *Michigan Law Review*, Vol. 87, No. 1, 1989, and SINGER, J.W., Persuasion. In: *Michigan Law Review*, Vol. 87, No.1, 1989, 2442.

[71] DELGADO, R., Storytelling for Oppositionists and Others: A Plea for Narrative. In: *Michigan Law Review*, Vol 87, No. 1, 1989, 2441.

[72] Ibid. See also CUNNINGHAM, C. D., A Tale of Two Clients: Thinking About Law as Language. In: *Michigan Law Review*, Vol. 87, No. 1, 1989, 2459.

[73] KERN, G. L., Narrative, Truth, and Trial. In: *Georgetown Law Journal*, Vol. 101, No. 2, 2013, p. 287-288.

[74] COVER, R. M., The Folktales of Justice: Tales of Jurisdiction. In: *Capital University Law Review*, Vol. 14, No.1, 1985, p. 180.

system and shifts their scholarly attention towards law's narrativity.[75] Said claims that legal story telling uses narratives to address various issues and even elaborates invented stories that could be real, with the aim to present situations in which certain conditions are perpetuated.[76]

Otten argues that powerful legal narratives follow a strategy of concealing their fictious and imagined components in order to convince the audience that they are telling the real story.[77] She also suggests that legal interpretation can provide tools to construct narratives and thus international law can be essentially understood as a rhetorical system.[78] Moreover, Fish suggest that the role of narratives in interpretation has been captured by for example the "parol evidence rule: in the first stage its presence on the interpretive scene works to constrain the path interpreters must take on their way to telling persuasive story… then, the rule us invoked to protect meanings from the flow of the story."[79] Hence, the methodological component of legal theory, "read as narrative, reveals a moral choice that a purely analytical reading will often obscure."[80]

3. The Duty to Disclose in Roman Law

We start our exploration of narratives in Roman law with analysis of a famous ancient narrative, launched by Cicero, on the famine at Rhodes and ethics (or what is moral thing to do). In this part we localize an example of narrative in Roman contract law and trace how and why it was created and examine the authority it establishes over time.

Consensual contracts in Roman law break into two groups, sale, hire and *societas* which are perfectly bilateral and have in each case a *quid pro quo*, consideration contracts, and mandate which is only imperfectly bilateral and is gratuitous. Contracts for sale of goods gave rise to *bona fidei*, *iudicia*, *actio empti* for the buyer, *venditi* for the vendor.[81] The binding force of Roman contracts can hardly be overstated, and the formation of contracts rested on consent.[82] However, consent being necessary the circumstances of fraud (*dolus*), violence or threats (*metus*) and mistake might make consent unreal.[83]

In cases of *dolus* a consent obtained by such fraud was none the less consent and the transaction was prima facie valid.[84] Yet in *stricti iuris* transactions, if there was a serious fraud, and this point was expressly invoked in the action (*exceptio doli*) the action was lost.[85] Buckland suggest that in *bona fidei* transactions to order payment only of what was due *ex fide bona*, the point of *dolus* could always be raised by the defence without any express *exceptio*, and the condemnation reduced, or the action dismissed, as the case might require.[86] If the exchange has been completed, then in the absence of any other remedy, the *actio doli* could be invoked to recover the loss caused by the fraud.[87]

In instances of mistakes Roman law regarded such contracts void. In *bona fidei* exchanges (sales) the rule was that fundamental mistake avoided contract.[88] On the other hand, error in *substantia* must have been such that contract would certainly not have been made in knowledge of the facts.[89]

Moreover, there have been two different sets of officials, the *aediles curules* (having jurisdiction over regulated cattle and slave markets) and the *praetor* (having general civilian jurisdiction over contracts) that actually developed remedies for mistakes,

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[75] Olson suggests "legal narratives are moreover the subject of law; in common, civil, and mixed legal systems, the re-construction of what happened to whom or to what is central to a given sequence of events' being ad-judged in juristic terms. Applying an abstract legal norm to a particular case in the civil law tradition requires that an interpretive process is undertaken that involves recourse to methods of narrative analysis such as differentiating between the frame of the telling, the telling, and the told, naming functions of narrative structures, and identifying types of tellers; OLSON, G., Narration and Narrative in Legal Discourse. In: HÜHN, P. – MEISTER, J. C. – PIER, J. – SCHMID, W. (eds), *Handbook of Narratology*, Berlin, 2014, pp. 371-383. For a synthesis on critical legal studies see MATTEI, U., Comparative Law and Critical Legal Studies. In: REIMANN, M. – ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*. Oxford, 2019, p. 815-836.

[76] SAID, E., *Culture and Imperialism*. New York, 1993.

[77] OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 192.

[78] Ibid. Her suggestion is based upon White's argument that the law is a "culture of argument and interpretation through operations of which the rules acquire their life and ultimate meaning; WHITE, B. J., Law as a Language: Reading Law and Reading Literature. In: *Texas Law Review*, Vol. 60, No. 3, 1981, p. 436.

[79] FISH, S., The Law wishes to have a Formal Existence. In: FISH, S. (ed.), *There's no such Thing as Free Speech, And it's a Good Thing, too*. Oxford, 1994, p. 153.

[80] Otten also suggests that even empirical data cannot escape narratives, since they are presented as objective, with an interpretive narrative attached to them by which they are giving meaning; OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 192. See also WEST, L. R., *Narrative, Authority and Law*. Ann Arbor, 2001, p. 358.

[81] BUCKLAND, W.W., *A Manual of Roman Private Law*. Cambridge, 1953, p. 278.

[82] Within most cases also on some other formal requirement; Ibid. See also KASER, M., *Roman Private Law*. London, 1965.

[83] Ibid. See also MOUSOURAKIS, G., *Fundamentals of Roman Private Law*. Berlin, 2012, p. 198.

[84] Ibid. See also BOUCKLAND, W. W., *Elementary Principles of the Roman Private Law*. Cambridge, 2013; and SALKOWSKI, C. – WHITFIELD, E.E., *Institutes and History of Roman Private Law with Catena of Texts*. London, 1886.

[85] MOUSOURAKIS, G., *Fundamentals of Roman Private Law*. Berlin, 2012, p. 203.

[86] BOUCKLAND, W.W., *A Manual of Roman Private Law*. Cambridge, 1953, p. 252.

[87] However, if the aggrieved party transferred property then there was generally an action (condictio) for the recovery of what had been handed over or its value; Ibid.

[88] Yet, Roman law does not offer any definition on what is fundamental; Ibid.

[89] Yet, as Buckland suggests Roman texts do not lend themselves to any clear-cut-rule and sometimes even laid down the rule that misdescription in an important point avoided the agreement, while if it was a minor point, there was a claim for compensation; Ibid. p. 254.

fraud, error and other nonconformity in sales contracts.[90] The praetor had the power of *iurisdictio* to resolve disputes between litigants and of *ius edicendi* to issue an edict listing the remedies available to litigants.[91] This paper focuses on praetor's jurisprudence which provided a single on-the-contract remedy (*actio ex empto*), affirming the contract but allowing the buyer to claim damages[92] Those damages has to be calculated according to the buyer's negative interest and were meant to make the buyer whole with the respect to his position prior to the contract.[93]

However, in the Augustan period, a convergence of different remedies could be detected and the praetor also introduced an off-the-contract remedy (*actio ex empto ad redhibendum*) which also included the possibility of obtaining restitution.[94] With such action the buyer returned the good and asked for the restitution of the price paid.[95] In addition, Donadio suggest that a buyer in a market sale could undertake an action either with aediles and choose between restitution (*actio redhibitoria*) and price reduction (*actio quanti minoris*) or could resort to general jurisdiction of praetor initiating an action employing *actio ex empto*.[96]

3.1 Famine at Rhodes Narrative

Cicero's De Officiis (On Duties) contains a discussion (narrative) on honest business dealings. He states that people want to be honest but that it might not always be obvious what an honest person should do in certain business situations.[97] It is not always clear what we should do when we are confronted with an opportunity where we can personally gain by refraining from saying or doing something.[98]

To this end, Cicero introduces a case that was first developed in the second century B.C. by the Stoic philosopher Diogenes of Babylon, and his pupil Antipater of Tarsus.[99] Cicero analyses this case from an ethical point of view.[100] What should we do when what is right and what is profitable conflict with each other? He states that personal advantage gained at the expense of others affords us no real advantage.[101] As we live in a social environment requiring mutual cooperation, actions undermining our society harm us in the long run, even though we might think that we are gaining in the short run.[102]

In the case, there is food-shortage and famine at Rhodes, resulting in an extremely high price of corn there.[103] An honest merchant has brought a large stock of corn all the way from Alexandria to the island Rhodes. On his way to Rhodes, he noticed that other merchants were also on their way with grain for the Rhodians.[104] Should this merchant share this information with the Rhodians? Or should he keep it to himself in order to sell his corn at a higher price? If the Rhodians know there will be an increase in supply soon, this will likely drive down the price of the grain that the merchant can get.[105] Cicero asks if it is honest of the merchant to benefit from withholding this knowledge from his customers.[106]

3.2 Cicero's Ethical Reasoning

In setting up the narrative, Cicero explains both Diogenes's and Antipater's reasoning. On the one hand, Antipater argues that the seller should disclose everything to the purchaser as the purchaser must be as informed as the seller about the good.[107] This refers to the conditions for a free market exchange, where both seller and buyer are equally, fully and completely knowledgeable about what they are buying and selling.[108] In this case, the invisible hand enforces a fair price in

[90] ABATINO, B. – DARI-MATTIACI, G., The Dual Origin of the Duty to Disclose in Roman Law. In: DARI-MATTIACCI, G. – KEHOE, D. P. (eds.), *Roman Law and Economics Volume II*. Oxford, 2020, p. 401–427, p. 401. See also ARANGIO-RUIZ, V., *La Compravendita in Diritto Romano*. Milano, 1956, pp. 237-239; and TALAMANCA, M., *Instituzioni di Diritto Romano*. Roma, 1990, p. 657-8.

[91] See e.g. DE LIGT, L., *Fairs and Markets in the Roman Empire: Economic and Social Aspects of Periodic Trade in Pre-Industrial Society*. Amsterdam, 1993; and BUCKLAND, W.W., *A Manual of Roman Private Law*. Cambridge, 1953.

[92] Abatino and Dari-Mattiacci suggest that these kinds of damages (*damnum emergens*) could be regarded as very similar to the modern reliance damages; ABATINO, B. – DARI-MATTIACI, G., The Dual Origin of the Duty to Disclose in Roman Law. In: DARI-MATTIACCI, G. – KEHOE, D. P. (eds.), *Roman Law and Economics Volume II*. Oxford, 2020, p. 401–427.

[93] Ibid, p. 408. See also TALAMANCA, M., *Instituzioni di Diritto Romano*. Roma, 1990, p. 591.

[94] See e.g. WATSON, A., Seller's Liability for Defects: Aedicilian Edict and Praetorian Law, *Iura*, Vol. 37, no. 1, 1987, p. 167-175; and DONADIO, N., *La Tutela del Compratore tra Actiones Aediliciae e Action Empty*. Roma, 2004, p. 37-38.

[95] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913, p. 21. 1. 23.7 and 21. 1. 60.

[96] DONADIO, N., *La Tutela del Compratore tra Actiones Aediliciae e Action Empty*. Roma, 2004, p. 34. See also DONADIO, N., Promissio Auctionatoris. In: *Index*, Vol. 39, No. 1, 2011, p. 524-57.

[97] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997.

[98] Ibid. See also MITCHELL, T. N., Cicero on the Moral Crisis of the Late Republic. In: *Hermathena*, Vol. 136, No. 1, 1984, pp. 21–41; LEVICK, B., Morals, Politics, and the Fall of the Roman Republic. In: *Greece & Rome*, Vol. 29, No. 1, 1982, pp. 53–62; and LINTOTT, A., Electoral Bribery in the Roman Republic. In: *The Journal of Roman Studies*, Vol. 80, No. 1, 1990, pp. 1–16.

[99] DONADIO, N., Promissio Auctionatoris. In: *Index*, Vol. 39, No. 1, 2011, p. 524-57.

[100] See e.g. BEARD, M., Cicero and Divination: The Formation of a Latin Discourse. In: *The Journal of Roman Studies*, Vol. 76, No. 1, 1986, pp. 33–46.

[101] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913. See also CICERO, M. C., *On Obligations: A New Translation by P. G. Walsh*. Oxford, 2000.

[102] RICHARDS, supra note 96.

[103] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913.

[104] Ibid.

[105] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997.

[106] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913.

[107] Ibid.

[108] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997.

the market.[109] Antipater states that it is one's duty to take the interests of others into account as well as to serve society.[110] However, Cicero also mentions Diogenes's counterargument, stating that as long as the seller is not breaking the law by not declaring the specific defects that he is obliged to declare, and by not committing misrepresentation, he is not obliged to reveal the information.[111] Diogenes continues that the merchant may try to sell his goods at the best possible price by withholding the information to his advantage as he has no duty to tell the Rhodians everything that might be in their interest to know.[112]

Moreover, Diogenes attacks Antipater's standpoint by arguing that private property does not really exist if people always have to consider everyone else's and society's interests in this way.[113] He continues that nothing should be sold in this case, but everything should be given away for free instead.[114] Both arguments are acknowledging that the action of keeping the information to himself is to the merchant's advantage.[115] However, Antipater labels this as wrong, whereas Diogenes does not.

Cicero concludes that the merchant should tell the Rhodians that other ships are on their way without making clear why he should do so.[116] He refers to the father of Cato who established the principle of good faith, entailing that any defect known to the seller should be notified to the buyer as well.[117] Cicero emphasizes the extensive scope of good faith, and then continues that if the decision of Cato's father was right, the merchant should have shared the information with the Rhodians.[118]

However, the grain itself was not defective in any way.[119] In any case, Cicero seems to agree with Antipater's argument that the purchaser should not be uninformed about any detail, hence, he or she should be as informed as the seller.[120] Hereby, Cicero states that honesty requires the seller to be morally obliged to tell the buyer everything, as not revealing information could be considered concealment.[121] Furthermore, by stating that concealment entails "…trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it"[122], Cicero implies that if the buyer would find the information useful in making the decision whether or not to buy the good, then an honest seller is required to share that information.[123]

3.3 Cicero and the Debate on Economics Versus Ethics

Conform Posner's efficiency hypothesis of law, most legal arguments and legal rules can be seen as ways of getting people to avoid waste or getting them to act efficiently.[124] Ethics looks at what we should do, which principles should guide our everyday behavior.[125] In Cicero's case, what we should do when what is right and what is advantageous or profitable conflict with each other.[126] Therefore, both the ethical, and the law and economics perspective are useful to conduct a normative analysis of the law, to analyze how the law should be.

These two lenses to analyze the famine at Rhodes case, followed different reasonings, but they both resulted in the same outcome, i.e., they both concluded that the merchant should have informed the Rhodians that more ships with grain were on their way to the island.

Therefore, this case can be seen as an example of De Geest's argument that a normative analysis based on Kaldor-Hicks efficiency and a normative analysis based on fairness maxims are not necessarily the polar opposites they are often portrayed to be.[127] According to De Geest, fairness maxims look at only one side of the problem as they emphasize how frustrating an outcome is for one of the parties, but do not take the conflicting (dis)advantage for the other party into account.[128] When applying this to the famine at Rhodes, it is frustrating for the Rhodians that the price they paid for grain would be a lot higher if the merchant did not share the information that other ships were on their way as well. Therefore, it is only fair that the merchant shares the information. Not shar-

[109] DE GEEST, G. – KOVAC, M., Formation of Contracts in the Draft Common Frame of Reference. In: *European Review of Private Law*, Vol. 17, No.2, 2009, p. 113-121.
[110] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997. See also BAJÁNHÁZY, I., Urkundenfälschung im Römischen Recht, Cicero als Schriftsachverständiger. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 219-226; and SUKAČIĆ, M., Lex Commissoria: from a Forbidden Clause in Roman Law to a (Contemporary) Debtor's Welcome Relief. In: *Journal on European History of Law*, Vol. 12, No. 2, 2021, p. 95-105.
[116] Ibid.
[117] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913.
[118] Ibid.
[119] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997.
[120] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913.
[121] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997.
[122] CICERO, M. C., *De Officiis. With an English Translation* (Miller, Walter tr). Boston, 1913.
[123] Ibid.
[124] POSNER, A. R., *Economic Analysis of Law*. New York, 2011.
[125] HARE, R. M., *Moral Thinking: Its Levels, Method and Point*. Oxford, 1981.
[126] RICHARDS, R., Cicero and the Ethics of Honest Business Dealings. In: *Online Journal of Ethics*, 1995-1997.
[127] DE GEEST, G., Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms. In: HATZIS, N. A. – MERCURO, N. (eds.), Law & Economics: Philosophical Issues and Fundamental Questions. London, p. 183-202.
[128] Ibid.

ing information can then always be seen as a bad thing. However, reasoning based on fairness maxims does not look at the other side of the problem.[129] The merchant, on the other side, might have incurred a lot of extra costs by investing in a speedy ship and a strong crew on board. In addition, the merchant has taken a longer, perhaps more perilous journey to Rhodes than if he had just sold his grain in Alexandria, resulting in higher opportunity costs. He probably did all this with the intention of selling his grain at a higher price in Rhodes than in Alexandria. He might incur huge losses, potentially even resulting in bankruptcy, bringing financial problems to his family if he is not able to get a higher price for his grain. This is then frustrating for the merchant.

To solve problems with conflicting (dis)advantages to the other side one has to acknowledge both sides and then balancing them using a certain measure. Thus, the discussion is misleadingly framed as "ethics versus economics" or "fairness versus welfare" as economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it.[130]

Moreover, Calabresi's concept of 'moral externalities,'[131] suggests that when a certain act or behavior morally offends society at large, legal rules will be put in place to prohibit this act or behavior, or at least render it more difficult to perform.[132] These are 'inalienability rules' which do not permit a transfer between a willing buyer and a willing seller.[133] The magnitude of these moral costs to third parties determines if they should be given normative weight, i.e., whether it is appropriate, both economically and legally, to protect people from such moral negative externalities.[134] These moral costs should be given normative weight if they are larger than the costs experienced by those suffering from the legal rule prohibiting the act or making it more difficult.[135]

Finally, merchants' non-disclosure of information and resulted allocation of fortunes in the famine at Rhodes case is not, as one might argue, a mere economic re-distribution issue but an instance of deliberately caused information asymmetry which by definition results in market failures and inefficient allocation of scarce resources. Such market failures and inefficient allocation of scarce resources should be in order to boost economic growth and social wealth, addressed and deterred by legal rules and related duties to inform. Outstandingly, ancient Roman law and Cicero's decision in famine at Rhodes case provided exactly such a remedy.

Thus, Cicero has managed to strike an optimal balance between curing market failures and allocative efficiency on the one hand and moral standards of behavior on the other hand – the Cicero's equilibrium. His equilibrium also shows that the discussion is misleadingly framed as "ethics versus economics" or "fairness versus welfare" as economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it. As shown Cicero's equilibrium simultaneously achieves pareto efficiency and induces ethical, fair and moral behaviour.

4. The Role of Narratives and Roman law

From ancient time lawyers know that law, legal acts or decisions are necessarily expressed through either written or oral language.[136] Mattila actually suggest that law is necessarily bound to human language and that the language of law is as old as law itself and has drawn people's attention from different viewpoints since ancient times.[137]

4.1 Roman Law and the Network of Narratives

As argued existence, revival and continuous teaching of Roman law may also be seen as a transmission mechanism, as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsibilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do.

How do legal such legal narratives go viral? Haidt suggests that reasons and arguments can circulate and affect people, even if individuals rarely engage in private moral reasoning themselves.[138] Contagion occurs from jurist to jurist through education, reading the cases from different legal systems and via talk and discussion, whether in person or through telephone,

[129] Ibid.
[130] Ibid.
[131] CALABRESI, G., *The Future of Law and Economics. Essays in Reform and Recollection*. New Haven, 2016. See also CALABRESI, G. – MELAMED, D., Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. In: *Harvard Law Review*, Vol. 85, No. 3, 1972, p. 1089-1128.
[132] CALABRESI, G., *The Future of Law and Economics. Essays in Reform and Recollection*. New Haven, 2016.
[133] CALABRESI, G. – MELAMED, D., Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. In: *Harvard Law Review*, Vol. 85, No. 3, 1972, p. 1089-1128.
[134] CALABRESI, supra note 129. See also TUZET, G., Calabresi and Mill – Bilateralism, Moral Externalities and Value Pluralism. In: *Global Jurist*, Vol. 19, No. 2, 2019, p. 1-10.
[135] CALABRESI, G. – MELAMED, D., Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. In: *Harvard Law Review*, Vol. 85, No. 3, 1972, p. 1089-1128. See also BROMLEY, D. W., Property Rules, Liability Rules, and Environmental Economics. In: *Journal of Economic Issues*, Vol. 12, No. 1, 1978, pp. 43–60.
[136] See e.g. WHITE, J. B., Legal Knowledge. In: *Harvard Law Review*, Vol. 115, No. 2, 2001-2002, p. 1396.
[137] MATTILA, H. E. S., Comparative Linguistics: A Discipline in Statu Nascendi. In: POZZOO, B. – JACOMETTI, V. (eds.), *Multilingualism and the Harmonisation of European Law*. Amsterdam, 2006, p. 21. See also MATILLA, H. E. S., Legal Language: History. In: BROWN, K. (ed.), *Elsevier Encyclopaedia of Language and Linguistics*. Oxford, 2006.
[138] HAIDT, J., The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgement. In: *Psychological Review*, Vol. 108, No. 4, 2001, p. 814-834. See also HAIDT, J. – GRAHAM, J. – JOSEPH, C., Above and Below Left-Right: Ideological Narratives and Moral Foundations. In: *Psychological Inquiry*, Vol. 20, No. 2-3, 2009, pp. 110-119.

conference or printed materials (articles, textbooks, commentaries, books). There is also contagion facilitated by the fact that jurists watch and read one another's judgements (narratives). Shiller suggest that the basic principle of contagion is the same as with the causes of epidemic.[139] Also legal narratives might follow the same pattern as the spread of disease where the aggregation of individual to collective decision making can be understood in terms of social contagion, where decisions are "transmitted" from one individual to another in a manner reminiscent of disease. Moreover, in recent years, the analysis and modeling of networks, and also networked dynamical systems, have been the subject of considerable interdisciplinary interest, yielding substantive insights in physics, mathematics, computer science, biology, economics, and sociology.[140] Namely, analysis of networks shows that the coincidence of high local clustering and short global separation, is a general feature of sparse, decentralized networks (as network of jurists) that are neither completely ordered nor completely random.[141]

In this constellation Roman law still functions as a spreader of narratives and is infecting jurists around the globe (preventing that contagion rate would decrease and cause the narrative to be forgotten).[142] These narratives then get narrated passed on from jurist to jurist, thereby potentially exerting considerable influence on a society's moral judgements and actions.[143] Namely, as Benabou and Tirole show such narratives induce one to act morally and have also multiplier effect causing a cascade of prosocial behaviors.[144]

Legal narratives are at first unobserved but then start to grow. This long lag between the publication of one legal narrative and its eventual epidemic status represents a time interval over which the legal narrative evolves from something regarded as peculiar and thought provoking into something that is clearly correct and great. During this interval other legal scholars start to increasingly appreciate the legal narrative (i.e. and corresponding legal solution/rule) and the legal epidemic spreads through studies of roman law, academic rituals, lectures, presentations at major conferences.[145] Eventually, legal narratives (and corresponding solutions) make their way into textbooks, curriculums, courses and may start to infect generation after generation of law students across different legal families and systems.

Moreover, legal education (the determination of which texts are read, and which courses are taught) is then influenced and shaped by interpretative community.[146] Hence, Roman law legal education features as super-important place of narrative transmission and transaction. Furthermore, in line with previously discussed literature Roman law might be seen as a network of narratives that acts as powerful tool to establish or reinforce interpretative authority and are hence inherently part of modern legal discourse. Roman narratives might effectively function as mental tools that shape, influence and form the understanding of current law.

4.2 Cicero's Famine at Rhodes Case as Super-spreader Narrative

Already in ancient Greece, the philosopher Plato appreciated the importance of narratives, he wrote his philosophy in the form of fictional dialogues featuring the celebrity, Socrates. As Shiller argues, the narrative force helps to explain what makes his work still popular today.[147]

Insightfully, Cicero in his book *De Oratore* (On the Orator, 55 BCE), which is analytically speaking actually a book on narratives, states: "Nature form and produces men to be facetious mimics or storytellers; their look, and voice, and mode of expression assisting their conceptions."[148]

Cicero's narrative on the famine at Rhodes does not just provide a structure for interpretation of similar contingencies where a judge or a legislator will face with similar moral dilemmas but has through centuries actually become also our common mental model (shared by lawyers around the globe) for controlling knowledge, since it actually operates as an instrument of mind in the construction of todays' reality. Cicero's ancient narrative has an impact on how and when current legal interpretation of moral dilemmas (to disclose or not to disclose the valuable information) takes place in the legal discourse in many modern legal systems. As Jackson stated, "lawyers internalize a set of narrative frameworks regarding the legal recognition of typical behavioral patterns – the narrative form of legal rules…(laden) with those forms of approval and disapproval which legal institutions use in order to confer recognition."[149] As shown, Cicero's superspreading super-narrative – mental map - has been from generation to generation via scholarly articles, spread of Universities and legal schools, first year textbooks on Roman

[139] SHILLER, R. J., Narrative Economics. In: *American Economic Review,* Vol. 107, No. 42, 2017, p. 967–1004, p. 21.
[140] The current generation of network-related research is a rapidly emerging and highly interdisciplinary synthesis of new analytical techniques, enormously greater computing power, and an unprecedented volume of empirical data. For a synthesis of network analysis see WATTS, J. D., The "New" Science of Networks. In: *Annual Review of Sociology*, Vol. 30., No. 2, 2004, pp. 243–70.
[141] See for example WATTS, J. D., Networks, Dynamics, and the Small World Phenomenon. In: *American Journal of Sociology*, Vol. 105, No. 2, 1999, p. 493-527.
[142] See for example, EREZ, A. – MICHEL, J. B., *Uncarted: Big Data as a Lens on Human Culture*. New York, 2013.
[143] Benabou and Tirole for example show how such responsibilizing narratives spread through population and how far each ultimately travels; BENABOU, R. – TIROLE, J., Incentives and Prosocial Behavior. In: *The American Economic Review*, Vol. 96, No. 5, 2006, p. 1652-1678.
[144] Ibid.
[145] See for example VINCK, P. – PHAM, P. N. – BINDU, K. K. – BEDFORT, J. – NILLES, E. J., Institutional Trust and Misinformation in the Response to the 2018-19 Ebola Outbreak in North Kivu, DR Congo: A Population-Based Survey. In: *Lancelot Infectious Diseases*, Vol. 19, No. 30063, 2019.
[146] OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 205.
[147] SHILLER, R. J., Narrative Economics. In: *American Economic Review,* Vol. 107, No. 42, 2017, p. 967–1004, p. 34.
[148] CICERO, M. T., *On Oratory and Orators*. New York, 1860, p. 145.
[149] JACKSON, B. S., *Law, Facts and Narrative Coherence*. London, 1988, p. 171.

law, courts' interpretations, student associations & competitions, and scholarly commentaries passed on in teaching to law students and consequently internalized through centuries by almost endless generations of lawyers across Europe (and across the world).[150]

Namely, Cicero's narrative became a mental tool and when narrative operates as a mental tool, this means that his story becomes real and receives unquestioned acceptance from legal audiences around the globe. Moreover, Cicero's narrative fits into the description of a very powerful narrative, since it makes sense of a moral/ethical problem, it locates troubles by incorporating them into its storyline, and it engages for centuries with us readers and convinces us of the story he presents. His powerful narrative developed a moral code which storied memories and insights of earlier contexts from ancient lawyers that have been via this narrative imbedded in us today. One may even argue that Cicero has deliberately created it in order to persuade legal communities with particular reading of contract law. As White suggests, such narrative becomes then a collective sign and the icon of a series of events and a code for understating reality.[151] In other words, Cicero's narrative is a signal (and a message interpreted as such) about the externalities resulting from the agent's choices and such narratives persuades irrespective of its source.[152]

In other words, Cicero's narrative is essentially a cognitive instrument that organizes experienced knowledge in the form of a story. His narrative has become so natural, convincing and self-evident that is internalized in our legal education, in our mental problem-solving mechanisms and into our moral standards of behavior.

Moreover, Cicero's narrative also fulfills Bruner's criteria for an effective narrative.[153] Namely, First, Cicero's narrative is a unique pattern of events occurring over time (narrative diachronicity) and is characterized as quintessential pattern of events occurring over time. Second, Cicero's narrative is very particular and take as its ostensive reference particular happening that serves as its vehicle rather than its destination. Third, Cicero's narrative is intentional state entailment and is about people acting in a setting, and the happenings that befall them are relevant to their intentional states, to their beliefs, desires, theories and values. Fourth, his narrative has hermeneutic property and composability, whereas automatized interpretations of narrative function as a default settings that deals with knowledge. Fifth, its is canonical and contains a breach of certain canonical script. Namely, as stated in order to be worth telling, narrative, while involving precipitating event, must be about how an implicit canonical script has been breached, violated, or deviated from in a manner to do violence to the legitimacy of the canonical script. Sixth, Cicero's narrative is also referential and its truth is judged by its verisimilitude rather than its verifiability. In other words, analyzed narrative de facto creates a reality. Seventh, it indeed belongs to a genre (human tragedy), since genres, once we narrate to ourselves or the ones that we hear or read, seem to provide us with commodious and conventional model for limiting the hermeneutic task of making sense of human happenings. Eight, his narrative is normative, because tellability as a form of discourse rests on a breach of conventional expectation, narrative is necessarily normative (i.e. normativeness). Nineth, Cicero's narrative is context sensitive and negotiable. Finally, this ancient narrative is accrual and creates a culture, history and tradition. For example, as Bruner suggests Cicero's narrative may be viewed as a system of narrative accruals, since it "guarantees a tradition by assuring that once a case has been interpreted in one-way, future cases that are similar shall be interpreted and decided equivalently." Moreover, Cicero's narrative has a "local" capacity for accruing stories of happenings of the past into some sort of diachronic structure that permits a continuity into the present. Hence, the perpetual construction and reconstruction of the past "provide precisely the forms of canonicity that permit us to recognize when a breach has occurred and how it might be interpreted."[154] Cicero's narrative also creates in us a sense of belonging to the canonical past that permits us to form our own narratives of deviation while maintaining complicity with the ancient canon.

Insightfully and in relation to the spread of Cicer's narrative Schäfer and Wulf show that the reception of Roman Law and the development of Canon was intertwined with the rise of "learned law" in the universities across Europe where a common legal grammar and a system of law gave legal scholarship and the law a flexibility and innovative openness, which enabled lawyers to create new legal forms conducive to business, like city statutes, companies, insurance contracts or cash-free payment methods.[155] Cicero's narrative in this respect boosted the rise of law as a rational and systematic scholarly discipline, which strengthened individual moral values over customary

[150] See for example TAYLOR-BRIGGS, R., Reading Between the Lines: The Textual History and Manuscript Transmission of Cicero's Rhetorical Works. In: COX, V. – WARD J., *The Rhetoric of Cicero in its Medieval and Early Renaissance Commentary Tradition*. Amsterdam, 2006, p. 77-108. Moreover, transmission took place via various mechanisms and routes from judgements, scholarly lectures, legal opinions, textbooks, articles and commentaries. As Otten suggests, narrative transmits its messages in codes and in evaluations of problems and dilemmas it has encountered; OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 213.

[151] WHITE, J. B., Legal Knowledge. In: *Harvard Law Review*, Vol. 115, No. 2, 2001-2002, p. 1396.

[152] BENABOU, R. – TIROLE, J., Incentives and Prosocial Behavior. In: *The American Economic Review*, Vol. 96, No. 5, 2006, p. 1652-1678.

[153] BRUNER, J., Life as Narrative. In: *Social Research*, Vol. 54, No. 1, 1987, p. 11-32.

[154] Ibid.

[155] It also created a new spirit of the law, which separated legal from moral and customary, mostly community-oriented obligations; SCHÄFER, H. B. – WULF, A. J., Jurists, Clerics and Merchants: The Rise of Learned Law in Medieval Europe and Its Impact on Economic Growth. In: *Journal of Empirical Legal Studies*, Vol. 11, No. 2, 2014, p. 266-300. See also BALOGH, E., Iurisprudentia in Medieval Ecclesiastical Jurisdiction (The Role of the Iurisperitorum in the German and Hungarian Case Law). In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 123-133.

duties and generated superior rules of conflict resolution. The spread of his narrative was due to its nature and characteristics actually independent from the extent to which a particular region adopted the rules of Roman law.

In addition, Vitz suggests that narratives are also a central factor in a person's moral development.[156] Based on extensive psychological contributions he argues that narrative material is an essential component of effective moral education.[157] Hence, Cicero's narrative for instruction in virtue has been via the comparative law's transmission mechanism internalized in our legal education, in our mental problem-solving mechanisms and into our moral standards of behavior. The narrative force and comparative law transmission mechanism helps to explain what makes Cicero's work after more than 2000 years still popular today.

4.3 Belgium Law of Contracts: The Duty to Disclose Valuable Information

This last part sets out to identify an example of narratives in comparative law, to trace its creation and to offer one reading of the story. Reading the narrative reveals a moral choice that a purely analytical reading might often obscure. In identifying the narrative, we deliberately rely on standard materials, including textbooks, commentaries, cases and mainstream legal discourse. The narrative of duty to disclose valuable information is a very well-known story and was, as discussed in chapter 3, created by Cicero in the famous famine at Rhodes case. His storyline does not merely deal with the content of the story but rather looks at what drives the story of the moral duty to disclose valuable information to the other contractual party that does not possess it. As suggested, the transmission was taking place via various routes: in judgements and legal opinions, in comparative textbooks and classrooms, and in articles and commentaries. As Otten suggests, essentially narrative transmits its messages in codes and in evaluation of the problems that it has encountered.[158] Cicero's narrative transmitted its messages and morals in codes that achieved to define what is new common sense. In the case of whether one should disclose valuable information to another party that does not posses such information his narrative induced the new common sense in for example in the contract law of Germany (*aufklrenguspflichten*) and Belgium. One may even argue that his narrative might be characterized as a meta-narrative, because its storyline provides the anchor and starting points for other related stories and for different legal systems.

As an example, one may consider the doctrine of fraud in Belgian law.[159] According to article 1116 of the Belgian civil code,[160] fraud takes place when one party employs subterfuge at the contracting stage and deliberately misleads the other party in order to make the latter enter into the agreement.[161] There are four cumulative requirements in order to be defined as fraud: 1) subterfuge or trickery is employed (material element), 2) stemming from the co-contractor, 3) with the deliberate intention (bad faith) to mislead the other contracting party and to induce that party to enter into the contract (psychological element), 4) which is crucial to conclude the agreement, because without the fraud, there would have been no consent.[162] When fraud took place, the party that has been misled can claim the annulment of the agreement due to a defect in consent.[163]

The concept of subterfuge or trickery is broadly interpreted as it can be seen as carrying out positive actions, giving wrong or incomplete information by lying or exaggerating, for instance, as well as deceptively being silent or hiding information.[164] The latter occurs when a party had the obligation to share the information but consciously or deliberately kept quiet.[165] Following article 1116 of the Belgian civil code, silence is seen as deceptive and can hence entail fraud in case the co-contractor would not have made the agreement or would have agreed at a lower price if he had known the information.[166]

The majority of case law and jurisprudence are of the opinion that a contracting party does not have the obligation to share all the information that he possesses with his co-contractor and

[156] VITZ, C. P., The Use of Stories in Moral Development: New Psychological Reasons for an Old Education Method. In: *American Psychologist*, Vol. 5, No. 6, 1990, p. 709-720.

[157] Narrative and narrative thinking are especially involved in how cognitive processes lead to moral development and hence narratives should be employed as a powerful mechanism of moral education; Ibid.

[158] OTTEN, J., Narratives in International Law. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation*, Vol. 99, No. 3, 2016, p. 213.

[159] JANSEN, S., Belgian Case Note. In: *European Review of Private Law*, Vol. 19, No. 3-4, 2011, p. 372 – 393.

[160] Belgian Civil Code dated March 21st, 1804. However, one should note that in February 2024, Book 6, which deals with extra-contractual liability, was adopted. The six articles from the old Civil Code (Articles 1382 et seq.) have now been expanded into six chapters, with chapter 7 covering specific liability regimes (such as the product liability law) without changing their content. The new Book 6 came into effect on 1 January 2025.

[161] DE BOECK, A., *Informatierechten- en Plichten bij de Totstandkoming en Uitvoering van Overeenkomsten, Mortsel.* Amsterdam, 2000. See also DE BOECK, A., *De Wilsgebreken Dwaling en Bedrog Vandaag. Responsabilisering en Ankerplaats voor de Precontractuele Informatieverplichting*. Brugge, 2006, p. 37-100.; STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 91-94; VAN RANSBEECK, R., *Totstandkoming van de Overeenkomst*. Brugge, 2002, p. 126-138.

[162] STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 91-94.

[163] Acknowledged in article 1109 Belgian Civil Code as a defect in consent; STIJNS, S., De Sanctionering van de Wilsgebreken. In VAN RANSBEECK, R. (ed.), *Wilsgebreken*. Brugge, 2006, p. 132-168.

[164] Belgian Court of Cassation 28 April 1961, Pasicrisie Belge 1961, 925, note R.H.; Antwerp 1 April 1992, Rechtskundig weekblad 1994-95, 783.

[165] MASSON, J. P., Les fourberies silencieuses. In: *Tijdschrift voor Belgisch Handelsrecht*, 1991, p. 203; DE BONDT, W., Bewuste Verzwijging, Onbewust Stilzwijgen en Bedrieglijk Opzet. In: *Tijdschrift Voor Notarissen*, 2013, 169; and DE BOECK, A., *De Wilsgebreken Dwaling en Bedrog Vandaag. Responsabilisering en Ankerplaats voor de Precontractuele Informatieverplichting*. Brugge, 2006, p. 77-84.

[166] NELEN, H., Wanneer Zwijgen Bedrog Wordt. In: *Tijdschrift voor Belgisch Handelsrecht*, Vol. 10. No.3, 2019, p. 1259-1267; and STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 91-94.

that a reasonable person takes into consideration in order to decide whether he concludes a contract and under which conditions he does so.[167] However, there are certain situations where there is an obligation to speak up, such as the mandatory information disclosure of an undertaking towards a consumer of article VI.2 of the Belgian Code of Economic Law.[168]

In the case of the 21st of December 2018, the Court of Cassation had to deal with the following facts.[169] An apartment with a sunbathing terrace and views of the old town of Antwerp was listed for sale. A couple bought the apartment for €285.000, which was only €10.000 under the demand. However, only a few months later, new construction works started on the adjacent lot, resulting in a concrete wall blocking the couple's view of the old town and limiting the incidence of light.

This case is similar to the famine at Rhodes case narrative as the seller of the apartment mentioned he would have shared the information that new construction would block the views of the terrace if the couple had asked. However, they did not, just as the Rhodians did not ask the merchant if there were other ships with grain on their way to the island.

The judge made the remark that the seller should not just answer specific questions, but has to guide the buyers, meaning that he "has to find the answer to the question which information is important to the buyers"[170]. Even a potential shortcoming of the buyers' active duty to investigate is lifted due to the deliberately keeping quiet of essential pieces of information which renders the invitation to purchase invalid.[171] If the buyers had been aware of the plans for the new construction on the adjacent lot and their consequences, they would have bought the apartment at a lower price, not the price they paid now. The seller used the terrace with views on the old town as a selling point in order to justify the asking price of €295.000, even though he was aware of the construction plans. Here we can also see a parallel with the famine at Rhodes case's narrative.

The seller argues that fraud due to withholding information only takes place when the other party is not and cannot reasonably be aware of the information. According to him, this was not the case as the buyers should have seen the notice on the outside of the adjacent building.[172] However, the Court of Cassation repeated that "fraus omnia corrumpit" entails that the perpetrator benefits from the fraud. In this case, he cannot call on the imprudence nor the gross or inexcusable negligence of the contracting party. He remains fully bound to compensate the damage.[173]

Mistake in Belgian law entails having a wrongful perception of a part of the agreement at the time of contracting.[174] In addition, article 1110 of the Belgian Civil Code states that mistake can only lead to nullity of the contract when it concerns the autonomy of the object of the agreement or when it concerns the person with whom one intended to contract in case of a contract *intuitu personae*.[175] Furthermore, according to article 1110 of the Belgian Civil Code, the mistake has to be essential or crucial, meaning any element that substantially determined that the party entered into the contract, without which the contract would not have been entered into.[176] The co-contractor should have been aware of the essential character of the part of the agreement.[177] The mistaken party has a precontractual duty to notify his co-contractor of the importance he attaches to a certain element if the element normally is not seen as decisive due to the nature of the contract or the circumstances around the contracting.[178] The mistake has to be excusable and hence cannot be due to an error of the person that is mistaken.[179] The contract can only be nullified if a reasonable person in similar circumstances would have been mistaken.[180]

In the case of the 23rd of January 2014, the Court of Cassation confirmed the decision of the Court of Antwerp of the 12th of November 2012 and rejected the arguments of the plaintiff.[181] The plaintiff had sold a real estate property to the defendants. This property had been exploited as a bar until four years prior, and still had the outlook of a bar. This is why the defendants bought it, as they had the intention of opening a bar there. However, the necessary permits were missing. Thus, the defendants canceled their purchase. Both courts decided that given the outlook of the property and the fact that it had been exploited as a bar until recently, the plaintiff had the obligation to inform the buyers about the urban planning regulations.[182] Hence, the plaintiff should have reasonably known that using the property as a bar was of a crucial nature to the

[167] DE BOECK, A., *De Wilsgebreken Dwaling en Bedrog Vandaag. Responsabilisering en Ankerplaats voor de Precontractuele Informatieverplichting*. Brugge, 2006, p. 667-670. See also STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 91-94.
[168] 28 Februari 2013, Wetboek van Economisch Recht, 11-13, 077, 2013-02-28/19.
[169] MEIRLAEN, M., Vormen en Kleuren van Bedrog. In: *Tijdschrift Voor Notarissen*, Vol. 2019, No. 6., 2019, p. 501-523.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 87-91.
[175] Ibid.
[176] STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 87-91.
[177] Hof van Cassatie van Belgie, Arrest nr. N-20130114-8 (C.10.0661.N) d.d. 14 januari 2013.
[178] STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 91-94; and DE BOECK, A., *Informatierechten- en Plichten bij de Totstandkoming en Uitvoering van Overeenkomsten, Mortsel.* Amsterdam, 2000, p. 539.
[179] STIJNS, S., *Verbintenissenrecht.* Brugge, 2015, p. 87-91.
[180] Hof van Cassatie van Belgie, Arrest nr N-20131128-2 (C.12.0549.N) d.d. 28 november 2013; Hof van Cassatie van Belgie, Arrest nr N-19960228-12 (P. 95.1059.F) d.d. 28 juni 1996; and Hof van Cassatie van Belgie, Arrest nr N-19780420-4 d.d. 20 april 1978. .
[181] Hof van Cassatie van Belgie, Arrest nr Nr. C.12.0356.N d.d. 23 januari 2014.
[182] Ibid.

buyers. Again, can also see a parallel with the famine at Rhodes case's narrative.

5. Conclusion

From ancient times, legal scholars have been puzzled by the question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains. Even the great Marcus Tullius Cicero, as one of the most prominent ancient lawyers and remarkable thinkers, has dealt with this complicated puzzle and explored whether or not it is honest of the merchant to profit by withholding the information that more ships with grain will arrive at Rhodes soon, hence not sharing this with the Rhodians. In his classic, eternal writings he weighs Diogenes's and Antipater's reasoning against each other, concluding that the merchant should tell the Rhodians that more ships are on their way to be considered honest.

This more than two thousand years old case, while brilliantly addressing the ever-present issues of morality and ethical behaviour, could be regarded as the first, in human history, recorded example of an asymmetric information problem. Moreover, as argued revival and continuous teaching of Roman law may also be seen as a transmission mechanism, as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsibilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do and via its multiplying effect causing a cascade of prosocial behaviors. Furthermore, Cicero's narrative does not just provide a structure for interpretation of similar contingencies where a judge or a legislator will face similar moral dilemmas but has through centuries actually become also our common mental model (shared by lawyers around the globe) for controlling knowledge, since it actually operates as an instrument of mind in the construction of todays' reality. His powerful narrative developed a moral code which storied memories and insights of earlier contexts from ancient lawyers that have been via this narrative imbedded in us modern lawyers.

Furthermore, although the ethical and economical perspectives on Cicero's narrative contain different reasonings, they both come to the same conclusion, suggesting fairness maxims (ethics) and efficiency (economics) are not as opposing as they are often portrayed to be. Economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it.

Finally, paper suggests that Cicero's moral judgement and its centuries long circulation via the extensive network of narratives spread widely and influenced the development of the modern legal regimes around the globe. In addition, development, transmission and employment of Roman law in modern legal education and curriculums might be seen as an extensive network of narratives, a special social structure, that enables a wide viral transmission of responsibilizing rationales and contextual adaptations that shape our moral decisions and reasoning on what is the moral thing to do.

On Legislative and Executive Control Logics – the Duty to In-Person Reporting in the German Employment Promotion System, 1927 to the Present

Beate Kutschke *

Abstract

The article unravels the convoluted history of what may at first seem like a peripheral aspect of German labour promotion law, both past and present: the in-person reporting complex comprising the legal norm authorizing the Federal Employment Agency to issue summonses to in-person reporting appointments [Meldeaufforderung], the appointment itself, and the sanction provisions that penalize failures to comply [Meldeversäumnis]. The article's aim is to explain the persistence of an 'effectiveness fallacy' – a variant of the is-ought dichotomy – arising from the implementation of the in-person reporting complex.

The article sets out the multifaceted and incoherent legislative purposes of the in-person reporting complex throughout its history, tracing this incoherence back to the earliest drafts of the Labour Promotion Act, enacted in 1927. The reconstruction shows that, despite appearing marginal, the in-person reporting complex has always been a central instrument of unemployment administration and social disciplining. Finally, the article points to an aspect of the erosion of the rule of law in Germany – namely, the lack of judicial review of the legality of summonses to in-person reporting, which has persisted for at least thirty years.

Keywords: *Control in the administration of social benefits; duty to in-person reporting [Meldepflicht]; history of employment promotion and unemployment insurance system; history of social law in the 20th and 21st centuries; fallacy of effectiveness; is-ought dichotomy; Germany.*

1. Fallacy of Effectiveness and the In-Person Reporting Complex (Introduction)

In philosophy and legal theory, the terms 'is-ought dichotomy', 'methodological dualism' [1] or 'is-ought fallacy' [2] refer to the logically flawed, yet frequently observed cognitive practice of inferring an 'ought' from an 'is'. However, there is only partial consensus on what exactly is meant by the phrase "inferring an ought from an is". The predominant view, following David Hume (or more precisely, the most widely accepted reading of a passage from his *Treatise of Human Nature* from 1739),[3] is that from a description of the (real) world – the 'is' – it is logically incorrect to conclude that our norms – the 'ought' – must be aligned with the world, i.e., with what is.

Even the application of an implicit, Leibniz-inspired assertoric bridge – according to which this world is the best of all possible worlds – [4] does not logically justify deriving the 'ought' from the 'is', unless additional implicit normative assumptions are made, such as "one ought always to strive for the good".

Be that as it may. Among the four variants of the is-ought dichotomy developed by Josef Franz Lindner in a 2017 article is the following: "From the fact that something is being followed, it cannot be inferred that it ought to be followed." [5] Tailored to general administrative law, this variant reads: From the fact that specific administrative actions constitute a practiced routine based on a legal provision ('is'), it does not follow that such actions are purposeful and proportionate and therefore should be continued ('ought'). I refer to this variant of the executive is-ought dichotomy as the 'practice-effectiveness dichotomy' or 'effectiveness fallacy'. Within the German legal system, the presence of an effectiveness fallacy is usually proved by means of a proportionality test. A practice that merely appears effec-

* Priv. Doz. Dr. Beate Kutschke, Fachbereich Kunst-, Musik- und Tanzwissenschaft, Abteilung Musik- und Tanzwissenschaft, Paris Lodron Universität Salzburg, Austria, email: beate.kutschke@gmx.de / ORCID 0000-0002-2940-6018.

1 The term 'methodological dualism' (used synonymously with that of 'is–ought dichotomy') goes back to Gustav Radbruch: "Never is something right merely because it is, or because it was – or even because it will be. […] Normative statements, value judgements and evaluations cannot be based inductively on statements of fact, but only deductively on other statements of the same kind. Evaluation and factual observation exist side by side as independent, self-contained spheres. That is the essence of methodological dualism" (RADBRUCH, G., *Rechtsphilosophie*. Leipzig, 1932, pp. 6-7).

2 See, for instance, MERKEL, R., Contra Speziesargument: Zum normativen Status des Embryos und zum Schutz der Ethik gegen ihre biologistische Degradierung. In: DAMSCHEN, G., SCHÖNECKER D. (eds.), *Der moralische Status menschlicher Embryonen*. Berlin and New York, 2003, pp. 35-60, here p. 37; STARK, A., *Interdisziplinarität der Rechtsdogmatik*. Tübingen, 2020, p. 325.

3 HUME, D., *Treatise of Human Nature*. London, 1739, pp. 469-470.

4 LEIBNIZ, G. W., *Essais de theodicée sur la bonté de Dieu, la liberté de l'homme, et l'origine du mal*. Amsterdam, 1710, pp. 116-118. Without this bridge, the is–ought inference is not comprehensible at all.

5 LINDNER, J. F., Sein und Sollen – zur Rekonstruktion des sog. Methodendualismus. In: *RphZ Rechtsphilosophie*, Vol. 3, No. 4, 2017, pp. 396-416, here p. 396. Available at: doi.org/10.5771/2364-1355-2017-4-396 [Accessed 07/05/2025].

tive but is not truly so is also not suitable, necessary, and/or proportionate in the narrower sense.

The effectiveness fallacy is often supported by habit and familiarity with the practice, along with implicit, unconscious assumptions about the purposefulness of the practice – i.e., a classic circular reasoning: "If this practice weren't purposeful, it wouldn't have been in place for years already." The history of the so-called 'in-person reporting complex', a normative framework within Books II and III of the German Social Code[6], represents a paradigmatic and historically entrenched effectiveness fallacy. This article will demonstrate that through the following steps: A brief outline of current, striking contradictions between the in-person reporting complex as an abstract normative framework and its application in unemployment administration, along with a selective proportionality review of that application (I), is followed by the main section: a reconstruction of the development of the in-person reporting complex, beginning in the late 19th century (II). The article concludes with a brief reflection on the reasons for the persistence of the duty to report in person, despite its inherent contradictions (Conclusion).

Although the history of unemployment insurance and poor relief for unemployed – to which the in-person reporting complex belongs – has been thoroughly researched since the 1980s, the reporting complex itself has never been closely examined. This may be due to the fact that the history of unemployment insurance and assistance in Germany is often understood as a successful logical progression[7] – despite the fact that critical historians have highlighted a continuity between the widespread use of force (and also violence) in poor relief since the late Middle Ages and modern unemployment management.[8] The internal lack of logic in the in-person reporting complex does not fit into this prevailing historiographical narrative.

2. Contradictions in the Implementation of the In-Person Reporting Complex

The in-person reporting complex in the Second and, especially, the Third Book of the German Social Code (henceforth: SGB II and III)[9] regulates under which conditions unemployed individuals may be obliged by institutions of the Federal Employment Agency – i.e., Jobcenter and Arbeitsagenturen[10] – to report in person to those institutions. SGB III outlines the rights and duties of unemployed persons entitled to wage-replacement benefits via unemployment insurance, whereas SGB II sets out the rights and obligations of those who are not entitled to benefits under SGB III and thus only qualify for basic income support for jobseekers.

The reporting complex consists of the following provisions: under the heading "General Obligation to Report in Person" [Allgemeine Meldepflicht], § 309 SGB III (in its current version)[11] codifies the obligation of unemployment insurance recipients to "report in person" (or alternatively, to attend a medical or psychological assessment). § 309(2) SGB III further specifies that an order to report in person is only permissible "for the purpose of: 1. career counselling, 2. placement into training or employment, 3. preparation of active labour promotion services, 4. preparation of benefit decisions, and 5. examination of eligibility requirements" – purposes which, apart from point 5, are usually pursued in meetings with caseworkers at the employment agency or job centre, or with external career counselling or placement services. § 59 SGB II mandates that § 309 SGB III must also be applied within the SGB II framework.

The obligation to report in person is also subject to sanctions. Under § 159(1) No. 8 and (6) SGB III, failure to attend an appointment results in the loss of benefits for one week. § 32 in conjunction with §§ 31b and 59 SGB II stipulates that benefits for SGB II recipients are to be reduced by 10 per cent of their "standard needs pursuant to § 20" for a period of three months for each missed appointment.[12] § 336a SGB III provides that objections and legal actions against the scheduling of such appointments under § 309 SGB III do not have suspensive effect.[13]

The application of this legal framework reveals the following contradictions:

1. Contrary to the title of § 309 SGB III – "General Obligation to Report in Person" – the provision, with the possible

[6] The third book was created and adopted before the second book.

[7] For instance, FAUST, A., Arbeitsvermittlung und Arbeitslosenversorgung von der Mitte des 19. Jahrhunderts bis zum Ende des Kaiserreichs. In: BENÖHR, H.-P. (ed.), *Arbeitsvermittlung und Arbeitslosenversorgung in der neueren deutschen Rechtsgeschichte*. Tübingen, 1991, pp. 105-136; SCHMUHL, H.-W., *Arbeitsmarktpolitik und Arbeitsverwaltung in Deutschland 1871-2002*. Karlsruhe, 2003.

[8] For instance, SACHSSE C., TENNSTEDT, F., *Geschichte der Armenfürsorge*, 4 volumes. Stuttgart, 1980-2012; SACHSSE C., TENNSTEDT, F. (eds.), *Soziale Sicherheit und soziale Disziplinierung: Beiträge zu einer historischen Theorie der Sozialpolitik*. Frankfurt am Main, 1986; AYASS, W., Die „korrektionelle Nachhaft". In: *Zeitschrift für Neuere Rechtsgeschichte*, Vol. 15, No. 3/4, 1993, pp. 184-201; AYASS, W., *„Asoziale" im Nationalsozialismus*. Stuttgart, 1995; RATHMAYR, B., *Armut und Fürsorge: Einführung in die Geschichte der Sozialen Arbeit von der Antike bis zur Gegenwart*. Opladen, Berlin, and Toronto, 2014.

[9] In force since 01/01/2004 (BGBl. I, 2003, p. 2954) or since 01/01/1998 (BGBl. I, 1997, pp. 594, 595), respectively.

[10] The Jobcenter [Job Centres] were implemented with the Second Act for Modern Services on the Labour Market of 23/12/2002, which came into force on 01/01/2003 (BGBl I, 2002, p. 4621). The Arbeitsämter [Labour Offices] were renamed Arbeitsagenturen [Employment Agencies] with the Third Act for Modern Services on the Labour Market of 23/12/2003 (BGBl I, 2003, p. 2848). The Employment Agencies manage unemployed persons under SGB III; the Job Centres manage unemployed persons under SGB II.

[11] 13th BUNDESREGIERUNG, *Gesetz zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz – AFRG)* (BGBl. I, Vol. 1997, p. 594) of 24/03/1997. The AFRG stipulated that the previous Employment Promotion Act (AFG) be incorporated into the Social Code as the Third Book.

[12] § 159 (1) no. 8 and (6) SGB III as well as § 32 (1) in conjunction with § 59 SGB II prescribe binding decisions. That is, employees may not exercise discretion. They must impose sanctions.

[13] Only with the Sixth Act amending the Social Courts Act (6. SGGÄndG) of 17/08/2001 (BGBl. I, 2001, p. 2144) was it clarified – by inserting § 336a into SGB III – that objections and legal actions against summonses to in-person reporting do not have suspensive effect, whereas at the same time § 86a of the Social Courts Act (SGG) enshrined the principle in law that objections against burdensome administrative acts generally do have suspensive effect. Until the enactment of the Sixth Act amending the Social Courts Act, there had been an unintended regulatory gap, which could be interpreted in such a way that "according to prevailing opinion, by analogy with § 80 (5) VwGO", objections and legal actions against in-person reporting notices did have suspensive effect (CANTZLER, C., § 86a SGG, margin no. 1. In: BeckOK SozR, 68th edition of 01/03/2023).

exception of point 5, does not prescribe a duty to merely 'personally appear' at a Federal Employment Agency institution (hereinafter: BA), as the German term 'sich melden' suggests. Rather, it mandates participation in a *consultation* appointment which typically lasts some time.

2. Although the vast majority of unemployed people independently find new employment[14] and thus likely do not require BA support, the practice of issuing appointments is justified by the assumption that all unemployed persons require counselling and support – and that, therefore, such meetings are essential to ending unemployment as quickly as possible

Public discourse, in turn, uses this 'assumed' connection between reporting appointments and early re-employment to justify sanctions for missed appointments.[15]

3. Section 309(2) SGB III is a discretionary provision – as indicated by the use of the verb 'may' (kann), which in this context means 'is only permissible if', i.e. German law requires that BA staff exercise this discretion in a reasoned manner, determining who should be invited, when, and for what purpose. In practice, however, the provision is applied as if it mandated automatic action: everyone who registers as unemployed must be summoned at least once.[16]

4. Despite the availability of numerous communication channels today – email, telephone, chat, video call, post – the provision rests on the assumption that (possibly unneeded) counselling and support are most effective when delivered via scheduled in-person meetings.[17] This contradicts the fact that there is no empirical evidence demonstrating that in-person counselling reduces unemployment duration more effectively than remote formats such as phone or video calls.[18]

5. Although summonses to in-person reporting ["Meldeaufforderungen] – administrative acts obliging unemployed persons to attend an appointment under § 309(2) SGB III – must document the lawful exercise of discretion,[19] they have for at least three decades been justified by the BA staff using a generic, empty formula:[20] "I would like to speak with you about

[14] From the approximately 15,000 questionnaires that German companies filled out and returned in 2010 to the Institute for Employment Research [Institut für Arbeitsmarkt- und Berufsforschung] (IAB), affiliated with the Federal Employment Agency [Bundesagentur für Arbeit] (BA), the institute calculated that, in 2009, twelve per cent of the most recent job placements in the surveyed companies had been made through the BA's placement services (HECKMANN, M., KETTNER, A., REBIEN, M., VOGLER-LUDWIG, K., *Stellenbesetzungen in Zeiten der Krise* (= IAB-Kurzbericht, No. 23, 2010), p. 4, table 3). This implies that 88 per cent of benefit recipients who transitioned to dependent employment in 2009 must have found their jobs through channels other than the BA. The reasoning of the 13th Federal Government (1994–1998) in the draft of the Act on the Reform of Employment Promotion stated that in 1996, 60 per cent of unemployed persons found their new job themselves. Whether this number is accurate cannot be verified due to lack of a source (13th BUNDESREGIERUNG, *Entwurf eines Gesetzes zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz - AFRG)* (= Bundestags-Drucksache No. 13/4941) of 18/06/1996, p. 145).

[15] Sanctions for failure to report are intended, indirectly, to serve the purpose of keeping costs for the insurance community as low as possible. This was implied, for example, by State Secretary Steffen Hebestreit, spokesperson for the Federal Government, during the government press conference on 09/10/2024, with reference to the draft Draft Act on the Modernisation of Unemployment Insurance and Employment Promotion (SGB-III-Modernisierungsgesetz) dated 24/09/2024 including an unpublished formulation guidance: "With the new regulation of a reporting obligation, which was approved today [in the cabinet], the Federal Government aims to strengthen the obligation to cooperate and thus ensure greater commitment and more successful integration into the labour market. A monthly in-person reporting obligation in the form of a personal interview is to be introduced for citizen's income recipients, where necessary for labour market integration" (*Regierungspressekonferenz* of 09/10/2024 (transcription). Available at: https://www.bundesregierung.de/breg-de/aktuelles/regierungspressekonferenz-vom-9-oktober-2024-2314128 [Accessed 07/05/2025]).

[16] Survey conducted by the author of this article in March 2025; details of the survey available from the author.

[17] Only in the context of administrative digitalisation is it planned, as of September 2024, that appointments may also be held via video call – as an exception, not as a standard (20th BUNDESREGIERUNG, *Entwurf eines Gesetzes zur Modernisierung der Arbeitslosenversicherung und Arbeitsförderung* (= Bundestags-Drucksache No. 20/12779) of 09/09/2024, p. 16).

[18] It is evident that it rarely makes sense to inform the unemployed about job offers in a personal interview instead of sending the offers to them pragmatically by email, unless the staff responsible for supporting jobseekers at BA offices have themselves obtained adequate information from the job providers beforehand.

[19] According to prevailing legal doctrine, the statutory requirement to document the considerations underlying the exercise of discretion – including pros and cons and the weighing of arguments – serves the purpose of enabling review bodies (such as internal objection authorities within the BA and the social courts) to assess whether BA staff scheduled mandatory appointments without actually exercising discretion – in other words, arbitrarily or by following a rigid template.

[20] So-called 'empty formula justifications' are characterised by their universal applicability, as they do not refer to the specific individual case. As the term suggests, they are 'empty', meaning they lack "justificatory value" (POESCHL, M., § 192 – Gleichheitsrechte. In: MERTEN, D., PAPIER, H.-J. (eds.), *Grundrechte in Österreich* (= Handbuch der Grundrechte in Deutschland und Europa, Vol. VII/1), Heidelberg and Vienna, 2009, pp. 251-318, here p. 297). According to German legal theory, empty formulaic justifications are considered formal justification errors, equivalent to providing no justification at all, when they appear in executive and judicial decisions characterised by a heightened duty to document the reasoning. This duty arises from the presence of evaluative, discretionary, or formative decision-making leeway, as well as the availability of legal remedies for the addressees of the authorities' decisions (KISCHEL, U., *Begründungsfehler*. Tübingen, 2004, p. 36; KISCHEL, U., *Die Begründung*. Tübingen, 2003, p. 379; KUTSCHKE, B., Universell einsetzbare Leerformelbegründungen in exekutiven und judikativen Entscheidungen. In: *Rechtswissenschaft*, RW, Vol. 13, No. 2, 2022, pp. 262-298. Available at: DOI: 10.5771/1868-8098-2022-2-262. For an ambivalent view: HUFEN, F., *Fehler im Verwaltungsverfahren*. Baden-Baden, 2002, margin no. 317, p. 200). In contrast, legally sound justifications – as emphasised by both social and administrative courts – compare and weigh various decision options with reference to the specific case and the purpose of the statutory authority, and explain why the chosen option was preferred. Such justification is required in decisions with a heightened duty to document the reasoning because otherwise, the decision can be understood or reviewed by neither its addressees nor oversight bodies (such as courts or, in Germany specifically, objection authorities) (cf. BSG, judgment of 18/4/2000, reference no. B 2 U 19/99 R, margin no. 21; BVerwG, judgment of 10/12/2014, reference no. 1 C 11.14, margin no. 22; BGH, ruling of 01/03/2012, reference no. V ZB 183/11, margin no. 7; BGH, ruling of 21/8/2019, reference no. V ZB 100/18, margin no. 3). For more references, see cited literature and case law.

your professional situation" (or alternatively, the ambiguous keyword "applicant offer" [Bewerberangebot]).[21]

6. The contradictions indicate that the in-person reporting complex does not pass a proportionality test. The suitability and necessity of the measure "appointment to discuss the unemployed person's occupational situation" (under § 309(2) SGB III) with regard to "promoting the intended goal"[22] of ending unemployment as early as possible are, at best, marginal, as there is no evident or demonstrable causal or consequential-logical link between the chosen measure and the intended outcome.

7. If the proportionality of the manner in which § 309(2) SGB III is implemented is questionable, then the sanctioning provisions of the in-person reporting complex – intended to enforce attendance at appointments (§ 159(1) No. 8 and (6) SGB III, and § 32(1) in conjunction with § 59 SGB II – also cannot be deemed proportionate.

8. The sanctioning provisions of the in-person reporting complex also fail the test because they are disproportionate to the intended purpose, i.e. they are not proportionate in the narrower sense. The statutory sanction level, involving the threatened withdrawal of benefits, is – judged against the sentencing frameworks established in the Criminal Code – exceedingly severe and therefore no longer proportionate. For recipients of basic security benefits, the withdrawal of benefits under § 32(1) SGB II can be existentially threatening, as they already receive only the bare (subsistence) minimum, which typically does not allow for the accumulation of savings. For recipients of benefits under SGB III, the sanctions represent a significant encroachment upon their property rights – currently up to € 1,852.25 for failing to attend one in-person reporting appointment.[23]

9. Despite the severity of the sanctions – and this is another contradiction – the proportion of sanctions imposed for missed reporting appointments is conspicuously high in relation to the total number of sanctions under SGB II and III. In 2024, this figure stood at just under 87 per cent of all sanctions under SGB II.[24] Under SGB III, sanctions for missed reporting appointments regularly accounted for around 30 percent up to and including 2019. Since the COVID lockdowns, this figure has shown greater volatility, most recently standing at 22 per cent in 2024.[25]

We can now define more precisely the effectiveness fallacy posited at the outset. The dichotomy between practice and effectiveness arises from the fact that the in-person reporting regime – especially § 309 SGB III – is applied routinely to all unemployed persons although there is no reasonable justification for such a practice. This is so because there is no general evidence demonstrating that such appointments are suitable or necessary for shortening the duration of unemployment and, thus, the ordering and enforcement of participation in personal appointments is likely to be proportionate only in individual cases.[26]

What is the reason for these contradictions? As will be shown below with reference to the genesis and history of the in-person reporting complex, it lies in a tension between official and unofficial normative purposes. This tension results in a fundamental incoherence of the reporting complex and its implementation.

3. On the History of the Norm

3.1 Origins of the Legislative In-Person Reporting Complex

The Act on Employment Services and Unemployment Insurance (AVAVG), which introduced the first legislative regulation of the in-person reporting complex in German law, was not a creatio ex nihilo. Passed by the German Reichstag on 7 July 1927 and entering into force on 1 October of the same year,[27] the Act was based on experience with a wide range of municipal, private-sector, and civil-society organisations which – often founded in the 19th century – aimed to mitigate the consequences of unemployment.

In accordance with its title, the AVAVG regulated (at least) two areas of responsibility that had typically been handled by different institutions: firstly, job placement, i.e. the bringing together of employees and employers, which had been offered since the 1840s by offices called "labour records" [Arbeitsnach-

[21] The basis for the standardised justifications used nationwide by the BA appears to be text module lists that the BA has provided since 2008 via a drop-down menu in its appointment management software (ATV). The phrase "discussion about professional situation" appears as the second option in the menu (BUNDESAGENTUR FÜR ARBEIT, response dated 04/04/2019 to a citizen's request under § 1(1) IFG. Available at: https://fragdenstaat.de/anfrage/optionen-des-auswahlmenus-einladungsgrund-zum-einladungstyp-sgb-iiiberatung-sgb-iiireha-in-der-atv-software/ [Accessed 07/05/2025].) For further details, see KUTSCHKE, 2022, p. 267.

[22] This is how the German Federal Constitutional Court phrased it in its decision of 24/06/2002, reference no. 1 BVR 575/02, margin no. 25.

[23] Unemployment benefits have a proprietary character because an individual who has made a not-insignificant contribution to unemployment insurance has acquired a core entitlement to those benefits (cf. MUTSCHLER, B., § 136 SGB III. In: KNICKREHM, S., KREIKEBOHM, R., WALTERMANN, R. (eds.), *SGB III*, 2017, margin no. 18, referring to the rulings of the BVerfG from 16/07/1985, reference no. 1 BvL 5/80, and from 12/02/1986, reference no. 1 BvL 39/83).

[24] BUNDESAGENTUR FÜR ARBEIT (ed.), *Leistungsminderungen (Zeitreihe Monats- und Jahreszahlen ab 2007)*, Nürnberg, 10/04/2025, Tab 2. Available at: https://statistik.arbeitsagentur.de/SiteGlobals/Forms/Suche/Einzelheftsuche_Formular.html?nn=1524068&topic_f=zr-leistungsminderungen [Accessed 07/05/2025].

[25] BUNDESAGENTUR FÜR ARBEIT (ed.), *Sperrzeiten Arbeitslosengeld (Zeitreihe Monats- und Jahreszahlen)*, Nürnberg, March 2025, Tab 1. Available at: https://statistik.arbeitsagentur.de/Statistikdaten/Detail/Aktuell/iiia7/sperrzeiten-zr-sperrzeit/zr-sperrzeit-d-0-xlsx.xlsx?__blob=publicationFile&v=1 [Accessed 07/05/2025].

[26] This lack of evidence stems from the absence of a comparator group – benefit recipients who are not subject to compulsory appointments – and from the BA's failure to collect data on the relationship between the number and content of appointments and transitions out of unemployment.

[27] Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung (AVAVG), promulgated on 16/07/1927 (RGBl., 1927, p. 187). "A retrospective apology" was, however, permissible.

weise];[28] secondly, financial support for the unemployed, which was initially purely a matter of welfare – that is, a charitable provision. Over the course of the 19th century, the latter was supplemented by the insurance principle, according to which the receipt of benefits was conditional upon claimants having previously paid contributions into an insurance fund.[29]

However, the organisers of welfare and unemployment insurance found themselves in a dilemma from the outset: the organisations offering support – in the 19th and early 20th centuries, these were municipal and private welfare institutions as well as, increasingly, the workers' funds of the free trade unions – could only do so sustainably on the assumption that the need for support remained relatively low. At the same time, these organisers assumed that the majority of benefit recipients would – without strict monitoring – make use of the support without being genuinely entitled to it. An elaborate system of control was built upon these expectations and the resulting economic constraints. Regular in-person reporting played a central role in this.

These interrelations can be reconstructed on the basis of the treatises by Friedrich Zietsch (1910) and Georg von Schanz (1914), who based their proposals for a future unemployment insurance scheme on the organisational forms that already existed at the time for the prevention and alleviation of unemployment.

a) Prevention of Undeclared Work

When the municipal policy treatise *Kommunale Arbeitslosenfürsorge* by Zietsch[30] was published in 1910,[31] in-person reporting obligations for unemployed benefit recipients had already been established in several European countries, according to the author. Zietsch cited as early examples the unemployment insurance funds that had existed in Bern since 1893 and in St Gallen since 1894, as well as the fund established by the Workers' Association in Basel in 1901. Members of these funds who had registered as unemployed were required to "report to roll call in person twice daily. Failure to report or giving false information would result in the withdrawal of the daily allowance",[32] he wrote. Depending on the organisation, in-person reporting was even required at a specific time[33] – which could vary each day.[34] Later-established funds in Germany and France employed similar control procedures.[35]

In the organisational forms that preceded the 1927 unemployment insurance scheme, in-person reporting obligations for the unemployed were thus generally in place at least since the early 1890s, and were linked to the receipt of support payments. From the perspective of the social security agencies, the purpose of these reporting requirements was to prevent abuse of social benefits -- that is, to prevent recipients from receiving payments while working illegally or not actively seeking employment.[36] From the perspective of the benefit recipients, the purpose of the mandatory reporting was to have their control cards ("Stempelkarten"), which documented the fulfilment of the reporting requirements, stamped[37] and to receive their support payment on payday.[38]

In any case – and this is a central partial finding of this article – the task of job placement was originally functionally in-

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[28] In the 1840s, as the economic and social crisis of the Vormärz period reached its peak, the first employment exchanges [Arbeitsnachweise] were established to connect employers offering job vacancies with unemployed workers. These exchanges were initially run as private businesses and, beginning in the 1860s, were increasingly supplemented by public, trade union, guild, and employer-run exchanges (SCHMUHL, Chap. 4). Their numbers grew significantly over the next three decades starting in the 1880s (FÜHRER, K. C., *Arbeitslosigkeit und die Entstehung der Arbeitslosenversicherung in Deutschland*, Berlin, 1990, p. 234).

[29] The unemployment insurance system developed by free trade unions in the early 1890s was later adopted by nearly all unions in Germany (SCHMUHL, p. 53).

[30] Since 1907, Zietsch represented the political aims of the Social Democratic Party as a member of the city council in Berlin-Charlottenburg. Since 1903, he had worked as editor of "Die Ameise," the journal of the Porcelain Workers' Union, and simultaneously as secretary of the International Porcelain Workers' Association (ZIETSCH, F., *Indexeintrag: Deutsche Biographie*. Available at: https://www.deutsche-biographie.de/pnd133694143.html [Accessed 12/02/2025]; SCHRÖDER, W. H., *Sozialdemokratische Parlamentarier in den Deutschen Reichs- und Landtagen 1867-1933*, Düsseldorf, 1995, pp. 817-818).

[31] Zietsch's treatise was published as Issue 10 in the series *Sozialdemokratische Gemeindepolitik,* edited by Paul Hirsch.

[32] ZIETSCH, p. 45. However, in the Workers' Union fund in Basel, only one daily personal check-in was required for benefit recipients, rather than two (ZIETSCH, pp. 43 und 47).

[33] Cf. the Unemployment Insurance Regulation of the City of Strasbourg from 27/12/1906: "The associations pledge to make every effort to minimise unemployment. Therefore, members must register with the municipal employment office no later than the first working day after becoming unemployed and must report there daily at the designated time for verification" (Arbeitslosenversicherungsordnung der Stadt Straßburg, from 27/12/1906, cited in ZIETSCH, p. 69).

[34] FÜHRER, p. 422. SCHMEISSER, H., in *AVAVG in der Fassung der Notverordnung vom 1. 12. 1930*, Vol. 2, Berlin and Leipzig, 1932, p. 795.

[35] In 1929, the reporting requirements of the Bavarian Employment Office stated: "For service-related reasons, and provided that the purpose of the in-person reporting is not undermined, the number of check-ins may be temporarily limited to three per week by resolution of the employment office's administrative committee" (Bestimmungen des Arbeitsamts Bayern, printed in JAEGER, H., NEUBURGER, O., and ADAM, R., *Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung*, Commentary, Vol. 2, Stuttgart, 1929, pp. 223-224). At the time of publication, Heinz Jaeger was Director of the Municipal Insurance Office in Munich; Otto Neuburger and Robert Adam were, respectively, Vice Chair and Chair of the Munich Employment Office.

[36] Reporting checks were also carried out during periods when, as in 1919/1920, support payments were so low that unemployed individuals were forced to work illegally in order to survive (on sometimes excessive control measures to prevent benefit fraud during the Weimar Republic: FÜHRER, pp. 421-422).

[37] Regarding the practice of recording compliance with reporting requirements using a stamp card (FÜHRER, pp. 235, 418, 419).

[38] "The in-person report must be made on each working day. On payment days, the check-in should, if possible, be combined with the disbursement of benefits" (Bestimmungen des Arbeitsamts Bayern, printed in JAEGER, NEUBURGER and ADAM, p. 223).

dependent from that of financial support (and the associated controls). The in-person reporting requirements of the early workers' funds therefore differed in essential respects from the current version of the reporting standard, § 309 SGB III, which carries the title "General Obligation to In-Person Report", but in fact – as shown – does not demand a personal appearance but rather participation in an appointment, whose ultimate aim lies in the earliest possible end to unemployment by means of job placement.[39]

b) Obligation to Take Up Employment

The prevention of undeclared work was, however, only one of the two control objectives of the in-person reporting requirements. Since the architects of unemployment insurance reckoned with the possibility that a significant proportion of the unemployed might prefer to live off benefits longer than necessary – i.e. refuse available jobs – the intention was to prevent abuse of benefits by ensuring that the institutions providing support worked closely with the job placement services, the Arbeitsnachweise, and that the latter reported to the former if unemployed persons neglected their job offers. This regime of control on the part of the benefit providers – which could only be effective if suitable job opportunities existed and the activities of the unemployed in overcoming their joblessness were systematically monitored – was accompanied by normative appeals to the recipients of support. The statutes of professional associations providing unemployment support in the French départements of L'Aude, Le Cher, Le Gard, and La Loire from 1903 and 1906, as cited by Zietsch, included (in addition to the duty of regular in-person reporting) the obligation of unemployed benefit recipients to accept employment if it was offered to them.[40]

This set of observations likely formed the basis for the proposal by Berlin's Social Democratic city councillors – of whom Zietsch was a member – to assign responsibility for monitoring the unemployed to the job placement offices.[41] The proposed measure to prevent benefit abuse conceptually unified the two functional areas of unemployment administration – job placement and financial support – and, consequently, brought both support and control under the roof of a single institution.

In his contribution entitled "Arbeitslosenversicherung" to the *Handbuch der Politik* of 1914, Georg von Schanz, a legal scholar and director of the administrative committee at the University of Würzburg from 1910 to 1920,[42] also emphasised the role of job placement in preventing abuse of benefits:

> The insurance [benefits providing side] must […] be based on a highly developed job placement system [placement providing side]. The continuation of unemployment must also be monitored, which can best be achieved by requiring the unemployed to appear once or twice at the placement office, with their invalidity card being retained. These measures curb the temptation to take time off or generally to live at the expense of others.[43]

Among the measures aimed at preventing benefit abuse was a deliberate reduction in the attractiveness of support payments. Since Schanz assumed that many insured individuals might voluntarily cause their unemployment – either by resigning or by intentionally provoking their dismissal – he recommended targeted benefit reductions as a deterrent.

> Inhibitions [against deliberately triggering the insured event – as they exist naturally in other insurance systems, for example health insurance, where the occurrence of the insured event is not desired by the insured – no one falls ill voluntarily] […] are […] not inherently present in our case [i.e., unemployment insurance]. A sense of duty is not always sufficient; such inhibitions therefore need to be *artificially* created.[44]

Accordingly, Schanz defined a tightly woven network of preventive measures against abuse, into which the in-person reporting obligations were embedded. These measures included a waiting period of several months with mandatory contribution payments, a one-week qualifying period without benefits following the onset of unemployment, a benefit level significantly below prior income, and a gradual reduction of this benefit to zero over time.

c) Obligation to be Willing to Work

Moreover, Schanz conceptually linked the already partially established practice of obliging the unemployed to accept any employment deemed acceptable by the employment office with the notion that overcoming unemployment presupposed a willingness to work. However, he expressed this consideration in a formulation that is logically inconsistent: "The unemployed must at all times unconditionally accept suitable work that is offered to them [by the employment office] and thereby prove their willingness to work."[45]

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[39] Individuals who check-in to the employment office but do not actively participate in the scheduled interview are sanctioned as if they had missed the appointment entirely (Bayerisches Landessozialgericht, judgement from 19/04/2014, reference no. L 16 AS 383/11).

[40] ZIETSCH, p. 52. "The statutes of the fund must oblige members, in the event of unemployment, to *accept work in their profession that is offered to them by the fund* and to report in person to the fund three times a week" (ZIETSCH, p. 53, italics by the author; see also SCHMUHL, p. 125). A similar wording was found in Regulation No. 6655 of 1919: "Municipalities and municipal associations are obliged to refuse or withdraw support if the unemployed person refuses to accept work that is offered to him – even if it lies outside his profession and place of residence – and can reasonably be expected of him in light of his physical constitution" (No. 6655, Verordnung, betreffend Abänderung der Verordnung über Erwerbslosenfürsorge vom 13. November 1918. In: RGBl., 1919, p. 69, here pp. 82-83).

[41] ZIETSCH, p. 63.

[42] AUTHOR UNKNOWN, Schanz, Georg von. In: *Hessische Biografie* (= Landesgeschichtliches Informationssystem Hessen), https://www.lagis-hessen.de/de/subjects/rsrec/sn/bio/register/person/entry/schanz%252C+georg+von [Accessed 07/05/2025].

[43] SCHANZ, G. VON, Arbeitslosenversicherung. In: LABAND, P., WACH, A., WAGNER, A., JELLINEK, G., LAMPRECHT, K., LISZT, F. VON, SCHANZ, G. VON, und BEROLSHEIMER, F. (eds.), *Die Aufgaben der Politik* (=Handbuch der Politik, Vol. 3). Berlin, 1914, pp. 53-59, here: p. 54.

[44] SCHANZ, p. 53, italics by the author.

[45] SCHANZ, p. 54.

That the proof of willingness to work became superfluous at the moment an unemployed person accepted a job – since from that point onward they would no longer be entitled to receive benefits – ought to have been apparent to Schanz. Thus, a more plausible and accurate formulation would have been: 'Unemployed individuals must unconditionally accept any suitable job offered to them [by the employment office]. By doing so, they retrospectively demonstrate their willingness to work during the preceding period in which they received benefits, thereby justifying their entitlement.'

Schanz' logically flawed formulation is symptomatic of a fundamental problem inherent in the principle of unemployment insurance. Despite all appeals and the obligation imposed on the unemployed not to refuse offered work, insurers could not (and still cannot today) rule out the possibility that unemployed individuals who had received wage-replacement benefits for weeks or months due to the lack of suitable employment would decline an appropriate position when finally offered one.[46] As Schanz indicated, the insurers assumed that such behaviour stemmed from a lack of willingness to work on the part of the unemployed, i.e., a fundamentally unverifiable psychological disposition. They thus engaged in circular reasoning by treating the refusal of a job offer as proof of this very unwillingness, which they had originally inferred from the refusal itself.[47]

This reasoning can also be described as a variant of the is-ought fallacy: after inferring the presence or absence of an internal disposition – namely, willingness to work – from the acceptance or rejection of a job offer, they concluded that all unemployed individuals ought to possess this positive disposition as a normative standard. The fallacy lies in deriving the normative 'ought' from a presumed and unproven mental state, which means that the ought is based on a merely speculative premise.

From this circular reasoning, and from the insight that a lack of willingness to work could only be revealed when the unemployed person received their first acceptable job offer, the insurers concluded that this willingness – assumed to be habitual rather than situational – had to be assessed earlier, already during the benefit period. This was to be done through 'tests' conducted *before* any such offer was made. As the following section will show, regular in-person reporting appointments were interpreted as evidence of a willingness to work.

In summary, as job placement and welfare services became increasingly integrated – as described by Zietsch and Schanz – job placement took on a supervisory role aimed at preventing benefit abuse. This shift fundamentally altered its purpose and character. The frequency of visits to the employment office was no longer determined by the likelihood of finding a job there. Instead, it depended on whether these visits could help identify signs of benefit abuse, caused by the lack of willingness to work and manifesting in insufficient job-seeking activities or in engagement in undeclared work. This functional shift was also reflected in the AVAVG.

3.2 The In-Person Reporting Complex and Its Purposes in the First Version of the AVAVG

The AVAVG – the first law on employment services and unemployment insurance from 1927 – largely corresponds, in terms of the design of the reporting and control regime, with the proposals made by Zietsch and Schanz. This had far-reaching consequences. The subsequent history of the in-person reporting complex as an element of unemployment insurance law amounts to a series of unsuccessful attempts – from its beginnings in 1927 to the present day – to mask the inherent contradictions embedded in its purposes. These contradictions stemmed from the merging of employment placement functions with the task of monitoring and preventing benefit misuse.

This is already evident in the first version of the AVAVG from 7 July 1927. It codified the in-person reporting obligations, already practised in many regions, across the entire Reich in § 173(1) (this provision corresponds to § 309 SGB III, in force since 1998):

> (1) Anyone receiving unemployment benefit must report regularly to the employment office in order *to obtain work*.
> […]
> (3) Further details shall be determined by the management committee of the regional employment office. In particular, it shall determine how often the unemployed person must report and for which time periods the reports shall be valid. It shall *prescribe at least three reports per week* and allow exceptions only insofar as the purpose of the reporting is not thereby compromised.[48]

The action required of the unemployed under § 173 AVAVG was, as before the law's enactment, the completion of an in-person report – that is, physically appearing at a facility of the then Reich Agency for Employment Services and Unemployment Insurance (the first of the predecessor institutions of today's Federal Employment Agency, from 1927 to 1951) and having a control card stamped to document the appearance. At the same time – and in contradiction to this – the wording of the provision stipulated that the regular personal reporting was to serve employment placement rather than the prevention of benefit misuse ("in order to obtain work"). Had the principle of proportionality already been developed and binding in its modern form at the time,[49] it would have had to be established that the regular stamping of unemployed persons' control cards was not a suitable means of placing them in work and, if job placements were to occur independently of the act of reporting, that the reporting frequency was not necessary for this purpose.

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[46] Absurdly, the requirement to provide proof of the presence or absence of willingness to work led to the loss of entitlement to benefits for the unemployed individuals concerned, regardless of the outcome of the evidence. They either lost entitlement because accepting the offer negated the eligibility condition of 'being unemployed', or they lost it because refusing the offer negated the eligibility condition of 'being willing to work'.

[47] See e.g. NAGEL, T., What Is It Like to Be a Bat? In: *The Philosophical Review*, Vol. 83, No. 4, 1974, pp. 435-450.

[48] § 173(1 and 3) AVAVG in the version of 16/07/1927 (RGBl., Vol. 1927, p. 187), italics by the author.

[49] In fact, Walter Jellinek had already proposed a subdivision of the concept of proportionality as a standard of review in 1913 that came close to today's three-(or four-)pronged proportionality test (cf. BECKER, F., Verhältnismäßigkeit. In: KUBE, H., MELLINGHOFF, R., MORGENTHALER, G., PALM, U., PUHL, T., und SEILER, C. (eds.), *Leitgedanken des Rechts*, Vol. 1, Heidelberg, 2013, pp. 225-236, here p. 227).

The legislator of the time was likely aware of these contradictions. For in the detailed justification of the government's draft of the AVAVG from 1926, published by the Reich Employment Administration, the actual purpose was indeed the control of benefit misuse rather than employment placement.

> Since unemployment benefit may only be granted to persons who are able and willing to work, ongoing supervision of beneficiaries is indispensable. According to the experiences of unemployment relief, it is generally necessary as a minimum requirement for the unemployed to report to the employment office three times a week. […] In other circumstances, more extensive control measures, such as surveillance by special inspectors, may also be necessary.[50]

The sanction provision as component of the reporting complex of the AVAVG, § 114, was accordingly aimed solely at monitoring and deterring benefit misuse. Anyone who missed a reporting appointment was, under § 114 AVAVG, denied benefits "for the days […] [of] the prescribed reports." There was no provision for intensified or follow-up job placement to make up for the placement opportunity missed due to the absence, nor for any reduction of the sanction if the missed report was quickly made up.

The reasoning given for § 114 AVAVG – still referred to as § 66 in the draft legislation to which the Reich Government's 1926 justification referred – also confirmed that the true purpose of the in-person reporting requirement was to monitor benefit abuse. It focused on checking willingness to work and preventing illegal employment, though it now subsumed willingness to work under the term "availability for work": "If the unemployed person fails to report in person, their availability for work cannot be assessed; in many cases, there will also be grounds to suspect that they are, in fact, not unemployed [, i.e. are working illegally]".[51]

Again – as with Schanz – the formulation was logically inconsistent, thereby concealing the inherent contradiction of the reporting requirement as a hybrid between job placement and control instrument. What was actually meant was either:

> 'If the unemployed person fails to report in person, they are not in a position to accept a job offer – should one be made during the reporting appointment.'

or

> 'If the unemployed person fails to report in person, they have not passed the test of their existing availability for work – that is, of their willingness to work. Instead, they have expressed that they are not available for work.'

Under the first interpretation, the justification aimed to show that the unemployed had to be on site to accept an available job, which was often announced or posted on a bulletin board, or occasionally offered directly, at Arbeitsnachweise and Arbeitsämter.[52] 'Availability for work' then referred – analogous to being on-call in an employment relationship with the fire service or a hospital – to a readiness in both *place and time*. In this reading, however, the reporting obligation did not serve to assess availability for work, contrary to the wording of the justification, but rather *to establish it*. Furthermore, the act of reporting – that is, physically appearing at an employment office – could only create the precondition for obtaining a job if the employment office was actually able to offer vacancies.[53]

By comparison, the second interpretation appears more plausible, particularly in light of Schanz's discussion and the justification provided in the government's draft legislation for §§ 173 and 87 AVAVG. According to the latter provision, entitlement to unemployment benefits should be granted only to those "who (1) are capable of working and willing to work but involuntarily unemployed; (2) have fulfilled the qualifying period; [and] (3) have not yet exhausted their entitlement to benefits".[54] Thus, in the context of § 87 AVAVG as well, the purpose of the regular in-person reporting appointments under § 173 AVAVG was to assess availability for work – specifically, the willingness to work.

3.3 The Development of the In-Person Reporting Complex in its Further Progression up to 1997

Even in subsequent years, the legislator's desire for control – and the inherent contradictions of the reporting complex regarding its intended purposes – continued to shape amendments to the AVAVG and the related legal commentaries.

a) In the Weimar Republic

In their commentaries published in 1929 and 1930, Heinz Jaeger, Otto Neuburger and Robert Adam, as well as Hans Kühne

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[50] REICHSARBEITSVERWALTUNG (ed.), *Regierungs-Entwurf eines Gesetzes über Arbeitslosenversicherung nebst amtlicher Begründung*, Part 2: Amtliche Begründung, Berlin, 1926, p. 103, cited in STIER-SOMLO, F., *Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung vom 16. 07. 1927, Erläuterte Handausgabe mit geschichtlicher und systematischer Einleitung, den wichtigsten Ausführungsvorschriften und Sachverzeichnis*, München, 1928, p. 449. The quotation is also found in JAEGER, NEUBURGER and ADAM, p. 220.

[51] REICHSARBEITSVERWALTUNG, p. 322.

[52] BUCHNER, T., Arbeitsmärkte ordnen oder konstruieren? In: *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte*, Vol. 100, No. 3, 2013, pp. 292-310, here: p. 305; FÜHRER, p. 237. When and at which labour offices vacancies were called out, posted, or offered directly, and to what extent, still requires more precise reconstruction.

[53] This was not the case in situations of cyclical and mass unemployment (e.g. as a result of the First World War and the ensuing global economic crisis of 1929). Margarethe Ehlert, a senior civil servant in the Reich Employment Office, described the cognitive dissonance caused in this labour market situation by the regular in-person reporting requirements: "The difficulty of individual placement, the harmful effect of mere control without the simultaneous possibility of placement on the psyche of the unemployed, the long distances, the costly journeys and the hours of waiting at the labour exchange, the danger of the accumulation of large masses of unemployed really do raise the question of what the advantages of public employment placement are" (EHLERT, M. In: Niederschrift ü. d. Besprechung m. Vertretern d. GroßBerliner Gemeinden ü. Fragen d. Arbeitsnachweises, 16. 2. 20, ZSıA, RAM 731, cited in FÜHRER, p. 237).

[54] § 87 AVAVG, italics by the author.

and Erwin Kawicz, justified the need to extend in-person reporting obligations to periods of disqualification and waiting times during which unemployed individuals did not receive benefits, arguing that this was necessary for the purpose of preventing abuse.[55] These proposals were implemented in the AVAVG in 1930.[56] Exceptions to the reporting obligation were to be virtually nonexistent. The Sabbath (for Jewish unemployed individuals), the prevention of flood damage, illness and deaths in the family, and summonses by official bodies justified a loosening of the reporting requirement – vocational training and retraining did so only on the condition that they were likely to contribute to a reduction in the duration of unemployment. Independent job-seeking efforts did not constitute justification.[57]

Abuse control regularly held an equal if not superior standing to job placement. In his 1932 *Erläuterungen* on the AVAVG, Herbert Schmeißer determined – contrary to the wording of § 173 AVAVG – that the purpose of regular reporting was the "continuous monitoring of benefit recipients":

> Based on the experiences of poor relief for the unemployed [that is, the institution which grants financial support and therefore must monitor the unemployed to prevent abuse], it can generally be stated as a minimum requirement that the unemployed must report in person to the employment office three times per week.[58]

At the same time, however, Schmeißer also recognised the necessity of assigning the regular reports a purpose beyond control. For, in his view, control should

> not be degraded into mere 'stamping', [it] must rather fundamentally in every individual case represent an attempt at job placement. […] Exceptions […] to [regular in-person reporting] will mainly be relevant in cases of particularly poor labour market conditions, where such frequent reporting is futile.[59]

Indeed, the state of the labour market was particularly dire in 1932, when Schmeißer published his *Erläuterungen*.[60] In February 1932, unemployment figures had peaked as a result of the Great Depression. The employment offices were likely operating under extreme strain – if not completely overwhelmed – due to the task of administrating an unemployment caseload more than three times larger than in 1928. There was neither official nor unofficial work available that unemployed individuals might have received from the employment office or illegal work in the shadow economy. Nevertheless, the legislator maintained the requirement of regular in-person reporting – probably less because undeclared work actually caused significant harm, and more because the narrative of benefit recipients engaging in informal labour served to shift attention away from the economy and economic policy as the true causes of the desperate socio-economic situation, redirecting blame toward the marginalised group of the unemployed.[61]

b) After 1945

After the end of the Second World War, the contradiction between the actual and official purpose of regular reporting according to § 173 AVAVG continued to exist. This was so because the western occupation zones – and later the new states of the Federal Republic of Germany – largely adopted the AVAVG in the form it had assumed before the end of National Socialist Germany.[62] Doubts about the connection between reporting obligations and job placement were now expressed by Horst

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[55] JAEGER, NEUBURGER and ADAM, pp. 220-221; KÜHNE, H., and KAWICZ, E., *Handbuch der Novelle zum Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung. Sozialpolitischer und rechtlicher Kommentar mit Textausgabe des AVAVG in der Fassung vom 12. Oktober 1929*, Berlin, 1929, p. 136. At the time of the publication of their handbook, Hans Kühne and Erwin Kawicz were senior government councillor and government councillor, respectively.

[56] The 1930 amendment to the AVAVG added the following sentence to § 173: "The same obligation applies to anyone who does not receive unemployment benefit solely because a sanction period has been imposed on him under § 90(1), § 92(1) or § 93, or because the waiting period under § 110 has not yet expired" (Gesetz zur Änderung des Gesetzes über Arbeitsvermittlung und Arbeitslosenversicherung vom 12. Oktober 1929 (RGBl., 1929, p. 153, here p. 160)).

[57] JAEGER, NEUBURGER and ADAM, pp. 222 and 224.

[58] SCHMEIßER, p. 795. Herbert Schmeißer was a senior government councillor at the time of the publication of his commentary. He had previously worked as a policy officer in the Thuringian Ministry of Economic Affairs, as deputy chairman of the Thuringian State Office for Employment Placement, and finally as a departmental adviser in the Regional Labour Office of Pomerania, Stettin.

[59] SCHMEIßER, p. 795.

[60] 1932 the average annual number of unemployed was 5.6 million, and in February over six million (AUTHOR UNKNOWN, Anzahl der Arbeitslosen in der Weimarer Republik in den Jahren 1926 bis 1935. In: *statista*. Available at: https://de.statista.com/statistik/daten/studie/277373/umfrage/historische-arbeitslosenzahl-in-der-weimarer-republik/ [Accessed 08/04/2025]; AUTHOR UNKNOWN, Anfang der 30er Jahre: Sechs Millionen ohne Arbeit. In: HANS BÖCKLER STIFTUNG (ed.), *Geschichte der Gewerkschaften*. Available at: https://www.gewerkschaftsgeschichte.de/1930-bis-1933-soziale-lage-55506.htm#:~:text=Aber%20sie%20belegen%2C%20wie%20viele, den%20Gewerkschaftsmitgliedern%20ist%20noch%20dramatischer [Accessed 08/04/2025].

[61] As an example of this narrative, see No. 36 Rundfunkrede des Reichskommissars für Arbeitsbeschaffung Gereke. 23. Dezember 1932. In: GALL, L., and HOLLMANN, M. (eds.), *Akten der Reichskanzlei. Weimarer Republik*. Available at: https://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/112/vsc/vsc1p/kap1_2/para2_36.html [Accessed 08/04/2025]. Gereke stressed that undeclared work had to be curbed. The narrative suggested that the shortage of officially available jobs and the limited benefits from unemployment insurance were not due to economic or labour market policy causes, but were instead brought about – and perpetuated – by those capable of working themselves (and employers), who filled available positions 'under the table' while simultaneously harming public funds through benefit fraud (for a similar narrative in National Socialist Germany: BRUNNER, C., *Arbeitslosigkeit im NS-Staat*, Pfaffenweiler, 1997, pp. 19 ff, especially pp. 19 und p. 24).

[62] Berlin-West had applied the version of the AVAVG of 12/10/1929 since 12/10/1929 (2nd BUNDESREGIERUNG, *Entwurf eines Gesetzes zur Änderung und Ergänzung des AVAVG* (= Bundestags-Drucksache No. 2/1274) of 17/03/1955, p. 172).

Schieckel, a Ministerialrat (a senior civil servant in a federal ministry) at the time.[63] In his commentary on the AVAVG in its version of 20 October 1947, he noted regarding § 173 AVAVG that "reporting […] is then pointless if the purpose ['to obtain work'] is obviously unachievable for any reason."[64] In 1947, the labour market situation was similarly difficult to that of 1932. Although official unemployment figures were low, this was not due to strong labour demand. Rather, the economy had collapsed in the aftermath of the war, and given the high inflation, wage labour – that is, work in exchange for rapidly devalued money – was no longer a viable means of securing a livelihood for many people and their families.[65]

What is noteworthy – as is hinted in Schieckel's wording – is that, by this point, social law discourse had apparently forgotten that job placement was only the official purpose according to the wording of the reporting provision, whereas the original and actual purpose of regular in-person reporting had been to monitor against benefit abuse (in the form of undeclared work and prolonged benefit receipt beyond necessity).

As a result of this failure to remember, the government of the Federal Republic of Germany, founded in 1949, proposed eight years later – i.e. in 1955 – in its *Entwurf eines Gesetzes zur Änderung und Ergänzung des Gesetzes über Arbeitsvermittlung und Arbeitslosenversicherung*, that the purpose of the in-person reporting requirement was (officially) defined as the prevention of abuse – apparently in an attempt to address shortcomings in the existing normative objective.

It initially affirmed that "the main purpose of regular in-person reporting […] as before, is to obtain employment" and, accordingly, employment offices should also be permitted to summon unemployed individuals to appointments outside of regular reporting intervals. However, the Federal Government also advised Parliament (and itself) that "an obligation to report regularly in person, solely from the perspective of employment services, […] might appear unjustified – at least temporarily – in an unfavourable labour market situation."[66] As a solution, it therefore proposed – mistakenly believing this to be a new approach – that in-person reporting should "now also explicitly serve to provide evidence of unemployment," thereby ensuring that, regardless of labour market conditions, regular in-person reports would serve the purpose of benefit abuse control.[67]

The restructuring of the reporting system (for the purposes of employment services and abuse control), as foreshadowed in the amendment of § 173 AVAVG, continued into the 1960s. In their commentary on the AVAVG (in the version of 1956 and its amendments and supplements from 1957 to 1960), Kurt Draeger, Heinz Buchwitz and Erwin Schönefelder proposed that the reports be developed into more significant reporting *appointments,* intended to serve the purpose of comprehensive monitoring of the unemployed. Within the framework of these reports, the unemployed were to

> provide the employment office with an ongoing overview of […] [their] situation […] insofar as circumstances arise which may affect entitlement to benefits (Gr. E 3422 AN 1929, p. 189), such as continuation of unemployment (§ 75), availability for work (§ 76), receipt of sickness benefit (§ 77), income from dependent or self-employed work (§ 95). The unemployed person must report changes in circumstances relevant to benefit entitlement at the time of reporting (cf. § 183).[68]

These approaches to reform culminated in 1969 in a radical reorganisation of the in-person reporting complex, along with the replacement of the AVAVG by the Employment Promotion Act (AFG), which came into force on 1 July 1969. Following the objection raised by the Bundestag Committee on Labour in November 1967 to the government's draft – namely, that the practice of 'getting the control card stamped' was no longer "appropriate to current times",[69] the government revised the new reporting provision, § 132, in its draft to stipulate that only

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[63] Schieckel committed himself after 1945 to the (re)construction of German social insurance (cf. SCHIECKEL, H., *Entwicklung, Aufgaben und Aufbau der Deutschen Sozialversicherung*, München, 1946).

[64] SCHIECKEL, p. 105.

[65] The efforts of the majority of the population focused on meeting the basic needs of life on the black market, through barter and hoarding (SCHMUHL, p. 349, with reference to SIEBRECHT, V., *Arbeitsmarkt und Arbeitsmarktpolitik*, Stuttgart, 1956, pp. 13-22).

[66] 2nd Bundesregierung, 1955, p. 162.

[67] Admittedly, the draft also expressed that regular in-person reporting may not even be suitable for pursuing this purpose. It could be that, despite "the repeatedly raised objection that in-person reporting alone is not sufficient to verify unemployment," "regular reporting cannot be dispensed with, as it at least provides some indication for the assumption that unemployment persists" (2nd BUNDESREGIERUNG, 1955, p. 162).

[68] *Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung in der Fassung vom 3. April 1957 unter Berücksichtigung der Änderungen und Ergänzungen durch das Erste Änderungsgesetz zum AVAVG vom 27. 7. 1957, das Zweite Änderungsgesetz zum AVAVG vom 7. 12. 1959 und das Dritte Änderungsgesetz zum AVAVG vom 28. 10. 1960*, explained by Kurt DRAEGER, Ministerialdirigent im Bundesministerium für Arbeit und Sozialordnung, Heinz BUCHWITZ, Leitender Verwaltungsdirektor, und Dr. Erwin SCHÖNEFELDER, Verwaltungsdirektor in der Hauptstelle der Bundesanstalt für Arbeitsvermittlung und Arbeitslosenversicherung, Stuttgart, 1961, p. 961, on § 179 AVAVG, formerly § 173 AVAVG.

[69] In the draft of the AFG, the reporting rule (then still § 129 instead of § 132) read: "(I) The unemployed person must report regularly and upon request to the employment office during the period for which he is claiming unemployment benefit, in order to obtain work and to credibly demonstrate that he is unemployed and available to employment placement" (5th BUNDESREGIERUNG, *Entwurf eines Arbeitsförderungsgesetzes (AFG)* (= Bundestags-Drucksache No. V/2291) of 16/11/1967, p. 26). The Committee for Labour, however, objected: "The Committee does not consider it timely for an unemployed person to be obliged to report regularly to the employment office – to get their stamp. The amendment to sentence 1 of paragraph 1 is intended to abolish this obligation and to allow the Federal Institute to adapt the reporting requirement to the needs of employment placement in individual cases" (19. AUSSCHUSS FÜR ARBEIT, *Schriftlicher Bericht des Ausschusses für Arbeit (19. Ausschuß) über den von der Bundesregierung eingebrachten Entwurf eines Arbeitsförderungsgesetzes (AFG) – Drucksache V/2291 – über den von den Abgeordneten Behrendt, Folger, Junghans, Lange, Liehr und der Fraktion der SPD eingebrachten Entwurf eines Gesetzes zur Anpassung des Arbeitsmarktes an die Entwicklung von Wirtschaft und Technik (Arbeitsmarkt-Anpassungsgesetz) (außer Drittem und Achtem Abschnitt) – Drucksache V/887* – (= Bundestags-Drucksache No. V/4110)) of 06/05/1969, p. 22, on § 129).

situational reporting requests "in accordance with the needs of employment services" should henceforth be issued.[70] The provision, in the version from 25 June 1969, thus read succinctly: "The unemployed person must report to the employment office during the period in which he claims unemployment benefit, if the employment office so requests."[71] The obligation to report regularly, that is, merely 'getting the card stamped', was abolished. The tension between the official and unofficial purposes of regular in-person reporting – which had arisen because the pursuit of the unofficial purpose, namely abuse control, required a much higher reporting frequency than the pursuit of the official purpose of employment services – was thereby resolved in favour of employment services.

Even the deficiency that the reporting provision, in its revised form, neither specified the circumstances nor the purposes to be pursued – which, in accordance with the principle of proportionality, would have reasonably limited the sovereign authorisation – was corrected in the following years. In 1972, the Board of Directors of the Federal Employment Institution [Bundesanstalt für Arbeit],[72] – the predecessor institution of today's Federal Employment Agency [Bundesagentur für Arbeit] – issued a directive on the obligation to report, which, with effect from 1 April 1973, closed the unintended regulatory gap. According to § 2 of the directive, a "person subject to the reporting obligation" could "only be required to report for the purpose of placement in vocational training or employment, preparation of measures for the promotion of vocational education, or decisions in the benefits procedure".[73]

The directive on the obligation to report also implied that, if the named purposes could be achieved by other means – in 1970, for example, via telephone or postal correspondence – then an in-person reporting requirement would be disproportionate, as it would neither be necessary nor represent the least restrictive means. Neither willingness to work nor undeclared employment was intended to be verified through reporting appointments. The purpose of job placement – now the sole remaining basis for a reporting appointment – no longer appeared implausible, especially as appointments (rather than regular in-person reporting) could now be scheduled strictly as needed.

However, this clear legal situation did not last long. As early as 1975 the Act to Improve the Budget Structure within the Scope of the Employment Promotion Act and the Federal Pensions Act (HStruktG – AFG) revived the tension-ridden construct by inserting into the AFG the provision that the employment office could require unemployed persons to report regularly, "if there is a justified suspicion that the unemployed person is engaged in dependent or self-employed activity which has not been declared to the employment office".[74] What specific indications could give rise to such suspicion was not addressed in the legal rationale.

The Fourth Act to Amend the Employment Promotion Act (4. AFGÄndG) of 1977 went a step further by obligating the authority to schedule appointments for "employment counselling" "at intervals of no more than three months".[75]

Although the relevant passages from 1975 and 1977 were deleted in the version of the reporting provision currently in force since 1997 (§ 309(2) SGB III),[76] they had in fact already been replaced in 1993. In the course of amending § 132 AFG as part of the First Act for the Implementation of the Savings, Consolidation and Growth Programme (1. SKWPG), the list of purposes for which the Federal Employment Agency could issue a summons to in-person reporting (provided those purposes could not be achieved by other means than through an in-person reporting appointment) was expanded to include a fifth. This purpose – the "examination of the existence of the conditions for entitlement to benefits" – was, according to the Federal Government's explanation, once again aimed at enabling controls to prevent all conceivable forms of benefit misuse.[77]

4. Causes and Consequences of the Effectiveness Fallacy (Conclusion)

The reconstruction of the genesis of the reporting complex from 1927 to the present reveals the causes of the effectiveness fallacy and the contradictions outlined in section 1 – namely, teleological inconsistency in the design of the in-person reporting complex from the initial draft to the present day. The persistent belief that the reporting regulation should simultaneously serve several mutually exclusive purposes – employment services and abuse control – has led to a constant balancing act in its implementation.

To effectively advise and support unemployed individuals – and thereby reduce the duration of unemployment – infrequent but well-prepared and in-depth appointments were (and still

[70] 19. AUSSCHUSS FÜR ARBEIT, p. 22.

[71] Arbeitsförderungsgesetz (AFG) in the version of 25/06/1969 (BGBl. I, 1969, p. 582, here p. 604).

[72] The Federal Institute for Employment Placement and Unemployment Insurance was established by law dated 10 March 1952 (BGBl. I, 1952, p. 123) and was replaced in 1969 by the Federal Employment Agency.

[73] § 2 of the Anordnung des Verwaltungsrates der Bundesanstalt für Arbeit über die Meldepflicht of 14/12/1972 (in: BUNDESANSTALT FÜR ARBEIT, Amtliche Nachrichten, 1973, pp. 1674–1675). The 'kann' [can] in the wording of the order required administrative discretion. 'Kann' means 'may' or 'only allowed if'.

[74] Gesetz zur Verbesserung der Haushaltsstruktur im Geltungsbereich des Arbeitsförderungs- und des Bundesversorgungsgesetzes (HStruktG-AFG) (Bgbl I, 1975, p. 3113) of 18/12/1975.

[75] Viertes Gesetz zur Änderung des Arbeitsförderungsgesetzes (4. AFGÄndG) (Bgbl. I, 1977, p. 2557) of 12/12/1977.

[76] 13th BUNDESREGIERUNG, 1997.

[77] One of the five objectives of the draft law reads: "To make benefit abuse more easily detectable and, including illegal employment, more effectively combat it." "Finally, the eligibility requirement of in-person unemployment registration [meant is in-person reporting] is newly regulated in support of the fight against benefit abuse […] The employment office is required on this occasion [the occasion of an in-person report] to examine whether unemployment still exists" (13th BUNDESREGIERUNG, Entwurf eines Gesetzes zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz - AFRG) (Bundestags-Drucksache No. 4941) of 18/06/1996, pp. 1 and 146).

are) the only potentially suitable approach, if suitable at all, given that around 90 percent of unemployed individuals likely require no such support. However, this kind of sporadic appointment scheduling is entirely inadequate for the purpose of preventing benefit misuse. Undeclared work can – if it can be prevented at all – only be deterred through a tightly scheduled reporting regime, where a brief in-person appearance is sufficient.

The effectiveness fallacy is rooted in a failure to recognise the incompatibility of pursuing multiple objectives through a single, predefined means and the resulting disproportionality of that means. At its core, it reflects a failure to clearly distinguish between well-defined goals and the selection of appropriate means to achieve them.

Why, then – this question inevitably arises – has the judiciary not recognised the effectiveness fallacy and called for the correction of the norm? Shouldn't the shortcomings of the norm have become apparent during a proportionality test? A review of the case law of the German Federal Social Court (BSG) over the past thirty years regarding sanctions for failing to attend scheduled in-person reporting appointments suggests that the judiciary itself was misled by the illusion of the effectiveness fallacy. Neither a proportionality review of the norm nor an assessment of its implementation in concrete cases was carried out – contrary to judicial doctrine, which derives from the constitution the obligation to regularly conduct a proportionality test.[78] The BSG ignored indications by individual claimants that the standard justifications given in summonses to in-person reporting [Meldeaufforderungen] were impermissibly formulaic. Consequently, the highest social court in Germany dismissed the claimants' appeals.[79] Nor has the social judiciary fulfilled its statutory obligation to resolve the internal and external inconsistencies that have arisen from its own case law.[80]

It is true that in 2015 the BSG systematically conducted a review for errors of discretion. However, it considered the universally applicable standard justifications used in summonses to in-person reporting not only appropriate for the cases at hand – since, in its view, a discussion of the claimant's professional situation would always be useful (as it would be for any unemployed person) – but also tailored to the individual case, even though it had received summonses to in-person reporting with identical justifications in at least twelve proceedings since 1995.[81] This, in turn, had the effect that the court was unable to find any misuse of discretion.[82]

This was so because the doctrinally defined discretionary errors – excess of discretion, non-use of discretion and misuse of discretion – are based on inconsistencies in the means-purpose relationship, while formulaic justifications 'beyond' the prevailing doctrine of discretionary errors are characterised precisely by the fact that they always appear appropriate.[83]

The current situation could hardly be more tangled – though the direct path to a solution can easily be derived from the history of the in-person reporting complex.

[78] Cf. e.g. BVerfG, ruling of 20/06/1984, reference no. 1 BvR 1494/78, margin no. 50 und 56.

[79] BSG, rulings of 23/05/2013 (reference no. B 4 AS 295/12 B) and 24/01/2019 (reference no. B 11 AL 62/18 B). On the lack of constitutional conformity of administrative acts with discretionary powers and empty formula justifications: KUTSCHKE, 2022, pp. 272 ff.

[80] KUTSCHKE, B., Binnen- und Außendivergenz der Sozialgerichtsbarkeit zu Ermessensverwaltungsakten mit universell einsetzbaren Leerformelbegründungen. In: *Sozialrecht aktuell*, No. 4 und 5, 2023, pp. 185-192 and 226-231. Cf. § 144(2) No. 2 or § 160(2) No. 2 SGG, respectively, as well as § 41(2) SGG and the Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung (RsprEinhG) as statutory concretisations of the rule of law principle (from Art. 20(3) GG).

[81] BSG, decisions of 25/04/1996 (B 11 RAr 81/95), 13/08/2008 (B 4 AS 178/07B), 09/11/2010 (B 4 AS 27/10 R), 25/08/2011 (B 11 AL 30/10 R), 19/12/2011 (B 14 AS 146/11B), 22/08/2012 (B 11 AL 53/12B), 23/05/2013 (B 4 AS 295/12B), 25/02/2014 (B 4 AS 417/13B), 29/04/2015 (B 14 AS 19/14 R), 29/04/2015 (B 14 AS 20/14 R), 10/02/2016 (B 4 AS 268/15B) und 27/02/2020 (B 4 AS 28/20B).

[82] On the unsuitability of discretion error reviews for identifying empty formula justifications: KUTSCHKE, 2022.

[83] For details, see KUTSCHKE, 2022, pp. 274, 285 ff.

Jewish Emancipation in Nineteenth Century Britain: Francis Goldsmid – Barrister, Legislator, Human Rights Campaigner, Religious Reformer and Philanthropist

*Andrew Watson**

Abstract

Francis Goldsmid was the first professing Jewish barrister in 1833 and the first to be appointed as a Queen's Counsel a quarter of a century later. His early life, education, Call to the Bar and time as a barrister is described. Civil and political disabilities faced by Jews in Nineteenth Century Britain are explained: Francis Goldsmid's important role in their ultimate removal is set out. His career as a Liberal Member of Parliament, during the 1860 s and 1870s, is considered, particularly his stances on significant reforms of English law and procedure and his concern for the human rights of his co-religionists and others abroad. Goldsmid's contribution to religious reform and his generous support, financial and otherwise, to causes and campaigns is recounted.

Keywords: *Goldsmid; Barrister; Jewish Emancipation; Britain.*

1. Introduction

On the evening of the 2nd of May 1878, after a day spent in Reading, a passenger returned to Waterloo Station, London. But before the train drew to a halt, he left his carriage through an opened door and was thrown between the platform and the train. Because of his severe injuries he was rushed to nearby St Thomas's Hospital but died within an hour of admission. So ended, at 70 years of age, by an accident, the busy, full, varied and accomplished existence of Sir Francis Henry Goldsmid. His death was widely reported and much mourned. On the 8th May he was buried in Islington in the Cemetery of West London Synagogue, where he was a founding warden and had been prominent in its governance. The funeral, conducted by the Reverend Professor Marks, was attended by many friends and admirers including distinguished members of both Houses of Parliament and of the Bar, representatives of the University of London and University College London, ministers of all the metropolitan synagogues and from elsewhere in Britain, as well as some Christian clergy of different denominations. Amongst those left behind by Francis Goldsmid were his wife and cousin Louisa Sophia, an early Jewish feminist who shared his social, religious and philanthropic values, and part author of a memoir of his life in 1879, and an enlarged edition in 1882, and his sister Anna Marie Goldsmid, poet, educationalist, linguist, translator and benefactor.

This article gives an account of Sir Francis Goldsmid,[1] the first professing Jew called to the English Bar in 1833 and in 1858 the first to be appointed a Queen's Counsel. It describes his considerable contribution to the campaign for removal of civil and political disabilities experienced by Jews in Britain. In contrast to some other European countries,[2] examples include France in 1791 and Prussia in 1812 and also the United States, where the constitution adopted in 1790 stipulated no religious test be required for any public office or post of trust (and where economic opportunity was similarly egalitarian), Jewish emancipation did not occur in Britain with an abrupt single legal or constitutional measure but was achieved by piecemeal reforms over decades. Francis Goldsmid's period as a Liberal Member of Parliament during in the 1860s and 1870s is considered as well, particularly his position on important reforms, or attempted reforms, of English law and procedure. Further his concern for the condition and human rights of his co-religionists and other peoples overseas is described. Francis Goldsmid's important role in establishing Reform Judaism in Britain is recounted, as his consistently generous philanthropy and support of many causes.

2. Early life and education

Francis Henry Goldsmith was born at Spital Square, London, on 1 May 1808, the second son of Sir Isaac Lyon Goldsmid (1778–1859), and his wife and cousin, Isabel Goldsmid (1788–1860). After an inauspicious early start as a speculator

* Andrew Watson LLB, MA, MPhil (Cantab) PhD, Senior Research Fellow, Sheffield Hallam University, United Kingdom, email: drwatsonandrew@gmail.com / ORCID: 0000-0002-9500-2249.

1 Second Baronet, Baron of the Kingdom of Portugal (both titles inherited from his father, Isaac) Queen's Counsel and Member of Parliament for the Berkshire seat of Reading.

2 For the progress of Jewish emancipation throughout Europe and beyond, see GOLDBERG, D., RAYNER J., *The Jewish People*, Penguin Books, 1989, Chapters 10 and 11 and BRENNER, M., *A Short History of the Jews*, Princeton, 2010, p. 189-200. Further see GRAETZ, H., *History of the Jews* (first published in 1895), The Jewish Publication Society of America,1956, Volume V, Chapter XVIII.

on the stock exchange, loosing £ 16,000 in one day, Isaac Goldsmid became a successful financier and amassed a large fortune. As a loan broker, he had extensive dealings with Turkey, Portugal and Brazil.[3] Using contacts developed in this business, he invested very profitably in foreign railway construction and mining. At home, amongst other activities, Isaac Goldsmid was one of the founders of the London Docks; he was chairman of the docks in Birkenhead; a director of the London, Brighton and South Coast Railway and one of the original promoters of the Imperial Gas Company.

Although immersed in financial affairs, Isaac Goldsmith was far from wholly occupied accumulating wealth and took a strong interest in a variety of progressive activities, often assisting them by his resources, and the social position so afforded. Working with William Wilberforce, Thomas Clarkson and Zachariah Macaulay, he was active in the movement to abolish slavery in the British Empire. Isaac Goldsmid joined prominent Quakers in a number of endeavours, including Joseph Lancaster's educational experiments and the work of Elizabeth Fry and Peter Bedford, with whom he collaborated in the causes of humanitarian penal and prison reform. He supported some ideas of Robert Owen, the textile manufacturer, social reformer and utopian socialist, especially about the education of infant children. The Goldsmids' family home became a favoured meeting place for leading utilitarians and social reformers. The ideas and debates heard in his childhood and youth had a profound and enduring effect on Francis Goldsmid.

With the Scottish poet and literary figure Thomas Campbell, Lord Brougham, the Radical MPs Thomas Warburton and Joseph Hume, and other supporters of liberal and non – sectarian education, Isaac Goldsmid took a leading part in establishing University College London in 1828, including advancing money to purchase the site before the institution was established. Previously all but Anglicans were denied university education in England, Wales and Ireland, though not Scotland. Unlike Oxford and Cambridge, and indeed this was much the impetus for its founding, UCL deliberately applied no religious test – giving access to Protestant Dissenters, Unitarians, Catholics, those of no faith and Jews thereby improving individual prospects in life for many.[4] In 1834 Isaac Goldsmith helped to establish University College Hospital.

Determined to provide an advanced education at home for his children, qualifying them for fulfilling and useful public lives, Isaac Goldsmith employed accomplished and eminent scholars as tutors. Francis Goldsmid from an early age began to study classics and mathematics in the morning and after lunch chiefly political economy (Isaac Goldsmid associated with David Recardo), Hebrew and modern languages. He was a good a student[5]. His only relaxation from study, other than on Sabbaths and Festivals, was horse riding, taught by a French gentleman who had been grand master of the stud of Jerome Bonaparte, King of Westphalia. Following his thorough education, after which he was recognised as a proficient classics scholar, Francis Goldsmid resolved at the age of 19 to become a barrister. In a speech for election to parliament many years later he stated his main reason for this vocational choice was to open a new career for his co-religionists.[6]

3. Francis Goldsmid's ambition to become a barrister

The law courts, from the eighteenth century, had shown sensitivity to Jewish religious observance by scheduling cases involving Jews and in extending legal deadlines to accommodate Jewish holidays. When litigants, witnesses and jurors, Jews were permitted to take an oath on the Torah (Pentateuch) compatible with their religion.[7] Although Jews first became scriveners and notaries as early as the Seventeenth Century[8] and are recorded as becoming solicitors since 1770,[9] no professing Jew had yet been called to the English Bar. In contrast to other European countries at the time, preparation for the legal profession was independent of university study.[10] That Francis Gold-

[3] For his services in helping to resolve a complicated financial dispute between Portugal and Brazil, he was created Baron de Palmeira in 1846 by the Portuguese government. He had already been made a baronet in 1841, the first professing Jew to obtain an English hereditary title. Previously he was elected a Fellow of the Royal Society, into which no Jew had been previously received, and became a patron and member of various other learned and scientific societies.

[4] Non – Anglicans were only admitted to degrees at Oxford in 1854; Cambridge in 1856 (hitherto they were permitted to study at Cambridge, but could not graduate) and Durham in 1865. The remaining tests (except in theology) were removed by the University Tests Act 1871, allowing non-Anglicans to become full members of the University (membership of Convocation at Oxford and Durham or the Senate at Cambridge) and to hold teaching positions.

[5] Francis's third and final classics tutor is of some note. The Reverend Doctor Fellowes left his valuable church living in St Brides in Fleet Street, London after conscientiously doubting the divinity of Jesus. Thereafter he divided his time tutoring Francis Goldsmid and a retired Baron of the Exchequer wishing to refresh the classical knowledge of his youth. The Judge as a mark of his great esteem, and having no children or close family, left his entire estate, worth Ł 90,000, in his will to Fellowes. Despite receiving this great fortune, and the freedom it brought, he continued to educate the young Francis Goldsmid until he reached 18. MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart.* Second Edition, London, 1882, Part I, Chapter I, 12.

[6] "*To the electors of Reading*" in 1860. MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart,* Second Edition, London, 1882, Part I, Appendix V.

[7] LACHS, P., A Study of a Professional Elite: Anglo – Jewish Barristers in the Nineteenth Century. In: *Jewish Social Studies*, Vol. 44, No. 2, Spring, 1982, p. 126.

[8] SAMUEL, E., Anglo – Jewish Notaries and Scriveners. In: *Transactions of the Jewish Historical Society of England*, Vol. 17, 1951–1952, p. 113-159.

[9] HENRIQUES, H., *The Jews and English Law.* Oxford, 1908, p. 205 and FINESTEIN, I., *The Jew in English Law: Aspects of Emancipation"* in *Aspects of Anglo-Jewish Life 1656–1956*, London, 1956, p. 52. By the second half of the nineteenth century there were about some fifty Jewish solicitors in London, some of whom were very highly successful.

[10] That is not to say that those who qualified as barristers did not go to university. The majority went, although they did not take a degree at Oxford or Cambridge. Most attended one or two years for general education to gain gentlemanly polish and to make social connections rather than for professional training.

smid was not educated at a university would be no impediment to becoming a barrister. Neither was the obligation to join one of the four Inns of Court as a student member. Presentation of a certificate of respectability, *of "fair character"*, and payment of a fee between five and ten pounds was all that was necessary. Further conditions of keeping twelve dining terms – eating a number of evening meals in Hall, over three years – and attending voluntarily lectures sporadically offered by the Inns, appeared eminently manageable, as did the fee of about twenty pounds to be paid before being admitted as a barrister at the ceremony of being Called to the Bar.[11]

What might, however, be a real obstacle for a professing Jew was the form of oath taken at the ceremony. It was by no means certain the Benchers (members of the governing body) of the Inns of Court would allow a professing Jew to swear an oath which did not include the asseveration "upon the true faith of a Christian". Fears of this were heightened in 1828 after the Repeal of the Test and Corporation Acts, removing the Anglican sacramental test that had excluded Protestant Dissenters from Crown and municipal office (although its effects had been nullified since 1727 by an annual indemnity act). Clearly taking aim at anti-Anglicans in the Roman and Dissenting churches, the House of Lords, placed in the repealing legislation a requirement that a candidate for office should declare he would not use his power to injure, weaken or disturb the Anglican established church or the privileges of the bishops "on the true faith of a Christian". Although this applied only to candidates for Crown or municipal office, alarm was raised it might nonetheless spread to exclude Jews from learned professions.[12]

Francis Goldsmid joined Lincoln's Inn in 1827 as a student having decided, if admitted to the Bar, to practice in the Court of Chancery. An important factor in his choice was that absences on Friday evening and Saturday (the Jewish Sabbath) would matter less than in the Common Law Courts. Periods of learning with practitioners, who usually charged for this (conventionally £100), then formed the core of legal training. Accordingly, he placed himself under Mr James Humphries, a leading Real Property lawyer, recorded in the Law List as a conveyancer member of the Bar, whose Chambers were 9 Old Square, Lincoln's Inn. Francis Goldsmid remained under his guidance until Mr Humphries's death. During a long period of sickness beforehand a considerable amount of his business fell to Francis Goldsmid, enabling him to acquire extensive practical experience.[13] After leaving 9 Old Square Francis Goldsmid entered the Chambers, at 3 Stone Buildings, Lincoln's Inn, of James Wigram, a distinguished Equity draughtsman, author of legal works[14] and later appointed Vice Chancellor of the Court of Chancery in 1841.

In 1833 Francis Goldsmid applied to the Benchers of Lincoln's Inn to be called to the bar and for the "privilege" of omitting the phrase "upon the true faith of a Christian" from the required oath of abjuration (of the earlier Royal House of Stuart). On the 25thJanuary a special council of twenty Benchers heard the application. A `vigorous, if not angry, debate ensued. In one exchange Mr Campbell M P, later Lord Campbell, recorded he pointed out the hardship that would be imposed on a young gentleman who had been allowed to keep his dining terms and whose prospects in life would be blasted were he not to be called to the Bar. A Mr Clarke, leader of the Midland Circuit, and at that time master of the library, replied "Hardship I see no hardship at all! Let him become a Christian…".[15] This was not taken as a serious argument and records of Lincoln's Inn indicate that a majority, including the Solicitor – General supported the application.[16] The matter was adjourned for five days. When nineteen of the original group met once more they unanimously supported a motion put by the Right Honourable Thomas Erskine that Francis Goldsmid be admitted to the Bar.[17] Sir Lancelot Shadwell, the Senior Bencher, Vice Chancellor of the Court of Chancery, and a supporter of Jewish emancipation,[18] sent a porter to fetch his personal copy of the Hebrew Bible, an

[11] Admission to the Bar required no participation in any educational activity and no examination. Only in 1872, were examinations for the bar made compulsory as a response to public, and later parliamentary concern, at least since the early 1840 s (resulting in the report and recommendations of the Select Committee on Legal Education in 1846), about the quality of legal education. Previously sitting examinations and attending lectures, introduced by the Council of Legal Education, after its creation by the Inns of Court in 1852, were optional. ABEL-SMITH, B., STEVENS, R., *Lawyers and the Courts A Sociological Study of the English Legal System 1750–1965,* London, 1967, p. 63-76. Also *Report of the Committee on Legal Education*, HMSO, 1971 (The Omrod Report), p. 1-11.

[12] Isaac Goldsmith wrote to the Prime Minister, the Duke of Wellington, on the 5th May,1828 expressing concern the Benchers of Lincoln's Inn might impose it on his son who he was educating in English Law. HENRIQUES, U., The Jewish Emancipation Controversy in Nineteenth Century Britain. In: *Past and Present*, No. 40, July, 1968, p. 126-127.

[13] Legal education was practical and primarily gained by self help: obtaining a seat, for a fee, in a lawyer's office or chambers where pleading and conveyancing could be studied; attendance at court, notebook in hand, to learn procedure and advocacy; reading case reports and studying books written by practitioners on substantive law BAKER, J., *An Introduction to English Legal History*, 1981, p. 147-150. Also see BAKER, J., Legal Education in London 1250–1850. In: *Selden Society Lecture* 4th July, 2005, London, Seldon Society, 2007, p. 19-23 for a description at that time of training, pupillage, which varied in quality and utility, in Barristers chambers.

[14] Including *Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills* (1831, four editions), and *Points in the Law of Discovery* (1836).

[15] CAMPBELL, J., *The Lives of the Chancellors and Keepers of the Great Seal of England*. London, 1846, p. 544 and HENRIQUES, H., *The Jews and English Law*. Oxford, 1908, p. 204.

[16] The Black Books of Lincoln's Inn. In: *Lincoln's Inn*, Vol. 4, 1902, p. 185.

[17] If the Benchers of Lincoln's Inn had refused to call Francis Goldsmid to the Bar a right of appeal to the judges as visitors to the Inn existed. ABEL-SMITH, B., STEVENS, R., *Lawyers and the Courts. A Sociological Study of the English Legal System 1750–1965*. London, 1967, p. 63-64.

[18] LACHS, P., A Study of a Professional Elite: Anglo – Jewish Barristers in the Nineteenth Century. In: *Jewish Social Studies*, Vol. 44, No. 2, Spring, 1982, p. 127, suggests Francis' Call to the Bar may have been assisted by some political influence from his father Isaac.

edition of the Mikraot Gedolot,[19] upon which Francis Goldsmid swore an oath acceptable to him. On the 30th January, 1833 for the first time a gentleman professing the Jewish faith became an English barrister.[20]

4. At the Bar

Lincoln's Inn's admission of Francis Goldsmith to the Bar was regarded as a precedent and followed without question by the other Inns of Court. John Simon, a graduate of University College, London, became the second professing Jewish barrister, called at Middle Temple in 1842, and the first to practice at the Common Law Bar. He was followed by others that decade, including in 1847 George Jessel, a graduate of UCL who became the first Jew to hold judicial office and was appointed Master of the Rolls, and in 1848 David Salomons, who, like Francis Goldsmid, was a leading figure in the campaign to remove civil disabilities affecting Jews in Britain, becoming Lord Mayor of London in 1853 and an MP six years after. Although he did not practice at the Bar, he used his legal knowledge and training elsewhere and as the first Jewish magistrate. In the Nineteenth Century Jewish barristers attained success in practice, the judiciary, the civil service and in government. Between 1858 and 1900 there were eleven Jewish Members of Parliament – eight Liberals and three Conservatives. Of the eight Liberals six were barristers. Barristers careers flourished most, however, not in Britain but in her overseas possessions including Australia, New Zealand, India, South Africa, and the East and West Indies where colonial society was more fluid and less resistant to Jews occupying high office.[21]

Francis Goldsmid is shown in Clarkes New Law List under the section Counsel, Special Pleaders, and Conveyancers at the Bar, as having chambers at 3 New Square, Lincoln's Inn in 1836 before moving to 5 Stone Buildings, Lincoln's Inn in 1839 where he remained until 1859, when he ceased to practice as a barrister.[22] The choice of chambers in Lincoln's Inn was probably much influenced by the Court of Chancery's location in the Old Hall of the Inn for part of the year and also by proximity to Chancery solicitors and other sets of Chancery barristers. Goldsmid advised on disputes concerning trusts, equity and conveyancing, as well as drafting documents in these areas and acting as a conveyancer. He also appeared as counsel in cases involving trusts and conveyancing argued in the Court of Chancery, some of which were reported in the English Reports and Law Times.[23] In 1858 Francis Goldsmid became a Queen's Counsel, which was seen as a just, though by some as long awaited, tribute to his professional abilities. He was the first professing Jew to receive this distinction.

On the death of Isaac Lyon Goldsmid in 1859, Francis Goldsmid succeeded the estates and titles of his father, becoming a baronet and a baron of Portugal. He retired from legal practice though retained a close interest in Lincoln's Inn and was elected a Bencher. The inheritor of a large fortune, he aspired to enter public life as a Member of Parliament, only possible since the passage of the Jewish Disabilities Act the year before, and to pursuing more intensely his philanthropic and religious causes and interests. Court appearances were not entirely ended; later in life he served as a magistrate and deputy lieutenant in Berkshire and also as a magistrate in Gloucestershire.

5. Civil and political disabilities to which Jews were subject

The Repeal of the Test and Corporations Acts in 1828 and the Catholic Emancipation Act 1829 had removed restrictions on Protestant Dissenters and Roman Catholics. By 1830, the Jews of Britain, numbering about twenty-seven thousand, eighteen thousand living in London and the rest in small communities in provincial towns and ports, were the only remaining religious minority subject to serious civil and political disabilities.[24]

Edward the First's *Statutum de judeismo*, Statute of the Jewry, 1275, reducing Jews to pariahs, required to wear yellow badges without rights and wholly dependent on the good will of the sovereign for their security, remained, written in Latin, on the statute book. Despite being allowed to return under Oliver Cromwell in 1655, the lack of specific legislation enabling resettlement led to some uncertainty whether the royal order banishing Jews in 1290 was still in force. Although contributing to levels of background general insecurity, neither the ancient laws, or the absence of legislative permission, were in everyday life any practical inconvenience and, save for a few legal

[19] A somewhat large book which generally includes the text in both masorah Hebrew and the Aramaic translation with Jewish commentaries on the bible. Possession of this work by Sir Lancelot may indicate he was a Hebrew scholar.

[20] Jews who had converted to Christianity, or at least were prepared to take the Christian oath, had been Called to the Bar of England and Wales previously. One was Nathaniel Nathan Basevi, cousin of Benjamin Disraeli, who had matriculated at Oxford in 1812 before his admission to Lincoln's Inn. Another was Francis Palgrave, effectively the founder of the Public Record Office in 1838 and mediaeval historian, was Called at Middle Temple in 1827. He converted to Anglicanism three years earlier before marriage. In her examination of the records of the four Inns of Court, LACHS, P., A Study of a Professional Elite: Anglo – Jewish Barristers in the Nineteenth Century. In: *Jewish Social Studies*, Vol. 44, No. 2, Spring 1982, p. 128, identified eleven barristers of "unmistakable Jewish names" who were admitted between 1800 and 1833, including a member of the Goldsmid family.

[21] LACHS, P., A Study of a Professional Elite: Anglo – Jewish Barristers in the Nineteenth Century. In: *Jewish Social Studies*, Vol. 44, No. 2, Spring 1982, p. 132.

[22] Between 1860 and 1861 his entry in the Law List shows his home address 14 Portland Place (and the addition after his name of "bart – meaning baronet). From 1862 until 1876 St. John's Lodge, Regent's Park – his late father's former residence – is recorded.

[23] Examples of major cases include: Trevelyan v White, 1839; Tomlin v Tomlin, 1841; Morgan v Morgan, 1851; The King of the Two Sicilies v Willcox, 1851; Sandford v Jodrell 1854; Hardington v Thomas 1854; Wilton v Calvin, 1854; Evans v Evans, 1856; Knight v Bowyer, 1857.

[24] Self – evidently not religious, but nonetheless a group, Atheists also faced considerable civil and political disabilities only lifting with the Oaths Act 1888 (51 & 52 Vict. c.56) which provided all oaths, including allegiance to the sovereign, necessary to sit in parliament, may be solemnly affirmed rather than sworn to God. The Act was the culmination of a campaign spearheaded by the noted atheist and secularist MP Charles Bradlaugh to take his parliamentary seat.

antiquarians, mentioned hardly ever.[25] After coming back to Britain Jews were not subject to restrictions found at times in other parts of Europe. They could live where they wished, employ non-Jewish labour in their homes or businesses, deal in any commodity and engage in any manufacture or business, save that retail trading within the City of London was restricted and numbers limited who could be members of the London Stock Exchange. There was some haziness in land law about their ability to own freehold property, but this was dealt by granting leases on peppercorn rents for indefinitely long periods.

Professing Jews were excluded by tests, oaths and declarations from employment by the Crown, municipal corporations, from Parliament, administration of justice, education and from most professions.[26] In practice those few males who met the general property qualification were allowed to vote in parliamentary elections, although the returning officer had the power, seldom used, to demand voters swear the Oath of Abjuration (of the former Royal House of Stuart) on the true faith of a Christian; not possible for professing Jews.

Since the repeal, of the Jewish Naturalisation Act 1753 – to allow individual foreign born Jews to seek naturalisation by the expensive and difficult process of promoting a Private Bill[27] – just one year after it had been passed, amidst a tremendous outburst of hostility, the majority of Jews led rather secluded lives. Seeking to avoid rekindling the rancour of 1753/1754, remembered and lamented by their parents and grandparents, the engagement of most with wider society was generally limited to what was necessary for business, commerce and trade.

6. The campaign for civil and political Jewish emancipation and the part played by Francis Goldsmid

Isaac Goldsmid believed that Jews should emerge and play a full part in British society and that this required complete equality before the law and changes in Jewish religious practices and outlook. His son Francis shared these views and with his father allied himself to two parallel campaigns for civil and political Jewish emancipation and for a new form of Jewish worship. The former, in which both played leading roles, ran for more than a quarter of a century.

After the repeal of the Test and Corporation Acts in 1828 and the Catholic Emancipation Act, 1829, as a further step in progressive elimination of discrimination against religious minorities, it was possible to contemplate civil disabilities suffered by Jews might also be removed. To achieve this goal, the Association for obtaining for British Jews Civil Rights and Privileges was formed with Isaac Goldsmid elected as Chairman. The push for Jewish emancipation was driven by the wealthy elite, Isaac and Francis Goldsmid, members of the Rothschild family, Nathan, Meyer and Lionel, and David Salomons foremost amongst them, and by Christian supporters, especially in the Whig/Liberal Party, the majority of whose members had long believed in separation of church and state and that religious belief was not one of public concern. In contrast to the Catholic Association, dominated by Daniel O'Connell, in the 1820s, the campaign never amounted to a mass movement. Amongst some of the educated religious misgivings were voiced about the effects on Jewish life and customs of assimilation into political and social life.[28] At least initially many of the small middle class failed to identify with what they saw as the political aspirations of the very rich. Indifference and apathy was felt by many in the impoverished and greatly more numerous working class, amongst them pedlars, old clothes dealers, sellers of fruit, stationery and trinkets, who did not qualify to vote under the ten pounds householder franchise introduced by the Reform Act of 1832. Little prospect was seen by them of improvement in their lives by the opening of municipal office to Jews and their entry to Parliament. Subsistence and employment mattered far more to the bulk of the community.[29]

Four Bills, promoted in the Commons by Sir Robert Grant, supported by Thomas Macauley (recently elected and sometime before becoming an influential historian) and in the Lords by Lord Holland, aimed at complete and immediate emancipation were introduced between 1830 and 1836 to remove all disabilities affecting British born subjects, save for the exceptions that applied to Roman Catholics. Each failed. Although the last two were passed in the House of Commons they were rejected in the Lords where the Tory Party and the Bishops[30] were entrenched.

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[25] See *A History of the Jews of England*, Second Edition, Oxford, 1949, p. 246-247 and ABRAHAMS, L., Sir I. L. Goldsmid and the admission of the Jews of England to Parliament. In: *Transactions of the Jewish Historical Society of England*, Vol. 4, 1899–1901, p. 117-118.

[26] Civil disabilities experienced by Jews are detailed in BLUNT, J., (a barrister in Lincoln's Inn), *A History of the Establishment and Residence of the Jews in England with an inquiry into their civil disabilities*. London, 1830, p. 110 et seq.

[27] PERRY, T., *Public Opinion, Propaganda, and Politics in 18th-Century England: A Study of the Jew Bill of 1753*. Cambridge, 1962. The purposes of the1753 Act were eventually achieved in 1826 when Parliament, without expressly mentioning Jews, passed an Act (6 George IV, cap. 67) abolished the necessity to receive the Church of England Sacrament before naturalisation.

[28] Joseph Crooll, for example, a former Manchester Synagogue preacher and teacher of Hebrew at Cambridge University, who claimed, in *The Last Generation*, published in 1829, that Jewish separateness was divinely ordained and asserted emancipation would wean Jews from Judaism – see FINESTEIN,I., Anglo-Jewish Opinion During the Struggle for Emancipation (1828–1858). In: *Transactions of the Jewish Historical Society of England*, Vol. 20, 1959-1961, p. 116-117 and 136.

[29] HENRIQUES, U., The Jewish Emancipation Controversy in Nineteenth Century Britain. In: *Past and Present*, No. 40, July 1968, p. 127-129. Henriques states the gulf between the handful of very wealthy Jews, atop the social pyramid, who could aim for an active political life, and those in the working class was as wide as that between British landed nobility and their impoverished farm labourers and factory hands. Also see FINESTEIN, I., Anglo-Jewish Opinion During the Struggle for Emancipation (1828–1858). In: *Transactions of the Jewish Historical Society of England*, Vol. 20, 1959–1961, p. 133-137.

[30] The great majority of Bishops implacably opposed to the end removal of Jewish civil and political disabilities. Important exceptions included Archbishop Whateley of Dublin, academic, rhetorician, logician, philosopher, economist, and theologian, who eloquently supported Jewish emancipation throughout the struggle.

Although many, including the Archbishop of Canterbury, William Howley, never tired of pointing out their respect, and even admiration for Jews, as individuals and as a people, there was determination to resist what they saw as further erosion of the Church of England's authority, already reduced by emancipation of Dissenters and Catholics (significantly the Lords had resisted almost unbroken majority support in the House of Commons for Catholic Emancipation over thirty years before 1829), and to oppose what was termed the "de – Christianising of Parliament".[31] Because Christianity "was part and parcel of the law of the land", an often repeated, though not always clearly understood, dictum of the famous Jacobean lawyer Sir Edward Coke[32],Jews ought not to be allowed to legislate in matters of Church or State. In traditional Tory eyes the two were united: the state was the secular aspect of the spiritual nation and the Anglican Church the nation at prayer. Some limited progress, however, was made towards Jewish emancipation in the 1830s. In 1830 the prohibition, the practical inconvenience caused was minimal, preventing Jews from carrying on retail trade within the small area of the City of London was lifted. A declaratory Act of Parliament in 1833 confirmed the right of Jews to own freehold property.[33] Legislation was passed in 1835 making it clear professing Jews, who met the post Reform Act 1832 property requirements, were to be allowed to vote in parliamentary elections. The Sheriffs Declaration Act, also in that year, enabled David Solomons to serve as Sheriff in the City of London without taking the statutory Christian oath. After this he successfully fought the City Aldermen for the right to sit on their council. Further in 1835 the first professing Jew was sworn as a member of a Grand Jury, at the Kirkdale Quarter Sessions in North Yorkshire.

Deploying his considerable literary talents Francis Goldsmith contributed to the cause of Jewish emancipation by writing a number of clearly expressed, analytical and well received pamphlets, mainly to enlist support of non – Jews. "Remarks on the Civil Disabilities of British Jews", written whilst training for the bar in 1830, was the first in a series published over eighteen years.[34] They addressed directly, sensitively and with reason, logic and diplomacy, the objections, sometimes vehemently put, of the opponents of Jewish political equality. These can be summarised as: religious belief; nationality, or nationalism, a notion that Jews were a distinct nation of cosmopolitans and exiles awaiting their return to Palestine whose patriotic attachment was exclusively confined to their own race and who were incapable of mingling as good citizens on equal terms with any others;[35] bad character or moral inferiority, associated by some with foreignness, deceit and crime; and indifference, or even opposition, to emancipation from within the Jewish community.[36]

After the failure of the four Bills in the 1830 s to achieve their ends advocates of Jewish equality turned their attention to obtaining admission to local government. A Bill to achieve this got as far as a first reading in the Lords by one vote, in 1841, but was lost on a second reading. However, after the Conservative Prime Minister Robert Peel arranged the Bill's progress through the Lords in 1845, Lord Lyndhurst's Jewish Municipal Relief Act became law.[37] Another milestone towards Jewish equality occurred the following year. The Religious Opinions Relief Act 1846 extended to Jewish congregations the code of recognition and protection for nonconformist worship, chapels, schools and property.[38] It also formerly repealed the intolerant *Statutum de judeismo* of 1271 and an Act of 1702 compelling Jews to maintain their Protestant children.

Parliament, however, still remained closed to Jews. Faced by this, and perhaps heeding advice given by Daniel O'Connell in 1829 that claims for Jewish Emancipation should be forced on Parliament and not to "confide in English liberality",[39] the campaign leaders resolved to stand for election in the general

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[31] See ABRAHAMS, L., Sir I. L. Goldsmid and the admission of the Jews of England to Parliament. In: *Transactions of the Jewish Historical Society of England*, Vol. 4, 1899–1901, p. 125-126.

[32] From a similar period, Mathew Hale's maxim *"Christianity is part of the Common Law of England"* was also sometimes quoted by opponents.

[33] It had only been since the Papists Act 1778, and then subject to an oath renouncing claims by the Stuarts to the throne and the civil jurisdiction of the Pope, that Roman Catholics were allowed to own property and to inherit land.(Reaction against this measure led to riots in Scotland in 1779 and followed by the immensely destructive Gordon Riots in London on 2 June 1780).

[34] Notable amongst these are :'Two Letters in Answer to the Objections urged against Mr. Grant's Bill for the Relief of the Jews,' 1830; 'The Arguments advanced against the Enfranchisement of the Jews considered in a Series of Letters,' 1831, 2nd edition, 1833; 'A Few Words respecting the Enfranchisement of British Jews addressed to the New Parliament,' 1833; and 'Reply to the Arguments advanced against the Removal of the remaining Disabilities of the Jews,' 1848.

[35] Arguments put forward by Francis Goldsmid, and others in Britain, to reject the national element in Judaism as a hindrance to patriotism were similar to those put forward at the time by Gabriel Riesser the leading advocate for Jewish civil rights in Germany. The principle of Jewish emancipation was established at the National Assembly (Riesser serving as an elected vice president) in Frankfurt following the 1848 rising. Baden in 1862, Saxony in 1868 and Bismarck's North German Federation in 1869 decreed full Jewish emancipation. When all Germany, save Austria, came under the German Imperial Constitution of 1871 the last remaining restrictions on Jewish residence, marriage, entry to professions, acquiring property and voting were removed. See GOLDBERG, D., RAYNER J., *The Jewish People*, Penguin Books, 1989, p. 153-154.

[36] HENRIQUES, U., The Jewish Emancipation Controversy in Nineteenth Century Britain. In: *Past and Present*, No. 40, July 1968, p. 127-129. Henriques assessed the worst features of Continental anti-semitism were generally avoided by opponents in their polemics and speeches: World Jewish conspiracy was not conjured and the blood libel summoned little and rapidly banished pp.134-135. See also FINESTEIN, I., Anglo-Jewish Opinion During the Struggle for Emancipation (1828–1858). In: *Transactions of the Jewish Historical Society of England*, Vol. 20, 1959–1961, p. 133-137.

[37] In advance of legislative reform, a number of municipal corporations, including Portsmouth, Birmingham and Southampton and other bodies already admitted professing Jews to elected office without taking the prescribed Christian oath. LIPMAN, V. D., *The Age of Emancipation*. In: *Three Centuries of Anglo – Jewish History,* Jewish Historical Society of England, Heffer and Sons, 1961, p. 79-80.

[38] PICCIOTTO, J., *Sketches of Anglo – Jewish History*. London, 1875, p. 396.

[39] Letter from Daniel O'Connell to Isaac Goldsmid 11th September 1829. Reproduced by ABRAHAMS, L., in Sir I. L. Goldsmid and the admission of the Jews of England to Parliament. In: *Transactions of the Jewish Historical Society of England*, Vol. 4, 1899–1901, p. 151-153).

election of 1847 as candidates for the Liberal Party, supportive of Jewish emancipation, and to which Isaac and Francis Goldsmid instinctively belonged. If elected they would argue a strong mandate existed for their admission to the Commons.[40] Francis Goldsmid stood for Great Yarmouth, his father Isaac put up in Beverley, Yorkshire, Baron Meyer de Rothschild tried Hythe, Kent, David Solomons attempted Greenwich and Baron Lionel de Rothschild contested one of the four City of London seats along with the Prime Minister, Lord John Russell and two other Liberal candidates. In other constituencies Liberal candidates were asked, as the price of Jewish votes, to promise their support for a measure to admit Jews to parliament. Francis Goldsmid was perhaps the first member of the Anglo-Jewish leadership to recognize the potential of the "Jewish vote" in the struggle for civic rights.[41] In the 1840s and 1850s this vote was skilfully exploited by the Whig-Liberal alliance. Of the five candidates, Lionel de Rothschild was elected for the City but, as he was unable to take the stipulated Christian oath of office, his seat fell vacant. Rothschild was re-elected. However the seat was declared vacant after Rothschild again met the barrier of the oath. This pattern of election by the City voters followed by declaration of a parliamentary vacancy was repeated over the next ten years, effectively disenfranchising the constituency.

A Jewish Disabilities Bill of 1848, to put Jews on the same footing as Roman Catholics and allow them to enter Parliament, passed its second reading in the House of Commons by 277 votes to 204. However the Lords, much aroused by clerical fears and agitation the measure would "de-Christianise" the legislature and imperil the country's religion, rejected the Bill in an exceptionally full House by 163 votes to 125.[42] Francis Goldsmith published a clearly expressed and highly reasoned refutation of the concerns of the opponents of the 1848 Bill in "Reply to the Arguments against the Removal of the remaining Disabilities of the Jews" which was read in parliament and beyond. The following year a modified measure, the Parliamentary Oaths Bill, which, by removing the obstacle of the form of oath, would have permitted professing Jews to sit in the House of Commons, also foundered in the Lords.

In 1851 events took a dramatic turn. David Solomons, who was returned for Greenwich, on his fourth attempt, at a by-election, attended the Table of the House of Commons and asked to be sworn. Instead of giving up like Lionel de Rothschild at the Oath of Abjuration, he recited it without "on the faith of a true Christian" and occupied a seat on one of the ministerial benches, ignoring an order to withdraw. The Speaker asked the House for support. In the debate that followed, whether to remove him by the sergeant -at -arms as a trespasser, he not only recorded his vote three times but also explained his position in a dignified and forceful manner, winning considerable sympathy. Although the government announced it would not take action against him for speaking without swearing the prescribed oath, a common informer commenced proceedings by writ in the Court of Exchequer where after a trial he was found liable to a statutory fine of £ 500 for each of the three occasions he had spoken. The Chief Baron expressed regret he was bound by the law to reach that conclusion: Sentiments which were repeated by the Exchequer Chamber which unanimously confirmed the decision of the lower court.

All but annual attempts were made thereafter in one form or another to allow elected representatives of the constituencies to take their seats by altering the Oath of Abjuration or abolishing it and introducing a new form of parliamentary oath altogether. Almost as a matter of course, they were rejected by the Conservative dominated House of Lords. A conference of both Houses was unable to reach agreement.[43] By 1858 those for and against removing Jewish disabilities wearied. Realising that political damage was being sustained, not least by the Lords continually rejecting the will of the Commons, through the intransigence of his party, the incoming Conservative Prime Minister, Lord Derby, hitherto consistently against Jewish emancipation, prepared for compromise. This took the form of adopting a suggestion of Lord Lucan,[44] another old opponent, that each House of Parliament be allowed to decide by Resolution the form of oath to be administered to Jews. A Bill to this effect passed through the House of Lords by 33 votes to 12 (many members abstained) and in the House of Commons by 129 to 55 and became the Jewish Relief Act 1858 (21 & 22 Victoria, cap.29).[45] Following long decades of campaigning together for complete Jewish emancipation, Isaac Goldsmid, in the final year of his life, and Francis Goldsmid, witnessed admission of a professing Jew to the House of Commons: After a Special Resolution under the new Act enabling taking of an oath satisfactory to him, Lionel de Rothschild finally took his seat as an MP on Monday, July 26th, 1858.[46] His brother Meyer was elected MP for Hythe at a by-election the year following. Also in 1859 David Solomons was re-elected for Greenwich, having been defeated in 1851.

[40] This tactic was employed by Daniel O'Connell in the County Clare elections of 1828 and 1829.

[41] ALDERMAN, G., *Goldsmid, Sir Francis Henry, second baronet*, Oxford Dictionary of National Biography, Published on - line, 23rd September, 2004. In *The arguments advanced against the enfranchisement of the Jews, considered in a series of letters*, 1831, 2nd edition, 1833, Goldsmid noted that although Sir Robert Grant's Jewish Relief Bill was defeated the previous year, the dozen MPs who represented London constituencies where the majority of British Jews resided had supported the measure.

[42] ROTH, C., *A History of the Jews of England*, Second Edition, Oxford, 1949, p. 257-259.

[43] ROTH, C., *A History of the Jews of England*, Second Edition, Oxford, 1949, p. 261-263.

[44] Four years earlier at the Battle of Balaclava, during the Crimean War, Lord Lucan gave the fateful order for the Charge of the Light Brigade, immortalised by Alfred Tennyson's poem of that name, against Russian artillery, resulting in heavy British losses without significant gains.

[45] The Resolution procedure was converted to a Standing Order by an Act of 1860 (23 & 24 Victoria, cap. 49) making admission of Jews a matter of right rather than privilege. By the Parliamentary Oaths Act 1866 (29 & 30 Victoria, cap. 19) a new and simplified oath for both Houses was introduced omitting reference to "true faith of a Christian".

[46] Converts to other religions, facing no difficulty with the prescribed oath, had sat in parliament before. Famous amongst them being: Benjamin Disraeli born to a Sephardi family, but baptised at 12 into the Church of England, entered parliament in 1837, later rising to prime minister; and David Ricardo, economist and financier, also from a London Sephardi family, became a Unitarian at 21 and served as an MP from 1819 to 1823.

Francis Goldsmid, himself, was elected in 1860 as Member for Reading,[47] the constituency he represented until his death, in a by-election, caused by the promotion of Sir Henry Keating, a former solicitor general, to a Court of Common Pleas judgeship.

7. Francis Goldsmith Member of Parliament

As an MP Francis Goldsmid saw the electorate of his constituency expand after the Representation of the People Act 1867 (30 & 31 Vict. c. 102), enfranchising part of the urban male working class, and following the Secret Ballot Act 1872 – passed to avoid intimidation, bribery and drunken fights which sometimes flawed elections – its members casting their votes in private. Reportedly liked well by all classes,[48] he was an assiduous representative with a consistent strong interest in raising housing standards for poorer residents and in promoting education of children and adults in the borough. From his own fortune, he gave generously to charities, schools and funds for building churches and chapels. Shortly before his death he contributed £ 5000 towards a new town hall and reading room in Reading. On the last day of his life he attended meetings of trustees at two parish schools.

Attending Parliament often, he was known as a patient and impartial chairman of committees and was frequently consulted by his party, when in power, on drafting Acts of Parliament, and on matters of a legal and constitutional nature.[49] His general interventions covered a broad range of contemporary economic and social matters.[50] Goldsmid's parliamentary record shows a strong desire to improve conditions for working people. On parliamentary and municipal voting he was a gradualist, linking increased standards in education to extending the franchise, and was described as a "temperate", rather than a radical Liberal. Reflecting a liberal belief in limited power of the state, he opposed increases in Income Tax (believing money was spent better by individuals); workers being able to impose arbitration on employers; and the government selling annuities from savings banks when they could be sold by the private sector because it departed from the "great general principle that government ought not to undertake business which the people are capable of undertaking themselves".

Unsurprisingly he wholeheartedly endorsed the Universities Tests Act 1871 abolishing religious "Tests" preventing non – Anglicans taking up professorships, fellowships, studentships and lay offices at the Universities of Oxford and Cambridge. The measure was introduced by the Gladstone government after Numa Edward Hartog, an outstanding young Jewish mathematician, was refused a fellowship at Cambridge University.

Turning to matters perhaps of closest interest to students of history of the English Law and procedure, Sir Francis, drawing on his past career at the Chancery Bar, supported a Bill to enable Dissenters to act as trustees in cases where no intention was expressed regarding the religious character of the Trust and a further Bill opening endowed schools to Dissenters.

Goldsmid spoke at length in 1863 to allow those in legal proceedings to affirm rather than swear a religious oath – a measure that would have particularly assisted atheists. However the Affirmations Bill was not backed by the government and fell on its second reading.[51]

He favoured the Courts of Justice Concentration (Site) Act 1865, which, together with the Courts of Justice Building Act of 1865, paved the way for the construction of the Royal Courts of Justice on the Strand in London. However, he regretted the scheme would be marred, as had much railway and local improvement building, by evicting families without making alternative provision for their housing.

Sir Francis supported the Gladstone government's Supreme Court of Judicature Bill 1873 to reorganise the English Court system, establishing a High Court and Court of Appeal, and to abolish (for England only) the judicial functions of the House of Lords. During the Second Reading he agreed the quality of judgeship was poor in the hereditary House of Lords and deprecated ex – Chancellors of the Courts absenting themselves from sitting on appeals in order to undertake well paid arbitrations elsewhere, behaviour he said would not have occurred thirty years ago when they would have regarded deciding cases almost as a condition of their pension.[52]

Creation of a General School, or University, of Law in London was proposed to increase the quality of legal education for solicitors and barristers, about which for some decades there was public and parliamentary concern, and to extend knowledge of law more widely. Advocated and championed by Sir Roundell Palmer, later Lord Selborne, and the Legal Education Association, formed to press for reforms in 1870,[53] the intention was for this institution to take over the educational functions of the Inns of Court and the Incorporated Law Society, which, unlike the Inns who were divided, vigorously supported it. Goldsmith opposed a Bill in 1872 to establish such a school

[47] For Goldsmid's election address to the voters of Reading see MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart*, Second Edition, London, 1882, Part I, Appendix V.

[48] Obituary, *The Solicitors' Journal*, May 11th 1878.

[49] For example in 1861 on the correctness in the Customs and Excise Bill of including repeal of duties on paper. For some years Francis Goldsmid employed as his secretary, to assist him in his parliamentary and philanthropic work, the author and noted translator Frederica Maclean Rowan (1814–1882).

[50] Some of these, and exerts from a number of his speeches, are set out by MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart,* Second Edition, London, 1882, Part 1, Chapter 8.

[51] The purpose of this reform was only achieved by the Oaths Act 1888.

[52] Although the Bill became Law, the judicial aspect of the House of Lords was retained under the Appellate Jurisdiction Act 1876 of the Disraeli Conservative government which introduced Law Lords – leading lawyers appointed as life peers to adjudicate on appeals.

[53] ABEL-SMITH, B., STEVENS, R, *Lawyers and the Courts A Sociological Study of the English Legal System 1750–1965*, London, 1967, p. 71-76.

on the grounds it would create a monopoly[54] in teaching and assessing law to the disadvantage of smaller law schools including that of University College London, in whose management he was concerned.[55] The Bill, opposed by the Inner Temple and Lincoln's Inn, though not Middle Temple and Gray's Inn, and without government support, collapsed.[56]

The Married Women's Property Act 1870 (33 & 34 Vict c 93), a landmark in female rights, permitting married women to own legally money they earned and to inherit property, received strong backing from Francis Goldsmid to remedy what he described as an admitted injustice.

The final occasion Sir Francis Goldsmid addressed the Commons in a set speech was in 1874 when he unsuccessfully opposed Lord Chancellor Cairn's Land Titles and Transfer Bill to introduce voluntary registration of title to land, based on a model used in Australia. Whilst praising the desire to establish in England "a really useful land registry", as a former Conveyancer, his opinion the procedure involved would be even more tortuous and expensive than that which existed and should be rejected. Possibly vindicating his view, the process in the Act was little used.

8. "The member for Jewry"

Very soon after his admission to the Commons Goldsmid became recognised as spokesman for the Jewish Community and was dubbed "the member for Jewry". Powerful and moving denunciations of attacks and abuses suffered by Jews in Russia, North Africa, Syria and Asia Minor, Persia, the Danubian provinces, Bulgaria and elsewhere won him widespread respect.[57] He also spoke against harsh conditions imposed on Hungarians and Poles and organised public meetings on their behalf. Outside parliament, concern for the welfare of Jews overseas led him to take a key role in establishing the Anglo Jewish Association in 1871 for the 'promotion of social, moral, and intellectual progress among the Jews; and the obtaining of protection for those who may suffer in consequence of being Jews'. It was joined by many prominent in the Jewish community in Britain and attracted memberships in Australia, Canada, India and Gibraltar.[58]

On the Eastern Question, although an advocate of the need for reform within, to avoid discrimination of minorities, Goldsmid favoured continued British support for the declining Ottoman Empire, which he saw as more tolerant of Jews than countries that had left it. For this reason, in 1868, he spoke in parliament against any move to detach Crete from Ottoman rule. In the next decade he steadfastly refused to follow Gladstone's crusade against Disraeli's pro – Ottoman foreign policy believing, like Disraeli, it was preferable to delay self – rule in the Balkans until the rights of Jewry there could be properly safeguarded against Russian dominated Slav nationalism. It has been speculated that Goldsmid's controversial position on the East, compounded with a general suspicion he might put Jewish concerns before Liberal Party interests, may explain why he never achieved government office.[59]

9. Francis Goldsmid and Reform Judaism in Britain

Francis Goldsmid shared his father's view that it was necessary to reform Jewish religious practices. They considered the division between Sephardi (Spanish and Portuguese / Ladino speaking) and Ashkenazi (German and Yiddish – speaking) synagogues hindered solidarity amongst Jews and, by emphasising their foreignness, was an obstacle to acceptance by the wider community. Some aspects of Orthodoxy they regarded as too nationalistic and obscure, more suited to the Middle Ages than Victorian Britain.[60] Services were thought drab, tedious and lacking sufficient decorum. The goal of the reformers was to make worship respected within Judaism and outside it. After proposals by Francis Goldsmid for change were rejected by the leaders of the Sephardi Bevis Marks synagogue, he and Isaac Goldsmid combined with a group of prominent Ashkenazim and Sephardim urging major revision of synagogue services, including greater use of English, and of Orthodox Jewish doctrine.

In 1840 Francis Goldsmid was among a group of twenty-four Ashkenazim and Sephardim who, at a meeting at the Bedford Hotel in Southampton Row, resolved to establish a new synagogue that would be "British", rather than Ashkenazi or Sephardi. The West London Synagogue of British Jews formally opened in Burton Street, Euston, in 1842, the first Reform Jewish Synagogue in the country,[61] followed by ones in Manchester and Bradford. As a founding warden he worked unstintingly on behalf of the new synagogue and community, including

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[54] Concern about preserving competition and avoiding monopoly was also manifested by Sir Francis some months earlier when he successfully opposed a plan to make attendance and qualification at Cooper's Hill, a government owned college, a necessary requirement for new British civil engineers to be employed in India. Instead he favoured an open independent examination for applicants, wherever trained, in the spirit of reformed civil service recruitment. MARKS, D., LOWY, A., GOLDSMID, L. *Memoir of Sir Francis Goldsmid, Bart,* Second Edition, London, 1882, Part I, Chapter VIII.

[55] Hansard HC Deb 01 March 1872, Vol. 209 cc1221-95.

[56] Some 12 years earlier Sir Francis successfully moved an amendment to the Attorneys and Solicitors Bill 1860 which placed on equal footing matriculation from London University with that of Oxford and Cambridge for the purposes of exemption from Solicitors preliminary and intermediate examinations.

[57] For details of these see MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart,* Second Edition, London, 1882, Part 2, Chapters II – VI.

[58] GRAETZ, H., *History of the Jews* (first published in 1895), The Jewish Publication Society of America, 1956, Vol V, 703. Graetz described British Jewry, subjects then of the world's leading power, as having been allotted a leading role in the relief and welfare of oppressed co – religionists.

[59] See ALDERMAN, G., *Goldsmid, Sir Francis Henry, second baronet*, Oxford Dictionary of National Biography, Published online, 23rd September, 2004.

[60] Depicted as a "spiritual decay into which synagogues had been plunged by past persecutions" by MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart,* Second Edition, London, 1882, Part I, Chapter V.

[61] Later in the century the synagogue moved to Upper Berkeley Street. The imposing building is generally considered as the "flagship" synagogue of the Reform Movement in Britain. For an account of Liberal and Reform Judaism in Germany and the United States, which influenced the Reform Movement in Britain, see BRENNER, M., *A Short History of the Jews*, Princeton, 2010, Chapters 13 and 14.

making available his professional services, becoming chairman of the Council of Founders and bequeathing a legacy of twenty thousand pounds.

Establishment of West London Synagogue had an importance beyond theology and communal organisation. It gave promoters of Jewish emancipation a platform independent of The London Committee of Deputies of British Jews, which, under the leadership of Sir Moses Montefiore was at best lukewarm to the cause, fearing greater civic engagement would dilute devotion to Judaism. In 1845 Isaac and Francis Goldsmid led a deputation to Sir Robert Peel. The advancement of British Jews in letters, sciences and the learned professions was put before the prime minister. Controversially claiming to speak for British Jewry, they also argued reform of their worship was a further reason why Jews were worthy of political emancipation.[62]

10. Philanthropy and civic responsibility

It was said by the Reverend Professor Marks of West London Synagogue, who officiated at his funeral service, that Francis Goldsmid was a striking example of the maxim "property has its obligations as well as its rights". A profuse contributor, privately and publicly, to many charities and causes, he principally regarded his large fortune, mainly inherited after the death of his father, as means to promote useful works and diffuse education. According to Louisa, his wife, much of his philanthropy was to enable, where possible, the less fortune to better themselves. Goldsmid's generosity, like that of his father, might perhaps be seen as an amalgam of Jewish ethics, utilitarianism and *noblese oblige*.

Impressed by ideas of the social reformer and textile manufacturer Robert Owen about the importance of early education, and by the way his school in New Lanark operated, Francis Goldsmid was instrumental in establishing in 1841 the Jews' Infant School in Houndsditch which became the largest infant school in England. For older children, he founded the rapidly academically successful West Metropolitan Jewish School some four years later.

Like his father, who had done much to create it, Francis Goldsmid took a deep interest in the non – denominational University College, London, going to nearly all council meetings and becoming President of the Senate. Amongst his benefactions, he endowed the chair of applied mathematics and mechanics in 1871, instituting a faculty of science. He also donated considerable sums to University College Hospital and served as treasurer from 1857 to 1868. In recognition of his efforts a ward was named after him in 1870.[63]

During parliamentary recesses in the final decade of his life, Francis Goldsmid resided at Rencomb Park, Gloucestershire, an imposing Italianate mansion constructed by him to replace an earlier house. He spent much time and money improving the sanitation and rebuilding cottages in the agricultural settlement nearby transforming it, to the benefit of the residents, into a model rural village. He also made a large contribution restoring the parish church in Cirencester, close by and donated liberally to charities and causes elsewhere in the county.

11. Conclusion

In a letter to Louisa Goldsmid, some months after her husband's death, Lord Justice James conveyed a unanimous resolution of a very full council of Benchers of Lincoln's Inn to accept her offer of a marble bust of her husband to be placed in the Inn in memory of Francis Goldsmid. Lord Justice James said it was very agreeable to have this as a record that Lincoln's Inn was the first Inn "that broke down the old and inveterate prejudice which had closed the career of the Bar to their Jewish fellow – countrymen… and to recall his great personal worth and professional eminence."[64]

In addition to his contribution to the history of the English Bar, he deserves recognition for: his involvement at the heart of the campaign to achieve full Jewish emancipation in Britain; for being a fully participating and conscientious Member of Parliament who used his position on behalf of his constituents, his party and liberal beliefs, law reform and to relieve suffering and oppression of Jews and non – Jews overseas; for his contribution to religious reform; and for his numerous philanthropic donations and support for enlightened and socially improving activities, perhaps most notably university and children's education and for establishing hospital care.

[62] Editorial on Jewish Emancipation. In: *Jewish Chronicle*, 21st March, 1845.

[63] In his will Francis Goldsmid bequeathed £ 50,000 between UCL and UCH.

[64] MARKS, D., LOWY, A., GOLDSMID, L., *Memoir of Sir Francis Goldsmid, Bart,* Second Edition, London, 1882, Part I, Appendix IV. The marble bust of Sir Francis Goldsmid stands in the entrance lobby to the Hall and the Library.

Year 1945: The Kingdom of the Netherlands, the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945) and the Beginning of a new Constitutionalism in Asia. A Study on History of Constitutionalism and Decolonization*

*Carlos Sardinha***

Abstract

The Japanese saw themselves as liberators of the Asiatic peoples. As a Japan's war aim, the establishment of the so-called Greater East Asia Co-Prosperity Sphere was to be understood as a decolonization and liberation of the East Asian peoples which were living under colonial rule. Against this background, in her Radio address made on December 6, 1942 Queen Wilhelmina of the Netherlands promised a conference at which a joint consultation would take place after the end of World War II about the structure of the Kingdom of the Netherlands and its parts in order to adapt it to post-war world. The plans of Queen Wilhelmina of the Netherlands comprised the creation of a commonwealth of the Netherlands, Indonesia, Surinam and Curaçao. In any case, any ideas on the constitution of the Kingdom of the Netherlands, including a dominion status for the Dutch East Indies, a federation between the Netherlands and Indonesia or the regulation of the relations of the Netherlands and Indonesia on the basis of equality of position, excluded any demand for complete independence. After the surrender of the Dutch troops to the Japanese on March 8, 1942, the liberation of the Dutch East Indies was never at the top of the list of American priorities. As the emerging leading power in the Pacific – supplanting the British – it is important, in this context, to know the attitude of the United States of America towards the political future of colonialism in general and the Dutch East Indies in particular. There was in the United States of America a widespread opinion unfavourable to colonialism. It seems that the American public opinion, besides the independence, did only accept a Dutch mandate under international law, excluding therefore the possibility of the East Indies continuing to be considered a part of the Netherlands. Against this background, it is worth to stress that both the Covenant of the League of Nations (1920) and the Charter of the United Nations (1945) foresee the independence of territories put under mandate. Unlike the Covenant of the League of Nations (1920), the Charter of the United Nations (1945) establishes that dependent territories could be voluntarily placed under mandate by states responsible for their administration. This means that colonial powers could, on a voluntary basis, place colonial territories under mandate. Consequently, the Charter of the United Nations (1945) ignores "… the staunch European opposition to trusteeship or any other formula which would challenge their sovereignty". Not long after the Charter of the United Nations (1945) was drafted, a new balance of power unfavourable to colonial powers became evident. This was the beginning of an evolution that would eventually led to an important transformation of International Law: the decolonization as a new manifestation of the principle of self-determination of peoples adequated to regulate the access of colonial peoples to independence. Beginning in 1945, the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945) can be considered the starting point of this transformation of International Law and praxis. Two days after Japans's surrender (August 15, 1945), on August 17, 1945, Indonesian nationalist and independence activist Sukarno, in the name of the Indonesian people, proclaimed the independence of the Republic of Indonesia. The decision to proclaim Indonesia's Independence taken by the nationalist leaders Sukarno and Mohammad Hatta and the following political course taken by the Indonesian Republic confirmed their desire of giving legal form to a pure Indonesian, Asiatic, non-Western Independence, that eventually did not contradict the spirit of the Japanese version of the principle "Asia for the Asians". Anticolonialism and independence are to be considered expression of humanity and justice. Therefore, in the context of the so-called "Five Obligations" (Pantja Dharma) where the alliance with Japan occupies a central place, Indonesian Antiwesternism has its roots in the inhumanity and injustice of colonialism. In other words, against the background of European imperialism and colonialism, the Proclamation of Indonesia's independence reveals the beginning of a new, Asiatic, eventually, Indonesian constitutionalism based on the principle "Asia for the Asians" with its Antiwesternism and Pan-Asiatic elements amalgamated by Indonesian nationalists during the period of Japanese occupation of the Dutch East Indies.

Keywords: *Dutch East Indies; Kingdom of the Netherlands; Republic of Indonesia; Anticolonialism; Decolonization; Mandate; Trusteeship; Independence; Revolution; Pancasila; 1945 Constitution; Antiwesternism; Integralism; Japanism.*

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* This study was conducted at libraries in the Netherlands and in Germany, namely at the NIOD (that is, at the Institute for War, Holocaust and Genocide Studies) (Amsterdam, The Netherlands), at the Amsterdam University Library (Amsterdam, The Netherlands), at the Berlin State Library – Prussian Cultural Heritage (Berlin, Germany) and at the University Library of the Free University of Berlin (Berlin, Germany).

** Prof. Carlos Sardinha, Católica Research Centre for the Future of Law, Faculty of Law, Universidade Católica Portuguesa, Lisbon, Portugal, email: csardinha@ucp.pt / ORCID 0000-0001-8957-7137.

1. The Empire of Japan's surrender (August 15, 1945) and the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945)

Not long before the attack of the forces of the Empire of Japan upon the United States of America at Pearl Harbor (December 7, 1941)[1], a feeling of an existing economic complementarity between Japanese capitalism and the agriculture-based economies of Southeast Asia caused an adviser to Prime Minister Fumimaro Konoe[2] to write about a bloc where the idea of freedom from imperialism and exploitation would play a central role[3]. The new Prime Minister General Hideki Tojo[4] gave a new impulse to The Greater East Asia Co-Prosperity Sphere, a new order based on the Japanese version of the principle "Asia for the Asians" which had been proclaimed in August 1940 in a radio address by Matsuoka Yōsuke, the Foreign Minister of the Empire of Japan in the Cabinet presided over by the above mentioned Prime Minister Fumimaro Konoe[5]. The Japanese saw themselves as liberators of the Asiatic peoples[6]. In this respect, General Tojo was an ardent defender of the ideology of a "holy war of liberation" of Asia in solidarity with Japan[7]. The Japanese would bring to the people of Indonesia "*…liberation from the oppression of the US and British puppets of the Dutch government in exile…*"[8]. For the Indonesian nationalists[9] the liberation of Indonesia from the Dutch colonialism[10] would begin with the expulsion of the Dutch by the Japanese[11]. As the Japanese arrived in Java in March 1942, they were greeted by the Indonesians as liberators from the colonial yoke[12]. The 9th of March, the remembrance day of the fall of the Netherlands Indies authority, was declared a day of celebration by the Japanese[13]. It is worth mentioning that the Nationalist leader Sukarno[14], who had been imprisioned and later exiled by the

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1 See MELBER, T., *Pearl Harbor. Japans Angriff und der Kriegseintritt der USA.* München, 2016.

2 Prince Fumimaro Konoe, Prime Minister of the Empire of Japan, presided over three Cabinets: Konoe I (June 4, 1937-January 5, 1939), Konoe II (July 22, 1940-July 18, 1941) and Konoe III (July 18, 1941-October 18, 1941).

3 See BEASLEY, W. G., *Japanese Imperialism 1894-1945,* Reprint. Oxford, 2013, p. 233-234. On imperialism in Southeast Asia, see TARLING, N., *Imperialism in Southeast Asia: 'A fleeting, passing phase'.* London and New York, 2001. For a report on the economy of the Dutch East Indies published significantly in 1942 during the Japanese Occupation of this territory, see BROEK, J. O. M., *Economic Development of the Netherlands Indies,* Reprint. New York, 1971.

4 General Tojo presided over the Cabinet of the Empire of Japan between October 18, 1941 and July 22, 1944.

5 See YELLEN, J. A., *The Greater East Asia Co-Prosperity Sphere: When Total Empire Met Total War.* Ithaca and London, 2019, p. 4. On The Greater East Asia Co-Prosperity Sphere, see further BEASLEY, W. G., *Japanese Imperialism 1894-1945,* Reprint. Oxford, 2013, p. 233-250; SATOSHI, N., *Japan's Colonial Moment in Southeast Asia 1942-1945. The Occupiers' Experience.* London, 2018, p. 108-157; HERDE, P., *Grossostasiatische Wohlstandssphäre: Die japanische Besatzungspolitik auf den Philippinen und in Indonesien im Zweiten Weltkrieg und ihre Folgen,* Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, Vol. XXXIX, Nr. 4. Stuttgart, 2002, p. 136.

6 See YELLEN, J. A., *The Greater East Asia Co-Prosperity Sphere: When Total Empire Met Total War.* Ithaca and London, 2019, p. 4; HOTTA, E., *Japan 1941: Countdown to Infamy.* New York, 2014, p. 11f.; IENAGA, S., *Japan's Last War: World War II and the Japanese, 1931-1945.* Oxford, 1979, p. 153ff.

7 Recently, SATOSHI, N., *Japan's Colonial Moment in Southeast Asia 1942-1945.The Occupiers' Experience*. London, 2018, p. 158ff., namely p. 164.

8 See SATOSHI, N., *Japan's Colonial Moment in Southeast Asia 1942-1945. The Occupiers' Experience.* London, 2018, p. 166.

9 On Indonesian Nationalism, see McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 9ff.

10 On Dutch colonialism, see SOARES, R. *Administração e Direito Colonial,* Lições refundidas e actualizadas por CARVALHO, A. – BASTOS, M. – RAMALHO, O., Universidade de Coimbra, Faculdade de Direito. Coimbra, 1962, p. 235-244.

11 See TOUWEN-BOUWSMA, E., The Indonesian Nationalists and the Japanese "Liberation" of Indonesia: Visions and Reactions. In: Journal of Southeast Asian Studies, Vol. 27, No. 1, 1996, p. 4: *"… there were signs that nationalist sympathy for Japan was also gaining ground in the same period. The Japanese propaganda "Asia for the Asians" was increasingly seen as an ideal solution to a political situation which seemed to have reached an impasse.* (…) *The Parindra (Partai Indonesia Raya/the Greater Indonesia Party), the largest nationalist party, was becoming steadily more pro-Japan minded. The popularity of Japan intensified as one aspect of the growing anti-Dutch animus, which was a projection of the frustrated desire for freedom. The idea took hold that the liberation of Indonesia would begin with the expulsion of the Dutch by the Japanese."* On the Japanese occupation of the Dutch East Indies, see KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 101ff.; DE JONG, L., *The Collapse of a Colonial Society. The Dutch in Indonesia during the Second World War,* With an introduction by KEMPERMAN, J., Verhandelingen van het Koninklijk Instituut voor Taal-, Land- en Volkenkunde, Vol. 206. Leiden, 2002; HERDE, P., *Grossostasiatische Wohlstandssphäre: Die japanische Besatzungspolitik auf den Philippinen und in Indonesien im Zweiten Weltkrieg und ihre Folgen,* Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, Vol. XXXIX, Nr. 4. Stuttgart, 2002, p. 219ff.; VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 69ff.; RICKLEFS, M. C., *A History of Modern Indonesia since c.1300,* Second Edition. London [et al.], 1993, p. 199ff.; ZWAAN, J., Nederlands-Indië onder Japanse bezetting (1942-1945). In: *Oorlog en Verzet in Nederlands-Indië 1941-1949 en de voorlichting aan de na-oorlogse generaties.* Amsterdam, 1989, p. 7ff.; AZIZ, M.A., *Japan's Colonialism and Indonesia.* 'S-Gravenhage, n.d., p. 166ff. On p. 166, we can read the following: *"The Japanese came to the Archipelago with the definite aim to eliminate all Dutch influence as quickly as possible from the life of Indonesia. The termination of all European and American influence – political, economic and cultural - was indeed one of the fundamental objects of the Asiatic Co-Prosperity plan."*

12 See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 50: *"The Japanese soldiers were surprised also at the ease of their victory and the extraordinary welcome they received from the Indonesians. The battle-hardened troops were in many places greeted as heroes.";* ANDERSON, B. R. O'G, *Java in a Time of Revolution. Occupation and Resistance, 1944-1946.* Ithaca and London, 1972, p. 35.

13 See AZIZ, M.A., *Japan's Colonialism and Indonesia.* 'S-Gravenhage, n.d., p. 175.

14 On Sukarno, see HERING, B., *Soekarno: Architect van een natie – Architect of a nation, 1901-1970.* Amsterdam – Leiden, 2001; GIEBELS, L., *Soekarno, Nederlandsch onderdaan. Biografie 1901-1950.* Amsterdam, 1999; LEGGE, J. D., *Sukarno: A Political Biography,* Third Edition. Singapore, 2003; DAHM, B., *Sukarnos Kampf um Indonesiens Unabhängigkeit. Werdegang und Ideen eines asiatischen Nationalisten,* Vol. XVIII der Schriften des Instituts für Asienkunde in Hamburg. Frankfurt am Main – Berlin, 1966.

Dutch because of his nationalist activities, was released by the Japanese[15]. Contrary to other Nationalist leaders like Sutan Sjahrir, the first Prime Minister of the Republic of Indonesia (1945-1947)[16] and one of the few Indonesian nationalists who did not participate in public life during the Japanese occupation, Sukarno decided to cooperate with the Japanese[17]. As a Japan's war aim, the establishment of the above mentioned Greater East Asia Co-Prosperity Sphere was to be understood as a decolonization and liberation of the East Asian peoples which were living under colonial rule[18]. Against this background, the cooperation between the Japanese occupiers and Indonesians was not to be considered condemnable, because Japan was not the enemy of the Indonesians. According to Indonesian nationalists, the collaboration between Japan and the Indonesians was to be interpreted as a phase in their struggle for freedom and against colonialism. Therefore, Japan played an important role in the decolonization in East Asia, including Indonesia[19].

Two days after Japans's surrender[20], on August 17, 1945, Indonesian nationalist and independence activist Sukarno, in the name of the Indonesian people, proclaimed the independence of the Republic of Indonesia together with Mohammad Hatta. In his short proclamation, the chief of the Indonesian nationalists expresses the intent of accomplishing as quickly as possible all necessary steps towards the transference of power[21]. Significantly, nationalist leaders like the above mentioned Sutan Sjahrir favoured a Proclamation of Independence "*… militantly anti-Japanese in character…*", refusing to participate in the meeting where the text of the Proclamation of the Independence of the Republic of Indonesia was drawn up[22]. To understand why this proclamation was possible one must take into consideration that since the occupation of the Dutch East Indies after the KNIL[23]'s surrender to the Japanese on March 8, 1942 the Indonesian nationalists enjoyed the support of the Japanese

[15] See KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 104; GIEBELS, L., *Soekarno, Nederlandsch onderdaan. Biografie 1901-1950.* Amsterdam, 1999, p. 121ff. and p. 278ff.; SLUIMERS, L., The Japanese Military and Indonesian Independence. In: *Journal of Southeast Asian Studies,* Vol. 27, No. 1, 1996, p. 28: *"In this situation of growing economic and political tensions in the countryside (…), Imamura and Kodama in June 1942 decided to allow Sukarno to return from Sumatra, where he had been banished by the Dutch, to Java.* (…) *In a sense the return of Sukarno, the generally acknowledged leader of the Indonesian nationalists, inaugurated certain change in Japanese policy as it was not to be expected that Sukarno, a flamboyant orator, would long keep quiet.".* Lieutenant-General Imamura Hitoshi was the first Commander-in-Chief of the 16th Army (Empire of Japan) and Count Kodama Hideo was his senior political advisor.

[16] See a list of the Prime Ministers of the Republic of Indonesia in KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 536. Further, MRÁZEK, R., *Sjahrir: Politics and Exile in Indonesia,* Studies on Southeast Asia No. 14, Southeast Asia Program. Ithaca, New York, 1994, p. 283ff.

[17] See HERDE, P., *Grossostasiatische Wohlstandssphäre: Die japanische Besatzungspolitik auf den Philippinen und in Indonesien im Zweiten Weltkrieg und ihre Folgen,* Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, Vol. XXXIX, Nr. 4. Stuttgart, 2002, p. 227: *"Dennoch haben sich die führenden Politiker, vor allem Sukarno und Mohammad Hatta* (…) *zur Kollaboration mit den Japanern entschlossen, da sie darin die einzige Möglichkeit sahen, die Sache der Unabhängigkeit ihres Landes weiter zu fördern.";* VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 72.

[18] See ZWAAN, J., Nederlands-Indië onder Japanse bezetting (1942-1945). In: *Oorlog en Verzet in Nederlands-Indië 1941-1949 en de voorlichting aan de na-oorlogse generaties.* Amsterdam, 1989, p. 9f.

[19] See ZWAAN, J., Nederlands-Indië onder Japanse bezetting (1942-1945). In: *Oorlog en Verzet in Nederlands-Indië 1941-1949 en de voorlichting aan de na-oorlogse generaties.* Amsterdam, 1989, p. 7. According to this Author, the foundation of the Republic of Indonesia was planned by the Japanese *"…long before the Japanese Armies conquered the Netherlands Indies."* See ZWAAN, J., Nederlands-Indië onder Japanse bezetting (1942-1945). In: *Oorlog en Verzet in Nederlands-Indië 1941-1949 en de voorlichting aan de na-oorlogse generaties.* Amsterdam, 1989, p. 8.

[20] August 15, 1945.

[21] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 80ff.; VAN DEN DOEL, W., Indonesian Independence, Struggle for. In: BENJAMIN, Th. (ed.), *Encyclopedia of Western Colonialism since 1450,* Vol. 2. Detroit, MI, 2007, p. 631f.; VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 84ff.; KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 134ff., namely p. 136; ANDERSON, B. R. O'G, *Java in a Time of Revolution. Occupation and Resistance, 1944-1946.* Ithaca and London, 1972, p. 66ff., namely p. 82; ANDERSON, B. R. O'G, *Some Aspects of Indonesian Politics under the Japanese Occupation: 1944-1945,* Interim Reports Series, Modern Indonesia Project, Southeast Asia Program, Department of Far Eastern Studies. Ithaca, New York, 1961, p. 65ff. A facsimile of this proclamation accompanied with a Dutch translation can be found in SMIT, C., *De liquidatie van een imperium: Nederland en Indonesië 1945-1962.* Amsterdam, 1962. For the full text of Sukarno's statement, see KAHIN, G. McT., Sukarno's Proclamation of Indonesian Independence. In: *Indonesia,* No. 69, Apr., 2000, p. 1-3, namely p. 2-3. The Charter of the United Nations had been signed in the United States of America, in San Francisco, on June 26, 1945.

[22] See KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 136 with footnote 2; HERDE, P., *Grossostasiatische Wohlstandssphäre: Die japanische Besatzungspolitik auf den Philippinen und in Indonesien im Zweiten Weltkrieg und ihre Folgen,* Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, Vol. XXXIX, Nr. 4. Stuttgart, 2002, p. 244ff.; ANDERSON, B. R. O'G, *Java in a Time of Revolution. Occupation and Resistance, 1944-1946.* Ithaca and London, 1972, p. 40; ANDERSON, B. R. O'G, *Some Aspects of Indonesian Politics under the Japanese Occupation: 1944-1945,* Interim Reports Series, Modern Indonesia Project, Southeast Asia Program, Department of Far Eastern Studies. Ithaca, New York, 1961, p. 65: *"Hatta himself reports that at 5:00 p. m. on the 14th he was visited by Sjahrir who told him that he was absolutely opposed to any independence that came as the gift of the Japanese."* On Sukarno's pro-Japan activities during the Japanese occupation of the Dutch East Indies, see KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 104: *"For several years it was repeatedly claimed by Dutch spokesmen that Soekarno was an unprincipled, pro-Japanese collaborator."*

[23] *Koninklijk Nederlands-Indisch Leger,* that is, Royal Netherlands Indies Army.

authorities[24] as part of Japan's policy of turning the indigenous population against the Dutch colonialism and preparing them for taking part at the above mentioned Greater East Asia Co-Prosperity Sphere, as said before, a new order based on the Japanese version of the principle "Asia for the Asians"[25]. On September 15, 1943, the Japanese established the Central Advisory Council in Java chaired by Sukarno, a body with less powers than the People's Council established by the Dutch (*Volksraad*), in order to provide Indonesians with popular representation[26]. At the 4th Session of the Central Advisory Council in Java on November 15, 1944, Sukarno gave a speech listing five guidelines for the Indonesian Nation, the so-called "Five Obligations" (*Pantja Dharma*), where the alliance with Japan occupies a central place: 1- "*We stay - together with the other peoples of Greater East Asia – in this war for live and death in a front with Dai Nippon*[27] *and we are ready to sacrifice, because this war defends justice and truth.*"; 2- "*We will establish an Indonesian State, which is independent, united, sovereign, just and flourishing, which will respect the merits of Dai Nippon and which will live as a genuine member in the bosom of the Greater East Asiatic family of peoples.*"; 3- "*We will endeavor, with sincere enthusiasm, to achieve glory and greatness by defending and respecting our own civilization and culture, by promoting the Asiatic culture and by penetrating the world culture*"; 4- "*We serve – in strong brotherhood with the peoples of Greater East Asia – with unshakable loyalty the own State and People under permanent responsibility before the Mighty God*". 5- "*We fight with fervent desire for perpetual peace in the world, which is based on the parentage of the whole human race and therefore corresponds to the ideal of the* Hakko Ichiu."[28]. Sukarno saw Western imperialism as his main opponent[29]. Therefore, Sukarno's vision of the Indonesian Nation was not to be separated from the Japanese ideal of *Hakkō ichiu*[30], that is, from Japanism as a distinct type of internationalism aiming at overcoming Westernism and corresponding to the principle on which Japan's foreign policy was based[31].

Japan's policy towards Indonesia began to change in September 1944 when the successor of General Tojo as Prime Minister of the Empire of Japan, General Koiso, declared in Tokio (September 7, 1944), after praising the success of Japan's policy of associating the indigenous population to the administration of the East Indies and stressing their collaborative spirit towards the Japanese local military authorities, that the independence of these territories should be approved in the future[32]. The guidelines issued on this occasion by the staff of the 7th Area Army at Singapore[33] to execute the Koiso's Declaration (Sep-

[24] See ELSBREE, W. H., *Japan's Role in Southeast Asian Nationalist Movements 1940 to 1945*, Issued under the auspices of the International Secretariat, Institute of Pacific Relations. Cambridge, Massachusetts, 1953, p. 76ff. On the Japanese role in the nationalist movement in Indonesia, see HORNBECK, S. K., The United States and the Netherlands East Indies. In: *The Annals of the American Academy of Political and Social Science, Foreign Policies and Relations of the United States,* Vol. 255, 1948, p. 127; SLUIMERS, L., The Japanese Military and Indonesian Independence. In: *Journal of Southeast Asian Studies,* Vol. 27, No. 1, 1996, p. 19-36 namely p. 19: *«"Sukarno and Hatta are puppets who just like other puppets will be punished!" So it was suggested that the Republic of Indonesia, proclaimed on 17 August 1945 by the these two prominent politicians was "made in Japan", and meant only to harass the Allied authorities who were attempting to restore the pre-war situation.».* As you can see, the two prominent politicians are the above mentioned Sukarno and Hatta. Nonetheless, Sluimers defends the opinion according to which there was no community of interests between the Japanese military administration and the Indonesian nationalists with respect to Indonesian independence. See SLUIMERS, L., The Japanese Military and Indonesian Independence. In: *Journal of Southeast Asian Studies,* Vol. 27, No. 1, 1996, p. 35-36. On p. 36, we can read: *"The Indonesians on the other hand only wanted to make use of the Japanese to get rid of Western dominance and so to settle their own affairs."* On the Japanese Military Government in Indonesia during the Occupation Period, namely, on its organization, see AZIZ, M.A., *Japan's Colonialism and Indonesia.* 'S-Gravenhage, n.d., p. 152ff.

[25] See SATO, S., Indonesia 1939-1942: Prelude to the Japanese Occupation. In: *Journal of Southeast Asian Studies,* Vol. 37, No. 2, 2006, p. 225-248, namely p. 225: *"On 17 August 1945, two days after Japan surrendered, Indonesia declared independence and a national revolution ensued. Since then it has become a historiographical convention to view the Japanese occupation as a prelude to Indonesian independence."*

[26] See KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 106.

[27] That is, *„Greater Japan".*

[28] See DAHM, B., *Sukarnos Kampf um Indonesiens Unabhängigkeit. Werdegang und Ideen eines asiatischen Nationalisten,* Vol. XVIII der Schriften des Instituts für Asienkunde in Hamburg. Frankfurt am Main – Berlin, 1966, p. 214.

[29] See DAHM, B., *Sukarnos Kampf um Indonesiens Unabhängigkeit. Werdegang und Ideen eines asiatischen Nationalisten,* Vol. XVIII der Schriften des Instituts für Asienkunde in Hamburg. Frankfurt am Main – Berlin, 1966, p. 213. Making reference to Sukarno, we can read the following: *"Denn sein Hauptgegner war der westliche Imperialismus geblieben, und er wurde nicht müde, die Gerüchte, die aus der Propaganda der Alliierten, aus Flugschriften und Radiosendungen herrührten, zu bekämpfen."*

[30] In English, *"Brotherhood of the Peoples".* See DAHM, B., *Sukarnos Kampf um Indonesiens Unabhängigkeit. Werdegang und Ideen eines asiatischen Nationalisten,* Vol. XVIII der Schriften des Instituts für Asienkunde in Hamburg. Frankfurt am Main – Berlin, 1966, p. 188 und p. 257f.: *„Hakko-Ichiu (Bruderschaft der Völker)".*

[31] On *Hakkō ichiu,* see YELLEN, J. A., *The Greater East Asia Co-Prosperity Sphere: When Total Empire Met Total War.* Ithaca and London, 2019, p. 94ff.

[32] See KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 115; HERDE, P., *Grossostasiatische Wohlstandssphäre: Die japanische Besatzungspolitik auf den Philippinen und in Indonesien im Zweiten Weltkrieg und ihre Folgen,* Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, Vol. XXXIX, Nr. 4. Stuttgart, 2002, p. 241f. For the text of the Koiso's Declaration (September 7, 1944) in English translation, see BENDA, H. J. – IRIKURA, J. K. – KISHI, K. (ed.), *Japanese Military Administration in Indonesia: Selected Documents.* Translation Series, No. 6, Southeast Asia Studies Yale University. N.p., 1965, p. 259: *«Statement by Premier Koiso before the 85th Imperial Diet, September 9, 1944, on the "Independence of the East Indies": "Last year, in conformity with the desires of the natives, the Empire undertook measures relative to their political participation. In the interim, the natives of the various areas thoroughly comprehended the Empire's true intentions and consistently continued their tremendous efforts toward the successful climax of the Greater East Asia war; moreover, their cooperation with local military governments has been truly something to behold. In response to these circumstances and in order to ensure the permanent welfare of the East Indies, the Empire here states that their independence will be sanctioned in the future.»*

[33] On the 7th Area Army, see AZIZ, M.A., *Japan's Colonialism and Indonesia.* 'S-Gravenhage, n.d., p. 160: *"The 16th and 25th Armies, the occupiers of Java and Sumatra respectively, were under the 7th Area Army with headquarters at Singapore. The latter constituted a part of the Chief Command of the Southern Expeditionary forces under Field Marshal Terauchi with headquarters first at Singapore and later near Saigon."*

tember 7, 1944) in Java show, however, how this new policy should be understood: on one side, it was not allowed to discuss neither the independence's moment, nor the territories to become independent, nor the future East Indies' constitution; on the other side, the nationalist spirit should be stimulated to the highest degree possible in order to fully integrate Java in Japan's war effort. General Harada's interpretation of this guidelines was made clear to Sukarno in a meeting of the "people's representatives" that took place in Djakarta a day after the Koiso's Declaration (September 8, 1944): according to the general - he was the commandant of the 16th Army stationed in Java - if Japan should lose the war, the East Indies would not be independent. Therefore, the Indonesian people should double his war efforts for the benefit of Japan. Sukarno shows his zeal for Japan's cause praising in two radio speeches the "Great Asiatic War", urging the Indonesian people to crush and to destroy the Allies in order to achieve independence. In an emotional tone, he accuses America, England and The Netherlands of trying to return to Indonesia; to avoid this, the Indonesians should fight them to dead side-by-side with the Japanese[34]. After the landing of the American forces on the island of Leyte in the Philippines on October 10, 1944, Sukarno makes an impressive appeal for fighting side-by-side with the Japanese. According to Sukarno, Indonesia's independence could be achieved only in cooperation with the Empire of Japan (*Dai Nippon*, that is, "*Greater Japan*")[35]. On December 7, 1944, three years after the attack on Pearl Harbor, Prime Minister Koiso affirms that in the forseeable future Indonesia would be granted independence[36]. On March 1, 1945 the 16th Army stationed in Java announced the establishment of the "Investigating Committee for Preparatory Work for Independence"[37]. As the war turned against Japan, the Japanese government installed in Java on May 28, 1945 a commission with the task of preparing Indonesia's independence[38]. As a result of this political efforts, on July 21, 1945 the Japanese Cabinet confirms the decision of the Supreme Council for the Direction of the War of granting independence to Indonesia in a short time[39]. The atomic bombing of Nagasaki (August 9, 1945) prevented the proclamation of an Indonesian Republic before Japan's surrender. It is not entirely clear what happened on August 17, 1945, the day of the proclamation of the independence of the Republic of Indonesia, and the days before[40]. We know that Sukarno feared the reaction of the Japanese garrison in Batavia (Djakarta) in case of a nationalist revolt and, because of that, refused the demand of young revolutionary leaders that wanted him and Hatta to proclaim the Republic without foreign interference. After being kidnapped and put under pressure by these, Sukarno und Hatta were freed by the Japanese and put under their protection in Batavia. It seems that the senior nationalist leaders, having worked closely with the Japanese authorities during the occupation[41], were conscious of the risk of being accused of collaboration[42]; on the other hand, with the unexpected Japan's surrender, they knew that it would be only a matter of time until the Allies could re-establish the pre-war *status quo* in the East Indies. To avoid alienating the young radical anti-Japanese nationalist leaders, but without taking the risk of a conflict with the Japanese troops, Sukarno and Hatta decided themselves for proclaiming Indonesia's independence immediately, with the tacit consent of the Japanese military authorities[43]. After Japan's surrender, the Japanese troops were ordered to continue to maintain law and order in the occupied territories until the arrival of the Allied forces[44]. Therefore, the Japanese commanders preferred

[34] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11b - *Nederlands-Indië II,* tweede helft. Leiden, 1985, p. 979ff.; ELSON, R. E., *The Idea of Indonesia:* A History. Cambridge – New York, 2008, p. 103ff. Further, ANDERSON, B. R. O'G, *Some Aspects of Indonesian Politics under the Japanese Occupation: 1944-1945,* Interim Reports Series, Modern Indonesia Project, Southeast Asia Program, Department of Far Eastern Studies. Ithaca, New York, 1961, p. 9ff. On Sukarno's pro-Japan activities during the Japanese occupation of the Dutch East Indies, see the above cited work by KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 104.

[35] See DAHM, B., *Sukarnos Kampf um Indonesiens Unabhängigkeit. Werdegang und Ideen eines asiatischen Nationalisten,* Vol. XVIII der Schriften des Instituts für Asienkunde in Hamburg. Frankfurt am Main – Berlin, 1966, p. 213: *„Sind sich alle Kameraden darüber klar, zutiefst bewußt, so, daß es ihnen in Fleisch und Blut und Mark und Bein eingedrungen ist, daß Indonesiens Unabhängigkeit nur auf dem Wege der Zusammenarbeit mit Dai Nippon verwirklicht werden kann?"*

[36] See SLUIMERS, L., The Japanese Military and Indonesian Independence. In: *Journal of Southeast Asian Studies,* Vol. 27, No. 1, 1996, p. 33.

[37] See Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI, Investigatory Body for Preparatory Work for Indonesian Independence), In: KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 55.

[38] See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 59ff.

[39] See BRUGMANS, I. J. (Dir.), *Nederlandsch-Indië onder Japanse bezetting: Gegevens en documenten over de jaren 1942-1945.* Franeker, 1960, p. 85; see also SMIT, C., *De indonesische quaestie: De wordingsgeschiedenis der souvereiniteitsoverdracht.* Leiden, 1952, p. 43.

[40] See SMIT, C., *De indonesische quaestie: De wordingsgeschiedenis der souvereiniteitsoverdracht.* Leiden, 1952, p. 44ff.; JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11b - *Nederlands-Indië II,* tweede helft. Leiden, 1985, p. 1032ff.

[41] See ZWAAN, J., Nederlands-Indië onder Japanse bezetting (1942-1945). In: *Oorlog en Verzet in Nederlands-Indië 1941-1949 en de voorlichting aan de na-oorlogse generaties.* Amsterdam, 1989, p. 7ff.

[42] On Sukarno's pro-Japan activities during the Japanese occupation of the Dutch East Indies, see the above cited work by KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 104.

[43] See SIJATAUW, J. G., *De Japanse bezetting van Nederlands-Indië 1942-1945. Een gezamenlijke ervaring van duizenden.* Voorburg, 2013, p. 173ff.

[44] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 80; VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 84; DENNIS, P., *Troubled days of peace: Mountbatten and South East Asia Command, 1945-46.* Manchester, 1987, p. 82: *"Originally it had been proposed that a leaflet should be dropped over the key areas of Java to advise the local populace of the impending arrival of the allied forces, and warning them not to obey either the defeated Japanese or the self-proclaimed republic. Since the allies were not due to land for several weeks, this was clearly a recipe for complete confusion, and after some discussion it was decided to direct the commander of the Southern Army, Field Marshal Count Terauchi, to continue to maintain law and order until the allies were capable of assuming control."*

a solution that allowed them to deny responsibility for the proclamation of Indonesia's independence [45]. Nevertheless, it was in the house of the Rear Admiral Tadashi Maeda in Batavia that the proclamation of Indonesia's independence was signed in the early morning of August 17, 1945. In the evening of that day, Maeda offered the members of the independence commission a banquet to celebrate the occasion. There he stated that: "*independence is a national right of each people*" [46]. In face of the emerging post-war world, it seems that some of the Japanese officers believed that it would be in Japan's interest to associate themselves to the birth of the new Republic.

We can therefore conclude that:

- Indonesia's independence was proclaimed by senior nationalist leaders, namely Sukarno and Hatta;
- The nationalists responsible for the proclamation of Indonesia's independence belonged to a political local elite that collaborated with the Japanese authorities during the occupation of the Dutch East Indies;
- Towards the end of the war, the Japanese planned to give independence to the occupied territories in Southeast Asia, in order to make them take part as independent nations in the Japanese Greater East Asia Co-Prosperity Sphere;
- With the goal of preparing Indonesia's independence, the Japanese authorities installed a commission formed by Sukarno, Hatta and other nationalist leaders chosen by the Japanese;
- As a reaction to the Japanese atrocities, an anti-Japanese mood spread among the nationalist young movement. After Japan's surrender (August 15, 1945), these young revolutionaries decided to put Sukarno and Hatta under pressure, challenging them to proclaim Indonesia's independence without Japanese interference;
- After Japan's surrender, the Japanese, being ordered to continue to maintain law and order in the occupied territories, were reluctant to openly support the independence plans of the nationalists. It can be said, however, that among the Japanese officers the mood was favourable to Indonesia's independence. In face of the emerging post-war world, it seems that some of them believed that it would be in Japan's interest to associate themselves to the birth of the new Republic. Rear Admiral Tadashi Maeda, in whose house the proclamation of independence was signed, affirmed on this occasion that: "*independence is a national right of each people*";
- The members of the nationalist young movement did not sign the declaration of independence. Only Sukarno and Hatta signed the document;
- Indonesia's independence was proclaimed in the name of the Indonesian people, without any reference either to Japan or to the Allies, namely The Netherlands.

2. The controversial restoration of Dutch Rule in the East Indies after World War II

Before making reference to the efforts made by the Dutch to restore their sovereignty over the East Indies, it is important to examine some political statements made by Queen Wilhelmina of the Netherlands during World War II concerning the future of the Dutch overseas territories. For example, on May 24, 1940 Queen Wilhelmina of the Netherlands made a Radio address from London via BBC where she states clearly that: "*Our constitution made the Overseas territories into an indestructible unity…*" [47]. In other Radio addresses she expresses the existing unity between her and the overseas territories, which are described as overseas parts of the Kingdom of the Netherlands [48] or insists on the idea of unity between the Motherland and the overseas territories and on the indivisible character of the Kingdom of the Netherlands [49]. About a month after the fall of the Dutch East Indies (March 8, 1942), Queen Wilhelmina of the Netherlands speaks about the creation of a "*Buitengewone Raad van Advies*" (in English, "*Extraordinary Council of Advice*") with the task of providing the Dutch Cabinet in Exil with advice and information and composed by Dutch from the occupied territories of the Dutch East Indies, from Suriname and Curaçao living outside the Netherlands, giving expression to the unity of the Kingdom of the Netherlands [50]. As a matter of fact, with the 1922 Dutch Constitutional Reform the Dutch East Indies had become part of the territory (*grondgebied*) of the Kingdom of the Netherlands [51]. On December 6, 1942, about a year after the Japanese attack on Pearl Harbor (December 7, 1941), Queen Wilhelmina of the Netherlands made a Radio address proclaiming that "*…after the war it will be possible to reconstruct the Kingdom*

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[45] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11b - *Nederlands-Indië II,* tweede helft. Leiden, 1985, p. 1037f., citing ANDERSON, B. R. O'G., *Java in a Time of Revolution. Occupation and Resistance, 1944-1946.* Ithaca and London, 1972, p. 80; SMIT, C., *De indonesische quaestie: De wordingsgeschiedenis der souvereiniteitsoverdracht.* Leiden, 1952, p. 45.

[46] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11b - *Nederlands-Indië II,* tweede helft. Leiden, 1985, p. 1040.

[47] See *De Koningin sprak. Proclamaties en radio-toespraken van H. M. Koningin Wilhelmina 1940-1945,* ingeleid door Dra. SCHENK, M. G. en SPAAN, J. B. Th., Driebergen - Franeker, 1945, p. 18: *"Onze grondwet maakte de gebieden van overzee tot een onverbrekelijke eenheid en het is mij tot meer voldoening dan ik onder woorden kan brengen, te ervaren, dat dit voorschrift geen lege letter is".*

[48] See Bijlage I – Teksten toespraken, 28 juli 1940. In: SCHAAP, J., *Het recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina.* Amsterdam, 2007, p. 226, lines 50-53: *"De deelen van het Rijk overzee, die zoo treffend in hun denken en voelen blijk gaven van hun medeleven in de ramp, die het Moederland trof, zijn meer dan ooit nauw met ons verbonden in hun denken en voelen."*

[49] See Bijlage I – Teksten toespraken, 28 november 1941. In: SCHAAP, J., *Het Recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina. Amsterdam,* 2007, p. 243, line 96: *"… saamhoorigheid van het moederland met de gebieden overzee…"* and p. 244, lines 164-166: *"Met innig vertrouwen zie ik het oogenblik tegemoet waarop Nederland zal zijn vrij geworden een alle deelen van ons dapper Rijk hereenigd zullen zijn ton één ondeelbaar geheel…".*

[50] See Bijlage I – Teksten toespraken, 3 april 1942. In: SCHAAP, J., *Het Recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina.* Amsterdam, 2007, p. 246, lines 18-24.

[51] On the 1922 Dutch Constitutional Reform and posterior evolution, see *infra* "Chapter IV – The Proclamation of the Independence of the Republic of Indonesia (August 17, 1945) and the Beginning of a new Constitutionalism in Asia."

on the solid foundation of complete partnership, which will mean the consummation of all that has been developed in the past." [52] It is obvious that according to Queen Wilhelmina of the Netherlands, from a constitutional point of view, the Dutch East Indies were not to be separated from the Motherland.

The Allied strategy in the Pacific war theatre was conducted by the American Joint Chiefs of Staff alone, with the political approval of the President of the United States of America. The Dutch Government was represented in the two Pacific War Councils (in London and Washington, D.C.), but both were mere consultative bodies of the Joint Chiefs of Staff without real influence on its decisions [53]. The liberation of the Dutch East Indies was never at the top of the list of American priorities [54]. As the emerging leading power in the Pacific – supplanting the British – it is important, in this context, to know the attitude of the United States of America towards the political future of colonialism in general and the Dutch East Indies in particular. There was in the United States of America a widespread opinion unfavourable to colonialism [55]. America's aversion to colonialism has its origins in the country's colonial background and traditional support for independence movements in the colonies [56]. For example, in a letter to Hubertus van Mook [57], a native of Java, Lieutenant Governor-General of the Dutch East Indies since January 1942 and Minister of Colonial Affairs in the Second Gerbrandy Cabinet since May 1942, P. H. W. Sitsen, former East Indies government official, after relating some examples of anti-Dutch feelings in the American society, stresses that for the Americans only one thing was important: to spread democracy. Sitsen points out that Americans tended to consider imperialism just as bad as Nazism: for him this was very strange, considering the widespread American imperialism in the press in the United States of America [58]. Interesting is also an episode related by Van Kleffens, Dutch Minister for Foreign Affairs in the above mentioned Second Gerbrandy Cabinet. In February 1942, at a time when the KNIL [59] was still resisting the Japanese, Van Kleffens, while taking lunch with the chief editors of the New York Times, noticed a sentiment favourable to an immediate and complete independence of the Asian peoples after the war. The minister's reaction was illuminating and shows well the difference between the American and Dutch mentality in respect of colonialism: for Van Kleffens, the natives' lack of administrative abilities and the necessity to protect them against their own inveterate [sic] failings like passion for gambling and nepotism made it indispensable to maintain them temporarily, at least in the Netherlands Indies, under a "*governing hand*" [60]. Against this background American anticolonialism reached a peak under President Franklin D. Roosevelt [61]. In a press conference held in March 1941, a year before the KNIL [62]'s surrender to the Japanese, President Roosevelt affirmed "*…that any nationality, no matter how small, has the inherent right to its own nationhood*" [63]. In the same year, he stressed to the Dutch envoy that The Netherlands should quickly and systematically take steps towards the independence of the East Indies, being the first step making of Java "*a sort of*

[52] See *The Queen Looks at the Future. Important Statements of H.M. Queen Wilhelmina on War and Peace Aims* [online]. The Netherlands Information Bureau. New York City z.j. [1943], p. 11-13, namely p. 12. Available at: Towards a Netherlands Commonwealth Text of H.M. Queen Wilhelmina's radio address of December 6th, 1942, outlining plans for the creation of a Commonwealth of the Netherlands, Indonesia, Surinam and Curaçao., The Queen Looks at the Future, Wilhelmina, prinses der Nederlanden - DBNL [Accessed 12 February 2025].

[53] In a memorandum from March 09, 1942 (cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 382) the Joint Chiefs of Staff express the opinion that the Pacific War Council in Washington, D.C. is *"… of a nature to let off steam but not such as would in any way affect the United States in its military decisions".*

[54] At the time of Japan's surrender, the Dutch East Indies were - as said above - almost entirely occupied by the Japanese.

[55] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 97. Further, SBREGA, J. J., The Anticolonial Policies of Franklin D. Roosevelt. In: *Political Science Quarterly,* Vol. 101, Nr. 1, 1986, p. 65-84; HOMAN, G. D., The United States and the Netherlands East Indies: The Evolution of American Anticolonialism. In: *Pacific Historical Review,* Vol. 53, Nr. 4, 1984, p. 423-446; McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 43ff.; McMAHON, R. J., Anglo-American Diplomacy and the Reoccupation of the Netherlands East Indies. In: *Diplomatic History,* Vol. 2, Nr. 1, 1978, p. 1-23, namely p. 5; WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, Nr. 3, 1976, p. 267ff., namely p. 273; HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 497ff., namely p. 499: *"People in general distrusted colonialism and imperialism and considered freedom and self-determination as the basic human right of the people."*

[56] See WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, Nr. 3, 1976, p. 273.

[57] Hubertus van Mook was one of the East Indies government officials that flew to Australia on behalf of the Governor-General of the Dutch East Indies Alidius Tjarda van Starkenborgh Stachouwer in the night from 6 to 7 March, 1942, just before the surrender of the Dutch troops to the Japanese on March 8, 1942.

[58] Letter from August 21, 1942, cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 99.

[59] As mentioned above, KNIL means *"Koninklijk Nederlands-Indisch Leger",* that is, *"Royal Netherlands Indies Army".*

[60] See *Van Kleffens: 'Reisverslag Ver. Staten (jan.-maart 1942)',* p. 33 (13 febr. 1942), cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 98, footnote 2.

[61] See McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 43ff., namely, p. 43-44.

[62] As mentioned above, KNIL means *"Koninklijk Nederlands-Indisch Leger",* that is, *"Royal Netherlands Indies Army".*

[63] See McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 54, cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 101, footnote 1; HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 499-500.

Dominion"[64]. However, in April 1942, shortly after the KNIL[65]'s surrender to the Japanese, he wrote to Queen Wilhelmina of the Netherlands that "*The Netherlands Indies must be restored – and something within me tells me that they will be.*"[66], a statement that, considering the circumstances, cannot be interpreted as an unconditional support to the restoration of the Dutch colonial rule in the East Indies, but merely as a word of encouragement and hope sent to Queen Wilhelmina of the Netherlands in a particularly difficult moment of Netherlands' history. Post-war economic objectives of the United States of America in Asia contributed to the American anticolonial attitude towards the Dutch[67]. In an interview held in March 1942, Herbert Feis, the Commercial Adviser to the Department of State, told Van Kleffens[68] that the United States of America would not allow the United Kingdom and The Netherlands "(…) *to dictate the prices at which it could buy its tin and its rubber*"[69]. Accordingly, in a speech given in May 1942, Under Secretary of State Sumner Welles affirmed clearly: "*The age of imperialism is ended. The right of people to their freedom must be recognized, as the civilized world long since recognized the rights of an individual to his personal freedom. The principles of the Atlantic Charter must be guaranteed to the world – in all oceans and continents*"[70]. Some months later, in November 1942, Secretary of State Cordell Hull formulates this idea even more precisely in a statement to John Winant (Ambassador of the United States of America to the United Kingdom): "*The President and I and the entire Government, earnestly favor freedom for all dependent peoples at the earliest date practicable. Our course in dealing with the Philippines situation in this respect, as in all other important respects, offers, I think, a perfect example of how a nation should treat a colony or a dependency in cooperating with it in all essential respects calculated to assist it in making all necessary preparation for freedom*"[71]. In a letter from August 6, 1942, Sir Ronald Campbell reported to the Foreign Office that Roosevelt did not think of the Dutch – whom he calls "*poor dears*" – getting the East Indies back: this territory should instead be placed under the supervision of an international body in which the Dutch would also be represented[72]. It seems that the American public opinion, besides the independence, did only accept a Dutch mandate under International Law, excluding therefore the possibility of the East Indies continuing to be considered a part of the Netherlands[73]. For Wendell Willkie, the Republican nominee in the 1940 United States Presidential Election, "*In Africa, in the Middle East, and throughout the Arab world, as well as in China and in the Far East, freedom means orderly but scheduled abolition of the colonial system.*"[74]. At this time, the Roosevelt Administration was working on an alternative system to the colonial empires[75]. In a conference organized by the Institute of Pacific Relations and held in San Francisco in January 1944, F. H. Visman, a former member of the Netherlands Indies Council (*Raad van Nederlands-Indië*), affirmed in his lecture that "*the indonesians on the whole*" hoped for the return of the Dutch administration, stressing that Queen Wilhelmina's radio address of December 6, 1942 constituted the political foundation for this return. On the other hand, he expressed his opposition to any form of international administration of the East Indies after the war[76]. In a conference held in January 1945,

[64] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III. Leiden,* 1986, p. 101.

[65] As mentioned above, KNIL means *"Koninklijk Nederlands-Indisch Leger",* that is, *"Royal Netherlands Indies Army".*

[66] See ROOSEVELT, E. (ed.), F. D. R. *His Personal Letters,* 1928 – 1945, Vol. II. New York, 1950, p. 1305, cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 101, footnote 4.

[67] See HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 497: *«It was contended by some that after the war Asia would be a prosperous customer in the world market and the American interest was definitely on the side of eliminating the imperialism of the 19th century and the declaration of the State Department in this regard represented not "idealism" but need for "commercial survival"».* Further, HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 517: *"Roosevelt was also anxious to end the colonial rule of the Dutch East Indies. The United States Government after the occupation of the colony by Japan was very anxious and on April 17, 1940, Secretary of State, Hull, said that the Netherland East Indies was an important factor in the commerce of the whole world, and they produced considerable portion of world supplies of important commodities and many countries including the United States depended upon them for such commodities."*

[68] See *supra*.

[69] See WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, Nr. 3, 1976, p. 273-274, namely, p. 274 with footnote 1.

[70] See McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 55, footnote 31, cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 102, footnote 2.

[71] See McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 55, footnote 33.

[72] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 102.

[73] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 98. Further, HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 518. Referring to the Dutch East Indies, we can read the following: *"Roosevelt included the colony in his scheme of trusteeship. He told Molotov in May 1942, that the colony would someday be ready for self-government and the Dutch knew it and that they could not hold the area too long."*

[74] See *The Times,* 27 Oct. 1942, cited by WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, No. 3, 1976, p. 269, with footnote 5. Further, HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 501: *"Wilkie after his tour of Asia in the fall of 1942, demanded that the US should take strong stand against imperialism and extend the Atlantic Charter to Asia."*

[75] See WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, No. 3, 1976, p. 270.

[76] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 389. In the conference which took place on December 4, 1942 in Mont-Tremblant (Canada), most lectures rejected the continuation of colonialism; the end declaration, however, did not speak of immediate independence but only of *"equal partnership".*

the Dutch, French and British delegations were exposed to attacks against colonialism on the part of the United States, Canada, Australia and New Zealand[77]. We can say that the victory of the Allied Powers in World War II caused the rise of a new superpower in Asia, the United States of America, a superpower which was favourable to those who were fighting against colonialism in this part of the globe[78]. In fact, for President Roosevelt, colonialism constituted the leading obstruction to international comity, peace and justice[79]. About three months before the opening session of the United Nations Conference, the so-called San Francisco Conference (April 25, 1945)[80], Special Assistant to the Secretary of State of the United States of America Leo Pasvolsky records as follows his conversation with Soviet Ambassador Gromyko: "*He*[81] *repeated the statement made by Sobolev*[82] *that, while the Soviet Government has neither colonies nor experience in colonial administration, it is greatly interested in the subject. He asked me if I would care to outline for him the principal problems in this field as we see them. I summarized for him the various alternative approaches to such problems as the distinction between trust and colonial areas; the possible declaration of general principles applicable to both; the machinery of international trusteeship for detached areas; the possibilities and structure of regional commissions for colonial areas; the question of international accountability; and the relation between the international organization and the possible regional commissions. I said that our basic thought runs generally in terms of the ideas expressed in Secretary Hull*[83]*'s memorandum, and that we consider our treatment of the Philippines as a desirable type of attitude toward dependent areas. In reply to his question as to whether all of these problems would have to be discussed at the United Nations Conference, I said that only questions relating to international trusteeship properly belong on the agenda of the conference. Colonial problems as such might be touched upon, but probably ought to be taken up in earnest at some special conference or by some other means. He inquired whether such a discussion of colonial problems would involve only the colonial powers or also the other important powers. Might it not even be appropriate, he asked, that such a discussion be arranged by the future international organization, since the problems raised might well come within the scope of the General Assembly and the Economic and Social Council? I said that any one of these procedures was possible*" [84]. In a memorandum on the forthcoming conversations with Oliver Stanley, British Secretary of State for the Colonies[85], Pasvolsky summarizes as follows the British and American views on "*Independence or self-government as the ultimate goal for dependent peoples*": "*British View. – In British opinion the goal should be self-government within the framework of empire. – Our Proposed View. – Our thinking to date favors independence as the goal of those dependencies capable of enjoying it. We think, however, that permitting such territories the option of freely choosing whether to be independent or to remain within an empire, might be acceptable*" [86]. Appended to this memorandum there is a memorandum on "*The Background of Recent Department Work Regarding Dependent Areas*", where we can read, with reference to a "*Draft Declaration by the United Nations on National Independence*" from March 9, 1943: "*Perhaps the most significant proposal, however, was the stipulation that colonial peoples should be granted progressive measures of self-government and should be given full independence in accordance with a fixed time schedule*" [87]. In a memorandum of March 1945, Charles Taussig, Adviser on Caribbean Affairs, says, referring to President Roosevelt, that "*he thought that Stanley*[88] *was more liberal on colonial policy than Churchill*". Then he adds: "(…) *I felt there was a genuine streak of liberalism in him, and that under his leadership, the British would make some substantial changes in their whole colonial policy. I told the President of the £ 120,000,000 appropriation that Parliament had made for Colonial Development over the next ten years* (…)". In the same meeting, Roosevelt said "*he was concerned about the brown people in the East*[89]*. He said that there are 1,100,000,000 brown people. In many eastern countries, they are ruled by a handful of whites and they resent it. Our goal must be to help them achieve independence – 1,100,000,000 potential enemies are dangerous. He said he included the 450,000,000 Chinese in that. He then added, Churchill doesn't understand this*". Clear enough are also the statements made by Roosevelt concerning Indo-China and New Caledonia: "(…) *I asked the President if he had changed his ideas on French Indochina as he had expressed them to us at the luncheon with Stanley*[90]*. He said no he had not changed his ideas: that French Indo-China and New Caledonia should be taken from France and put under a trusteeship. The President hesitated a moment and then said – well if we can get the proper pledge from France to assume for herself the obligations of a trustee, then I would agree to France retaining these colonies with the proviso that independence was the ultimate goal. I asked the President if he would settle for self-government. He said no. I asked him if he would settle for dominion status. He said no – it must be independence. He said that is to be the policy and you*

[77] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 389f.
[78] See VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 80.
[79] See SBREGA, J. J, The Anticolonial Policies of Franklin D. Roosevelt. In: *Political Science Quarterly,* Vol. 101, No. 1, 1986, p. 65.
[80] This Conference ended with the signature of the Charter of the United Nations on June 26, 1945.
[81] The Soviet Ambassador to the United States of America Andrei Gromyko.
[82] The Minister-Counselor of the Soviet Embassy in the United Kingdom.
[83] Cordell Hull, Secretary of State of the United States of America.
[84] See Memorandum of Conversation, by Mr. Leo Pasvolsky, Special Assistant to the Secretary of State, Washington, January 13, 1945. In: *Foreign Relations of the United States, Diplomatic Papers - 1945,* Vol. I – *General: The United Nations.* Washington, 1967, p. 15f.
[85] This memorandum has the same date as the memorandum of conversation with the Soviet Ambassador: January 13, 1945. See above.
[86] See Memorandum of Conversation, by Mr. Leo Pasvolsky, Special Assistant to the Secretary of State, Washington, January 13, 1945. In: *Foreign Relations of the United States, Diplomatic Papers - 1945,* Vol. I – *General: The United Nations.* Washington, 1967, p. 19.
[87] See Annex – Memorandum, January, 13, 1945. In: *Foreign Relations of the United States, Diplomatic Papers - 1945,* vol. I – *General: The United Nations.* Washington, 1967, p. 21.
[88] Oliver Stanley, British Secretary of State for the Colonies. See above.
[89] East Asia.
[90] Oliver Stanley, British Secretary of State for the Colonies. See above.

can quote me in the State Department"[91]. As we can see, as an alternative system to the colonial empires, President Roosevelt's plans included the establishment of a system of international trusteeships for the colonies with independence as its ultimate goal[92]. The attitude of the United States of America towards the political future of colonialism in general and the restoration of the Dutch East Indies in particular was, therefore, unfavourable. As stated before, there was in the United States of America a widespread opinion unfavourable to colonialism. Against this background, President Roosevelt decided to include the Dutch East Indies in his system of international trusteeships, rejecting the possibility of the East Indies continuing to be considered a part of the Netherlands. On the other hand, according to Queen Wilhelmina the Dutch East Indies were not to be separated from the Motherland. F. H. Visman, a former member of the Netherlands Indies Council (*Raad van Nederlands-Indië*) expressed his opposition to any form of international administration of the East Indies after the war.

3. The San Francisco Conference (April 25, 1945 – June 26, 1945): the fate of the Non-Self-Governing Territories and the system of international trusteeships in the United Nations Charter. The delayed reoccupation of the Dutch East Indies

When we look back at the 20th century today we recognize that it achieved a continuing historical importance specially because of a determined reason: both world wars had questioned the moral and juridical basis upon which the supremacy of the West rested. The hope of a new beginning was based upon two facts: on the one hand, the belief in the economic and military power of the United States of America; on the other hand the emerging Communist Bloc, which under the leadership of the Soviet Union menaced the West and so doing contributed towards maintaining the cohesion of the Western Allies. This political consensus made the project of a peaceful, united Europe with Germany's participation possible and drove it forward, contributing to maintaining Europe's position of power in the world. The United Kingdom and France, both colonial powers, did manage to achieve a position under International Law that was able to preserve their world power status. The Charter of the United Nations (1945) recognized them a permanent membership in the United Nations Security Council with veto power and, while establishing the principle of self-determination of peoples[93], did not expressly stipulate the end of colonialism[94]. Towards the end of World War II, the United States of America and the United Kingdom discussed the creation of a world organization with supervisory powers over all colonies under the idea according to which all imperial powers should be made accountable to an international organization. The main objective of the British was to prevent the foundation of a world organization that would interfere with the British Empire, hastening its decline[95]. From August 21, 1944 to October 7, 1944, took place at the Dumbarton Oaks estate in Washington, D.C., USA, the Washington Conversations on International Peace and Security Organization, the so-called Dumbarton Oaks Conference, at which delegations from the United States of America, the United Kingdom, the Soviet Union and China deliberated over the establishment of an international organization of universal character which could succeed the League of Nations and maintain peace and security in the world. The Charter of the United Nations (1945) which established the new international organization was drafted at the San Francisco Conference (April 25, 1945-June 26, 1945) after the Yalta Conference took place on February 4-11, 1945, mostly on the basis of the proposals of the Dumbarton Oaks Conference[96]. The American views were written into the text of the Charter of the United Nations (1945) and an international trusteeship system was established which did not put British colonial interests at risk[97]. Actually, against the background of President Roosevelt's plans for an alternative system to the

[91] See Memorandum of Conversation, by the Adviser on Caribbean Affairs (Taussig), Washington, March 15, 1945. In: *Foreign Relations of the United States, Diplomatic Papers - 1945,* vol. I – *General: The United Nations.* Washington, 1967, p. 121f. and p. 124.

[92] See McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 61ff.; WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, No. 3, 1976, p. 271, with footnote 1; HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 501ff.

[93] See Charter of the United Nations, Article 1 (2) – Article 55.

[94] Unlike the Covenant of the League of Nations (see Article 22), the Charter of the United Nations does not use the word "colony".

[95] See WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, Nr. 3, 1976, p. 290ff.

[96] See SCHEUERMANN, M., *Die Vereinten Nationen: Eine Einführung.* Wiesbaden, 2014, p. 24ff.; VOLGER, H., *Geschichte der Vereinten Nationen,* 2., aktualisierte und erweiterte Auflage. München – Wien, 2008, p. 13ff. On p. 20, we can read the following: *"Mit anderen Worten, weil die Diskussion sich an den Vorschlägen von Dumbarton Oaks orientierte, statt bei null anzufangen, entwickelte sich die Charta der Vereinten Nationen mehr oder weniger als eine Variation der Ideen von Dumbarton Oaks. Allerdings ist es auch schwer vorstellbar, daß die Großmächte eine völlig neue Konzeption der Weltorganisation, die beträchtlich von ihren in Dumbarton Oaks entwickelten Ideen abgewichen wäre, akzeptiert hätten.";* SCHLESINGER, S. C., *Act of Creation: The Founding of the United Nations. A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and Their Quest for a Peaceful World.* Cambridge, MA, 2004; SCHILD, G., *Bretton Woods and Dumbarton Oaks: American Economic and Political Postwar Planning in the Summer of 1944.* New York, 1995, p. 139ff., namely p. 168ff.; HILDERBRAND, R. C., *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security.* Chapel Hill and London, 1990. Further, KELSEN, H., The Old and the New League: The Covenant and the Dumbarton Oaks Proposals. In: *The American Journal of International Law,* Vol. 39, No. 1, 1945, p. 45–83. This study by Hans Kelsen was published in January 1945, that is, before the Yalta Conference (February 4-11, 1945) and the San Francisco Conference (April 25, 1945-June 26, 1945) took place.

[97] See WILLIAMS, J. E., The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944. In: *British Journal of International Studies,* Vol. 2, Nr. 3, 1976, p. 291: *"The end result was favourable for the United Kingdom, although no defence arrangement was agreed to. It faced the post-war world without any new commitment to grant independence to its colonies or a United Nations that could interfere with its running of the Empire."*

colonial empires comprising the establishment of a system of international trusteeships for the colonies[98], the Charter of the United Nations (1945) considers the possibility of an independence only for the *trust territories*[99], not for the so called *non-self-governing territories*[100]. The colonial powers administering non-self-governing territories were obliged to "*develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions* (…)"[101], a formula that seems to be inspired in the British Colonial Law and practice (namely, the evolution towards Dominion status), but which does not explicitly admit the independence of these territories[102]. Against this background it is of importance to compare the Charter of the United Nations (1945) with the Covenant of the League of Nations (1920). The Covenant of the League of Nations (1920) establishes: "*To those colonies and territories which as a consequence of the late war*[103] *have ceased to be under the sovereignty of the States which formerly governed them*[104] *and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.* (…)"[105]. Comparing the Charter of the United Nations (1945) with the Covenant of the League of Nations (1920), we see that the Covenant of the League of Nations (1920) does not include any principle or rule concerning the political evolution of dependent territories towards self-government or independence, with the exception, as regards to independence, of "(…) *Certain communities formerly belonging to the Turkish Empire* (…)" which "(…) *have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.* (…)"[106] (the so-called mandates of type A). For other peoples and territories[107] (the so-called mandates of types B and C), the possibility of their future independence is not mentioned[108]. Unlike the Covenant of the League of Nations (1920), the Charter of the United Nations (1945) establishes as a basic principle of the trusteeship system "*to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement*"[109]. On the other hand, the Charter of the United Nations (1945) establishes that "*The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:* (…) *to territories voluntarily placed under the system by states responsible by their administration*[110]. Therefore, according to the Charter of the United Nations (1945) the colonial powers can place territories voluntarily under the trusteeship system with the intention of preparing colonial peoples for independence or, at least, self-government. Consequently, the Charter of the United Nations (1945) ignores "*…the staunch European opposition to trusteeship or any other formula which would challenge their sovereignty*"[111].

We can therefore conclude that:

- Both the Covenant of the League of Nations (1920) and the Charter of the United Nations (1945) foresee the independence of territories put under mandate. The difference is that in the Covenant of the League of Nations (1920) only "*certain communities formerly belonging to the Turkish Empire*" are considered to be capable of independence;
- Neither the Covenant of the League of Nations (1920) nor the Charter of the United Nations (1945) foresees the independence of dependent territories that are not under mandate. This means that neither the Covenant of the League of Nations (1920) nor the Charter of the United Nations (1945) foresees the independence of territories under colonial rule that are not under mandate;
- Unlike the Covenant of the League of Nations (1920), the Charter of the United Nations (1945) establishes the principle according to which the administering powers of non-self-governing territories (namely, territories under colonial rule) accept the obligation "(…) *to develop self-government, to take due account of the political aspirations of the*

[98] See *supra*.
[99] See Charter of the United Nations, Article 76 (b).
[100] See Charter of the United Nations, Article 73.
[101] See Charter of the United Nations, Article 73 (b); VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 78.
[102] On the British colonial praxis, see, for example, CUNHA, J. da S., *Administração e Direito Colonial.* Lisboa, 1956, p. 146ff.
[103] World War I.
[104] Germany and Turkey.
[105] See The Covenant of the League of Nations, Article 22.
[106] See The Covenant of the League of Nations, Article 22.
[107] See The Covenant of the League of Nations, Article 22.
[108] On the mandates according to the Covenant of the League of Nations (1920), namely, on the the so-called mandates of type A, B and C see CUNHA, J. da S. – PEREIRA, M. da A. do V., *Manual de Direito Internacional Público,* Second Edition. Coimbra, 2004, p. 442-445.
[109] See Charter of the United Nations, Article 76 (b).
[110] See Charter of the United Nations, Article 77 (1) (c).
[111] See McMAHON, R. J., Anglo-American Diplomacy and the Reoccupation of the Netherlands East Indies. In: *Diplomatic History,* Vol. 2, Nr. 1, 1978, p. 5.

peoples, and to assist them in the progressive development of their free political institutions (…)[112]";

- Unlike the Covenant of the League of Nations (1920), the Charter of the United Nations (1945) establishes that dependent territories could be voluntarily placed under mandate by states responsible by their administration. This means that colonial powers could, on a voluntary basis, place colonial territories under mandate. Consequently, the Charter of the United Nations (1945) ignores "*…the staunch European opposition to trusteeship or any other formula which would challenge their sovereignty*"[113].

Not long after the Charter of the United Nations (1945) was drafted, a new balance of power unfavourable to colonial powers became evident. This was the beginning of an evolution that would eventually lead to an important transformation of International Law: the decolonization as a new manifestation of the principle of self-determination of peoples adequated to regulate the access of colonial peoples to independence[114]. Beginning in 1945, the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945) can be considered a starting point for these developments in International Law and praxis concerning colonial peoples (*peuples coloniaux*)[115].

Shortly after the signature of the Charter of the United Nations (June 26, 1945) and before Japan's surrender (August 15, 1945), in July 1945, the Allies decided at the Potsdam's Conference (July 17, 1945-August 2, 1945) to transfer the Dutch East Indies from the American SWPA (South West Pacific Area) under General Douglas MacArthur to the British SEAC (South East Asia Command) under Admiral Lord Louis Mountbatten as part of the Joint Chiefs of Staff's strategy of giving priority to the Japanese archipelago in the American war effort against Japan[116]. This decision caused some division among the Dutch. Van Mook in a telegram sent to the Minister for Overseas Territories Schmutzer[117] on June 21, 1945, expresses his fear that the decision of puting the East Indies in the territory under British operational command could significantly delay its liberation and stresses that under the British the supply of goods was worse than in the American operational area. Van Mook regrets further that such an important decision could be taken without consulting the Dutch authorities and without their approval. The War Council (*Raad van Oorlogsvoering*) presided by the new Prime Minister Schermerhorn[118] had a different opinion. Schermerhorn considers it uncertain that with the change in the commanding areas the liberation of the East Indies would take more time; according to him, the Dutch Government should not oppose the extension of Mountbatten's operational area because the "*British understand our position better*"[119]. However, like Van Mook, some members of the Council, namely the Minister without portfolio Van Roijen[120] and the Minister for Naval Affairs De Booy[121], found it questionable not to be consulted before the changing in the commanding areas was settled. According to De Booy, General MacArthur was not permitted to land in Java because the American public opinion was against a military campaign in the Dutch East Indies; therefore the Dutch must hope of Mountbatten, an opinion shared by Prime Minister Schermerhorn and the Minister for Overseas Territories Logemann[122]. The agreement between the British Government and the Dutch Government concerning the occupation of the East Indies was signed on Au-

[112] See Charter of the United Nations, Article 73 (b).

[113] See McMAHON, R. J., Anglo-American Diplomacy and the Reoccupation of the Netherlands East Indies. In: *Diplomatic History,* vol. 2, Nr. 1, 1978, p. 5.

[114] See LAOUTIDES, C., Self-Determination and Decolonization. In: GRIFFITHS, R. D. – PAVKOVIĆ, A. – RADAN, P. (ed.), *The Routledge Handbook of Self-Determination and Secession.* London, 2023, p. 60-73; KILIAN, P., Self-Determination of Peoples in the Charter of the United Nations. In: *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* (RECHTD), Vol. 11, No. 3, 2019, p. 341ff.; SIMPSON, B., Self-Determination and Decolonization. In: THOMAS, M. – THOMPSON, A. S. (ed.). In: *The Oxford Handbook of the Ends of Empire.* Oxford, 2018, p. 417-435.

[115] Making reference to "(…) *developments in international law.",* see KILIAN, P., Self-Determination of Peoples in the Charter of the United Nations. In: *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* (RECHTD), Vol. 11, No. 3, 2019, p. 348: *«For example, the French version of General Assembly Resolution 1514 of 14 December 1960 (and many others) already use the term "peuples coloniaux". It may be argued that this was a retroactive amendment to the Charter as a result of developments in international law.».* See United Nations General Assembly Resolution 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples, 14th December 1960* [online]. Available at: Declaration on the Granting of Independence to Colonial Countries and Peoples | OHCHR [Accessed 15 February 2025].

[116] See SMIT, C., *De indonesische quaestie: De wordingsgeschiedenis der souvereiniteitsoverdracht.* Leiden, 1952, p. 48. Further, VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 82ff.; DENNIS, P., *Troubled days of peace: Mountbatten and South East Asia Command, 1945-46.* Manchester, 1987, p. 67ff., p. 89ff., p. 112ff., p. 138ff. and 180ff.; McMAHON, R. J., *Colonialism and Cold War. The United States and the Struggle for Indonesian Independence, 1945-49.* Ithaca and London, 1981, p. 74ff.

[117] J. I. J. M. Schmutzer was the Minister for Overseas Territories in the Third Gerbrandy Cabinet (February 23, 1945-June 24, 1945).

[118] In office since Juni 24, 1945. Willem Schermerhorn, Prime Minister of the Kingdom of the Netherlands, presided over the so-called Cabinet Schermerhorn-Drees (June 24, 1945-July 3, 1946). See DUYNSTEE, F. J. F. M. - BOSMANS, J., *Het Kabinet Schermerhorn-Drees 24 juni 1945 - 3 juli 1946. Parlementaire Geschiedenis van Nederland na 1945,* Deel 1. Assen - Amsterdam, 1977.

[119] See JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 488f.

[120] J. H. Van Roijen was Minister without portfolio (June 24, 1945-March 01, 1946) and Minister for Foreign Affairs (March 01, 1946-July 3, 1946) in the so-called Cabinet Schermerhorn-Drees (June 24, 1945-July 3, 1946) [online]. Available at: Kabinet-Schermerhorn-Drees (1945-1946) | Regering | Rijksoverheid.nl [Accessed 15 February 2025].

[121] J. M. de Booy was Minister for Naval Affairs in the Third Gerbrandy Cabinet (February 23, 1945-June 24, 1945) and in the so-called Cabinet Schermerhorn-Drees (June 24, 1945-July 3, 1946) [online]. Available at: Kabinet-Schermerhorn-Drees (1945-1946) | Regering | Rijksoverheid.nl [Accessed 15 February 2025].

[122] See *Ministerraad, Raad van Oorlogvoering: Notulen, 20 juli 1945,* cited by JONG, L., *Het Koninkrijk der Nederlanden in de tweede wereldoorlog,* Deel 11c - *Nederlands-Indië III.* Leiden, 1986, p. 489. J. H. A. Logemann was Minister for Overseas Territories in the so-called Cabinet Schermerhorn-Drees (June 24, 1945-July 3, 1946) [online]. Available at: Kabinet-Schermerhorn-Drees (1945-1946) | Regering | Rijksoverheid.nl [Accessed 15 February 2025].

gust 24, 1945. The forces under Mountbatten were, however, not enough to bring the East Indies easily under control. In a letter sent to the Minister for Overseas Territories Logemann on August 2, 1945, Van Mook, Lieutenant Governor-General of the Dutch East Indies, pointed out that the British admiral had only some Australian divisions at his disposal to fulfill his task. For his part, due to the extension of the British operational command, Van Mook was no more able to receive the military equipment he asked for in the headquarters of General MacArthur and needed to equip the Dutch forces destined to the East Indies. On the other hand, the Australian Government, which in a 1943 statement had acknowledged as its duty to do everything it could to give the Dutch, French and Portuguese colonies back "*to their proper owners*" and, therefore, had commited itself to provide the Dutch with the facilities needed to accommodate and train an army of about 30.000 men in Australian soil soon after the liberation of the Netherlands, decided, in a meeting of the War Cabinet which took place on May 31, 1945, to reconsider his promise and to examine the possibility of a small force consisting in 5600 Netherlands army, air and civil affairs personnel being assembled in Australia. The time it took to transfer the military command to Admiral Mountbatten, the shortage of men and shipping, the lack of reliable intelligence, the priority given to the liberation of the British colonies of Malaya and Singapore and the fact that any military movements in the region could only be accomplished after the signature of the agreement that formalized the Japanese surrender, which occurred on September 2, 1945, delayed the reoccupation of the Dutch East Indies [123].

4. The Proclamation of the Independence of the Republic of Indonesia (August 17, 1945) and the Beginning of a new Constitutionalism in Asia

It was not until the founding of the first People's Council (*Volksraad*) created by law of December 16, 1916 [124] and its opening in 1918 that the peoples of the Dutch East Indies began to participate in the affairs of the central government of this colony [125]. In 1922 took place an important constitutional reform in the Kingdom of the Netherlands. All references to "colonies" (*koloniën*) were removed from the Dutch Constitution (*Grondwet*) and replaced by the inclusion of the Dutch East Indies, Suriname and Curaçao as parts of the Kingdom of the Netherlands [126]. In this sense, after this constitutional reform the Dutch East Indies became part of the territory (*grondgebied*) of the Kingdom of the Netherlands. Nonetheless, the Dutch Constitution (*Grondwet*) was to be applied only to the European territories of the Kingdom of the Netherlands [127]. In July 1936, few years before the outbreak of World War II (September 1939), the so-called Sutarjo Petition, a Petition asking for more autonomy for the Dutch East Indies within the Kingdom of the Netherlands, namely asking for a conference aiming at preparing dominion status for Indonesia after ten years, was submitted to the People's Council (*Volksraad*) by Sutarjo Kartohadikusumo, a native bureaucrat [128]. On September 14, 1940 the Governor-General of the Dutch East Indies Alidius Tjarda van Starkenborgh Stachouwer appointed a "Commission to Study Constitutional Reforms" (*Commissie tot Bestudeering van Staatsrechtelijke Hervormingen*) headed by F. H. Visman, a member of the Council of the Indies (*Raad van Indië*), the so-called Visman Commission, in order to study the ideas of the peoples of the Dutch East Indies with respect to constitutional reforms [129]. Further, Ch. J. I. M. Welter, Minister for Colonial Affairs in the Second Cabinet presided over by D. J. de Geer (August 10, 1939-August 26, 1940) and in the First Cabinet presided over by P. S. Gerbrandy (September 3, 1940-June 12, 1941), declared to the Lower House of the Dutch Parliament (*Tweede Kamer*) that the final goal of the Dutch colonial policy was to implement the autonomy of the Dutch East Indies within the Kingdom of the Netherlands while preserving its unity

[123] See McMAHON, R. J., Anglo-American Diplomacy and the Reoccupation of the Netherlands East Indies. In: *Diplomatic History,* Vol. 2, Nr. 1, 1978, p. 6: *"Mountbatten found his command short of the men and shipping necessary to fulfill its expanded responsibilities and lacking any reliable intelligence estimates in regard to actual conditions in the East Indies. Since the liberation of the British colonies of Malaya and Singapore was SEAC's top priority, the reoccupation of the East Indies was delayed even further."*. Further, HORNBECK, S. K., The United States and the Netherlands East Indies. In: *The Annals of the American Academy of Political and Social Science, Foreign Policies and Relations of the United States,* Vol. 255, 1948, p. 127-128; SMIT, C., *De indonesische quaestie: De wordingsgeschiedenis der souvereiniteitsoverdracht.* Leiden, 1952, p. 48f.: *"Deze wijziging in het bevelsgebied op het meest ongelukkige ogenblik heeft de bezetting van Indonesië door de geallieerden vertraagd."*

[124] See SCHMUTZER, E. J. M., *Dutch Colonial Policy and the Search for Identity in Indonesia 1920-1931.* Leiden, 1977, p. 57 with footnote 1.

[125] On the People's Council (*Volksraad*), see SOARES, R. *Administração e Direito Colonial,* Lições refundidas e actualizadas por CARVALHO, A. – BASTOS, M. – RAMALHO, O., Universidade de Coimbra, Faculdade de Direito. Coimbra, 1962, p. 238. Further, Volksraad (People's Council). In: KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 497-498; SCHMUTZER, E. J. M., *Dutch Colonial Policy and the Search for Identity in Indonesia 1920-1931.* Leiden, 1977, p. 57ff.; ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 53 with footnote 18. On the Statehood and Sovereignty of Indonesia, see recently LEE, S. (ed.), *Encyclopedia of Public International Law in Asia,* Vol. II: *Southeast Asia.* Leiden – Boston, 2021, p. 17ff.

[126] See *Grondwet (Grondwetsherziening van 1922)* [online], Eerste Hoofdstuck. *Van het Rijk en zijn inwoners. 1: Grondgebied: "Het Koninkrijk der Nederlanden omvat het grondgebied van Nederland, Nederlandsch-Indië, Suriname en Curaçao."* Available at: www.denederlandsegrondwet.nl/id/vi7ilzlwwyyx/eerste_hoofdstuk_van_het_rijk_en_zijn [Accessed 15 February 2025].

[127] See *Grondwet (Grondwetsherziening van 1922)* [online], Eerste Hoofdstuck. *Van het Rijk en zijn inwoners. 2: Reikwijdte Grondwet: „De Grondwet is alleen voor het Rijk in Europa verbindende, voor zoover niet het tegendeel daaruit blijk. Waar in de volgende artikelen het Rijk wordt genoemd, wordt alleen het Rijk in Europa bedoeld."* Available at: www.denederlandsegrondwet.nl/id/vi7ilzlwwyyx/eerste_hoofdstuk_van_het_rijk_en_zijn [Accessed 15 February 2025].

[128] See Sutarjo Petition. In: KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 459. Further, ABEYASEKERE, S., The Soetardjo Petition. In: *Indonesia*, No. 15, Apr., 1973, p. 80-108.

[129] See De SCHILLER, A. A., Autonomy for Indonesia. In: *Pacific Affairs,* Vol. 17, No. 4, 1944, p. 478ff., namely p. 479 with footnote 5. Further, VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 59f.

(*Rijkseenheid*)[130]. From a constitutional point of view, the invasion of the Netherlands by Nazi Germany (1940) caused the Queen of the Netherlands and the Dutch Government to promise a far-reaching reorganization of the Kingdom of the Netherlands and its component territories (The Netherlands, Netherlands East Indies, Surinam and Curaçao) after the end of World War II[131]. Against this background, on January 31, 1941, about a year before the surrender of the KNIL[132] to the Japanese (March 8, 1942), a memorandum which called for a full parliament of two chambers composed by elected members and an executive with responsible ministers was laid before the People's Council (*Volksraad*). This parliament was to have the highest legislative power in the state[133]. On January 27, 1942 the Dutch Government further defined the conference on the above mentioned reorganization of the Kingdom of the Netherlands and its component territories. The conference was to be convened following the end of World War II[134]. In the above mentioned Radio address made on December 6, 1942, Queen Wilhelmina of the Netherlands promised a conference at which a joint consultation would take place after the end of World War II about the structure of the Kingdom of the Netherlands and its parts in order to adapt it to post-war world. The plans of Queen Wilhelmina of the Netherlands comprised the creation of a commonwealth of the Netherlands, Indonesia, Surinam and Curaçao[135]. In any case, any ideas on the constitution of the Kingdom of the Netherlands, including a dominion status for the Dutch East Indies, a federation between the Netherlands and Indonesia or the regulation of the relations of the Netherlands and Indonesia on the basis of equality of position, excluded any demand for complete independence[136]. This means that any autonomy of the above mentioned territories was to be implemented within the framework of the Kingdom of the Netherlands (*in het verband van het Koninkrijk)* according to the idea that the Indonesians must be trained for self-government by an "*outside power*"[137].

During the last months of the Japanese occupation of the Dutch East Indies, in two sessions from May to July 1945, at the end of World War II, the "Investigating Committee for Preparatory Work for Independence"[138] adopted the so-called *Pancasila* (that is, "*Five Principles*") as Indonesian State Philosophy[139] and presented a draft Constitution for the Republic of Indonesia in the first week of August 1945[140]. In this context, we should make reference to one of the participants of these proceedings and an important member of the "Investigating Committee for Preparatory Work for Independence", Sopomo, a jurist who had studied Law in Leiden under the influential Dutch Law Professor Cornelis van Vollenhoven. During the proceedings, after making reference to the words of the chief of the General Affairs Department, Major-General Nishimura, praising the importance of taking into consideration the specific character of a nation

[130] See VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 60.

[131] See Bijlage I – Teksten toespraken, 30 juli 1941. In: SCHAAP, J., *Het Recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina.* Amsterdam, 2007, p. 236-237, lines 59-80. Making reference to this promise, see the Radio address made by Queen Wilhelmina of the Netherlands on April 3, 1942. See Bijlage I – Teksten toespraken, 3 april 1942. In: SCHAAP, J., *Het Recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina.* Amsterdam, 2007, p. 246, lines 24-30.

[132] As mentioned above, KNIL means *"Koninklijk Nederlands-Indisch Leger",* that is, *"Royal Netherlands Indies Army".*

[133] See SCHILLER, A. A., Autonomy for Indonesia. In: *Pacific Affairs,* Vol. 17, No. 4, 1944, p. 483.

[134] See Bijlage I – Teksten toespraken, 7 december 1942. In: SCHAAP, J., *Het Recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina.* Amsterdam, 2007, p. 252-253, lines 48-114.

[135] See *The Queen Looks at the Future. Important Statements of H.M. Queen Wilhelmina on War and Peace Aims* [online]. The Netherlands Information Bureau. New York City z.j. [1943], p. 11-13, namely p. 13. Available at: Towards a Netherlands Commonwealth Text of H.M. Queen Wilhelmina's radio address of December 6th, 1942, outlining plans for the creation of a Commonwealth of the Netherlands, Indonesia, Surinam and Curaçao., The Queen Looks at the Future, Wilhelmina, prinses der Nederlanden - DBNL [Accessed 15 February 2025]. Further, HABIBUDDIN, S. M., Franklin D. Roosevelt's Anti-Colonial Policy towards Asia. Its Implications for India, Indo-China and Indonesia (1941-45). In: *Journal of Indian History,* Vol. LIII, No. 3., 1975, p. 518-519.

[136] See Bijlage I – Teksten toespraken, 31 december 1943. In: SCHAAP, J., *Het Recht om te waarschuwen: Over de Radio Oranje-toespraken van koningin Wilhelmina.* Amsterdam, 2007, p. 265, lines 36-41: *"… den nieuwen staatkundigen opbouw van Nederlandsch-Indië in het verband van het Koninkrijk, volgens de grondslagen, welke ik u in breede trekken reeds mededeelde…".*

[137] See SCHILLER, A. A., Autonomy for Indonesia. In: *Pacific Affairs,* Vol. 17, No. 4, 1944, p. 480.

[138] See *supra*.

[139] On the constitutional debates of 1945, see BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 65ff. Further, KUSUMA, A. B. – ELSON, R. E., A note on the sources for the 1945 constitutional debates in Indonesia. In: *Bijdragen tot de Taal-, Land- en Volkenkunde,* Vol. 167, No. 2-3, 2011, p. 196-209. The *Pancasila* was formulated by Sukarno in a speech delivered by him to the "Investigating Committee for Preparatory Work for Independence" referred above on June 1, 1945, during the Occupation Period. For the text of this speech, see FEITH, H. – SMITH, A., Indonesia. In: SMITH, R. M. (ed.), *Southeast Asia: Documents of Political Development and Change.* Ithaca and London, 1974, p. 174ff. Further, BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 69-70; *Pancasila*. In: KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 339-340; DAHM, B., *Sukarnos Kampf um Indonesiens Unabhängigkeit. Werdegang und Ideen eines asiatischen Nationalisten,* vol. XVIII der Schriften des Instituts für Asienkunde in Hamburg. Frankfurt am Main – Berlin, 1966, p. 255ff. The Pancasila, the Indonesian State Philosophy, is to be found in the Preamble of the Constitution of the Republic of Indonesia, the so-called 1945 Constitution. According to Sukarno, the Republic of Indonesia should be based on Pancasila or the Five Principles: 1- *"Belief in the One and Only God";* 2- *"Just and civilized humanity";* 3- *"The unity of Indonesia";* 4- *"Democratic life led by wisdom of thoughts in deliberation amongst representatives of the people"* and 5- *"Social justice for all the people of Indonesia".* See *The 1945 Constitution of the Republic of Indonesia,* Preamble [online]. Available at: constitution_1_1625426222_4c1e13f466840d7ed721.pdf (mkri.id) [Accessed 16 February 2025]. Sukarno was to be in the future celebrated as the "Discoverer of the Pancasila" by the people of Indonesia. On the concept of Pancasila, see further PRAWIRANEGARA, S., Pancasila as the Sole Foundation. In: *Indonesia*, No. 38, Oct., 1984, p. 75: *"I. What Is the Pancasila? The answer usually given is: The Pancasila is the State Philosophy, the philosophy that is the basis of the 1945 Constitution, that constitutes the basis of law for the Republic of Indonesia."*

[140] See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 61.

when defining its government system, Sopomo mentions the Historical School while asserting the importance of History of Law (*Rechtsgeschichte*) in determining a State's internal organization along with its social structure, in this case, the Indonesian History of Law and the Indonesian social structure[141]. Against the background of a condemnation of Liberalism and Marxism, Supomo attacks Western individualism and praises an organic unity in society in which the State looks after all aspects of the life of a nation and does not give too much importance to the individual. This ideas corresponded to "integralism" as a political theory in accordance with Indonesia's tradition of political thought. Nazi Germany and Imperial Japan are considered examples of integralism. In this context, the terms "totalitarianism" and "integralism" are used with the same meaning by Sopomo when he makes reference to Nazi Germany while praising Nazi precepts like the unity of the people or the Nazi leadership principle of unlimited authority of the *Führer* over the people and the Japanese system which, as Supomo stresses, comprises "… *the abiding spiritual and temporal unity of the Most Esteemed Emperor, the state and the whole Japanese people.*"[142]. Further, according to Sopomo the importance given by Japan to unity and the family principle as foundation of the state are very compatible to traditional Indonesian social organization. The traditional constitutional order contains an idea of unity which corresponds to a totalitarian concept, an Indonesian integralist concept[143]. The importance of the reference to Sopomo lays also in the fact that both Sopomo and Sukarno belonged to the same group within the "Investigating Committee for Preparatory Work for Independence" and both favoured a strong and authoritarian State[144]. The 1945 Constitution emerged from the draft produced by Supomo's drafting subcommittee (July 12, 1945) whose composition tended to favour a strong, centralized, non-Islamic State favourable both to the Japanese and to Sukarno[145].

On August 7, 1945, the day after the atomic bombing of Hiroshima, Field Marshal Count Hisaichi Terauchi, Commander of the Japanese Southern Area, granted permission for the establishment of the so-called "Preparatory Committee for Indonesian Independence"[146] with the mission of preparing the transfer of power from the Japanese armed forces to this Committee[147]. On August 11, 1945 Field Marshal Count Hisaichi Terauchi inaugurated Sukarno as chairman of the "Preparatory Committee for Indonesian Independence" and Mohammad Hatta as deputy chairman[148]. The "Preparatory Committee for Indonesian Independence" met for the first time one day after the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945), on August 18, 1945. It added new members to the Committee and the expanded Committee selected Sukarno as President and Mohammed Hatta as Vice President of the Republic of Indonesia and established a commission to approve the final draft of the Constitution of the Republic of Indonesia. On this same day, August 18, 1945, or a week later, the "Preparatory Committee for Indonesian Independence" ratified the text of the 1945 Constitution[149]. On August 29, 1945, the "Preparatory Committee for Indonesian Independence" was dissolved and the "Central Indonesian National Committee" was established[150] as an advisory body to the President and his Cabinet of the newly independent Indonesia. Sukarno, assisted by Hatta, appointed 135 members to this new body among "… *whom they deemed to be the outstanding Indonesian nationalists and the most important leaders of the chief ethnic, religious, social, and economic groups in Indonesia*"[151]. The first Indonesian Constitution, the Constitution of the Republic of Indonesia, the so-called 1945 Constitution, was officially published in the Gazette of the Republic of Indonesia on February 15, 1946[152]. The introductory phrases of the Preamble to this Constitution[153] read as follows:

[141] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 66 with footnotes 8 and 9.
[142] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 66-67.
[143] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 67.
[144] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 70.
[145] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 74.
[146] See Panitia Persiapan Kemerdekaan Indonesia (PPKI, Committee for the Preparation of Indonesian Independence). In: KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 341.
[147] See KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 127; VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 77; ANDERSON, B. R. O'G, *Java in a Time of Revolution. Occupation and Resistance, 1944-1946.* Ithaca and London, 1972, p. 62ff.
[148] See BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 80; ANDERSON, B. R. O'G, *Java in a Time of Revolution. Occupation and Resistance, 1944-1946.* Ithaca and London, 1972, p. 63. See also ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 61 with footnote 28.
[149] See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 61-62. Further, BOURCHIER, D., Illiberal Democracy in Indonesia: The ideology of the family state. London and New York, 2015, p. 73; VAN DEN DOEL, W., Indonesian Independence, Struggle for. In: BENJAMIN, Th. (ed.), *Encyclopedia of Western Colonialism since 1450,* Vol. 2. Detroit, MI, 2007, p. 632; VAN DEN DOEL, H. W., *Afscheid van Indië. De val van het Nederlandse imperium in Azië.* Tweede en derde, herziene druk. Amsterdam, 2001, p. 86; KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 138.
[150] See Komité Nacional Indonesia Pusat (KNIP, Central Indonesian National Committee). In: KAHIN, A., *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 244.
[151] See KAHIN, G. McT., *Nationalism and Revolution in Indonesia.* Southeast Asia Program Publications, Southeast Asia Program, Reprint. Ithaca, New York, 2003, p. 139f., namely, p. 140.
[152] See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 62 with footnote 30.
[153] The text of the Preamble to the 1945 Constitution had been proposed on June 22, 1945 in Jakarta and was based on the so-called Jakarta Charter. This Charter contained the principles on which an independent Indonesia is based. See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 62. See also ELSON, R. E., Another Look at the Jakarta Charter Controversy of 1945. In: *Indonesia*, No. 88, Oct., 2009, p. 105-130.

"Whereas Independence is the inalienable right of all nations; therefore, colonialism must be abolished in the world as it is not in conformity with humanity and justice.

And the moment of rejoicing has arrived in the struggle of the Indonesian independence movement to guide the people safely and well to the gate of the independence of the state of Indonesia which is independent, united, sovereign, just and prosperous; By the blessings of Almighty God and motivated by the noble desire to live a free national life, the people of Indonesia hereby declare their independence." [154]

As we can see, the Preamble condemns colonialism and proclaims Indonesian independence. Doing so the Preamble attacks the Netherlands and the Dutch colonialism clearly. Anticolonialism and independence are to be considered expression of humanity and justice. Therefore, in the context of the so-called "Five Obligations" (*Pantja Dharma*) where the alliance with Japan occupies a central place [155], Indonesian Antiwesternism has its roots in the inhumanity and injustice of colonialism. It gains expression in Indonesian attacks on western capitalism and western political superiority while defending social justice for the people of Indonesia according to *Pancasila*, the Indonesian State Philosophy [156]. Decolonization, namely the decolonization of Indonesia is to be understood as the concretization of the ideals of independence and anticolonialism as applied to Indonesia by the Constitution of the Republic of Indonesia, the so-called 1945 Constitution. Decolonization and self-determination have to do with the birth of a new State and therefore with both Constitutional Law and International Law. In fact, the birth of a new State must be seen from the point of view of Constitutional Law, that is, a new State exists when it possesses a permanent population, a defined territory and a government. Under government we can include the capacity to maintain relations, namely diplomatic relations, with other States [157]. The validity of the Constitution of the Republic of Indonesia, the so-called 1945 Constitution, must therefore be referred to the success of the Indonesian Revolution [158], to the Indonesian independence and to the condemnation of colonialism as proclaimed in the Preamble to the 1945 Constitution. In other words, with the success of the Indonesian Revolution a new State began to exist, the Republic of Indonesia, with its population, territory [159] and government as defined in its Constitution. Between the capitulation of the Empire of Japan (August 15, 1945) and the Allied reoccupation of the Dutch East Indies took place a constitutional change caused by the Indonesian Revolution and formalized by the "Preparatory Committee for Indonesian Independence" with the establishment of the Constitution of the Republic of Indonesia, the so-called 1945 Constitution, on August 18, 1945, a day after the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945), or a week later [160].

Generally speaking, the Japanese saw themselves as liberators of the Asiatic peoples. They defended the ideology of a "holy war of liberation" of Asia in cooperation with Japan. For the Indonesian nationalists, the expulsion of the Dutch by the Japanese constituted the beginning of the liberation of Indonesia from the Dutch colonialism which eventually would lead to the independence of Indonesia and to the beginning of a new constitutionalism in Asia, the Indonesian constitutionalism. We can say that the nationalist leaders tried to adapt themselves to the reality emerging from the clash between the Japanese strive to build a new order in Asia and European colonialism. The proclamation of the 17th August, made after Japan's surrender but before the Dutch could come back to take control of the East Indies affirmed the wish of the Indonesian nationalists to decide their own future without foreign interference. Although they did not succeed in keeping the Japanese out of the events that led to the declaration of independence, the circumstances made clear that the Japanese could not have played the decisive role in the birth of the new Republic and in the beginning of the Indonesian constitutionalism. Just like the Japanese, the Indonesians wanted to get rid of Western dominance. In this sense, the Indonesian independence movement continued Japan's offensive against the Occident [161]. The Antiwesternism in Asia after World War II got expression in the so-called "Asian Values" discourse which conceives Asian values as values incompatible

[154] See *Preamble of the Constitution of the Republic of Indonesia,* the so-called 1945 Constitution [online]. Available at: constitution_1_1625426222_4c1e13f466840d7ed721.pdf (mkri.id) [Accessed 16 February 2025].

[155] See *supra*.

[156] In a somewhat emotional tone, see VLEKKE, B. H. M., Progress toward Self-Government. In: *Far Eastern Survey,* Vol. 14, No. 24, 1945, Political Problems of Indonesia (Dec. 5, 1945), p. 348-350, namely p. 349: *"Moreover, it is by no means the intention of the Nationalists to destroy everything that Dutch administration and Dutch energy and capital have created in the Indies. Not the destruction of western enterprises but their expropriation for the benefit of the new socialistic Indonesian state was always Soekarno's ideal."*

[157] See LEE, S. (ed.), *Encyclopedia of Public International Law in Asia,* vol. II: *Southeast Asia.* Leiden – Boston, 2021, p. 19-20.

[158] See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 62. Further, see Revolution. In: KAHIN, A. *Historical Dictionary of Indonesia,* Third Edition. Lanham – Boulder – New York – Toronto – Plymouth, UK, 2015, p. 405; VAN DEN DOEL, W., Indonesian Independence, Struggle for. In: BENJAMIN, Th. (ed.), *Encyclopedia of Western Colonialism since 1450,* Vol. 2. Detroit, MI, 2007, p. 631ff. See also VAN REYBROUCK, D., *Revolusi. Indonesien und die Entstehung der modernen Welt,* aus dem Niederländischen von ECKE, A., Berlin, 2022.

[159] According to International Law (principle *Uti Possidetis Juris*), the territory of the newly independent State preserves the former colonial boundaries, that is, in the case of Indonesia, the territorial boundaries of the Dutch East Indies. See LEE, S. (ed.), *Encyclopedia of Public International Law in Asia,* vol. II: *Southeast Asia.* Leiden – Boston, 2021, p. 21ff.

[160] See ASSHIDDIQIE, J., *The Constitutional Law of Indonesia. A Comprehensive Overview.* Petaling Jaya, Selangor, Malaysia, 2009, p. 62-63. See *supra*.

[161] See SMIT, C., *De indonesische quaestie: De wordingsgeschiedenis der souvereiniteitsoverdracht.* Leiden, 1952, p. 46ff. On Japan's view of Indonesia's independence, see HORNBECK, S. K., The United States and the Netherlands East Indies. In: *The Annals of the American Academy of Political and Social Science, Foreign Policies and Relations of the United States,* Vol. 255, 1948, p. 127: *"From the Japanese point of view, the Indonesian independence movement became at that point a projection and continuation of Japan's offensive against the Occident."*

with Western constitutionalism like authoritarianism and the placing of the State above the individual[162]. In other words, against the background of European imperialism and colonialism, the Proclamation of Indonesia's independence reveals the beginning of a new, Asiatic, eventually, Indonesian constitutionalism based on the principle "Asia for the Asians" with its Antiwesternism and Pan-Asiatic elements amalgamated by Indonesian nationalists during the period of Japanese occupation of the Dutch East Indies.

5. Conclusion

The Japanese saw themselves as liberators of the Asiatic peoples. In this respect, General Tojo was an ardent defender of the ideology of a "holy war of liberation" of Asia in solidarity with Japan. For the Indonesian nationalists the liberation of Indonesia from the Dutch colonialism would begin with the expulsion of the Dutch by the Japanese. As the Japanese arrived in Java in March 1942, they were greeted by the Indonesians as liberators from the colonial yoke. Contrary to other Nationalist leaders like Sutan Sjahrir, the first Prime Minister of the Republic of Indonesia (1945-1947) and one of the few Indonesian nationalists who did not participate in public life during the Japanese occupation, Sukarno decided to cooperate with the Japanese. As a Japan's war aim, the establishment of the so-called Greater East Asia Co-Prosperity Sphere was to be understood as a decolonization and liberation of the East Asian peoples which were living under colonial rule. Sukarno saw Western imperialism as his main opponent. Therefore, Sukarno's vision of the Indonesian Nation was not to be separated from the Japanese ideal of *Hakkō ichiu* (in English, *Brotherwood of the Peoples*), that is, from Japanism as a distinct type of internationalism aiming at overcoming Westernism and corresponding to the principle on which Japan's foreign policy was based. Therefore, Japan played an important role in the decolonization in East Asia, including Indonesia. On the other hand, in her Radio addresses from London via BBC Queen Wilhelmina of the Netherlands expresses the existing unity between her and the overseas territories, which are described as overseas parts of the Kingdom of the Netherlands, or insists on the idea of unity between the Motherland and the overseas territories and on the indivisible character of the Kingdom of the Netherlands. As a matter of fact, with the 1922 Dutch Constitutional Reform the Dutch East Indies had become part of the territory (*grondgebied*) of the Kingdom of the Netherlands. In her Radio address made on December 6, 1942, Queen Wilhelmina of the Netherlands promised a conference at which a joint consultation would take place after the end of World War II about the structure of the Kingdom of the Netherlands and its parts in order to adapt it to post-war world. The plans of Queen Wilhelmina of the Netherlands comprised the creation of a commonwealth of the Netherlands, Indonesia, Surinam and Curaçao. In any case, any ideas on the constitution of the Kingdom of the Netherlands, including a dominion status for the Dutch East Indies, a federation between the Netherlands and Indonesia or the regulation of the relations of the Netherlands and Indonesia on the basis of equality of position, excluded any demand for complete independence. Against this background American anticolonialism reached a peak under President Franklin D. Roosevelt. There was in the United States of America a widespread opinion unfavourable to colonialism. America's aversion to colonialism has its origins in the country's colonial background and traditional support for independence movements in the colonies. Post-war economic objectives of the United States of America in Asia contributed to the American anticolonial attitude towards the Dutch. As an alternative system to the colonial empires, President Roosevelt's plans included the establishment of a system of international trusteeships for the colonies with independence as its ultimate goal. The American views were written into the text of the Charter of the United Nations (1945) and an international trusteeship system was established which did not put British colonial interests at risk. Actually, against the background of President Roosevelt's plans for an alternative system to the colonial empires comprising the establishment of a system of international trusteeships for the colonies, the Charter of the United Nations (1945) considers the possibility of an independence only for the "trust territories", not for the so called "non-self-governing territories". Therefore, according to the Charter of the United Nations (1945) the colonial powers can place territories voluntarily under the trusteeship system with the intention of preparing colonial peoples for independence or, at least, self-government. Not long after the Charter of the United Nations (1945) was drafted, a new balance of power unfavourable to colonial powers became evident. This was the beginning of an evolution that would eventually lead to an important transformation of International Law: the decolonization as a new manifestation of the principle of self-determination of peoples adequated to regulate the access of colonial peoples to independence. Beginning in 1945, the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945) can be considered the starting point of this transformation of International Law and praxis. Two days after Japans's surrender, on August 17, 1945, Indonesian nationalist and independence activist Sukarno, in the name of the Indonesian people, proclaimed the independence of the Republic of Indonesia together with Mohammad Hatta. Significantly, nationalist leaders like the above mentioned Sutan Sjahrir favoured a Proclamation of Independence "*… militantly anti-Japanese in character…*", refusing to participate in the meeting where the text of the Proclamation of the Independence of the Republic of Indonesia was drawn up. On August 18, 1945, or a week later, the "Preparatory Committee for Indonesian Independence" ratified the text of the 1945 Constitution of the Republic of Indonesia. The Preamble to the 1945 Constitution of the Republic of Indonesia condemns colonialism and proclaims Indonesian independence. Doing so the Preamble attacks the Netherlands and the Dutch colonial-

[162] See JIUNN-RONG, Y. – CHANG, W.- C., The Emergence of East Asian Constitutionalism: Features in Comparison. In: *The American Journal of Comparative Law,* Vol. 59, No. 3, 2011, p. 805-839, namely p. 837f.. On Asian values discourse, see ENGLE, K., Culture and Human Rights: The Asian Values Debate in Context. In: *New York University Journal of International Law and Politics,* Vol. 32, No. 2, 2000, p. 291-333.

ism clearly. Anticolonialism and independence are to be considered expression of humanity and justice. Therefore, in the context of the so-called "Five Obligations" (*Pantja Dharma*) where the alliance with Japan occupies a central place, Indonesian Antiwesternism has its roots in the inhumanity and injustice of colonialism. It gains expression in Indonesian attacks on western capitalism and western political superiority while defending social justice for the people of Indonesia according to *Pancasila*, the Indonesian State Philosophy. Decolonization, namely the decolonization of Indonesia is to be understood as the concretization of the ideals of anticolonialism and independence as applied to Indonesia by the Constitution of the Republic of Indonesia, the so-called 1945 Constitution. The validity of the Constitution of the Republic of Indonesia, the so-called 1945 Constitution, must therefore be referred to the success of the Indonesian Revolution, to the Indonesian independence and to the condemnation of colonialism as proclaimed in the Preamble to the 1945 Constitution. With the success of the Indonesian Revolution a new State began to exist, the Republic of Indonesia, with its population, territory and government as defined in its Constitution. Between the capitulation of the Empire of Japan (August 15, 1945) and the Allied reoccupation of the Dutch East Indies took place a constitutional change caused by the Indonesian Revolution and formalized by the "Preparatory Committee for Indonesian Independence" with the establishment of the Constitution of the Republic of Indonesia, the so-called 1945 Constitution, on August 18, 1945, a day after the Proclamation of the Independence of the Republic of Indonesia (August 17, 1945), or a week later. In other words, against the background of European imperialism and colonialism, the Proclamation of Indonesia's independence reveals the beginning of a new, Asiatic, eventually, Indonesian constitutionalism based on the principle "Asia for the Asians" with its Antiwesternism and Pan-Asiatic elements amalgamated by Indonesian nationalists during the period of Japanese occupation of the Dutch East Indies.

Reflections on Legal History of Romania and a Comparison to Greek Family Law

*Charalampos Stamelos**

Abstract

This paper presents reflections of the laws of Romania and a comparison of family law of Romania to Ancient Greek family law. Roman law left a profound and enduring legacy on the legal system of Romania. The introduction of Roman law in the region began with the Roman conquest of Dacia in 106 AD under Emperor Trajan. This marked the beginning of a period of significant Romanization, during which Roman legal principles, institutions, and practices were extensively implemented. Later, the influence of Byzantine law on Romania was a critical chapter in the nation's legal history, reflecting the cultural and political interactions between the Byzantine Empire and the Romanian principalities of Wallachia and Moldavia. Byzantine law began to permeate the region following the withdrawal of Roman forces from Dacia in 271 AD and continued to shape Romanian legal traditions through the Middle Ages. Further, the Ottoman Empire's dominion over these principalities from the 15th to the 19th centuries introduced a complex interplay between local traditions and Ottoman legal principles. Lastly, family law in Greece from Roman times to the Ottoman era shared several parallels with the evolution of similar laws in Romania, reflecting the broader legal and cultural influences of the region.

Keywords: *Roman Law of Romania; Byzantine Law of Romania; Ottoman Law of Romania; Family Law; Law of Ancient Greece; Comparison.*

1. Introduction

The history of law in Romania is a rich tapestry woven from various cultural, social, and political influences that have shaped the legal landscape over centuries. Starting from the ancient Dacian society, through Roman colonization, medieval transformations, Ottoman rule, and modern statehood, each era left an indelible mark on Romanian legal traditions and institutions. The evolution of Romanian law reflects the country's unique geographical position at the crossroads of major civilizations and empires, fostering a distinctive legal heritage.[1]

During the Roman occupation (106-271 AD), the legal system in the region known today as Romania was significantly influenced by Roman law. The province of Dacia[2] became in-

* Dr. Charalampos Stamelos, Ph.D., LL.M., Assistant Professor, History of Law, Law School, European University Cyprus, Cyprus, email: c.stamelos@euc.ac.cy / ORCID 0000-0003-2597-2685.

1 CĂLINOIU, C., *Romanian Legal History*. Bucharest, 2000; VERNEA, S.-A., *History of Romanian Law.* Bucharest, 2024; TINU A., BOBOC, C., *History of the Romanian State and Law*, 3rd edition. Bucharest, 2022; NEAGU, I., *History of Romanian Law*. Lugoj, 2014; GHEORGHE, S., *History of Romanian Law*. Galati, 2010; DARIESCU, C., *History of the Romanian State and Law in Contemporary Times*. Bucharest, 2010; ASANDULUI, G., The Institution of Marriage in Old Romanian Law. In: *Juridica*, 2009, p. 128-134. For the law of Romania in the period of Communism see POSTOLACHE, M., Developments of the Romanian State and Law in the Period of Communism. In: *International Journal of Social Science and Human Research*, vol. 7/5, 2024, p. 2748-2752.

2 "The conquest of Dacia by the Romans was possible after two military campaigns carried out by Emperor Trajan in the years 101-102 and 105-106 AD. At the end of the second war, Sarmizegetusa was conquered by the Roman legions, and the tragic death of King Decebal marked the end of the Geto-Dacian state. After two long and exhausting wars, part of the Dacian population perished, another part fled from the path of the Romans in today's northern Romania, and a large part remained in the conquered territory, being subjected to a new form of organization. In 106 AD, Emperor Trajan turned Dacia into a Roman province, occupying only part of the original territory of Decebalus' state. Territorially, the province adjusted its borders during three organizations. In the first stage, between 106-117 AD, the territories of Northern Transylvania (the historical provinces of Crişana and Maramureş), along with Northern Moldova, were not under Roman domination, being inhabited by free Dacians, refugees from the second Roman war. Southern Moldova and a large part of Muntenia's plain, along with the southeastern corner of Transylvania (the region between the Olt River and the Carpathian Mountains), were incorporated into the province of Moesia Inferior. The remaining territory of Decebal's former state, namely Transylvania without the Northern part, and without the South-East corner, along with Banat and Oltenia were part of the unitary Province of Dacia Augusta. The second stage started in 117 AD, the year of Emperor Trajan's death, when the free Dacians from the northern area, together with other conquered populations, tried to remove the Roman administration through repeated attacks. With a view to effective military organization, Emperor Hadrian, divided the province into Dacia Superior, which included the territory of the unitary province, with the exception of Oltenia, and Dacia Inferior, which included the territory of Oltenia, the South-Eastern corner of Transylvania and part of Western Muntenia, the latter two originally being part of the province of Moesia Inferior. Seven years later, in 124 AD, Emperor Hadrian decided to separate the territories north of the rivers Mureş and Arieş, forming the province of Dacia Porolissensis, a militarized zone, used for defense against attacks from the North. The third stage began in 168 AD, and lasted until the Aurelian Retreat (271-275 AD). Emperor Marcus-Aurelius united Dacia Superior and Dacia Inferior, forming Dacia Apulensis. In the year 169 AD Oltenia and part of western Muntenia were separated, forming Dacia Malvensis. Dacia Porolissensis remained within the known limits after the second stage of the organization. In this form, the Roman province preserved its borders until the Aurelian retreat. Roman provinces, in the first stage of the Roman Empire, were divided into imperial and senatorial provinces. The classification was made according to their economic and military importance. Throughout its existence, Dacia was an imperial province, unpacified, being placed under the administration of the Emperor, who was represented by a trustee, who performed the function of Governor". VERNEA, S.-A., *History of Romanian Law.* Bucharest, 2024, p. 16-18.

tegrated into the Roman Empire, adopting Roman legal norms and practices. This period laid the foundational elements of the legal system, which included the codification of laws and the establishment of judicial structures. The impact of Roman law persisted long after the withdrawal of Roman administration, as it continued to influence local customs and legal practices.[3]

The medieval period saw the emergence of feudal law, which was characterized by a mix of local customs and external influences from neighboring countries. The principalities of Wallachia and Moldavia, which later formed Romania, developed their own legal systems that were influenced by Byzantine, Slavic, and Hungarian law. The oldest written laws from this period, such as the "Cartea Românească de Învățătură" of 1646,[4] reveal a complex interplay between local traditions and external legal influences.[5]

Ottoman rule, which lasted from the 15th to the 19th centuries, also left a significant imprint on Romanian legal history. Although the principalities retained a degree of autonomy, Ottoman legal principles and administrative practices were introduced. The Capitulations, agreements between the Ottoman Empire and European powers, further complicated the legal landscape by introducing elements of Western legal traditions. This period was marked by a blend of Eastern and Western legal influences, which were later synthesized into the modern Romanian legal system.[6]

The 19th century was a pivotal time for Romanian law, characterized by a drive towards modernization and codification. The unification of Wallachia and Moldavia in 1859 and the subsequent formation of the Kingdom of Romania in 1881 spurred significant legal reforms. Influenced by the French Napoleonic Code, Romania adopted its first Civil Code in 1864, which sought to harmonize and modernize the legal system. This period also saw the establishment of new judicial institutions and the professionalization of the legal profession.[7]

In the 20th century, Romanian law continued to evolve through periods of political upheaval, including the establishment of the communist regime[8] in 1947 and its subsequent fall[9] in 1989. The communist era brought about significant changes, including the nationalization of property and the implementation of socialist legal principles. After the fall of communism, Romania undertook comprehensive legal reforms to align its legal system with European Union standards, culminating in its accession to the EU in 2007. This period of transition involved the revision of the Constitution, the adoption of new codes, and the integration of international human rights standards.[10]

2. Roman Law in Romania

Roman law has left a profound and enduring legacy on the legal system of Romania. The introduction of Roman law in the region began with the Roman conquest of Dacia in 106 AD under Emperor Trajan. This marked the beginning of a period of significant Romanization, during which Roman legal principles, institutions, and practices were extensively implemented.

Roman law provided a structured legal framework that influenced various aspects of governance and daily life in Dacia, contributing to the region's integration into the Roman Empire.[11]

Public law in Roman Dacia encompassed regulations and norms governing the relationship between individuals and the state. This included administrative law, which structured the organization and functions of government entities, and constitutional law, which defined the powers of the emperor and other magistrates. Roman Dacia was administered by a governor appointed by the emperor, who exercised judicial and military authority. The implementation of Roman public law helped maintain order and facilitated the administration of justice in the province.[12]

Criminal law under Roman rule in Dacia was characterized by a well-defined system of penalties and legal procedures aimed at maintaining public order and deterring criminal behavior. Crimes such as theft, murder, and fraud were addressed through a combination of fines, corporal punishment, and imprisonment. The Roman legal system emphasized the protection of property rights and personal safety, with legal procedures ensuring that accusations were formally investigated and adjudicated. This structured approach to criminal justice had a lasting impact on the legal traditions of the region.[13]

Private law, encompassing areas such as property law, family law, and contract law, was another significant aspect of Roman legal influence in Dacia. The Roman legal system introduced the concept of private ownership, regulated inheritance, and formalized contractual agreements. Property rights were clearly defined and protected, facilitating economic transactions and the development of a stable society.

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[3] DIACONU, A., *Roman Law in the Province of Dacia*. Cluj, 1998; VERNEA, S.-A., *History of Romanian Law.* Bucharest, 2024.

[4] Download: tiparituriromanesti, https://www.scribd.com/doc/198206126/Carte-Romaneasca-de-Invatatura-1646.

[5] IORGA, N., *Byzantium after Byzantium*. Humanitas, 1995; TINU A., BOBOC, C., *History of the Romanian State and Law*, 3rd edition. Bucharest, 2022.

[6] CONSTANTINESCU, N., *Ottoman Influence on Romanian Law*. Bucharest, 1987; NEAGU, I., *History of Romanian Law*. Lugoj, 2014.

[7] IONESCU, C., *The Codification of Romanian Law.* Polirom, 2004; VERNEA, S.-A.

[8] For the law of Romania in the period of Communism see POSTOLACHE, M., p. 2748-2752; POLDNIKOV., D., *The formalistic pattern of Soviet Civil Codification as a Chapter in European Legal History.* In: *Journal on European History of Law,* Vol. 11, No. 1, 2020, p. 53-60, at 54, n. 9. For the legal history of informed consent in Communist Romania (related to family consent of China due to Confucianism) see JULESZ, M., The Legal History of Informed Consent. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 161-171, 161-163 (Romania).

[9] For post-communist law of Romania see for example BUBALO, L., CERKIC, S., Protection of the Right to Honor and Reputation-A Historical Overview. In: *Journal on European History of Law*, Vol. 13, No.1, 2022, p. 21-34, at 24, n. 48.

[10] POPESCU, I., *Romanian Law in Transition*. Trei, 2012; TINU A., BOBOC, C. For the law of Romania in the period of Communism see POSTOLACHE, M., p. 2748-2752.

[11] DIACONU, A. NEAGU, I.

[12] CĂLINOIU, C. VERNEA, S.-A.

[13] CONSTANTINESCU, N. NEAGU, I.

Family law governed marriage, divorce, and the rights of children, reflecting the societal values of the time.

The principles of Roman private law continued to influence local customs and legal practices long after the end of Roman rule.[14]

Commercial law under Roman rule was essential for regulating trade and commerce within Dacia and between the province and other parts of the Roman Empire. The legal framework included regulations on trade practices, commercial transactions, and the resolution of disputes.

The introduction of Roman commercial law facilitated economic integration and promoted commercial activities, contributing to the prosperity of the province.

This legal infrastructure supported the development of markets, trade routes, and economic relations that persisted even after the decline of Roman authority.[15]

The legacy of Roman law in Romania is evident in the enduring influence of Roman legal principles and structures.

The withdrawal of Roman forces from Dacia in 271 AD did not erase the impact of Roman law; instead, it became embedded in local traditions and continued to shape the legal landscape. Roman law served as a foundation for the development of medieval legal systems in the principalities of Wallachia and Moldavia, blending with local customs and later Byzantine and Slavic influences.[16]

Throughout Romanian history, Roman law has been a touchstone for legal reform and modernization. During the 19th century, the codification of Romanian law drew heavily on Roman legal traditions, particularly through the influence of the French Napoleonic Code, which itself was based on Roman law.

The adoption of the Civil Code in 1864 marked a return to the principles of Roman private law, emphasizing codification and legal clarity. The enduring legacy of Roman law in Romania underscores its significance in shaping the legal and cultural heritage of the nation.[17]

3. Byzantine Law in Romania

The influence of Byzantine law on Romania[18] is a critical chapter in the nation's legal history, reflecting the cultural and political interactions between the Byzantine Empire and the Romanian principalities of Wallachia and Moldavia. Byzantine law began to permeate the region following the withdrawal of Roman forces from Dacia in 271 AD and continued to shape Romanian legal traditions through the Middle Ages. The codification and systematic organization of laws during the Byzantine period provided a model for the development of legal frameworks in the Romanian principalities.[19]

Byzantine public law played a pivotal role in structuring the relationship between the state and its subjects in Romania. The principalities adopted various elements of Byzantine administrative and constitutional principles, including the centralized authority of the ruler and the organization of government offices. This legal framework was characterized by the integration of Christian values and Roman legal traditions, which emphasized the divine right of kings and bishops as judges[20] and the hierarchical structure of society. The adoption of Byzantine public law helped consolidate the power of local rulers and facilitated the development of a centralized administration.[21]

Criminal law in the Romanian principalities was heavily influenced by Byzantine legal codes such as the Ecloga and the Basilica. These codes introduced detailed regulations on various crimes and their corresponding punishments, ranging from fines and corporal punishment to more severe penalties such as mutilation and execution. The Byzantine legal tradition emphasized the protection of public order and moral conduct, reflecting the influence of Christian ethics.[22] This comprehensive approach to criminal justice provided a structured system for addressing offenses and maintaining societal stability.[23]

Commercial law under Byzantine influence was crucial for regulating trade and economic activities in the Romanian principalities. Byzantine legal principles provided a framework for commercial transactions, contracts, and the resolution of disputes. The protection of property rights and the enforcement of contractual obligations were central to Byzantine commercial law, facilitating the growth of trade and commerce in the region. The influence of Byzantine commercial law contributed to the economic development of Wallachia and Moldavia, promoting market activities and the establishment of trade routes.[24]

Civil law in the Romanian principalities also bore the imprint of Byzantine legal traditions. The regulation of family matters, inheritance, and property ownership was based on Byzantine codes, which combined Roman legal principles with Christian

[14] IONESCU, C.VERNEA, S.-A.

[15] POPESCU, I. TINU A., BOBOC, C. For the law of Romania in the period of Communism see POSTOLACHE, M.

[16] IORGA, N. TINU A., BOBOC, C.

[17] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.

[18] ŠARKIĆ, S., *The Influence of Byzantine Law in East Central Europe.* In: SÁRY, P., *Lectures on East Central European Legal History.* Miskolc. 2022, p. 41-63.

[19] IORGA, N. TINU A., BOBOC, C.

[20] For example, for the Mandatum of Magister Miklós, canon of Bishop of Gyulafehérvár (Alba Iulia/Romania), vicar of Tasnád (Tășnad/Romania) see BALOGH, E., Iurisprudentia in Medieval Ecclesiastical Jurisdiction. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 123-133, at 132.

[21] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.

[22] McGUCKIN, J., *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization.* New York, 2012. NIKOLTCHEV, D., The Church Law and the Civil Law in Byzantium: Two Parts of One Legal Order (Legal Schools). In: *Ius Canonicum,* Vol. XLII/84, 2002, p. 615-627, at 615: "*In fact, in the theory and the political ideology of Byzantium the existence of different juridical practices was impossible in that public and social reality. It did not refer to separate institutions (in the broad sense of the word), but to two aspects of the term church —one and inseverable, and to the Christian empire— an earthly image of the Kingdom of God. These were two inseparable aspects in the political and the theological thinking of the Byzantines*".

[23] CONSTANTINESCU, N.

[24] POPESCU, I. TINU A., BOBOC, C.

values[25]. Byzantine civil law emphasized the sanctity of marriage, the protection of family rights, and the orderly transfer of property through inheritance. This legal framework provided a stable and predictable system for managing private affairs, contributing to social cohesion and the stability of local communities.[26]

The court systems in Wallachia and Moldavia[27] were significantly influenced by Byzantine judicial practices. The structure and procedures of courts were modeled after Byzantine examples, with a clear hierarchy of judicial authority. Local courts handled minor disputes and criminal cases, while higher courts dealt with more serious matters and appeals. Judges were often drawn from the local nobility and clergy, reflecting the integration of secular and religious authority in the judicial process. The influence of Byzantine judicial principles ensured a degree of legal uniformity and consistency in the administration of justice.[28]

"In the mediaeval codes of law, marriage was regulated according to the Byzantine law which in turn retained many elements from the Roman law. It did not have a solemn character and there was no civil institution to perform it or to issue a written civil act to certify the marriage between the spouses. During the Middle Ages marriage was contracted only in front of religious authorities, in respect of the basic condition imposed by the religious codes of law, by the Byzantine laws, the codes of law in force and the customs.

The husband had obligations such as: to assist his wife and provide medical care if she was taken ill and to support his wife. In the old Romanian customary law, marriage affected patrimonial relations. Such effects were grounded in the principle of inequality between sexes, as the codes and custom bestowed on the husband more rights than on the woman. Hence, the entire mediaeval matrimonial system bestowed on the husband the right to administrate the entire income during the marriage period".[29]

The enduring impact of Byzantine law on Romania is evident in the legal traditions that persisted partly into the modern era. The synthesis of Roman, Byzantine, and local legal practices created a unique legal heritage that continued to influence Romanian law even after the fall of the Byzantine Empire. The codification efforts in the 19th century, which drew on Byzantine legal principles, underscored the lasting significance of this influence.

Byzantine law provided a foundation for the development of a coherent legal system in Romania, contributing to the nation's legal and cultural identity.[30]

4. Law of Romania during Ottoman times

The influence of Ottoman law on Romania, particularly in the principalities of Wallachia and Moldavia, is a significant aspect of the region's legal history. The Ottoman Empire's dominion over these principalities from the 15th to the 19th centuries introduced a complex interplay between local traditions and Ottoman legal principles. Although the principalities maintained a degree of autonomy and their own local laws, the Ottoman influence permeated various aspects of public administration, criminal justice, commercial regulations, civil law, and the court system.[31]

Public law under Ottoman rule in the Romanian principalities involved the incorporation of Ottoman administrative practices and tax systems. The principalities were governed by local princes (*'voivodes'*) who were appointed with the approval of the Ottoman Sultan. These rulers were responsible for collecting taxes and tributes for the Ottoman Empire, which required the implementation of Ottoman fiscal policies. This integration of Ottoman public law ensured the principalities' loyalty and financial contribution to the empire while allowing them a measure of self-governance.[32]

Criminal law in Wallachia and Moldavia during the Ottoman period reflected a blend of local customs and Ottoman legal principles. The Ottomans introduced their own legal concepts and penalties for various crimes, which were often harsher and more systematized than local practices. Punishments for crimes such as theft, murder, and rebellion could include fines, corporal punishment, and execution. The Ottoman legal system aimed to maintain public order and deter criminal behavior through strict enforcement and visible penalties, which impacted local legal practices.[33]

Commercial law was significantly influenced by the Ottoman legal framework, which regulated trade and economic activities across the empire. The principalities adopted Ottoman commercial laws to facilitate trade within the empire and with other regions. These laws covered aspects such as trade contracts, debt repayment, and the resolution of commercial disputes. The integration of Ottoman commercial law helped standardize trade practices and promoted economic stability and growth in Wallachia and Moldavia, contributing to the prosperity of the principalities.[34]

Civil law in the Romanian principalities was also shaped by Ottoman influence, particularly in areas such as family law, inheritance, and property rights. Ottoman legal principles were

[25] The Church also established charitable institutions and hospitals/ 'xenodochium'. For Hungary and Romania see FALUS O., The 'Hungaricum' of the Crusader Orders: the Order of St Stephen. In: *Journal on European History of Law*, Vol. 13, No. 2, 2022, p. 129-137, 129.
[26] IONESCU, C.VERNEA, S.-A.
[27] For Transylvania see CSERVAK, C., The Constitutional Development of Transylvania. In: *Journal on European History of Law*, Vol. 14, No. 2, 2023, p. 97-103.
[28] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.
[29] ASANDULUI, G., The Institution of Marriage in Old Romanian Law. In: *Juridica*, 2009, p. 132-133.
[30] IORGA, N. McGUCKIN, J. NIKOLTCHEV, D.
[31] CONSTANTINESCU, N.
[32] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.
[33] DIACONU, A. NEAGU, I.
[34] POPESCU, I. TINU A., BOBOC, C.

integrated with local customs, resulting in a hybrid legal system. Family law under Ottoman influence emphasized patriarchal authority and the protection of family honor, while inheritance laws ensured the distribution of property according to both local traditions and Islamic principles. This synthesis of legal norms created a unique civil law framework in the principalities.[35]

The court systems in Wallachia and Moldavia under Ottoman rule were characterized by the coexistence of local and Ottoman judicial practices. Local courts continued to operate, handling minor disputes and criminal cases, while more significant matters could be referred to Ottoman judicial authorities. The kadis, or Islamic judges, played a crucial role in the administration of justice, particularly in commercial and family law cases. This dual judicial system allowed for a degree of local autonomy while ensuring compliance with Ottoman legal standards.[36]

The lasting impact of Ottoman law on Romania is evident in the continued influence of Ottoman legal principles and administrative practices even after the decline of Ottoman power in the region. The integration of Ottoman and local legal traditions created a distinctive legal culture that persisted into the modern era. The reforms and codifications of the 19th century, which sought to modernize Romanian law, were built upon this complex legal heritage, reflecting the enduring legacy of Ottoman rule in shaping the legal and administrative landscape of Romania.[37]

5. Family and divorce law in Romania from Roman to Ottoman times

The evolution of family and divorce law in Romania from Roman times to the Ottoman era showcases a rich tapestry of legal influences and adaptations. During the Roman occupation of Dacia (106-271 AD), Roman family law heavily influenced local customs and legal practices. Roman family law was structured around the principles of *pater familias*, where the male head of the family held significant authority over family members. Marriage, divorce, inheritance, and guardianship were regulated under Roman civil law, which emphasized the legal and social responsibilities of the family unit.[38]

In Roman Dacia, marriage was a civil contract, and its validity required formal consent from both parties and their families. Marriages were classified into two types: *cum manu* (under the husband's authority) and *sine manu* (retaining the wife's independence). Divorce was relatively straightforward under Roman law and could be initiated by either party for various reasons, including infidelity, infertility, or mutual consent. The Roman legal system allowed for a relatively progressive approach to family law, with both men and women having defined rights and responsibilities.[39]

With the withdrawal of Roman forces and the subsequent periods of migration and settlement, local customs began to intertwine with the remnants of Roman legal principles. During the early medieval period, the influence of Byzantine law began to take hold in the Romanian principalities. Byzantine family law was heavily influenced by Christian doctrine, which emphasized the sanctity of marriage and the family unit. Marriages were now seen not only as civil contracts but also as sacred unions. Divorce became more restricted, primarily allowed on grounds such as adultery, abandonment, and incapacity.[40]

Under Byzantine influence, family law in the principalities of Wallachia and Moldavia became more codified and aligned with Orthodox Christian teachings. The church played a significant role in regulating marriage and divorce. Marriages required the blessing of the church to be considered valid, and ecclesiastical courts had jurisdiction over marital disputes and divorces. This period marked a shift towards greater religious oversight in family matters, reinforcing the idea of marriage as a lifelong commitment.[41]

"In the mediaeval codes of law, marriage was regulated according to the Byzantine law which in turn retained many elements from the Roman law. It did not have a solemn character and there was no civil institution to perform it or to issue a written civil act to certify the marriage between the spouses. During the Middle Ages marriage was contracted only in front of religious authorities, in respect of the basic condition imposed by the religious codes of law, by the Byzantine laws, the codes of law in force and the customs. The old regulations contain a number of principles that to this day lie at the basis of the institution of marriage: the principle of monogamy and of free consent. Old Romanian law retained, however, the woman's inferior status, as she was considered incapable and less intelligent than the man. As for the absolute impediments, the codes of law enjoined certain basic conditions: the consent of the parties and of the parents. Also, if there had been a previous marriage, this had to be annulled; a fourth marriage was not permitted. The breach of any of these conditions affected the marriage through absolute nullity. From among the relative impediments that prevented marriage between two persons, the old code of laws included: age, unbroken betrothal of previous marriage, non-observance of the one-year mourning period, of relationship, of guardianship, of difference in terms of religion. Regarding the effects of marriage, old Romanian law enjoined both reciprocal and unilateral obligations; some of the reciprocal obligations were: fidelity, the care of parents for their children and of the children for their parents. The unilateral obligations were those that applied to spouses individually. Most of them applied to both spouses, while others applied only to one of them. Some of the wife's obligations were: the obligation to

[35] IONESCU, C.VERNEA, S.-A.
[36] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.
[37] CONSTANTINESCU, N.
[38] DIACONU, A. NEAGU, I.
[39] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.
[40] IORGA, N. McGUCKIN, J. NIKOLTCHEV, D.
[41] IONESCU, C.VERNEA, S.-A.

obey her husband, the obligation to cohabit with her husband and to follow him, the obligation to wait for the husband who had gone to war, had been taken prisoner or even that who left the marital residence and lived elsewhere with another woman. The husband had obligations such as: to assist his wife and provide medical care if she was taken ill and to support his wife. In the old Romanian customary law, marriage affected patrimonial relations. Such effects were grounded in the principle of inequality between sexes, as the codes and custom bestowed on the husband more rights than on the woman. Hence, the entire mediaeval matrimonial system bestowed on the husband the right to administrate the entire income during the marriage period. In the old Romanian customary law, marriage was subject to the interests resulting from the existence of private property; consequently, the consent of both parties to marriage was often not a genuine one since the parents had the right to disinherit their sons if they married without parental consent. Old Romanian customary law would govern the institution of marriage until the dawns of modern age. Certain features would be still retained in the codes belonging to the Phanariot age and the age of the Regulations. The Civil Code of 1865[42] would become the modern legal norm to govern the institution of marriage up to the middle of the 20th century".[43]

The Ottoman period (15th to 19th centuries) introduced another layer of complexity to family and divorce law in Romania. The Ottoman legal system, based on Islamic principles and the *Sharia*, influenced local customs and practices. In the Romanian principalities, family law continued to be governed by local traditions and the Orthodox Church, but Ottoman legal concepts also began to permeate. Polygamy, though rare among Christians, was permitted under Ottoman law for Muslims, and Islamic principles sometimes influenced divorce practices.[44]

Divorce under Ottoman influence in the Romanian principalities remained relatively rare and was still primarily regulated by the church. The Orthodox Church's stringent view on the indissolubility of marriage often clashed with the more flexible Ottoman approach.

However, civil authorities sometimes granted divorces in cases of severe marital discord or when sanctioned by both the church and the local Ottoman administration. This dual influence created a unique legal environment where religious and secular authorities shared jurisdiction over family law matters.[45]

Throughout these periods, the evolution of family and divorce law in Romania reflects the interplay of various legal traditions and cultural influences.[46]

From the structured Roman legal framework to the religiously infused Byzantine principles and the layered complexity of Ottoman rule, each era contributed to shaping the legal landscape of family and divorce law. These historical layers provided a foundation for the modern Romanian legal system, which continued to evolve in response to changing social[47] and political contexts.[48]

6. Family law in Greece and Romania

Family law in Greece from Roman times to the Ottoman era shares several parallels with the evolution of similar laws in Romania, reflecting the broader legal and cultural influences of the region. During Roman rule, family law in Greece was characterized by the authority of the *pater familias*, the male head of the household, who held significant control over family members. Roman law established marriage as a civil contract, where consent was crucial, and provided relatively straightforward procedures for divorce, allowing either party to dissolve the marriage under certain conditions, such as infidelity, infertility, or mutual consent.[49]

Similar to Romania, Roman law in Greece emphasized the legal and social responsibilities of family members. Under Roman law, marriages in Greece were classified as *cum manu* (where the wife came under the husband's authority) and *sine manu* (where the wife retained her independence). This Roman legal framework provided a structured approach to family law, emphasizing the rights and duties of both men and women within the household. Divorce procedures were regulated to ensure legal and social responsibilities were maintained. Divorce was accessible, focusing on reasons like infidelity or mutual consent. These principles, ensuring a degree of consistency in legal principles across the Roman Empire, laid a foundational structure that influenced Greek legal practices long after the decline of Roman political control.[50]

With the advent of the Byzantine Empire, both Greece and Romania saw significant shifts in family law under the influence

[42] A few years earlier, in 1849, an important peace agreement had been signed between Hungarians and Romanians in Transylvania (14 July). Religious rights were granted to the Romanians of Transylvania. CSERVAK, C., FARKAS, G. T., Development of the Nationality Law of Hungary. In: *Journal on European History of Law*, Vol. 11, No. 1, 2020, p. 145-151, at 146-150.

[43] ASANDULUI, G., The Institution of Marriage in Old Romanian Law. In: *Juridica*, 2009, p. 132-133.

[44] CONSTANTINESCU, N.

[45] POPESCU, I. TINU A., BOBOC, C.

[46] For the interesting case of the Romanian State refusing to pay a pension to a widow in 1923 see JOO, L. A., Under Duress or Coercion. Special Land Registry Cancellation Lawsuits after the Second Vienna Award. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 150-160, at 155. "*Under the terms of the Second Vienna Award, announced on August 30, 1940, Hungary (re)annexed the northern part of Transylvania, as well as Romanian territories to the west and north of it, a total of more than 43,000 km*^{2}*. The Hungarian Parliament approved Act XXVI of 1940 on the return of the eastern and Transylvanian parts of the country freed from Romanian rule to the Hungarian Holy Crown and their unification with the country, and authorized the government to take all measures necessary to integrate the entire legal system of the annexed territory into the existing legal system of Hungary.*" JOO, L.A., 150.

[47] For the law of Romania in the period of Communism see POSTOLACHE, M., Developments of the Romanian State and Law in the Period of Communism. In: *International Journal of Social Science and Human Research*, Vol. 7, No. 5, 2024, p. 2748-2752.

[48] CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.

[49] DIACONU, A. NEAGU, I. EVANS, J.A.S., *The Age of Justinian: The Circumstances of Imperial Power*. London, 1996.

[50] POMEROY, S. B., *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity*. New York, 1995.

of Christian doctrine. In Greece, Byzantine law heavily integrated Christian values, emphasizing the sanctity and indissolubility of marriage. The church's authority in marital matters grew, requiring ecclesiastical approval for marriages and divorces. Divorce became more restricted reflecting the church's influence on legal practices. Byzantine legal codes such as the Ecloga and the Basilica provided a comprehensive legal framework for family law, reflecting a blend of Roman legal traditions and Christian ethical principles.[51]

In Romania, the influence of Byzantine law similarly emphasized the sacred nature of marriage, with the Orthodox Church playing a pivotal role in regulating family matters. The ecclesiastical courts had jurisdiction over marital disputes, mirroring the situation in Greece where the church's involvement in family law reinforced the concept of marriage as a lifelong commitment. Divorce became, as mentioned above, more restricted, generally permitted only on grounds such as adultery or abandonment or incapacity, showcasing a convergence in legal practices influenced by Byzantine legal traditions in both regions.[52] This period marked a shift towards greater religious oversight in family law, reinforcing the idea of marriage as a sacred and lifelong commitment. The church's involvement ensured that family law was deeply intertwined with Christian doctrine both in Romania and in Greece.[53]

The Ottoman conquest of Greece in the 15th century introduced another layer of legal influence. Under Ottoman rule, Islamic principles from the *Sharia* began to permeate local legal systems. Although the Greek Orthodox Church retained significant authority over family law for Christians, the Ottomans introduced their own legal concepts and practices. Polygamy was permitted for Muslims, and divorce procedures could be more flexible compared to the stringent requirements of Christian doctrine. In Ottoman Greece, as in Romania, the local Orthodox Church continued to regulate marriage and divorce for the Christian population, maintaining a degree of continuity with Byzantine practices. This duality created a unique legal environment where both Ottoman and local traditions coexisted.[54]

In Romania, as in Greece, the integration of Ottoman legal principles into family law created a unique legal environment where both Ottoman and local traditions coexisted. The Orthodox Church continued to dominate marital regulations for Christians, but Ottoman authorities also influenced divorce practices, sometimes allowing civil authorities to grant divorces in cases of severe marital discord. This duality in legal influence mirrors the situation in Greece and in Romania, where local customs, religious doctrines, and Ottoman law intermingled to shape family and divorce law.[55] The Ottoman influence allowed for civil authorities to have a say in marital disputes and divorces in certain cases, especially among Muslims. The Orthodox Church in Greece and Romania had a strong influence on marital rules for Christians. Thus, this dual influence of religious and secular authorities ensured that family law both in Romania and in Greece was a blend of Orthodox Christian principles and Ottoman legal practices, reflecting the complex socio-political landscape of the period.[56]

In conclusion, the evolution of family and divorce law in Romania and in Greece from Roman times through the Byzantine and Ottoman periods showcases a dynamic interplay of legal traditions and cultural influences. Both regions experienced the foundational impact of Roman law, the transformative influence of Byzantine Christian principles, and the complex legal environment under Ottoman rule. From the structured Roman legal framework to the religiously infused Byzantine principles and the layered complexity of Ottoman rule, each era contributed to shaping the legal landscape of family and divorce law in Greece. These historical layers provided a foundation for the modern Romanian and the Greek legal systems, which continued to evolve in response to changing social and political contexts.[57]

7. Concluding remarks

The legal history of Romania is related to Roman Law, Byzantine Law and Ottoman Law which applied also to Greece. Roman family law and Byzantine family law in Romania and in Greece along with the Christian Orthodox rules and ethics shaped common values in both regions. Despite regional variations, the comparative development of family and divorce law in Romania and in Greece reflects broader patterns of legal and cultural continuity and change generally in southeastern Europe.

[51] EVANS, J.A.S., *The Emperor Justinian and the Byzantine Empire*. Westport, Connecticut, 2005. McGUCKIN, J. NIKOLTCHEV, D.
[52] LAIOU, A. E., *Byzantium and the Transformation of the Roman World*. Harvard, 2001; IONESCU, C.
[53] EVANS, J.A.S., *The Emperor Justinian and the Byzantine Empire*. Westport, Connecticut, 2005; McGUCKIN, J. NIKOLTCHEV, D.
[54] GEROLYMATOS, A., *The Ottoman Empire and the Greek War of Independence*. Montreal, 2003.
[55] PHILLIOU, C. M., *Biography of an Empire: Governing Ottomans in an Age of Revolution*. California, 2011.
[56] LAIOU, A. E. PHILLIOU, C. M. GEROLYMATOS, A.
[57] LAIOU, A. E. EVANS, J.A.S. CĂLINOIU, C. VERNEA, S.-A. TINU A., BOBOC, C. NEAGU, I. GHEORGHE, S. DARIESCU, C. ASANDULUI, G.

Der Ehekonsens als Mittel zur Bekämpfung der Armut? Das „lange Leben“ der Ehebewilligung in der Habsburgermonarchie*

(Marriage Consent as a Means of Poverty Reduction? The „Long Life“ of Marriage Licenses in the Habsburg Monarchy)

*Zdeňka Stoklásková***

Abstract

The article focuses on the little-discussed issue of marriage approval for Austrian citizens in the Habsburg monarchy from the time of Empress Maria Theresa until the end of the monarchy, in terms of poor relief. The so-called political marriage consent, as marriage approval was called in the 19th century, underwent different developments over time and space. In some crown lands, marriage consent was not applied, while in others, especially poorer regions like Tyrol, it was practiced as an obstacle to marriage, with the aim of preventing the growth of the poor population. The article attempts to challenge the usual interpretation of the abolition of serfdom as the liberation from manorial power over marriage. Marriage was supposed to be free since the year 1781 (according to the intention of the patent on the abolition of serfdom), yet the author demonstrates the continued application of marriage consent in some crown lands of the Habsburg monarchy. The ‚long life‘ of the marriage consent was only ended by its abolition in the years 1867–1871.

Keywords: *Marriage consent; Marriage consent tax; Regulation of Marriage; Poverty; Pauperism; Solving poor welfare; Poor Care; General Civil Code; Military service; Serfdom; The Patrimonial system; 19th Century; Habsburg monarchy.*

1. Einführung

Die Festigung der Leibeigenschaft nach dem Dreißigjährigen Krieg manifestierte sich lediglich in der Wiederholung älterer Vorschriften, die die Wiederverheiratung von verwitweten Untertaninnen in andere Herrschaften ohne die Bewilligung der Herrschaftskanzlei untersagten. Es wurde zur Regel, dass das Heiraten aller Untertanen, unabhängig von deren Stellung, der herrschaftlichen Bewilligung unterlag, allerdings finden sich keine Beweise dafür, dass eine ohne den Konsens geschlossene Ehe für ungültig erklärt worden sei, lediglich von finanziellen Sanktionen ist die Rede.[1]

Welche Gründe hatte der verpflichtende Heiratskonsens?[2] Entsprechende Abgaben (und die in diesem Kontext vermutete Korruption herrschaftlicher Beamter) stellten zweifellos eine regelmäßige Einnahmequelle dar, ebenso sollte damit die personelle Abhängigkeit der Leibeigenen von ihrer Herrschaft und der Willkür ihrer Beamten gefestigt werden.[3] Eine wichtige Rolle spielte die Person des Leibeigenen als Arbeitskraft, die für die Herrschaft elementare Bedeutung besaß, wobei eine Entlassung der eigenen Leibeigenen nach dem Prinzip der Reziprozität geschah. Die Willkür herrschaftlicher Beamter stellte häufig wohl ein Hindernis für eine Eheschließung dar.[4]

Dagegen sprechen die sogen. Generalia des Fürsten Adam Schwarzenberg (1680–1732), der auf seinen südböhmischen Herrschaften seinen Beamten die Befugnis zur Erteilung von Heiratsbewilligungen entzog, um selbst bei „unpossionierten Leuten, die keine Nahrung haben und sich nicht anders, als mit Taglöhnerarbeit zu ernähren wissen“, zu entscheiden. Die damit verbundene Absicht bestand darin, eine „grosse Ueberhäuffung der Inleute“ zu verhindern, „da sie sich aus Mangel anderer Nahrung auf die Dieberei und andere böse Stück verlegen“.[5] Witwen mit Kindern, die sich wieder verehelichen wollten, waren vom Gesuch um den Heiratskonsens ausgenommen. Ebenso sollte der Konsens an Personen erteilt werden, das heißt konkret: er konnte nicht verweigert werden, wenn die Braut bereits schwanger war.[6]

* Der Beitrag entstand im Rahmen des Projekts der Forschungsagentur Grantová agentura ČR GA21-07473S *„Der Schub und die Armenfürsorge in der österreichischen Monarchie 1780–1850: die Bemühung um die systematische Lösung der Armenfrage“*. Der Projektträger war die Masaryk-Universität, Brno.

** PhDr. Zdeňka Stoklásková, Ph.D., Institut für Geschichte, Philosophische Fakultät, Masaryk-Universität, Brünn, Tschechische Republik, E-Mail: stoklas@phil.muni.cz / ORCID 0000-0002-2469-5527.

1 KROFTA, K., *Dějiny selského stavu*. Praha, 1949, S. 208-209.

2 In den Quellen werden synonyme Begriffe benutzt: Ehekonsens, Heiratskonsens, Ehebewilligung, Ehelizenz, Heiratslizenz, Traukonsens, Vermählungsschein und Copulierschein. Dagegen müssen die Termini Ehemeldzettel (Ehemeldungszettel), Ehelichungsmeldungszettel, Meldungsschein, Trauungsmeldzettel und Meldzettel (Meldungszettel) nicht mit dem Ehekonsens identisch sein, zumal sie auch die Tatsache des Umzugs der betreffenden Person mit beinhalten können.

3 KLABOUCH, J., *Politický konsens k manželství v Čechách. Z novějších dějin manželství v našich zemích*. Praha, 1960, s. 5.

4 SALABA, J., Bylo v českých zemích poddanství či nevolnictví? In: *Časopis pro právní a státní vědu*, Jg. 9, Nr. 3, S. 184-201, hier 187-188.

5 *Archiv Český čili staré písemné památky české i moravské*. Sebrané z archivů domácích i cizích. Bd. XXIV, Nr. 384. Praha, 1908, S. 135-136.

6 Ebenda.

2. Maria Theresia als die Ehe fördernde Landesmutter

Weder die Verhinderung von Eheschließungen noch die Willkür herrschaftlicher Beamter lassen sich in (in meiner Forschung) zumindest für die zweite Hälfte des 18. Jahrhunderts und für das 19. Jahrhundert belegen. Für die Regierungszeit Maria Theresia finden sich keine dergestalt verhinderten Eheschließungen. Bereits im Jahre 1753 befahl die Herrscherin den Obrigkeiten: „Den Untertanen soll zu ihrer Verehelichung der obrigkeitliche Konsens willig erteilet, denselben hierzu keine hauptsächliche Hinderung, ja vielmehr alle Beförderung gemachet, zur besseren Unterhaltung aber derley Neuverehelichten die besitzende, besonders erkaufte Gründe zertheilet, und nicht selbsten wider die Generalien an sich gezohen (…)“ [7] Zehn Jahre später ließ die Monarchin ein Dekret veröffentlichen, demzufolge die Ehekonsenstaxe dem jeweiligen Vermögensstand entsprechen sollte. Auf jeden Fall sollten die Ehekonsenstaxen keinen Hinderungsgrund für eine Eheschließung darstellen. Die Absicht des Dekrets bestand darin, den Stand der Population in der Monarchie zu halten, zumal man festgestellt hatte, Verlobte würden eher ins Ausland gehen, um zu heiraten, damit sie nicht die Ehekonsenstaxe entrichten mussten. Das in einigen nicht genannten Herrschaften verlangte sog. Schleiergeld in Höhe von drei Gulden, wurde von Maria Theresia als willkürlich bezeichnet und sollte abgeschafft werden.[8]

Im Jahre 1765 erfolgte die Einführung einer festen Ehekonsenstaxe. „Die Herrschaften sollen einem jeden ihrer Untertanen, so die Erlaubnis zur Verheirathung begehren, den Konsens unweigerlich ertheilen, und für diesen mehr nicht als 30 kr. für jede Person abgenommen werden.“ [9] Das Hofdekret untersagte nicht allein das Verweigern, sondern auch die Verzögerung des Ehekonsenses. Die Summe von 30 Kreuzern galt als nicht besonders hoch und entsprach etwa – abhängig von der Region, in der sie konsumiert wurde – einer sechstägigen Portion für Arme; die festgeschriebene Taxe bot zudem keinen Raum für Korruption. Die an die Kirche zu entrichtenden Stola-Abgaben für eine Eheschließung fielen hingegen unterschiedlich aus: in Böhmen betrugen sie 20, in Galizien 15 Kreuzer, in den österreichischen Ländern jedoch einen Gulden.[10]

Kaum bekannt ist die Aufhebung der Ehelizenztaxe in Dominien, in denen das Robotabolitions-System eingeführt wurde, also in Herrschaften, in denen man die Robotpflicht abgeschafft hatte.[11] Dies geschah auf der rechtlichen Grundlage eines freiwilligen Abkommens des Dominialherrn mit seinen Untertanen, was bei den meisten Reformen des Grafen Raab geschah. Untertanen in Galizien genossen in der Frage der Verehelichung größere Freiheiten; volljährige Personen konnten ungehindert die Ehe schließen, der Ehekonsens durfte nicht verweigert werden und musste im Unterschied zu anderen Ländern kostenlos ausgestellt werden.[12]

Die problembehaftete Verehelichung von Soldaten fand ebenfalls Unterstützung: „Da es Ihre Majestät landesmütterliche Gesinnung ist, daß die Heirathen zwischen unterthänigen Weibspersonen und Soldaten nicht nur nicht erschweret, sondern im Gegentheile zu besten der Monarchie in alle Wege erleichtert werden sollen; so versehen sich Allerhöchstdieselbe gegen sämmtliche Obrigkeiten dieses Königreichs, daß sie beeifert seyn werden, diese Landesmütterliche das Wohl des Staates zum Gegenstande habende Absicht ihres Orts auf alle Art und Weise zu unterstützen.“ [13]

Die Eheschließung von Juden unterlag speziellen Vorschriften, die unter der Regierung des Kaisers Karl VI. erlassen wurden und die bis zum Jahre 1849 galten. Zur Eheschließung wurden in einigen Kronländern (u. a. Böhmen, Mähren und Österreichisch Schlesien, wo die meisten Juden innerhalb der Habsburgermonarchie lebten) lediglich sog. Familianten zugelassen. Anderen Juden war eine Heirat offiziell untersagt. Die sog. Familianten-Nummer, die unter anderem die Erlaubnis zu heiraten enthielt, wurde innerhalb der Familie vom Vater an den Sohn vererbt; andere Söhne erhielten in der Regel keinen Heiratskonsens. Ausnahmen vom jüdischen Heiratskonsens waren sehr kostspielig und hingen vom Besitz des Bräutigams bzw. der Brautleute ab.[14] Jüdische Familianten entrichteten die übliche Heiratstaxe, mussten jedoch seit der Zeit des Josephinismus spezielle Bedingungen erfüllen. Hierzu zählten die vorgeschriebene Prüfung der Deutschkenntnisse bei beiden Verlobten, was als Nebenprodukt zur wesentlichen Hebung der Bildung jüdischer Frauen beitrug.

In Theresianischer Zeit unterlag das Eherecht noch – mit Ausnahme des Besitzrechts – der Jurisdiktion der Kirche. Der Codex Theresianus ging noch vom kanonischen Recht aus, das um zivilrechtliche Bestimmungen ergänzt wurde. Die wichtigste Einschränkung stellte gerade der obrigkeitliche Konsens dar, der bei der Vorbereitung des Codex Theresianus den Gegen-

[7] Reskript vom 17. Februar 1753. JAKSCH, P. K., *Gesetzlexikon im Geistlichen, Religions- und Toleranzfache, wie auch in Güter-, Stiftungs-, Studien- und Zensursachen für das Königreich Böhmen von 1601 bis Ende 1800*, Bd. 2. Prag, 1828, S. 45.

[8] Hofdekret vom 24. Juli 1773. JAKSCH, P. K., *Gesetzlexikon im Geistlichen, Religions- und Toleranzfache* (…), Bd. 2, S. 63.

[9] Ebenda, S. 62.

[10] KOPETZ, W. G., *Österreichische politische Gesetzkunde, oder systematische Darstellung der politischen Verwaltung in den deutschen, böhmischen und galizischen Provinzen des österreichischen Kaiserthumes*. Bd. 1, Wien, 1807, § 122, S. 102.

[11] Patent vom 15. Mai 1779. JAKSCH, P. K., *Gesetzlexikon im Geistlichen, Religions- und Toleranzfache* (…), S. 61.

[12] KOPETZ, W. G., *Österreichische politische Gesetzkunde* (…), Bd. 1, § 117, 118, S. 97-98.

[13] Hofdekret vom 27. Dezember 1766. JAKSCH, P. K., *Gesetzlexikon im Geistlichen, Religions- und Toleranzfache* (…), S. 46.

[14] Die Taxe der Ehebewilligung für jüdische Brautleute in Form der Dispensierung vom Familiantengesetz war vom Besitz des Bräutigams bzw. der Brautleute und vom Land abhängig. Sie bewegte sich zwischen zehn und 1000 Gulden in Böhmen, in Mähren betrug sie ein Prozent vom Besitz der Brautleute, in Schlesien drei Prozent vom Besitz des Bräutigams. GRAßL, I., *Das besondere Eherecht der Juden in Österreich nach den § 123-126 des Allgemeinen Bürgerlichen Gesetzbuches*. 2. Auf., Wien, 1849; KLABOUCH, J., Zvláštní manželské právo osob židovského vyznání v letech 1783-1945. In: *Právněhistorické studie*, Jg. 5, 1959, S. 175-210.

stand intensiver Diskussionen bildete.[15] „Jene Personen, denen Wir wegen der gemeinen Wohlfahrt, wegen einer gewissen Eigenschaft, oder wegen anderer Umstände, worinnen sie sich befinden, keine Heirat einzugehen verstatten, sind zwar befugt, sich in ein giltiges Eheversprechen einzulassen, doch muß die Erfüllung desselben insolange aufgeschoben bleiben, als die besagte Eigenschaft oder Umstände fürdauern, und solle diesfalls Unseren ergangen politischen Anordnungen auf das Genaueste nachgelebet werden.[16] Der Kreis derjenigen Personen, denen „wegen der gemeinsamen Wohlfahrt" kein Ehekonsens erteilt werden sollte, wird nicht weiter spezifiziert, jedoch waren vermutlich Menschen gemeint, die ihre Ernährungsquelle nicht nachzuweisen vermochten.

Ob man damit Personen jüdischen Glaubens, Invaliden und Soldaten meinte, wie einige Autoren glauben,[17] ist nicht ganz eindeutig. Soldaten und Militärinvaliden unterlagen speziellen Gesetzen, ebenso Juden, die ohnehin nicht ohne die Familianten-Stelle (in den böhmischen Ländern) heiraten konnten, ausgenommen freilich spezielle Fälle – etwa die Konversion von Juden zum Christentum, der Eintritt von Juden in die Armee usw. Ausnahmen bei der Erteilung des Ehekonsenses für Juden oblagen der Befugnis des Landes und waren an die Zustimmung der Herrschaft gebunden.

Ein umstrittener Grund für die Verhinderung des Ehekonsenses blieb der angebliche Mangel an billigen Arbeitskräften auf dem Lande. Knechten mit Familien mögen höhere Löhnen gezahlt werden als unverheirateten Knechten. Welche Rolle in diesem Kontext die Wohnungsnot spielte, lässt sich mit Blick auf den aktuellen Forschungsstand nur schwer beurteilen, zumal sich dieses Problem auch bei mäßig bemittelten, jedoch kinderreichen Bauernfamilien als exorbitant wichtig erwies. Jüngere Geschwister des Bauern sahen sich genötigt, anderorts eine Ernährungsquelle und ein Obdach zu suchen, was partiell das Raab'sche System hätte lösen können. Die Einführung des letzteren unterlag allerdings der Freiwilligkeit. Zwar hatte Maria Theresia die Einführung des Raab'schen Systems empfohlen, doch besaß sie andererseits keine rechtliche Macht, die Wirtschaftsführung der einzelnen Herrschaften auf deren eigenem Besitz zu steuern. Auf dem Familienbesitz der Familie Habsburg-Lothringen hingegen wurde das Raab'sche System – ebenso wie auf den säkularisierten Gütern – eingeführt.

Aus der Arbeit der Kompilations-Kommission des Codex Theresianus wird klar ersichtlich, dass ein nicht vorhandenes Vermögen zu den wichtigen Kriterien für eine Verhinderung des Ehekonsenses zählte. „Die offenbare Unvermögenheit der künftigen Eheleute sich und ihre Kinder durch Dienstleistung, Handarbeit, Handel und Gewerb oder auf sonstige redliche Weise zu ernähren, woraus vorzusehen wäre, daß sie der Herrschaft, denen Mitunterthanen und selbst dem gemeinen Wesen zur Last gereichen würden.[18] Der Codex Theresianus bot in der Frage des Ehekonsenses den Kronländern und den hier üblichen Gewohnheiten. viel Spielraum. „Desgleichen, wo es die Landesverfassung mit sich bringet, daß einem Unterthan sich ohne Einwilligung seiner Herrschaft zu verehelichen nicht erlaubet seie, da lassen Wir es noch ferners dabei bewenden, doch solle sothane Einwilligung denen Unterthanen von der Herrschaft ohne genugsamer Ursache nicht verweigeret, sondern vielmehr die Heirathen des gemeinen Volks, wann die zusammen Heirathende anderst sich zu nähren im Stande sind, und der Herrschaft kein Schaden und Nachtheil hieraus erwachset, nach Unseren anderweiten Verordnungen in Absicht auf den aus der mehreren Bevölkerung erzielenden gemeinsamen Nutzen auf alle thunliche Weise erleichteret werden."[19] Bei den nicht näher spezifizierten Personen, denen der Ehekonsens verweigert oder nicht erteilt werden sollte, handelte es sich höchstwahrscheinlich um Personen, die nicht für ihren Lebensunterhalt sorgen konnten, wobei auf der Grundlage späterer Gesetze angenommen werden darf, dass die betreffenden Personen weder ihre Ernährungsquelle noch vorhandenen Besitz nachweisen mussten, sondern es lediglich den Willen zu artikulieren galt, sich auf eine bestimmte Art und Weise ernähren zu können.

3. Der Josephinische Pragmatismus

Eine große Änderung in der Frage des Ehekonsenses brachte der Josephinismus mit sich, unter dem drei wichtige Regelungen publiziert wurden: die Aufhebung der Leibeigenschaft (1781), das Ehepatent (1783) und das Allgemeine Bürgerliche Gesetzbuch (1786). Die Aufhebung der Leibeigenschaft am 1. November 1781 spielte eine wesentliche Rolle in der Frage der persönlichen Freiheit von Untertanen. Traditionell wird dieses Patent als die Aufhebung der Macht der Herrschaften interpretiert, der ehemalige Leibeigene konnte fortan an persönlich frei sein. In der Praxis hingegen war die persönliche Freiheit weiterhin begrenzt.

„Über die meisten österreichischen Provinzen ehemals verbreitetes, und auf die zahlreiche Volksclasse höchst schädlich wirkendes Hindernis der Ehe war die Leibeigenschaft. Dieses, aus einem rechtlosen Zeitalter abstammende Verhältnis hemmte nicht nur die Freyheit in der Schließung der Ehen, sondern auch, durch die aus diesem Zwange entstandenen ungleichen Bedingungen die Fruchtbarkeit derselben. In neueren Zeiten wurden die Folgen dieser Stiftung des Mittelalters theils durch die fortgeschrittene Cultur, theils durch landesherrliche Gesetze zum Vortheile der bedrückten Classen gemildert."[20] Gustav

[15] HARRASOWSKY von, P. H., *Der Codex Theresianus und seine Umarbeitungen*. Bd. IV. Wien, 1886, Drittes Kapitel: Von den Rechten zwischen Mann und Weib. § 1-99. Der ursprüngliche Text, verfasst von der Kompilationskommission in den Jahren 1753 bis 1756 in Brünn, veröffentlichten in einer zweisprachigen Edition Jaromír Tauchen und Drahoslav Sojka. Der Text befindet sich im Familienarchiv des Adelsgeschlecht Kálnoky im Mährischen Landesarchiv in Brünn. SOJKA, D. – TAUCHEN, J. (Hrsg.), *Codex Theresianus*. Multimediale elektronische Ausgabe. Brno, 2009 [https://is.muni.cz/elportal/estud/praf/ps09/codex/web/index.html].

[16] HARRASOWSKY von, P. H., *Der Codex Theresianus und seine Umarbeitungen*. Bd. IV., § 13, S. 31.

[17] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 10.

[18] HARRASOWSKY von, P. H., *Der Codex Theresianus und seine Umarbeitungen*. Bd. I., Nr. 37, S. 93.

[19] Ebenda, Bd. I., Nr. 30, S. 93.

[20] KOPETZ, W. G., *Österreichische politische Gesetzkunde* (…), Bd. 1, § 118, S. 98.

Wenzel Kopetz (1782-1857), Professor der Rechte an der Karl-Ferdinands-Universität in Prag, unterzog die Leibeigenschaft und die Hinderung von Ehen einer scharfen Kritik. Die Aufhebung der Leibeigenschaft erweckte den Eindruck, die Ehehindernisse in der volljährigen Zivilbevölkerung seien beseitigt worden. „Ist jeder Untertan bloß vorhergehende Anzeige und unentgeltlichen Meldezettel sich zu ehelichen berechtiget.“[21] Punkt 1 der Aufhebung der Leibeigenschaft bildete die Richtschnur hin zum zivilen Bürger und zur Säkularisation. Doch gerade die knapp gehaltene Formulierung wurde zum rechtlichen Ausgangspunkt für spätere diverse Auslegungen vonseiten der Obrigkeiten.

Der Ehekonsens erfuhr mit dem Patent vom 16. Januar 1783 eine wesentliche Erleichterung, zum ersten Mal wurde auf dem Territorium der Monarchie das staatliche Eherecht eingeführt.[22] Nach außen hin schien in dieser Angelegenheit Klarheit zu herrschen, doch gingen die Meinungen im unmittelbaren Umfeld des Kaisers in dieser Frage auseinander. Der staatliche Charakter der Ehe erwies sich für die Kirche als inakzeptabel. Der Widerstand gegen das staatliche Eherecht vonseiten hoher katholischer Würdenträger mit dem Wiener Erzbischof Kardinal Migazzi[23] an der Spitze war derart massiv, dass der Staatsrat sogar über die Einführung der Zivilehe nachdachte, was angesichts der Zeitumstände revolutionär gewesen wäre.[24] Die Zivilehe wurde in der Habsburgermonarchie wesentlich später und unter anderen politischen Rahmenbedingungen im Jahre 1868 eingeführt.

Der staatliche Charakter der Ehe wurde wesentlich durch andere Gesetze des Jahres 1783 unterstützt: „Die Ehe als ein bürgerlicher Vertrag, die daraus fließenden, und den Vertrag errichtenden gegeneinander zu stehenden bürgerlichen Gerechtsame und Verbindlichkeiten erhalten ihre Wesenheit, Kraft und Bestimmung ganz und allein von den landesfürstlichen Gesetzen. Daher gehört die Entscheidung der hierüber stehenden Streitigkeiten für die landesfürstlichen Gerichtsstellen.“[25] Aus dem System des kanonischen Rechts behielt man die religiösen Schranken für den Abschluss der Ehe bei, unter den zivilen, d. h. staatlichen Ehehindernissen hingegen blieben lediglich zwei Hürden bestehen: die Unmündigkeit und der militärische Stand. Eine unmündige Person konnte lediglich mit Zustimmung des Vaters, des Großvaters oder eines Vormunds heiraten, allerdings bestand die festgeschriebene Möglichkeit, dass sich die unmündige Person an das Gericht für den Fall einer Verweigerung der Eheschließung wenden könne. Dafür war jedoch eine Einhaltung staatlicher Vorschriften bzw. des kanonischen Rechts Voraussetzung. Die Eheschließung von Militärangehörigen unterlag der Bewilligung des Regiments, Korps oder einer anderen, hierfür zuständigen militärischen Führungsebene. Ohne einer solchen Erlaubnis besaß die geschlossene Ehe keine Gültigkeit, gleiches galt für eine Eheschließung unmündiger Personen ohne zuvor eingeholte Bewilligung.

In diesem Zusammenhang ist die Feststellung äußerst wichtig, dass der Staat die Ehe nicht mehr aus materiellen Gründen verhinderte. Dabei besteht durchaus die Möglichkeit, dass Herrschaften noch die älteren Resolutionen vom 10. Juli 1765 und vom 5. März 1766 zur Geltung brachten, um Ehen von Vagabunden und älteren Personen zu verhindern, die der öffentlichen Armenfürsorge zur Last fielen. Ehen junger arbeitender Untertanen wurden hingegen nicht unterbunden, auch wenn die Großgrundbesitzer versuchten, die niedrige Ehekonsenstaxe wieder einzuführen.[26] Die Revolution in Frankreich beeinflusste sämtliche Schichten der Bevölkerung, ein Teil des Adels zeigte sich zu einigen Zugeständnissen bereit, während sich der andere Teil umso konservativer verhielt.

In unserem Zusammenhang sind die Populationstheorien nicht zu unterschätzen, die den Ehekonsens von unbemittelten Personen beeinflussten. Typischer Repräsentant dieser gesellschaftlichen Gruppe war der Geselle, der zwar in einem Handwerk seine höchste Ausbildung erhielt, dem jedoch aus finanziellen Gründen die Möglichkeit verwehrt blieb, selbst Meister zu werden. Viele Gesellen gelangten durch die Heirat mit der Meisterwitwe oder Meistertochter auf die Stelle eines Meisters, andere mussten ein entsprechendes Finanzkapital vorweisen, das ihnen freilich als Gesellen kaum zur Verfügung stand. Wo blieb da Raum für eine Familie? Die Möglichkeit als Geselle eine Familie zu gründen, offenbart der pragmatische Zugang Maria Theresias, diese gebildete und für den Staat äußerst wichtige Berufsgruppe zu unterstützen. So war es verboten, einen Unterschied zwischen ledigen und verheirateten Gesellen zu machen, auch wenn die Existenz eines verheirateten Gesellen seit dem Jahre 1731 zugelassen war. Ein verheirateter Geselle, der durch die Zunft aufgrund seines Standes abgelehnt wurde, durfte sein Gewerbe auch außerhalb der Zunft betreiben. Aufgrund des Patents vom 1. September 1770 durfte man in Manufakturen, Fabriken und Gewerben keinen Unterschied zwischen ledigen und verheirateten Gesellen machen. Sowohl die Theresianische wie auch die Josephinische Gesindeordnung verbieten es den Arbeitgebern, eine Eheschließung innerhalb des Gesindes

[21] *Handbuch allller unter der Regierung des Kaisers Joseph des II. für die K. K. Erbländer ergangenen Verordnungen und Gesetze in einer sistematischen Verbindung*. 18 Bde. Wien, 1785–1789, weiter siehe: Joseph II. – Gesetze, hier Bd. 1, 1785, S. 74.

[22] *Joseph des Zweyten Römischen Kaisers Gesetze und Verfassungen im Justizfache. Für Böhmen, Mähren, Schlesien, Österreich ob und unter der Enns, Steyermark, Kärnten, Krain, Görz, Gradisca, Triest, Tyrol und die Vorlande. In den ersten vier Jahren seiner Regierung*. Wien, 1817 (weiter siehe: *Justizgesetzsammlung*), Nr. 117, S. 192-203.

[23] Christoph Anton von Migazzi (1714–1803), Erzbischof der Erzdiözese Wien, Kardinal und 1762–1785 Administrator in Waitzen (Vác in Ungarn).

[24] Interesse verdient, dass drei Mitglieder der geistlichen Hofkommission für die obligatorische Zivilehe stimmten (Präses Franz Karl Kressel von Qualtenberg, Abt Franz Stephan von Rautenstrauch und Hofrat von Haan); Karl von Martini hingegen verhielt sich ablehnend. Der Kaiser übergab die Angelegenheit der Kompilationskommission, die sich zu einer Zustimmung für die obligatorische Zivilehe durchringen konnte, da diese „nur Ärgernis errege und das gute Einvernehmen zwischen Kirche und Staat störe“. HOCK, K. F. – BIDERMANN, H. I., *Der österreichische Staatsrat (1760–1848)*. Wien, 1879, S. 248.

[25] Verordnung vom 16. Januar 1783. *Joseph II. – Gesetze*, Bd. 2, 1785, § 1, S. 149.

[26] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 13. Die Wiedereinführung der niedrigen Ehekonsenstaxe forderten im Jahre 1790 in den Desiderien der böhmischen Stände lediglich einige Obrigkeiten.

zu verhindern.[27] Die bevorstehende Heirat eines Dienstboten bildete keinen Bestandteil der Kündigungsfrist (§ 59c); letztere betrug drei Monate, womit in der Regel die letzten drei Monate des Jahres gemeint waren.

Im Josephinischen Gesetzbuch[28] wurde die rechtliche Linie des Ehepatents ungeachtet des Widerstands seitens der katholischen Kirche beibehalten, bestimmte Probleme wurden explizit erörtert. Hierzu gehörte beispielsweise die Eheschließung volljähriger Personen, die ohne die Zustimmung oder gegen die Einwilligung des Vaters, Großvaters oder des Vormunds geheiratet hatten. Eine solche Heirat war dem Gesetz nach gültig (§ 12). Die Grundprinzipien des Eherechts gingen auch in das Allgemeine Bürgerliche Gesetzbuch ein, so dass lediglich Unmündigkeit und militärischer Stand als Hinderungsgrund einer Eheschließung entgegenstanden. Hinzu kamen auch katholische Geistliche. Zwar erscholl im Josephinismus der Ruf nach Aufhebung des Zölibats, doch sah sich Joseph II. aufgrund heftigen Widerstands gezwungen, das Weiterbestehen des katholischen Klerus als lediger Stand zu verkünden, auch wenn der Monarch selbst, wie die Quellen andeuten, als Anhänger der Aufhebung des erzwungenen Zölibats von Priestern galt.[29]

Die oben erwähnte Formulierung im Patent zur Aufhebung der Leibeigenschaft bot Anlass für eine spätere Beschränkung des Ehekonsenses. Der Zeit der Populations-Theorien, die jeglichen Bevölkerungszuwachs unterstützten, folgte ein Populations-Pessimismus. Die Lebensmittelproduktivität stieg langsamer als die demographische Entwicklung, was ein Zeitgenosse, Johann Pezzl, scharf kritisierte. „Ein allgemeiner Geist der Sparsamkeit und Oekonomie hat sich über die Paläste der Großen verbreitet. Sie opfern ihren Luxus, ihre Schmausereien, sogar ihre Mätressen auf, um einige Summe zu ersparen. Sie drücken sogar ihre Untertanen über gewisse Punkte weniger, damit sie sich schleuniger mehren, und richtiger bezahlen können. Tausend neue, ihren Vätern ganz unbekannte Kanäle haben sie geöffnet, durch die sie unversiegbare Ströme Goldes in ihre Schatzkammer leiten. (…) Gieng es nach ihrem Sinn, so könnte eine Nation nichts besseres thun, als so viele Kinder zu fabrizieren wie möglich. Sie scheinen nicht zu wissen, daß ein Garten nur eine gewisse Menge Pflanzen ich ihrer natürlichen Güte nähren kann, niemals aber mehr, wenn auch alle Projekteurs ihren Dünger auf denselben zusammentrügen. Unser Vaterland ist der Garten; wir sind die Pflanzen. Die physische Fruchtbarkeit des Landes hat unstreitig ihre Gränzen; wenn wir nun gedoppelt mehr Kinder machten, als gewöhnlich, so müßte auch die Erde gedoppelt mehr Lebensmittel hervorbringen, als gewöhnlich; wo nicht, so muß die Hälfte der Landespopulation zu Bettlern werden, oder sie muß auswandern oder sie muß die andre Hälfte auffressen.“[30]

4. Die Reglementierung der Eheschließung

Innerhalb der regierenden Kreise suchte man den demographischen Pessimismus mit der Frage der Ernährung der Bevölkerung zu verbinden. Dabei dominierte die Furcht vor einer raschen Zunahme armer Personen und deren Radikalisierung, zumal das Bild der französischen Revolution noch frisch vor Augen stand. Es galt folglich ein Instrument zu finden, um die freie Heirat unbemittelter Personen zu reglementieren.

Einen ersten Versuch stellte in diesem Zusammenhang die Reglementierung von Eheschließungen in der Residenzstadt dar, die zu einem Schmelztiegel vieler Berufe und Nationen der Monarchie wurde. Zuerst kamen Gesellen an die Reihe, die zwar für die ökonomische Entwicklung erstrangige Bedeutung besaßen, zugleich jedoch als eine sehr arme Schicht galten. Ihr Heiratskonsens sollte abhängig sein von der Sittlichkeit, der Praxis, dem Fleiß und der (eventuell notwendigen materiellen) Hilfe der künftigen Ehefrau. „(…) daß Handwerksgesellen nicht die Ehe-Bewilligung versagt werden darf, wenn sie eine empfehlende Sittlichkeit, Fleiß und Geschichtlichkeit, dann eine mehrjährige Verwendung in ihrem Berufsfache für sich haben, und sich hierüber legal ausweisen können. Besonders ist die Eheligung auch dann nicht zu versagen, wenn solche Gesellen auf einen Miterwerb ihrer künftigen Gattin rechnen können.“[31] Interesse verdient hier einer der frühesten Hinweise auf den Beitrag von Frauen für die Ausübung des Berufs des Mannes. Natürlich besteht die Möglichkeit, dass sich dieser Beitrag auch auf die Mitgift beziehen könnte, zugleich böte sich an, dass damit die Eigenschaft, den Ehegatten beruflich zu vertreten, gemeint sein könnte, zumal dies bei Meisterwitwen üblich war, oder ihn beruflich zu unterstützen, was bei einigen körperlich nicht so anstrengenden Berufen möglich war.

Mit dem Dekret vom 22. Dezember 1796 wurden die Bedingungen des Ehekonsenses zunächst für Wien formuliert. Der Leitgedanke bestand darin, auf diese Weise die Niederlassung von Gesellen in Wien zu begrenzen. Wien kämpfte mit einem großen Zustrom von Menschen, die hygienische Lage erwies sich als sehr schlecht, unzureichend war zudem die Versorgung mit Lebensmitteln, was die Vorschriften für die Lebensmittellieferanten zeigen. Personen, die Viktualien nach Wien brachten, waren von den Passvorschriften ausgenommen; sie erhielten Passierscheine, die sie an den Wiener Linien (d. h. zwei bewachten Grenzen der Stadt) vorzeigen mussten. Allerdings ström-

[27] Gesindordnung für das Landgesind vom 30. September 1782 (für Böhmen vom 20. September 1782). *Joseph II. – Gesetze*, Bd. 1, Nr. VI, S. 84-99.

[28] Allgemeines Bürgerliches Gesetzbuch, publiziert durch das Patent vom 1. November 1786. *Justizgesetzsammlung*, 2. Fortsetzung, Nr. 591, S. 71.

[29] KOPETZ, W. G., *Österreichische politische Gesetzkunde* (…), Bd. 1, § 120, S. 101.

[30] (Anonymus), *Marokkanische Briefe. Aus dem Arabischen*. Frankfurt und Leipzig, 1785, S. 17-18. Die Marokkanischen Briefe erschienen anonym, allerdings wurde später Johann Pezzl (1755–1823) als deren Verfasser identifiziert. Der Bäckersohn aus dem bayerischen Malersdorf machte eine steile Beamtenkarriere am österreichischen Hof, die er mit dem Posten eines Offizials des Geheimen Chiffrenkabinetts abschloss. Den Besuch einer marokkanischen Gesandtschaft am Wiener Hof im Jahre 1783 nahm er zum Anlass, die Fehler und Unzulänglichkeiten des österreichischen Staates mit Hilfe des in der Zeit der Aufklärung beliebten Topos eines Fremden in einer „zivilisierten“ Gesellschaft genau vor Augen zu führen. Dies reflektiert bereits der fiktive Untertitel des Werkes „Aus dem Arabischen“. Ob Pezzls Autorenschaft noch zu seinen Lebzeiten entdeckt wurde, bleibt unbekannt.

[31] KOPETZ, W. G., *Allgemeine österreichische Gewerbs-Gesetzkunde, oder systematische Darstellung der gesetzlichen Verfassung der Manufacturs- und Handelsgewerbe in den deutschen, böhmischen, galizischen, italienischen und ungarischen Provinzen des österreichischen Kaiserstaates*. Bd. 1, Wien, 1829, § 227, S. 399. Hier zitiert vom Dekret für die Steiermark vom 17. Juni 1818.

ten mit diesen Lieferanten auch andere Arme in der Hoffnung in die Donaumetropole, sich in Wien besser durchschlagen zu können.[32]

Die Hindernisse für die Eheschließung der Handwerksburschen sollte die bessere Vernetzung der Gewerbe auf dem flachen Land unterstützen, dessen ungeachtet erschall der Ruf nach Einführung eines allgemeinen Ehekonsenses. Die von der Kodifikationskommission geführten Debatten, mit denen das neue Allgemeine Bürgerliche Gesetzbuch vorbereitet wurde, brachten Bewegung in die Frage des Ehekonsenses. Der revidierte Vorschlag Martini's[33] aus Jahre 1792 fußte auf dem Josephinischen Konzept und betonte dezidiert die Hindernisse für Eheschließungen (Teil III, § 24).[34] Fünf Jahre später treffen wir auf eine veränderte Lage: Joseph von Sonnenfels[35] unterbreitete den Vorschlag, die Hinderungsgründe für Eheschließungen, die sich bislang lediglich auf Unmündige und Militärpersonen bezogen, auch auf andere Bevölkerungsschichten zu erweitern: „Handwerksgesellen und überhaupt Leute ohne bestimmten Nahrungsstand würden verpflichtet, die Erlaubnis zur Verehelichung bei der Obrigkeit anzusuchen."[36] Der Ehekonsens sollte Sonnenfels zufolge erst dann erteilt werden, wenn die Personen, die keinen bestimmten Beruf besaßen oder arbeitslose Gesellen, zwei Jahre ihrer Beschäftigung nachzuweisen vermochten; interessant und sehr modern erscheint der Nachweis der Arbeitstätigkeit auch für die zukünftige Braut. Sonnenfels sieht in der Einführung des Ehekonsenses die Bestätigung des Eherechts als eines „anerschaffenen Menschenrechts", welches das Recht nach sich zieht, für Kinder zu sorgen. Sonnenfels' Leitmotive bestanden nicht allein darin, Personen zu „ehrbarer Arbeitsamkeit" zu erziehen, sondern zugleich dafür Sorge zu tragen, eine Verbreitung der Armut zu verhindern und die Rechte der Kinder zu schützen. „Kinder, welche zu erhalten die Aeltern außer Stande sind, entweder den öffentlichen Anstalten zur Last fallen, oder nur eine an Körper und Geiste verwahrloste Bevölkerung geben, gegen welche, als die Pflanzschule der verderblichsten Unordnungen, wohl keine Vorsichtigkeit für überflüssig angesehen werden könne."[37]

Sonnenfels Vorschlag mag mit Blick auf seine älteren Schriften, in denen er als begeisterter Aufklärer erscheint, überraschen. Seine Hinneigung zu konservativeren Positionen steht im Zusammenhang mit der gesellschaftlichen Entwicklung in Europa und Österreich, aber vermutlich auch mit seiner persönlichen Situation. Die Französische Revolution, ihre blutigen Folgen und der mehrjährige Krieg führten einige zeitgenössische Denker in das konservative Lager, darüber hinaus spielte in Österreich auch der wachsende Einfluss der katholischen Kirche eine wichtige Rolle. Das Engagement für die Rechte von Kindern mag zudem mit der persönlichen Lage von Sonnenfels zusammenhängen, da seine ansonsten harmonische Ehe mit Theresia Hay, der Schwester des Bischoffs Johann Leopold Hay, kinderlos blieb. Diesen Umstand ertrug Sonnenfels nur sehr schwer, da er hierin keine vollständige Erfüllung der Ehe erblickte.

Die Mitglieder der Kompilationskommission waren keine Gegner der Vorschläge von Sonnenfels per se, jedoch stellten sie sich gegen die Bemühungen, den Ehekonsens in das vorbereitete Allgemeine Bürgerliche Gesetzbuch aufzunehmen, zumal eine solche Regelung ihrer Auffassung nach nicht in das Gesetzbuch gehöre und sich diese Frage durch spezifische Verordnungen regulieren ließe. Franz von Zeiller stimmte mit J. von Sonnefels darin überein, auch wenn er mit naturrechtlichen Argumenten operierte.[38] Zeiller verwies in seiner Interpretation auf das Menschenrecht: Jeder Mensch habe das Recht zum freien Handeln unter der Bedingung, dass damit das Recht anderer Menschen nicht verletzt werde. „Das Weib habe nach den Gesetzen Recht, von dem Manne den Unterhalt zu fordern. Ist sie großjährig, so soll sie freilich selbst für ihr Wohl bedacht sein. Aber bei Minderjährigen wende der Staat die größte Sorgfalt an; kaum ist die Frauensperson großjährig geworden, so gebe der Staat zu, daß sie durch Vorspiegelung und Liebe getäuscht, offenbar in das Verderben stürze. Bei Verschwendern sorgte man, den Rest für Weib und Kind zu retten; hier gebe man die Ehe zu, ohne zu wachen, ob eine Quelle des Unterhalts vorhanden sei. (…)"

Minderjährige Personen sahen sich dem Gesetz nach im Ehekonsens benachteiligt. „Niemand habe ein Recht, Kinder zu erzeugen, welche darben, unerzogen bleiben, sich selbst und anderen zur Last fallen sollen. Würden die Staaten wie vormal Sparta alle Kinder übernehmen, und für ihre öffentliche Erziehung zu guten Bürgern sorgen, so ist nichts gegen erwähnte Ehen einzuwenden. Was könne aber nach der bestehenden Einrichtung die Kinder für ein Schicksal treffen? Sie aussetzen, sei ein Verbrechen; Findelhäuser bestehen nicht überall, machen, wo sie bestehen, große Schwierigkeit wegen der unentgeltlichen Aufnahme, und ziehen große Sterblichkeit nach sich. Auch wollen selbst die ärmsten Eltern nicht einmal die Kinder von sich lassen. Die Folge sei, daß sie elend umkommen, oder selbst unter den Augen ihrer Eltern, durch Beispiele angelocket, zu Bettlern oder Verbrechen heranwachsen."[39] Von Zeiller verwendet

[32] STOKLÁSKOVÁ, Z., *Cizincem na Moravě. Zákonodárství a praxe pro cizince na Moravě 1750–1867*. Brno, 2007, S. 61.

[33] Karl Anton von Martini (1726–1800), Jurist, zusammen mit Franz von Zeiller Schöpfer des Allgemeinen Bürgerlichen Gesetzbuches, vor allem in der Systematik, Gesetzgebungstechnik und Rechtssprache. Die Publizierung von ABGB im Jahre 1811 erlebte er nicht, jedoch wurde der vollständige Entwurf im Jahre 1797 als das sog. Westgalizische Gesetzbuch veröffentlicht.

[34] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 14.

[35] Joseph von Sonnenfels (1732/1733–1814), Jurist, Staatsmann und Gelehrter, der erste Lehrstuhlinhaber der Kameralistik, betätigte sich als sprachliche Korrektor der wichtigen gesetzlichen Normen.

[36] OFNER, J., *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches*. Bd. 1. Glashütten im Taunus, KG, 1976, S. 97.

[37] Ebenda, S. 98.

[38] Franz von Zeiller (1751–1828), Jurist, gilt zusammen mit seinem Lehrer Karl von Martini als der wichtigste Vertreter des Naturrechts in Österreich und Schöpfer des Allgemeinen Bürgerlichen Gesetzbuches. 1803-1807 bekleidete er das Amt des Rektors der Universität Wien.

[39] Beide Zitate: OFNER, J., *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches*, S. 101.

hier das Argument der ungleichen rechtlichen Behandlung unmündiger Personen, denen die Ehe erst nach einem Konsens zu gestatten sei. Dabei schlug er vor, den Ehekonsens entweder zugleich für minderjährige Personen aufzuheben oder ihn für alle Personen einführen, verbunden mit der Pflicht, den Unterhalt nachweisen zu müssen.

Die Minderjährigkeit der Braut bildete keine Ausnahme, sondern gehörte eher zu den üblichen Fakten. Für eine Eheschließung galt Minderjährigkeit nicht als Hindernis, jedoch musste die schriftliche Zustimmung des jeweiligen Vormunds vorgelegt werden. Ein Beispiel hierfür ist Ludmila Hollubetz, die minderjährige Tochter des Viktorin Hlawačz, Häusler in Mikultschitz (Mikulčice), die Kaspar Fiala, Häusler in Luschitz (Lužice) zu heiraten beabsichtigte. Das Verwaltungsamt in Göding (Hodonín), die für Kaspar Fiala zuständige Obrigkeit, bat nicht allein um die Entlassung von Ludmila Hollubetz, sondern zugleich um die vormundschaftliche Zustimmung. Der nicht des Schreibens kundige Vormund Augustin Rottasek gab nicht allein seine Zustimmung zu Protokoll, sondern äußerte seine Freude angesichts der bevorstehenden Heirat: „Indessen die Ludmila Hollubetz durch die Verehelichung mit dem Luschitzer Häusler Kaspar Fiala ihre Versorgung findt, da mir derselbe als ein ehrlicher Mann bekannt ist, so habe ich gegen die angesagte Entlassung zu ihrer Verehelichung nichts anzuwenden, sondern sie ist mir sehr wünschenswert.“ [40]

Die Lösung der Frage des Ehekonsenses bewegte sich – selbstredend mit den Ausnahmen für Militärangehörige, Juden und Mitglieder des katholischen Klerus – von der gänzlichen Aufhebung des Ehekonsenses bis hin zur Wiedereinführung des Ehekonsenses für alle Personen, verbunden mit der Bedingung der Ungültigkeit der Ehe, was freilich eine noch verschärftere Regelung als im Falle der Existenz der Leibeigenschaft darstellte. Vor der Aufhebung der Leibeigenschaft fand eine fehlende Bewilligung seitens der Obrigkeit lediglich in einer Geldstrafe ihren Ausdruck, jedoch nicht in der Ungültigkeit der geschlossenen Ehe.

Die Beratungsprotokolle zum ABGB zeigen eine interessante Entwicklung der Problematik des Ehekonsenses. Im Februar 1802 stimmte die Mehrheit der Mitglieder der Hofkommission für die Formulierung, dass die fehlende Zustimmung der zuständigen Behörde die Ungültigkeit der Ehe bedeute,[41] was später durch ein „bloßes Verbothgesetz“ ersetzt wurde. In der Revision der Beratung wurde vorgeschlagen, der Ehekonsens „ganz der politischen Gesetzgebung zu überlassen.[42] Der Ehekonsens fand keine Aufnahme in das ABGB von 1811, lediglich allgemeine Bestimmungen des Eherechts wurden hier behandelt. Der Weg ging jedoch in Richtung einer Aufhebung des Josephinischen Systems der Eheschließung. Im Jahre 1800 erfolgte auch für Beamte die Einführung des Ehekonsenses, die fortan die Zustimmung zur Heirat durch ihre Vorgesetzten benötigten.[43] Der Anspruch auf den Heiratskonsens bei landesfürstlichen, städtischen und Stiftungsbeamten erwuchs ab einer bestimmten Höhe des Gehalts, abhängig vom Territorium, in dem der Empfänger hiervon lebte.

In Wien belief sich dieser auf 400, in anderen Städten auf 300 und auf dem Land auf 200 Gulden des Jahreseinkommens. Eine mögliche Ungültigkeit der Ehe ohne Ehekonsens findet sich nicht, jedoch hatten Gattin und Kinder im Todesfall des Familienernährers keinen Anspruch auf eine Witwen- oder Waisenrente, was sich zweifellos als eine wirksame Maßnahme erwies. Ausgenommen von der Pflicht des Ehekonsenses waren „Salz-, Zoll-, Wegmauts- und Wirtschafsbeamten“, die ihren Posten in abgelegenen Orten ausübten, die „oft selbst zum Berufe ihrer aufhabenden Bedienstungen einer Gattin unumgänglich bedurften“.[44]

5. Der Ehekonsens in den Händen der Herrschaften

Im 19. Jahrhundert setzte sich die Tendenz, den Ehekonsens auf weitere Bevölkerung zu erweitern, fort. Im Jahre 1815 wurde für die Stadt Wien eine Vorschrift verkündet, die jene Bevölkerungsgruppen aufzählte, die ohne den Ehekonsens heiraten durften: „Der Adel, landfürstliche, ständische, städtische, Fonds- und herrschaftliche Beamte, Doktoren, Magister, Professoren und Lehrer der öffentlichen Schul- und Erziehungsanstalten, Advokaten, Bürger, alle Haus- und Güterbesitzer, alle Personen, die mit einem Meisterrechte, Landes-Fabriks-, Fabriks- oder stadthauptmannschaftlichen Befugnis versehen waren.“ Alle übrigen Personen sollten vor ihrer Verehelichung um einen Ehekonsens nachsuchen.[45]

In besagter Frage des Ehekonsenses lässt sich ein inkonsequentes Vorgehen der Beamten feststellen, die der älteren Vorschrift keine Beachtung schenkten. Das weiter oben zitierte Hofkanzleidekret hatte für die Stadt Wien die niederösterreichische Regierung publiziert. Doch wie gestaltete sich die Lage in den Kronländern und auf dem Lande? Unternahmen die Obrigkeiten den Versuch, der Aufhebung der Leibeigenschaft keinerlei Bedeutung beizumessen? Die Situation stellte sich in der Praxis zweifellos als ziemlich heterogen dar. Einen Einblick gewährt die Korrespondenz der Hofkanzlei und des böhmischen Landesguberniums aus dem Jahre 1824, in der die Hofkanzlei zu sondieren suchte, für welche Gruppen der Bevölkerung der Ehekonsens notwendig sei.

Das böhmische Landesgubernium antwortete korrekterweise, dass nach Aufhebung der Leibeigenschaft, abgesehen von Fällen, in denen Dispensationen der Hindernisse des Staatsbürgerrechts auftraten, lediglich Unmündige, Zwangsarbeiter, Militärangehörige, Juden und Ausländer genötigt seien, den Ehe-

[40] Moravský zemský archiv Brno (weiter MZA Brno), Herrschaft Lundenburg F 43, Karton 412, Fascikel Nr. 2 Registratur-Nr. 8.

[41] OFNER, J., *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches*, Bd. 1, Wien, 1889, S. 103 (§ 79).

[42] Ebenda, Bd. 2, Wien, 1889, S. 343-344 (§ 64 und 65).

[43] Dekret der Finanzhofstelle vom 29. Juli 1800. KROPATSCHEK, J. (Hrsg.), *Sammlung der Gesetze welche unter glorreichen Regierung Kaisers Franz des II. in den sämtlichen k. k. Erblanden erschienen sind, in einer chronologischen Ordnung* (weiter Franz II. – Gesetze). Wien, 1800, Bd. 15, Nr. 27, S. 101.

[44] Hofdekret vom 29. Juli 1800 an alle Länderstellen, kundgemacht durch das Tiroler Landesgubernium. *Franz II. – Gesetze*, Bd. 10, 1800, Nr. 4365, S. 354-355.

[45] Hofkanzleidekret an die niederösterreichische Regierung vom 26. Januar 1815. *Franz II. (I.) – Gesetze*, Bd. 43, Nr. 8, S. 108-109.

konsens vorzulegen.[46] Gleichzeitig jedoch gab die Landesstelle zu, keine Kenntnis davon zu besitzen, woher der Wind von den höchsten Stellen wehe und dass diese Praxis noch nicht die Regel bilde. Weiterhin hieß es, in Böhmen fände die auf Traditionen und Gewohnheiten beruhende Praxis Anwendung, wobei die Landesstelle eine einheitliche Norm begrüßen würde.[47]

Der Sinn der Formulierung im Patent zur Aufhebung der Leibeigeschaft: „Ist jeder Untertan bloß vorhergehende Anzeige und unentgeltlichen Meldzettel sich zu ehelichen berechtiget“ [48], erweist sich als problematisch. Stellten die Meldezettel lediglich ein Relikt der Leibeigenschaft dar oder erfüllten sie einen praktischen Zweck – beispielsweise mit Blick auf die Evidenz des Familienstandes? Letzteres ergab für die Stellung gegenüber dem Militär einen Sinn, jedoch fehlte ein Kontrollmechanismus, ob es real zur Heirat gekommen war. Die Meldezettel interpretierte man als eine rein formale Anzeige der bevorstehenden Heirat, als eine parallel verlaufende ‚zivile Linie‘ (im ABGB § 70-82) neben dem katholischen und protestantischen Aufgebot; jüdische Ehen unterlagen speziellen Vorschiften.

In Böhmen und Oberösterreich verband sich mit der Ausstellung der Ehelizenz die Pflicht für den Bräutigam, mehrere Obstbäume zu pflanzen. „Mit der Verehelichung der Untertanen verknüpfet die Regierung die zum Behuf der Landeskultur abzweckende Anstalt, daß der Bräutigam sich immer bevor mit der Pflanzung einiger Obstbäume ausweisen müssen (wegen des richtigen Vollzugs hat der Beamte darüber ein Vormerkungsbuch zu halten).“ [49] Diese Handlung verlieh dem Ehekonsens Sinn, sie mochte dabei lediglich ein begleitendes Residuum älterer Bräuche darstellen.

Die Frage nach einer eventuellen Korruption vonseiten der Bürokratie (Obrigkeitliche Ämter), lässt sich nur schwer beantworten, doch scheint es die Möglichkeit gegeben zu haben, insbesondere in Gebieten, in denen der Ehemeldezettel keine reine Formalität darstellte. Den Vorschriften gemäß sollte der Ehekonsens gebührenfrei sein,[50] jedoch setzte man die Mildtätigkeit der Brautleute voraus, zumal manche Ehekonsense die Mitteilung enthalten, wieviel für die Armen aufzuwenden sei, was als eine alte Tradition aufgefasst werden konnte. Trauungen als Quelle für die Sammlung von Almosen erscheinen bereits in den Statuten der Armeninstitute in den achtziger Jahren des 18. Jahrhundert.[51]

Die Brautleute sollten vor der Eheschließung auf Kenntnisse in der Religion befragt werden, wobei die von den Seelsorgern ausgestellten Zeugnisse an die Patrimonialämter gingen. Ob dieser Vorgang das Ergebnis des wachsenden Einflusses der katholischen Kirche darstellt oder dies als eine gewisse Gleichschaltung mit anderen Religionen interpretiert werden muss, bleibt umstritten. Jüdische Brautleute mussten seit dem Josephinismus vor der Eheschließung eine auf Kenntnisse im Judaismus hinauslaufende Prüfung in deutscher Sprache vor einem fachkundigen Mann, meist einem Rabbiner, ablegen.

Die Erteilung von Ehekonsensen gestaltete sich in der ersten Hälfte des 19. Jahrhunderts in der Habsburgermonarchie sehr unterschiedlich. Das böhmische Landesgubernium teilte im Jahre 1825 der Hofkanzlei mit, in Böhmen würden „in der Regel“ nach der Aufhebung der Leibeigenschaft keine Bewilligungen mehr von der Bevölkerung gefordert werden, jedoch gäbe es „in herkömmlicher Gewohnheit begründete besondere Verfahrensarten“.[52] Die Hofkanzlei erkundigte sich, ob es nicht vorteilhafter wäre, die Praxis so zu belassen oder nicht eher sinnvoller, neue und genaue Richtlinien herauszugeben bzw. einfach die Vorschrift für Wien aus dem Jahre 1815 auf das ganze böhmische Land auszudehnen. Eventuell sollten notwendige Modifizierungen geprüft werden.[53]

Nachfolgend startete das böhmische Landesgubernium in der ersten Hälfte des Jahres 1827 eine Enquete, an der sich die Kreisämter und der Prager Magistrat beteiligten. Die Enquete spiegelte die Realität; die Kreisämter zeigten sich nicht uneins, einige waren mit der bestehenden Lage zufrieden, andere schlugen kleine Änderungen vor, wiederum andere plädierten für die Einführung des Ehekonsenses für bestimmte Gruppen der Bevölkerung, vor allem für Personen ohne ständigen Unterhalt. Zur problematischen Gruppe von Ehekandidatinnen gehörten auch Prostituierte. Der Prager Magistrat weigerte sich im Jahre 1838, einem Prager Kaufmann den Ehekonsens zu erteilen, da dessen – vom flachen Lande stammende – Braut in der Landeshauptstadt einen zweifelhaften Ruf besaß. Der Bräutigam sandte daraufhin einen Rekurs an das Gubernium, das seinerseits den Magistrat um eine nähere Erläuterung bat. Der Magistrat teilte mit, er stelle lediglich die Konskriptionszettel aus, nicht die Ehekonsense. Allerdings sah sich der Magistrat gezwungen, im konkreten Fall die umstrittene Braut in seine Heimatzuständigkeit aufzunehmen, was er freilich nicht zu tun beabsichtigte, zumal der Bräutigam die Möglichkeit besaß, eine ‚ehrwürdige‘ (d. h. makellose) Pragerin zu heiraten.[54]. Für den Fall, dass der Magistrat einer Heirat zustimmen sollte, würde er der Möglichkeit einer Ausweisung der betreffenden Prostituierten aus der Stadt beraubt werden, zumal die Frau nach der Heirat, sollte sie auch weiterhin ihrem Gewerbe nachgehen, unter die Heimatgerichtsbarkeit ihres Mannes in Prag fiele. Das Verbot der Heirat

[46] Für Juden galten außer älteren Vorschriften (Familiantengesetz, 1726) darüber hinaus spezielle Vorschriften in der Frage von Heiraten unter Verwandten, die für die christliche Bevölkerung nicht galten, besonders in der Frage der Ehe unter verschwägerten Verwandten (erneute Heirat mit der Schwester der Verstorbenen bzw. dem Bruder des Verstorbenen), was bei Christen nicht üblich war, jedoch bei Juden empfohlen wurde.

[47] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 20.

[48] *Joseph II. – Gesetze*, Bd. 1, 1785, S. 74.

[49] REICHEL, F., *Das Dorf- und Bauernrecht im Königreiche Böhmen, mit Rücksicht auf die übrigen k. k. teutschen Erbländer im Grundrisse*. Prag, 1817, § 12, S. 12. Justiziar Reichel zitiert einige ältere Vorschriften für Böhmen und Oberösterreich (Jahre 1787, 1792, 1796).

[50] Hofdekret vom 24. Juli 1773. JAKSCH, P. K., *Gesetzlexikon im Geistlichen, Religions- und Toleranzfache* (…), Bd. 4, S. 159-160.

[51] [SPAZIERER, B.], *Zuverlässige und ausführliche Nachricht von dem Armen-Institute, welches auf den gräflich Buquoischen Herrschaften in Böhmen im Jahr 1779 errichtet worden*. Linz, 1784, S. 9.

[52] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 27.

[53] Dekret vom 5. November 1831. *Provinzialgesetzsammlung des Königreiches Böhmen. Bd. 1-31*. Prag, 1830–1849, hier Bd. 13, Nr. 241, S. 685-687.

[54] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 27. Das Verbot der Heirat der Prostituierten war seit der Zeit des Josephinismus angewendet.

für Prostituierte stellte eine bereits seit dem 18. Jahrhundert angewendete Praxis dar, es handelte sich also keineswegs um eine Neuerung der Vormärzzeit.

Innerhalb der Behörden diskutierte man zugleich die Einführung einer Ehelizenz für Männer, die der Militärpflicht unterlagen, was sich insofern als ziemlich problematisch darstellte, da sich auf diese Weise kaum die zeitige Eheabschließung würde verhindern lassen, zu der manche junge Männer schritten, um so dem Militärdienst zu entgehen, da sie als Verheiratete nicht ohne weiteres einberufen werden konnten. Die Enquete brachte keine konkreten Auswirkungen, die Situation in der Frage einer Erteilung von Ehekonsensen erwies sich auch weiterhin als sehr heterogen. Allerdings lässt sich die Tendenz bei höheren Ämtern beobachten, sich um eine Lockerung in der restriktiven Handhabung von Eheschließungen der Armen bemühten.

Die Erteilung des Ehekonsenses hing oft mit der Entlassung aus der Herrschaft zusammen. Nach der Aufhebung der Leibeigenschaft konnten sich die ehemaligen Leibeigenen frei bewegen, also umziehen; der Umzug war jedoch an die Pflicht einer Entlassung aus der Herrschaft verbunden. „Kein Dienstherr, oder Landwirth soll, unter unnachsichtlichem Erlage der Patentalstrafe, einen Dienstboten von einer fremden Herrschaft ohne vorgezeigten Entlaßschein, oder Pass annehmen.“ [55] Diese Pflicht kam einer Kontrolle der Mobilität der Untertanen gleich, also – um mit Michel Foucault zu sprechen – einer „Ordnung der Dinge“; als bedeutsamer freilich erwies sich die Kontrolle bei Männern, die der Militärpflicht unterlagen.

Wie wurde dies von einer noch nicht vollständig alphabetisierten Bevölkerung rezipiert? Wenngleich zur Beantwortung dieser Frage eine breitere Analyse noch aussteht, darf vom Postulat der pragmatischen Anstellung der Unterschichten ausgegangen werden. Letztere waren sich der materiellen Konsequenzen bewusst, die der Militärdienst und später die Alters- und Armenfürsorge nach sich zogen. Entlassungsscheine benötigten jene Personen nicht, die sich seit zehn Jahren im selben Land der Habsburgermonarchie (des späteren Zisleithaniens; die Länder der Ungarischen Krone galten hingegen als Ausland) aufhielten, das heißt in einem anderen als ihrem Geburtsland, die „eine gute Nahrung haben und sonst ein standhaftes Gewerb treiben“.[56] Zehn Jahre des Aufenthaltes galten sowohl für den Anspruch auf Heimatzuständigkeit als auch jenen auf die österreichische Staatsbürgerschaft als Rechtsnorm. Keinen Entlassungsschein benötigten Personen, die im gleichen Ort bereits einmal verheiratet gewesen waren, sowie jene Personen, die älter als vierzig Jahre waren. Die Vorschriften spiegeln eine maximale Substanz an Pragmatismus des Staates in der Frage der Armenfürsorge.

Einen Einblick in die Mobilitätsverhältnisse von Personen gewährt die folgende Tabelle, die die in der Liechtensteinischen Herrschaft Lundenburg in Südmähren aufgenommenen und entlassenen Personen in den vierziger Jahren des 19. Jahrhunderts vor Augen führt. Die vierziger Jahre des 19. Jahrhunderts wurden bewusst ausgewählt, gilt es doch anhand der archivalischen Quellen die Frage nach der Existenz und der Anwendung der Mechanismen nach Aufhebung der Leibeigenschaft zu beantworten. „Jedem Untertan… steht (es) frei, unter Beobachtung dessen, was das Werbbezirkssistem vorschreibt, auch von der Herrschaft wegzuziehen, und innerhalb des Landes sich niederzulassen, oder Dienste zu suchen. Nur haben iene Untertanen, die von ihren Herrschaften wegziehen, und sich anderswo häuslich oder inwohnungsweise niederlassen wollen, ebenfalls den unentgeltlichen Entlaßschein, den sie auch der neuen Grundobrigkeit aufzuweisen, und dadurch, daß sie von der vorigen grundobrigkeitlichen Pflicht entlassen sind, zu bestätigen haben, zu begehren.“ [57] Gemäß des Patents über die Aufhebung der Leibeigenschaft konnte der vormalige Leibeigene ungehindert seinen Wohnsitz wechseln, doch musste er sich der Pflicht der Entlassung durch die Herrschaft unterwerfen. Dies haben die Forschungen bestätigt.

Tabelle 1: Die Mobilität von Untertanen in der Liechtensteinischen Herrschaft Lundenburg. Moravský zemský archiv Brno, Herrschaft Lundenburg, F 43, Karton 412, Faszikel Nr. 1-9.

Liechtensteinische Herrschaft Lundenburg		
Personen		
Jahr	Aufgenommen	Entlassen
1841	21	56
1842	33	56
1843	31	51
1844	32	25
1845	42	43
1846	50	42
1847	31	62
1848	31	61
1849	39	38
1841-1849	**310**	**434**

Die Entlassungsscheine wurden laut der durchgeführten Teilstudie in der Regel innerhalb von drei Tagen ausgestellt, mitunter lagen sie auch bereits am darauffolgenden Tag vor. Die Herrschaft selbst, auch dies belegt die Untersuchung, legte der Entlassung nie ein Hindernis in den Weg. Den häufigsten Grund für die Entlassung stellten eine bevorstehende Heirat des Untertanen (beiderlei Geschlechts) oder die Ausübung eines Gewerbes als Ernährungsquelle dar, was in zahlreichen Fällen mit einem Umzug, der Ausübung des Gewerbes oder dem Ankauf einer Realität und der geplanten Heirat verbunden war, wie dies der Fall des Johann Mikosch bezeugt. Der ledige und volljährige „Inwohner“ Johann Mikosch, Sohn eines Lundenburger Bürgers, der ein Haus in der Stadt Lundenburg besaß, erwarb das Haus Nr. 99 in Niederkreuzstetten in Niederösterreich mit der Absicht, sich dort niederzulassen und die minderjährige Katharina Leberwurst aus Wolkersdorf (Niederösterreich) zu heiraten. Die Herrschaft Kreuzstetten stellte ihm am 14. August 1843 eine Aufnahmeurkunde aus, nachdem er sich vorschriftsmäßig die vorläufige Bewilligung Lundenburger Herrschaftskanzlei besorgt und nachfolgend den Entlassungsschein seiner Herrschaft vorgelegt hatte.[58]

[55] Ordnung für das Landgesind. Nr. VI. Hofentschließung vom 1. April 1806. *Joseph II. – Gesetze*, Bd. 10, S. 101-103.
[56] Ebenda, S. 102-103.
[57] *Joseph II. – Gesetze*, Bd. 1, 1785, S. 75.
[58] MZA Brno, Herrschaft Lundenburg F 43, Karton 412, Faszikel Nr. 3, Registratur-Materie 8.

In diesem Kontext stellt sich der Autorin eine prinzipielle Frage: Was eigentlich spiegeln die erhaltenen Quellen? Bedeutet die Tatsache, dass lediglich Untertanen, die vorschriftlich mit Entlassungsscheinen umgezogen, aufgespürt wurden, dies also den einzigen Weg darstellte? Bilden die erhaltenen Quellen lediglich die berühmte Spitze des Eisbergs? Vielleicht ist unsere These allzu optimistisch, doch schenken wir dem in den Archivquellen reflektierten Bild Glauben. Dies gilt zumindest für österreichische Staatsbürger männlichen Geschlechts. Der Entlassungsschein und die Aufnahmeurkunde reflektieren die Legalität des Inhabers in der neuen Herrschaft. Dieser wurde in der Folge weiter als einheimisch konskribiert und besaß dementsprechend das Recht auf Armenfürsorge im Falle von Alter, Krankheit, Tod des Ernährers oder einer zeitweilig angespannten materiellen Lage. Die Entlassungsscheine dienten vermutlich als Reisezeugnis und Identifikationsurkunde, einer Vorstufe des Personalausweises. Dies war in den Kreisen der armen Bevölkerung bekannt. Jeder Mann, der ohne Identifikationsurkunde durch Kontrollorgane angehalten wurde, konnte zum Militär eingezogen werden. Er besaß keine Möglichkeit, sich rechtlich zu wehren, ganz im Einklang mit den damals gültigen Gesetzen. Bei Militärangehörigen handelte es sich häufig um fremde Männer, mit denen man das Werbekontingent auffüllte, so dass in der Folge die Werber weniger der „eigenen" Männer (d. h. Männer aus dem eigenen Werbebezirk) rekrutieren mussten. Hier öffnete sich ein breiteres Feld für mögliche Korruption der zuständigen Werbesubjekte; folglich gab es für die Untertanen prinzipielle Gründe, nach Gesetzen und Vorschriften zu handeln. Doch wie sah es mit den Dominien aus? Würden Herrschaften fremde Untertanen aufnehmen und ihnen Ehekonsense erteilen? Lag es nicht eher in deren Sinn, über quantitativ mehr arbeitende Hände zu verfügen und damit wirtschaftliche Stärke zu demonstrieren? Im Prinzip ist dies richtig, doch ließ sich überprüfen, inwieweit sich die Herrschaft solidarisch verhielt, zumal die Untertanen bei der nächsten Revision der Konskription gesucht wurden. In diesem Zusammenhang darf die wachsende Macht des Staates nicht unterschätzt werden, zumal der staatliche Apparat ein solches Verhalten eines Dominiums nicht duldete. Darüber hinaus muss noch „die Standesehre" adeliger Kavaliere in Betracht gezogen werden, die ein gegen andere adelige Besitzer gerichtetes Verhalten verhinderten.

6. Der Ehekonsens in der Zeit der Industrialisierung

In der Zeit des Vormärz beschleunigte sich das Tempo der Industrialisierung. Die ländliche Bevölkerung verließ in größerem Umfang ihre Dörfer und wanderte in die Städte ab, wo sie Arbeit in Manufakturen, Fabriken oder im Dienstleistungsbereich suchte. Mit der wachsenden Anzahl an Personen in den Städten, die sich Dienstpersonal erlauben konnten, stieg auch die Nachfrage an Dienstboten oder anderen Berufen (Handelsgehilfen, in Luxusgewerben wie Goldschmiedekunst, Modistinnen, Handschuhmacher, Tapezierer, Stuckateure usw.). Die Patrimonialämter gerieten immer öfter in die Situation, den Ehekonsens an zwei patrimonialfremde Brautleute erteilen zu müssen. In großen Städten wuchs damit die Befürchtung, mit dem bewilligten Ehekonsens beiläufig auch das politische Domizil zu erteilen, mit dem wiederum die eventuelle Armenfürsorge in Verbindung stand.

Dieses Problem entstand sehr rasch auch in Wien, das mit einer großen Zuwanderung zu kämpfen hatte, wobei die meisten Personen aus der näheren Umgebung kamen – aus Niederösterreich und Mähren. Das Hofdekret vom 19. Juli 1810 verordnete die Pflicht, Untertanen fremder Herrschaften müssten entweder den Ehekonsens oder die Entlassung aus der vormaligen Herrschaft bei einer Vermählung in einer anderen als ihrer eigenen Herrschaft vorlegen. Die Ehelizenz allein bedeutete keineswegs automatisch die Aufnahme in die neue Jurisdiktion.[59] Die direkte Verhandlung zwischen den Kronländern Niederösterreich und Mähren führte zu nachfolgendem, per Hofdekret vom 25. August 1831 publizierten Ergebnis: Der Wiener Magistrat erteilte die Ehekonsense an die in der Donaumetropole lebenden herrschaftsfremden Personen und eruierte deren Subsistenzmöglichkeiten sowie deren moralisches Profil.[60] Die erforderlichen Meldungszettel für die politischen Domizile der Brautleute besaßen die Kraft von Entlassungsscheinen und der Wiener Magistrat stellte mit dem Ehekonsens die Brautleute unter seine Jurisdiktion.

Das Abkommen zwischen Wien, Niederösterreich und Mähren sollte die Lage unbemittelter Brautleute erleichtern, deren Herrschaftsämter sich weigerten, ihnen den Ehekonsens zu erteilen, zumal man wusste, dass diese im Falle einer möglichen Verarmung an ihre Heimatorte geschickt würden. Die Wirtschaftsämter sahen sich genötigt, derart verarmte und in der Regel alte Menschen aufzunehmen und sich um deren Armenfürsorge zu kümmern. „Da nun durch die Ertheilung des ortsobrigkeitlichen Ehekonsenses von Seite der Wiener Jurisdiktionen nicht auch die Aufnahme in die betreffende Jurisdiktion erfolgte, und deßhalb solche Individuen, wenn selbe in der Folge verarmten, den betreffenden Jurisdiktionsobrigkeiten und Gemeinden zur Erhaltung zugewiesen wurden; so geschah es häufig, daß die Grundobrigkeiten die Ertheilung des Ehemeldzettels verweigerten, wodurch zwischen diesen und den Wiener Jurisdiktionen stets Differenzen sich ergeben haben. Zur Beseitigung dieser Differenzen ist die k. k. niederösterreichische Landesregierung mit dem k. k. mährisch-schlesischen Landesgubernium aus Anlaß mehrerer Fälle dahin übereingekommen, daß: 1. Zwar jeder Unterthan fortan berechtigt seyn solle sich zu verehelichen, daß er jedoch vorher eine gesicherte Erwerbsfähigkeit und hiedurch das hinreichende Auskommen sich und seine Familie zu ernähren, ausweisen müßte. 2. Daß zur Ertheilung des ortsobrigkeitlichen Ehekonsenses von Seite der Wiener Jurisdiktion zwar noch ferner die Beibringung des sogenannten Ehemeldzettels oder grundobrigkeitlicher Heirathslizenz erforderlich bleibt, daß jedoch die grundobrigkeitliche Heirathslizenz in Hinkunft auch die Wirkung der obrigkeitlichen Entlassung aus der Jurisdiktion habe."[61] Die zwischen beiden Ländern und der Stadt Wien vereinbarte Regelung sollte die Lage armer berufstätigen Brauleute

[59] *Archiv český*, Bd. XXV, Nr. 985, S. 477.
[60] Unter das moralische Profil fielen vor allem Prostitution, Zuhälterei, Diebstähle und die kleine Kriminalität verstanden.
[61] *Provinzialgesetzsammlung Böhmen*, Bd. XIII, Nr. 241, S. 685-687.

erleichtern, die in Wien heiraten, leben und arbeiten wollten. Die formulierte Bedingung „gesicherter Erwerbsfähigkeit“ der Brautleute ließe sich als eine bloße Deklaration ihres Willens zu arbeiten, interpretieren. Diese bisher kaum bekannte Übereinkunft sollte zum wirtschaftlichen Aufstieg der Stadt Wien und ihrer arbeitenden Bewohner beitragen. Sie zeigt zugleich die äußerst progressive Haltung aller beteiligten Parteien.

Als eine Art „Musterehe“ innerhalb dieses Abkommens mag die im Jahre 1845 zwischen einem niederösterreichischen Bräutigam und seiner aus Mähren stammenden Braut geschlossene Eheverbindung gelten. Der Bräutigam Andreas Marker, ein einundvierzigjähriger „Packfongarbeiter“ aus Obersulz in Niederösterreich, bat im Oktober 1845 in Wien um die Erteilung des politischen Ehekonsenses.[62] Bei der Braut handelte es sich um die zweiundvierzigjährige Catharina Piruschka aus Dalleschitz (Dalešice) in Mähren; die Brautleute, beide katholischer Religion und ledig, galten als „wegen ausgewiesener Erwerbsfähigkeit zur Ehebewilligung geeignet“, bedurften jedoch der Meldezettel ihrer für sie zuständigen Behörden. Der Wiener Magistrat wies darauf hin, dass er lediglich „in den Fällen des angesuchten Bürgerrechtes eines Hausbesitzers, einer Handlung oder eines Gewerbes um die förmliche Entlassung einzuschreiten pflegt“, in diesem Fall jedoch „kein Grund vorliegt, um (gegen) diese Entlassung einzuschreiten.“[63] Der Wiener Magistratsbeamte Pelikan fügte am 14. Oktober 1845 hinzu, dass „diesem Schreiben ein legal gestandenes Gesuch zu Grund liege“, wodurch er den Packfongarbeiter vor eventuellen Sanktionen seiner Obrigkeit und einer möglichen Ausweisung aus der Stadt schützen wollte. Auf diese Weise sollte die Legalität des Gesuches unterstrichen werden. Im Übrigen bestand für eine Ausweisung kein Grund, da Andreas Marker eine ordnungsgemäße Aufenthaltsbewilligung besaß, deren Gültigkeit vermutlich von einer Urkunde seiner Herrschaft abhing. Der Prozess stand ganz im Einklang mit den geltenden Gesetzen. Wir dürfen folglich davon ausgehen, dass die Brauleute nach ihrer Heirat in der neuen Wiener Jurisdiktion Aufnahme fanden.

In der Teilstudie über die Ehebewilligungen standen unter juristischen Aspekten interessante Fälle im Fokus, beispielsweise derjenige der in Wien heimatzuständigen Franziska Lutzer, die einen nicht aus der Donaumetropole stammenden Mann heiraten wollte. Größere Städte verweigerten unbemittelten Fremden die Aufnahme, was auch den zukünftigen Ehemann betraf, selbst wenn dessen Gemahlin zu ihren Jurisdicentinnen gehörte. Dies traf auch für Franziska Lutzer zu, eine sechsunddreißigjährige Handschuhmacherin aus Wien, die den siebenundzwanzigjährigen Goldarbeitergesellen Franz Kwasinger heiraten wollte. Über die bevorstehende Heirat sind wir durch das Gesuch des Bräutigams an den Wiener Magistrat unterrichtet, der sich pflichtgemäß mit der Bitte um Ausstellung des politischen Ehekonsenses an seine Obrigkeit – die Liechtensteinische Herrschaft Lundenburg (Mähren) – wandte. Beide Brautleute waren ledig, katholischer Religion und, was primäre Bedeutung besaß, „wegen ausgewiesener Erwerbsfähigkeit zur Erlangung dieser Ehebewilligung geeignet“. Der Ehe stand also kein Hindernis im Weg, zugleich wurde jedoch überprüft, ob die Trauung wirklich erfolgte. Hätte es das Abkommen zwischen Niederösterreich, Mähren und Wien nicht gegeben, wäre Franziska nach der Heirat plötzlich eine fremde Person in Wien gewesen, da sie laut § 92 des Allgemeinen Bürgerlichen Gesetzbuches als verheiratete Frau der Zuständigkeit ihres Gatten folgen musste. Im Falle von Verarmung, Krankheit, Tod des Ehegatten oder aufgrund eines anderen Schicksalsschlages, hätte man sie nicht nur mit der Bitte um Unterstützung abgewiesen, sondern zugleich aus der Stadt Wien nach Lundenburg, also „nach Hause“, abgeschoben, wo sie vermutlich niemand kannte, ungeachtet der Tatsache, dass die entsprechende Gemeinde per Gesetz dort für sie zuständig war. Hierzu kam es freilich nicht, da ihr Ehemann als Mährer aufgrund des oben genannten Abkommens nach der Heirat die Wiener Zuständigkeit erhalten konnte.[64]

Eine solche Möglichkeit bot sich einer armen jungen Witwe in Wien nicht. Die in Niederösterreich geborene Eva Maria Krause arbeitete als Tuchmacherin in einer Seidenfabrik in Wien, wo sie sich seit ihrem zwölften Lebensjahr aufhielt. Im Mai 1847 suchte sie bei Wiener Stiftsherrschaft Schotten um eine finanzielle Unterstützung nach, da eines ihrer drei Kinder erkrankt war, so dass sie ihrem Gewerbe nicht nachgehen konnte. Die Herrschaft prüfte ihren Anspruch, wobei sich herausstellte, dass nicht Wien für die Antragstellerin zuständig war, sondern Altenbuch (Staré Buky) in Böhmen. Eva Marias Mann, ein Schlossergeselle aus Altenbuch, war im Jahr zuvor an Typhus verstorben und hinterließ seine 24jährige Frau mit drei Kindern im Alter von vier und zwei Jahren sowie sechs Monaten. Die Herrschaft Schottenstift ihrerseits entschied, dass Eva Maria Krause nicht nur keine Unterstützung erhalten sollte, sondern nach Altenbuch abzuschieben sei. Die Witwe brachte gegen den Bescheid ein Gnadengesuch ein, zumal sie in Altenbuch niemand kannte und sie sich dort nur äußerst schwierig ernähren könne; außerdem befürchtete sie, dass ihr sechs Monate altes Baby den Schubtransport nicht überleben werde. Die Landesregierung ließ die Situation prüfen: der Verdienst der Frau als Seidenspulerin betrug 3 Fl. 30 Kr. wöchentlich, wobei sie 7 Fl. pro Monat Miete bezahlen musste. Selbst die Beamten vertraten die Auffassung, dass die Antragstellerin in Altenbuch bei ihrer spezialisierten beruflichen Tätigkeit keine entsprechende Beschäftigung finden könne und dass ihr für eine schwere Feldarbeit die notwendige Kraft fehle. Die Gemeinde Altenbuch erkannte förmlich Eva Marias Anspruch auf die Heimatzuständigkeit an, teilte jedoch zugleich mit, dass sie E. M. Krause angesichts unzureichender Mittel im Armenfond nicht unterstützen könne. Aufgrund der kalten Jahreszeit durfte die Witwe mit ihren Kindern, von denen das jüngste bereits verstorben war, in Wien bleiben. Da sie sich auch weiterhin nicht im Stande sah, sich selbst und ihre Kinder zu ernähren, wurde gegen sie eine Abschiebung verfügt. Das Grundproblem

[62] Packfond ist eine alte Bezeichnung für Neusilber, also eine Kupfer-Nickel-Zink-Legierung, verwendet für die Produktion von Bestecken, Teilen von Blasinstrumenten, feinmechanische, elektrotechnische und medizinische Geräte usw.

[63] Hausarchiv der regierenden Fürsten von Liechtenstein in Wien, Herrschaft Wilfersdorf, H 1837, nicht foliiert.

[64] MZA Brno, Herrschaft Lundenburg F 43, Karton 412, Faszikel Nr. 3, Registratur-Nr. 8.

bestand in der ablehnenden Haltung der großen Agglomerationen, zugezogenen Arbeitern die Heimatzuständigkeit zu verleihen. Der verstorbene Ehemann E. M. Krauses hatte zwar 17 Jahre sein Schlossergewerbe in Wien betrieben, doch hatte der Magistrat bei der Erteilung eines Konsenses ausdrücklich festgehalten, dies schließe den Erwerb der Heimatzuständigkeit ausdrücklich aus.[65]

Aus der Ehebewilligung für Michael Hauser folgte keine Aufnahme in die Zuständigkeit der Stadtgemeinde Wien. „Der Seidenzeugmachergeselle" Michael Hauser, der am Schottenfeld Nr. 474 bei Heinrich Manner tätig war, suchte im Juli 1843 um die Ehebewilligung mit Barbara Pleyl nach, die ebenfalls in Wien am Schottenfeld (Nr. 249) vermutlich als Bedienstete arbeitete. Michael selbst war Witwer, Barbara wiederum zur Zeit des Eheantrags unmündig, so dass sie für die Heirat die väterliche oder vormundschaftliche Einwilligung einholen musste. Interesse verdient die Reaktion des Wiener Magistratsbeamten, nach dessen Äußerung der Bräutigam Michael Hauser „durch diese Verehelichung allein noch keineswegs nach Wien zuständig werde, sondern zufolge das k. k. Hofkanzleidekrets vom 8ten Sept. 1820, z. 26106 die vorgeschriebene Reise und Aufenthaltsbewilligung auch in Zukunft bey seiner bisherigen Zuständigkeits-Obrigkeit anzusuchen habe".[66] Bei besagter Ortsobrigkeit handelte es sich um die niederösterreichische Herrschaft Wilfersdorf in der Liechtensteinischen Domäne. Im August 1843 überprüfte die Herrschaft Stift Schotten die Ehescheine, die Heirat konnte stattfinden. Die Verweigerung der Aufnahme in die Wiener Zuständigkeit besaß militärische Gründe, zumal verheiratete Männer nicht in ihrem Aufenthaltsort, sondern durch die für sie zuständige Obrigkeit konskribiert werden sollten.[67] Diese Vorschrift widersprach dem Abkommen zwischen Wien, Niederösterreich und Mähren aus dem Jahre 1831; den Grund hierfür bildeten zum einen wohl der wachsende Einfluss der militärischen Kreise oder aber die Tatsache, dass die Braut keinem der drei am Vertrag beteiligten Länder angehört hatte.[68]

Keine rechtlichen Hindernisse hinderten wiederum den ledigen und volljährigen Lundenburger „Inwohner" Johann Mikosch (dessen Vater besaß das Haus Nr. 52 in Lundenburg), der das Gesuch um Aufnahme in die Jurisdiktion an die niederösterreichische Herrschaft Kreuzstetten richtete. Johann Mikosch erwarb das Haus Nr. 99 in Niederkreuzstetten in der Absicht, sich dort niederzulassen und die minderjährige Katharina Leberwurst aus Wolkersdort zu heiraten. Die Herrschaft Kreuzstetten stellte ihm am 14. August 1843 eine Aufnahmeurkunde aus, nachdem der Antragsteller vorschriftsmäßig eine vorläufige Bewilligung seitens der Lundenburger Herrschaftskanzlei eingeholt und dann den Entlasungsschein seiner Herrschaft vorgelegt hatte. Somit gab es für die Heirat keinen Hinderungsgrund, zumal Johann Mikosch ein Haus in Niederkreuzstetten erworben hatte; seine Braut hingegen bedurfte als Minderjährige der Zustimmung ihres Vaters oder Vormunds.[69]

Im Verlaufe der Zeit verflüchtigte sich in den politischen Behörden[70] die Unterscheidung zwischen der Bewilligung der Heirat und der bloßen Meldung der Ehe, was die nachfolgenden Formulierungen zeigen: „Die Heirat wird anmit bewilliget" und „Gegen die Heirat wird kein Anstand genommen". Die Unsicherheit der Behörden in der Frage des Ehekonsenses bringt die am 15. Juli 1844 von Erzherzog Stephan von Habsburg-Lothringen initiierte Umfrage zum Vorschein, unter welchen Umständen die Ehekonsense zu erteilen oder abzulehnen seien.[71] Das böhmische Landesgubernium wandte sich an die Kreisämter, die Nachforschungen in den ihnen unterstellten Territorien durchführten. Die Kreisämter kamen zu unterschiedlichen Ergebnissen, waren sich allerdings darin einig, dass der Pauperismus wesentlich zugenommen habe und dass dies in der Folge katastrophale Auswirkungen auf das Familienleben hätte. Einige Kreisämter verwiesen bei den hierfür ausschlaggebenden Gründen auf eine vermeintliche Arbeitsscheue sowie negative moralische Eigenschaften. In armen Gebieten, namentlich im Riesengebirge, läge die Ursache der Armut in der Übervölkerung, deren Ursache als ein Nebenprodukt der Befreiung von Ehekonsensen zu betrachten sei. Zusammenfassend gelangte die Umfrage zu dem Ergebnis, dass die Ursachen der Armut tiefere Gründe hätten und vornehmlich in den begrenzten Möglichkeiten der Ernährung für unqualifizierte Personen gesucht werden müssten.[72]

Zwei Interessante Tatsachen kommen in der Umfrage quasi zwischen den Zeilen zum Ausdruck: Dabei handelt es sich zum einen um die steigenden Machtansprüche von Gemeinden unter den Bedingungen der weiter bestehenden Untertänigkeit und der wachsende „bürokratische Mut" von Untertanen, zum anderen zeichne hierfür die steigende Anzahl von Untertanen verantwortlich, die den Rekurs gegen die Ehekonsensverweigerung wagten. Die meisten Herrschaftsämter zeigten sich darin einig, dass in der Frage der Erteilung von Ehekonsensen eine Zusammenarbeit mit den Gemeinden erforderlich sei, zumal die Kräfte der zur Beibehaltung berufenen Gemeinden erschöpft sein können. Im Moment der Übertragung der obrigkeitlichen Kompetenz in der Frage der Armenfürsorge an die Gemeinden

[65] HEINDL, W. – SAURER, E. (Hrsg.), *Grenze und Staat. Passwesen, Heimatrecht und Fremdengesetzgebung in der österreichischen Monarchie 1750–1867*. Wien – Köln – Weimar, 2000; hier das Kapitel von Harald Wendelin, S. 219-220.

[66] Hausarchiv der regierenden Fürsten von Liechtenstein in Wien, Herrschaft Wilfersdorf, H 1837.

[67] Hofkanzleidekret vom 8. September 1820. Franz II. (I.) – Gesetze, Bd., Nr. 103, S. 215.

[68] Hausarchiv der regierenden Fürsten von Liechtenstein in Wien, Herrschaft Wilfersdorf, H 1837.

[69] MZA Brno, Herrschaft Lundenburg F 43, Karton 412, Faszikel Nr. 3, Registratur-Nr. 8.

[70] Das Adjektiv „politisch" wird hier in zeitgenössischer Bedeutung benutzt, da es besser den Inhalt abdeckt. Es ist nicht möglich, das Wort „politisch" lediglich durch das Wort „staatlich" zu ersetzen, als politische Behörden galten sämtliche Behörden, die eine durch den Staat übertragene Verwaltungskompetenz besaßen, also Staats- und Landesbehörden, vor dem Jahre 1849 auch herrschaftliche Ämter. Dies betraf sowohl die bürgerliche (zivile) wie auch die Strafjurisdiktion.

[71] Erzherzog Stephan Franz von Habsburg-Lothringen (1817–1867), der Enkelsohn Kaiser Leopolds II., wirkte im Untersuchungszeitraum als böhmischer Landesgouverneur.

[72] KLABOUCH, J., *Politický konsens k manželství v Čechách*, S. 37.

sehen wir eines der wichtigsten Kennzeichen des sich kurz vor der Aufhebung befindenden Patrimonialsystems.

Die mögliche Verweigerung des Ehekonsenses muss als eine schwache Waffe der Obrigkeiten und Gemeinden angesehen werden. Es ging nicht darum zu verhindern, dass arme Personen im Eheverband lebten, sondern man musste die rasche Zunahme von Kindern armer Eltern versuchen zu bremsen. Führte die Verweigerung des Ehekonsenses zum Zusammenleben von ledigen Personen, zum Anwachsen der Sterbefälle von Neugeborenen und zu Fehlgeburten? Das Konkubinat von Personen, denen der Ehekonsens verweigert wurde, ließ sich nicht per Gesetz verhindern, wie die Entwicklung bei Juden zeigte, deren Familienleben noch immer dem äußerst strengen Familiantengesetz unterworfen war.

Die Zahlen ehelich und außerehelich geborener Kinder in Prag, wo der Ehekonsens seit 1838 eine reine Formalität darstellte, veränderten sich im Laufe vierziger Jahren des 19. Jahrhunderts kaum. Der hohe Prozentsatz der außerehelich geborenen Kinder – fast die Hälfte aller Lebendgeborenen – zeigt einen geringen Einfluss des Ehekonsenses auf den Geburtenstand. Natürlich gilt es für Prag eine wichtige Tatsache zu beachten: In der böhmischen Landeshauptstadt gab es, im Unterschied zu anderen Städten und zum flachen Lande, ein Findelhaus und das allgemeine Krankenhaus mit einer Geburtsabteilung, in der arme Frauen kostenlos entbinden konnten. Sie waren jedoch verpflichtet, die Kosten für ihre Entbindung „abzuarbeiten" – durch das Stillen ihres eigenen Kindes und eines der sich im Findelhaus befindlichen Säuglinge. Sie erhielten Unterkunft und Kost; die so verbrachte Zeit gestattete ihnen, die schwierige Entscheidung, ob sie ihr Kind im Findelhaus belassen oder den schwierigen Weg einer ledigen Mutter zu wählen, zeitlich hinauszuschieben.

Tabelle 2: Die Zahl der ehelich und außerehelich geborenen Kinder in Prag in den Jahren 1842–1844. Quelle: KLABOUCH, J., *Politický konsens k manželství v Čechách. Z novějších dějin manželství v našich zemích*. Prag, 1960, S. 40.

Geborene Kinder in Prag				
Jahr	**Eheliche**	**Außereheliche**	**Absolut**	**Außereheliche %**
1842	3 031	2 821	5 852	**48,21**
1843	3 104	2 920	6 024	**48,47**
1844	3 125	2 672	5 797	**46,09**
1845	3 330	3 171	6 501	**48,78**
1842-1845	**3 148**	**2 896**	**6 044**	**47,89**

Einige hohe Bürokraten erblickten, im Unterschied zu klerikalen Kreisen, in den Geburten außerehelicher Kinder keine für den Staat diskriminierende Angelegenheit. Sie nährten sich in ihren Vorstellungen den großen Aufklärern, die das Wachstum der Bevölkerung im Sinne Justi's unterstützten und ähnlich wie Johann Peter Frank in unehelichen Kindern lediglich eine Frucht der Natur sahen: „Die Natur verursacht keine Sünde".[73] Graf Thun, Mitglied der Kommission für die Armenpflege in der Region Riesengebirge, sah in den außerehelich geborenen Kindern kein Unglück, sondern vielmehr eine Möglichkeit für den Staat, die das Findel- und Waisenhaus überlebenden Kinder als willkommenen Nachwuchs für die Armee zu betrachten und Militärschulen für verwaiste Kinder zu errichten.[74]

Tabelle 3: Die Zahl der ehelich und außerehelich geborenen Kindern in Zisleithanien im Jahre 1881 je 1000 geborene Kinder. Quelle: *Österreichische Statistik*, Band V, Heft 1. Wien, 1884, S. XI.

Von 1000 Geborenen Kindern im Jahre 1881				
	Eheliche Kinder		**Außereheliche Kinder**	
	Lebend	**Totgeboren**	**Lebend**	**Totgeboren**
Böhmen	973,14	26,86	963,64	36,36
Bukowina	982,71	17,29	972,37	27,63
Dalmatien	991,51	8,49	963,35	36,35
Galizien	976,78	23,22	973,05	36,95
Görz und Gradisca	980,52	19,48	942,20	57,80
Istrien	978,77	21,23	955,62	44,38
Kärnten	979,96	20,04	972,05	27,95
Krain	984,09	15,91	974,14	25,86
Mähren	979,04	20,96	964,55	35,45
Niederösterreich	966,03	33,97	954,78	45,22
Oberösterreich	970,21	29,79	963,69	36,31
Salzburg	974,91	25,09	959,83	40,17
Schlesien	975,77	24,23	966,96	33,04
Steiermark	969,15	30,85	958,50	41,50
Tirol	987,74	12,26	979,83	20,17
Triest und Gebiet	962.50	37,50	938,69	61,31
Vorarlberg	988,71	11,29	953,13	46.87
Zisleithanien	**975,75**	**24,25**	**962,05**	**37,95**

Tabelle 4: Die Zahl der ehelich und außerehelich geborenen Kindern in Zisleithanien im Jahre 1881 in Prozent. Quelle: *Österreichische Statistik*, Band V, Heft 1. Wien, 1884, S. XI.

Von 1000 Geborenen Kindern im Jahre 1881 in Prozent				
	Eheliche Kinder		**Außereheliche Kinder**	
	Lebend	Totgeboren	Lebend	Totgeboren
Böhmen	50,25%	42,49%	49,75%	57,51%
Bukowina	50,26%	38,49%	49,74%	61,51%
Dalmatien	50,72%	18,93%	49,28%	81,07%
Galizien	50,10%	38,59%	49,90%	61,41%
Görz und Gradisca	51,00%	25,21%	49,00%	74,79%
Istrien	50,60%	32,36%	49,40%	67,64%
Kärnten	50,20%	41,76%	49,80%	58,24%
Krain	50,25%	38,09%	49,75%	61,91%
Mähren	50,37%	37,16%	49,63%	62,84%
Niederösterreich	50,29%	42,90%	49,71%	57,10%
Oberösterreich	50,17%	45,07%	49,83%	54,93%
Salzburg	50,39%	38,45%	49,61%	61,55%
Schlesien	50,23%	42,31%	49,77%	57,69%
Steiermark	50,28%	42,64%	49,72%	57,36%
Tirol	50,20%	37,80%	49,80%	62,20%
Triest und Gebiet	50,63%	37,95%	49,37%	62,05%
Vorarlberg	50,92%	19,41%	49,08%	80,59%
Zisleithanien	**50,35%**	**38,99%**	**49,65%**	**61,01%**

Im Zeitalter der Statistik veränderte sich das Verhältnis zwischen ehelichen und außerehelich geborenen Kindern kaum.

[73] Johann Peter Frank (1745–1841) war ein in mehreren europäischen Städten tätiger deutsche Mediziner; er gilt heute als ein Pionier des öffentlichen Gesundheitswesens, der Hygiene als Fach und als Wegbereiter der systematischen Ausbildung von Ärzten und Krankenschwestern. Seine modernen Methoden und der Ruf nach einem öffentlichen Gesundheitssystem machten ihn freilich damals unbeliebt.

[74] Franz Anton Graf von Thun-Hohenstein (1786–1873), Großgrundbesitzer und Abgeordneter im böhmischen Landtag, widmete sich als Industrieller auch der sozialen Frage und der Verbesserung der Lebensbedingungen von Armen.

Die Tabelle geborener Kinder im Jahre 1881 zeigt für Böhmen 49,75 % außerehelich lebend geborene Kinder. In Prag lag seit dem Bestehen des Ehekonsenses die Zahl außerehelich geborener Kinder in den Jahren 1842–1845 bei 47,89 %. Die Statistik zeigt mit Blick auf das Bestehen des Ehekonsenses keinen großen Unterschied bei den außerehelich geborenen Kindern im Vergleich zur späteren Zeit, als die Ehekonsense nicht mehr erforderlich waren. Die Daten für einzelne Länder und das gesamte Zisleithanien zeigen geringe Unterschiede in der Prozentzahl außerehelich geborener Kinder, der Anteil der lebenden außerehelich geborenen Kinder betrug für Gesamt-Zisleithanien 49,65 %.

Drastisch fällt hingegen der Vergleich totgeborener außerehelicher Kinder mit der Zahl der totgeborenen Kinder ehelicher Abstammung aus. In den südländischen und bergigen Provinzen belief sich die Zahl der toten außerehelichen Neugeborenen im Vergleich mit den ehelichen Geborenen (Dalmatien, Görz und Gradisca) sogar auf das Vierfache, in Vorarlberg stehen 19,41 % ehelich totgeborenen 80,59 % uneheliche totgeborene Kinder gegenüber!

Die mögliche Verhinderung von Eheschließung bewerteten die Zeitgenossen unterschiedlich. Gleichzeitig zur Bejahung von Ehekonsensen finden sich Ansichten, mit der Verhinderung von Ehen ließe sich die Verbreitung der Armut nicht verhindern, vielmehr gelte es, die Armut durch eine Verbesserung der Arbeitsbedingungen in Industrie und Landwirtschaft wirksamer zu bekämpfen. Somit standen sich zwei diametral entgegenstehende Auffassungen über die Eheschließung von Vaganten, Bettlern und Personen ohne die ständige Arbeit gegenüber. Die Ehe, so hieß es, sei das beste Mittel, um einander bei schweren Schicksalsschlägen beistehen zu können.

Die Debatte auf böhmischer Landesebene nahm einen interessanten Verlauf, da sie sowohl die Haltung der Landes- und Kreisbeamten als auch diejenige der Großgrundbesitzer offenbarte, die vor einer Radikalisierung der armen Bevölkerung warnten, die sich möglicherweise aus der Verhinderung von Eheschließungen ergeben könnte. In vielerlei Hinsicht verdient die Umfrage des böhmischen Landesguberniums aus dem Jahre 1846 Aufmerksamkeit, handelt es sich doch um die Initiative der mittleren Verwaltungsebene, d. h. der Landesbehörde, die sich eine Situation zu klären bemühte, welche sich in vielen Ländern und Länderteilen der Monarchie als heterogen erwies. Dies geschah mit den demokratischen Mitteln einer Meinungsumfrage, die die unterschiedlichen Ansichten spiegelte. Zahlreiche Großgrundbesitzer, also die damals noch bestehenden Herrschaften, zeigten mehr Verständnis für die Abschaffung des Ehekonsenses als viele Landes- und Kreisbeamte. Die Enquete fand kurz vor der Revolution des Jahres 1848 und vor der Aufhebung der Untertänigkeit statt.

Welche Bestimmungen aber enthält das Allgemeine Bürgerliche Gesetzbuch zum Eherecht? Die Artikel 16 („Jeder Mensch hat angeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten“, wozu auch das Recht „sich zu verehelichen“ zählt) und Artikel 47 („Einen Ehevertrag kann jedermann schließen, sofern ihm kein gesetzliches Hindernis im Wege steht“) sind sehr allgemein gehalten und rücken die Bemühungen der böhmischen Landesbehörde in kein gutes Licht, zumal, wenn man die Kommentare des zeitgenössischen Kenners Franz von Zeiller liest, der eine mögliche Verhinderung der Ehe als nicht dem ABGB widersprechend interpretiert. „Diejenigen Gesetze, welche eine Ehe aus politischen Gründen untersagen, wären eigentlich ein Gegenstand der politischen Gesetzgebung. Da aber mehrere dieser politischen Verbothsgesetze zugleich auf Rechtsgründen beruhen, und alles, was einen Vertrag ungültig macht, auch in dem bürgerlichen Gesetzbuche bemerkt werden soll; so überläßt man nun jene Verbothe, welche eine Ehe (unter Verantwortung und Strafe) unerlaubt (aber nicht ungültig) machen, der politischen Gesetzgebung.“[75] Gegen eine automatische Erteilung von Ehekonsensen wendet sich der Artikel 53: „Mangel an dem nöthigen Einkommen; erwiesene oder gemeinbekannte schlechte Sitten; ansteckende Krankheiten oder dem Zwecke der Ehe hinderliche Gebrechen desjenigen, mit dem die Ehe eingegangen werden will, sind rechtmäßige Gründe, die Einwilligung zur Ehe zu versagen“.[76] Der Artikel 53 fand nach Aufhebung der Untertänigkeit im Bereich der Erteilung der Ehekonsense weiterhin Anwendung.

Das Patrimonialsystem endete am 7. September 1848, womit das seit Jahrhunderten bestehende System seinen Zusammenbruch „von oben“ erlebte.[77] Die Zeit hierfür war bereits seit langem gereift, zumal die Akten in den einzelnen Herrschaften beweisen, dass die Patrimonialverwaltung mit einer Flut von Regeln, gegen die die herrschaftlichen Beamten anzukämpfen sich bemühten, regelrecht überschüttet worden war. Der Staat verlangte die praktische Umsetzung zahlreicher Regelungen und machte hierbei sein das Recht, die Herrschaftsbeamte zu kontrollieren, geltend, ohne dabei den herrschaftlichen Ämtern eine entsprechende Entlohnung anzubieten.

Die Frage des Ehekonsenses blieb in der Schwebe. Die Praxis der Ausstellung von Entlassungsscheinen der jeweiligen Herrschaften fiel weg, ebenso jene für die Ausgabe von Aufnahmezetteln für die neue Herrschaft. Ungeachtet dieser Regelungen handelten einige Herrschaftsbeamte sozusagen in den eingefahrenen Gleisen, wie der Fall von Amalia Fischer beweist. Das Oberamt in Kanitz (Dolní Kounice, Südmähren) bat am 31. März 1848 die Lundenburger Herrschaft um die Entlassung von Amalia Fischer, Tochter von David Fischer aus Lundenburg. Abraham Klein, Uhrmacher und Judenfamiliant aus Kanitz, artikulierte gegenüber dem Oberamt in Kanitz seinen Willen, Amalia Fischer zu ehelichen und wandte sich deshalb an die für ihn zuständige Obrigkeit. Das Gesuch traf am 4. April 1848 in Lundenburg ein und bereits am nachfolgenden Tag wurde Amalia Fischer aus der Lundenburger Jurisdiktion entlassen.

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[75] ZEILLER von, F., *Commentar über das allgemeine Bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*, Bd. 1. Wien und Triest, 1811, S. 176-177.

[76] ABGB 1811, Patent vom 1. Juni, Nr. 946, § 16, § 47, § 53.

[77] Patent vom 7. September 1848. *Sr. K. K. Majestät Ferdinand des Ersten politische Gesetze und Verordnungen für sämmtliche Provinzen des österreichischen Kaiserstaates, mit Ausnahme von Ungarn und Siebenbürgen*. Bd. 76, Wien, 1851, Nr. 112, S. 285-288.

Die Ehe kam allerdings aus nicht näher bekannten Gründen nicht zustande. Amalia Fischer kehrte zu ihrer Familie zurück und ihr Entlassungsschein wurde in der Tat an die herrschaftliche Kanzlei in Lundenburg zurückgeschickt. Die ehemalige Braut fiel also wieder in den Zuständigkeitsbereich ihrer alten Jurisdiktion.[78] Dieser Fall ist in mehrfacher Hinsicht bedeutend: Er belegt das vorschriftmäßige Handeln der herrschaftlichen Verwaltung. Was jedoch viel interessanter erscheint ist die Tatsache, dass der Entlassungsschein am 15. Februar 1849 retourniert wurde, obwohl in der Zwischenzeit, nämlich am 7. September 1848, die Untertänigkeit aufgehoben worden war. Die alten bürokratischen Wege scheinen also nicht postwendend verlassen worden zu sein. Da es sich um eine jüdische Ehe handelte, findet sich natürlich der Hinweis, dass es sich bei dem Bräutigam um einen Familiant handele. Die religiösen Konsequenzen, die die nicht vollzogene Eheschließung prägten, erwiesen sich für die herrschaftliche Verwaltung als nicht maßgeblich.

Die Ehekonsense wurden nach der Aufhebung der Untertänigkeit beibehalten, im Unterschied zu den Enttlassungs- und Aufnahmescheinen. Die zuständigen Ämter waren offensichtlich unsicher, wie sie unter den neuen Verhältnissen handeln sollten, wie auch die Formulierung des Ministeriums des Innern aus dem Jahre 1849 zeigt. „Ueber die gestellte Anfrage, ob zur Eingehung von Ehen noch, wie bisher, Meldscheine erforderlich sind, wird E. M. eröffnet, daß die diesfälligen Vorschriften zwar ihre Geltung verloren haben, in soferne sie lediglich in dem Untertänigkeits-Verhältnisse ihren Grund hatten. Die politischen Eheconsense können jedoch nicht als aufgehoben betrachtet werden, und es ist darüber feste Hand zu halten und anzuordnen, daß für alle Fälle, wo nach den bisherigen Vorschriften die Erklärung einer politischen Behörde erforderlich war, das betreffende Brautpaar vor seiner Verehelichung sich mit einem Certifikate der politischen Behörde ausweise; es sei die bevorstehende Verehelichung ordnungsgemäß gemeldet worden, und es walte kein gesetzlicher Anstand dagegen ob.“[79]

Die politischen Ehekonsense bedeuteten lediglich die Fortsetzung der eingeführten Praxis in der Frage der Heiratsbewilligungen. Eine Neuerung stellte lediglich die Übertragung der Kompetenz an die Gemeinden dar, die bereits vor der Aufhebung des Patrimonialsystems die Ehelizenzen zu regulieren beabsichtigten und dabei das Argument ins Feld führten, sie trügen die größte Last der Verantwortung für die Armenfürsorge. Die neu gegründeten Bezirksämter hielten sich zumeist an die von den Gemeinden getroffenen Entscheidungen; über Rekurse entschieden hingegen Kreisämter und Landesämter. Die an Gemeinden übertragene Kompetenz der Entscheidung in der Frage der Ehekonsense führte in der Realität zu Zersplitterung und fehlender Ausgewogenheit in den verschiedenen Ländern und Länderteilen. Auf diese Weise gelangte ein potentielles Mittel für eine mögliche Rache oder Meinungsverschiedenheiten in die Hände der jeweiligen Gemeinde. Hinter der Verweigerung des Ehekonsenses konnten sich beispielsweise persönliche Animositäten innerhalb der Gemeinde verbergen.

Weiterhin spielten in der Erteilung von Ehekonsensen folgende drei Faktoren eine Rolle: (Nicht)Existenz einer Ernährungsquelle, moralische Eigenschaften und Militärdienst. Körperliche (gemeint sind sexuell ansteckende) oder geistige Krankheiten, die Unmöglichkeit des Ehevollzugs, Unmündigkeit und Geschäftsunfähigkeit waren bereits im Allgemeinen Bürgerlichen Gesetzbuch verankert und wurden in der zweiten Hälfte des 19. Jahrhunderts als selbstverständliche Hindernisse von Ehebewilligungen verstanden. Die Existenz der Ernährungsquelle bedeutete bei armen Brautleuten keineswegs der Nachweis eines Besitzes, sondern eines bestehenden Arbeitsverhältnisses oder sogar allein lediglich die erklärte Bereitschaft eine Beschäftigung aufzunehmen.

Die moralischen Eigenschaften wurden besonders bei Personen überprüft, die mit der Heirat automatisch unter die Heimatzuständigkeit gelangten. Große Agglomerationen wehrten sich dabei, prostituierten Frauen vom Lande die Ehe mit in ihren Zuständigkeitsbereich fallenden Männern zu bewilligen, da sie mit der Heirat zu Einheimischen wurden und man sie nicht mehr in ihre Heimatgemeinden ausweisen konnte. Hindernisse für eine Verweigerung des Ehekonsenses konnten das Vagieren, der Alkoholismus sowie sich wiederholende kleinkriminelle Taten (Diebstahl) darstellen.

Der Militärdienst bildete einen wichtigen Faktor bei der Erteilung der Ehekonsense. Die Verpflichtungen gegenüber der Ehegattin und den Kindern schlossen in der Regel die Pflicht zum Militärdienst aus, aus diesem Grunde stellte die Heirat von jungen Männern keine Ausnahme dar. Seit dem Jahre 1858 sollte, sofern keinerlei außerordentliche Umstände dagegensprächen, der Bräutigam ein Alter von 22 Jahren erreicht haben. Die Heirat junger Brautleute ließ sich nicht verhindern (auf ziviler Ebene beabsichtigte man dies auch nicht), aus diesem Grunde war die Altersgrenze der einzige Faktor, bei dem die Stimmen einflussreicher militärischer Kreise gehört wurden. Nach der Einführung der allgemeinen Wehrpflicht in Österreich-Ungarn im Jahre 1868 sollten Erben bäuerlicher Grundstücke und Gewerbetreibende lediglich einen achtwöchigen Militärdienst leisten, die meisten anderen Männer (mit einigen Ausnahmen wie einjährigen Freiwilligen u.a.) leisteten eine dreijährige direkte Dienstpflicht.[80]

Der materielle Status der Brautleute, vorzüglich der Männer, übte einen Einfluss auf das Alter der Eheschließung aus. Eine vermutete spätere Eheschließung innerhalb der ärmeren Bevölkerung konnten mehrere historisch-demographische Studien bestätigen. Am Beispiel der Gemeinde Staňkov im Böhmerwald (Šumava) lässt sich das Heiratsalter innerhalb eines

[78] MZA Brno, Herrschaft Lundenburg F 43, Karton 412, Faszikel Nr. 2 Registratur-Materie 8.

[79] Erlass des Ministeriums des Innern vom 21. Juni 1849, publiziert für Oberösterreich. *Allgemeines Reichs-, Gesetz- und Regierungsblatt für das Kaiserthum Oesterreich*. Jg. 1849, Wien, 1850, Nr. 285, S. 358.

[80] HOCHEDLINGER, M., Militarisierung und Staatenverdichtung. Das Beispiel der Habsburgermonarchie in der frühen Neuzeit. In: KOLNBERGER, T. – STEFFELBAUER, I. – WEIGL, G. (Hrsg.), *Krieg und Akkulturation*. Wien, 2004, S. 107-129; FIALOVÁ, L. et al., *Dějiny obyvatelstva českých zemí*. Praha, 1996, S. 161.

Jahrhunderts von Eheschließungen 1800-1900 verfolgen.[81] Das niedrigste Heiratsalter findet sich bei Bauern, wesentlich später heirateten Arbeiter in der Landwirtschaft (Landknechte, Tagelöhner in der Landwirtschaft u.a.), also meist die ärmste Bevölkerungsschicht. Das höchste Heiratsalter wiesen demgegenüber „andere" aus, zumeist Männer mit einer höheren Ausbildung, die mehr Vorbereitungszeit für ihren Beruf benötigten; darüber hinaus mussten Beamte bei ihren Vorgesetzten um den Heiratskonsens bitten, so dass das hohe Heiratsalter in dieser Kategorie keineswegs überrascht.

Tabelle 5: Das Heiratsalter von Männern in den Jahren 1800-1900 in Staňkov nach Besitz und Beruf. Quelle: BOZDĚCH, L., Vliv majetkových poměrů a povolání na sňatkový věk ve Staňkově v 19. století. In: *Historická demografie*, Jg. 44, Nr. 2, 2020, S. 168.

	Beruf des Bräutigams						
	Bauer	Gewerbe	Landarbeiter	Arbeiter	Andere	Unbekannt	Zusammen
Anzahl absolut	47	283	122	134	51	72	709
Durchschnittsalter	25,20	27,10	28,00	25,70	28,70	27,90	27,10

7. Der Weg zur Aufhebung des Ehekonsenses

Die Aufhebung des Ehekonsenses gelangte bereits im Jahre 1863 auf Antrag der Stadt Wien durch den deutschliberalen Politiker J. N. Berger im Reichsrat auf die Agenda.[82] Die Lage stellte sich in den einzelnen Kronländern in der Frage des Ehekonsenses sehr heterogen dar: In Böhmen, Mähren, Niederösterreich, Oberösterreich, der Steiermark, Tirol und Vorarlberg fand der politische Ehekonsens in den einzelnen Territorien in unterschiedlicher Weise Anwendung. In Tirol und Vorarlberg bedeutete der im Jahre 1820 eingeführte Ehekonsens (Gesetz für Tirol vom 12. Mai 1820) keineswegs die Fortsetzung der Untertanenverhältnisse, die zu keinem Zeitpunkt so wie beispielsweise in Böhmen bestanden hatten. In Ungarn, inklusive Siebenbürgen, gab es niemals einen Ehekonsens, in Dalmatien, Lombardo-Venetien, im Küstenland, Krain, Kärnten, Galizien und Bukowina fand dieser keine Anwendung.

Die Länder der Böhmischen Krone behielten nach der Revolution im Jahre 1848 die Ehemeldescheine bei, deren Ausstellung jedoch zumeist formell geschah. Minister Lasser[83] berichtete über sechs Rekurse in zehn Jahren (1853-1863), die alle im Staatsministerium positiv entschieden wurden.[84] Die Gemeinden in Nieder- und Oberösterreich beklagten sich wiederholt beim Staatsministerium über die allzu liberalen Regelungen des Ehekonsenses, was für die Stadtgemeinde Wien zu keinem Zeitpunkt galt. Wien drängte vielmehr auf die Aufhebung des Ehekonsenses, da dieser in der Residenzstadt keinen Einfluss auf die Anzahl armer Personen ausübte. Die Niederösterreichische Landesvertretung im Reichstag unterstützte jedoch die Aufhebung des politischen Ehekonsenses, da es dem Abgeordneten von Mende zufolge „jedem Eigenberechtigten freistehen sollte, ohne weitere Rückfrage eine Ehe zu schließen", die Institution des Ehekonsenses ein Relikt „aus der Zeit der Hörigkeit" sei.[85]

Als drängendes Problem erwies sich der politische Ehekonsens in Vorarlberg und besonders in Tirol, wo die Gemeinden sehr unter der Last der Armenfürsorge stöhnten. Manche Tiroler Gemeinden waren dem Innenminister Lasser zufolge mit Umlagen belastet, deren Umfang sich auf 100 bis 400 Prozent der direkten Steuer belief. Je ärmer das Land war, desto restriktiver handelten die Gemeinden in der Frage des politischen Ehekonsenses. Einige Politiker wie Innenminister Joseph Lasser sprachen sich für die Aufhebung des Ehekonsenses, zumal damit die Behörden nicht mehr verpflichtet seien, „gegen engherzige Auffassungen der Gemeinden das Individuum in Schutz zu nehmen".[86] Tirol und Vorarlberg optierten für die Beibehaltung des Ehekonsenses, der eine Zunahme der Zahl armer Kinder bremsen sollte. Die beiden Länder sahen sich darüber hinaus mit einem Mangel an fruchtbarem Boden konfrontiert, die Parzellen fielen klein und ärmlich aus und vermochten große Familien nicht zu ernähren. „Bei der nicht verdorbenen Berg- und Landbevölkerung Tirols und Vorarlbergs", so die Worte des Tiroler Abgeordneten Sartori, „sind die natürliche Schamhaftigkeit und Redlichkeit, der religiöse Sinn und die Frömmigkeit ein sehr mäßiger Hemmschuh gegen die Ausgelassenheit, und die Verweigerung des politischen Ehekonsenses hat doch in der Regel nicht die schlimme Folge in moralischer Beziehung, die sie anderswo haben mag."[87] Ein Konsens in der Frage der Ehebewilligungen konnte innerhalb Zisleithaniens nicht erreicht werden: die Stadtgemeinde Wien sprach sich für die Aufhebung, die Länder Tirol und Vorarlberg hingegen votierten nicht allein für eine Beibehaltung, sondern vielmehr für die Verschärfung des Ehekonsenses, da „die unverdorbene kräftige Landbevölkerung in Tirol und Vorarlberg" sich zu früh „dem Joche der Ehe unterzieht (…) mit den bedauerlichen Folgen der

[81] BOZDĚCH, L., Vliv majetkových poměrů a povolání na sňatkový věk ve Staňkově v 19. století. In: *Historická demografie*, Jg. 44, 2020, Nr. 2, S. 145-178.

[82] Johann Nepomuk Berger (1816–1870), Jurist, war ein deutschliberaler Politiker, der stark von der Idee des Föderalismus der Habsburgermonarchie geprägt war; im Untersuchungszeitraum wirkte er als Abgeordneter des niederösterreichischen Landtags, der ihn auch in den österreichischen Reichsrat delegierte.

[83] Joseph Lasser von Zollheim (1815–1879) gilt als verfassungstreuer und liberaler österreichischer Staatsmann, er war Innenminister 1871–1878 und Mitschöpfer der Februarverfassung (1861).

[84] *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten*. Bd. 1, Wien, 1864, 16. Sitzung der 2. Session am 24. September 1863, S. 242.

[85] Der Jurist Leopold von Mende (1816–1893) gehörte von 1861 bis zum 1873 dem niederösterreichischen Landtag an und war zudem Reichsratsabgeordneter. Zitat ebenda, S. 243.

[86] *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten*. Bd. 1, Wien, 1864, 16. Sitzung der 2. Session am 24. September 1863, S. 243.

[87] Ebenda, S. 244.

nun entstehenden Bettlerfamilien und der verkümmerten und schlecht erzogenen verdorbenen Kinder, (…) welche mit der unbeschränkten Freiheit der Verehelichung verbunden sind.“ [88]

Der Staat selbst verhielt sich in der Frage des Ehekonsenses gleichgültig, sah er sich doch weder zur Lösung der sozialen noch der kirchenrechtlichen Konsequenzen verpflichtet, wie dies Innenminister Lasser formulierte: „Ich muß vor allem bemerken, daß die ganze Frage für die Regierung unmittelbar von ganz untergeordneter Bedeutung ist. Ob irgend eine Behörde auf die Ertheilung oder die Verweigerung des Eheconsenses Einfluß nimmt, ist, offen gesagt, für die Regierung werthlos.“ [89] Der Ehekonsens brachte vor allem soziale Konsequenzen mit sich, die von einer zur anderen Gemeinde übertragen wurden. Dies erwies sich zwar für die Gemeinden selbst als sehr bedeutsam, jedoch spielte es für den Staat keine Rolle, welche Gemeinde die Kosten für die Armenfürsorge zu tragen habe; auf der gesamtstaatlichen Ebene änderte sich dabei sehr wenig.

„Das lange Leben“ des politischen Ehekonsenses fand durch das Gesetz im Jahre 1868 sein Ende. Das Gesetz vom 25. Mai 1868 kehrte in der Frage des österreichischen Eherechts zu den Bestimmungen des Allgemeinen Bürgerlichen Gesetzbuches zurück.[90] Der Einfluss der katholischen Kirche, manifestiert vor allem im Konkordat mit dem päpstlichen Stuhl aus dem Jahre 1855, wurde wesentlich verringert.[91] Eine interkonfessionelle Ehe zwischen unterschiedlichen christlichen Religionen angehörenden Verlobten konnte „in Gegenwart zweier Zeugen vor dem ordentlichen Seelsorger eines der beiden Brautleute oder vor dessen Stellvertreter“ geschlossen werden. „Den Brautleuten steht es in allen Fällen frei, die kirchliche Einsegnung ihrer vor dem Seelsorger des einen der Brautleute geschlossenen Ehe bei dem Seelsorger des anderen Teiles zu erwirken.“ [92] Zum ersten Mal wurde es auf dem Gebiet der Habsburgermonarchie möglich, eine sog. zivile Ehe zu schließen, d. h. nicht vor einem kirchlichen Würdenträger, sondern vor einem Vertreter des Staates.[93] Das Institut des politischen Ehekonsenses behielt man zwar bei (§ 4), aber ein solcher Ehekonsens erwies sich unter den Verhältnissen des sog. Bürgerministeriums, d. h. der Macht der liberalen Kreise, als nicht mehr auf Dauer haltbar.

Durch die Entscheidung vom 8. April 1868 wurde an einige Landesbehörden der Gesetzentwurf gesendet, dessen Inhalt mehr oder weniger mit jenen Gesetzen identisch war, die dann die einzelnen Länder publizierten. Politische Ehekonsense und die Ehemeldezettel fielen weg. „Eine Heiratsbewilligung von Seite der politischen Behörde oder der Gemeinde ist fernerhin nicht erforderlich. Die in Böhmen bisher bestehenden politischen Ehemeldescheine (Ehemeldzettel), sie mögen unter was immer für eine Benennung ertheilt werden, sind abgeschafft und die darauf bezüglichen Verordnungen aufgehoben.“ [94] Die wortgleiche Fassung des Gesetzes wurde am Mährischen Landtag von allen 51 anwesenden Landtagsabgeordneten einstimmig angenommen.[95]

Die Abschaffung des Ehekonsenses in der Habsburgermonarchie erfolgte in den meisten Kronländern in den Jahren 1867-1871.[96] In den Ländern, in denen es den Konsens gab, wurde dessen Aufhebung in Gestalt der Landesgesetzgebung veröffentlicht, in Kärnten und im Küstenland, wo er keine Anwendung fand, jedoch formal bestanden hatte, erfolgte die administrative Aufhebung. Die speziellen Bewilligungen für die Eheschließung von Juden wurden bereits im Jahre 1859 aufgehoben, Juden somit den anderen Staatsbürgern gleichgestellt. Sie mussten sich nunmehr in Ländern, wo der politische Ehekonsens fortbestand, diesem unterwerfen.[97] Die Aufhebung des Ehekonsenses betraf folglich auch die Juden. Der politische Ehekonsens stand bereits nach der Publizierung der Dezemberverfassung (21. Dezember 1867) im Widerspruch zu den allgemeinen bürgerlichen Rechten. Mehr als achtzig Jahre nach Aufhebung der Leibeigenschaft konnte die freie Eheabschließung erreicht werden, die eigentlich bereits im Jahre 1781 zur Anwendung gelangen sollte, allerdings auf Landesebene eine unterschiedliche Interpretation erfuhr.

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[88] So die Worte des Tiroler Abgeordneten Sartori. Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten. Ebenda.

[89] Ebenda S. 243.

[90] *Reichs-Gesetz-Blatt für das Kaiserthum Oesterreich*. Bd. XIX, Nr. 47, 1868, S. 93-97.

[91] Das Konkordat des Kaisertums Österreich mit dem Päpstlichen Stuhl wurde im Patent vom 5. November 1855 veröffentlicht. *Reichs-Gesetz-Blatt für das Kaiserthum Oesterreich (RGBl.)*, Bd. XLII, Jg. 1855, Nr. 195, S. 635-652.

[92] Gesetz vom 31. Dezember 1868. *RGBl.,* Bd. III, Nr. 3, 1869, S. 55-58.

[93] Mit der Übertragung der Kompetenz von Eheschließungen wurden später Bezirkshauptmannschaften und Gemeindebehörden (bei sog. Statutarstädten) betraut, Eheregister (Ehematrikel) zu führen. Gesetz vom 9. April 1870. *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*. Bd. XVII, Nr. 51, 1870, S. 83-84; Verordnung der Minister des Innern, des Cultus und der Justiz vom 20. Oktober 1870. Ebenda, Nr. 128, S. 277.

[94] Gesetz vom 1. Dezember 1868. *Landes-Gesetzblatt für das Königreich Böhmen* (*LGBl.*), Bd. XX, Jg. 1868, Nr. 51, § 1, S. 107. Die Debatte über die Aufhebung des politischen Ehekonsenses war im böhmischen Landtag sehr kurz. Sitzung vom 24. September 1868. *Stenographische Berichte des böhmischen Landtags*. XVIII. Sitzung der 2. Jahressession, S. 64-66.

[95] „Die in Mähren bisher bestehenden politischen Ehemeldescheine (Ehemeldzettel), sie mögen unter was immer für eine Benennung ertheilt werden, sind abgeschafft und die darauf bezüglichen Verordnungen aufgehoben.“ 7. Sitzung der 3. Session am 4. September 1868. *Landtags-Blatt über die Sitzungen des mährischen Landtags*, 1868, S. 86-88.

[96] Die Aufhebung des Ehekonsenses in einzelnen Ländern, publiziert in den Landesgesetzgebung: Küstenland: 25. 12. 1867, Nr. 24; Kärnten: 29. 2. 1868, Nr. 1207; Niederösterreich: 20. 9. 1868, Steiermark: 20. 9. 1868, Nr. 16; Nr. 9; Mähren: 22. 9. 1868, Nr. 16; Schlesien 16. 10. 1868, Nr. 13; Oberösterreich: 31. 10. 1868, Nr. 20; Böhmen: 1. 12. 1868, Nr. 51; Tirol und Vorarlberg 16. 7. 1870, Nr. 9976. In Krain wurde der Ehekonsens nicht angewendet, in Salzburg, Dalmatien, Galizien und Bukowina und dem Königreich Ungarn hatte der Ehekonsens nie bestanden. MISCHLER, E. – ULBRICH, J. (Hrsg.), *Österreichisches Staatswörterbuch*. *Handbuch des gesamten österreichischen öffentlichen Rechts.* Bd. 1. Umgearbeitete Aufgabe. Wien, 1905, S. 705-706.

[97] *RGBl.,* Bd. LXI, Nr. 217, 1859, S. 605-606.

Die innere Selbstbestimmung der Völker und die Sprachrechte ethnischer Minderheiten in der amtlichen Kommunikation in der Tschechischen Republik einhundert Jahre nach dem Ersten Weltkrieg

(Internal Self-Determination of Peoples and the Language Rights of Ethnic Minorities in Official Communication in the Czech Republic a Hundred Years on since the Great War)

Tomáš Mach *

Abstract

The present article addresses the evolution of the customary international law right to self-determination of peoples in Europe since World War I, along with the treaty-based system for the protection of minority and regional languages in Central Europe that emerged in the 20th Century.

This article also briefly examines the history of minorities residing in the territory of the present-day Czech Republic, commencing with the German colonization of the border regions in the 13th century. Subsequently, it elucidates the discrimination against minorities in the Czech Republic during the latter half of the 20th century, attributable in part to the post-war communist regime, as well as to the resentment harboured by the majority of the Czechoslovak population towards German citizens following World War II.

Based on this discussion, the article then scrutinizes the current state of the Czech legal system concerning the procedural rights of ethnic (national) minorities in the use of minority languages under the municipal law of the Czech Republic at the onset of the 21st century.

Keywords: *self-determination of peoples; internal self-determination; minority language; regional language; language rights; Czechoslovakia.*

1. Einleitung

Im Jahr 1921 wurde der am 10. September 1919 in Saint-Germaine-en-Laye unterzeichnete Vertrag zwischen den alliierten und assoziierten Mächten und der Tschechoslowakei in der Gesetzessammlung der Tschechoslowakischen Republik unter der Nummer 508/1921 Slg. veröffentlicht. Parallel dazu wurde der am 10. September 1919 in Saint-Germaine-en-Laye unterzeichnete Friedensvertrag zwischen den alliierten und assoziierten Mächten und Österreich in der Tschechoslowakischen Gesetzessammlung unter der Nummer 507/1921 Slg. veröffentlicht. Zu den Themen dieser Verträge gehörten die ethnischen, religiösen[1] und sprachlichen Minderheiten und ihre Rechte im neu organisierten Staat. Die Entwicklung der Rechte dieser Minderheiten bis heute, d.h. hundert Jahre später, als Ergebnis der Entwicklung des internationalen Rechts auf dem Gebiet der inneren Selbstbestimmung, die den Inhalt der Verfassungsordnung der Tschechischen Republik unter Bezugnahme auf Art. I Abs. 2 der Verfassung der Tschechischen Republik berührt, ist Gegenstand der Analyse von diesem Artikel. Das Ziel von diesem Beitrag ist es, zu analysieren, ob die Tschechische Republik nach dem Inhalt der tschechischen Rechtsordnung gegenwärtig ihre völkerrechtlichen Verpflichtungen im Bereich der internen Selbstbestimmung ihrer Minderheiten erfüllt, da diese Rechte in der zweiten Hälfte des 20. Jahrhunderts zu Gewohnheitsrecht wurden, und die Tschechische Republik ist somit verpflichtet, diese nicht nur im Rahmen der Nachfolge der Friedensverträge von Saint-Germaine-en-Laye in dem dort vereinbarten Umfang zu beachten, sondern auch über Art. I Abs. 2 der Verfassung die Ausübung des internen Selbstbestimmungsrechts als Verpflichtung aus dem geltenden Völkergewohnheitsrecht sowie aus regionalen Verträgen aus dem Ende des 20. Jahrhunderts, zu ermöglichen.

2. Historische Einführung: der Erste Weltkrieg und das Selbstbestimmungsrecht der Völker als ein politisches Postulat

Bereits ein Jahr vor der Unterzeichnung der oben genannten internationalen Verträge war die Donaumonarchie faktisch in kleinere Einheiten zerfallen, die von nationalistischen Zentrifugalkräften bestimmt wurden und auf der Doktrin der Nationalität beruhten, insbesondere der serbisch-kroatisch-slowenische Staat (spätere Jugoslawien) und die Tschechoslowakei.

* JUDr. Tomáš Mach, Ph.D., LL.M., Assistent für Internationales Recht, Rechtswissenschaftliche Fakultät, Westböhmische Universität in Pilsen, Tschechische Republik, E-Mail: tmach@cantab.net / ORCID: 0009-0003-8325-0741.

[1] Der Schutz ethnischer und religiöser Minderheiten ist eine Problematik, die besonders nach dem Ersten Weltkrieg auftaucht. Historisch gesehen ist es weiterhin ein Thema, insbesondere in Bezug auf die jüdische Bevölkerung, die im europäischen Kontext sehr spät erscheint. Im Kontext Österreich-Ungarns taucht sie eigentlich erst mit den Reformen Josefs II. auf, wobei die vollständige Gleichberechtigung erst 1867 mit der neuen Verfassung erreicht wurde. Es ist interessant, diese Tatsache mit anderen geografischen und historischen Abschnitten zu vergleichen, zum Beispiel mit der Stellung religiöser Minderheiten in Jerusalem nach 638 (Dekret des Kalifen Omar). STAMELOS, C., The Greek Orthodox Patriarchate and the Religious Minorities in Jerusalem in Different Historic Periods since AD 33. In: *Journal on European History of Law*, Vol. 15, No. 2, 2024, S. 58.

Die Tschechoslowakei war insofern eine Besonderheit, da ihre politische Vertretung im Exil bei ihrer Gründung die Fiktion der Existenz einer „tschechoslowakischen Nation" und einer „tschechoslowakischen Sprache" schuf, wodurch heterogene Kreise der tschechischsprachigen cisleithanischen Bevölkerung und der damit verbundenen slawisch (westslowakischer Dialekt, Mittel- und Ostslowakisch) sprechenden Untertanen der ungarischen Krone einen *Anschein* von Homogenität verliehen, mit dem Ergebnis, dass nicht die slowakischsprachigen Bürger der Tschechoslowakei, sondern die deutschsprachigen Bürger (und natürlich die ungarisch, polnisch und ruthenisch sprechenden Bürger) in der Minderheit waren.[2] Nach dieser Doktrin lebten im Jahr 1921 auf dem Gebiet der Tschechoslowakei 64,37 % „Tschechoslowaken" (8.759.701 Personen) und 22,95 % Deutsche (3.123.305).[3] In Wirklichkeit war die deutsche Bevölkerung in den Jahren um die Ausrufung der Tschechoslowakei und die militärische Unterdrückung der Selbstbestimmungsbestrebungen der deutschen Bevölkerung wahrscheinlich viel größer, wie sich an einem Mikrobeispiel einer Kreisstadt zeigen lässt, wie die Menschen bei der Volkszählung 1921 und anschließend 1930 ihre Nationalität bestimmten. Im damaligen Deutschbrod / Německý Brod (heute Havlíčkův Brod) mit einer Gesamtbevölkerung von 8.986 Einwohnern im Jahre 1921 bezeichneten sich nur 51 Personen als Deutsche und nur zwei Personen gaben die jüdische Nationalität an (weshalb allerdings 160 Personen in der Religionsstufe das Judentum angaben).[4] Es gab also eine starke Motivation beider ethnischer Gruppen, mit der Mehrheitsbevölkerung auf nationaler Ebene zu verschmelzen. Im Gegensatz dazu erklärten sich im Jahr 1930, als sich die gesellschaftliche Situation (kurzzeitig) beruhigt hatte und der Nationalsozialismus noch nicht jenseits der Grenze gekommen ist, bei einer Gesamtbevölkerung von 10.760142 Personen als Deutsche.[5] In dieser Perspektive ist es nötig auch die Verhältnisse zwischen den Prozentsätzen der lokalen Bevölkerung bereits im Jahr 1921 zu betrachten, zwar zum Zeitpunkt der Tschechisierung von Ämtern und Führungspositionen in diesen und der militärischen Besetzung Deutschböhmens, d.h. der militärischen Ciesleithanies der Bestrebungen der deutschen Bevölkerung nach der Selbstbestimmung zum Zeitpunkt des Zusammenbruchs Österreichs, die den tschechischen Bewohnern Vorlitauens von der neu ausgerufenen Tschechoslowakischen Republik gewährt wurde.[6]

Aus der Sicht des Völkerrechts und seines damaligen gewohnheitsrechtlichen Inhalts kann man sicherlich nicht sagen, dass das Selbstbestimmungsrecht der Völker (und seine Komponente der so genannten inneren Selbstbestimmung, die das Recht auf Sprachgebrauch sowohl im privaten als auch im amtlichen Verkehr umfasst) Teil des in den Jahren unmittelbar nach dem Ersten Weltkrieg geltenden Rechts war. Gerade deshalb wurde diese Frage auf dem Gebiet der Tschechoslowakei und Österreichs in den oben genannten Friedensverträgen als geschriebenes positives Recht geregelt.

Die Frage des Selbstbestimmungsrechts erscheint zunächst als ein politisches Konstrukt, artikuliert einerseits von Wladimir Iljitsch Lenin im Jahr 1914 in seinem Werk *Selbstbestimmung der Völker*[7] (diese seine Ansichten waren lediglich vor seiner Machtergreifung und der Gründung der Sowjetunion artikuliert) und andererseits unter dem Einfluss der exilnationalistischen Vertretung der Völker der Donaumonarchie durch Woodrow Wilson in seiner Rede vom 8. Januar 1918, den sogenannten „Vierzehn Punkten".[8] Bei Woodrow Wilson handelte es sich allerdings nicht um eine allgemeine Maxime, er sprach

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[2] Auf welche Weise sich die damalige tschechoslowakische Republik mit der Stellung dieser Minderheiten auf verfassungsrechtlicher Ebene unmittelbar nach ihrer Entstehung auseinandersetzte, diskutiert Jaromír Tauchen ausführlich unter Bezugnahme sowohl auf tschechische als auch auf zeitgenössische deutsche Autoren. Siehe: TAUCHEN, J., Recht und Sprache. Zur Anwendung des „Sprachrechts" der deutschen Volksgruppe in der Ersten Tschechoslowakischen Republik. In: *Zeitschrift für Neuere Rechtsgeschichte*, Vol. 41, Nr. 3,4, 2019, S. 215. Zu weiteren Quellen siehe: SOBOTA, E., *Národnostní právo Československé.* Brno, 1927; HORÁČEK, C., *Jazykové právo Československé republiky*. Praha, 1928; PEŠKA, Z., *Národnostní menšiny a Československo*. Praha, 1932; KUČERA, J., Minderheit im Nationalstaat. *Die Sprachenfrage in den tschechisch-deutschen Beziehungen 1918-1938*. München, 1999; PETRÁŠ, R., *Menšiny v meziválečném Československu. Právní postavení národnostních menšin v první Československé republice a jejich mezinárodněprávní ochrana*. Praha, 2009; EPSTEIN, L., *Das Sprachenrecht der Tschechoslowakischen Republik*. Reichenberg, 1932; ADLER, F., Das Sprachenrecht in der Tschechoslowakischen Republic. In: *Zeitschrift für Politik*, 1923, S. 468-479; SCHRANIL, R. – JANKA, F., *Tschechoslowakische Gesetze. Das öffentliche Recht der Tschechoslowakischen Republik, Teil 1: Die Verfassungsgesetze*. Praha, 1934.

[3] ŠKORPILA, F. B., *Zeměpisný atlas pro měšťanské školy*. 2. erweiterte Auflage. Praha, 1930.

[4] *Statistický lexikon obcí v Republice československé 1921.* Díl I. Země Česká. Praha, 1924, S. 12.

[5] *Statistický lexikon obcí v Republice československé 1921.* Díl I. Země Česká. Praha, 1934, S. 22.

[6] Innerhalb des deutschen Österreichs erklärten die einzelnen Provinzen nach und nach ihre Unabhängigkeit, so erklärte die Provinz Deutschböhmen am 29. Oktober 1918 ihre Unabhängigkeit von Österreich, die Provinz Sudetenland am selben Tag wie die Slowaken die Martinserklärung, am 30. Oktober 1918. Die Hauptstadt der Provinz Deutschböhmen war Reichenberg, das heutige Liberec, das am 16. 12. 1918 von tschechoslowakischen Truppen militärisch besetzt wurde. Litomerice, die letzte der deutschböhmischen Städte, die Widerstand leistete, wurde am 27. 12. 1918 von tschechoslowakischen Truppen besetzt. Die anderen Provinzen der Einheit Deutschösterreichs, d.h. der im Rahmen des sogenannten Vorlitauischen Commonwealth in Wien von den deutschen (sprachlichen) Abgeordneten des österreichischen Reichsrates proklamierten staatlichen Einheit, waren bereits am 21. Oktober 1918 in ähnlicher Weise betroffen. Deutschösterreich umfasste ursprünglich folgende Gebiete (Hauptstädte): Sudetenland (Opava/Troppau), Deutschböhmen (Liberec/Reichenberg), Salzburg (Salzburg), Vorarlberg (Bregenz), Tirol einschließlich Südtirol (Innsbruck), Kärnten (Klagenfurt), Steiermark (Graz), Oberösterreich einschließlich Böhmerwald (Linz), Niederösterreich einschließlich Deutsch-Südmähren (Wien). Siehe: PACNER, K., *Osudové okamžiky Československa*. Praha, 2012, S. 100-106.

[7] LENIN, V. I., Die Selbstbestimmung der Nationen. In: *Prosveshcheniye Nr. 4-6*. St. Petersburg, 1914. Online verfügbar in der Sammlung der Werke von W. I. Lenin in Übersetzung: *Collected Works*. Vol. 20 [online]. Moskow: Progress Publishers, 1964, S. 393 ff. Verfügbar unter: https://www.marxists.org/archive/lenin/works/cw/pdf/lenin-cw-vol-20.pdf [Zugriff am 2022-02-01].

[8] WOODROW, W., President Woodrow Wilson's Fourteen Points. In: *Avalon Project - President Woodrow Wilson's Fourteen Points* [online]. 8 Jan. 1918. Verfügbar unter: https://avalon.law.yale.edu/20th_century/wilson14.asp [Zugriff am 2022-02-01].

in den „Vierzehn Punkten“ zwar nur kasuistisch, z.B.: Die Rückführung Elsass-Lothringens in die Grenzen von vor Jahr 1871,[9] die Anpassung der Grenzen Italiens an die nationale Grenzen[10] (was letztlich nicht geschah, weil Österreich Südtirol an Italien abtreten musste), oder die Wiederherstellung des polnischen Staates.[11] An einer Stelle sprach er noch viel weiter und verallgemeinerte, wenn er erklärte: *„Allen Völkern Österreich-Ungarns, deren Platz unter den Nationen wir gesichert sehen wollen, sollen die freieste Möglichkeit einer autonomen Entwicklung gegeben werden.“*[12] Auch die Tschechoslowakei wurde nach diesem Postulat gegründet, nur etwas einseitig, als sie die ungarisch besiedelten Gebiete in der heutigen Südslowakei und die oben erwähnten Gebiete im sogenannten Sudetenland übernahm, deren mehrheitlich deutsche Bevölkerung im Übrigen überwiegend einheimisch bzw. ursprünglich war, seiend hauptsächlich im Rahmen der sogenannten Außenkolonisation im 13. Jahrhundert[13] in bisher unbewohnte Gebiete eingewandert gewesen.

Sowohl bei W. I. Lenin als auch bei W. Wilson handelte es sich jedoch um politische Proklamationen ohne jegliche Verankerung im Völkerrecht. Tatsächlich gibt es aus der fraglichen Zeit wissenschaftliche Artikel in Zeitschriften der Völkerrechtswissenschaft, die die Frage der Regelung nach dem Ersten Weltkrieg auf der Grundlage der politischen Postulate jener Zeit kritisieren. Erwähnenswert ist ein Artikel in der immer noch höchstens angesehenen Zeitschrift *The American Journal of International Law,* in dem der Princeton-Professor für Völkerrecht, der früher im diplomatischen Dienst der USA tätig gewesen war, Philip Marshall Brown, die folgende Glosse schrieb:

> *„Das „Selbstbestimmungsrecht“ ist nie klar definiert worden, und es wurden auch nie Regeln für die praktische Anwendung dieses grundlegenden Prinzips des Völkerrechts und der internationalen Ordnung formuliert.*
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> *Es stimmt, dass dieses Recht in der Erklärung von Präsident Wilson geeignet wurde, „dass allen klar definierten nationalen Bestrebungen die größtmögliche Befriedigung bereitgestellt wird, die ihnen gewährt werden kann, ohne neue oder alte nachhaltige Elemente der Inkonsequenz und des Antagonismus einzuführen, die mit der Zeit den Frieden in Europa und folglich in der Welt brechen könnten“.*
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> *Tatsächlich haben die unglücklichen Experimente der Friedenskonferenz mit dem Selbstbestimmungsrecht einige schwerwiegende Einschränkungen dieses Prinzips aufgezeigt. Erstens ist zu beklagen, dass es, wie im Völkerbundspakt festgehalten ist, rückständige Völker gibt, die sich in einem so primitiven Entwicklungsstadium befinden, dass sie zu einer nationalen Existenz so wenig wie ein Kind zu einer rechtlichen oder moralischen Verantwortung fähig sind, und dass der Status dieser Völker - ob sie absolut regiert werden oder ein gewisses Maß an Selbstverwaltung erhalten sollen - nicht von ihnen bestimmt werden kann.*
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> *Zweitens gibt es eine logische Einschränkung für das Recht einer Minderheit, das Recht auf Selbstbestimmung egoistisch gegen größere und vielleicht lebenswichtigere Interessen durchzusetzen. Der amerikanische Bürgerkrieg wurde geführt, um das Selbstbestimmungsrecht der Konföderation gegen die Notwendigkeit der Erhaltung der Union zum Wohle aller abzulehnen.*
>
> *[…]*
>
> *Die wichtigsten Merkmale der Friedensregelung in Mitteleuropa sind die folgenden: Die Tschechen, treue und tapfere Verbündete der „Alliierten und Assoziierten Mächte“, haben drei Millionen deutschstämmige Menschen aufgenommen, die sich diesen Band gewaltsam widersetzen. Sie haben auch ihre slawischen Vettern, die Slowaken, in die Partnerschaft aufgenommen, zusammen mit dem für Ungarn notwendigen reichen Territorium, obwohl es keinen Hinweis darauf gibt, dass diese Vettern sich eine vollständige Eingliederung in die Tschechen wünschen. Die Ruthenen - die halbe Million „Kleinrussen“ auf der ungarischen Seite der Karpaten - wurden den Tschechen zugeteilt, obwohl sie aufgrund ihrer wirtschaftlichen Interessen eher zu den Ungarn tendiert hätten. Und die Tschechoslowakei erhielt auch eine Donaufront in der ungarischen Stadt Pressburg und auf der mehrheitlich von Ungarn bewohnten Insel Großer Schutz. Die junge Tschecho-Slowakische Republik hatte auch keinen guten Start mit ihrem Nachbarn Polen, da beide in Teschen und Oberschlesien einen Zankapfel hatten.*
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> *Im Falle der neuen Österreichischen Republik wurde nicht nur den erwähnten drei Millionen Menschen des deutschen Stammes das Recht verweigert, sich mit ihren Brüdern in Österreich zu vereinigen, sondern allen Österreichern wurde ausdrücklich das Recht verweigert, sich mit allen anderen Deutschen zu vereinigen, es sei denn mit der formellen Genehmigung des Völkerbundes!“*[14]

3. Historische Einführung: die Entwicklung der Doktrin der internen Selbstbestimmung: der Fall Åland

Die politische Frage der Selbstbestimmung der Nationen, wie sie während der Neuordnung Europas am Ende des Ersten Weltkriegs aufkam, begann bereits 1920 die internationalen Beziehungen und damit auch das Völkerrecht durchzudringen. Der erste und immer noch grundlegende Fall ist der der Åland-Inseln (Aaland). In diesem Fall ging es um die schwedischsprachige Minderheit auf den Aaland-Inseln bei der schwedischen Küste, die jedoch historisch gesehen zum finnischen Territorium gehörten (bzw. vorher zur Finnischen Mark im unter dem zaristischen Russland). Mit dieser Frage befasste sich der Völkerbund. Der Völkerbund setzte den so genannten „Juristenausschuss“ (*Comittee of Jurists*) ein, der in seinem Bericht „In the Matter of the Aaland Islands“ (5. September 1920) zu folgen-

[9] Ebd, Punkt VIII.
[10] Ebd, Punkt IX.
[11] Ebd, Punkt XIII.
[12] Ebd, Punkt X.
[13] ŽEMLIČKA, J., *Království v pohybu: kolonizace, města a stříbro v závěru přemyslovské epochy.* Praha, 2014. S. 98-100.
[14] BROWN, P. M., Self-Determination in Central Europe. In: *The American Journal of International Law,* Vol. 14, Nr. 1-2, 1920, S. 235, 236, 237, 238.

der Schlussfolgerung in Bezug auf das Selbstbestimmungsrecht kam:

> *„Obwohl der Grundsatz der Selbstbestimmung der Nationen im modernen politischen Denken, insbesondere seit dem Ersten Weltkrieg, eine wichtige Rolle spielt, ist es zu betonen, dass er in der Völkerbundkonvention nicht erwähnt wird. Die Anerkennung dieses Grundsatzes in einer Reihe von internationalen Verträgen kann nicht als ausreichend angesehen werden, um ihn auf die gleiche Stufe wie eine positive Regel des Völkerrechts zu stellen. Im Gegenteil, in Ermangelung ausdrücklicher Bestimmungen in internationalen Verträgen ist das Recht, über nationales Territorium zu verfügen, im Wesentlichen ein Attribut der Souveränität eines jeden Staates. Das positive Völkerrecht erkennt weder das Recht nationaler Gruppen als solche an, sich durch eine bloße Willensbekundung von dem Staat zu trennen, dem sie angehören, noch das Recht anderer Staaten, eine solche Trennung zu verlangen. Im Allgemeinen ist die Gewährung oder Verweigerung des Rechts eines Teils seiner Bevölkerung, sein eigenes politisches Schicksal durch ein Plebiszit oder auf andere Weise zu bestimmen, ausschließlich ein Attribut der Souveränität eines jeden endgültig konstituierten Staates."* [15]

Diese Schlussfolgerung entsprach jedoch nicht ganz der vorherrschenden politischen Strömung auf der Ebene der internationalen Beziehungen und der Diplomatie im Jahr 1920. So kommt es, dass der Rat des Völkerbundes vorsorglich einen zweiten Ausschuss einsetzt, diesmal unter der Bezeichnung „Berichterstatterkommission" (*Commission of Rapporteurs*). Die Berichterstatterkommission stellte in ihrem Bericht [B.721/68/106 (1921)] fest, dass der Grundsatz der Selbstbestimmung *„keine Regel des Völkerrechts im eigentlichen Sinne ist und der Völkerbund ihn nicht in seinem Pakt verankert hat".* [16] Im Gegensatz zu den juristischen Schlussfolgerungen des Juristenausschusses stellte der Berichterstatterkommission jedoch weiter fest, dass *„es sich um einen Grundsatz der Gerechtigkeit und der Freiheit handelt, der in einer vagen und allgemeinen Formel ausgedrückt ist, die zu verschiedenen Auslegungen und Meinungsverschiedenheiten Anlass gegeben hat".* In anderen Teilen des Berichts führte die Berichterstatterkommission das Argument weiter aus, dass es einen Unterschied gibt zwischen Situationen, in denen die Rechte von Minderheiten in einem bestimmten Staat, insbesondere das Recht auf kulturelle und sprachliche Selbstbestimmung, von diesem Staat respektiert werden, und Situationen, in denen dies nicht der Fall ist.

Die Berichterstatterkommission bezeichnet die Situation, in der Minderheiten auf nationaler Ebene ihre kulturellen und sprachlichen Rechte, einschließlich des Zugangs zum Unterricht in ihrer Muttersprache und des Zugangs zu Behörden in dieser Sprache, frei ausüben können, als **interne Selbstbestimmung**. Die gegenteilige Situation, d.h. die Situation, in der die genannten Rechte der Minderheiten nicht respektiert werden, würde nach Ansicht der Berichterstatterkommission den Weg für die Suche nach alternativen Lösungen öffnen, und die Berichterstatterkommission schlug hier das vor, was derzeit als **externe Selbstbestimmung** durch Sezession und die Gründung eines neuen Staates und/oder die Aufgabe eines bestehenden Staates durch Abspaltung und Anschluss an einen anderen Staat bezeichnet wird (wie im Falle des Wunsches der Aalanders, Finnland zu verlassen und sich Schweden anzuschließen).[17] Diese juristische Formulierung, die das Selbstbestimmungsrecht in ein inneres und ein äußeres Selbstbestimmungsrecht unterteilt, ging mit dem Fall der Aaland-Inseln als theoretisches Novum für die damalige juristische Diskussion über das Selbstbestimmungsrecht der Völker in die Geschichte des Völkerrechts ein.

4. Die Rechtsentwicklung nach dem Zweiten Weltkrieg - das Selbstbestimmungsrecht als eine Norm des Völkergewohnheitsrechts

Die Frage der Selbstbestimmung der Völker hat nach dem Zweiten Weltkrieg eine eigene Dimension bekommen. Bereits während des Zweiten Weltkriegs war die Frage der Selbstbestimmung der Nationen Gegenstand der so genannten Atlantik-Charta vom August 1941, einer politischen Proklamation, die Churchills Regierung zusammen mit den USA akzeptieren musste, um die USA in die Kriegsanstrengungen einzubinden. Churchills Antwort auf Artikel 3 dieser Erklärung, die er in einer politischen Rede im September 1941 akzeptieren musste, lautete, dass dies die Selbstbestimmung von Nationen unter deutscher Besatzung bedeute und keinesfalls für das Britische Empire gelte.[18]

Gleichwohl findet sich der Grundsatz der Selbstbestimmung der Völker auch in der Charta der Vereinten Nationen (Artikel 1 Absatz 2 der Charta, in dem die Ziele und Grundsätze des Bestehens der Vereinten Nationen wie folgt definiert werden: *„2. freundschaftliche Beziehungen zwischen den Nationen zu entwickeln, die auf der Achtung des Grundsatzes der Gleichheit und der Selbstbestimmung der Völker beruhen, und andere geeignete Maßnahmen zur Förderung des Weltfriedens zu treffen"*). Der Grundsatz der Selbstbestimmung findet sich auch im Internationalen Pakt über bürgerliche und politische Rechte und im Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte vom Jahr 1966, deren gemeinsamer Artikel I Absatz 1 lautet: *„(1) Alle Völker haben das Recht auf Selbstbestimmung. Kraft dieses Rechts bestimmen sie frei ihren politischen Status und verfolgen frei ihre wirtschaftliche, soziale und kulturelle Entwicklung."* In diesen beiden internationalen Verträgen wurde also das Selbstbestimmungsrecht als ein Recht konstituiert, zu dem sich die Vertragsparteien dieser

[15] Bericht der Internationalen Juristenkommission, die vom Rat des Völkerbundes mit der Aufgabe betraut wurde, ein Gutachten über die rechtlichen Aspekte der Frage der Aaland-Inseln abzugeben. *Official Journal. Special Supplement no. 3*. 1920. Auch online verfügbar unter: https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1original.pdf [Zugriff am 2022-02-01].

[16] VÖLKERBUND. *The Aaland Island Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs 16 April 1921*. Völkerbundsrat, Dok. B.7 21/68/106, 28.

[17] Ebd., ähnlich auch FISCH, J., *The Right of the Self-Determination of Peoples. The Domestication of an Ilusion*. Cambridge, 2015, S. 51, und zu den theoretischen Diskussionen siehe: SCHMITZ, G., *Tibet und das Selbstbestimmungsrecht der Völker*. Berlin, 1998, S. 205.

[18] CRAWFORD, N. C., *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention*. Cambridge, 2002, S. 297.

Verträge (einschließlich der Tschechoslowakei durch den Erlass Nr. 120/1976 Slg. des Außenministeriums) verpflichtet haben.

Die Entwicklung nach dem Zweiten Weltkrieg hat jedoch auf der Ebene der Politik, der internationalen Beziehungen und folglich der Staatenpraxis eine eigene Dimension angenommen, die zur Entstehung einer Gewohnheit führen könnte. Als Folge des Zweiten Weltkrieges und der anschließenden Entwicklung der internationalen Beziehungen hin zu einer bipolaren Ordnung löste sich auch das Prozess der Dekolonisierung aus, der seit der Unabhängigkeit Indiens im 1947 und Israels im 1948 über der Zusammenbruch des Estado Novo und die anschließende Auflösung Portugals, das seine überseeischen Gebiete in Afrika, die es als integrale Gebiete seines Staates betrachtete, in 1974 verlor, bis heute in unterschiedlichem Maße andauert.

Parallel zu den Entwicklungen auf politischer Ebene änderte sich die Meinungsbildung des Internationalen Gerichtshofes (IGH) zwischen den 1960er und 1970er Jahren allmählich, was zum Teil auf die Entwicklung der Weltstimmung und zum Teil auf Veränderungen in der Zusammensetzung des Gerichtshofs zurückzuführen sein dürfte. Während zwei parallele Fälle, die üblicherweise als Südwestafrika-Fälle (*South West Africa Cases*) bezeichnet und in den Berichten des Internationalen Gerichtshofes unter South West Africa Cases (Äthiopien gegen Südafrika; Liberia gegen Südafrika) [19] veröffentlicht werden, in denen sich Liberia und Äthiopien in polizeiliche Angelegenheiten im heutigen Namibia einmischten, das damals von Südafrika beherrscht wurde, aufgrund des erloschenen Mandats des Völkerbunds nach der Beschlagnahme dieser ehemaligen deutschen Kolonie nach dem Ersten Weltkrieg, und zwar unter Berufung auf die Rechtswidrigkeit des Apartheidprinzips (dessen Verbot heute in der Völkerrechtslehre als zwingende Norm des Völkerrechts gilt), war der Gerichtshof unter Argumentation mit den Grundsatz der Souveränität und der Nichteinmischung zum Schluss gekommen, dass weder Liberia noch Äthiopien nicht *locus standi* haben,[20] was er nur wenige Jahre später grundsätzlich revidiert hat.

Die Revision seiner Argumentation führte er zum ersten Mal in seinem Gutachten von 1971 zu einer Frage, die ihm von der UN-Generalversammlung vorgelegt wurde, die damals bereits weitgehend von entkolonialisierten Staaten, insbesondere aus der sogenannten Dritten Welt, besetzt war. In einer mit der Namibia-Frage zusammenhängenden Angelegenheit, den *rechtlichen Folgen der fortgesetzten Präsenz Südafrikas in Namibia trotz der Resolution des Sicherheitsrates Nr. 276 (1970),* kam der IGH zu folgendem Schluss:

> *„… die spätere Entwicklung des Völkerrechts in Bezug auf nicht selbstverwaltete Gebiete, wie sie in der Charta der Vereinten Nationen verankert ist, hat den Grundsatz der Selbstbestimmung auf alle diese Gebiete anwendbar gemacht.*
>
> *[.]*
>
> *Das Gericht muss die Veränderungen, die im letzten halben Jahrhundert stattgefunden haben, berücksichtigen, und seine Auslegung nicht von späteren Rechtsentwicklungen unberührt bleiben kann, und zwar durch die UN-Charta und Gewohnheitsrecht.*[21]

An diese Schlussfolgerungen knüpfte der IGH in seinem Gutachten zur *Westsahara*[22] aus 1975 an, in dem er zunächst seine Schlussfolgerungen aus dem Jahr 1971 zitierte[23] und dann im Zusammenhang mit der Frage, ob es sich bei dem von Nomaden bewohnten Teil der Westsahara um *terra nullius* handelte oder nicht (und somit für einen ursprünglichen Erwerb durch Besetzung zugunsten Marokkos in Frage kam) und ob die örtliche (hier nomadische) Bevölkerung bei der Verfügung über das fragliche Gebiet konsultiert werden sollte, bekräftigte er wieder den Grundsatz der Selbstbestimmung als bereits entwickelte Norm des Völkergewohnheitsrechts, wobei es im Zusammenhang mit der untersuchten Frage *inter alia* feststellte:

> *„59. Die Gültigkeit des Grundsatzes der Selbstbestimmung, der als Notwendigkeit, den frei geäußerten Willen der Völker zu respektieren, definiert ist, wird nicht dadurch berührt, dass die Generalversammlung in bestimmten Fällen auf das Erfordernis der Konsultation der Bewohner des betreffenden Gebiets verzichtet hat."*[24]

Daraus lässt sich schließen, dass parallel zur Existenz des Grundsatzes der Selbstbestimmung der Völker als ein partikuläres Recht in den beiden internationalen Pakten von 1966 (in Kraft seit 1976) der Internationale Gerichtshof Anfang der 1970er Jahre zu dem Schluss kam, dass dieses Recht Teil des Völkergewohnheitsrechts bereits geworden war und somit für Nationen/Minderheiten und alle Völkerrechtssubjekte bindend ist.

Die Frage, die in diesem Zusammenhang zu beantworten ist, lautet, ob es sich bei der Entkolonialisierung um das Recht eines Volkes auf Unabhängigkeit handelt oder ob dieses Recht einen intrinsischen und einen extrinsischen Aspekt hat, d.h. dass es zunächst ein intrinsisches Recht auf interne Selbstbestimmung gibt und nur im Falle seiner Verletzung das betroffene Volk oder Ethnie das Recht auf Selbstbestimmung hat, und dass eine solche Bevölkerungsgruppe folglich unter den Bedingungen der Verweigerung des Rechts auf interne Selbstbestimmung durch den Staat, in dem sie sich befindet, eine relevante Rechtspersönlichkeit auf der Ebene des Völkerrechts erlangt, die genau durch den Sinn und Zweck der Ausübung eines solchen Rechts begrenzt ist. Mit anderen Worten, die Frage zu beantworten ist die, ob die von der Berichterstatterkommission in der Rechtssache Aaland-Inseln vorgenommene Unterteilung noch gilt. Die Antwort auf diese Frage ist positiv. Die Völkerrechtslehre

[19] Südwestafrika-Fälle (Äthiopien/Südafrika; Liberia/Südafrika), ICJ Rep. 1966, S. 3 an.
[20] Ebd.
[21] Die rechtlichen Folgen der fortdauernden Präsenz Südafrikas in Namibia (Südwestafrika) für die Staaten trotz der Resolution 276 (1970) des Sicherheitsrates, ICJ Rep. 1971.
[22] Westsahara. IGH-Gutachten vom 16. [online] Oktober 1975. IGH Rep. 1975, S. 12 an. https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf [Zugriff am 2022-02-01].
[23] Ebd, S. 31.
[24] Ebd, S. 33.

geht nämlich von einer Unterscheidung zwischen einem internen und einem subsidiären externen Selbstbestimmungsrecht aus.[25] Dies wurde vom Obersten Gerichtshof Kanadas in 1998 eindeutig und mit Verweisen auf theoretische Autoritäten in der Sache der Frage des Rechts von Quebec, seine Unabhängigkeit zu erklären (*Reference Re Secession of Quebec*) angemerkt, wobei es die staatliche Praxis und die damit verbundenen Gewohnheiten sowie den Inhalt internationaler Verträge, einschließlich der oben erwähnten Pakte von 1966, wie folgt zusammenfasste:

> *„(b) Das Recht der Völker auf Selbstbestimmung*
> *113. Während das Völkerrecht im Allgemeinen das Verhalten von Nationalstaaten regelt, erkennt es unter bestimmten Umständen auch die „Rechte" von anderen Einheiten als Nationalstaaten an - wie etwa das Recht einer Nation auf Selbstbestimmung.*
> *114. Die Existenz des Rechts einer Nation auf Selbstbestimmung ist inzwischen in internationalen Übereinkommen so weit anerkannt, dass dieser Grundsatz einen Status jenseits der „Konvention" erlangt hat und als allgemeiner Grundsatz des Völkerrechts gilt (A. Cassese, Self-determination of peoples: A legal reappraisal (1995), auf S. 171-72; K. Doehring, „Self-Determination", in B. Simma, Hrsg., The Charter of the United Nations: A Commentary (1994), S. 70).*
> *[.]*
> *122. Wie wir sehen werden, erwartet das Völkerrecht, dass das Recht auf Selbstbestimmung von Völkern innerhalb bestehender souveräner Staaten und im Einklang mit der Wahrung der territorialen Integrität dieser Staaten ausgeübt wird. Wo dies nicht möglich ist, kann das Recht auf Sezession unter den unten dargelegten außergewöhnlichen Umständen entstehen.*
>
> *(i) Definition von „Nation"*
> *[.]*
> *124. Es ist klar, dass eine „Nation" nur einen Teil der Bevölkerung eines bestehenden Staates umfassen kann. Das Recht auf Selbstbestimmung hat sich weitgehend als Menschenrecht entwickelt und wird im Allgemeinen in Dokumenten verwendet, in denen gleichzeitig auf „Nation" und „Staat" Bezug genommen wird. Ein Vergleich dieser Begriffe zeigt, dass ein Verweis auf „Nation" nicht unbedingt die gesamte Bevölkerung eines Staates meint. Eine Beschränkung der Definition des Begriffs auf die Bevölkerung bestehender Staaten würde verursachen, dass die Gewährung des Selbstbestimmungsrechts weitgehend dupliziert wäre, und zwar angesichts in den meisten Quellendokumenten parallelen Betonung der Notwendigkeit, die territoriale Integrität bestehender Staaten zu schützen, und den Zweck des Rechts auf Selbstbestimmung verfehlen.*
> *[.]*
> *(ii) Umfang des Selbstbestimmungsrechts*
> *126. Anerkannte Quellen des Völkerrechts legen fest, dass das Selbstbestimmungsrecht einer Nation normalerweise durch interne Selbstbestimmung ausgeübt wird - die Bemühungen eines Volkes, sich politisch, wirtschaftlich, sozial und kulturell innerhalb des bestehenden Staates zu entwickeln. Das Recht auf äußere Selbstbestimmung (das in diesem Fall potenziell die Form der Ausübung des Rechts auf einseitige Sezession annimmt) kommt nur in den extremsten Fällen vor, und selbst dann nur unter genau definierten Umständen. Das externe Selbstbestimmungsrecht kann wie in der folgenden Erklärung aus der Freundschaftserklärung definiert werden:*
> *„Die Errichtung eines souveränen und unabhängigen Staates, die freie Assoziation oder Integration mit einem unabhängigen Staat oder die Schaffung eines anderen politischen Status, der vom Volk frei bestimmt wird, sind Mittel zur Verwirklichung des Selbstbestimmungsrechts des Volkes."*[26]

Es sei darauf hingewiesen, dass der Inhalt des Völkerrechts, wie er vom Obersten Gerichtshof Kanadas in der Rechtssache von 1998 zur Auslegung des Rechts Quebecs, seine Unabhängigkeit zu erklären, dargelegt wurde (*Reference Re Secession of Quebec),* den Inhalt des Völkergewohnheitsrechts in diesem Bereich treffend wiedergibt. Dieses Recht hat sich nicht weiterentwikkelt und wird sich wahrscheinlich auch in naher Zukunft nicht weiterentwickeln, trotz der ständigen und notorischen Verletzungen dieses Rechts durch einige der wichtigsten Akteure in den diplomatischen Beziehungen, insbesondere in Xinjiang,[27] Tibet, Tschetschenien usw.

5. Die Entwicklung des Rechts auf interne Selbstbestimmung der Völker nach dem Zweiten Weltkrieg - der heutige Inhalt dieses Rechts in Bezug auf die Sprachenrechte in der Welt im Allgemeinen und in Europa im Besonderen

Völkerrechtlich ist die Entwicklung des internen Selbstbestimmungsrechts der Völker im Kontext der sprachlichen Rechte im Wesentlichen bei den Inhalten der beiden Internationalen Pakte von 1966 stehen geblieben, wenn es im Internationalen Pakt über bürgerliche und politische Rechte heißt: *„In Staaten, in denen ethnische, religiöse oder sprachliche Minderheiten bestehen, darf ihren Mitgliedern nicht das Recht untersagt werden, sich in Gemeinschaft mit anderen Angehörigen der Minderheit an ihrer eigenen Kultur zu erfreuen, ihre eigene Religion zu bekennen und zu bekunden oder ihre eigene Sprache zu gebrauchen."*[28] Daraus lässt sich schließen, dass der Inhalt dieser Vertragsbestimmungen auch dem Konzept dieser Frage im Bereich des Gewohnheitsrechts auf der Grundlage der Genese aus dem Fall der Aaland-Inseln entspricht und somit als Gewohnheitsnorm für die Nichtvertragsstaaten dieser Pakte gleichermaßen verbindlich ist.

Auf dem europäischen Kontinent ging die Entwicklung etwas tiefer, bzw. es wurden mehrere internationale Verträge geschaffen, in denen unter anderem die sprachlichen Rechte nationaler

[25] FISCH, J., *The Right of Self-Determination of Peoples. The Domestication of an Illusion*. Cambridge, 2015, S. 51; SCHMITZ, G., *Tibet und das Selbstbestimmungsrecht der Völker*. Berlin, 1998, S. 205.

[26] Referenz Re Secession of Quebec. 1998, 2 SCR 217.

[27] Abstimmung Nr. 56, 43. Parlament, 2. Sitzung. In: *Vote Detail - 56 - Members of Parliament - House of Commons of Canada* [online]. 22 Feb. 2021. Verfügbar unter: https://www.ourcommons.ca/members/en/votes/43/2/56 [Zugriff am 2022-02-01].

[28] Artikel 27 des Internationalen Pakts über bürgerliche und politische Rechte.

Minderheiten etwas konkreter erörtert und festgelegt werden, wenn auch nicht immer allzu konkret in Bezug auf die so genannten „unmittelbar einklagbaren Normen" (*directly enforceable norms*).

Der erste dieser internationalen Verträge ist die Europäische Charta der Regional- oder Minderheitensprachen, ein internationaler Vertrag, der am 5. November 1992 von einigen Mitgliedsstaaten des Europarates angenommen wurde. Sie wurde von der Tschechischen Republik im Jahr 2006 mit Wirkung vom 1. März 2007 ratifiziert (Mitteilung des Außenministeriums Nr. 15/2007 Slg.). Der zweite dieser internationalen Verträge ist das Rahmenübereinkommen zum Schutz nationaler Minderheiten (in der Tschechischen Republik durch Mitteilung des Außenministeriums Nr. 96/1998 Slg. als ratifiziert bekannt gemacht).

6. Die Entwicklung des internen Selbstbestimmungsrechts der Nationen in der Tschechoslowakei nach dem Zweiten Weltkrieg

Wie bereits erwähnt, wurden auf dem Gebiet des europäischen Kontinents zwei internationale Verträge verabschiedet, die auf dem Gewohnheitsrecht im Bereich der internen Selbstbestimmung der Völker und auf den Pakten von 1966 aufbauen und die Frage der internen Selbstbestimmung der Völker im Bereich der sprachlichen Rechte in gewisser Weise weiterentwickeln. Im Zusammenhang mit den sprachlichen Rechten ist Artikel 10 des Rahmenübereinkommens zum Schutz nationaler Minderheiten von besonderer Bedeutung, der Folgendes vorsieht:

> *„(1) Die Vertragsparteien verpflichten sich anzuerkennen, dass jeder Angehörige einer nationalen Minderheit das Recht hat, seine Minderheitensprache frei und ohne Einmischung, sowohl privat als auch öffentlich, mündlich und schriftlich, zu verwenden.*
> *2. In Gebieten, die von Angehörigen nationaler Minderheiten traditionell oder in erheblicher Zahl bewohnt werden, bemühen sich die Vertragsparteien, soweit möglich Bedingungen zu schaffen, die den Gebrauch der Minderheitensprache in den Beziehungen zwischen diesen Angehörigen und den Verwaltungsbehörden ermöglichen, wenn diese Angehörigen dies beantragen und ein solches Ersuchen einem echten Bedürfnis entspricht.*
> *Die Vertragsparteien verpflichten sich, jedem Angehörigen einer nationalen Minderheit das Recht zu garantieren, unverzüglich und in einer ihm verständlichen Sprache über die Gründe für seine Festnahme sowie über Art und Gründe der gegen ihn erhobenen Beschuldigungen unterrichtet zu werden und sich in dieser Sprache zu verteidigen, erforderlichenfalls mit der unentgeltlichen Hilfe eines Dolmetschers."*

Nicht weniger wichtig, vor allem angesichts der Entwicklungen zwischen den Jahren 1942 und 1951, als zunächst die tschechoslowakischsprachigen und deutschsprachigen Mitbewohner der böhmischen Ländern jüdischer Religion oder „Herkunft" von den Nazis dezimiert worden sind und dann die deutschsprachigen nicht-jüdischen Mitbewohner der böhmischen Ländern vom Nachkriegsregime der Nationalen Front wild vertrieben worden sind, und schließlich die Dezimierung und Zerstreuung der mährischen Kroaten durch das kommunistische Regime nach dem sogenannten „Siegreicher Februar"[29], ist dann der Artikel 3 des Rahmenübereinkommens zum Schutz nationaler Minderheiten, der lautet:

> *„1. Jeder Angehörige einer nationalen Minderheit hat das Recht, frei zu wählen, ob er als solcher angesehen werden will oder nicht; aus dieser Wahl und der Ausübung der damit verbundenen Rechte darf ihm kein Nachteil erwachsen.*
> *2. Angehörige nationaler Minderheiten können die Rechte und Freiheiten, die sich aus den in diesem Rahmenübereinkommen niedergelegten Grundsätzen ergeben, entweder einzeln oder in Gemeinschaft mit anderen ausüben."*

Die Bedeutung des Prinzips der Autonomie des Einzelnen, seine Zugehörigkeit zu einer nationalen Minderheit im tschechischen Kontext der oben beschriebenen historischen Ereignisse selber zu bestimmen, liegt insbesondere darin, dass Angehörige der oben beschriebenen nationalen Minderheiten, die irgendwie auf dem Gebiet der Tschechischen Republik verblieben sind, in den 1940er und 1950er Jahren, in denen sie oft den Kontakt zu ihrer Muttersprache oder der Sprache ihrer Eltern oder Großeltern verloren haben, die gezwungen waren, den Gebrauch dieser Sprache zu unterdrücken.[30]

Der Zeitraum seit dem Jahre 1945 ist natürlich in erster Linie durch die „Vertreibung" der deutschsprachigen Zivilbevölkerung[31] aus den böhmischen Ländern durch die tschechischsprachige Mehrheit und später, nach 1948, durch Übergriffe auf andere Minderheiten, wie die südmährische kroatische Bevölkerung, bestimmt.[32]

Nach dem Rückzug der größten unmittelbaren Nachkriegsexzesse und der Errichtung des kommunistischen Satelliten-

[29] ŠRAHŮLKOVÁ, M., *Chorvatská menšina v ČR*. Masterarbeit. Olomouc, 2008, S. 46. Auch online verfügbar unter: https://geography.upol.cz/soubory/studium/dp/2008/2008_Srahulkova.pdf [Zugriff am 2022-02-01].

[30] Der aus der Pilsner Region stammende Autor dieses Beitrags traf in seiner Anwaltspraxis im ersten Jahrzehnt des 21. Jahrhunderts unter anderem auf Mandanten, deutschsprachige Senioren aus den Gebieten des heutigen Stříbrsko und des Bezirks Pilsen-Nord, die jedoch infolge der Zwangsassimilation in den 1950er Jahren gezwungen waren, tschechisch zu sprechen. Sie hatten zwar einen spezifischen lokalen Dialekt des Deutschen beibehalten, doch war dieser seit dem Ende des Zweiten Weltkriegs auf der Sprachausstattung ihrer Kindheit eingefroren, oft sogar unter Verlust der korrekten Bestimmung der Geschlechter von Substantiven (die sie teilweise aus dem Tschechischen übernommen hatten, das sie besser und ohne Dialekt beherrschten), so dass ihre Nachkommen Deutsch nicht mehr oder nur noch sehr eingeschränkt als Fremdsprache kannten.

[31] Und diejenigen, die in Ausnahmefällen bleiben durften, wurden gewaltsam assimiliert. Zum Beispiel wurde der Deutschunterricht sofort eingestellt, wie Kolumber im Detail beschreibt. Siehe: KOLUMBER, T., Immediate Legal Changes in Czechoslovak Education after WWII. In: *Journal on European History of Law*, Vol. 15, No. 2, 2024, S. 111.

[32] ŠRAHŮLKOVÁ, M., *Chorvatská menšina v ČR*. Masterarbeit. Olomouc, 2008, S. 46. Auch online verfügbar unter: https://geography.upol.cz/soubory/studium/dp/2008/2008_Srahulkova.pdf [Zugriff am 2022-02-01].

regimes, das paradoxerweise bald seine negative Aufmerksamkeit auf die jüdische Bevölkerung innerhalb der Strukturen der prosowjetischen (Kolonial- / Sattellit-) Macht richtete,[33] ist es jedoch möglich, die Zeit des Kalten Krieges theoretisch in zwei Perioden zu unterteilen, was die rechtliche Regelung des Status der nationalen Minderheiten betrifft. Petráš unterteilt diese Perioden in Phase vor 1968 und Phase nach 1968, als in 1968 das Verfassungsgesetz Nr. 144/1968 Slg., über den Status der nationalen Minderheiten, verabschiedet wurde.[34]

Petráš beschreibt: *„Anfang der 1950er Jahre, in der Zeit des größten Terrors, gab es auch Exzesse, von denen einige Minderheiten betroffen waren. Dazu gehörten Juden, die vom halboffiziellen Antisemitismus betroffen waren, insbesondere während des Prozesses gegen Slánský, und Rusinen/Ukrainer im Zusammenhang mit der Liquidierung der griechisch-katholischen Kirche und der sogenannten Ukrainisierung. In diesen Aktionen manifestierten sich die UdSSR und ihre Interessen in der internationalen und nationalen Politik. Besonders peinlich war der halboffizielle Antisemitismus, der in den frühen 1950er Jahren diese von den Nazis fast vernichtete Gruppe offen und während der Normalisierungsphase weniger offen betrifft, die jedoch als Basis der gefährlichen Streikposten und als Initiator der Entwicklungen im Jahr 1968 identifiziert wurde. Zur jüdischen Frage noch eine wichtige rechtliche Bemerkung. Das Vorgehen gegen diese Gruppe beruhte nicht auf gesetzlichen Bestimmungen, so dass es keine Analogie zu den Nürnberger Gesetzen gab; im Gegenteil, die Existenz der Juden als eigenständige Nation wurde von der kommunistischen Tschechoslowakei stets abgelehnt, und die Frage wurde daher nicht zusammen mit dem Status der ungarischen, polnischen, ukrainischen und ab 1968 der deutschen Nationalität behandelt. Das erwähnte Vorgehen gegen die Minderheiten war zweifellos ein sehr negativer Ausdruck der Integration in die sowjetische Einflusssphäre."*[35]

Bis zum Jahre 1968 wurde die Frage der nationalen Minderheiten übersehen, bzw. zweckmäßig nicht gelöst, und zwar in Bezug auf die Reste der deutschen Sprachminderheit in Teilen der tschechischen Länder, sowie in der Karpatenslowakei (Karpatendeutsche), und vor allem der ungarischen Minderheit in der Karpatenslowakei. Die Verfassung von 1948 schweigt daher zu diesem Thema, vom Sprachengesetz von 1920 wird abgewichen. Es kam nur teilweise zu faktischer Korrektion des politischen Kurses, wie die Rückgabe der tschechoslowakischen Staatsbürgerschaft an die verbliebenen Deutschen und Ungarn.[36]

In Bezug auf die ungarische nationale Minderheit, deren Nationalstaat sich ebenfalls im sozialistischen Satellitenblock von Vasallenstaaten der Sowjetunion befand, ordnete die Regierung am 17. Juni 1952 heimlich die Durchführung von Maßnahmen zur Wiederherstellung ihres Minderheitenstatus an, einschließlich sprachlicher Rechte, was jedoch nie vollständig umgesetzt wurde.[37] Seit den 1950er Jahren verfügen die Angehörigen der ungarischen, polnischen und ukrainischen Minderheiten faktische, angemessene und kulturelle Rechte (Anweisungen des Zentralausschusses der tschechoslowakischen Kommunistischen Partei an die Partei- und Staatsorgane - obwohl die Führungsrolle der Partei erst durch die Verfassung von 1960 festgelegt wurde!).[38]

In den 1960er Jahren, mit der fortschreitenden gesellschaftlichen Liberalisierung im Zuge des so genannten Prager Frühlings, wuchs das Interesse an der Frage der nationalen Minderheiten. Die ersten Vorschläge zur Zweisprachigkeit und zur Vertretung der Minderheiten in den Behörden und im Bildungswesen erschienen. Für Details verweise ich auf Petráš.[39] Im Jahr 1968 wird die Minderheitenfrage dann durch die nationalen Auseinandersetzungen im Zusammenhang mit der tschechisch-slowakischen Frage wiederbelebt. In der Südslowakei eskalierte die Situation zu nationalen Unruhen. Am 12. März 1968 verabschiedete das Zentralausschuss des Csemadok, einer Organisation der ungarischen nationalen Minderheit, die Resolution, in der unter anderem zweisprachige Schilder gefordert wurden. Die Kommunistische Partei der Tschechoslowakei reagierte auf die Entwicklung der Situation mit der Verabschiedung des Aktionsprogramms vom 5. April 1968, in dem sie den Minderheiten verfassungsmäßige und rechtliche Garantien (Vertretung in den Gremien) versprach. All dies führte dazu, dass die Frage der nationalen Minderheiten mit Fragen des Staatsrechts verknüpft wurde, was zur Verabschiedung des Verfassungsgesetzes Nr. 144/1968 Slg. über den Status der Nationalitäten, am 27. Oktober 1968 führte (gleichzeitig mit der Verfassung der Tschechoslowakischen Föderation).

Der Beginn der sog. Normalisierung, die die Unterdrückung der Bevölkerung und der Zivilgesellschaft mit sich brachte, beendete die Entwicklung des Status der nationalen Minderheiten. Es wurden keine Ausführungsgesetze zu diesem Verfassungsgesetz erlassen. Insgesamt führte das vorherrschende innenpolitische Klima zur negativen demografischen Entwicklung der Minderheiten, allmählichen Assimilierung und zum Desinteresse am nationalen Leben. Der Gebrauch von Minderheitensprachen in den Ämtern war minimal und es gab ein deutliches Missverhältnis unter den Universitätsstudenten (Tschechen 5,2 %, Slowaken 5,1 %, Ungarn 2,1 % und Deutsche 1,2 %).[40]

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[33] Zum Beispiel der Slánský-Monsterprozess, siehe DRDA, A. – BERNATT-RESZCZYŃSKÁ, M., Jedenáct špagátů pro „protistátní spiklenecké centrum kolem Rudolfa Slánského". In: *Paměť národa*. Verfügbar unter: https://www.pametnaroda.cz/cs/magazin/stalo-se/proces-s-protistatnim-spikleneckym-centrem-rudolfa-slanskeho [Zugriff am 2024-03-20].

[34] PETRÁŠ, R. – PETRŮV, H. – SCHEU, H. C., *Menšiny a právo v České republice*. Praha, 2009, S. 104.

[35] Ebd., S. 112.

[36] Ebd., S. 107.

[37] Ebd., S. 107.

[38] Instruktionen des Zentralkomitees der Kommunistischen Partei der Tschechoslowakei von 1956 über die Deutschen, 1959 über die Polen, Instruktionen des Zentralkomitees der Kommunistischen Partei der Tschechoslowakei von 1955 über die Ukrainer und 1958 und 1959 über die Ungarn, aus Quelle: ebenda, S. 107.

[39] PETRÁŠ, R. – PETRŮV, H. – SCHEU, H. C., *Menšiny a právo v České republice.* Praha, 2009, S. 115.

[40] Ebd., S. 123.

7. Sprachliche Rechte, innere Selbstbestimmung der Nationen, Rechte der nationalen Minderheiten in den offiziellen Beziehungen und die Tschechische Republik heute

Wie bereits erwähnt, entwickeln sich in der freien Welt, insbesondere in Westeuropa, die Rechte der nationalen Minderheiten allmählich. Die Tschechische Republik hat sich dieser Entwicklung mit dem Fall des Eisernen Vorhangs dann auch angeschlossen. Das wichtigste Material in diesem Zusammenhang ist die bereits erwähnte Europäische Charta der Regional- oder Minderheitensprachen, ein internationales Abkommen, welches in 1992 von einigen Mitgliedern des Europarates angenommen wurde. Die Tschechische Republik hat es im Jahr 2006 mit Wirkung vom 1. März 2007 ratifiziert (Mitteilung des Außenministeriums Nr. 15/2007 Slg.).

Ebenso wichtig ist auch das bereits erwähnte Rahmenübereinkommen zum Schutz nationaler Minderheiten (in der Tschechischen Republik durch die Mitteilung des Außenministeriums Nr. 96/1998 Slg. also ratifiziert bekannt gemacht, bzw. ausgerufen). Alle Staaten des mitteleuropäischen geografischen Raums, einschließlich der Tschechischen Republik, sind Vertragsparteien dieser internationalen Verträge, und daher überschneidet sich der Inhalt des internen Selbstbestimmungsrechts der Völker in Form nationaler Minderheiten auf der Gewohnheitsebene in gewissem Maße mit der Ebene des Vertragsrechts nach diesen internationalen Verträgen.

Die Europäische Charta der Regional- oder Minderheitensprachen (im Folgenden „ECRM“) geht dann speziell auf die sprachliche Frage des Rechts der Völker (hier der nationalen Minderheiten) auf (innere) Selbstbestimmung ein, indem sie folgende Bereiche regelt:

a) Artikel 8 ECRM - Unterricht (in Minderheiten- oder Regionalsprachen),
b) Artikel 9 ECRM - Zugang zur Justiz in Minderheiten- und Regionalsprachen,
c) Artikel 10 ECRM - Zugang zu öffentlichen Stellen,
d) Artikel 11 ECRM - Massenmedien,
e) Artikel 12 ECRM - kulturelle Aktivitäten und kulturelle Einrichtungen,
f) Artikel 13 ECRM - wirtschaftliches und soziales Leben.

Im Allgemeinen ist der Zugang zum Bildungswesen und die Inanspruchnahme von Justiz- und Verwaltungsbehörden in Minderheiten- oder Lokalsprachen nach dem ECRM auf Regionen beschränkt, in denen diese Sprachen weit verbreitet sind. Dies ist ein klares Zugeständnis an die politischen und administrativen Gegebenheiten zur Zeit der Aushandlung des ECRM auf Kosten des absoluten Konzepts des Rechts auf interne Selbstbestimmung, wie es in der Lehre des allgemeinen Völkerrechts seit seiner frühen Entwicklung im Fall der Aaland-Inseln formuliert wurde. Dieses Konzept wurde dann im tschechischen Raum auf den Zeitraum angewandt, in dem die Mehrheit der jüdischen deutschsprachigen Bevölkerung von den Nazis ermordet wurde, und auf die anschließende Vertreibung der Mehrheit der christlichen deutschsprachigen Bevölkerung, sowie auf die Überreste (denjenigen, die bleiben durften), ihrer proportionalen Verdünnung durch die sesshafte Bevölkerung des Sudetenlandes durch die Nachkriegsregierungen und der Dezimierung und Zerstreuung der mährischen Kroaten durch die Kommunisten, garantiert einen effektiven Zugang zum Gebrauch der traditionellen Minderheitensprachen der polnischen Minderheit in der mährisch-schlesischen Region, die laut der Volkszählung von Jahr 2021 26,80 Tausend Einwohnern der Tschechischen Republik umfasst.[41] Im Gegensatz dazu haben die Folgen der Assimilierung der späten 1940er und frühen 1950er Jahre in Verbindung mit der Wahlfreiheit dieser Daten in der Volkszählung in den letzten zwanzig Jahren zu folgender Entwicklung bei der deutschen Nationalität geführt: 160 Tausend Einwohner im Jahr 1950, 134 Tausend Einwohner im Jahr 1961, 81 Tausend Einwohner im Jahr 1970, 58 Tausend Einwohner im Jahr 1980, 49 Tausend Einwohner im Jahr 1991, 39 Tausend Einwohner im Jahr 1991, 39 Tausend Einwohner im Jahr 1990 und 39 Tausend Einwohner im Jahr 1991, wie aus der Volkszählung laut Tschechisches Statistikamt hervorgeht.[42] Aus politischer Notwendigkeit heraus befasst sich das ECRM paradoxerweise nur mit der oberflächlichen Regelung des Gebrauchs von Minderheitensprachen in den oben genannten Gebieten, ohne in irgendeiner Weise die Rechte des Einzelnen - der Angehörigen nationaler Minderheiten - als subjektive, unmittelbar gegenüber der Staatsgewalt einklagbare Rechte zu regeln. *Expressis verbis* das Rahmenübereinkommen zum Schutz nationaler Minderheiten verleiht dem Einzelnen diese Rechte, zusätzlich zum Gewohnheitsrecht in Bezug auf „die Nation“.

Die Schlussfolgerung, dass das ECRM im Gegensatz zum Rahmenübereinkommen zum Schutz nationaler Minderheiten dem Einzelnen keine Rechte einräumt, ist auf den ersten Blick richtig, hält aber einer tieferen Analyse der praktischen Auswirkungen des rechtlichen Rahmens dieser beiden internationalen Verträge in der Anwendungspraxis in Bezug auf Staaten, die Vertragsparteien beider Verträge sind (was auch auf die Tschechische Republik zutrifft), nicht stand. Wie Cardi am Beispiel Ungarns feststellte[43], empfahl der Sachverständigenausschuss im Rahmen seines ersten Monitoring-Zyklus Ungarn, die Strafprozessordnung von 1973 in Artikel 8 so zu ändern, dass das Recht, eine andere Sprache als Ungarisch (d.h. eine Minderheitensprache im Staatsgebiet) zu verwenden, nicht auf Situationen beschränkt wird, in denen die betreffende Person nicht über ausreichende Ungarischkenntnisse verfügt. Der zweite Monitoring-Zyklus-Bericht, über den Cardi berichtet,[44] empfahl dasselbe in Bezug auf die neue Strafprozessordnung von 1998, die in der Tat später durch das Gesetz von 2002 geändert

[41] Staatsangehörigkeit. In: *Národnost | Sčítání 2021* [online]. Verfügbar unter: https://www.czso.cz/csu/scitani2021/narodnost [Zugriff am 2022-02-15].
[42] Ebd.
[43] CARDI, V., Regional or Minority Language Use before Judicial Authorities: Provisions and Facts. In: *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 6, No. 2, 2007, S. 5.
[44] Ebd.

wurde, so dass die relevante Bestimmung von Artikel 9 dahingehend geändert wurde, dass neben der ungarischen Sprache, in der das Verfahren geführt wird, *„jede betroffene Person ihre Muttersprache oder, gemäß einem internationalen Vertrag, eine Regional- oder Minderheitensprache verwenden kann“.* Die Bedingung, dass man Ungarisch nicht versteht, wird in der fraglichen Bestimmung nur für die nächste Alternative erwähnt, nämlich jede andere Sprache (außer der Sprache der historischen nationalen Minderheit).[45]

In diesem Zusammenhang ist in Bezug auf die Tschechische Republik anzumerken, dass sie etwa zur gleichen Zeit, wenn auch weniger ausdrücklich, die gleiche Änderung der Strafprozessordnung vorgenommen hat, offenbar unter dem Einfluss derselben Umstände. Artikel 2 Abs. 14 des Gesetzes Nr. 141/1961 Slg., Strafprozessordnung, der bis zur Änderung durch das Gesetz Nr. 265/2001 Slg. lautete*: „(14) Jeder hat das Recht, sich im Strafverfahren vor den Strafverfolgungsbehörden seiner Muttersprache zu bedienen. Die Strafverfolgungsbehörden führen das Verfahren und fassen ihre Beschlüsse in tschechischer Sprache ab“*, so dass es seit 2001 wie folgt heißt: *„(14) Die Strafverfolgungsbehörden führen das Verfahren und fassen ihre Beschlüsse in tschechischer Sprache ab. Wer erklärt, dass er der tschechischen Sprache nicht mächtig ist, hat das Recht, sich vor den Strafverfolgungsbehörden seiner Muttersprache oder einer Sprache zu bedienen, die er nach eigenen Angaben beherrscht“*, wobei heißt es in der Begründung zum Gesetz Nr. 265/2001 Slg., dass *„Die Bestimmung über die Verwendung der Muttersprache in Strafverfahren wird hinzugefügt, damit jeder nicht nur seine Muttersprache verwenden kann, die er möglicherweise nicht ausreichend beherrscht, sondern auch jede andere Sprache, die er nach eigene Einschätzung beherrscht. Damit steht die Bestimmung in vollem Einklang mit Artikel 37 Absatz 4 der Charta der Grundrechte und Grundfreiheiten. Daran schließt sich die Bestimmung in Artikel 28 an.“*[46]

Die Kohärenz des neuen Wortlauts von Artikel 2 Absatz 14 der Strafprozessordnung in der Fassung des Gesetzes Nr. 265/2001 Slg. wird in verfahrensrechtlicher Hinsicht durch Artikel 37 Absatz 4 der Charta weiterentwickelt, in dem es heißt*: „Wer erklärt, dass er die Sprache, in der das Verfahren geführt wird, nicht kennt, hat das Recht auf einen Dolmetscher“.* Die Charta der Grundrechte und Freiheiten ist jedoch in Bezug auf nationale Minderheiten unvollkommen, beispielsweise in der Frage, ob die Kosten für einen Dolmetscher in einem Verfahren (sei es ein Gerichts- oder ein Verwaltungsverfahren) im Zusammenhang mit einer historischen nationalen Minderheit in den Staatshaushalt des Trägers der öffentlichen Gewalt oder des Empfängers der öffentlichen Gewalt fallen sollten. Wichtig ist hier jedoch die Unterscheidung zwischen der Muttersprache und der Sprache einer anderen Sprache, die er oder sie spricht.

Im Zusammenhang mit der oben erwähnten Änderung der Strafprozessordnung der Tschechischen Republik durch das Gesetz Nr. 265/2001 Slg. ist in Bezug auf nationale Minderheiten auch zu beachten, dass der Träger der öffentlichen Gewalt (die Strafverfolgungsbehörden) nicht mehr berechtigt ist, die Muttersprache des Adressaten der öffentlichen Gewalt zu prüfen, sondern dass der Adressat in voller Übereinstimmung mit der verfassungsmäßigen Ordnung derjenige ist, der berechtigt ist, die Sprache zu wählen, in der er sich äußert. Dies entspricht der Bestimmung des Art. 9 des Gesetzes Nr. 273/2001 Slg. über die Rechte der Angehörigen nationaler Minderheiten und über die Änderung einiger Gesetze, wonach unter Bezugnahme auf die untergesetzlichen Bestimmungen in den Fußnoten (darunter insbesondere Art. 2 Abs. 14 der Strafprozessordnung): *„Angehörige nationaler Minderheiten, die traditionell und seit langem auf dem Gebiet der Tschechischen Republik leben, das Recht haben, im amtlichen Verkehr und vor Gericht die Sprache der nationalen Minderheit zu verwenden. Die Bedingungen für die Ausübung dieses Rechts werden durch besondere Rechtsvorschriften geregelt*.“ Die Synthese aus dem Recht, die Sprache einer nationalen Minderheit zu verwenden, und der Erklärung, dass eine Person „die tschechische Sprache nicht beherrscht“, ohne dass die Strafverfolgungsbehörden befugt sind, den Wahrheitsgehalt dieser Erklärung zu überprüfen, ist in der tschechischen Rechtsordnung also sowohl eine Erfüllung des Rechts auf innere Selbstbestimmung der Nationen in Form einer teilweisen Zugehörigkeit einer Person zu einer solchen Nation, der behauptet, einer der historisch begründeten Nationalitäten anzugehören, und andererseits ist es eine Manifestation des rechtlichen Rahmens, der dem Einzelnen das Recht gibt, seine Nationalität zu wählen - was neben Art. 3 des Rahmenübereinkommens zum Schutz nationaler Minderheiten ausdrücklich in Art. 2 Abs. 2 des Gesetzes Nr. 273/2001 Slg., der behauptet: *„(2) Ein Angehöriger einer nationalen Minderheit ist ein Bürger der Tschechischen Republik, der sich als Angehöriger einer anderen als der tschechischen nationalen Minderheit bezeichnet und den Wunsch äußert, zusammen mit anderen, die sich auf dieselbe Staatsangehörigkeit berufen, als Angehöriger einer nationalen Minderheit betrachtet zu werden“.* Die Synthese aus Art. 2 Abs. 14 der Strafprozessordnung und Art. 2 Abs. 2 des Gesetzes Nr. 273/2001 Slg. ist dann der Art. 3 des Gesetzes Nr. 273/2001 Slg. wonach gilt, dass:

> *„(1) Den Angehörigen nationaler Minderheiten wird einzeln oder gemeinsam mit anderen Angehörigen einer nationalen Minderheit die Ausübung ihrer Rechte garantiert, die in diesem Gesetz, in besonderen Rechtsvorschriften oder in internationalen Verträgen über Menschenrechte und Grundfreiheiten, an die die Tschechische Republik gebunden ist, festgelegt sind.*
> *(2) Die Ausübung der Rechte von Angehörigen nationaler Minderheiten darf nicht eingeschränkt oder verhindert werden.“*

Der zweite Absatz des zitierten Artikels 3 des Gesetzes Nr. 273/2001 Slg. ist auch eine Erklärung dafür, warum die Strafverfolgungsbehörden in einem Strafverfahren nicht den Wahrheitsgehalt einer Aussage gemäß § 2 Abs. 14 der Strafprozessordnung prüfen darf, d.h. die Frage, ob dieser oder jener Adressat der öffentlichen Gewalt tatsächlich die tschechische Sprache beherrscht, revidierend angehen darf. Eine gegentei-

[45] Siehe die englische Übersetzung hier: https://www.legislationline.org/documents/id/21384.

[46] Begründung der Regierungsvorlage Nr. 265/2001 Slg. zur Änderung des Gesetzes Nr. 141/1961 Slg. über das Strafverfahren (Strafprozessordnung) in der geänderten Fassung, des Gesetzes Nr. 140/1961 Slg. über das Strafrecht in der geänderten Fassung und einiger anderer Gesetze.

lige Auslegung würde eine Einschränkung der Ausübung der Rechte eines Angehörigen einer nationalen Minderheit bedeuten, einschließlich des Rechts, sich für die Zugehörigkeit zu einer solchen Minderheit gemäß Art. 2 Abs. 2 des Gesetzes Nr. 273/2001 Slg. zu entscheiden, d.h., dass: *„Ein Angehöriger einer nationalen Minderheit ist ein Bürger der Tschechischen Republik, der sich zu einer anderen als der tschechischen Staatsangehörigkeit bekennt und den Wunsch äußert, als Angehöriger einer nationalen Minderheit zu gelten“.*

In diesem Zusammenhang sind im Rahmen eines ausgewogenen historischen Überblicks über die Entwicklung dieser Frage zwei weitere Umstände zu beachten. Zum einen hat sich die Unantastbarkeit des Rechts, die Sprache einer nationalen Minderheit im Strafverfahren zu verwenden, als individuelles absolutes Recht in der Anwendungspraxis in Mitteleuropa erst seit dem Inkrafttreten der ECRM und des Rahmenübereinkommens zum Schutz nationaler Minderheiten wirklich entwickelt. Noch in den 1980er Jahren hat die Entscheidungspraxis der Menschenrechtskommission im Rechtsrahmen des Internationalen Paktes über bürgerliche und politische Rechte in *Dominique Guesdon v. Frankreich*[47] auch unter dem Gesichtspunkt des Rechts auf ein faires Verfahren nicht als fehlerhaft angesehen, als die französischen Gerichte einem französischen Staatsangehörigen, der in einem Strafverfahren wegen Vandalismus angeklagt war, das Umschreiben von Straßenschildern aus dem Französischen ins Bretonische mit der Begründung verweigerten, dass er sich trotz der Tatsache, dass diese Regionalsprache seine Muttersprache ist, auf Französisch verständigen könne. Die Menschenrechtskommission tat dies, obwohl das gewohnheitsrechtliche Selbstbestimmungsrecht zu diesem Zeitpunkt bereits voll entwickelt war, und relativierte damit faktisch die Stellung des Einzelnen im Verhältnis zu den absoluten individuellen Rechten, die sich aus dem Recht der nationalen Minderheiten ergeben. Diese Schlussfolgerung der Menschenrechtskommission, die aus dem Jahr 1986 stammt, also vor der Aushandlung des Rahmenübereinkommens zum Schutz nationaler Minderheiten und der Entwicklung der Anwendungspraxis des ECRM, würde jedoch aus heutiger Sicht gerade wegen der Entwicklung des rechtlichen Rahmens in diesem Bereich nicht ohne weiteres bestanden.

Die zweite Bemerkung, mit der die Analyse der Anwendung der Rechte historischer Minderheiten in der Tschechischen Republik in verschiedenen Verfahrensarten abgeschlossen werden kann, bezieht sich auf die Form der Zivilprozessordnung als zweite wichtige Verfahrensordnung neben der Strafprozessordnung. In der Begründung des Gesetzes Nr. 265/2001 Slg. zur Änderung von Art. 2 Abs. 14 des Strafgesetzbuches heißt es zwar*: „Die Bestimmung über den Gebrauch der Muttersprache im Strafverfahren wird so ergänzt, dass jeder nicht nur seine Muttersprache verwenden kann, die er möglicherweise nicht ausreichend beherrscht…“*[48] (und dies *inter alia* gerade infolge des Assimilationsdrucks in der Mitte des 20. Jahrhunderts), arbeitet Artikel 18 Absatz 2 des Gesetzes Nr. 99/1963 Slg. über die Zivilprozessordnung (im Folgenden „ZPO“) noch immer mit der Maxime „Muttersprache“ (und eröffnet damit die Möglichkeit einer materiellen Überprüfung der Muttersprache bei der sprachlichen Auslegung, d.h. nach der Begründung des Gesetzes Nr. 265/2001 Slg. aus dem Jahr 2001 der Sprache, die der eine oder andere Verfahrensbeteiligte „möglicherweise nicht ausreichend beherrscht“). Darüber hinaus geht Artikel 18 der Zivilprozessordnung in der fraglichen Bestimmung davon aus, dass nur ein „Verfahrensbeteiligter“, dessen Muttersprache nicht Tschechisch ist, das Recht auf einen Dolmetscher hat, nicht aber andere am Verfahren beteiligte Personen. Die positive gesetzliche Regelung verwehrt also *expresis verbis* den allgemeinen Bevollmächtigten und letztlich auch den national emanzipierten Rechtsanwälten das Recht, im Zivilverfahren eine Minderheitensprache zu verwenden, und zwar in der Situation, in der die Tschechische Republik keine festgelegte Amtssprache hat,[49] sondern nur teilweise geregelte Verfahrenssprachen, z. B. in Art. 16 Abs. 1 des Gesetzes Nr. 500/2004 Slg. über die Verwaltungsverfahrensordnung („Verwaltungsverfahrensordnung“), was in der Zivilprozessordnung nicht der Fall ist.

Im Zusammenhang mit der Verwaltungsverfahrensordnung ist ferner anzumerken, dass sie in Anbetracht des Zeitpunkts ihrer Entstehung und der Qualität ihrer Ausarbeitung im Hinblick auf die Rechte nationaler Minderheiten eindeutig ist und die einzige Verfahrensvorschrift im geltenden Recht der Tschechischen Republik darstellt, die mit dem Inhalt der Sprachenrechte gemäß dem internen Selbstbestimmungsrecht der Völker, dem Rahmenübereinkommen zum Schutz nationaler Minderheiten und schließlich dem Inhalt des Gesetzes Nr. 273/2001 Slg. vollständig übereinstimmt:

> *„Ein Bürger der Tschechischen Republik, der einer nationalen Minderheit angehört, die traditionell und seit langem auf dem Gebiet der Tschechischen Republik lebt, hat das Recht, vor einer Verwaltungsbehörde in der Sprache seiner nationalen Minderheit Stellung zu nehmen und zu handeln. Verfügt die Verwaltungsbehörde nicht über eine offizielle Person, die mit der Sprache der nationalen Minderheit vertraut ist, muss der Bürger einen Dolmetscher hinzuziehen, der in die Liste der Dolmetscher eingetragen ist. In diesem Fall gehen die Kosten für den Dolmetscher und die Übersetzung zu Lasten der Verwaltungsbehörde.“*

8. Schlussfolgerung

Aus der Analyse im vorangegangenen Teil dieser Arbeit ergibt sich, dass bei älteren Verfahrensregelungen vor 2011, bzw. vor dem Gesetz Nr. 273/2011 Slg., die Übereinstimmung des materiellen Inhalts der tschechischen Rechtsordnung mit der völkergewohnheitsrechtlichen Maxime der inneren Selbstbestimmung der Völker im Bereich der Sprachenrechte in der

[47] Dominique Guesdon gegen Frankreich, Mitteilung Nr. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 (1990).

[48] Supra Nr. 33.

[49] Dies steht im Gegensatz zur Situation während der so genannten Ersten Republik, in der das Gesetz Nr. 122/1920 Slg. zur Festlegung der Grundsätze des Sprachenrechts in der Tschechoslowakischen Republik, das durch das Verfassungsgesetz Nr. 150/1948 Slg., die Verfassung der Tschechoslowakischen Republik, ersatzlos aufgehoben wurde, die fiktive Sprache „Tschechoslowakisch“ als Amtssprache festlegte.

korrekten Anwendungspraxis und oft flexibleren Auslegung zu suchen ist und sein wird, damit sie den völkerrechtlichen Verpflichtungen der Tschechischen Republik entspricht, letztlich aber auch im Rahmen der Auslegungsregeln und des Inhalts der im Gesetz Nr. 273/2011 Slg. enthaltenen Normen, insbesondere Art. 3 Abs. 2 des Gesetzes, demzufolge: *„Die Ausübung der Rechte von Angehörigen nationaler Minderheiten darf nicht eingeschränkt oder verhindert werden“.* Problematisch und eine Relativierung dieser absoluten Rechte im tschechischen Rechtssystem scheint jedoch Art. 9 desselben Gesetzes Nr. 273/2001 Slg. zu sein, dessen letzter Satz in Bezug auf das Recht, die Minderheitensprache im Verfahren zu verwenden, besagt: *„Die Bedingungen für die Ausübung dieses Rechts werden durch besondere Rechtsvorschriften geregelt“.* Während das Verwaltungsgesetzbuch diese Bedingungen in Übereinstimmung mit dem internationalen Rechtsrahmen regelt, regelt die Strafprozessordnung bei ordnungsgemäßer Anwendung nach der Novelle des Gesetzes Nr. 265/2001 Slg. diese Bedingungen im Prinzip ebenfalls, so z.B. die Strafprozessordnung bei der Auslegung der Sprache, auf die sich Art. 9 des Gesetzes Nr. 273/2001 Slg. 273/2001 jedoch keine Bedingungen für die Vertreter in diesem Verfahren vorsieht, d.h. in einer Auslegung, die mit den völkerrechtlichen Verpflichtungen der Tschechischen Republik im Einklang steht, *ad absurdum* führt, und da sie die Verfahrenssprache nicht regelt, schränkt sie den Sprachgebrauch der Vertreter nicht ein, obwohl dies eindeutig nicht die Absicht des Gesetzgebers war.

In der Anwendungspraxis ist festzustellen, dass die Mehrheit der Bevölkerung, einschließlich der Fachöffentlichkeit, im Allgemeinen wie selbstverständlich von der Verwendung des Tschechischen als allgemeiner „Amtssprache“ ausgeht, ohne dass dies ausdrücklich durch positives Recht unterstützt wird. Im Gegensatz zur Zeit der so genannten Ersten Republik, als die künstlich erfundene tschechoslowakische Sprache per Gesetz als Amtssprache eingeführt wurde (gemäß dem Gesetz Nr. 122/1920 Slg. zur Festlegung der Grundsätze des Sprachenrechts in der Tschechoslowakischen Republik), gibt es in der tschechischen Rechtsordnung keine derartige Einrichtung. Schließlich ist darauf hinzuweisen, dass in der Praxis, z.B. im Bereich des Strafrechts, wo das geschriebene Recht infolge der Novelle von 2001 eindeutiger ist, der Autor dieses Artikels in seiner Rechtspraxis in der Královéhradecký Region noch im Jahr 2021 auf den Versuch der Kriminalpolizei gestoßen ist, die Staatsangehörigkeit des Adressaten der öffentlichen Gewalt materiell zu beurteilen und ihm das Recht auf Ausübung des Rechts auf Sprachwahl nach Art. 14 des Strafgesetzbuches zu verweigern, was offensichtlich auf das mangelnde Bewusstsein für die Rechte nationaler Minderheiten auf den unteren Ebenen der Exekutive zurückzuführen ist. Eine korrekte Anwendungspraxis ist daher auch in diesem Zusammenhang unerlässlich. Nur durch eine konsequente Auslegung des positiven Rechts durch die Justiz, die allerdings anfällig für nationalistische und minderheitenfeindliche Stimmungen in der Gesellschaft sein kann (man erinnere sich an die richterliche Rechtsprechung zwischen 1933 und 1945 im Dritten Reich),[50] kann der Schutz der sprachlichen Rechte nationaler Minderheiten tatsächlich in einer Situation gewährleistet werden, in der der tschechische Gesetzgeber nicht die Notwendigkeit oder den politischen Mut fand, neben dem Verwaltungsgesetzbuch alle Verfahrensordnungen auf der Ebene des geschriebenen Rechts in dem betreffenden Bereich angemessen und ausdrücklich zu regeln. Daraus ist folgerichtig zu schließen, dass das geschriebene Recht der Tschechischen Republik die verfahrensrechtlichen Sprachrechte nationaler Minderheiten nicht ausreichend schützt.

[50] Die Rechtsprechung in Zeiten des perversen Nationalismus ermöglichte es beispielsweise, die Tatsache, dass ein Arbeitnehmer oder Auszubildender „jüdischer Herkunft“ war, in den Anwendungsbereich des Instituts des „wichtigen Grundes“ als Grund für die fristlose Kündigung eines Dienstvertrages (d.h. aus Sicht des tschechischen Rechts eines Arbeitsvertrages) nach § 626 BGB (d.h. für eine Art „fristlose Kündigung“) aufzunehmen. Vgl. RÜTHERS, B., *Die unbegrenzte Auslegung*. Tübingen, 2017, S. 169f. Und S. 396 bzw. die dortige Zitierung und Paraphrasierung: HAFERKAMP, H.-P., *Das Bürgerliche Gesetzbuch während des Nationalsozialismus und in der DDR - mögliche Aspekte und Grenzen eines Vergleichs*. Köln, 2005, S. 18. Die Rechtsprechung aus dieser Zeit schloss z. B. auch einen Wettbewerbsverstoß aus, wenn einem Mitbewerber allein aufgrund des Hinweises auf seine jüdische Herkunft die Zusammenarbeit verweigert wurde. Vgl. das Urteil des Reichsgerichtshofs vom 9. Februar 1942, RG, DR 1939, 437.

Ernst Swoboda und der tschechoslowakische BGB-Entwurf der Zwischenkriegszeit*

(Ernst Swoboda and the Czechoslovak Draft Civil Code of the Interwar Period)

*David Marhold***

Abstract

Ernst Swoboda (1879–1950) is among the leading civil law scholars and legal philosophers of the interwar period in Central Europe. This paper examines a chapter of his work that is well-known in the German-speaking world, namely the period of the 1930s, when, as a professor at the German University in Prague, he participated in drafting the Czechoslovak Civil Code. Based on the study of archival sources and contemporary publications, it aims to reconstruct and analyse Swoboda's contribution to this project. His criticism of some original proposals significantly influenced the final wording of individual provisions (certain introductory provisions of Civil Code; the concept of personhood, possession, and ownership; strict liability). He introduced the natural law philosophy of Immanuel Kant and the contemporary German philosophy of Oswald Spengler into local legal discourse, bringing into it two influences that remained marginal and are still insufficiently explored within Czechoslovak interwar legal science. Thus, the paper is not merely a presentation of an episode in the legal science of a single state, but in a certain sense opens a broader topic of the intermingling of legal science in Central Europe during the period between the World Wars.

Keywords: *Unification; Recodification; Civil Law; Czechoslovak Law; Ernst Swoboda; Czechoslovakia.*

1. Einführung

Mit der Gründung der Tschechoslowakei im Jahr 1918 wurden die Bestrebungen zur Überarbeitung des Allgemeinen Bürgerlichen Gesetzbuchs (ABGB) erneuert. Sie verstärkte sich zusätzlich durch die Notwendigkeit einer Vereinheitlichung des Privatrechts im gesamten Staatsgebiet, da in der Slowakei und in Karpatenrussland weiterhin ungarisches Recht galt. Bereits 1921 legten die Subkomitees erste Entwürfe vor, die später von der Superrevisionskommission in den Entwurf des tschechoslowakischen Bürgerlichen Gesetzbuches von 1931 überführt wurden. In der zweiten Hälfte der 1930er Jahre befasste sich zudem die sogenannte Redaktionskommission mit der Vorbereitung eines neuen Bürgerlichen Gesetzbuches. Als Ergebnis ihrer Tätigkeit entstand im Jahr 1937 der Regierungsentwurf des Bürgerlichen Gesetzbuches. Dieser Entwurf konnte jedoch aufgrund der internationalen und innenpolitischen Entwicklungen letztlich nicht in Kraft treten.[3]

Auch wenn der Entwurf keine Rechtskraft erlangte, gehört er – ebenso wie der Kontext seiner Entstehung – dennoch zu den zentralen Themen der tschechischen Rechtsgeschichte. Die Professoren der Juristischen Fakultät der Deutschen Universität in Prag blieben bislang in der rechtshistorischen Forschung weitgehend unbeachtet. Im Mittelpunkt der vorliegenden Studie steht einer von ihnen – Ernst Swoboda (1879–1950). Obwohl er der Kommission erst Mitte der 1930er Jahre beitrat, hatte er sich bereits zuvor in zahlreichen, oftmals bemerkenswerten und anregenden Veröffentlichungen zu Fragen des tschechoslowakischen BGB-Entwurfs geäußert.[2]

Die Studie bewegt sich an der Schnittstelle von Rechtsgeschichte, Rechtsphilosophie und allgemeiner Historiographie und ermöglicht eine facettenreiche Betrachtung der Person

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** Mgr. David Marhold, Lehrstuhl für Rechtstheorie und Rechtsgeschichte, Juristische Fakultät, Palacký-Universität Olmütz, Tschechische Republik, E-Mail: marhold.david@gmail.com / ORCID 0009-0008-4253-551X.

1 Näheres insbesondere: SALÁK, P., *Historie osnovy občanského zákoníku z roku 1937. Inspirace, problémy a výzvy* [Geschichte des Entwurfs des Bürgerlichen Gesetzbuches aus dem Jahr 1937. Inspirationen, Probleme und Herausforderungen]. Brno, 2017; KOBER, J. (Hrsg.), *Osnova československého občanského zákoníku* [Entwurf des tschechoslowakischen Bürgerlichen Gesetzbuches]. Praha, 2021; oder auch HORÁK, O., *Brněnská normativní civilistika (postavy – projekty – polemiky)* [Die Brünner normative Zivilistik (Persönlichkeiten – Projekte – Polemiken)]. Praha, 2019.

2 Das Thema ist jedoch nicht völlig neu und knüpft an frühere Forschungen an, insbesondere an die von Petra Skřejpková von der Karls-Universität in Prag. Näheres z.B. SKŘEJPKOVÁ, P., Úloha Německé právnické fakulty Německé univerzity v Československu mezi válkami [Die Rolle der Deutschen Juristischen Fakultät der Deutschen Universität in der Tschechoslowakei zwischen den Kriegen]. In: HALÁSZ, I. – PETRÁŠ, R., Menšiny, vysoké školy a právo. Praha, 2018, S. 29–50; SKŘEJPKOVÁ, P., Učitelé Německé právnické fakulty a jejich účast na unifikaci právního řádu v meziválečném období [Lehrer der Deutschen Juristischen Fakultät und ihre Teilnahme an der Vereinheitlichung der Rechtsordnung in der Zwischenkriegszeit]. In: KOBER, J. (Hrsg.), *Republika právníků*. Praha, 2021, S. 216–235; SLAPNICKA, H., Die Beteiligung deutscher Professoren an den tschechoslowakischen Kodifikationsplänen (1919–1938). In: SVATOŠ, M. (Hrsg.), *Magister noster. Sborník statí věnovaných in memoriam prof. PhDr. Janu Havránkovi, CS*c. Praha, 2005, S. 253–259.

Ernst Swobodas sowie seines Beitrags zur tschechoslowakischen Zivilrechtslehre. Der erste Teil bietet in knapper Form eine Skizze seines Lebenswegs, wobei der Schwerpunkt auf den Jahren 1934 bis 1939 liegt, als Swoboda als Ordinarius an der Deutschen Universität in Prag tätig war und die tschechoslowakische Staatsbürgerschaft erwarb. Grundlage dieses Abschnitts bilden Archivbestände österreichischer und tschechischer Provenienz, insbesondere universitäre Personalakten und Materialien aus der Zeit des Nationalsozialismus. Die systematische Zusammenführung dieser bislang wenig ausgewerteten Quellen bietet einen besonderen wissenschaftlichen Mehrwert.

Eine Verbindung zwischen dem biographischen Teil und Swobodas Tätigkeit im Rahmen der Rekodifikation stellt der zweite Teil her, der seine rechtsphilosophische Grundhaltung kompakt darstellt. Der dritte Teil widmet sich sodann Swobodas Rolle als Kritiker und Mitgestalter des Regierungsentwurfs des tschechoslowakischen Bürgerlichen Gesetzbuches. Eine umfassende Analyse des gesamten Entwurfs wird bewusst vermieden. Stattdessen stehen jene zentralen Bestimmungen im Fokus, die Swoboda einer vertieften Kritik unterzog. Die Auswahl orientiert sich maßgeblich an seinem Aufsatz aus dem Jahr 1937,[3] in dem er die Hauptpunkte seiner Kritik zusammenfasst und auf seine früheren Arbeiten verweist. Zusätzlich werden einschlägige Quellen aus dem Prager Nationalarchiv herangezogen, insbesondere die im Bestand des Ministeriums für Unifizierung *(Ministerstvo unifikací)* überlieferten Sitzungsprotokolle der Redaktionskommission.

Die vorliegende Studie bezweckt, das Wirken Ernst Swobodas im Prozess der Vorbereitung des tschechoslowakischen Bürgerlichen Gesetzbuches zu analysieren, insbesondere im Hinblick auf seine kritische Haltung gegenüber der Abkehr von einigen leitenden Ideen des österreichischen ABGB. Swobodas Tätigkeit wird dabei in den breiteren Kontext der tschechoslowakischen Zivilrechtslehre der Zwischenkriegszeit eingebettet, die die Schaffung eines eigenständigen tschechoslowakischen Bürgerlichen Gesetzbuches anstrebte.

Die Untersuchung konzentriert sich auf zwei Hauptfragen. Zunächst wird erforscht, welche der vorgeschlagenen Änderungen gegenüber dem österreichischen ABGB Swoboda als problematisch erachtete und aus welchen Gründen er diese ablehnte. Anschließend wird analysiert, inwieweit seine Kritik erfolgreich war – also in welchem Maße es ihm gelang (sei es direkt oder indirekt), seine Einwände in den Regierungsentwurf einzubringen und somit die Gestalt des entstehenden Kodex zu beeinflussen. Methodisch stützt sich die Untersuchung auf eine eingehende Analyse der in Swobodas wissenschaftlichen Veröffentlichungen dargelegten Thesen sowie auf die systematische Auswertung archivalischer Quellen, insbesondere der Sitzungsprotokolle der Superrevisionskommission, wobei diese Erkenntnisse stets in den breiteren Kontext der tschechoslowakischen Rechtswissenschaft der Zwischenkriegszeit eingeordnet werden.

2. Ernst Swoboda und Tschechoslowakei

Ernst Swoboda, einer der später bedeutendsten Zivilrechtslehrer Mitteleuropas, wurde am 18. Juni 1879 in Tachau (Westböhmen) als Sohn des damaligen Bürgermeisters Heinrich Swoboda[4] und seiner Ehefrau Ernestine geboren. Diese deutschsprachige evangelische Familie mit tschechischem Namen war seit Generationen im böhmischen Grenzgebiet ansässig. In seiner autobiographischen Notiz betont Swoboda, sein Großvater Karl Swoboda sei ein Mitglied der Tachauer Nationalgarde gewesen, von dem er die Ideale der Freiheit übernommen habe.[5] Nach dem Besuch des Gymnasiums in Mies begann er sein Studium an der Deutschen Universität in Prag, wechselte später nach Innsbruck und schloss sein Rechtsstudium schließlich in Graz erfolgreich ab.[6]

Die anschließende Periode seines Lebensweges verbrachte er in Graz, wo er überwiegend als Richter tätig war – eine Laufbahn, die im Amt eines Oberlandesgerichtsrats ihren Höhepunkt fand. Dieses Amt übte er vom 1. August 1907 bis zum 30. Juli 1934. In den Jahren 1927 bis 1934 bekleidete er zudem das Amt des Vizepräsidenten der Vereinigung österreichischer Juristen. Seine akademische Karriere begann erst Mitte 1919 mit seiner Ernennung zum Privatdozenten für Bürgerliches Recht an der Grazer Universität,[7] wo er Ende Februar 1924 zum außerordentlichen Professor berufen wurde. In diese Zeit fielen auch zwei persönlich bedeutsame Lebensereignisse: seine Vermählung mit Irene Ploss (geb. 30. Juni 1888) im Jahr 1926 sowie die Geburt seines Sohnes Walter am 30. Oktober 1927.[8]

Der Schwerpunkt dieser Abhandlung liegt auf Swobodas nachfolgender Wirkungsstätte, der Juristischen Fakultät der Deutschen Universität in Prag, wo er als Nachfolger des verstorbenen renommierten Familienrechtlers Bruno Kafka (1881–1931) antrat. Am 31. Oktober 1933 wurde er von Präsident Masaryk zum ordentlichen Professor für Bürgerliches Recht ernannt. Seine Antrittsvorlesung widmete er dem Wert der einleitenden Bestimmungen des ABGB. Mit der Position des ordentlichen Professors war der Erwerb der tschechoslowakischen Staatsbürgerschaft verbunden. Den polizeilichen Aufzeichnungen zufolge meldete er seinen Aufenthalt in Prag am 19. August 1934 an. Nach dem Münchener Abkommen von 1938 und der folgenden Abtretung des Sudetengebiets zog er am 13. Dezember 1938 in das von Deutschland annektierte Gablonz. Im akademischen Jahr 1935/1936 bekleidete er das Amt des Dekans der Juristischen Fakultät.

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[3] SWOBODA, E., Die Reform des bürgerlichen Rechts in der Tschechoslowakei. In: *Annuario di Diritto Comparato e di studi legislativi,* Jg. 13, Nr. 2, 1937, S. 16–29.

[4] Heinrich Swoboda (1837–1910). Abgeordneter des Reichsrates, Abgeordneter des Böhmischen Landtags, Bürgermeister von Tachau; von Beruf Apotheker.

[5] Diese Erinnerungen führte E. Swoboda in seiner schriftlichen Stellungnahme zum Nationalsozialismus an; einige der in dieser Schrift enthaltenen Informationen sind daher als Versuch einer Selbstverteidigung zu verstehen. Archiv der Wiener Universität (AWU), J PA 398, Bl. 23.

[6] Österreisches Staatsarchiv (OeStA), Swoboda, Ernst, Professorenakt, sign. AVA Unterricht UM allg. Akten 915. 25.

[7] Ebenda.

[8] Národní archiv ČR (Nationalarchiv der Tschechischen Republik = NA), F. Policejní ředitelství Praha II – evidence obyvatelstva, Swoboda Arnošt (* 1879). Wiener Stadt- und Landarchiv (WStLA), Gauakten, A1 – „Gauakten": Personalakten des Gaues Wien; Zahl: 156205, Ernst Swoboda (Prof. Dr.), geb. 18. Juni 1879 (nicht foliiert).

Mit seiner Prager Tätigkeit ist auch seine Mitwirkung an den Kodifikationsarbeiten in der Tschechoslowakei eng verbunden. In der ersten Redaktionssitzung der Superrevisionskommission am 4. November 1935 sprach Egon Weiss (1880–1953), ein weiterer ordentlicher Professor an der Juristischen Fakultät der Deutschen Universität, die Empfehlung aus, dass „das Justizministerium die durch den Tod von Professor Dr. Kafka freigewordene Mitgliedschaft in der Superrevisionskommission Professor Dr. Ernst Swoboda anbieten möge.“[9] Auf Emil Svobodas Anregung hin, auch einen Ersatz für den verstorbenen Miloslav Stieber zu ernennen, schlug František Rouček seinen Brünner Kollegen Jaromír Sedláček vor. Die Kommission stimmte der Aufnahme beider genannten Professoren zu.[10] Unter Historikern wird diskutiert, welches Gewicht den Empfehlungen von Weiss bzw. Rouček beizumessen ist und ob es sich nicht – den Memoiren zufolge – um eine Initiative des Kommissionsvorsitzenden Prof. Krčmář handelte.[11] Swoboda nahm erst an der dritten Sitzung teil und blieb bis zu deren Auflösung Mitglied der Kommission. Als dann Anfang des Jahres 1939 die Entscheidung getroffen wurde, die Arbeiten am Entwurf des Bürgerlichen Gesetzbuchs wiederaufzunehmen, ernannte das Ministerium anstelle von Swoboda und Egon Weiss Robert Mayr-Harting (1874–1948) als Vertreter der Deutschen Universität.[12]

Mit seinem Weggang aus Österreich verließ Swoboda nicht nur seine Alma Mater, sondern legte nach langen Jahren auch den Richtertalar ab. Dies und der Erwerb der tschechoslowakischen Staatsbürgerschaft ermöglichten ihm den Beginn einer politischen Laufbahn in Henleins Sudetendeutscher Partei, deren Mitglied er seit Mai 1935 war. Obwohl er nie ein gewählter Politiker wurde, ist erwähnenswert, dass die SdP damit bereits in der frühen Phase der Kodifikationsarbeiten zum bürgerl. Gesetzbuch politische Vertretung hatte, noch ehe die Regierung den Gesetzentwurf dem Parlament vorlegte. Ab diesem Jahr wird er auch als Rechtsberater der Hauptleitung der Partei genannt.[13] Am 1. November 1938 wurde er nach der Verschmelzung mit der SdP Mitglied der NSDAP mit der Mitgliedsnummer 6.797.155.[14] Zudem trug er die Uniform der SA im Rang eines Sturmbannführers.[15]

In der zweiten Hälfte des Jahres 1939 verließ er Prag und seine Universität, da er an die Universität Wien berufen wurde. Hier lehrte er Bürgerliches Recht und Zivilprozessrecht.[16] Ab dem Wintersemester 1943/1944 wirkte er als Dekan der Fakultät. Neben seinen akademischen Aktivitäten war Swoboda in Wien als Oberlandesgerichtsrat tätig.[17] Nach der Befreiung Österreichs wurde er suspendiert, wodurch ihm die Fortsetzung seiner akademischen Tätigkeit verwehrt blieb. Er lebte zurückgezogen in Wien und verstarb dort am 24. April 1950 nach längerer Krankheit.[18]

3. Rechtsphilosophische Ausrichtung von Swobodas Werk und Denken

Der Entwurf eines tschechoslowakischen bürgerlichen Gesetzbuchs konnte aufgrund der politischen Lage nicht vollständig umgesetzt werden. Dennoch stellt er das Ergebnis jahrelanger Verhandlungen einer fachlich und ideologisch vielfältigen Kommission dar, an der Vertreter der tschechischen Universitäten in Prag und Brünn sowie der Deutschen Universität in Prag beteiligt waren. Ernst Swoboda, der der Kommission erst später angehörte, brachte umfassende Kenntnisse der mitteleuropäischen Rechtswissenschaft ein. Neben seiner Tätigkeit als Hochschullehrer und Richter in Graz beschäftigte er sich intensiv mit verschiedenen europäischen Zivilkodifikationen, darunter auch dem jugoslawischen Entwurf[19] sowie mit dem polnischen Obligationenrecht.[20] Eine vergleichbare intellektuelle Diversität – mit ihren Vorzügen und Konsequenzen – lässt sich auch bei anderen mitteleuropäischen Rekodifikationskommissionen feststellen.[21]

[9] Übersetzung aus dem tschechischen Original. Protokoll der I. Redaktionssitzung der Kommission für die Superrevision des Bürgerlichen Gesetzbuches vom 4. November 1935. NA, F. Ministerstvo unifikací, Kart. 156.

[10] Ebenda.

[11] Auf das Protokoll der I. Redaktionssitzung bezieht sich Pavel Salák mit dem Zusatz, dass „aus dem Text ersichtlich ist, dass [beide] diesem bereits im Voraus zugestimmt hatten.“ SALÁK, *Historie osnovy…*, S. 22. Vgl. weiter KOBER, *Osnova…*, S. 54.

[12] NA, F. Ministerstvo spravedlnosti – dodatky, Kart. 1963.

[13] Er soll auch Autor von Gesetzesentwürfen zum Minderheitenschutz gewesen sein, die von der SdP vorgelegt wurden. WStLA, Gauakten, K1 – Kartei zu den „Gauakten“: SWOBODA, Ernst (Prof. Dr.), geb. 18. Juni 1879. WStLA, Gauakten, A1. AUW, J PA 640, Bl. 4.

[14] Diesen Akt versuchte Swoboda nach dem Krieg anzufechten, etwa mit der Begründung, er habe dem nicht zugestimmt bzw. nie ein Parteibuch abgeholt, weshalb seine Mitgliedschaft nie zustande gekommen sei. WStLA, M. Abt. 119, A42 – NS-Registrierung: SWOBODA, Ernst (Prof. Dr.), geb. 18. Juni 1879. WStLA, Gauakten, A1.

[15] Darüber hinaus war er Rechtsberater der Prager SA-Standarte. Wiener Stadt- und Landarchiv, Gauakten.

[16] OeStA/AdR UWK BMU PA 10/093 Swoboda Ernst; AUW, J PA 640, Bl. 3.

[17] WStLA, Gauakten, A1.

[18] Parte: AUW, J PA 640, Bl. 7.

[19] SWOBODA, E., *Der Vorentwurf eines bürgerlichen Gesetzbuches für das Königreich Jugoslawien.* Ljubljana, 1936.

[20] SWOBODA, E., Uwagi do polskiego prawa zobowiązań. In: *Głos prawa,* Jg. 13, Nr. 1–3, 1936, S. 10–20.

[21] Die polnische Kodifikationskommission der Zwischenkriegszeit knüpfte an verschiedene Rechtstraditionen an, da ihre Mitglieder die Rechtstraditionen der ehemaligen Teilungsgebiete – der preußischen, österreichischen und russischen – vertraten. Ihre Tätigkeit war nicht nur dadurch von einer entsprechenden Pluralität geprägt. Vgl. hierzu ausführlicher: GLÜCK, M., Equality of Rights in the Work of the Codification Commission of the Republic of Poland on Drafts of Matrimonial Property Law. In: *Journal on European History of Law,* Jg. 15, Nr. 1, 2024, S. 57 ff.; DOLATA, T., A Few Comments on Problems Related to the Codification of Civil Law in Post-War Poland (1945–1964). In: *Journal on European History of Law,* Jg. 15, Nr. 2., 2024, S. 98–99. Die breite Vielfalt ideeller Strömungen und unterschiedlicher Rechtskulturen im ungarischen Kodifikationsprozess wird von Réky Pusztahelyi untersucht: PUSZTAHELYI, R., Undue Influence as a Civil Law Concept in the Hungarian Legislation and Judicial Practice (Investigation of the Drafts of the Hungarian Civil Code between 1900 and 1928 and the Corresponding Literature and Practice). In: *Journal on European History of Law,* Jg. 14, Nr. 2, 2023, S. 144–155. Mit ungarischen Einflüssen bei der Vorbereitung des tschechoslowakischen Zivilgesetzbuchs befassten sich darüber hinaus Ondřej Horák und Bence Zsolt Kovács: HORÁK, O. – KOVÁCS, B. Z., Die Rolle des ungarischen Zivilrechts bei der Rechtsvereinheitlichung in der Tschechoslowakei in den Jahren 1918–1948 (unter besonderer Berücksichtigung des Erbrechts). In: *Journal on European History of Law,* Jg. 15, Nr. 1, 2024, S. 79–92.

3.1 Zum Einfluss Immanuel Kants auf Franz von Zeiller und den naturrechtlichen Hintergrund des ABGB

Anlässlich des hundertsten Todestages Immanuel Kants im Jahre 1924 entstanden zahlreiche Abhandlungen über seinen Einfluss auf das Recht. Zu den bedeutendsten Beiträgen zählt Swobodas Werk *Das Allgemeine bürgerliche Gesetzbuch im Lichte der Lehren Kants* (1926). Während das Hauptinteresse bislang Kants Einfluss auf das öffentliche Recht und das Strafrecht galt, widmete sich Swoboda als Zivilrechtler hingegen dem bürgerlichen Recht. Obwohl er weder der erste noch der einzige war,[22] erwies er sich doch als einer der wissenschaftlich fruchtbarsten Vertreter.[23]

Swobodas Nähe zu Kant ging weit über akademisches Interesse hinaus, sodass er als Kantianer gelten kann – allerdings nicht im Sinne einer einheitlichen Richtung. Der tschechische Rechtsphilosoph Vladimír Kubeš (1908–1988) unterschied in seiner *Rechtsphilosophie des XX. Jahrhunderts* (1947) acht verschiedene kantianische Richtungen.[24] Während in Böhmen die normative Theorie von Brünn dominierte,[25] ordnete Kubeš Swoboda einer eigenständigen naturrechtlichen Richtung zu, die sich primär an Kants *Metaphysik der Sitten* orientierte.[26] Swobodas Naturrechtsposition grenzte ihn klar von der naturrechtskritischen tschechischen Jurisprudenz ab.[27]

Nach Swobodas Forschung war das ABGB das einzige zeitgenössische bürgerliche Gesetzbuch, das unmittelbar systematisch auf der Philosophie Kants aufbaute.[28] Swoboda betrachtete es als hervorragendes gesetzgeberisches Werk, wozu sein letzter Redakteur Franz von Zeiller am meisten beigetragen habe. Er war es, der Kants „geläutertes Naturrecht" für praktische rechtliche Zwecke adaptiert habe.[29] Zeiller wich laut Swoboda bewusst von seinem Lehrer Karl von Martini ab, um dem ABGB Flexibilität und Praktikabilität zu verleihen.[30] Dadurch wurde die Rechtssprache des ABGB für die Bürger verständlich und die kulturelle Funktion des Rechts gestärkt.[31]

Swoboda sah die größte Leistung Zeillers darin, dass das ABGB von drei regulativen Prinzipien getragen wurde – dem Gedanken der Gerechtigkeit, der Freiheit und der Gleichheit vor dem Gesetz, die gemeinsam die tragenden Säulen des Rechts bildeten.[32] Nach Swoboda hätten die Positivisten diese regulativen Prinzipien als rein statisch und inhaltsleer betrachtet. Es handle sich jedoch um dynamisch regulative Ideen, die dem Zahn der Zeit widerstünden und als Inspiratoren bzw. Regulatoren der Rechtsnormen dienten.[33] Diese Gedanken spiegelten sich auch in der richterlichen Tätigkeit wider und bildeten einen Maßstab zur Schließung von Lücken im Gesetz (siehe folgendes Kapitel).

3.2 Der Untergang des Abendlandes von Oswald Spengler und die dynamische Rechtslehre

Swobodas positives Verhältnis zu Kant und Zeiller ist in der tschechischen Fachwelt weithin bekannt. Weniger bekannt ist jedoch sein Rückgriff auf den deutschen Philosophen Oswald

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[22] Ein anderer Autor war bereits in den 1890er Jahren beispielsweise Ernst Landsberg. Swoboda weist jedoch darauf hin, dass sich Landsberg mit dem Phänomen nur oberflächlich befasst habe und keine vertiefte Untersuchung der einzelnen Institute und ihrer Herkunft unternommen habe. SWOBODA, E., *Die Neugestaltung der Grundbegriffe unseres Bürgerlichen Rechts, ihre Bedeutung für die Gegenwart und für das Privatrecht der Zukunft.* Wien, 1929, S. VII.

[23] Swoboda machte sich diesen Einfluss nahezu in jedem seiner Aufsätze zunutze. Unter seinen rein rechtsphilosophischen Veröffentlichungen lässt sich noch Folgendes erwähnen: SWOBODA, E., Die philosophischen Grundlagen des österreichischen bürgerlichen Rechts und ihre Bedeutung für die Gegenwart. In: *Zeitschrift für ausländisches und internationales Privatrecht,* Jg. 2, 1928, S. 333–369; ders., *Franz von Zeiller der große Pfadfinder der Kultur auf dem Gebiete des Rechts, und die Bedeutung seines Lebenswerkes für die Gegenwart.* Graz, 1931; ders., Das Privatrecht der Zukunft. In: *Archiv für Rechts- und Wirtschaftsphilosophie,* Jg. 25, N. 4, 1932, S. 459–520; ders., Die Wiedergeburt unseres Rechtsdenkens. In: *Archiv für die civilistische Praxis,* Bd. 140, Nr. 3, 1935, S. 296–319; ders., Die Einwirkungen der Philosophie Kants auf das österreichische und tschechoslowakische Bürgerliche Recht. In: *Zeitschrift für die gesamte Staatswissenschaft,* Bd. 98, Nr. 1, 1938, S. 151–172; ders., Kant und das Zivilrecht. In: *Kant-Studien,* Bd. 43, Nr. 3, 1943, S. 369–392.

[24] KUBEŠ, V., *Právní filosofie XX. století: Kantismus, hegelianismus, fenomenologie a theorie myšlenkového řádu).* [Rechtsphilosophie des 20. Jahrhunderts: Kantianismus, Hegelianismus, Phänomenologie und Theorie der Gedankenordnung]. Brno, 1947, S. 26.

[25] Diesem widmet sich in jüngerer Zeit insbesondere Ondřej Horák (vgl. oben) sowie einige Rechtshistoriker der Masaryk-Universität in Brünn – etwa Jaromír Tauchen, der sich seit längerer Zeit mit Vladimír Kubeš befasst.

[26] Ebenda, S. 26, 94 ff.

[27] Vgl. HORÁK, O., Ratio scripta? K přirozenoprávním vlivům v ABGB. [Ratio scripta? Zu naturrechtlichen Einflüssen im ABGB]. In: ŠIDLOVSKÝ, G. – VALEŠ, V. – POLESNÝ, J. (Hrsg.), *Melior est aquisitio scientiae negotiatione argenti: pocta Prof. Ignácovi Antonínovi Hrdinovi, O. Praem. K šedesátým narozeninám.* Praha, 2013, S. 61 ff.

[28] SWOBODA, Die philosophischen Grundlagen…, S. 334.

[29] Swoboda erinnert daran, dass Zeiller ein Anhänger des Naturrechts war; dennoch habe er das ABGB nicht auf der Grundlage des unvollkommenen Naturrechts Kants Vorgänger, sondern gerade auf dem Fundament der Kant'schen Philosophie geschaffen. Ders., *Franz von Zeiller…,* S. 10. Swoboda führt aus, dass Zeiller aus vermutlich zensurbedingten Gründen Kants Namen in Übereinstimmung regelmäßig verschwieg, ihn jedoch bei abweichender Auffassung stets ausdrücklich nannte. Ders., Kant und das Zivilrecht, S. 378.

[30] Die Kodifikationen des 18. Jahrhunderts, die von der Lehre Wolffs inspiriert waren, sollten eine möglichst detaillierte kasuistische Regelung der Rechtsvorschriften anstreben. Ders., Die Einwirkungen…, S. 154. Swoboda führt sogar aus, dass Wolff nach Vollständigkeit strebte und dabei „…pedantisch bemüht war, die ganze Welt fein säuberlich in trockene Paragraphen einzuschachteln…". Ders., Kant und das Zivilrecht…, S. 370.

[31] „Das Gesetzbuch ist für das Volk bestimmt." Ders., Die philosophischen Grundlagen…, S. 337.

[32] In seiner grundlegenden Monographie über Immanuel Kant widmete er jedem dieser Gedanken ein eigenes Kapitel. SWOBODA, E., *Das allgemeine bürgerliche Gesetzbuch im Lichte der Lehren Kants.* Graz, 1926, S. 57–144.

[33] Ders., *Franz von Zeiller…,* S. 12. „Deshalb hat Kant im Gegensatz zu allen seinen Vorgängern die Idee des Rechts in ihre Grundelemente zerlegt, die nicht selbst Rechtsnorm sind, sondern nur die Inspiratoren der Rechtsnorm und deren Regulatoren und erst in ihrem Zusammenwirken, in ihrer gegenseitigen Beeinflussung die wahre Natur des Rechts plastisch verkörpern." Ders., Die Wiedergeburt…, S. 313.

Spengler (1880–1936).[34] In seinem Werk *Der Untergang des Abendlandes* (1918–1923) kritisierte Spengler die zeitgenössische deutsche Rechtswissenschaft, die sich auf römisch-rechtliche Begriffe stütze. Während sich die Formensprache aus philologischer Tradition herleiten lasse, müsse der Inhalt rechtlicher Konzepte auf wirtschaftlicher und sozialer Erfahrung basieren, um den Bedürfnissen der modernen Zeit zu entsprechen.[35]

Spenglers Werk inspirierte einzelne deutschsprachige Juristen zur Kritik an der zeitgenössischen Rechtswissenschaft, bildete jedoch keine eigene Richtung.[36] Swoboda nutzte diese Argumentation zur Kritik an der deutschsprachigen Rechtswissenschaft, die sich im deutschen BGB widerspiegelte.[37] Im Gegensatz dazu habe er, gestützt auf die Philosophie Kants und Zeillers Version des ABGB, die Qualitäten dieses älteren Kodex hervorgehoben. Obwohl Swoboda als einer der führenden Vertreter der dynamischen Rechtswissenschaft galt, also einer Abkehr von der römisch-rechtlichen Tradition hin zu neuen Herausforderungen in den wirtschaftlichen, gesellschaftlichen, kulturellen und anderen Bereichen, habe er Spengler nicht uneingeschränkt zugestimmt. Nach Swoboda sei Spengler in mancher Hinsicht zu weit gegangen. Dabei berief er sich auf das von Leibniz formulierte *Gesetz der Kontinuität,* wonach Vergangenheit, Gegenwart und Zukunft (bzw. in diesem Fall Statik und Dynamik) einander die Hand reichen sollten.[38]

Swoboda kritisierte Savignys historische Rechtsschule als zu statisch, da sie sich auf das römische Recht konzentrierte.[39] Dieser Ansatz habe nach seiner Auffassung nicht dem Geist der deutschen, sondern der französischen Rechtslehre entsprochen. Im Gegensatz dazu sei das deutsche Rechtsdenken dynamisch gewesen – also fähig, sich veränderten Bedingungen anzupassen.[40]

Eine weitere maßgebliche Komponente von Swobodas Denken war sein Verständnis von der Einheit des Rechts, das sich in der wechselseitigen Durchdringung von Privatrecht und öffentlichem Recht zu einem integralen Ganzen widerspiegelte.[41] Auch in diesem Zusammenhang berufe er sich auf alte germanische Wurzeln bzw. auf die dynamischen Grundlagen des germanischen Rechts und weise den Rechtsdualismus dem römischen Rechtsdenken zu. Die Einheit des Rechts solle den Bedürfnissen der modernen Gesellschaft entsprechen und sich an den ethischen Prinzipien der Gerechtigkeit, Freiheit und Gleichheit vor dem Gesetz orientieren.[42]

4. Swobodas Anregungen im Kontext der tschechoslowakischen Kodifikationsarbeiten

Swoboda wurde zwar erst in der ersten Redaktionssitzung am 4. November 1935 als Mitglied der Superrevisionskommission vorgeschlagen und nahm erstmals an der dritten Sitzung am 18. November 1935 teil. Dennoch hatte er sich bereits zuvor intensiv für die Rekodifikationsarbeiten interessiert.

Seinen letzten Aufsatz, der dem tschechoslowakischen Bürgerlichen Gesetzbuch gewidmet war, verfasste Swoboda für die italienische Zeitschrift *Annuario di Diritto Comparato*,[43] herausgegeben vom römischen *Istituto di Studi Legislativi*, dessen Mitglied Swoboda war.[44] Darin behandelt er sechs Probleme, die seiner Ansicht nach zu den grundlegenden Änderungen des tschechoslowakischen BGB-Entwurfs gehörten.[45] Diese Gliederung diente der vorliegenden Arbeit als Inspiration, da der Artikel in der italienischen Zeitschrift retrospektiv auf Argumente zurückgreift, die Swoboda bereits in seiner früheren Kritik am tschechoslowakischen Entwurf verwendet hatte, wodurch sich diese leichter mit seinen Bestrebungen und Erfolgen in den Verhandlungen der Redaktionskommission vergleichen lassen.

4.1 Auslegung und das Problem der Lücken im Gesetz

Die Frage der Auslegung und der Gesetzeslücken gehörte zu den zentralen Streitfeldern der tschechoslowakischen Rechtswissenschaft in der Zwischenkriegszeit.[46] Besondere Aufmerksamkeit erhielt § 7 ABGB, der den Richter verpflichtete, sich bei fehlender gesetzlicher Grundlage oder Analogie auf die *natürlichen*

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[34] Im deutschsprachigen Raum hingegen blieb dieser Einfluss keineswegs unbeachtet. Lutz Martin Keppeler widmete sich in umfassender Weise Oswald Spengler und dessen Wirkung, wobei er auch Ernst Swoboda nicht unerwähnt lässt: KEPPELER, L. M., *Oswald Spengler und die Jurisprudenz.* Tübingen, 2014, S. 45–49. Keppeler stellt fest, dass Swoboda ab dem Jahr 1936 auf ausdrückliche Nennungen Spenglers verzichte, dessen dynamische Begriffe jedoch weiterhin verwende. Zitate aus Spenglers *Untergang des Abendlandes* finden sich allerdings auch in einigen späteren Aufsätzen Swobodas, etwa in: SWOBODA, E., Das künftige bürgerliche Recht in der Tschechoslowakei. In: *Juristenzeitung für das Gebiet der Tschechoslowakischen Republik*, Jg. 18, Nr. 1, 1937, S. 3; Ders., *Kant und das Zivilrecht*, S. 384–385.

[35] SPENGLER, O., *Der Untergang des Abendlandes. Umrisse einer Morphologie der Weltgeschichte*. München, 2017, S. 652 ff.

[36] Neben Swoboda, der um eine „dynamische Auffassung" des österreichischen Rechts bemüht war, ist insbesondere Hans Fehr (1873–1961) zu nennen. S. KEPPELER, *Oswald Spengler…,* S. 41 ff. Später trugen Spenglers Gedanken zur Delegitimierung des römischen Rechts als angeblich jüdisches bzw. orientalisch-jüdisches Recht in der Zeit des Nationalsozialismus bei. Ebenda, S. 196 ff.

[37] Er kritisierte etwa die Streichung der einleitenden Bestimmungen sowie die enge Definition der Sache im rechtlichen Sinne.

[38] Z.B. SWOBODA, E., Der Personen und Sachbegriff des a. b. G. b. und die Notwendigkeit der Erhaltung dieser Begriffe im künftigen bürgerlichen Gesetzbuche. In: *Wissenschaftliche Vierteljahrsschrift zur Prager juristische Zeitschrift*, Jg. 8, Nr. 2, 1928, Sp. 52.

[39] Ders., Die Wiedergeburt…, S. 302.

[40] Ebenda, S. 309–310.

[41] Ausführliches siehe: Ders., Die gegenseitige Durchdringung des öffentlichen und privaten Rechts. In: *Archiv für Rechts- und Sozialphilosophie,* Jg. 28, Nr. 2, 1934/1935, S. 184–194; ders., Die Einheit des öffentlichen und privaten Rechtes. In: *Volk und Führung,* Jg. 1 (6), Nr. 7, 1935, S. 290–297.

[42] Swoboda nimmt hier Bezug auf die Natur selbst und führt aus: „…in der Natur alle Grenzen flüssig und fließend sind, dass es z.B. keine klare, restlose Sonderung des Tier- und Pflanzenreiches gibt… Erst der Mensch schafft hier wie dort die scharfen Grenzen, welche die Begriffe scheiden sollen, und er tut dies nur infolge seiner eigenen Unzulänglichkeit." Ebenda.

[43] SWOBODA, Die Reform…, S. 16–29.

[44] Siehe AWU, J PA 640, Bl. 4; AWU, Senat S 304.1270 (nicht foliiert).

[45] SWOBODA, Die Reform…, S. 29.

[46] Am aktivsten an den betreffenden Diskussionen beteiligten sich Vertreter der Brünner normativen Schule. Diese lehnten die Existenz von Lücken im Recht ab. Über ihren Einfluss in dieser Polemik besonders HORÁK, *Brněnská normativní civilistika…*, S. 84–89.

Rechtsgrundsätze zu stützen. Während der tschechoslowakische Entwurf des Subkomitees von Jan Krčmář (1921) die Auslegungsbestimmungen praktisch unverändert ließ, wurden im Entwurf von 1931 sicherheitshalber sämtliche einleitenden Bestimmungen gestrichen, was zur Kritik seitens einiger Experten führte. Zu den schärfsten Kritikern gehörten Vladimír Kubeš, damals Dozent an der Masaryk-Universität in Brünn,[47] und Ernst Swoboda, der zu jener Zeit noch an der Universität Graz lehrte.[48]

Swoboda wies die Behauptung zurück, dass diese einleitenden Bestimmungen für die zeitgenössische Rechtspraxis überflüssig seien bzw. dass die Frage der Auslegung ausschließlich der Rechtslehre überlassen werden sollte.[49] Auch seine richterliche Erfahrung bildete eine Grundlage für seine Ansichten. Er bewertete den Entwurf der jugoslawischen Kodifikation positiv, die sich mehr als der damalige tschechoslowakische Entwurf am ABGB orientierte.[50] Dennoch bestand er selbst nicht auf der Übernahme der Formulierungen des ABGB. Im Gegenteil, er war sich bewusst, dass der Wortlaut der Auslegungsbestimmungen modernisiert werden musste.[51] Eine geeignete Lösung sah er auch nicht in der Auslegungsbestimmung des schweizerischen ZGB. Das Kriterium, wonach der Richter nach der Regel entscheiden sollte, die er selbst als Gesetzgeber aufstellen müsste, hielt er – ähnlich wie ein Teil der schweizerischen Lehre – für allzu subjektiv. Es bestand die Gefahr, dass ein und derselbe Fall von verschiedenen Richtern jeweils völlig unterschiedlich entschieden würde.

Nach Swoboda sollte nicht die Person des Gesetzgebers im Vordergrund stehen. Maßgeblich sei vielmehr der „Geist des Gesetzes", verstanden als leitende Gedanken, die die Struktur des gesamten Gesetzes und die Natur der einzelnen Institute bestimmten. Für das tschechoslowakische Bürgerliche Gesetzbuch sollten es drei regulative Prinzipien sein, abgeleitet von der Philosophie Immanuel Kants, die das gesamte ABGB durchdringen und die Zeiller im Zusammenhang mit den *natürlichen Rechtsgrundsätzen* verstehen sollte.[52]

Eine entscheidende Rolle spielte die 24. Sitzung der Superrevisionskommission am 20. Februar 1936.[53] Die Kommission befasste sich dort mit der Form der einleitenden bzw. auslegenden Bestimmungen, wobei die Kritik von Ernst Swoboda und Jaromír Sedláček[54] einen besonderen Anteil hatte. Sedláček schlug vor, dass die Richtlinie für die Entscheidung des Richters in dem Fall, in dem er weder nach einer gesetzlichen Vorschrift noch nach einer daraus abgeleiteten Analogie entscheiden kann, die Grundsätze der Gerechtigkeit und Anständigkeit sein sollten, ohne diesen Gedanken näher auszuführen. Es folgte ein sehr umfangreicher Vorschlag Swobodas, der im Wesentlichen der heute führenden teleologischen Auslegung entspricht.[55] Jaromír Sedláček kritisierte diese Bestimmung – möglicherweise wegen ihrer Länge – und bemerkte, dass das Gesetz keine Normen mit Kommentarcharakter enthalten dürfe.[56] Der schließlich angenommene Vorschlag der Kommission, verfasst von Jan Krčmář, enthält die von Swoboda formulierten Gedanken.[57]

4.2 Das Rückwirkungsverbot

Der Grundsatz, dass Gesetze nicht rückwirkend gelten (sogenanntes Rückwirkungsverbot), ist im Recht allgemein anerkannt. Es handelt sich um eine zentrale Frage des intertemporalen Rechts, ein Begriff, der die Regelung zeitlicher Konflikte zwischen Gesetzen betrifft.[58] Für den Bereich des österreichi-

[47] Eine Auswahl der Literatur von V. Kubeš zum Thema vgl. ebenda, S. 85, Anm. 341.

[48] Gegen die Streichung der einleitenden Bestimmungen im Entwurf von 1931 positionierte sich Swoboda in seiner Antrittsvorlesung an der Deutschen Universität in Prag im Jahr 1934. Diese wurde in Fortsetzungen in der Januar- bzw. Februarausgabe der Juristenzeitung veröffentlicht. SWOBODA, E., Der Wert der einleitenden Bestimmungen des allgemeinen bürgerlichen Gesetzbuches und ihre Gestaltung im künftigen bürgerlichen Recht. In: *Juristenzeitung,* Jg. 16, 1935, Nr. 1, S. 1; Nr. 3, S. 21; Nr. 4, S. 29.

[49] Diese doktrinäre Ansicht sollte in der Zeit vor dem 1. Weltkrieg vorherrschen und führte zur Streichung der Auslegungsbestimmungen im deutschen BGB. Im Gegensatz dazu hebt er die schweizerische Kodifikation (namentlich von Eugen Huber) von 1907 hervor, die eine solche Auslegungsbestimmung enthält. Ders., Zur Wiedererweckung der einleitenden Bestimmungen des allgemeinen bürgerlichen Gesetzbuches im künftigen tschechoslowakischen bürgerlichen Gesetzbuch. In: *JUDr. Jan Krčmář. Soubor článků o jeho osobnosti a díle, vydaný u příležitosti 60. narozenin.* Prag, 1937, S. 176–177.

[50] „Man hat in den letzten Jahrzehnten Vorschriften über die Auslegung von Gesetzen für überflüssig angesehen, weil ihre Erforschung der Rechtswissenschaft überlassen bleiben solle und deshalb hat auch das deutsche BGB auf die Aufnahme solcher Bestimmungen verzichtet." Ders., *Der Vorentwurf…*, S. 73.

[51] Er führte an, dass der bloße Verweis auf natürliche Rechtsgrundsätze zu unklar sei. Ders., Die Reform…, S. 20.

[52] Ders., Zur Wiedererweckung…, S. 179.

[53] Vgl. das Protokoll dieser Sitzung in: NA, F. Minsterstvo unifikací, Kart. 156.

[54] Sedláček übermittelte seine Anmerkungen zu diesem und anderen Problemen bereits in seinem Brief an das Justizministerium vom 27. Januar 1932. NA, F. Ministerstvo unifikací, Kart. 156.

[55] „Bei der Anwendung des Gesetzes hat der Richter nicht am Buchstaben zu haften. Maßgebend ist der Sinn des Gesetzes. Ob es zulässig ist, in jenen Fällen, die im Gesetze nicht oder nicht klar entschieden sind, eine für ähnliche Fälle bestimmte gesetzliche Vorschrift anzuwenden oder die Unzulässigkeit der Anwendung aus dem Schweigen des Gesetzes zu folgern, ist aus dem Zwecke dieser gesetzlichen Bestimmungen zu erschließen. Ist auf diese Weise keine Sicherheit zu gewinnen, so sind die in der Verfassungsurkunde festgelegten leitenden Grundgedanken der Gerechtigkeit, der durch die Rechtsordnung beschränkten Freiheit des Einzelnen und der Gleichheit vor dem Gesetze zur Richtschnur zu nehmen. Immer muss sich aber zur Wahrung der Einheit des Rechts die Entscheidung befriedigend einfügen in den ganzen Bau des Gesetzes." Protokoll der Redaktionssitzung, Bl. 2–3.

[56] Emil Svoboda bemerkte zu diesem Vorschlag, dass er „etwas den Charakter eines Absatzes aus einem Lehrbuch hat". SVOBODA, E., Spravedlnost, svoboda, rovnost [Gerechtigkeit, Freiheit, Gleichheit]. In: *Naše doba*, Jg. 45, Nr. 5, 1938, S. 287.

[57] „Kann man auf diese Weise zu keiner Entscheidung gelangen, so sind für die Entscheidung maßgebend die in der Verfassungsurkunde enthaltenen Grundgedanken der Gerechtigkeit, der durch die Rechtsordnung eingeschränkten Freiheit und der Gleichheit vor dem Gesetz." Deutsche Übersetzung aus: SWOBODA, Die Reform…, S. 22.

[58] „Diese Vorschriften sind keine selbständigen Normen, sondern determinieren zeitlich die Tatbestände des alten und neuen Gesetzes. Der Normalfall des intertemporalen Rechts ist jener, bei dem das alte und neue Gesetz nebeneinander bestehen, wobei jedes einen zeitlich unterschiedlich determinierten Tatbestand hat." SEDLÁČEK, J. In: ROUČEK, F. – SEDLÁČEK, J. (Hrsg.), *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl prvý (§ 1 až 284).* Praha, 1935, S. 107–108 (§ 5). Weitere Normen des intertemporalen Rechts sind in § 9 ABGB (Festlegung der Geltungsdauer der Gesetze) und Abs. V des Einführungspatents enthalten. Über die intertemporalen Normen hinaus findet sich eine zeitliche Determination noch in § 3 ABGB (Wirksamkeit des Gesetzes).

schen (tschechoslowakischen) Zivilrechts ist dieses Prinzip in § 5 ABGB ausgedrückt. Auch diese Bestimmung wurde im Entwurf von 1931 zusammen mit den anderen einleitenden Bestimmungen gestrichen. Im Gegensatz zu den Auslegungsbestimmungen wurde sie jedoch nicht rehabilitiert.

Die Lehre der Vorkriegs- und Zwischenkriegszeit betrachtete diesen Grundsatz bzw. seine gesetzliche Verankerung als überholt.[59] Swoboda vertrat die gegenteilige Meinung.[60] Ihre Bedeutung sah er vor allem auf der Ebene der *Rechtssicherheit* für die Adressaten der Normen.[61] Den Grundsatz sah er in erster Linie als Verpflichtung für den Gesetzgeber, dem er eine gewisse Nachlässigkeit in der damaligen Gesetzgebungspraxis vorwarf. Die Rückwirkung eines Gesetzes sollte nach Swobodas Ansicht nur in Fällen zulässig sein, für die dieselben Gründe vorliegen, die das Gesetz für die Enteignung vorsieht.[62] An oberster Stelle sollte also das Gemeinwohl stehen (*Salus populi suprema lex esto*); das Interesse einer einzelnen Gruppe hingegen reiche nicht aus.[63] Man könnte sagen, dass es sich dabei um allgemeine Bedingungen nach Swoboda für die Beurteilung der Rechtmäßigkeit eines Eingriffs der Staatsgewalt in die erworbenen Rechte des Einzelnen handelte.

Der Entwurf von 1931 enthielt eine ähnliche intertemporale Bestimmung in Art. LXXIII der einleitenden Vorschrift, laut vergleichender Tabelle sollte es sich jedoch nicht um eine Übernahme des in § 5 ABGB ausgedrückten Gedankens handeln.[64] Das Protokoll der Redaktionskommission gibt lediglich vielsagend an, dass der Text auf Wunsch von Dr. Swoboda umformuliert und ergänzt wurde,[65] was Swoboda später in seinen Publikationen nicht versäumt zu betonen als wesentliche Änderung zum Besseren.[66] Die Debatte über die Rückwirkung tauchte in den Rekodifikationsdebatten noch in der ersten Sitzung der Subkomitees der verfassungsrechtlichen Ausschüsse auf, wo gewisse Zweifel einiger Gesetzgeber über die unzureichende Betonung dieses Grundsatzes geäußert wurden. Der Wortlaut des Gesetzes änderte sich in dieser Hinsicht jedoch nicht.[67]

Ein weiterer in der Lehre diskutierter Streitpunkt betraf die Frage nach der Geltung dieser Bestimmung außerhalb des eigentlichen ABGB; mit anderen Worten, ob sich das in § 5 ABGB ausgedrückte Rückwirkungsverbot nur auf die vom privatrechtlichen Kodex geregelten Verhältnisse bezog oder ob es auch für andere Rechtsvorschriften gelten sollte. Swoboda verteidigte einen engeren Wirkungsbereich: „Durch die Einordnung dieser Bestimmung in das ABGB will man die grundsätzliche Nichtrückwirkung nur für den Bereich des Zivilrechts zum Ausdruck bringen".[68] Dabei berief er sich auf Franz Zeiller, der die privatrechtliche Normsetzung im Vergleich zu den sich ständig ändernden politischen Vorschriften als eine Art ruhigen Hafen bezeichnet hatte.[69] Ähnlich unter Verweis auf die alte österreichische Rechtsprechung bzw. andere Rechtsvorschriften führt Robert Mayr-Harting an, dass diese Regel nur für Normen des materiellen Rechts gilt.[70] Zu demselben Schluss kam auch Egon Weiss.[71] Adolf Procházka vertrat jedoch eine entgegengesetzte Meinung.[72]

4.3 Der dynamische Personenbegriff

Die römischrechtliche Trias, die sich unter anderem in der Systematik der Lehrbücher widerspiegelte, bildete neben den Klagen gerade die mit Personen und Sachen verbundenen In-

[59] Der historische Gesetzgeber fasste diesen Grundsatz nicht bloß als eine Zweifelsregel auf, sondern vielmehr als eine allgemein verbindliche normative Vorgabe für künftige (Zivil-)Gesetze. Aus heutiger rechtstheoretischer Perspektive wäre eine solche Bestimmung eher dem Verfassungsrecht zuzuordnen, wie überhaupt zahlreiche Bestimmungen der Einleitung des ABGB mehr staatsrechtlichen als zivilrechtlichen Charakter aufweisen. SCHMETTERER, Ch., Die Diskussion um die Rückwirkung bei Einführung der Untreue in Österreich 1931. In: *Journal on European History of Law*, Jg. 14, Nr. 1, 2023, S. 16.

[60] SWOBODA, Die Reform…, 1937, S. 22.

[61] SWOBODA, E., *Der Vorentwurf…*, S. 71.

[62] Swoboda erkennt also kein absolutes Rückwirkungsverbot an, denn „nur vor ungesunden Extremen soll uns das Gesetz schützen". Ders., Die Reform…, S. 23.

[63] Der Grundsatz sollte somit keinen absoluten Schutz der privatrechtlichen Sphäre darstellen. Jede Rückwirkungsklausel musste restriktiv ausgelegt werden, da es sich um eine Ausnahmeregel handelte. SWOBODA, Die Reform…, S. 23; ders., Der Wert der einleitenden Bestimmungen…, Nr. 1 u. 2, S. 2.

[64] Vergleichende Tabelle gemäß Anlage des Motivenberichts zum Regierungsentwurf des BGB (1937), S. 432. Die Fassung des Art. LXVI im Regierungsentwurf von 1937 dagegen sollte laut der Tabelle dem § 5 entsprechen.

[65] Protokoll der XXIX. Redaktionssitzung vom 17. März 1936, Bl. 4. NA, F. Min. unifikací, Kart. 156. Swoboda versuchte, die Debatte zu diesem Grundsatz bereits in der 24. Sitzung zu eröffnen, als er um die Aufnahme dieses Prinzips (das die Grundlage der Rechtssicherheit ist) unter die anderen einleitenden Bestimmungen bat, wodurch vor allem eine Warnung gegeben werden sollte, damit es in dieser Hinsicht nicht zu Verletzungen kommt. Jan Krčmář schlug zunächst die Schaffung eines neuen § 8 vor, dies lehnte die Kommission jedoch ab, unter anderem mit der Begründung, dass keine Vorschrift des BGB den Missbrauch der Rückwirkung ohnehin verhindern könne. Protokoll der XXIV. Redaktionssitzung vom 20. Februar 1936, Bl. 8–9. NA, F. Min. unifikací, Kart. 156.

[66] SWOBODA, Der Vorentwurf…, S. 72; Ders., Die Reform…, S. 23.

[67] 1. Sitzung des Subkomitees der verfassungsrechtlichen Ausschüsse vom 29. September 1937, Bl. 10/1–10/2. NA, F. Min. unifikací, Kart. 157.

[68] „Die Einfügung dieser Bestimmung in das bürgerliche Gesetzbuch will ohnehin nur die Bedeutung der grundsätzlichen Nichtrückwirkung für das Gebiet des bürgerlichen Rechtes zum Ausdruck bringen." SWOBODA, Der Vorentwurf…, S. 71.

[69] Er entlehnte dafür einen Vers aus Schillers Gedicht Der Spaziergang „ruhenden Pol in der Erscheinungen Flucht". SWOBODA, Der Wert der einleitenden Bestimmungen…, Nr. 1 u. 2, S. 2.

[70] MAYR-HARTING, R., *Lehrbuch des bürgerlichen Rechtes. Erster Band, 1. Buch: Allgemeine Lehren*. Reichenberg, 1922, S. 47.

[71] WEISS, E., *Das bürgerliche Recht. I. Teil Das Allgemeine bürgerliche Gesetzbuch mit Entscheidungen*. 2. Aufl. Prag, 1927, S. 18.

[72] Nach ihm erstreckt sich § 5 ABGB auf alle Gesetze. Gleichzeitig weist er jedoch auf die Möglichkeit der Derogation dieser Regel durch ein Gesetz gleicher Rechtskraft hin. Bei Annahme von Procházkas These müsste das Gesetz diesen Grundsatz also ausdrücklich einschränken oder ausschließen. PROCHÁZKA, A., Retroaktivita zákonů [Rückwirkung von Gesetzen]. In: HÁCHA, E. et al. (Hrsg.). *Slovník veřejného práva československého. Svazek III. P až Ř. Brno*, 1934, S. 802.

stitute (personae–res–actiones). Die letztgenannten Begriffe haben ihre klassische, das heißt statische Auffassung überwunden.[73]

Die dynamische Auffassung der Persönlichkeit zeigt sich in der positiven Bestimmung ihres Inhalts. Eine solche Bestimmung sah Swoboda in § 16 ABGB verwirklicht.[74] Darin wird die Existenz angeborener Rechte deklariert, jedoch nicht deren vollständiger Katalog.[75] Den konkreten Inhalt des Persönlichkeitsbegriffs sieht Swoboda in Verbindung mit dem Verfassungsrecht und dem Katalog der Grundrechte.[76]

Swoboda betrachtete den Einzelnen nicht als isolierte Einheit, sondern forderte seine Eingliederung in das Gesamtsystem.[77] Daraus ergab sich die negative Seite der Persönlichkeit im Sinne von Swobodas Auffassung, denn die freie Betätigung des Einzelnen soll nicht nur mit Rücksicht auf den Nächsten beschränkt sein, sondern auch durch die Eingliederung seiner Interessen in die Interessen des Ganzen.[78]

Swoboda kritisierte zunächst die Form der vorgeschlagenen Bestimmung, die § 16 ABGB im Entwurf von 1931 ersetzen sollte.[79] In seinem Artikel schlug er eine Formulierung vor, die im Gegensatz zum Entwurf positiv konstruiert sein sollte: „Jedermann ist kraft seiner Menschenwürde als Person im Rahmen der durch die Verfassung anerkannten Grundrechte fähig, Träger von Rechten zu sein." [80]

Während der Beratungen in der Redaktionskommission kam Swoboda noch einmal auf den Begriff der Person zurück. Der Entwurf von 1931 legte in § 2 fest, dass eine Person im Rechtssinne fähig ist, Rechte und Pflichten im Rahmen der Rechtsordnung zu haben. Obwohl die Überzeugung bestand, dass diese Formulierung ausreicht, war es gerade Swoboda, der den Zusatz initiierte, dass auf diesen Rechtscharakter niemand verzichten könne.[81] Dies sollte auf das Verbot von Verträgen abzielen, durch die jemand seine Handlungsfreiheit zu sehr einschränkt. Das Subkomitee der verfassungsrechtlichen Ausschüsse schlug schließlich vor, diesen Hinweis in die folgende Bestimmung (§ 62 des Entwurfs) einzufügen, die nach der Änderung lautete: „Eine Person im Rechtssinne ist fähig, Rechte und Pflichten im Rahmen der Rechtsordnung zu haben; auf diese Fähigkeit kann sie nicht verzichten." [82] In dieser Hinsicht setzt sich auch der Motivenbericht zum Regierungsentwurf mit Swobodas Kritik auseinander, obwohl Swoboda nicht direkt genannt wird.[83]

Unbeachtet blieb hingegen ein weiterer Vorschlag Swobodas bezüglich § 1 des Entwurfs von 1931. Er wies auf den unzureichenden Ausdruck „Fähigkeit, Rechte und Pflichten zu haben" hin, die jedem Menschen gegeben sein sollte. Er schlug daher vor, dass der Text betonen sollte, dass die natürliche Person diese Rechte und Pflichten notwendigerweise bereits von Geburt an hat.[84] In seiner Argumentation berief er sich auf den Schweizer Juristen August Egger (1875–1954).[85]

4.4 Der dynamische Sachbegriff

Der in § 285 ABGB festgelegte Sachbegriff wird als weite Definition bezeichnet, da er sowohl *res corporales* als auch *res incorporales* umfasst.[86] Dadurch unterschied sich diese Auffassung von der römischrechtlichen Konzeption oder vom deutschen BGB an der Wende vom 19. zum 20. Jahrhundert, das nur kör-

[73] SWOBODA, E., Der Personen und Sachbegriff des allgemeinen bürgerlichen Gesetzbuches und die Notwendigkeit der Erhaltung dieser Begriffe im künftigen bürgerlichen Gesetzbuche. In: *Prager juristische Zeitschrift*, Jg. 8, Nr. 2, 1928, Sp. 47 ff.

[74] „Jeder Mensch hat angeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten…" Nach Swoboda versteht man unter angeborenen Rechten die Pflicht der Gesetzgebung, die Menschenwürde des Einzelnen zu respektieren, der im Sinne Kants niemals zu einem bloßen Objekt degradiert werden darf. Kant knüpft mit seinem Begriff der Persönlichkeit, der auf der Menschenwürde basiert, an Rousseau an und veredelt diesen Begriff durch den Begriff der Pflicht, den er untrennbar damit verbindet. SWOBODA, Probleme der Neuordnung…, S. 132. Die „angeborenen" Rechte gehen nach Swoboda aus dem Urrecht der Freiheit hervor. Ders., *Franz von Zeiller…,* S. 27.

[75] Damit sollte sich Zeiller – beeinflusst von Kants Philosophie – vom „fehlerhaften Standpunkt" der alten Naturrechtslehrer wie Ch. Wolff befreien. Ders., Probleme der Neuordnung…, S.132–133.

[76] Der positive Geist des § 16 ABGB oder seines Ersatzes sollte nach Swoboda jedoch weiterhin Bedeutung haben, da er den Zusammenhang zwischen Privatrecht und öffentlichem Recht, also die Einheit des Rechts, betonen sollte.

[77] Er warnt sogar vor unbegrenztem Individualismus und kritisiert dabei das Laissez-faire. Ebenda, S. 132.

[78] Ebenda, S. 132.

[79] „Eine Person im Rechtssinne ist fähig, Rechte und Pflichten im Rahmen der Rechtsordnung zu haben". Eine solche Auffassung des Persönlichkeitsbegriffs ist nach Swoboda rein negativ, d.h. sie drückt nur die Befugnis der Gesetzgebung aus, die Freiheit des Einzelnen zu beschränken, ohne dieser Befugnis irgendwelche Grenzen zu setzen, wodurch es zu einer Abgrenzung des Rechts kommen soll. Ebenda, S. 133.

[80] Ders., Probleme der Neuordnung…, S.134.

[81] Es handelt sich um die Bestimmung des § 61 des Entwurfs von 1937. 4. Sitzung des Subkomitees der verfassungsrechtlichen Ausschüsse vom 30. September 1937, Bl. 22/4. NA, F. Min. unifikací, Kart. 157.

[82] Ebenda, Bl. 24/3.

[83] „Es kann weder zugelassen werden, dass § 61 eine nominelle Gleichung enthält, noch dass diese beiden Paragraphen – besonders nach der bei der Endredaktion beschlossenen Ergänzung – die Rechtssubjektivität weniger schützen als die bisherigen Paragraphen […] Es ist zu bemerken, dass beide Bestimmungen auch Verträge erfassen, die jemanden so verpflichten würden, dass er seine Rechtspersönlichkeit oder Handlungsfreiheit verlieren würde." *Důvodová zpráva* [Motivenbericht], S. 255.

[84] Protokoll der XXV. Redaktionssitzung, 21. Februar 1936, Bl. 5. NA, F. Min. unifikací, Kart. 156.

[85] In seinem Kommentar führt er an, dass die Fähigkeit einer Person, Rechte und Pflichten zu haben, die im Rahmen der Rechtsordnung gegeben sind, eine *Entpersönlichung des Rechts* bedeutete, da die Person als Wesen nicht nur über diese Fähigkeit verfügen soll, sondern (natürlich) auch über diese Rechte und Pflichten. Vgl. SWOBODA, Die Reform…, 1937, S. 23.

[86] § 285 ABGB setzt drei Begriffsmerkmale einer Sache voraus – die Sache ist 1) von der Person verschieden (negatives Merkmal), 2) dient dem Bedürfnis der Menschen (positives Merkmal) und die explizit nicht erwähnte 3) selbständige Existenz. Vgl. ROUČEK, F., In: ROUČEK, F., SEDLÁČEK, J. (Hrsg.), *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl druhý (§ 285 až 530)*. Praha, 1935, S. 7 ff. (§ 285); ebenso BARTSCH, R., In: KLANG, H. (Hrsg.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Erster Band (§ 1 bis 352)*. Wien, 1927, S. 1146–1148 (§ 285).

perliche Gegenstände als Sachen betrachtet (vgl. § 90 BGB). Eine solche Auffassung wurde bereits von Oswald Spengler in seinem Werk *Der Untergang des Abendlandes* kritisiert.[87] Swoboda verstand die Definition der Sache als Reflexion von Kants Unterscheidung zwischen dem äußeren Mein und Dein.[88]

Das ursprüngliche Subkomitee (1921) hatte beschlossen, die Bestimmung, die den Sachbegriff definiert, zu streichen und diese Aufgabe der Rechtslehre zu überlassen. Die Superrevisionskommission „rehabilitierte" jedoch die entsprechende Definition,[89] obwohl sie das Eigentum nur auf körperliche Sachen beschränkte. Erst mit dem Regierungsentwurf von 1937 kehrte die weiteste Variante zurück.[90] Swoboda war einer derjenigen, die sich für die ursprüngliche Fassung der in ABGB definierten Bestimmung aussprachen.[91] Seiner Meinung nach spielte die weite Definition der Sache im rechtlichen Sinne eine außerordentlich wichtige Rolle für den modernen Wirtschaftsverkehr,[92] da zunehmend Objekte Gegenstand dieses Verkehrs wurden, die nicht rein materiell (oder körperlich) sind.

Als Sachen sollten zweifellos auch Rechte gelten, jedoch nur solche, die einen vermögensrechtlichen Charakter haben, d.h. bewertbar sind. Schon der Anspruch, der durch die Annahme eines Versprechens einer anderen Person entsteht, gilt als Sache im rechtlichen Sinne, obwohl der Gegenstand des Versprechens noch nicht übergeben wurde; bereits dieser Anspruch kann rechtlich übertragen werden.[93] Auch Dienstleistungen von Personen und ihre Handlungen sind Sachen, da auch ihnen ein Vermögenswert zukommt. Dies beschränkt sich jedoch nur auf die Leistung; es besteht kein Anspruch auf die Person selbst. Sogar Unterlassungen können bewertbar sein.[94] Eine bedeutende Gruppe bilden auch Naturkräfte, insbesondere die zur Zeit Swobodas diskutierte elektrische Energie. Entscheidend sollte hier der Aspekt der möglichen Beherrschbarkeit durch den Menschen sein. Swoboda erinnert daran, dass sich mit der Entwicklung menschlicher Erkenntnis und Technologien der Sachbegriff erweitern wird, und zwar ohne dass dafür eine Gesetzesänderung erforderlich wäre.[95] Es handelt sich somit um eine dynamische Auffassung, die eine zukünftige Entwicklung voraussetzt.

4.5 Besitz und Eigentum in dem dynamischen Sinne

An den weiten Sachbegriff schließen die Institute des Besitzes und des Eigentums an, bei denen Swoboda erneut die Notwendigkeit betont, sie dynamisch zu gestalten.[96] Was die vorgeschlagene Regelung des Besitzes betrifft, bewertet Swoboda sie durchweg positiv. Swoboda begrüßt, dass der Entwurf nur Eigenbesitz kennt und auf eine Differenzierung zwischen Eigen- und Fremdbesitz verzichtet. Der Entwurf definiert lediglich die Person des Besitzers, und zwar als denjenigen, *wer ein Recht für sich ausübt*.[97] Damit wird nur der „Rechtsbesitz" anerkannt, was sich darin äußert, dass beispielsweise der Mieter einer Wohnung zum Besitzer des Mietrechts wird (er besitzt die Miete als sein „eigenes" Recht), wodurch der possessorische Schutz verständlich auch für einen anderen als den Eigentumsbesitz geöffnet wird.[98]

Auch das Eigentum sollte im Entwurf in seiner umfassenden Ausprägung Anerkennung finden.[99] Der ursprüngliche Entwurf von 1931 hatte § 353 ABGB gestrichen und bekannte sich damit nur zum engen Eigentumsbegriff.[100] Swoboda betrachtet jedoch die Bedeutung des weiten Eigentumsbegriffs als unverzichtbar für das moderne Wirtschaftsleben.[101]

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[87] „Das antike Recht war ein *Recht von Körpern*, unser Recht ist das von *Funktionen*. Die Römer schufen eine juristische Statik, unsere Aufgabe ist eine juristische Dynamik. Für uns sind Personen nicht Körper, sondern Einheiten der Kraft und des Willens, und Sachen nicht Körper, sondern Ziele, Mittel und Schöpfungen dieser Einheiten." SPENGLER, *Der Untergang…*, S. 654.

[88] Vgl. SWOBODA, *Franz von Zeiller…,* S. 26 ff.

[89] *Vládní návrh zákona, kterým se vydává občanský zákoník (Důvodová zpráva)* [Regierungsentwurf des Bürgerlichen Gesetzbuches (Motivenbericht)]. Praha, 1937, S. 257.

[90] Nach Ansicht der Kommission war es auch aus theoretischen Gründen nicht erforderlich, den Eigentumsbegriff einzuschränken. Es wurde betont, dass „im Gegenteil der flexible Eigentumsbegriff den Vorzug verdient", wobei sich der Motivenbericht direkt auf Swobodas Artikel bezog. *Důvodová zpráva*, S. 263.

[91] Die weitere Auffassung der Sache im rechtlichen Sinne fand ihre Befürworter unter den Normativisten (Sedláček, Rouček) und „Germanisten" (Stieber, Swoboda), die durch die Kritik an romanistischen Konzepten verbunden waren. HORÁK, O. – DOSTALÍK, P., Věc v právním smyslu v novém občanském zákoníku z právněhistorické perspektivy [Die Sache im Rechtssinne im neuen Bürgerlichen Gesetzbuch aus rechtshistorischer Perspektive]. In: *Časopis pro právní vědu a praxi*, Jg. 21, Nr. 1, 2013, S. 15.

[92] Ders., Die Neugestaltung…, S. 136.

[93] Ebenda, S. 136.

[94] Swoboda erinnert jedoch daran, dass es sich nur um solche Unterlassungen handelt, die nicht bereits auf einer allgemeinen Pflicht beruhen, auf einem „Postulat der praktischen Vernunft". Er geht also von einer besonderen Verpflichtung aus, ein sonst bestehendes Recht nicht auszuüben. Ders., Die Neugestaltung…, S. 137.

[95] Ebenda, S. 138.

[96] Dem Besitz widmete sich Swoboda u.a. in *Randas Jubiläumsgedenkschrift*, womit er an die Person von Antonín Randa erinnert, der sich ebenfalls mit der österreichischen Auffassung des Besitzes befasste. SWOBODA, E., Der Besitz im neuen bürgerlichen Recht. In: KRČMÁŘ, J. (Hrsg.), *Randův jubilejní památník. K stému výročí narození Antonína Randy*. Praha, 1934, S. 237–250.

[97] Ders., Die Reform…, S. 26–27. Früher in seinem Artikel schlug er folgende Fassung vor: „Besitzer ist, wer ein Recht an einer körperlichen Sache für sich derart ausübt, dass diese Rechtsausübung nach außen erkennbar hervortritt. Sachbesitz liegt vor, wenn das Eigentumsrecht an einer körperlichen Sache ausgeübt wird, Rechtsbesitz, wenn die Ausübung ein anderes Recht an einer körperlichen Sache zum Gegenstande hat." Ders., Der Besitz…, S. 248.

[98] Ders., Die Reform…, S. 26–27.

[99] Der Entwurf von 1937 gab die frühere römische „enge" Definition auf, die nach dem Vorbild des BGB in den Entwurf aufgenommen worden war. Er verzichtet sogar auf die gesetzliche Definition selbst. Ebenda, S. 24; Ders., Die Neugestaltung…, S. 139.

[100] Dies sollte dem deutschen und französischen Bürgerlichen Gesetzbuch entsprechen. Ders., Die Neugestaltung…, S. 139.

[101] Ebenda.

Neben dem Eigentum als stärkstem dinglichen Recht erkennt Swoboda auch Formen des „eingeschränkten (minderen) Eigentums“ an, also Nutzungsrechte an einer Sache.[102] Dies äußert sich darin, dass nach dem tschechoslowakischen Entwurf auch obligatorische Rechte petitorischen Schutz genießen, ähnlich wie Eigentumsklagen. Es geht dabei besonders um Miete und Pacht.[103] Es handelt sich jedoch nicht nur um diese. Swoboda war der Auffassung, dass das gleiche Schutzbedürfnis auch für jede obligatorische Berechtigung bestehe. Dieser Schutz kann grundsätzlich erst mit dem tatsächlichen Beginn der Ausübung des Nutzungsrechts gewährt werden (in der Regel ab dem Zeitpunkt der Übergabe der fremden Sache in die Obhut der berechtigten Person).[104]

Der obligatorisch berechtigte Nutzer einer Sache müsste sich somit nicht an den Eigentümer der Sache wenden und könnte sein subjektives Recht selbständig verteidigen. Dies schlug sich auch in den Beratungen über den Entwurf nieder. In der Redaktionssitzung vom 12. Februar 1936 schlug Swoboda vor, Personen, die an körperlichen Sachen ein anderes Recht als das Eigentumsrecht haben, Schutz nach dem Vorbild der Eigentumsklagen zu gewähren. Ferner wurde auf Vorschlag von Krčmář die Bestimmung des § 278, die das Eigentum nur auf körperliche Sachen beschränkte, gestrichen, was nach Swoboda, Sedláček und Rouček ausreichte.[105] Swoboda kam jedoch noch einmal auf die Sache zurück, und auf seinen Anstoß bzw. die Formulierungsänderung des Kommissionsvorsitzenden Krčmář wurde in den Regierungsentwurf eine Bestimmung über die Entsprechungen der Eigentumsklagen (§ 155 des Entwurfs) eingefügt.[106]

4.6 Bedeutung und Umfang der Haftung ohne Schuld

Im Zuge der wirtschaftlichen Veränderungen, die durch die industrielle Revolution sowie die Entwicklung neuer Technologien und den Aufschwung des Automobilismus (sowie anderer Verkehrsarten) ausgelöst wurden, trat der Begriff der Erfolgshaftung im Recht immer stärker hervor. Swoboda wandte sich insbesondere im Hinblick auf dieses Konzept und seine Bedeutung für die moderne Zeit der Problematik des Schadensersatzes zu.[107] Seine Wurzeln hatte das Konzept der objektiven Haftung im alten germanischen Recht.[108]

Das ABGB habe dann die subjektive Haftung für Schäden (§ 1295 ABGB) als allgemeinen Grundsatz bevorzugt; im Gegensatz dazu sei ein unverschuldeter Schaden in der Regel nicht ersetzt worden (§ 1306 ABGB). Die Erfolgshaftung stellte somit eine Ausnahme dar, die nur durch besondere gesetzliche Anordnung vorgesehen war.[109] Einige Tatbestände, die zur Erstattung unverschuldeter Schäden verpflichteten, fanden sich teilweise außerhalb des Kodex in besonderen Gesetzen (typischerweise die Haftung der Eisenbahnen oder die Haftung beim Fahren mit Kraftfahrzeugen).

Die Frage des Schadensersatzes habe einen der Bereiche dargestellt, dessen mögliche Überarbeitung bereits vor dem Großen Krieg in Angriff genommen wurde.[110] Das Recht auf Schadensersatz im ABGB habe aufgrund der 3. Teilnovelle von 1916 gewisse Veränderungen erfahren.[111] Und während sich das Subkomitee unter der Leitung von Egon Weiss auf Randas Vorkriegsentwurf gestützt habe, habe die Superrevisionskommission lieber den Wortlaut der Teilnovelle bevorzugt. Keiner der Entwürfe habe dann vorgeschlagen, die in Sondergesetzen festgelegten Tatbestände unverschuldeten Schadens in den Kodex aufzunehmen, mit Hinweis auf einen möglichen übermäßigen Anstieg des Umfangs der Regelung.[112]

Swoboda war daran interessiert, den Bereich des Schadensersatzes dynamisch, also entsprechend den Bedürfnissen der modernen Zeit, zu gestalten. Die Haftung ohne Verschulden

[102] Dieses mindere Eigentum hat einen beschränkteren Inhalt als das vollständige Eigentum im traditionellen Sinne und sein Inhalt kann unterschiedlich sein, jedoch immer bestimmt. Ders., Die Reform…, S. 25.

[103] Dieser Gedanke soll aus dem alten germanischen Recht stammen. Ders., Die Neugestaltung, S. 140.

[104] Swoboda bringt dies in Zusammenhang mit der alten Auffassung der Publizität, die auf einem offensichtlichen äußeren Tatbestand basiert. Ders., Die Reform…, S. 26.

[105] Protokoll der XVII. Redaktionssitzung, 12. Februar 1936, Bl. 3. NA, F. Min. unifikací, Kart. 156.

[106] „Nutzungsrechte an einer fremden Sache genießen, soweit im Gesetz keine besonderen Bestimmungen enthalten sind, in Bezug auf diese Sache ab Beginn der Nutzung Schutz nach dem Vorbild der Eigentumsklagen.“ Protokoll der XXV. Redaktionssitzung, 21. Februar 1936, Bl. 8. NA, F. Min. unifikací, Kart. 156. Diese Frage hat auch Auswirkungen auf das geltende tschechische Recht, insbesondere durch § 1044 des tschechischen Bürgerlichen Gesetzbuches. Vgl. hierzu ausführlicher: HORÁK, O., Ochrana oprávněného detentora proti zásahům třetích osob (ke kořenům a výkladu § 1044 ObčZ) [Schutz des berechtigten Besitzers gegen Eingriffe Dritter (zu den Wurzeln und zur Auslegung des § 1044 OZ]. In: *Právní rozhledy*, Jg. 23, Nr. 4, 2015, S. 115–119; MELZER, F. – TÉGL, P., Absolutní ochrana relativních práv? K výkladu § 1044 občanského zákoníku aneb po devadesáti letech opět na začátku [Absoluter Schutz relativer Rechte? Zur Auslegung des § 1044 OZ oder nach neunzig Jahren wieder am Anfang]. In: *Právní rozhledy*, Jg. 28, Nr. 10 und 11, 2020, S. 351–357, 381–391. Ferner auch: HORÁK, *Brněnská normativní civilistika…*, S. 89 ff.

[107] Dennoch fügt Swoboda hinzu, dass die Schuldhaftung nach wie vor eine völlig andere Bedeutung hat als die Erfolghaftung, denn die schuldhaft verursachte Beschädigung führt grundsätzlich zur Schadenersatzpflicht, während die unverschuldete Beschädigung nicht mit gleicher Regelmäßigkeit dieselbe Pflicht erzeugen kann. Ders., Die Reform…, S. 28.

[108] „Ob der Täter vorsätzlich oder aus Unterlassung gehandelt hat, oder ob durch seine Tat ein Schaden zufällig entstanden ist, war für das ältere mitteleuropäische Recht gleichgültig. Ausdrücklich wird dieser Standpunkt für das deutsche Recht in dem Spruch ‚wer unwillig getan, muss willig zahlen‘ betont“ (Übersetzung aus dem tschechischen Original), SATURNÍK, T., *Přehled dějin soukromého práva ve střední Evropě.* Praha, 1945, s. 145.

[109] WOLFF, K., In: KLANG, H. (Hrsg.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Vierter Band (§ 1293 bis 1502)*. Wien, 1929, S. 68 (§ 1306); ebenso SEDLÁČEK, J., In: ROUČEK, F. – SEDLÁČEK, J. (Hrsg.), *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl pátý (§ 1090 až 1342)*. Praha, 1937, S. 807–808 (§ 1306).

[110] Zum Beispiel befasste sich der erste wissenschaftliche Kongress der tschechischen Juristen im Jahre 1904 mit der Problematik des „unverschuldeten Schadens“. *Publikace prvního vědeckého sjezdu českých právníků konaného v Praze ve dnech 21., 22. a 23. května 1904*. Praha, 1904, sekce I., otázka 1.

[111] Kaiserliche Verordnung vom 19. März 1916, RGBl. Nr. 69, über die dritte Teilnovelle zum Allgemeinen Bürgerlichen Gesetzbuch.

[112] *Zákon, kterým se vydává všeobecný zákoník občanský. Návrh superrevisní komise. Díl II. Důvodová zpráva.* Praha, 1931, S. 300; *Vládní návrh zákona, kterým se vydává občanský zákoník (Důvodová zpráva).* Praha, 1937, S. 382.

verstehe er nicht als spezielles Phänomen, für dessen Anerkennung eine besondere gesetzliche Bestimmung erforderlich wäre, sondern als eines der Prinzipien dieses Rechtsgebiets. Das zweite sei natürlich die Verschuldenshaftung. Gemeinsam bildeten sie zwei Extreme – die Verschuldenshaftung auf der einen und die Erfolgshaftung auf der anderen Seite –, die einander regulierend beeinflussen und ausgleichen sollten.[113] Dies ermögliche es, den Gedanken der Haftung ohne Verschulden künftig auch in Fällen anzuwenden, die im Gesetz zwar nicht entschieden seien, bei denen aber eine gerechte Entscheidung des Falles dies erfordere.[114] Auch aus diesem Grund habe Swoboda es als positiv erachtet, dass dieser Teil mit „Schadensersatz" und nicht mit „unerlaubte Handlungen" (wie z.B. im BGB) überschrieben wurde.[115]

Auf die Form des vorbereiteten bürgerlichen Gesetzbuchs habe er in diesem Fall bei der Redaktionssitzung am 27. Januar 1936 Einfluss genommen, als er auf den Widerspruch zwischen § 1112 und 1121 des Entwurfs hingewiesen habe. Die Bestimmung zur Zurechnung von Schäden (§ 1112) habe beide Haftungsarten nebeneinander als Regel gestellt, während hingegen die Bestimmung des § 1121 (Haftung für unverschuldeten Schaden) die Erfolgshaftung zu einer bloßen Ausnahme degradiert habe, die nur dann gegeben wäre, wenn das Gesetz dies so festlege. Er habe daher vorgeschlagen, die letztgenannte Norm aus dem Gesetz zu streichen, damit sie „den Richter nicht zu einer ungewollten Auslegung verleite". Krčmář habe sich diesem Schluss angeschlossen und vorgeschlagen, zur Systematik des ABGB zurückzukehren, also neun „Imputationsgründe" festzulegen.[116] Das Belassen des § 1112 ABGB als allgemeine Regel, die beide Grundsätze enthalten habe, habe Swoboda so verstanden, dass es in Zukunft möglich sein werde, einen ohne Verschulden entstandenen Schaden auch nur auf Grundlage dieser Bestimmung zu ersetzen, ohne dass eine andere ausdrückliche gesetzliche Bestimmung erforderlich wäre, wenn dies im gegebenen Fall notwendig und gerecht sei.[117]

5. Fazit

Ernst Swoboda gehört zu den Autoren, die der tschechoslowakischen Zivilrechtslehre in der Vergangenheit zahlreiche interessante Impulse verliehen haben. Dennoch zählt er heute eher zu den in Vergessenheit geratenen Autoren, was möglicherweise auf die abnehmende Deutschkenntnis im tschechischen Umfeld, auf seinen relativ komplexen ideellen Hintergrund oder auf sein äußerst problematisches politisches Wirken während der Zeit des Nationalsozialismus zurückzuführen ist. Die Studie zeigt das ungenutzte Potenzial von Swobodas wissenschaftlichem Werk. Es konnte jedoch nicht Ziel dieser Studie sein, sämtliche Aspekte vollständig darzustellen, da dies den Rahmen gesprengt hätte.

Die Aktivitäten von Ernst Swoboda belegen seine Beteiligung an einem Großteil der maßgeblichen Polemiken der tschechoslowakischen Rechts- und Zivilrechtslehre in der Zwischenkriegszeit, wobei er zweifellos, sei es direkt oder indirekt, die endgültige Form des Entwurfs des Bürgerlichen Gesetzbuches beeinflusste, aus dem auch die Autoren des gegenwärtigen Bürgerlichen Gesetzbuches schöpften. Seinen wohl größten Erfolg verzeichnete Swoboda bei der Gestaltung der Bestimmungen zur Gesetzesauslegung, wo es ihm gelang, in das Gesetz einen Verweis auf die drei regulativen Prinzipien einzufügen, auf denen nach seiner Forschung Franz von Zeiller – beeinflusst von der Philosophie Immanuel Kants – das gesamte Privatrecht aufbaute. Wesentlich trug er auch zur Rückkehr zur weiten Definition der Sache bei. Seine Überlegungen zum Eigentumsbegriff wirken bis heute in der wissenschaftlichen Diskussion nach. Swobodas rechtliches Denken wich in vielerlei Hinsicht von der herrschenden tschechoslowakischen Rechtslehre der Zwischenkriegszeit ab. Dennoch gelang es ihm, durch seine Studien und seine Tätigkeit in der Redaktionskommission, seine Kollegen zur Vornahme von Änderungen am vorbereiteten Entwurf des tschechoslowakischen Bürgerlichen Gesetzbuches zu bewegen. Er verzeichnete jedoch auch Misserfolge, zu denen auch die Streichung des Rückwirkungsverbots in den einleitenden Bestimmungen zählt.

Swoboda wurde von seinen Zeitgenossen als jemand wahrgenommen, der sich hauptsächlich mit der Vergangenheit befasste – er schützte die alte Form des ABGB, die Zeiller geschaffen hatte. Es zeigt sich jedoch, dass Swoboda im Gegenteil oft einen zukunftsorientierten Blick einnahm, indem er sich der dynamischen Auffassung der einzelnen Institute bediente. Das alte ABGB war dann in gewissem Sinne zeitlos und entsprach dieser Auffassung. Dennoch weist Swoboda oft darauf hin, dass die in den betreffenden Bestimmungen (z.B. § 7 und 16 ABGB) enthaltenen Gedanken für die Zeit, in der er lebte, ungeeignet formuliert sind und anders formuliert werden müssen. Auch durch sein Zutun behielt der tschechoslowakische Entwurf die ideelle Anbindung an das österreichische Privatrecht. Im Umfeld der tschechischen Zivilrechtslehre war Swobodas naturrechtliche Ausrichtung eine Rarität, aber eine angenehme Bereicherung der fachlichen Diskussion.

[113] SWOBODA, Die Reform…, S. 28; auch ders., Abgrenzung zwischen Verschuldens- und Erfolgshaftung im Schadenersatzrecht unter besonderer Berücksichtigung des Entwurfes zum ABGB. In: *Sechster Deutscher Juristentag in der Tschechoslowakei. Gutachten.* Prag, 1933, S. 52, 66.
[114] Ders., *Der Vorentwurf…*, S. 129.
[115] Ders., Die Reform…, S. 27.
[116] Protokoll der IX. Redaktionssitzung vom 28. Januar 1936, Bl. 2: NA, F. Min. unifikací, Kart. 156.
[117] SWOBODA, Die Reform…, S. 28.

Between Interdependence and Subordination. The Relationship of Spatial Planning Law and Economic Planning Law in People's Poland*

*Piotr Eckhardt***

Abstract

The paper presents the results of research on the evolution of the relationship between legal regulations on economic planning and spatial planning in People's Poland from 1945 to 1989. Spatial planning law is a discipline of public law present in all modern legal systems, regardless of the economic system. Economic planning law is a discipline of public law specific to countries in which the economic system is based on central planning. In the first years after World War II, legal solutions were designed in Poland, through which spatial planning and economic planning were supposed to be two separate divisions of state activity, with cooperation between them. Separate structures of administrative bodies were created for them. However, during the Stalinist period, spatial planning was in practice subsidiary to economic planning – partly through amendments to regulations, partly simply by not applying the existing law. In the 1960 s, the status quo was sanctioned, with the introduction of regulations in line with it – spatial planning became one of the sub-fields of economic planning, which had already gained complete official supremacy. In the 1980 s, in an attempt to save from collapse a state plunged into a deepening crisis, reforms were made as a result of which spatial planning again became a separate area of state activity. It was bound with economic planning (henceforth called "socio-economic planning") by a bilateral relationship of interdependence.

Keywords: *state socialism; really existing socialism; centrally planned economy; economic planning law; spatial planning law; planning law, Poland.*

1. Introduction: "Planning Law" on both sides of the Iron Curtain

At first, I had some trouble finding an international definition of spatial planning law, understood as a branch of public law whose regulations deal with possible uses of real estate. A library inquiry revealed that in Western legal literature, for the definition of this branch of administrative law just the term "planning law" is often used.[1] Until a few decades ago, in the Polish legal system, the so-called category covered a much broader range of regulations.

Naturally, planning law as understood in Western literature still exists in Poland to this day. Its regulations are gathered in the Law on Spatial Planning and Development.[2] It should be clarified at this point that after 1989, spatial planning law is sometimes referred to as spatial development law. This comes out of the fact that the first piece of legislation regulating this area during the political transformation period was titled the Law on Spatial Development.[3] Presumably, there was an intention to radically break with the terminology connoting a centrally planned economy. The subsequent, aforementioned piece of legislation still in effect today employs both terms.

Z. Leoński, M. Szewczyk and M. Kruś define spatial development law as: "a branch of law comprising legal regulations, the essence of which is public law interference with the property right and other rights to real estate."[4] Nowadays, it is an area of substantive administrative law very closely related to construction law, and sometimes even treated as part of it.

H. Kisilowska and D. Sypniewski, in their textbook[5] on Polish construction law, write that in the science of law the term "construction law" tends to be used in two different senses. The narrower meaning is the designation for the set of legal norms

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** Dr. Piotr Eckhardt, Ignatianum University in Cracow, Poland, email: piotr.eckhardt@ignatianum.edu.pl / ORCID 0000-0003-3761-3241.

1 See, for example, the very name of the *Journal for European Environmental & Planning Law*, or book titles:
MORE, V. – PURDUE, M., *A Practical Approach to Planning Law.* Oxford, 2012; MCAUSLAN, P., *The Ideologies of Planning Law.* Oxford, 2000; VAN WYK, J., *Planning Law*. Cape Town, 2020; BLACKHALL, J. C., *Planning Law & Practice*. Abingdon, 2000.
Sometimes other terms are used, such as "development," but there is still an absence of reference to space, see for example: HOBMA, F.A.M. – JONG, P., *Planning and Development Law in the Netherlands. An Introduction*. 's-Gravenhage, 2016; DENYER-GREEN, B. – UBHI, N., *Development and planning law*. London, 2012.

2 Law of 27 March 2003 on Spatial Planning and Development (Journal of Laws 2003, No. 80 item 717).

3 Law of 7 July 1994 on Spatial Development (Journal of Laws 1994, No. 89 item 415).

4 LEOŃSKI, Z. – SZEWCZYK, M. – KRUŚ. M., *Prawo zagospodarowania* przestrzeni. Warszawa, 2019, p. 33.

5 KISILOWSKA, H. – SYPNIEWSKI, D., *Prawo budowlane.* Warszawa, 2012, p. 37.

contained in the Law of 7 July 1994 – Construction law.[6] While the broader one includes a whole set of legal norms regulating construction investment activities. Aforementioned scholars list the Law on Spatial Planning and Development among the legal acts that make up this complex, just after the Construction Law and before the Law on Real Estate Management,[7] the Surveying and Cartographic Law[8] and the Law on Environmental Protection.[9] T. Biliński and E. Kucharczyk define construction law as "a set of legal regulations that govern the construction process and the relations between its actors."[10] According to them, "the basic acts that determine the localization and course of investment and construction processes are: the Law on Spatial Planning and Development and the Construction Law."[11] Moreover, many authors of contemporary Polish textbooks on administrative law discuss construction law and spatial planning law together, grouping these issues in one chapter.[12] Then there are whole volumes aimed at both students and practitioners of law, treating the topics of construction law and spatial planning law jointly.[13]

Prior to the political transformation, planning activity in Poland was not limited to urban planning. Economic historians have already described relatively accurately the centrally planned economy based on state ownership of the means of production, i.e. the economic system inherent in the political system of state socialism, which functioned in Poland before 1989.[14] Such an economic system was typical of most countries on the eastern side of the Iron Curtain. However, it should not be confused with those economies in which economic planning did not implicate state ownership of the means of production, including those present in Central Europe, such as the Protectorate of Bohemia and Moravia.[15] However, after World War II, businesses were taken into state ownership in Czechoslovakia as well.[16]

The political and economic measures applied in socialist Poland needed a peculiar legal system that could serve as a tool for implementing the stated political goals. The purpose of this paper is to answer the question what was the relationship between the legal regulations of spatial planning and economic planning, and how the place of spatial planning law in the legal system of state socialism (on the example of People's Poland) differed from the shape of the legal systems of democratic countries where the market economy operated.

Unfortunately, there is no comprehensive legal-historical study of the regulation of planned economy in People's Poland. Therefore, the paper hereinafter will include the minimum information necessary to understand its principles. By contrast, the history of spatial planning law in Poland in 1944–1989 has already been covered by the author of this paper.[17] Only those regulations of the aforementioned area that are relevant from the perspective of its relationship with economic planning will be presented in this study.

People's Poland's legal regulations (including the internal law of its administrative institutions), as well as legal literature from different periods of its history were used as sources for the following study. The latter group of materials was analyzed critically because it should still be remembered that censorship was in effect under state socialism, and all publications had to be more or less (depending on the period) in line with the ideology of the ruling party.

Due to the evolutionary nature of the relationship between the laws of spatial planning and economic planning, the relevant regulations will be analyzed chronologically.

2. The first years after World War II – an experiment with the cooperation of economic planning and spatial planning

Prior to World War II, regulations on spatial planning were in the same piece of legislation as those on construction law – in the Ordinance of the President of the Republic of Poland on the Construction Law and Development of Settlements.[18] The part of the ordinance covering construction law remained in force until 1961,[19] but the norms on urban planning were replaced by new arrangements very quickly. In addition to the devastation caused by warfare and the change of Poland's borders, the decisive influence on the development of legal regulations in this area after 1945 was exerted by the political intentions of the authorities, who sought a complete reconstruction of the

[6] Law of 7 July 1994 – Construction law (consolidated text: Journal of Laws 2024, item 725).
[7] Law of 21 August 1997 on Real Estate Management (consolidated text: Journal of Laws 2024, item 1145).
[8] Law of 17 May 1989. Geodetic and Cartographic Law (consolidated text: Journal of Laws 2024, item 1151).
[9] Law of 27 April 2001. Environmental Protection Law (consolidated text: Journal of Laws 2024, item 54).
[10] BILIŃSKI, T. – KUCHARCZYK, E., *Prawo budowlane z omówieniem i komentarzem,* Zielona Góra, 2013, p. 44.
[11] Ibid.
[12] See for example URA, E., *Zagadnienia prawa administracyjnego i funkcjonowania administracji publicznej*, Przemyśl, 2006; DUNIEWSKA, Z. – JAWORSKA-DĘBSKA, B. – KORZENIOWSKA, P. – OLEJNICZAK-SZAŁOWSKA, E. (eds.), *Prawo administracyjne materialne*. Warszawa, 2022; JAGIELSKI, J. – WIERZBOWSKI, M. (eds.), *Prawo administracyjne*. Warszawa, 2022.
[13] See for example LEOŃSKI, Z. – SZEWCZYK, M., *Podstawowe instytucje planowania przestrzennego i prawa budowlanego.* Poznań, 1997; FIJAŁKOWSKI, T. – CENDROWSKI, J., *Prawo budowlane i gospodarka przestrzenna*. Warszawa, 1995; BRZEZIŃSKA-RAWA, A. – SZWAJDLER, W., *Prawo budowlane i gospodarki przestrzennej. Ćwiczenia*. Toruń, 2011.
[14] See for example LESZCZYŃSKA, C – JEZIERSKI, A., *Historia gospodarcza Polski*. Warszawa, 2013; KALIŃSKI, J., *Gospodarka Polski w latach 1944–1989. Przemiany strukturalne.* Warszawa, 1995.
[15] See: TAUCHEN, J., Die gelenkte Wirtschaft, ihre Rechtsgrundlage und ihr strafrechtlicher Schutz im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, Vol. 14, No. 2, 2023, p. 12–27.
[16] See: KOLUMBER, D., Disputes over Ownership of the Bata Empire. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 73–74.
[17] ECKHARDT, P., *Socialism under Construction. Law and Ideology in Housing, Construction and Spatial Planning in Poland 1944–1989*. Warszawa, 2024.
[18] Ordinance of the President of the Republic of Poland of 16 February 1928 on the Construction Law and Development of Settlements (Journal of Laws 1928, No. 23 item 202).
[19] Until the enactment of the Law of 31 January 1961 Construction Law (Journal of Laws 1961, No. 7, item 46).

economic and political system in postwar Poland, which would also result in a change in the spatial structure of the country.[20]

A. Rybicki, in a 1968 textbook[21] discussing the legal foundations of a planned economy, outlined the history of the development of legal regulations for that economic system in the first years after World War II. He stated that "in accordance with the provisions of the Manifesto [of the Polish Committee of National Liberation], from the first days after liberation, work was underway to establish and then implement the principles of planned economy.[22] However, it is necessary to agree with W. Brzeziński, who wrote as early as 1948 that "in the Manifesto of the State National Council of 22 July 1944, which laid the foundations for the construction of the new Republic, there is no mention of a planned economy"[23] and further explained that the system of planned economy was implemented gradually, along with the stabilization of the situation after the war. This shows that legal literature from different periods of People's Poland is an excellent source, but it must be approached very critically, keeping in mind that especially textbooks presented a vision of the legal system adapted to a given stage of the evolution of state socialism.

Without over-interpretation this time, A. Rybicki described[24] that first institutions were created to develop and implement the principles of planned economy. Based on several decrees,[25] a new organizational framework was created: as early as 1944, the Bureau of Economic Studies was established, which became the nucleus of the Central Planning Office (CPO), created on 10 November 1945.[26] Only after that the legal framework for the functioning of the bodies of the state responsible for conducting a planned economy was created. According to the author of the discussed textbook,[27] the basic legal acts regulating this area were the 1947 Decree on Planned National Economy[28] as well as the 1946 Decree on the State Investment Plan[29] and the 1946 Decree on Planned Spatial Development of the State.[30]

As can be seen, the act on spatial planning was regarded as one of the elements of the integral regulatory system of planned economy. However, it should still be remembered that this view was contained in a book from the late 1960s.

In the first years of the construction of state socialism in People's Poland, spatial planning and economic planning were seen as two separate elements of the state planning system. In the introduction to the 1948 book, W. Brzeziński writes: "alongside economic planning, but as a completely separate issue, we will discuss spatial planning. Economic planning indicates the national economy's goals, establishes the means for their realization and schedules the related processes over time. (…) Spatial planning, on the other hand, arranges the same issues in space."[31] Further W. Brzeziński explains the changes that occurred with the introduction of state socialism in Poland: "spatial planning originated from urban planning. Until recently, it was part of the 1928 construction law because it concerned only the development of settlements (…). As soon as planning was extended to all actions that find their expression in space, spatial planning became a separate snapshot of economic planning. That is why we treat spatial planning alongside, but not in conjunction with, economic planning."[32]

The relationship between economic planning and spatial planning is evident in the analogous way the two areas are regulated. First, the Decree on Planned Spatial Development of the State established a central body of state administration analogous to the CPO – the General Office of Spatial Planning (GOSP) was established under Article 8 of this act. Secondly, both spatial planning and economic planning were to be implemented through various types of planning acts arranged hierarchically. According to Section 2 of Article 1 of the Decree on Planned National Economy, national economic plans were to be established for multi-year periods and for annual periods. The annual plan was to determine the extent and manner of implementation of the multi-year plan in a specific year. According to Article 2 of the Decree on Planned Spatial Development of the State, national, regional and local plans were to be drawn up. According to Article 4 of the act, regional plans were to be prepared on the basis of the national plan, and Section 1 of Article 5 stipulated that local plans should be prepared on the basis of regional plans. In these provisions it is easy to see the implementation of the principle contained in the above-quoted statement by W. Brzeziński, according to whom economic planning distributes individual projects over time, and spatial planning places the same projects in space. Therefore, economic plans were divided into less and more detailed in temporal perspective (multi-year and annual), and spatial plans – in spatial perspective (national, regional and local).

In addition, the regulations explicitly defined the relationship of the institutions of spatial planning and economic planning. Article 2 of the Decree on Planned Spatial Development of the State stipulated that all spatial plans should be developed in ac-

[20] LEOŃSKI – SZEWCZYK – KRUŚ, *Podstawowe instytucje*, p. 49.
[21] RYBICKI, Z., *Administracyjno-prawne zagadnienia gospodarki planowej*. Warszawa, 1968.
[22] Ibid, p. 14.
[23] BRZEZIŃSKI, W., *Podstawy prawne planowania gospodarczego i przestrzennego.* Warszawa 1948, p. 9.
[24] RYBICKI, *Administracyjno-prawne zagadnienia,* p. 14.
[25] In the face of organizational difficulties in the functioning of the legislature, in the first years after the end of the war, the state authorities ruled by decree law. The situation was similar in other countries in the region. See, for example: DOBEŠ, M., Prostitution as a Special Form of the Offence of Social Parasitism in Socialist Czechoslovakia. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 82.
[26] Decree of 10 November 1945 on the Establishment of the Central Planning Office under the Economic Committee of the Council of Ministers (Journal of Laws 1945, No. 52, item 298).
[27] RYBICKI, *Administracyjno-prawne zagadnienia,* p. 14.
[28] Decree of 1 October 1947 on Planned National Economy (Journal of Laws 1947, No. 64, item 373).
[29] Decree of 25 June 1946 on the State Investment Plan (Journal of Laws 1946, No. 32, item 200).
[30] Decree of 2 April 1946 on Planned Spatial Development of the State (Journal of Laws 1946, No. 16, item 109).
[31] BRZEZIŃSKI, *Podstawy prawne*, p. 6.
[32] Ibid, p. 7.

cordance with the guidelines of state economic policy. According to Section 2 of Article 17 of the discussed act, the GOSP was supposed to cooperate with the CPO during the development of the national plan. The details of this cooperation were specified in the ordinance,[33] according to which the GOSP was required to agree with the CPO on the draft principles of the national plan before making them known to ministers and other central authorities, and to agree with the CUP on its position before approving the regional plan drawn up by the regional planning authority.

Thus, as can be seen, already in the first legal acts created in the early years of People's Poland, spatial planning was regulated as strongly linked to the economic planning that was created practically from scratch.[34] However, it quickly became apparent that under the political system of state socialism, coordination and linking of spatial planning with economic planning was not enough. U. Wich, in a 1976 paper, negatively assessed such a solution: "In turn, the relationship between the bodies of spatial planning and the bodies of economic planning was based on the principles of cooperation. This seems to be a serious organizational and methodological mistake, since the interdependence of the problems of the two types of plans should suggest a different solution, giving expression to the unity of planning in a socialist state."[35]

In contemporary literature, the link between urban planning and economic planning is described as "the most significant novelty of the legal regulation introduced by decree [of 1946]".[36] However, for the authorities of People's Poland, such a solution proved insufficient in practice. W. Brzeziński wrote that "the system of planned economy was then experiencing a period of turbulent development and growth. After the completion of the Three-Year Plan and with the beginning of the period of the Six-Year Plan, which represented a new stage in the development of the planning system, the statutory framework for the legal system proved too rigid to allow this legal system to develop within its designated framework, keeping pace with the pace of development of the economic system".[37]

3. The turn of the 1940s and 1950s – the de facto domination of economic planning against the letter of the law

Consequently, as early as the beginning of 1949, that is, barely after several years of existence of the regulations analyzed above, the Law on Changes of Organization of the Chief Authorities of the National Economy was passed.[38] According to its Article 9, the CPO was abolished. Instead, article 9 of discussed statute established the State Economic Planning Commission (SEPC). During the same period, the postwar-specific Ministry of Reconstruction was replaced by the Ministry of Construction. The law[39] establishing the new ministry included not only the provisions abolishing its predecessor (Article 6). The GOSP and its subordinate regional spatial planning directorates also ceased to exist (Section 1 of Article 7). According to Section 2 of Article 7 of the discussed law, the competencies of the liquidated GOSP were taken over by the SEPC. The exceptions were issues related to the planning and implementation of urban and settlement development, which became the new ministry's own task. Pursuant to Section 1 of § 4 of the ordinance[40] issued under the discussed law, the Ministry of Construction took over matters of local spatial plans and supervision of their implementation. Section 3 of § 4 of this ordinance stipulated that the competencies of regional spatial planning directorates were taken over by heads of the provinces (field representatives of government administration) and provincial economic planning offices. Meanwhile, Section 4 of § 4 stipulated that all other matters previously within the jurisdiction of the GOSP and its subordinate regional directorates were transferred to the SEPC. Thus, the liquidation of institutions whose even partial independence could impede the smooth implementation of the political agenda was carried out. During the Stalinist period, such processes took place in various countries of the Eastern Bloc, not only in People's Poland.[41]

B. Wełpa, in a 1978 publication, stated that these changes were "an expression of the authorities' conviction at the time that in a socialist state the only form of macro planning is economic planning".[42] U. Wich positively assessed the reorganization of state institutions, stating that: "it should be considered beneficial and justified, since the fusion of spatial planning at the national and regional level with economic planning, was a confirmation of the need to implement the principle of unity of planning in a socialist state".[43] In 1984, that is already in the declining period of People's Poland, A. Karpiński assessed the liquidation of the GOSP in the following way: "this decision is an interesting example of how plans based on rational considerations and coming from the best intentions can lead to

[33] Ordinance of the Council of Ministers of 20 March 1947 on Cooperation of Authorities in the Action of Planned Development of the State (Journal of Laws No. 34 item 152).

[34] The economic plans drawn up in Poland before World War II concerned only state investment programs, which were only part of the economic activity in the capitalist system. See: KALIŃSKI, J., *Plan odbudowy gospodarczej 1947–1949*. Warszawa, 1977, p. 9-13.

[35] WICH, U., Rozwój planowania przestrzennego w Polsce. In: *Annales Universitatis Mariae Curie-Skłodowska. Sectio H, Oeconomia*, No. 10, 1976, p. 63.

[36] LEOŃSKI – SZEWCZYK – KRUŚ, *Podstawowe instytucje*, p. 51.

[37] BRZEZIŃSKI, W., *Plan zagospodarowania przestrzennego. Studium z zakresu nauki administracji i prawa administracyjnego*. Warszawa, 1961, p. 100.

[38] Law of 10 February 1949 on the Change of Organization of the Chief Authorities of the National Economy (Journal of Laws 1949, No. 7 item 43).

[39] Law of 27 April 1949 on the Establishment of the Office of the Minister of Construction (Journal of Laws 1949, No. 30 item 216).

[40] Ordinance of the Council of Ministers of 12 May 1949 on the Scope of Activities of the Minister of Construction (Journal of Laws 1949, No. 30 item 217).

[41] In Hungary, for example, the State Audit Office was liquidated in 1949, see: PFEFFER, Z., The Development of Modern Budgetary Law in the European Legal Culture. In: *Journal on European History of Law*, Vol. 11, No. 2, 2020, p. 93.

[42] WEŁPA, B., Okres ograniczeń zakresu planowania przestrzennego. In: MALISZ, B. (ed.), *40 lat planowania struktury przestrzennej Polski*, Warszawa 1978, p. 47.

[43] WICH, Rozwój planowania, p. 63.

less than ideal consequences. The transfer of national planning matters to the SEPC was guided by the desire to strengthen the position of spatial planning, which had a sound rationale, taking into account that the SEPC was in fact supra-ministerial at the time and had a strong directive, operative and controlling gesture. Despite this, however, the decision to liquidate the GOSP must be evaluated negatively. It was influenced by the unpreparedness of the SEPC apparatus to take over these functions".[44] It should be remembered that A. Karpiński published his paper in the pages of the journal "Planned Economy", which was issued in a political system where censorship was still in place, and its history was closely connected with economic planning bodies (for a certain period it was issued by the CPO).[45] Therefore, the stated intentions to empower urban planning by transferring it to the SEPC should be viewed with some reserve. On the other hand, it is significant that even in such a journal there was room for a negative assessment of the real effects of these changes.

The subordination of spatial planning to economic planning at the national and regional levels was evident in the changed structure of state institutions and the new distribution of competencies. Meanwhile, the loss of autonomy of local planning can be seen by analyzing a certain practice of public administration in the late 1940s and early 1950s. The issue is the use of so-called localization decisions. These were administrative acts issued to determine the place where an investment provided for in the economic plan should be implemented.[46] Localization decisions had no basis in generally binding law – they were described not in any statute or decree, but only in the so-called "Instruction No. 20 on the Rules for the Preparation and Approval of Technical Documentation for Investments" applicable by order of the SEPC Chairman.

Instruction No. 20 was not officially published anywhere, it functioned in the form of a brochure with the notation "for staff use".[47] The document used the terms "general localization" and "detailed localization." Its § 6 defined the former as "the approximate determination of the place (county, municipality, settlement) where a particular investment object is to be made, so that it can most appropriately fulfill the role assigned to it in the national and local economy," and the latter as "the precise designation of the area where the investment object is to be made, based on the requirements of planned settlement development and the technical requirements of the object in question".

The provisions contained in § 215 – § 219 of the Instruction laid down the rules under which the investor would determine general localization in accordance with economic plans and have them approved by the SEPC or provincial economic planning commissions (depending on the size of the investment). Especially serious implications for local land use planning came from § 220 of the Instruction. It stipulated that investors (i.e., socialized economic entities) themselves were responsible for preparing detailed location proposals. They should rely on local spatial plans, but their absence did not stop the procedure regulated by the Instruction. In such a situation, the investor was obliged to use so-called "simplified plans" or "other studies in the possession of the SEPC's field bodies and the Ministry of Construction".[48] According to § 222 of the discussed document, "the provincial field bodies of the Ministry of Construction, [acting] in this regard in coordination with the provincial economic planning commissions, [were] the competent authorities to give approval to the detailed localization proposed by investors."[49]

It comes out clearly from the regulations in the Instruction that in the case of both general localization and detailed localization, the investor was responsible for preparing the proposals. The role of the state bodies responsible for spatial planning was limited only to their approval. Thus, the localization decision was, in practice, an expression of consent to what had been invented by the investor – a state-owned enterprise, whose main task was, after all, to achieve the goals set in the economic plans.

Authors publishing after the fall of People's Poland could afford to openly criticize the changes in spatial planning that took place in the second half of the 1950s. Urban planner Bartłomiej Kolpinski concluded in 2015 that the Decree on Planned Spatial Development of the State began to lose its meaning as early as 1948, when the drafting of local spatial plans for cities was abandoned in favor of "ZOR urbanism."[50] ZOR is a Polish abbreviation for the Department of Workers' Estates (Zakład Osiedli Robotniczych), a state-owned enterprise that at the time carried out the vast majority of investments in the housing sector. ZOR chose the locations of its investments on its own, using the localization decision regulations described above, and did not need any spatial plans. Probably for its leadership the priority was the execution of economic plans. W. Radecki, J. Sommer and W. Szostek assessed in 1995 that "the prioritization of socio-economic planning led to the degradation of spatial planning and the violation of spatial order in Poland."[51]

Moreover, also authors publishing during People's Poland's existence, within the small freedom of expression that

[44] KARPIŃSKI, A., Związki między planowaniem gospodarczym i przestrzennym w czterdziestoleciu. In: *Gospodarka Planowa*, No. 11 (463), 1984, p. 471.

[45] See: JAROSZ-NOJSZEWSKA, A., Gospodarka Narodowa – Gospodarka Planowa – Gospodarka Narodowa. In: *Gospodarka Narodowa. The Polish Journal of Economics,* No. 245(1–2), 2011, pp.1–18.

[46] BRZEZIŃSKI, W., *Plan zagospodarowania przestrzennego. Studium*, p. 108.

[47] STATE ECONOMIC PLANNING COMMISSION, *Instrukcja o zasadach sporządzania i zatwierdzania dokumentacji technicznej dla inwestycji,* Warszawa, 1950.

[48] Ibid, p. 58.

[49] Ibid.

[50] KOLPIŃSKI, B., Zagadnienia metodyczne miejscowego planowania przestrzennego w świetle przepisów prawa. In*: Biuletyn Komitetu Przestrzennego Zagospodarowania Kraju PAN*, No. 257–258, 2015, p. 20.

[51] RADECKI, W. – SOMMER, J. – SZOSTEK, W., *Ustawa o zagospodarowaniu przestrzennym oraz wybrane przepisy wykonawcze. Komentarz.* Wrocław, 1995, p. 8.

the system left, allowed themselves a kind of cautious criticism of urban planning practice in the 1950s. W. Brzeziński wrote in 1964: "at that time there appeared trends that could be called discriminatory tendencies towards spatial planning. The scope of regional planning work was significantly reduced, with attempts to replace it in practice with localization decisions."[52] B. Wełpa stated: "between 1949 and 1955, practically speaking, no serious work and studies of a spatial nature were carried out on a national scale in Poland."[53] Meanwhile, at the level of local spatial planning, it was intended that a partial solution to the problems (related, inter alia, to the "ZOR urbanism" described above) would be the transfer of relevant competencies from the Ministry of Construction to the Committee for Urban Planning and Architecture, established in 1953.[54] Larger changes came with the replacement of the 1946 Decree with an entirely new piece of legislation.

4. The 1960s and 1970s – the legal legitimacy of the domination of economic planning over spatial planning

The new law on spatial planning[55] was adopted in early 1961. It did not reverse the trend in the relationship between spatial planning and economic planning. The legislator opted for solutions that created a legal framework for the general trends that had begun in the 1950s.

E. Usakiewicz, in training materials for legal service employees of socialized economic units on spatial planning dating back to 1968, wrote that "the link between spatial planning and economic planning is a basic principle of the Law of 31 January 1961 on Spatial Planning."[56] An analysis of these regulations shows that the relationship of the two types of planning was something stronger than a link – at least in one direction. Article 1, Section 3 of the discussed law, listed prospective plans for the development of the national economy and multi-year national economic plans in first place among the sources on which decisions made within the framework of spatial planning should be based. The results of studies of natural, demographic, economic or social conditions were indicated only in the next place. Hence, the effects of economic planning were supposed to be the basis for spatial planning. According to the literal wording of the law, since 1961, economic planning was officially primary to spatial planning.

Moreover, Article 2, Section 1, item 1 of the new law stipulated that spatial planning for the entire area of the state should have been conducted within the framework of prospective plans for the national economy. The previous practice of not preparing spatial plans at the national level gained a statutory foothold. The new regulations transferred this level of planning to economic planning entirely. The 1961 Law on Spatial Planning did not contain any additional regulations on the national plan. It was believed that this was an implementation of the principle of unity of plan.[57]

According to Article 5, Section 1, Item 1, the supreme body of state administration in the field of spatial planning for the entire country and for regional plans was the Planning Commission under the Council of Ministers, the body that replaced the SEPC in 1956.[58] According to Section 1 of Article 8, drafts of regional plans were to be prepared by provincial economic planning bodies. Meanwhile, Section 1, Item 2 of Article 5 stipulated that with regard to local plans, the Committee for Construction, Urban Planning and Architecture was the supreme body of state administration.[59]

Therefore, a structure was maintained in which spatial planning at the national and regional levels was managed by an institution established primarily to carry out economic planning. Article 2 of the law that established the Planning Commission stipulated that its scope of activity included drafting and presenting to the Council of Ministers proposals defining the main directions of the State's economic policy; drafting prospective, multi-year and annual economic plans; examining the course of the implementation of economic plans and drafting and presenting to the Council of Ministers proposals for the application of measures aimed at ensuring the implementation of the plans; drafting methods and procedures for the preparation of economic plans; and, finally, drafting other issues provided for in specific regulations or ordered by the Council of Ministers. Tasks related to spatial planning were only in the latter category, as "other issues." The law creating the Planning Commission did not explicitly mention spatial planning in any context. These regulations are further evidence that especially during this period the People's Poland authorities viewed spatial planning as secondary to and subordinate to economic planning.

Moreover, even the transfer of powers related only to local planning to the bodies of architecture, urban planning and construction administration has been criticized. W. Brzeziński wrote: "without repeating the details of the criticism of this solution, it should be noted that spatial planning on a local scale, which can occur in various departments of the national economy, was here subsidiary to the body in charge of one of these departments of the economy."[60]

This specialist in administrative law is the one who wrote the most works on urban planning law during People's Poland. Many passages can be found there, in which he argued that it is part

[52] BRZEZIŃSKI, W., Planowanie przestrzenne. In: *Studia Prawnicze*, No. 7, 1965, p. 92.
[53] WEŁPA, B., Okres, p. 47.
[54] KARPIŃSKI, Związki, p. 471.
[55] Law of 31 January 1961 on Spatial Planning (Journal of Laws 1961, No. 7, item 47).
[56] USAKIEWICZ, E., *Planowanie przestrzenne*. Katowice, 1968, p. 17.
[57] NIEWIADOMSKI, Z., *Planowanie przestrzenne. Zarys systemu*. Warszawa, 2002, p. 18.
[58] Law of 15 November 1956 on the Establishment of a Planning Commission under the Council of Ministers and on the Abolition of the State Economic Planning Commission (Journal of Laws 1956, No. 54, item 244).
[59] It replaced the Committee for Urban Planning and Architecture in 1960, see Law of 14 June 1960 on the Transformation of the Committee for Urban Planning and Architecture into the Committee for Construction, Urban Planning and Architecture (Journal of Laws 1960, No. 29, item 164).
[60] BRZEZIŃSKI, W. – KALETA, J. – MARTAN, L. – WERSALSKI, M., *Problemy prawne planowania gospodarczego,* Warszawa, 1964, p. 42.

of the economic planning system, also in its legal dimension. In a 1964 paper, he wrote: "spatial plans occupy a separate place in our system of economic plans. All other economic plans set planning tasks, operating with the elements of volume (quantity) and time period for the implementation of its planning tasks. Spatial plans, on the other hand, operate on the element of space, treating the element of time only auxiliary.[61] A little further on, the author of this paper wrote: "the task of spatial plans is to establish the use of land in such a way that it is consistent with the requirements of the economic activity in question and with the needs of implementing economic plans in the wider area."[62] He further stated that: "there is actually only one system of economic plans. This comes out of the unity of the economic plan in our system."[63] A few pages further he reiterated: "Spatial plans occur (…) as a distinct generic system of economic plans within the general system of planned economy."[64]

In a 1961 monograph, W. Brzeziński presented a catalog of economic plans basic to the People's Poland system. It included 6 types of documents: national economic plans (several years and annual), field economic plans, production and service plans, financial plans, investment plans, and spatial plans.[65] In 1978, this administrative law scholar continued to write that spatial plans should be included in the "large and very diverse conceptual category of economic plans."[66]

5. The 1980s – an attempt to restore the independence of spatial planning at the decline of People's Poland

The early 1980s was a period of liberalization of the political system, when the groundwork for such political reforms as the restoration of the administrative judiciary was discussed and prepared.[67] It was also a period of preparing economic reforms in response to the deepening economic crisis as well as in an attempt to save state socialism in People's Poland.[68] The relationship between spatial planning and economic planning, which is the basis of the state's economic system, made it impossible for reforms to bypass this area as well.

M. Szydłowski, in a 1982 textbook for participants of an extramural course on construction law, wrote that in 1980 the People's Poland's highest authorities decided to prepare an update to the law on spatial planning.[69] There were different visions of the new regulations among People's Poland's political insiders. A. Pyszkowski, president of the Society of Polish Town Planners and director of the Land Development Team of the Planning Commission, i.e. a person speaking on behalf of the bodies of People's Poland's authorities responsible for the shape of spatial planning, in a discussion reported in the pages of the monthly "City" magazine, considered the view that spatial planning was an integral part of planning as a whole and therefore should not be regulated by a separate law as radical.[70] It should therefore come as no surprise that the direction of change was different.

As part of the preparation of the legal framework for these reforms, the Law on Social and Economic Planning was adopted in February 1982,[71] which was the first law to comprehensively regulate economic planning since the Decree on a Planned National Economy. Its Article 4 listed the basic types of plans: central plans, territorial plans (provincial, municipal and communal), plans of enterprises and other units of the socialized economy, and plans of budget units and other state organizational units. It did not list spatial plans. Territorial plans were not to perform this function. Further articles in that piece of legislation clarified that their purpose was to define tasks to be carried out at the level of individual provinces, cities and municipalities. It was therefore decided that a separate law on spatial planning was nevertheless needed.

It was passed two years later.[72] M. Szydłowski wrote in the aforementioned textbook that "»spatial planning« is a term commonly used to designate one of the three basic types of planning in our country, which include economic planning, social planning and spatial planning. The latter planning is distinguished because of its peculiar characteristics relating to space."[73]

Such wording foreshadows a different relationship between spatial planning and economic planning than in the 1961 Law. The new legislation explicitly redefined the relationship between spatial planning and socio-economic planning – Section 1 of Article 4 of the 1984 Law stipulated that the two types of planning are interdependent. Section 2 of Article 4 defined the extent of the impact of spatial planning on economic planning, stating that the opportunities and constraints for socio-economic development that come out of spatial planning should be the basis for determining in spatial plans the ways, proportions and location of projects intended to address social needs. The relationship in the opposite direction was defined in Section 3 of Article 4, which stipulated that the development conditions arising out of socio-economic plans should provide the basis for

[61] Ibid, p. 22.
[62] Ibid, p. 23.
[63] Ibid, p. 26.
[64] Ibid, p. 32.
[65] BRZEZIŃSKI, *Plan zagospodarowania przestrzennego. Studium*, p. 12–13.
[66] BRZEZIŃSKI, W., Plan zagospodarowania przestrzennego jako forma prawna zarządzania gospodarką narodową. In: *Państwo i Prawo*, No. 3 (385), 1978, p. 8.
[67] SADŁOWSKI, M., *Geneza, ustrój i orzecznictwo Naczelnego Sądu Administracyjnego do 1989 r.* Warszawa, 2023, p. 217.
[68] See: GRALA, D., *Reformy gospodarcze w PRL (1982–1989). Próby ratowania socjalizmu.* Warszawa, 2005.
[69] Ibid, p. 1.
[70] Spór o ustawę. In: *Miasto*, No. 10, 1984, p. 5.
[71] Law of 26 February 1982 on Social and Economic Planning (Journal of Laws 1982, No. 7, item 51).
[72] Law of 12 July 1984 on Spatial Planning (Journal of Laws 1984, No. 35, item 185).
[73] SZYDŁOWSKI, M., *Miejscowe planowanie przestrzenne*. Warszawa, 1982, p. 3.

determining in spatial plans the ways, proportions and location of projects aimed at meeting social needs.

In a collection of comments on the new law published by the Society of Town Planners, the Society's vice president, K. Bald wrote that "an important establishment of the new law is the interdependence of economic planning and spatial planning. Thus, the equivalence of the economic and spatial aspects in social development has been recognized for the first time."[74]

In this context, it is worth to critically analyze some other statements from that time. Minister of Administration and Spatial Planning General[75] W. Oliwa declared that "the general principle of the draft [of new law] is to meet the demands made by representatives of science, as well as practice, especially that spatial planning should be linked to economic planning and spatial planning with socio-economic planning."[76] Meanwhile, A. Karpiński wrote in the already quoted paper from the journal " Planned Economy: "at the end of the four decades [of People's Poland], practice and experience settled the dispute over the unity or dualism of spatial and socio-economic planning in favor of the integration of these forms of planning. It can only be said that if this had happened earlier it would probably have been possible to look more optimistically at the results of spatial management in four decades and prevent the deformation of the country's spatial system."[77] Both Oliwa and Karpiński emphasize the importance of the interdependence of economic planning and spatial planning in the new law. Reading their statements, it can be deduced that the problem of the previous regulations lied in insufficient influence of spatial planning effects on actions taken in economic planning. This is consistent with the findings presented above in this paper. However, it is possible to get the impression that, according to Oliwa and Karpiński, that these problems stemmed from the excessive independence of spatial planning, rather than the dominance of economic planning. At this point, it should be emphasized again that publications from the People's Poland period require a critical approach as coming from an authoritarian state without political pluralism, but instead with censorship. Open criticism of the system was not possible, and corrections of previous mistakes had to be presented as improvements to the previous solutions, which were not that bad.

Last but not least, in the context of previous conflicts between spatial planning and economic planning over the application of localization decisions, it is still worth noting Article 2 item 3 of the new law, which explicitly indicated that the spatial planning process should include, inter alia, the determination of the location of investments.

6. Summary

The above analysis of both the legal regulations in effect at different periods of People's Poland's history and the views of lawyers contained in publications that appeared in official circulation in a state where censorship was in effect (and therefore had to toe the government line) shows that the place of spatial planning law in People's Poland's legal system was different from the status of analogous regulations in democratic states with market economies.

In these countries, spatial planning law is an independent area of substantive administrative law, with very close ties to construction law. In People's Poland, there was an overarching area of law absent in those systems, as it was specific to centrally planned economies. This was planning law, containing regulations on economic planning (later called socio-economic) and precisely on spatial planning.

This was the general position of spatial planning law throughout the whole existence of People's Poland. However, the relationship of spatial planning law and economic (socio-economic) planning law changed from period to period. In the first years after World War II, these two fields were regulated as separate planning areas, with their own independent organizational structures, consisting both of central bodies of state administration and field units.

In the late 1940s and early 1950s, spatial planning lost its practical significance, although regulations of statutory rank remained unchanged. The preparation of spatial plans at all levels was abandoned. At the national and regional levels, economic planning acts were sufficient for the People's Poland authorities. At the local level, there were non-statutory administrative instruments, by means of which entities of the socialized economy determined on their own the locations of their investments provided for in economic plans. Thus, in practice, spatial planning was dominated by economic planning.

The new law on spatial planning from the early 1960s put things in order so that the previously practical subordination of the area to economic planning gained a legal framework. From this period comes the legal literature presenting spatial planning as an element of economic planning, and spatial plans as a tool for implementing the tasks envisaged in economic plans in a spatial aspect.

The 1980s was a decade in which the People's Poland authorities tried to save the political system from collapse. Reforms included planning regulations. The relationship between spatial planning and socio-economic planning was redefined. From then on, the two areas were to be interdependent.

However, even such an arrangement could not survive the political transition. The Law on Social and Economic Planning was reversed at the end of 1990.[78] From that point on, urban planning no longer had anything to be interdependent with. A new law regarding spatial planning was passed in 1994. It no longer contained any reference to economic planning, and even in its name the word "planning" was replaced by the term "development."

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[74] BALD, K. Nowa regulacja prawna w planowaniu przestrzennym – nadzieja i zagrożenia. In: TOWARZYSTWO URBANISTÓW POLSKICH, *Komentarze do ustawy o planowaniu przestrzennym.* Warszawa, 1986, s. 82.

[75] In Wojciech Jaruzelski's government, military officers headed key ministries even after the end of martial law.

[76] KARPIŃSKI, Związki, p. 477.

[77] Ibid.

[78] Law of 30 November 1990 on the Repeal of the Law on Socio-Economic Planning and Amendments to Certain Laws (Journal of Laws 1990, No. 87, item 505).

The Terror of Central- and Eastern Europe of the 13th Century: Genghis Khan. The Analysis of The Secret History of the Mongols as a Legal History Source Work*

*Orsolya Falus,** Borbála Obrusánszky****

Abstract

In the first half of the 13th century, Europe feared the conquering invasion of the Mongol Empire. The key to an empire's strength undoubtedly lies in its organized state and legal structure. The first remarkable stage of the development of the legal system of the Mongolian nation took place during the formation of the Great Mongol Empire with the establishment of Genghis Khan's so-called Yassa Law, as the first, integrated, written code. The legal source compiled the customary law of the time by Šigi Qutuqu, chief judge of the great khan. The original text of the code has not survived, but we can indirectly deduce its content through the study of historical sources and traditions. Despite the fact that many literary works have been published on the Great Mongol Empire, representing various disciplines, no one has yet undertaken a legal history- and legal theory-based examination of The Secret History of the Mongols - which, unlike Yassa, is the oldest surviving contemporary document in Mongolian history. The present paper collects the customary law elements found in the source work by branch of law and attempts to capture the moment in legal history when codification and the separation of powers, as the first steps of legal modernization, appeared on the Mongolian steppe as early as the 13th century. The research method used is source analysis.

Keywords: *Great Mongol Empire; Šigi Qutuqu; The Secret History of the Mongols; customary law; legal history source work.*

1. Introduction

The development of Mongolian law was a volatile process, typically associated with the dissolution of a powerful empire and its replacement by an independent, modern nation-state. The progress can be divided into three main historical phases: [1] First stage – the period of the formation of the legal system of the Mongolian nation: the Great Mongol Empire *(Yeke Mongol Ulus)* establishment of Genghis Khan's so-called *Yassa* Law (Cyrillic mongol: *Их Засаг*, English: *Great Law*), as the first, integrated, written code. The legal source compiled the customary law of the time by the literate *Šigi Qutuqu*, who was appointed chief judge by the great khan.

The original text of the code has not survived, but we can indirectly deduce its content through the study of historical sources and traditions. Second stage – the period of the second integration of legal sources, such as the Mongol-Oyirat laws adopted at the 1640 parliament, which unified the laws used by the Mongolian tribal confederations. The *Khalkh Juram*, published in 1709, is a collection of laws for the *Khalkhas*,[2] a Mongol ethnic group already under Manchu rule. Third stage – the period of the emergence and development of the modern system, with the related written legislation.[3]

For a long time, the only available literature summary on the law and international relations of the Mongols was Riasanovsky's 1937 monograph *Fundamental Principles of Mongol Law*,[4] in which the author collected and had the legal sources of the medieval and early modern Mongolian state translated into English. Following the publication of the book, the author also published a detailed study summarizing the research in 1948 in

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** Dr. habil Orsolya Falus PhD, associate professor, Institute of Social Sciences, University of Dunaújváros; honorary professor, Dezső Márkus Research Group for Comparative Legal History, Department of Legal History, Faculty of Law, University of Pécs, Hungary, email: falus.orsolya@pte.hu / ORCID 0000-0002-8217-3065.

*** Dr. Borbála Obrusánszky PhD; assistant professor, Faculty of Humanities and Social Sciences, Károli Gáspár University of the Reformed Church in Hungary, Budapest, Hungary, email: borbala.obrusanszky@gmail.com / ORCID 0000-0001-8654-1796.

1 ODGEREL, T. – GANBOLD, B., *The Mongolian Legal System and Laws: a Brief Overview*. NYU LAW, 2006, GLOBALEX. [online]. Available at: https://www.nyulawglobal.org/globalex/Mongolia.html. [Accessed: 27 October, 2024].

2 The *Khalkhas* are traditionally direct descendants of Genghis Khan. They make up 80% of Mongolia's population. Their dialect is the official language of Mongolia. *See* URADYN, E. B., *Ethnicity, National Unity and Law in Mongolia.* Ulaanbaatar, 2020.; MYAGMARJAV, B., On Avga Taiji Nobles in Khalkha. In: *Chinggis Khaan Heritage & Culture,* Vol. 2, No. 2, 2023, p. 23-36.

3 ODGEREL, T. – GANBOLD, B., *The Mongolian Legal System and Laws: a Brief Overview*. New York, 2006. [online]. Available at: https://www.nyulawglobal.org/globalex/Mongolia.html. [Accessed: 27 October, 2024].

4 RIASANOVSZKY, V. A., *Fundamental Principles of Mongol Law.* Tientsin, 1937.

the Washington Law Review.[5]

This study, however, does not examine the primary legal sources researched already by other legal historians, but rather focuses on an original source from the 13th century that has so far been mostly interpreted as a literary work. Despite the fact that, based on the analysis of *The Secret History of the Mongols*, numerous detailed works have been published to this day on both the state organization of the Great Mongol Empire[6] and the leadership habits of Genghis Khan,[7] we cannot read anywhere that this work, in addition to the *Yassa* and the *Blue Book (Köke Debter)*, is also rich in data on contemporary customary law. According to the research hypothesis, *The Secret History of the Mongols* (hereinafter: SHM) can also be interpreted as a valuable source for legal historians.[8] The work, which tells the story of how Temüjin, the son of the chief of an insignificant small Mongolian tribe, sets out on his journey of world conquest, how Temüjin becomes Genghis Khan (in SHM: Činggis Qa'an[9]) and establishes the vast Mongol Empire, provides insight into the lifestyle and thinking of the medieval steppe horse nomads. It also allows us to draw conclusions about the principles on which the peoples who kept large animals organized their states and how they operated their vast steppe empire.

The work was kept in Kublai Khan's palace in Beijing (Khanbaliq, "City of the Khan"), and miraculously survived the centuries. The original text was able to survive because it was used by interpreter schools in the Chinese court to teach the Mongolian language, as a translation practice text. In the process, the original Mongolian text was phonetically transcribed with Chinese characters, so it was preserved. It is still the most valuable 13th-century Mongolian language monument. It was first published in a foreign language in Russian in 1866, and then the Mongolist *Baavuday Tsend Gun* issued the work in Mongolian between 1915 and 1917.[10] It was published in Western languages from the 1940s onwards. The present research is based on the English translation by *Igor de Rachewiltz*;[11] its method is source analysis, during which we examine *The Secret History of the Mongols* (SHM) as a legal history source work.

2. Historical Background of the Work: The Formation of the Great Mongol Empire

According to Mongolian historians, the steppe state idea was based on the doctrine of unity. The essence of this is that bow-wielding peoples are strong only when they unite with each other.[12] In SHM, Genghis Khan's ancestral mother, Alan Qo'a, also encouraged her sons to unite: "One day in spring, while she was cooking some dried lamb, she had her five sons Belgünütei, Bügünütei, Buqu Qatagi, Buqatu Salǰi and Bodončar Mungqaq sit in a row. She gave an arrow-shaft to each of them and said, "Break it!" One by one they immediately broke the single arrow-shafts and threw them away. Then she tied five arrowshafts into a bundle and gave it to them saying, "Break it!" The five sons each took the five bound arrow-shafts in turn, but they were unable to break them." Then the mother gave the following teaching to her sons: "You, my five sons, were born of one womb. If, like the five arrow-shafts just now, each of you keeps to himself, then, like those single arrow-shafts, anybody will easily break you. If, like the bound arrowshafts, you remain together and of one mind, how can anyone deal with you so easily?"[13]

The Mongol Empire was a collection of small principalities (khanates) in the second half of the 12th century,[14] and there were frequent wars between them over the best grazing lands. Some powerful khans sought to unite these small khanates under their own rule. According to Mongolian researcher *Otgoni Pürev*,[15] based on the idea of a belief system on ancestor veneration, the old Scythian and Hunnic territories should be ruled by a single ruler, someone of special origin, connected to celestial forces, and capable of uniting the bow-drawing or, as they are also known, *yurt-dwelling* peoples.[16]

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[5] RIASANOVSZKY, V. A., Far Eastern Section, Mongol Law—A Concise Historical Survey. In: *Washington Law Review,* Vol. 23, No. 2, 1948, p. 166-177.

[6] BEDESKI, R., Human Sources of the Mongol State: Chinggis Khan's Survival, Will-to-Live and Will-to-Power as told int he Secret History. In: *Chinggis Khaan Heritage & Culture,* Vol. 1, No. 1, 2022, p. 25-51.; ALLSEN, T., Technologies of Governance in the Mongolian Empire: A Geographic Overview. In: SNEATH, D. (Ed.) *Imperial Statecraft.* Washington, 2006, p. 110-140.; FITZHIGH, W. W. – ROSSABI, M. – HONEYCHURCH, W., *Genghis Khan and the Mongol Empire.* Washington DC, 2013, p. 209.

[7] BAYARSHAIKAN, D., Some thoughts on why did the Mongol Empire suceeed and fell. *Chinggis Khaan Heritage & Culture,* Vol. 1, No. 1, 2022, p. 6-24.; EARLE, T., *How Chiefs come to Power: The Political Economy in Prehistory*. Stanford, 1997.; JUVAINI A. D. A. M., *The History of the World-Conqueror*. Cambridge, Massachusetts, 1958; SAUNDERS, J. J., The Nomad as Empire Builder: A Comparison of Arab and Mongol Conquests. In: *Diogenes*, Vol. 13, No. 52, 1965, p. 79-103.

[8] It is necessary to mention here that some Mongolian researchers - not lawyers, but historians - have previously dealt with the work and have drawn attention to various customs related to it, but they have not conducted a legal or legal history analysis in this regard. *See* PERLEE, K., *Nuuts tovchoond uldsen khuulitsaazni zarim zuil*. Ulaanbaatar, 1962.; DASHTSEDEN, D., Nuuts tovchooni khuuli tsaazni zarim zuil. In: *Dornodakhin sudlal*, Vol. 2, No. 23, 1990, p. 41-50.

[9] In the following Genghis Khan is referred to according to the common use, and not as mentioned in SHM as opposed to the names of others mentioned in the SHM.

[10] OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024.

[11] RACHEWILTZ, I., *The Secret History of the Mongols: A Mongolian Epic Chronicle of the Thirteenth Century*. Canberra, 2015. [online]. Available at: http://cedar.wwu.edu/cedarbooks/4 [Accessed: 20 October, 2024] –hereinafter abbreviated and referred to as: SHM.

[12] OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 35.

[13] SHM 19-22.

[14] The most powerful principalities: Kereyit Khanate, Naiman Khanate, Önggüt Khanate.

[15] PÜREV, O., *Mongol böögijn sasin*. Ulaanbaatar, 2002.

[16] OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 40.

At the end of the 12th century, it was Temüjin, a candidate for the Khamag Mongol throne, who, despite the difficulties that loomed before him, was able to unite the smaller and larger tribes. In 1189, he was elected Khan of the Khamag Mongols. It was then that he took the name *Genghis*. At the *kurultai* (national assembly)[17] of 1206, at the source of the Onon River, he founded the Great Mongol Empire. The kurultai, after elevating Genghis Khan to the rank of Great Khan, established law. They also elected the heads of the administration and judiciary. The empire was divided into three wings, in accordance with the ancient steppe equestrian tradition. One was governed by Muqali and the other by Bo'orču, who were friends and loyal fellow warriors of the Great Khan. At the kurultai Šigi Qutuqu, the elected chief judge of the empire, had certain legal cases resolved based on customary law (*töre* in Mongolian; the Hungarian word *tövény* is also related to this word) recorded in the so-called *Blue Book*.[18] However, the customary law was later modified, in 1210 and 1218, by additions and changes adopted by the kurultai, created as a result of codification activities. The assemblies decided on common foreign and domestic policy, as well as on the taxation of the peoples under their rule. Genghis and his successor, Ögödei, using the communication system already developed by the early Mongol peoples, organized the most advanced network of post stations[19] in the world at that time, which enabled the rapid flow of information within the empire.[20]

The nomadic state organization, like settled civilizations, had three important branches of power: the legislature (as the *law-making*), the administration (as the *execution*), and the judiciary (as the *adjudication*). Before the formation of the Mongol Empire, all three were under the control of the ruler. With the formation of the Mongol Empire, the branches of power were separated. The highest state offices were filled by officials appointed by the Great Khan. The 1206 Kurultai, as part of administrative and judicial reforms, appointed Genghis Khan a literate chief judge in the person of Šigi Qutuqu, a Tatar by birth: "Further, he entrusted Šigi Qutuqu with the power of judgement over all (…) Furthermore, writing in a bluescript register all decisions about the distribution and about the judicial matters of the entire population, make it into a book. Until the offspring of my offspring, let no one alter any of the blue writing that Šigi Qutuqu, after deciding in accordance with me, shall make into a book with white paper. Anyone who alters it shall be guilty and liable to punishment."[21]

The assembly (kurultai) also decided which people to attack and also determined the number of troops to be deployed. Most of the SHM contains entries of this kind. From a Hungarian perspective, the most tragic is the decision referring to the Mongol invasion of 1241-42, which was made at the Kurultai in 1235. It was then that the campaign to defeat the western peoples was decided: "Earlier on, Sübe'etei Ba'atur, campaigning against Meket, Menkermen Keyibe and other cities, had crossed the rivers Adil and Jayaq rich in waters, and had reached as far as the Qanglin, Kibča'ut, Bajigit, Orusut, Asut, Sesüt, *Majar*, Kešimir, Sergesüt, Buqar and Kerel peoples. (…) He ordered that Batu should be in command of all those princes who went on the campaign and that Güyük should be in command of all the troops coming from the centre."[22]

At the kurultai convened in 1219, Genghis Khan, at the instigation of his main wife, Yisüi Qatun, made a will and divided his empire among his sons. At the suggestion of his second son, Ča'adai, he appointed his third son, Ögödei, as his successor. His eldest son, Ĵoči[23] was of dubious origin, so he received the most remote, western territories, while his second son, Ča'adai, became the ruler of the Central Asian Muslim kingdoms conquered by his father that year,[24] and also the guardian of the empire's legality. His youngest son, Tolui, inherited the ancient Mongol territories - the lands along the Onon, Kerülen (Kherlen) and Tula (Tuul) rivers - and his father entrusted him with leading the army.[25] The Kurultai proved to be a decisive legislative institution not only under Genghis Khan, but also under his successors. After Genghis Khan's death,[26] the Kurultai convened in 1229 at a place called *Köde'e Aral* elected his son, Ögödei, who was named his heir, as Great Khan.[27]

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[17] The word comes from the word *kuri* (=to gather). The word is related to the Hungarian word *kör*. Earlier among the Mongols, *eje* was the collective name for tribal and khan gatherings. The latter word has a meaning that suggests that the leaders had to reach unity at the forum. *See* OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 81.

[18] The name *Blue Book*, which is common in legal literature, is actually the result of an inaccurate translation. The original Mongolian name is *Köke Debter*, in English it is *Blue Notebook*. SHM 203; OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 81.

[19] SHM 279.

[20] OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 85.

[21] SHM 203.

[22] SHM 270. *Majar* here refers to Hungary (Hungary in Hungarian means: *Magyarország*). The first great tragedy in Hungarian history was the Mongol Invasion, during which, among other things, the operation of a large part of the crusader knight orders was rendered impossible due to the losses suffered in the Battle of Muhi (1241). See FALUS, O., The "Hungaricum" of the Crusader Orders: the Order of St Stephen. In: *Journal on European History of Law,* Vol. 13, No. 2, 2023, p. 129-137.

[23] SHM 100 – 106, 255. His first wife, Börte, was kidnapped by the Merkits. This was in revenge for the fact that Temüjin's father had kidnapped Höelün, Temüjin's mother, from the Merkits. To free Börte, Temüjin allied with Khan Ong (Tooril) and Jamuqa, and together they defeated the Merkits. Temüjin was able to take his wife home, who was already expecting her first child. Although the Great Khan acknowledged the child as his son, the child's name, *Joči* (=guest), suggests that the father could have been someone else. OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 64.

[24] *"In the Year of the Hare (1219), Činggis Qa'an set out against the Sarta'ul people crossing the Alai"* SHM 257.

[25] SHM 254 – 255. *See also* 3. 1. 3.

[26] *" (…) in the Year of the Pig (1227) ascended to Heaven."* SHM 268.

[27] SHM 270; OBRUSÁNSZKY, B., *Törvények és tanítások. A sztyeppei lovas birodalmak szellemi öröksége*. Budapest, 2024, p. 86.

3. Source Analysis: Customary Law Elements and Legislation in *The Secret History of the Mongols*

The SMH reveals that the primary task of the first appointed, literate chief justice, Šigi Qutuqu, was the compilation of *töre* (customary law) in the *Blue Book*. Like other steppe peoples, the Mongols respected their traditions, including their legal customs. An important element of the modernization of the Great Mongol Empire under Genghis Khan was the collection and written recording of these legal customs. This is also the basis of their later codification activities, as the customary law recorded in the *Blue Book* by Šigi Qutuqu was supplemented or modified at a time and in a manner generated by social changes, so that it could only become a valid source of law with the acceptance of the Kurultai. The elements of (customary) law found in the work are presented by branch of law.

3.1 Private law

3.1.1 Legal status of a person

3.1.1.1 The *darkhan*

In Mongolian society, all adults, except slaves, were free, independent, and equal, as everyone was dependent on the Great Khan. Although in a patriarchal society, men obviously made important decisions, for the reasons given for the legal institution of marriage, women themselves had to have knowledge similar to that of men, and were therefore respected members of the steppe clans.[28] The only exception among the equals was the *darkhans*, a narrow, privileged class who, as a reward for their service, valor, and loyalty, received numerous privileges (e.g., they could keep all the spoils of war for themselves and had free access to the Great Khan).[29] The path to becoming a darhhan was open to everyone - in the name of equality. Their privileges also included a special criminal law provision: a quasi-"preliminary" pardon[30] under which they were granted a pardon in advance for nine of their future crimes. Their rights could also be inherited by their descendants.

The owners could dispose of slaves as they pleased, as movable property: "If they abandon your door,/ Cut out their livers and/ Cast them away!"[31]

3.1.1.2 The *beki* rank

The beki was already considered an important dignitary in the pre-Mongol era, the leader of several small principalities (Merkit, Oyirat, etc.) was called this. It is special that both women[32] and men could hold this dignity. Unfortunately, due to the scarcity of sources, we know little about it. Based on the SHM it is certain that Genghis Khan left this dignity with a special status: "In the Mongol tradition it is customary for a senior ranking personage to become a beki. (…) When one has been raised to the rank of beki, He shall wear a white dress/ And ride a white gelding;/ He shall sit on a high seat/ And be waited upon. Furthermore, yearly and monthly I shall hold discussions with you to seek your advice. Let it be so!' So he ordered."[33]

3.1.1.3 The status of a legally incapacitated person

3.1.1.3.1 Succession of a legally incapacitated person

The lineage of Genghis Khan is presented at the beginning of Chapter One of the work. After the death of one of Genghis Khan's ancestral mother, Alan Qo'a, his five sons divided the wealth: "After the death of their mother Alan Qo'a, the five brothers divided the livestock among themselves. Belgünütei, Bügünütei, Buqu Qatagi and Buqatu Salǰi all took their share; to Bodončar no share was given, for they said that he was a fool and a half-wit, and they did not regard him as one of the family."[34] The above paragraph suggests that an adult who was deemed incompetent due to mental disorder was excluded from the family, and therefore from inheritance. Declaring incompetent was a family decision that could be revoked. This may have happened to Bodončar, who was later sought out by his brothers and accepted back into the family. It is likely that his incompetent status changed because they later attacked a leaderless people on his advice and took a large amount of booty.[35]

3.1.1.3.2 Marriage of a legally incapacitated person

The "fool and a half-wit" Bodončar, who was disinherited, kidnapped a woman during a battle: "Bodončar, as he was riding ahead reconnoitring, captured a woman who was in the middle of her pregnancy."[36] Bodončar subsequently married another woman and fathered numerous heirs.[37]

The description clearly shows that, despite the fact that an adult person who was incapacitated due to mental disorder was excluded from inheritance, his marriage was still valid. This served to maintain the lineage, and was successful, as Bodončar became the ancestor of the Khamag Mongol rulers.

3.1.2 Family law

3.1.2.1 Marriage

a) Poligamy

Bodončar's story also makes it clear that polygamy was a legal custom in contemporary society. Genghis Khan himself had

[28] BROADBRIDGE, A. F., *Women and the Making of the Mongol Empire.* Cambridge, 2018, p. 18.
[29] The origin of the *darkhan* dignity (title, rank) dates back to the Hephthalite (Hun) Empire in Central Asia, but the title *tarkhan* was also known and used by the Turks and Uyghurs.
[30] Explained in more detail: 3. 2. 5.
[31] SHM 137.
[32] SHM 165, 168, 186, 198, 239.
[33] SHM 216.
[34] SHM 23.
[35] SHM 32-35.
[36] SHM 38.
[37] SHM 44 - 43

several wives: the SHM mentions seven women by name, in addition to his countless concubines, in the order of their appearance in the chronicle: *Börte*;[38] *Yisüi*[39] és *Yisügen*, as sisters;[40] *Ibaqa Beki*,[41] *Qulan*,[42] *Gungju,*[43] and *Čaqa*.[44] Börte's hand was asked in marriage by Genghis Khan's father, Yisügei Ba'atur, when he was still a child. Ibaqa Beki was the daughter of the younger brother of the conquered Kereyit Ong Khan, and Qulan was offered as a wife by her father when the Merkit people were subdued by Temüjin. Gungju was the daughter of the surrendering Kitat people's Altan Khagan, and Çaqa was the daughter of the also capitulating Qašin khan. However, the Great Khan abducted Yisüi and Yisügen.

The ranking of wives was determined by the husband. The SHM describes how the ranking between Yisüi Qatun and Yisügen, the two sisters changed: "Then, on that occasion, Činggis Qa'an took as wife Yisügen Qatun, daughter of the Tatar Yeke Čeren. Being loved by him, Yisügen Qatun said, If it pleases the Qa'an, he will take care of me, regarding me as a human being and a person worth keeping. But my elder sister, who is called Yisüi, is superior to me: she is indeed fit for a ruler. Recently, a bridegroom for her was taken into our family as son-in-law. I wonder now where she has gone in all this confusion. On these words Činggis Qa'an said, If your elder sister is better than you, let us make a search for her! But if your elder sister comes to hand, will you yield your place to her? Yisügen Qatun said, If it pleases the Qa'an, as soon as I see my elder sister I shall yield to her. (…) When Yisügen Qatun saw her elder sister, keeping the promise she had made earlier, she rose and let her sit in the place she had occupied. She herself took a lower seat. Since she turned out to be as Yisügen Qatun had said, Činggis Qa'an was pleased with her; he married Yisüi Qatun and placed her in the rank of his principal wives."[45]

Multiple wives were typically a means of strengthening the Khan's power, as this ensured the succession of the dynasty. If the main wife did not produce a son, the other wives were expected to produce an heir to the throne. The gift of wives was also a means of exercising the ruler's favor. The SHM mentions the reward of the loyal Qorči, who asked the Great Khan to grant him thirty wives in exchange for his services: "At that time you, Qorči, said, If the prophecy comes true and if it is fulfilled by Heaven according to your wishes, let me have thirty women. Now, because it has come true, I shall favour you. Look at the fine women and fine girls of the people who have submitted to us and choose thirty women from among them. So he ordered."[46]

b) Abduction of women

One common form of marriage was abduction of women. This is how Genghis Khan took Yisüi and Yisügen – the two sisters – from his enemy, the Tatar people. SHM even recorded the exact year of their marriage, as well as the season: "(…) in the autumn of the Year of the Dog (1202)."[47] The chronicle mentions such marriages in numerous places, in addition to Bodončar and Genghis Khan. Genghis Khan himself was the son of a marriage that was formed in this way. His father, Yisügei Ba'atur, kidnapped Lady Hö'elün.[48] The Merkits later avenged this by kidnapping Genghis Khan's first wife, Börte, [49] who was later regained, however pregnant already.[50]

Temüjin's mother, the Great Lady Hö'elün, was already married when she was kidnapped. Her husband, Čiledü, was saved by his wife, who asked him to flee from the overwhelming force.[51] Divorce was not recognized by the customary law of the time. Marriage was established by taking possession, so if the former husband left the woman's property, he was no longer considered a legal spouse. Leaving the property could also be accomplished by the husband renouncing it in favor of someone else. A description of such an incident can also be found in the series of gifts listed in Chapter Eight, when Jürčedei received the hand of Ibaqa Beki: "Činggis Qa'an favoured Jürčedei and gave him Ibaqa Beki as wife. He said to Ibaqa, I did not say that you have a bad character and that in looks and appearance you are ugly. You, who have entered into my heart and limbs, and who have come to me taking your place in the rank of my principal wives, I present to Jürčedei in deference to the great principle whereby services are duly rewarded, to Jürčedei."[52] However, considering Ibaqa Beki's status as a princess by birth, and the fact that she was the wife of the Great Khan, Genghis Khan also ensured her worthy maintenance, with the stipulation that he claimed a portion of her dowry: one cook out of two and one hundred maidservants out of two hundred.[53]

c) Wedding (contract of marriage)

However, the Mongols did not only obtain wives by kidnapping women. The chronicle notes that it was about the inca-

[38] SHM 66 (first mentioned), 94 (marriage).
[39] SHM 155 (marriage).
[40] SHM 155 (marriage).
[41] SHM 186.
[42] SHM 197.
[43] SHM 248.
[44] SHM 249.
[45] SHM 155.
[46] SHM 207.
[47] SHM 153.
[48] SHM 54-56.
[49] SHM 102-103.
[50] SHM 110.
[51] SHM 56.
[52] SHM 208.
[53] SHM 208.

pacitated Bodončar that "From the wife that Bodončar himself had taken was born a son named Barim Ši'iratu Qabiči."[54]

Genghis Khan was betrothed to his first wife, Börte, when he was still a child: "I will give you my daughter, and you, for your part, leave your son here as my son-in-law. So they both agreed and Yisügei Ba'atur said, I will leave my son as your son-in-law, but my son is afraid of dogs. Quda, don't let him be frightened by dogs! Then he gave him his spare horse as a pledge and went off, leaving Temüjin as his son-in-law."[55] After the fathers agreed,[56] the ten-year-old Temüjin stayed with Börte's family to pay the bride price with his work according to the contemporary customary law. However, this custom actually served the purpose of the two young people getting to know each other and getting used together.

d) The legal status of the wife

In a patriarchal society, women had limited rights. However, given the fact that men often went to war for months or even years, the task of farming was taken over by women during these periods, who also had to know how to handle weapons in order to protect themselves and their property if necessary. Consequently, women had to have similar knowledge to men in order to survive. Men often took the advice of their mothers and wives. One such case in the chronicle is the advice given to Temüjin by his mother, Hö'elün, and his wife, Börte, to part ways with Jamuqa.[57] One of the most important details of Chapter Eleven of SHM is when his chief wife, Yisügen, draws Genghis Khan's attention to the fact that it is time to make a will, and the Great Khan gratefully thanks her for this advice.[58]

It also happened that after the husband's death, his wife took over his duties: "As Daiduqul Soqor, the leader of the Tumat people, had died, his wife Botoqui Tarqun was governing them."[59] A further addition to the recognition of women is that – as already explained above – they could also receive the rank of *beki*.[60]

e) Concubine

In addition to wives, concubines also played an important role. Some of their sons were given the legal status of children born out of wedlock: "Bodončar alsotook as concubine a housemaid of Qabiči Ba'atur's mother, who had come as dowry. She had a son by him named Je'üredei. At first Je'üredei could take part in the Jügeli sacrifice in which meat is hung on a pole and offered to Heaven."[61]

3.1.2.2 Filial responsibility laws (filial piety)

Respect for elders is still strong among indigenous peoples to this day. The Mongols are no different. The SHM describes this legal custom in connection with Genghis Khan's mother. After her widowhood, Lady Hö'elün raised her sons herself. When the children came of age, they took care of their mother: "Saying to each other,/ Let us feed our mother!/ They sat on the bank of Mother Onon,/ They prepared their hooks and fished/ Mean and paltry fish;/ Bending needle into hook,/ They fished for salmon and grayling./ They made seines and dragnets,/ And caught fingerlings:/ Then, with grateful heart,/ They fed their mother."[62]

3.1.2.3 The legal status of the sworn brother (sworn friend): *anda,* and *anda-quda*

Fraternal alliances outside the family,[63] which in most cases were also sealed by a blood contract, were common on the Mongolian steppe. This alliance remained in effect for their descendants. In the SHM, we first read in Chapter Three that the head of the Kereyit clan, Ong Khan, helped Temüjin recover the kidnapped Börte, citing that his father, Yisügei Ba'atur, was his *anda*.[64] The brotherhood treaty his father had concluded with Ong Khan also obliged his son, Temüjin. It was expected that a needy anda would be taken in and properly cared for, so he even levied a special tax on his own tribe to ensure Ong Khan's maintenance: "Because Ong Qan had arrived starved and exhausted, Činggis Qa'an raised taxes for him, brought him into the camp and took care of him."[65] Later, he confirmed this bond with his own oath: "Formerly his good father had saved my people who had been lost like this; now, once more, his son, by sending his four steeds, has rescued my lost people for me. As to my repaying these favours, let only the protection of Heaven and Earth decide how, and in what measure!"[66]

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[54] SHM 43.
[55] SHM 66.
[56] This form of marriage was already recorded in archaic Rome as marriage was arranged by the parents of the consorts, often without the consent of the spouses. *See* CREMADES, A. A. D-B., Approaching the Legal Regime of Consensual Abduction Through History. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 78-87.
[57] SHM 118.
[58] SHM 254. *See also* 3. 1. 3.
[59] SHM 240.
[60] *See* 3. 1. 1. 2.
[61] SHM 43. However, when the head of the family died, they got rid of the unnecessary heir by claiming that *"the Adangqa Uriangqai man was constantly in the house and Je'üredei must be his son. They made him take the clan name Je'üreyit and he became the ancestor of the Je'üret."* SHM 44 (quasi *rebuttal of presumption of paternity*)
[62] SHM 75.
[63] DE LIMA, J. M. Y. F., 'Born by the Destiny of Heaven': gender Relations between the Mongols on the Secret History of the Mongols (c. XIII). In: *Chinggis Khaan Heritage & Culture*, Vol. 2, No. 3, 2023, p. 37-49.
[64] SHM 104.
[65] SHM 151.
[66] SHM 163.

The most famous sworn brotherhood, however, is certainly that of Temüjin and Jamuqa.[67] Jamuqa, a friend who was adopted as an anda in childhood, himself participated in the recovery of the kidnapped Börte. The two friends renewed their oath of brotherhood several times: "We learn that such is the rule by which sworn friends love each other. Now, renewing once more our oath of friendship, we shall love each other."[68]

In the steppe equestrian society, the contracting parties could confirm the concluded alliance not only by shedding blood but also by marriage, which provided a double guarantee. Both internal and external sources report a complex alliance system, a combination of sworn brothership and marriage, which was called the anda-quda relationship in Mongolian terminology. The earliest data come from the time of the empire unification wars at the end of the 12th century, and we also find data on its existence during the Mongol-origin Yuan dynasty (1271-1368). An example of this type of alliance in the SHM is the case of Yisügen Baatar and Dei Sečen (Börte's father). Yisügen calls his future co-father-in-law a *quda*, which in the Mongol interpretation shows that there was a close relationship between the two tribes - the Borjigin and the Onggirat - before. This is confirmed by the information that Genghis Khan confirmed the blood treaty with the leader of the Onggirats, Terge Emel, through a marriage relationship.[69] *Rashid al-Din* mentions[70] that Genghis Khan made a similar alliance with the leader of the Western Mongolian Oyirats, Qutuqa Beki. When Genghis Khan renewed the blood treaty that had once been concluded between his father and the Kereyit Ong Khan, and wanted to strengthen this close relationship with marriage, he therefore asked for the hand of Ong Khan's daughter, Ča'ur Beki, for his eldest son, Ĵoči, and offered his own daughter, Qojin Beki, for Ong Khan's son, Senggüm.[71] However, the Kereyits rejected this offer, and relations between the former allies deteriorated. In the early 13th century, during Genghis Khan's campaigns to unify the empire, he formed an alliance with the Öngüt (Ongud) ruler Alaquš Digit, who was granted the right to marry into the *Golden Horde*, the khanate. The Great Khan and the Öngüt ruler thus established an *anda-quda* relationship.[72] In Yuan-era inscriptions, numerous administrative leaders and chieftains erected monuments to themselves, immortalizing their privilege of establishing an *anda-quda* relationship with the Golden Horde.

3.1.2.4 Adoption

3.1.2.4.1 Adoption of a minor

The social sense of the Mongols is demonstrated by the fact that they took in found, orphaned children.[73] This is how the later chief judge of Tatar origin ended up with Genghis Khan's mother.[74] In addition to Šigi Qutuqu, she raised five other adopted children as her own: "Mother Hö'elün reared in her tent these four: the boy called Güčü found in the Merkit camp, the boy called Kököčü found in the Besüt camp among the Tayiči'ut, the boy called Šigi Qutuqu found in the Tatar camp, and the boy called Boro'ul found in the Jürkin camp."[75]

3.1.2.4.2 Father-son adoption between adults

Since none of Ong Khan's sons were suitable for rule, he adopted his son Temüjin as his son based on the sworn brotherhood treaty concluded with Yisügei Ba'atur: "Ong Qan and Činggis Qa'an met together in the Black Forest by the Tu'ula River and declared themselves father and son. The reason why they declared themselves father and son was because in early days Ong Qan had declared himself a sworn friend of Činggis Qa'an's father Yisügei Qan, and by virtue of this fact Činggis Qa'an said that Ong Qan was like a father to him. Such was the reason why they declared themselves father and son."[76] They also strengthened family ties through marriage, thus creating a blood bond between clans: "On top of affection let there be more affection! Činggis Qa'an thought; and requesting the younger sister of Senggüm, Ča'ur Beki, for his son Ĵoči he said, I shall give in exchange our daughter Qojin Beki to Senggüm's son Tusaqa."[77] Years later, Genghis Khan adopted the Uyghur (Uyiqur) leader Idu'út, and gave him his daughter, Al Altun, as his wife.[78]

3.1.3 Inheritance

In the absence of codified law, a particularly important element of customary law was the donatio mortis causa, the beneficiaries of which could not only be blood descendants: "Qabul Qa'an ruled over all the Mongols. After Qabul Qa'an, although he had seven sons, Ambaqai Qa'an, the son of Senggüm Bilge, became the ruler of all the Mongols by Qabul Qa'an's will."[79] However, when the heir named in the will is eliminated, his blood descendants take his place.[80]

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67 SHM 116-117.
68 SHM 117.
69 *Altan Tobcsi* (Golden History/Frame) *See* LUVSZANDAZAN, *Altan Tobcsi*. Höhhot, 1984, comment no. 81. 1.
70 AL DIN, R., *Jami – at tawarikh* (The Compendium of Chronicles) In: FAZLULLAH, R., (Ed.) *Compendium of Chronicles: A History of the Mongols*, Cambridge, 1998, p. 55.
71 SHM 165.
72 EGAMI, N., *Chapters of The Mongol Empire and Christendom*. Tokyo, 2000, p. 13.
73 The legal custom of supporting children who have left without parental care appeared in other tribal structured nations as well, eg. in the Illyrian Law where some norms were inherited from tribes and then some served to regulate relations between various tribes. See BELEGU, M. – RAHMANI, B., Marital and Inheritance Law from the Middle Ages to the Positive Law. From Scanderbeg Canon to Positive Law. In: *Journal on European History of Law,* Vol. 14, No. 1, 2023, p. 202-211.
74 SHM 135.
75 SHM 138.
76 SHM 164.
77 SHM 165 The marriages were only planned, but they did not come to fruition due to the resistance of the Kereyits.
78 SHM 235.
79 SHM 52.
80 SHM 53.

After Temüjin's father, Yisügei Ba'atur, left his son with his future wife's family, he was poisoned on his way home by Tatars who wanted to avenge the abduction of his wife. Yisügei Ba'atur said: "I feel sick within me. Who is at hand? When they told him that Mönglik, the son of Old Čaraqa of the Qongqotat, was close by, he called him, made him come and said to him, Mönglik my boy, I have young children. I left my son Temüjin to be a son-in-law and, as I was coming back, I was secretly harmed by Tatar people on the way. I feel sick within me. You take care of your younger brothers, the little ones that I leave behind, and of your widowed elder sister-inlaw. Go quickly and bring back my son Temüjin, Mönglik my boy! He spoke and passed away."[81] In the absence of widespread literacy, the nuncupative will was the common form of death provision at this time. If the heirs were minors, the custodian designation was an essential element.

According to Mongolian customary law, the youngest son took care of his parents, so he received the paternal share of the inheritance.[82] The youngest of Genghis Khan's brothers was called Otčigin. The name means *Fire Prince*, which itself referred to the boy's role in the family: he had to guard the family territory while his older brothers left. Genghis Khan's childhood friend, Jamuqa *anda*, mentioned this in the chronicle: "He is the youngest son of Mother Hö'elün. He is called Otčigin, the Easy-going. He is an early sleeper and a late riser (…)"[83] Of Genghis Khan's four sons, Tolui, the fourth and youngest, also received his father's inheritance, the territory of present-day Mongolia.[84]

Before Genghis Khan set out on a vengeful campaign against Sarta'uls in the Year of the Rabbit (1219),[85] his main wife, Yisügen Qatun, reminded him that his life was also finite, so it was time for him to dispose of his property by will: "Of your four sons, the heroes whom you have begotten, which one will you designate as your successor? I have given you this advice on what, thinking about it, we – the sons, younger brothers, the many common people and my poor self – understood to be an important question. Your order shall decide!"[86] The eldest son, Ĵoči, whose parentage was uncertain, as his mother, Börte, returned from the Merkits pregnant, was out of the question, despite Genghis Khan's protection of him and his declaration that he enjoyed the same rights as his other sons: "Thereupon, Činggis Qan said to Ča'adai, How can you speak thus about Ĵoči? Isn't Ĵoči the eldest of my sons? In future do not talk like that!"[87] Based on the above details, it can be stated that on the one hand, the acknowledged child has the same legal status as the bloodline in principle, but in practice this is not the case, since the goal is to keep the bloodline pure, and on the other hand - as can be confirmed by previous examples - not the oldest, but the most capable son was chosen in every case. This decision ensured the survival of the clan. The heirs made a provision on the expected inheritance based on this, and named Ögödei they deemed most suitable among themselves. According to the *Altan Tobchi* (Eng. *Golden Socket*) chronicle, compiled in the 17th century, Genghis Khan chose Ögedei as his successor because he was the most suitable to rule the empire.[88] Genghis Khan's brother, Tolui, immediately swore allegiance to the heir, thus recognizing the validity of the will.[89]

The wife's esteemed position is evidenced by the fact that she was entitled to inherit in her own right. His chief wife was even allowed to accompany Genghis Khan on his last campaign. When Genghis Khan died in 1227, the Year of the Pig, his widow received the largest share of the spoils of war: "After he had ascended to Heaven a great part of the Tang'ut people was given to Yisüi Qatun."[90]

Genghis Khan did name his successor, but – since the khan was elected by the Kurultai according to customary law – the validity of this part of his will required the resolution of the Great Kurultai, which elected the khan, held in the Year of the Rat, in 1228. Only then did the prince, previously appointed as heir, receive the inheritance.[91] Since Ögedei received the right to exercise the power of the Great Khan by the decision of the Khan-electing Kurultai, only after this did he have the right to create new laws and modify the rules established by his father in 1206.[92]

3.1.4 Naming rules

According to legend, when Genghis Khan was born in 1162, he was clutching a clot of blood the size of an ankle bone. Those around him interpreted this as a sign from heaven and predicted a bright future for the newborn. "Blood" soon added "iron" as well. The child's father, Yisügei Ba'atur, from the Kiyan clan of the Mongol Borjigin tribe, had just returned from a campaign with his Tatar captive, *Temüjin Üge*. It was customary among the Mongols to name a child after some notable event related to his birth. Thus, Yisügen's son was given the name of the Tatar captive, which is a modified form of the word *temür* meaning "iron", and in English means "blacksmith": "Then Yisügei Ba'atur captured the Tatars Temüjin Üge, Qori Buqa, and other

[81] SHM 68.
[82] SHM 242.
[83] SHM 195 *Otčigin* is the one who, on the orders of the Great Khan, breaks the spine of the rebellious shaman, *Teb Tenggeri*, during a wrestling match. SHM 246.
[84] SHM 242.
[85] 100 of Genghis Khan's envoys were killed by the Sarta'ul army before: SHM 254.
[86] SHM 254.
[87] SHM 255.
[88] LUVSZANDAZAN, *Altan Tobcsi*. Höhhot, 1984, comment no. 230.; BAWDEN, C. R., *The Mongol Chronicle Altan Tobči*: *Text, Translation and Critical Notes.* Wiesbaden, 1955.
[89] SHM 255.
[90] SHM 268.
[91] SHM 269 *See also* 3. 3. 1.
[92] SHM 270.

Tatars. At that time Lady Hö'elün was pregnant, and as she was staying at Deli'ün Boldaq by the Onan, it was right there that Činggis Qa'an was born. At the time of his birth he was born clutching in his right hand a clot of blood the size of a knucklebone. Because he was born when the Tatar Temüjin Üge had been brought captive, for this very reason they gave him the name Temüjin."[93] The child may have received this name because that Tatar was an excellent warrior.

3.1.5 Gift

One of the most important obligations of the contemporary Mongolian legal system was gift.[94] Gift-giving for political reasons arose between tribes. In cases of equal power, gift-giving was a mutual legal transaction, as a sign of alliance. In cases of shifted power, however, it was provided unilaterally, in order to win the goodwill of the other, as a kind of "booty", and symbolized the relationship of dependence.[95] The SHM records countless cases, from the gift of movable property[96] to the gift of a found, orphaned child[97] to ranks and privileges[98] granted by the khan, including the right to use pastures.[99]

3.1.6 Confirmation and security of contracts

In the absence of written documents, the parties authenticated or later confirmed the contracts with acts that were suitable for long-lasting memory in the minds of those present. Such were the blood contract,[100] the (horse)sacrifice,[101] the ceremonial wine drinking (toast),[102] and the solemn oath.[103]

If the blood contract was made between distant parties, the blood was captured in a small birch-bark casket and sent by messenger to the other party. This was also the case with Ong Khan, who broke his previous oath and, regretting it, confirmed his previous vow with a blood contract: "Oh! Sinful that I am!/ By abandoning my son/ I abandoned the norm;/ By parting from him/ I parted from my duty. Pained in his heart, Ong Qan said, Now, if I think evil when I see my son, let my blood be shed like this! And, taking the oath, he pricked the ball of his little finger with his arrow-notching knife, let the blood trickle and poured it into a small birch-bark casket. He sent it by the messenger saying, Give this to my son."[104] However, Genghis Khan did not accept the attempt of the treacherous Ong Khan. Since Itürgen, the envoy (guarantor), acted on behalf of the treacherous Ong Khan, he received the punishment that Ong Khan deserved for traitors according to customary law: "Not speaking to Itürgen, Činggis Qa'an said, Take him to Qasar; let Qasar decide how to deal with him! They took him to Qasar who, without saying a word to him, cut Itürgen down and cast away his body there and then."[105]

The ritualistic wine drinking was also a ceremonial form of confirming the conclusion of a treaty. In the Kurultai of 1206, Genghis Khan expressly provided that the official blessing ceremony - state (authority) "witness" - would be granted the rank of official blessing ceremony - in recognition of their merits - to Sorkan-shi and his sons, which state position would be hereditary: "Now, with my support, enjoy the privilege of being freemen, allowed to carry a quiver and drink the ceremonial wine!"[106]

3.2 Criminal law

3.2.1 Criminal conducts

3.2.1.1 Self-judgment, revenge, blood feud

The voluntary recovery of property taken by force, the spouse, and other assets, as well as self-justification and blood feuds, were accepted acts in the Mongolian legal system.[107] Failure to do so was considered cowardly and despicable behavior. Retaliation did not have to be proportional to the injury suffered, as its primary purpose was general and special prevention. The SHM lists numerous cases, including the one in which Ĵoči Darmala retaliated against Jamuqa's younger brother for kidnapping his stallion: "shot and killed Taičar with an arrow that split apart his spine, then took his horses and returned."[108] Cruel revenge was usually met with even more inhuman blood revenge, such as Jamuqa for the death of his younger brother, Taičar: "Jamuqa had the princes of the Činňs boiled alive in seventy cauldrons. Having cut off the head of Čaqa'an U'a of the Ne'üs, he dragged it away bound to the tail of his horse."[109] Genghis Khan's clan attacked the Tatar tribes as their enemies on several occasions, robbed them, massacred their people, or took them away as

[93] SHM 59.
[94] RÁCZ, A., A mongol társadalom és állam alapjai a XIII. században. In: *Dunakavics,* Vol. 8, No. 3, 2013, p. 11-30.
[95] MAUSS, M., Ajándékok és viszonzásuk. In: BOHANNAN, P. – GLAZER, M. (Eds.) *Mérföldkövek a kulturális antropológiában.* Budapest, 1997, p. 373.
[96] SHM 114, 211, 214, 234, 235.
[97] SHM 135, 137.
[98] SHM 134, 204, 205, 206, 207, 213, 2016, 218, 219, 220, 221, 222, 223, 224, 230, 231, 233, 234, 235.
[99] SHM 219. The owner of all the pastures of the empire was the Great Khan. /This tradition is still followed in Mongolia today, where the pastures are owned by the state./.
[100] SHM 178.
[101] SHM 141. This form of sacrifice was also practiced among the Hungarians, even after the adoption of Christianity. *See* DÖMÖTÖR, T., "áldozat" In: ORTUTAY, GY., (Ed.) *Magyar Néprajzi Lexikon.* Budapest, 1977.
[102] SHM 141, 189, 219. We also know from the Secret History of the Mongols that after the Kurultai ended, the participants drank wine (toast) together, thus sanctifying the resolutions. SHM 154; *See also* UCSIRALTU, *A hun nyelv szavai*. Budapest, 2008, p. 89.
[103] SHM 163.
[104] SHM 178.
[105] SHM 184.
[106] SHM 219.
[107] SHM 136.
[108] SHM 128.
[109] SHM 129.

slaves: "From olden days the Tatar people/ Have destroyed our fathers and forefathers;! To avenge our fathers and forefathers,/ And requite the wrong, for them/ We shall measure the Tatars against the linchpin of a cart,[110]/ And kill them to the last one,/ We shall utterly slay them./ The rest we shall enslave:! Some here, some there, dividing them among ourselves!"[111]

There were peoples who first surrendered to the Great Khan, then changed their minds later. Such were the Tang'uts, with whom Genghis Khan was particularly angry because they did not keep the promise he had made when they surrendered that they would provide the right wing of his army in the event of his going to war. Therefore, in the autumn of the Year of the Dog, in 1226, he set out with an army to avenge the breach of oath. He enslaved the young men of the conquered nation.[112] And when their oath-breaking khan, Burqan, appeared before him, he shamed him: "On that occasion, when Burqan paid homage, Činggis Qa'an felt revulsion within his heart. On the third day, Činggis Qa'an issued an order giving Iluqu Burqan the name Šidurqu. Being thus visited by Iluqu Burqan Šidurqu, Činggis Qa'an then ordered that Iluqu be put to death and that Tolun Čerbi seize and execute him with his own hands."[113]

3.2.1.2 Robbery and plundering

In addition to abduction of women,[114] the robbery of subjugated peoples was also accepted behavior: "On that occasion, Činggis Qa'an and Ong Qan plundered the Tatars and shared the booty, each taking his part; then they returned to their own encampments."[115]

3.2.2 Punishment

3.2.2.1 Scapegoat

It happened that instead of the guilty person who was distinguished or who was to be treated with special respect as a guest, a person of lower rank received the punishment. This was also the case with Šiki'ür, the cook: "As he was being thrashed, the steward Šiki'ür said, What sort of thing is it, your thrashing me like this, just because Yisügei Ba'atur and Nekün Taiši are dead? So he spoke and cried out loudly."[116]

On occasions when two tribes held a joint feast and one of the guests committed a crime, the enforcement of guest rights caused a problem. Instead of punishing the guilty person, the representatives of the two tribes, as the organizers of the feast, settled the matter between themselves, by wrestling.[117] During the Western Campaign, before the invasion of Hungary, Batu Khan and the future Great Khan, Güyük, had a quarrel because Batu, as the commander-in-chief of the army, drank from the cup first at the farewell banquet. Güyük, as the future heir to the throne, was offended by this and left the event without permission.[118] The dispute became so heated that Ögödei ordered his son and his army home in order to ensure the success of the campaign, and they returned home in the Year of the Rat, in 1240.[119]

3.2.2.2 Capital punishment

For the sake of prevention, the most common form of punishment among the steppe peoples was the capital punishment.[120] It was used as a form of blood feud,[121] but also for perjury, disloyalty, treason, and military crimes, such as refusing or disobeying orders. Hiding a fugitive was also considered treason.[122]

In the case of the more merciful (*privileged*) way of carrying out the death penalty, the blood of the condemned was not shed. However, if the gravity of the crime and the interest of prevention required it, blood was shed and the body remained unburied – in some cases, thrown directly into the garbage.[123] Sača and Taiču were both punished this way for breaking their oath: "Being so addressed, Sača and Taiču said, We did not keep to the words we spoke. Now make us comply with them! And, admitting their oath, they held out their necks to the sword. Making them to admit their oath and causing them to comply with their words, he executed them and cast off their bodies there and then."[124] Genghis Khan's childhood friend and anda, Jamuqa, also received a privileged death sentence for treason: "Because of this I was excelled by my sworn friend, whose destiny was ordained by Heaven. If you want to show favour to me, let me die swiftly and your heart will be at rest. And if you

[110] SHM 154. The basis for the revenge was that Genghis Khan's father was poisoned by the Tatars, and one of his ancestors was captured and killed by being impaled on a wooden donkey. Similar cases: SHM 240, 251, 256, 265-266.
[111] Only those taller than the"linchpin" would be killed. This meant that male children taller than the wheel of a chariot were slaughtered as potential enemies, while children younger than that were taken home and raised as their own. Girls were usually distributed among the victors as wives, or as concubines, or sometimes as servants. Genghis Khan himself had two Tatar wives.
[112] SHM 265-266.
[113] SHM 267.
[114] *See* 3.2.1.1.
[115] SHM 134 More: SHM 153, 154, 277, 274.
[116] SHM 130.
[117] SHM 131.
[118] SHM 275.
[119] AL DIN, R., *Jami – at tawarikh* (The Compendium of Chronicles) In: FAZLULLAH, R., (Ed.) *Compendium of Chronicles: A History of the Mongols*, Cambridge, 1998, p. 828.
[120] Provisions relating to death penalty, at least regarding the so-called common crimes, existed basically at the level of customary law in Hungary – as steppe nation of origin – as well even until the end of the eighteenth century. More: TÓTH, J. Z., The Death Penalty in Hungary during the Enlightenment and the Reform Era. In: *Journal on European History of Law*, Vol. 12, No. 1, 2021, p. 121.
[121] *See* 3.2.1.1.
[122] SHM 87. *See also* DASHTSEDEN, D., Nuuts tovchooni khuuli tsaazni zarim zuil. In: *Dornodakhin sudlal*, Vol. 2, No. 23, 1990, p. 42.
[123] SHM 140; 188.
[124] SHM 136. Another example: SHM 149.

condescend to have me put to death, let them kill me without shedding blood. When I lie dead, my bones buried in a high place, for ever and ever I shall protect you and be a blessing to the offspring of your offspring."[125] The same privileged death sentence was given to the shaman Teb Tenggeri, who had incited discord between Genghis Khan and his brother Qasar, and had humiliated the great khan's younger brother, Otčigin. His blood was not shed, but his spine was broken. Genghis Khan finally had a gray yurt erected over his body: "After they had covered the smoke-hole of the tent in which they had placed Teb Tenggeri, had blocked the door and put people to keep watch, on the third night at dusk Teb Tenggeri opened the smoke-hole of the tent and came out bodily through it."[126]

3.2.3 Humiliation

In the case of a minor breaking a given word, the community's disapproval was expressed by spitting in the face: "Ong Qan had them brought in fetters into his tent and said to them, What did we pledge to each other when we passed by the country of the Ui'ut and the Tang'ut? How could I think like you? So saying, spitting in their faces, he had them freed from their fetters. After they had been spat on by the Qan himself, the people who were in the tent all rose and spat on them."[127]

Humiliation could also be done through dishonor. This is what Genghis Khan did to the mother of the leader of the Naimans: "Činggis Qa'an had Tayang's mother Gürbesü brought to him and said to her, You used to say that the Mongols have a bad smell, didn't you? Why, then, did you come now? And Činggis Qa'an took her as wife."[128]

Another form of humiliation was when the despised person was not received in person and only spoken to through the closed walls of the yurt,[129] or given a derogatory name.[130] Fraudulent and misappropriate managers of public property became easily recognizable by having their noses cut off with a knife as punishment.[131]

3.2.4 Clemency of the Khan

Those who fought in enemy tribes also kept their oaths of allegiance to their own khan. Genghis Khan punished traitors, whether they betrayed him or the enemy leader, according to customary law, and pardoned those who fought against him who remained loyal to their own khan. This shows the "international" - beyond tribes, clans - scope of martial law among the steppe peoples of the time: "Činggis Qa'an approved Qadaq Ba'atur's words, saying, Is he not a true fighting man who says that he is unable to forsake his rightful lord and lets him escape, saving his life? He is a man worthy to be one's companion. And favouring him, he did not have him killed."[132] Similarly, Naya'a, who had previously been a man of the enemy Khan Tarqutai Kiriltuq, became his confidant, but did not betray him.[133] As a sign of his esteem, Genghis Khan later appointed him commander of the ten thousandth army of the Centre: "Then, because the reason why he could not make away with his rightful lord was the fact that he had been mindful of the great principle, I approved of his words and said, I shall entrust him with an important task. (…) Now, Naya'a will be in charge of the ten thousand of the centre."[134]

There was also a case where he married princesses of the conquered people to members of his own family, and therefore pardoned the fathers and brothers who thus became related: "Further, Činggis Qa'an ordered as follows: Ong Qan's younger brother Jaqa Gambu had two daughters. The elder one, Ibaqa Beki, Činggis Qa'an took for himself. The younger one, Sorqaqtani Beki, he gave to Tolui. For that reason, saying that Jaqa Gambu and the personal subjects belonging to him should be kept together and be regarded like the second shaft of a cart for himself, he showed favour to Jaqa Gambu and did not take his people away from him."[135]

In another place, the SHM mentions that, on the recommendation of his advisors, Genghis Khan exempted his three sons from punishment for violating the obligation to hand over war booty.[136]

3.2.5 Preliminary pardon – the privilege of the darkhans

Darkhans were granted a pardon in advance for nine of their future crimes: "(…) on account of your services, you shall not be punished for up to nine crimes."[137] Such a privilege was granted to Jelme, who was raised with Temüjin,[138] as well as to Boroqul, who earned this dignity by saving the lives of two of Genghis Khan's sons.[139]

3.3 Public law

The elements of public law are mostly the decisions of the khan-elector Kurultai of 1206. With the appointment of Šigi Qutuqu as chief judge and the writing down of the rules, the era of codified law began in the Great Mongol Empire.

[125] SHM 200-201.
[126] SHM 245-246.
[127] SHM 152.
[128] SHM 196.
[129] SHM 267 *See also* 3.2.1.1.
[130] SHM 267: Burqan was given the name *Šidurqu* (Eng. *Submissive*) by Genghis Khan.
[131] SHM 280 *See also* 3.3.2.
[132] SHM 185.
[133] SHM 149.
[134] SHM 220.
[135] SHM 186.
[136] SHM 263 *See also* 3.4.5.
[137] SHM 203.
[138] SHM 211.
[139] SHM 214 Mentioned also: SHM 219.

3.3.1 Democratic election of the Khan

The khan was elected by the heads of the clans in the Kurultai. Genghis Khan was elevated to the position of Great Khan in 1206.[140] In another place, SHM writes about this historical event: "And so, when the people of the felt-walled tents had been brought to allegiance, in the Year of the Tiger (1206) they all gathered at the source of the Onan River. They hoisted the white standard with nine tails and there they gave Činggis Qa'an the title of *qan*."[141]

The democratic moment is most clearly seen in the chronicle of the election of Ögödei Khan, who was not the eldest son of Genghis Khan, but was selected by his brothers as the most suitable among themselves, and who could not automatically assume the dignity of Great Khan upon his father's death in 1227, only following the decision of the Kurultai of 1228.[142] In the spirit of democracy, Ögödei Khan later gave an account to the Kurultai of four excellent and four sinful actions he had taken during his reign. He considered it an excellent decision to go on a campaign against the Jaqut (Yakut)[143] people and destroy them; to organize postal stations for the express traffic of couriers and to facilitate official matters; to order the digging of wells in the waterless areas, thus providing water and grass to the people of the empire; and to leave vanguards and governors with the people of the various cities and "causing them to rest/ Their feet upon the ground,/ Their hands upon the earth."[144] Among his misdeeds, he mentioned his addiction to alcohol first, then listening to women and having girls brought to him from the country of Otčigin; secretly killing Doqolqu, who risked his life in the service of Genghis Khan; and for violating natural law: "Further, being greedy and saying to myself, What if the wild animals born with their destiny ordained by Heaven and Earth go over to the territory of my brothers? I had fences and walls built of pounded earth to prevent the animals from straying. As I was thus confining them, I heard resentful words coming from my brothers. That, too, was a fault of mine."[145] The public accounting and self-evaluation held by the Ögödei Khan would undoubtedly have been highly unusual among 13th-century European rulers.

The SHM ends with Chapter Twelve and entry 282: "The writing of this book was completed at the time when the Great Assembly convened and when, in the Year of the Rat, in the month of the Roebuck, the Palaces were established at Dolo'an Boldaq of Köde'e Aral on the Kelüren River, between Šilginček and […]."[146] By specifying the exact date and place, the chronicler made the written record authentic. This moment marks the beginning of official writing, when legal facts were no longer formalized and certified by blood contracts, wine drinking ceremonies, or horse sacrifices, but rather were validated by the editor, similar to modern contracts.

3.3.2 Separation of powers

Legislative power was exercised by the Kurultai. Judicial power was separated from that of the Khan's in 1206. One of the most modern decisions of the 1206 Kurultai was the appointment of the literate Šigiken Qutuqu as chief judge and his assignment to record customary law in the *Blue Book*.[147]

When Genghis Khan's successor, Ögödei, became angry with his eldest son, Güyük, he decided on the matter of the decision-making body's jurisdiction, on the advice of his advisors. They acted on Genghis Khan's decree, which stated that field matters should be decided in the field (steppe), and family matters in the family: "Right! This is a field matter. They have said that it is Batu's concern. Let then Batu decide on Güyük and Harqasun. He sent them both to him, and said, Elder brother Ča'adai shall decide about Büri."[148]

In addition to the judicial power, the great khans established various state offices and authorities that operated in certain branches of the executive power. Such was the pasture supervision (*camp masters*) organized by the Ögödei: "Moreover, as there is nothing but wild animals in the Čöl country, Čanai and Ui'urtai, being put in charge of the campmasters, shall make them dig wells in the Čöl for people to live in this rather vast area, and they shall build brick walls around the wells to protect them from wild animals,"[149] however, the establishment of storehouses also proves this aspiration.[150] The organization of the postal service also shows the image of a modern, well-organized state.[151]

Fraudulent and inappropriate managers of public property received severe punishment: "If one causes even a piece of string to be lacking,/ He shall be guilty and liable/ To splitting in half along the top of the head;/ If one causes even a spoon-shaped spoke of a wheel to be lacking,/ He shall be guilty and liable/ To 'splitting in half along the nose."[152]

3.3.3 State benefits (bounty) for war widows and war orphans

The military nation successfully resolved the issue of caring for the relatives of those killed in wars. Widows and orphans received various privileges and contributions in an organized

[140] SHM 123.
[141] SHM 202 Temüjin became Genghis Khan (*Genghis* in Mongolian means *mighty, great, sea*) in 1189, when he was elected leader of the Khamag Mongol principality.
[142] SHM 269-270.
[143] The name refers to the Jin Dynasty that ruled Northern China.
[144] SHM 281.
[145] SHM 281.
[146] SHM 282.
[147] SHM 203.
[148] SHM 277.
[149] SHM 279.
[150] SHM 280.
[151] SHM 280.
[152] SHM 280.

manner, within the framework of the state: "Because Quyildar lost his life, Qadaq Ba'atur and one hundred Jirgin must serve Quyildar's wife and children. If boys are born to them, they must in turn serve Quyildar's descendants to the offspring of his offspring. If girls are born to them, their parents must not betroth them according to their own wishes, for their daughters must be servants and attend to Quyildar's wife and children. He gave this order favouring Qadaq Ba'atur. (…)On account of Quyildar's service, Quyildar's descendants to the offspring of his offspring shall receive the bounty granted to orphans."[153] Chapter Ten, which lists Genghis Khan's donations, also contains entries referring to war orphan care: "Further, Činggis Qa'an said to Čaqŕn Qo'a's son Narin To'oril, 'Your father Čaqŕn Qo'a was fighting zealously before me at the battle of Dalan Baljut when he was killed by Jamuqa. Now, To'oril, for your father's services you shall receive the bounty granted to orphans."[154]

3.3.4 Social law

The Great Khan also ensured that people who had become fugitives during the fighting became useful members of the army and received provisions: "Further, Činggis Qa'an made the shepherd Degei bring together the unregistered households and put him in charge of a thousand."[155] One of Ögödei's most important measures was to care for the poor. That is why he decided to impose a sheep tax to finance their assistance: "Sitting now on the throne made ready by Our father the Qa'an, so that people do not suffer, every year from these people one two-year-old sheep out of every flock shall be given as levy for Our soup. They shall also provide one sheep out of every hundred sheep and give it to the poor and needy within the same unit."[156]

Among the innovations of Ögödei Khan were the establishment of public warehouses, the drilling of public wells, and the distribution of water and campmasters to the population: "Conveying satins, gold and silver ingots, quivers, bows, breastplates, weapons and the land-tax grains into the storehouses, We shall have people guarding them: storemen and grainkeepers must be selected from different areas and made to guard the storehouses. And, dividing camps and waters, We shall give them to the people. If We select campmasters from the various units of a thousand to reside in the camps, that will surely be an appropriate measure."[157]

3.4 Martial law, combat operations process

3.4.1 Organization of the army

Genghis Khan modernized the Mongolian state organization after the 1206 Khanal Kurultai. As part of this, he weakened the tribal framework by separating the military and tribal leadership. He divided the conquered peoples into tens, centuries, thousands (regiments), and tens of thousands according to the already used ten-digit system.[158] According to the SHM, ninety-five regiments were created in 1206: "Excluding the People of the Forest, the commanders of a thousand of the Mongol people appointed by Činggis Qa'an were ninety-five."[159] Since military operations cannot be successful without a clear definition of the right to give orders and take action, the Great Khan appointed a specific person to lead each campaign in each case. After naming his heir, the commander became Ögödei accordingly.[160] Only very rarely, as a special favor of the ruler, could a tribe that had voluntarily surrendered be enlisted in the same military unit: "Because, from among the Sartaq people, Yalawači and Masqut were adept in the laws and customs of cities, Činggis Qa'an appointed them, with our resident commissioners, putting them in charge of the Kitat people."[161]

Following the election of Ögödei Khan, who succeeded Genghis Khan on the throne in 1228, on the advice of his brother, Ča'adai, decided that families should send their eldest sons to war: "If the eldest of the sons goes into the field, the army will be larger than before. If the troops who set forth are numerous, they shall go to fight looking superior and mighty."[162] This reformed army then maintained the empire, as the newly conquered peoples could be easily incorporated into this system.

3.4.2 Organization of the guard

The Great Khan attached great importance to his personal safety, since the leadership of the empire was concentrated in his hands. He therefore organized the formations of the quiver bearers and the guard with special attention.[163] It is recorded in Chapter Ten of the SHM that he rewarded them, bestowed upon them honorary titles, and then thanked them in verse for being placed on the throne and for being able to trust them.[164] Genghis Khan's personal bodyguard of ten thousand was selected from the fittest soldiers of the ninety-five regiments. The Great Khan also ensured that both he and his successors were obliged to provide for them.[165] The Great Khan defined the

[153] SHM 185.
[154] SHM 218.
[155] SHM 222.
[156] SHM 279.
[157] SHM 279 The campmasters (pasture supervision) functioned as a quasi-administrative authority. Its task was to ensure that the pastures owned by the Great Khan were properly used by those who had been granted the right to use them. See also: 3.1.6., 3.3.2. Dashtseden mentiones it also: DASHTSEDEN, D., Nuuts tovchooni khuuli tsaazni zarim zuil. In: *Dornodakhin sudlal*, Vol. 2, No. 23, 1990, p. 46.
[158] SHM 224.
[159] SHM 202.
[160] SHM 258. *See also* 3.1.3.
[161] SHM 263.
[162] SHM 270.
[163] SHM 225-229.
[164] SHM 230.
[165] SHM 231.

duties of the night guards in detail, and also stipulated that "(…) the chamberlains in charge of troops who transgress the order and, out of jealousy for the nightguards, send them out on campaign, shall be guilty and liable to punishment."[166] They were also exempted from military service, with the condition that they would only go to war if they had to defend him: "The reason why We say that they must not take the field separately and without Us, is because We say to Ourselves that they have already so many and quite distinct duties."[167]

The guards could decide on their own legal disputes with the involvement of the chief judge Šigi Qutuqu, and he appointed Dödei Čerbi as their commander in charge of personnel and ordered that his provisions be ensured: "Dödei Čerbi shall take up duty and be constantly present, at the rear of the Palace,/ Eating scraps of leftovers,/ Burning dried dung."[168]

After ascending the throne, Ögödei modified and modernized the service regulations created by his father for the quiver bearers and the guard. He appointed the person of the commander in charge of the staff, and also determined the types of severe punishments that could be imposed for military crimes. The right (scope) of military jurisdiction was taken over by the Great Khan.[169] Given that the Great Mongol Empire functioned as a predominantly military state, the centralization of military criminal justice and punishment became an essential means of maintaining a strong and effectively functioning army.

3.4.3 Combat procedure, tactical rules

3.4.3.1 Pretending to escape

The army received strict orders from the Khan, under penalty of beheading[170]: "If we overcome the enemy, we shall not stop for booty. When the victory is complete, that booty will surely be ours, and we will share it among ourselves. If we are forced by the enemy to retreat, let us turn back to the point where we began the attack. Those men who do not turn back to the point where we began the attack shall be cut down!"[171] The following entry also refers to this tactical element: "Every time they turn about,/ Their battle array holds;/ Every time they wheel round, too,/ Their ranks hold."[172]

3.4.3.2 Misleading the enemy

Their well-known tactic was to mislead the enemy. One example of this is the method used during the 1204 attack on the Naimans, in which each night guard lit five campfires to deceive the enemy about the size of their force.[173] It was typical of the Mongols that they did not advance with their armies on the road, but approached the chosen target from a direction unexpected by the enemy, breaking through the forest with axes. This is what Dörbei Doqšin did during the attack on the Tumats: "Dörbei set the army in order and beforehand made a decoy manoeuvre along the paths, trails and passes where the army was expected to advance and which enemy patrols would keep under surveillance. Then, going by paths trodden by the red bull (…) Along the paths trodden by the red bull he had them chop, hew and saw the trees that stood in the way, thus making a road for the army to pass. They went up the mountain and, as though falling on to the smoke-hole of the tents of the Tumat people who were busy feasting, they took them by surprise and plundered them."[174]

They also used military tactics when attacking the Kitat people in 1200: "We shall entice them and get them to move and come after us. Then, let us put them to the test!"[175]

3.4.4 Capitulation

Before attacking each tribe, envoys were sent in all cases where the attack was not for revenge. If the tribe surrendered voluntarily, they did not launch an attack against them, but appointed a governor to lead them: "As they had submitted peacefully, Činggis Qa'an did not touch anything of theirs."[176] In several cases, they also established family ties with the subjugated tribes, through marriage, to ensure that they retained power: "Because he had not opposed resistance, Činggis Qa'an showed favour to Arslan and said, I shall give him a daughter in marriage."[177] The leader of the Uyghurs, Idu'út, also sur-

[166] SHM 233.
[167] SHM 233.
[168] SHM 234.
[169] SHM 278.
[170] *See* 3.2.2.
[171] SHM 153. This tactic was also used in the territory of the Kingdom of Hungary in 1241, when they feigned flight, then turned back and attacked the pursuing Hungarian army. This method of warfare had previously been used by the conquering Hungarians. In *Regino*'s work at year 889 it is mentioned that the Hungarians avoided close combat, were not good at city sieges, and were masters of feigned flight.: *"fugam simulant… paulo post pugnam ex fuga repetunt"* REGINO, *Monumenta Germaniae Historica Scriptores in usum scholarum* 7. ad annum 889, Hannover, 1890, p. 132-133. [online]. Available at: https://archive.org/details/sim_monumenta-germaniae-historica_1890/page/172/mode/2up. [Accessed: Nov. 11, 2024].
[172] SHM 170.
[173] SHM 191-193.
[174] SHM 240. This tactic was also used during their invasion of Europe. In the early centuries of the Kingdom of Hungary, but also before that in the 10th century, the grassland was an element of the defensive strategy. The primary task of the grassland, which represented the Carpathians and the area surrounding them from the outside, was to stop and slow down the movement of the armed enemy. Its essence was that the passes leading through the mountains were narrowed in such a way that a larger cavalry force could only pass through with difficulty. Upon hearing of the Mongols' arrival, King Béla IV sent himself, the palatine, Dénes of Tomaj, to defend the Verecke Pass. Due to the narrowing of the pass, a major attack would have required extensive preparations, but during the Mongol invasion of 1241, no one could resist the enemy. It is said that forty thousand axemen were ahead of them, who removed all obstacles from the armies. *See* GAÁL, M. *Ezeréves multunkból. Történetek, jellemképek és rajzok.* Budapest, 1913, p. 38.
[175] SHM 247.
[176] SHM 176. Another example: SHM 182.
[177] SHM 235.

rendered, and Genghis Khan adopted him as his fifth son, and as a token of this, he gave him his daughter, Al Altun, as his wife.[178] The submissive khans offered not only their daughters, but also their sons to the victorious Great Khan: "After the Altan Qan had entered Namging, he submitted himself in person and, making obeisance, sent his son called Tenggeri, with a hundred companions, to Činggis Qa'an to serve as a dayguard and hostage."[179]

3.4.5 Booty

The spoils of war belonged to the khan. He was the one who distributed a share of it after victorious campaigns: "When the Mongols subjugated the Kereyit people, they distributed them among each other so that nobody went short. They distributed the Tümen Tübe'en and they all took of them until they had plenty."[180] Those generals who did not deliver all the spoils to the Great Khan were subject to military punishment according to customary law. After the conquest and plunder of Jungdu, the generals broke their oath of allegiance, with only Šigi Qutuqu refusing to share in the spoils due to the Khan: "Činggis Qa'an then mightily rebuked Önggür and Arqai. As for Šigi Qutuqu, he greatly favoured him, saying, You, Šigi Qutuqu, have been mindful of the great norm concerning one's obligations to the qan."[181]

Even the Great Khan's own sons were guilty of failing to hand over the booty. After the capture of the city of Örünggeči (Ürünggeči) princes Ĵoči, Ča'adai and Ögödei divided the booty among themselves, violating the relevant rules of military law. Genghis Khan was prepared to punish his own sons accordingly, but his advisors, including the chief judge Šigi Qutuqu, begged him to pardon them.[182]

4. Conclusion: Legal History Lessons from *The Secret History of the Mongols*

A detailed analysis of SHM from a legal historical perspective reveals that Genghis Khan and his successor, Ögödei, consciously built an empire. One after another, they systematically conquered the surrounding tribes, and then tried to subjugate the widest possible geographical area. Before attacking a nation, they always sent envoys to them, as they did not want to unnecessarily risk their own military strength. They only went to war with those peoples who killed their envoys or who resisted: they subjugated them by force, slaughtered their leaders and nobles, and took the common people with them as slaves. They did not attack the capitulating and subjugating tribes, but rather made them their allies through various family law means: through marriage; adoption as sworn brothers (*anda*); or a combination of this and marriage (*anda-quda*); and adoption as father-son. Loyal governors who understood the local customs and language were appointed to lead the conquered tribes. A military state was built. In particular, the army was strengthened and organized, martial law and military criminal law were regulated in writing, and special service regulations were created for quiver bearers and the guard; social benefits were provided for war widows and war orphans; a postal service was established to speed up the transfer of information.

The basis of the state was the organization of the legal system, insofar as customary law was consistently enforced in all branches of law; agreements, quasi-"contracts" were bound by formalities, such as: blood contracts, horse sacrifices and wine drinking (toast), oaths and votive gifts; the khans did not decide alone, but employed advisors who were selected with good sense; the literate Šigi Qutuqu was appointed by Genghis Khan as the chief judge and entrusted with the management of the *Blue Book*, thus separating the judicial power, and the written recording and compilation of customary law began; the foundations of legal and official writing were created, and the codification of the decisions of the Kurultai began; rules of competence and jurisdiction were determined in certain areas of the judiciary; strict punishments were imposed in the interests of general and special prevention, thus ensuring unconditional legal justice. The throne was not automatically inherited. The Great Khan designated his son (not necessarily the eldest) during his lifetime, but the khan-elector Kurultai decided on his person by voting. The Great Khan reported on his actions to the Kurultai. Officials and offices ensured the functioning of the partially separated executive power. Fraudulent and misappropriate managers of public property and embezzlers were severely punished. Welfare measures were introduced to address social inequalities. In particular: Ögödei Khan introduced a sheep tax for the benefit of the poor; the khans granted grazing rights; Ögödei Khan placed the legal use of pastures under the control of the campmasters ("pasture supervision"), as a quasi-administrative authority; Ögödei Khan established public warehouses; and also Ögödei Khan dug public wells.

The source analysis shows that the analyzed epic work provides useful legal historical contributions regarding the customary law of the Great Mongol Empire and the transformation of its legal system, therefore the research hypothesis proved to be correct.

[178] SHM 238 *See also* 3.1.2.4.2., SHM 248, 249.
[179] SHM 253.
[180] SHM 187.
[181] SHM 252.
[182] SHM 260.

The Development and Spread of Different Types of Constitutional Courts

*Csaba Cservák**

Abstract

In international comparison, two basic constitutional models are recognized. In one model, traditional courts – headed by the Supreme Court – compare individual legal norms with constitutional standards, and ultimately overturn any conflicting statues. The other model involves the establishment of a separate, specialized body to review legal acts and statutes for constitutionality. The third type can be described as a mixed system. The so-called «school of thought» models influenced fundamental rights protection systems worldwide. From the 1960 s onward, the German centralized constitutional court and the US Federal Supreme Court, which became highly influential in legal and political spheres, served as benchmarks for many countries. After the collapse of the socialist system in Central Europe, despite the American intellectual influence, almost all countries established centralized constitutional courts.

Keywords: *constitutional courts; fundamental rights; decentralized constitutional courts; centralized model; democratic transition; Central Europe; Hungarian Constitution.*

1. Preface

One of the most significant achievements of modern European constitutionalism and the rule of law, and a defining characteristic thereof, is the constitutional review of legislation. This mechanism, essentially a last resort (ultima ratio) in the form of constitutional adjudication, is now widely considered a core function of state power in modern democratic states.[1] The question "What is a Constitutional Court?" may seem obvious to many. In general terms, it can be described as a body that reviews legal norms and state legislation for constitutionality.[2]

In international comparison, two basic constitutional models are recognized. In one model, traditional courts – headed by the Supreme Court – compare individual legal norms with constitutional standards, and ultimately overturn any conflicting statues. Thus, in this system, practically all courts engage in constitutional review, but due to appeals and legal remedies, the Supreme Court serves as the authoritative and principal body for interpreting the Constitution. This system of constitutional review is therefore termed "decentralized".

The other model involves the establishment of a separate, specialized body to review legal acts and statutes for constitutionality. (It is only in this latter model that the term "constitutional court" can be used literally and in its classical sense.) Naturally, these bodies may possess other areas of authority beyond constitutional review. Within the centralized model, a subtype can be identified where the specialized body has the power to adjudicate constitutional complaints.

The third type can be described as a mixed system. In this model, ordinary courts also have the power to review the constitutionality of legislation, but a central body with specific constitutional review functions also exists. The boundaries of this category are somewhat fluid, but Portugal, Brazil, Greece and Switzerland are the most likely examples. (The Costa Rican model, which will be analysed later, also falls close to this category.)

The United Kingdom, the United States, Australia, Canada, Denmark, Norway, Sweden, and Japan do not have separate, classical constitutional courts. A unique feature is Article 120 of the Dutch Constitution: courts – and thus there is no separate constitutional court – do not rule on the constitutionality of legislation. (The current Dutch constitution, which assumed its most important modern form in 1983, reflects this principle.)

Constitutional law literature generally traces the development of constitutional review of legislation to two key sources: the landmark US Supreme Court case *Marbury v. Madison*, and the work of Hans Kelsen, particularly his development of the *Sufenbau* theory and his role in drafting the Austrian Federal Constitution of 1920. While both sources are subject to historical and cultural interpretations – which warrant careful consid-

* Dr. Csaba Cservák, PhD, Professor, Head of the Department of Constitutional Law and Ecclesiastical Law, Károli Gáspár University of the Reformed Church in Hungary, Budapest, Hungary, email: cservak.csaba@kre.hu / ORCID 0000-0003-3701-9840.

1 Vid. BOTERO-BERNAL, A., Historical Notes on the Constitution and Judges in Colombia in the 19th Century. In: *Journal on European History of Law*, Vol. 15, No. 2, 2024, p. 77; and LUKÁCSI, D. Cs., *Közhatalmi egyensúly. Magyarország államhatalmi alaprendjének jogtudományi értékelése*. PhD Thesis, Budapest, 2024, p. 72-84 and 103.

2 Vid. KILÉNYI, G., Az alkotmánybíróság helye az állami szervek rendszerében. In: KILÉNYI, G. (ed.), *Alkotmánybíráskodás*. Budapest, 1993, p. 9-61.

eration, if only for the sake of credibility – they can be regarded as the legal-historical origins of constitutional jurisprudence.[3]

2. The Emergence of Decentralised Constitutionalism *(Marbury v. Madison)*

The notion that legislation should not be arbitrary and should meet certain accountable societal requirements has a long history. *Marbury v. Madison* being the first widely known case of a law being declared invalid based on constitutional principles. Sir Edward Coke, as Chief Justice of England's Court of Common Pleas, declared in *Bonham's case* (1610) that *"when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void"*.[4]

It is important to emphasize that, at that time, constitutional review of legislation was not yet institutionalised in England,[5] and Coke himself later recanted this view. Nevertheless, the idea had a significant impact on Anglo-Saxon – and consequently American – legal thinking over time. For example, in 1761, James Otis, a prominent figure of the North American revolutionary period, argued in *Writs of Assistance*, drawing on the principle from *Bonham's Case*,[6] that laws contrary to the Constitution and natural equity were void and should be disregarded.[7]

These two cases alone demonstrate that judicial review did not emerge from a vacuum; it had ideological and historical antecedents. However, *Marbury v. Madison* can be considered as a milestone in the institutionalisation of constitutional review at the federal level.[8]

Beyond the ideological developments, a concrete fact of constitutional law and a specific political situation (one might say a crisis) were necessary for judicial review to be established as a constitutional power.

(1) The constitutional fact in question is set forth in Article VI of the United States Constitution*: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.*" This provision unequivocally establishes the supremacy of the Constitution, which judges are bound to uphold.

(2) In 1801, the Democratic-Republican Party, led by Thomas Jefferson, won a landslide election, and Federalist President John Adams had to hand over the administration to the new leadership. Before the transition, however, the still Federalist-controlled Congress created 16 new circuit courts in 1801, and President Adams appointed members of his own party (the "midnight judges") to these positions in the final hours of his presidency. Many of these appointments, though signed and sealed by then-Secretary of State John Marshal, were not delivered. Since the incoming President had forbidden the delivery of these appointments (the new Secretary of State was James Madison), the judges concerned were not allowed to take office.

William Marbury, one of the "midnight judges", filed a suit in the US Supreme Court seeking a writ of mandamus, with John Marshall, now Chief Justice, presiding. This presented a significant political dilemma for Marshall. If he ruled in Marbury's favour, Jefferson would likely ignore the ruling, thus undermining the Court's authority. Conversely, if he ruled in Jefferson's favour, it would appear as though the judiciary had capitulated to the executive branch.

Chief Justice Marshal, despite a potential conflict of interest due to his prior involvement in this matter, ruled in 1803 that the statute granting the Supreme Court original, rather than appellate, jurisdiction over writs of mandamus was unconstitutional (Article III. Section 2.), He added, *"Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument."*[9] Although the decision formally favoured Jefferson, it also affirmed the authority of the judiciary and institutionalised the power of judicial review.[10]

While the institution of judicial review was quickly consolidated, but, because this power is always tied to specific litigation (*erga inter pares*), its ability to generate decisions of general application (*erga omnes*) is limited.[11]

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[3] BOTERO-BERNAL, A., p. 78.

[4] Thomas Bonham v College of Physicians (1610) 8 Co Rep 114.
Thomas Bonham, a graduate of St John's College, Cambridge, began practicing medicine in London. However, to do so legally, he needed a licence from the College of Physicians in London, which he was denied. Continuing to practice medicine without explicit prohibition, he was fined and imprisoned by the College. Bonham was granted habeas corpus. The judgment in the case distinguished between practicing without a licence (punishable by a fine) and endangering patients (punishable by imprisonment), noting that Bonham had committed only the former, meaning the College had no right to imprison him. The judgement also pointed out that because the College was both the accuser, judge, and beneficiary of the situation (*nemo iudex in sua causa*), by retaining the fine, the law conferring jurisdiction upon it was contrary to common law.
Vid. KOVÁCS, V., Egy jogász, aki nyomot hagyott. Edward Coke a rule of law-ról, a bírói függetlenségről és a parlamenti szabadságjogokról. In: CHRONOWSKI, N. (et al.) (ed.), *A szabadságszerető embernek. Liber Amicorum, István Kukorelli*. Budapest, 2017, p. 269-270.

[5] MANHERTZ, T. I., *Alkotmánybírósági hatáskörök jogösszehasonlító vizsgálata*. PhD Thesis, Budapest, 2021, p. 14.

[6] The „writ of assistance" was a general warrant issued by the British Court of Exchequer under an act of Charles II, empowering customs officers, with local law enforcement support, to search anything, anywhere, at any time, without any reasonable suspicion. See more SMITH, M. H., *The Writs os Assistance Case*. Berkeley and Los Angeles – London, 1978, Chapter 1-3.

[7] Ibid.

[8] GÁRDOS-OROSZ, F., Alkotmánybíróság. In: JAKAB, A. (et al.) (ed.), *Internetes Jogtudományi Enciklopédia*. 2020, p. 4. [12], Available at: http://ijoten.hu/szocikk/alkotmanybirosag [Accessed 27 January 2025]; and MANHERTZ, T. I., p. 16.

[9] MARBURY v. MADISON, 5 U.S. 137 (1803).

[10] LUKÁCSI, D. Cs., p. 75-76.

[11] BOTER-BERNAL, A., p. 82.

3. The Emergence of Centralised Constitutionalism (Kelsen)

On the European continent, the first institutionalised form of constitutional review appeared much later and in a different form than in the US. While in the US, constitutional adjudication was part of the judicial function, in Europe it emerged as a separate, specialized branch of government in the form of a centralized constitutional court.

Hans Kelsen's work is central to this development.[12] It is wort noting, that even before Kelsen, Lajos Kossuth anticipated the concept of centralised constitutionalism.[13] His ideas included a "guardian of the constitution" (*„Alkotmány Őr szék"*), a body that would review laws for constitutionality before promulgation and determine their validity. *"No law shall be promulgated without a declaration by this high judicial authority that there is nothing in it which is contrary to the constitution."* Members would be elected by the upper house of the legislature (proposed name: Senate). In essence, he envisioned a centralised constitutional court with an *ex ante* review procedure, which would have been automatic.[14]

Following the Austro-Hungarian Compromise of 1867, Hungary introduced several reforms that contributed to the development of the bourgeois state model. Some of these remain in effect today, such as the oversight of the rule of law in the counties.[15] These reforms could have laid the groundwork for the introduction of constitutionalism during the Dual Monarchy. The historical constitution held significant importance in Hungary.[16] It is therefore important to note that Kossuth's proposal was never adopted. While the concept of a "guardian of the constitution" never entered the Hungarian legal system, the underlying idea has remained influential in Hungarian public thinking. Often, the moral binding force is not primarily based on the place of the norm of conduct in the legal hierarchy, but rather on the authority of the person who established it.[17]

On the one hand, Kelsen was personally involved in drafting the chapter on the constitutional court in the 1920 Austrian Constitution.[18] On the other hand, the concept itself is based on his and Adolf J. Merkl's Stufenbau theory ("stepladder theory").[19] In Kelsen's view, the purpose of constitutional adjudication –a necessary and indispensable element of constitutional democracies[20] – was not primarily to enforce constitutionalism in specific cases but rather to protect the integrity of the entire legal system. Consequently, Kelsen advocated for the creation of an autonomous branch of government, separate from the judiciary, rather than incorporating it as part of the judicial system (the so-called centralized model).[21] It should be added that, in the German-Austrian understanding of the separation of powers, the idea of judge overruling or disregarding valid legislation was inconceivable.[22]

It is also worth noting that Kelsen was initially hesitant about the idea of a constitutional court, fearing that it could easily become a "political court". However, he eventually embraced the concept, developed its theoretical foundations, and gave it legal form.[23]

In Czechoslovakia, the constitution and related legislation established a centralized constitutional court in 1920, with its inaugural session taking place in 1921. (Although some have argued that the Brno school of normative jurisprudence played a significant role in the establishment of the Czechoslovak Constitutional Court, this view is questionable.)

It consisted of seven members: two delegated by the Supreme Administrative Court, two by the Supreme Court from among its own members, and three, including the President, appointed by the President of the Republic.[24] The Constitutional Court served two ten-year terms. During the "protectorate", it, of course, ceased to function.[25] Similarly, constitutionalism was suppressed in the Slovak "successor" state.[26] While *the Austrian Constitutional Court predated the Czechoslovak one, it was the Czecho-*

[12] An important early contribution to the debate on constitutional adjudication was Georg Jellinek's pioneering 1885 work, Ein Verfassungsgerichtshof für Österreich, in which he argued that anyone seeking to establish the rule of law must first determine how to constrain a parliament that, in theory, can legislate without limit. See JELLINEK, G., *Ein Verfassungsgerichtshof für Österreich.* Wien, 1885.

[13] PACZOLAY, P., Hans Kelsen és az alkotmánybíráskodás európai modelljének fejlődése. In: CS. KISS, L. (ed.), *Hans Kelsen jogtudománya*. Budapest, 2007, p. 447-448.

[14] KOSSUTH, L., *Javaslat Magyar Ország jövő politicai szerveztét illetőleg – tekintettel a nemzetiségi kérdés megoldására*. Budapest, 1994, p. 29-30.

[15] VARGA, N., Administrative Reforms in the Hungarian Municipalities after the Austro-Hungarian Compromise: The Introduction of the Office of Lord Lieutenant and the Applicable Rules in Hungary. In: *Journal on European History of Law*, Vol. 15, No. 2, 2024, p. 153-160.

[16] CSERVÁK, Cs., The Constitutional Development of Transylvania. In: *Journal on European History of Law*, Vol. 14, No. 2, 2023, p. 97.

[17] ARATÓ, B., The Historical Roots of Family Businesses, the Entail and the Unification of Wealth. In: *Journal on European History of Law*, Vol. 14, No. 2, 2023, p. 143.

[18] HALMAI, G., Hans Kelsen és a magyar Alkotmánybíróság. In: *Világosság*, Vol. 46, No. 11, 2005, p. 3.

[19] The theory is that the legal system is a hierarchical system of different and varying levels of legal norms, based on a so-called axiomatic Grundnorm. In this system, the validity of each norm is directly based on the norm at the highest level of the hierarchy, ultimately the basic norm, i.e. the constitution in its substantive sense. LUKÁCSI, D. CS., p. 78-79.

[20] GÁRDOS-OROSZ, F., p. 5. [19]

[21] LUKÁCSI, D. Cs., p. 79.

[22] GÁRDOS-OROSZ, F., p. 8. [35]

[23] HALMAI, G., p. 3-4.

[24] HALÁSZ, I., Az „adventi bíróság" „pünkösdi bíráskodása". Az első csehszlovák alkotmánybíróság összetétele és működési sajátosságai (1920-1939). In: *Közjogi szemle*, Vol. 12, No. 1, 2019, p. 36-37.

[25] Vid. TAUCHEN, J., Das Handelsrecht und seine Entwicklung im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, Vol. 12, No. 1, 2021, p. 12-27.

[26] Vid. GAJARSKÝ, A., Enabling Powers of the Government of the First Slovak Republic from the Perspective of the Constitutional War Practice of 1939–1945. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 59-69.

slovak that first formally established the framework for constitutional jurisdiction.

Just as in the judiciary, women were underrepresented in the constitutional courts in the early 1900s.[27] Their representation increased slightly later.

The most important power of the Austrian Constitutional Court is the review of the constitutionality of laws. For provincial laws, this review initiatied by the federal government; for federal laws, by any of the provincial governments. The Court can also intiate review *ex officio* if the law in question forms the basis of one of its decisions [Article 140, original (1)]. The Federal Chancellor or the relevant provincial governor is than obligated to promptly announce repeal without delay [Article 140. §]. In 1929, the Austrian constitutional legislator also allowed the Supreme Court *(Oberster Gerichtshof)* and the Administrative Court *(Verwaltungsgerichtshof)* to initiate a constitutional review if they found that the law underlying their decision to be unconstitutional [§ 140, amended (1)]. *Actio popularis* was considered during the preparatory phase, but was ultimately rejected.[28] Finally, it is important to note that the Austrian model excludes the possibility of reviewing the constitutionality of court judgments or administrative decisions, i.e. there is no possibility of a constitutional complaint to the Constitutional Court. *The institution of a genuine constitutional complaint was first established in Germany by the 1949 Bonn Basic Law [Article 93(1)(4)].*

While the creation of the constitutional court as an independent branch of government is not solely attributable to Kelsen, and while his theory of integrity is not without its critics[29], he can still be considered the forefather of centralised constitutionalism.[30]

Constitutionalism spread across continental Europe in several waves, primarily after World War II. The devastating nature of the war, and especially in Eastern Europe, liberation from dictatorships, were significant contributing factors.[31] It is crucial to emphasize that the American and "Celtic" models are just that – models –, and the actual implementations are adapted to the specific socio-political and historical circumstances of each state. A prime example is the Constitutional Council (*Conseil Constitutionnel*) of France, a special constitutional court established by the Constitution of the Fifth Republic in 1958, which initially had constitutional review powers only for the *ex ante* control of legislation.[32]

The Basic Law, adopted in Bonn in 1949, established one of the strongest constitutional courts in the world. The German Federal Constitutional Court served as a model for the Hungarian Constitutional Court.[33] Its jurisdiction is quite broad in international comparison. Germany is the origin of the true constitutional complaint, recently introduced in Hungary. In addition to the powers similar to those in Hungary, the German court also has the unique power of electoral review. (It should also be mentioned that constitutional courts operate at the member state level in Germany as well.)

The German Federal Constitutional Court began operating in 1951. By 1999, it had decided over 100,000 cases, 96% of which were individual constitutional complaints.[34] A particularly important power of the German court is its ability to issue temporary injunctions in urgent situations, effectively creating interim legal norms.[35] This represents a positive legislative power, contrasting with he traditionally negative legislative competence of constitutional courts.

Constitutional complaints can be lodged against specific judicial decisions or statutes. In the former case, all other remedies must be filed within one month. In the latter case, the complaint may be filed within one year of the law comming into effect.[36] The Federal Constitutional Court can also engage in "constitutionally conforming interpretation", determining the correct meaning of a legal norm based on constitutional principles.[37]

4. The Worldwide Expansion of the Main Constitutional Court Models

The so-called "school of thought" models influenced fundamental rights protection systems worldwide. From the 1960 s onward, the German centralized constitutional court and the US Federal Supreme Court, which became highly influential in legal and political spheres, served as benchmarks for many countries. Critics argue that these courts have significantly reshaped public law systems structured as political democracies, enabling governance occasionally contrary to the will of the electorate and allowing former elites to maintain influence without resorting to any coup d'état or constitutional coup.[38]

According to critics, several European bodies adopted the German constitutional court's approach of departing from the written constitution and relying on its decision-making style,

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[27] Vid. SCHNEIDER, G., Women as Judges and Public Prosecutors in Austria: A Historical Overview. In: *Journal on European History of Law*, Vol. 14, No. 2, 2023, p. 2-11 and STAUDIGL-CIECHOWICZ, K., The Long Struggle to Open Austria's Law Faculties to Women. From the First Woman Doctor of Law to the First Female Law Professor. In: *Journal on European History of Law*, Vol. 13, No. 2, 2022, p. 12-23.

[28] HALMAI, G., p. 3-5.

[29] RAZ, J., *The Authority of Law. Essays on Law and Morality.* Oxford, 1979, p. 122-143.

[30] HALMAI, G., p. 3.

[31] MANHERTZ, T. I., p. 26.; GÁRDOS-OROSZ, F., p. 7. [29]-[32].

[32] POLLÁK, K., *Franciaország közigazgatása, közigazgatási eljárásjoga*. Budapest, 2023, p. 15-17.

[33] In contrast with the Austrian model – as generally regarded - the first centralised Constitutional Court, many see the origin of the institution in the Paulskirche court, set up according to the Constitution adopted in 1848. ÁDÁM, A., *Alkotmányi értékek és alkotmánybíráskodás*. Budapest, 1998, p. 185.

[34] LEGÉNY, K., Az alkotmánybíráskodás modelljei. In: TÓTH, J. – LEGÉNY, K. (eds.*), Összehasonlító alkotmányjog*. Budapest, 2006, p. 225.

[35] ÁDÁM, A., p. 188.

[36] Ibid.

[37] Ibid, p. 185.

[38] Vid. POKOL, B., Jurisztokrácia – a kezdetek. In: Smuk Péter (et al.) (ed.), *Gubernatio, constitutio, communitas – ünnepi írások a 65 éves Stumpf István tiszteletére*. Budapest, 2022, p. 327-334.

which tended to be based on its own precedents. The Spanish constitutional court, modelled on the German one, even surpassed the activism of its predecessor.[39]

Ran Hirschl argues that similar developments have occurred in South Africa, Israel, New Zealand and Canada. As a result, political parties that held a majority in parliament, perceiving the growing influence of opposing political forces with a strong chance of electoral victory, transferred their parliamentary supremacy to chief justices who shared their political values. This manoeuvre was often presented to the public as prioritizing human rights and individual constitutional rights, with the judiciary assuming ultimate authority over constitutional interpretation. A comprehensive analysis of this legal theory is beyond the scope of our legal history, but it should be noted that, in the view of the writer of these lines, this criticism is valid only if the parliamentary majority, under an absolute democratic electoral system, genuinely represents the will of an absolute majority of the electorate.

It is worth noting that in the case of the new South African political system of the early 1990s, constitutionalists, relying on courts representing the values of the white minority as opposed to the vastly larger black majority electorate, created a very broadly based constitutional court, seemingly to counterbalance future electoral results. This body adopted almost all the dogmas and theoretical deductions from constitutional court practices that had developed throughout legal history. Interestingly, they drew from the previous decisions and reasoning techniques of both the US Supreme Court and the German Federal Constitutional Court.[40]

In Asia, similar developments occurred early on. In India, for example, in the late 1950 s, the intelligentsia of the then opposition began to draw on the activist constitutionalist trend then emerging in the US. Often, despite electoral results, political forces in the minority remained dominant in state decision-making, effectively circumventing the will of the electorate.[41]

It is noteworthy that from the late 1980s onwards, the constitutional courts of first Taiwan, then South Korea and Thailand, have used the German centralized constitutional adjudication model and decision-making style as their benchmark. Often, their reasoning is characterized by decision-making formulas and reasoning techniques that depart from the written constitution. In Thailand in particular, they have been shown to have a strong influence on the functioning of state power.[42]

Latin America is a unique region from perspective of constitutionalism. From the 1980s onwards, the decentralized system of constitutional adjudication in the United States and the practice of the US Supreme Court were initially considered the benchmark. Later, the South African and Indian systems, which were also based on the same foundations, influenced Latin American countries.[43] Finally, the German model and the European system were also adopted. Within the continent, the role of constitutionalism is particularly important in Colombia and Brazil.[44]

The details of the rules of the European Constitutional Courts will be discussed in more detail later.

5. Interesting Aspects of Constitutional Courts Established in the Latter Half of the 20th Century

After World War II, Austria's Constitutional Court resumed its functions. In this country, when the Constitutional Court repeals a law or finds it unconstitutional, its judgment is binding on all courts and administrative authorities. However, previous applications of the repealed law, based on facts that occurred before the repeal, remain valid, unless the Constitutional Court's decision specifies otherwise. If the Constitutional Court sets a deadline for the annulment to take effect, the law remains applicable to any cases arising before that deadline.[45]

Switzerland's *system can be described* as a unique blend of the classical European and American models. Each court, except the federal level, has the right to examine the constitutionality of laws. The Federal Court has the power to adjudicate individual constitutional complaints; however, it can only overrule cantonal legal regulations. In Switzerland, the federal court has been reviewing legal norms since the 1874 constitutional amendment.[46]

The Greek form of constitutional judiciary is also noteworthy. Its judges are selected by drawing lots from among members of the Supreme Court and law professors. The judiciary's jurisdiction is limited to reviewing legislative acts, it does not have the authority over lower-level legislation, such as statutes. However, other courts can consider the constitutionality of statutes within their own purview.[47]

The Belgian model is quite unique. The King appoints judges with two-thirds majority approval from the Senate, drawing from two distinct pools of candidates. The first pool consists of individuals who have held high positions in the Court of Cassation, the Council of State, or the Constitutional Court for at least five years, or who have been university professors for at least five years. The second pool comprises individuals who have been members of the Senate or the House of Repre-

[39] Ibid.

[40] Vid. HIRSCHL, R., *Towards Juristocracy. The Origins and Consequences of New Constitutionalism*. Harvard, 2004, p. 17-30.

[41] BALGANESH, S., The Constitutionalization of Indian Private Law. In: *Penn Carey Law, All Faculty Scholarship*, 2016, p. 15. Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2558&context=faculty_scholarship [Accessed: 27 January 2025].

[42] For example, the prime minister has been removed from office twice in recent years, at the behest of the opposition, and some of his decisions have been deemed unconstitutional. Vid. POKOL, B., 2022.

[43] Ibid.

[44] Vid. GARGARELLA, R., *Too „Old" in the „New" Latin American Constitutionalism*, 2015. Available at: https://law.yale.edu/sites/default/files/documents/pdf/SELA15_Gargarella_CV_Eng_20150512.pdf [Accessed: 27 January 2025].; and ESQUIROL, J. L., The Geopolitics of Constitutionalism in Latin America. In: CRAWFORD, C. – MALDONADO, D. B. (eds.), *Constitutionalism in the Americas*. New York, 2018, p. 79-108.

[45] Vid. Article 140. of the Constitution of Austria

[46] MANHERTZ, T. I., p. 122.

[47] Greek Constitution, Articles 95-100.

sentatives for at least eight years. This latter pool directly incorporates political experience, contrasting with the model that traditionally kept the judiciary separate from politics.[48] This structure makes the Constitutional Court an integral part of the system of checks and balances.[49]

The Turkish model is also highly specific. The Constitutional Court was established in 1961, based on the 1961 Turkish Constitution. Following a 2010 constitutional amendment, the institution of individual constitutional complaints was introduced, leading to a large number of individual cases being decided by the Turkish Constitutional Court.[50] The head of state has complete authority to appoint the 11 regular and four deputy members. Uniquely, public institutions and organizations, such as higher courts, the State Council, the Higher Education Board, administrative professionals' organizations, and bar associations, nominate the judges.[51]

In Portugal, three of the thirteen members of the Constitutional Court are co-opted by the ten initially elected members. This approach, in my views, allows for a more nuanced assessment of candidates' expertise from within the Court and provides a clearer understanding of the skills and experience needed for effective case distribution.[52]

Costa Rica has a particularly interesting constitutional structure. The Sala Constitutional, a specialized chamber within the Constitutional Court, handles constitutional review. (The two bodies, with relative autonomy, are interconnected.) Members are elected by a two-thirds majority in parliament for eight-year term. If the legislature fails to judges with a two-thirds majority decision, their mandates are automatically extended. This model, in my opinion, provides a balance of independence and oversight. This system was established by a constitutional reform in 1989.[53]

The election of judges to constitutional courts is also an interesting area of study. International practice typically divides the power to elect judges among different branches of government. In many countries, the head of state has the authority to appoint some members. Bicameral parliaments also provide complex opportunities for shared appointment powers.

In France, for example, the President of the Republic, the President of the National Assembly, and the President of the Senate each appoint three of the nine members of the Constitutional Council.[54]

In Italy, one-third of the 15 members of the Constitutional Court are appointed by the Parliament, another third by the head of state, and the remaining third by the higher courts: one each by the colleges authorized through certain collegiums of the Supreme Court, the Council of State, and the State Audit Office. This model inherently ensures that individuals with professional judicial experience can became members of the Court.[55]

In Austria, the President of the Republic appoints the president, the vice-president, twelve ordinary members, and half of the six alternate members. The Federal Council and the National Council nominate nine regular members each and three or six alternate members. One-third of these nominees are then appointed by the President.

In Spain, the King appoints the judges. Four are appointed by the lower house of Parliament, four by the upper house (both based on a two-thirds majority), and four (two each) by the government and the Supreme Juridical Council.[56]

The length of presidential terms also varies across countries. In Portugal, it is two years; in Bulgaria, Spain, and Slovenia, three years; and in Croatia, four years. France has the longest term, at nine years.[57]

6. Socialist "Constitutional Courts"

In certain socialist states, institutions emerged prior to 1990 that may be regarded, to some extent, as precursors to constitutional adjudication. Although these entities did not fulfil the criteria of classical constitutional courts operating under the rule of law, they were formally designated to oversee constitutional compliance. However, they lacked independence from the party-state, and their jurisdiction was substantially constrained.

The establishment of socialist predecessors to democratic constitutional courts in Czechoslovakia and Yugoslavia warrants particular attention.[58]

In Czechoslovakia, following the interwar precedent, a Constitutional Court was instituted in 1968 as part of the reforms associated with a so called attempt "human-faced socialism",

[48] Specific requirement that Dutch and French language groups give the same number of judges in each group.

[49] On the Belgian Constitutional Court, vid. JUDO, F. – NOLET DE BRAUWERE, N., A Belga Alkotmánybíróság avagy a dialógus művészete. In: *Alkotmánybírósági szemle*, No. 2, 2011, p. 119-125.

[50] SISKA, K., Akiért a harang szól – Osman Kavala. In: *Acta Humana*, Vol. 10, No. 3, 2022, p. 174.

[51] LEGÉNY, K., p. 232.

[52] Portugal's Constitutional Court (Tribunal Constitucional) was established in 1982 and began operating in 1983. LEGÉNY, K., p. 231.

[53] Furthermore, in respect of specific constitutional complaints judges have a great freedom of movement. Vid. POKOL, B., *A bírói hatalom*. Budapest, 2003, p. 39-40.

[54] Vid. KELEMEN, K., Az alkotmánybírák választása Európában és hazánkban. In: *Új Magyar Közigazgatás*, Vol. 4, No. 4, 2011, p. 2-14.

[55] In 1948, the Italian Constitution created the Constitutional Court, which is separate from the ordinary courts. It actually became functioning in 1956. Vid. VIGORITI, V., Italy: The Constitutional Court. In: *The American Journal of Comparative Law*, Vol. 20, Issue 3, p. 404.

[56] The Spanish Constitutional Court was established in 1978. The constitutional judges of the first Spanish Constitutional Court cycle were almost half „anti-activist". With this composition, even if a majority could overrule them on a decision, it could still act as a deterrent for the whole body, preventing an open break with the constitution. This would change from 1989 onwards, with the end of the nine-year term of the first Constitutional Court, the new majority was no longer constrained by the anti-activists. POKOL, B., Alkotmánybírósági döntési stílusok Európában. In: *Jogelméleti szemle*, No. 3, 2015, p. 127.

[57] Vid. KELEMEN, K., Az alkotmánybírák újraválaszthatósága és hivatalviselési ideje. In: *Pázmány Law Working Papers*, No. 5, 2011, p. 1-17.

[58] KOLUMBER, D., Stručný přehled a srovnání ústavního soudnictví v Jugoslávii a v Československu. In: *Dny práva 2013 – Days of Law 2013. Část VII. Soudy a soudnictví v historickém kontextu.* Brno, 2014, p. 156- 174.

a notion describing a less oppressive autocracy thus being more bearable for the people. This body was ostensibly empowered to review the constitutionality of legislation. However, it was dissolved in 1970 amid the political restructuring that followed the suppression of the Prague Spring. This development exemplifies the broader tendency within socialist regimes, where the primacy of political control rendered even experimental forms of constitutional review unsustainable if they exhibited excessive autonomy.[59]

In Yugoslavia, due to its federal structure, institutions with limited powers to examine the constitutionality of laws were already in existence by the 1960s. The 1963 Constitution formally established a Constitutional Court with the primary function of resolving disputes between the federal state and its constituent republics. Despite Yugoslavia's relative decentralization compared to other socialist states, the Constitutional Court remained subject to political influence and could not function independently of the prevailing political order.

A distinctive feature of the Yugoslav constitutional system was the existence of constitutional courts not only at the federal level but also within each constituent republic. These republic-level courts were, in principle, empowered to assess the compliance of federal legislation and regulations with their respective republican constitutions. However, their jurisdiction was effectively curtailed by political constraints. The 1974 Constitution further reinforced the autonomy of the republics, yet political decision-making continued to operate within the framework of self-managed socialism. These institutional precedents may have contributed to the establishment of robust constitutional courts in several successor states following the dissolution of Yugoslavia, particularly in Croatia, Serbia, and Slovenia.[60] Nevertheless, the strength and efficacy of these newly established courts varied across jurisdictions. Following Kosovo's declaration of independence, a Constitutional Court was also established.[61]

While these institutions bore some resemblance to Western constitutional courts in terms of nomenclature and structure, they did not function as genuine checks on governmental power. They remained subject to party control, operated within significantly constrained mandates, and frequently rendered decisions influenced by political considerations. It was only after the political transformations of the late 20th century that genuinely independent constitutional adjudication emerged in the post-socialist states. Ultimately, the establishment of these socialist-era courts served more as a mechanism for legitimizing the ruling regimes rather than ensuring substantive constitutional governance. These institutions were intended to project an image of legality and constitutionalism, yet they were precluded by the party-state from developing true autonomy.

By the late 1980s, the Soviet Union introduced its own form of constitutional oversight through the Committee for Constitutional Supervision (1988; Комитет конституционного надзора).

"The predecessor of the Hungarian Constitutional Court is the Constitutional Council, established in 1983 and operating from 1984-1989. The Council in its Decision No 3/1988 declared 'unlawful' and 'therefore unconstitutional' the provision of the Council of Ministers' Regulation implementing the social security law then in force, which suspended the payment of pension and accident benefits for stays abroad exceeding 90 days… The political change of 1989 in Hungary has involved transforming constitutional institutions. The Constitutional Court played a crucial role in defining the content of the fundamental rights, thus – among others – in the interpretation of the right to social security."[62]

7. Constitutional Courts in Former Socialist Countries after 1990

After the collapse of the socialist system in Central Europe, despite the American intellectual influence, almost all countries established centralized constitutional courts. Such courts operate in Poland, Hungary, the Czech Republic, Slovakia, Romania, Croatia, Slovenia, Serbia. (In Yugoslavia, a Constitutional Court without annulment powers was established as early as 1963.) The Baltic states underwent exemplary development in this regard. This may be due to the need to rebuild judicial systems from scratch (at least the Constitutional Court), as the socialist regime had heavily influenced the existing court personnel. Interestingly, Lithuania and Latvia established centralized constitutional courts. (Moreover, Lithuania adopted the German model of the classic constitutional complaint.) In Estonia, there is no separate body for constitutional review. In Hungary, the new Constitution of 2011 and the Constitutional Court Act of 2012, which entered into force simultaneously, contain detailed provisions on the Constitutional Court.

The institution of German constitutionalism significantly influenced the systems of Central and Eastern Europe, particularly regarding the reference to the Constitutional Court's own previous practice and the possibility for judges to write dissenting opinions.

It is commendable that all the states in the region have introduced constitutional courts with strong powers.

In Romania, dissenting opinions and parallel reasoning by constitutional judges are common. Interestingly, their reasoning practice is similar to that of continental ordinary courts, as op-

[59] On the history of constitutionalism in Czechoslovakia, see BENÁK, J., Historický vývoj ústavního soudnictví a přístupu jednotlivce k ústavnímu soudu. In: *Časopis pro právní vědu a praxi*, Vol. 26, No. 3, 2018, p. 397-417.

[60] These antecedents cannot be considered classical constitutional courts, but they contributed to the emergence of strong centralised constitutional courts in the successor states of the disintegrating and democratising Yugoslavia, reinforcing this tradition. In addition to the antecedents, of course, international influences have also contributed to this. In particular, the German constitutional judiciary was the benchmark. In addition, the positions of certain international organisations, such as the Venice Commission, also had an influence. See BAČIĆ, A. (ed.), *Ustavi i demokracija – Strani utjecaji i domaći odgovori*. Zagreb, 2012.

[61] Contestability before the European Court of Human Rights has also shaped the jurisprudence of these bodies. See HASANI, E. (et al.) (eds.), *Constitutional Justice in Southeast Europe: Constitutional Courts in Kosovo, Serbia, Albania, and Hungary between Ordinary Judiciaries and the European Court of Human Rights.* Baden-Baden, 2012.

[62] TÉGLÁSI, A., Historical Development of the Constitutional Social Rights in the Hungarian Constitutional System in the 20th Century. In: *Journal on European History of Law*, Vol. 15, No. 1, 2024, p. 153-154.

posed to German or Hungarian practice. That is, they refer to the specific text of the Constitution itself, rather than to their own previous practice.[63]

The Czech Constitution is narrower in its formulation of the conflict-of-law formula than the German or Hungarian constitutions.[64]

In Croatia, dissenting opinions and parallel reasoning for Constitutional Court decisions are not common, although their Constitutional Court Act allows for this. There are few references to previous Constitutional Court decisions. In Slovenia, the old Constitutional Court decisions are cited more frequently, but this level is far below the activism of Hungarian judges in this respect.[65]

Comparing the Czech and Hungarian Constitutional Courts reveals an interesting difference among many similarities. While the Czech court often refers to its own past decisions, it strictly limits itself to the narrow subject matter of the case when citing old constitutional court decisions. For example, in cases in cases involving the fundamental right to property, they do not cite other aspects of property law, let alone their decisions on broader constitutional principles (the rule of law, separation of powers, etc.).[66]

Some authors suggest that the Czech constitutional judges are also characterized by a fundamental rights activism that goes beyond that of their Hungarian counterparts. Interestingly, in the Czech Republic, the direct effect of fundamental rights has been proclaimed, even though, unlike in the Germany the Czech Charter of Fundamental Rights does not explicitly authorize this.[67]

It is worth noting that the Czech constitutional judges' decision-making style is quite different from that of the other judges, who tend to write many dissenting opinions. This is a marked similarity between the Constitutional Courts of the Czech Republic and Hungary. However, this contrasts with the German practice, where there is almost pressure on judges to avoid parallel reasoning and dissenting opinions. So, in addition to the two differences mentioned above, there are similarities between the decision-making styles of Hungarian and Czech constitutional judges in this respect.[68]

The decision-making style of Polish constitutional judges is more similar to the Hungarian system than that of the Slovenian and Czech Constitutional Courts, in that they make significant references to their relevant past decisions in the reasoning of their current decisions. This adherence to past decisions does not reach the level of the Hungarian practice, where long explanatory memoranda are often cited, but the number and substance of previous decisions are listed for each issue. The presence of dissenting opinions and parallel reasoning is stronger in Poland than in Germany.[69]

The Lithuanian Constitutional Court began operating in 1993. It is noteworthy that the President has special powers to receive petitions and to grant permission to examine the merits.[70]

Some authors argue that the Lithuanian constitutional court is the closest to the Hungarian constitutional court in terms of referring to its own previous practice, rather than citing the text of the constitution. This tendency emerged after 1999.[71] In Lithuania, the concept of the rule of law is interpreted very broadly, similarly to Hungary. This serves as the basis for many constitutional court decisions.[72]

Latvia's Constitutional Court operates under the Constitution and examines the constitutionality of laws within the scope prescribed by law, as well as other matters within its competence. The Constitutional Court has the authority to declare laws and other acts invalid.[73]

The judges of the Constitutional Court are appointed be various bodies, including the parliament, government, and higher courts[74]. Two judges are appointed be each of these three bodies, and the seventh judge is appointed be the President. All appointments are confirmed by the absolute majority in parliament. The term of office is ten years and cannot be revoked.[75]

The Court's jurisdiction includes examining the constitutionality of laws and international treaties, both before and after their enactment, pronouncing on the legality of decisions of lower-level administrative bodies, and considering constitutional complaints.[76] (This reflects the adoption of the German model of individual constitutional complaints and concrete norm control).

In Slovakia, the institution of constitutional complaints was introduced in 2001, expanding powers of the Constitutional Court. The Court considers complaints from individuals or legal entities whose fundamental rights and freedoms have been

63 POKOL, B., 2015, p. 123.
64 Article 87(1)(i) of the Constitution of the Czech Republic does not allow the Czech counterparts to declare a conflict with abstract international treaties but merely allows them to annul domestic legal provisions that prevent the enforcement of the judgments of certain international courts, Ibid. p. 108.
65 Ibid. p. 118.
66 Ibid. p. 109-110.
67 Ibid.
68 Ibid.
69 Ibid. p. 120.
70 RINKEVICIUS, V., *The Organisation of Work of Law Clerks as Support for Decision-Making by Constitutional Judges*. Strasbourg, CDL-JU (2005)034, p. 2.
71 POKOL, B., 2015, p. 124.
72 Vid. VARGA, Zs. A., *Eszményből hálvány? A joguralom dogmatikája*. Budapest, 2015, especially p. 16-19.
73 Vid. Article 85 of the Constitution of the Republic of Latvia. The legal aid system is a strong connotation, the mere fact that the Constitution is very laconic density these terms.
74 LEGÉNY, K., p. 232.
75 CHRONOWSKI, N. – DRINÓCZI, T. (ed.): *Európai kormányformák rendszertana*. Budapest, 2007, p. 302.
76 Ibid.

violated, or from the National Council of Slovak Republic, regarding breaches of human rights treaties ratified by Slovakia, if the matter does not fall within the jurisdiction of another court. The President of the Republic appoints the 13 constitutional judges from a pool of 20 candidates recommended by the National Council. This model features a plural designation system, where several individuals are considered for the position, but only a few are ultimately oppointed. This can diminish the prestige of candidacy and may discourage the most qualified individuals from applying.

A notable departure from the classic "binary code" is the solution applied in Bosnia and Herzegovina, which also prevents the inevitable comparison with the duality of government and opposition. The President of the European Court of Human Rights appoints three of the nine members of the Constitutional Court. Furthermore, these members cannot be citizens of Bosnia and Herzegovina or its neighbouring countries.[77]

The question of whether a constitutional court has the jurisdiction to hear a genuine constitutional complaint is of crucial importance. The German Constitutional Court, considered the gold standard for this type of complaint, has had this authority from its inception. Spain has introduced a similar system. Individuals can challenge specific judicial decisions to defend constitutional rights and freedoms, excluding "ecosoc" (social and economic) rights.

The situation is more complex for the constitutional courts established in the 1990s. Latvia adopted the German model. The Czech and Polish Constitutional Courts also have jurisdiction to hear constitutional complaints, although the latter only in cases involving the application of an unconstitutional law, similar to the former Hungarian solution.[78] In the Czech Republic, the court has no discretion regarding the admissibility of the complaint.

In Slovenia, both individuals and legal entities may lodge a constitutional complaint if public authorities have violated their human rights or fundamental freedoms through individual decisions. A further condition is that the complaint must have constitutional significance beyond the individual case. Croatia also allows for a constitutional complaint against a decision by public authorities (in the broad sense) that violate human rights or fundamental freedoms. While exhaustion of legal remedies is a basic requirement, the Constitutional Court may make exceptions if the ordinary court has not ruled within a reasonable time or if delaying action would have serious and irreparable consequences.[79]

8. The Democratic Transition and Establishment of the Constitutional Court in Hungary (1989-)

Although the regime transition in Hungary was a multi-stage process, the establishment of the Constitutional Court, in my opinion, was a crucial milestone.[80]

In the preparatory phase from 1988 to 1989, Minister of Justice Kálmán Kulcsár and his deputy, Géza Kilényi, who was competent in public law matters, played a vital role in drafting the Constitution. (Both were distinguished professors and members of the Hungarian Academy of Sciences). During their preparatory activities, it became clear that they envisioned a centralized Constitutional Court, i.e. a specialized body tasked primarily with reviewing legislation. n addition to classic powers, the Court would also adjudicate elections and assess the constitutionality of political organizations' programs and activities.

Early drafts proposed that the Constitutional Court could only suspend the validity of unconstitutional laws, referring its decision to Parliament for a final ruling. There were also considerations for the National Council of Justice (the equivalent of the later National Council for the Judiciary, created in 1997) to nominate some members. The Head of State would have the right to nominate the President and members of the Constitutional Court. Ultimately, a multi-channel nomination system was developed for the Constitutional Court.[81] This process was finalized during the National Round Table negotiations and subsequently given legal form by Parliament.

Ultimately, a solution was chosen whereby a nominating committee of MPs proposed judges, and the plenary of the Parliament elected them by a two-thirds majority vote. The term of office was nine years, renewable once. The members elected the President from among themselves for a three-year term. Members received the same remuneration and protocol rank as government ministers.

The criteria for becoming a constitutional judge were very strict yet open (the new Constitution maintained these rigorous standards.) Any lawyer aged 45 or older who was an outstanding academic (university professor or academic doctor) or had at least 20 years professional experience could be elected as a member of the body. (Contrary to popular belief, 20 years of 'outstanding' work experience was not a prerequisite.)[82] This opened opportunities for individuals who had been marginalized under the previous regime to join this prestigious body. As a result, the first cohort consisted of exceptional legal scholars. The presidency was decided between Géza Kilényi and László

[77] LEGÉNY, K., p. 235.
Analogous rule, that in Liechtenstein from the six members only the president, the deputy and two other members must be citizens, while the others may be foreigners.

[78] TÉGLÁSI, A. – T. KOVÁCS, J., Alkotmánybíráskodás visegrádi szomszédainknál. In: *Pro Publico Bono*, Vol. 3, No. 1, 2015, p. 93.

[79] BODNÁR, E., Az alkotmányjogi panasz intézménytörténet és nemzetközi kitekintés. In: BITSKEY, B. – TÖRÖK, B. (ed.), *Az alkotmányjogi panasz kézikönyve*. Budapest, 2015, p. 34.

[80] Vid. CSERVÁK, Cs., The Constitutional History of the Democratic Transition. In: *Journal on European History of Law*, Vol. 15, No. 2, 2024, p. 132-142.

[81] KILÉNYI, G. (ed.), *Egy Alkotmány-előkészítés dokumentumai*. Budapest, 1991, p. 93 and 152-153.

[82] Ibid.

Sólyom, a renowned civil law professor, with the katter ultimately prevailing. During the initial transitional period, László Sólyom led the court as vice-president.

The original plan was for the "old parliament" to elect five judges at the turn of 1989 and 90, followed by another five in the new parliament after regime change, and then five more in 1994. However, due to the two-thirds majority requirement and the difficulty of compromise, the number of judges was reduced from 15 to 11. Even then, reaching an agreement often proved challenging.

Despite the challenges, the first Constitutional Court comprised a diverse group of highly respected legal minds. János Zlinszky, a professor of Roman law (former lawyer), and Tamás Lábady, a civil law judge and legal scholar, represented a Christian philosophy of law. Ödön Tersztyánszky, a judge known for his respect for the rule of law, and Pál Solt, who later became President of the Supreme Court, also joined the Court. Imre Vörös, a professor of private international law, later became a full member of the Hungarian Academy of Sciences. Although nominated by the state party, Antal Ádám carried out his duties with impartial professionalism. Géza Herczegh, a legendary professor of international law, was later elected to the International Court of Justice in The Hague. András Szabó created the concept of "constitutional criminal law", which remains relevant today. Péter Schmidt was arguably the most renowned professor of constitutional law in the late socialist era.

László Sólyom developed the concept of the "Invisible Constitution".[83] The concept posits that certain fundamental rights, while not explicitly mentioned in the Constitution, can be derived from other fundamental rights and principles through legal interpretation. Overall, the natural law approach was favoured by the constitutional court after the regime change.[84]

9. Epilogue

In the previous system of the Constitutional Court Act (1989. XXXII.), the "reduced jurisdiction" constitutional complaint could only be lodged against legislation that violated fundamental rights, a serious shortcoming. The interpretation of an insufficiently thought-out statute with uncertain interpretative possibilities (but not necessarily unconstitutional) by a rigid and dysfunctional textualist method may, on the whole, constitute a very serious violation of fundamental rights.[85]

This debt has been remedied by the new Constitutional Court Act (2011. CLI.). It introduced a genuine constitutional complaint, which can be used against a judicial decision.[86] The conditions for meaningful inclusion are somewhat aligned with the German model.[87] The term of office of constitutional judges was increased from 9 to 12 years, but members were no longer eligible for re-election. Under the new rule, it is not the members who elect the President from among themselves for a three-year term, but Parliament. The President's term of office is the same as the remainder of his term of office as a member.

[83] TRÓCSÁNYI, L., Az alkotmányozás dilemmái – 10 év múltán. In: *Acta Humana*, Vol. 9, No. 2, 2021, p. 140.; and RIMASZÉCSI, J., *A hatalmi ágak megosztásának XXI. századi kérdései, különös tekintettel az igazságszolgáltatásra*, Phd Thesis, Budapest, 2022, p. 137.

[84] On the concept of natural law, vid. KARÁCSONY, A., Additions to the Idea of Nature in Natural Law Thinking – Transition to Modernity. In: *Journal on European History of Law*, Vol. 13, No. 1, 2022, p. 161-167.

[85] Vid. LAJOS, E., Az alkotmányjogi panasz morális vonatkozásairól. In: *KRE-DIt*, Vol. 7, No. 1, 2024, p. 139-149.

[86] Vid. JUHÁSZ, I., Az Alkotmányjogi panasz eljárásjogi vetületének néhány aspektusa. In: VARGA, I. (ed.), *Codificatio processualis civilis: Studia in Honorem Németh János, II*. Budapest, 2013, p. 119-132.

[87] Vid. FARKAS, Gy. T., Az alkotmányjogi panasz befogadhatósága, különös tekintettel az alapvető alkotmányjogi jelentőségű kérdésre. In: *KRE-DIt*, Vol. 3, No. 2, 2020, p. 1-35.; and ARATÓ, B., Alkotmányjogi panasz a német jogrendben, különös tekintettel a befogadhatóság kérdésére. In: ANON (ed.), *Az Alaptörvény érvényesülése a bírói gyakorlatban II. Alkotmánybírósági panasz – hatáskörrel kapcsolatos kérdések*. Budapest, 2019, p. 502-515.

The Fraudulent and Culpable Bankruptcy in Complex Approach, with Special Regard to the Practice of the Royal Hungarian Curia*

*Benedek Varga***

Abstract

The protection of creditors' interests are ensured by several areas of law, for example by civil law or insolvency law, but the criminal law should provide protection against the most dangerous infringements. The first Hungarian Criminal Code (Act V of 1878) regulated two forms of delicts which protected the creditors' economic interest against the fraudulent conducts of the bankrupt person: the fraudulent and culpable bankruptcy. In my study, fisrtly I seek to answer the question of what was the protected legal matter (Rechtsgut) of these delicts. It is an essential question because in my study I used teleological interpretation, which is equal with the legal matter-centered interpretation in criminal law. Following the identification of the legal matter, I will analyse the fraudulent and culpable bankruptcy from a dogmatic point of view. Since the statutory definitions of these delicts contained more definitional elements which fall within the scope of a non-criminal law (e.g. definition of bankruptcy) legal field, so I have sought to answer the question whether the highest Hungarian judicial forum, the Royal Curia has assigned autonomous criminal law meanings to these conceptual elements or has interpreted them in the context of the norms of the relevant non-criminal law (e.g. insolvency or commercial law) area. During my research, I compared the different dogmatic views based on the criminal law literature of the 19th and 20th century, after that I systematically analysed the relevant decisions of the Royal Hungarian Curia between 1880 and 1932.

Keywords: *criminal law; dogmatics; insolvency law; fraudulent bankruptcy; Hungary.*

1. Introduction and methodology

The Austro-Hungarian Compromise of 1867 opened a new era in Hungarian consituitional and legal history. The Compromise established a dualist state, the Austro-Hungarian Monarchy, which was a real union. The real union meant an international law confederation in which the independent states (Austrian Empire and Hungarian Kingdom) was not only linked by the person of the monarch, but the two states had common affairs: the defence affairs, the foreign affairs and the financial affairs which covered the previous two.[1]

After the establishment of the Dual Monarchy a great economic development occured in Hungary. Before the Compromise Hungary was an agricultural country, but during the dualism there was a rapid industrial development, consequently the Hungarian Kingdom had a well-developed food industry in the early 20th century and the country became an intensive exporter.[2] From the point of view of my research the development of the credit system is the most relevant. Between 1867 and 1914 the number of credit institutions and saving banks has grown steadily and the capital stock of the financial institutions also increased.[3] Due to the evolution of credit flow and the build of the modern railaway network, the commercial life prospered in both domestic and international field.[4]

The legislator had to react to these economic changes, creating the convenient substantial and procedural rules which led to codification processes in this era. Firstly the legislator accepted the Trade Act (Act XXXVII of 1875) the codex of commercial law, which uniformly regulated the legal status and liability of the traders, the main commercial contracts, as well as the trader companies.[5] As far as the criminal law is concerned, Hungary had not got criminal code before 1878. Before the codification the main legal sources of criminal law were the customary law and works of legal scholars (e. g. *Tivadar Pauler*, who was profes-

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** Benedek Varga, Department of Hungarian Legal History, Faculty of Law and Political Sciences, University of Szeged, Hungary, email: benedekvarga1@gmail.com / ORCID 0009-0003-1008-7314.

1 CIEGER, A., A közös ügyek rendezése In: HERMANN, R. – LIGETI, D. (eds.), *Megosztó kompromisszum – Az 1867. évi kiegyezés 150 távlatából*. Budapest, 2018, p. 127.

2 ROMSICS, I., *Magyarország története a XX. században*. Budapest, 2010, p. 25.

3 Ibid, p. 27.

4 Ibid, p. 27.

5 HORVÁTH, A., A kereskedelmi törvény – 1875. évi XXXVII. tc. In: MÁTHÉ, G. – MENYHÁRD, A. – MEZEY, B. (eds.), A *kettős monarchia*. Budapest, 2018, p. 226-237.

sor in Budapest and Minister of Justice in Hungary),[6] although it is important to mention that there were periods in Hungarian legal history when for a short period of time, foreign criminal codes were in force.[7] The first Hungarian Criminal Code (Act V of 1878) was drafted in 1878 and entered into force in 1880, it is called the „*Code Csemegi*", after its creator *Károly Csemegi*. The codex followed the structure of the French *Code Pénal*, the so-called trichotomous system, which meant that the act distinguished three types of delicts: felony, misdemeanour and contravention.[8] The next codification product which relevant to the research topic was the Act XVII of 1881 about Bankruptcy, which contained the comprehensive substantial and procedural norms of insolvency law, regulating seperately the ordinary and commercial bankruptcy.[9] It should be noted that not all areas of law were codified during the period of dualism, there were some legal fields that were codified between the two World Wars, such as antitrust and competition law.[10]

During the codification of criminal law there was no doubt that the interests of the creditors require complex legal protection, so not only the private law and insolvency law ensure the adequate legal framework, but criminal law too. That's why the legislator did not fail to create the two main criminal law category of creditor protection: the fraudulent and culpable bankruptcy. These provisions of the Criminal Code had been in force until 1932, when the legislator repealed them and created the Act IX of 1932 about concealment of assets.[11] In my study I am going to analyse the dogmatic questions of fraudulent and culpable bankruptcy. I follow the principles of „contemporary legal history school", which means that I seek to answer current legal questions with legal history reasoning.[12] The topicality of the research is underlined by the fact that the Hungarian Constitutional Court annulled the Uniformity Decision no. 6/2018 of the Curia, which interpreted the aggrieved party and the legal matter of the fraudulent bankruptcy. In summary in this decision the Curia declared that the legal matter of the insolvency delict is the economic order as a collective interest, consequently the creditors are not considered as victims, as a result they could not exercise their civil claim.[13] In its annulment decision the Constitutional Court partly used historical interpretation to show that the interpretation of the Curia is not correct dogmatically.[14]

2. The structure of the regulation – comparison of the two statutory definitions

First of all, it is important to clarify some definitions before the analysis of the text of the norm. According to the 19-20th century dogmatics, the bankruptcy meant a status, when debtors could not fulfill all their obligations, because their passive assets exceeded their active assets or they could not satisfy proportionately all of their creditors in a certain time.[15] Besides the substantive law definition, we can speak about bankruptcy procedure, which is the procedural aspect of insolvency and it means the process during which the debtors' assets are liquidated in order to satisfy the creditors' claims.[16] The guilty bankruptcy is criminal law dogmatic definition, including all conducts that harmed or endangered the creditors' rights by causing or pretending insolvency.[17]

The *Code Csemegi* regulated two forms of guilty bankruptcy: the fradulent and culpable bankruptcy.[18] The legislator defined the statutory definition of the fraudulent bankruptcy in a casuistic way: „*The bankrupt who intended to harm his creditors' claim by 1. hiding, putting aside, alienating under value, donating the asset which belongs to his wealth or releasing or hiding the claim which he is entitled or fulfilling a fictitious claim; 2. admitting a debt or obligation which is fully or partly fictitious; 3. providing preferential treatment one or more of his creditors by granting a lien or a right of retention or*

[6] MEZEY, B., A kodifikáció terhe: A büntetőjogi kodifikáció eredményei a dualizmus jogalkotásában. In: MÁTHÉ, G. – MENYHÁRD, A. – MEZEY, B. (eds.), *A kettős monarchia*. Budapest, 2018, p. 283.

[7] For example during the so-called „neo-absolutism" era, after the downfall of the Hungarian Independece War, from 1852 to 1861 the Austrian Criminal Code was in force. MEZEY, B., Das ungarische bürgerliche Strafrecht. In: MÁTHÉ, G. (Hrsg.), *Die Entwicklung der Verfassung und des Rechts in Ungarn*. Budapest, 2017, S. 506.

[8] MEZEY, B., 2017, S. 521.

[9] PÉTERVÁRI, M., Reformtörekvések az 1881. évi csődtörvény megújítására. In: *Jogtudományi Közlöny*, Vol. 78, No. 1, 2023, p. 23-24. PÉTERVÁRI, M., A kereskedelmi csőd a második magyar csődtörvényben. In: MEZEY, B. (ed.), *Kölcsönhatások Európa és Magyarország a jogtörténelem sodrásában*. Budapest, 2021, p. 280.

[10] KRUSÓCZKI, B., The First Hungarian Competition Act in the Judicial Practice. In: *Journal of European History of Law,* Vol. 14, No. 1, 2023, p. 173; VARGA, N., Introduction to the Hungarian Cartel Regulation in the Interwar Period. In: *Krakowskie Studia z Historii Państwa i Prawa*, Vol. 15, No. 2, 2022, p. 215-226.; VARGA, N., A Special Professional Authority of Cartel Supervision in Hungary: The Cartel Committee. In: *Journal of European History of Law*, Vol. 13., No. 2, 2022, p. 121-125; VARGA, N., Lawsuits on Cartel Presentation Omission After the 20th Act of 1931 Came into Effect. In: *Journal of European History of Law,* Vol. 13, No.1, 2022, p. 149-152.

[11] MADAI, S., A csalárd bukás néhány történeti és dogmatikai kérdése. In: *Jogtörténeti Szemle,* No. 3, 2004, 31.

[12] STIPTA, I., A jelenkori jogtörténet-tudomány. *Jogtörténeti Szemle*, Vol.18, No. 3, 2016, p. 39.

[13] SZOMORA, ZS., A sértetti (pótmagánvádlói) legitimáció alapjogsértő módon történő szűk értelmezése semmisített meg az Alkotmánybíróság büntetőbírósági döntéseket. *Magyar Jog*, Vol. 70, No. 10, 2023, p. 625-628.

[14] 15/2023. (VII. 24.) AB határozat. Paragraph [77] – [83]; [89]-[90].

[15] APÁTHY, I., *A magyar csődjog rendszere Vol. 1*. Budapest, 1887, p. 1-2.

[16] Ibid. p. 2. See more about the development and definitions of bankruptcy law: MÁRKUS, E., A váltójog és a csődjog történetéből. In: FÖLDI, A. (ed.), *Összehasonlító jogtörténet*. Budapest, 2018, p. 607-630.

[17] HEIL, F., *A csalárd és vétkes bukás*. Budapest, 1897, p. 3.

[18] Besides it is important to emphasize that these crimes had been regulated in different laws before the *Code Csemegi*, for example in the first Hungarian bankruptcy act (1840. évi XXII. tc. a csődületről). See more information: KORSÓSNÉ DELACASSE, K., A fizetésképtelenség körüli csalárdság és csalárd bukás. In: BÓDINÉ BELIZNAI, K. – GOSZTONYI, G. (eds.), *Jogtörténeti parerga III : Ünnepi tanulmányok Mezey Barna 70. születésnapja tiszteletére*. Budapest, 2023, p. 215-219; STEINER, G., *A csődbűncselekmény története, elmélete és gyakorlata.* Budapest, 2024, p. 16-23.

transferring a part of his assets; 4. if the perpetrator was obliged to manage trade books, he failed to do it, or he destroyed, concealed, disclosed false information in the accounts or he changed them in a way that the active or passive assets of the business or the transactions of the business cannot be determined." [19] This delict was a *delictum proprium*, because only the bankrupt person could commit it.[20] The conducts mentioned from 1 to 4 points were the form of the perpetration activity, all of these conducts could harm or endanger the creditors' claim, this was taxative, so the judicial practice did not expand it with additional activities.[21] The fraudulent bankruptcy was factual, only if the perpetrator commited the crime with mischievous intent,[22] consequently there had to be a specific intention (*dolus directus*), *dolus eventualis* was not factual. Since the harming of the creditors claim dogmatically was not the result of the perpetration, but the part of the perpetrator's mischievous intent, consequently the actual damage did not have to be realised to establish criminal liability.[23]

The second form of the guilty bankruptcy was the culpable bankruptcy, which also had casuistic formulation. According to the codex it was commited by *„the bankrupt who become insolvent 1. by wasting his wealth, managing his business negligently, doing stock market game or such a risky business which did not belong to the normal scope of his economic actvity; 2. by commiting those conducts which are listed Section 414. 4th point with the intention to harm his creditors*; *3. if the perpetrator was obliged to manage trade book, he did not make yearly account about his active and passive assets. 4. the perpetrator who know about his insolvent status or he should have known about it and created new debts or failed to submit the petition of bankruptcy, allowing one or more of his creditors to obtain lien or the right of retaining of his assets."* [24] Based on the text of the two sections, there are more difference between the two statutory definitions. As I mentioned previously the fraudulent bankruptcy was factual, only if the perpetrator commited the crime with mischievous intent (the so-called *animus nocendi*), so the *dolus directus* was inevitable. The statutory definition of the culpable bankruptcy contained no reference to the perpetrator's intention, *a contratio* it could have been commited with foreseeable intent (*dolus eventualis*) too.[25]

The question may arise, the criminal liability could be established if the conduct of the perpetrator was negligent? [26] This dogmatic problem derived from the fact that the Section 75 of *Code Csemegi* declared that the misdemeanour is punishable if it was commited intentionally in principle, unless the legislator also declared negligent conduct as a misdemeanour and there was no explicit reference to negligent perpetration under Section 416[27]. It is important to highlight that the declaration about negligent perpetration did not have to appear *expressis verbis* in the text of the law, it was enough if we can conclude to the negligent form of perpetration from the immanent meaning of the definitional element.[28] *Pál Angyal* affirmed that culpable bankruptcy had such perpetration activities which were almost exclusively committed negligently in practice.[29] There is also a difference between the two delicts related to the qualification of the perpetrator. Both of them were a *delictum proprium*, but while the offender of the fraudulent bankruptcy could be any bankrupt person, some form (the 2nd and 3st point of Section 416) of the culpable bankruptcy could be commited by only traders, because only the traders had the obligation to manage accounts and trade books compulsively.[30]

3. Legal matter of the crime and its connection with the aggrieved party's position

The decision of the Hungarian Constitutional Court and the Hungarian Curia has brought to the surface a dogmatic dilemma surrounding the legal matter (*Rechtsgut*) of bankruptcy offenses. In this point it is important to emphasize the connection between the legal matter of the crime and the position of the aggrieved party. According to the current Hungarian Code of Criminal Procedure the victim is the natural or non-natural person whose right or legitimate interest is directly breached or endangered by the crime.[31] If someone wants to exercise its civil claim as a private party or represents the prosecution as private prosecutor, they must have a procedural position as a victim.[32] From this point of view, the question of whose and which rights are violated by the offense is relevant, because it determinates the legal position of the victim, therefore, the precise interpretation of the legal matter is inevitable. While the development of guilty bankruptcy has a long history, the historical interpretation may help to deeply understand the legal interest which is protected by the delict.

Fausztin Heil, the judge of the Royal Court of Appeal of Budapest highlited that the dogmatic views sorrounding the legal matter of the guilty bankruptcy divided into two main groups in the 19th century: (1) those legal scholars who said that the guilty bankruptcy violated certain type of public interest, the so-called *publica fides* in commercial life or in other words the credit transactions in the market.[33] From this view, it follows

[19] 1878: V. tc. a magyar büntetőtörvénykönyv a büntettekről és vétségekről. Section 414.
[20] ANGYAL, P., *Okirathamisítás, bélyeghamisítás, védjegybitorlás, csalárd és vétkes bukás*. Budapest, 1929, p. 152.
[21] Ibid. p. 156-161.; ANGYAL, P., *Az uzsora és a hitelsértés*. Budapest, 1942, p. 92; FINKEY, F., *A magyar büntetőjog tankönyve.* Budapest, 1914, p. 754.
[22] FINKEY, F., 1914, p. 755.
[23] VARGHA, F., Controvers kérdések a csalárd és vétkes bukásnál. In: *Magyar igazságügy,* Vol. 19, No. 4, 1892, p. 285-286.
[24] 1878: V. tc. a a magyar büntetőtörvénykönyv a büntettekről és vétségekről. Section 416.
[25] HEIL, F., Adalékok a vétkes bukás kérdéséhez 2. r. In: *Ügyvédek Lapjía*, Vol. 12, No. 29, 1895, p. 2.
[26] ANGYAL, P., 1929, p. 178.
[27] Ibid.
[28] Ibid.
[29] Ibid. *Fausztin Heil* took the opposite view, saying that this offense could only be committed intentionally. See more: HEIL, F., 1895, p 2.
[30] ANGYAL, P., 1929, p. 169-170.
[31] 2017. évi XC. törvény a büntetőeljárásról. Section 50.
[32] FANTOLY, ZS. – BUDAHÁZY Á., *Büntető eljárásjogi ismeretek I. – Statitkus rész.* Budapest, 2019, p. 60.
[33] HEIL, F., 1897, p. 1.

that the fraudulent bankruptcy is punishable only if it is committed by a trader, because the violation of the credit transaction can only occur in the commercial sphere of the economy.[34] (2) The majority of legal scholars in the 19th century held the opinion that both the fraudulent and culpable bankruptcy were crimes against property, because they violated or harmed the property rights of the creditors.[35] *Pál Angyal,* one of the most outstanding Hungarian criminal law professors took the latter view, with a little clarification. *Angyal* derived the punishability of these crimes from the fact that the debtors' obligation to maintain and preserve his solvency, consequently if the debtor fraudulently breaches this obligation, they violates or harm the creditors' claim.[36] *Miklós Zöldy* agreed with *Angyal*, he applied objective teleological interpretation and he argued that the text of law had mentioned the „harm of the creditors", so *de lege lata* the legal matters of the delict was the property rights of the creditors.[37] *Ferenc Vargha's* (the Crown Prosecutor of Hungary between 1922-1930) opinion harmonized with the previous two opinions, he said that the legal matter of these delicts is the creditors' proportionate claim.[38] *Vargha* also based this argument on the statutory definitions of the delict, which is clear from Section 414 of the Act, where the emphasis was on the *animus nocendi* (so the intention to cause damage to the creditors), and from Section 415, which stated that the extent of the damage was a qualifying circumstance.[39]

So the legal matter is the proportional satisfaction of all creditors affected by the bankruptcy. This view implies that the thwarting or impairing two or more creditors' satisfaction did not mean aggregation of criminal offenses (*Gesetzeskonkurrenz*), becasuse the delict protects all of the creditors in one bankurptcy proceedings. As a consequence, there will be accumulation only if the perpetrator commit the fraudulent activity in two or more bankruptcy proceedings. The question may arise, although this crime mainly violated the creditors' claim, but could it also violate collective economic interests too? *Sándor Kornél Túry*'s (the writer of the first Hungarian monograph about economic criminal law) answer was affirmative, according to his view the fraudulent bankruptcy could endanger an collective economic interest, exactly the credit transactions.[40] It is explained by the fact that the proliferation of these conducts affects the credit market negatively, because if the creditor see too much risk in granting a loan, the „price" of the loan is going to increase, making the credit-flow more limited, which is incredibly dangerous during an economic recession.[41]

The Curia has voted in favour of the individual legal-matter concept in a decision from 1908. According to the facts of the case the accused did not sumbitted the petition of bankruptcy after the onset of the insolvency, consequently one of his creditors asserted his lien against the bankrupt. Although that creditor's claim was satisfied, the others could not get the proportional satisfaction, because enforcement of the lien reduced the assets used as the basis for satisfaction.[42] The Curia ruled that the fraudulent and culpable bankruptcy criminalized those conducts and omissions which harmed or endangered the creditors' right of claim by reducing or making inaccessible the assets of the claim.[43]

4. The interpretation of the bankruptcy opening as the definitional element of the crime

As I mentioned, the fraudulent and culpable bankruptcy was a *delictum proprium*, because only the bankrupt person could commit it. Although the definition of bankruptcy referred to the economic status of the offender, dogmatically the bankruptcy opening was an objective ground for punishability, which meant that the perpetrator's intention or negligency did not need to cover this definitional element.[44] The norms of bankruptcy opening regulated by the Act XVII of 1881 about bankruptcy, so this definiton belonged to the territory of insolvency law. The question may arise that the criminal court had to interprete this definition in the context of insolvency law or it had to use a *genuine* criminal law-specified interpretation? According to *Ferenc Finkey*, if the definiton of a legal institution regulated by another territory of law, the court was not bound by it in criminal cases, it could give a different meaning to the definition according to the purpose of criminal law.[45]

Firstly, the Royal Hungarian Curia formed a decision about this definitional element in 1911. The Curia ruled that both procedural and substantive (material) bankruptcy were objective elements of the statutory definiton of these delicts.[46] According to the Curia, the courts must determine not only the starting date of the bankruptcy proceeding, but also the amount of the perpetrator active and passive assets in that date.[47] At

34 Ibid.
35 Ibid. p. 2.
36 ANGYAL, P., 1929, p. 148.
37 ZÖLDY, M., *A hitelezőket károsító bűncselekmények: a fizetésképtelenségekhez fűződő bűnkeretek alapja, fejlődése és mai helyzete*. Budapest, 1930, p. 5.
38 VARGHA, F., 1892, p. 284.
39 VARGHA, F., Adalék a csalárd bukás kérdéséhez. In: *Ügyvédek Lapja*, Vol. 7, No. 46, 1890, p. 4.
40 TÚRY, S., *Gazdasági szemlélet és büntetőjog*. Budapest, 1941, p. 28.
41 Ibid. p. 29. LENGYEL, A., *Fizetőképtelenségi büntetőjogunk reformja*. Budapest, 1929, p. 8. The dichotomous conception of the legal matter also harmonises well with the functions of bankruptcy proceedings, since a bankruptcy does not only affect the interests of creditors, but also certain public interests, such as large-scale redundancies or changes in the structure of the market. See more information: VON WILMOWSKY, P., Insolvency Law: Its Roles and Principles. In: CORDES, A. – SCHULTE BEERBÜHL, M. (eds.), *Dealing with economic failure. Between Norm and Practice.* Frankfurt am Main, 2016, p. 246-247.
42 3460/908. SZ. A. 1. B. t. In: BALOGH, J. (ed.), *Büntetőjogi döntvénytár Vol. 2.* Budapest, 1909, p. 199.
43 Ibid. p. 200.
44 HEIL, F., 1897. p. 9-10; VARGHA, F., 1897, p. 369.
45 FINKEY, F., 1914. p. 104.
46 4221/910. sz. a. III. Bt. In: BALOGH, J. (ed.), *Büntetőjogi döntvénytár Vol. 4.* Budapest, 1911, p. 271.
47 Ibid.

the same year the Curia created another decision in which, the supreme court interpreted the meaning and role of substantive bankruptcy. The Curia applied legal matter-centered interpretation in that case, it started the reasoning with the next: those conducts and omissions criminalized under the two statutory definitons, which harmed or endangered the creditors' economic interests, therefore the main emphasis was on the lack of assest.[48] As a consequence, in the case when the perpetrator was under the bankruptcy proceedings, but the bankruptcy was declared not because of the lack of active assets, but it was caused by any other cases, the perpetrator's conduct was not punishable. In this point it is important to emphasize that this situation was possible for registered merchants, because in case of „commercial bankruptcy" the opening of the bankruptcy proccedings did not mean necessarily the real lack of active assets, it was enough if the merchant stopped paying of his obligations.[49] We can draw the conclusion that the Curia considered the opening of bankruptcy proceedings factual only if the procedural bankruptcy paired with substantive bakruptcy, so the supreme court used a *genuin* criminal-law specified interpretation to this definitional element.

In that point a question may arise, what happened if the court overturned the previous judgement about opening the bankruptcy, but there was still lack of assets. The Curia did not accepted the legal reasoning of the Royal Regional Court of Appeal of Budapest, because the court of appeal intrepreted the overturn of the judgement as if the court had not ever declared the bankruptcy, so it did not find the perpetrator guilty. According to the facts of the case, the accused knew about his own insolvency and he failed to submit the petition of bankruptcy, consequently one of his creditors obtained an execution lien on his property, harming other credtiors's claim.[50] The court opened the bankrurptcy proceedings in April of 1906, but after a month later the court overturned its previous decision, because the bankrupt did not even have any assets.[51] The Curia ruled that in the point of view of the realisation of the delict it was irrelevant that the bankruptcy was subsequently discharged by the court, it did not influence the consummated actualization stage of the delict.[52] So we can see again that the Curia made a distinction between insolvency law and criminal law interpretations of the definitional element, accepting the latest one.

The supreme forum also affirmed this legal reasoning in another case in 1914, when it ruled that: „*The material bankruptcy and the opening of bankruptcy proceedings is the condition of punishability of delicts regulated under Section 414 and 416, although the termination of the bankruptcy proceedings does not influence the realisation of statutory definition.*"[53] *Fausztin Heil* also affirmed that the „mutual dependency" of the criminal and bankruptcy procedure did not prevail in the Hungarian legal system, the end of criminal proceedings did not necessarily mean the end of bankruptcy proceedings and the subsequent termination of bankruptcy proceedings did not influence of the punishability of the conduct.[54]

5. Qualification of the offender – dilemmas around legal persons

Since not only natural persons were involved in commercial life, the legislator had to take account the case, where there were legal persons in the position of bankrupt. The *Code Csemegi* stated if the bankruptcy proceedings opened against a trading company or society, the criminal liability burdens the people responsible for the management of the business.[55] According to Act XXXVII of 1875 about commerce, unlimited mercantile partnership, limited partnership, share company and co-operative society were considered trading companies.[56] The range of people who were liable of managing the legal persons regulated partly the Commercial Act and partly the articles of the corporation, for example the members of the directorate and those who were obliged to lead trading books.[57] It is important to emphasize that this regulation referred to the partnership businesses, not the one-man enterprise, when the trader ran a business with the assets he owned.

The main legal question was who could be considered the offender of the crime if the owner of the business (who was the bankrupt in the sense of insolvency law) fully authorized a manager to handle all kind of affairs of the business, while the owner did not do anything criminally relevant. The Curia created a doctrine, which ruled that the fraudulent bankruptcy could only be commited by the bankrupt person, and the supreme forum ruled that in case of bankruptcy against legal persons only the owner of the company could be the offender of the crime, the conducts of every other member of the company classified as an accomplice.[58] According to the facts of this case R. K. and R. T. were the owners of the company which went bankrupt and the company did not lead trading books, consequently the amount of the active and passive was not possible to determine. The main legal problem derives from the fact that the owners of the company gave an authorization to R. GY., who became the manager of the company and because of the full-power attorney the owners were not aware of the economic situation of the company.[59] The Curia found R.

[48] 881/910. sz. a. III. Bt. In: BALOGH, J. (ed.), *Büntetőjogi döntvénytár Vol 4.*, Budapest, 1911, p. 203-204.
[49] APÁTHY, I., 1887, p. 63; MESSINGER, S., Kereskedelmi csőd. In: MÁRKUS, D. (ed.), *Magyar jogi lexikon. Vol* 4. Budapest, 1903, p. 641.
[50] Curia 1909 február 17. 1191. sz. a. In: BALOGH, J. (ed.), *Büntetőjogi döntvénytár Vol. 3*. Budapest, 1910, p. 330.
[51] Ibid.
[52] Ibid. p. 329.
[53] 3804/1913. sz. a. III. Bt. In: VARGHA F. (ed.), *Büntetőjogi döntvénytár Vol. 7*. Budapest, 1914, p. 273.
[54] HEIL, F., 1897, p. 25.
[55] 1878: V. tc. a a magyar büntetőtörvénykönyv a büntettekről és vétségekről. Section 417.
[56] 1875: XXXVII. tc. Section 61; NAGY, F., *A magyar kereskedelmi jog kézikönyve Vol. 1*. Budapest, 1901, p. 213-215.
[57] ANGYAL, P., 1929, p. 155.
[58] ANGYAL, P., 1929, p. 153, HEIL, F., 1897, p. 16-17.
[59] 1905. márcz. 30. 2981. szám. In: VAVRIK, B. (ed.), *Grill-féle döntvénytár Vol. 12*. Budapest, 1907, p. 131.

K. and R. T. guilty as offeneders and convicted R. GY too, but as accomplice.[60] Both of them were liable for the bankurptcy, but the omission was different: R. GY., the fully authorized manager omitted to lead trading books, contrary to the fact that the commercial and criminal law regulation obliged him to make a yearly account.[61] The Curia declared that only the member (in that case the owner) could be the offender of both the fraudulent and culpable bankruptcy, therefore the conduct of company manager could only be considered as an accomplice.[62] This dogmatic viewpoint derived from the fact that the offender of the guilty bankruptcy was the bankrupt, who is the person whose assets have been declared insolvent, so in this case the business owner.[63] However this provision referred only the financial responsibility of the bankrupt, not the criminal liability. *Pál Angyal*, *Fausztin Heil* also stressed that in these cases the court should have applied autonomous interpretation and qualified the acts the owner and the manager as complicity (*Mittäterschaft*).[64] Although, from the insolvency law point of view, indeed the owner of the business had to be considered bankrupt, the criminal court could attribute a *genuin* criminal meaning to a definitional element, so it could have considered the manager to be a bankrupt from a criminal law point of view, as *Pál Angyal* also emphasized.[65]

The Curia ruled the same way in 1912. According to the facts of the case the accused L. M. ran a clothing shop under the name of his son, L. J. The shop was destoyed by fire on 12th June of 1908, and the amount paid by the insurance company and the loan taken out by the defendant did not cover the previous debts, the value of the active assets was 20,534 crowns, the creditors' claim amounted 29997 crowns, so the value of the unsecured debts were 9462.[66] L. M. was a business manager, who had unlimited right of disposal, exercising this right to satisfy the claim of some creditors from the loan, which he took out after the fire. Besisdes he put aside the insurance from the creditors.[67] As a consequence of these conducts, some creditors' claim remained unsatisyfied and criminal procdure started. Firstly the Curia concluded that L. M. managed the shop independently and exclusively, after that the court compiled again the liability rules of insolvency law and criminal law and drew an incorrect dogmatic conslusion.[68] The Curia ruled that L. M.' was an accomplice not an offender, because the shop *de jure* operated under the name of his son, he was listed in the register of companies and during the bankruptcy proceedings L. J. has taken the oath of non-asset status.[69] So in that case the Curia draw conclusion to the offender's qualification from other territory of law, trying to determine the qualification with the rules of commercial law and insolvency law. The final decision of the Curia was dogmatically questionable, because it acquitted L.J. of the charge of offender of fraudeulent bankruptcy, but it found L. M. guilty in the accomplice of fraudulent bankruptcy.[70] The main problem derived from the fact that the court concluded accomplicity contrary to the fact that there was not criminally relevant act of the offender, because the according to the facts of case L. J. was unware of the whole process, his completely passive conduct could not be subsumed under any kind of delicts.

The Curia issued a similar decision in G. A.'s case. G. A. was the owner of a legal person, who has been placed under guardianship. G. A. and her legal representative authorized a business manager to run the business. When the company started to face liquidity problems and went into insolvency, the business manager accumulated new debts and he failed to inform G. A. and her legal representative about the necessity of submitting petition of bankruptcy, before the creditors asserted their claims.[71] As a consequence of this omission, some of the creditors got *fieri facias* to the assets, so the passive conduct led to the infringement of the claims of those creditors, who did not enforced the lien. The Curia found the business manager guilty as the accomplice of culpable bankruptcy, because of this omission.[72]

As far as the partnership businesses are concered, the Criminal Code regulated this situation, and declared that the criminal liability burdens the persons responsible for the management of the business who committed the offense.[73] Consequently the courts had to decide from case to case who is the manager of the company. In the case of W. M and G.H the supreme forum analysed this question in connection with limited partnership. The Curia stated that it was not relevant whether the member of the company (in this the case the „silent partner") was registered in the company register or not.[74] In order to establish the qualification of the offender, the courts had to analyse whether the perpetrator was a person

60 Ibid.
61 Ibid. p. 130.
62 Ibid.
63 1881: XVII. tc. a csődtörvényről. Section 1; MESSINGER, S., Közadós. In: MÁRKUS, D. (ed.), *Magyar jogi lexikon. Vol 5.* Budapest, 1904, p. 87.
64 ANGYAL, P., 1929, p. 153; HEIL, F., 1897, p. 16;
65 ANGYAL, P., 1929, p. 153. *Miklós Degré* criticised *Pál Angyal*'s viewpoint, saying that only those could be insolvent in the criminal law sense, whose assets have been declared bankrupt. DEGRÉ, M., Angyal Pál büntetőjogi kézikönyvének két újabb füzete. In: *Magyar Jogi Szemle*, Vol. 11, No. 4, 1930, p. 146.
66 2652/1912. sz. a. IV. Bt. In: VARGHA, F. (ed.), *Büntetőjogi döntvénytár Vol. 6*. Budapest, 1913, p. 284-285.
67 Ibid. p. 285.
68 Ibid.
69 Ibid.
70 Ibid.
71 4837 1912. sz. a. III. Bt. In: VARGHA, F. (ed.), *Büntetőjogi döntvénytár Vol. 6*. Budapest, 1913, p. 273-274.
72 Ibid.
73 1878: V. tc. a a magyar büntetőtörvénykönyv a büntettekről és vétségekről. Section 417.
74 6154/912. sz. a. III. Bt. In: VARGHA, F. (ed.), *Büntetőjogi döntvénytár Vol. 6*. Budapest, 1913, p. 305-306.

who had influence of all branch of the business or not.[75] This interpretation harmonized with the provision of the Criminal Code mentioned above, because this Section burdens the criminal liability to the „real manager" of the company, irrespective of what was in the company regsiter, so the criminal law regulation defined the business management as a *questiones facti* and not a *questiones iuris*.

6. Negligent business management

It is necessary to analyse separately the version of culpable bankruptcy set out in the first point of Section 416, which was commited by a bankrupt who become insolvent by wasting his wealth, managing his business negligently, doing stock market game or such a risky business which did not belong to the normal scope of his economic actvity.[76] The historical-dogmatical analysis of this statutory definition is so important because the current form of the insolvency crime in the Hungarian Criminal Code contains almost the same form of the perpetration („in contradiction to the requirements of prudent management").[77] This statutory definition leaves the statutory definition partially open to the courts,[78] so the historical interpretation may contribute to the deeper undestanding of this definition. The four conducts regulated under the Section mentioned above, can be collectively referred as „negligent-unwary management", as *Pál Angyal* says.[79] The criminality of this delict lies in the fact that if the debtors' negligent conduct leads to bankruptcy, it jeopardises not only the debtors' financial interests but also creditors'.[80] This also means that the conduct of the debtor was punishable only if the bankruptcy is caused by the conducts described above, and there is a casuality between negligent behaviour and bankruptcy.[81] As a matter of fact, with this regulation the legislator made an obligation for traders to conduct their business according to the standard of ordinary commercial care.[82] Among the forms of the perpetration the interpretation of wastefulness and negligent business management require more explanation. Wastefulness means spending which is out of proportion to the debtor's personal and financial circumstances and which exceeds the amount of necessary, normal expenditure.[83] *Miksa Bernhard*, a 20th century scholar of bankruptcy law, points out that this definition is not limited to personal and household expenses, but also extends to business expenses, therefore wastefulness may also be established when the debtor has spent beyond the normal scope of his business.[84] In contrast to this flexible definition, negligent business management had a more secure normative framework, becuase the Commercial Act regulated the concept of ordinary commercial care.[85] This was the standard of liability that traders had to follow in their contractual relations and this was a stricter standard in commercial life than the liability of *bonus et diligens pater familias.*[86]

*I*n the following, I am going to show how the Curia has interpreted these two definitional elements. The supreme forum interpreted the definition of wastefulness in 1913, however interpreted together with negligent business management. According to the facts of the case, the accused spent 18 500 crowns of his business income on his household and 40 000 crowns on advertising.[87] The Curia ruled, that by spending 18 500 crowns on a household, the accused spent a disproportionate amount compared to the income of the business and found that the defendant had failed to exercise the care and diligence required in the management of his business, since, if he had acted diligently, he would have been able to recognise the disproportionate relationship between the cost of advertising and the turnover of his business.[88] It can be seen that while in the case of wastefulness the court examined the income and wealth of the bankrupt, in the case of negligent management the court examined the standard of liability set by the Commercial Code.

The Curia also issued a decision examining the concept of negligent business management. According to the historical facts, the accused opened and maintained his business by using a large loan, which later went bankrupt.[89] The legal question the court had to answer was whether there was negligence in establishing and maintaining the business in this way. The Curia found that although the accused had completed only three elementary grades, this fact alone did not lead to the conclusion that he was lacked of commercial knowledge, therefore this fact could not be the basis of negligent business management. The court then considered the defendant's commercial experience prior to setting up the business. The Curia concluded on the basis of the underlying facts that before the accused opened a spice and hardware shop in *Mohács*, he had run a linen shop in another town, so it cannot be established that he founded the later bankrupt business without professional knowledge

[75] Ibid.
[76] 1878: V. tc. a magyar büntetőtörvénykönyv a büntettekről és vétségekről. Section 416.
[77] 2012: C. törvény a Büntető Törvénykönyvről. Section 404. Paragraph 2. Point c).
[78] KARSAI, K., A gazdálkodás rendjét sértő bűncselekmények. In: KARSAI, K. (ed.), *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez*. Budapest, 2022, p. 988.
[79] ANGYAL, P., 1929, p. 170.
[80] Ibid.
[81] HEIL, F., 1897, p. 34-35. VARGHA, F., 1892, p. 289; ZÖLDY M., 1930, p. 93.
[82] BERNHARD, M., *Bűnvádi csődper*. Budapest, 1914, p. 46.
[83] ANGYAL, P., 1929, p. 170.
[84] BERNHARD, M., 1914, p. 48.
[85] 1875: XXXVII. tc. a kereskedelmi törvény. Section 271.
[86] BERNHARD, M., 1914, p. 49-50.; NAGY, F., *A magyar kereskedelmi jog kézikönyve Vol. 2*. Budapest, 1901, p. 52-53.
[87] 2887/1913. sz. a. III. Bl. In: VARGHA, F. (ed.), *Büntetőjogi döntvénytár Vol. 7*. Budapest, 1914, p. 191-192.
[88] Ibid.
[89] 1559. sz. In: BALOGH, J. (ed.), *Büntetőjogi döntvénytár Vol. 3*. Budapest, 1910, p. 159.

and experience, consequenetly negligent management cannot be established.[90] However, the Curia did not always consider the liability of the trader as the standard of negligent negligent business management, but only conducted a cost-benefit analysis. In a case from 1917, the accused entered into a partnership agreement with K. J. The conviction found that the accused had spent too much money on fitting out the premises compared to the capital available and incurred disproportionate expenses in running his business.[91] As a result, between August and December 1911, the gross profit from the business could only partially cover his costs and he would have had to earn twice the profit to cover his costs.[92] The Curia draw the conclusion that the fact, the accused uncurred expenses without taking into account the income of the business, letting the company to go bankrupt, constitutes negligent management and found him guilty in culpable bankruptcy.[93]

7. Unity (*Einheit*) or aggregation (*Gesetzeskonkurrenz*)?

The last dogmatic issue I want to deal with is related to the aggregation of offenses, which involves two separate subquestions. Firstly it is important to answer that the conduct of the perpetrator qualified as unity or aggregation, if he realized more forms of fraudulent or culpable bankruptcy (e.g. when the perpetrator alianeted the assets under value and provided a preferential treatment to one his creditors too.). In other words which factors determined the realization of the aggregation? The second question refers to the relation of the fradulent and the culpable bankruptcy: unity or multiple count of offenses were realized, if the conduct of the same perpetrator fitted into both statutory definitons. On the first question, there was consensus in the legal literature, because both fraudulent and culpable bankruptcy have been classified as a legal units (in German terminology it is called *Gesetzliche Einheit*).[94] The legal unit means that the legislator subsumes different acts under one statutory definiton. In that case all of the subsumated acts are natural criminal units, so without the legal unit aggregation would have to be established, but because of the provision of the law these acts qualified as unity,[95] consequently cumulative sentence is not applicable. The domgatic basis of the legal unit is the uniformity of the legal matter and the bankruptcy proceedings. As I detailed above, the legal matter of these delicts was the proportional satisfaction of all creditors affected by the bankruptcy proceedings, all forms of the perpetration harm or endanger the same legal matter in the same bankruptcy proceedings.[96] The legal unit can be deduced from the text of the norm, because the legislator used the word „creditors" (e. g. *„The bankrupt who intended to harm his creditors' claims"*), which expressed that the number of the creditors did not influence the number of the crimes, harming or endangering two or more creditors'claim did not result multiple counts of offenses.[97] Consequenty we can draw the conclusion that not the number of the creditors resulted cumulative offenses, but the number of the bankruptcy proceedings, so if someone commited two or more forms of perpetration during one procedure it is evaluated as a legal unit.

What is the situation if the same perpetrator realized both fradulent bankruptcy and culpable one during one bankruptcy proceedings? In this case we can face with an *absorbtio* which was one type of apparent aggregation (*scheinbare Gesetzeskonkurrenz*). The apparent aggregation means that one or more conducts of the perpetrator apparently fit into two or more statutory definitions, but for some reason only one delict can be established.[98] The *absorbtio* means that the conduct of the perpetrator fits into the statutory definition of a more serious and a less serious crime, therefore the more serious delict absorbs the less serious one.[99] Applying this dogmatic category to the analysed two crimes, it can be said that the fradulent bankruptcy absorbs the culpable bankruptcy.[100] It was explained by the fact that almost all of the definitional elements of the two delicts were the same, with the exception of the *dolus directus* aiming to harm the creditors, which was only the element of fradulent bankruptcy. Therefore the fradulent bankurptcy was the more serious crime which absorbed the culpable one.

The Curia also had the same opinion in connection with the aggregation. The Curia stated that the provisions of fraudulent and culpable bankruptcy formed an indiviseble complex, because of the common legal matter, consequently the real aggregation (*Gesetzeskonkurrenz*) of the two crimes could not be established.[101] The Curia also analysed the problem of the *absorbtio* between the fraudulent bankruptcy and fraud. According to the facts of the case, the accused was only able to finance his business by borrowing money, as a consequence he became so indebted that he had to take a loan to repay the interest of the loan. Subsequently, knowing exactly about his

[90] Ibid.
[91] 27. B III. 3130. sz. In: LENGYEL, A. (ed.), *Büntetőjogi döntvénytár Vol. 12*. Budapest, 1920, p. 24-25.
[92] Ibid.
[93] Ibid. p. 23.
[94] FAYER, L., *A magyar büntetőjog kézikönyve Vol 2*. Budapest, 1905, p. 488. FINKEY, F., 1914, p. 754.
[95] FINKEY, F., *Az egység és többség tana a büntető jogban*, Sárospatak, 1895, p. 44; ZÖLDY M., *A halmazat büntetőjogi alapelmélete, különös tekintettel az egység-többség gyakorlati tanára*. Budapest, 1931, p. 14-15.
[96] ANGYAL, P., 1929, p. 166; HEIL, F., 1897, p. 18-19; FINKEY, F., 1895, p. 47-48.
[97] This dogmatic category is called *„the special form of the legal unit"* in the current Hungarian legal dogmatics, meaning under the type the legal unit, when the number of victims is irrelevant by the express provision of the legislator, the perpetration always qualifies as criminal unity regardless of the number of the victims. AMBRUS, I. *Egység és halmazat – régi dogmatikai kérdés, új megközelítésben*. Szeged, 2014, p. 169-172.
[98] BAUMGARTEN, I., Törvényhalmazat és bűnhalmazat. In: BAUMGARTEN, I. (ed.), *Büntetőjogi tanulmányok Vol. 1.* Budapest, 1907, p. 314. FINKEY, F., 1895, p. 34-35.
[99] ZÖLDY, M., 1931, p. 56.
[100] FINKEY, F., 1895. p. 38; FINKEY, F., 1914, p. 756.
[101] 299/909. sz. a. III. Bt. In: BALOGH, J. (ed.), *Büntetőjogi döntvénytár Vol. 3.* Budapest, 1910, p. 123-126.

insolvency, pretended that his solvency was stable, so he misled the credtitors to took more and more loans contrary to the fact that his business had serious liquidity problems and he knew that he would not be able to repay the loan.[102] These conducts realized both the statutory definition of fraud and fraudulent bankruptcy.

The question was whether the meeting of the two offenses would establish aggregation or not? In its reasoning, the Curia first underlined that there is a doctrinal position which says that fraudulent bankruptcy is in fact a fraud committed against creditors, and therefore the two offenses cannot be considered cumulative, but afterwards the court declared that this viewpoint is not correct. The Curia then analysed the conditions of *absorbtio*, so is there a situation where the more serious offense asborbs the less serious one.[103] Therefore, a further condition of the *absorbtio* that the statutory definition of the less serious crime (in this case the fraud) have to fully fit into the statutory definition of the more serious delict (in this case the fradulent bankruptcy),[104] so the definition of the more serious one have to cover the definitional elements of the less serious one. Consequently, the court have to comparise the statutory definition of fraud and fraudulent bankruptcy. Firstly, the Curia declared that the legal matter of the two crimes are not the same: while the fraudulent bankruptcy protected the proportional satisfaction of all creditors affected by the bankruptcy proceedings, the fraud is commited against certain creditors, it does not defend the „overall creditor interest".[105] Secondly the fraud is a *delictum commune,* anyone can commit it, regardless of any special personal qualification, but the fraudulent bankruptcy is a *delictum proprium,* only the bankrupt person can commit it. Thirdly the statutory definition of fraudulent bankruptcy does not involve the realization of damage (only the the perpetrator's mischievous intent aiming to cause it), whereas fraud does. Taking the above into consideration, the Curia concluded that the two delicts did not cover each other, therefore *absorbtio* could not be established, consequently the two crimes evaluated as aggregation.[106]

8. Summary

The historical interpretation confirmed the legal matter concept of the Constitutional Court, based on the analysed criminal law literature I could draw the conclusion that the primary legal matter of the fradulent and culpable bankruptcy was the protection of proportional satisfaction of all creditors affected by the bankruptcy, but they also had secondary, collective legal matter which was the protection of normal course of the credit flows. After that, I put the legal matter at the centre of my research methodology and I used objective teleological interpretation during the dogmatic analysis of the statutory definitions. As far as the bankruptcy opening as objective objective ground for punishability is concerned, I was able to show that the Curia interpreted the definition of bankruptcy in an autonomous way, assigning a *genuine* criminal law meaning to this definitional element, not only transferred it from the field of insolvency law. This cannot be said of the interpretation of the qualification of the offender in case of one-man enterprises, because the Curia considered only the business owner as the offender, although legal scholars (e.g. *Pál Angyal* or *Fausztin Heil*) expressed the impropriety of this legal opinion, emphasizing that the court had to establish complicity in the case, when the owner has delegated the management of the business to a manager with full power of attorney. It is explained by the fact that, the court could have considered the manager to be a bankrupt with autonomous criminal law interpretation. Besides it is necessary to underline that the Curia correctly applied the standard of commercial care during the interpretation of negligent management, so the court interpreted a criminal law concept on the basis of a concept falling within the field of commercial law. As far as the unity and aggregation are concerned, the practice of the Curia harmonized with the point of view of the legal scholars. Overall, it can be concluded that the dogmatic issues detailed in the study may be useful not only for the science of legal history, but may also serve as a contribution to a deeper understanding of the current regulation of insolvency crimes.

[102] B III. 7690/1926. sz. In: LENGYEL, A. (ed.), *Büntetőjogi döntvénytár Vol. 21.* Budapest, 1929, p. 7.
[103] Ibid. p. 8.
[104] ZÖLDY, M., 1931, p. 56.
[105] See more on the legal matter of fraud: KORSÓSNÉ DELACASSE, K., A csalás törvényi tényállásának és jogi tárgyának változása a magyar büntetőjog történetében. In: GOSZTONYI, G. – RÉVÉSZ T, M. (eds.), *Jogtörténeti parerga II : Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére*. Budapest, 2018, p. 153-158.
[106] B III. 7690/1926. sz. In: LENGYEL, A. (ed.), *Büntetőjogi döntvénytár Vol. 21.* Budapest, 1929, p. 8.

The Most Significant Case of Military Supplier Fraud in Hungary During the First World War: The Criminal Judgement of the Cloth-Fraud Case Based on the Judgements of the Military Courts of the Time

Roland Kelemen,[*,**] *Róbert Bartkó*[**]

Abstract

In the first year of the First World War, several cases of war transport abuse came to light in Hungary, which were of great social interest and caused extremely significant material and moral damage. One of the largest of these was the so-called baized fraud case. The special feature of these cases is that some of the defendants are military personnel, while others have civilian status. In Hungary, the practice has developed that both categories of persons are tried by military courts. This study aims to provide a comprehensive overview of the historical facts of the case, the legal context of the case and the decisions of the courts at first and second instance.

Keywords: *war; military cloth fraud; military criminal law; the special legal order, Hungary.*

> *„That's why you see wonderfully tattered cloaks on the backs of marching bucks, why the hussar sits in the saddle without trousers, and why the train has failed to deliver enough fresh new clothing to certain regiments in battle. By the third day the clothes had begun to tear, even though it would be a long three weeks before the new ones arrived."* [1]

1. Introduction

It is an inherent part of war that some people try to take advantage of the economic opportunities that war offers, many of them going beyond the moral norms and breaking the legal framework to do so. The dualist period[2] also saw many cases of corruption in political circles,[3] and the political crises of the decade before the First World War brought systemic problems to the surface,[4] so it is no coincidence that in the year following the outbreak of the First World War, several major abuses committed by suppliers occurred and came to light. The most significant of these was the cloth-fraud case.

The criminal case exploded on 17 March 1915, when the capital's newspapers – and after a few days the provincial ones – reported that the investigators of the Budapest police headquarters were investigating an extremely significant fraud case, worth about ten million crowns.[5] The next day, the number of suspects was so high that the detention centre of the main police station got full, and some of the accused were already being held in the detective rooms under police supervision, so suspects from other cases were transferred to the toloncház.[6,7]

Unfortunately, there are no archival sources on the details of the case, but articles in the daily press give us a detailed account account of the investigation and the trial before the court at second instance, and the daily press also published the conclusive decisions of the courts at first and second instance in great detail. It should be added that, relating to the investigation only data concerning civilians were reported, so we cannot know from the newspaper columns the military prosecutor's procedural actions during the investigation. Nevertheless, we can still use them to get a comprehensive picture of one of the most important and most public-interest criminal cases in Hungary during the First World War period, in which military courts and military penal codes were used to pass sentences, despite the fact that many of the accused were civilians.

* Dr. Roland Kelemen, associate professor, Department of the Legal History, Faculty of Law, Széchenyi István University, Győr, Hungary, email: kelemen.roland@ga.sze.hu / ORCID 0000-0002-5419-8425.

** Dr. Róbert Bartkó associate professor, Department of Criminal Law, Faculty of Law, Széchenyi István University, Győr, Hungary, email: bartko.robert@ga.sze.hu /ORCID 0000-0002-3547-4252.

1 KRÚDY, GY., A háromszoknyás lányok. In: KRÚDY, GY., *Régi pesti históriák – Színes írások.* Budapest, 1967, p. 7.

2 For the constitutional foundations of the Hungarian dualist state, see: GOSZTONYI, G., Freedom in the Hungarian April Laws of 1848. In: *Journal on European History of Law,* Vol. 15, No. 1, 2024, p. 138–142.

3 CIEGER, A., *Politikai korrupció a monarchia Magyarországán 1867–1918.* Budapest, 2011.

4 FARKAS, Á., *A [hon]védelmi alkotmány kialakulása a polgári Magyarországon 1867–1944*. Budapest, 2019; WIENER, GY., A többségi elv és a bizalmi kérdés a dualizmus kormányzati rendszerében. In: *Jogtörténeti Szemle*, Vol. 21, No. 3, 2007, p. 68–89.

5 U/A, Női kelmébe. In: *Az Est*, 1915, 17 March 17, p. 1.

6 Toloncház: Detention centre for the temporary accommodation of prisoners.

7 U/A, Hogyan csaltak a katonai posztószállítók – Ujabb kihallgatások a rendőrségen. In: *Az Est*, 1915, 18 March, p. 3.

2. Cloth Outlaws in the Crosshairs of the Authorities – Investigation and History of the First World War Cloth Fraud Case

The investigation against civilians was launched on 9 March, under the direction of Dr Jenő Marinovich, head of the Criminal Investigation Department of the State Police, when the Budapest[8] Military District Prosecutor notified the Police Headquarters that they had found some pieces of evidence of significant fraud and requested an investigation.[9] On the orders of the Ministry of Defence, the military prosecutor's office had already opened an investigation and had presented the results of the investigation to detectives who had been requested to come out. The case began with a report from a combat battalion that the soldiers' jackets and trousers were tearing at an extremely high rate.[10] This led to a military committee at the central military clothing depot in Budapest, with the assistance of an expert, examining the cloth-material in stock and finding that out of the five hundred ends examined, about one hundred did not correspond to the samples contracted for with suppliers. It is an indication of the poor quality of the material delivered and received that many of them were not even suitable for summer uniforms or even as linings.[11] As a test, in the Maria Theresa barracks on Üllői Road and in the Franz Joseph barracks in Népliget, a marching squadron was dressed in brand new uniforms made from this cloth and the soldiers started to practice, after less than half an hour the clothes were pierced on the knees and elbows of almost all the soldiers.[12]

After the military commission's investigation, they immediately began to identify the suppliers of the poor quality material from which it was sourced. At the time, the army had fifteen suppliers, who were obliged to seal each end with their company's mark on the outside and inside. In this way they could easily identify the suppliers who delivered the poor quality material to the Central Clothing Depot. The essence of the abuse was that instead of supplying wool made from the wool provided as a sample, they supplied cotton-cross-linked wool, so that instead of pure wool worth 10-13 crowns per metre, they supplied cotton-cross-linked wool worth 3-4 crowns.[13] The central element of the crime, which in today's terms can only be classified as simple fraud, was that the members of the perpetrators involved in the case as suppliers deceived the Military Forces by delivering a product with much poorer characteristics than the sample order instead of the expected quality of the material. In the causal relation with using deceit, the Military Force suffered damage on account of the disproportionate purchase price. Not forgetting that this also reduced the combat value of the troops, thus endangering the war interests of the state.

But the fraud did not end there, as the poor quality material was turned into uniforms, and consequently some tailors were also involved in the criminal offence. It could be possible because the peacetime military procedure whereby the cloth received were graded and certified by a sergeant to be used to make a jacket, cape, trousers or cap, was abolished. The material so certified was delivered by the military authorities themselves to its sole manufacturer, the National United Textile Works Corporation, where the certified garment was cut from the 136 cm wide baize, which is compulsory at the ends, and sewn under the supervision of an army officer. However, after the outbreak of war, Textile Works indicated that it was unable to meet the huge increase in orders, so the military authorities contacted other manufacturers. This is how the firm of Zsigmond Kohn and Company came into the picture. As a result of these circumstances, the garments ordered were now being tailored for the army without any controls. This has created the possibility for suppliers to supply the manufacturer with a lower quality product, as described above, and also the possibility for the manufacturer to freely dispose of the quantity of cloth supplied in the absence of supervision by the defence. The chaotic conditions of war and the impossibility of ensuring constant supervision provided the breeding ground for the fraud. Although the company had received the same instructions from the army as the Textile Works, i.e. they were bound by the number of centimetres of cloth to be cut from the garments and had to account for this, they used one centimetre less per metre of material for each cut of garment, so they made a considerable amount of profit concerning the material delivered. However, on 9 March, the military commission searched the company and found considerably more cloth-material than they could account for, and it was also discovered that material had been stored in such a way that the ends of the cloth-material from Jenő Taubes had been kept separate, for which they were also unable to provide an explanation. In addition, there were cases where the supplier delivered good quality cloth to the warehouse, but when it was sent to Kohn's company, it was replaced with poor quality goods. Thus, in addition to embezzlement, Kohn was also accused of helping to supply the army with uniforms made of poor quality baize material unsuitable for military uniforms.[14] Kohn's conduct, whereby he substituted good quality raw materials for inferior ones and used them to produce clothes for the army, could also be qualified as fraud, but since the element of fraud concealed the commission of a deliberate embezzlement, the two offences cannot create a real material aggregation[15] with each other.

[8] Budapest held a unique legal status within the public administration of the dualist Hungarian state. See: SCHWEITZER, G., Der Rechtsstatus und die Selbstverwaltung der Hauptstadt Budapest in der bürgerlichen Ära. In: *Journal on European History of Law,* Vol. 14, No. 2, 2023, p. 91–96.

[9] U/A, Ujabb részletek a posztócsalók rendőri kihallgatásáról. In: *Az Est,* 1915, 19 March, p. 2.

[10] U/A, A rendőrség jelentése: a posztócsalókról és az élelmiszeruzsoráról. In: *Az Est*, 1915, 13 April, p. 6.

[11] U/A, Letartóztattak több posztónagykereskedőt. In: *Az Ujság*, 1915, 18 March, p. 7.

[12] U/A, A tízmilliós posztócsalás – A próba-egyenruhák félóra alatt szétszakadtak. In: *Magyarország*, 1915, 20 March, p. 7.

[13] U/A, Hogyan csaltak a katonai posztószállítók – Ujabb kihallgatások a rendőrségen. *Az Est*, 1915, 18 March, p. 3.

[14] U/A, Letartóztattak több posztónagykereskedőt. *Az Ujság*, 1915, 18 March, p. 7.

[15] According to the criminal legal dogmatics material aggregation means the case when one or more actions committed by the perpetrator result two or more criminal offences.

On the orders of the military court, the police started an investigation against the defendants for a crime against the army of the state under Article 327 of the Military Criminal Code of 1855. It is important to stress here that the accused suppliers and manufacturers were all civilians, yet the police, acting on the instructions of the prosecutor attached to the military court, suspected them of offences under the military penal code.[16] Accordingly, during the first stage of the investigation, the police interrogated and detained Béla Faragó, an employee of the publishing office, and the suppliers László Neumann, Jenő Taubes,[17] Dezső Hecht, Béla Sándor Váradi, Béla Kohn B., Miklós Ligeti, Arthur Pártos, Ödön Szász, Ernő Bastir[18] and Dezső Váradi.[19]

As a result of the search carried out in the house of the publishing agent Béla Faragó 30,000 crowns in cash and a savings deposit was found by the authorities, as well as a notepad with a list of some of the army's suppliers. Faragó had learned in November 1914 that a special military commissioner had been appointed to buy up all the baize in stock in Budapest for the army. Aware of this inside information, Faragó contacted Béla Sándor Váradi, László Neumann, Dezső Hecht, Pártos Ekker and Partners and other traders to buy options on their baize stock at an average price. In the following days, the Commissioner of War also approached the companies, but because of the option to buy, they could no longer control their own stock, as they wanted to be direct suppliers to the army, so they forced Faragó to give up his option for 70 fillér per metre. From this deal Faragó profited 100,000 crowns from the companies of Váradi, Hecht and Pártos.[20]

The investigation was intense, as it was also necessary to establish who were the intermediaries and who were the people involved in the crime on the part of the armed forces. On 20 March, Henrik Fenyves, a labour insurance fund official, was arrested, who, according to Ödön Szász, had linked him to a military officer for money.[21]

Due to newspaper articles often going into details of the investigation and even the interrogation,[22] the Press Committee[23] of the War Inspection Commission sent a confidential notice to the editorial offices, asking them not to publish any further news about the case until they received a signal to the contrary and an official statement from the police.[24]

The official police report also revealed that a stock of cloth at the Textile Works, which was being processed, was also under investigation. It was found that suppliers had supplied a total of nearly 23 000 metres of this material, of which more than 9 000 metres were of poor quality, so that the Treasury had suffered damage of more than 100 000 crowns from this stock alone. Ernő Bastir 252, László Neumann 1049, Béla Váradi S. 3186, Dezső Hecht 55, Artur Pártos 1874, Jenő Taubes 2651, while Ödön Szász caused the state damage in the form of a difference in the purchase price resulting from the inequality in value by fraudulently buying 113 metres of poor quality cloth material.[25] So it is not surprising that on 28 March, the director of the formerly suspected National United Textile Works, Gyula Riemer, and his colleague Jenőné Bóra were arrested. Jenőné Bóra had placed orders for László Neumann in exchange for gifts (a gold cigarette case and a brilliant ring) and money. The complex criminal case was also interwoven with corruption, since the undue advantages granted to the Textile Works, as the responsible employee of the manufacturing company, were the countervalue of the contracts concluded with certain suppliers. Riemer is believed to have been the mastermind behind the whole affair. Riemer bought up all the cloth stock, good and bad, of three factories and sold it to the army through a stooge.[26] Like Faragó, he also obtained options on stocks, for which he received a crown per metre, and also concealed the poor quality of the cloth supplied by the merchants, for which he also received a crown per metre.[27] Riemer was caught by trying to influence the testimony of Ernő Bastir by giving money to his relative, but the relative concerned, Bastir's wife, did not

[16] As the following chapter will briefly describe the legal context relevant to the case at the time of the offence, we will only make this brief reference here.

[17] The family was also involved in a paper shoe delivery case, as Jenő's brother Dr. Henrik Taubes, a lawyer from Máramarossziget, was also incriminated. – U/A, A milliós posztó-csalók a rendőrségen. *Az Est*, 1915, 17 March, p. 4.

[18] U/A, A nagy posztócsalás. In: *Budapesti Hirlap*, 1915, 27 March, p. 8.

[19] U/A, Ujabb részletek a több milliós posztócsalásban – Eddig tíz embert tartóztatott le a rendőrség, In: *Az Ujság*, 1915, 19 March, p. 11.

[20] U/A, A milliós posztócsalás. In: *Budapesti Hirlap*, 1915, 19 March, p. 11.

[21] U/A, A rendőrség befejezi a nyomozást a posztócsalók ügyében. *Az Est*, 1915, 21 March, p. 5.

[22] A perfect example of this is an article in Az Est, which wrote: „A staff member of Az Est saw a short, stocky man with a reddish moustache, limping on his left leg, who a few years ago was the director of a small financial institution, being brought before the editor of the newspaper, Dr. Gyula Bartha. After a few minutes, a loud, nervous shouting sounded out through the padded door into the corridor. The extremely nervous man was apparently not immediately available for questioning." – U/A, A rendőrség befejezi a nyomozást a posztócsalók ügyében. In: *Az Est,* 1915, 21 March, 5.

[23] During the war, the Press Committee was responsible for monitoring matters that came before the press, forbidding the publication of certain matters if necessary, and liaising with the editorial offices and the authorities. See more: KELEMEN, R., World War I special press order in the light of the foreign and domestic rules and practices with an outlook on limiting news on Spanish flu. In: GOSZTONYI, G. – LAZAR, E. (ed.), *Media Regulation During the Covid-19 Pandemic: A Study from Central and Eastern Europe.* Cambridge, 2023, p. 284–305; GOSZTONYI, G., Censorship and Law in Hungary in the Past. In: *Revista Română de Istoria Dreptului/Romanian Journal of Legal History*, Vol. 1, No. 1, 2021, p. 37–46; GOSZTONYI, G., *Censorship from Plato to Social Media: The Complexity of Social Media's Content Regulation and Moderation Practices.* Cham, 2023; RÉVÉSZ, T. M., Die Formveränderung des Presserechts in Ungarn in den Jahren des ersten Weltkrieges. In: *Jogtörténeti Szemle,* Vol. 35, No. Special issue, p. 59–70; as we may see in the future: GOSZTONYI, G., Aspects of the History of Internet Regulation from Web 1.0 to Web 2. 0. In: *Journal on European History of Law,* Vol. 13, No. 1, 2022, p. 168–173.

[24] U/A, A milliós posztócsalás. In: *Pesti Napló*, 1915, 22 March, p. 7.

[25] U/A, A rendőrség hivatalos jelentése a posztócsalásról. In: *Az Ujság*, 1915, 27 March, p. 8.

[26] U/A, Az aranyszelence és a brilliáns nyakék – A posztócsaló gyárigazgató bűnei. In: *Magyarország*, 1915, 28 March, p. 7.

[27] U/A, A posztócsalás. In: *Világ*, 1915, 28 March, p. 18.

accept this.[28] So the case is not just about economic corruption, but also about corruption in official proceedings that could undermine faith in the administration of justice. The latter case came to light when police officer Gábor Elek was persuaded by Riemer to allow him to have contact with Ernő Bastir. Riemer used this to persuade Bastir to partially change his statement. Riemer then wrote to his wife to give 40,000 crowns to Ernőné Bastir, who refused the money and handed it over to the police. It is not a prerequisite for the offence to be committed that the person who intends to bribe actually changes his or her statement, since this is not the result of the offence, but only its purpose. The list of charges against Riemer thus grew, and Constable Elek was suspended and arrested.[29]

Another interesting sidelight to the story was the arrest in June of Henrik Fenyves' two daughters[30], Jenőné Drechsler and Hajnalka Fenyves, who had confessed to having concealed two hundred thousand crowns to criminal charges by throwing the paper money into the stove, thus committing an act of aiding and abetting in today's terms.[31] During later interrogations, Hajnalka changed her testimony, which revealed that only half of the amount had been burned and the other half deposited in a savings bank, and that the amount seized was much more,[32] 380 thousand crowns. However, it was also revealed that the envelope given to Hajnalka Fenyves by her father had been given to her uncle Ignác Fenyves, a cattle dealer in Békásmegyer, who buried it in the garden of his house and in his grandmother's grave in the Kerepesi cemetery.[33] However, it has also come to light that the envelope received from her father was given by Hajnalka Fenyves to her uncle Ignác Fenyves, a cattle dealer from Békásmegyer, who buried it in the garden of his house and in his grandmother's grave in the Kerepesi cemetery.[34]

3. The Relevant Legal Context of the Offence

The social, legal practitioner and legislator perception of the fraud perpetrators was fundamentally influenced by the fact that they committed their acts during wartime, which caused much greater damage to the state (not only in material terms) than crimes committed in peacetime, and the crime itself posed a much greater threat to society through the state being at war. Because of the special period, the question of which court (military or civilian) and under which law (civilian or military code, special war crimes legislation) to act was more complex, as cases involving such contractors involved both military and civilian persons by their very nature. The purpose of this chapter is to provide at least a sketch of the legal context of the judicial proceedings that will be presented later.

It is worth noting at once that both the Civil Penal Code (Csemegi Code) and the Austrian Military Criminal Code, enacted by an imperial open order in 1855, contained relevant provisions. Chapter XLI of the Csemegi Code, under offences and misdemeanours against the armed forces, dealt with the scope of cases relating to military contractors.[35] According to Article 457, "whoever, *in time of war*, or after the army or part of the army has been mobilized, *fails to fulfil a contract concluded with an authority for the supply of the armed forces, or fails to fulfil it in accordance with the terms of the contract, shall be punished with imprisonment for a term of two years and a fine of up to two thousand forints."*[36] The italicised section points out that the Civil Penal Code can be applied to civilians in wartime too, but the punishment is not commensurate with the potential harm, as it only punishes the perpetrator with a short prison sentence and a fine that is negligible compared to the potential gain. It is also clear from the provision that the statutory elements criminalised the performance which wasn't in conformity with contracts concluded with the armed forces during the war. The conduct of misleading and deception, which are considered as statutory elements of fraud, and the intention to make an unlawful profit were not elements of the offence. Although the war implications of the offence may indeed have been significant, and a differentiated system of penalties would have been justified, it can be argued that the lower social risk may have been justified by the legislator (despite the time of commission) because of the lack of the unlawful financial gain.

It is worth examining the criminal legal provisions of the Act on Exceptional Powers during War of 1912.[37] This Act loosens the rules of criminal procedure in several areas: it introduces accelerated prosecution for certain offences and the possibility of summary justice.[38] In the case of criminal substantive law, the penalties for several statutory offences set out in the Csemegi Code have been increased, including several offences under Chapter XLI, but the offence under our analysis has not been affected.[39] This, in turn, can be seen as a major omission on the part of the legislator, given the abuses of war suppliers during the war. It is no coincidence that after the cases of "paper

[28] U/A, A posztó-panama irányítója: Riemer Gyula. In: *Az Est*, 1915, 1 April, p. 7.
[29] U/A, A posztócsalók leveleztek egymással a rendőrség fogházában – Megvesztegettek egy rendőrt is. In: *Az Est*, 1915, 2 April, p. 4.
[30] KOVÁCS-SZÉPVÖLGYI, E., Die Jugendgerichtsbarkeit – als Eroberer der Rechtsgeschichte. In: *Journal on European History of Law,* Vol. 13, No. 1, 2022, p. 156–160.
[31] U/A, Eltüntettek 200.000 korona bűnjelet – A kályhába dobták a posztócsalás bizonyítékait. In: *Az Est*, 1915, 20 June, p. 12.
[32] U/A, A posztócsalás „elégetett" 200.000 koronája. In: *Az Est*, 1915, 22 June, p. 4.
[33] U/A, Fenyves Hajnalka szabadon. In: *Az Est*, 1915, 29 June, p. 7.
[34] U/A, Megtalálták a posztócsalók pénzét. Kertbe és a temetőbe ástak el 400,000 koronát. In: *Friss Ujság*, 1915, 27 June, p. 5.
[35] MEZEY, B., Strafrechtskodifikation in Ungarn im Jahre 1878. In: MEZEY, B. (ed.), *Strafrechtsgeschichte an der Grenze des nächsten Jahrtausendes*. Budapest, 2003, p. 151–177.
[36] The Hungarian Penal Code on Crimes and Misdemeanours Article V of Act 1878, 457. §.
[37] KELEMEN, R., *A kivételes hatalom történeti és elméleti rendszere.* Budapest, 2022; DOMANICZKY, E., Historical Development of the Hungarian Regulation on Special Legal Order. In: *Journal on European History of Law*, vol. 12, No. 1, 2021, p. 145–156.
[38] KELEMEN, R., *Military Jurisdiction in Hungary at the Time of the Dualism (1867-1918)*. Budapest, 2017; HAUTZINGER, Z., *A katonai büntetőjog rendszertana.* Pécs, 2010.
[39] Article LXIII of 1912 on Exceptional Measures in Case of War, Chapter II.

boots, cloth-fraud and horse fraud", a special legal regulation was passed at the beginning of the summer of 1915 to tighten up the abuses of war suppliers. According to the provisions of this law, the perpetrator was punishable by imprisonment for up to five years in the basic case, while if he bribed a public official to do so, he could be sentenced to up to ten years' imprisonment, and if he did so during wartime and with the result of a reduction in combat value, he could be punished by death. It can therefore be seen that, as a result of the offences detected, the legislator has moved towards the development of a differentiated classification system, within the framework of which a legal unity has been created in the relationship between several offences (e.g. between bribery and the named offence). The final provision of the Act also repealed the above-mentioned provisions of the Csemegi Code, but did not affect the provisions of the Military Criminal Code.[40] It should be added that due to the provisions of the Csemegi Code, which also had a temporal effect, this law could not yet be applied against the participants in the cloth-fraud case.

As mentioned above, the Military Prosecutor's Office prosecuted all the defendants for the commission of a crime under Article 327 of the Military Criminal Code. This article also refers to an offence against the military forces of the state. According to this article, "Whoever, in time of war with the enemy or in the 321. § or, even without such agreement, commits any act or omission with the intent that by such agreement, act or omission the Imperial Austrian Army or an allied army may be disadvantaged or the enemy may be benefited, even if the manner of such action would be of the nature of another crime or misdemeanour, shall be guilty of a crime against the armed forces of the State."[41] This offence is punishable by death by hanging in the most serious cases, i.e. if it has caused important damage to the armed forces, or in less serious cases by a severe prison sentence of ten to twenty years. Looking at the first part of the statutory elements, it can be said that only a broad interpretation can include the acts of the perpetrators of the case analysed by the paper under this offence. While it is undoubtedly true that there is a close correlation between the loss of combat value of soldiers equipped with uniforms made of wool cloth supplied by them and the poor quality of the uniforms, the intentionality required by the above statutory is highly questionable. According to the statutory elements of the case, the act or omission must already be carried out with the intention to cause detriment. In other words, the fraudsters must have committed the successive crimes with the intention of causing serious harm to the Hungarian armed forces on the battlefield. However, in the case analysed, it is difficult to draw a clear conclusion from the media reports as to the existence of such a purpose in the case of perpetrators who are merely "profiteering". The severity of the handicap is not in question, however, because - as was the case here - if the uniform wore out during a normal exercise, it could significantly weaken the soldiers' effectiveness on the battlefield. While in the basic case the harm is merely the purpose of the act, in the qualified case it is the result of the act. Since the combat capability of soldiers depends to a large extent on the condition of their equipment, it cannot be disputed that such poor clothing is also capable of establishing serious detriment as described above, so that the procedure under the Military Criminal Code cannot be objected to in this optics.

Of course, the defendants and their lawyers fought to be tried not by a military court but by a civilian court and under a civilian penal code, but their arguments were not successful. According to the newspaper entitled "Magyarország", this is because the Ministry of Defence and the Ministry of Justice agreed at the beginning of the investigation that the perpetrators would be tried by a military court.[42]

4. Decisions of the Courts

The civilian court was the first to rule on the Riemer bribery case, a precursor to the military court's decision, which was a side issue in the cloth-fraud case. This is the case in which factory director Gyula Riemer promised a cash reward to policeman Gábor Elek if he would pass on his messages to Ernő Bastir. The tribunal found both Riemer and Elek guilty and sentenced the former to two years imprisonment to be executed in prison and the latter to two and a half years imprisonment. The others were acquitted. Riemer's defence lawyer, Jenő Gaál, asked for the case to be referred to a military court on the grounds of Riemer's military service, but the court refused. The defence appealed against the judgment on the grounds of nullity. The Criminal Council III of the Curia, presided over by János Tanai, heard the case in the first days of February 1916 and annulled the first instance decision, increasing Riemer's sentence to two and a half years in prison, and sentencing Béla Faragó and Henrik Fenyves, who had been acquitted by the court at first instance, to two and a half years in prison, while Gábor Elek's sentence was upheld. Bastir's case was referred to the military court.[43]

The series of bribery cases against Riemer is not over yet, as he is scheduled for an accelerated trial on 19 April,[44] when he is accused of promising the chief commissioner Jenő Bóra 160,000 crowns if he would accept the Kammer Brothers' offer of 20 crowns. The court found him guilty: he was sentenced to three and a half years imprisonment and fined 5,000 crowns, and the Curia dismissed his subsequent appeal for nullity.[45] The case of Military Commissioner General Jenő Bóra was heard by the Military Court of Criminal Appeals in January 1917, with Lieutenant Colonel Ödön Rudloff, Judge Advocate Gen-

[40] Article XIX of Law 1915 on the Repression of Crimes Against the Interests of Warfare, in Particular Abuses Committed in Connection with Military Transport.

[41] PAP, K., A katonai b*üntető és fegyelmi fenyítő jog kézikönyve.* Budapest, 1888, p. 65.

[42] U/A, A tízmilliós posztócsalás – Eddig tíz bűnöst tartóztattak le – A katonai bíróság szerepe. In: *Magyarország*, 1915, 19 March, p. 7.

[43] U/A, A Riemer-ügy a Curián. In: *Pesti Hirlap*, 1916, 6 February, p. 21.

[44] U/A, Riemer Gyula ujabb bűnpöre. In: *Pesti Hirlap*, 1916, 6 April, p. 14.

[45] U/A, Riemer Gyula vesztegetése. In: *Budapesti Hirlap*, 1916, 6 December, p. 14.

eral, presiding, and Károly Edvi-Illés[46], his defence attorney.[47] The Military Commissioner General was sentenced to eight months imprisonment to be executed in prison, dismissed from his post as Commissioner General and stripped of his medals for the bribery case involving the military transport officer Gábor Polyár, but was acquitted in other cases. The eight months of imprisonment were considered to have been completed during his pre-trial detention since 1915.[48] Bóra appealed, but the Supreme Military Court upheld the sentence. Interestingly, in Bóra's case, the 33,000 crowns accepted were considered by the military courts to be the acceptance of a prohibited gift under Article 383 of the Military Criminal Code.[49]

The trial of the cloth-fraud case started on 4 April 1916 at the Military Court of Criminal Appeals in Budapest, presided over by Lieutenant Colonel Ödön Rudloff, Judge Advocate General. At the first hearing, a closed trial was ordered on the grounds of public interest. The defence lawyers of the civilian defendants disputed the jurisdiction of the court, since in their opinion, the application of Article 327 would have required that the defendants had deliberately intended to harm the armed forces by their misconduct, but if this intention had not been shown, they argued that the only basis for prosecuting their defendants would be the misuse of military supplies and that there would be no investigation of the consequences of the defendants' dishonest act. However, the court rejected their argument, as in another case the Supreme Military Court ruled in principle that if the perpetrator handed over goods to the army knowing that they were not fit for their intended purpose and knowing exactly what they were to be used for, he could commit an offence under Article 327 of the Military Criminal Code, and the case would be decided by a military court.[50] It is not known how thoroughly the newspaper of the time analysed the decision of the Supreme Military Court in question, but it should be noted that, for the purposes of establishing the offence challenged by the defenders, it was not important that the perpetrator knew for what purpose the property provided would be used by the armed forces, but that the aim of causing serious harm was already the driving force behind his conduct at the time of the offence. However, from the above-mentioned Supreme Military Court decision, it seems that the court also considered the probable intention to be sufficient for the crime in question - note *contra legem*. The charge against all the defendants was therefore a crime against the armed forces of the State within the meaning of Article 327 of the Military Criminal Code.

The main defendant in the case was Major Jákó Fenyves, a technical officer in the clothing depot, whose actions allowed the supply and use of substandard baize to escalate to this level. The Court of First Instance found the suppliers Jenő Taubes, Artur Pártos, László Neumann and Béla Sándor Váradi guilty. According to the Court's opinion, they had committed the offences of bribing Major Jákó Fenyves with a considerable sum of money during certain occasions of the cloth deliveries, and they were also aware that by accepting their goods the field personnel would receive inadequate clothing. Due to this fact, they were all sentenced to ten to ten years imprisonment to be executed in prison, with periodic fasting and solitary confinement. Major Jákó Fenyves was also found guilty by the court of a crime against the armed forces of the state, which he committed by maliciously and deliberately failing to report the poor quality of suppliers' goods and concealing the abuses in exchange for a consideration as the head of a central clothing warehouse. For this he was stripped of his rank of major and sentenced to 15 years' rigorous imprisonment with periods of fasting and solitary confinement. Also found guilty was Béla Kohn, who deliberately set aside the better quality materials for his own use, producing uniforms from poor quality materials, despite knowing that this would negatively affect the combat value of those serving in the field, for which he was sentenced to twelve years in prison. Jakab Fenyves and Henrik Fenyves were convicted as accomplices for facilitating the abuses and sentenced to 10 years and 15 years in prison respectively. Ernő Bastir was sentenced to six months imprisonment for abusing official authority. Of the sentences imposed, the court considered one year of the period of pre-trial detention to have been served.[51]

Surprisingly, in the light of the results of previous investigations and other proceedings, the court acquitted Tihamér Szegedi-Maszák, Gyula Riemer, Dezső Hecht, Ödön Szász, Miklós Ligeti, Dezső Váradi and Béla Faragó. In the case of Military Commissioner General Tihamér Szegedi-Maszák, it was found that he had not received any money at all, which was attributable to his exceeding his authority in the case of manual purchases, which the court martial found to be a mere disciplinary offence. More interesting is the case of Gyula Riemer, already twice convicted at the time, against whom the court found that there was no evidence that he had bribed any of the commissioners-general and that the only charge against him was that he had abused his contacts in the ministry. This is an interesting statement by the court martial in the light of the fact that the civilian court sentenced Riemer to three and a half years imprisonment for attempting to bribe Jenő Bóra and had already succeeded in the case of policeman Gábor Elek during the procedure. In the cases of Béla Faragó and Dezső Hecht, it was established that they had transferred funds to Henrik Fenyves, but according to the court, they did not know for what purpose Fenyves would use them. And in the case of Ödön Szász, the experts said the poor quality was a bona fide error. In the case of Hecht and Szász, the court probably assessed that the quantity

[46] Edvi-Illés, Károly (1842-1919) was a prominent figure in Hungarian criminal law. Member of the Hungarian Academy of Sciences.
[47] U/A, Bóra vezérhadbiztos a hadbíróság előtt. In: *Frissujság*, 1917, 30 January, p. 3.
[48] U/A, Bóra Jenőt elítélték. In: *Az Est*, 1917, 3 February, p. 5.
[49] U/A, Ma délután ítélnek a posztócsalók ügyében. In: *Az Est*, 1917, 31 July, p. 8.
[50] U/A, A haditörvényszék ítélete a posztócsalók bűnperében – Kilenc vádlott súlyos börtönre ítéltek, hetet fölmentettek. In: *Magyarország*, 1916, 1 August, p. 7.
[51] U/A, Kihirdették az ítéletet a posztócsalás ügyében. In: *Az Est*, 1916, 1 August, p. 8.

of poor-quality goods delivered was negligible compared to the others, and that in the case of the former the poor-quality goods barely reached 5% of the total quantity of its own goods.[52]

Of the attorneys, Károly Edvi-Illés, Illés Pollák, Jenő Gaál, Miklós Zboray and Mór Hers announced to the judge that they would appeal against the judgment, while Jenő Vidor and Sándor Pető, the defence lawyers of the acquitted defendants, accepted the judgment and asked for their clients to be released.[53]

The case was heard by the Supreme Military Court in July 1917. Károly Arthur Szilágyi[54], a lawyer, joined the above defenders. The whole trial was held in public, where all the defenders presented their arguments. It is worth summarising them briefly. The defender Lajos Holló wanted to draw attention to the fact that the sample issued by the army was also inherently unsuitable for making proper clothing, and that his defendant Jenő Taubes had repeatedly supplied a better quality than the original sample, the inferior quality baize being, according to his allegations, intended by the army only for the army battalions anyway. Sándor Pető did not see any evidence of a link between the poor quality of the cloth and the poor quality of the garments supplied.[55]

Lt. Colonel László Mesterházy Nagy prosecutor said in his speech that there is no evidence that the army has assigned 91% of its staff unfit for duty. In his opinion, both Tihamér Szegedi-Maszák and Gyula Riemer were guilty, the former for not properly defending the interests of the armed forces, which should have been his duty, and Riemer for having demonstrably handed over 5,000 crowns to Jákó Fenyves and for having misused the baize deliveries to the tune of several hundred thousand crowns. He withdrew the complaints of nullity against Béla Faragó and Ernő Bastir. Lajos Holló's defence maintained its earlier claims, arguing that in the case of an anti-contractual shipment, the question was not whether the armed forces were weakened, but how much material damage it caused to the armed forces, a question which in its view was not a military question, but a matter for a civil court. In his opinion, he did not share the content of the Supreme Military Court's decision in principle, but he could not present any arguments against it - complementing the previous ones - and did not attack its logic, but repeated the previous defence position.[56]

Miklós Zboray Kohn's defence argued that his client had not committed any bribery, he had only put aside what he considered to be his rightful earnings, for which he should be charged with embezzlement at most. However, the defender disregarded the fact that several traders had exchanged their good quality goods for inferior quality goods in Kohn's workshop.[57]

Jenő Vidor Jákó Fenyves's lawyer did not dispute that his client had accepted gifts from the baize traders, but he did not think that this meant that he was responsible for the poor quality of the cloth. He committed the former because he was still living in poverty with his sick wife after 30 years of service. His defence is based on the fact that, in a similar case involving Jenő Bóra, the Supreme Military Court ruled that the allowance he received was a gift, and so imposed a much lighter sentence. It is true that there was a significant difference in value between the two cases, which was ignored by the defence.[58]

Jenő Gaál's defence lawyer, Gyula Riemer, asked for all proceedings to be terminated and transferred to a civil court, stressing that the case would not have been of such importance and would not have been "the focus of sensational public interest" if Jenő Balogh, then Minister of Justice, had not presented incorrect statistics to the Parliament. Jenő Gaál's request for a transfer to a civil court is a tragicomic defence statement, given that in the previous civil hearings he had in turn made a request for a transfer to a military court.[59]

The penultimate day of negotiations took an extraordinary turn. In his speech, the prosecutor of the Hungarian Army Corps, László Mesterházy Nagy, maintained that all the accused were guilty, but in his view, civilian accused should not be tried by a military court under Article 327 of the Military Criminal Code, but by a civilian court applying civilian criminal law. The main perpetrator of the acts was, in his view, Jákó Fenyves, but he did not see any justification for the crime against the armed forces of the state against him, but rather for the abuse of official authority. In the light of these facts, he asked for the release of the civilian accused and for their cases to be referred to a civil court.[60] However, the Supreme Military Court's presiding chamber did not adopt the prosecutor's position and (upholding the previous acquittals) convicted all the defendants due to the offence under Article 327 of the Military Criminal Code, but reduced all the sentences. The court justified its decision by stating that "the statutory elements of this crime must require the direct intent (*dolus directus*) because the perpetrator shall desire the consequences of his conduct. […] Article 327 of the Military Penal Code is indifferent to whether or not the benefit or harm it specifies has occurred, because the crime of endangering is the possibility of danger itself."[61] Therefore, the court reasoned that the offence under Article 327 of the Military Criminal Code is an abstract offence of endangerment, i.e. it can be established even in the absence of a concrete danger. It is a different matter that, in its qualified case, the crime analysed is already a substantive crime, since serious harm must

[52] U/A, Ítélet a posztócsalók ügyében. In: *Pesti Hirlap*, 1916, 1 August, p. 14.
[53] U/A, Ítélet a posztócsalók ügyében. In: *Világ*, 1916, 1 August, p. 10.
[54] Károly Arthur Szilágyi (1865-1933) lawyer, former military judge, one of the most prominent figures in Hungarian criminal law.
[55] U/A, Posztószállítók a legfelsőbb honvédtörvényszék előtt. In: *Pesti Hirlap*, 1917, 17 July, p. 13–14.
[56] U/A, A posztószállítók bűnpere – Perbeszédek. In: *Pesti Hirlap*, 1917, 18 July, p. 10.
[57] U/A, A posztóbeszállítók bűnpörének védöbeszédei. In: *Pesti Hirlap*, 1917, 21 July, p. 12.
[58] U/A, A posztóbeszállítók bűnpörének védöbeszédei. In: *Pesti Hirlap*, 1917, 26 July, p. 12.
[59] U/A, Az utolsó védőbeszéd. In: *Pesti Hirlap*, 1917, 27 July, p. 11.
[60] U/A, Szabadlábra helyezik a posztószállítókat. In: *Budapesti Hirlap*, 1917, 29 July, p. 17.
[61] U/A, A posztócsalókat a legfelsőbb bíróság is elítélte. In: *Budapesti Hirlap*, 1917, 31 July, p. 8.

occur in this case. The court found that the defendants were aware that they were supplying the wrong baize, unsuitable for military uniforms, and that a significant proportion of the personnel would be provided with inappropriate clothing. According to the above reasoning, therefore, the threat to the armed forces of the State had already been created by the deliberate supply of material unsuitable for military uniforms in the hope of additional profits for the suppliers. Although the full judgment is not known from the original source, this argument is precisely in the direction of establishing the *dolus eventualis*[62] and not the *dolus directus*. The available evidence shows that the cloth fraudsters' conduct was motivated by an unlawful profit motive, and that the unsuitability of the product actually produced would be more likely to be attributed to acquiescence than to guilt, which would cast serious doubts on the factual basis of the facts.

The court reduced the sentences imposed by the first instance court: sentenced Jenő Taubes to five years imprisonment to be executed in prison, Sándor Váradi to six years, László Neumann to six years, Artur Pártos to five years, Béla Kohn to nine years, Major Jákó Fenyves to eleven years, Henrik Fenyves to eight years and Jakab Fenyves to five years imprisonment.[63]

5. Afterword

Krúdy wrote about the case as early as 1915 in his work The Women in Three Skirts, he writes: "Soldiers sometimes wander barefoot and ragged in the snow on distant frontiers, their cloth-boy's hose torn off early in the autumn […] The trousers hang in pieces on the hussar, the buttons are torn off and the torn, torn pieces of cloth are tied together with rope […].] the weather, the cold, the plague ravaged our beautiful blood, because the perpetrators on Deák Street wanted to make millions on the garments that were supposed to protect the soldier's health…"[64]

The judgments of the courts have not resulted in social satisfaction, despite the fact that the judges who have acted have interpreted the criminal law rules rather broadly and sometimes wrongly to this end. Thus, the perpetrators were "judged by civil conscience"[65]. A striking example of this is the case of Gyula Riemer, who was awarded the Order of the Holy Sepulchre by the Pope in 1925, causing a huge national outcry.[66] Nevertheless, on balance, if it is perhaps arguable that a military court acted against civilians in this case, the moral justification for the sentences imposed can no longer be in question.

[62] This form of the intent means that the perpetrator acquiesces to the consequences of his conduct.
[63] U/A, A posztócsalókat a legfelsőbb bíróság is elítélte. In: *Budapesti Hirlap*, 1917, 31 July, p. 9.
[64] KRÚDY, GY., A háromszoknyás lányok. In: KRÚDY, GY., *Régi pesti históriák – Színes írások.* Budapest, 1967, p. 6.
[65] *Ibid*, p. 7.
[66] KLESTENITZ, T., Schioppa nuncius búcsúja Budapesttől a sajtó tükrében. ZOMBORI, I. (ed.), *Ecclesiae et Historiae Servus Infatogabilis – Tanulmányok Somorjai Ádám 70. születésnapjára.* Budapest, 2022, p. 65–74.

The Validity of Cartel Agreements in Hungarian Cartel Law in the Period between the Two World Wars with a European Perspective*

*Norbert Varga***

Abstract

The regulation of Hungarian cartel law is the legislative product of the period between the two world wars: the appearance of state intervention in law became very significant at this time, as a result of which the Cartels Act in 1931 had a strong public law nature. Cartel agreements were also subject to the general rules of Hungarian private law. My paper intends to focus on the validity of cartel agreements and to substantiate my findings with archival sources on the practice in Hungary in the interwar period. It shows that the first Hungarian cartel law contained rules that were introduced for the purpose of cartel supervision, but which also affected private cartel law. This paper will provide new insights not only into the history of Hungarian private cartel law, but also into the history of the European codification of cartel law before the Hungarian act came into effect.

Keywords: *Hungarian cartel law; cartel private law; validity of cartel agreements; archival sources; disclosure obligation; European regulation of cartel; Hungary.*

1. Introduction

The Hungarian cartel law focused on the protection of the public interest due to the changed economic situation between the two world wars. World War I brought to the surface a number of problems that Hungarian law and judicial practice had not dealt with in depth.[1] 'The long period of peace before the world war and the absence of a written code may make understandable, yet it does not excuse the impartiality which left our private law virtually unprotected against events.'[2] In his work titled A háború hatása a magánjogra (The Impact of the War on Private Law) Antal Almási starts with these words to outline the state of private law, the reasons for its change, as well as the impact of the world war on the content or the creation of private law. In his opinion, 'economic harm and legal danger'[3] cannot be separated from the war, and legislators and those applying the law must work together to tackle the problem.

In Hungarian literature, Act XX of 1931 is considered an act of public law, as it regulated the instruments of state intervention. It took all measures to protect the public interest and the economy in order to protect consumers in the changed economic circumstances. The instruments of state intervention were manifested in public administration and the judiciary. Therefore, on the basis of its content, the Hungarian literature of the time basically regarded this as an act of public law.[4] According to Ferenc Király Harasztosi, 'the state must provide for a separate public cartel law, which ensures that cartel struggles in economic life can be conducted without endangering the

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** Prof. Dr. Norbert Varga, Department of Hungarian History of Law Faculty of Law and Political Sciences, University of Szeged, Szeged, Hungary, email: vargan@juris.u-szeged.hu / ORCID 0000-0001-6126-3099.

1 SCHWARTZ, I., A háború hatása a szerződések teljesítésére és az osztrák bírói gyakorlat. In: *Jogtudományi Közlöny*, Vol. 51, 1916, p. 24.

2 ALMÁSI, A., *A háború hatása a magánjogra.* Budapest, 1917, p. 8. The most important changes of Hungarian private law in the interwar period: PÉTERVÁRI, M., Changes in the Hungarian Insolvency Law in the Interwar Period. In: *Krakowskie Studia z Historii Paristwa i Prawa*, Vol. 15, 2022, p. 230-231, PÉTERVÁRI, M., The Bankruptcy in Hungary in the Interwar Period. In: DAVID, A. F. – VARGA, N. (eds.), *Law and History New Studies*. Athens, 2021, p. 65-84; SZIVÓS, K., The Changes in the Right of Novelty in Hungary Civil Procedure in the Interwar Period. In: *Krakowskie Studia z Historii Paristwa i Prawa*, Vol. 15, 2022, p. 245-259; SZIVÓS, K., Das freie Vorbringen und seine Begrenzung nach der Kodifikation des ungarischen Zivilprozessrecht. In: *Journal on European History of Law*, Vol. 13, No. 2, 2022, p. 114-120; SZIVÓS, K., Die Rolle der Prozessaufnahmeverhandlung der ersten ungarischen Zivilprozessordnung. In: *Journal on European History of Law*, Vol 15, No. 1, 2024, p. 143-150; LEGEZA D., Copyright Aspects of Promise of Reward in Hungary. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 178-188; HERGER, CS., Az igazságosság és a jogtalanság határai a Magyar magánjogban. In: *JURA*, Vol. 25, No. 1, p. 94-103; HERGER, CS., Eherecht in Ungarn (1918-1945). In: LÖHNING, M. (ed.), *Kulturkampf um die Ehe Reform des europäischen Eherechts nach dem Großen Krieg*. Tübingen, 2020, p. 45-81; KRUSÓCZKI, B., The First Hungarian Competition Act in the Judicial Practice. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 172-178.

3 Ibid p. 9.

4 In the course of the Hungarian parliamentary debate of the draft version of the cartel act, opinions were also expressed that the regulation of private cartel law has taken a back seat to public cartel law. See: the speech of Csák Károly, member of Parliament submitting the bill. *Az 1927. évi január hó 25-ére hirdetett országgyűlés képviselőházának naplója.* Budapest, Vol. 33, 1931, (hereinafter: OKN.) p. 44.

interests of the economy and public good, within the permissible limits'.[5] The Hungarian Cartel Act was mostly criticised because it had not regulated private cartel law. The private law of cartels was governed by the rules of Hungarian private law in general, as well as the rules of related commercial laws.[6]

Hungarian cartel law was enacted in 1931, which is fully in harmony with the process of codification of cartel law across Europe. As an introduction to the topic, I will examine whether provisions of a private law nature appeared in the European cartel rules of the time, special attention to the Hungarian regulation and practice.[7]

The aim of this paper is to present, from the process of relevant European cartel codification, the Hungarian cartel regulation, through opinions published in Hungarian literature, legislation and archival sources. It is therefore important to mention that the depth and originality of a legal-historical research lies in the analysis of primary sources. I will focus to the examination of primary sources in the second part of my paper. This part will be unique research result in the Hungarian and international cartel literature.

A dogmatic analysis of these primary and secondary sources is essential for legal history research, which contributes to a complex and novel approach to the subject. A systematic and, where necessary, comparative analysis of the sources related to the subject is also indispensable. A full presentation of the European process of cartel codification falls outside the purposes of this paper, which only includes references to the cartel codification of other countries to the extent necessary alongside its discussion of the development of Hungarian cartel law. The subjective teleological method and interpretation help to find answers to the research questions and problems raised, taking into account the will of the legislator, such as the role of Hungarian cartel law, where and to what extent the Hungarian legislator took them into account, and what was the result of practice.

2. Private law provisions of European competition laws

Among the European rules of cartel law, I intend to present the relevant provisions of those that were already in effect in the country in question before the entry into force of the Hungarian Cartel Act of 1931. My aim is to present the European rules of cartel law of the time that regulate the disclosure obligation and the validity of cartel agreements. In the context of the present paper, I will not discuss English or American antitrust laws and judicial practice, because it was the codification of continental European cartel law that influenced Hungarian cartel law.[8] I will only present those provisions of the German act of 1923, the Norwegian act of 1926, as well as the Danish act of 1931 that relate to the validity of cartel agreements and disclosure obligation.

Europe's first cartel law was the German Cartel Decree (Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen vom 2. November 1923), which then served as a model for cartel laws in many other European countries.[9] The reasons attached to the Hungarian Cartel Act of 1931 also refers to the German model several times, and the German decree was even cited as an example during the parliamentary debate. In connection with the concept of a cartel, it was defined in the decree as an agreement or decision which lays down an obligation in respect of the control of production or turnover, the application of commercial conditions, the method of setting or demanding prices, and it is valid only in writing, which is also stated in the Hungarian Cartel Act. Section 21 also stated, in relation to the formality of the written form, that it is not only after the entry into force of the decree that the written form must be complied with as a condition for the validity of the contract. With respect to agreements concluded before the entry into force of the decree (20 November 1923) and which fell within the definition of a cartel described above, but which were not in writing, the decree provided that they need to be drawn up in a written form within three weeks after the entry into force. Otherwise, such a cartel agreement was null and void. The reasons attached to the Hungarian Cartel Act of 1931 also referred to the German decree that made written form a prerequisite for transactional validity.[10] The decree then provided that any cartel agreement for the ratification of which an oath of honour or other similar solemn assurances were required or given was null and void. A contract or decision that precluded recourse to the Cartel Court was also null and void.[11] The decree also pro-

[5] HARASZTOSI KIRÁLY, F., *A kartel.* Budapest, 1936, p. 512. On this topic, see: *A gazdasági verseny szabadságát korlátozó megállapodásokról (kartellekről) szóló törvényjavaslat vitája az Országos Ipartanács állandó bizottságában.* Budapest, 1930; SZABÓ I., A gazdasági verseny szabályozásának morális kérdései az első magyar kartelltörvényben (1931). In: KOMÁROMI, L. et al. (eds.), *Munus et dilectio: Ünnepi kötet Kuminetz Géza 65. születésnapja alkalmából.* Budapest, 2024, p. 344.

[6] Zoltán Ráth has already discussed the problems concerning private cartel law. RÁTH, Z., Emlékirat. In: *Központi Értesítő*, Vol. 25, 1900, p. 94-95. See also STIPTA, I., A gazdasági versenyt szabályzó megállapodásokról szóló 1931. évi XX. tc. hazai előzményei. In: *Versenytükör*, Vol. 12, 2016, p. 54-55. TUNYOGI SZŰCS, K., A karteltörvény előzményei és alapelvei. In: *Karteljog Tára*, Vol. 1, 1931, p. 53; SZABÓ, I., Jogesetek az első Magyar karteltörvény gyakorlatából (1931). In: HOMICSKÓ, Á. – SZUCHY, R. (eds.), *Studia in honorem Péter Miskolczi-Bodnár 60*. Budapest, 2017, p. 489-490.

[7] This paper will not show the Austrian bill of 1897, because it did not eventually enter into force. It should be noted, however, that this was the first significant step in the codification of cartel law in Europe.

[8] FEAR, J., *Cartels*. In: Jones, G. – Zeitlin, J. (ed.), *The oxford handbook of business history.* New York, 2007, p. 275-280.

[9] MICHELS, R. K., *Cartels, combines, and trusts in post-war Germany.* Galway, 1968, p. 49; KESSLER, W. C., The New German Cartel Legislation: July 15, 1933. In: *The American Economic Review*, Vol. 24, 1934, p. 477; LIEFMANN, R., *Cartels, Concerns and Trusts.* London, 2001, p. 213.

[10] The reasons also mentioned that similar legislation was being planned in Czechoslovakia, Poland and Denmark. *Indokolás a gazdasági versenyt szabályzó megállapodásokról szóló törvényjavaslathoz.* In: *Az 1927. évi január hó 25-ére összehivott országgyűlés képviselőházának irományai.* Budapest, Vol. 23, 1931 (hereinafter: Reasons), p. 383.

[11] HOMANN, O., *Die Wirkung der Kündigung aus § 8 der Kartellverordnung vom 2. November 1923 bei der Kartell-Ges. m.b.H.* Münster, 1931, p. 13-14; BIRNBAUM, W., *Die Rechtsprechung des Kartellgerichts auf Grund § 9 der Kartellverordnung im Vergleich zur Rechtsprechung der ordentlichen Gericht.* Berlin, 1930, p. 19-26; MARBURG, T. F., Government and Business in Germany: Public Policy toward Cartels. In: *The Business History Review*, Vol. 38, 1964, p. 83; SZABÓ I., Kartelbíróság (1931). In: *Jogtörténeti Szemle*, Vol. 19, No. 1-2, 2017, p. 111-112.

vided that if a cartel agreement endangered the interests of the economy or the public good, the Imperial Minister of Economy could declare such an agreement null and void in whole or in part, or prohibit certain aspects of its application.[12] This meant nothing more than regulating the disclosure obligation. The reasons to the Hungarian bill of 1931 also referred specifically to the aforementioned provisions of the German decree as a positive example.[13] The minister could order the disclosure of the agreement, as well as stipulate that the contract can only be performed after its disclosure. The minister could also extend the obligation to disclose agreements with respect to such cartels where the parties to the agreement were the same as those in an agreement previously declared null and void. This rule also applied to agreements where persons who had already been employed in a managerial or advisory capacity were previously acting in a similar capacity in an agreement declared null and void.[14] Although the Hungarian Cartel Act did not provide for nullity, it did lay down the rules on the disclosure obligation in more detail than the German Cartel Decree, as we will discuss later.[15]

The next European law in chronological order is the Norwegian Trust Act of 1926 (Norwegian Act on the Control of Restraints of Competition and Price Abuses), which fundamentally departed from the German model. We cannot find any provisions in the Norwegian legislation, unlike in its German counterpart, which explicitly deal with the validity or nullity of cartel agreements. However, the disclosure obligation was regulated in much more detail in the Norwegian legislation, and in this respect, parallels can be drawn with the Hungarian Cartel Act. The so-called Control Office[16] could order, by means of notices, the disclosure of agreements by associations of economic operators that had taken or intended to take such binding decisions on price, production and marketing conditions that would affect the domestic market; agreements which had the aforementioned purpose; by economic operators that, through their activities, exercised a significant influence on the Norwegian market in relation to prices, as well as by owners or managers of plants belonging to a foreign company or association of companies, where such foreign companies had exercised a significant influence on prices in one or more countries. The Norwegian legislation also laid down the rules for the disclosure procedure, as well as the required annexes. A record of the disclosures made had to be kept.[17] The reasons attached to the Hungarian bill of 1931 pointed out that the Norwegian legislation provided for a preventive register.[18] The Norwegian law mentioned "prohibited agreements" in two cases. It was prohibited to engage in a boycott for commercial purposes or to call for or otherwise facilitate such a boycott if it could be presumed that such a boycott would adversely affect the general interest. Further, it was also prohibited to conclude an agreement under which an economic operator would be associated exclusively or preferentially, or on particularly favourable terms, with only one or a limited number of economic operators or consumers, provided that the agreement would harm the general interest or unfairly affect any outside party. In each case, it was up to the Control Office to decide whether or not the agreement fell within the scope of the above provisions.[19]

The last law to be mentioned is the second Danish Competition Act (Law on price agreements), which entered into force on 15 October 1931, only a few months before the Hungarian Cartel Act.[20] The Danish Act also defined, in its first section, the scope of the law and stated that agreements on price fixing by cartels must be subject to a hearing under the Act if the entities concerned had set, or had sought to maintain or fix prices that would be manifestly unfair for goods in public trade. The hearing was conducted by a committee. Once the commit-

[12] In the event that the minister has declared a part of the contract null and void, it also had to be decided whether the nullity of that part entailed the nullity of other parts of the agreement and, if so, to what extent. Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen vom 2. November 1923. (hereinafter: Kartellverordnung), Section 7. DOBROVICS, K. – KŐHÁZI, E., *Kartel, árelemzés, külföldi törvények.* Budapest, 1938, p. 17-25; HELLER, F. – KUNCZ, Ö. – KIRÁLY, F., *A kartel.* Budapest, 1930, p. 95-99.

[13] Reasons, p. 382.

[14] Kartellverordnung, Sections 1-7. KESSLER, W. C., 1934, p. 477; LIEFMANN, R., 2001, p. 214-218.

[15] KESSLER, W. C., German Cartel Regulation Under the Decree of 1923. In: *The Quarterly Journal of Economics*, Vol. 50, 1934. p. 680-693; KUHLMANN, O., *Kartellbegriff und Genossenschaften.* Leipzig, 1930, p. 5-18; ISAY, R. – TSCHIERSCHKY, S., *Kartellverordnung.* Mannheim, 1925, p. 13-89; LEHMANN, W., *Grenzen der Kartellgerichtsbarkeit.* Greifswald, 1929, p. 7-23.

[16] The Hungarian bill of 1931 also cites the Norwegian legislation as an example of how it regulated the control of cartels. Reasons, p. 372. See more: ESPELI, H., Transparency of cartels and cartel registers: a regulatory innovation in Norway? In: FELLMAN, S. – SHANAHAN, M. (ed.), *Regulating Competition: Cartels registers in the twentieth-century world.* Abingdon, 2016, p. 133-152; KELLEHER, G. W., The National „Antitrust" Law of Europe. In: *Section of Antitrust Law,* Vol. 17, 1960, p. 510-511, 513; LIEFMANN, R., 2001, p. 224-225.

[17] Norwegian Trust Act, Sections 6-7. In: DOBROVICS, K. – KŐHÁZI E., 1938, p. 61-74; HELLER, F. – KUNCZ, Ö. – KIRÁLY F., 1930, p. 102-109; REICHERT, J. W., *Die Kartellgesetze der Welt: eine deutschsprachige Wiedergabe aller Kartellgesetze und -verordnungen nebst einer rechtsgeschichtlichen Betrachtung.* Köln, 1935, p. 152.

[18] Reasons p. 382.

[19] Norwegian Trust Act, Sections 21-22. The law did not, however, declare the nullity of such agreements *expressis verbis*, but this was to be understood as the meaning. DOBROVICS, K. – KŐHÁZI E., 1938, p. 61-74; ESPELI, H., Insurance cartels and state policies in Norway, 1870s-1990s. In: *Scandinavian Economic History Review*, Vol. 68, 2020, p. 230-231.

[20] The first Danish Competition Act was enacted on 27 March 1929 under the title „Protection of the right to pursue trade and perform work". The second Danish Competition Act was „Law on price agreements" was enacted on 28 March 1931. The second Danish price regulation was adopted in 1937. IVERSEN, M. J., *Economic integration in Danish business history, 1850-2000*. [online] 2009. p. 15-16. Available at: https://escholarship.org/content/qt7kq1f4j4/qt7kq1f4j4.pdf [accessed 26 April 2023]. The Hungarian bill of 1931 mentions that in some European countries there is an effort to control cartels. In this context, the Act refers to the Danish legislation of 1929. Even the Danish Act of 1931 was only referred to as a proposal in the reasons attached to the Hungarian bill, mentioning that a detailed Danish proposal was being prepared to regulate the state control of organisations restricting competition. Reasons p. 372.

tee had established the above facts, the case had to be brought before an ordinary court and the court could then declare the agreement null and void.[21]

Based on the European examples above, it can be said that actual provisions on private cartel law can be found in the German Cartel Decree of 1923. The Norwegian and Danish acts are rather similar to the Hungarian legislation in this respect, as the provisions on the validity and nullity of cartels under private law are regulated in the context of cartel supervision measures. In the following, I intend to describe the relevant provisions of the Hungarian Cartel Act in more detail and support my statements with archival sources.

The Hungarian regulation of cartel law was essentially of public law nature in Act XX of 1931, in view of the changed economic and political conditions.[22] The primary objective of the state was to ensure the protection of public interest through the supervision of cartels. This, however, did not mean that elements of private law would not appear in the Cartels Act. The law required cartel agreements to be disclosed by way of presenting them to the competent minister. Written form was an additional requirement in addition to the fact of disclosure. These two important formal requirements were the basic condition for the validity of cartel agreements, which also meant transactional validity.

Based on a more detailed examination of the provisions of the Cartels Act, it can be concluded that cartels were subject to state supervision. Such supervision was primarily in the form of a checking, which resulted in the mandatory disclosure of agreements. Supervision at the top level was exercised by the minister of economic affairs, which in fact meant that the state was able to become familiar with the content of the agreements, thereby gaining an insight into the functioning of the cartels. For this purpose, the cartel registry office was created within the Ministry of Economic Affairs.[23]

Legal transactions were considered invalid if one of the formal requirements was lacking based on the general rules of private law. According to Bálint Kolosváry, invalidity due to prohibited and unlawful acts constituted the 'ineffectiveness of the transaction despite the apparent external factual situation.'[24] On the other hand, there were special rules in cartel law, with a view to which the 'cases of invalidity for such contracts differ in more than one respect from those of other types of contracts.'[25] In principle, for cartel agreements to be valid, the same conditions had to be fulfilled as generally in private law with regard to contracts. However, the Cartels Act further extended this scope when it laid down the conditions discussed below. In such a case of invalidity, we can speak of nullity. Another type of invalidity is where an agreement is invalid for reasons of substantive law. According to the general rules of private law, a contract contrary to good morals was null and void.[26] A cartel agreement could not, in principle, be regarded as contrary to good morals or public order; it was only that in the course of its performance the cartel may have engaged in an activity contrary to good morals or public order and, on the basis of which such transactions could be challenged.[27] The (formation of the) cartel itself could, therefore, also be such an immoral transaction. On the basis of contemporary judicial practice, we can conclude that in case 'two or more persons are united to use joint effort to push down the ordinary market price emerging through the laws of supply and demand, of some goods constituting the subject of industrial and commercial trade, or of the goods necessary for their production, or to make their acquisition more expensive,' thereby resulting in the restriction of the free market, which is in the interest of the community of consumers, then such cartel is deemed to be contrary to good morals and public order.[28] Károly Szladits described the rules of nullity and violability in the context of the invalidity of legal transactions, and specifically emphasised that a judge could not ex officio take nullity into account in all cases. 'Exceptionally, a declaration of nullity is the subject of a separate action (e.g. (…) the illegality of a cartel agreement or the fact that it is contrary to good morals or public order.'[29]

3. The substantive scope of the Hungarian Cartels Act

The Hungarian Cartels Act specified precisely which agreements or resolutions were to be disclosed. Section 1 of the Act provided as follows: "An agreement or resolution establishing an obligation in respect of goods for their production, turnover or pricing, or otherwise restricting or regulating economic competition (cartels and other similar relationships), shall be valid only if drawn up in written form. The same shall also apply to any agreement or resolution supplementing or amending the original agreement or resolution."

[21] Danish Cartel Act, Sections 1-5., DOBROVICS, K. – KŐHÁZI, E., 1938, p. 80-83.
[22] Ibid p. 245.
[23] RANSCHBURG, N., *Kartelljog. Kartellszervezet.* Budapest, 1931, p. 52.
[24] KOLOZSVÁRY, B., *Magánjog. Vezérfonál a magyar magánjogból tartott egyetemi előadásokhoz.* Budapest, 1927, p. 38.
[25] DOBROVICS, K., *Kartelismeretek.* Budapest, 1937. p. 36; DOBROVICS, K., A kartelszerződések semmissége és megtámadhatósága. In: *Közgazdasági Értesítő*, Vol. 33, No. 5, 1936, p. 14.
[26] SZLADITS, K. – UJLAKI, M. – VILLÁNYI, L., *Magyar magánjog mai érvényben. Törvények, rendeletek, joggyakorlat III. rész: Kötelmi jog.* Vol. 1, Budapest, 1942, p. 126-128; SZLADITS, K., A kötelem jogalkata. In: SZLADITS, K. (ed.), *Magyar magánjog: Kötelmi jog általános része.* Budapest, 1941, p. 55; MENYHÁRD, A., *A jóerkölcsbe ütköző szerződések.* Budapest, 2009.
[27] DOBROVICS, K., 1937. p. 38-40. There is also a reference to this in connection with the parliamentary debate on the bill. OKN., p. 375. In case of the breach of public interest, an action could be brought in the public interest. HARASZTOSI, F., 1936. p. 528-541; SZABÓ, I., A kartellfelügyelet szervezete és hatásköre az 1931. XX. törvénycikk nyomán. In: *Versenytükör*, Vol. 12, 2016, p. 77-78; SZABÓ, I. Az 1931. évi XX. törvénycikk rendes bíróságok előtti gyakorlata. In: *Versenytükör*, Vol. 13, 2017, p. 36; SZLADITS, K. – FÜRST, L., *A magyar bírói gyakorlat. Magánjog.* Budapest, Vol. 2, 1935, p. 76; HOMOKI-NAGY, M., Megjegyzések a kartellmagánjog történetéhez. In: *Versenytükör*, Vol. 2, 2016, p. 45-49.
[28] SZLADITS, K. – UJLAKI, M. – VILLÁNYI, L., 1942, p. 50-51.
[29] SZLADITS, K., Magánjogi tényállások. In: SZLADITS, K. (ed.), Magyar magánjog: Általános rész. Budapest, 1941, p. 355.

At this point, it is necessary to consider which agreements were covered by the aforementioned statutory provision. The substantive scope of the Act covered legal relationships that were drawn up in a binding agreement or resolution, aimed at restricting or regulating economic competition, and had products as goods as their subject. If those conditions are examined, it can be concluded that the scope of the Cartels Act did not extend to discussions the fulfilment of which was at the parties' option. Therefore, a recommendation to interested parties on aligning prices did not constitute an agreement which had to be disclosed. If the conduct of the interested parties endangered the common good and public interest, the state could intervene against them in accordance with Article 6 of the Cartels Act. What constituted an agreement or resolution under the Act? "Under the Act, an agreement primarily meant the contract creating a cartel or a similar legal relationship. Resolutions, in turn, were also primarily understood as resolutions creating a cartel, because the cartel agreement is frequently laid down by the parties in the form of a resolution drawn up in written minutes."[30]

It should also be noted that any supplementations or amendments also had to be disclosed to the competent minister. In such cases, an important condition was that the supplementations or amendments had to relate to the substantial content of the legal relationship. According to Nándor Ranschburg, such supplementations and amendments could not be considered in the above category that fell, by way of their nature, not within the scope of the cartel agreement, but rather the operation of the cartel. He considered agreements concluded in the course of the cartel's operation with third parties (e.g. exclusivity and loyalty rebate contracts) or resolutions aimed at isolating or boycotting third parties as such. The regulation of economic competition is the most essential condition, since any such agreement or resolution fell under the scope of the Act. Another important condition was that the subject of the agreement or resolution had to be the trade of some goods. What the Act meant by goods was such things and rights that could constitute the subject of sale in commerce. Money could also be considered as goods if it was the subject of purchase and sale as foreign currency. However, work or related services could not be regarded as goods. On the basis of the reasons attached to the bill submitted to Parliament, it can be concluded that the scope of the Act did not cover, for example, the activities of engineers, attorneys, notaries, agreements pertaining to legal relationships for provision or undertaking of work, or agreements restricting economic competition in the fields of forwarding services, insurance or banking. The aim of the phrase other legal relationships with a similar purpose in the Act was essentially to ensure that the disclosure obligation would also apply to agreements following aims similar to those of cartels. On first reading, this definition seems to extend the substantive scope; however, upon further consideration, we can conclude that the abovementioned provision of the Act had exactly the opposite effect in practice. If an agreement regulated economic competition, restricted it but not with the aim of controlling prices, then such an agreement did not fall within the scope of the Cartels Act, which means that in such a case the objective to be achieved is no longer the same as the fundamental objective of cartels.[31]

The disclosure obligation imposed by the Act was even narrower than this, since it concerned only agreements and resolutions in which the participants had a greater impact on the market by virtue of their economic weight. In that regard, the Act laid down the criterion that at least once such commercial or industrial company must be a party to the agreement that has a minimum of 20 employees. This condition strengthened the large-scale nature of the companies subject to the Act. The above-mentioned provision of the Act was not a fortunate legal wording, since smaller-scale craftsmen in trades or retailers could also engage in price-setting activities that had a significant impact on economic competition.[32]

In practice, the agreement or resolution had to be submitted to fulfil the disclosure obligation. A separately enclosed letter had to include the name or company name, occupation, place of residence or place of business of the participants in the legal relationship; the subject matter and content of the obligation; as well as the place and date of the conclusion of the agreement, if this was not stated in the documents submitted.

In the following two cases, the cartel agreements were properly disclosed and statutory provisions were complied with. Ganz és Társa Villamossági, Waggon- és Hajógyár Rt. and Hajós and Szántó Elektromos Gyár Rt., both of them companies registered in Budapest, concluded a cartel agreement in which they agreed on the following. As a consequence of their severe situation due to the smaller market demand resulting from the loss of territories after the Treaty of Trianon, Hungarian producers of electric meters could only sustain their domestic production in a profitable manner by eliminating any unnecessary expenditure, whether incurred as manufacturing or marketing expenses. The state of production capacities at the time caused unhealthy competition between the companies, which in many cases resulted in loss-making business operations, and prevented the development of the companies, which indirectly also affected consumers adversely. Therefore, the parties have resolved that, in order to ensure economical production and the supply of domestically manufactured products of the highest quality, made in Hungary, in line with the needs of consumers, they would allocate among themselves the domestic market demands for electric meters. The subject of the agreement was single and multi-phased, alternating current watt-hour meters.[33] The cartel agreement was disclosed on 12 September 1934. "We are hereby submitting to the Hungarian Royal Minister of Commerce the document for the purpose of disclosing our agree-

[30] RANSCHBURG, N., 1931, p. 40; SZABÓ, I., Két jogértelmezési probléma az 1931-es kartelltörvény gyakorlatából. In: BARNA, A. et al. (eds.), *Laudator temporis acti. Ünnepi tanulmányok a 65 éves Horváth Attila tiszteletére*. Budapest, 2024, p. 650.

[31] Ibid p. 41-42.

[32] Ibid p. 52-53; DOBROVICS, K., *A kartelek helyzete és működése Magyarországon.* Budapest, 1934, p. 90.

[33] Hungarian National Archives, Department of Economic Archives (hereinafter: MNL GLF) Z425-2. cs. 20. t. Agreements, minutes in the subject of electric meter cartel, 1926-1948.

ment concluded on the 10th day of the current month in the subject of the manufacturing and sale of watt-hour meters, as well as the power of attorney for the appointment of the cartel representatives, both of which are duly signed by us."[34]

After signing, the documents had to be returned to Mr. Marcel Pártos, director. Pursuant to Act XX of 1931 on Agreements Regulating Economic Competition, as well as Decree no. 5381/1931. M.E., the agreement concluded on 10 September 1934 concerning the production of watt-hour meters was annexed in one original and two copies. The letter to the minister also stated that each of the parties to the agreement was a company with more than 20 employees.[35]

The enclosed power of attorney set forth that, pursuant to Section 3 of Act XX of 1931, the signers of the agreement concluded on 10 September 1934 concerning the production of watt-hour meters, authorised, as their joint representative to act before the minister of commerce, courts and other authorities, Mr. Béla Valentin, certified mechanical engineer and director of Ganz és Társa Villamossági, Gép-, Waggon- és Hajógyár Rt., as well as Mr. Marcel Pártos, commercial director of Hajós és Szántó Elektromosgyár Rt.[36] On the basis of the remarks added by the clerk at the Ministry, it can be concluded that the agreement has been properly disclosed.

Documents relating to the disclosure of an agreement concluded to prevent imports of sulphuric alumina and potash alum into Hungary can also be found in the archives.[37] As background to this agreement, Victoria Vegyészeti Művek Rt. and Pulyesfabrik Skodawerke-Wetzler A.G. conducted several rounds of negotiation in relation to the sale of sulphuric alumina, potash alum and chrome alum. It was agreed, among other things, that the foreign partner would not supply, directly or indirectly, sulphuric alumina and potash alum to Hungary, and would not provide quotes for such products either. It was also stipulated that during the term of the agreement, the foreign partner would not establish or finance a plant in Hungary which was engaged in the production of sulphuric alumina or potash alum. The Hungarian partner, on the other hand, has committed itself not to supply sulphuric alumina, potash alum and aluminium hydrates to Austria during the term of the agreement (except possibly to a partner company), and that it would not provide quotes for such products either. Further, it would not establish or finance a plant for the manufacturing of these products. According to the letter dated 25 November 1931, the above cartel agreement was duly disclosed.[38]

The interesting feature of the next disclosure is that the cartel members gave notice of the termination of the enamel vessel cartel agreement previously registered under no. 795 Kt. The members acknowledged the fact that, on the basis of the armistice treaty, the two members of the cartel, Füleki Iparművek Rt. and Princz Testvérek Vasöntőde és Gépgyár Rt., no longer fell under the authority of the Hungarian state, as a result of which these factories ceased to be members of the cartel. "For full compliance with the relevant provisions, the factories listed below hereby respectfully declare that since the liberation of the country, their capacities have been used exclusively for the Russian army, and therefore, apart from the small-scale sales effected by the works councils in exchange for food for the workers, the factories have not produced for civilian purposes, have not delivered any goods subject to the cartel agreement, and there was no supply of goods at all in the current year by way of the cartel head office."[39]

4. The regulation of the disclosure obligation as a condition for the validity of transactions

In accordance with the provision of the Cartels Act, disclosure was a prerequisite for the validity of cartel agreements and resolutions. This meant that the failure to disclose an agreement or resolution resulted in its invalidity. It should be noted that validity applied retroactively to the date when the agreement or resolution had been adopted. The scope of the invalidity also extended to agreements concluded with a third party which was outside the scope of the disclosure obligation. However, the invalidity of the cartel agreement had no effect on normal transactions concluded by the cartel's head office or by the members of the cartel, because those agreements were concluded between legal persons separate from the cartel and their will to transact existed independently from the validity of the cartel agreement.[40]

The disclosure obligation could be fulfilled by sending the agreement or resolution to the competent minister within the relevant deadline. The subject matter of the disclosure was the cartel agreement and its annexes. If the cartel agreement was concluded in the form of commercial correspondence, all the letters relating thereto had to be disclosed.

The agreement or resolution subject to the disclosure obligation had to be submitted to the Ministry within 15 days of the date on which it was drawn up in written form. Cartel agreements concluded before the effective date of the Act also had to be disclosed within 45 days of the effective date. If the contract had not been drawn up in writing, the parties had 30 days to do so, after which the relevant agreement had to be disclosed within 15 days.

[34] MNL GLF Z425-2. cs. 20. t. Agreements, minutes in the subject of electric meter cartel, 1926-1948.
[35] MNL GLF Z425-2. cs. 20. t. Agreements, minutes in the subject of electric meter cartel, 1926-1948.
[36] Submission to Mr. Tihamér Fabinyi, minister of commerce, dated 15 September 1934. MNL GLF Z425-2. cs. 20. t. Agreements, minutes in the subject of electric meter cartel, 1926-1948.
[37] MNL GFL Z 341-3. cs. Victoria Vegyészeti Művek Rt., Secretariat, Agreements to prevent the import of sulphuric alumina and potash alum into Hungary, 1931-1932.
[38] MNL GFL Z 341-3. cs. Victoria Vegyészeti Művek Rt., Secretariat, Agreements to prevent the import of sulphuric alumina and potash alum into Hungary, 1931-1932.
[39] The following factories participated in the cartel: Budafoki Zománcedény-, Fémáru- és Elektromosgyár Rt. (Budapest), Fuchs és Schlichter Zománc-, Fém- és Bádogárugyár Rt. (Budapest), Weiss Manfréd Acél- és Fémművei Rt. (Budapest). MNL GFL Z 466-D-20: Minutes, correspondence, agendas, statements in the case of the enamel vessels cartel (Zománcedény Értékesítő Kft.), 1937-1948.
[40] RANSCHBURG, N., 1931, p. 53-54.

The question arises whether the failure to comply with the disclosure obligation could be remedied after the above deadline. On the basis of the relevant provisions of law, the Minister had the discretion in case of a missed deadline to draw the attention of the cartel concerned to the performance of the disclosure obligation or to submit additional documentation as necessary. This means that the disclosure obligation could be satisfied later. In terms of legal effect, there was no difference between timely and subsequent disclosure. If the documents were disclosed only upon the minister's call, this has made up for the missed deadline and has made the agreement or resolution valid with retroactive effect. The Act mentions the submission of additional documentation upon the minister's call, but also did not exclude the possibility of voluntary subsequent disclosure. It did not include any provision on a time limit for the above, as a result of which subsequent submissions could be made until the annulment of the agreement or resolution was declared by the court.[41]

Among the materials of the Hungarian National Archives of Economic History, we can also find the documents of the so-called steel cartel, on the basis of which it is possible to reconstruct precisely, in chronological order, how the disclosure obligation was performed in practice. The Budapest-based company Ganz és Társa Villamossági, Gép- Waggon- és Hajógyári Rt. submitted the cartel agreement concerning the production of steel castings to Béla Kenéz, Minister of Commerce, as an annex to a letter dated 28 November 1931. According to the letter, the parties to the cartel agreement were the following companies: Magyar Királyi Állami Vas-, Acél- és Gépgyárak, Ganz és Társa Villamossági Gép-, Waggon- és Hajógyár Rt., Magyar Waggon- és Gépgyár Rt. and Weiss Manfréd Acél- és Fémművei Rt.

The agreement, which was approved by the participating companies at a conciliation meeting held on 24 June 1927, remained in effect until 24 June 1931. The parties subsequently wished to conclude a new agreement, and they indicated their intention to this effect to the Minister in the letter mentioned above. 'The negotiations of the permanent committee for the conclusion of a new agreement are still ongoing and are expected to be concluded within a short time. We will submit the new agreement to Your Excellency in due time, after it has been concluded and signed.[42]

The archival materials also include the agreement referred to, which regulated the legal relationship between the parties. The purpose of the agreement: "that the grave situation of Hungarian industry resulting from the reduced consumption brought about by the Treaty of Trianon can be radically improved only if the industrial companies make every effort to rationalise their plants as far as possible, and therefore, as much as feasible, work together along the whole line, eliminating any unnecessary expenditure, whether it be manufacturing or selling costs."[43]

The agreement was disclosed within the time limit prescribed by law. On the basis of a letter dated 26 January 1932, the Minister of Commerce called upon Ganz és Társa Rt. to submit additional documentation in relation to the said agreement. He warned the cartel that, pursuant to the provisions of the Cartels Act, the Legal Directorate of the Hungarian Treasury could not represent Magyar Királyi Vas és Gépgyár, and instructed the company to appoint a new representative. Further, the letter also called attention to the fact that the price list referred to in point 2 of the cartel agreement had not been submitted, as well as requested further clarification as to whether the monitoring body established under point 3 of the agreement had been transformed into a joint sales office on the basis of the provision laid down in point 10 of the agreement.[44]

The response of the registered companies included the authorisation of the new representative. The explanation they provided for the lack of the price list was that the scope of the disclosure obligation had not been clear yet, as the National Association of Hungarian Industrialists and the Ministry of Commerce were still engaged in negotiations on this matter. They promised to respond to this point in substance once the negotiations had been concluded. Even though point 10 of the agreement provided that the monitoring body would be transformed into a joint sales office, this 1in practice (…) did not appear necessary and therefore the envisaged joint sales office was not established.'[45]

5. Legal consequence of failure to comply with the disclosure obligation

In the case of cartel agreements, it was necessary to examine whether the parties were in compliance with the formal requirements of the Cartels Act. In case of non-compliance, the legal transaction could not have any legal effect and such transactions were considered null and void. An agreement which did not satisfy the formal requirements set forth by the Cartels Act was considered a null and void transaction which could not subsequently be remedied with retroactive effect. 'The gravest consequence of the omission is, therefore, non-reparable invalidity under private law.'[46] This was also confirmed by the case law of the Cartel Court, in connection with the validity of cartel agreements and arbitration awards. Invalidity affected the agreement as a whole, with any supplements or amendments to the contract also shared the fate of the principal agreement, meaning that cartel law did not permit severability. "As regards non-compliance with formal requirements, it should be noted that the failure to disclose the agreement is a violation of the law, cartel agreements cannot be concluded without drawing up in writing and properly disclosing (in the cases set forth by the

[41] Ibid p. 54; DOBROVICS, K., Karteljogi kérdések. In: *Közgazdasági Értesítő*, Vol. 29, 1934, p. 10-14.
[42] MNL GFL Z 425-C19: Steel cartel agreements, 1922-1940.
[43] Steel cartel agreement. Date of arrival at and disclosure to the Ministry: 30 November 1931. MNL GFL Z 425-C19: Steel cartel agreements, 1922-1940.
[44] Letter no. 112/1.Kt.-XI/1931 concerning the correction of deficiencies. MNL GFL Z 425-C19: Steel cartel agreements, 1922-1940.
[45] MNL GFL Z 425-C19: Steel cartel agreements, 1922-1940.
[46] DOBROVICS, K., 1934, p. 110.

law), and therefore, the conclusion of any cartel agreement not in compliance with the statutory formal requirements may be considered as falling within the meaning of prohibited transactions."[47]

In case of a failure to disclose the agreement, upon the instruction of the competent minister, the director of legal affairs at the Hungarian Treasury could initiate proceedings before the competent court. If the company concerned did not provide satisfactory evidence serving as an excuse from the disclosure obligation, the court imposed a fine.[48]

In relation to the following cartel agreement, however, the fulfilment of the statutory requirements of the disclosure obligation within the relevant time limit was the subject of the dispute. The agreement was concluded between Budapest-based companies Alfa Separator Tejgazdasági, Gép- és Bádogárugyár Rt., Ganz és Társa Villamossági, Gép-, Waggon- és Hajógyár Rt. and Röck István és Első Brünni Gépgyár Rt., in the subject of the manufacturing of refrigeration and ice production equipment, as well as auxiliary machinery and structures related to the above. The parties agreed that the grave situation of the Hungarian refrigeration industry due to its reduced consumption area following the Treaty of Trianon could be radically altered only if the refrigeration companies make every effort to rationalise their plants to the greatest extent possible and cooperate in reducing unnecessary expenditure; "that production capacity on the one hand, and the disproportionate nature of demand on the other hand have created such intense competition between the companies and in many cases seriously affected the possibility of their healthy development; that production costs disproportionately high in relation to the low demand, as well as the low level of demand leading to manufacturing that can only be continued in irrational ways, resulting in an unnecessary increase in the manufacturing expenses of refrigerating machinery, which circumstance was then primarily harmful for the market of consumers, while the manufacturers also often unable to recover their production costs."[49]

Subsequently, Béla Ébner-Rupp, departmental counsellor at the Ministry drew the attention of the representative of Ganz és Társa Villamossági Gép-, Waggon és Hajógyár Rt. that on 11 July 1938 they concluded an agreement with Alfa Separator Tejgazdasági Gép és Bádogárugyár Rt. and Röck István Első Brünni Gépgyár Rt. laying down an obligation to regulate economic competition for the production of refrigerating equipment, which they were supposed to have been disclosed within 15 days, pursuant to Section 2 of Act XX of 1931.

With reference to Section 9 of Decree no. 5381/1931 M.E. he then requested the submission of a certifying report on why the agreement dated on 11 July was only disclosed on 28 July.[50] From the letter of Ganz és Társa Rt. dated 7 September 1939, it transpires that the company has indeed complied with its disclosure obligation.

In order to clarify the case, under No 906/1/Kt/VII/938, the Ministry called upon the companies involved in the cartel to justify their delay in the disclosure of the agreement concerning the production of refrigerating equipment. It is apparent from the correspondence that the agreement was typed on 11 July 1938, which was followed by further negotiations, and then the agreement was not signed until 18 July 1938 and was subsequently sent to the Ministry on 28 July 1938. The following statement of reasons was given in the letter. "Due to the fact that, at the time of the re-typing of the agreement, the date of 11 July 1938 was erroneously left in the document, we kindly ask Your Excellency to calculate the time limit from the actual date of the agreement, as reported by us, i.e. 18 July 1938, and to accept these reasons as our justification report."[51]

An interesting feature of this case is that, after the administrative proceeding, the deputy attorney general initiated proceedings before the Budapest Royal Court of Law, as court of register, due to the companies' failure to perform the disclosure obligation.[52]

The court sent this document to the companies concerned, and called upon them to submit their statements in response within 15 days. Failure to comply with the above time limit would have resulted in the court making its decision on the basis of the documents only, without a hearing.

The archival sources include a letter from Alfa Separator Rt. containing a statement of justification sent on behalf of the companies participating in the cartel. Upon the request of the Legal Directorate, the companies concerned submitted the following justification in response to order no. Cg. 41964 of the court of register. The basic agreement, concluded between Ganz és Társa Villamossági, Gép-, Waggon- és Hajógyár Rt. and Röck István Gépgyár Rt., was joined in 1938 by Alfa Separator Rt., which resulted in the amendment of the abovementioned agreement. Alfa Separator joined after a long series of negotiations, resulting in several changes to the text of the agreement. The company in charge of administering the signing claimed that the agreement was first signed by Alfa Separator Rt. and then by Röck István Gépgyár Rt. It was only afterwards that the agreement was sent as an enclosure to the letter dated 23 July

[47] DOBROVICS, K. – KŐHÁZI, E., 1938, p. 252. Cf. Section 1010 of the Private Law Bill of 1928: „No contract shall become valid by reason of the cause of invalidity subsequently ceasing to exist. If, after the cause of invalidity has ceased, the parties confirm the invalid contract, they shall, in case of doubt, be entitled and bound towards each other as if the contract had been valid from the outset. Such confirmation shall have no retroactive effect vis-ŕ-vis a third party." See also: Section 973 of the Private Law Bill of 1928: „a contract contrary to good morals or public order shall be null and void." SZENDE, P. P., *Magyar magánjog mai érvényben: Törvények, rendeletek, szokásjog, joggyakorlat „Magyarország Magánjogi Törvénykönyve" javaslatának rendszerében.* Budapest, 1928, p. 37.

[48] RANSCHBURG, N., 1931, p. 55.

[49] MNL GLF Z 425-C-27 Refrigerator cartel: agreements, minutes, correspondence and records, reports, decisions, (hereinafter: Refrigerator cartel) 1925-1948.

[50] Letter No 906/1 Kt/VII 1938. MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.

[51] MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.

[52] MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.

1938 to Ganz és Társa Rt. The latter company declared that they had signed the agreement on 26 July 1938, and satisfied their disclosure obligation in a few days, on 28 July 1938. They used the version of the text that was typed on 11 July 1938, and this is why the above date was shown on the document 'even though the correct date is 18 July 1938, on which day the contract was concluded by way of a verbal agreement.'[53] The last signature was added to the agreement on 26 July 1938, which meant that the agreement became valid on that day, and this was also the date from which the 15-day time limit had to be calculated. In its statement of justification, the company argued that 'from the point of view of the disclosure obligation, we cannot take into consideration the dates erroneously added in the course of typing, which do not indicate the date of signature by any of the parties, and therefore, it cannot serve as the basis of the deadline for performing the disclosure obligation.'[54]

With reference to the reasons set forth above, the cartel members requested that the court discontinue the proceedings and further "if the Court cannot dispense with the imposition of a fine, then we kindly ask that it also be taken in consideration that even in case the agreement had been concluded on the erroneously indicated date of 11 July, that would mean that we have performed our disclosure obligation with a delay of only 48 hours, which means that – even if the worst is assumed – there was obviously no intention to keep the agreement a secret."[55]

The Court then ordered that a hearing be held in the case, since on the basis of the reasons discussed in the companies' statement of justification, the discovery procedure could not be dispensed with. The hearing was scheduled for 26 October 1940, for which date the Court summoned the respondents, the Royal Attorney General's Office and the Legal Directorate of the Hungarian Treasury.[56]

The court then dismissed the proceedings in its order following the hearing. On the basis of the results of the discovery procedure conducted at the hearing, namely the complaint, the respondent's statement of justification, as well as the evidence given by Gábor Hollenrung, witness, under oath, the Court has established the following facts of the case. The respondent companies concluded an agreement regulating competition concerning refrigeration equipment in Budapest.[57] The agreement, which was drawn up in writing with the date 11 July 1938 shown on the document, was not signed by the parties at the same time: it was first signed by Alfa Separator Rt., which then forwarded the agreement to Röck István Gépgyár Rt. This latter company signed the agreement on 23 July 1938, and then forwarded it as an enclosure to its letter sent to Ganz és Társa Villamossági, Gép- Waggon- és Hajógyár Rt., respondent, with the instruction that after signing they should forward it to the Ministry of Industry. This last of the respondents signed the cartel agreement after 23 July 1938 and submitted it to the competent minister on 28 July 1938. The court found that 1the validity of the cartel agreement requires it to be drawn up in writing, and therefore, the agreement of the respondents is only concluded validly once all the companies that are parties to the agreement have signed it.'[58] This meant that the disclosure obligation was performed in due time and that the respondents have not committed a breach of law. The Attorney General's Office would have had eight days to appeal against the ruling to the court of appeal, but there is no reference among the archival sources examined to any such appeal being submitted.

6. Rules applicable to the disclosure of foreign agreements

Cartel agreements concluded abroad had to be disclosed if the cartel also extended its operation to Hungary. This is justifiable by the fact that, under the rules of private international law, a public policy measure laid down by law also was also applicable to foreign nationals. The activities of a foreign cartel were considered to extend to Hungary if its provisions restricting competition also applied to Hungary. Such cases could include, for example, if a foreign cartel made Hungary the exclusive sphere of interest of one of its companies or groups. If an international cartel had a Hungarian member, the members were responsible for the performance of the disclosure obligation themselves. If the international cartel had no Hungarian member, but either the cartel or any of its members maintained a representative office in Hungary, the disclosure obligation was not imposed on the representative office of the cartel, but on the member of the cartel registered or the cartel representative appointed by the Cartel Court. An important question arising was whether it was possible for a Hungarian court to institute proceedings against a foreign cartel. Hungarian courts could, by way of their ruling, also declare a foreign cartel agreement invalid. As regards invalidity, the rules of private international law had to be taken into account, on the basis of which it can be concluded that the law of the jurisdiction where the agreement was drawn up was applicable.

Laws of public order nature were also applied by the state vis-ŕ-vis foreigners. The provision of the Cartels Act on the disclosure obligation served such public purposes. The Minister's right of supervision over foreign cartels was limited to their activities in Hungary. A foreign cartel could also include the part of the cartel agreement applicable to Hungary in a separate document, and disclose only this document to the Minister, if reluctant to disclose the entire agreement.[59] In the following, I provide a brief description of the disclosure of a foreign cartel agreement, based on the surviving archival sources.

[53] MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.
[54] MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.
[55] MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.
[56] Order no. Cg. 41964. MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.
[57] The registration number of the original cartel agreement based on archival data: 217/Kt.XI.1931. This Agreement was concluded by the parties on 26 November 1931, and was extended several times afterwards. MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.
[58] Order no. Cg. 41.964/5. MNL GLF Z 425-C-27 Refrigerator cartel 1925-1948.
[59] RANSCHBURG, N., 1931, p. 56.

Correspondence was started between the cartel members concerning the introduction of the Inland Vessels Convention, the Foreign Vessels Convention and the International Vessels Repair Convention.

Based on the letter pf Ganz és Társa, it can be concluded that the following agreements had to be sent to the Ministry for disclosure by Első Dunai Gőzhajózási Társaság: the Inland Vessels Convention concluded on 14 May 1927 between D.D.S.G. and Ganz, the Foreign Vessels Convention concluded on 14 May 1927 between Climax, D.D.S.G. and Ganz, as well as the International Vessels Repair Convention concluded on 15 December 1927 between D.D.S.G., Climax, Ganz, Deggendorfer Werft und Maschinenfabrik, Regensburt, Christof Ruthof, Schiffswerften und Maschinenfabrik, Regensburt, and Uebigau Aktiengesellschaft, Schiffswerft, Maschinen- und Kesselfabrik, Dresden. The companies have prepared the powers or attorney and the exchanges of letters relating to the agreements as necessary for the disclosure.[60]

7. Conclusion

The formal validity requirements prescribed in connection with the disclosure obligation were regulated in Act XX of 1931, which meant that the Cartels Act also included provisions of private law. The general rules of private law on the invalidity of contracts apply in cartel law as well; however, after analysing the statutory rules and examining the practice, we can declare that private cartel law imposed additional formal conditions with respect to validity.

Continental cartel law fundamentally emerged in the 20th century, among which the German Cartel Decree of 1923 was the first where we find the introduction of cartel supervisory bodies and the question of the validity of cartel agreements. This proved to be the most decisive influence on Hungarian cartel rules in the period between the two world wars. The Hungarian Cartel Act of 1931 mainly followed the model provided by the Cartel Decree of Germany. However, it was also necessary to refer to the Norwegian Trust Act of 1926 and the Danish provisions of cartel law of 1931. The latter two laws also contained provisions on the disclosure and supervision of cartels. In the Hungarian literature of the period, we can mainly observe that the German rules of cartel law were being followed. This would become the model most often referred to by Hungarian lawyers and economists during the codification process of the Hungarian cartel act.

The provisions of cartel law were essentially of a public law nature, which can be explained by the need to safeguard public interest and the economy. The activities of the cartels that emerged as a result of free competition were subject to supervision, and it was defined what constituted a cartel and what rules had to be complied with for a cartel agreement to be valid. The general rules of Hungarian private law were applicable to cartel agreements, but the relevant provision of the act imposed a formal disclosure obligation, which affected the validity of the agreements. This demonstrates that there were also provisions in the field of cartel law that fell within the scope of private cartel law.

The real depth of the research lies in the discussion and analysis of archival sources, through which a comprehensive picture of the day-to-day functioning of the companies and individuals involved in cartels can be obtained. The analysis of the archival sources confirms the theoretical findings of the paper. The archival sources provide an understanding of when a cartel agreement was contrary to good morals and public order, which could lead to its invalidity. Further, the archival sources can be used to determine what the transactional validity of the contracts actually meant.

On the basis of the archival examples, it can be concluded that the rules on the disclosure obligation have been strictly complied with. Agreements that were contrary to good morals were considered null and void. While European economic and political perceptions of the time did not regard cartels as acts contrary to good morals, in the course of their activities cartels could engage in conduct which was contrary to the public interest, against which the state acted using all available legal means.

[60] Cartel agreement on shipbuilding work. MNL GLF Z 501-D-31: Cartels and other agreements, 1931.

The Commencement and Historical Development of the Right to Property in Hungary

*András Téglási**

Abstract

The paper introduces the emergence and the historical development of the right to property in Europe and in Hungary, and gives a historical overview of this right in the 19-20th century. During the historical development of property rights it became clear that property of individuals should be protected not only against other individuals, but against the arbitrary interference by the State as well. Consequently, the requirements formulated as principles of constitutionality by modern societies sprang up on the basis of an established bourgeois society founded on the freedom to own and deal with various categories of property. In the modern sense of ownership in the traditional Hungarian private law there was no "property", the 1848 revolution established free private ownership of land in Hungary. The right to property was introduced in the Hungarian Constitution during the comprehensive revision performed simultaneously with the transformation of the political system of the years 1989/90 after centuries of property law development preceding it. The Hungarian constitutional regulation was determined as a result of almost 40 years of influence by Stalin's Constitution of the year 1936. The destruction of the enormous predominance of former State property concepts and the formation of the new social order based on private property rights of individuals were the first serious task of the Hungarian Constitutional Court following the transformation of the political system.

Keywords: *right to property; property rights; constitution; historical overview; Hungarian constitution; socialist constitution; 1848 April Laws; Hungary.*

1. Introduction

The right to own and deal with property is without doubt one of the most fundamental of all rights of any democratic society and it plays a key role both in the life of individual persons and in the economy as a whole. The question is not only whether property rights are some of the most important for such a society but whether they are the most important one for determining the existence of human freedom. In fact, the history of the human society up to now can be also viewed as one of fights for and against property rights. The current order of property rights decisively determines the character of a particular social and economical structure and the regulation of property rights also appears as one of the determinative elements of the sovereignty of the State. Simultaneously, property rights ensures the domination of individuals, as well as the community itself and the State, over the material goods and the resources. It also determines the distribution of goods, as well. The various forms of property rights and their regulation reflect the inherent values embodied in a particular era or society and, of course, their changes and development. Consequently significant differences arise from time to time as a result of social and political changes, as well as those of communal life which take place in a particular society and how the system of property rights itself is adapted to those circumstances. In addition, the concept of property ownership and its associated meaning regarding inherent rights and limitations has always been the focus of discussion in legal literature, fundamentally influenced by the individual historical periods, as well as by political tendencies.

Property rights, arising from an absolute characteristic which excludes co-extensive rights of third persons require *eo ipso* (in itself) protection: in other words, without protection of legally acquired goods, intellectual property and real estate rights, the autonomy and independence of the individual would be violated. Different means of the protection of property rights have been developed throughout history. The most typical one is when the owner averts the attacks against his or her property using his or her own rightful authority, which could mean the return to the principle of *"bellum omnium contra*

* Dr. habil. András Téglási PhD., Department of Constitutional and Comparative Public Law, Faculty of Public Governance and International Studies, Ludovika-University of Public Service, Budapest, Hungary, email: Teglasi.Andras@uni-nke.hu / ORCID 0000-0003-2402-8334.

omnes".[1] That is the reason why the State has always striven to help property owners with the available means of law to thwart unlawful attacks against those interests. During the development of the classical private law, the means of public law and private law (i.e. criminal and the civil law), however, were not separated. Penalties were adapted to the point of criminality (not merely to extent of damage caused to the property interests themselves). Often, in addition to the penalties of pecuniary character, penalties were imposed of a personal character (e. g. cutting the hand off). The multitude of means developed for protection of property rights up to the present time has been formed only one or two centuries ago, as result of the development of rights during thousands of years. Yet, this development has not been closed. It is the criminal law which provides one of most effective defenses against the most severe attacks against property rights, penalizing the culprit by punishing both severe and less grave acts as contraventions of societal norms. If the behavior causing damage to the property does not reach the level of a criminality, it is presumably not dangerous to society such that the damaged person can adequately seek redress through claims in the framework of civil law.

During history it became clear that property of individuals should be protected not only against other individuals, but against the arbitrary interference by the State as well. Consequently, the requirements formulated as principles of constitutionality by modern societies sprang up on the basis of an established bourgeois society founded on the freedom to own and deal with various categories of property. Thinking about the historical antecedents of the bourgeois society, it is clear that the current government could create rights essentially at any time, to interfere with property rights, i.e. to intervene in the relations of property owners, including those of individuals, and it did so. As an example, considering the rather ancient possibility of fiefs being taken back during the Middle Ages, the State had an asserted right to withdraw granted property rights even in very early times. Another more extreme example is the position of Grand Viziers (who were essentially slaves) in the Ottoman Empire of the Middle Ages so the State (embodied by the sultan) could by a simple order effectively deprive them of their life and property at any time in this way. These are historical prototypes of the apparition of classical bourgeois property where the State – in accordance with the comprehension of that age – could intervene, according to law, in the individual property rights and associated relations with the State and third parties so the State could deprive individuals of their basic property rights with or without just cause. As an answer to that situation, the concept eventually developed that the State should protect and guarantee the right to own and deal with property not only in the relations between its citizens (in private law) but also in the relation between the State and its citizens, primarily in regard to public law, in the first place as an element of fundamental constitutional rights on the Constitutional level. Consequently, the protection of property rights at constitutional level appears simultaneously with the development of limitations on the power of State to intervene in such rights.[2]

Consequently the bourgeois society refused the omnipotence of the State and all kinds of intervention of the state power into the life of the society. The civil society requires only the functions of the State necessary for maintaining social order and makes efforts that these functions are kept legally regulated, while refusing any interference by the State in a wide range of relationships that form the very fabric of its society. The most important, and at the same time the most frequently discussed sphere, is the economy, wherein the State ensures the order of the economy by rules protecting private property and it is also a participant in the overall economy through government expenditures financed from the taxes and its resulting undertakings and possessions.

The events of the later time periods, mainly the ideas immediately impinging upon private property rights in preference to common ownership under the fascist and communist regimes reinforced, of course, even more strongly the necessity of the constitutional protection of private property rights against the State itself, as well as against various laws enacted by the State interfering unjustifiably with those rights.

2. The commencement of the right to property as a constitutional right

The constitutional right to property is one of the fundamental rights appearing in the earliest times. The commencement of the right to property as a constitutional right or as a human right begins with the era of Enlightenment and the transformation towards the bourgeois society. Since then certain rights, among them the right to freedom and to property are guaranteed not only for some privileged classes of society but for all the people. It is not mere chance that these two rights appear at the same time during decomposition of the feudal regime, as basic rights supporting each other. It is easy

[1] A Latin phrase meaning "the war of all against all," is the description that Thomas Hobbes gives to human existence in the state of nature thought experiment that he conducts in Leviathan (1651). According to Mark Horsley, Justin Kotzé and Steve Hall the dark shadow of post-Roman Britain, particularly the early part of the Middle Ages, provided at least some of the inspiration for Thomas Hobbes's idea of a pre-social 'state of nature' lacking any sort of inherent inclination to pacification and plagued by both exploitative and defensive brutality. Violence, he argued, was used to gain control over the lives of other people and their property, used in the defence of honour and property, and often arose at the slightest provocation or perception of threat. HORSLEY, M. – KOTZÉ, J. – HALL, S., The Maintenance of Orderly Disorder: Modernity, Markets and the Pseudo-Pacification Process. In: *Journal on European History of Law,* Vol. 6, No. 1, 2015, p. 18-29. For more on the theory of Thomas Hobbes, see recently: ŠVEC, J., On the Historical Development of Lex Naturalis and Ius Naturale in the Context of Contract Theories of the Selected Authors of Early Liberalism (Analysis, Comparison, and the Criticism of Selected Concepts). In: *Journal on European History of Law,* Vol. 15, No. 1, 2024, p. 181-189.

[2] In my view we can speak about the constitution not only from the beginning of the bourgeois era but also from the commencement of the first written constitutions, since Aristotle described in his work *Politics* in the 4th century B. C. that he made a study of *constitutions* of 158 city-states. ARISTOTLE, *Politics*. Budapest, 1969, p. 10-12.

to comprehend – and as John Locke[3] observed – that when people do not have property rights, one cannot speak about real freedoms. Consequently *the right to property* can be interpreted as the "mother right" of all human rights. Considering its formation and function, *it should be ranked among the rights of first generation*. I think it acceptable, of course, to consider that the right to property is associated with or the foundation for the economic, social and cultural rights formed later i. e. to the rights of second generation, even though the rights of second generation provide protection of the individual by the State (like e. g. the right to social security). When speaking of the right to property, however, this is not the case because here the individual should be protected by the State against (arbitrary interference by) the State. In the case of the rights of second generation, on the other hand, the State does not "threaten" with anything and it does not take away anything. In the worst case, the State does not give anything and this is the reason why constitutional problems arise.

2.1 The main ideological and historical trends linked to the emergence of constitutional protection of property

Examining the theories concerning the protection of property we can observe the formation of two fundamental concepts. According to the *natural-liberal understanding,* property is a natural right of individuals, established prior to the formation of states and associated later lawmakers. Consequently this approach put an emphasis on the existence "before State" of property and, accordingly, the owner's rights are seen as unlimited – including the traditional "right to possess" (and to exclude others from possession), "the right to usage", and "the right to free disposition". Consequently, the State legislature is obliged to have respect for those rights according to this construct; i. e. the protection of property has priority even against the State's power. The scope of tasks for the Constitutional Court, therefore, requires that, when necessary, it annul State created legal norms regulating individual property rights or limit State created restrictions to their permissible limits. This conception of the right to property as a fundamental human right, following its most important proponent, John Locke, exerted significant influence not only on the declarations of North America and the constitution of the United States of America but also on the Declaration of the Rights of Man and of the Citizen in France.

The other concept is that of *the social welfare conception of property*, which, contrary to the previous interpretation, emphasizes the role of the State against property. In other words, according to this view, private property is not superior to the interests of the State. Rather, private property constitutes an integral part of the interests of governmental policy and it accordingly plays an important role in defining the relationship between owners and their property (usage and disposition over it) and society itself. At its core, it is the social function of property which determines the scope of appropriate legislative action in the regulation of property, and not inversely. Consequently, the right to property is in this framework separated from human rights and freedoms and, instead, gives rise to the possibility of limitations on individual owner's rights from the beginning. Accordingly, property is seen as having no absolute validity and its associated rights cannot be unlimited. It exists only to the extent the legislator allows by legal regulation so overriding control by the Constitutional Court is restricted only to procedural issues (e.g. due process examination) of the legal regulations relating to property. This excludes the possibility of re-examination by the Court from the viewpoint of the substance of the regulations at the same time.[4]

In addition to these two schools of thought, we cannot ignore provisions concerning the property as they appeared in the so-called *socialist Constitutions*. They were characterized by the complete elimination of private property concerning land, drawing the instruments of production into State possession and the formation of the so-called socialist form of property which was a further elevation of the privileged position of State property.

3. Property rights in Hungary in the 19th century – The Acts of 1848

In the modern sense of the word (ownership) in the traditional Hungarian private law[5] there was no "property", or, more precisely, proprietas as an exclusive right on goods existed only on moveable assets (res mobiles) and on "acquired goods" (bona acquisita).[6] In the case of the land and some other valuable goods (qualifying as res immobiles under the old Hungarian private law), some traditional institutions restricted the owner's rights, first of all the right of disposition (ius disponendi), which is indeed the most significant right of the owner in the modern interpretation of private law; the most important restrictive institution was aviticitas.[7]

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[3] For more on the theory of John Locke, see recently: ŠVEC, J., On the Historical Development of Lex Naturalis and Ius Naturale in the Context of Contract Theories of the Selected Authors of Early Liberalism (Analysis, Comparison, and the Criticism of Selected Concepts). In: *Journal on European History of Law,* Vol. 15, No. 1, 2024, p. 181-189.

[4] This theory - originating from the theories of Thomas Hobbes - had a major role in development of the German Constitution and in the later French ones. It also appeared in the practice of the Hungarian Constitutional Court, when the Court laid down in its Decision 64/1993. (XII. 22.) AB that the extension of the constitutional protection of property is always factual; it depends on the subject, object and function of property, and also on the method of restriction. The content of property protected as a basic right should be always be considered in conjunction with the current (constitutional) restrictions of public law and private law."

[5] It is worth comparing the development of Hungarian private law with that of Czech private law. For a thorough overview of the historical development of Czech private law, see: VOJÁČEK, L. – SCHELLE, K. – TAUCHEN, J. et al., *An Introduction to History of Czech Private Law*. Brno, 2011.

[6] KÉPES, Gy., The Birth and Youth of the Modern Hungarian Private Law. In: *Journal on European History of Law,* Vol. 7, No. 2, 2016, p. 102-113.

[7] KÉPES, Gy., The Birth and Youth of the Modern Hungarian Private Law. In: *Journal on European History of Law,* Vol. 7, No. 2, 2016, p. 104-105. About marriage property law on the Hungarian marriage property law from the 17th to the18th centuries see: PERES, Zs., Marriage Property Rights of the Hungarian Noble Women according to their Prenuptial Agreements. In: *Journal on European History of Law,* Vol. 9, No. 2, 2018, p. 125-132.

In the course of Hungarian history, the revolution of 1848[8] established - among other freedoms - free (private) ownership of land.

The Hungarian Diet's resolution of 8 April 1848 abolished serfdom (*jobbágyság*)[9] and the landlord's ownership of serfs' land. The serf estates used by the serfs were transferred to the serfs without any special declaration, since the services they had been entitled to were no longer provided. This step put Hungary at the forefront of European modernisation: in the Habsburg Empire - not taking into account Lombardy, where there had been no serf system since the 17th century - Hungary was the first country to emancipate serfs, and the laws of the Bratislava diet were extended to Croatia-Slavonia.

With the Act IX of 1848, the peasantry became free owners of the manorial land they cultivated. In return, compensation was ordered for the landlords. Details of the compensation were laid down in the patent of the Emperor on 2 March 1853.[10]

Prominent among the liberties declared by the acts of 1848 was the principle of the sanctity of property, an indispensable condition for modern commodity production and exchange. The protection of property was mentioned in the Act III of 1848 in the context of the establishment of ministerial responsibility, when it stated that ministers should be held responsible for any act or decree that violated the independence of the country, the guarantees of the Constitution, the decree of existing laws, individual liberty or the sanctity of property, committed by them officially.[11]

By this time, the protection of property was understood to include the free right to acquire and transfer property (among living persons or in the case of death), as well as the protection of property already acquired. Thus, in the context of the civil transformation, the protection of the existing property system by the state through legal (constitutional) regulation also appears in Hungary. As a result, the owner had an unlimited right to dispose of his property, which in the capitalist economic system was represented as a commodity. This meant not only the property of the ancient Roman law[12] but also the possibility of acquiring ownership of labour or intellectual works. The principles of freedom of contract and equality of rights, i.e. the equal right of all to acquire property and the absence of separate regulations for each class, as in feudalism, were also introduced as provisions protecting the sanctity of property.

The Urbarium[13] issued by Maria Theresa by octroi in 1767 was cancelled in 1848. With the abolition of Urbarium, the former noble land ownership and serf land use was transformed into civil commodity ownership. Act XV of 1848[14] provided for the abolishment of the institution of aviticitas.

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[8] The Revolution of 1848/49 resulted in the abolition of feudalism in the whole of the Habsburg monarchy, but the actual process of the liquidation of feudalism in some federal provinces continued for several decades. The old rules still regulated most social relationships, although normative acts, which were aimed at releasing the peasantry from their feudal obligations toward the landowners, were adopted during the revolutionary period and during Bach's absolutism (imperial patents of 1853 and 1857). The fight between the former feudal lords and their dependents, which was partly an attempt by landowners to force their former serfs to perform some forms of feudal duties, and partly their effort to appropriate arable land for the construction of new capitalist property, continued for a long time even after the legal basis for the resolution of these issues had already been set by the patents and other laws. PERES, Zs. – GARDAŠ, M. – ROŠKAR, J., Manors in Baranja County in the 18th and 19th centuries. In: DRINÓCZI, T. – ŽUPAN, M. (ed.), *Law – Regions – Development*. Pécs – Osijek, 2013, p. 259.

[9] About this terminology see more: GRAY, R. W. B., *Land Reform and the Hungarian Peasantry c. 1700-1848. Thesis submitted for a PhD in History* [online]. 2009. Available at: https://discovery.ucl.ac.uk/id/eprint/19321/1/19321.pdf [Accessed 20 October 2024] p. 12.

[10] According to this, landlords were given state bonds that relieved the land of its burden, and these bonds were drawn by lot over 40 years. Repayment began in 1857. While some of the large landowners were paid off early, and were also able to obtain substantial mortgage loans from Austrian banks, the usury rates on loans to medium landowners sometimes reached 80-100%. In addition, if the middle-owners wished to obtain the capital needed for agricultural cultivation in some other way, they could sell their bonds at a discount.

[11] Act III of 1848, § 32. On the Acts of April 1848, see: SCHWEITZER, G. – SZENTE Z., Polner Ödön ismeretlen előadása az 1848. évi áprilisi törvényekről. In: *Díké: A Márkus Dezső Összehasonlító Jogtörténeti Kutatócsoport Folyóirata,* Vol. 7, No. 1, 2023, p. 117-134.

[12] See: HAMZA, G., Elméletek a római tulajdonról, In: *Jogtudományi Közlöny,* Vol. 55, No. 10, 2000, p. 407-411.

[13] The Urbarium, a decree issued by Maria Theresa in 1767, intended to supplant unwritten custom and varied local use with a set of written and uniform standards. The Urbarium aimed to record and regulate the peasants' holdings, and required registers to be kept to account for all peasant-farmed land and the obligations that derived therefrom. As a consequence, the peasants' urbarial holdings – that land to which they possessed rights as they had been defined in the *Tripartitum* – became permanently separated from their lords' dominical land. At the same time, the peasants' obligations became tied to the size of their holding in an attempt to ensure that the peasants could subsist, pay taxes to the crown and meet their obligations to their lords. By issuing a standardized form that was to be the basis of urbarial agreements, the Urbarium sought to introduce a uniform and regulated set of dues and obligations. By dictating that the agreements were to be accompanied by comprehensive land registers, the Urbarium introduced a uniform regulation and standardization of peasants' plots. GRAY, R. W. B., *Land Reform and the Hungarian Peasantry c. 1700-1848. Thesis submitted for a PhD in History* [online]. 2009. Available at: https://discovery.ucl.ac.uk/id/eprint/19321/1/19321.pdf [Accessed 20 October 2024] p. 7. In 1514 Stephen Werbőczy presented the Tripartitum opus iuris consuetudinarii inclyti regni Hungariae to the Hungarian legislative assembly, the diet. Werbőczy holds the duty of retreat to be mandatory for everyone, and it could also be presumed that only the retreat in case of an attack against life was required by Werbőczy, but in case of an attack against property rights, Werbőczy explained that one has to withdraw, if he can escape without a harm of his person and honour, hence we can deduce, that he has not to withdraw, if he can escape without a harm affecting his property rights. BÓNIS, P., The self-defense in the Tripartitum and the European ius commune. In: *Journal on European History of Law*, Vol. 5, No. 2, 2014, p. 83.

[14] Act XV of 1848 can be considered as the fundament of modern Hungarian private law. Beyond the declaration of the abolition of aviticitas, this act contained two further provisions as well: the immediate cancellation of all related pending litigations (Article 2), and an instruction to the government to prepare a draft Civil Code and to present it to the Diet (Article 1). The preamble of the act was quite clear: "Abolition of the aviticitas being hereby declared…". KÉPES, Gy., Abolishment of the institution of aviticitas and the establishment of modern private law in Hungary. In: *Revista Română de Informatică și Automatică*, Vol. 1, No. 1, 2021, p. 119.

The abolition of aviticitas finally took place in the wake of the revolutionary events of March 1848, on the last traditional Diet held in 1847/48, in quite unusual circumstances.[15]

Emperor Franz Joseph finally issued his edict called Avitizitäts-Patent on November 29, 1852, this edict can be considered as a kind of (unconstitutionally adopted) implementing regulation of Act XV of 1848.[16]

About Hungary's former inheritance system, the legislators expressed their optimistic hope that the government would draft a Civil Code that would settle the issue completely.[17] The fate of the two types of property, aviticum and acquisitum, which have been part of the inheritance tradition for centuries, has also been simplified and the abolition of patrimony has brought us closer to a modern, more transparent and predictable inheritance regime for citizens seeking rights.[18]

4. Constitutional regulation of property relations in Hungary in the 20th century

4.1 Legal regulation of property rights in 1919

In Hungary, only one law from the period of the First People's Republic deserves to be highlighted, the People's Act No. XVIII of 1919 on the Land Allocation of the Peoples of the Land, which, if implemented, would have brought about significant changes in the economic order and land ownership relations.

Article 1 of the Land Reform Act stated that the People's Republic intended to place the country's arable land in the hands of the peasantry. To this end, the law further provided for the right of expropriation of secular medium and large estates of more than 500 acres, or, where necessary to provide the people with land, of more than 200 acres. In the case of ecclesiastical estates, however, the ceiling on the remaining land could never exceed 200 acres. The Act extended the right of expropriation to include, together with the immovable property, the mills, distilleries and other factories belonging to them, as well as usufructuary rights and easements. If these were not taken into public ownership, they could be given into the ownership or possession of the land only to cooperatives of landowners with sufficient members. The expropriation price of the land was set at the market value in 1913. However, due to wartime inflation, this was only a quarter of the 1918 land prices.

With Decree XXXVIII of 1919, the Revolutionary Governing Council began the process of taking state ownership of landed estates. According to the Decree of the Governing Council of 3 April, all medium and large estates, with all their appurtenances, their equipment, living and dead, and their agricultural industrial plant, were transferred to the proletarian state without any redemption. The estates transferred to public ownership were handed over to the proletariat cultivating the land for cooperative management. Given that the decree did not define the concept of public land precisely, different areas of land were considered expropriable in different municipalities of the country. In some cases, the minimum was 50 cadastral acres, i.e. an expropriation that exceeded by orders of magnitude the extent of what could be expropriated under the law.[19]

Even if its application in practice and its impact on the later development of the Hungarian constitution is almost insignificant, the Provisional Constitution of the Council of the Hungarian Soviet Republic, enacted by the Revolutionary Governing Council on 2 April 1919, following the first Hungarian Soviet Constitution, and the Final Constitution of 23 June 1919, deserve to be mentioned as the first Hungarian charter constitutions. The newly established Council of People's Economy was given the power of unified management of production and distribution of goods, issuing and implementing decrees regulating management, and exercising technical and economic control over the bodies responsible for production and distribution. Article 4 and Article 5 of the Constitution of the Hungarian Soviet Republic declared the ownership of the means of production by the workers. However, it did so without naming the objects of property themselves. The constitution also laid down the public ownership of all agricultural, industrial, mining and transport enterprises, as well as banks and insurance institutions, which went beyond the confines of the small enterprise. It is therefore clear that the constitution of the Hungarian Soviet Republic defined the objects of state ownership primarily through the main economic activities, and not through the objects of ownership themselves.

4.2 The transformation of property relations – from Act I of 1946 ("the minor constitution") to 1949

Not only in the context of the constitutional protection of property, but also in any analysis of constitutional history, Act I of 1946 (the "minor constitution") deserves to be mentioned. In its preamble, the Act enshrined for the first time in the history of the Hungarian constitution - and under the influence of the concept of natural law - the principle of respect for human rights. These included - as a natural and inalienable right of citizens - the right to property.[20]

But then, following the success of the Communist Party in the 1947 early elections, a wave of nationalisation laws affecting property relations began, initially only affecting key sectors (e.g. coal mining or electricity), but by Act XXV of 1948 all factories employing more than 100 workers were nationalised. This move, forced by the left, was clearly aimed at eliminating capitalist ownership.

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[15] KÉPES, Gy., Abolishment of the institution of aviticitas and the establishment of modern private law in Hungary. In: *Revista Română de Informatică și Automatică*, Vol. 1, No. 1, 2021, p. 119.

[16] KÉPES, Gy., Abolishment of the institution of aviticitas and the establishment of modern private law in Hungary. In: *Revista Română de Informatică și Automatică*, Vol. 1, No. 1, 2021, p. 120.

[17] GOSZTONYI, G., Freedoms in the Hungarian April Laws of 1848. In: *Journal on European History of Law,* Vol. 15, No. 1, 2024, p. 139.

[18] GOSZTONYI, G., Freedoms in the Hungarian April Laws of 1848. In: *Journal on European History of Law,* Vol. 15, No. 1, 2024, p. 139.

[19] MÉHES, T., Birtokpolitika – A földszerzés elmélete és gyakorlata. In: *Acta Humana,* Vol. 5, No. 3., 2017, p. 49.

[20] On the echo of the Minor Constitution in the contemporary public law literature, see: SCHWEITZER, G., A magyar királyi köztársaságtól a magyar köztársaságig – Az 1946. évi I. tc. visszhangja a korabeli közjogi irodalomban. In: *Acta Humana*, Vol. 5, Nr. 1, 2017, p. 27-38.

After June 1948, the first wave of violence in the agricultural sector was also triggered by the *"forced collectivization"* of the sector, which then culminated in the complete abolition of private land ownership.

4.3 The provisions of the 1949 Constitution of the People's Republic at the time of its promulgation

According to the text of Act XX of 1949, the majority of the means of production in the Hungarian People's Republic were owned by the state, public authorities (social bodies) or cooperatives as social property.

In the Hungarian Constitution, therefore, social property enjoyed special protection since its promulgation. In addition, it enshrined cooperative property, referred to the main features of the cooperative form and its state support, and - for the first time in a series of people's democratic constitutions - also expressed the specific socialist principles of the cooperative form: voluntary character, state support and the cooperative's character based on the work of its members. In addition to declaring all these, the Constitution also made it a fundamental duty of the citizens of the Hungarian People's Republic to consolidate social property. However, it added that means of production could also be privately owned. Private property, as such, therefore, appeared *expressis verbis* in the text of our socialist Constitution, but in such a way that private property and private initiative could not infringe public interests. Article 8(1) of the Constitution of that time stipulated that the Constitution recognised and protected property acquired by work. This legislation was thus based on the socialisation of the means of production and a kind of subordination of the recognition and protection of the various forms of property.

The restrictions on property that had been present in the socialist constitutions - including the constitution of our country for almost 40 years - were abolished during the change of regime. This is reflected in the text of our Constitution as comprehensively amended by Act XXXI of 1989 and Act XL of 1990.

5. The period of property regime change in Hungary (1989–1990)

The right to property as a constitutional fundamental right was introduced into the Hungarian Constitution during the comprehensive revision performed simultaneously with the transformation of the political system of the years 1989/90.[21]

This new constitutional regulation was determined as a result of almost 40 years of influence by Stalin's Constitution of the year 1936. The destruction of the enormous predominance of former State property concepts and the formation of the new social order based on private property rights of individuals were the first serious task of the Hungarian Constitutional Court following the transformation of the political system. In fact, this was the situation essentially the first time when the Constitutional Court had to face the problem of the interpretation of the Sections 9 and 13 of the Constitution.

During the general constitutional revision of Act XXXI of 1989, the equal constitutional protection of public and private property were introduced into the Constitution. Since this amendment the Constitution of Hungary defined Hungary's economy as a market economy, which - at that time - also took advantage of planning. According to the explanatory memorandum, the restructuring of the economy also entails a change in the way in which forms of property are viewed and constitutionally represented and protected. Thanks to this comprehensive constitutional amendment, the constitutional guarantees of expropriation of private property was also introduced in Article 13, now elevated to constitutional status, and in the amendment made by Act XL of 1990, it was incorporated into the Constitution as a constitutional guarantee of the right to property, alongside the provision on the right to property, and under strict conditions, such as exceptionality and public interest, regulation by law and the obligation to provide immediate, unconditional and full compensation.

Expropriation had previously been regulated only by legislative decree, but this section was a clearer statement of the protection of property than previously understood, and provided adequate safeguards for both foreign and domestic owners. As the primary function of the state is to organise the conditions of life in society, this requires the state itself to be an owner to a certain extent. However, as a public authority, the state must be separate from the other elements of society, and its ownership is therefore formulated as the property of the Hungarian nation as a society. Accordingly, state property can only be owned by organisations representing the whole people. The 1989 constitutional amendment created the possibility for a constitutional act to define the scope of the exclusive property of the State and its exclusive economic activity. After the first free elections, the second major constitutional amendment, implemented by Act XL of 1990, allowed not only a constitutional act but any act to list the scope of exclusive State property.[22]

The same amendment added to the section on expropriation - the unchanged provision of which then became Article 13(2) - a declaration of the constitutional protection of the right to property, stating that the Republic of Hungary shall guarantee the right to property.

Thus, with the change of the public law system, the right to property was not placed in Chapter XII on Fundamental Rights, but in Chapter I, under General Provisions. This 'drafting error', was a remnant of the old socialist constitution, which regulated property relations, which were regarded as the defining element of socialist relations of production, in the first chapter on social

[21] It is worth comparing the process of democratisation of Hungarian law with that of the Czech Republic. For a comprehensive overview of the process of democratisation of law in the Czech Republic see: SCHELLE, K. (ed.), *The Process of Democratization of Law in the Czech Republic (1989-2009).* Rincon, 2009.

[22] The reason for this was not, however, a ‚backward step' in the protection of property, but the disappearance of the category of „constitutional act". A "constitutional act" was defined in the Constitution of the time as a statute of Parliament passed by at least two-thirds of all members of Parliament.

order, i.e. socialist ideology was based on the assumption that the totality of social relations constitutes the basis of society, and that this determines the social structure, which forms the economic basis of socialist societies and on which the political structure is also built.[23]

The reasons for the constitutional positioning of the right to property after the change of regime can thus be traced back primarily to the earlier socialist traditions, although it should be added that some legal literature argues that the definition of the economic basis of a given social system generally goes beyond the framework of citizens' rights, and therefore - although constitutions often regulate property relations within the framework of citizens' rights, and in connection with them - some of the provisions on property relations should rather be placed among the introductory provisions. For my own part, however, I would have preferred to attribute the position of the right to property in the constitution to the circumstances in which it came into being, for it is well known that, according to socialist ideology, the prevailing form of property and social property were of decisive importance for the organisation of the state, and that the rules on property were therefore placed at the head of the constitution, in accordance with the socialist constitutional model, among the general provisions defining the social and economic order. And the constitutional amendment laws implemented during the regime change have modified the property provisions in such a way that their constitutional order has been left practically untouched. In my opinion, it would not have been appropriate to move the property provisions to Chapter XII of the Constitution, which also dealt with rights and duties in a unified manner, in the socialist tradition, but it would have been appropriate to declare fundamental rights at the very beginning of our Constitution, as most modern democratic constitutions do. The Constitutional Court, however, did not attach any particular importance to the fact that the right to property was not placed in the chapter on fundamental rights and that it was protected as a fundamental right without any particular justification.[24]

Already the constitutional amendment of '89 mentioned the recognition of the property of local government when it allowed for the creation and functioning of producer self-government and the property of municipalities, in the interests of our socio-economic development. The new wording of this section, as laid down in the 1990 Constitutional Amendment Act XL, states that 'The State shall respect the property of municipalities'.[25] In this connection, a constitutional problem arose because neither the text of the amendment nor the explanatory memorandum to the Act made any reference to the enactment of the legislation necessary for its implementation, whereas the new rule directly amended the laws in force at the time on forms of property, such as the provisions of the Civil Code or the Companies Act. This also meant that the law enforcement bodies could apply these provisions of the Constitution directly to the specific cases that arose from their entry into force, which presented them with a difficult task of legal interpretation.

6. The dismantling of the socialist property system and the creation of a new private property system

The new provisions that emerged as a result of the constitutional property regime change, as just described, created the constitutional basis for the process that allowed the majority of national property, which had been almost entirely nationalised after 1945, to be returned to private ownership within 15 years. This privatisation process, which took place in a relatively short period of time by historical standards, played a decisive role in the establishment and revival of the market economy, which started with a share of public ownership of over 85 per cent, but now accounts for almost four-fifths of the Hungarian economy. By comparison, in the second half of the 20th century, in the capitalist economies of Western Europe, state ownership was a significant percentage of the economy in countries such as France, Italy and Austria.

The comprehensive amendment of the Hungarian Constitution in 1989-90 was based on the denial of the property relations existing at that time. It was, moreover, a rejection of the previous socialist system of property ownership, which had been successfully implemented in the means of production, and which had aimed at the systematic abolition of private property.

It was ultimately up to the Constitutional Court to reconcile the legal and political aspects of this new system of property ownership, thus making it possible to establish a new system of property ownership that was different from the previous one.

The Hungarian Constitution of 1989 (which was in force until 31 December 2011) contained provisions about property in several sections. Paragraph 9 declared the equal status of public and private property in relation to the market economy and paragraph 13 declared, in addition to expropriation, the guarantee of the right to property by the State.

The Constitutional Court made clear in its decision no. 64/1993. (XII. 22.) AB that the protection of property is not absolute, restrictions on property are constitutionally allowed in the public interest, in certain cases even without compensation. Property as a constitutional right is protected by the "guarantee of value" or to put it in a different terminology, ownership is protected against public regulation by liability rule and not by property rule. For public purpose, property can be taken when full compensation is paid. And the Court "requires no stricter 'necessity' than public interest, which the Court will not review except in borderline cases such as those in which invoking the public interest is obviously unfounded."

The Constitution of 1989 drew a distinction between the

[23] BALOGH, E., A magyar termőföldtulajdon az Alkotmánybíróság judikatúrájában. In: BOBVOS, P. (ed.), *Reformator iuris cooperandi. Tanulmányok Veres József 80. születésnapja tiszteletére.* Szeged, 2009, p. 38.

[24] 21/1990. (X. 4.) AB decision, ABH 1990, 73; 7/1991. (II. 28.) AB decision, ABH 1991, 22; 16/1991. (IV. 21.) AB decision, ABH 1991, 54; 28/1991. (VI. 3.) AB decision, ABH 1991, 80.

[25] Article 12(2) of the Constitution of the Republic of Hungary.

expropriation of public property [Art. 13 section (2)] and the constitutional protection of the right to property in civil law [Art. 13 section (1)].

In its first two decades of operation (1990-2010) the Constitutional Court of Hungary gradually extended protection of the right to property, in addition to property ownership as a civil right, to other real legal titles such as legal titles of obligatory rights and, what is more, to claims of public law. The extension was essentially based on the function of the property ensuring the autonomy. From among them, the qualification of claims to social insurance as property was the one having the greatest effect. This made it possible to cut down the so-called "package of Bokros" in the year 1995 (that time Bokros was the finance minister of Hungary). According to the practice of the Hungarian Constitutional Court, the constitutional right to property comprised not only the property rights of civil law but also other elements of public law, social ones and those of social insurance entitlements; but only *contributory* social security benefits should be guaranteed by the State as property right.

In addition to the "classical function" of property rights, the concept of autonomy of individual freedom of acting and the insistence on the social function of property appeared in the practice of the Constitutional Court. The Constitutional Court declared that "socially motivated restrictions imposed on property made constitutionally permissible a far-reaching restriction on the autonomy of the property-owner." In other words the social constraints on property rights make constitutionally possible significant restrictions on the autonomy of the owner. The Court enforced those social constraints in such a way that it projected the requirement of public interest, which was decisive at the expropriation in Article 13 section (2) of the Constitution, to the restriction of the right to property as defined in the Article 13 section (1).

7. Conclusion

The right to property is one of the most fundamental of all rights of any democratic society and it plays a key role both in the life of individual persons and in the economy as a whole. During the historical development of property rights it became clear that property of individuals should be protected not only against other individuals, but against the arbitrary interference by the State as well. Consequently, the requirements formulated as principles of constitutionality by modern societies sprang up on the basis of an established bourgeois society founded on the freedom to own and deal with various categories of property.

In the modern sense of ownership in the traditional Hungarian private law there was no "property", the 1848 revolution established free private ownership of land in Hungary. The right to property as a fundamental right was introduced in the Hungarian Constitution during the comprehensive revision performed simultaneously with the transformation of the political system of the years 1989/90, after centuries of property law development preceding it. The Hungarian constitutional regulation was determined as a result of almost 40 years of influence by Stalin's Constitution of the year 1936. The destruction of the enormous predominance of former State property concepts and the formation of the new social order based on private property rights of individuals were the first serious task of the Hungarian Constitutional Court following the transformation of the political system.

Jan Kabát

Historie právnických sjezdů v českých zemích a na Slovensku [Geschichte der Juristentage in den böhmischen Ländern und in der Slowakei]

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Das Buch *„Geschichte der Juristentage in den böhmischen Ländern und in der Slowakei"* des Brünner Rechtshistorikers Jan Kabát ist ein Werk von außerordentlicher Bedeutung nicht nur für die tschechische und slowakische Rechtsgeschichtsschreibung, sondern auch für die Kolleginnen und Kollegen aus den deutschsprachigen Ländern, die sich für das Wirken und das Schicksal der deutschen Juristen in der Tschechoslowakei der Zwischenkriegszeit interessieren. Mit tiefem Respekt vor der Tradition, mit außerordentlicher fachlicher Sorgfalt und wissenschaftlicher Gründlichkeit widmet sich der Autor in dem zu besprechenden Buch einem Phänomen, das wesentlich zur Prägung des tschechischen Rechtsdenkens, zur Festigung des Standesbewusstseins der Juristen und zur Kultivierung der Rechtswissenschaft in der Tschechoslowakei beigetragen hat.

Der Erfolg eines jeden Buches hängt bis zu einem gewissen Grad von der Wahl des Themas ab. In diesem Fall hat Jan Kabát das Thema sehr gut gewählt: Die Geschichte der Juristentage in den böhmischen Ländern und in der Slowakei in der ersten Hälfte des 20. Jahrhunderts wurde bisher weder in der tschechischen noch in der tschechoslowakischen Rechtsgeschichtsschreibung systematisch und umfassend behandelt. Dabei sind gerade die Juristentage ein faszinierendes Zeugnis nicht nur für die Entwicklung des Rechts selbst, sondern auch für die umfassenderen gesellschaftlichen und politischen Veränderungen, die die böhmischen Länder und den gesamten mitteleuropäischen Raum erfassten.

Der Autor macht deutlich, dass die Juristentage nicht nur akademische Diskussionen oder Fachtagungen waren, sondern echte Plattformen, auf denen juristisches Denken geprägt, Erfahrungen ausgetauscht und die Standesidentität der Juristen geformt wurde. Jeder Kongress war eine Gelegenheit, zu bekräftigen, dass das Recht mehr ist als ein Handwerk – es dient höheren Werten: der Wahrheit, der Gerechtigkeit und dem nationalen Leben.

Das Buch vermittelt ein umfassendes und sorgfältig dokumentiertes Bild der Juristentage von ihren Anfängen an der Wende vom 19. zum 20. Jahrhundert. Schon damals wuchs in der tschechischen Juristenschaft das Bedürfnis nach einer eigenen Plattform, die ein gemeinsames Nachdenken über grundlegende Fragen des Rechts und seiner Entwicklung ermöglichen sollte. Ein wichtiger Impuls war die feierliche Enthüllung des Denkmals für den mittelalterlichen Juristen Viktorín Kornel ze Všehrd (Victorinus Cornelius) in Chrudim im Jahre 1901, bei der die Idee geboren wurde, die tschechischen Juristen regelmäßig zu Fachgesprächen zu versammeln.

Diese Idee wurde dann von der Právnická jednota *(Juristenvereinigung)* gemeinsam mit dem Prager Spolek českých právníků Všehrd *(Verein tschechischer Juristen Všehrd)* in die Tat umgesetzt. Die Vorbereitungen gipfelten 1904 in der Organisation des I. Wissenschaftlichen Kongresses tschechischer Juristen in Prag. Dieser Kongress war in der damaligen Monarchie eine einzigartige Manifestation der fachlichen Reife und nationalen Eigenständigkeit der tschechischen Rechtswissenschaft. Mehr als 1300 Juristen versammelten sich in den Räumen des Nationalmuseums und der Prager Universität, um in Fachsektionen vorbereitete Vorträge zu Fragen des Zivilrechts, des Zivilprozessrechts, des Strafrechts und des öffentlichen Rechts zu diskutieren. Der Kongress hatte einen feierlichen und kulturellen Rahmen, einschließlich einer Aufführung der Oper „Die Teufelswand" von Bedřich Smetana im Nationaltheater. Die Ergebnisse der Diskussionen wurden in Fachpublikationen veröffentlicht und wirkten nachhaltig in der Fachwelt. Der erste Kongress legte somit nicht nur den Grundstein für die Tradition der Juristentage, sondern zeigte auch, wie eng das Recht im tschechischen Kontext mit den Idealen der Standessolidarität und der nationalen Identität verbunden war.

Die Vorbereitung des Tschechoslowakischen Juristentages 1925 in Brünn lag in den Händen der Moravská právnická jednota *(Mährischer Juristenverein)* und führender Vertreter der tschechoslowakischen Rechtswissenschaft, unter ihnen die Professoren der Brünner juristischen Fakultät František Vážný und Jaromír Sedláček. Der Kongress fand in feierlicher Atmosphäre in den Räumlichkeiten der Tschechischen Technischen Universität statt und hatte als Hauptthema die Notwendigkeit der Vereinheitlichung der Rechtsordnungen in der neu entstandenen Tschechoslowakei. Mehr als 1.200 Teilnehmer diskutierten in Fachsektionen Fragen des Zivil-, Straf-, Verwaltungs- und Finanzrechts. Eine wichtige Rolle spielte dabei das Bestreben, den sogenannten Rechtsdualismus, also das Nebeneinander von österreichischem und ungarischem Recht, zu beseitigen. Der Kongress bestätigte das hohe fachliche Niveau der tschechoslowakischen Rechtswissenschaft und gab die Richtung für die weitere gesetzgeberische Entwicklung vor.

Noch eindrucksvoller war der III. Tschechoslowakische Juristentag in Preßburg im Jahre 1930. Den Organisatoren, allen voran dem Universitätsprofessor Vladimír Fajnor und dem Preßburger Rechtsanwalt Cyril Bařinka, gelang es, eine Veranstaltung von außergewöhnlicher Größe auf die Beine zu stellen – an ihr nahmen rund 3.000 Juristen teil, darunter Delegationen aus Europa, Amerika und Japan. Präsident der Republik Tomáš G. Masaryk betonte in seiner Rede die Bedeutung des Rechts als Grundpfeiler eines demokratischen Staates. Der Kongress umfasste Fachdiskussionen in sechs Sektionen, ein Kulturprogramm mit Opernaufführungen und gesellschaftliche Veranstaltungen. Die Frage der einheitlichen Kodifizierung des Rechts und die Förderung der Rechtsethik fanden große Beachtung.

Anknüpfend an diesen Erfolg fand 1933 der I. Juristentag der slawischen Staaten erneut in Preßburg statt. Ziel dieses Kongresses war es, die Zusammenarbeit der slawischen Völker auf dem Gebiet der Rechtswissenschaft, insbesondere des internationalen Privatrechts, zu fördern. Obwohl die politischen Umstände die vollständige Verwirklichung der ehrgeizigen Pläne verhinderten, stellte der Kongress einen wichtigen Versuch der transnationalen juristischen Zusammenarbeit auf einer kulturell verwandten Grundlage dar.

Auch die deutschen Juristentage in der Tschechoslowakei in der Zwischenkriegszeit werden in der rezensierten Publikation ausführlich behandelt. Der erste Deutsche Juristentag 1927 in Aussig (Ústí nad Labem) zeichnete sich durch ein hohes fachliches Niveau und das Bemühen um die Lösung praktischer Rechtsprobleme im Bereich der Minderheitenrechte, der Wirtschaftsbeziehungen und des allgemeinen Privatrechts aus. Die folgenden Kongresse in Reichenberg (Liberec) und Troppau (Opava) konzentrierten sich auf die Modernisierung des Handelsrechts und der Verwaltungsgerichtsbarkeit. Darüber hinaus dienten die deutschen Juristentage auch der Kontaktpflege mit Juristen aus dem österreichischen und deutschen Rechtsraum. Die deutschen Juristen bemühten sich um ein hohes fachliches Niveau, obwohl die politischen Spannungen der 1930er Jahre die Atmosphäre dieser Treffen prägten. Jan Kabát zeigt sachlich und respektvoll, dass die deutschen Juristentage zur Kultivierung des Rechtslebens in der Tschechoslowakei der Zwischenkriegszeit beitrugen und würdigt, dass trotz nationaler Unterschiede das Recht als über den politischen Konflikten stehend angesehen wurde.

Neben den wichtigsten Kongressen zeichnet der Autor auch den ersten Fachkongress der tschechoslowakischen Juristen im Jahre 1936 nach, der sich mit Standesfragen befasste, sowie den ersten Vereinheitlichungskongress in Preßburg im Jahre 1937, der den Bemühungen um eine legislative Vereinheitlichung der Gesetzgebung in der Tschechoslowakei gewidmet war.

Das Buch bleibt nicht bei der Beschreibung der Erfolge der Zwischenkriegszeit stehen. Mit nüchterner Sachlichkeit schildert der Autor den Wandel der Kongresstradition nach dem Februar 1948, als der IV. Kongress der tschechoslowakischen Juristen im Jahre 1949, der unter dem Motto „Für das sozialistische Recht!“ stattfand, bereits vollständig den ideologischen Forderungen des Regimes unterworfen war und seinen Charakter als freier Fachkongress verloren hatte. Dennoch geht Kabát auch diese Zeit mit Respekt vor der historischen Realität ein und bemüht sich um eine objektive Sichtweise.

Das Thema der Juristentage ist auch heute noch von großer Aktualität. Im Jahr 2022 wurde diese Tradition in der Tschechischen Republik wiederbelebt und für das Jahr 2025 ist eine weitere Veranstaltung geplant. Dies ist ein Beweis für die zeitlose Bedeutung von Fachtagungen, für die Notwendigkeit der Solidarität innerhalb der Berufsgruppe und für das Bestreben, die Tradition der juristischen Arbeit als Dienst an Wahrheit und Gerechtigkeit zu bewahren. Ich bin überzeugt, dass das Buch von Kabát auf dem nächsten Juristentag nicht unerwähnt bleiben wird, da es aufgrund seines Umfangs und seiner Fachkenntnis neue Perspektiven und wertvolle Erkenntnisse über die Vergangenheit bietet, aus denen die heutige Rechtsgemeinschaft Inspiration schöpfen kann.

Das besprochene Buch basiert auf ausführlichen Archivrecherchen, ist mit einem Namensverzeichnis versehen und enthält Dutzende verschiedener historischer Fotografien und Dokumente, die das Thema angemessen illustrieren. Im Anhang findet sich auch eine Liste aller auf den einzelnen Juristentagen diskutierten Fragen.

Kabáts Arbeit ist ein Musterbeispiel für die Verbindung von wissenschaftlicher Redlichkeit, Respekt vor der Tradition und einem tiefen Verständnis der Werte, auf denen das Recht aufgebaut war und sein sollte. *„Die Geschichte der Juristentage in den böhmischen Ländern und der Slowakei“* ist ein Buch, das nicht nur informiert, sondern auch inspiriert. Es gehört zweifellos zu den bedeutendsten Beiträgen zur tschechischen Rechtsgeschichtsschreibung der letzten Jahre.

Jaromír Tauchen*

* Prof. JUDr. Jaromír Tauchen, Ph.D., LL.M., Lehrstuhl für Staats- und Rechtsgeschichte, Juristische Fakultät, Masaryk-Universität Brünn, Tschechische Republik, E-Mail: jaromir.tauchen@law.muni.cz / ORCID 0000-0001-9400-9484.

Lars Holger Tilgner

Können Compliance-Management-Systeme Short-Seller-Attacken verhindern? Regulatorische und unternehmerische Maßnahmen zum Schutz vor Leerverkaufsattacken: Eine Analyse der rechtlichen Rahmenbedingungen und Reformvorschläge

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I.

Methodisch liefert der Verfasser einen Beitrag zu einem Bereich, der jüngst und zukünftig erhöhtes Problembewusstsein fordert, ja sogar schon eine eigene junge Rechtsgeschichte aufweisen kann. Denn Compliance ist vor allem Risikomanagement der unternehmerischen Tätigkeit und der professionelle Umgang hiermit, besonders relevant im Rahmen der EU-Leerverkaufsverordnung, um Unternehmen zu helfen, sich gegen rechtliche Angriffe und potenzielle Marktmanipulationen zu schützen.

(1) Vorliegende Dissertation untersucht sehr gründlich die Schnittstelle zwischen diesen beiden Phänomenen und die Rolle von Compliance-Management-Systemen (CMS) in diesem Kontext. Ein besonderes regulatorisches Risiko stellt die Corporate Sustainability Due Diligence Directive (CSDD) dar, die von Unternehmen eine umfassende Sorgfaltspflicht im Bereich der Menschenrechte und Umwelt in der gesamten Lieferkette verlangt. Sie erhöht den Druck auf Unternehmen erheblich, da Verstöße gegen diese Sorgfaltspflichten nicht nur rechtliche, sondern auch finanzielle Konsequenzen haben können. Unternehmen, die diese Anforderungen nicht vollständig umsetzen, dürften vermehrt ins Visier von Leerverkäufern geraten, da solche Schwächen in ESG-Kriterien öffentlichkeitswirksam leicht ausgenutzt werden können.

Die bisherige EU-Leerverkaufsverordnung (EU) Nr. 236/2012 und die Marktmissbrauchsverordnung (EU) Nr. 596/2014 bieten zwar einen rechtlichen Rahmen zur Kontrolle von Leerverkäufen, doch der zunehmende Druck durch ESG-Standards und Regulierungen wie die CSDD verdeutlicht, dass neue Ansätze erforderlich sind, um Unternehmen und den Finanzmarkt vor den Risiken missbräuchlicher Leerverkaufsattacken zu schützen.

(2) Dabei werden zurecht folgende Kernfragen formuliert:

1. In welchem Ausmaß können effektive CMS Unternehmen vor Leerverkaufsattacken schützen oder deren Auswirkungen abmildern?
2. Welche neuen Risiken bringen umwelt- und sozialbezogenen Sorgfaltspflichten mit sich, insbesondere im Hinblick auf potenzielle Leerverkaufsattacken oder negative öffentliche Berichterstattungen?
3. Wie müssen CMS modifiziert und erweitert werden, um den Anforderungen des Nachhaltigkeitsrechts gerecht zu werden und Unternehmen gleichzeitig vor den daraus resultierenden Risiken zu schützen?

(3) Als Zielsetzung der Studie benennt Verf., dass er sowohl Unternehmen als auch den Gesetzgeber mit fundierten Handlungsempfehlungen unterstützen will, um den wachsenden Herausforderungen durch Leerverkaufsattacken und die strikten ESG-Regulierungen zu erfüllen. Schwerpunkte bilden -den Themen geschuldet- rechtliche Reformen, die der ESMA erweiterte Befugnisse zur Handelsaussetzung bei Verdacht auf Marktmanipulation verleihen. Ferner präventive Maßnahmen für Unternehmen, um durch die Implementierung robuster Compliance- und Risikomanagementsysteme (CMS und RMS) sicherzustellen, dass Unternehmen die ESG-Anforderungen erfüllen und gleichzeitig gegen Leerverkaufsattacken gewappnet sind, ehe er regulatorische und verfassungsrechtliche Abwägungen vornimmt, die den Schutz der Marktintegrität mit dem Schutz der Eigentumsrechte der Marktteilnehmer (Art. 14 GG) in Einklang bringen.

Anders gesagt: Die Arbeit zielt darauf ab, die komplexen Wechselwirkungen zwischen Leerverkäufen, regulatorischen Anforderungen und Unternehmens-Compliance zu analysieren, also wie Unternehmen ihre CMS optimieren können, um sowohl den gesetzlichen Anforderungen zu entsprechen als auch sich selbst vor potenziellen Angriffen durch Leerverkäufer zu schützen. Neben der Analyse von Fällen wie Grenke, Wirecard und Mutares sind die Darstellungen zu den Auswirkungen der CSRD (Lieferkettensorgfaltspflichtengesetz = LKSG) Thema mit praxisrelevanten Erkenntnissen und Handlungsempfehlungen für Unternehmen und Regulierungsbehörden.

Generelles Ziel ist es nicht zuletzt, einen Beitrag zur Verbesserung der Unternehmensführung und des Risikomanagements in einem zunehmend komplexen und regulierten globalen Wirtschaftsumfeld zu leisten. Dazu betrachtet Verf. praxisnahe Beispiele wie Wirecard und Grenke, um zu analysieren, in welchem Ausmaß CMS-Systeme Short-Seller-Attacken abwehren können. Insbesondere der Wirecard-Skandal zeigt die Schwächen bei der Überwachung und den Umgang mit potenziellen Short-Sell-Angriffen auf. Am Fall Grenke und dem aktuellen Fall Mutares (September 2024), können die Folgen aggressiver Leerverkaufsaktivisten aufgezeigt werden, ja sogar der Einfluss auf den Kapitalmarkt. Die wachsende Relevanz von Leerverkäufen sowie spekulativen Short-Seller-Angriffen stellt Unternehmen vor erhebliche Herausforderungen. Diese Angriffe, unabhängig davon,

ob sie gerechtfertigt sind oder nicht, können zu signifikanten Kursverlusten und einem gravierenden Reputationsschaden führen (Fall Grenke).

(4) Der aktuelle Fall Mutares vermag herauszuschälen, wie dramatisch sich eine unerwiesene Behauptung auf den Kurs auswirken kann. Zum jetzigen Zeitpunkt hat das Unternehmen zwar, wie es zuvor auch Grenke und Wirecard machten, den Behauptungen widersprochen, doch war ein Kursverlust nicht zu verhindern. Diese Fälle zeigen obendrein, wie schwer es ist, eine Balance herzustellen. Auf der einen Seite werden Leerverkäufe als wichtiges Instrument für einen transparenteren Markt angesehen. Es wird teilweise sogar bei Leerverkäufern von der wichtigen Funktion der „Finanzdetektive" gesprochen, auf der anderen Seite besteht die Gefahr von Marktmanipulation durch Leerverkaufsattacken, die gefährlich für Aktionäre und Unternehmen sind.

Leerverkaufsattacken haben allein das Ziel, möglichst hohe Gewinne durch Kurseinbrüche zu erzielen. Es werden Gerüchte verbreitet und mit einem Mausklick können Millionenbeträge bewegt werden, indem die Marktteilnehmer auf steigende oder fallende Kurse setzen. Zudem haben die verschärften regulatorischen Anforderungen auf Kapitalmärkten, die verstärkte Aufmerksamkeit auf Nachhaltigkeitsaspekte und die Einführung neuer nationaler Gesetze, wie das Lieferkettensorgfaltspflichtengesetz (LKSG), die unternehmerische Risikolandschaft grundlegend verändert. Neben den finanziellen Risiken gewinnen nicht-finanzielle Risiken, insbesondere Menschenrechtsverletzungen, Umweltschäden und Verstöße gegen Governance-Prinzipien zunehmend an Bedeutung. Unternehmen sehen sich folglich veranlasst, diesen Herausforderungen mit geeigneten Compliance-Management-Systemen (CMS), Risikomanagementsystemen (RMS) und Internen Kontrollsystemen (IKS) zu begegnen unabhängig der gesetzlichen Verpflichtung von bestimmten Unternehmen diese Systeme sowieso zu unterhalten.

(5) Durch neue europäische Vorschriften, wie die Corporate Sustainability Reporting Directive (CSRD), die EU-Umwelttaxonomie, die Corporate Sustainability Due Diligence Directive (CSDDD) und die Sustainable Finance Disclosure Regulation (SFDR), sind Unternehmen verpflichtet, ihre nicht-finanziellen Risiken systematisch zu überwachen und offenzulegen. Diese Berichtspflichten umfassen unter anderem die Einhaltung von Sorgfaltspflichten entlang der gesamten Lieferkette und die Sicherstellung der Einhaltung von ESG-Kriterien (Environmental, Social, Governance). Ohne funktionsfähige Kontroll- und Berichtssysteme wird es für Unternehmen zunehmend schwieriger, den gestiegenen Transparenzanforderungen nachzukommen. Parallel dazu erhöht die Zunahme spekulativer Leerverkaufsaktivitäten die Risiken für Unternehmen. Dies verdeutlicht der Fall der Grenke AG im Jahr 2020, bei dem der Short-Seller Viceroy Research eine Leerverkaufsposition von 0,63 % hielt und dabei gegen die Meldepflichten der Leerverkaufsverordnung (SSR) verstieß. Trotz der Widerlegung der wesentlichen Vorwürfe erlitt das Unternehmen erhebliche Kursverluste, was die Anfälligkeit von Unternehmen gegenüber solchen spekulativen Angriffen verdeutlicht. Auch der nun aktuelle Fall Mutares zeigt, dass Unternehmen kaum Möglichkeiten haben, schnell und effektiv zu reagieren.

Diese Entwicklungen unterstreichen die Notwendigkeit eines umfassenden Compliance-Managementsystems und eines Risikomanagements, das Unternehmen nicht nur vor rechtlichen und operativen Risiken schützt, sondern auch vor spekulativen Short-Seller-Angriffen. Aber zeigt auch, dass es notwendig ist, bei der Regulatorik Veränderungen herbeizuführen und einen schnelleren Eingriff in den Markt der Aufsichtsbehörden zum Schutz des regulierten Marktes vorzunehmen. Wie die Unternehmensführung damit umgeht, erhellt diese Dissertation, indem angemessenes Risikomanagement und geeignete Risikokontrolle innerhalb des Unternehmens beschrieben werden, bis sogar hinein in digital ethische Methoden.

II.

Aus der Hauptforschungsfrage formuliert Tilgner gute Einzelfragen, die sich in der Hauptdarstellung der Dissertation für den Leser auffächern und in Handlungsempfehlungen münden. Hierzu fasst der Autor die Einzelfragen prägnant zusammen; gerade die rechtlichen Implikationen (Rechtliche Änderungen zur Stärkung der Marktintegrität) verdienen es, herausgegriffen zu werden.

(1) Die EU-Leerverkaufsverordnung (EU) Nr. 236/2012 sollte um eine spezifische Befugnis für die ESMA erweitert werden, den Handel mit betroffenen Aktien bei Verdacht auf eine Leerverkaufsattacke vorübergehend auszusetzen. Zudem sollte eine Definition für den Begriff „Leerverkaufsattacke" in Artikel 2 aufgenommen werden, die signifikante Leerverkaufspositionen und gleichzeitige negative Berichterstattung umfasst. Hier sollten die generelle Problematik von Legaldefinitionen und die Ausgestaltung durch die Judikatur noch Erwähnung finden. Bei der Anlegung des Stoffes und der Proportionierung wäre noch mehr Sorgfalt angebracht gewesen. Hauptbeispiel ist die Definition des Zentralbegriffes der Leerverkäufe, dem der Leser erst relativ spät begegnet. Bei einem solchen Begriff hätten Ansätze und diverse Formen von Definitionen erwähnt werden müssen. Die Verordnung (EU) Nr. 1095/2010 zur Errichtung der ESMA sollte dahingehend geändert werden, dass der Behörde die Befugnis eingeräumt wird, ohne vorherige Zustimmung der nationalen Aufsichtsbehörden einzugreifen. Dadurch wird die Reaktionsfähigkeit der ESMA in Krisensituationen deutlich verbessert.

Die ESMA sollte, so der Verf. zurecht, erweiterte Untersuchungsbefugnisse erhalten, um gezielte Leerverkaufsattacken zu untersuchen. Hierzu gehört die Überwachung der Kommunikation zwischen Leerverkäufern und Medien. Bei nachgewiesenen Manipulationen sollten zudem deutlich höhere Sanktionen verhängt werden.

(2) Die vorgeschlagenen rechtlichen Änderungen stärken nicht nur den Anlegerschutz, sondern auch die Handlungsfähigkeit der Aufsichtsbehörden. Die Möglichkeit, den Handel bei Verdacht auf eine Leerverkaufsattacke vorübergehend auszusetzen, bietet sowohl Unternehmen als auch Aufsichtsbehörden den nötigen Raum, um auf Anschuldigungen zu reagieren und weitere Ermittlungen durchzuführen. Gleichzeitig bleibt der Eingriff in die Marktmechanismen begrenzt und verhältnismäßig, was unter verfassungsrechtlichen und europarechtlichen Gesichtspunkten vertretbar ist.

Ob letztlich dadurch die Marktintegrität geschützt wird, ohne die Preisfindung übermäßig einzuschränken, wird die Praxis entscheiden. Dass die BaFin die Möglichkeit erhalten soll, den Handel bei Verdacht auf Leerverkaufsattacken auszusetzen, bleibt ebenfalls zu testen, bildet aber einen Teil der sorgfältig vom Verfasser entwickelten Instrumentarien und Handlungsempfehlungen, wie es sich für eine sehr gute Doktorarbeit mit praxisrelevanter Ausrichtung gehört.

III.

Was können wir insgesamt festhalten?

(1) Lars Tilgner liefert als Steuerberaterkanzlei-Inhaber zu einem aktuell brennenden Thema die finanzökonomischen, politischen und rechtlichen Befunde sowie die Grundlagen für eine Argumentation zu den Leerverkäufen, die hoch technisch ablaufen und auch didaktisch-darstellerisches Geschick verlangen. Die aktuelle Rechtslage und Problematik fasst er nachvollziehbar unter die beiden Punkte:

1. Es besteht kein wirksamer Schutz gegen Leerverkaufsattacken.
2. Short-Seller können durch negative Berichte einen Herdeneffekt auslösen, die zu Kursverlusten führen, bevor Unternehmen reagieren können.

(2) Primärziel der Arbeit ist es, Unternehmen und Gesetzgeber mit Handlungsempfehlungen zu unterstützen, die auf rechtliche Reformen, präventive Maßnahmen und die Balance zwischen Marktstabilität und Eigentumsschutz abzielen. Kenntnisse und Einsichten über Compliance- und Risikomanagementsysteme (CMS, RMS, IKS) Compliance-Management-Systeme (CMS) und Risiko-Management-Systeme (RMS) sind für Unternehmen essenziell, um gesetzliche Anforderungen zu erfüllen und Risiken aktiv zu managen. Diese Systeme müssen nahtlos mit Internen Kontrollsystemen (IKS) zusammenarbeiten, die als Rückgrat der operativen Sicherheit und Transparenz gelten. Die Dissertation zeigt, dass ein ganzheitlicher Ansatz zur Integration dieser Systeme erforderlich ist, um komplexe rechtliche Anforderungen und den Schutz vor spekulativen Angriffen zu gewährleisten. Dabei sind regelmäßige Audits und eine umfassende Risikokontrolle, insbesondere in ESG-Bereichen, zentral.

Sodann thematisiert Tilgner plausibel ESG-Standards und neue regulatorische Anforderungen sowie den Einfluss von Leerverkäufen und Marktmanipulation, denn Leerverkäufe können einerseits zur Markteffizienz beitragen, bergen jedoch auch die Gefahr spekulativer Attacken, die Unternehmen destabilisieren können. Anhand von Fallstudien deutscher Unternehmen werden die negativen Auswirkungen solcher spekulativen Angriffe aufgezeigt. Die Arbeit fordert hier strengere regulatorische Maßnahmen und eine Harmonisierung der Marktregeln in der EU, um Unternehmen besser vor spekulativen Angriffen zu schützen. Dies vermag vorab allzu forsch klingen, bildet aber die Conclusio aus den bisher aufgezeigten „Missbrauchsfällen".

Technologischer Fortschritt und Digitalisierung dürfen ferner nicht fehlen, d.h. IT-gestützte Kontrollsysteme und die Digitalisierung bieten Unternehmen neue Möglichkeiten, ihre Compliance- und Risikomanagementprozesse zu optimieren. Die Arbeit zeigt, wie moderne Technologien wie Künstliche Intelligenz (KI) und Big Data-Analysen die Effizienz und Präzision in der Risikobewältigung verbessern können. Denn IT-Systeme sind entscheidend, um Daten in Echtzeit zu überwachen und potenzielle Verstöße und Risiken frühzeitig zu erkennen. Die Dissertation betont zurecht, dass technologische Lösungen unverzichtbar sind, um die ESG-Berichterstattung und das Risikomanagement effektiv zu gestalten.

(3) Hinweisgeber-Meldesysteme und Prävention finden erörternden Raum, ehe Prüfungsstandards und Anforderungen an die Marktüberwachung beleuchtet werden und Handlungsanleitungen für Unternehmen und Gesetzgeber an der Reihe sind:

1. Compliance und Risikomanagement als strategische Notwendigkeit
2. ESG als zentraler Teil der Unternehmensführung
3. Digitalisierung als Schlüssel zu Effizienz und Resilienz
4. Schutz durch interne Kontrollen und Hinweisgeber-Systeme
5. Regulatorische Reformen und internationale Kooperationen
6. Fortlaufende Anpassung und Flexibilität

Mit der Verkettung der konkreten Frage und allgemeinen Forschungstendenzen in Ökonomie, Management und nationalem wie internationalem Rechtsrahmen gelingt es aufzuzeigen, dass ein vorausschauendes, gut ausgestattetes Compliance- und Risikomanagementsystem nicht nur regulatorische Erfüllung bedeutet, sondern auch als Wettbewerbsvorteil und „Vertrauensanker in der modernen Geschäftswelt" fungieren kann. Unternehmen, die ESG-Standards ernst nehmen und auf technologische Unterstützung setzen, sind ergo besser gerüstet als die, die dies unterlassen. Auf diese Weise findet die sehr empfehlenswerte Studie eine passende Antwort.

Thomas Gergen*

* Prof. Dr. iur. Dr. phil. Thomas Gergen, Maître en droit, Institut Supérieur de l'Économie, ISEC Université Luxembourg, E-Mail: thomas.gergen@isec.lu / ORCID 0000-0002-0546-204X.

Am Strom des Rechts – Bericht von der Tagung „Zivilprozessrecht im Mitteleuropa der Zwischenkriegszeit“

„Geographische Lage und Geschichte wiesen dem bayerischen Stamm eine Sonderstellung zu. Die bayerische Donau ist der einzige deutsche Strom, der nicht nach Deutschland hinein, sondern aus ihm hinaus nach Osten fließt.“ [1] — So beschrieb Wilhelm Hoegner, der Vater der bayerischen Verfassung, in der Rückschau auf die deutsche Republik der Zwischenkriegszeit, die den Bayern zukommende Mittlerrolle zwischen dem westlichen und östlichen Mitteleuropa. Was liegt also näher, als eine Tagung zum mitteleuropäischen Zivilprozessrecht jener intellektuell so fruchtbaren und vielgestaltigen Jahre zwischen den beiden Weltkriegen [2] an der Donau, in Regensburg, abzuhalten. Dem geistigen Austausch tat es jedenfalls keinen Abbruch, dass sich einige der Teilnehmer aus Ungarn und Kroatien nur virtuell stromaufwärts begeben konnten.

Es begann *Kamila Staudigl-Ciechowicz* (Wien), die sich in ihrem Vortrag der Entwicklung des Zivilprozessrechtes im Österreich der 20er- und 30er-Jahre widmete. Diese war von großer Kontinuität geprägt, da die neu gegründete Republik (Deutsch)Österreich neben den zivil- und strafrechtlichen Kodifikationen auch das Zivilprozessrecht der Habsburger Zeit weiter in Geltung ließ. Die auf Entwürfe Franz Kleins zurückgehende österreichische ZPO von 1895 – der Gastgeber hatte der österreichischen Kollegin den Vortritt gelassen, damit dieses „role model“ für zahlreiche mitteleuropäische Länder zu Beginn der Konferenz erläutert würde – stellte noch in den 20er-Jahren ein modernes Gesetzeswerk dar. Sie verband liberale Errungenschaften, wie die Grundsätze der Mündlichkeit, Öffentlichkeit und Unmittelbarkeit, mit einem sozial-fortschrittlichen Gedanken, welcher in der Verbesserung des Zugangs zu den Gerichten durch das sogenannte „Armenrecht“ oder der zumindest abgeschwächten Geltung des Amtsermittlungsgrundsatzes seinen Ausdruck fand. Nichtsdestotrotz wurde bereits in den letzten Jahren der Monarchie und dann später während republikanischer Zeiten Kritik laut, die sich vor allem an der Überlastung der Gerichte, den allgemein zu langsamen Prozessen und dem Missbrauch des „Armenrechts“ fest machte. So ergingen von 1914 bis 1933 insgesamt acht Gerichtsentlastungs- und zwei Streitwertnovellen zur ZPO. Diese sollten einerseits, etwa durch die Stärkung des Einzelrichtertums, Rechtsmittelbeschränkungen oder der Einführung engerer Voraussetzungen für die Gewährung des „Armenrechts“, den Zivilprozess beschleunigen und die Rechtsprechung entlasten. Andererseits bedurfte es aufgrund der grassierenden Inflation weitreichender Änderungen der für die Zuständigkeit in der ersten Instanz oder der Zulässigkeit des Mahnverfahrens relevanten Streitwerte. Staudigl-Ciechowicz stellte zusammenfassend eine Schwächung der liberalen und sozialen Prinzipien der ZPO während des betrachteten Zeitraumes fest. In der anschließenden Diskussion begründete die Referentin das Misslingen einer großen Reform auch mit der schwierigen innenpolitischen Lage des österreichischen „Rumpfstaates“. Die Tagungsteilnehmer konstatierten eine große Übereinstimmung hinsichtlich der Art und Weise der Novellengesetzgebung in ihren jeweiligen Ländern. Ähnlich wie in Österreich, wo zu diesem Zweck von kaiserlichen Notverordnungen und – noch 1933 – kriegswirtschaftlichen Ermächtigungen Gebrauch gemacht wurde, brachten auch in den übrigen mitteleuropäischen Staaten zivilprozessuale Reformen häufig nicht die Parlamente auf den Weg.

Als nächstes trug *Martin Löhnig* (Regensburg) zur Situation im Deutschen Reich vor. Den Ausgangspunkt der Entwicklung des deutschen Zivilverfahrensrechtes stellte der liberale Gedanke von Jherings vom „Kampf ums Recht“ dar, wie er in der ZPO von 1879 niedergelegt worden war. Die Vorstellung von einem weitgehend staatsfreien Raum, in dem der Richter nur als neutraler Schiedsrichter auftritt, hatte auch noch in der Weimarer Zeit seine Anhänger. Daneben traten aber andere Strömungen, die durch den Zivilprozess auch Gemeinschaftsaufgaben erfüllt sehen wollten oder diesen gar als gänzlich im Dienst des Staates stehende, für die Bewährung der Rechtsordnung verantwortliche Institution betrachteten, in der Zwischenkriegszeit erstmals prominent in Erscheinung. Eine Abkehr vom klassisch-liberalen Verständnis der ZPO fand auch in den beiden großen Reformen der Zwischenkriegszeit, der sogenannten Emminger-Novelle, einer Notverordnung von 1924, und einem Änderungsgesetz von 1933, ihren Niederschlag. Erstere stärkte die prozessleitende Gewalt des Gerichts und beseitigte die Herrschaft der Parteien über Termine und Fristen. Die wichtigsten Neuerungen der Reform von 1933 sind in der Einführung der Wahrheitspflicht der Parteien und in der Ersetzung des Parteieides, dessen formelle Beweiskraft das Gericht bis dahin zu binden vermocht hatte,

[1] HOEGNER, W., *Die verratene Republik. Geschichte der deutschen Gegenrevolution.* München, 1958, S. 99.

[2] Der im Nachgang zu dieser Tagung entstandene Band, LÖHNIG, M. (Hrsg.), *Varieties of Social Civil Procedure. The Reform of Civil Procedure Law in Central Europe in the Interwar Period*. Berlin, 2025 ist jüngst erschienen.

durch die der freien Beweiswürdigung zugängliche Parteivernehmung zu sehen. Zumindest hinsichtlich der noch in demokratischen Tagen erlassenen Emminger-Novelle, so der Referent, greife es aber zu kurz von generell illiberalen Neuerungen zu sprechen. Löhnig warf vielmehr die Frage auf, ob nicht Liberalität auch durch Prozessbeschleunigung und damit beschleunigter Durchsetzung subjektiver Rechte gewährleistet werden könne. Resümierend hielt er fest, dass sich alle Reformdiskussionen nach der Weimarer Zeit zwischen den Polen der damaligen Debatte bewegten, auch wenn diese seinerzeit wissenschaftlich flacher als heutzutage geführt worden sei, was sich an zahlreichen überlieferten Polemiken zeige. Beispielsweise sei man gegen „Austriazismen" im deutschen Zivilprozessrecht zu Felde gezogen, auch wenn es andererseits, wie Löhnig auf Nachfrage von Staudigl-Ciechowicz bestätigte, zeitgenössische Gedankenspiele einer deutsch-österreichischen Rechtsvereinheitlichung gegeben habe.

Als Verschnitt zwischen der deutschen und österreichischen Zivilprozessordnung lässt sich die ungarische Kodifikation des Jahres 1911 einordnen, zu deren Entstehung maßgeblich Sándor Plósz beigetragen hatte und die den Gegenstand des nun folgenden Referats von *Eszter Cs. Herger* (Pečs) bildete. Einerseits kam dem Richter zwar eine prozessleitende Funktion zu und die Parteien waren zur Wahrheit verpflichtet, andererseits galt grundsätzlich die Verhandlungsmaxime. Durch eine Reform von 1925, basierend auf zwei Verordnungen aus den Jahren 1916 und 1923, wurde – ähnlich wie in Österreich – das Einzelrichtertum gestärkt und auch in den Berufungssenaten die Zahl der Mitglieder verringert, um der hohen Belastung der Gerichte Herr zu werden. Außerdem erfolgte eine Straffung des Zivilprozesses, etwa durch eine Beschränkung der Zahl vorbereitender Schriftsätze und der Ermöglichung von Zeugenvernehmungen durch entsandte Richter. Diesen Weg setzte eine zweite Novelle aus dem Jahr 1930 fort, die unter anderem ein vereinfachtes Zahlungsbefehlverfahren regelte und die Möglichkeiten der Berufung bzw. Revision einschränkte. Im zweiten Teil ihres Vortrages beleuchtete Herger die vielfältigen Kooperationen zwischen deutschen und ungarischen Juristen nach dem Ende der Weimarer Republik. Das Zivilprozessrecht fand in diesem Diskurs zwischen Vertretern des nationalsozialistischen Deutschlands und des autokratischen Ungarns vergleichsweise geringe Beachtung, bildete es doch lediglich den Rahmen der Entrechtung bestimmter Bevölkerungsgruppen im materiellen Recht.

Nachmittags setzte *Anna Stawarska-Rippel* (Katowice) den Reigen der Referenten mit ihren Ausführungen zur Zwischenkriegszeit in Polen fort. Der polnische Staat war nach seiner Wiedererstehung nach dem ersten Weltkrieg mit den zivilprozessualen Kodifikationen der ehemaligen Teilungsmächte konfrontiert. So galt in den unterschiedlichen Landesteilen jeweils russisches, deutsches und österreichisches Recht fort; in einem kleinen ehemals transleithanischem Gebiet des Habsburgerreiches im Süden Polens fand die ungarische Zivilprozessordnung Anwendung. Für Vereinheitlichung sollten die 44 Juristen der Kodifikationskommission der zweiten polnischen Republik sorgen. Die Arbeit dieses Expertengremiums wurde nicht nur aufgrund des vermeintlich zu großen Einflusses österreichischer und deutscher Rechtstraditionen, sondern auch wegen dessen Innovationsfreude kritisiert. So schlugen die Kommissionsmitglieder bereits in den 1920er-Jahren etwa eine verpflichtende, vorprozessuale Klageerwiderung nach Schweizer Vorbild vor, welche zwar in Polen abgelehnt wurde, aber 1925 den rumänischen Reformgesetzgeber inspirierte. Erst durch eine Novelle im Jahr 2019 fand sie Eingang ins polnische Recht. Hinsichtlich eines weiteren Vorschlages der Kommission, der sanktionsbewehrten Wahrheitspflicht der Parteien, lassen sich neben schweizerischen auch ungarische Einflüsse ausmachen. In dem im Jahr 1930 schließlich verabschiedeten Entwurf der polnischen Zivilprozessordnung bevorzugte der Gesetzgeber jedoch das österreichische Modell ohne Sanktionsmöglichkeit. Im Gegensatz zur jüngsten Entwicklung hinsichtlich der vorprozessualen Klageerwiderung, verzichtet auch eine 2019 eingeführte Generalklausel, welche den Missbrauch prozessualer Rechte regelt, auf dieses Instrument zur Durchsetzung der Wahrheitspflicht.

Vor ganz ähnlichen Herausforderungen wie der polnische Staat standen die zwei südlich von ihm entstandenen „neuen Reiche" – die Tschechoslowakei und das Königreichs Jugoslawien. Von diesen handelten die Vorträge von *Petra Skřejpková* (Praha) bzw. *Mirela Kresić* und *Dunja Milotić* (Zagreb). Im cisleithanischem Böhmen und Mähren galt österreichisches, in den ehemals zur östlichen Reichshälfte gehörenden der ČSR (Slowakei, Karpatenukraine) die ungarische ZPO. Das Ministerium für Vereinheitlichung und mehrere Kommissionen mühten sich um die Ausarbeitung eines neuen Gesetzeswerkes für die Tschechoslowakei, mit dem neben der Rechtseinheit auch eine Reform des Zivilprozesses erreicht werden sollte. Dieses Werk, welches in einem Entwurf von 1937 mündete, wurde durch die außenpolitischen Bedrängnisse, in welchen sich die letzte verbliebene liberale Demokratie Mitteleuropas spätestens ab 1938 befand, zunichte gemacht, sodass die Zivilprozessordnung erst 1950 unter neuen Vorzeichen verabschiedet werden konnte. Derzeit finden Arbeiten an einem neuen Zivilprozessrecht für die Tschechische Republik statt, im Rahmen derer, so Skřejpková, die Ideen der Zwischenkriegszeit aufgegriffen würden. Besonderes Interesse bei den anderen Tagungsteilnehmern fand die tschechoslowakische Diskussion um den Einsatz von Laienrichtern in der Handelsgerichtsbarkeit nach österreichischem Vorbild. Ähnliche Vorstellungen hatte es auf Grundlage der bayerischen ZPO von 1869 auch beim deutschen Vereinheitlichungsprozess vor 1877 gegeben. Da als gemeinsame Wurzel dieser Regelungen der französische Code de procédure civile ausgemacht wurde,

stellte Löhnig fest, dass sich hier wieder einmal zeige, dass die ganze Rechtsgeschichte nur eine Geschichte von Rezeptionen sei. Als ebenso zukunftsweisend wurde die im Entwurf von 1937 enthaltene Einschränkung hinsichtlich des Vorbringens neuer Tatsachen im Berufungsverfahren beurteilt – in Deutschland fand eine ähnliche Regelung erst im Rahmen der ZPO-Reform von 2002 Eingang ins geltende Recht.

Eine noch größere Rechtszersplitterung als in der ersten Tschechoslowakischen Republik herrschte im Nachkriegsjugoslawien. Der Zivilprozess wurde in den verschiedenen Landesteilen von nicht weniger als sechs unterschiedlichen Verfahrensordnungen geregelt. Nach langen Diskussionen im ständigen Gesetzgebungsrat, erfolgte schließlich im Jahr 1929, in den Zeiten der Königsdiktatur, die Verabschiedung einer Zivilprozessordnung. Diese stellte mehr oder weniger eine Übersetzung des österreichischen Gesetzeswerkes von 1895 dar, welches zuvor bereits in Slowenien und Dalmatien Anwendung gefunden hatte. Gänzlich durchdringen konnten die dort niedergelegten Gedanken vor allem in den früheren serbischen Gebieten allerdings bis zum Ende des ersten Jugoslawiens nie. Zu groß war der „clash of legal worlds" zwischen den in der deutschen bzw. österreichischen Tradition stehenden Juristen im Westen und den spätosmanisch-französisch sozialisierten Kollegen im Osten des Landes, sodass auch das Ziel der Integration des neuen Staates nur bedingt erreicht wurde. Dazu beigetragen haben mag neben der – ohne Kenntnis des Originals – nur schwer verständlichen deutschen Rechtsterminologie auch die Beseitigung zivilprozessualer Institutionen des serbischen Rechts, wie die streitwertabhängige Beschränkung der Zahl der Zeugen, deren Beibehaltung – aufgrund der damit steigendenden Bedeutung des Urkundenbeweises – sowohl den neu verankerten Grundsätzen der Mündlichkeit und Unmittelbarkeit widersprochen, als auch die damals geringe Alphabetisierungsrate unberücksichtigt gelassen hätte.

Beschleunigung und Gerichtsentlastung auf der einen Seite, staatliche Integration auf der anderen. Die Anforderungen an das Zivilprozessrecht in der Zwischenkriegszeit waren vielfältig. Dies zeigt, dass sich das Verfahrensrecht als „technisches Recht in seiner allerschärfsten Ausprägung"[3] nicht in Technizität erschöpfen darf. Einer demokratisch legitimierten Gesetzgebung muss es gelingen, Anschlussfähigkeit an andere gesellschaftliche Teilbereiche herzustellen. Auch ein liberaler Zivilprozess ist nicht Selbstzweck, sondern Ausfluss der sich wandelnden Vorstellungen von Liberalität in der jeweiligen Rechtsgemeinschaft. Und noch etwas lässt sich am Ende der Tagung festhalten: Die Geschichte des Zivilprozessrechtes in den einzelnen mitteleuropäischen Staaten kann nicht isoliert betrachtet werden. Mag während der jahrzehntelangen Spaltung Europas in Ost und West das Verständnis für die Zusammenhänge zwischen den Rechtsordnungen dieser Länder teilweise verloren gegangen sein, erscheint es in Zeiten, in denen sich die Zentrifugalkräfte innerhalb der europäischen Staatengemeinschaft nach dem anfänglichen pro-ukrainischen Schulterschluss wieder zu verstärken scheinen, umso nötiger, sich dieses gemeinsamen Erbes zu besinnen. Wie die mitteleuropäischen Staaten verbunden sind durch das Flusssystem, das der alten Donaumonarchie einst ihren Namen gab, haben sie auch Anteil an einem gemeinsamen Strom des Rechts. Auch die Entwicklung des Zivilprozessrechtes in Mitteleuropa lässt sich so als Geschichte von Zu- und Abflüssen, Anstauungen und Durchbrüchen, frei mäandernden Verläufen und einhegenden Begradigungen erzählen.

William Kerscher*

[3] STEIN, F., *Grundriß des Zivilprozessrechts*. Tübingen, 1921, S. III.

* Dipl.-Jur. Univ. William Kerscher, wissenschaftlicher Mitarbeiter am Lehrstuhl für Bürgerliches Recht, Deutsche und Europäische Rechtsgeschichte und Kirchenrecht, Universität Regensburg, Deutschland, E-Mail: William-Joseph.Kerscher@jura.uni-regensburg.de / ORCID 0009-0000-3320-3750.

Jewish Law Moot Court 2024

From the 18th to the 26th of September 2024, the Jewish Law Moot Court took place in Vienna. It was an international moot court, where the students of law faculties from Masaryk University of Brno, University of Vienna, Tel Aviv University and Hebrew University of Jerusalem participated. The students were divided into several teams and had to argue for one of the parties in a case from the Jewish tribunal of Prague, based on real historical cases, while using sources of Jewish law. In every team there were students from different universities.

The case itself was set in 18th century Prague and revolved around Jewish inheritance law. A successful businessman, Mr. Jacob Kisch, passed away on November 14th, 1712, leaving behind four complex questions regarding the distribution of his assets.

Mr. Kisch wrote a note stating that his daughter should be treated like his sons concerning his estate. Traditionally, under Jewish law, daughters do not inherit in the presence of sons, opening an ongoing debate about the meaning and true intent behind his wishes. This led to discussions that twisted and stretched interpretations of Jewish legal sources, including the Talmud, Bava Batra and other texts.

Two days before his death, Mr. Kisch expressed a wish that his collection of Jewish books be passed on as a whole to his grandson, acknowledging his outstanding achievements at the Prague Yeshiva. However, this wish was conveyed verbally at a family gathering without formal documentation, raising the question whether an oral will could be considered valid under Jewish law. This also brought attention to the need for careful examination of the dates, as it was the Sabbath on that day, and he could not have written a will. The brothers argued that oral wills were not legally binding, especially given that their father was gravely ill at the time, potentially casting doubt on his awareness and intent. Additionally, the grandson was not comfortable receiving the entire collection and preferred that it be distributed.

Mr. Kisch's estate included several government bonds, which Reuben, the eldest son, argued should be used to settle the outstanding debts rather than paying them off with the available cash. Reuben believed this would preserve the estate's liquidity. However, his siblings objected, preferring to use cash for repayment to avoid depleting the estate's financial assets. Further complicating matters, the siblings contended that since Reuben, as the firstborn, was entitled to a double portion of the inheritance, he should also bear a double share of the debt repayment, a claim that he strongly opposed.

The most challenging issue arose around the division of the residential estate into plots and the right of Judah, one of the sons, to access them. After Mr. Kisch's death, the estate was divided into four parts, and Judah expressed his desire to inherit Plot 4, which bordered his existing property and gave him access to a stream for his new ventures in the fish market. However, the other brothers insisted that Judah should inherit Plot 3, where he already owned a warehouse. Judah argued that since his property bordered both Plot 3 and Plot 4, inheriting Plot 4 would better suit his business needs.

<table>
<tr><td>Plot 1 - with stands</td><td>Plot 2 - with the house</td><td rowspan="3">The stream</td></tr>
<tr><td>Plot 3 - with warehouse</td><td>Plot 4 - regular</td></tr>
<tr><td colspan="2">Judah's plot</td></tr>
</table>

The dispute intensified over Judah's claim that he had the right to continue using his warehouse on Plot 3 and to cross Plot 1 to reach the market, as he had done during his father's lifetime. The brothers opposed this, stating that they intended to sell their plots and wanted them free of any third-party rights. They argued that Judah's continued access would complicate the sale.

In resolving these disputes, the family sought the guidance of the Prague Rabbinical Tribunal, which was at the core of the moot court experience, even though it was held in Vienna. The court's mission was not only to resolve the disputes but also to maintain family unity and prevent any bad blood, focusing on achieving settlements as much as possible.

The case of Mr. Jacob Kisch highlights the complexity of inheritance law, not only in Jewish legal traditions but also in other legal systems. It brings to light the tension between tradition and progress in Jewish law, as well as the challenges in interpreting the will of the deceased when it conflicts with established norms. It raises ethical questions alongside legal ones, often putting them in direct conflict.

Ultimately, this case underscores the importance of clear legal documentation, especially in matters of inheritance. The delicate balance between legal principles and personal wishes serves as a testament to the complexities of inheritance law, both within Jewish tradition and in broader legal contexts.

Besides working on the case, several activities connected with Jewish history were prepared for students. These, among others, included a guided tour at the site of the former Jewish quarter of Vienna, visiting the main synagogue in Vienna, having a traditional Shabbat dinner in a kosher restaurant, workshop about Jewish law and antisemitism

and visiting Vega-Payer-Weyprecht-Kaserne, historical military barracks in the outskirts of Vienna. The visit to the barracks was accompanied by a brief lecture about the history of the place and the history of Jews serving in the Austrian army. Another activity that took place was a tour to Mikulov (Nikolsburg) in the Czech Republic. This historical town used to be a centre of Jewish community of Moravia. After a brief lecture about the history of Jews of Mikulov, students visited the historical baroque synagogue, the old Jewish cemetery of Mikulov and the ruins of local mikveh, Jewish ritual bath. The visit to Mikulov was ended by a tour throughout the historical centre of the town.

The finale of the moot court was held in a historical building of Austrian supreme administrative court. The teams presented their arguments and the judges, Jewish law academics from the Hebrew University of Jerusalem and the University of Tel Aviv, decided the cases. Furthermore, at the end, they also announced which three teams had the best speech.

Mirjam Luisa Mifková,* Tomáš Bartoloměj Skoček**

* Mirjam Luisa Mifková, Student at the Faculty of Law, Masaryk University, Brno, Czech Republic, email: 541831@mail.muni.cz / ORCID 0009-0008-0341-060X.

** Tomáš Bartoloměj Skoček, Student at the Faculty of Law, Masaryk University, Brno, Czech Republic, email: 547224@mail.muni.cz / ORCID 0009-0005-0560-0333.

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5. Reviews must go beyond mere annotation. A review must include, besides characterising the structure and content of the reviewed work, a critical evaluation of the work regarding its strengths and weaknesses. This implies pointing out the merits of the work and its manuscript to the field, supported by specific examples, as well as reporting on those opinions of the author of the reviewed publication to which there are reasons to object or which deserve further discussion, further argumentative elaboration, or development.
6. By submitting a manuscript (author's work) to the editorial office, the author acknowledges that the work will be made available online to internet users and preserved after its publication in the Journal on European History of Law. Until the publication decision, the author must inform the editorial office that they do not allow their work to be available online. The author's rights to further use of the work are not affected.

Peer Review Process

Submitted manuscripts first undergo an in-house review by the Editors, who decide on acceptance or rejection for the complete review procedure based on conformity to the formal and substantive requirements of the Journal.

If accepted, the article is then sent to two reviewers, experts in the given area of research. Every effort is made to maintain professional and personal independence between the author and the reviewers; however, we ask the authors to indicate the persons who have read the paper and cooperated in its completion before its submission. Also, the author may state in a separate letter why they wish specific persons should not be contacted for reviewing purposes. Editors, however, reserve the right to decide on the reviewers. Please be advised that the completion of the review process typically requires a period of six months to one year. Based on the verdicts, we will either:

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- Decline the text for further consideration.

Although the opponents' reviews are crucial, the editorial team and the editor-in-chief are responsible for deciding whether to accept or reject the article for publication. A third opinion will be solicited in case of contradictory or otherwise conflicting reviews.

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